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A

General Abridgment

OF

LAW and EQUITY

Alphabetically digeſted under proper TITLES

WITH

NOTES and REFERENCES

to the WHOLE.

By CHARLES VINER, *Eſq;*

Favente Deo.

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

PRINTED for the Author, by Agreement with the *Law-Patentees.*

TO THE HONOURABLE

Sir LAWRENCE CARTER Knight,

ONE OF THE

Barons of the EXCHEQUER.

THIS Book (being Part of A General Abridgment of Law and Equity &c.) is moſt humbly Dedicated by

Your Moſt Oblig'd

and Obedient Servant,

Charles Viner.

A

TABLE

OF THE

Several TITLES, with their Diviſions and Subdiviſions.

A TABLE of the ſeveral TITLES,

Regiſtring

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(Q) If the Common Law and Eccleſiaſtical Law differ, and the Proceeding is not according to the Common Law, a Prohibition lies. [*But where the Common Law gives no Remedy, it lies not.*]

1. IF a Man ſues for a Legacy in the Eccleſiaſtical Court, and the Defendant there ſays, That the Legacy was given on Condition that he ſhould not diſturb the Execution of the Will of the Deviſor, and alleges that he diſturb'd him &c. and ſo the Condition broken. If they will not allow there ſuch Condition upon a Legacy, yet no Prohibition lies, becauſe a Legacy is a Gift by the Eccleſiaſtical Law for which no Remedy is in our Law; and therefore inaſmuch as it is due by the Eccleſiaſtical Law only, it may be ordered and allowed according to the Eccleſiaſtical Law, and the Executor who is to pay it has not any Remedy but in Chancery by Way of Equity. M. 15 Ja. B. between *Wilſon and Wilſon*, agreed per Curiam, and Prohibition denied. But this was denied partly becauſe it does not appear to the Court whether this Plea was diſallowed there or not.

2. So upon a Suit for a Legacy in the Eccleſiaſtical Court, if the Defendant there ſays, That it was given upon Condition that the Plaintiff (being a Feme) ſhould not eſpouſe any Man without the Aſſent of his Executor, and that ſhe had eſpouſed J. S. without the Aſſent of the Executor; and ſo the Condition broken. If they diſallow this Condition there, yet no *Prohibition ſhall be granted for the Cauſe aforeſaid, but he is put to his Remedy in the Chancery. Mich. 15 Ja. B. in the ſaid Caſe of *Wilſon*, agreed by Winch and Warburton; and Winch ſaid that he had known it to be ſo adjudged. * Fol. 300.

3. If a Man libels in the Eccleſiaſtical Court againſt an Adminiſtrator after Refuſal of the Executorſhip for a Legacy, and he can prove the Will by which the Legacy was given but by one Witneſs, and therefore they will not allow it, yet no Prohibition lies; for by our Law there is not any Teſtament where there is not any Executor; and therefore if they will give him Relief, they may give it in what Manner they pleaſe. Hill. 37 El. B. R. Per Curiam. For the *Probate of Wills* is a Matter purely Spiritual, and ſo they may proceed in their own Manner, tho' different from ours. 2 Salk. 547. Hill. 1 W. & M. B. R. Shotter v. Friend.

4. If a Man libels in the Eccleſiaſtical Court for his Child's Part againſt an Adminiſtrator, who pleads there that the Father of the Plaintiff made a Teſtament Nuncupative, and thereby deviſed a Term to the Defendant, and died without making any Executor, whereupon the Defendant took the Adminiſtration &c. And this Plea is refuſed becauſe he cannot prove it but by one Witneſs, yet no Prohibition ſhall be granted, becauſe by our Law no Teſtament is allowed in which there is not any Executor ordained, tho' the Eccleſiaſtical Court will compel him to perform the Will, if he proves it, as their Law requires. Hill. 37 El. B. R. Per Curiam. If one *makes a Will, but appoints no Executor*; this is no Will, but is void. But if the *Ordinary commits Adminiſtration with the Will annexed*, the Legatees to whom any Legacy is deviſed by ſuch Will, may ſue the Adminiſtrator for their Legacies in the Spiritual Court. Agreed. Nov 12. Chadron v Harris.

In the Caſe of a *Nuncupative Will* which is meerly Spiritual, and is null in their Law, unleſs prov'd by two Witneſſes at leaſt, no Prohibition ſhall go, tho' they diſallow the Will, becauſe prov'd by *one Witneſs only*; for that Court has the Cognizance of the *Probate of Wills*. But yet if a *Recovery* of ſuch Will is pleaded there, and prov'd by one Witneſs, and they refuſe the Plea for Want of ſufficient Proof, a Prohibition ſhall go. Adjudged. Carth 145. Shotter v. Friend.

5. If a Man makes his Son, being an Infant, his Executor, and during his Infancy he makes two others Guardians to the Infant, and alſo makes by the ſame Will two Supervifors, and deviſes certain Legacies out of the Profits of certain Land, to be paid at certain Days; And appoints alſo by the Will, That the Guardians ſhall enter into an Obligation to the Supervifors to pay the Legacies at the Days appointed by the Will. In a Suit in the Eccleſiaſtical Court to compel the Guardians to enter into the Obligation as is aforeſaid, if they ſay that they cannot raiſe the Legacies out of the Profits by the Days aforeſaid, and this Plea is refuſed, a Prohibition ſhall be granted. Tr. 16 Ja. B. between *Walkedon* and Adjudged, and Prohibition granted.

Yelv 92. S. C.—S. C. Cited Vent. 291. 292. in Caſe of Richardſon v. Disborough. Per Hale Ch. J. who ſaid that this Caſe here is

6. [So] If a Man makes a Will, and thereby gives a Legacy to J. S. and after revokes the Will, and dies Inteſtate, and the Ordinary grants Adminiſtration to J. D. againſt whom J. S. ſues for the Legacy in the Eccleſiaſtical Court, and J. D. there pleads the Revocation, and offers to prove it by one Witneſs, which is refuſed; for this Plea is in Effect that he made no Will. Tr. 4 Ja. B. R. between *Brown and Wentworth* Prohibition granted after Debate, but Demurrer upon the Count.

intirely of Eccleſiaſtical Conuſance.——Tho' they have Cognizance of the Original Matter, yet when the Defendant pleads a Revocation, which is an *Incident of Temporal Cognizance*, and triable at Common Law, they ought to try it as the Common Law would; and if they will try it ſo, and allow one Witneſs, they may; otherwiſe a Prohibition lies. 2 Salk 547. Shotter v. Friend ——And if they refuſe *the Proof of one Witneſs*, whether he be a *Credible* Witneſs, *or not*, they ſhall judge; and the Party has no *Remedy but by Appeal*. Ibid.——But per Gilbert Ch B. This ſeems to intrench upon their Juriſdiction; for if they cannot judge by the Law whether the Will is revoked or not, they cannot judge whether there is a Will or no Will; and the denying them to prove, unleſs they will allow by one Witneſs, is denying them to determine touching the Validity of a Will of a Perſonal Eſtate, which all allow to be of Eccleſiaſtical Conuſance. G. Eq. R. 28. Hill. 12 Geo. in Caſe of Marlot v. Marlot.

Agreed Show. 172. in Caſe of Shotter v. Friend.—— If the Spiritual Court proceeds

7. If an Executor will prove the Teſtament in the Eccleſiaſtical Court by one Witneſs, and this is diſallowed, yet no Prohibition ſhall be granted, becauſe they have Juriſdiction of the Matter and Proceeding. Tr. 4 Ja. between *Brown and Wentworth* agreed.

in a Matter meerly Spiritual, and pertaining to their Court, according to the Civil Law, tho' their Proceedings are againſt the Rules of the Common Law, yet a Prohibition does not lie; As if they refuſe a ſingle Witneſs to prove a Will; for the Conuſance belongs to them. Nov 12. Chadron v. Harris.——S. P. But when in ſuch Caſe Collateral Matter ariſes, which is not of their Conuſance properly, there the Courts of Common Law enforce them to admit ſuch Evidence as the Common Law would allow. Per Holt Ch. J. Ld. Raym. Rep. 221. 222. Paſch 9 W. 3. in Caſe of Breedon v. Gill.

Cro. J 217. pl. 3. S. C. —Prohibition, for that the Defendant being *Vicar* there, where were

8. If a Man libels in the Eccleſiaſtical Court for a Penſion where he never demanded it, tho' the Statute of 34 H. 8. [19.] which gives Remedy for ſuch Penſions, is where it is wilfully denied, he muſt ſue in the Eccleſiaſtical Court, yet no Prohibition ſhall be granted, becauſe the Suit belongs originally to the Eccleſiaſtical Court. H. 6 Ja. B. R. between *Bullbrook and Bridges*. Per Curiam.

two Churches, ſued in the Spiritual Court, ſurmiſing in his Libel, That whereas for 12 Years, 20 Years, 40 Years, and 60 Years, he ought to ſay Service in the one Church on one Sunday, and in the other Church the other Sunday Alternis vicibus; it was *agreed he ſhould ſay Service every Sunday, and have* 4 l. viz. 40 s. *of each Church, to be taxed of the Inhabitants*; and that the Plaintiff being taxed 4 l. had not paid &c. And becauſe he doth *not allege a Preſcription* Time whereof &c. a Prohibition was granted; but upon Motion, becauſe it is but a Penſion, and meerly Spiritual, and triable there, and it is not neceſſary to alledge a Preſcription but for 60 Years; it was well enough, and ſhall be intended Time whereof &c. unleſs the Contrary be ſhewn; and for that the Suit was before the Prohibition, and affirm'd in the Appeal, a Conſultation was granted, without inforcing him to appear and plead to the Prohibition. Cro. J. 666. pl. 3. Paſch. 21 Jac. B. R. Gilby v. Williams Parſon of Leath and Lanuoit in Glamorganſhire.

A Biſhop ſued for a Penſion to which he intitled himſelf by Preſcription; the Defendant ſuggeſted for a Prohibition, That it being by Preſcription the Court had no Cognizance of it; and ſtood for it Ld Coke's Opinion 2 Inſt. 491. But it was reſolved by Keyling and Twiſden, the other 3 being abſent) That Penſions, tho' by Preſcription, might be ſued for in that Court, they having Cognizance of the Principal.

Principal And they ſaid that Coke's Opinion is not warranted by the Books. Vent. 3 Mich. 22 Ch. 2. B. R. The Biſhop of Lincoln v. Smith

So where the Suggeſtion was, *That the Lands out of which, were Monaſtery Lands which came to the King, and he granted them &c. and that the Plaintiff claims under that Grant, and that he covenanted to diſcharge the ſaid Lands of all Penſions* &c. and this *upon the Statute of* 34 *H.* 8. *cap* 19 *which appoints the Court of Penſions in ſuch Caſes to be in the Court of Augmentations, and not elſewhere.* But the Court would not grant it without producing the Letters Patents, being a Matter of Record; but that where the Suggeſtion is of Matter of Fact, it is ſufficient to ſuggeſt it. And the Court ſaid that Penſions, whether by Preſcription or otherwiſe, might be ſued for in the Spiritual Court; but if by Preſcription, then there was a Remedy * at Law alſo. Vent 120. Paſch. 23 Car. 2. B. R. Anon.

* A Parſon that has a Penſion by Preſcription, may either ſue at Common Law or in the Spiritual Court; but if he *brings a Writ of Annuity at Common Law*, he can never after ſue in the Spiritual Court, for *his Election is determined.* Mod 218. pl. 6. Trin. 28 Car. 2. C. B. Barry v. Trebeswycke.

If the Preſcription be denied to be Time out of Mind, then a Prohibition is to go, ſo that the Preſcription may be tried at Law. Vent. 265. Mich. 26 Car. 2. B. R. Anon.

The Spiritual Court has Cognizance of a Penſion as well *between a Parſon and a Layman*, as between Spiritual Perſons, elſe all Impropriations will be free, which would be miſchievous; And tho' it was ſuggeſted for a Prohibition that there is no ſuch Preſcription, yet the Prohibition was denied, becauſe this Preſcription is triable there. 2 Keb. 41. pl. 82. Paſch. 18 Car. 2. B. R. Philips v. Hinkſon.

9. **Upon a Suit in the Eccleſiaſtical Court** for Subſtraction of Tithes, if Defendant pleads that he ſet them out, **and they will not allow the Proof by** one Witneſs, **a Prohibition lies. M. 17 Ja. B. between** *Downs and Devenſh.* **Per Curiam.**

For *the Setting out* is an *Incident of Temporal Conuſance*, and triable at the Common Law, where one Witneſs would be ſufficient. See 2 Salk. 547. Shotter v. Friend.—— Between a Layman and Farmer of the Parſon, the Suit ſhall be in Bank, and not in Curia Cleri; and they were at Iſſue there If the Corn were ſever'd from the 9 Parts as Tithes, or Not ſever'd. Br. Diſmes &c. pl. 2. cites 45 E. 3. 17.——Br. Juriſdiction, pl. 1. cites S. C.

Prohibition for ſuing for *Tithe-Pigeons.* The Defendant in the Court Chriſtian *pleaded Payment, and offered to prove it by two Witneſſes*; and they refuſed to admit thereof without 2 Witneſſes; and he thereupon brought a Prohibition And ruled that it well lay; for it would be a greater Inconvenience to bring two Witneſſes to prove Payment of every Sort of Tithes &c. wherefore &c. Cro. Eliz. 666. pl. 2. Paſch. 41 Eliz. C. B. Mallary v Marriot.

Farmer of an Appropriation libell'd for Tithes of Lambs for 7 Years, and Payment was prov'd by one Witneſs; a Prohibition was granted for not allowing it. Cited by Hutton J. Het. 87. in Caſe of Warner v. Barret, as one Hawkins's Caſe.

10. **If Baron and Feme** are divorced for Adultery a Menſa & Thoro* & mutua Cohabitatione, **and after the** Feme ſues alone **in the Eccleſiaſtical Court againſt a Stranger** for Slander **and Defamation, and Sentence there given for her, and Penance injoined the Defendant,** and Coſts of Suit aſſeſs'd to the Plaintiff, **and after the** Baron releaſes all Actions, and this Suit and all appertaining to it, **and the** Defendant pleads this Releaſe **in the Eccleſiaſtical Court, which is** diſallowed, **yet no Prohibition ſhall be granted, becauſe tho' the ſaid Divorce does not diſſolve the Marriage, but they continue Baron and Feme notwithſtanding this; per tantum as by the Courſe of the Eccleſiaſtical Law ſuch Feme may ſue alone without the Baron, and this Suit is but to reſtore her to her Credit again, which was impeached by the Defendant, and the Coſts of Suit are not for any Damages, but merely for the Charge of the Suit, and depending upon the Suit; therefore neither the Suit nor the Coſts depending thereupon ſhall be releaſed by the Baron. Mich. 14 Ja. B. between** *Moſam and Moſam* **adjudged.**

* Fol. 301.

S. C. Roll. Rep. 426. But Curia adviſare vult. ——Motteram v. Motteram. S. C. 3 Bulſt. 264. reports, That the whole Court were of Opinion that a Prohibition ſhould not be granted, and that a Prohibition was denied by the whole Court.—Holt Ch. J. ſaid he took this *Difference*, If a Feme Covert ſue for Defamation in the Spiritual Court, and there ſhe obtains Sentence, and Coſts are given her; if ſhe *cohabits with her Husband* at that Time, he may releaſe them, but if ſhe be *divorced a Menſa & Thoro*, tho' the Marriage ſtill continues, he cannot; becauſe if there is a Divorce the Husband is to allow the Wife Alimony, and if ſhe has Alimony the *Coſts* expended in the Suit are *ſuppoſed to iſſue out of it*; and therefore the Husband cannot releaſe it, becauſe ſhe has it ſeparate, which is the Reaſon, tho' not mentioned, of Moſam's Caſe 2 Roll Abr. 301. 12 Mod. 80. Hill 7 W. 3. Chamberlain and Hurſton.——5 Mod 71. Chamberlain v. Hewſon.—1 Salk. 115. S. C.——Ld. Raym. Rep. 73. 74. S. C.

11. **But if ſuch Feme after ſuch Divorce ſues in the Eccleſiaſtical Court for a Legacy given to her, and the Releaſe of the Baron is pleaded and diſallowed, a Prohibition ſhall be granted,** for here the

S. C. Mo. pl. [illegible] but ſays that

Legacy

the Legacy was devised to her by her Father after the Divorce, and that a Conſultation was granted, but that it was upon Terms, viz. That the Eccleſiaſtical Judge would not diſallow the Releaſe.——Cro. E. 908. S. C. And all the Court held the Releaſe good.——Noy 45. S. C. accordingly.

Legacy is originally due to the Baron and Feme, and the Suit there is for a Real Intereſt, and therefore the Releaſe of the Baron will diſcharge it. 44 El. B. R. between *Stephens and Tett* adjudged.

Cro C 222. pl. 9. Trin. 7 Car. B. R. Anon. But ſeems to be S. C. And ſays The Court conceiv'd that the Releaſe of a Baron *cannot* be *a Bar* to this Suit *Quoad Reformationem Morum*; for the Feme being ſcandalized, may ſue in the Spiritual Court to be repaired therein; and the *Court may ſentence* the Defendant *to a* Submiſſion or *Corporal Satisfaction, which the Baron cannot releaſe*; but for the Releaſe of the Coſts, the Baron may well do it. Whereupon Rule was given, if Cauſe were not ſhewn at a Day &c. that a Prohibition ſhould be awarded to ſtay the Suit Quoad the Coſts.

12. If A. a Feme Covert ſpeak ſcandalous Words of B. another Covert, and after the Baron of B. releaſes this to the Baron of A. and after A. ſues B. in Court Chriſtian for this Defamation, to reſtore her to her Credit, and there the Releaſe of the Baron of A. is pleaded, and notwithſtanding Sentence is there given for A. and Coſts tax'd, and thereupon an Appeal; no Prohibition lies as to the Matter, becauſe they have Juriſdiction of the Cauſe, and alſo of the Manner of Proceeding; but a Prohibition lies as to the Coſts, for the Coſts ſhall go to her Baron who has made the Releaſe. Tr. 7 Car. B. R. between *Perry and Hubbart*, per Curiam, and Prohibition granted accordingly. Tr. 13 Car. B. R. between *Paynell and Walford*, per Curiam, where the Feme ſued in Court Chriſtian for Defamation, and the Baron and the other refer'd them to the Award of J. S. who made an Award, and pleaded it in Court Chriſtian, and not allowed, yet a Prohibition denied, becauſe this Suit is to reſtore her to her Fame, which the Baron cannot hinder.

A. died, and made B. and C. his Executors, and deviſed a Legacy to them betwixt them; B. takes Husband, and dies, and the Husband ſues C. in the Eccleſiaſtical Court *for a Moiety*; for in that Court they will not allow any Survivorſhip; and therefore C. moved for a Prohibition; and it being oppoſed, it was granted per Curiam. And the Court told them, if they were not ſatisfied, they might demur to the Declaration, and cited 2 Roll. 301. Freem. Rep. 286. Trin. 1675 B. R. Barton's Caſe—(But the Reporter ſays) Nota q'le ſuit la eſt pur un Legacy, mes icy le Legatee eſt mort.—So where J. S. *deviſed Goods to B. and C.* and the *Executor aſſented to the Legacy*; and afterwards *B. died*, and his Executor ſued in the Spiritual Court for his Part; and thereupon C. ſued a Prohibition, and declared. Upon Demurrer and Argument it was adjudged that the Prohibition ſhould ſtand; for by the Executor's Aſſent the Intereſt is veſted, and is become a Chattle, and governable by the Common Law. 2 Lev 209. Mich. 29 Car. 2. B. R. Baſſard v. Stukely.——2 Jo. 130. Hill 31 & 32 Car. 2. B. R. Baſſard v. Stukeley. S. C. argued, but no Judgment.——3 Keb. 828. pl. 50 Mich. 29 Car. 2. B. R. S. C. adjudged accordingly.——[So that the Year and Term in Jones ſeem miſprinted.]

13. If a Man deviſes 20 l. to 5 of his Children, to be equally divided between them, and after one of the Children dies, and then the ſurviving Children ſue in the Court Chriſtian for the whole 20 l. as they may by the Eccleſiaſtical Law; for by their Law they are Jointenants, tho' by the Common Law they are Tenants in Common; yet no Prohibition lies, becauſe there is not any Remedy for ſuch Legacy by the Common Law, but only by the Eccleſiaſtical Law; and therefore they ſhall have Power to adjudge who ſhall have it. M. 5 Car. B. R. between *Evans and King* reſolved, and a Conſultation granted accordingly.

Roll Rep. 419. S. C.—3 Bulſt. 241. Reading v. Goſlin. S. C. *cur. ejus* is not ſufficient, notwithſtanding the Biſhop of Wincheſter's Caſe. 2 Rep. 45 *unleſs* it was *pleaded below*, becauſe perhaps they might admit the Plea. 2 Salk. 551. pl. 13. cites 12 W. 3. B. R. Per Holt.—And per Holt Ch. J. If a Modus be there *pleaded and admitted*, no Prohibition ſhall go; *but* if the Queſtion be *Modus or No Modus*, a Prohibition ſhall go. Ibid. Hill. 12 W. 3. B. R. Anon.

14. If a Suit be upon a Modus Decimandi in the Spiritual Court, and the Defendant ſays that the Modus is other than the Plaintiff alleged, and proves it by one Witneſs, which is not ſufficient by the Spiritual Law; if they refuſe it for this Cauſe, a Prohibition lies. By Reports. 14 Ja. *Goſlin and Harden.*

15. So

15. So if the Suit be upon a Modus in the Spiritual Court, and the Defendant ſays that the Modus is other than the Plaintiff has alleg'd, and they refuſe to accept his Proof of this Modus, a Prohibition lies. My Reports. 14 Ja. *Goſlin and Harden.*

16. If a Suit be for a Legacy in the Spiritual Court, and the Defendant pleads a Releaſe in Bar, which is denied by the Plaintiff, and the Defendant * proves it by one Witneſs, if they refuſe this Proof there, a Prohibition lies, becauſe it is good Proof by our Law. Mich. 15 Ja. B. between *Percher and Wable.* Per Curiam. Dobart's Reports 255. Anonimus.

* Fol. 322. 2 Salk. 552 in Caſe of Shotter v Friend —— Prohibition

and *ſurmiſed, That* the Defendant ſued him, being an Executor, in the Spiritual Court for a Legacy, whereas the *Plaintiff had a Releaſe*, but had only one Witneſs to prove it; but a Conſultation was granted. *But* if he had ſurmiſed that he *had pleaded this Releaſe* in that Court, and produced his Witneſs, and that they would not allow it becauſe he had not two Witneſſes; this had been a good Surmiſe. And it was ſaid the Plaintiff is at no Miſchief, for he may have a Prohibition after Sentence given in that Court. Cro E. 88. pl 11. Hill. 30 Eliz. in B. R. Bagnall v. Stokes.

One ſued for a *Legacy* in the Court of Audience, and the Libellee *pleaded a Releaſe*, and proved it by one Witneſs. The *Plaintiff denied not the Releaſe, but replied*, That *the Inteſtate that made it was an Idiot*, and the Prohibition was denied; for it was pertinent to the Cauſe and their Juriſdiction; but if they will diſallow the Proof, becauſe it is by one Witneſs, which he aſſign'd as a Reaſon at the firſt, a Prohibition will lie; for it is not ſufferable by our Law to diſallow that Proof againſt a Legacy, which is allowable by Law againſt a Statute, Recognizance or Judgment, for that would make a Devaſtavit; but if they will except to the * Credit of Witneſſes, or the like, they may, according to their Law. Hob. 188. pl 231. Anon.——* It was agreed, That a *Suggeſtion that the Spiritual Court objected to the Credibility of a Witneſs*, is not a ſufficient Ground for a Prohibition; for they are the proper Judges of the Credit of a Witneſs. Carth 143. Trin. 2 W. & M. B. R. in Caſe of Shotter v. Friend.

On praying a Prohibition to the Official's Court at York, becauſe they would proceed to try a Deed relating to an Executor, it was ſaid per Twiſden, (and not denied by any) That from the Time of Juſtice Jones till now, no Prohibition has been granted, upon ſuggeſting that Spiritual Court *refuſe* to allow *Proof* of a Deed &c. *by one Witneſs.* Sid. 161. Mich 15 Car B. R. Prince v. Huett.

17. So when the Releaſe is pleaded in Bar of the Legacy, if they will not allow it becauſe the Witneſſes named in the Deed are dead, nor will allow any Proof of the Deed by Circumſtances, as by comparing of the Witneſſes Hands &c. a Prohibition ſhall be granted. M. 16 Ja. B. between *Watts* and his Wife, againſt the Executor of Sir *John Conisby* Reſolved, and a Prohibition granted. Dobart's Reports 312. S. C. If this be not proved upon the Prohibition, a Conſultation ſhall be granted; and if it be proved, Plaintiff has no Cauſe of Action.

Hob. 249. S. C. And the Prohibition was granted, containing this Averment of the Witneſſes being dead, and that ſhe offered to

prove by Witneſſes that it was the Hands of the Witneſſes, and that Watts the Husband confeſs'd that he ſubſcribed the Releaſe.——S. C. Hutt. 22. Conesbie's Caſe; and that in ſuch Caſe the Spiritual Court will allow no Proof but of thoſe that wrote it, or who ſaw them ſubſcribe.

18. Upon a Suit in the Spiritual Court, if the Court takes an Obligation of the Defendant to perform their Sentence, a Prohibition lies; for they have other lawful Means to compel him to perform it, if they have Juriſdiction. M. 12 Ja. B. R. *Cold's* Caſe, per Curiam. See my Reports. 14 Ja.

S. C. Roll. Rep 432. pl. 18. Mich. 14 Jac. B. R. The Bond was *to appear De Die in*

Diem, till they ſhould determine what Alimony he ſhould allow his Wife; the which he refuſ'd, and therefore the High Commiſſion Court, in which the Cauſe was, committed him. Whereupon he mov'd for a Habeas Corpus; and the Court ſaid they might commit him for refuſing to take his Wife, or to ſhew Cauſe to the contrary, but as to the Obligation they would adviſe; and ſo he was remanded.

19. If a Parſon ſues againſt a Pariſhioner, for not ſetting out of Tithes according to the Statute of 2 E. 6. and Defendant ſays that he ſet out the Tithes, and this Plea is there refuſed, becauſe it is not ſufficient ſetting forth of Tithes unleſs the Parſon be preſent; yet Prohibition ſhall be granted, becauſe it is ſufficient by the Common Law, tho' the Parſon be abſent. Mich. 15 Ja. B. Reſolved, and Prohibition granted.

2 Vent. 48. Trin. 1 W & M. in C. B. Anon. —— If they refuſe to allow the Plea becauſe the Defendant

had

had not given the Parſon Notice of ſetting out the Tithes; upon ſuggeſting this Matter, a Prohibition ſhall go, becauſe Notice *is not requiſite by the Common Law.* Carth 143. in the Caſe of Shotter v. Friend.

20. If a Man ſues another in the Eccleſiaſtical Court for calling him Baſtard, and the Defendant there pleads that he was born after a Contract between his Father and Mother, but before any Marriage, which Plea is there refuſed, becauſe they by the Eccleſiaſtical Law hold ſuch Iſſue Legitimate which by the Common Law is a Baſtard, a Prohibition ſhall be granted. P. 39 El. B. R. between *Ambler and Metcalfe* adjudged.

21. If Baron poſſeſs'd of Goods in Right of his Feme, as Adminiſtratrix, grants the Goods to J. S. and after the Feme dies, and then a new Adminiſtration is granted to J. D. who ſues the Grantee of the Goods for a Spoliation in the Eccleſiaſtical Court, a Prohibition lies. Mich. 11 Car. B. R. between *Clarke and Daniel*, a Prohibition granted per Curiam.

6-2. Arg. in Caſe of Baron v. Berkley.

22. If Baron poſſeſs'd of Goods in Right of his Feme, as Adminiſtratrix, waſts the Goods, and after the Feme dies, if the Baron be ſued in the Spiritual Court for a Spoliation, or for Waſte of the Goods, a Prohibition lies. M. 11 Car. B. R. in the ſaid Caſe of *Clerke and Daniel*, ſaid by Juſtice Jones that it had been ſo reſolved, tho' the Spiritual Courts complain of it to be very hard.

A Libel was for Subſtraction of Tithes; it was ſuggeſted for a Prohibition,

23. If a Parſon ſues for Tithes againſt a Pariſhioner, and there the Pariſhioner pleads the Leaſe to him of his own Tithes by the Parſon by Way of Diſcharge by Deed, and this Plea is refuſed, a Prohibition lies. Mich. 15 Ja. B. R. Parſon *Starce's* Caſe adjudged, and Prohibition granted.

That the Plaintiff having a Leaſe of the Tithes, had but *one Witneſs* to prove it in the Spiritual Court, and for that Reaſon they would not allow it; but it was at Length reſolv'd, that a Conſultation be awarded; for by their having Cognizance of the Principal, they have conſequently Cognizance of the Acceſſary; and if ſuch Surmiſe ſhould be allowed in every Caſe, it would often be made for mere Delay, and the Spiritual Court ſhould not try the Acceſſary as well as the Principal. Cro. J. 269. Hill. 8 Jac. B. R. Roberts's Caſe.——12 Rep. 65. S. C. accordingly.

A Libel was for Tithes; the Defendant pleaded there a *Deed and Covenant to hold his Land Tithe-free during the Life of the Parſon, rendring ſo much Rent, and for Default of Payment the Grant to be void*, and [to which the Plaintiff there] ſaid, That the Rent ſuch a Day was not paid according to the Condition, by which &c. It was mov'd for a Prohibition, becauſe now the *Queſtion is upon a real Contract, and they* in the Court Chriſtian *will not allow one Witneſs*, which our Law does. Per Mountague Ch. J. clearly, *If the* Parſon had denied his Deed, ſo that the *Queſtion had been whether there was a Demiſe or not*, a Prohibition ſhould be granted for the Cauſe above; but he has confeſs'd the Demiſe, and therefore as the Spiritual Court has Conuſance of the Principal, they ſhall likewiſe have it of the Acceſſary; And Haughton J. accordingly; and the Iſſue now is upon the Payment of the Rent, which they may well try; but if upon Trial they refuſe Proof by one Witneſs, a Prohibition ſhall be granted upon Suggeſtion thereof. And Doderidge and Crooke J. accordingly. 2 Roll. Rep. 42. Trin 16 Jac. B. R. Barnewell v. Tracy.——Godb. 272. pl. 384. Barnwell v. Pelſie, S. C. but mentions nothing of Non-payment of the Rent, or of one Witneſs; but that the Court would not grant the Prohibition, becauſe the Original, viz. the Tithes, belong to the Spiritual Juriſdiction; but it was ſaid that the Pariſhioner might have Action of Covenant againſt the Parſon in the Temporal Court upon the Deed.

S.C. Roll. Rep. 12. Anon. that it was ſuggeſted for a Prohibition,

24. If a Parſon ſues for Tithes, and the Defendant pleads an Arbitrement in Bar, if this be refuſed in the Eccleſiaſtical Court, a Prohibition ſhall be granted. By Reports. P. 12 Ja.

That Arbitrement is a Matter triable at Law; but it was denied per Cur. But if the Spiritual Court adjudges otherwiſe upon Arbitrement than they ought by the Common Law, then a Prohibition ſhall be granted; Per Coke Ch. J. quod fuit conceſſum per Doderidge, and therefore they adviſed to move it again if the Arbitrement be diſallowed ——But 2 Bulſt. 227. S. C. by the Name of Parker v. Kemp ſays, a Prohibition was prayed upon Refuſal of the Plea; and that Coke ſaid they would not grant it, and that the Court was all clear of Opinion, That this Plea of the Award there pleaded and by them refuſed, was no Ground for a Prohibition; and ſo by the Rule of Court a Prohibition was denied.

S. P. Upon a Surmiſe that diverſe

25. If an Executor be ſued in the Eccleſiaſtical Court for a Legacy, and the Executor there pleads that there is an Obligation forfeited, which

which ought first to be satisfied, and this Plea is disallowed, a Prohibition shall be granted; for by the Common Law Debts ought to be satisfied before Legacies. M. 11 Ja. B. R.

Obligations were depending, and that they were true ones; and at Length a Consultation was granted, so that the Libellers give *Security to repay the Legacy in Case of Recovery* against the Executors, upon the Obligations. Mo. 413. pl. 568. Trin. 37 Eliz. Necton & Sharp v. the Waxchandlers Company.——Goldsb. 141. pl. 54 S. C.——Cro. E. 466. [bis] pl. 17. Hill. 38 Eliz. B R. by Name of Nector & Sharp v. Gennet reports, that the Bond was for Indemnifying the Sheriffs of London from Escapes, and that it was held in B. R. to be no Plea unless the Bond was forfeited; but Fenner said, He doubted. Coke took a Difference between a Bond for Payment of a less Sum at a Day to come, which is a Duty immediately, and a Statute or *Bond for Performance of Covenants, or to do a collateral Thing*; and that in the last Case it is no Plea against a Legatee. And in the principal Case the Obligation not being forfeited, a Consultation was awarded ——Ow. 72 Norton & Sharp v. Gennet, S. C. and same Difference taken, and a Consultation awarded, upon Condition the Legatee would enter into a Bond to the Executor to make Restitution if &c. or otherwise not.

26. If the Executor be sued in Court Christian for a Legacy, and the Executor pleads that he has fully administer'd all that which he had, but there are some desperate Debts upon Obligations and upon Contracts, which he offer'd to the Plaintiff there, and to make Letter of Attorney to him to sue in the Name of the Executor, and the Court Christian will not allow this Plea, a Prohibition shall be granted. M. 3 Ja. B. between *Sheyney and Hermy* Dubitatur.

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But where the Executor pleaded No Assets to discharge the Debts of Testator, the Spiritual Court would not allow the Allegation, yet the Opinion of the Court was, That no Prohibition shou'd be granted; for the Legacy is a Thing merely determinable in the Spiritual Court, and this is a Thing which consists merely in the Discretion of the Court; and 'twas resolved that therefore no Prohibition shall be granted. Win. 78. Pasch. 22 Jac. C. B. Anon.

27. If an Administration is granted to the next of Blood, and upon this an Appeal is sued to the Delegates, and there they intend to revoke the said Sentence and to grant it to another, who is not nearer of Blood by our Law but is by the Ecclesiastical Law, a Prohibition lies, because this being ordained by Statute, ought to be interpreted according to our Law. Mich. 21 Ja. B. R. between *Wingate and Fitch* resolved, and Prohibition, because the Administration was granted to the Brother of the Half Blood; and upon the Appeal to the Delegates, they inclined to repeal it, and to grant it to the Brother of the whole Blood; and therefore Prohibition granted to try the Law thereupon by our Law.

S. C. Cited Lev. 157. Price v. Parker —— If Administration be once duly granted, the Grantee has a just Interest which cannot be revoked; and by such Grant all the Intestate, he Power of the Ordinary is determined. And if he grants Administration to the Wife of the cannot revoke it; but if he grants Administration to one as next of Kin, and *another more near of Kin comes*, he may revoke. Het. 48. Mich. 3 Car. C. B. Anon ——[But for more as to this Point See Title Executor, under the Division of, Administration repeal'd in what Cases]

28. If Administration be granted to a Cousin of the Half Blood, and upon this a Suit is by another, who pretends to be Cousin of the Whole Blood, where his Father was a Bastard by our Law, and appealed to the Audience, and there they intend to repeal the first Administration, and grant it to the Son of the Bastard, according to the Ecclesiastical Law, a Prohibition lies, because the Statute is to be interpreted according to our Law. H. 22 Ja. B. R. Prohibition granted between .....

29. The Abbot of St. Albans *kept the Wife of J. S. in his House two Hours against her Will*, to have made a Whore of her, and the *Baron spoke of it, by which the Abbot sued him for a Scandal in the Spiritual Court*; and because the *Baron* of this Act *may have Writ of False Imprisonment*, therefore a Prohibition was granted. And per Brian, The Abbot for this Cause shall not have Consultation. Br. Prohibition, pl. 14. cites 22 E. 4. 20.

So if A tells B. who speaks of it, and A sues in the Spiritual Court, a Prohibition lies. Br. Prohibition, pl. 14. cites 22 E.

4. 20 ——So *in any Case*, if Suit be in the Spiritual Court, where Action is thereof given at the Common Law, Prohibition shall be granted. Br. Consultation, pl. 7. cites S. C.

And

S. P. F. N. B. 41. (B) *But if a Man by Reaſon of Marriage or a Will*, acknowledges in the Spiritual Court that he ought to pay 100 Marks, or any other Sum at a certain Day, then if he does not pay it according to his Acknowledgment, he may be ſued in the Spiritual Court for the ſame, and a Prohibition will not lie.——So if he promiſes the Payment of Tithes. F. N. B. 41. (B) in the new Notes there, (b) cites 20 E. 4. 10.

30. *And* per Brian, if I *ſwear to pay* 10 *l. Debt*, and *he* ſues in the Spiritual Court, Prohibition lies; for he may have Debt at Common Law; for where the Common Law may meddle, the Spiritual Court ſhall not meddle. Br. Prohibition, pl. 14. cites 22 E. 4. 20.

S. P. F. N. B. 43. (D)—*S. P. F. N. B. 42. (I) Becauſe the Oath concerns a Temporal Thing, viz. Land.

31. *So* of Swearing *to infeoff him, or that a Feme ſhall not ſue* * *Cui in Vita*, Prohibition lies. Br. Prohibition, pl. 14. cites 22 E. 4. 20.

31. A Pariſhioner had *paid* 12 *d. and no more* yearly, *for the Tithes* of ſuch a Cloſe *for* 60 *Years*; the Parſon made a Leaſe of the Rectory, and the Leſſee ſued in the Spiritual Court for Tithes in Kind; the Defendant pleaded Payment of 12 d. &c. and the Court refuſed the Plea, and gave Sentence for the Leſſee, and B. R. granted a Prohibition, upon Suggeſtion that this Plea was refuſed, notwithſtanding this Rent of 12 d. was iſſuing out of Land, ſo as an Aiſiſe lay thereof, or that it might be diſtrained for. D. 79. a. pl. 49. Hill 6 & 7 E. 6. Anon.

32. If one *recovers a Debt in the Spiritual Court* againſt another, and after *ſues there to have Execution*, a Prohibition lies againſt the Party and the Judge. F. N. B. 41. (D)

S. C. 3 Le. 265. pl. 355. Pendleton v. Green.

34. It was ſuggeſted for a Prohibition to a Libel for Tithes, that Defendant pleaded there that the Plaintiff was *not lawful Incumbent* &c. *but one T.* which being a Plea to the Right of Incumbency, that Court refuſed it, but a Prohibition was granted per Cur. For he being the Tenant to the Land, might plead it, otherwiſe he might be twice charg'd for his Tithes. Cro. Eliz. 228. Paſch. 33 Eliz. B. R. Green v. Peniſden.

So if any Thing is offer'd in *Proof* which by our Law ought to be allowed, and they there will *not allow it*, a Prohibition ſhall be granted. Admitted. Arg. Lat. 217. in Caſe of Longmore v. Churchyard.

35. If the Common Law differs from the Civil Law *touching the Legality or Non-legality of a Thing*, if they will proceed according to their Law, a Prohibition lies, becauſe the Common Law is to be preferr'd. Sty. 10. Paſch. 23 Car. the 8th Reſolution in the Caſe of Betſworth v. Betſworth.

S. P. Mo. 413. in Caſe of Necton v. Sharp, cites Hill. 30 Eliz. Eaton's Caſe.

36. A Prohibition was denied, where they of the Spiritual Court refuſ'd a ſingle Witneſs in Proof of *Payment of a Legacy*. Noy 12. in Caſe of Chadron v. Harris; cites Paſch. 4 Jac. B. R. Peep's Caſe.

——Yelverton J took a Difference where the Suit is merely Eccleſiaſtical, for a Sum of Money; as for a Legacy, there the Payment of the Legacy is of the Nature of the Thing, and the Eccleſiaſtical Court ſhall have Juriſdiction of the Proof and Matter; but if one gives a *Legacy of* 20 *Oxen, and the other pleads Payment of ſo much Money in Satisfaction*, there they cannot proceed but upon the Common Law, becauſe the *Legacy is alter'd*; and if a Proof of one Witneſs is not accepted, a Prohibition ſhall be granted, for now it is a legal Trial. Het. 87. Paſch. 4 Car. C. B. in Caſe of Warner v. Barret.——To a Suit for a *Legacy* in the Eccleſiaſtical Court, the *Defendant pleaded Fully Adminiſter'd*, but he proving his Payments only by *one Witneſs*, Sentence was given againſt him. He pray'd a Prohibition. And by Hale Ch. J. Where the *Matter to be proved* (which *falls in incidently* in a Cauſe before them) *is Temporal*, they ought not to deny ſuch Proof as our Law allows; and it would be a great Miſchief to Executors, ſhould they be forced to take two Witneſſes for the Payment of every petit Sum; and if they ſhould, there would be the ſame Inconvenience after their Death. And ſo a Prohibition was granted, and the Party to demur upon the Declaration, if he pleaſe. Vent. 291. Hill. 27 & 28 Car. 2 B. R. Richardſon v. Disborow.——S. P. Argu'd Show 158. Trin. 2 W. & M. B. R. And afterwards in Mich Term following adjudged accordingly by the whole Court. And there Holt Ch. J obſerved that the Caſe in 2 Inſt. 608 where all the Judges agreed under their Hands, That if the Queſtion be upon Payment of Tithes or Legacy, or ſuch like Incident, it is to be left to the Trial of the Law, tho' the Parties have but one Witneſs, yet that in the very next Year, in Caſe of **Brown v. Wentworth**, a Prohibition was granted. Show. 172. Shatter v Friend.——Cirth 172. S. C——S. C.

S. C—2 Salk. 547. S. C.—S. C. Cited Ld Raym Rep 222. Paſch. 9 W. 3. by Name of Shottar v Friend, in Caſe of Breedon v. Gill.

37. A Libel was brought on a *Cuſtom, That the Conſtable of the Town ſhould collect the Rates aſſeſs'd for Repairing the Pariſh Church, which he refuſed to do*; and on a Motion for a Prohibition, it was ſuggeſted that it was not triable there Whether the Party was Conſtable, and duly elected or Not; but the Court denied to grant one, becauſe this Matter is pleadable there, and Prohibitions ought not to go, unleſs upon a Trial of the Matter there, their Law and Proceedings croſs the Common Law, and in that Caſe a Prohibition lies only till Trial here, and after that a Conſultation ſhall be granted. Hard. 510. Paſch. 21 Car. 2. in Scacc. Goddin v. Wainwright.

(R) In what Caſe they ſhall not have Jurisdiction for a Collateral Cauſe, for Proſecution at the Common Law. * See the Statute 1 E. 3. cap. 11.

See Marriage (F. 2) pl. 5 Boyle v. Boyle. * See pl. 6. at the End.

1. IF a Man be accuſed of being the Father of a Baſtard before Juſtices of the Peace, and the Juſtices in examining the Matter ſay that it is his Baſtard, if they are after ſued for thoſe Words in the Spiritual Court, a Prohibition lies, becauſe they ſay it in the Adminiſtration of their Office. Hill. 14 Ja. B. *Cade and Windham*, and Mich. 14 Ja. it was affirm'd again.

Prohibition was pray'd, for that C. ſued W. in the Spiritual Court, for *ſaying*, That *he had a Baſtard*; Webb the *Defendant alleged in the Spiritual Court that* the *Plaintiff was adjudged the reputed Father of a Baſtard by two Juſtices* of the Peace, according to the Statute, whereupon he ſpake theſe Words; And they of the *Spiritual Court* accepted his Confeſſion, but *would not allow his Juſtification*; wherefore he pray'd a Prohibition, which was granted him. Cro J. 535. pl. 19. Paſch. 1 Jac. B. R. Webb v. Cook.——S. C. Cro. J. 625. pl. 18 Mich. 19 Jac B. R. Adjudg'd upon Demurrer that the Prohibition ſhould ſtand, for being ſentenced at the Seſſions, which is by Authority of the Statute Law, it cannot be impeach'd elſewhere, and all are concluded to ſay the contrary till it be revers'd ——S. P. Cited by Holt Ch. J. 2 Mod. 80. 81. as adjudged in Lord Hyde's Time, That ſince he had been adjudged before the Juſtices to have been the Father, he could not ſue below for Defamation. And of that Opinion was the Court.

2. But otherwiſe it would be, if the Juſtices ſay the Words at another Time after the Examination, as was agreed Mich. 14 Ja. in the ſaid Caſe of *Cade and Windham.*

3. If A. ſues B. in the Eccleſiaſtical Court for ſaying that he liv'd incontinently with C. B. ſhall have a Prohibition, upon a Suggeſtion that he was produced before a Juſtice of Peace, where he gave Evidence that the ſaid C. had confeſs'd to him that A. liv'd incontinently with her, tho' he does not ſuggeſt that he ſaid the Words, for this is only Evidence. P. 11 Ja. B. R. between *Berry and Miles* adjudged, and Prohibition granted.

4. If a Man ſues in the Eccleſiaſtical Court for Tithes, and recovers, and there Coſts of Suit are tax'd, and afterwards the Defendant procures a Prohibition, but after this a Conſultation is granted, and the Eccleſiaſtical Court taxes New Coſts againſt the Defendant for the Coſts of the Plaintiff in the Temporal Court to obtain a Prohibition, a Prohibition ſhall be granted for the taxing of thoſe New Coſts, becauſe otherwiſe every one ſhall be deterr'd from ſuing Prohibitions, and the Plaintiff in the Prohibition at the Common Law ſhall not have any Coſts, tho' he recovers there. Mich. 1 Ja. B. R. between *Stoner* Caſe and *Read*, per Curiam reſolved, and Prohibition granted, if this may appear.

Cro. J. 69. pl. 1. Mich. 21 Jac. S C but not S. P. —2 Roll. Rep 3. & S. C but I do not obſerve the S. P.

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5. If a Man be defamed for [getting] a Baſtard by a Whore, and the Churchwardens compel him to enter into an Obligation to diſcharge the Pariſh according to the Statute, and thereupon the Party defam'd ſu-

bſcribes

bels in the Eccleſiaſtical Court againſt the Wardens for the Defamation, a Prohibition ſhall be granted. M. 10 Ja. B. R. *Berry's* Caſe, per Curiam.

S. P. And the Indictment was removed into B. R. and the Party having brought Action upon the Caſe, and which was ſuggeſted to be then depending in B. R. and thereupon a Prohibition being mov'd for, it was granted. Palm. 379. Trin. 21 Jac. B. R. Anon.

6. If a Man be indicted in a Leet for keeping of a Bawdy-houſe, and the Party libels for this in the Eccleſiaſtical Court, a Prohibition ſhall be granted. M. 10 Ja. B. R. per Curiam.

1 *E.* 3. *Stat.* 2. *cap.* 11. *A Prohibition ſhall be granted againſt thoſe who in the Spiritual Court do vex their Inditors.*

S. P. Becauſe no Man ought to be ſued there for giving Evidence in any of the King's Courts.

7. If a Man be indicted in a Leet upon the Statute for Drunkenneſs, and J. S. gives Evidence there againſt him that he was drunk, and thereupon he ſues J. S. in the Eccleſiaſtical Court for ſaying the Words, a Prohibition ſhall be granted. M. 12 Ja. B. R. between *Anfield and Feverell* adjudged.

Quod fuit conceſſum per totam Curiam. 1 Roll. Rep. 61. Mich. 12 Jac. B. R. S. C. by Name of Anfield v Feverell.—2 Bulſt. 269. S. C accordingly.

If two Men are ſworn to *give Evidence unto a Jury*, and do ſo, *by which certain Perſons are indicted*, if they who are indicted ſue them in the Spiritual Court who gave Evidence for Defamation, they ſhall have a Prohibition. F. N. B. 42. (F)——So it ſeems if a Feme be ſued for Defamation for proſecuting a Homine Replegiando for her Husband. F. N. B. 42. (F) in the new Notes there (a) cites 33 E. 3. Brief 912.

But where the Perjury ariſes *upon a Spiritual Matter*, as *Teſtament, Matrimony, Legacy &c.* the Spiritual Judge has Authority to puniſh it, and the Prohibition does not lie. Kelw 39. b. pl. 7.

8. If Indictors in Caſe of Felony are perjur'd, yet if they are ſued for it in the Eccleſiaſtical Court, a Prohibition lies; for this Perjury ariſes upon a Temporal Cauſe. 13 H. 7. Kell. 39. b. per Curiam.

9. So if a Jury gives a Falſe Verdict between Party and Party, yet if they are ſued for this Perjury in the Eccleſiaſtical Court, a Prohibition lies. 13 H. 7. Kell. 39. b. per Curiam.

10. If A. a Parſon of a Church ſues for Tithes in the Spiritual Court againſt B. who obtains a Prohibition upon 2 E. 6. upon Surmiſe of barren Land, and thereupon Iſſue is join'd, and a Verdict for A. and a Conſultation granted, and after a Sentence given in the Spiritual Court, and there Coſts tax'd, upon a Bill preferr'd, the Particulars of which amount to about 10 l. and there is preferr'd alſo to have Coſts pro Expenſis Jurisperitorum & Solicitatorum 48 l. and upon this Coſts aſſeſs'd for all to 48 l. In this Caſe, becauſe A. the Plaintiff refuſed to take his Oath that nothing of theſe Coſts was for any Expences at Common Law, tho' it was ſo certified by the Chancellor; yet upon this Surmiſe a Prohibition lies. Mich. 9 Car. B. R. between *Flower and Warner*, per Curiam, but no Prohibition granted, becauſe by Conſent of the Parties the Coſts were mitigated per Curiam to 30 l.

In ſuch a Caſe a Prohibition was granted, becauſe the Plea in the Biſhop's Court was mov'd pending this Plea here. Br Prohibition, pl. 13. cites 18 E. 4. 6.

11. Newton ſhew'd to the Court, that A. had brought *Treſpaſs againſt B.* in this Place, and are at Iſſue; and *pending this Suit the Plaintiff impleaded the Defendant for the ſame Matter in the Spiritual Court*, and prayed Prohibition, and it was granted to him. Br. Prohibition, pl. 19. cites 10 H. 6. 21.

In this Caſe, tho' the Opinion of the Court was, that a Prohibition ought to go, becauſe tho' the Sollicitation &c. was of Eccleſiaſtical Conuſance, yet the Force and Hurt to it makes it cognizable in the Temporal Court, yet at the Prayer of the Defendant's Counſel, they

12. Where the *Sollicitation of Chaſtity*, and an Aſſault, are one intire Act, the Spiritual Court can't divide them, and Prohibition lies Far. 80. Mich. 1 Ann B. R. Rigaut v. Gallifard.

Order that the Caſe ſhould be argued by Civilians; but afterwards an apparent Fault being in the Pleadings, a Prohibition was granted. Ld Raym. Rep. 829. Mich. 1 Ann. B. R. S. C. by Name of Gallifland v Rigaud.——2 Salk. 552. S.C.

13. It was mov'd for a Prohibition to a Libel for Words, upon a Suggeſtion that the Plaintiff below had *brought an Action for thoſe Words, grounded upon ſpecial Damage ſuſtained by the ſpeaking them*; and that tho' the Words were ſuch as are properly ſuable for in the Eccleſiaſtical Court, yet a ſpecial Damage attending the ſpeaking them, ſo that an Action lies, they ſhall not proceed in the Eccleſiaſtical Court. But the Court denied to grant a Prohibition. Ld. Raym. 2 Rep. 1101. Hill. 3 Ann. Evans v. Brown.

(S) In what Caſes they ſhall not have Juriſdiction for Collateral Cauſe, for Cauſe of Pardon.

1. IF A. ſues B. in Court Chriſtian for ſaying that he was a Pandar &c. and after Sentence is given againſt the Defendant, and that he ſhall be condemned in Expenſis litis, but before the Coſts are taxed in certain, comes the General Pardon of 21 Ja. by which the ſaid Offence was pardon'd. By this Pardon the Coſts are alſo pardoned, becauſe tho' there was an Award of Coſts, yet till they are put in certain, the Party has not any Intereſt in them; and therefore if they proceed there afterwards for the ſaid Coſts, a Prohibition ſhall be granted. M. 2 Car. between *Lewis* and *Whitton*, per Curiam. Nov. 82. Lewes v. Whitton. S. C——Lat. 155. Lewes v. Whitton or Witney's S. C——Rhett for Words. The Defendant was condemn'd, and *Coſts tax'd* to 18 l. And upon a Significavit an Excommunicato capiendo iſſued, but before it was returned, or he taken, a General Pardon was publiſh'd. He was afterwards taken, and prayed to be diſcharged. Reſolved that this Taxation of Coſts being for the Plaintiff's Benefit, is not diſcharged by the Pardon. Cro. J. 159. Paſch. 5 Jac. B. R. Banning v. Fryer.——But where the Defendant was ſued before the Ordinary for Defamation, and the Suit was begun, before the laſt General Pardon, ex Officio, and the Coſts tax'd after the Time limited by the Pardon, a Prohibition was granted, inaſmuch as all Things promoted ex Officio are diſcharged by the Pardon, and inaſmuch as the Principal was pardon'd, the Coſts being as Acceſſary, ſhall be alſo pardon'd, notwithſtanding that they were tax'd after the Pardon. 2 Brownl. 28. Mich. 9 Jac. C. B. Enby v. Walcott.

Between the Time of awarding Coſts, and the taxing them in the Spiritual Court, came a Pardon, which pardon'd all Offences before December 1623. which was after the awarding and before the taxing them, yet they are not thereby pardon'd; and therefore a Prohibition was denied. Cro. C. 9 pl. 7. Paſch. 1 Car. C. B. Dr. Brickenden's Caſe.——On a Libel by B. for Defamation, he had Sentence, and 6 l. were aſſeſs'd for Coſts. Defendant appeal'd to the Arches, which was depending in 1622. By a General Pardon 21 Jac. the Offence of the Defamatory Words were pardoned, and this was pleaded in the Arches; notwithſtanding which they proceeded in the Appeal, where the firſt Sentence was reverſ'd, and in that Suit 16 l. were aſſeſs'd for Coſts to Appellant. All which was ſuggeſted for a Prohibition, and it was thereupon demurr'd. But it was reſolv'd, That there was no Cauſe of Prohibition; for tho' the Pardon has diſcharg'd the Offence of the Defamation as to any Puniſhment to be inflicted by Way of Penalty &c. yet in Reſpect of the *Coſts in the firſt Suit*, which are not diſcharged by the Pardon (being *aſſeſs'd before the Day to which the Pardon relates*, as was agreed in Hall's Caſe, 5 Rep. 51 b.) *if they are not duly aſſeſs'd, the Court* may proceed in the Appeal to diſcharge the Party of them; and if they reverſe the firſt Sentence, ſo as it appears the Coſts were unduly tax'd, and the Party unjuſtly vex'd, they *may in the Appeal aſſeſs Coſts*; for the Pardon does not extend to ſtop the Suit commenc'd in the Appeal, for by Reaſon of the Pardon had they Cauſe to forceaſe the Suit; and tho' the Coſts in the Appeal be aſſeſs'd after the Pardon, yet they are well aſſeſs'd, the Cauſe of thoſe Coſts not being taken away by the Pardon; Whereupon Conſultation was awarded. But Hutton doubted thereof, becauſe (as he conceived) the Pardon diſcharging the Offence, they ought not to have proceeded for the Coſts. Cro. C. 46. 47. Mich. 2 Car. C. B. Baldry v. Hickard.——In the Caſe of an Excommunication by the Delegates, and the Party taken upon an Excommunicato capiendo, the Court reſolved that he ſhould be diſcharg'd; for the Contempt and Impriſonment was pardon'd, but the Coſts were not, and that the Party may ſue again in the Delegates againſt the other when he is at large, to compel him to perform the Sentence for the Coſts. Jo. 227. Hill. 6 Car. B. R. Cutting's Caſe v. Redman, als. Rotman.——And Ibid. ſays, This Caſe was mov'd again Paſch. 7 Car. And the Court were of the ſame Opinion as above; and that a Precedent was ſhewn in 2 Car. of a like Judgment, where upon the Party was diſcharg'd.——Cro. C. 198. accordingly, The King and Coderington's Caſe.

W. 2

W. a *Parſon* was ſued in the High Commiſſion Court *for Incontinency*, and *was depriued, and another preſented* to his Living. He procured a Pardon to be reſtor'd, and was afterwards proceeded againſt for Coſts of Suit; whereupon he pray'd a Prohibition, the Pardon being before any Sentence given. And it was granted; for if *Pardon* comes *before Sentence*, they ſhall not afterwards give Coſts. Cro. J. 535. Hill. 11 Jac. B. R. Watts's Caſe.——2 Bulſt. 182. S. C.

S. C. Noy. 85 ——— Lut. 155. S. C. And the Deſertion of the Appeal was right; for in the Arches they cannot allow the Pardon, they being to inquire there of the Iniquity of the Sentence only. Per Jones J. to which Doderidge agreed; but adjornatur.

2. And in the ſaid Caſe, if before the Pardon, and after the ſaid Sentence, the Defendant appeals, and then comes the ſaid General Pardon, and after the Defendant deſerts his Appeal, upon which new Coſts are taxed for this Deſertion, a Prohibition lies; becauſe he has no other Way to have Benefit of the Pardon but this; for the firſt Court ought to allow the Pardon. 9. 2 Car. between *Lewis and Whitley*.

Fol. 305. Hob 288. Trin. 16 Jac. C. B.

3. If a Parſon of a Church be convicted of Manſlaughter, and after has his Clergy allowed, according to the Statute of 18 El. and deliver'd out of Priſon, if he be after ſued in the Eccleſiaſtical Court to be deprived of his Benefice for this Offence, a Prohibition lies; for by the Allowance of the Clergy by Force of the Statute, he is purged and acquitted of the Felony, and of all Penalties and Damages incident to it in Nature of a Pardon. Hobart's Reports 315. between *Serle and Williams* adjudged. And there cites 9. 27 El. Rot. 2545. *Nichol's* Caſe accordingly.

4. Prohibition was brought to ſtay a *Suit* in Court Chriſtian *for Defamation*, upon theſe Words, If Maſter William Norwood had not gone out of Town, he ſhould have anſwered for the two Baſtards he begot upon two ſuch Women. He there pleaded the General Pardon, which would not be allowed; and thereupon the Prohibition was brought, ſurmiſing this Matter; and now Conſultation was prayed. And all the Court beſides Glanvile held, That it is well grantable; for they all reſolved that a General Pardon doth not aid him for the ſtaying a Suit in Court Chriſtian, which is for and *ad inſtantiam partis*; but if it were ſued there *ex Officio Judicis*, the General Pardon would then diſcharge him. Cro. E. 684. pl. 18. Trin. 41 Eliz. in C. B. Norwood's Caſe.

5. A. and his Wife were *ſued* before the High Commiſſioners, that is to ſay, *the Wife for Adultery* with Sir M. B. *and the Husband for Connivency* to it as a Wittal; and *they were ſentenced* there for that, and *Coſts tax'd* in July; and after the General Pardon came, and pardoned all the Offences before the 9th Day of November before; and thereupon A. moved for a Prohibition, and had it, becauſe the Offences were not Enormous Crimes, and the Statute and the Commiſſion upon that, is to give Power to them to proceed upon Enormous Crimes, and to Fine and Impriſon for them. Alſo reſolved that the General Pardon hath diſcharg'd the Coſts, though the Coſts were tax'd before the Pardon was in Print; and this by the Relation that it had to the Day before the Coſts were tax'd. 2 Brownl. 37. Mich. 8 Jac. Dr. Conway's Caſe.

6. Dr. H. libell'd in the Spiritual Court againſt one of his Pariſhioners *for Tithes*; the *Defendant there ſhewed*, that the Doctor came to the Parſonage by *Simony* and Corruption, and upon Suggeſtion thereof made in C. B. pray'd a Prohibition; Dr. H. alleged that he had his Pardon, and pleaded the ſame in the Spiritual Court; and notwithſtanding that the Court granted a Prohibition, becauſe the *Pardon doth not make the Church to be Plena*, but maketh the Offence only diſpuniſhable. But in ſuch Caſe, if the King doth preſent, his Preſentee ſhall have the Tithes. Godb. 202. pl. 288. Trin. 10 Jac. in C. B. Dr. Hutchinſon's Caſe.

Cro. C. 113. 114. Trin. 4 Car. S. C. And ſays,

7. It was mov'd for a Prohibition to the High Commiſſioners for Mrs. P. The Articles againſt her were, That Anno 1622 and 1623. ſhe had a Houſe next adjoining to Somerſet-Houſe, and that there was a private Paſſage

Paſſage thro' her Houſe to Somerſet-Houſe, and that ſhe permitted Sir R. H. to go by this Paſſage to the Counteſs of P. And that ſhe Abetted, Cauſed and *Procured Adultery* between them; for which ſhe was fined and Impriſoned; and inaſmuch as the Offence was before the laſt General Pardon of King James, in which Pardon, *tho' Adultery be excepted, yet Abetting is not* excepted, *Prohibition was pray'd for the Fine*, and Habeas Corpus to releaſe the Impriſonment. And Day was given to ſhew Cauſe why no Prohibition ſhould go. Litt. Rep. 150. Paſch. 4 Car. C. B. Mrs. Peel's Caſe.

That a Prohibition was granted after diverſe Days debating, and chiefly upon the Pardon, becauſe it was not any of the Offences excepted therein.

8. A Libel was for the ſacrilegious *Taking away Bells*, & pro ſalute Animæ. The Defendant pleaded that he took them by Order of ..... and that he was pardoned by the Act of General Pardon; This Plea was refus'd, and thereupon they moved for a Prohibition; but it was denied, becauſe this Offence was not totally pardon'd thereby, but that they may ſue there Pro ſalute Animæ, and the rather becauſe the Suit was againſt the *Churchwardens*; and tho' the Succeſſors may have an Action for the Taking the Bells, yet the propereſt Remedy is in the Spiritual Court, becauſe at Common Law Damages only are recovered, but in the Spiritual Court they will decree the Thing in Specie to be reſtored. Sid. 281. 282. pl. 12. Paſch. 18 Car. 2. B. R. Welcome v. Lake.

S. C. Cited Arg. 8 Mod. 328.

9. Succeſſor libell'd for *Dilapidations* againſt the Executor of the former Incumbent, and ſuggeſted for a Prohibition the General Act of Pardon; for that all Suits for Offences of Inceſt, Simony or Dilapidations, are *excepted* in the Act, *unleſs commenced and depending before ſuch a Day*, (viz.) the 20th Day of March laſt; and this Suit was commenced ſince. The whole Court, upon hearing of Council, and Conſideration of the Matter, conceived that the *Parliament never intended to take away the Succeſſor's Remedy* for Dilapidations, for that would be to eaſe the Executor of the laſt Incumbent, who was the Wrong-doer, and tranſlate the Charge to the Succeſſor; but they would intend this Exception of ſuch Suits as might be in the Eccleſiaſtical Court ex Officio, againſt the Dilapidator himſelf, to puniſh it as a Crime againſt the Eccleſiaſtical Law, and to pardon it, unleſs there was a Proſecution before the Day aforeſaid. And ſo the Prohibition was denied. 2 Vent. 216. Mich. 2 W. & M. in C. B. Anon.

(T) In what Caſes they ſhall not have Juriſdiction for Collateral Cauſe. [*Anſwering upon Oath.*]

1. WHERE a Layman is to forfeit a Penalty either by Statute or otherwiſe, there he is not bound to anſwer upon his Oath in the Eccleſiaſtical Court, whether he has committed the Offence which cauſed the Forfeiture; for otherwiſe he ſhall be bound to diſcover ſufficient Matter for an Informer to inform againſt him upon the Statute. M. 12 Ja. B. R. per Curiam, in *Bradſton's* Caſe.

2. If a Man be ordered in the High Commiſſion Court to give Alimony to his Wife, and alſo bound in an Obligation of 300 l. to perform it, he is not bound afterwards upon a Suit there, to anſwer whether he hath given Alimony to his Wife accordingly, becauſe by this he is to diſcover the Forfeiture of the Obligation. M. 12 Ja. B. R. *Bradſton's* Caſe, per Curiam reſolved.

Roll. Rep. 119. pl. 53. S. C.—2 Bulſt. 300. S. C. And Coke Ch. J. cited Gowen, als. Gawen's Caſe, to have been reſolved accordingly in the Time of Wray Ch. J. and a Prohibition granted.

3. A Man is not bound to anſwer upon his Oath Articles concerning the Book of Common Prayer puniſhable by the Statute of 1 El.

Mo 840. pl. 1134 S. C by the Name

of Deyton's Caſe. —— S. C. adjornatur Roll. Rep. 220 pl. 24. Trin. 13 Jac. B. R. The King v. Dighton & al. ——S. C. and S. P. per tot. Cur. Hill 13 Jac. B. R. Roll. Rep. 337. pl. 52. Dighton and Holte. ——Ibid. 415. pl. 52. Trin. 14 Jac. B. R. Holt and Dighton S. C. but D. P —— Cro. J. 388. Hill. 13 Jac. B. R. Dighton and Holt's Caſe. After three Terms Deliberation, the Court gave their Reſolutions that they ought to proceed againſt them by Witneſſes, and not compel them to accuſe themſelves by Oath.

El. becauſe then he ſhall diſcover Matter for an Information. H. 13 Ja. B. R. *Dighton and Holt's Caſe.*

4. But a Clergyman **may be examined upon his Oath for preaching againſt the Book of Common Prayer; for Clergymen are not within the Statute. Tr. 7 Ja. B. Parſon** *Manſfeld's* **Caſe, adjudged per Curiam.**

A Man may ſue a Prohibition directed unto the Sheriff, not

5. **A Man is not to anſwer upon his Oath Matters** concerning his Faith; **for there is a Statute by which he may be puniſh'd, if he publiſhes Falſe Doctrine. Mich. 18 Ja. B.** *Jenor's* **Caſe, per Curiam.**

to ſuffer the King's Lay Subjects to come to any Place at the Citation of the Biſhop, *ad faciendum alias Recognitiones, vel Sacramentum præſtandi*, niſi in Cauſis Matrimonialibus & Teſtamentariis; and the Party may have thereupon an Attachment againſt the Biſhop, if he cite or diſtrain any one to appear before him, to take an Oath at the Will of the Biſhop, againſt the Will of him who is ſo ſummoned or cited. And by that it appears, that thoſe *General Citations* which Biſhops make to cite Men to appear before them Pro Salute Animæ, without expreſſing any Cauſe, are againſt the Law, and the Party may have an Attachment againſt the Biſhop for the ſame, and may ſue a Prohibition ſo to do. And if he do expreſs any Cauſe in the Citation, it ſeemeth that it ought to be for ſome Matrimonial or Teſtamentary Cauſe. F. N. B. 41. (A)

2 Brown. 14. S. C by the Name of Huntley v. Cage.

6. **If a Feme be ſued in the Eccleſiaſtical Court** for a Contract of Marriage, and enters into an Obligation **to the Court, with Condition** not to marry, **or to cohabit in Fornication, with any** Pendente lite. **She cannot afterwards be examined there upon her Oath** whether ſhe be a ſingle Woman; **for this tends to the Forfeiture of the Obligation. H. 8 Ja. between** *Clifford and Huntley.* **Per Curiam reſolved.**

S C 4 Le. 194. pl. 307. But the Court would adviſe. —— Cro. E. 201. S. C. accordingly, by

7. In a Libel for *Incontinency*, the Judge in the Spiritual Court would have *examined* the Parties upon Oath, *whether they did the Fact or not.* Whereupon a Prohibition was awarded, becauſe no Man is bound *Seipſum prodere, where Diſcredit enſues*; but otherwiſe it is in Caſes Matrimonial or Teſtamentary. Mo. 906. pl. 1265. Mich. 32 & 33 Eliz. B. R. Collier v. Collier.

the Name of Cullier v. Cullier ——S. P. And upon a Reference to the Lord Anderſon, and the Lord Chief Baron, and Wray, they certified thus, viz. Where the Knowledge of the Matter belongs to the Court Chriſtian, they may proceed according to the Civil Law. Gawdy ſaid the Oath cannot be adminiſter'd to the Party but where the *Offence* is *preſented firſt by two Men*, Quod fuit conceſſum; and it was ſaid it was ſo in this Caſe Cro E. 262. pl. 52. Mich. 33 & 34 Eliz C. B. Dr. Hunt's Caſe. —— It was mov'd for a Prohibition to the Eccleſiaſtical Court, in caſe of *Adultery*, becauſe they obliged the Party to anſwer on Oath; and Prohibition was granted quoad that, that he ſhould not anſwer on Oath, but proceed as to the reſt; then it was mov'd that there was a Temporal Penalty for providing for Baſtard Children But per Cur. We will not grant it, becauſe the Eccleſiaſtical Court *proceeds only to the Puniſhment* of the Crime of Adultery 12 Mod. 40. Paſch. 5 W. & M. B. R. Anon.

8. Upon a *Suit* againſt the Executor of a Parſon, by his Succeſſor *for Dilapidations*, a *Queſtion aroſe about a Leaſe* for Years *alledged to be taken by the Executor in his own Name, but* covenouſly *in Truſt for the late Parſon*, and would put him to his Oath to anſwer concerning the Covin; whereupon a Prohibition was granted quoad their examining him *on Oath concerning the Covin*; for tho' the original Cauſe belongs to their Cognizance, yet the Covin is Criminal, and the avowing it to be Bona Fide is puniſhable both in the Star-Chamber, and by the Penal Law of Fraudulent Gifts; and therefore not to be extorted out of himſelf by his Oath. Beſides the Expoſition of the 13 Eliz. 10. of Dilapidations, and what ſhall be Covin or not within the Law, reſts not in them to judge, but in the Courts of Common Law. Hob. 84. Spendlow v. Smith.

S P. And becauſe the Biſhop had

9. One was excommunicated for not taking the *Oath of Churchwarden, to preſent upon all the Articles contained* in a Book thereunto annex'd, among

among which were *ſome* that *would oblige him to accuſe himſelf.* It was held per Cur. That ſuch Oaths as may be adminiſter'd there are only in Cauſes Matrimonial and Teſtamentary; and that ſince the Statute of 13 Car. 2. No Man ought to have an Oath adminiſter'd to him to accuſe himſelf, or to be ſworn to a Book that contains ſuch Matter inter alia; and if a Man be excommunicated for not anſwering to ſuch Articles upon Oath, it is good Cauſe of Prohibition; and that Churchwardens *ought to be ſworn to do what appertains to their Office, and no more.* Hard. 364. Paſch. 16 Car. 2. in Scacc. King v. Lake.

excommunicated him for refuſing ſuch Oath, a Prohibition was granted Quoad the compelling him to make any Anſwer to the ſaid Articles

concerning himſelf, and the Excommunication diſcharged. 2 Mod. 118. Mich. 28 Car. 2. B. R. Waterfield v. Biſhop of Chicheſter.

In the Spiritual Court they tender'd an Oath to a Churchwarden, *to preſent according to the Biſhop's Articles*, which he refuſing, was Excommunicated. It was ſuggeſted for a Prohibition, That ſome of the Things to be preſented, according to thoſe Articles, were *Filthy Talkers, Reviters* &c. and *Common Sowers of Sedition amongſt Neighbours*, which were general Terms, and might be underſtood to comprehend Things out of their Juriſdiction. And the Court conceived a Prohibition ought to go as to thoſe Things, but *he ſhould firſt have pleaded* there, that *non tenetur reſpondere* as to thoſe Matters; and upon their Refuſal to have pray'd a Prohibition. Vent. 114. Paſch 23 Car. 2. B. R. Anon.—Afterwards this Matter came on again, and then it appeared that the Oath tender'd was in general Words, (viz.) *to preſent according to the King's Eccleſiaſtical Law*; and thoſe Articles were offer'd only by Way of Direction, and Quaſi a Charge; and ſo a Prohibition was denied. Vent. 127. S. C.

10. Upon a Prohibition it was held, That if *Articles ex Officio* are exhibited *for Matters Criminal*, and the Party is demanded to anſwer upon Oath, he may plead there Quod non tenetur reſpondere; and if notwithſtanding this they proceed againſt him, he ſhall have a Prohibition. But *otherwiſe if the Matter be Civil*; for then he ought to anſwer. Sid. 374. Trin. 20 Car. 2. B. R. Goulſon v. Wainwright.

11. A Prohibition was pray'd to a Suit in the Eccleſiaſtical Court. The Libel ſets out, That a *Tax* has been made *for the Repairs of a Chur h* where the Defendant inhabited, and was *to make him pay his Proportion.* To which they required his Anſwer, (viz.) Whether he had paid &c. The Suggeſtion was, That the Party had tender'd his Anſwer, but the Court had refuſed it, becauſe it was not upon Oath, and that the Eccleſiaſtical Court cannot tender an Oath to the Party ſued, Niſi in Cauſis Matrimonialibus & Teſtamentariis. But the Court, after hearing diverſe Arguments, denied the Prohibition; for they ſaid it was no more than the Chancery did, to make Defendants anſwer upon Oath in ſuch like Caſes. 1 Vent. 339. Trin. 31 Car. 2. B. R. Herne v. Brown.

2 Lev. 247. S. C. by Name of Farmer Quinton &c. v. Brown; and there 'Twilden at firſt held, That Prohibition ought to be granted, to which Keeling inclined, but

Hide Ch. J. totis Viribus contra. And afterwards the Court being inform'd, that this was always the Courſe of the Court, the Prohibition was denied. And a Conſultation was afterwards granted by the whole Court, viz. Scroggs Ch. J. Jones, Dolben and Pemberton.——S. C. Freem. Rep. 296. pl. 348. That it was held after many Arguments, That they might compel the anſwering upon Oath in this Caſe, which was a Spiritual Cauſe, and is particularized in the Statute of Circumſpecte agatis among the Mere Spiritualia; but it was ſaid that they ought not to make a Man anſwer upon Oath ſo as to accuſe himſelf in any Thing Criminal. And the Court granted a Conſultation.

(U) In what Caſes the Spiritual Court ſhall have Juriſdiction of a Matter ſubſequent after the Suit, [*Incident or Dependent*] Having Juriſdiction of the Original Suit. [*And what may be tried there.*]

1. IF a Suit be in the Spiritual Court for a Modus Decimandi, if the Defendant pleads Payment thereof, this ſhall be tried there, and no Prohibition ſhall be granted, becauſe the Original Suit was well commenced there. Mich. 14 Ja. B. R. between *Goſlin and Harden*, agreed per Curiam. Hobart's Reports, Caſe 314.

2. So

2. So, if Payment be pleaded in a Suit in the Eccleſiaſtical * Court for any Thing whereof they have Original Conuſance. By Reports. 12 Ja. B. R.

* Fol. 506. As in Caſe of a Suit for a Legacy, if Payment be pleaded, a Prohibition ſhall not be granted; for it is a Matter depending upon the Original. Roll. Rep. 12. pl. 14. Paſch. 12 Jac. B. R. Anon.

3. In an Action in Spiritual Court by two Churchwardens, if Defendant pleads the Releaſe of one, this ſhall be tried there, and no Prohibition ſhall be granted. By Reports. 14 Ja. Cites it to be ſo adjudged 7 Ja.

S. P Jenk. 305. pl. 78. —— Cro. J. 234 Hill. 7 Jac. B. R. Starkey v. Barton. —— Yelv. 172. S. C. accordingly, becauſe the Temporal Court had nothing to do with the Principal Matter, which was a Tax for Reparations. —— So where Parſon and Pariſhioners ſued the Churchwardens, and recovered Coſts, and the Parſon releaſed the Coſts, a Prohibition ſhall not be granted. Mar. 73. pl. 112. Mich. 15 Car. Anon.

4. If a Man ſues for Tithes againſt J. S. in the Eccleſiaſtical Court, and makes Title to them by a Leaſe made to him by the Parſon, and J. S. makes Title alſo to them there, by Force of a firſt Leaſe made to him by the ſame Parſon; ſo that the Queſtion there is, which of the ſaid Leaſes ſhall be preferr'd, a Prohibition ſhall be granted; for they ſhall not try which of the ſaid Leaſes ſhall be preferr'd, tho' they have Conuſance of the Original Suit; for the Leaſes are Temporal. P. 12 Ja. B. R. between *Wrots and Clifton*. Per Curiam, and Prohibition granted.

Cro. J. 350. S. C. by the Name of Worts v. Clyſton. —— Roll. Rep. 61. pl. 5. Wortes v. Clifton —— S. C. 2 Bulſt. 283. Clifton v. Oates. If the Queſtion be, Whether one has one Leaſe, and the other has another Leaſe, this is triable there; but if they would try the Validity of Leaſes, they are to be prohibited —— S. C cited Arg. 2 Show. 406.

5. If a Man having a Parſonage Impropriate, makes Leaſe for Years of Parcel of the Tithes by Deed, and the Deed is denied in the Eccleſiaſtical Court, and Iſſue taken thereupon, a Prohibition ſhall be granted. P. 8 Ja. B. per Curiam.

Covenant is not a ſufficient Ground for a Prohibition Palm. 36. Mich 17 Jac. B. R. Aldreſh v. Ray.

6. If a Parſon compounds with a Pariſhioner for his Tithes, and grants them by his Deed to him for a certain Sum by the Year, according to the Agreement, and after he ſues the Pariſhioner in the Eccleſiaſtical Court for the Tithes in Kind, no Prohibition ſhall be granted upon this Diſcharge by Deed; for they may well try this, having Conuſance of the Principal. 8 E. 4.

7. P. 16 Ja. B. R. between *Griffin and Bulfuſt* reſolved, and Prohibition denied, tho' once before it was reſolved to the contrary for the Church of *Wakerly*.

8. If a Parſon leaſe all the Tithes of his Benefice to a Pariſhioner, and after ſues him for his own Tithes, no Prohibition ſhall be granted; for this Leaſe is a good Diſcharge there. 8 E. 4. 14. per Choke.

9. If a Pariſhioner grants Land to a Parſon for his own Tithes, and after the Parſon ſues him for the Tithes, a Prohibition ſhall not be granted; for this Matter will be a good Diſcharge there. 8 E. 4. 14. Per Choke.

10. If a Parſon grants to a Pariſhioner the Tithes of his own Land for a certain Rent by the Year, upon Condition of Non-payment, and after ſues the Pariſhioner for his Tithes in Kind, no Prohibition ſhall be granted, tho' the Parſon ſuppoſes that the Condition is broken; for they ſhall try it there, having Conuſance of the Principal; and if they adjudge otherwiſe than the Common Law allows, then a Prohibition ſhall be granted. P. 16 Ja. B. R. between *Griffin and Bulfuſt* ſo held.

Roll. Rep. 55. pl. 31. S. C —— Ibid. 12. pl. 14. Anon S. P. and ſeems to be S. C.

11. If a Parſon ſues for Tithes in the Eccleſiaſtical Court, and the Defendant there pleads an Arbitrement in Bar, they ſhall try it there, and no Prohibition ſhall be granted thereupon till they have diſallowed the Plea; for by Intendment this is a good Diſcharge there. By Reports. P. 12 Ja. per Curiam, Prohibition denied. Tr. 12 Ja. B. R. between *Reynell's and Hayes* adjudged, and a Conſultation granted.

12. If

12. If a Parſon ſues for Tithes in the Eccleſiaſtical Court, and the Defendant there pleads a Leaſe of them by Deed by the Parſon to him rendring Rent, to which the Plaintiff ſays, That the Rent was reſerved upon Condition of Non-payment to be void, and avers that he did not pay it at a certain Day, and the other pleads Payment at the Day, this ſhall be tried there, and no Prohibition ſhall be granted. Tr. 16 Ja. B. R. between *Griffin and Bulfuſt* reſolved per Curiam, and a Prohibition denied. 2 Roll Rep. 42. Trin. 16 Jac. B. R. Barnewell v. Tracy. S. P. exactly; and held that the Iſſue being upon the Payment of the Rent, they may try it; but if they diſallow the Proof of it by one Witneſs, Prohibition will be granted; and ſo it would be if the Iſſue had been whether there was any Deed of Demiſe, or not

13. If a Parſon leaſes by Deed the Tithes of the Pariſh, and after ſues for the Tithes in the Spiritual Court, and there this Leaſe is pleaded, where the Queſtion between them is, Whether the Tithes of all the Pariſh, or only of ſome particular Things; yet no Prohibition lies; for they have Conuſance of the Original, and they ought to take Advice of thoſe who are learned in the Common Law to direct them, as the Judges of the Common Law do of them; but if they judge contrary to the Common Law, a Prohibition lies after Sentence. Mich. 13 Car. B. R. between *Dr. Pocklington and Sir Saint John*, Prohibition denied. Fol. 300

14. If a Man ſues for a Legacy in the Spiritual Court, and the Defendant pleads a Releaſe in Bar, and the Plaintiff denies it; this ſhall be tried there, and no Prohibition ſhall be granted, becauſe it is a Matter ariſing from the Original Cauſe of which they had Juriſdiction. M. 15 Ja. B. between *Percher and Wheble*, per Curiam, and Prohibition denied. Hobart's Reports 255. Anonimus.

15. If an Adminiſtrator ſues for a Legacy due to the Teſtator, in the Spiritual Court, and the Defendant pleads the Releaſe of the Teſtator in Bar, and the Plaintiff avoids it becauſe his Teſtator was an Ideot; this Ideocy ſhall be tried there, and no Prohibition ſhall be granted, becauſe they have Juriſdiction of the Original Matter. Mich. 15 Ja. B. between *Percher and Wheble*, Prohibition denied, but againſt the Opinion of Warburton. Hob. 188 pl. 234. Anon. S. P. and ſeems to be S. C.

16. If a Parſon ſues in the Eccleſiaſtical Court, and the Defendant there pleads that the Plaintiff was preſented upon a Simoniacal Contract, againſt the Statute of 31 El. this ſhall be tried there, inaſmuch as they have Juriſdiction of the Original Thing. M. 8 Ja. B. *Pen's* Caſe. S. P. The Suit being for Tithes, and the Defendant thereupon pleaded that the Church was void, and the Tithes not appertaining to the Plaintiff. And a Conſultation was granted; for the Simony might more aptly be tried in the Spiritual Court. Cro. E. 642. pl. 42. Mich. 40 & 41 Eliz. C. B. Riesby v. Wentworth.——S. P. Jenk. 305 pl. 78. in the Beginning.

17. If a Parſon of a Church be outlawed, and the Benefit of the Outlawry granted over to J. S. who receives the Tithes of the Pariſhioners, and after the Parſon ſues the Pariſhioners (as I intend it, and not the Farmer) for the Tithes, who pleads the Outlawry againſt him, and the Grant over to J. S. the Farmer, a Prohibition lies in this Caſe, becauſe this is a * Matter of Record, which they cannot try there. Mich. 9 Car. B. R. between *Burley and Wright*, per Curiam, and Prohibition granted accordingly to the Court of York. * So in Caſe of a Libel for Defamatory Words, in calling the Defendant *Baſtard-maker*, who pleaded a *Conviction before two Juſtices of Peace*, according to the Statute of 18 Eliz. which Plea the Court refuſed, and therefore a Prohibition was accordingly granted. 2 Roll. Rep 82 Paſch 1 Jac. B. R. Cooke's Caſe.——Cro J. 535. S. C. by the Name of Webb v. Cooke.——Ibid. 625. pl. 18. Mich. 19 Jac B. R. accordingly.

18. If the Parſon of B. in London libels in the Spiritual Court, upon a Cuſtom, that if a Pariſhioner of B. dies in B. and is brought and buried in another Pariſh in London, and there are given to the Parſon a Gown, a Pulpit Cloth, and a Pair of Gloves, that the ſame Churchwardens libelled for [illegible] Sd. upon [illegible]

Payment of so much for being buried in the Body of the Church.

Things ought to be given to him; a Prohibition lies to try this Cuſtom, if it be denied; for a Cuſtom may be made by a ſhorter Time than at Common Law. Tr. 15 Car. B. R. between *Cooker* Parſon of St. Thomas Apoſtles, and *Goale*; Prohibition granted.

A Prohibition was prayed on Suggeſtion of No ſuch Cuſtom The Court held the Cuſtom good, becauſe the Pariſh is to be at the Charge of making up the Church Floor; but if the Cuſtom be denied, it muſt be tried at Law, as in Caſe of a Modus Decimandi, or Mortuary. And afterwards Hale Ch J. being preſent, a Prohibition was granted, which he ſaid was ſometimes granted Pro Defectu Juriſdictionis, and ſometimes Pro Defectu Triationis, as in this Caſe and others, where the Ground of the Suit is Preſcription; for in their Law they have ſometimes allowed Preſcriptions of 20 Years, and ſometimes of 40, but we admit none but what are De temps d'ont &c. Vent. 274. Mich. 27 Car. 2. B. R. Anon.

See (F) pl. 1. 20. and the Notes there — And ſee (M) pl. 9 and the Notes there. — * 3 Bulſt. 241. 242. Doderidge J held, That where a different Modus is ſuggeſted, the Truth of this Matter ſhall be tried there. S. C.

19. If the Parſon libels in the Eccleſiaſtical Court for a Modus, (viz. for Tithes of Fiſh brought from Iceland) if the Defendant ſuggeſts that the Parſon has miſtaken his Modus, and ſhews * another Modus, he ſhall have a Prohibition, becauſe the Eccleſiaſtical Court ſhall not try the Modus by which his Inheritance ſhall be bound, and an Uſage for 10 Years is good Cuſtom by the Eccleſiaſtical Law; and if this ſhall be ſuffered, they will defeat the Temporal Court of all Juriſdiction. My Reports. 14 Ja. B. R. adjudged between *Goſſyn and Hardin.*

Hob. 247. Trin 16 Jac. S C. And ſays, That if it be found for the Cuſtom, then a Conſultation muſt go, otherwiſe the Prohibition ſtands.——Het 133. S C — ſo, as to any Other *Cuſtom*; for a Cuſtom is not triable in the Spiritual Court; and where a Libel was for not repairing a Church-Wall, according to Cuſtom, where the Foundation of the Libel was the Cuſtom, the Eccleſiaſtical Court could have no Conuſance *till the Cuſtom was tried at Law*; and therefore a Prohibition was granted to try it, which being tried, and found againſt the Plaintiff in the Prohibition, a Conſultation was awarded. See Carth. 33. cites the Caſe of Vanacre v. Spleen.

20. So if a Suit be in the Eccleſiaſtical Court upon the Manner of Tything, that is to ſay, upon a Cuſtom for the Owner to have 54 [45 Sheaves] and the Parſon 5 [for] Tithes; if the Cuſtom be denied a Prohibition lies; for they ſhall not try the Modus, it being to charge the * Inheritance. Hobart's Reports, Caſe 314. between *Seet and Wall*, Prohibition granted.

*Fol. 528.

21. If the Churchwardens of the Pariſh of Steevenage libel in the Eccleſiaſtical Court againſt J. S. Farmer of the Farm called D. for Contribution to the Reparation of the Church, and allege that Parcel of the Farm lies in Steevenage, and Parcel in Walkerne another Pariſh, and allege a Cuſtom, by which the Farmers of the ſaid Farm have uſed to contribute to the Reparation of the Church of Steevenage for all the ſaid Farm. If the Defendant ſays that Parcel of the Land lies in the Pariſh of Walkerne, and that he has uſed Time whereof Memory &c. to contribute for it to the Church of Walkerne, and not to Steevenage, and denies the Preſcription; this ſhall not be tried in the Eccleſiaſtical Court, but by the Common Law; and therefore a Prohibition lies; for they ſhall not try the Cuſtom in the Eccleſiaſtical Court, by which the Inheritance is to be perpetually charged. (Yet note, that this is but in Effect a denying the Preſcription.) Tr. 16 Ja. B. R. between the Churchwardens of *Steevenage and Green* reſolved, and a Prohibition granted accordingly.

S. P. As to the Tithes of Lambs, and ſurmiſed the Cuſtom further to be, that if he had 10, the Parſon ſhould have

22. If a Suit be in the Spiritual Court for Tithes of Calves in Kind, a Prohibition lies upon the General Cuſtom, to pay ob. [a Halfpenny] for every one under 7, and a Calf if 7, and that the Parſon will give a Halfpenny for every one above 7, with Averment that the Parſon can not drive over to the next Year, that is to ſay, not to relinquiſh his Tithes till the Pariſhioner has 10 Calves, as he may by the Canon Law. P. 11 Car. B. R. *Langford's* Caſe, Prohibition granted; for by the Canon Law it is at his Election

the Tenth without paying any Thing. Berkley and Jones held, That the Canon Law is to, and to be received in the Spiritual Court, and it is furmiſed that the Spiritual Court allows of it, and therefore there needs not any Prohibition; but becauſe it was alleg'd, That it was a Cuſtom, and that the Parſon would not ſtay till the Tenth, and would refuſe to accept according to the Cuſtom, and that in the Spiritual Court this Surmiſe is not allowed; therefore it was held that a Prohibition is grantable. Cro. Car. 403. pl. 2. Paſch. 10 Car. B R. Anon.

23. If A. the Parſon of D. ſues for Tithes in the Spiritual Court againſt B. who pleads a Leaſe for Years made to him by the Parſon; to which A. the Parſon replies, That he was Non-reſident, and abſent 80 Days and more in ſuch a Year &c. from his Benefice, by which the Leaſe became void. No Prohibition lies upon this Plea, tho it is grounded upon the * Statute of 13 El. And tho' it was objected that the Judges of the Spiritual Law ſhall not have the Expoſition of a Statute; for inaſmuch as they have Juriſdiction of the Original Cauſe, they ſhall have Power to try this, which incidently ariſes thereupon H. 14 Car. B. R. between *Sir Thomas Lucy and Dr. Lucy*, per Curiam; Prohibition denied.

* A Suit was in the Eccleſiaſtical Court for teaching School without Licence, in Contempt of the Canons, a Prohibition was granted Nili Cauſa, and afterwards a Conſultation; for tho' the Act of Uniformity gives 5 l. Penalty, which muſt be ſued for at Common Law, yet this takes not away the Juriſdiction of the Spiritual Court, ſo long as they proceed upon the Canons, and not for the Penalty upon the Statute. 2 Lev. 222. Trin. 30 Car. 2. B. R. Cory v. Pepper.

24. Citation was awarded in the Spiritual Court for a *Slander againſt a Feme ſole*; and the Libel proved true; Whereupon the *Court awarded* 10*l.* to the Plaintiff *for the Coſts and Defamation*; and after the *Feme took Baron, and made him her Executor*, and died; and *Citation was ſued afterwards againſt the Baron as Executor of the Feme*, to ſatisfy the 10 l. And the Baron obtained *Prohibition*; and the beſt Opinion was, That *it does not lie, becauſe the Matter is meerly Spiritual*, and the Sum for Recompence was well awarded. Br. Prohibition, pl. 9. cites 12 H. 7. 24.

25. If a Man *acknowledges in the Spiritual Court to pay a certain Debt* at a certain Day, *and doth not* pay it at the Day for which the other ſues him in the Spiritual Court, and Excommunicates him there becauſe he did not pay it at the Day, the other Party ſhall have a Prohibition againſt him. F. N. B. 41. (C)

26. A Libel was for a *Rate for Repairs* of the Church. It was *ſuggeſted* for a Prohibition, *That* in this Suit they of the *Spiritual Court would try the Quantity of the Land, for they were taxed according to the Rate of their Land.* And they pretended that he hath more Land there than in Truth he hath, which is always triable at the Common Law. Sed non allocatur; for the Principal being ſuable there, the Circumſtances concerning it are inquirable, and triable there alſo. Wherefore a Conſultation was awarded. Cro. Eliz. 659. 660. pl. 5. Paſch. 41 Eliz. in C. B. Paget v. Crumpton.

27. In Prohibition the Caſe was, That a *Pariſhioner ſevered the Tithes* from the 9 Parts; but being *in a Cloſe*, the *Gate was locked, ſo as the Parſon could not come at them*; and he ſued in the Spiritual Court; And there the Queſtion was, Whether the Gates were Locked or Open? And thereupon a Prohibition was brought, ſuppoſing this to have been a Temporal Matter; for the Tithes being ſever'd, are Lay Chattles. But the Court ſaid, That altho' the Tithes be ſever'd, yet by the Statute they remain ſuable for in the Spiritual Court; and then the other is but a Conſequent thereof, and therefore is there Triable. And if they refuſe to allow his Proofs, as it was furmiſed, (but not within the Prohibition) it was ſaid that he ought to appeal. Cro. Eliz. 843. 844. pl. 26. Paſch. 41 Eliz. in C. B. Blackwell's Caſe.

28. B. ſued *for Tithes* in the Spiritual Court; and the *Pariſhioners pleaded*, That there was *an Act of Parliament that ſettled theſe Tithes upon W.* And the Spiritual Court refuſing to allow this Plea, Baldwin mov'd for a Prohibition; and ſaid, where the Pariſhioners did plead to the

The Caſe was, That B. mortgag'd a Rectory to W. who

Part

was indebted to W. and abſconded; upon which it was enacted by Parliament, That this Mortgage ſhould be veſted in W. as fully as it was in P. B. ſued in the Spiritual Court for Tithes, and W. came in Pro Intereſſe ſuo, and ſhew'd this Matter to the Court; and yet they gave Judgment for B. for the Tithes; upon which W. pray'd a Prohibition, which was denied per Hale and all the Court; for the Act veſted the Eſtate in W. as was in P. and P. being only Mortgagee, and out of Poſſeſſion, and B. Mortgagor in Poſſeſſion, P. could not have recovered the Tithes before he had recovered the Poſſeſſion of the Rectory by Ejectment; no more can W. but till the Rectory be recovered againſt B. the Tithes belong to him. 2 Lev. 64 Trin. 24 Car. 2. B. R. S.C. by Name of Sir William Juxon v. Lord Byron. ——S. C. cited 3 Lev. 73. Mich. 34 Car. 2. C. B. in Caſe of Bonſey v. Lee ——In the above Caſe of Lord Byron, Freem. Rep. 67. pl. 81. a Caſe was cited, where a Parſon ſued for Tithes, and the Pariſhioners pleaded that he had *not read the Articles within two Months*, according to the Statute 13 Eliz. and the Spiritual Court refuſing to allow this Plea, the Court granted a Prohibition.

Parſon's Title in the Spiritual Court, and they refuſed to allow of it, that it was uſual to grant a Prohibition. Vaughan at firſt oppos'd it, becauſe he ſaid, If the Party ſet forth his Tithes, it did not concern him who had the Intereſt in them, for he had no more to do; but Atkins J. ask'd what he ſhall do if he hath not ſet them forth. And after Debate, the Court ordered a Prohibition Niſi. Freem. Rep. 67. pl. 81. Mich. 1672. C. B. Lord Biron's Caſe.

See (Y)

(X) Jurisdiction Spiritual. Where the Right of Tithes comes in Queſtion.

12 Rep. 18. Marg —— S. P. Br. Diſmes &c. pl. 5. cites 14 H. 4. 17.

1. **WHERE the Right of Tithes comes in Queſtion in the Temporal Court, the** Temporal Court ſhall be ouſted of Juriſdiction. 2 E. 4. 15.

——Br. Jurisdiction, pl. 28. cites S. C——But Sty. 169. in Caſe of Harwood v. Paty, it was ſaid, Arg. That where the Right of Tithes is in Diſpute, the Common Law ſhall take Place, but not where the Tithes themſelves are in Diſpute; and cites Seld. of Tithes, cap. 14.

13 Rep. 18. Marg.—In ſuch a Caſe the Plea to the Juriſdiction was not allowed *in the Exchequer*.

2. **In Action of** Treſpaſs by one Parſon againſt another **Parſon, if** Defendant claims it as Tithes appertaining to his Parſonage, **the Court ſhall be ouſted of Juriſdiction; for the Debate being between** two Parſons, **it ſhall be intended that it is for the Right of Tithes.** 38 E. 3. 5. b.

Br. Juriſdiction, pl. 90. cites 38 Aſſ. 20. but that the Book ſays Quod Mirum! tho' it was in Suit of the King in Aid.——* So between a Parſon and Vicar. See Br. Juriſdiction, pl. 3. cites 35 H. 6. 39. S. P. But it was argued there ſtrongly, That the Lay Court ſhould not be ouſted of Juriſdiction by Reaſon of *ill Pleading*; for the *Defendant alleg'd that he was Parſon at the Time of the Treſpaſs*, viz. Of the *Taking*, but does *not ſay that he was Parſon at the Time of the Severence*; and if he was not Parſon at the Time of the Severance, as well as at the Time of the Taking, he ſhall not have them. Quod nota per multos, & adjornatur.——* S. P. Arg. Le. 94. cites it as Buſhie's Caſe the Parſon of Pancras.

In Treſpaſs, if the *Defendant juſtifies for Tithes as Parſon*, and *gives Colour to the Plaintiff as Parſon of another Church adjoining*; this ſhall ouſt the Court of Juriſdiction; for the Right of Tithes will come in Debate between Parſon and Parſon. Br. Juriſdiction, pl. 60. cites 38 H. 6. 21. Per Forteſcue J.—— *But if the Defendant gives other Colour than as Parſon*, he gives Juriſdiction to the Lay Court; for it does not appear that Right of Tithes will come in Debate. Br. Juriſdiction, pl. 60.——*But* if the Plaintiff in his *Replication intitles himſelf as Parſon to the Portion of Tithes out of the Pariſh of the Defendant, as appropriate to his Church*, there, if this Matter be confeſs'd by the Defendant, the Lay Court ſhall be ouſted of Juriſdiction, for as ſoon as it appears that the Right of Tithes will come in Debate, the Lay Court ſhall ceaſe, and ſhall be ouſted of Juriſdiction; and the ſame Law of the Spiritual Court, if it may appear that the Right of Advowſon is in Debate, tho' it did not appear at firſt; quod nota; for it was agreed. Br. Juriſdiction, pl. 60. cites 38 H. 6. 21.

Where the Right of Tithes are in Queſtion *between two Parſons*, the Trial belongs to the Civil Law. Cro E. 251. 33 & 34 Eliz. C. B. Dullingham v. Kyſely.—Le. 58. pl. 76. Paſch. 29 Eliz. C. B. The Parſon of Packham's Caſe——*But where* two Parſons were of two ſeveral Pariſhes, and the one claimed certain Tithes within the Pariſh of the other, and ſaid, That he and all his Predeceſſors Parſons of ſuch Church, *Cujus* of D. had us'd to have the Tithes of ſuch Lands within the Pariſh of S. and that was pleaded in the Spiritual Court; And the Court was mov'd to grant a Prohibition; And per Suit and Clenche J. He ſhall have a Prohibition; for he *claims only a Portion of Tithes*, and that *by Preſcription*, and *not merely as Parſon*, or by Reaſon of the Parſonage, *but by a Collateral Cauſe*, viz. by Preſcription, which is a Temporal Cauſe and Plea;

and it is not material whether it be betwixt two Parſons. Godb. 45. pl. 55. Mich. 25. 27 Eliz. in B. R. Anon.

3. If a Man who is not a Parſon brings Treſpaſs of his Corn taken againſt another, who claims it as Tithes, he being Parſon; the Court ſhall not be ouſted of Jurisdiction, becauſe it is not between two Parſons; and therefore the Plea is but a Traverſe of the Writ, that is to ſay, That it is not the Corn of the Plaintiff. 38 E. 3. 8. b. adjudged. 13 Rep 18. Marg. — Br. Juriſdiction, pl. 6. cites 42 E. 3. 12. — Ibid. pl. 34. cites S. C.

4. If a Prior brings Treſpaſs againſt an Abbot, of his Corn carried away, if Defendant ſays that the Plaintiff is Parſon, and that the Lands of the Defendant ought to be free of Tithes by Compoſition, and that the Action is brought for Tithes there, the Court ſhall not be ouſted of Juriſdiction, becauſe the Plaintiff has not ſuppoſed himſelf Parſon, nor that the Action is brought for Tithes. 38 E. 3. 8. Fol 309. Prohibition in a Suit for Tithes was denied, on *Suggeſtion of a Compoſition*; for per Cur. The Law has been taken otherwiſe. Show 81. Bradſhaw v. Swanſton. — Prohibition is not to be granted upon Ancient Compoſitions made with Conſent of Patron and Ordinary before the 13 Eliz. cap 10. becauſe they may be pleaded and tried below in the Spiritual Court; and tho' formerly Prohibitions had been granted upon Suggeſtions of Compoſitions, it has been held otherwiſe ſince. Per Holt Ch. J. to which Powell J. agreed. Ld Raym. 2 Rep 1161. Paſch. 4 Ann. in Caſe of Startup v. Doderidge.

5. In Treſpaſs againſt a Prior, of his Corn taken, Defendant ſaith that he is Parſon &c. and the Corn was ſevered for Tithes from the nine Parts, and ſo he took them. If Plaintiff pleads an ancient Privilege to be quit of Tithes, and a Compoſition made between the Plaintiff and Defendant, rendring a certain Sum to the Defendant by the Year, yet the Court ſhall be ouſted of the Juriſdiction, becauſe the Right of Tithes comes in Debate. 38 E. 3. 6. b. adjudged. Br. Juriſdiction, pl. 32. cites 38 E. 3. 8. That the Plaintiff pleaded the Order of Ciſterians, and becauſe it was betwen Spiritual Perſons for Tithes, the Plaintiff took nothing by his Writ. — It was ſuggeſted for a Prohibition, That the Pariſhioners had compounded with the Parſon for the Tithes, but yet the due Tithes were ſevered and expoſed, and the *Parſon took and carried them away, and the Pariſhioners* met him and *took them from him*, whereupon the Parſon ſued in the Spiritual Court, and a Prohibition was awarded. Noy 40. Brook's Caſe.

6. But in Treſpaſs againſt a Parſon, if the Defendant juſtifies as for Tithes ſevered from the nine Parts, and the Plaintiff pleads the Grant of the Defendant of the Tithes of the Land for one or two Years, the Court ſhall not be ouſted of the Juriſdiction. 38 E. 3. 6. b.

7. In Writ of Covenant by the Parſon againſt another, the Plaintiff counts that the Defendant covenanted by Compoſition to tithe all his Demeſne Lands, the which he hath not done; the Court ſhall not be ouſted of the Juriſdiction, becauſe the Action is grounded upon the Deed which cannot be pleaded elſewhere, and the Plaintiff is not to recover in this Action the Tithes, but only Damages. 38 E. 3. 8. adjudged. Br. Juriſdiction, pl. 33. S. C.

8. In Treſpaſs of his Corn taken, if Defendant ſaith, That he is Parſon of E. and by Compoſition between his Predeceſſor and the Plaintiff, who is an Abbot, (it ſeems it is intended that he was Parſon of the Parish where the Corn was taken) that the Demeſne Lands of each of them ſhould be free, and the Place where the Corn grew was his Glebe; the Court ſhall be ouſted of Juriſdiction, becauſe the Right of Tithes comes in Queſtion. 38 E. 3. 19. b.

9. If an *Abbot be Parſon impariſonee, and another Parſon is in Contention* with him for Tithes, to the Value of the fourth Part of the Church, Indicavit lies, tho' there are four Perſons, viz. Two Patrons and two Parſons; for the Abbot is Patron and Parſon, and ſo in Effect they are four. Per Littleton and Choke; quære; for afterwards Littleton was contra. Br. Prohibition, pl. 12. cites 12 E. 4. 13.

10. The Parſon may ſue for *Mala Decimandi* in the Spiritual Court, and cites 2 R. 3. 3. a. But if the Pariſhioner *denies it*, they ought to forceaſe; and a Prohibition lies, and it ſhall be tried at Common Law. Noy 121. Steward's Caſe.

Noy 147. Randall v. Knowles. S. P.——Cro. E. 136. Botham &c. Cooper v. Lady Grefham.—3 Le. 203. S. C.—Cro. E. 306. Sherburn's Caſe.—Cro. E. 317. Tryer v. Beſtney Betts.—But where the *Vicar libell'd for the Great Tithes of ſuch a Field*, B. the Owner moved for a Prohibition, upon a *Suggeſtion that the Field was Parcel of ſuch a Farm* &c. *and preſcribes to pay a Modus to the Parſon*; tho' it was objected, that the Queſtion to whom the Tithes belong, eſpecially as it concerns Spiritual Perſons, (viz.) the Vicar and Parſon, is properly determinable in the Spiritual Court, yet a Prohibition was granted, becauſe their Conteſts ſhall not draw the Pariſhioner, who has a Modus, Ad aliud Examen, eſpecially in a Caſe where they will not allow his Plea, viz. Of the Modus. Sid. 332. pl. 15. Paſch. 19 Car. 2. B. R. Box v. Cole.

11. If a Parſon ſues in the Spiritual Court for Tithes, and the other *pleads a Modus to the Vicar*; this Modus now can never come in Queſtion by this Suit between the Parſon and him for Tithes due to the Parſon, but muſt be queſtioned and determined in the Spiritual Court to whom they belong, whether to the Parſon or to the Vicar. Per Coke Ch. J. And ſays it has been diverſe Times ſo adjudg'd, and cites Buſh's Caſe in C. B. 2 Bulſt. 157. Mich. 11 Jac. Draiton and Cotterill v. Smith.

12. In a Suit for Tithes *Defendant pleaded in the Spiritual Court, that the Tithes belonged to another, who was Rector, and not to the Plaintiff*, which Plea being *refuſed*, and Oath made thereof in B. R. a Prohibition was granted. Vent. 248. Mich. 25 Car. 2. B. R. Anon.

(Y) Right of Tithes. [*Juriſdiction.*]

A libell'd againſt B. for Tithes in Specie, of certain Paſtures in N. where A. was Parſon. B. *ſuggeſted* for a Prohibition, *That he was an Inhabitant in S. and that Time out of Mind every Inhabitant there that had Paſtures in N. had paid Tithes for them to the Vicar of S. and that the Vicar of S. had paid to the Parſon of N. 2 d. for every Acre.* And the Court held the Prohibition did lie, and that the Plaintiff ſhall declare, and the Defendant may demur to it, if he will; for it is as if he had preſcribed to pay 2 d. for every Acre. Cro. E. 236. pl. 4. Trin. 31 Eliz. B. R. Coleford v. Peace.

1. PRima facie in an Action between a Spiritual Man and a Layman, **the Temporal Court ſhall not be ouſted of Juriſdiction till the Right of Tithes comes in Queſtion.** 2 E. 4. 15.

Br. Juriſdiction, pl. 72. cites S. C.

2. As in Treſpaſs of Corn taken, Defendant ſaith that he was Parſon of D. and that the Corn grew in certain Land within his Pariſh, and was ſever'd from the nine Parts; and the Abbot of W. claiming the ſaid Corn as a Portion, commanded the Plaintiff to take them, by which he took them, and the Defendant retook &c. and demands Judgment if the Court will take Conuſance &c. The Court ſhall not be ouſted of Juriſdiction by this Plea, becauſe the Plaintiff is a Layman, and cannot have Action in the Eccleſiaſtical Court, and this Title made to the Abbot is given but by Way of Colour, which peradventure is not true, but that the Plaintiff will make other Title; and therefore for any Thing which yet appears, the Court ſhall not be ouſted of the Juriſdiction, inaſmuch as the Right of Tithes does not yet come in Queſtion. 2 E. 4. 15. adjudged.

3. So if Leſſee of a Parſonage brings Treſpaſs for Tithes ſever'd from the 9 Parts; the Court ſhall not be ouſted of Juriſdiction till the Right of Tithes comes in Queſtion by ſome Plea pleaded. 2 E. 4. 15. b.

Where Coſts were awarded againſt the Plaintiff in the Spiritual Court upon an Appeal there by him, he himſelf may pray a Prohibition as to the Coſts, and it will be granted him. 1 Le. 130. pl. 177. Trin. 30 Eliz. B. R. Stranſham v. Metcalf.—Cro. E. 178. pl. 7. Tranſam's Caſe.

4. So if a Parſon leaſes his Parſonage rendring Rent, and brings Action here for the Rent; this Court ſhall not be ouſted of Juriſdiction * without Plea pleaded of the Right of Tithes. 2 E. 4. 15. b.

* Fol. 310.

5. If

5. If the Right of Tithes comes in Queſtion between a Layman and a Spiritual Man, the Temporal Court ſhall be ouſted of Juriſdiction. 2 E. 4. 15. b.

As in Treſpaſs by a Parſon againſt a Layman, who claimed by Leaſe of the Parſon of D. who had two Parts of the Tithes, and the Plaintiff the third Part And yet per Gaſcoigne, This Court ſhall be ouſted of Juriſdiction becauſe 'tis of Tithes; but it was ſaid that M. 44 E. 3. it is adjudged that the Bank ſhall have Juriſdiction, becauſe it is *between a Layman and a Parſon*; for it was ſaid that by the *Statute de Articuli Cleri, the Tithes by the Contract paſs into Chattles*, and therefore the Lay Court ſhall have Jurisdiction; and ſo it ſeems clearly, that upon Contention of Tithes between *Parſon and a Lay Servant of another Parſon*, the Spiritual Court ſhall have Juriſdiction; for the Servant claims to the Uſe of his Maſter, and not to his own Uſe by any Lay Contract. Br. Juriſdiction, pl 82. cites 7 H. 4. 35. ——— *So* in *Treſpaſs by a Parſon againſt a Layman of Sheaves taker*, the *Defendant juſtified by Leaſe of Tithes made to him by another Parſon*, and gave *Colour* &c. the *Plaintiff ſaid that the Sheaves were a Portion of Tithes belonging to him*; and therefore the Defendant prayed that the Court be ouſted of Juriſdiction, for both claim the Tithes, and becauſe he concluded his Bar to the Action, and alſo he is a Layman, he cannot try for Tithes in the Spiritual Court; therefore this Court of Bank ſhall have thereof the Juriſdiction Quære; for the Truth was, that they were growing in the Pariſh of the Leſſor of the Defendant, but the Plaintiff as Parſon of another Pariſh claim'd them as Portion of Tithes belonging to him; and they demurr'd, and ſo Adjornatur. Br Juriſdiction, pl. 85. cites 20 H. 6. 17. ———S. C. Cited Cro. E. 251. in Caſe of Dullingham v. Kyſeley. See (Y) pl. 9.

6. In Treſpaſs by a Parſon againſt J. S. of Corn taken, if Defendant juſtifies as Servant to another Parſon, as for Tithes ſevered from the 9 Parts within his Pariſh, A. who is Plaintiff replies, That he is Parſon of a Pariſh adjoining, and that he has a Portion within the other Pariſh, and therefore he took the Corn &c. The Court ſhall be ouſted of Juriſdiction, becauſe the Right of Tithes comes in Queſtion. 31 H. 6. 11. adjudged.

Br. Juriſdiction, pl. 51. cites S. C.— *But where the Defendant in Treſpaſs ſaid that he was Servant to the Parſon of O.* & non Allocatur; for he cannot try the Right of Tithes as his Maſter may, and therefore he pleaded it in Bar. Br. Juriſdiction, pl. 8 cites 44 E. 3. 39. ——— S. P Br. Juriſdiction, pl. 89. cites 1 H. 6. 5.

and took as Tithes ſevered from the nine Parts, Judgment if the Court will take Conuſance, *So in Treſpaſs of Corn in Shock and Hay in Stacks by the Parſon of D.* and the *Defendant ſaid that it grew'd in the Pariſh of S. of which J. was Parſon, and were ſever'd from the Nine Parts, and he as Bailiff of J. took them*; and demanded Judgment if the Court will take Cognizance, & non Allocatur, becauſe it is between *Parſon and Bailiff* of the other Parſon, which Bailiff cannot try the Right of Tithes in Court Chriſtian Br. Juriſdiction, pl. 19. cites 50 E. 3. 22.

So in Treſpaſs of Grain taken *between Vicar and Servant of Parſon who claimed as Tithes of his Maſter*, and the *Plaintiff claimed* as his Tithes *as Vicar, abſque hoc, that they were the Tithes of the Parſon.* And per Moyle, Needham and Younge, Becauſe it is between Vicar and Servant of Parſon, the Court ſhall have Juriſdiction, for the Plaintiff cannot have Action againſt the Servant in the Spiritual Court; Contra if it was between Vicar and Parſon, or between Parſon and Parſon; for in this Caſe as here, the Servant may have Prohibition againſt the Spiritual Court. Br Juriſdiction, pl. 75 cites 6 E. 4. 3.— *But* Action lies in Spiritual Court *between Parſon and Farmer of another Parſon*; for *he claims the Tithes to himſelf* during his Term, and ſhall have Action in the Spiritual Court, and Action of Tithes lies there againſt him; Contra of a *Servant* who *does not claim Intereſt in the Tithes*; and therefore as here, in the firſt Caſe this Lay Court ſhall have Juriſdiction. Br. ibid. Per Moyle.

7. In an Action, tho' both Parties are Laymen, yet if it be come ſo far by Montrance of the Parties, that the Iſſue ſhall be upon Right of Tithes; the Temporal Court ſhall be ouſted of Juriſdiction. 2 E. 4. 15. b. By all the Serjeants.

8. *Treſpaſs by the Parſon of E. of Corn carried away in E.* the *Defendant ſaid that he is Parſon of W. and he carried them away as His Tithes*, and the Plaintiff claims them as His Tithes &c. Judgment if the Court will take Cognizance. And per Cur. The *Defendant ought to ſay that the Place where* &c. *is in his Pariſh, or if it be within the Pariſh of the Plaintiff, to claim it as a Portion*; and therefore the Defendant *preſcribed in the Place &c. for Tithes there*; and well; and becauſe the Right of Tithes were to be tried, the Court ouſted him of Juriſdiction, notwithſtanding that the *Plaintiff ſaid that the Defendant had leaſed his Parſonage for Years, which yet continues.* Br. Juriſdiction, pl. 28. cites 14 H. 4. 17.

9. *Treſpaſs between Parſon and Parſon*; if the Right of Tithes be in Debate between Parſon and Parſon, this goes to the Juriſdiction of the Lay Court, and ſhall be tried in Court Spiritual. Br. Juriſdiction, pl. 85. cites 5 H. 5. 10.

But if they are at Iſſue whether the Place where they grow *is in the one Pariſh or the other*, this ſhall be tried in Banco. Br. ibid.

10. If the *Lord of a Manor claims* the Tithes of ſuch Lands in D. *to find a Chaplain in D. and the Pariſhioners alſo claim it for the ſame Purpoſe*, it is ſaid for Law that the Lay Court ſhall have Juriſdiction between them, and not the Spiritual Court. Br. Juriſdiction, pl. 95. cites 25 H. 8.

11. A Parſon may ſue *Pro Modo Decimandi* in the Court Chriſtian; as if the Pariſhioner will not *make his Tithe into Cocks where he ought by the Cuſtom*; but then the Suit ought to be ſpecial for not ſetting it out in Cocks, and not generally for not ſetting it out. Per Cur. Lat. 125. in Layton's Caſe.

12. Libel in the Spiritual Court againſt W. for Tithes; W. *ſuggeſts* for a Prohibition, *That the Dean and Chapter of Canterbe are ſeiſed of the Manor* of which the Place where is Parcel, *and that he is Copyholder* thereof in Fee, *and that all the Tenants* of the Manor *have been diſcharged of the fourth Part of the Tithes* for all their Lands (in whatſoever Place they lie) *paying* to the Lord *ſo much for Quit-rent*. And upon this Suggeſtion the other demurr'd. And per Cur. No Prohibition ſhall go; for it cannot be that other Lands held of others may be diſcharged by Payment to the Lord; and it does not appear that the Payment to the Lord here was in other Manner than for Rents; but if it was, it does not appear that he hath any Title to receive them, and ſo Quaecunque via no Prohibition. Sid. 258. Trin. 1 Car. 2. B. R. Wilkinſon v. Richardſon.

13. A Prohibition was pray'd, upon a *Suggeſtion that all Letters Patents* and Grants *of the King are triable* &c. *at Common Law*, and not in the Spiritual Court, and that the now Defendant libell'd there for Tithes, upon a Title to the Rectory by a Grant of the King, whereas the Plaintiff had a precedent Title to the ſame Rectory by the King's Grant. The Prohibition was granted by three Juſtices, but Levins contra, Becauſe the Suit was founded on the Tort only, (viz.) In Withdrawing the Tithes; and if the Title ſhould come in Queſtion, it falls in only as an Incident; and in Suits at Common Law for Tithes, the Declaration is general as Proprietor, without ſhewing Title in the Declaration; And in ſuch Caſes the Spiritual Court ſhall try the Temporal Matter, ſo as they proceed according to the Temporal Law therein; and he cited many Caſes to that Purpoſe, but a Prohibition was granted. 3 Lev. 72. Mich. 34 Car. 2. C. B. Bonſey v. Lee.

14. One may libel in the Spiritual Court for *Tithe of Rakings of Corn*, if it *never was gather'd into Sheaves*, but ſecus after Corn has been gathered into Sheaves, and there was *no Fraud* in the Gathering; and Prohibition would lie. Per Holt. 12 Mod. 235. Mich. 10 W. 3. The King v. Moor.

(Z) What Perſons ſhall have the Prohibition. Right of Tithes. Spiritual Perſons.

S. P. Br. Juriſdiction, pl. 2. cites 25 H. 6. 29. —In *Suit between Parſon and Vicar in Court Chriſtian for Tithes*, *Prohibition* has always been denied, unleſs there be other Matter which is determinable at Common Law. 2 Roll. R. 55. Mich. 16 Jac. B. R. Anon.

1. If the Queſtion be in Court Chriſtian whether the Tithes belong to the Parſon or the Vicar, no Prohibition ſhall be granted, becauſe it is between Spiritual Perſons. M. 5 Ja. B. between *Rolles and Helyman* reſolved, and Conſultation granted accordingly. M. 10 Ja. B. between *Mumpaſſons and Mern*, per Curiam, this being between a Parſon and a Chanterer.

2. If a Man be ſued in the Eccleſiaſtical Court by the Parſon for Tithes, and the Defendant ſaith that the Vicar has uſed Time where-

of

of Memory &c. to have thoſe Tithes, and is endowed of them, and that the Vicar had leaſed them to him, [if] this Plea is refuſed in the Eccleſiaſtical Court, yet no Prohibition ſhall be granted, becauſe it is between Eccleſiaſtical Perſons. Cr. 11 Ja. B. R. Per Curiam.

3. If the Parſon ſues in the Eccleſiaſtical Court for Tithes, and Defendant pleads a Modus to be paid to the Vicar in Diſcharge of thoſe Tithes, and that this Modus anciently was due to the Parſon, and within Time of Memory upon the Endowment of the Vicarage this Modus was aſſigned to the Vicar, a Prohibition ſhall be granted, becauſe upon the Matter this Plea amounts but to this, That Tithes in Kind are diſcharged by the Parſon, and made Lay Fee. H. 7 Car. B. R. between .... and Sir *Richard Baker*, per Curiam Prohibition granted. Contra H. 11 Ja. B. R. between *Smith* and *Drayton*, per Curiam.

of A. for all Tithe of Willows. It was held that a *Modus* to the Rector is a good Diſcharge againſt the Vicar. Mod. 126. Trin. 28 Car. 2. C. B. Anon.

4. If a Man ſues for Tithes as Rector againſt another, and another comes in Pro Intereſſe ſuo, claiming the Tithes by the Letters Patents of the King, and after ſues for a Prohibition, becauſe the Spiritual Court ſhall not try the Letters Patents, yet he ſhall not have a Prohibition, becauſe both are Spiritual Perſons. M. 14 Ja. between *Adams and Sir Thomas Vavaſor* Rectors of Skillingthorpe againſt *Hutchinſon*, Prohibition denied.

5. If a Vicar ſues againſt the Parſon Appropriate, who is a Layman, in the Eccleſiaſtical Court, for Tithes of Saffron, ſuppoſing them to be Minutæ Decimæ, whereof he is endowed, and the Parſon there ſays that he has uſed Time whereof Memory &c. to have Tithes of * Hay and Corn of this Land, till now within 20 Years, when it was ſown with Saffron; yet no Prohibition ſhall be granted to try this Cuſtom, and whether Saffron be Small Tithes, but it ſhall be tried in the Eccleſiaſtical Court, inaſmuch as it is between the Parſon and Vicar, for they can beſt judge of this, and of the Compoſition. P. 38 El. B. R. between *Bedingfield and Feake* adjudged, and Conſultation granted.

* Fin. 311.

for Tithe Saffron againſt the Vicar, who pleaded that Time out of Mind he and his Predeceſſors &c. Tithe of all Saffron growing within the Parish &c. Another Tenfold. That here the Leſſee be Party to the Suit, yet the Right of the Tithe is in Queſtion between two Spiritual Men, and Temporal Court has no Juriſdiction; and ſaid that the very Point was adjudged 20 Eliz. between Hunt and Bush in this Court, that the Party ſhall not be admitted to plead Modus. The Parties is a Man Temporal, and ſo was it not in our Caſe ——5 C. M. 569 pl. 1. per Nel. of Bedingfield v. Feake, mentions the Suit to have been by the Vicar againſt the Parſon, and that Conſultation was granted, according to Rolle —— Cro. E. [illegible] Bedingfield's Caſe. 5 H. 5 accordingly. ——2 Neſf. Abr. 516. pl. 2. cites Cro. 74. that a Prohibition was granted, becauſe the Plea was refuſed in the Spiritual Court. But the Books are [illegible]

6. If the Vicar ſues a Pariſhioner for a Modus, and Defendant pleads that it belongs to the Parſon, yet no Prohibition ſhall be granted, becauſe the Right of Tithes comes in Queſtion. Mich. 28, 29 El. between the Vicar of * *Pankridge and Bayley* adjudged, and a Conſultation granted accordingly.

That Time out of Mind &c. they had paid to the Vicar of the ſaid Parish a Modus of Tithe of Hay of every Acre. It was moved, That upon that Surmiſe a Prohibition ought not to be granted, for that a Modus Decimandi can never come in Queſtion; but the Parſon muſt have ſued the ſame Matter in the Spiritual Court, ſaid, That the ſame doth appertain to the Vicar, and not to the Parſon; and then if the Vicar ſueth for the Tithe of the Hay, the Modus Decimandi will come in Queſtion, and alſo that he hath averred in his Surmiſe that the Tithe-Hay belongeth to the Vicar, yet that is not materially; and afterwards a Conſultation was awarded. 2 Le. 225. pl. 250. Eliz. in C. B. Botham v. Lady Grecham ——* S. C. Gobb. 50. pl. 53. and Ibid. 65. pl. 80.

7. 13 *El.* 1. *cap.* 5. *Sect.* 4. Enacts that *when the Parſon or any Other is* Diſturbed, to demand Tithes in the next Parish [illegible] *the Parſon or the Party ſo Diſturbed, ſhall have a Writ* [illegible]

Common Law of England, the Form whereof appeareth in Glanvile and other Antient Authors.

Advowſon of the Tithes being in Demand; And when it is Deraigned, then ſhall the Plea paſs in the Court Chriſtian, as far forth as it is Deraigned in the King's Court.

2 Inſt. 362.——It *is a Prohibition*, and ſhall be *directed as well unto the Judge* of the Court *as* unto *the Party*, that they do not proceed in the Plea &c. and then the Patron of that Parſon who is ſo prohibited by the Indicavit, may have and ſue a Writ of Right of Advowſon and Diſmes. F. N. B. 30. (E)

† *By the Common Law*, if the Incumbent of one Patron demanded Tithes againſt the Incumbent of another Patron, the Writ of Indicavit did lie, for that the Right of the Patronage ſhould come in Queſtion; for by the Preſentation of the Patron his Incumbent is to have the Tithes, which are the Profits of the Church; and in a Writ of Right of Advowſon the Patron ſhall allege the Eſplees in his Incumbent, in Taking of the Great and Small Tithes; and therefore if the Right of the Tithes come in Queſtion that concerned the Right of Advowſon, the Writ of Indicavit did lie; and this appeareth by the Writ itſelf. 2 Inſt. 364.

But for *Subſtraction of Tithes againſt an Inhabitant* within the Pariſh of the Rector, claiming from one Patron, *where the Right of Advowſon of the Tithes never came in Queſtion*, the Court Chriſtian hath Juriſdiction. 2 Inſt. 364.

The *Miſchief before this Statute was*, That ſeeing the Right of Tithes could not be tried between the two Perſons after the Indicavit granted, the *Perſon prohibited was without Remedy for Trial of the Right of Tithes*; and therefore *this Act doth give* the Patron, whoſe Clerk is prohibited, *a Writ of Right De Advocatione Decimarum*, the Form of which Writ appeareth in the Regiſter; and *if the Right be tried for the Demandant*, the *Cauſe ſhall be remanded into the Court Chriſtian*. 2 Inſt. 364.

But what if the *Patron hath but an Eſtate* in *Tail, or* an Eſtate *for Life* &c. ſo as he cannot have this Writ of Right of Advowſon, what Remedy ſhall be had for Trial of the Right of Tithes in this Caſe? It ſeemeth that by Conſtruction of this Statute, the Defendant in the Indicavit appearing upon the Attachment, ſhall plead to the Right of the Tithes in the King's Court, or otherwiſe he ſhall be without Remedy. And this ſtandeth well with the Words of the Writ of Indicavit, viz. Vobis prohibemus, ne Placitum illud teneatis donec diſcuſſum fuerit in Curia noſtra, ad quem illorum pertineat ejuſdem Eccleſiæ advocatio &c. 2 Inſt. 364.

By this Branch it appeareth, That the *Value* of the Tithes at the making of this Act *was not material*; for of whatſoever Value they were of, the Right of Tithes could not be determined in Court Chriſtian, *but by* the Statute of *Articuli Cleri, cap* 2. the Tithes *muſt amount to a fourth Part of the Value of the Church* in that Caſe, or otherwiſe the Writ of Indicavit doth not lie; but the King may have a Writ of a leſſer Part, for he *is not bound by that Act*. 2 Inſt. 364.——F. N. B. 30. (E)

Alſo *by this Act* a Writ of *Indicavit was maintainable Ante litem conteſtatam*, that is, when the Party hath libelled in Court Chriſtian, and the adverſe Party hath anſwered thereunto; but *this is remedied by the Statute De conjunctim Feoffatis*. 2 Inſt. 365.——F. N. B. 30. (G) That Indicavit lies not before a Libel exhibited, and he ought to ſhew the Copy thereof before the Indicavit be granted; and Indicavit lies not after Judgment in the Spiritual Court.——Indicavit lies *only before Sentence given* in the Spiritual Court. Br. Prohibition, pl. 21. cites the Regiſter, fol 47.——S. P. 2 Inſt. 365. For it is but a Superſedeas donec &c. Ne placitum illud teneatis, donec diſcuſſum fuerit &c. And this Act ſaith, Procedat poſtmodum placitum in Curia Chriſtianitatis, which could not be after Sentence.

And albeit this Statute doth give the Writ of Right of Advowſons of Tithes, yet a *Writ may be* brought *De Decimis & Oblationibus*; for Oblations be in Conſimili caſu. 2 Inſt. 365.

This Writ of Indicavit is againſt the Canonical Sanction, and yet hath been ever obeyed; for all Foreign Sanctions, or Canons againſt the Law or Cuſtom of the Realm, are of no Force, and bind not here. 2 Inſt. 365.

The Writ of Indicavit *ſhall not mention that the Tithes* &c. in Suit *amount to the fourth Part of the Church, but* it *ſhall be pleaded* by the other Party to have a Conſultation. 2 Inſt. 365.

If an Abbot be Parſon Imparſonee of the Church of D. and another Abbot is Parſon Imparſonee in the Church of E. ſo as there be (in Reſpect of the Impropriations) but two Parſons, yet becauſe *each Party is both Patron and Incumbent*, an Indicavit lieth between them. 2 Inſt. 365.

8. If *two Incumbents* are *in Suit for Tithes, which exceed the fourth Part of the Church*, there, if *one and the ſame Man be Patron of both Churches*, the one Incumbent nor the other ſhall not have Prohibition nor Indicavit; For which ſoever of the Incumbents ſhall have the Tithes, it is no Prejudice to the Patron; Contra if two ſeveral Men were Patrons. Br. Prohibition, pl. 16. cites 2 H. 7. 12. Per Keble for Law.

9. A. Proprietor of the Parſonage of S. in Suffolk, libell'd againſt C. for Tithes of certain Land in the Pariſh of S. Afterwards B. the Parſon of H. in Suffolk, *came in Pro intereſſe ſuo, and alleg'd a Cuſtom within the Pariſh of S. that the Parſon of H. ſhould have* 13 *Cheeſe for the Tithes of thoſe Lands in S. and* that in Recompence thereof *the Parſon of S. had* 13 *Cheeſe for the Tithes of ſuch Lands in H.* and ſurmis'd for a Prohibition, That he had pleaded this in the Spiritual Court, and it would not be received. It was objected that a Prohibition lies not here, it being for one that is not ſued, and it is not Reaſon he ſhould ſtay the Suit of a Stranger. It was anſwered, That the Right of Tithes is not in Queſtion, but a

Modus

Modus Decimandi, and ſo is triable here, and that the Pariſhioner might well plead this, and that what the Pariſhioner might plead, he that comes in Pro Intereſſe may plead. Gawdy held that the Pariſhioner might well plead it, but that when the Parſon of another Pariſh will plead it, the Right of Tithes will thereby come in Queſtion between the two Parſons; and cited 20 H. 6. 18. and 31 H. 6. And afterwards the Court was of Opinion to grant a Conſultation. Sed adjornatur. Cro. E. 251. Mich. 33 & 34 Eliz. C. B. Dullingham v. Kyſeley.

10. Libel for Tithes of Underwood in Thackſly Park; the Defendant ſuggeſted a Modus to pay 10s. yearly to the Vicar for all Tithes of Underwood there, yet a Conſultation was granted, becauſe it appeared that the Suit, as to the Right of Tithes, was between the Parſon and the Vicar, which is triable in the Spiritual Court. 3 Nelſ. a. 315. pl. 9. cites Moor 907. * Sherbourne v. Clerke, in the Caſe of Fryer v. Beſtney. S. P. Moor 907. Dubitatur. Becauſe a Modus was ſuggeſted, which is not triable in that Court.

* The Court inclin'd [ſemble] a Conſultation ſhould be granted for the Reaſon here mentioned. And to this Purpoſe Coke the Queen's Solicitor cited two Judgments, viz. One of Mich. 28 & 29 Eliz. Bulſh v. Kunt Parſon of Pancraſs, and the other Mich. 30 & 31 Eliz. Dame Greſham's Caſe. Et adjornatur. Mo. 907. pl. 1267. Mich. 35 & 36 Eliz. B. R. Sherburne v. Clarke —— The like Caſe was in Queſtion for Tithe Hay, where the Surmiſe was of a Modus Decimandi of 6s. 8d. to the Vicar, the Suit being by the Parſon who was Patron of the Vicarage. And it was doubted if a Conſultation ſhould be granted, becauſe the Ground of the Prohibition is a Modus Decimandi, which the Spiritual Court will not allow. Quære. Mo. 907. pl. 1268. Paſch. 36 Eliz. Fryer v. Beſtney.

11. Vicar libels for Small Tithes, upon his *Compoſition* between him and the Parſon upon the Appropriation, againſt B. Defendant in Court Chriſtian pleads *Preſcription* for the Parſon againſt the Compoſition; and becauſe the Court Chriſtian allowed the Preſcription againſt the Compoſition, the Vicar had Prohibition in B. R. *to bar his own Suit in Eccleſiaſtical Court*; and upon ſeveral Arguments the Prohibition ſtood. Mo. 780. pl. 1081. Pringe v. Child.

(A. a) What Perſons ſhall have the Prohibition.

1. If the Churchwardens of A. libel againſt the Pariſhioners of B. for the Reparation of A. the Pariſh Church, and the Defendants allege that in the ſame Pariſh there is a Pariſh Church and Chapel of Eaſe, and preſcribe that they have uſed Time whereof Memory &c. to repair the Chapel, and in Conſideration thereof that they have been diſcharg'd of the Reparation of the Church, yet no Prohibition ſhall be granted; becauſe both thoſe Things belong to the Eccleſiaſtical Court. H. 12 Ja. B. R. between the Churchwardens of Aſhton and Brummage.

See (H) pl. 7. S. and the Notes there —— The Court ſeem'd to incline that no Prohibition ſhould be granted, but ſaid they would adviſe. Roll Rep. 126 S. C. —— If the Chapel of Eaſe has been built within Time of Memory, they ought to have *Proof of ſome Agreement*, by Virtue of which they are diſcharg'd of Reparations of the Mother Church. Mar. 91. pl. 151. Hill. 16 Car. B. R. Anon.

2. If the Vicar ſues the Parſon Impropriate for Damages for cutting the Trees growing in the Church-yard, a Prohibition ſhall be granted, becauſe if the Trees belong to him he may have Treſpaſs at Common Law. H. 13 Ja. B. R. *Bellamy's* Caſe reſolved, and Prohibition granted.

A Conſultation was pray'd, becauſe it was ſaid that the Trees in the Church-yard belong to the Vicar, and not to the Parſon; and that therefore it was maintainable in the Spiritual Court; but the Suit here being for Damages, the Court agreed that no Conſultation ſhould be granted. Roll. Rep. 255. pl. 23. Mich. 13 Jac. B. R. Bellamie and .....

3. If there be a Parſonage Appropriate, which comes to the Crown by the Diſſolution of Monaſteries, and after this is granted over to a common Perſon, and there is alſo a Vicarage endowed in the ſame Pariſh, and

by

by Command of the Visitor of the Archbishop in his Visitation the Churchwardens make a Terrar of the Tithes and Glebe in the Parish [shewing] which belong to the Parson, and which to the Vicar, and deliver it into the Spiritual Court; and thereupon the Vicar libels in the Spiritual Court against the Parson, to have it confirmed and sentenced for him, and the Parson prays a Prohibition, and shews in his Suggestion, and agrees that all which is in the Terrar belong to the Vicar, except some particular Tithes, to wit, Tithes of Carrots, Coal, and such like, growing and being in Lands out of Gardens, and for Burials in the Chancel, and for them prays a Prohibition; a Prohibition lies, because tho' it be between Parson and Vicar, and to the Right of Tithes will come in Question between them, yet (because it is not between the Vicar or Parson, and a Parishioner, in which Case no Prohibition would lie, because against him the proper Suit is in the Spiritual Court) the Prohibition lies, because the Vicar may have his Action at the Common Law against the Parson, if he takes the Tithes being set out by the Parishioner. Tr. 11 Car. B. between *Sir George Winter, and Pierce* Vicar of St. Peter and James in Bristol, per Curiam. Mich. 11 Car. this was mov'd again, and the Court took Diversity between Parson Appropriate and Parson Presentable, and they seemed to incline, that the Parson Appropriate has this as a Lay Fee by the * Statute, and therefore ought to be tried between the Vicar and him at the Common Law, tho' I urg'd that the Jurisdiction of the Ordinary is saved by 31 H. 8. and that it was not the Intent of the Parliament to alter the Course of Suits for them; but the Court were not resolv'd of this Opinion, but granted the Prohibition with Purpose to have Demurrer thereupon, and to be argued, as they said. Contra M. 15 Car. between *Warner and Hasler*, per Curiam Prohibition denied, where the Suit was between the Parson Appropriate and the Vicar.

* Fol. 312.

If B. R. has Knowledge by whatever Means, that the Spiritual Court meddles with *Temporal Things*, tho' the Plaintiff himself in the Spiritual Court informs B. R. of it, a Prohibition will be granted. Cro. J. 351. Mich. 12 Jac. B. R. Worts and Clifton.——See Goldsb. 149. pl. 15. Hill. 43 Eliz. Benefield v Feek.——In some Cases the Plaintiff himself who libels may have a Prohibition. Le. 130. cites the Case of Wignal v. Brook.

4. If a Man libels in the Spiritual Court for a Matter which does not appertain to the Jurisdiction of the Spiritual Court, but to the Common Law, as for Matter of Franktenement, yet he himself against his own Suit may pray a Prohibition, and shall have it. Mich. 15 Ja. B. R. between *Kiste and Bridgman* resolved, and Prohibition granted.

5. If a Vicar sues a Parishioner for Tithes in the Spiritual Court, and the Parson Appropriate appears there Pro interesse suo, and prays a Prohibition, it shall be granted. Hill. 14 Car. B. R. *Roberts's* Case, Prohibition granted.

6. If the Parson of D. sues a Parishioner of the Parish of S. for Small Tithes, as a Portion appertaining to his Rectory of D. and thereupon comes the Parson of S. Pro interesse suo, and claims it as Parson of S. as appertaining to his Rectory, it being within his Parish; in this Case no Prohibition lies for the Parson of D. to prohibit his own Suit, because it is between Spiritual Persons, and the Plaintiff can not have any Remedy at the Common Law for those Tithes, they being Small Tithes, which are not within 2 E. 6. Mich. 14 Car. B. R. between *Scot* Plaintiff, and *Wilson and Playter* Defendants, Prohibition denied per Curiam, the Parish being North Lin in Norfolk.

Kelw. 110. b. pl. 33. Casus incerti temporis. Contra, By the Opinion

7. If the Bounds of a Vill within a Parish, come in Question in the Spiritual Court, in a Suit between the Parson Impropriate and the Vicar of the same Parish, as if the Vicar claims all Tithes within the Vill of D. within the Parish, and the Parson all Tithes within the Residue of the Parish, and the Question is between them, whether certain

tain Land whereof the Vicar claims Tithes, be within the Vill of D. or not, yet inasmuch as this is between Spiritual Persons, that is to say, between the Parson and Vicar, tho' the Parson be a Layman, and the Parsonage Appropriate a Lay Fee, yet this shall be tried in the Spiritual Court, and no Prohibition shall be granted. H. 15 Car. B. R. between *Ives and Wright*, per Curiam Prohibition denied.

of Grantham, who held that the Court shall cease, this Issue is taken upon a Thing

Real, viz. Whether the Place be within the one Parish or the other.—See (D) pl. 6. Butler v. Yateman in the Notes there.—See (L) pl. 1. Petler v. Yaleman in the Notes there.

8. If *Lessee for Years* is sued in the Spiritual Court for Tithes, *he in Reversion* may have a Prohibition. Moor 915. pl. 1298. says it was so ruled Pasch. 29 Eliz. B. R. Sir Robert Lane v. Pigot.

S. C. by Name of Love v. Pigot. Cro. E. 55. pl. 3. where it is

said that there are diverse Precedents to this Purpose.

(B. a) Prohibition. [*In what Cases.*]

1. IF a Man recovers in Quare Impedit in B. against an Incumbent, upon which the Incumbent brings Writ of Error in B. R. where the Judgment is affirm'd, and Writ to the Bishop granted for the Recoverer, and by Force thereof his Clerk is Admitted and Instituted by the Bishop, and after the Metropolitan grants an Inhibition to the Archdeacon not to intermeddle him; a Prohibition may be granted, because it appears apparently that it is for Delay. Tr. 15 Ja. B. R. between *Murrey and Sir H. Wallop*, for the Church of Langharn in Cornwall, a Prohibition granted.

If a Man recover his Presentation by Quare Impedit, and hath his Clerk Admitted and Instituted, and another Person who claimeth the

Advowson by Provision from the Pope, sueth in the Spiritual Court to avoid and remove the other Clerk, the Patron who hath recovered his Presentment &c. shall have a Prohibition unto the Judge for to surcease &c. F. N. B. 42. (C)

2. 13 *E.* 1. *Stat.* 4. *S.* 1. 2. 3. 4. *For Penance Corporal or Pecuniary injoined for deadly Sin, as Fornication, Adultery, or the like; also for not Fencing the Church-yard, or not Reparing the Church, or sufficiently Adorning it, a Prohibition lieth not; Nor for Oblations, Tithes, Mortuaries, Pensions, * Laying violent Hands upon a Clerk, Defamation, (when Money is not demanded) Nor for Breaking an Oath.*

Note a Diversity between a Spiritual Man of the Church consecrated to the Service

of God, and *Goods dedicated* to Divine Service, or meerly Ecclesiastical; for Laying of violent Hands upon the Person of any Infra Sacros Ordines, the Ecclesiastical Court hath Conusance; but for the Violent taking away, Consuming of Ornaments of the Church, or Goods dedicated to Divine Service, their Court hath no Conusance, for that is not given to them; as for Taking away of the Bible, the Book of Divine Service, the Chalice, and the like, or for the Taking away of an Image out of the Church; but Remedy must be taken for these at the Common Law. 2 Inst. 492. ——but if a Clergyman be *arrested by Process of Law*, he cannot for this sue in the Ecclesiastical Court. 2 Inst. 492. ——See Prerogative (N. e) pl. 9

* A Parson or other Priest may sue in the Spiritual Court for *Laying violent Hands* upon him &c. in order to have him Excommunicated, but not to have Amends &c. F. N. B. 51 (K)——And if the Defendant in Case of *Defamation* be put to Corporal Punishment, or for Laying violent Hands upon Clerks &c. if the Party will *redeem his Penance, and agree to pay* the Party damnified a certain Sum of Money for his Damages, the Party damnified may have Suit for this in the Court Christian; and if the other Party purchases a Prohibition, he shall have a Consultation. F. N. B. 55 (A)——And if one is condemned in the Spiritual Court for Defamation, and he *appeals*, and the *Sentence is confirmed*, and is condemned in 20 *s.* Costs, and the Cause remitted whereupon he sues a Prohibition, the other Party shall have a Consultation. F. N. B. 52. (D)——S. P. And same Cases cited 2 Rep. 2. b. pl. 1. Trin. 25 Eliz. B. R. in Case of Palmer v. Thorpe; and says that upon these Diversities you will better understand the better Opinion in 12 H. 7. 2 and the Sense of the Register, fol. 54. where all the Justices refused to grant Consultation in a Case of Defamation, viz. Either because the Matter of the Defamation was not merely and solely Spiritual, or because the Plaintiff sued for Damages or Amends for such Defamation. ——And if the Clerk sue in Court Christian for Damages for the Battery, he is in Case of Premunire; for in that Case the Ecclesiastical Judge ought to proceed Ex Officio only to correct the Vice. 2 Inst. 492.

Prohibition; for that P. libelled againſt L. before the High Commiſſion, that

3. 9 *Ed.* 2. *cap.* 3. *If any lay violent Hands upon a Clerk, the Articles for the Peace broken ſhall be before the King, and for the Excommunicated before a Prelate; and if Corporal Penance be injoined, and the Offender will redeem it with Money to give to the Prelate or to the Party grieved, it ſhall be required before the Prelate, and the King's Prohibition lieth not.*

the ſaid L. beat him, or at leaſtwiſe aſſaulted him with a Bill, and would have ſtruck him, being a Clerk, and called him Gooſe and Woodcock, with many ſuch Words; whereas ſuch Pleas of Aſſault and Battery appertain to the Court Temporal. And now Conſultation was prayed; for being done to a Clerk, the Court Spiritual might examine it. But all the Court held, That a Prohibition well lies; for although for Violenta manuum injectione in Clericum, the Suit ought to be in the Spiritual Court, as appears by Articuli Cleri, cap. 1. yet for an *Aſſault only*, it is clear that the Suit ought to be at the Common Law, and for theſe Words they be not actionable; therefore it is not Reaſon he ſhould be vexed for them; and it was ordered that the Prohibition ſhould ſtand. Cro. E. 753. pl. 14. Paſch. 42 Eliz. Love v. Prin.—Mo 607. S. C. by the Name of Lovegrove's Caſe as to the Words, but nothing ſaid as to Aſſault.

4. Attachment upon a Prohibition, becauſe the Defendant ſued in Court Chriſtian for *Detinue of Goods*, the other ſhew'd that he ſued for Detinue of Goods *deviſed by Teſtament*, where the *Plaintiff claimed them by Gift*: And yet per Judicium, the Plaintiff took nothing by his Writ; for if it be *under the Name of a Legacy*, it belongs to the Spiritual Law whether he ſue Right or Wrong; and notwithſtanding the other ſhew'd Gift, *it belongs to them to try the Circumſtances, if the Deviſe be good or not.* Br. Attachment ſur Prohibition, pl. 4. cites 46 E. 3. 32.

S. P And he ſhall alſo have an Attachment thereupon, if they proceed againſt him in their Court. F. N. B. 41. (H)

5. Where a Man ſues in the Spiritual Court for Spiritual Cauſes, and the Defendant *purchaſes a Prohibition* directed unto the Judges there, and delivers the ſame, *and for ſo doing the Judges excommunicate him* for the Offence which he did to the Church, in bringing a Prohibition to them upon a Spiritual Cauſe, the Party excommunicate ſhall have a *New Prohibition* upon that Matter, commanding them to revoke the ſame; for a Man ſhall not be puniſhed for ſuing forth Writs in the King's Courts, whether he is Right or Wrong. F. N. B. 42. (G)

Where a Statute *makes* a Thing *a Temporal Offence*, which

6. Always *when an Act of Parliament commands or prohibits any Court*, be it Temporal or Spiritual, *to do any Thing* Temporal or Spiritual, *if the Statute be not obeyed*, a Prohibition lies. 13 Rep. 42. Trin. 7 Jac.

is puniſhable by Canon Law, they may alſo *proceed to Deprivation*, but not puniſh it as a Temporal Offence. 12 Mod 239. in Caſe of Biſhop of St. David's v. Lucy.

7. If the *Spiritual Court refuſes a Plea meerly Spiritual*, as Excommunication, Divorce, Hereſy, Simony &c. an Appeal lies, but no Prohibition. 13 Rep. 44. Trin. 7 Jac.

8. A Teſtator bequeath'd ſeveral *Legacies out of a Term* for Years to the Children of A. and made J. S. Executor; A. on the Behalf of his Children required J. S. to pay the Money to him, that he might imploy it for his Children's Benefit, but A. refuſing, J. S. ſued him in the Spiritual Court, and had Sentence; whereupon A. mov'd for a Prohibition, alleging that he was Executor, and chargeable in an Account for the Money; but becauſe he came after Sentence &c. and alſo becauſe he *refuſed to give Security for Payment of the Legacies to the Children*, the Court refuſed to grant a Prohibition. Godb. 243. pl. 337. Hill. 11 Jac. C. B. Ayliffe v. Brown.

9. Libel for *Tithes*; the Defendant, who was a Layman, ſuggeſted for a Prohibition, That he was *ſeiſed of the Manor of D. and* ſo *prescribes to have the Tithes within that Manor, and* that he and all thoſe whoſe Eſtate he had &c. had *uſed to maintain a Chaplain in the Church of D.* It was objected, That the Defendant had *not alleg'd that the Church of D. is within the ſame Pariſh* where the Manor is, and ſo is no Conſideration to the Parſon who is the Plaintiff. 2dly. Becauſe the Maintenance of the Parſon is *not alleg'd ſo extenſively as the Claim of the Tithes*, viz. Time

out of Mind &c. 3dly. He has *not prov'd* that Part of the Suggeſtion, as to *the Maintenance of the Parſon, within* 6 *Months*, tho' he has the Reſidue, whereas this is the Principal Matter which makes his Preſcription good, and that therefore a Conſultation ought to be granted; Quod fuit conceſſum per Cur. as to this laſt Point. But Coke ſaid, That it ſhould be granted for the other Exceptions alſo; but as to thoſe the other Juſtices ſaid nothing. Roll. Rep. 2. pl. 3. Paſch. 12 Jac. B. R. Boocher v. Rogers.

10. A Libel was brought for Tithes; the Plaintiff here ſuggeſted for a Prohibition, That he is an *Executor*, and was *ſued for Double Damages*, which do not lie againſt an Executor. Keyling J. ſaid, That if by the Common Law an Executor ſhall not be charg'd, if the Spiritual Court will ſue him there, a Prohibition lies, becauſe it expoſes him to a Devaſtavit. But the Reaſon of Keyling was diſallowed, and a Prohibition was denied. Raym. 95. Hill. 15 & 16 Car. 2. B. R. Wilks v. Ruſſel.

11. A Suggeſtion that the Spiritual Court *objected to the Credibility of a Witneſs*, is not a ſufficient Ground for a Prohibition; for they are the proper Judges of the Credit of a Witneſs. Carth. 143. Trin. 2 W. & M. in Caſe of Shotter v. Friend.

12. It is not a ſufficient Ground for a Prohibition to *ſuggeſt* that the Plaintiff *had only one Witneſs* to prove the Fact, unleſs he *allege that he offered ſuch Proof, and it was refuſed for Inſufficiency*. Carth 144. in Caſe of Shotter v. Friend.

13. A Libel was for *Building Sheds upon the Church-yard*; it was ſuggeſted for a Prohibition, That they *were built upon a Lay-fee, and not on any Part of the Church-yard*. This was held a good Suggeſtion. Carth. 151. Trin. 2 W. & M. Quilter v. Newton.

But it ſeems the Suggeſtion has not been ſufficient, if it had not ſaid that the Structures were not built upon any Part of the Church-yard. Carth 152. *See* Ogden v. Wiſeman cited there —— *But* a Prohibition ſhall *not* be granted to any Suit in the Spiritual Court *for any Nuſance or other Matter done in the Church-yard, upon a Suggeſtion* that the Church-yard is a *Lay-fee*; for a Nuſance there is properly of Eccleſiaſtical Conuſance. Carth 152 in Caſe of Quilter v. Newton.

14. Where the *Suggeſtion* upon which a Prohibition is moved for, *appeared to be falſe*, the Court denied to grant a Prohibition upon the Authority of the **Parish of Ashton**'s Caſe in Hob. 66. Ld Raym. Rep. 220. Paſch. 9 W. 3. Breedon v. Gill.

S.P. Per Holt Ch. J. That in ſuch Caſe B. R. ought not to grant a Prohibition; and cited Hob. 66. But where the Sequeſtrator of the *Tithes of a Vicarage* ſued the Impropriator in the Spiritual Court for Tithes upon the Endowment, and the Defendant *ſuggeſted that it was not a Vicarage*, and that this ought to be tried at Common Law, Holt ſaid this Suggeſtion is good in Point of Law; and tho' it was held, Hob. 66. That notwithſtanding the Surmiſe be Matter of Fact, and triable by a Jury, yet it was in the Diſcretion of the Court to deny a Prohibition, and that ſo it was done Hob. 185. Jones v. Jones; Yet at laſt a Prohibition was granted by Conſent, and Iſſue to be taken *Vicarage or Not*, to be tried at the next Aſſiſes to ſettle the Right. Ld Raym Rep. 587. Trin. 12 W. 3. Smith v. Wallet.

15. A Suggeſtion for a Prohibition was. 1ſt. That they *refuſed a Copy of the Libel*. 2dly. That the Citation was *Pro Profanatione Cœmeterii*, which ſuppoſed Profanation was *as Coroner, in Digging up a Corpſe for a View*, according to the Duty of his Office. Holt Ch. J. ſaid, That theſe Matters ought not to be joined, and are Grounds for Prohibitions of different Natures; the firſt being for a Prohibition only Quouſque, which is Ipſo Facto diſcharged by granting a Copy of the Libel without Writ of Conſultation, and the other a Peremptory Prohibition, which ties them up till a Conſultation; and upon ſuch a Suggeſtion we ought not to grant a Prohibition. Indeed a Prohibition Quouſque they give a Copy of the Libel, if it be granted before any Libel exhibited does not bind them from exhibiting a Libel, and after they ſhall not proceed till they give a Copy of it; and then to have a Prohibition upon the Merits, you muſt make a new Suggeſtion. 6 Mod. 308. Mich. 3 Ann. B. R. Anon.

(B. a. 2) In what Cafes it lies. *In reſpect of the Libel.*

R B delivered 200 Marks to the Chamberlain of London to deliver to his Executors or Adminiſtrators after his Deceaſe to diſpoſe for his Soul, and he delivered theſe 200 Marks to T. B. upon Bond to deliver to the Chamberlain when it ſhould be required; R. B. died, and P P took Adminiſtration from the Biſhop of London; whereupon he ſued Subpœna againſt the Chamberlain to ſue Obligation againſt T. B. to bring in the ſaid 200 Marks, becauſe the Obligation was made to the Uſe of R B. and after T. B. (becauſe R. B. had Goods in diverſe Dioceſes, as he pretended) obtain'd Adminiſtration from the Archbiſhop of Canterbury, and after libell'd in the Arches at the Church of Bow, to cite P. P. and after P. P. ſued *Prohibition* out of Chancery *to the Arches, commanding them* to deliver the Copy of the Libel to the ſaid P. P. according to the Statute of 2 H. 5. cap. 3 *to forceaſe till the Copy of the Libel was deliver'd*, and *notwithſtanding this they proceeded*; whereupon the ſaid P. P. ſued Attachment upon the Prohibition and Statute aforeſaid, rehearſing the Statute, againſt the Judge of the Spiritual Court, and pray'd another Prohibition to the Party and to the Officer to ſurceaſe, becauſe Matter is pending in Bank to deliver the Libel; and the other ſaid, That this is Spiritual Matter, for the *Power of the Biſhop of Canterbury and of London are here to be tried*; and notwithſtanding this a ſpecial Prohibition was granted, that they ſurceaſe 'till Libel be deliver'd to the Party; quod nota. Br. Prohibition, pl. 11. cites 4 E. 4. 37. — Br. Prohibition, pl. 15. cites S. C. — Br. Conſcience, pl. 10. cites S. C

1. 2 *H.* 5. 3. ENACTS, That *a Copy of a Libel grantable in the Eccleſiaſtical Court ſhall be preſently delivered upon the Defendant's Appearance.*

If a Man be ſued in the Spiritual Court, and the Judges there will not grant the Defendant a Copy of the Libel, then he ſhall have a * Prohibition directed to them to ſurceaſe &c. until they have deliver'd the Copy of the Libel according to the Statute 2 H 5. and alſo the Defendant may have an Action againſt them upon the ſaid Statute, if they will not deliver the Copy of the Libel, whether the Cauſe in the Libel be a Spiritual Cauſe or not. F. N. B. 43. (E) ——— * S. P Hard. 364 in the Caſe of the King v. Sir Edward Lake. —— S. P. 2 Salk. 553. pl. 19. Anon. —— S. P. But the Court being inform'd, That the *Prohibition* which was taken out was *abſolute*, they did not think fit to grant a Conſultation, but *diſcharged it by a Superſedeas*; whereupon the Eccleſiaſtical Court proceeded to *excommunicate the Party* for want of anſwering, who again moved for a Prohibition, and the Court granted one with a *Mandamus* in it *to abſolve* the Party, if it were for not anſwering before they gave him a Copy of the Articles. 1 Vent. 5. Hill. 20 & 21 Car. 2 Anonimus.

But a Prohibition Quouſque a Copy of the Libel deliver'd, being mov'd for, was refus'd, without an *Affidavit* that they tender'd the Fees, and yet they refus'd to deliver it. 1 Keb 825. pl. 117. Mich. 16 Car 2. B R. Dr. Watkinſon's Caſe.

It was formerly held by all the Judges of England, That when there was a *Proceeding Ex Officio* in the Eccleſiaſtical Court, they were not bound to give the Party a Copy of the Articles; but the Law is otherwiſe; for in ſuch Cafes, if they refuſe to give a Copy of the Articles, a *Prohibition* ſhall go *quouſque they deliver it*; and accordingly, upon Motion, a Prohibition was granted in the like Caſe. Per Holt Ch. Juſt. Lord Raym 2 Rep. 991. pl 3. Trin. 2 Ann. B. R Anon. —— S C. cited 2 Salk. 553. pl. 19 Anon. ——— But Paſch. 11 W. 3. Holt Ch. J. deny'd to grant a Prohibition *to the Admiralty Court*, upon a Suggeſtion, That they refuſed to give the Party ſued there a Copy of the Libel, becauſe the *Statute extends only to Eccleſiaſtical Courts*, and not to the Admiralty Court. Lord Raym. Rep. 442. Anon —— S. C. cited 2 Salk. 553. pl. 19. Hill. 2 Ann. B. R. in a Nota of the Reporters.

* S. P. Per Cur Comb. 136.

2. No Prohibition ſhall be granted where the *Libel* is * *not brought into Court, and the Party put to anſwer* to it, viz. Of the Tithes, *and this certified to the Chancellor* by view of the Libel; Per Henxſton; who ſaid, That this is by the Statute De Regia Prohibitione, and of Conjunctim Feoffatis in Fine, which Forteſcue conceſſit, and thereupon the Parties pleaded over. Br. Prohibition, pl. 20. cites 31 H. 6. 14.

3. A Prohibition was granted in Caſe of *Tithes*, becauſe the *Libel* was *not againſt proper Parties*. Le. 10. Mich. 25 & 26 Eliz. C. B. Sutton v. Dowſe.

4. Libel *for Tithe* of Billet, Faggots, and Tall-wood, and averr'd It came of *Birch, Haſel, Holm, and Maple*; the Defendant *ſuggeſted, That they came from Oak, Aſh, Elm, and Birch*; and becauſe the Plaintiff, in his *Libel, had not alleged how many Faggots were made of Haſel*, therefore a Prohibition was granted, and afterwards a Conſultation was denied. Goldsb. 127. pl. 18. Hill. 43 Eliz.

5. Defendant ſuggeſted for a Prohibition to a Libel for *Tithes*, That the Prior of D. was ſeiſed of the Grange of S. in Right of his Priory, and *preſcribed in the Prior and his Predeceſſors to hold* this Grange *without*

Paying

Payment of Tithes, and *ſhewed the Diſſolution* thereof, and that it came to H. 8. by the Statute of 31 H. 8. to hold it as the Prior held it before, and ſo *derived* to *himſelf a Leaſe from Queen Elizabeth* for 50 Years, and that afterwards the Plaintiff libel'd againſt him in the Spiritual Court for the Tithe of 40 Fleeces of Wooll &c. The Defendant in the Prohibition pleaded, That he ſued the Plaintiff for the Tithes of 400 Fleeces of Wooll, and ſo pray'd a Conſultation; and becauſe of this *Variance between the Libel and the Suggeſtion* a Conſultation was awarded by the Juſtices of Aſſiſe, and Double Coſts; but adjudg'd erroneous for both Cauſes, for the Variance is *not material*, becauſe the Plaintiff preſcribed in *Non Decimando*, and ſo *ouſts the Spiritual Court of all Juriſdiction* for any Tithes ariſing from this Grange, and the giving *Double Coſts is Error* upon the very Letter of the Statute of 2 E. 6. which gives them in no Caſe but in Default of proving his Suggeſtion. Yelv. 79. Mich. 3 Jac. Hutton v. Barnes.

6. The Defendant was preſented in the Eccleſiaſtical Court for working upon Holidays, viz. *Carrying Hay on St. John Baptiſt's Day in Church Time*; but a Prohibition was granted, becauſe this was out of the Statute by the very Words of the Act, viz. 5 E. 6. becauſe it was for Neceſſity; and this being an *Holiday by Act of Parliament*, it belongs to the Judges of the Common Law to determine whether it was broken or not. Godb. 218. pl. 315. Mich. 11 Jac. C. B. Wheeler's Caſe.

7. Where the Libel againſt the Defendant is *too general*, as for certain Offences, theſe are good Cauſes for a Prohibition. Per Cur. Hard. 364. Paſch. 16 Car. 2. in the Exchequer, in the Caſe of the King v. Sir Edward Lake.

8. A Prohibition was mov'd for becauſe the *Libel* in the Eccleſiaſtical Court was againſt the Plaintiff *for not coming to Church at all, or very ſeldom*, becauſe *very ſeldom* was utterly incertain; But to that it was anſwer'd per Curiam, That that was their Form of Proceeding there; and tho' ſuch a Pleading here would have been naught, yet it being according to their Form of Proceeding, it was well enough; and if it was not, they might help themſelves by appealing. And Twiſden cited a Caſe where a Libel was for ſpeaking ſcandalous Words vel his Similia, and the Court would grant no Prohibition becauſe it was their uſual Way of Proceeding. Freem. Rep. 286, 287. pl. 332. Trin. 1675. B. R. Anon.

9. It was urg'd, That if it *appear on the Face of the Libel, that* the Eccleſiaſtical Court *has no Juriſdiction*, they may be prohibited without Suggeſtion; but Cur. contra, for the Suggeſtion is a fundamental Point, and is the Declaration on the Writ. 12 Mod. 435. Blaxton v. Honore.

Wherever the *Matter ſuggeſted* is *foreign to the Libel*, you *muſt plead it below* before you can have a Prohibition, otherwiſe where the Cauſe of Prohibition appears on the Face of the Libel. 2 Salk 551. pl. 13. Hill. 12 W. 3. B. R. Anon. cites it as held by Holt Ch. J. 12 W. 3. B. R.

(B. a. 3) In what Caſes it lies. In reſpect of the *Matter* being *Temporal*.

1. FOR *Rent reſerved for Tithes or Offerings*, Prohibition lies if the Party ſue in the Spiritual Court; for this is a Lay Debt. Br. Attachment ſur Prohibition, pl. 3. cites 44 E. 3. 32.

2. In *Debt*, if the *Defendant wages his Law*, by which the Plaintiff is barr'd, and after the *Plaintiff ſues thereof in the Spiritual Court*, Prohibition ſhall go. Mordant ſaid, He ſhall ſhew the Libel &c. Br. Prohibition, pl. 26. cites 13 H. 7. 16.

3. H. *deviſed*, That his *Goods ſhould be divided* between his Children *according to the laudable Cuſtom of London*; C. one of his Children, *libel'd for his Legacy*, averring, That the Goods amounted to ſuch a Sum, and ſo demanded ſo much Virtute Legationis. Wray Ch. J. was for granting a Prohibition, becauſe here is not any Legacy; for the Teſtator ſets forth his Meaning to be, That the Cuſtom of London ſhould be obſerved in the Diſpoſition of his Goods, and that C. is put to his Writ De Rationibili Parte Bonorum; But afterwards a ſpecial Conſultation was granted. 4 Leon. 12. pl. 45. Trin. 26 Eliz. B. R. Harvey v. Harvey.

Roll. Rep. 123. S. C. accordingly; and ſays, This Order was made becauſe Doderidge doubted, Whether they rejected this Plea for want of Form.

4. Libel againſt an *Adminiſtratrix to account for the Perſonal Eſtate.* She *made an Inventory* of the Goods, in which ſhe *inſerted ſome Goods which the Inteſtate had diſpoſed in his Life-Time by Deed* of Gift (which ſhe ſhewed) to a younger Child; all which ſhe pleaded, but the Court refuſed her Plea; and thereupon, and becauſe the Deed of Gift was pleaded before Sentence, a Prohibition was granted, quoad thoſe Goods, but not as to any Choſes en Action; But Day was given for a Civilian to come and ſhew Cauſe why the Spiritual Court rejected the Plea, and for want of ſhewing Cauſe the Prohibition to ſtand; And no Cauſe being ſhewn, the Prohibition ſtood. 2 Bulſt. 315, 316. Hill. 12 Jac. James v. James.

The Report ſays nothing that Prohibition was granted. And Glanvil ſaid, That if ſuch Suggeſtion was allow'd, no Suit would ever be in that Court

5. The Plaintiff exhibited a Bill, ſuggeſting a Title to a *Portion of Tithes* as Heir at Law &c. and ſet forth, That *the Lands out of which* this Portion of Tithes was iſſuable, *were ſo very obſcure that he could not know where to reſort*; and therefore having no Remedy at Common Law, he *pray'd that the Tertenants*, the Defendants, *might ſet out the Boundaries* of the Lands, and diſcover them to the Plaintiff; the *Defendants anſwer'd, That the Complainant was not Heir, but another*; and thereupon the Complainant moved for a Prohibition, and had it; for otherwiſe that Court would try who was Heir. 3 Nelſ. Abr. 294. pl. 11. cites Palm. 424. Duckett v. Barſey.

on Account of Equity in an Anceſtor; for the Defendant would plead a falſe Plea, viz. That the Plaintiff is not Heir &c. At length the Parties aſſented to try the Matter in Debate upon the Statute, and to join Iſſue upon this Point, Heir or not Heir; and ſo the Matter ended. The Caſe was Paſch. 2 Car. B. R.

S. C. Lev. 158. accordingly, the Suit there being only for Deprivation, he having obtain'd a Benefice.

6. Prohibition was mov'd for to the Spiritual Court upon *Suggeſtion, That* the *Plaintiff was ſued* there *for Forging Letters of Ordination, but* the Truth was, That *he was ſued* there *to deprive him, becauſe* he was *Mere Laicus*, and therefore a Prohibition was denied; but if one be ſued there to puniſh him by Corporal Pain or Fine &c. a Prohibition ſhall go. Sid. 217. Trin. 16 Car. 2. B. R. Slater v. Smallbrook.

Slader v. Smallbrook.— S. C. cited Gibb. 190. Hill. 4 Geo. 2. B. R. in the Caſe of Newcomb v. Higgs.

7. Libel in the Eccleſiaſtical Court againſt his Brother, Executor of his Father, *Pro Rationibili Parte* of the Goods, *according to the Cuſtom of the Province of York.* It was ſuggeſted for a Prohibition, that this is a temporal Cauſe founded on a Cuſtom, and for which there is an original Form in the Regiſter, and where there is any Remedy at Common Law, that Court ſhall not meddle; but adjudged by three Juſtices, abſente Hale Ch. J. that in this Caſe and the Caſe of a Penſion *Both Courts have a Juriſdiction.* 2 Lev. 128. Hill. 26 & 27 Car. 2. B. R. Trafford v. Trafford.

2 Salk 550. pl. 10. S. C

8. A Suit in the Spiritual Court may be *founded upon a Preſcription*, and where it is *againſt a Vicar for not performing Divine Service* in ſuch a Chapel, for which he received ſuch a Recompence &c. and a Prohibition ſhall not be granted, eſpecially if the *Preſcription is not traverſed in the Suggeſtion*; For it is an *Eccleſiaſtical Right*, to bind an Eccleſiaſtical *Perſon* to do an Eccleſiaſtical *Duty*; and tho' the Duty began by Cuſtom, yet the

the Perſon neglecting it may be ſued in the Eccleſiaſtical Court. If this was a Preſcription to bind Laymen, Holt Ch J. ſaid it might perhaps have another Conſideration: Ld. Raym. Rep. 578. Trin. 12 W. 3. Jones v. Stone.

(C. a) In what Caſes it lies, *where* the *Temporal Court cannot give Remedy*, but the Conuſance belongs to another. Fol. 513.

1. IF the Lord of Manor has Probate of Teſtaments within his Manor, if any ſuch Will be to be proved in the Eccleſiaſtical Court a Prohibition lies, becauſe the Juriſdiction thereof belongs to the other. Co. 5. *Orphans of London.* 73. b. This was ſaid by Popham Ch. J. in the Caſe of the Orphans of London. 5 Rep 73. b.

2. If any Orphan who is by the Cuſtom of London under the Government of the Mayor and Aldermen, ſues in the Spiritual Court, or Court of Requeſts, for any Goods or Chattels due by the Cuſtom of London, or for a Deviſe or Legacy, Prohibition lies; Becauſe the Government of Orphans belongs to the Mayor &c. Co. 5. *Orphans*, 73. b. S. P. 4 Inſt. 249 cap 52. S. 7. —— Heath ſaid, That he always conceived the Law againſt this Caſe, and Brampſtone Ch. J. Heath and Mallet J. were againſt granting a Prohibition, becauſe though the Orphan had the Privilege to ſue there, yet if he conceives it better and more ſecure for him to ſue in the Court of Requeſts, he may waive his Privilege of ſuing in the Court of Orphans, and ſue in the Court of Requeſts; For Quilibet poteſt renunciare Juri pro ſe Introducto. Mar. 107. Trin. 17 Car. B. R. pl. 185. Anon.

3. If the Council of the Marches of Wales holds Plea of an Eccleſiaſtical Matter, which appertains to the Prerogative Court, as to bind an Adminiſtrator to render an Account there which is not within their Inſtructions; though the Temporal Court cannot give Remedy, yet Prohibition lies. P. 17 Ja. B. *Drinkwater's* Will, per Curiam. Sir H. W. was ſued for a Legacy in the Council of the Marches, which was above the Value of 50 l. viz. 60 l. and for that Reaſon a Prohibition was prayed. To this it was anſwered at the Bar, That their Inſtructions were to hold Plea of Legacies of any Sum; but the Court doubted thereof, whether ſuch Inſtruction ſhould be good to warrant their Proceedings, becauſe Cauſes Teſtamentary and Legacies are ſuable in the Spiritual Court, and not elſewhere, notwithſtanding their Inſtruction; For they cannot warrant that which is not according to Law: and the Statute of 34 H. 8. warrants that Court. Cro. C. 595. pl 13 Mich. 16 Car. B. R. Sir Henry Williams's Caſe.

R. V. made K. his Executor, and now J S libelled in the Court of the Marches againſt K ſetting forth, that *after R. V. had made K the Defendant his Executor, he made J. S. the Plaintiff his Executor by a Will Nuncupative*, but that the ſaid *K. hindered his proving the ſaid Will.* A Prohibition was prayed and granted, becauſe this is a Matter determinable in the Spiritual Court, and therefore the Temporal Court ſhall not meddle with it. 2 Roll. Rep 495. Hill. 22 Jac. B R. Keffin's Caſe. —— Another Reaſon was, becauſe they *commenced* by Way of Execution, viz. *by Sequeſtration*, where their Conſtructions [Inſtructions] are, that after Contempt they ſhall proceed to Sequeſtration, whereas here there is not any Contempt. Et adjornatur.

4. If an Executor or Adminiſtrator of Goods within the Government of the Court of Orphans of London be ſued in the Eccleſiaſtical Court, to do any Thing againſt the Cuſtom of the Court of Orphans to impugn the Cuſtom, a Prohibition lies. Hobart, Caſe 213. *Lucy's* Caſe. Hob 245. pl. 215. Mich. 16 Jac. S C. accordingly, by the Name of Lucy's Caſe. —— Het. 132. S. C. by the Name of Laſh's Caſe, and ſeems only a Copy of Hobart, but is miſ-placed there under Hill. 4 Car.

Cro. C. 596. pl. 15 Mich. 16 Car. B. R. Anon. S. P. and ſeems to be S. C. but becauſe the *Suit* in the Spiritual Court *was by* J. S. who was only a *Curate and Sequeſtrator of the Rectory by Reaſon of the Suſpenſion of the Rector*, it was doubted, whether in this Caſe a Prohibition was grantable, J. S. being neither Parſon or Vicar. And it being inſiſted, that for Houſes Tithes ought not to be paid without ſpecial Cuſtom; and that the Statute 37 H. 8. is a new Law, and that thereby it is appointed How it ſhall be ruled, and before what Judges, and what Remedy ſhall be for the Party grieved unleſs their Order be obeyed, and that even then he may not ſue in another Place, nor before other Judges than the ſaid Statute appoints; and that the not granting a Prohibition would be a defrauding the Statute, and make it of no Effect, the Court doubted, and gave Day to hear Counſel on both Sides.——It was held per Cur. that Suit in the Spiritual Court was well brought in the Name of the Curate and Sequeſtrator. 2 Lutw, 1066. Mich. 13 W. 3. Barton v. Cookerman.

5. If a Parſon in London ſues for Tithes of a Houſe by the Statute of 37 H. 8. in the Eccleſiaſtical Court, a Prohibition ſhall be granted in B. R. though they cannot hold Plea thereof; For the Juriſdiction of this Suit belongs to the Mayor of London; For the Statute has expreſsly limited it to be ſued there. P. 16 Ja. B. R. between Doctor *Googe* and *Bond* and others, reſolved and Prohibition granted. M. 5 Ja. B. between *Bell* and *Moyle*, reſolved and Prohibition granted.

6. If a Man ſues before the Collector of the Pope (who has Power given to him by a Bull of the Pope to hold Plea) for a Matter ſpiritual which belongs to the Ordinary to determine; though the Temporal Courts cannot hold Plea thereof, yet a Prohibition lies; For the King has Judges Spiritual who have Juriſdiction to determine Spiritual Matters, as Archbiſhops and their Officers, Deans, and other Minters, and other Conſervators of Privileges, as St. John's of Jeruſalem, and others. 2 H. 4. 10. the Dicar of *Saltaſh's* Caſe adjudged.

Hob. 17. pl. 29. S. C.

7. If one will of his own Gree will put himſelf in Judgment of a Layman or other Clerk who furmiſes him to have Juriſdiction where he has not any, a Prohibition lies. 2 H. 4. 10. per Hank.

8. Where the Dioceſe of Winton extends to the Borough of Southwark as part of the County of Surry, and the Judge of the Audience of the Archbiſhop of Canterbury holds a Court ſometimes in Southwark, and cites Men there from the remoteſt part of the Dioceſs of Winton, being 60 Miles, and if they do not appear to excommunicate them, and would not abſolve them, unleſs they aſſent to tranſmit the Cauſe into the Archbiſhop's Court, by which the Statute of 28 H. 8. was eluded, yet Prohibition lies, though it be touching the Juriſdiction between two Spiritual Perſons; becauſe the King is to ſee that every Court keep within its Bounds, and though it has been heretofore conceived, that the * Archbiſhop has a concurrent Juriſdiction in every inferior Dioceſs, yet this was not as he † was Archbiſhop, but as he was Legatus Natus to the Pope; (for the Archbiſhop of York neither has it nor claims it within his Archbiſhoprick) and then this Power is ended, being abrogated with the Pope, and the late Practice, if any ſuch has been, was an uſurpation; And if the Archbiſhop of Canterbury ſhall be permitted to erect an Audience in every Dioceſs, he may take away all Cauſes out of the Inferior Courts. Hobart's Reports, *Doctor James's Caſe*. 24. b. Prohibition granted per Curiam.

* See Archbiſhop (A)

† Fol. 314.

9. 24 *E.* 1. Enacts, that *when the Chancellor or Chief Juſtice (upon Sight of the Libel) conceive that the Plaintiff cannot have Remedy in any Temporal Court, the Plaintiff ſhall have Conſultation, viz. the ſaid Chancellor or Chief Juſtices ſhall write to the Eccleſiaſtical Judges before whom the Cauſe depends, that they proceed therein notwithſtanding the King's Prohibition.*

10. 18 *E.* 3. *Stat.* 3. *cap.* 5. Enacts, that *no Prohibition ſhall be awarded but where the King hath Conuſance.*

11. If

11. *A. lying Sick* upon his Bed *made his Will, and afterwards faid to his Executors* named in the Will, *I will that B fhall have 20 l. more if you can fpare it*; and the *Executor anfwered* and faid, *Yes, forfooth*; but *no Codicil was made* of the fame Legacy. And a *Bill was preferred in the Spiritual Court for a Legacy*, whereupon the Executor prayed a Prohibition; and it was holden by this Court, that although this Court has not Power to hold Plea of the Thing libelled for there in the Spiritual Court, yet it has Power to limit the Juriſdictions of other Courts; and if they abuſe their Authority, to grant a Prohibition, and cited 2 H. 4. 10. but it was doubted, whether the Spiritual Court, as this Caſe is, might give Remedy to the Perſon for the Legacy; for the ſame not being annexed to the Will by a Codicil, *it was but Fides Commiſſum*; and ſo the Doubt was, whether the Spiritual Court might hold Plea of it; for if they cannot hold Plea of it, then in this Caſe a Prohibition may be lawfully granted, although that this Court have not Power nor juriſdiction of the thing itſelf. The Court would be adviſed of it, and therefore it was adjourned. Godb. 246, 247. pl. 344. Paſch. 12 Jac. in B. R. Cartwright's Caſe.

12. The Defendant ſuggeſted for a Prohibition to a Libel for *Tithes*, that the Tithes did ariſe *within a Peculiar* and that it was againſt the Statute of H. 8. to ſue for them before the Biſhop, the Archdeacon having Authority by Commiſſion from the Archbiſhop; but if he had Authority by Compoſition, this ſhall not take away the Juriſdiction of the Biſhop; but if he had Authority by Preſcription it ſhall. In the principal Caſe it is not ſhewn by what Commiſſion he has Authority, ſo as it appears not whether it be excluſive [or] concurrent therewith, and for that Reaſon a Conſultation was granted Niſi &c. 2 Roll. Rep. 357. Trin. 21 Jac. B. R. Gaſtrell v. Jones.

(D. a) In what Caſes it lies, *though the* ſame *Court which grants it cannot give Remedy*, but the Conuſance belongs to another.

1. IF a Man be ſued at the Council of York for a Matter within the Juriſdiction of Durham, a Prohibition ſhall be granted; for Durham is a County Palatine, and has a Chancery, and the Writ of the King does not run there, nor is it within the Inſtructions of York. P. 16 Ja. B. R. between *Pierſon and Sley*, a Prohibition granted.

2. If the Vice Warden of the Stanneries in Cornwal, when a Suit is in one of the Dutchy Courts of Record in the ſame County, pretending himſelf to have Power to order all Things there depending, upon a Petition made to him as a Chancellor, makes a Decree by Way of Equity, he not having any Court, but upon a Petition preferred and Notice given to the other Party, and Examination of ſome Witneſſes makes a Decree Summarie & de Plano & ſine Figura Judicii, a Prohibition lies, upon Surmiſe that he did this out of any Court and before any Suit commenced before him, or in any Court. Mich. 9. Car. B. R. between *Adams* and *Adams*. Reſolved per Curiam praeter Richardſon; In which Caſe the Decree of Coryton the Vice Warden was confirmed by the Lord Warden; But it appears alſo in the ſame Caſe that Coryton claimed this Authority not as Vice Warden, but as Deputy-Steward to the Lord-Warden, and ſo to have Power over the Dutchy Courts as this Court was, to wit, Callſtock, where the Action was brought; But Coryton, upon Examination, could not make

S. C. Cro. C. 332. pl. 19. Adams v. Ld Warden of the Stanneries and his Deputy, and Adams & al. and the Sheriff of Cornwall. That they proceed in Order and Decree for Payment of Money to them without Cauſe ſhewn, or ſufficient Appeal from the De-

fendant to appear, and without any Answer or Sentence of Court, and that so the Proceedings were Coram Non Judice.

appear that he was Deputy-Steward of the said Courts; Also in this Case a Decree was made for some Persons who were not Parties to the Petition, which was in Nature of a Bill as was pretended.

So where the Plaintiff pray'd a Prohibition *to the Grand Sessions of Wales*, for that the Defendant had brought a *Bill* against him *there to discover a Deed* concerning his Title, and *supposed to be in the Possession of the now Plaintiff*, and *suggests that he lives out of the Jurisdiction of the Court*, and ought not to be sued there; And *it was moved, that this* was no Cause for a Prohibition, because the Substance of the Bill *is concerning* a Title of *Land which is local, and ought to be tried where the Land lieth*, which being within the Jurisdiction, and lying in the same County where the Sessions are kept, the Trial ought to be there; But a Prohibition was granted; for this being in the Nature of a Chancery Suit, *the Process is personal*, by summoning of the Person, which they cannot do, he living in another County, and out of the Jurisdiction; for by that Means you would run a Man to Contempt, and thereby grant a Sequestration of his Lands, that is no Way under your Authority, or subject to the Observance of your Power. Comb. 168. Hill. 10 W. 3. in B. R. Tranter v. Duggen. ——— 12 Mod. 138. Mich. 9 W. 3. S. C. Ordered to shew Cause next Term. ——— And it being then moved again, a Prohibition was granted, the Court saying they would not prohibit their Proceedings in this Court of Equity, but only their Proceeding on any Process against any living out of their Jurisdiction; For else if he did not appear there, they would sequester the Estate he had within their Jurisdiction; Then it was moved, That Trantor might have pleaded this below to the Jurisdiction of the Court; But the Court said, If he had lived within the Locality of their Jurisdiction, tho' in a Franchise, or Place exempt, it might have been another Matter; but where a Man lives out of the Limits of their Jurisdiction, it is no Reason to force him to appear there to defend himself. Ibid. 172, 173. Hill. 9 W. 3. S. C.

3. A *Bill* was preferred *in* the Exchequer of *Chester against two* Executors, *one* of them *living in Chester*, and *the other in London*, relating to an Agreement made with their Testator in the County Palatine. He who lived in Chester put in his Answer, and the *Process was awarded to him who lived in London*, and an Injunction granted to stay their Proceedings at Common Law; It was insisted, that this Agreement was made in the County Palatine, and the Privilege followed the Person who dwelt there; But Hobart Ch. J. said, that by this Means one dwelling at Dover, might be forced to come and answer to a Bill in Chester, which would be infinite Trouble, and the Matter is transitory. And resolved that the Court of Chester had no Jurisdiction in this Case, but it belonged to the Court of Chancery at Westminster; And a Prohibition was granted. Hutt. 59. Grigg's Case.

So where E. brought a *Bill of Foreclosure* in the Court of Grand Sessions for the County of Montgomery, against V. and others, to foreclose V. *of his Equity of Redemption upon a Mortgage* of Lands that lay in that County; And a Motion was made for a Prohibition upon Suggestion that V. did not inhabit in that County, but lived in England, and that E. had sued out Process in order to get a Sequestration of V's Lands that lay in Mongomeryshire. After Argument the Court made the Rule for the Prohibition absolute; Because the Suit is in Nature of a Suit in Chancery, and the *Process is personal* to summons the Party, *which cannot be served* in this Case, *V. living in England out of the Jurisdiction of the Court* of Grand Sessions, and if he could not be served with the Process he could not be guilty of a Contempt in not appearing upon it, and then by Consequence no Sequestration ought to go against his Lands tho' they lay in that County, and this is the same Case in Effect as that in Comb. 468. Tranter v. Duggen [above] in Lord Ch. J. Holt's Time; And tho' it was objected, that the Court of Chancery of England had their Process served beyond Sea, and brought Parties into Contempt, and this of the Grand Sessions, was an original Jurisdiction; The Court said this was not to be compared to the Chancery (if they did proceed so) because *this Jurisdiction* if it was *an original one, yet it was a limited one and confined to that County*. The Rule for the Prohibition was made absolute. Ld. Raym. 2 Rep. 1408. Trin. 11 Geo. Vaughan v. Evans. —— 8 Mod. 374. S. C. & P. And says it seems hard in personal Actions to punish a Man not within the Jurisdiction of the Court, and that it is said in Hutton that it cannot be done.

(D. a. 2) Proceedings. *What* must be *done* in order *to get a Prohibition.*

*This Word (*Rehearsed*) is very material, for this additional Act

1. 2 & 3 *E.* 6. *cap.* 13. *S.* 14. ENACTS, That *if any Party at any Time hereafter, for any Matter or Cause before* * *rehearsed, limited, or appointed by this Act to be sued or determined in the King's Ecclesiastical Court, or before the Ecclesiastical Judge, do sue for any Prohibition in any of the King's Courts, where Prohibitions before this Time have been used*

to be granted; That then in every such Case the † *same Party, before any Prohibition shall be granted to him or them, shall bring and deliver to the Hands of some of the Justices or Judges of the same Court, where such Party demanded Prohibition, the very true Copy of the Libel depending in the ecclesiastical Court concerning the Matter wherefore the Party demandeth Prohibition, subscribed or marked with the Hand of the same Party, and under the Copy of the said Libel shall be written the Suggestion, wherefore the Party so demandeth the said Prohibition* ‡, *and in Case the said Suggestion by* ‖ *two honest and sufficient Witnesses at the least, be not proved true in the Court where the said Prohibition shall be granted within* †† *6 Months next following after the said Prohibition shall be so granted and awarded, that then the Party that is letted or hindered of his or their Suit in the ecclesiastical Court by such Prohibition, shall upon his or their Request and Suit, without Delay have a Consultation granted, in the same Case in the Court where the said Prohibition was granted, and shall also recover double* ** *Costs and* ‡‡ *Damages against the Party that so pursued the said Prohibition, the said Costs and Damages to be assigned or assessed by the Court, where the said Consultation shall be so granted; for which Costs and Damages the Party, to whom they shall be awarded, may have an Action of Debt by Bill, Plaint, or Information in any of the King's Courts of Record, wherein the Defendant shall not wage his or their Law, nor have any Essoign or Protection allowed or admitted.*

of 2 Ed. 6. extends only to predial and personal Tithes; but in as much as this Act doth rehearse the Statute of 27 H. 8. cap. 20. & 32 H. 8. cap. 7. both which Statutes extend unto all Kinds of Tithes, viz. predial, personal, and mixt, and to Offerings also; therefore this Branch extends to them all.

And it is to be observed that this Branch respects the Cause of Suit, viz. for Tithes or Offerings, and not the Cause of the Prohibition 2 Inst. 662. cites Dyer 2 Eliz. f. 170. —— This Act *extends to Suits for small Tithes* as well as great. Ld. Raym 2 Rep. 1172. says it was so agreed by the Counsel and the Court Trin. 4 Annæ. in the Case of Foy v. Lister.

† Exception was taken, because the *Suggestion was delivered by Attorney*, whereas it ought to have been in proper Person, and to that Purpose was cited this Statute; And it was affirmed the Clerks of the Court that the common Use and Practice for 20 Years had been not to exhibit such Surmises or Suggestions by Attorney; But it was resolved by the whole Court that it ought to be Attorney. Le. 286. pl 388. Pasch. 20 Eliz. B. R. Sir Gilb. Gerrard v Sherrington.

The Suggestion ought to be *entered in the Office*, otherwise a Consultation shall go. 2 Show. 308. Straker v Baynes.

‡ This Clause was made in Favour of the Clergy for Proofs by Witnesses, which they had not at the Common Law. 2 Inst. 662.

If the Suggestion be in the *Negative*, as if the Proprietary of a Parsonage impropriate sue for Tithes, and the Cause of the Suggestion be, that the Parsonage is Not Impropriate; or if the Parson of Dale sue for Tithes of Lands in that Parish, and the Party sue a Prohibition for that the Land lieth not in that Parish, as that the Parson that sueth for Tithes was Not Inducted, &c. or any the like Cause in the Negative of any Matter of Fact, he shall not produce any Witness by Force of this Branch, because a Negative cannot be proved; and therefore a Prohibition upon Causes in the Negative remains at the Common Law. 2 Inst 662.

If a Man plead a Deed in Bar wherein Witnesses be, and Issue is joined Non est Factum, and Process is awarded against the Witnesses who are joined to the Jury, and it is found Non est Factum, notwithstanding this Rejoinder, the Party grieved shall have an Attaint; For it is a Maxim in Law, That Witnesses cannot testify in the Negative, but in the Affirmative; otherwise it is if they found it to be the Deed of the Party in the Affirmative, there no Attaint doth lie Vid. 11. Ass p 19 22 Ass p. 15 23. Ass. p. 11. 40 Ass p. 23. 12 H. 6. 6. F. N. B 106. (B). So it is, if the Suggestion be grounded upon any Matter in Law, for that the Suit for Tithes in that Kind are not due by Law. As if the Libel be in the Ecclesiastical Court for the Tithe of Tiles, Turfs, or the like, there need no Witnesses to be produced; for that Matters in Law are to be decided by the Judges, and not to be proved by Witnesses, and Quod constat Curiæ, Opere Testium non indiget, and the Cause of this Prohibition, or the like, appears in the Libel itself. 2 Inst 662.

If a Prohibition be *granted upon Matter at Common Law*, as upon personal Agreement between the Parson and Parishioner for his Tithes, and not upon Matter within the Statute of 2 E. 6 cap 13. the *Suggestion shall not be proved within the 6 Months according to the Statute*. Per tot. Cur. Litt. Rep 297. Trin 5. Car. C. B. Anon.

‖ If a *Suggestion consists of* 2 *Parts*, it was said to be sufficient to produce one Witness to the one, and another to the other. Vent. 107. Hill. 22. & 23 Car. 2 B. R. in Robson's Case.

The Court agreed, That *slight Proof* of the Suggestion *will serve*, viz. *as he thinketh or believeth*; and that if there be not any Certainty in the first *Proof*, it *cannot be supplied* by good Proof *after the 6 Months*, because the Statute is strict in this Matter; But, within the Time, better Proof may be given, and if the *Proof* be *within the Time* it *may be certified after the 6 Months*. Litt. Rep. 155. Trin. 4 Car C B Stiddar al. Toddard, al. Goddard v. Tiler. ——Precise Proof is not requisite upon this Statute, but Proof by *Hearsay* is sufficient Palm. 377 Trin. 21 Jac. B. R. Bennet v Snell.—If 2 affirm they have known it so or so, or that *Common Fame* is so, it is sufficient. Noy 28. Webb v Batts. 44 Anon.

†† The 6 Months to prove the Suggestion must be *intended in Term Time*, and the Vacation is no Part of it. Mo. 513 pl 688. Mich. 41 & 42 Eliz per tot. Cur. Anon. —— The Proof is good tho' made in the Vacation Noy. 30. in Skinner's Case, cites Pasch. 43 Eliz. B. R. Pottinger v Johnson. —— and [illegible] Case

Caſe in Mo. 573. was denied 2 Salk. 554. Trin. 4 Annæ, B. R in the Caſe of Foy v. Liſter. ——— Ld Raym. 2 Rep. 1171. accordingly in S C. ——— They ſhall be taken for Half a Year, and in the principal Caſe the Proof was offered the *laſt Day* of the 6 Months after the Computation of 28 Days to the Month; But becauſe it *was Dies Dominicus*, the Judge refuſed to take it, but he took it the Day after and well. Litt. 19 Hill. 2 Car. C. B Dr. Clea v. His Chaplain.

** H libell'd for Tithes againſt C who ſuggeſted for a Prohibition a Modus Decimandi as to Part of the Tithes demanded, and to the Reſidue ſuggeſts a Contract executed in Satisfaction of the Reſidue, and becauſe he proved not his Suggeſtion within 6 Months H. had a Conſultation and Coſts aſſeſſed Afterwards H. brought Debt in C. B. for the Coſts &c and had Judgment; It was aſſign'd for Error (among other Things) that no Coſts ought to be aſſeſſed or adjudged in the Cauſe above, becauſe the Prohibition is grounded ſolely upon the Modus Decimandi, which needs Proof, and upon the Contract between the Parties which requires no Proof, and the Suggeſtion being intire, and Part of it needing no Proof, they could not give any *Coſts*; For that *is only where the whole Matter of the Suggeſtion requires Proof*; And therefore the mixing of the Contract with the Manner of Tithing, privileges the Whole as to the Matter of Coſts; but they might grant a Conſultation as to the Part of the Suggeſtion which concerned the Manner of Tithing, but not for the reſt; which was granted by the whole Court, Yelv. 119. Hill. 5 Jac. B R. Cobb v. Hunt. ——— Brownl. 98 Gobb v. Hunt S. C. and ſeems to be only a Tranſlation of Yelverton.

‡‡ This Statute does not give any Damages for Subſtraction of Tithes merely; but if the Tithe be firſt ſet forth and then ſubſtracted, there the Parſon ſhall recover treble Damages, becauſe he had once an Intereſt in them Godb. 245. pl. 341. Hill. 11 Jac. C. B. Baldwin v. Girry.

This Act ſhall not give Power to any eccleſiaſtical Judge to hold Plea of any Matter againſt the Meaning of the Statute of Weſtm. 2 cap. 5. Articuli cleri, Circumſpecte agatis, Sylva Cædua, the Treatiſe De Regia Prohibitione, nor of 1 *Ed.* 3. 10. *nor of any of them, nor where the King's Court ought of Right to have Juriſdiction.*

2. Upon Suggeſtion of a Modus the Court do uſe to grant Prohibitions without *Notice* given to the other Party. Freem. Rep. 75. pl. 95. Trin. 1673. Anon.

S. P. cited Arg. Wm's Rep 659 — Vent. 181. St Aubin v. Cox.

3. Where the Matter ſuggeſted for a Prohibition appears upon the Face of the Libel we never inſiſt upon an *Affidavit*, but unleſs it appears upon the Face of the Libel, or if you move for a Prohibition, as to more than appears upon the Face of the Libel, to be out of their Juriſdiction, you ought to have Affidavit of the Truth of your Suggeſtion. Per Holt Ch. J. 2 Salk. 549. Trin. 11 W. 3. B. R. Godfrey v. Lewellin.

4. If a Suit be in the Spiritual Court for a *Mortuary*, a Prohibition cannot be granted without *denying the Cuſtom in the Spiritual Court*. Ld. Raym. 609. Mich. 12. W. 3. B. R. Johnſon v. Oldham.

5. *Rule* was made *to ſhew Cauſe* why a Prohibition ſhould not be granted to ſtay a Suit againſt the Plaintiff in the Court of the Archdeacon of Litchfield, *for not going to his Pariſh Church*, nor any other Church on Sundays or Holydays, nor receiving the Sacrament thrice a Year, upon Suggeſtion of the Statute of Eliz. and the Toleration Act, and then qualifying himſelf within the Act, and alleging that he pleaded it below, and they refuſed to receive his Plea. Cauſe was ſhewn that this Fact was falſe, and that the Plaintiff was not a Diſſenter, nor had qualified himſelf ut ſupra, and therefore hoped the Court would *not* allow the Rule to ſtand, unleſs he had an Affidavit of the Fact; For by that Means any Perſon might come and ſuggeſt a falſe Fact, and oust the Spiritual Court of their Juriſdiction; Quod Curia conceſſit, and therefore the Rule was *diſcharged*, the *Counſel for the Plaintiff having no Affidavit*. Ld. Raym. 2 Rep. 1211. Trin. 4 Ann. Burdet v. Newell.

6. After *Sentence* in the Spiritual Court *for defamatory Words* the Court will not grant a Prohibition upon *Suggeſtion that they were ſpoke in London, and are actionable there by the Cuſtom*; For the Courts at Weſtminſter are not Ex Officio to take judicial Notice of ſuch Cuſtom after Sentence; but *if* ſuch Matter had been *moved before Sentence*, it *need not* then *be proved by Affidavit*, becauſe it is ſufficiently known. 8 Mod. 176. Trin. 9 Geo. Brook v. Winfield.

(E. a) How it may be Granted. To part.

See (F) pl. 1, in the Notes. (D) pl. 12. and the Notes. — See (F. a)

1. If a Suit be in the Spiritual Court for a Thing Spiritual mixed with a Matter triable by the Common Law, a Prohibition shall be granted Quoad the Matter triable at the Common Law, and not for the Whole if they may be severed. Mich. 14. Ja. B. R. *Fish and Chamberlaine* Resolved. Contra H. 8. Ja. B. Per Curiam *Fenor's* Case.

See (L) pl. 1, 2 in the Notes there against pl. 1.

2. As if the Suit be in the Spiritual Court by a Viscount to avoid an Institution of another who is instituted to A. his Chapel of Ease as he pretends. If the other suggests that A. is a parochial Church by itself. a Prohibition shall be granted as to the Trying whether it be a Parish by itself, because they shall not try the Bounds of the Parish; but not for the Institution; because it appertains to them to * examine whether it be well made. Mich. 14. Ja. B. R. *Fish and Chamberlaine* the Prohibition granted; But Haughton said, That they cannot well try the Institution without trying the Bounds of the Parish.

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3. If a Testament be made of Land and Goods, and the Suit in the Ecclesiastical Court is for the Goods, and the Question is Whether the Testator revoked Will in his Life, or not, a Prohibition shall be granted Quoad the Land, and not Quoad the Goods. H. 13. Ja. B. between *Athill and Athill* Resolved.

Where such Will was endeavoured to be proved Per Testes, a Prohibition was granted as to the Lands, but not for the Legacies. 2 Roll. Rep. 431. Trin.

4. If a Man sues for the Probate of a Testament in the Spiritual Court, in the Testament Land is devised, and other personal Things, a Prohibition shall be granted Quoad the Land, and not Quoad the Residue. H. 14. Ja. B. R. *Bancroft's* Case. Prohibition is granted.

21. Jac. Fasbio v. Gilbert. — F. N. B. 42. (P) S. P. and in Margin cites 37 H. 6. 9. per Ashton 46 E. 3. 32. S. Prohibition. And in the New Notes there (a) cites 22 E. 4. Consultation 5. 8 H. 5. pl. 19. 38 H. 6. 14. 40 E. 3. 36 H. 6. Prohibition 3.

A Prohibition was awarded generally, and afterwards a *Consultation Limited non procedant as to the Land.* Mo. 873. in Gery's Case, pl. 1217. cites 45 Eliz. Broke v. Lucas. — The Testator devised Houses, Lands and Goods, equally to be divided amongst his 3 Daughters who were all married, the Legatees libelled in the Spiritual Court for their Legacies; but a Prohibition was granted Quoad the Lands and Houses in which the Testator had Fee or Freehold, the Remedy for those being in Chancery; But a Clause was ordered to be inserted in the Prohibition that they may proceed for the Goods. Palm. 120. Mich. 17 Jac. B. R. Desbunnet v. Ferbanke.

5. Upon Allegation in such Case, that the Devisor revoked the Will before his Death, a Prohibition shall be granted Quoad the Land. H. 14. Ja. B. R. *Nevil and Boyer v. Winchcomb.* Prohibition is granted, upon the Will of Sir J. Norris.

6. If a Man by Will devise all his Land and Goods to a Stranger and dies, and after his Death Administration is granted to another upon Suggtion that the Devisor was Non Sanæ Memoriæ at the Time of the Devise, a Prohibition may be granted to stay the Probate of the Will as well for the Goods as for the Land; Because otherwise the Proof of the Will for the Goods will be an * Evidence for the Land; and here there is an Administrator who may sue the Executor in the mean Time, and so the Will may be tried at the Common Law. H. 12. Ja. B. R. Sir *John Egerton's* Will Resolved, and Prohibition granted.

S. C. Roll. Rep. 21. accordingly. — Cro. J. 346. Egerton v. Egerton accordingly. But a Difference was taken and agreed by the whole Court, That in Case of such Will they will not grant a Prohibition for the Whole in the Generality; but if in such a Case it be specially alleged, That the Testator was Non Sanæ Memoriæ, a Prohibition shall be granted for the Whole; but not in all Cases, for that would tend to hinder all the Proceedings in the Ecclesiastical Court, and the Law allows a Probate there; Because before a Will is proved, the Executor cannot bring any Action. — S. C. 2 Bulf. 212. accordingly; and that tho' a Prohibition may be granted as to such Will, yet it ought to be but in very special Cases only, as the Principal Case was held at first upon to be; but to be a Case of great Necessity, and that it doth deprive a Person of a Benefit for the finding of a

great Houſe and Family which was diſinherited by the ſaid Will; and ſo a Prohibition was granted for the Whole—Bulſt. 111. Paſch. 9 Jac. Anon. Prohibition was granted for the Whole; For the Land being the more conſiderable Thing ſhall draw all to it, and make the Probate of all to be here, and not in the Spiritual Court for any Part. —— A Prohibition was granted to the Proving a Will of Lands and Goods. Bulſ. 199. Paſch. 10 Jac. Mary Semaine's Caſe —— Cro C 115. pl. 7. Trin. 4 Car. a Prohibition was granted generally for both Lands and Goods, and there being an Allegation of its being revoked, there ſhall be no diſjoining in the Prohibition; But if one makes ſeveral Wills, viz. one of his Lands and another of his Goods, and a Revocation is alleged of both, there a Prohibition ſhall be granted for the one and denied for the other. Denn's Caſe.—— Het. 113. Denne v. Sparkes S. C. ——— No Prohibition ſhall go in any Manner to the Eccleſiaſtical Court to retain the Probate of a Will, for the Probate doth not affect a Deviſe of *Land*, tho' 2 Cro. 346. [Egerton v. Egerton] was objected; to which Holt anſwered, That it had been adjudged contrary to that Caſe ever ſince. Cumb 170. Hudſon v. Fiſher

* The Probate of the Will in the Spiritual Court, for the Land will not prejudice the Heir; For it ſhall not be Evidence at Common Law; nor ſhall the Examination of the Witneſſes there be given in Evidence at Common Law. Per Berkley J. Cro. C. 396 in the Caſe of Netter v. Brett.——— S P. by Fleming Ch. J. Paſch. 10 Jac. Bulſt 199. in Mary Semaine's Caſe. —— S. P. mentioned. 2 Ch. Caſes 202. in the Caſe of Rothwell v. Huſſey. —— See (F. a) pl. 1, 2.

7. Libel was *for Tithes and Agiſtment to ſeveral Values.* After Sentence a Prohibition was granted, that they ſhould not proceed as to the Tithes only. Mo. 873. pl. 1217. in Gerey's Caſe, cites 1 Jac. Cook v. Staffford.

8. The Suggeſtion was a *Modus for a Farm*, and the *Libel was for Tithes and Offerings*; ſo that the *Suggeſtion did not extend to the Offerings*; wherefore it was ruled per Cur. That Prohibition ſhall be only *Quoad*; and ſo it was ruled in the Caſe of **Coleman v. Gilbert**, upon a Motion the other Term. Sid. 251. Paſch. 17 Car. 2. B. R. Luſh v. Webb.

An Article (among others) was againſt a Biſhop, *that the Biſhop of the Diocеſs for the Time being was Viſitor of a Publick School, and that this Biſhop had perverted the Charity* to other Perſons than directed by the Founder, *and upon his Viſitation had carried away all the Books which concern'd the Charity, and the very Grant* by which it was given, and govern'd now at his Pleaſure. As to the other Matters, a Prohibition was denied, but was granted as to this of the School, which was held to be merely Temporal. Carth. 484. Paſch. 11 W. 3. Biſhop of St. Davids v. Lucy —— 12 Mod. 239. S. C. & P.

9. A Biſhop was libell'd againſt *for Simony*, and alſo for *taking exorbitant Fees for giving Inſtitution*, and for *miſapplying Charities*, and converting them to his own private Uſe, *and* for *certifying that ſeveral* Perſons *had taken the Oaths*, when in Truth they had not. It was ſuggeſted for a Prohibition, That theſe Things are puniſhable in the Temporal Courts, and as to the Fees, that there was a Cuſtom for taking ſo much for Fees for granting Ordinations; and a Prohibition was granted quoad &c. 5 Mod. 433. Paſch. 11 W. 3. The Biſhop of Cheſter's Caſe. [But it ſeems miſprinted, and that it ſhould be The Biſhop of St. David's, viz. Dr. Watſon's Caſe.

10. *Adminiſtration* was *granted to the Wife*; the *Mother brought an Appeal*, *alleging* among other Things that *the Wife had covenanted ſhe ſhould not meddle*, for that ſhe was well provided for otherwiſe; and it was ſaid that they had nothing to do with this Matter in the Spiritual Court. But it was inſiſted that this fell incidently into the Principal Matter, of which that Court had Cognizance, and it did *not appear whether the Delegates would admit this Allegation*, or not, and there is *no Inſtance of a Prohibition quia timet*; a Prohibition was granted quoad that Allegation only. 1 Vent. 313. Trin. 29 Car. 2. B. R. Baker v. Baker.

11. Prohibition on a Suggeſtion of a Modus laid by Way of *Cuſtom, for a Groat to be paid for every Hogſhead of Cyder, or 2s. per Annum in Lieu of all Tithes of all Grain and Fruit in any ſuch Orchard growing*; and another Cuſtom of the Parſon's having the *Sole Milking and Milk of all our Milch Kine for ſo many Weeks after Midſummer, and* ſo many Weeks after *Michaelmas, in Lieu of all Tithes of Milk.* The Statute of Improvement was ſuggeſted as to Part; and thereupon prayed a Prohibition for Tithes quoad hoc; and upon Debate it was granted. 2 Show. 460. 461. pl. 428. Hill. 1 and 2 Jac. 2. B. R. Hill v. Harris.

Cumb. 200. S C accordingly.—— 12. A Suit was for *Inceſt in marrying a firſt Wife's Siſter.* The Plaintiff in the Prohibition ſuggeſted that the *ſecond Wife was dead, and he had*

a Son by her, to whom an Eſtate was deſcended as Heir to his Mother; and that tho' he had pleaded this Matter, they went on to annul the Marriage, and baſtardize the Iſſue. Per Cur. A Prohibition ſhall go *as to the Annulling the Marriage, and Baſtardizing the Iſſue*, but they may proceed to *puniſh the Inceſt*. 2 Salk. 548. Harris v. Hicks. 12 Mod 35. S. C. accordingly ——4 Mod. 182. Paſch. 5 W. & M. B. R. S. C. by the Name of Hinks v Harris.——Carth. 271. S. C. accordingly

13. A Libel was *for Words ſpoken of a Parſon, and* alſo *for Brawling in the Church-yard*. A Prohibition was granted as to the Words, but not as to the Brawling. 3 Salk. 288. pl. 9. Paſch. 2 Ann. Brown v. Tanner.

(F. a) How it ſhall be granted [*as to a Part.*]

See (E. a)

1. IF a Man deviſe Goods and Land, upon a Suggeſtion that the Deviſor was Non compos mentis at the Time of the Deviſe, a Prohibition ſhall be granted to ſtay the Probate Quoad the Land only, and not Quoad the Goods, becauſe if it ſhall be granted Quoad the Goods, the Executor cannot have any Action in the Mean Time, which would be inconvenient. M. 14 Ja. B. R. Prohibition ſo granted. 2 Bulſt. 210. Egerton v. Egerton. —— Cro. J. 346. S. C. —— Roll. R. 21. S. C. but ſee (E. a) pl. 6. and the Notes there.

——This was the Practice heretofore, but now no Prohibition will be granted in ſuch Caſe; for unleſs Probate be, the Executor cannot ſue for Debts which might be inconvenient. And to grant Prohibition as to the Land would be in vain, becauſe as to the Land the Probate is no Evidence either Pro or Con in any Court of Law, but as a Proceeding Coram non Judice; yet it is good as to the Goods. 2 Salk. 552. Partridge's Caſe.

2. If a Man makes his Will in Writing, and thereby deviſes ſeveral Legacies, and deviſes thereby alſo certain Land to his Executor here after nam'd in Fee for Payment of Debts and Legacies, and after names the Executor, who proves the Will, and another appeals to revoke the Probate, no Prohibition lies either for the Land or Goods, or otherwiſe, upon Surmiſe that Teſtator was Non compos mentis for the Inconvenience which will enſue as to the Legatees and Perſonal Eſtate, and the * Probate is no Evidence as to the Land at Common Law. Tr. 1650. between *Bowles and Clerk* adjudged per totam Curiam, and Prohibition denied to the Prerogative Court. Sty. 228. S. C. accordingly. * See (E. a) pl. 6.

3. If a Man makes his Will, and diſpoſes of his Goods, and then makes A. B. his Executor thereof, and after deviſes his Lands; in this Caſe if the Executor be cited into the Spiritual Court to prove the Will Quoad the Land, a Prohibition lies Quoad the Land; for theſe are ſeveral Wills. M. 10 Car. B. R. Reſolved per Curiam, and Prohibition granted upon Stephen Brett's Will, between *Brett Nectar and Stephen Brett*. But Hill. 10 Car. a Conſultation was granted upon ſolemn Argument in this Caſe, upon View of the Will, by which it appeared that it was One Will, tho' [there were] ſeveral Parts thereof; and this was granted by Jones and Barkley againſt the Opinion of Croke; and they ſaid that in the Caſe of Ca. 2. * *Marquis of Wincheſter*, a Conſultation was alſo granted as well for the Land as for the Goods. Intratur. Mich. 10 Car. Rot. 132. Jo. 355. pl. 3. Netter v. Brett. S. C. accordingly. —— Cro. C. 301. S. C. That the Land was charg'd with a Condition for Payment of certain Legacies; and that the * Fol. 316

Reaſon of Croke's Doubt was, becauſe the Land was the Principal, and they have no Authority to meddle with any Will concerning Land, and that there might be an Inconvenience if the Will there ſhould be countenanced or diſcountenance'd concerning the Land; and becauſe a Prohibition was granted, he was of Opinion that the Parties ought to purſue the uſual Courſe for the Defendant to appear, and the Plaintiff to declare. But the other Juſtices gave a Rule that Conſultation be awarded Nifi &c.—Ibid. 305. S. C. and S. P.—Upon Motion for a Prohibition, becauſe they proceeded to prove a Will of Lands and Goods, Hale Ch. J. ſaid, Their proving the Will ſignified nothing as to the Land, and that the Will is intire, and

W 2

we are not advis'd to grant a Prohibition in ſuch Caſe. Mod 90. pl. 57. Mich. 22 Car. 2. B. R. Anon. ——S. P. Comb. 46. Paſch 3 Jac. 2. B. R. Anon. And Holloway J. ſaid that Witneſſes might well be examined there to the whole.——* 6 Rep. 23. —See (E. a) pl. 3. 4. and the Notes.

Mo 873 pl. 1217 Gerey's Caſe S. C. accordingly —— Godb 225 pl. 341. S. C. Baldwin v. Girry.

4. In a Suit in the Eccleſiaſtical Court, if the Court there gives Sentence for the Plaintiff, and gives to him treble Damages, where by the Statute they cannot give but Double Damages, a Prohibition ſhall be granted; but this ſhall not be generally upon the Cauſe, but that they ſhall not proceed to the Execution of the Sentence Quoad the Treble Value without more, and if they there may by their Law ſever it, they may proceed to the Execution for the Double Value. Hil. 11 Ja. B. between *Baldwin and Geery* per Curiam reſolved, and Prohibition ſo granted.

5. If a Man makes a Will in Writing for his Land only, and thereby diſpoſes his Land, and does not make him Executor of his Goods by the ſame Will, but this is a diſtinct Will of it ſelf, and is endeavoured to be proved in the Spiritual Court, a Prohibition lies; becauſe it is made deviſable by the Statutes of 32 & 34 H. 8. and concerns real Things with which the Spiritual Court has nothing to do, and were not Teſtamentary at the Common Law. H. 10 Car. B. R. between *Brett and Nectar* per totam Curiam agreed.

6. If a Man libels in the Eccleſiaſtical Court for two Things, whereof the one belongs to the Juriſdiction of the Eccleſiaſtical Court, and the other is triable at Common Law, and thereupon Sentence is given; if by this the Puniſhments are intermixed for both, that the Sentence cannot ſtand for any unleſs for both, a Prohibition ſhall be granted for both. M. 38. 39 El. B. R. between *Butler and Bartlett*.

Where a Libel was in the Spiritual Court for Scandalous Words, and ſome of the Words were actionable at Law, and ſome puniſhable in the Spiritual Court, a Prohibition was pray'd

7. As if a Man libels for ſaying of him, Thou art fitter for the Pillory than for a Preacher, and that he ſpoke thoſe Words in Time of Divine Service, and thereupon Sentence is given that the Defendant ſhall recant the Words &c. If the Defendant ſhews to the Temporal Court that he, ſpeaking of a certain Releaſe &c. ſaid, that the Plaintiff had forged the ſaid Releaſe, and by Reaſon thereof he ſpoke the ſaid Words, ſo that he may have Action for the Words at the Common Law. In this Caſe, tho' the Suit is maintainable in the Eccleſiaſtical Court for ſpeaking of the Words in Time of Divine Service, yet becauſe the Sentence is given that he ſhall recant the Words, which is for all, a Prohibition lies for all. M. 38. 39 El. B. R. between *Butler and Bartlett* adjudged.

Quoad thoſe Words which were actionable at Law; and it was granted by the Ch. J. becauſe the Words were an entire Sentence, and ſpoken altogether at the ſame Time; and therefore if a Prohibition ſhould not go, it would be a Double Vexation. 3 Mod. 74. Mich. 1 Jac. 2. Anon.

8. A Woman libell'd for ſaying, That *ſhe had a Baſtard*. A Prohibition was awarded as to the Baſtardy, but that they ſhall proceed for the Defamation. Mo. 873. pl. 1217. cites 37 Eliz. Cullier v. Cullier.

(F. a. 2) *Writ, Declarations* &c. in Prohibitions, and Rules concerning them.

1. IF *Prohibition iſſues* to the Spiritual Court, *and notwithſtanding* this the *Party is there Suſpended or Excommunicated*, there Proceſs ſhall iſſue to the Biſhop to abſoil him, but the *firſt Writ ſhall not be with a Pain*. Br. Prohibition, pl. 25. cites 13 H. 7. 16.

2. If a Libel be in Court Chriſtian *for Defamation*, the Defamation muſt be *particularly expreſs'd* therein. 2 Inſt. 493.

3. The

3. The *Surmiſe for a Prohibition is as a Writ*, ſo that if *Variance* be *between the ſame and the Declaration*, all is naught. Le. 128. pl. 175. Trin. 30 Eliz. B. R. in the Caſe of Gomerſhall v. Biſhop. The Plaintiff *preſcribed to pay 2 d. for Tithes of Wooll and Lambs*, but *the Witneſſes* to prove his Suggeſtion, *ſpoke* nothing of the Wooll, but *only of the Lambs*; whereupon the Court was moved for a Conſultation, becauſe the Suggeſtion was of a joint Preſcription, & Modus Decimandi, both for Wooll and Lambs; and no Proof being as to the Wooll, he had failed in Toto; But per Cur. there is a Difference between a Suggeſtion to have a Prohibition and a Preſcription compriz'd therein, and where the Preſcription is by way of Defence for Plea in any original Action; for in the laſt Caſe a joint Preſcription is alleg'd for two Things, and failing in one deſtroys the whole, becauſe it is by way of Title; but 'tis otherwiſe here, becauſe *this Prohibition is only to give the King's Court a Juriſdiction*; and therefore, tho' the Plaintiff ſuppoſes, That the Court ought to hold Plea both of the Tithes of the Wooll and the Lambs, and as to the Wooll it is payable in Kind, and ſo to be ſentenc'd in the Spiritual Court, yet the Modus is good for the Lambs, and the Court ſhall have Juriſdiction of that; for now, upon the Proof, it ſhall be taken, That the Preſcription, which makes the Plea Temporal, was only for the Lambs. Yelv. 55. Mich. 2 Jac. B R. Caſe of Prohibition.

4. A Vicar libel'd *againſt two* of his Pariſh *ſeverally for ſmall Tithes*, and alſo for Herbage, Milk &c. they *joined in a Prohibition*, and ſuggeſted for all but the ſmall Tithes a Cuſtom of Tithing. Adjudg'd, They could not join in one Prohibition, becauſe the Vexation of one could not extend to the other; but becauſe the Cuſtom ſuggeſted was triable at Common Law, the Spiritual Court was juſtly prohibited, tho' not in ſo due a Form as it ought; and therefore ordered the Plaintiffs to declare ſeverally, and to proceed as upon ſeveral Prohibitions. Yelv. 128. Trin. 6 Jac. B. R. Burges and Dixon v. Aſhton. S. P. Le. 286. pl. 388 Paſch. 29 Eliz. B.R. Sir Gilbert Gerrard v Sherrington.

5. Libel &c. for *calling the Plaintiff Old Thief and Old Whore*; the Defendant *ſuggeſted* for a Prohibition, *That if any ſuch Words were ſpoken* they were ſpoken at the ſame Time; This Suggeſtion was ill, becauſe the Words *ought to have been fully confeſs'd*. Vent. 10. Hill. 20 & 21 Car. 2. B. R. Day v. Pitts.

6. Where a Prohibition is *founded on a Preſcription*, and the Defendant *traverſes the Preſcription*, if the *Plaintiff demurs*, a Conſultation ſhall go. Vide Lord Raym. 2 Rep. 755. Paſch. 1 Annæ. Jacob v. Dallow.

7. The Plaintiff declared upon a Prohibition, and upon Demurrer to the Declaration, Exception was taken to it, becauſe the Declaration *ſets forth*, *That* the *Defendant ſued in the Spiritual Court poſt Regiam Prohibitionem ei* prius inde in contrarium *direct'*, but does not ſay (*deliberat'*) and here appears no Cauſe of Action, ſince it is not ſet forth, That the Prohibition was deliver'd. The Court was of Opinion, Holt abſente, That when you proceed *for Damages*, then it muſt be ſet forth, That the Prohibition was deliver'd, and alſo a *Venue* laid; But in this Caſe, which is only *to maintain the Juriſdiction of the Court*, it is not neceſſary. 11 Mod. 263. Hill. 8 Ann. B. R. Biſhop v. Eagle.

8. If Declaration in Prohibition be *by him who ſued* the Prohibition, and *no Plea* be *put in in due Time*, the Plaintiff may have Judgment by *Nihil dicit*, *ideo ſtet Prohibitio*; *but if* it be *of the other Side*, and no Plea, there ſhall be likewiſe a *Nihil dicit*, *and a Conſultation*. 12 Mod. 447. Paſch. 13 W. 3. B. R. Turton v. Reiner.

(G. a) The Continuance of a Prohibition.

1. IF a Prohibition was granted by Q. Eliz. it ſeems, That this continues now in the Time of the King, ſo that the Spiritual Court cannot proceed. 9. 14 Ja. B. R. between *Johnſon* and *Poppinger* was doubted per Curiam, becauſe it was granted for a Contempt to the Queen. When a Prohibition iſſues out of B. R if no other Proceſs be there, it is * diſcontinued by Demiſe of the King. But if Attachment iſſues and is return'd, as the Chief Juſtice ſaid, or if the Party appears, and puts in Bail, it is then become the Suit of the Party, and is not diſcontinued

nued by the King's Demiſe. Lat. 114, 115. Watkins's Caſe. —— * Becauſe in this Caſe the Prohibition is the Suit of the Party. Noy 77. Dixy v. Brown.

(H. a) By whom it may be granted. [And when. Before Plea pending.] pl. 3.

1. AMONG the Petitions in Parliament of 18 E. 1. fo. 1. there is ſuch Petition and Anſwer to it.

2. In Queremonia Populi &c. Cancellarius aut Capitalis Juſticiarius habeat poteſtatem cognoſcendi, quæ Placita ſuperſederi poſſint in Cauſibus Eccleſiaſticis.

Fol 317.

3. A Prohibition may be granted by the Court of Common Bench to the Eccleſiaſtical Court, to the Court of the Council of York, or &c. upon Suggeſtion made to the Court of the Cauſe, tho' there be not any Plea pending in the ſame Court for the ſame Thing. 9. 6. Ja. B. between *Banks* and *Wharton*, per Curiam; Contra, Walmſley. 9. 7. Ja. B. between *Robinſon* and *Biſſe*. Adjudg'd.

S. P. 2 Brownl. 17. Paſch. 9 Jac C.B. Anon — S. P. reſolv'd 12 Rep. 58.

Mich. 6 Jac. Anon. —— 12 Rep. 108. Hill. 2 Jac. —— S.P. For the *Common Law*, which *is a Prohibition of itſelf, to keep* as well Temporal as Eccleſiaſtical *Courts within their Bounds* and Juriſdiction, ſtands inſtead of an Original, and thereof are infinite Precedents in this Court of C. B. And this Point, as to the Juriſdiction of C. B. to grant Prohibitions upon Suggeſtions, where there is neither Writ of Attachment nor Plea depending, is in Peace, being reſolv'd by the Juſtices of B. R. and C. B. and by the Barons of the Exchequer. 4 Inſt. 99, 100. —— Noy 153. Anon Walmſley Cem'd contra — All Prohibitions for incroaching Juriſdiction iſſue out of C. B. as well as out of B. R. Vaugh. 127 in Buſhell's Caſe.— A Prohibition was granted to the Court of Briſtol, upon Suggeſtion, That a Plaint was enter'd there by S. againſt W. for a Thing done out of their Juriſdiction Sid. 464. pl. 9. Trin. 22 Car 2. B.R. Wainman v. Smith.—Ibid. ſays, The like Prohibition was cited to be granted here to the Court of the Marches, after the Party had declar'd there Hill. 16 & 17 Car. 2 Smith v. Bond. — Vent. 88. Weyman v Smith, ſays, That the Plaint was enter'd there for 66 l. and Affidavit was made, That the Cauſe of Action aroſe in London, and not in Briſtol. —— Noy 77. in the Caſe of Dixye v Brown, theſe Points were touch'd upon, That in C. B. a Prohibition ſhall not be awarded until the Suggeſtion be of Record, and becauſe it is the Suit of the Party, it ſhall not be diſcontinued by the Demiſe of the King; but otherwiſe, if it be out of B.R. for there a Prohibition may be awarded upon a bare Surmiſe, without any Suggeſtion of Record, and is only in Nature of a Commiſſion Prohibitory, which ſhall be diſcontinued by Demiſe of the King — Palm. 422. Paſch. 1 Car. B.R. S.C. — S. P. Lat. 114. Watkins's Caſe. — Noy 153 cites Regiſt. 34. F.N.B. 43. 2 E. 4. 11. — *Except* in Caſe *De Modo Decimandi*, cauſe the Spiritual Court will not allow that. Noy 153. Anon. cites 22 E. 4. 20. — Upon a bare Surmiſe, That the Matter aroſe out of the Juriſdiction of the Court, this Court will not grant a Prohibition; ſo likewiſe it *muſt be pleaded, and the Plea* muſt be *ſworn*, and it muſt come in before Imparlance. Mod 81. Mich. 22 Car. 2. in the Caſe of Cox v. St. Albans, it was ſaid by Hale Ch. J. to have been ſo adjudg'd. — Vent. 181. S.C.

A Prohibition cannot be granted to the Eccleſiaſtical Court where there is no Proceeding there by way of Suit. Mar. 22. pl. 50. Paſch. 15 Car. The Pariſh of St. Ethelborough's Caſe. — S. P. That there *muſt be a Suit there*, and that *upon a Petition to the Archbiſhop* or any other Eccleſiaſtical Court, *no Prohibition lies*. Mar. 45. pl. 70. Trin. 15 Car. Per Berkley and Croke J. only in Court. Anon. —— C. B. may grant a Prohibition, and if the Matter after appears to be Spiritual, they may grant a Conſultation: quod nota. Br. Conſultation, pl. 3. cites 38 H. 6. 14. — Br. Prohibition, pl. 6. cites S.C.

Hob. 15. pl. 20. S.C — Mo. 861. pl. 1182. Mich. 12 Jac. C.B. Rot. 1141. S.C. by the Name of Rowth v. the Biſhop of Cheſter.

4. A Prohibition may be granted by the Court of Common Bench to the Court of Delegates, for ſuing there to avoid an Inſtitution of a Clerk to a Church in Lancaſhire after Induction made of him thereto; tho' the Quare Impedit for this Church cannot be brought here but only in the County of Lancaſter, becauſe the Title of the Advowſon is not to be queſtioned by this Prohibition, but the Intruſion upon the Common Law, of which this Court has ſpecial Care, and is to be reſtrained. Hobart's Reports 23. *Hutton's* Caſe. Prohibition granted to Cheſter, where the Suit was.

Br. Attachment ſur Prohibition, pl. 15. cites S.C. — Br. Conſultation, pl.

5. Prohibition was ſued out of Chancery, directed to the Juſtices of C. B. to make Attachment, becauſe the Defendant has ſued in the Eccleſiaſtical Court for a *Debt which neither touched Matrimony nor Teſtament*, and of which Conuſance belong'd to the King's Court; and it was ſhew'd, That *notwithſtanding this Matter the Party had proceed in the Spiritual*

C. [illegible]

Court, and the Judges there held the Plea, and pray'd Prohibition out of C. B. to the Judges and Party to ceaſe; And it was in doubt at firſt, but afterwards, becauſe Precedents were thereof ſhewn, it was therefore granted with Aſſent of all the Juſtices; And ſo ſee that the *Chancery*, *B. R.* and C. B. may grant Prohibition. *But it ſeems*, That *C. B. cannot unleſs they have firſt an Original pending in the ſame Bank of the ſame Matter.* Br. Prohibition, pl. 6. cites 38 H. 6. 14.

2 cites S. C. And that Conſultation ſhall not be granted upon Spoliation, where it proves a *Lay Treſpaſs, and no Spiritual*

Spoliation; for Spoliation, *in its proper Nature, appertains to the Spiritual Law.*

6. If a Man *ſues in C. B. for Treſpaſs*, or the like, *and likewiſe in the Spiritual Court for the ſame Cauſe*, he may ſhew the Matter in C. B. and ſhall have a Prohibition *from thence* directed to the Judges &c. F. N. B. 43. (G)

But a Man ſhall have a Prohibition *out of the Chancery or B. R.* upon

his Surmiſe, *ſurmiſing, That he is ſued* in the Spiritual Court *for a Temporal Cauſe* &c. altho' he be not ſued in B. R. or elſewhere, for that Cauſe. F. N. B 43. (H)

7. The *Grand Seſſions of North Wales* may ſend a Prohibition, and write to the Spiritual Courts there as well as the Courts here may; and ſo they have us'd to do, and it is the ancient Court of the ſaid Kingdom, which has been Time out of Mind, and is confirm'd by the Statute 37 H. 8. Sid. 92. pl. 16. Mich. 14 Car. 2. B. R. Winn's Caſe.

Ibid ſays, Quære; For it ſeems, That they cannot write to the Biſhop, and

this is the Reaſon that Quare Impedit does not lie there — But Cro C. 341, 342. Hill. 9 Car. B. R. in the Caſe of Court v. Biſhop of St. David's and Owen & al. It being aſſign'd for Error, That the Biſhop being Party, the Grand Seſſions could not write to the Archbiſhop of Canterbury, becauſe they have no Power to puniſh him if he ſhould not obey. The Court doubted, but the Reporter ſays, It ſeems Prima Facie, that they may well write to him; for it is now a Court of the King's, and a Quare non Admiſit lies if he does not admit; But when they were the Marches in Wales they had no ſuch Power, and for that Reaſon a Quare Impedit lay in the adjoining Counties, but not ſo at this Day; But they would adviſe. — Ibid. 348. Judgment was affirm'd — — — Jo. 330, 332. S. C. & P.

(I. a) To the Courts Temporal. In what Caſes it lies.

1. If there be one entire Contract above 40 s. and the Suit for it is in a Court Baron, ſevering it into diverſe ſmall Sums under 40 s. a Prohibition ſhall be granted, becauſe it is done to defraud the King's Court. 19 H. 6. 54. (Note, There have been ſeveral Prohibitions granted in ſuch Caſes of late Time.) Vide the Statute of 11 H. 7. cap. 19. accordingly.

See S. C. (& pl. 2. — Yelv. 55. Girling v. Alders S. P.

2. If an Inferior Court of Record, which has Power by Charter or by Preſcription, of Things and Actions ariſing within the Juriſdiction of the Court, hold Plea of a Contract, Battery, Obligation, or other Thing done out of the Juriſdiction of the Court, tho' it be tranſitory, yet the Cauſe of Action not ariſing within the Juriſdiction of the Court, a Prohibition lies. M. 15 Car. B. R. Per Curiam, præter Berkley, who ſeemed e contra by reaſon of the common Uſage, that ſuch Courts hold Plea in ſuch Caſes.

No Prohibition ſhall lie on a Suggeſted Promiſe only, unleſs that a Prior before be duly put in to the Juriſdiction of the Court, and

To the Caſe in 2 Roll. Abr. 317. is to be underſtood. 2 Lutw. 1527. Per Powell J. in Caſe of Gwinne v. Poole.

If a Matter ariſes Extra Juriſdictionem, and the Plaintiff declares of it as Infra Juriſdictionem, the Defendant may plead to the Juriſdiction of the Court, and if that be over-ruled, may have a Prohibition on the Statute of Weſtminſter; but if he waives that and *pleads to the Merits*, he cannot have a Prohibition, nor can he take Advantage of their Want of Juriſdiction, for by the Attornment of the Court and his own Admiſſion, he is Eſtopp'd to ſay that it was a Matter that aroſe out of their Juriſdiction. Per Cur. B. P. 2 Lutw. 1527. in Caſe of Ludding v. Deering.

Roll. Rep. 354. pl. 3. S. C. and that in this Caſe it is uncertain what the Sum is.—The Suit was occaſioned by the not making a Leaſe according to an Agreement, and it was to compel the Party to execute the Poſſeſſion, by making a Leaſe according to the Agreement; but becauſe the Party might have an Action on the Caſe or Covenant, a Prohibition was granted. And they ſaid he could not be compell'd to execute a Leaſe in Specie. Roll. Rep. 368. pl. 21. Bromage v. Genning

3. If a Man ſues in the Marches of Wales, and ſhews a Matter which the Defendant has done, to the great Damage of the Plaintiff, a Prohibition ſhall be granted, becauſe it is not ſhewn in the Bill to what Damage it is; for this Court cannot hold Plea by their Inſtructions over the Value of 40 l. and here the Damages may exceed this Sum, and it ought to appear that they have Juriſdiction of the Matter, to ouſt the Court of the King of Juriſdiction. P. 14 Ja. B. R. between *Jennings and Bromage* reſolved, and Prohibition granted.

Where the Marches proceeded upon an Engliſh Bill, ſuppoſing the Defendant had promiſed upon a Conſideration to pay the Debt of a Stranger, a Prohibition was pray'd, becauſe it is in the Nature of an Action on the Caſe, and conſiſts meerly in Damages; and tho' many Precedents were ſhewn of their Proceedings in ſuch Actions, and the Statute of 34 H. 8. cap. 26. that they ſhould determine ſuch Caſes as were heretofore accuſtom'd and uſed &c. as ſhould be aſſign'd to them by the King &c. and it was pretended that this was within their Inſtructions, yet the Court granted the Prohibition; for where *Damages are uncertain*, they cannot be ſet in a Court of Equity, but by a Jury. Vent. 300. Trin. 30 Car. 2. B. R. Anon.

An Action in the Nature of an *Ejectment* was brought in the Court of the Marches of Wales, and Prohibition granted, becauſe they have nothing to do to meddle with the Poſſeſſions of Men, unleſs in Reſpect of Force. Roll Rep. 359. Paſch. 21 Jac. B. R. Anon.

In Debt in the Court of the Marches, a Prohibition was granted, becauſe the *Plaintiff did not ſhew the Contract to be within their Juriſdiction.* Roll. Rep. 311. [but it is wrong pag'd, and ſhould be 312.] Paſch. 21 Jac. B. R. Anon.

The Defendant ſued the Plaintiff in the Court of the Marches of Wales at Ludlow, *for a Legacy* of 50 l and a Braſs Pot; and the Plaintiff prayed a Prohibition, and it was granted to him; becauſe this Court by their Inſtructions have not Power to hold Plea of a Legacy. Raym. 191. Mich. 22 Car. B. R. Ellis v. Winne.

4. If the Court of *Council of York*, which is a Court of Equity, do *decree againſt a Maxim in Law*, as againſt a Jointenant who was in by Survivorſhip, that the Heir of his Companion ſhall have the Moiety; in this Caſe a Prohibition ſhall be granted, unleſs during the Lives of the Parties it was agreed that there ſhall not be any Survivorſhip; and then if they hold Plea upon that Equity, it is good. Win. 79. Paſch. 22 Jac. C. B. Portington v. Beamont.

But where Debt was brought in London, the Defendant mov'd for a Prohibition,

5. In Aſſumpſit for Wares brought in Feverſham Court, the *Defendant tender'd a Plea, that the Contract was made out of the Juriſdiction*, and demanded Judgment if &c. Upon producing of an *Affidavit* of the Tender of the Plea and Refuſal, a Prohibition was granted. Raym. 189. Mich. 22 Car. 2. B. R. Michel v. Bisby.

ſuggeſting that he tender'd a Plea below, That the Cauſe of Action did ariſe out of the Juriſdiction &c. and offered to make Oath of the Truth of his Plea, but it was ſhewn that he *tendered ſuch Plea after the Court was up*, whereas it ought to be in Propria Perſona, and in Court; and tho' he offered to *make Affidavit* in B. R. of the Truth of his Plea, it was denied, becauſe he muſt make it *in that very Court whoſe Juriſdiction is ouſted thereby.* 6 Mod. 146. Paſch. 3 Ann. B. R. Sparks v. Wood ——The Plea muſt be tender'd upon Oath in the Inferior Court. Vent. 180. 181. Hill. 23 & 24 Car. 2. B. R. St. Aubin v. Cox.

If an *Inferior Court has Juriſdiction over the Cauſe* of Action, no Prohibition ought to go upon a Suggeſtion That the Cauſe of Action aroſe out of the Juriſdiction; but you *ought to plead to the Juriſdiction*, and if they refuſe ſuch Plea, then move for a Prohibition. Per tot. Cur And Holt ſaid, There have been Caſes to the contrary, but the Law is now ſettled otherwiſe; and if a Parſon *pleads in Chief*, he ſhall never aſſign this for Error, if ſuch Inferior Court has Juriſdiction of the Thing. 11 Mod. 132. Trin. 6 Ann. 1707. B. R. Anon.

6. A Prohibition was prayed to the *Court of the Chamberlain of Cheſter*, where an *Engliſh Bill* was preferr'd, ſetting forth *that J. S. being indebted to the Plaintiff, the Defendant* upon good Conſideration *promiſed, that if J. S. did not pay it, he would, and* that he *wanted ſuch preciſe* Proof of the Promiſe *as the Law required*; and ſo prayed to be relieved by the Equity of the Court; the *Defendant confeſs'd the Promiſe in his Anſwer*, and ſaid that he had paid the Money. And a Prohibition was granted; for

for the Plaintiff had now obtained the End of his Suit, and might have Remedy at Law upon the Evidence of the Defendant's Anſwer. Vent. 212. Trin. 24 Car. 2. B. R. Mekins v. Minthaw.

7. Prohibition to the *Admiralty* was denied to be granted, unleſs they *refuſed a Plea*. Carth. 166. Mich. 2 W. & M. B. R. Edmonſon v. Walker.

So a Prohibition was moved for to the Admiralty, but denied *unleſs* the *Defendant there would appear and give Bail.* 2 Salk 548. Trin. 4 & 5 W. & M. Wharton v. Pitts.

(K. a) To what Court it may be granted.

1. If a Writ of Right of Dower be ſued in B. where the Lord has a Court to hold Plea; the Lord may ſue a Prohibition directed to the Juſtices of B. that they proceed not upon this Plea. Fitz. Nat. 8. (B)

But it was added there, viz. Quere of this Matter.

2. A Prohibition may be granted by the King's Bench to the Court of the Dutchy, if they hold Plea of any Land not Parcel of the Dutchy. Tr. 12 Ja. B. R. between Sir *Thomas Beamont* and the Hoſpital of *Wigston* adjudged. * M. 13 Ja. B. R. between *Coates and Stackerman* Plaintiffs, and Sir *Henry Warner* Defendant adjudged. Hobart's Reports 106. between * *Owen and Holt* in Bank.

A Prohibition was granted to * Fol. 518. the Dutchy for holding Plea of the Validity of Letters Patents granted of a Manor — 3 Bulſt 119. Sir H. Warner v. Stackerman and Coates. — Roll. Rep. 252. S. C. Coats and Stackerman v. Warner. Mich 13 Jac B. R. and the Suit being for Tithes, it was held that a Prohibition lies, Tithes being an Inheritance

A Suit was commenced in the *Dutchy Chancery Court to enforce Matters whereby the Defendant there would forfeit his Freehold*; and a Prohibition was granted — 2 Salk 552. Sir Baſil Firebrace's Caſe. — * Hob. 77. pl. 101. S. C.

3. If a Man ſues in the Chancery of Cheſter for a Matter triable at the Common Law, yet no Prohibition ſhall be granted by the Court of B. R. becauſe the King's Writ does not run there, and there is a Court of B. R. to grant a Prohibition; for there are all Courts there as there are here. M. 13 Ja. B. R. and there M. 13 Ja. between * *Vawdry and Pannell* reſolved, and Prohibition denied. But Tr. 1651. between † *Fitton and Richardſon* reſolved e contra, and Prohibition granted accordingly. Contra M. 12 Ja. B.

* 3 Bulſt. 116. S. C. And that the Suit was for Franktenement. — Roll. Rep. 246. S. C. — 231. S. C. — † Sty. 285. There being a Suit there by Engliſh Bill *for Jointure of the Wife*, which is a *Matter of Freehold*, and notwithſtanding ſuch Anſwer there, they having made a Decree, a Prohibition was granted — Per Cur. Sid. 189. Gerard v. Butler & al.

4. If an Obligation be made in Cheſhire (but it is not ſo dated) and the Parties inhabit there, and Debt is brought upon this Obligation in Bank, and thereupon the Obligor exhibits a Bill in the Exchequer at Cheſter to be relieved, and an Injunction is awarded againſt the Plaintiff not to proceed at Common Law, a Prohibition may be granted out of Bank to them; for ſuch tranſitory Actions may be ſued in any Place, tho' the Parties dwell in Cheſhire. Tr. 7 Ja. B. between *Povey and Ales*, per Curiam.

5. If a Quare Impedit be brought in the Court at Lancaſter after the Incumbent is Inducted, and afterwards a Suit is in the Eccleſiaſtical Court to avoid the Inſtitution, yet no Prohibition [will be granted.]

6. If a Suit be in the Eccleſiaſtical Court of Cheſter to avoid an Inſtitution, after which the Clerk is inducted to the Benefice within the County Palatine of Cheſter, tho' it be within the County Palatine, and

See (K. a) Pl. 4

and ſo the Writ of the King does not run, and tho' the Common Law Court within the County Palatine may grant a Prohibition, yet a Prohibition may be granted here in Bank or Banco Regis; for it is only to reform the Uſurpation which they make upon the Common Law. M. 12 Ja. B. between Sir *Timothy Hutton and the Biſhop of Cheſter* per Curiam.

7. Prohibition was granted *to the Council of York for* holding Pleas in *Replevin* and Avowries, the Court being clear of Opinion that theſe are Matters determinable at Common Law. 1 Bulſt. 110. Paſch. 9 Jac. Baker v. Dickenſon.

8. If any *Engliſh Court* holds Plea of a Thing whereof Judgment is given at the Common Law, Prohibition lies upon Statute 27 E. 3. 1. 4 H. 4. 23. Per Choke Ch. J. and cites 13 E. 3. Prohibition 11. that after Judgment in a *Quare Impedit*, the Defendant ſued *in Chancery* to avoid the Judgment, and there Prohibition was awarded. Mo. 836. pl. 1129. Mich. 12 Jac. Wright's Caſe.

9. A Prohibition was granted by B. R. to the *Court of Exchequer*, for holding Plea of Common Pleas without a Writ of Privilege. Per Coke Ch. J. who cited the Regiſter. 3 Bulſt. 120. in Caſe of Warner v. Sukerman.

10. If the Judges of *C. B. hold Plea of an Appeal*, a Prohibition is to be granted by B. R. Per Coke Ch. J. 3 Bulſt. 120. cites the Regiſter.

11. B. R. may prohibit *any Court whatſoever, if they exceed and tranſgreſs their Juriſdiction*; Per Coke Ch. J. And he ſaid, There is not any Court in Weſtminſter-Hall but may be prohibited by B. R. if they exceed their Juriſdiction, and that this is clear without any Queſtion. 3 Bulſt. 120.

12. Prohibitions are grantable to almoſt all Sorts of Courts which differ from the Common Law in their Proceedings; to Courts Chriſtian, to the Admiralty, nay *to the Delegates*, and even to the * *Steward and Marſhal*, upon the Statute of Articuli ſuper Chartas, cap. 3. Show. Parl. Caſes 63. Arg. in the Caſe of Oldis v. Donnille.

S. C. cited 2 Hawk. Pl. C. 14. cap. 4. S. 12. And the Serjeant ſays, That this is ſtrongly inſiſted on there; but he ſays, That there having been no Court holden before a Conſtable and a Marſhal for theſe many Years, and there ſeeming to be ſmall Likelihood of its being revived, he refers the Reader to the Report of the Caſe by that learned Author. — And ſee a Prohibition mov'd for to the Court of *Chancery*. Lord Raym. Rep. 531. Hill. 11 W. 3. B. R. Davis's Caſe.

* S. P. F. N. B. 241. (C)

13. A *Cuſtom-Houſe Officer exhibited an Information of Seiſure* of an Hogſhead of Wine belonging to E. and ſeiſed *for not paying Cuſtom*, E. neglected to enter his Claim in the Exchequer, but in the mean Time *brought Treſpaſs in B. R.* The Barons, upon Motion, order'd the Proceedings in B. R. ſhould be ſtay'd, and the Cauſe removed into the Exchequer in the ſame State and Forwardneſs. *E. was ſerved with the Order, but gave Rules for Pleading*; whereupon an *Attachment was iſſued by the Exchequer againſt him*, upon which *he moved for a Prohibition to the Court of Exchequer*, and a Rule was made to hear Counſel; On the Argument ſeveral *Precedents were cited*, one in 19 H. 7. Rot. 16. exactly like this. The Court took Time to conſider of the Precedents, and in the mean Time the Matter was compounded. 2 Salk. 550. Mich. 12 W. 3. B. R. Earle v. Paine. — cites Reg. 187. 2 Inſt. 551.

14. A Prohibition lies *to the Court of Honour* to prohibit a Suit there for Words. Holt Ch. J. at firſt doubted, Whether there was or could be any ſuch Court? but ſaid a Prohibition would lie *to a pretended Court*; and tho' it was urg'd, That there would be no Remedy if this would not allow'd, yet no one Precedent being to be found of ſuch a Suit for Words in the Court of Honour, the Prohibition went abſolutely. 2 Salk. 553. Hill. 1 Ann. B. R. Chambers v. Sir John Jennings.

(L. a) *At what Time* it ſhall be *granted. After Sentence.*

See (M. a)

1. IF a Man be ſued out of his Dioceſe, and there anſwers without taking Exception to it, and afterwards Sentence is given againſt him, he ſhall not have a Prohibition, becauſe he had not taken Exception to the Juriſdiction before, but had affirmed the Juriſdiction there. P. 15 Ja. B. R. per Curiam. Prohibition denied in ſuch Caſe between *Pudſey* and *Richardſon*.

S. P. Per tot. Cur. 2 Show. 155. Hill. 32 & 33 Car. 2. B. R. Anon. —— S. P. Comb. 448.

Trin. 9 W. 3. B. R. Per Holt Ch. J. Chicken v Dickſon —— 12 Mod. 133. S. C —— S. P Vent. 61 Hill. 21 & 22 Car 2. B R. Anon. —— S. P. And in no other Caſe is it ever too late to move for a Prohibition to any Court Per Holt Ch. J. 11 Mod 5 pl 23 cites Comb 224, 283, 448, 480, 490 and Show. 197, 333, 396. — The *Reaſon is*, becauſe the Cauſe belongs to the Spiritual Court, and tho' not to that Spiritual Court, yet it belongs to ſome other, and not to the King's Temporal Court. 2. Salk. 548. Trin. 10 W. 3. B. R. Gardiner v. Booth.

2. If it appears in the Libel, That the Court has not Juriſdiction of the Cauſe, a Prohibition ſhall be granted after Sentence; but otherwiſe it is, if it does not appear in the Libel, but it ought to appear by Averment. M. 8 Ja. B.

2 Show. 145. Thomlinſon v. Freeman. S. P — If they proceed to Sentence in the Spiritual Court in a Cauſe where they have Juriſdiction of the Libel, the Court will not grant a Prohibition; but if it be *of a Matter ſcienter they had not Juriſdiction*, they will grant a Prohibition, altho' it be after Sentence. Freem. Rep. 78. pl 95. Trin. 1675. Anon. —— S. P. Freem. Rep. 299. pl. 358. Newman and Ux v. Moore —— S. P. Per Holt Ch. J. Comb. 254. Pollock v. Neſh.

If it appears upon the Face of the Libel, That the Eccleſiaſtical Court can have no Conuſance of the Cauſe, as where there is *no other Fundation than a Cuſtom* alleg'd, or if it appears, That the Party cited is an Inhabitant at a Place out of the Dioceſe, there the *Libel is Falſe in fact*, and in ſuch Caſes the Sentence makes no Alteration; But it is otherwiſe where no ſuch Thing appears in the Libel. Carth. 55. Paſch. 1 W & M. B R. Tyler v. Mantell — 10 Mod 439. Trin. 5 Geo 1 S P in the Caſe of Argill and Hunt. B. R. —— Where it appears in the Libel, *or by the Proceedings in the Cauſe*, That the Conuſance belongs not to the Spiritual Court, a Prohibition may be moved for and granted after Sentence; and this *holds in all Caſes, except* where one is *ſued out of the Dioceſe*, but in that it does not, for the Reaſon mention'd in the Margin of pl. 1. 2 Salk. 548. Gardiner v Booth. —— 12 Mod 132, 135, 206 Pool v. Gardine. S. C — Carth. 403. S C —— S. P. 12 Mod. 133. Chickham v Dickſon. —— S. P. Per Holt Ch. J. But adds, That indeed if a Suit be in the Spiritual Court for a Modus, and the Defendant pleads Payment, he comes after too late to plead or ſuggeſt, That there is no Modus, becauſe he had admitted one by pleading a Payment. 6 Mod. 252 Mich. 3 Annæ. B. R. in the Caſe of Parker v. Clerk. —— See (M. a) pl. 1

3. After Sentence, if the Party appeals, a Prohibition lies. M. 8 Ja. B. James's Caſe.

S. P. It appearing on the Libel itſelf, that the Cauſe was out of their Juriſdiction 2 Show. 145. Mich 32 Car 2. Thomlinſon v. Freeman — Note, It was ruled in full Court, If Sentence is given in the Spiritual Court, and Coſts taxed, and the Defendant brings an Appeal, yet if the *Suit did not originally or properly belong to that Court* to determine, as of *Titles of Trees ſpent in Fewel*, a Prohibition ſhall be awarded as well to the Coſts as to the principal Suit, notwithſtanding the Statute 32 H. 8. cap 7. ſays, That the Eccleſiaſtical Court ſhall compel the Appellant forthwith to pay Coſts; for that is to be intended when the Caſe appertains properly to the Spiritual Court. Noy 137. Anon.

It lies after Appeal and after Sentence, by the Opinion of the Court. Sid. 65. pl. 38. Mich. 13 Car. 2 in Serjeant Morton's Caſe.

4. A *Sentence* in the Spiritual Court *at Lichfield* was had *againſt the Plaintiff*, who afterwards *appealed to the Arches*, where the *Sentence was affirmed*, and adjudg'd ut Supra againſt the Plaintiff; whereupon *he ſued* a Commiſſion *to the Delegates*, and the Matter was re-examined, *and Sentence* then given *for the Plaintiff*, and thereupon *another Commiſſion was ſued* forth *to re-examine* this Matter; and now a Prohibition was pray'd to ſtay this, for it was ſaid, That by the Statute of 25 H. 8. it is appointed, that a Sentence before the Delegates ſhall be final, and then this 2d Commiſſion is not well awarded; But it was thereto ſaid, That the Queen hath by Law an abſolute Power to grant Commiſſions to re-examine, which is not reſtrained by the Statute of 25 H. 8. and that it hath

Haliwell v. Jerſeiſe. S. C. Mo. 402. pl. 652. Upon Conference with all the Juſtices of England, it was at length agreed, That the Commiſſion was well granted, and

that Conſultation be awarded; but if the Commiſſioners do not proceed to the Examination according to the Common Law, they ſhall be reſtrained by Prohibition.

been ſo ruled before theſe Times; and of that Opinion was Popham. But becauſe it was a new Caſe they would adviſe thereof. Cro. E. 571. pl. 10. Trin. 39 Eliz. in B. R. Gervis v. Hallewel.

5. It was given for a Rule by Coke Ch. J. to which the Court agreed, That after Sentence in the Spiritual Court he would not grant a Prohibition if there was not *Matter apparent within the Proceedings*; for he ſaid, He would not allow the Party to ſhew any Thing not grounded on the Sentence, becauſe he has admitted the Juriſdiction, and there is no Reaſon for him to try if the Spiritual Court will help him, and afterwards to ſue forth a Prohibition at Common Law. Godb. 163. pl. 228. Paſch. 8 Jac. C. B. in the Caſe of Candiſt v. Plomer.

Tho' Sentence be given in the Admiralty, yet if it *appears, That the Matter within the Libel is triable at Common Law*, a Prohibition ſhall be granted

6. It was reſolv'd per tot. Cur. That if one be ſued in the Admiralty for a Thing alleg'd to be done upon the High Sea, within the Juriſdiction of the Admiralty, and the *Defendant pleads* to it, *and confeſſes the Thing to be done, and after* Sentence is given the Court will be adviſed to [before they will] grant a Prohibition, upon *Surmiſe, That it was done infra Corpus Comitatus*, againſt their own Confeſſion; unleſs it can be made appear to the Court, by any Matter in Writing, or other good Matter, That it was done upon Land; for otherwiſe every one would ſtay till after Sentence, and then, for Vexation only, ſue out a Prohibition. 12 Rep. 77. Mich. 8 Jac. Anon.

2 Brownl. 30. Mich. 9 Jac. C. B. in the Caſe of Jennings v. Audley.—— S. P. Per Holt Ch. J. Comb. 463. Mich. 9 W. 3. in the Caſe of Tremoulin v. Sands.

A Libel in the Admiralty ſet forth *a Contract made upon the River of Lisbon*; The Defendant put in his Anſwer, whereupon Sentence was given. It was now ſuggeſted for a Prohibition, That this Contract was made upon a River, and not Super altum Mare. Coke Ch. J. propoſed, and it ſeems to have been agreed to, That in Caſe of a Contract ſuppoſed to be made Super altum Mare, and Suit thereupon in the Admiralty, and anſwer'd to, and Sentence given, no Prohibition ſhall be granted upon a *naked Surmiſe, That it was not done Super altum Mare*, unleſs it appears by the Libel, or by Writing, or other Matter apparent. And the Court ſaid, It cannot appear to them where this River is, and that perhaps it may be an Arm of the Sea. Roll. Rep. 80. Mich. 12 Jac. B. R. Tourſon v. Tourſon.

A Ship in her Voyage Home was out of Repair on the High Sea; J. S. the Maſter, perceiving it, ſent to Plymouth to A. who came and agreed with J. S. to repair the Ship. Afterwards J. S. brought the Ship into the Harbour, and there A. repaired her; A. ſued in the *Admiralty*, and Sentence was given for him. A Prohibition was pray'd, but denied; for the *Contract*, which *was* the Cauſe of Action in the Admiralty, being *made on the High Sea*, within the Admiral's Juriſdiction, tho' *the Work was done on the Land*, yet the Recompence ſhall be had in the Admiralty, eſpecially as in this Caſe, *the Maſter* being *run away*; And being after a Sentence, this Court will not enter into the Examination of the Merits farther than what appears upon the Face of the Libel; for it is a conſtant Rule, That *no Matter delors the Libel ſhall be admitted* as a Suggeſtion to ground a Prohibition *after a Sentence in a Civil Law Court*. 8 Mod. 194. Mich. 10 Geo. Anon.—— 8 Mod. 176. Trin. 9 Geo. 1724. Brook v. Wingfield

You can *not* have Prohibition to the Admiralty *before Sentence*, but otherwiſe it is to Court Chriſtian. Per Holt Ch. J. Holt's Rep. 49. Brown's Caſe.

7. A *Bill* was brought *for a Treſpaſs at the Seſſions at Montgomery*, and proceeded to a Decree, a Prohibition was granted; Upon ſhewing Cauſe againſt the Prohibition, it was urg'd, That this *might have been demurr'd to at firſt*, it *being a Bill for a Treſpaſs*; but it was anſwer'd, That if there is no Equity in the Bill, the Court may award Prohibition notwithſtanding the Decree; but Twiſden ſaid, That hereby, upon 34 H. 8. the Juriſdiction of South Wales will come in Queſtion; and therefore, beſides the Suggeſtion, they would ſee the Bill itſelf, becauſe a Prohibitinn is not Honorary; whereupon the *Prohibition was wav'd till a View had of the Bill*. Keb. 100. pl. 99. Trin. 13 Car. 2. B. R. Cooper v. Gardiner.

8. After a *Sentence* in a Suit *for Tithe* of Mills was *given on the Right*, a Rule for a Prohibition was for that Reaſon diſcharg'd. 2 Keb. 721. pl 117. Mich. 22 Car. 2. B. R. Meſſenger v. Jennings.

The Reporter makes a Quære, be-

9. *Aſſumpſit* in Windſor-Court *for Meat, Drink* &c. at Maidenhead, *infra Juriſdictionem* &c. Upon Non Aſſumpſit pleaded, the *Evidence was of Meat, Drink, and a Promiſe* at Henley, which was *out of the Juriſ-*

diction;

diction; The Defendant demurr'd on the Evidence, but the Steward refus'd, and the Plaintiff had a Verdict and Judgment, and now moved for a Prohibition; but it was denied becauſe *after Judgment*. 2 Lev. 230. Mich. 30 Car. 2. B. R. Jackſon v. Neale.

becauſe the Defendant has no other Remedy, and he did what he could Ibid. But where a Prohibition was mov'd for to a Libel in the Spiritual

10. If it *appears upon all the Proceedings in the Eccleſiaſtical Court, That the whole was of Eccleſiaſtical Conuſance*, a Prohibition lies not after Sentence. Comb. 448. Trin. 9 W. 3. B. R. in the Caſe of Chicken v. Dickſon.

Court *for a Mortuary*, upon ſuggeſting the Statute 21 H. 8. cap 6. alleging alſo, That there is no peculiar Cuſtom within the Pariſh to have Mortuaries; to which it was anſwer'd, That this was too late, being after Sentence, and that a Mortuary is merely of Eccleſiaſtical Conuſance, whereof B. R. has no Juriſdiction; and that it ſhall not be granted after Sentence, except it appears, That the Spiritual Court had no Juriſdiction of the Cauſe. The Court, upon the whole Matter, was doubtful, Whether a Prohibition would lie for a Mortuary? and ſo adviſed the Defendant to accept a Declaration, and thereupon to demur, that the Matter might be ſolemnly debated. Carth. 97. Mich. 1 W. & M. B. R. Broad v. Piper.

11. An *Information* was *for ſtriking in the Church*, and an Acquittal thereon, and then they exhibited Articles in the Spiritual Court for Brawling in the Church, but the Court would not grant a Prohibition, becauſe they *ſhould have pleaded this* Matter, which they ſuggeſt here, *in the Spiritual Court*; and if they had *refuſed the Plea*, then they might have juſtly come and moved for a Prohibition. 11 Mod. 200, 201. Hill. 7. Annæ B. R. Sawyer v. Loggin.

(M. a) At what Time it *lies*. After Sentence.

Fol. 319

See (L) pl. 9 (L. a) After Sentence on a Libel *for Tithes*, the *Defendant ſuggeſted a Modus*, but a Prohibition was denied, becauſe he came too late, and Rolls took

1. GEnerally if a Suit be in the Spiritual Court, and there Sentence given for the Plaintiff, and upon this the Defendant appeals, and after prays a Prohibition, no Prohibition ſhall be granted, though if he had come before Sentence it ought to be granted; becauſe it is inconvenient after ſuch great Expence, and no Exception taken to the Juriſdiction to grant a Prohibition. H. 9 Car. B. R. in the Caſe between *Frizewell* and Per Curiam ſaid, That all the Judges of England have agreed under their Hands lately, when Prohibitions were in Queſtion, not to grant Prohibition in ſuch Caſe.

this *Difference*, and ſaid the Opinion of the Court had been ſo, viz. *where the Party pleads the Matter*, and *where not*; For if he pleads it, there notwithſtanding a Sentence Prohibition has been granted, but contrary where he does not plead it. But notwithſtanding the Court refuſed to grant a Prohibition. Mar. 73 pl. 111. Mich. 15 Car. Anon.

In all Caſes except *ſuing out of the Dioceſs*, if the Eccleſiaſtical Court has no Juriſdiction, they may be prohibited as well after Sentence as before, and Frithwell's Caſe in Roll is no found Doctrine, per Holt Ch. J. Hill. 8 W. 3. B. R. Cumb. 356. Haines v. Jeſcot.——See (L. a) pl. 1, 2.

2. But if a Suit be in the Spiritual Court for Tythes, where the Queſtion is, Whether the Land out of which the Tithes are ſtinting, be within the Pariſh of the Parſon, or out of it, and within a Foreſt of the King; After a Sentence for the Plaintiff, and an Appeal by the Defendant a Prohibition ſhall be granted; Becauſe it is utterly out of their Juriſdiction to try the Bounds of the Pariſh. And alſo this concerns the King; For if it be within the King's Foreſt, he ſhall have the Tithes, and Nullum Tempus occurrit Regi. Hill. 9 Car. B. R. between *Frizewell* and which concern'd the Lord Darcy of the North, a Prohibition granted per Curiam.

Executor was ſued for a *Legacy* in the Spiritual Court, and *pleaded Payment, and* offered to prove it by *one Witneſs*, which was refuſed, and Sentence againſt him. Prohibition lies; For the Sentence in this Caſe is the Grievance. 2 Salk. 547. Hill. 1 W. & M. B. R. Shotter v. Friend.——Show. 158. 1-2 S. C.

3. Prohibition is grantable after a Sentence in Court Chriſtian for a *Legacy* where a *Releaſe* was pleaded *and proved by one Witneſs*, and diſallowed by Court Chriſtian for want of another. Mo. 907. pl. 1269. Hill. 30 Eliz. Bagnel v. Stokes.

A Prohibition was granted upon 23 H. 8. cap. 9. for *ſuing in the Prerogative Court for a Legacy of* 10 *l. when the Parties lived in another Dioceſe*, but becauſe the *Will was proved in that Court*, and

4. A. a Feme, *Leſſee for Years*, had Iſſue two Daughters, viz. B. married to J. S. and C. to W. R. B. had Iſſue 4 Daughters, and C. alſo had Iſſue. A. *deviſed Legacies to B's Children out of the Rent reſerved upon the Leaſe*, and made W. R. Executor, and died. *J. S. demanded* of W. R. the Executor *the Legacies due to his Children*, that he might employ the Money for their Benefit, and libelled for it in the Spiritual Court, *and had Sentence*; from which Sentence the *Executor appealed*; and there the *firſt Sentence was confirmed*; then he moved for a Prohibition, ſuggeſting that he was Executor, and chargeable in Account for Money, but becauſe he came after Sentence, and after he had appealed to the Delegates, and a Sentence there againſt him alſo, and for other Reaſons the Court refuſed to grant a Prohibition. Godb. 243. pl. 337. Hill. 11 Jac. C. B. Ayliffe v. Brown.

the Suit in the ſame Court where the Probate was, *and Sentence there given for the Legacy, and upon an Appeal afterwards to the Delegates* the Sentence was *affirmed*, and Coſts taxed, and Excommunication upon that Sentence, and no Endeavour before to ſtay the Proceedings, the Court ſaid, That having ſo long allowed the Juriſdiction of the ſaid Court he came too late now for a Prohibition. Cro. C. 97. Mich. 3 Car. C. B. Smith v. the Executors of Poyndreill.——S. C. cited 5 Mod. 341. Trin. 9 W. 3. in Caſe of the King v. Broom.

Cro. C. 97. Mich. 3 Car. C. B. Smith v. the Executors of Poyndreil.——S. P. accordingly, the Matter being of Eccleſiaſtical Conuſance

5. Upon a Rule in C. B. for a *Prohibition*, the Party *laid* it *by without ſerving it*, and the *Spiritual Court proceeded to Sentence*; then the *Defendant appealed*, and *two Terms afterwards he ſerved the Prohibition.* The Court held, that becauſe he had ſuffered Sentence to paſs, he ſhould have no Benefit now of the Prohibition; and a *Difference* was taken, *where* a Prohibition is granted and the *Party* not ſerving it *is excommunicated for not anſwering* the Libel; in ſuch Caſe he ſhall have the Benefit of the Prohibition; but not *where* there is a *Sentence Definitive.* Cro. J. 429. pl. 6. Trin. 15 Jac. B. R. Anon.

and not delivering the Prohibition till after Sentence, the Court will grant a Conſultation; For it is a Prohibition after Sentence. Comb. 448. Trin. 9 W. 3. B. R. Gibbons's Caſe.

After Sentence in the Spiritual Court for Defamatory Words, the Court will

6. *Libel* was in the Arches *for* ſcandalous and defamatory *Words*, and Sentence was given for the Plaintiff, and *four Years after* the *Sentence* the Defendant prayed a Prohibition, and the Court were againſt the Prohibition, becauſe the Defendant came *too late.* Mar. 153. Hill. 17 Car. C. B. Dudley v. Crompton.

not grant a Prohibition on a *Suggeſtion that the Words were ſpoke in London*, and that there is a Cuſtom in London, that Defamatory Words ſpoke there are actionable, but it ſhould have been pleaded to the Juriſdiction of the Court; for the Courts at Weſtminſter are not Ex Officio to take judicial Notice of ſuch Cuſtom in London after Sentence, but if ſuch Matter be moved before Sentence it need not then be proved by Affidavit, becauſe it is ſufficiently known. 8 Mod. 176. Trin. 9 Geo. 1. 24 Brook v. Wingfield ——S. P. 10 Mod. 439 Trin. 5 Geo. 1. B. R. Aſgill v. Hunt.——In ſuch a Caſe the Court doubted, whether a Prohibition ſhould be granted after Sentence; and yet per Cur. the Plaintiff, notwithſtanding the Sentence, may bring an Action in London for the ſame Words, to which the Sentence cannot be pleaded in Bar; and by this Means the Party may be doubly puniſhed for one and the ſame Thing; Curia adviſare vult. Carth. 213 Hill. 3 W. & M. B. R. Hawkins v. Cook

7. *Executor* becoming afterwards *Bankrupt*, the Prerogative Court *revoked the Probate* and committed Adminiſtration, as it was agreed they might in the Caſe of Lunacy or other natural Diſability; but in the Caſe here the Court was clearly of Opinion, that the Revocation is void, and the Teſtator having truſted him, Bankruptcy is not ſuch a Diſability,

that

but that he may continue Executor this Non Obſtante; for the Teſtator's Eſtate is not liable to be aſſigned by Commiſſioners, but remains ſubject to the Truſts in the Will; and a Man having made his Executor and dying, ſhall never be ſaid to die Inteſtate as long as he has an Executor alive who will intermeddle, and has proved the Will; and therefore, though *after a Sentence and Appeal brought*, the Court granted a Prohibition, it being twice moved. Skin 299. Mich. 3 W. 3. B. R. Adriel Mills's Caſe.

8. A *Prohibition* was granted Anno 9 Will. 3. to ſtay a Suit in the Conſiſtory Court at *Wells* for *Tithe Hay*, and *Seed of Clover Grafs*, upon a Suggeſtion of a *Modus* to pay 4*d. per* Acre for all *Up-land Meadows*, which *Modus* was pleaded below, and Depoſitions taken there. And in *Trinity Term*, Anno 10 Will. 3. this Court was moved for a Conſultation, becauſe the Plaintiff in the Prohibition had not proved this *Modus within ſix Months*; and thereupon a Conſultation was awarded, and then the Spiritual Court proceeded to Sentence againſt Pool. And now it was moved for a new Prohibition, becauſe the Conſultation was awarded for Default of proving the *Modus* in Time, and not upon the Merits of the Cauſe, ſo not within the Statute of Ed. 3. by which it is enacted, that no Prohibition ſhall be allowed after Conſultation duly granted, ſo as the Matter in the Libel is not charged. And the Court was of this Opinion; whereupon a Prohibition was granted upon Payment of *double Coſts*, according to the Statute, though it was ſtrongly oppoſed, becauſe after Sentence. Carth. 463. Mich. 10 W. 3. B. R. Pool v. Gardner.

9. In a Motion for a Prohibition it was agreed, that though a *Preſcription*, As whether a whole Pariſh or a ſelect Vestry ſhould *chuſe Church-wardens* be a Matter triable a Common Law by a Jury, yet Sentence is to be given in the Spiritual Court according to the Verdict, and therefore though this Matter be triable at Common Law, yet if the *Party ſubmits to a Trial in the Spiritual Court by not demanding a Prohibition*, it will be too late after Sentence to move for one. 10 Mod. 12. Mich. 9 Ann. B. R. Banifter v. Hopton.

(N. a) Pluis citius. [Where he may have a more ſpeedy Remedy]

1. WHERE a Man by Intendment ſhall have Remedy by Appeal, no Prohibition lies. If the Spiritual Court will *not purſue their Rules and Order of Juſtice*, that is not a cauſe of Prohibition but Appeal; Per Richardſon J. Het 115 in Caſe of Deane v. Sparkes.

2. [As] if a Man deviſe a Legacy to B. to be paid him within a Year after his Death, proviſo, that if he dies within this Year, that then this Legacy ſhall be void, and it ſhall be divided between D. and E. and after B. dies within the Year, and his Executor ſues for the Legacy, and Sentence given for him, becauſe they there hold the Condition void, yet no Prohibition lies, becauſe by Intendment he ſhall be aided by Appeal. M. 21 Ja. B. R. *Clarke's* Caſe reſolved, and Prohibition denied.

(O. a)

(O. a) *After Consultation.* At what Time it lies.

Hob. 286. pl. 353. S. C.

1. IF a Prohibition be granted upon a Discharge of Tithes upon the Statute of 31 H. 8. in the Hands of the Abbot, and upon Issue joined it is tried at Common Law, and the Plaintiff is nonsuited thereupon, and a Consultation granted, and after the Consultation granted, the Plaintiff in the Prohibition pleads in the Ecclesiastical Court the same Plea in Discharge of Payment of Tithes, which was alleged in the Prohibition, which the Spiritual Judge accepts, and proceeds to try it there, a Prohibition lies, For the Trial at Law is final upon this Libel, and shall not be tried in the Ecclesiastical Court again, it being proper for a Trial at Common Law. Hobart's Reports, Case 372. *Farmer's* Case.

Prohibition upon a Libel for Tithes of Slate-Stones; the Defendant prayed a Consultation, for that heretofore the Plaintiff sued a Prohibition for the same Cause in Chancery, and upon the same Libel, and there a Consultation was granted, for otherwise he shall be infinitely vexed, that when one Court grants a Consultation he shall sue a Prohibition in another Court. And of this Opinion was all the Court, that he shall have a Consultation, if before a Consultation was granted in another Court upon the same Cause. Cro. Eliz. 277. pl. 8. Pasch. 34 Eliz. in B. R. Lyfe v. Watts.

2. 50 *Ed.* 3. *cap.* 4. Enacts, that *whereas a Consultation is once duly granted upon a Prohibition made to the Judge of Holy Church, that the same Judge may proceed in the Cause by Virtue of the same Consultation, notwithstanding any other Prohibition thereupon to him delivered. Provided always, that the Matter in the Libel of the said Cause be not engrossed, enlarged, or otherwise changed.*

Prohibition for Tithes, the Defendant shews, that before that Time the *Plaintiff* had *sued in Chancery to have it by English Bill*, and *afterwards brought a Prohibition there*, and a *Consultation was there granted*, and that this Prohibition is for the same Cause, viz. for Matter of Discharge; wherefore he prayed a Consultation upon this Statute. But the Court held, that *this Consultation was not duly granted according to the Intent of the Statute, because the Prohibition was not duly executed there*, and so out of the Statute; for is was not duly granted *upon an English Bill*. And by Popham, the *Statute is to be intended* where the Consultation is granted *upon the Examination of the Matter*, and *not for the Insufficiency of the Proceedings*. Quod fuit confessum. Whereupon it was awarded, that the Prohibition should stand. Cro. Eliz. 730. pl. 5. Hill. 42 Eliz. C. B. Sibley v. Crawley ——— If it be *apparent* Matter, *that the first was not duly granted*, then a new Prohibition may be granted, by the whole Court, and with this agreed the Book of Entries in the Title of Prohibition; But this *is to be intended to the Spiritual Judge*; and it seems that the *Admiral is out of this Statute*. 2 Brownl. 35. Trin. 11 Jac. 1612. B. R. Anon. cites 22 H. 7.

In a Suit for Tithe of Lambs and Wool &c. of Sheep depastured in a Close called G. in B. The Plaintiff suggested for a Prohibition, that G. had always paid 10 s. in Discharge of all Tithe of Lamb, Wool, &c. It was moved for a Consultation, because the *same Suggestion had been made before in four several Prohibitions for the same Close, and the same Manner of Tithes alleged, and Consultation always granted for want of Proof within six Months*; But per Cur. it being for want of Proof only, and *not upon the Right* or Trial *of the Cession*, and being also *for Tithes of another Year not in Demand before*, the Suggestion is good; For this Statute goes to the Suggestion made upon the same Libel and to Consultations duly granted, which is not done in the Case before, but only by Negligence in not having his Proofs ready. Yelv. 102. Mich. 5 Jac. B. R. Cox v. Semor.

A Man *sued* upon this Statute in the Spiritual Court *for Wood cut*, and a Consultation was granted, yet the Defendant in the Court Christian might have a new Prohibition if it *appeared that the first Consultation was not duly granted*. 2 Brownl. 26. Dorwood v. Brickinden ——— So if a Man *sued for Tithes for divers Years*, and *Prohibition is granted for part of the Years*, and after that a Consultation awarded, yet the Plaintiff may have a *new Prohibition for the Residue of the Time*, notwithstanding this Statute, and that it be upon one self same Libel. 2 Brownl. 26. Dorwood v. Brickinden.

A Prohibition was granted to a libel for Tithes upon *Suggestion of a Modus* of 2 s. for all Tithes, and Issue was taken upon the Modus, and the *Plaintiff was nonsuited*, and thereupon a *Consultation granted*; afterwards *Sentence passed there against him*, and he *appealed in another Court upon the same Libel, and suggested another Modus differing from the first*, viz. for all Tithe Corn and Hay, and prayed a new Prohibition upon this but it was denied, and it was there held, That this Act ought to have a reasonable Construction, viz. to be before the same Judge, and for the same Cause. And a Prohibition was denied per tot. Cur. for the great Inconvenience which might ensue, for so upon several Appeals several Prohibitions might be granted. 3 Bulst. 182. Pasch. 14 Jac. Biggs v. J. S. Parson of D. ——— S. C. Roll. Rep. 378. pl. 55. Anon. accordingly. ——— Mo. 917. pl. 1305. S. C. but says, it was agreed, that if a *Consultation be not well awarded*, in such Case a new Prohibition lies.

In a Prohibition to a Libel for *Tithe Hay* it was found for the Plaintiff, because the Land which was pleaded to be *Parcel of the Possessions of a Priory* and held discharged Time whereof Memory &c. was a Discharge for so long only as it was in the Hands of the Priors, and not when it was in the Hands of their Farmors, the Priory being of the Order of *Premonstratenses*, and thereupon a Consultation was

was awarded. Afterwards *another Libel* was, but *differing from the former*, viz. where the firſt Libel was, that (They had paid Tithes Time out of Mind) now in the ſecond Libel it is added, (That though the Prior was diſcharged, yet they, viz. the Farmors, had paid Tithes by 20, 30, or 40 Years, and Time whereof Memory &c.) It was argued, that this was no Changing of the Subſtance of the Libel, and to this Mountague Ch. J. inclined, but Doderidge and Haughton J. e contra; For now by this laſt Libel they could fetch the Plaintiff in for Tithes; for though the Land was diſcharged in the Hands of the Abbot, yet becauſe Tithes had been paid for 20, 30, or 40 Years ſince the Statute, (which according to the Civil Law is ſufficient to make a Preſcription) they will charge the Land with Tithes in whatever Hands it be, whereas by the Statute it ought to be diſcharged only in the Hands of ſome Perſons, viz. of the Priors; and all the Court ſaid, That if the Spiritual Court proceed upon this Addition ſo as to give *Sentence for the Tithes upon any Preſcription ſince the ſtatute*, they will grant a Prohibition. 2 Roll. Rep. 207. Mich. 18 Jac. B. R. Lady Denton v. Conſtable of Chatrickard.

It was agreed by the Court, That if there be a Suit in the Eccleſiaſtical Court, and a Prohibition awarded, and afterwards Conſultation granted, that upon the ſame Libel no Prohibition ſhall be granted again; but *if there be an Appeal* in this Caſe then a Prohibition may be granted, but with theſe Differences; 1ſt If *he who appeals* pray the Prohibition, there he *ſhall not have it*, for then Suits ſhall be deferred in Infinitum in the Eccleſiaſtical Courts. 2dly, If the Prohibition and Conſultation were *upon the Body of the Matter* and the Subſtance of it; for otherwiſe he ſhall be put to many Times to try the ſame Matter, which is full of Vexation. Poph. 159. Paſch. 1 Car. B. R. Bowry v. Wallington —— The Caſe was thus, viz. W. libelled againſt B. for Tithes, who upon ſuggeſting a Modus had a Prohibition, and an Attachment, and declared, and Iſſue found for the Defendant, and upon a Conſultation granted Sentence was given againſt B, who appealed and prayed a new Prohibition and had it. Noy moved for a Conſultation, 1ſt Becauſe a Prohibition and Attachment upon it are but one Suit for the Contempt, and when once tried ſhall not be tried again. And as to this Statute he confeſſed the printed Book, and alſo in the Extract of the Parliament, one Roll remaining in the Tower is (*the ſame Judge*) but the *Parliament Roll* itſelf, and the Petition *is* (*Lecatque judici Eccleſiaſtico ſive Dioceſſ. eidem an Injuſmodi*) and the Anſwer to the Petition is (One Conſultation granted ſufficeth in this Caſe) and the Parliament Roll itſelf was brought into Court and view'd; but he ſaid, that if it were, as in the printed Book and Extract, (the ſame Judge) it ſhall not be *intended the ſame perſonal Judge*, but the ſame Judge of Conſtance of the ſame Juriſdiction or Cauſe, to avoid Infinity. Poph. 159. Paſch. 1 Car. Bowry v. Wallington ——Palm. 418. S. C. and Doderidge and Bridgman ſaid, the Appeal was the Party's own Act, and therefore in this Caſe the Intent of the Statute was (*Eccleſiaſtical Judge in general*) And Jones ſaid, it would be hard to have a new Prohibition upon his Appeal, when the Matter is tried againſt him. Doderidge ordered it to be moved again when the Court is full.——S. C. Lat. 6.——S. C. Lat. 75 ſays no Conſultation was awarded.

Prohibition, upon the Statute of 2 E. 6. becauſe he ſues for Tythes of Heath and Barren Ground within 7 Years after the Improvement. The Defendant pleads the Statute of 50 E. 3. cap. 4. and that at another Time a Prohibition was granted, and Conſultation thereupon, therefore he ſhall not now have another Prohibition. It was ſhewn that the *Conſultation was not upon the Subſtance of the Prohibition, but* becauſe he *did not prove* by two Witneſſes *the Suggeſtion within the 6 Months*, and it was thereupon demurred. It was reſolved, That the Conſultation being granted, for not proving the Suggeſtion by two Witneſſes, according to the Statute of 2 E. 6, and not upon the Subſtance of the Suggeſtion for want of its Verity, or for the Inſufficiency thereof, it is not within the Statute of 50 E. 3. cap. 4. For that is intended where Conſultation is granted upon the Subſtance of the Suggeſtion being proved to be inſufficient in Verdict, or Nonſuit after Evidence, and not where it is granted for the Inſufficiency of the Form of the Suggeſtion, or in the Proceeding thereupon; Wherefore it was adjudged for the Plaintiff; Eſpecially as this Caſe is, for that it is a collateral Cauſe out of the Suggeſtion, and no Cauſe of Conſultation at the Time of the Statute made. Cro. C. 253, 254. pl. 3. Hill. 6 Car. B. R. Stroud v. Hoskins. —— Jo. 231. pl. 3. S. C. Accordingly, and that the Defendant, notwithſtanding his Plea in Bar of the Prohibition, may plead in chief to the Matter of the Suggeſtion, and if he will diſpute it, then he ſhall have ſeveral Conſultations upon the ſaid Libel.

A Motion was made for a Prohibition to a Suit for Tithe Lamb upon Suggeſtion of a Modus to pay 2*d.* a Lamb for Lambs falling in the Plaintiff's Farm in the Pariſh. It was objected, That a Prohibition was granted before to ſtop this Suit upon a Suggeſtion; which was try'd and found for the Plaintiff, and a Conſultation granted; But it was anſwered, That that Suggeſtion was for every Lamb which fell in the Pariſh, whereas this is only for Lambs falling in a particular Farm, and ſo not within this Statute. But the Court inclined againſt a Prohibition, by Reaſon of the ſaid Statute. 2 Vent. 47. Trin. 1 W. & M. C. B. Anon.

3. If a Conſultation be once granted, the Party ſhall never have another Prohibition *in the ſame Cauſe*. Le. 130. pl. 177. Trin. 30 Eliz. B. R. in the Caſe of Stranſham v. Medcalf, ſays it was ſo holden in the Caſe of Hoskins v. Jones.

Upon a Motion to diſſolve a Prohibition granted to the Spiritual Court upon a Libel for Tithes, the Court took this Rule; When a Conſultation is lawfully granted, there a new Prohibition ſhall not be granted upon the ſame Libel; and yet they qualified that with this *Difference*, That *when* a Conſultation is *granted upon any Fault of the Prohibition* in Form, by Miſpriſion of the Clerk, or by Miſpleading of any Statute, or ſuch like, there a new Prohibition may be granted upon the ſame Libel; But if Conſultation be granted *upon the Right of the Thing in Queſtion*, there a new Prohibition ſhall not be granted upon the ſame Libel. 2 Brownl. 247. Paſch. 7 Jac. Anon.

Where the Plaintiff in Prohibition *failed in his Proof*, and thereupon a Conſultation was awarded, afterwards upon *Appeal to another Court* a New Prohibition was awarded. Cited Palm 418 in the Caſe of Bowry v Willingford, as Mich 21 Jac. Davy v. Cocks.—— S. C. cited Lat. by Name of Davis's Caſe.——— S C. cited Lat 75. by Name of Cockeril v Davis. —— S P. The Granting the Conſultation for Want of Proving a Modus ſuggeſted, being only collateral, and not granted upon the Right. 2 Keb. 719 Mich. 22 Car. 2. B. R. in the Caſe of Briggham v. Robſon. —— But Comb 63 Mich 1 Jac. 2. B R. Anon. Holloway J. ſaid, That after a Conſultation awarded for *not Proving his Suggeſtion* &c. the Party ſhall be for ever barred from having another Prohibition on the ſame Libel.

4. A Prohibition was granted to a *Suit for Tithes* upon a *Suggeſtion of the Lands being Barren and newly improved*, Hereupon a Trial is had on a Declaration on the Prohibition, and a *Verdict* for the Parſon, *that the Lands were not barren*, and thereupon is a *Conſultation*, and he proceeding there gets a Sentence; from thence there is an *Appeal to the Arches*, and there they enter an *Allegation that the Land is barren*, and the Court there is proceeding to repeal the Sentence, becauſe Barren Land, tho' contrary to the Verdict at Law; And upon all this Matter the Court grants a Prohibition Quoad the Allegation of Barren Land. 2 Show. 195. pl. 195. Paſch. 34 Car. 2. B. R. Owen's Caſe.

(O. a. 2) Contempts to Prohibitions. Puniſh'd How, and Where. And Pleadings.

1. ATtachment upon a Prohibition was ſued, inaſmuch as the Defendant *ſued in Curia Cleri of Lay-Fee contrary to the Prohibition of the King*, and Counted that he delivered the Prohibition in Preſence of certain Perſons; Mombray ſaid * He has ſued No Plea contrary to the Prohibition of the King, Priſt. Thorp ſaid, You ſhall not have ſuch Plea; For if no Prohibition was delivered to You, and You had ſued there of Fee, You had committed a Contempt; For the Statute is a Prohibition in itſelf, and after the *Iſſue was* taken *that he had not ſued any Plea of Lay-Fee in the Spiritual Court*, *Priſt*; and the others e contra. Br. Attachment ſur Prohibition, pl. 9. cites 21 E. 3. 29.

* In ſuch a Caſe this Plea was diſallowed for the Reaſon given here by Thorp, by which the Defendant ſaid, That he did not ſue in the Spiritual Court of Lay Fee before, nor after, the Prohibition, Priſt, and the others econtra. Br. Attaint. pl. 14. cites 21 E 3. 38

2. Attachment upon a Prohibition lies *in the County where the Summons to appear in the Spiritual Court was made*, tho' the Plea, and the *Excommunication*, which is a Grief, *was in another County*. Br. Attachment ſur Prohibition, pl. 3. cites 44 E. 3. 32.

3. Attachment upon a Prohibition, becauſe the Defendant *held Plea of great Trees after Prohibition delivered to him*, and he *ſaid That he held Plea de Sylva Cædua by reaſon of a Conſultation to him directed after the Prohibition*, *Abſque hoc that he held Plea of other than De Silva Cædua*, and no Plea; For he ought to traverſe *Abſque hoc*, *that he held Plea of great Trees*; For, Per Belk Silva Cædua is all that which is fit to be cut and will grow again, and every Tree cut will grow again if it be kept from Beaſts, ſo that by this Word Silva Cædua * Prieſts ſue for, or claim Tithes as well of great Trees as of ſmall, and it was never ſeen that Tithes ſhould be demanded of great Trees, nor of Timber, by which he ought to traverſe That he he did not hold Plea of great Trees, Quod Curia conceſſit. Br. Attachment ſur Prohibition, pl. 5. cites 50 E. 3. 10.

* Orig. is (Priſtes purſuant)

Br. Quinzime, pl. 2. cites S. C. — Br. Impriſonment, pl. 12 cites S. C.

5. The Prior of E. brought Attachment upon a Prohibition againſt the Collectors of Tenths and Fifteenths, and counted that he deliver'd to them a Prohibition in the Preſence of certain Perſons, *That they ſhould not diſtrain for certain Rents iſſuing out of certain Tenements held of him*

him in London; and notwithſtanding this they had taken certain Sums of Rents of certain of the Tenants of the Prior for Tenths aforeſaid tortiouſly &c. They juſtified for Tithes ariſing out of the Lands of the Religious, purchaſed after 21 E. 1. becauſe the Ward in London, in which the Tenements lay, was not ſufficient of Goods, they took the Rent of the Tenants, becauſe the Day of Payment was come, and becauſe the Tenants had paid the Fifteenth for their Goods, therefore per Cur. the Prior ſhall not pay Tenth for the ſame Tenements, and therefore the Defendants were condemned, and *the Damages taxed to* 10 *l. and the Collectors capiantur.* Br. Attachment ſur Prohibition, pl. 7. cites 7 H. 4. 33.

5. Attachment upon a Prohibition, the *Writ was Tenuit placitum contra Prohibitionem noſtram*, and *did not Count That Prohibition was delivered to the Defendant*, by which the Defendant demanded Judgment of the Count for this Default; And per Cur. he ought to Count it, and yet it is not traverſable. Br. Attachment ſur Prohibition, pl. 1. cites 9 H. 6. 61.

6. Prohibition iſſued *to a Bailiff not to hold Plea* in Action between J. C. and W. D. and after *Attachment* upon the ſame, Prohibition *was brought againſt the Bailiff and the Plaintiff*, becauſe they proceeded contrary to the Prohibition of the King; And per Newton, clearly the Action does not lie againſt both, becauſe the Prohibition was directed only to the Bailiff, ſo that the Plaintiff has not committed any Contempt; But per Aſcue the Statute is a Prohibition in itſelf, and ſo the Action lies well *againſt both*, *Quære* inde; For the Reaſon was that the Bailiff held Plea of 40s. which belong to the King's Court, and it ſeems that there is not any Statute thereof, but only the Common Law; and it ſeems that the Attachment is the Original, and the Prohibition and the Refuſing to obey it is the Ground and Cauſe of the Action, but the Attachment is the Original and the Action. Br. Attachment ſur Prohibition, pl. 11. cites 19 H. 6. 54.

7. A Man ſhall have an *Attachment* upon a Prohibition *againſt the Judge*, *if he refuſe to receive the Prohibition*, and to admit of it. F. N. B. 40 (K) And ibid 40 (I) in the New Notes there (c) ſays, where there ſhall be an Attachment againſt the Judge and Party by a ſeveral Pone per Vad. See 33 E. 3. Brief 912. For the Act of the Judge is depending on the Suit and Act of the Party, and ſee there an Attachment on a Prohibition *againſt the Plaintiff and the Judge, where the Prohibition was directed only to the Judge*, and held by Newton not good; For the Plaintiff in the Suit there ſhall not anſwer to the Contempt, but only to the Treſpaſs; Becauſe no Prohibition was directed to him, and ſo he cannot be joined in the Action. But Aſcough Contra, that the Law is in itſelf a Prohibition, and ſo there needs no Mention of any Prohibition, and therefore the Plaintiff ſhall anſwer for the Contempt, as in a Premunire &c. which Norton agreed, had the Prohibition been directed to both of them, and yet this Surmiſe is not traverſable 19 H. 6. 54 a. b. See Accordingly of the Matter of the Prohibition that it is not traverſable. 9 H. 6. 61. a. 21 E. 3. 29. a 38. b.

8. If a Parſon *libels for Tithes*, and a Prohibition is brought, and *he libels for Tithes of another Year*, *the firſt not being determined*, an Attachment ſhall be awarded. Per tot. Cur. Mo. 599. pl. 824. Mich. 37 & 38 Eliz. Sharington v. Fleetwood. *So* where a *Preſcription is general for all Inhabitants*, and a *Prohibition is granted for one* who is ſued, if the *Parſon ſues another upon the ſame Title before the firſt is determined*, an Attachment lies. Mo. 599. pl. 824. Mich. 37 & 38 Eliz. Sharington v. Fleetwood.

The Parſon of B. libell'd for Tithe Milk of 8 Kine depaſturing in Bl. Acre in his Pariſh; Defendant preſcribed to pay 10 s. a Year to the Parſon for the Tithes of that Field, which Plea being refuſed, a Prohibition was granted, and an Injunction againſt the Judges, Doctors, Proctors, &c. Afterwards the ſame Parſon libell'd again againſt the ſame Pariſhioner for the ſame Tithes, but there was no Difference in the 2 Libels, only that the *later Libel was for a leſs Number of Kine* than the firſt, whereupon the Pariſhioner prayed an Attachment, which the Court granted; For otherwiſe a Prohibition ſhould be granted to no Purpoſe. Le. 111. pl 151. Paſch 30 Eliz. C B Stafford's Caſe.

Fol. 320.

(P. a) *Conſultation. In what Caſes* it ſhall be *granted.*

See (Q. a) Hob. 192. pl. 242. S. C.

1. IF a Prohibition be granted upon a good Suggeſtion, **and the Parties go to Iſſue upon the Suggeſtion,** and the Iſſue is found againſt the Plaintiff in the Prohibition, **yet if it** appears to the Court upon the finding **of the Jury** that there is good Diſcharge **of Tythes** upon a Modus **Decimandi**, tho' the Plaintiff has miſtaken his Iſſue, **no Conſultation ſhall be granted**; **Becauſe it appears that they ought not to have Juriſdiction thereof in the Spiritual Court. Hobart's Reports Caſe. 259.** *Berry's* **Caſe.**

Hob. 192. pl. 242. S. C.

2. As if **upon a Prohibition** the Iſſue be whether all the Land in ſuch a Pariſh ought to be diſcharged of Tithes for a certain Modus **Decimandi**, and the Jury finds that all **the Land** except certain Acres **ought to be diſcharged; but not thoſe Acres &c. tho' the Iſſue be found againſt the Plaintiff in the Prohibition, yet no Conſultation ſhall be granted for any of the Land, but** for thoſe Acres, **inaſmuch as it there appears that there is a good Diſcharge, and real Compoſition for it. M. 15. Ja. B. between** *Perry and Bacetry* **adjudged. Hobart's Reports. 259 Same [Caſe] yet there, becauſe the Suit was for Tithes in Kind out of the Land excepted only, the Conſultation was granted; For there the Suit was well founded.**

See Diſmes (F. a) pl. 3. S. C. and the Notes there.

3. **In a Prohibition,** if Plaintiff declares that he is ſeiſed in Fee of 2 Meſſuages and 2 Mills, and that he and all thoſe whoſe Eſtate he has &c. have uſed to pay 20 s. **to the Parſon** in Lieu of all Tithes **iſſuing out of thoſe 2 Meſſuages and Mills, and that he has** erected de Novo 2 New Mills within the ſaid 2 Meſſuages, **for which alſo he ought to be diſcharged of Payment of any Tithes by the Law, and that Defendant has ſued him in Court Chriſtian for Tithes of the 4 Mills: To which the Defendant pleads for a Conſultation, and** traverſes the Preſcription **as to the 2 Meſſuages and 2 ancient Mills; upon which they are at Iſſue, and** as to the 2 new Mills a Demurrer is joined, **and after the** Plaintiff is nonſuited **upon Trial** of the Preſcription. **This determines the Demurrer alſo, and therefore a Conſultation ſhall be granted for the Whole. Mich. 13. Car. B. R. between** *Goodwin and Smith.* **Per Curiam adjudged. This concerns** *Torrington Mills* **in the County of Devon.**

Mich. 10 Jac. ——

4. **If the** Declaration **in a Prohibition** be good, and the Plea for a Conſultation be inſufficient, and yet Iſſue joined, and a ſpecial Verdict **found, by which the Plaintiff has not any Cauſe to have a Prohibition, yet if this which is ſo found be** impertinent to the Iſſue, **no Conſultation ſhall be granted. Co. 11.** *Priddle and Napper* **15. Adjudged.**

It ſhould not be granted before the Pope's Collector. Br. Conſultation. pl. 2. cites 2 H. 4 9. —— Br. Juriſdiction, pl. 20. cites S. C.

5. After a Prohibition, **if the Party will** ſubmit himſelf to the Judgment of one who ſurmiſes **that he has** Juriſdiction (where he has not any) **yet no Conſultation ſhall be granted.** 2 H. 4. 10.

6. **If a Man has a** Prohibition upon a Libel for Tithes of Faggots, upon a Suggeſtion, That they were made of **great** Trees above 20 Years of Age; **and in the Suggeſtion** the Quantity **of the Faggots** is miſtaken, **yet if it appears that he makes his Suggeſtion** according to the Copy of the Libel **given to him by his Proctor, no Conſultation ſhall be granted**; **for** by the Statute of 2 H. 5. he ought to have a true Copy of the Libel. **M. 4 Ja. B. R. between** *Swinnerton* **and** *Moon.* **Adjudg'd.**

7. It

7. It was agreed in the Parliament at Sarum, That Conſultation lies of *Silva Cædua*, notwithſtanding that they are renew'd Annually. Br. Conſultation, pl. 11. cites the Regiſter.

8. Conſultation after Prohibition ſhall not be directed to the Spiritual Court to hold Plea *in Caſe of Defamations*; for the Cauſe belongs to the King's Court; by all the Juſtices. Br. Juriſdiction, pl. 96. cites the Regiſter. S. P. Br. Conſultation, pl. 11. cites the Regiſter.

9. Citation was ſued in the Spiritual Court *againſt a Feme Sole upon Slander*, and the *Libel prov'd* for the Plaintiff; upon which the *Court awarded* 10 *l. to the Party for his Coſts, and for the Defamation*; and after the *Feme took Baron, and made the Baron her Executor, and dy'd*; afterwards *Citation was againſt the Baron, as Executor of his Feme, to pay the Sum to the Party*; upon which Prohibition was ſued, and the other pray'd Conſultation; and by the Opinion of the Court, becauſe the Slander is Spiritual, and they cannot award better Recompence than Money, and that the Baron has prov'd the Teſtament of the Feme, therefore it was agreed, That as ſhe made him Executor, a Conſultation ſhall be granted. But ſeveral Serjeants e contra, and that the Spiritual Court cannot award a Sum of Money, and that the Slander dies with the Perſon, and all that depends upon it likewiſe. But Brooke ſays, It ſeems to him, that *it is a Debt, and by the Death of the Feme the Debt ſhall not run upon the Baron*; But it ſeems, *by the Probate of the Teſtament he has taken upon him to pay it in Law.* Br. Conſultation, pl. 5. cites 12 H. 7. 22.

10. It ſeems, That where the Spiritual Court is *prohibited to hold Plea of a Thing whereof the Plea belongs to them*, that in thoſe Caſes *Conſultation lies.* Br. Conſultation, pl. 7. *As if a Man ſues in Court Chriſtian for a juſt Cauſe of Spoliation,* and the *other Party gets Prohibition*, the Plaintiff ſhall have Conſultation; for it is *merely Spiritual*, and triable in the Spiritual Court. Br. Conſultation, pl. 9. cites 38 H. 6. 19. — But where a *Prohibition is granted of ſuch Matters, for which Actions lie at Common Law*, a Conſultation ſhall not be granted. Br. Conſultation, pl. 6. cites 22 E. 4. 20.

The Juſtices ſaid, That properly a Conſultation ought not to be *granted, but* in Caſe *where* a Man *cannot recover at the Common Law* in the King's Courts. F. N. B. 53. (H.) — It does not lie of a Thing which a Man may recover in a Lay Court. Br. Conſultation, pl. 7.

11. When a *Conſultation* is once *duly granted*, the *Court Chriſtian may proceed, notwithſtanding* the Party purchaſe *a new Prohibition*, directed to them, if the Libel be not chang'd. F. N. B. 45. (A) ſays, Quod Vide by the Statute of 50 E. 3. cap. 4.

12. Prohibition for *Tithes* againſt the Defendant, Farmer of the Rectory of Frit-tender, in the County of Eſſex; and *ſurmiſeth*, That from Time whereof &c. he *had uſed to pay* 4 *s. per Annum, in diſcharge of all Tithes*; and his *Proofs were*, That he uſed to pay 4 *s.* 6 *d.* per Annum, And upon this *Variance*, a Conſultation was pray'd, and becauſe it appeared, That there were not any Tithes due in Kind to the Parſon, as he hath ſued, but it is a Modus Decimandi, altho' not in ſuch Manner as the Plaintiff ſurmiſeth, the Court held, That the Defendant ſhould not have Conſultation; for he *had not any Cauſe for Tithes of that Land*; and it was ruled accordingly. Cro. Eliz. 819. pl. 13. Paſch. 43 Eliz. in C. B. Beal v. Webb. cites 2 Eliz. Dy. 171.

13. A Prohibition was granted upon Suggeſtion of a *Modus Decimandi.* Afterwards a Conſultation was pray'd, and granted, *as to Offerings*; becauſe the Modus &c. does not go to the Perſonalty. Mar. 81. pl. 131. Paſch. 16 Car. Anon.

14. It is moved, That where a *Prohibition* was 6 *Months ſince granted* for Stay of a Suit in the Eccleſiaſtical Court at Hereford, *upon Surmiſe, That the Lands are held in Capite*; whereas it *appeared by Letters Patents thereof, That the Lands were holden of Eaſt Greenwich*; therefore Conſultation was granted, unleſs Cauſe ſhew'd, and the Party to pay *Double Coſts*, according to the Statute whereby the Prohibition is granted. Cary's Rep. 113, 114. Wolfe v. Merrick Clums.

15. The *Temporal Court* may well *try the Regularity* of a Deprivation, and if it is within their Juriſdiction, we will admit the juſtice of their Proceedings where they have Authority. Per Holt Ch. J. Comb. 134. Trin. 1 W. & M. B. R. in the Caſe of Crawley v. Oldiſh.

16. A Prohibition was granted upon *Suggeſtion of a Cuſtom to pay no Tithes for Agiſtments of Barren Cattle*; and in a Declaration upon the Prohibition, Iſſue was join'd upon the *Cuſtom*, and *found for the Plaintiff*; and notwithſtanding, becauſe it was *void in Law*, a Conſultation was awarded. Lord Raym. 2 Rep 1162. cites it as adjudg'd. Hill. 8 W. 3. B. R. in the Caſe of Dix v. Woodſon.

17. If a *Prohibition* be *granted before Sentence*, and *not deliver'd till after* Sentence, the Matter being of Eccleſiaſtical Conuſance, the Court will grant a Conſultation; for it is a Prohibition after Sentence. Comb. 448. Trin. 9 W. 3. B. R. Gibbons's Caſe.

(Q. a) Conſultation. *At what Time*, and *out of what Court*, and *How*.

Br. Conditions, pl 236. cites S. C.

1. QUARE *Impedit* by the *King*, who *recover'd the Preſentation, and his Clerk in, who after dy'd*, and *another in by the Collation of the Biſhop*, and *F. made Spoliation*, by which the *Preſentee of the Biſhop ſued Spoliation in the Spiritual Court*, and *the other got Prohibition upon certain Matter*, and the *other got Conſultation upon Condition that it ſhould not impugn the Preſentation of the King*; *by which Conſultation the other was ouſted, and ſued in Chancery, ſuppoſing, That this Conſultation was in Defeaſance of the Preſentation of the King*; and becauſe the Preſentee of the King was in all his Life, and the Spoliation does not go in Defeaſance thereof, nor any Thing to the Right of the King; and if any Tort ſhall be, it is to the Biſhop who made Collation, and not to the King; therefore the Defendant was diſmiſs'd. Br. Conſultation, pl. 10. cites 43 E. 3.

Br. Conſultation, pl. 3. cites S. C.

2. If a Prohibition be granted by the Court of *C. B.* a Conſultation may afterwards be granted out of C. B. after, if it appears, That the Matter is Spiritual; quod nota. Br. Prohibition, pl. 6. cites 38 H. 6. 14. Per Moile J.

3. Libel againſt the Biſhop of L. for *refuſing to admit the Plaintiff preſented to the Church of P.* The Biſhop *ſuggeſted* for a Prohibition, That there is *no ſuch Rectory with Cure of Souls in the Dioceſe, but it is only a perpetual Vicarage*. It was objected, That a Conſultation ought not to be granted; for whether there be ſuch a Rectory or Not ſhall be tried Here; But afterwards, by Aſſent of the Parties, a Conſultation was granted Quoad Inſtitutionem of the Plaintiff, but that they ſhould not proceed farther. Le. 181. pl. 255. Trin. 31 Eliz. B. R. Slugg v. the Biſhop of Landaff.

4. Prohibition for ſuing for *Tithes of Faggots* of Oak and Elm, cautiouſly making his Libel for Faggots which were of Beech and Thorn; The Defendant prayed a Conſultation, Ita quod he ſhould not meddle with the Faggots of Oak and Elm; for otherwiſe the Party, that makes the Faggots, may *per Cautelam put in a Stick of Great Wood* into the Faggots, and ſo prejudice the Parſon of all the Tithes of the Reſidue But the Court ſaid, If it be ſo the Party *muſt ſhew the Special Matter* Pro Conſultatione Habenda, *that the Oak and Elm are ſo intermixt* that he cannot do otherwiſe, *and pray a Conſultation as to* that which was *Thorn and Beech*. And ſo it was done in **Molyn's and Dawes's Caſe**, where ſuch a Special Conſultation was granted upon ſuch Special Plea, but as it is, he can have no Conſultation for any Part. Cro. Eliz. 347. pl. 18. Mich. 36 & 37 Eliz. in B. R. Buckhurſt v. Newnton.

5. No

5. No Conſultation can be granted *out of Term*, becauſe it is an Award of Court, and is final, and cannot be granted by all the Judges out of Term, nor by any of them in Term *out of Court*. 12 Rep 41. Fuller's Caſe.

6. A Conſultation was granted *Quoad Procurations demanded generally*; but if the Plaintiff denied the Quantum, then a Prohibition. Raym. 360. Paſch. 32 Car. 2. B. R. Kirton v. Guilder.

For more of Prohibition in General, See **Courts, Diſmes, Peculiars**, and other Proper Titles.

Property.

(A) *In what Perſons* may be, or ſhall be ſaid to be.

1. NOTE, That the *Goods of an Abbot* belong to him during his Life, and he has Property in them, and may give or ſell them; but if he dies, the Property of the Goods not given or ſold are in the *Succeſſor*. Br. Property, pl. 36. cites 9 H. 6. 25.

2. A *Felon* can claim no Property; Contra of a *Treſpaſſor*. Br. Appeal, pl. 84. cites 4 H. 7. 5. S. P. Br. Appeal, pl. 102. cites 13 E. 4. 6.——S. P. Br. Eſtray, pl. 13. cites 46 E. 3. 16.——S. P. Br. Ejectione, pl. 8. cites 38 Aſſ 9.

3. A Man *Outlaw'd and Pardon'd* has Property in Goods. Agreed per Cur. Owen 116. Mich. 29 & 30 Eliz. Knowles v. Powell.

4. *Executor* has no Property in the Goods which he has as Executor. Per Williams J. 3 Bulſt. 6. Hill. 12 Jac. in Caſe of Waller v. Hanger. S. P. Per Yelverton J. Ibid. 8. in S. C.——S. P. Per Fleming Ch. J. Ibid. 11. in S. C.——S. P. Per Doderidge J. Ibid. 18. in S. C.

5. A Man may have a Property, *tho' not in himſelf*, as in the Caſe of *Joinetenants*, where it is not in one but in both. Arg. 3 Mod. 97. Hill. 1 Jac. 2. B. R. in Caſe of Upton v. Dawkin.

6. If *a Man hires an Horſe* for a particular Time to ride ſuch a Journey, he *hath a ſpecial Property* in the Horſe during that Time *againſt all Men*, *even* againſt *the* right *Owner*, who cannot juſtify the taking it during the Time it was hir'd for, tho' upon a Pretence of the other's intending to cozen him of his Horſe, or to ride him to any other Place than was agreed upon. Cro. J. 236. pl. 7. Hill. 7 Jac. B. R. Lee v. Atkinſon and Brooks. Brownl. 212. S. C. and P. —— Yelv. 72 S. C. and P.

7. Whatever an *Apprentice gets* belongs *to his Maſter*, and whether legally Apprentice or not, is no ways material; for it is enough if he be ſo *de Facto*. 1 Salk. 68. Trin. 2 Ann. Barber v. Dennis.

(B.) In what *Things* it may be.

1. PRoperty may be of *Fiſh in a Piſchary*, and therefore in Treſpaſs Quare *Piſcem Piſcarie ad Valentiam* &c. cepit, the Plaintiff ſhall recover Damages by this Word Valentiam. Br. Property, pl. 18. cites the Regiſter, fol. 95.

2. Treſpaſs was brought of J. N. *Scotum Priſonarium* ſuum quem ipſe cepit & de quo habere debuiſſet 100 l. Pro Vita ſua ſalvanda &c cepit &c.

&c. Brooke says, And so it seems that a Man has Property in a Prisoner. Br. Property, pl. 18. cites the Register, fol. 102.

S. P. Br. Property, pl. 44. cites 12 H. 8. 4. 3. A Man has Property in his *Dog*. Br. Property, pl. 49. cites the Register, fol. 109.

——S. P. Cro. E. 125. pl. 6. Hill. 31 Eliz. B R. Ireland v. Higgins.——As of a *Blood-hound or Mastiff*. Rep. 18. cites 12 H. 8. 3. 18 H. 8. 2.——Cro. E. 126. pl. 6. Arg. cites 23 Eliz. that J. S brought Trespass for taking a Bloodhound, and found for him, and he recover'd 10 l. Damages.

Br. Brief, pl. 11. cites S. C. 4. A Man who has a Warren has no Property in the *Hares*, and yet he shall have them by Reason of the Warren; and his Writ of Trespass of mille Lepores was held good without suos. Br. Property, pl. 4. cites 3 H. 6. 55.

5. When *Savages* are *out of the Forest*, none has Property in them. Br. Customs, pl. 64. cites 7 H. 6. 36. Per Newton.

* Trespass was brought Quare Vi & Armis *tres pullos Esperverum suorum Pretii* &c. *cepit* &c. apud &c. and so see that he has Property when they are in his own Land, as it seems. Br. Property, pl. 18. cites the Register, fol. 193 ——A Man has Property *in Young Hawks*, and in their *Nests*. Br. Property, pl. 28 cites 10 E. 4. 14. —— Br. Property, pl. 30. cites 16 E. 4. 7.

6. As long as * *Hawks*, † *Herns*, ‡ *Deer*, || *Conies* &c. are *in my Soil* or Land, or in my Warren or Park, I shall have an Action of Trespass of the taking of them, therefore I have Property in them as it seems, and per Newton, it shall say Damas suas. Br. Property, pl. 16. cites 22 H. 6. 59.

† S. P. And Brooke says it appears there, that those which are *in Nests* and of *Eggs of Wild Birds in Nests*, the Owner of the Soil has Property, as of Hawks &c. Br. Property, pl. 48. cites 14 H. 8. 1.

‡ Trespass does not lie Quod *Damam suam cepit*; For he has not Property; Contra, if it be Damam suam *Domitam* cepit; For in Tame Deer the Owner has Property; Note the Diversity; For in *Bees*, *Fowls*, or *Fish*, as are *Savage*, there is no Property, unless *Ratione Soli*. Br. Property, pl. 37. cites 43 E. 3. 24 —— No Property is of Deer in a Park, unless they are tame and reclaimed, 3 Lev. 227. Trin. 1 Jac. C. B. Mallock v. Eastly.

|| Trespass was brought Quare &c. *ducentos Cuniculos suos Pretii* &c. apud D. cepit &c. and also note this Word Pretii &c. pretends that the Plaintiff ought to recover Damages, and so Property. Br. Property, pl. 18. cites the Register, fol. 93. 102.

Deer in a Park, or Conies in a Warren, *as long as they continue* in the *Park or Warren*, the Owner has a special Property in them; otherwise he has not, unless they are domestick. Cro. Car. 554. Trin. 15 Car. Case of Child v. Greenhill.—— S P. per Houghton J. 2 Roll. R. 50 —— See (F) pl. 2. in the Notes. Sutton v. Moody.

Trespass was brought Quare &c. 100 l. *Denariis suis in Pecuniis numeratis* cepit &c. Br. Property, pl. 18. cites the Register, fol. 95. 7. *Trespass* of taking 30 l. the *Defendant intitled himself as to an Offer* by reason that he is Parson of D. by which he took it as Offering, delivered it to N. to keep to his Use, and he delivered it to the Plaint. and the Defendant took it, Judgment &c. And so it seems here that it is admitted that a Man may have Property *in Money out of any Purse*, *Bag*, *or Chest*; and he gave Colour as above, and justified the retaking, Quod mirum; For one Penny cannot be known from another. Br. Property, pl. 7. cites 34 H. 6. 10.

So it seems to be *of Swans*, which after the Taking, produce *Signets*, *a Mare with Fold*, *a Cow with Calf* &c. 8. If a Man takes *my Sow with Pig*, *and after she farrows* 5 *Pigs*, I shall have Replevin of the Sow and Pigs, and shall recover Damages for both, Quod nota; and yet they *were not in Esse* Quoad Mundum, before they were farrow'd. Br. Property, pl. 29. cites 12 E. 4. 5.

But quare if it was not *big with Young at the Time of the Taking*. Ibid.

9. There is no Property in *Pidgeons*. See Br. Property, pl. 30. cites 16 E. 4. 7.

*And therefore Trespass lies for striking and killing his Hawk; tho' Trover and Conversion lies not but of a Hawk reclaimed, which may be known by her Varvels, Bells, or by some other Mark, whereby Notice can be taken of her Owner. Cro C. 18. pl. 11. Mich. 1 Car. C. B. Vincent v. Beshey. 10. A Man may have Property *in Hounds*, * *Hawks*, *Apes*, *Thrushes*, *Popinjays* &c. which are Feræ Naturæ, if they are made tame. Br. Property, pl. 44. cites 12 H. 8. 4.

11. A Man may have a Property in a *Ferret*. Arg. Cro. E. 126. pl. 6. Hill. 31 Eliz. B. R. in the Caſe of Ireland v. Higgins cites 2 E. 2. Avowry.

12. *Abſolute* Property, cannot be in any Thing but what is *Domitæ Naturæ*. *Qualified or Poſſeſſory* may be of Things *Feræ Naturæ*; but then it is after they are tamed, and ſo long as they remain Tame, or in Poſſeſſion; but there is no Property in Savage Beaſts which a Man has *Ratione Privilegii*, as Deer &c. in Park or Warren &c. 7 Rep. 17. b. Trin. 34 Eliz. in the Caſe of Swans.

The Property in *Deer, Conies* &c. is *Ratione Furis*. Per Yelverton J. but of a Tame Deer there is an abſolute Property; Per Hutton J. Het. 50. Mich. 3 Car. C. B. Ireland v. Higgins.

(C) *Deveſted or Preſerved*, by what, and when.

1. WHERE a Man *enters into another's Franktenement, and cuts down Trees, and makes them Timber*, yet the Property is in the Owner of the Soil till they be carried away; per Priſot, quod nota; And yet the Cutting and Carrying away [immediately] is not Felony, as adjudged elſewhere, and therefore it ſeems that the Property was never in the Owner of the Soil as a Chattel. Br. Property, pl. 8. cites 35 H. 6. 2.

2. If a Man *loſes his Goods*, and *J. S. finds them*, and after *ſells them to the firſt Owner in Market Overt for certain Money*, Quære if the Vendor be barred in Action of Debt for the Money or not; for the Sale ſeems to be void; Becauſe the Property was never out of the Owner. Br. Property, pl. 27. cites 7. E. 4. 15.

3. In Treſpaſs, the *Defendant ſaid, That the Place is* 10 *Acres, which was the Franktenement of S. and he as his Servant, and by his Command entered, and S. took the Beaſts Damage feaſant, and delivered them to the Defendant to put them in Pound* &c. *which he did* &c. and it was held a good Plea; for *by ſuch taking the Property is not out of the Plaintiff*; For if it was then the Plaintiff could not have Treſpaſs againſt the ſecond Treſpaſſor. Br. Treſpaſs pl. 329. cites 12 E. 4. 10.

4. The Property of a *Cow Attach'd* is not out of the Owner till he makes Default at the Day. Br. Property, pl. 24. cites 9 H. 7, 6.

5. If a Man *waives his own Goods without* [having done any] *Offence*, *ſaying*, That *he will not have them any longer*, this is no Forfeiture, and he may retake them at his Pleaſure. Br. Forfeiture de Terres, pl. 112. cites Doct. and Stud. lib. 2. cap. 29. fol. 115.

The Property of *Goods waved by Felon* is preſerved to the Owner by his *freſh Suit* of the Felons. 2 Le. 192 pl. 242. Trin. 28 Eliz. C. B. Rook v. Dennis.

6. If a *Foreſter follows a Buck*, which is *chaſed out of the* Park or *Foreſt*, altho' he that hunts him kills him in his own Ground, yet the Foreſter or Keeper may enter into his Ground and retake the Deer, by reaſon of the Property and Poſſeſſion which he hath in it by the Purſuit. Arg. Godb. 123. pl. 144. cites 12 H. 8.

7. If I *leaſe certain Sheep for 2 Years*, now upon that Leaſe ſomewhat remains in me, but that cannot properly be ſaid a Property, but rather a *Poſſibility of a Property* which cannot be granted over; per Windham J. Le. 43. Mich. 28 & 29 Eliz. C. B. in the Caſe of Wood v. Foſter. — cites 11 H. 4. 177, 17.

Leaſe of live Cattle Leſſee is to leave ſo many at the End of the Leaſe. The Property of the Leſſor is no longer than the ſame Cattle live, and the Property of thoſe that ſucceed is in

in the Leſſee; but 'tis otherwiſe of *Dead Goods*; for there, if any thing is added for mending or repairing &c. the Leſſor, at the End of the Term, ſhall have the Additions; For of them he hath always the Property, and they are annexed to the Principal. Godb. 113. pl. 135. Mich. 28 & 29. Eliz. C. B. Wood v. Aſh.——Ow. 139. S. C.

8. If Goods are taken by a *Treſpaſſer*, yet if the Party, from whom they were taken, be attainted of Felony, he ſhall forfeit them; For the Right and Property *remains in the Owner*, and the Law ſhall adjudge them in him *until he makes his Election* to the contrary by bringing a *Writ of Treſpaſs*. Cro. E. 824. Paſch. 43. Eliz. C. B. in the Caſe of Biſhop v. Lady Montague.

9. If a Man bring *Treſpaſs for taking his Horſe, and is barred in that Action*, yet if he *gets the Horſe into his Poſſeſſion*, the Defendant in the Treſpaſs can have no Remedy, becauſe notwithſtanding ſuch Recovery the Property is ſtill in the Plaintiff. 2 Mod. 319. Trin. 30 Car. 2. B. R. in the Caſe of Put v. Roſter, als. Rawſterne.

After a *Condemnation on a Seiſure*, the Property is *divеſted* out of the Party.

10. If Condemnation be of Goods by the Court, and they are *proclaimed as forfeited*, the Property is altered. Raym. 336. Mich. 31 Car. 2. in Scacc. Eikens v. Smith.

Carth. 327. Trin. 6 W. & M. in Scacc. Martin v. Wilsford.

11. *After Aſſignment by Commiſſioners of Bankrupts* the Bankrupts Property ceaſes. Vent. 53. Hill. 21 & 22 Car. 2. in Caſe of Willbraham v. Snow. S. P. And not before. 1 Salk. 108. Paſch. 1 W. & M. B. R. Cary v. Criſp.——See Bankrupt.

12. In Trover the *Plaintiff made Title under a Will* made in 1689, *by which* the *Teſtator deviſed to her all his Perſonal Eſtate*; ſhe produced the Probate; the *Defendant produced a Deed of Gift* made by the Teſtator in 1650, Habendum *to Truſtees for the Uſe of his Children*; the Plaintiff admitted the Deed of Gift to be made of the ſame Goods as in the Will, but inſiſted that it was not good againſt Creditors; that a *Judgment was had againſt the Teſtator* 7 Years *after the Deed of Gift*; That by Virtue of a Teſtatum Fieri Facias, *the Goods* were *taken in Execution, and ſold* by the Sheriff in 1657 for 8000 l. It was proved that the *Teſtator's Steward paid the Money*, and redeem'd the Goods, *and* that the *Teſtator gave him Bond for the Money, which he afterwards paid* him, and the Bond was cancell'd; ſo that *by this Means he had gained a New Property*. A Copy of the Teſtatum Fi. Fa. was produced, and the Bill of Sale by the Sheriff, and the Bond cancell'd; and thereupon the Plaintiff to whom the Goods were deviſed, had a Verdict. 4 Mod. 51. Mich. 3 W. & M. B. R. Lady Winchelſea v. Lady Maidſtone.

(D) Property *Gain'd, Alter'd, or Transferr'd by what* Act &c.

So if an *Adulterer cloaths a Man's Wife*, the Husband may take his Wife and Cloaths alſo.

1. A *Prior took a Man's Son*, and *put a Suit of new Cloaths upon him*. The Father took away his Son, and the Prior brought Treſpaſs for the Cloaths; but adjudg'd he ſhould be barr'd, becauſe he had annex'd it to his Body. Arg. Mo. 214. pl. 354. Mich. 27 & 28 Eliz. in the Viſcounteſs of Bindon's Caſe, cites 12 H. 4.

But in both Caſes, if the Son and the Wife had two Suits of Apparel, *one upon their Body and another Suit in their Chamber*, neither the Father nor the Husband can take the ſpare Suit; for the *Law* which *tolerates Neceſſity*, does *not* tolerate *Exceſs*. Ibid. Arg.——S. P. But putting a *Winding-ſheet on a dead Body*, gives no Property to the dead Body, but the Property remains in the firſt Owner; for a dead Body is not capable of Property, and a Man *cannot relinquiſh the Property he has in Goods, unleſs they are veſted in another*. 12 Rep. 112. Mich. 11 Jac. Haynes's Caſe

2. If

2. If A. *licences B. to sow A.'s Land*, and B. sows it, yet A. the Owner of the Land shall reap it. Hob. 35. cites 21 H. 6. 37. for it is no Leafe.

But if a Man enters upon another's Land, and sows it, it is his Corn till he that hath Right *re-enters*. Vent. 221. 222 Trin. 24 Car 2. B. R. in Cafe of Perrot v. Bridges. ——3 Keb. 61. S. C. by Name of Peal v. Bridges.

3. Note, That any Man may seise such *Goods as Enemies of the King bring into England*, and retain them to their proper Use. Br. Forfeiture de Terres, pl. 57. cites 7 E. 4. 14.

And he who takes such Goods from the Enemies of the King, *which were before taken from an Englishman*, shall have it as a *Thing gained in Battle*, and not the King the Admiral, nor the Party to whom the Property was before, because the Party did not come freshly the same Day it was taken from him, and before Sun-set, and claim it. Br. Forfeiture de Terres, pl. 57. cites 7 E. 4. 14. Per Vavisour, who said it was adjudged in the Time of the same King.——Br. Chattles, pl. 22 cites S. C.—— Br. Property, pl. 38. cites S. C.

If a Ship be *taken by Letters of Mart*, and be *not brought Infra Præsidia of that King, by whose Subject it was taken*, it is no lawful Prize, and the Property not altered, and a Sale being made in such Case is void. Agreed per Cur. (Reeve J. being absent) and this was said by the Proctor of the Owner to be the Law of the Admiralty. Mar. 110. 111. pl. 188. Trin. 17 Car. Anon.

Motion was for a Trial at Bar in Trover for Goods of 400 l. Value, taken by a Spanish Caper, and brought into Plymouth, and from thence shipt away without Condemnation, because tho' Br. Property 38. says the Property is altered by the Enemy's Possession above 24 Hours, which is good when they are brought into Safe Port of an Enemy's Country, yet the constant Opinion of the Civilians, and the Practice at Guildhall in the Dutch War is, That if such Goods be *brought into a Neutral Port*, or, as these were, into *a Friend's*, the *Property* is *not altered till Condemnation*, and these Goods were taken from a Frenchman in League with us, which is stronger; and this being Matter of Evidence, tho' the Defendant was only a Factor in England, could not condemn the Goods; but the Condemnation was in Holland whither they were shipt, yet the Trial at Bar was granted. 3 Keb. 397. Mich. 26 Car. 2. B. R. Verdale v. Marten.

If *Goods* are *taken by an Enemy*, and retaken by an Englishman, the Property is alter'd; otherwise of *Pirates*. Vent. 174. Mich. 23 Car. 2. B. R. in Case of Radrey and Delbow v. Egleshield and Whitall.

4. If *a Man buys* 20 Quarters of *Malt*, which is *not* put *in* to *Sacks*, *nor sever'd* from the other Malt, the Property is not alter'd; *but if* it was *in Sacks, or otherwise sever'd* from the other Malt, the *Property is alter'd*. Keilw. 77. pl. 25.

5. A. *sells Trees to be cut at Michaelmas* next, and before Michaelmas Hawks breed in them, A. shall have the Hawks; by which it appears the Property is not altered. Per Warburton J. Arg. 2 Brownl. 197. Trin. 10 Jac. in Case of Rowles v. Mason,—cites 29 Ass. 29.

6. If *A. B. a Merchant customs certain Wares in the Name of W. S.* this does not prove the Property of them to be in W. S. for it is usual that Merchants may Custom Wares in another's Name, and well; for the Intent of the Statute is, that the King shall not be deceived, but paid his Custom. Br. Property, pl. 46. cites 2 H. 7. 15.

In Action brought for Goods the Case was, viz. Harvey loaded them on board a Ship, and consigned them to the Plaintiff by a Bill of Loading, but the Goods by the Invoices appear'd to be H's. The Question was, Who should bring the Action, whether H. or the Plaintiff? The Court held, That the *Invoices* signify nothing, but the *Consignment in a Bill of Loading* gives the Property, *except* where it is *for the Account of another*; so that if a Bill of Loading be made to A. A. hath thereby an Ownership to maintain an Action; but if it be to A for the Account of B. then A is only B.'s Factor, and B. hath the Ownership, and must bring the Action; So that in this Case the Action is well brought by the Plaintiff. 12 Mod. 156. Mich. 9 W. 3. Evans v. Martell.——3 Salk. 290. S. C.——S. P. But if the Bill be Special, *to be delivered to A. to the Use of B.* there B. ought to bring the Action. Ld Raym. Rep. 271. S. C.

7. Property may be changed *without Offence in the Owner*, as by *Wreck*, *Waif*, *Stray*, *Deodand*, *Sale in Market overt*, and the like. Br. Property, pl. 48. cites 14 H. 8. 1. and Doct. & Stud. lib. 2. cap. 51.

8. *Money delivered to be redelivered* cannot be known, and therefore the Property is altered, and *Debt* lies for it; but if *Portugal* or other Money which may be known, be delivered to be redelivered, *Detinue* lies. Ow. 86. Mich. 41 & 42 Eliz. Bretton v. Barnett.

Nov. 72. S. C. by Name of Britton v. Barnet —— *Money delivered to a Man to buy Cattle*, or to *Merchandize* with, tho' the Money be *sealed up in a Bag*, yet the Property of the Money is in the Bailee, and the Bailor can't have Action for the Money, but only an Account

Account, tho' he never buys or merchandizes. 3 Le 38. Mich. 15 Eliz. in B. R. Anon.——— If Goods are *delivered to A. to the Uſe of B.* the Property is in A. but if Money be delivered *to A. to pay B.* there the Right of the Money is in B. and he may bring an Action of Debt 2 Vent. 310. Paſch. 2. W. & M. in the Exchequer, in Caſe of Cramlington v. Evans.———Skin. 265. Hill. 2 & 3 Jac. 2. S. P. in S C. in B. R. by Name of Evans v. Cramlington

The *bare Delivery of Goods* and Chattles upon a *Confidence* is not a Truſt, but the Property remains in *Ceſty que Uſe*. Arg. Show. 4. Paſch. 1 W. & M. in Caſe of **Cramlington v. Evans**, cites **Shaw v. Fortwood** Yelv. 23. and **Farris v. Beaver** 2 Cro. 678. And where Goods or *Money*, or other Perſonal Things are delivered to another, they give no Property unleſs it be to his Uſe. So if it be expreſsly to the Uſe of the Deliverer, or a Stranger, cites D. 20. 21.

As if A. and B. agree on a Price for Goods, *A promiſes Delivery on Payment* of the Money, *B. tenders the Money*, the Property is altered. Per Holt Ch. J. Cumb 381 Trin. 8 W. 3. Anon.

9. Where a *Tender* is of a Thing which the Party ought to have by the Tender, the Property is chang'd. Per Doderidge J. Godb. 330. Trin. 21 Jac. B. R. in Caſe of Wiſeman v. Denham.

10. *Gift to a ſpecifical Intent*, as a Preſent of a Jewel &c. to a Lady in Courtſhip, does not alter the Property. 2 Mod 141. Mich. 28 Car. 2. C. B. in Caſe of Beaumont v. . . . .

11. A. having a *Bill remitted* to him from beyond Sea for a *particular Purpoſe, receives Part of the Money, and takes a Note for the Remainder*, payable to himſelf or Bearer, and falling ill, gives the Note to B. with Orders to receive the Money, and apply it to the Uſe it was deſign'd, and then dies; B. receives the Money, and applies it accordingly; the Adminiſtrator of A. brings *Trover*, and recovers, B. ſues here for Relief, and per North K. is reliev'd. Vern. R. 264. Mich. 1694. Merret v. Eaſtwick.

12 Mod. 6). S. C.—Holt's Rep. 328. S. C.—Per Holt Ch. J. 5 Mod. 13. in S. C.——— S. P. by Manwood. 2 Le. 154. pl. 187. Mich 20 Eliz. C. B. in Caſe of Weſt v. Stowel.

12. Property of *Money ſtaked at Gaming*, is altered by the Caſt of a Dye; otherwiſe if not ſtaked; in the one Caſe it is Executory, in the other it is Executed. Per Holt Ch. J. Cumb. 303. Mich. 6 W. & M. B. R. in Caſe of Walker v. Walker.

12 Mod. 92. Paſch. 8 W. 3. S. C —— 5 Mod. 195. S. C. ——— Comb. 361. S. C.

13. Bringing an Action for *Goods forfeited by Act of Parliament*, veſts a Property in the Plaintiff. 1 Salk. 223. Paſch. 8 W. 3. B. R. Roberts v. Wetherall.

S. P. Salk 130. Paſch. 2 Ann. B. R. Lucas v. Haynes.

14. *Blank Indorſement* on a *Bill of Exchange*, payable to Indorſer, Order, does not actually transfer Property without ſome further Act. 1 Salk. 126. Paſch. 10 W. 3. B. R. Clark v. Pigot.

15. In *Trover* the Caſe was this; The *King's Orders* were iſſued upon disbanding of the Army, *that each Trooper ſhould retain his Horſe*; and this was againſt a Captain, who, in Breach of the ſaid Order, had taken the Troopers Horſe; and held that Trover lay for the Trooper in this Caſe; For tho' before the Property was in the King, yet by the Order it was veſted in the Trooper, he having the Poſſeſſion at that Time. 12 Mod. 311. Mich. 11 W. 3. B. R. Anon.

16. *Son employ'd his Father* to buy a Frame for him; *Father agrees* for it *in his own Name, and pays Part* of the Money down, *and gives a Note for the Reſt*; By the Payment of the Money and giving the Note, the Property of the Frame was immediately veſted in the Father; And tho' the *Bill of Sale*, which was *not made till a Month after*, *was made to the Son*, the Property which was already altered and veſted in the Father, could not be thereby deveſted and lodg'd in the Son; But if the Bill of Sale had been made to the Son at the Time of Sale, it would have veſted the Property in the Son. And an Earneſt does not alter the Property, but only binds the Bargain, and Property remains in Vendor

till

till Payment of the Money or Delivery of the Goods. Per Holt. Ch. J. 12 Mod. 344. Mich. 11 W. 3. B. R. Anon.

17. A Goldſmith has *Lottery Tickets* of A. and B. and delivers A.'s Tickets to B. for his own. A. may maintain Trover againſt B. This was no Change of the Property, or any Conſideration; For tho' the Goldſmith had Power from the Owner to receive Money for the Tickets, yet he had no Power to *Exchange* them for other Tickets. Per Holt. 1 Salk. 283. Hill. 12 W. 3. B. R. Ford v. Hopkins. Holt's Rep. 119. S. C.

19. A. by Articles *agrees to pay B. 35 l. for every* 100 *Stacks of Wood lying* in ſuch an Wood, and ſo *for as many more as ſhould be felled till Michaelmas* following. Agreed per Cur. That ſo much a Hundred by Retail was the ſame Thing; and that here either Party may tell them out, and that if he that told them had told them wrong, then the other might ſhew that, and join Iſſue upon it; And that the Property of every 100 that was cut at the Time of the Agreement did veſt in the Plaintiff, and ſo of the Reſt as they were cut down. Farr. 88. Mich. 1 Ann. B. R. Grips v. Ingledew. 2 Salk 658. S. C. By Name of Ingledon v. Crips, but S. P. does not appear.

(E) Property Given, Alter'd, or Transferred; By what Act. *Fraud* &c.

1. THO' a Treſpaſſor gains Property *by the taking of Goods, viz. His Tithe Barley, and carrying it from one Vill to another*, yet the Owner may affirm the Property to remain in him; And ſo where the *taking was of a Horſe Damage Feaſant in his Barley, and he took his Horſe and the Barley again*; For where Treſpaſs is done of Goods taken, the Owner may ſue *Replevin*, and this *affirms Property*; or may bring Action of *Treſpaſs*, and this *diſaffirms* Property, and ſo he has Election. Quod nota. Br. Treſpaſs, pl. 134. cites 19 H. 6. 65. *And* if a Man *takes* my Goods *in A. and carries them into B. and after into C.* I may have Action of Treſpaſs in B. or C.

For this affirms my Property till I bring my Action. And a Man may juſtify Battery in Defence of his Goods. Per Newton. Br. Treſpaſs, pl. 134 cites 19 H. 6. 65.

2. If a Man takes my Goods or Money and *Offers* them *to an Image*, in this Caſe I am barr'd, as if the Goods had been ſold in a Fair or Market overt and Toll'd; *But* if they *come again to the Hands of the firſt Treſpaſſor*, I may re-take them. Per Moile & Choke, Et non Negatur. Br. Property, pl. 7. cites 34 H. 6, 10.

3. If *I Bail Goods to a Man who Gives or Sells them to a Stranger*, and the Stranger *takes them without Delivery*, I may have Treſpaſs; For *by the Gift or Sale the Property is not changed, but by the Taking*. Per Fineux & Tremail Juſtices. Br. Treſpaſs, pl. 216. cites 21 H. 7. 39.

4. *Stealth* alters not the Property, as a *Treſpaſs* does. Fin. Law, 8vo. 210. S. P. Br. Corone, pl 170. cites 34 H. 8. —It was ſaid by Littleton J. that the Opinion of the Juſtices was, That if a Man *takes my Goods feloniouſly*, and *another takes them from him feloniouſly*, I ſhall have Appeal of the ſecond Taking; For by the firſt Taking the Property was not out of me; For a Felon can claim no Property. Contra it is ſaid elſewhere of a Treſpaſſor. Br. Appeal, pl. 100. cites 15 E. 4. 6.

5. In all Caſes where a Thing is *taken tortiouſly*, and *alter'd in Form*, if that which remains is the Principal Part of the Subſtance, then is not the *Notice of them loſt*, and ſo the Property of them not alter'd. Mo. 20. pl. 67. Mich. 2 Eliz. Anon. S. P. As if a Man takes *Cloth* and *makes it into a Robe*, the Owner may retake it; For the Nature is not changed. Br. Property, pl. 23. cites 5 H. [illegible] —— S. P. And ſo if he takes my Cloak and makes it into a Doublet, I may retake it. Mo. [illegible] pl. 67. Anon. —— So if a Man takes my *Garment and embroiders it with Silk*, or Gold &c. I may take my Garment, but if I ſell the ſame Silk with you and with this ſame [illegible] you ſhall not take my Gar-

Dalt.

ment for your Silk which is in it, but are put to your Action for taking of the Silk from you. Agreed by the Juſtices Poph. 38 Hill 36 Eliz. Br. Anon. —— S. P. Mo 20. pl. 67. Anon. —— *And* if a Man takes my *Tree* and *ſquares it into Timber*, yet I may retake it; For it may be known. Br. Property, pl. 23. —— *So* of *Iron made into a Bar*. Br. Property, pl. 23. —— *So* in Treſpaſs of taking Shoes and Boots, the Defendant ſaid that he was *poſſeſſed of three Pieces of Leather* and *Bail'd them to W. S. who gave to the Plaintiff, who made thereof Shoes and Boots, and the Defendant retook them*, and the Retaking good and lawful; For the Nature remains. Br. Property, pl. 23. cites 5 H. 7. 15. —— *But* where *Grain* is taken and *made into Malt*, or *Money* taken and *made into a Cup*, or a *Cup* made *into Money*, thoſe cannot be taken; For Grain *cannot be known one from another*, nor one Penny from another. Per Cur. Br. Property, pl. 23. —— *And* if a Man takes *Timber* and *makes a Houſe of it*, this cannot be retaken; For the *Nature is altered* into Franktenement. Br. Property, pl. 23. —— S. P. Mo. 20. pl 67. Anon —— *So* by ſome, If a Man *takes a White Piece and cauſes it to be Gilt*, the Owner cannot retake it. Br. Property, pl. 23. cites 5 H. 7. 15.

S. C. Roll Rep. 133. Hill. 12 Jac. accordingly And Coke and Croke ſaid it was ſo ruled in Sir Richard Martin's Caſe; And the Reporter, by Way of Remark, ſays he had heard Croke cites Martin's Caſe to be, That if a Man takes a Handful out of my Heap, and puts it into his Heap, that I may take a Handful out of his Heap back again; And that peradventure Coke and Croke intended this to be all one with the Caſe here. —— Roll 45. Trin. 12 Jac. In Caſe of Hill v. Hankes, Croke J. cited Martin's Caſe according to what Roll mentions, and that it was Popham's Opinion; And that the whole Court then ſeem'd to be of the ſame Opinion, (it being of taking Salt out of the one's Heap and flirging it into the other's.) And now Haughton and Doderidge ſeem'd to be of the ſame Opinion as to the taking of Corn in like Manner; but Coke doubted of it, and in a Manner denied it; For he ſaid, That if one takes my Goods, I cannot take his Goods for them —— Cro. J. 366. S. C. of Ward v Ayre, accordingly. —— If one blends his Money with mine, by rendering my Property uncertain he loſes his own. Per Ld K. Wright. 2. Vern. 516. Mich. 1705. in Caſe of Fellows v. Mitchell and Owen.

6. If A. and B. are *at Play*, and *A. intermingles his Money in B.'s Heap of Money*, B. ſhall now have all; For this is done by A. of his own Wrong, and as a Trick with Intent to deceive B. And ſhould it be otherwiſe, B. would be a Treſpaſſor Nolens Volens, by taking his Money again; And to avoid this Inconvenience the Law is, that B. ſhall retain all. Cited by Coke Ch. J. 2 Bulſt. 323, 324. in the Caſe of **Ward v. Eyre**, to have been ſo adjudg'd in Sir **Richard Martin's Caſe**; And the like Judgment, and for the ſame Reaſons, was given in the principal Caſe.

S. P. in the ſaid Caſe of Ward v. Ayre. Cro. J. 366. —— And in S. C. Roll Rep. 133 —— S. P. by the Ch. J. Sid. 38. Paſch. 13 Car. 2 C. B. In Caſe of Beſt v. Jolly.

7. *So* if A. will intermingle his *Corn* with B.'s Corn, B. may take all for the ſame Reaſon; cited by Coke Ch. J. 3 Bulſt. 323. As adjudg'd in the Caſe of Shordiſh v. Moore.

S. P. cited by Dodderidge J. who ſaid the Court inclined that B. might take as much again preſently. 2 Bulſt. 204 in Caſe of Hill v Hanks. —— *But* Paſch. 36 Eliz. B. R. It was agreed by the Juſtices, That if A. takes B.'s Hay and *carries it to A.'s Houſe, and there intermixes it* with A.'s Hay, there B can't take back his Hay, but is put to his Action againſt A. for taking his Hay. And, per Anderſon Ch. J. If a Goldſmith be melting Gold in a Pot, and as he is melting it, I will *caſt Gold* of mine *into the Pot* which is melting, together with the other Gold, I have no Remedy for my Gold, but have loſt it. Poph. 38. Anon —— And Croke and Houghton J. ſaid, There was a like Caſe here of Corn, and that B. might preſently take his own Corn again; Becauſe it was ſo done of his own Wrong; And that it was pleaded, That he took moſt of his own Corn again. But Coke ſaid, He ſomewhat doubted of this Caſe; For he can't take his own Corn in *Winterton*, and he can't do Wrong becauſe the other has done Wrong. —— But the Caſe of Ward and Eyre ſupra, was ſo adjudg'd ſince; and Coke Ch. J. himſelf, cites Sir Richard Martin's Caſe ſo adjudg'd by them; For that his own Corn or Money could not be known, and 'twas his own Act, and of his own Wrong. 2 Bulſt. 324. —— Roll. R. 133. Ward v. Eyre.

8. *So of Hay*, Croke J. ſaid it had been adjudg'd in B. R. that if B. has a Load of Hay, and A. will come and mingle his Hay with B.'s, in this Caſe B. might well take and detain the Whole. Bulſt. 95. Mich. 8 Jac. B. R. In Caſe of Douglas & al. v. Kendall.

9. A Man comes to a Merchant or other *Dealer*, and by *falſe Inſinuations* and Account of himſelf, prevails on the Merchant &c. to *ſell him Goods upon Tick*. Holt Ch. J. ſeemed to incline that that was not ſuch a Cheat as would alter the Property. 6 Mod. 114. Hill. 2 Ann. B. R. Anon.

(F) Gain'd

(F) Gain'd; by *Poſſeſſion* only, and in what Caſes Actual Poſſeſſion is neceſſary to give Property.

See Occupant (C)

1. HE that hath *Poſſeſſion* hath Right againſt all but him that hath the very Right. Chan. Caſes. 25. Trin. 15 Car. 2. in the Caſe of Smith v. Oxenden. Abr. Equ. Caſes 369. pl. 1. cites S. C. —— *As* if a Man be poſſeſs'd of *any Thing bail'd* to him, there, during the Poſſeſſion he has Property againſt all People but the Bailor. Br. Property, pl. 11. cites 2 H. 4. 22. 11 H. 4. 17. 7 H. 4. 18. 21 H. 7. 14, 15. 48. E. 3. 20, 21. 47 E. 3. 12.

2. Beaſts *feræ Naturæ* are reduc'd to ſuch Property when they are *in my Ground*, by Reaſon of my Poſſeſſion which I then have in them, that I may have *Action of Treſpaſs* againſt him who takes them; As if one has *Deer in his Park*, and another takes them away, he may have Action of Treſpaſs for the Taking. Arg. Godb. 123. Hill. 29 Eliz. B. R. in Coney's Caſe. cites 42 E. 3. 24. But if J. S. hath *Warren* by Grant or Preſcription *in my Ground*, this Liberty *Ratione Privilegii* deſtroys; or rather *ſuſpends the Privilege Ratione Soli*, ſo that the Property of Conies &c. is in him that has the Warren; tho' otherwiſe whether the Conies &c. be wild or tame, it is in the Owner of the Ground while they continue there as much as if he had a Warren, the Warren not making the Conies to be more or leſs his; the Privilege of a Warren only giving a Man Liberty to employ his Ground in keeping Conies &c. which otherwiſe he cannot do 12 Mod. 144. Mich. 9 W. 3 Sutton v. Moody. —— 2 Salk. 556. S. C. —— 5 Mod. 376. S. C. —— Comb 458. S. C. —— If a Man has a Cloſe Pond, in which there are Fiſh, he may call them Piſces ſuos in an Indictment, or he may not do it, at his Pleaſure, and either Way is good; becauſe being in a Cloſe Pond, the Property (Ratione Loci) in them cannot be loſt, becauſe they cannot ſwim away; but notwithſtanding he cannot call them Bona & Catalla ſua, if they be not in Trunks, and for that the Indictment is bad; but however not fit to be quaſh'd on Motion, the Offence of fiſhing in other Mens Ponds, and taking away their Fiſh, being too great to receive ſo much Countenance. 6 Mod. 183. Trin. 3 Ann. B. R. the Queen v. Steer & al

3. Where a *Treſpaſſer takes my Goods*, I may have Replevin: for I may affirm Property in me; or have Treſpaſs, and diſaffirm Property; Per Danby; and note by him, Where a *Man bails* his *Goods to W. N.* and a *Stranger takes them*, yet the Bailor may give them to another, and the Gift is good. Contra, Per Littleton; For the Property is in the Stranger. And Brooke ſays, Bene dixit ut videtur; and yet, that *Replevin lies*, is good Law; for this was *of the Property* which was *in him at the Time of the Taking*; but in the other Caſe, Property was *not* in him *at the Time of the Gift*. Br. Replevin, pl. 39. cites 2 E. 4. 16.

4. When *the King's Savage Beaſts go out of the Foreſt*, the Property is out of the King. Brooke ſays, And ſo it ſeems, that the King has Property in them when they are in the Foreſt; For, Per Newton, the Land gives the Property of ſuch Beaſts; Quod nota. Br. Property, pl. 20. cites 7 H. 6. 38. S. C. cited Godb. 123. pl. 144.

5. Where a Controverſy for Tithes is between Parſon and Vicar, and the *Parſon claims the Tithes*, the Property and Poſſeſſion is in him without carrying them away. Br. Property, pl. 35. cites 22 E. 4. 23. Per Brian, Choke, and Catesby J.

6. Where a Man *leaſes* his *Land except the Wood*, and *Herns breed there* in them, there the Leſſor has Intereſt in the Herns by Reaſon of the Trees whereon they build, and alſo has Property in them when they are in the Wood &c. Per Brooke J. and Pollard J. But if they are *out of the Neſts* or Trees, a Stranger may take them; but not in the Neſts, nor when they are in the Branches; And in Treſpaſs he ſhall ſay, *Quod nidos Ardearum ſuarum cepit*. Per Brooke, and ſo, by him, the Plaintiff has Property in the Fowls. Br. Property, pl. 17. cites 14 H. 8. 1.

7. If a *Bond* is ſealed and delivered to a Man's Uſe, who dies before *Notice*, his Executors may bring an Action, Per Ventris J. 2 Vent 203. in the Caſe of Thompſon v. Leach, —— cites D. 167.

C 4

5 Mod. 376. S. C. & P. cites 12 H. 8. 10. S. P. *But* if A. ſtarts an Hare *in his own Cloſe*, and hunts her into B's, and kills her there, yet the Original Property is ſtill in A. and the Courſing is a Continuance of that Property; Per Powell J. 11 Mod. 75. Paſch. 5 Annæ. B. R. in the Caſe of Keble v. Hickeringhill. — S. P. Per Holt Ch. J. Holt's Rep. 18. in S. C. But Powell ſaid, If a Man ſtarts an Hare in my Ground, and kills him there, it would be hard to charge him in an Action of Treſpaſs for it. Ibid. 19.

8. If *A. ſtarts an Hare in my Cloſe*, and kills her there, 'tis my Hare but if A. hunts her into B's Cloſe, and kills her there, then 'tis the Hunter's. 2 Salk. 556. Mich. 9 W. 3. in the Caſe of Sutton v. Moody.

If *I ſpring a Bird in my Ground*, and let my Hawks fly at him, and this Bird is chas'd over your Ground, and you ſhoot him on the Wing, I ſhall have him, becauſe of my Original Property; Per Powel J. Holt's Rep. 16. in the Caſe of Keble v. Hickeringal.

Holt's Rep. 16. S. C. & P.

9. Holt Ch. J. ſaid, It was agreed on all Hands, that while the *Ducks* are *in a Decoy Pond*, the Owner of the Pond has a Property, and he that diſturbs them is a wrong Doer. And Powel J. ſaid, That the Defendant by frightning them away had deſtroy'd the Plaintiff's Property, and done an Injury thereto; And Powis and Gould J. accorded. 11 Mod. 74, 75. Paſch. 5 Ann. B. R. Keble v. Hickeringhill.

(G) Gain'd, Alter'd, or Transferr'd by *Operation of Law.*

1. PROPERTY of Money or Goods, upon Satisfaction or Conſideration, ſhall be *alter'd in the Hands of* him that has it without Word, without Contract, and without Suit of Law or Execution, and all *by Operation of Law.* Arg. Pl. C. 186. Trin. 5 Mar. 1. in the Caſe of Woodward v. Darcy.

2. A *Sheriff*, upon his Account, is *charged with a Debt to the King not receiv'd by him* of the King's Debtor; by this the Debt of the King's Debtor is become the proper Debt of the Sheriff. Jenk. 188. pl. 88.

S. P. Per Fenner J. Cro. J. 74. Trin. 3 Jac. B. R. in the Caſe of Brown v. Wootton. —— *So* in * *Trover Plaintiff recovers*, the Property of the Goods veſts in the Defendant againſt whom the Damages for 'em are recover'd; But where on a Fieri Facias the Sheriff returns Nulla Bona, and Action is brought againſt him for a falſe Return, and a *Recovery is had againſt the Sheriff*, the Property of the Goods is not veſted in him, but they are liable to any other Execution. 2 Vern 239. Per Cur. Mich. 1691 in the Caſe of Underwood v. Mordant. —— * Kelw. 58. b. Per Frowike. —— 12 Mod. 145. Per Holt Ch. J. in the Caſe of Sutton v. Moody.

3. A. brings *Treſpaſs* againſt B. *of a Horſe taken*, and *recovers Damages*; by this Recovery and Execution thereupon, the Property of the Horſe is in B. *Solutio pretii Emptionis loco habetur.* Jenk. 189. pl. 88.

If one *declares in Replevin* for Cattle with an *Adhuc detinet*, and Defendant has *Judgment* againſt him *for Damages*, by *Payment* thereof the Property of the Diſtreſs ſhall be veſted in him. Per Holt Ch. J. 12 Mod. 428. in the Caſe of More v. Wats.

See Infra, Superſedeas (D) pl. 5. Sare v. Shelton. — The Property is not alter'd till a Bill of Sale made. 2 Show. 481, 482. Arg. Said to have been ſo held —— The *Sheriff by Seiſure has* ſuch *a Property* that he may have Treſpaſs or Trover. 2 Sand. 47. Bill. 21 & 22 Car. 2 Wilbraham v. Snow. —— Vent. 53. S. C. Adjudg'd by 3 Juſtices, Hæſitante Twiſden. — Lev. 282. S. C. — Mod. 30. S. C. — 1 Salk. 323. Mich. 3 Ann. Clerk v. Withers. It is ſaid, That by Seiſure on an Execution the *Property is* diveſted out of the Defendant, *and in Abeyance* — 6 Mod. 232. S. C.

4. The Property of *Goods taken in Execution* remains in the Defendant till they are ſold. D. 67. b. pl. 20. Marg. cites 17 Jac. C. B. Shelton's Caſe.

5. It was ſaid by Counſel, Arg. That a *Patent for a new Invention*, that none for ſo many Years ſhall uſe the ſame, may veſt a Property. Vern. 62, 63. Mich. 1682. in the Caſe of Jenks v. Holford.

6. *Sale*

6. *Sale* of a Ship *under* the *Sentence of a Foreign Court of Admiralty is* good to change the Property. Skin. 59. Mich. 34 Car. 2. B. R. Hughes v. Cornelius.

7. *Attachment and Condemnation* of a Debt in London, alters the Property; But till Condemnation the Property is not alter'd. 1 Salk. 280. pl. 6. Coram Holt Ch. J. at Nifi Prius in Middlefex. Pafch. 5 W. & M. Brook v. Smith.

8. Award or Judgment, *Quod fiat Executio* on a *Scire Facias*, fixes a Property in the Baron of a Debt due to the Wife, and recovered by both. 1 Salk. 117. Mich. 9 W. 3. B. R. Woodyer v. Gretham.

9. If Cattle be *taken in Withernam by Way of Execution* in Replevin, the Plaintiff thereby gains an abfolute Property in them in lieu of his own; *But not* fo where the Withernam *is only a Procefs*. Per Holt. Ch. J. 12 Mod. 428. Mich. 12 W. 3. In Cafe of More v. Wats.

(H) Gain'd, Altered, or Transferred; *By what Words.*

1. COvenant in feveral Cafes *may alter the Poffeffion of a Thing from one Man to another.* Br. Property, pl. 2. cites 27 H. 8. 16. 28. Marten Dockwre's Cafe.

As if a Man Covenants with me, That *if I pay him* 10 *l.* fuch a Day, that *I fhall have all his Beafts in D.* or his Leafe of the Manor of D. There, if I pay, I fhall have the Beafts, or after enter into the Manor. Quod Nota. Ibid.

So if A. Covenants *that B. fhall have his Cow*, by this the Property is prefently altered to B. Arg. 3 Bulft. 252 Mich. 14 Jac. In Cafe of Havergil v. Hare——Cites 27 H. 8. 5.

So a Covenant, That *if B. Marries his Daughter*, B. fhall have fuch Goods; If B Marries her, the Property is in B. Arg. Roll. R. 69 Mich. 12 Jac. B. R. In the Cafe of Hitchcock v. Fox.——Cites 27 H. 8. D.

So if A. *Covenants with* B. That *if B. will* marry A.'s Daughter, *B fhall have fuch a Flock of Sheep*; B. marries the Daughter; the Property of the Sheep is prefently in B. Becaufe it was but a Perfonal Thing, and the Covenant is a Grant. Per Tanfield, Cro. J. 102 Trin. 5 Jac. B. R. in Cafe of Evans v. Thomas, cites 44 E. 3. Monftrans de Faits, 144.—— 2 Brownl. 388. S. P. Per Coke Ch J. in the Earl of Rutland's Cafe.

2. *Bargain and Sale of Trees growing Hal end.* Succidend. & Exportand. *within* 20 *Years.* The 20 Years expire. Quære, If the Property is veited in the Bargainee, abfolutely, or only conditionally. Le. 275. pl. 371. Pafch. 26 Eliz. B. R. Anon.

Sale to B. for Money, *of all the Butter which fhall be made of A.'s Cows* in one Year, is only a Covenant and Agreement, but no Property transferred, becaufe *not in Effe*. But Sale of *Wooll on Sheeps Backs*, or *all his Corn growing* on the Land fown before, transferrs Property; Becaufe *in Effe before the Contract*. Mo 174. pl. 307. Mich. 25 and 26 Eliz. Anon.

A. *demifes*, grants, and to Farm lets his Land, and alfo *all Timber Trees growing* on the fame; adjudged, That no Property in the Trees paffes by thefe Words, nor if the Words had been *With liberty to Fell and Sell.* Mo. 831. pl. 1117. Trin. 10 Jac. Billingfly v. Hercy.

3. *Sale to A. to the Ufe of B.* The *Ufe* is only Confidence, which does not give Property to B. in Law. Mo. 702. pl 975. Hill. 36 Eliz. Hinfon v. Burridge.

4. In Cafe &c. the Plaintiff declared that J. S. *Pawn'd Goods* to him, *upon* Condition of *Redemption on a certain Day*, which was not done. Afterwards the *Plaintiff told the Defendant that he would Sell* the Goods; the *Defendant promifed*, that *if he would forbear for three Days, he would pay the Money and take the Goods*; The Plaintiff averred that he forbare to fell them accordingly. It was moved, in Arreft of Judgment, that the Declaration is not good; For it feems here was no Confideration, becaufe this Agreement did not alter the Property of the Goods in the Defendant. Sed per Coke Ch. J. and Croke J. The Pawnee might fell the Goods, and this Agreement is in Nature of a Sale; For if the Defendant had paid the Money, he might have brought Detinue for the

S. C. 3 Bulft 98. but it is wrong Pag'd, and fhould be 70

Goods. Per Doderidge J. If the Plaintiff has any Loſs, the Conſideration is good; And the Court thought it a good Conſideration, and Judgment was given accordingly. Roll. Rep. 215. pl. 10 Trin. 13 Jac. B. R. Capper v. Dickinſon.

5. A. *ſells Sheep to B.* in a Market, but did not deliver them, and afterwards, in that very Market, they *diſcharged each other of the Contract*, and a *new Agreement* was made between them; That B. ſhould drive the Sheep home, and Depaſture them till ſuch a Time, and A. would pay him ſo much per Week for their Paſture; And, *if at that End of that Time, B. would pay A. ſo much for his Sheep, then B. ſhould have them.* — Before the Time expir'd A. ſells them to C. Per Cur. The firſt Sale to B. was defeated by the After-Agreement, and the new Agreement to have the Sheep, if B. would pay ſo much at a future Day, will not *amount to a Sale*; and the new Property is *chang'd*, and conſequently the Sale by A. to C. before the Day, is good, and ſo the Property of the Sheep is in him. 2 Mod. 242. Trin. 29 Car. 2. C. B. Miers v. Soleby.

Holt's Rep S. pl. 7. S. C.

6. In an Action upon the Caſe, upon Mutual Agreements, the Evidence was a *Note*, in the Nature of a *Bill of Parcels*, to this Purpoſe; *Bought by Anne Knight, of —— Hopper, 100 Pieces of Muſlins at 40s. per Piece, to be fetch'd away by 10 Pieces at a Time, to be paid for as taken away.* It was held in this Caſe, per Holt Ch. J. That the Pieces being Mark'd and Seal'd, the Property is altered immediately, and that they remained only as a Security for the Money. Skin. 647. Trin. 8 W. 3. at Guildhall. Knight v. Hopper.

See (H) pl. 1. in the Notes.

(I) *Veſts.* At what Time.

1. *TREES ſtanding* are *ſold* by Husband ſeiſed in Jure Uxoris, or by Tenant in Tail and the Husband, or Tenant in Tail dies *before Severance*, the Vendee ſhall not have them; And he has no Property in them till actual Severance. Per Doderidge J. 2 Bulſt. 7. Mich. 10 Jac. In Caſe of Billingſly v. Herſey. —— Cites 18 E. 4. 6. and 21.

2. When *Tithes* are ſevered from the nine Parts, they are preſently veſted in the Party that has Right, and they are Things Tranſitory, and ſo alſo is the Taking of them; For the Party may take them in any Place as well as in his own Pariſh, and the Place where is not traverſable. Le. 39. Mich. 28 and 29 Eliz. The Queen v. Lord Vaux.

D 49. b pl. 15 Marg. cites S. C. —— S. C cited per Ventris J. 2 Vent 203.

3. If a Deed of *Gift of Goods* be delivered to B. *to the Uſe of C.* The Good are in C. before *Notice* or Agreement. But if C. *refuſe*, the Property and Intereſt ſhall be deveſted without any Matter of Record. 3 Rep. 26. b. Mich. 33 and 34 Eliz. B. R. In Caſe of Butler v. Baker.

Arg. In Caſe of Thompſon v. Leach. —— Show. 300. S. C. and P.

4. If *I requeſt B. to buy a Gelding for me*, and promiſe to repay B. again, and B. buys this Gelding for me accordingly; B. may have an Action againſt me for this Money upon my Promiſe, and I may take the Gelding; And before my taking him, the Property is not in B. who bought him to my Uſe, but in me who requeſted B. to buy the Gelding for me. Per tot. Cur. Bulſt. 169. Trin. 9 Jac. In Caſe of Moor v. Moor.

(K) Where

(K) Where *ſeveral Properties* may be *in the ſame Thing.*

1. MAnwood ſaid, It is not ſtrange in our Law to ſee that two ſhall have an Intereſt ſeverally in one and the ſame Term, and two Properties therein; For he ſaid, That if *Leſſee for Years grants over* his Term, by Deed indented to another, *rendring Rent, and for Default of Payment, to enter and retain till* paid; there, if *he enters* for Default of Payment, and retains, *he has a Property*, and this is *uncertain*; For upon Payment of the Arrears by the other it ſhall be determined; and the Grantee has alſo another Property; For his Intereſt is not totally gone, but he has a Property, ſuch as it is, and may have the whole Property upon Payment of the Arrears. Pl. C. 524. b. Hill. 20 Eliz. In Caſe of Weleden v. Elkington.

2. So if a *Termor* for Years be, and he *is bound in a Recognizance* or Statute Staple, and *Execution is ſued* againſt him for Non-payment, and *the Term is extended*, and delivered to the Conuſee *at a certain annual Value* as it well may be; For it may be ſold utterly, or extended at the annual Value, as Franktenement may at the Election of the Sheriff; there the *Conuſee* to whom the Term is delivered *has a Property*, which is *uncertain*; For how long he ſhall retain it he does not know; and the *Leſſee* himſelf *has another Property*; For upon Payment of the Debt, or upon the Debt received out of the Revenue thereof by the Conuſee, he ſhall re-have the Term; And ſo two have Property ſeverally in one and the ſame Term. Per Manwood. Pl. C. 524. b. in the Caſe of Weleden v. Elkington.

3. A Feme made a *Leaſe* for Years *of Mills* in Kent *with Exception that ſhe ſhould have the Profits for Term of her Life*, and it was greatly debated if this Exception was good or not, inaſmuch as the Profits of the Mills is all the Benefit, and in effect the Mills themſelves; and at laſt the Exception was adjudged good in Law, and the Feme had the Profits; there if ſhe enters to take the Profits, ſhe has thereby a Property, and the Leſſee another Property, and the Property of the Feme is uncertain how many Years it ſhall continue. cited by Manwood as a Caſe in Kent. Pl. C. 524. b.

In *Chattels merely perſonal*, as in *Sheep leaſed* for a Time to compeſter Land, or in a Chain pledged as the Caſe of 5 H. 7. the Owner has one Property, and he to whom the Sheep are leaſed, or the Chain is pledged, has another. A Fortiore, two Properties may be in a Leaſe, which is a Chattel real, and has long Continuance certain. Per Manwood. Ibid.

(L) *What* may be *an Intereſt*, but *no Property.*

1. A *Foreſter purſued a Hunter who chaſed a Hart out of the Foreſt into his own Land, and there killed him*, and the Foreſter retook it, and the other brought Treſpaſs De Cervo mortuo, capto & aſportato, and was barred; For *as long as Wild Beaſt, Fiſh, or Fowl, is in my Land, I have Poſſeſſion but not Property*; and ſo he who chaſes it out of my Land, and kills it in his own Land ſhall loſe it, and I ſhall have it if I purſue; For it *it may be known by the Skin, Horns*, &c. Br. Property, pl. 45. cites 12 H. 8. 10.

But if it *goes out of its own Will*, it is lawful for any to take it, and ſo a Diverſity where a Man of his own Tort conſtrains it to go out, and kills it and where econtra Ibid.

2. *And* by Brooke J. if a Man *permits his Faulcon to fly at a Pheaſant, which kills it in another's Land*, he may enter and take the Pheaſant, and

So where my *Hound takes a Stage*

Beaſt. Contra of taking *of an Otter, Fox, or Badger*

and ſhall not be puniſhed but for his Entry, for the taking of the Pheaſant by my Faulcon is Poſſeſſion in me. Br. Property, pl. 45. cites 12 H. 8. 10.

; For thoſe are *Vermin*, and pernicious to the Commonwealth, and are Carrion; but Deer, Pheaſant &c. are Pleaſure, and good Victuals. Ibid.

3. If I *leaſe certain Sheep for 2 Years*, now upon that Leaſe ſomewhat remains in me; but that cannot properly be ſaid a Property, but rather *a Poſſibility of a Property*, which cannot be granted over. Le. 43. pl. 54. Mich. 28 & 29 Eliz. C. B. in the Caſe of Wood v. Foſter cites 11 H. 4. 177, 178.

S. C. cited 3 Mod. 61.

4. A Man may have *an Intereſt without a Property* in a Chattle, and ſuch an Intereſt as gives the Perſon a Remedy to recover, as in the Caſe of 1600 Load of Wood ſold to A. and aſſigned by A. to B. (the Wood being ſtanding) and after the ſame Vendor ſold 2000 Load to C. to be taken at C's Election. B. cut 600 Load, and C carried it away, B. brought his Action and Judgment for him; becauſe A. had an Intereſt, which he might well aſſign. 5 Rep. 24. Sir Tho. Palmer's Caſe.

(M) *Pleadings.* Good. And in what Caſes it muſt be ſet forth.

1. EXecutors, who have Poſſeſſion of *the Goods of the Teſtator*, ſhall call them Bona ſua in Replevin, Recordare, &c. and not Bona Teſtatoris, tho' he names himſelf Executor in the Writ; Quod nota. Br. Property, pl. 21. cites 24 E. 3 35.

Br. Property, pl 37. cites S. C. — In Treſpaſs Quare clauſum fregit & damas cepit, he may ſay *Damas ſuas*; per Newton. Brooke ſays, And ſo it ſeems that where Beaſts Feræ Naturæ are taken out of my Soil, I have Property in them as long as they are in the Soil. Br. Property, pl. 19 cites 22 H. 6. 59.

2. In Treſpaſs the Writ ſhall not ſay Damam *ſuam*, if he does not ſay that it was taken in Park or Warren, or ſay Damam Domitam. Br. Property, pl. 10. cites 43 E. 3. 24.

Br, Property, pl. 4. cites S. C — It was ruled by the whole Court in an Action of Treſpaſs that Quare Clauſum fregit, & *Cuniculos ſuos* vel ipſius A. cepit &c. is good. Godb. 174 pl. 240. Paſch. 8 Jac. C. B. Newton v. Richards. — * See pl. 7.

3. Treſpaſs quare *Warrenam ſuam fregit, & mille* * *Lepores cepit*, and did not ſay Lepores *ſuos*; And good by the Opinion of the Court, becauſe he has no Property in them, but has them by reaſon of the Warren; Quod nota. Br. Brief, pl. 11. cites 3 H. 6. 55.

S. P. Br. Property, pl. 31 cites 18 E. 4 14.

4. If a Man *chaſes in my Park*, I ſhall have Action, Quod *Parcum fregit*, and *Feras ibidem cepit* &c. and *not* Feras *meas*. Per Newton. Br. Property, pl. 20. cites 7 H. 6. 38.

Br Traverſe, per &c. pl. 217. cites S. C.

5. In Treſpaſs of Goods, if the *Defendant ſays, that before the Treſpaſs the Property was in him, and he bailed them to A. who gave to the Plaintiff*, the *Plaintiff ſhall ſay that he himſelf was poſſeſſed till the Defendant took them, Abſque hoc, that the Property was in the Defendant*, and this is a good Plea. Br. Treſpaſs, pl. 308. cites 5 E. 4. 1.

6. In *Treſpaſs De Parco fracto, and Beaſts taken*, the *Defendant ſaid that the Property was to T. A. before the Treſpaſs who was thereof poſſeſſed, till B. took them from him, and bailed them to the Plaintiff, by which T. A. ſued Plaint of Replevin in the County againſt the Plaintiff before the Sheriff, which Sheriff made Precept to the Defendant to deliver them to T. A. by which he came, and found the Park open, and entered and made Deliverance.* Per Grene

Grene the Plea is double, the one the Juſtification That they were the Beaſts of another Man, and The Precept of the Sheriff; by which he held him to the Precept of the Sheriff only; For it was held double by all the Juſtices. Tremaile ſaid the Property was in J. R. and they came into our Land, by which we took them for Damage feaſant, and impark'd them, and the Defendant broke the Park, and took them, Abſque hoc; that the Property was in T. A. prout &c. Br. Double, pl. 105. cites 21 E. 4. 54.

7. *Treſpaſs Quare Equum cepit a Perſona* of the Plaintiff; the Defendant pleaded Non culp. and found againſt him; and Exception taken in Arreſt of Judgment, becauſe he doth *not ſay Equum ſuum*, or that he was taken *from the Plaintiff's Poſſeſſion*; For otherwiſe it may be that the Plaintiff had not any Cauſe of Action, if he had not Property or Poſſeſſion; and it may be, for any thing which appears in this Declaration, that he had not any of them, therefore the Declaration is not good; and of that Opinion was Gawdy, Fenner, and Yelverton, and the Declaration *cannot be aided by Intendment*, but ought to be certain; But Popham and Williams econtra; Becauſe it being alleged Quod cepit *a Perſona*, it is neceſſarily to be intended that he had Poſſeſſion; wherefore &c. But notwithſtanding afterwards upon a ſecond Motion for the Reaſons aforeſaid, it was adjudged for the Defendant. Cro. J. 46. Mich. 2 Jac. B. R. Burſer v. Martin, alias, Purſer v. Walter.

8. Treſpaſs &c. for Fiſhing *In ſeparali Piſcaria*, of the Plaintiff, and *taking Piſces ipſius* (the Plaintiff) He had a Verdict. 'Twas moved in Arreſt of Judgment for ſaying Piſces ſuos, whereas they are Feræ Naturæ, and ſo no Property in them; Berkley J. admitted it true that in a general Senſe they cannot be ſaid Piſces ipſius, but in a particular Senſe they may, and that a Man may have a *ſpecial and a qualified Property* in Things Feræ Naturæ 3 Ways. viz. *Ratione Infirmitatis*, Rationi *Loci*, or Ratione *Privilegii*, and in this Caſe the Plaintiff hath a Property Ratione Privilegii; and Judgment was affirmed by the whole Court upon this *Diſtinction*, that *where* Plaintiff *declares*, *generally for taking Piſces ſuos or Lepores ſuos* &c. the Action will not lie; *But* if it be for *Fiſhing* in his ſeveral Piſcary as here, or for breaking his Cloſe, *and taking* Lepores ſuos &c. it will lie. Mar. 48. pl. 77. Trin 15 Car. Child v. Greenhill.

Cro. C. 552 S. C. accordingly. — Jo. 444. pl. 6. S. C. accordingly. — In this Caſe it was moved in Arreſt of Judgment, that the Plaintiff only had the Piſces ſuos, unleſs they were in his Trunk or Pond; For that there is no more Property in Fiſh in a ſeveral than a free Piſcary, upon the firſt Juſtice ſaid, That *after a Verdict ſuch thing ſhall be intended* to make the Caſe good, and ſo it might be intended a Stew-Pond, which is a Man's ſeveral Piſcary; *But* the Court held, that it was not good *upon Demurrer*, by reaſon of the local Property, and ſo is the Regiſter Writ 127. Pa. 22 Car. 2. B. R. Pollexfen v. Criſp. — 2 Keb. 555. pl. 20. S. C. accordingly by Name of Aſhford and Pollexfen v. Criſpin Ibid. 565. S. C. by Name of Pollexfen v. Criſpin. — But Hill. 1 Ja. 2. B. R. It was objected in Arreſt of Judgment, That the Declaration was ill, becauſe the Plaintiff had not ſhewn Property in Libera Piſcaria, as to call them Piſces ipſius, or his own Fiſh; and for that Reaſon the Judgment was arreſted. 3 Mod. 97. Upton v. Dawkin — Comb. 11. S. C. accordingly by Name of Upton v. Dawkins.

9. In *Treſpaſs* for *taking of a Hook* &c. Defendant *pleaded* that he had a Way *ſuch a Wood upon the Land of the Plaintiff*, and that he was paſſing there, and the *Plaintiff endeavoured to cut his Harneſs*, *and to wound him with the ſaid Hook*, and therefore he took the ſaid Hook out of the Hands of the Plaintiff, and delivered it to the Conſtable &c. and Iſſue upon the Way, and Verdict for the Plaintiff; it was moved in Arreſt of Judgment, that the Plaintiff *had not ſhewed* in his Declaration, *that the Hook was in his Poſſeſſion*; And it was agreed, per Cur. That if the Defendant had pleaded *Not Guilty*, the Judgment ſhould be arreſted, becauſe the Plaintiff in his Declaration did *not ſay Hunum ſuum*, *nor ſhew that it was in his Poſſeſſion*; But in this Caſe the Court were of Opinion, that the Defendant *by his ſpecial Plea made his Declaration good* for the Defendant pleaded that he took the Hook *Extra Poſſeſſionem the Plaintiff*, for which the Plaintiff may well maintain this Action upon his Poſſeſſion, without any Property. Sid. 184, 185. Patch. 16 Car. 2 B. R. Brooke v. Brooke & al.

10. Upon Writ of Error the Caſe was, that Treſpaſs was brought in C. B. and the Writ there was Bona & Catalla ſua cepit, and the Declaration was *Unum bovem* &c. *without ſaying (Suum)* &c. and Verdict for the Plaintiff, and Judgment there; and Writ of Error brought in B. R. and Error aſſigned, becauſe the Plaintiff hath not ſhewn in his Declaration that it was his Ox &c. but the Judgment was affirm'd per Cur. and a Difference taken between C. B. and B. R. for in C. B. the Writ is Parcel of the Declaration, and therefore Suum in the Writ makes the Declaration good. Sid. 187. Paſch. 16 Car. 2. B. R. Jones v. Pritchard.

For more of Property in General See Market, Pawn, Piracy, and other proper Titles.

Fol. 321.

Protection.

See (D) (D. 2) (F) (H) (K)

(A) Protection. *By what Perſon* it may be *caſt*. Quia Profecturus.

The Defendant came in Ward upon Cepi Corpus, and was

1. HE who is by Mainprize, may caſt a Protection Quia Profecturus in Perſon for himſelf, tho' it appears that he is in Priſon; for this may well be. 4 H. 6. 8.

Mainpriz'd to another Day, and at the Day caſt Protection Quia Profecturus, and it was allowed; for he may caſt it in Perſon. Contra of Eſſoign de Servitio Regis; for he is ſuppoſed in Priſon by the Mainprize. Nota. Br. Protection, pl. 59. cites S. C.

In Account Exigent iſſued, and the Defendant render'd himſelf in Bank, and found Mainprize, and had Superſedeas to the Sheriff, and now in Bank the Defendant was demanded, and Protection was caſt for him. Green ſaid, If it be allowed, the Mainpernors ſhall be diſcharg'd, which cannot be; but notwithſtanding this it was allow'd &c. Fitz. Tit. Protection, pl. 8-. cites M. 20 E. 3. and ſays ſee 22 E. 3. accordingly, twice.——Priſot took a Difference between the Defendant's being by Mainprize or by Bail, that in the laſt Caſe he may caſt a Protection, but not in the firſt. Fitzh. Tit. Protection, pl. 13. cites M. 32. H. 6. 4.

Quia Moraturus.

The Protection was caſt by an Infant, and not by the

2. Quia Moraturus ſuper Vitulatione Caliſiæ may be caſt by the Party himſelf; for he may be here to Purvey for it. Quære. 21 E. 4. 18. b. See 21 E. 4. 82.

Defendant himſelf; and upon praying Allowance it was agreed that *Infant, Monk and Feme Covert* may caſt Protection; and it was ſaid that the *Defendant was ſeen in London*, ſed non Allocatur, becauſe it is *not proved of Record*; and it was ſaid that if the Plaintiff had ſued Habeas Corpus againſt him, he would be put to anſwer. Quære inde; for he may be come hither to Victual. Br. Protection, pl. 74. cites 21 E. 4. 18.——pl. 77. S. P. As to Infant, cites 21 E. 4. 82 ——S. P. As to Infants F. N. B. 28. (L) but ſays, There are diverſe Opinions among the Juſtices, if it ſhall be allowed for a Feme Covert.—— Co. Litt. 130 a. ſays it is allowable for Men within Age, and for Women as neceſſary Attendants upon the Camp, and that in three Caſes, *Quia Lotrix, Quia nutrix ſeu Obſtetrix.*——But Co. Litt. 131. a. (w) ſays that an Infant was vouched, and at the Pluries venire fac. a Protection was caſt for the Infant, and diſallowed, becauſe his Age muſt be adjudged by the Inſpection of the Court.

See pl. 1.

3. He who is by Mainprize, may caſt a Protection Quia Moraturus for himſelf in Perſon, tho' it appears that he is in Priſon. Dubitatur. 4 H. 6. 8.

Beth.

Both.

4. An Infant may caſt a Protection. 21 E. 4. 18. 82. adjudged. Br. Feoffment de Terres, pl. 50. cites S. C.——In this Caſe the Protection was caſt by the Infant for his Father. Vide the Year-book.——See pl. 2.

5. So a Monk may. 21 E. 4. 18. See pl. 2.

6. So a Feme Covert may. 21 E. 4. 18. See pl. 2.

7. *Recordare by J. againſt P. who avowed upon F.* the ſaid *J. ſaid that F. gave by Fine to E. which E. leaſed to him for Years, and prayed Aid of E. and had it*, tho' E. was a Stranger to the Avowry, and *at the Day of Summons ad auxiliand' E. caſt Protection*; and upon long Argument it was agreed, That J. Plaintiff who prayed Aid, cannot be by Protection; for he is Plaintiff, and is to recover Damages. But yet the beſt Opinion was, that E. of whom he pray'd Aid, may be by Protection. Br. Protection, pl. 39. cites 5 H. 5. 5.

8. In *Detinue* the *Garniſhee* came, and *pleaded to Iſſue, and at the Niſi Prius* the Garniſhee *made Default*, and *A. B. caſt Protection for him*; and thereupon Day was given in C. B. At which Day Repellance was ſet forth, and yet the Protection ſhall ſave his Default, becauſe it was allowable at the firſt Day; but econtra if there be Variance between the Record and the Protection, for this is never allowable; and ſo ſee that Garniſhee may be by Protection. Br. Protection, pl. 59. (bis) cites 4 H. 6. 9.

9. *Any Stranger* in the World may caſt Protection for the Party. Br. Protection, pl. 10. cites 28 H. 6. 1. S. P. Co. Litt. 131. a (f)

(A. 2) *What* it is. And *in what Caſes it lies.*

ENACTS that *notwithſtanding the King's Protection of his Debtor, other Creditors may proceed to Judgment againſt him, with a Ceſſet Executio until the King's Debt be paid; and here, if the Creditors will undertake for the King's Debt, they ſhall have Execution againſt the Debtor, both for their own Debts, and likewiſe for ſo much as they have paid the King.* Where the Protection recited, That the King for the more ſpeedy Payment of his Debt *ſeized the ſaid G. M. the Defendant into his Protection, and that none ſhould meddle with his Perſon or Goods, or ſue or implead him* in any Court for any Debt or Treſpaſs &c. *until the King be ſatisfied*, this Protection is not allowable, the Statute being expreſly, that none ſhall be delay'd upon theſe Protections, but that the Party ſhall anſwer and go to Judgment, but that Execution ſhall ſtay. Cro. J. 477. Pach. 16 Jac. B. R. Travers v. Malines.

This Statute is to be intended of ſuch Executions, whereby the King may be prejudiced, viz. Execution of Lands or Goods, but not Execution of the Body; for that is all to all. Hob. 111. pl. 139. See Tho. Shirley's Caſe.

J. S. being *in Execution for Debt to the King*, had Judgment given againſt him in B. R. was brought to the Bar by Habeas Corpus to be charg'd in Execution for this Debt alſo. It was objected that this could not be by Reaſon of this Statute, and of that Opinion was the whole Court; but becauſe he had not a *Writ of Protection*, the Court reſolved that he is out of the Statute, and thereupon awarded that he ſhould be in Execution as well for the Party as the King. Cro. C. 389. pl. 23. Mich. 10 Car. B. R. Stevenſon's Caſe.

2. Regularly a Protection lies *only where the Defendant or Tenant is demandable*; for the Protection is to excuſe his Default, and he cannot make Default when he is not demandable. By the Juſtices of both Benches. Jenk. 94. pl. 83.

3. Writs of Protection lie *not in Caſes of Felony*, nor is it to be allow'd to any that is *Priſoner to the Court*. 3 Inſt. 240. cap. 125.

(B) A-

(B) At what *Time*.

At the Nisi Prius the Plaintiff, Defendant and *Jurors appeared*, a *Protection is cast* for the Defendant, *varying from the Original Writ in the Addition of his Name*, the Judges adjourned the Inquest to another Day; at this Day *another* Protection *is cast, agreeing with the* Addition in the *Original Writ*; This Protection was allowed, for no Juror was sworn Jenk. 85. pl. 66.——*Regularly* a Protection *is only allowable at the Day, when the Tenant is demandable in Court*, to excuse his Default. Jenk. 85. pl. 66.

1. IT cannot be cast after the Inquest adjudged by Default, and charged. 43 E. 3. 20. b.

Quia Profecturus.

For one Judge alone at the Day of Nisi Prius cannot record the Protection without his Companion. Br. Protection, pl 20. cites S. C.

2. At Nisi Prius, if Protection be cast before one Judge, and prays Allowance, the other Judge being absent, and after the other comes, the said Casting and Praying shall not serve without a new Prayer. 43 E. 3. 20.

Fitzh. Tit. Protection, pl. 34. cites S C. per Thirne

3. In Trespass, the Sheriff returned Cepi Corpus, but the Party did not appear; a new Sheriff is made, and Distress Issues to the old Sheriff to have the Body &c. which is returned Distrain'd, but he has not the Body, yet the Defendant may cast a Protection Quia Profecturus; For he has Day in Court, and ye may appear. 44 E. 3. 1. b.

Quia Moraturus.

4. After Verdict for the Demandant in B. the Defendant cannot cast a Protection. 17 E. 3. 13. b.

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5. So if at the Nisi Prius the Inquest passes for the Demandant, no Protection lies for the Tenant at the Day in Bank; For * both are but one Time. 17 E. 13. b. 25 E. 3. 43.

* It was said by Thorp, That the Day of Nisi Prius and the Day in Bank is not all one to all Respects; For Writ purchased, Mesne shall abate, notwithstanding Nonsuit at the Nisi Prius, but as to the Pleading any Plea which comes Mesne between them, it shall be one and the same Day; For he shall not plead the Plea Puis le Darrein Continuance Mesne between the Nisi Prius and the Day in Bank. But Brooke says, See the contrary Elsewhere. Br. Continuances, pl. 13. cites 40 E 3. 38.

The Inquest pass'd against the Defendant by Nisi Prius en Pays, and now in Bank the Defendant was by Protection, and was disallowed, and Judgment given for the Demandant upon the Verdict &c. Fitzh. Tit. Protection, pl. 88 cites M. 20 E. 3.——See (P) pl. 2. 3.

Both.

F. N. B. 29. (C)

6. A Protection may be cast at the Return of the Petit Cape, or before. 11 E. 4. 7. b.

Br. Protection. pl 32. cites S. C.— Ibid. pl. 83 cites S. C.

7. At the Petit Cape, if the Defendant cast Essoign de Servitio Regis, yet at the Day which he has to shew his Warrant, he may cast a Protection; because this proves that he is in Service of the King. 7. H. 4. 5. b.

At Nisi Prius en Pays, the Defendant made Default, and the Default was recorded, and at the Day in Bank, the Demandant pray'd Petit Cape, and one cast a Protection for the Tenant, and the Default was enter'd on the Roll, and there the Protection was allow'd. Fitzh Tit Protection, pl. 94. cites T. 9 E 3. 21.

S. 3

8. A Man Outlaw'd in Account, purchas'd Charter of Pardon, and ſued Scire Facias; a Protection for him does not lie, before the other has Counted againſt him upon the Original, for before this he himſelf is Plaintiff; But this lies after the Count, for then he is Defendant. 43 E. 3. 36.

9. At the Niſi Prius Protection may be caſt. 43 E. 3. 20. b. 48 E. 3. 8. 3 H. 6. 56. 17. E. 3. 22. b. A Protection *after the laſt Continuance*, may be allowed at the Niſi Prius, as well as a Plea after the laſt Continuance. There is equal Reaſon in both Caſes. Jenk. 85. pl. 66

10. After Iſſue, and Iſſues returned againſt Jurors upon Diſtreſs & Alias with Niſi Prius pray'd, Protection lies for the Defendant. 3. H. 6. 55. b. But Eſſoigns of Service of the King does not lie; For the one is certified by the King under his Seal, and the other is only the Surmiſe of the Party himſelf. Note the Diverſity. Br. Protection, pl. 4 cites S. C.——Br Eſſoign, pl. 2. cites S. C.

11. After Diſtreſs returned, and Challenge taken to the Array, and Triors choſe, Protection does not lie for the Defendant, for he ſhall not be demanded after, and the Protection is to ſave a Default. 4 H. *8. 22. b. The Trior were choſe and *ſworn upon the Trial, but before Verdict* Protection was caſt for the Defendant. And Babb. ſaid, That it ſhall be allowed now; But contra, if any *Juror was ſworn upon the Principal*. And Hals J. agreed, but Jane Ch B. doubted And Cheney, Tyrwhit, and Martin J. held, That it ſhall not be allowed; For per Martin, after the Defendant has appeared, he ſhall not be demanded, and Protection is to excuſe a Default, and therefore when the Defendant appears and challenges, he does not make Default; which Brook ſays is the beſt Opinion; and after the Plaintiff granted that it ſhall be allowed. Br. Protection, pl. 60. cites 4 H 6 22.——Ibid pl. 9. cites S. C.——Br. Protection, pl. 10 cites S. C per Danby.——A Protection may be allowed *after the Array is challenged, and the Triors elected and Sworn, or after an Adjournment*; but Protection cannot be allowed *after a Juror is ſworn*; For it is a manifeſt Delay of Juſtice. Jenk 94. pl. 83 —— S. P. Jenk. 108. pl. 8. * This ſhould be (6).

12. After the Jurors, or any of them, are ſworn upon the Principal, a Protection does not lie. 4 H. 6. 23. In Treſpaſs the Parties are at Iſſue; at the Trial *ſome* of the *Jurors appear*, and ſome make Default; a Diſtringas with Decem Tales is awarded; *upon* this *Diſtringas a full Jury appears*; at this Day a Protection caſt for the *Defendant* ſhall be allowed; For he *is then demandable*, and the *End of the Protection is to excuſe his Default*. Jenk. 108, pl. 8.——S P. Jenk. 85, pl. 66.

13. But after the Return of a Diſtringas, a Protection lies, before any Challenge to the Array. 4 H. 6. 23.

14. If at the fourth Day of the Eight, the Inqueſt be ready to paſs, and Day given till two Days after, at which Day, the Protection bearing Date after the fourth Day [is caſt,] it lies for the Defendant; and this ſhall be entered ſpecially. 10 H. 6. 3. b. Dubitatur. S. P. Br. Protection, pl 10. cites 28 H. 6. 1. by the Opinion of the one Bench and the other.—Br. Protection, pl. 90. cites 10 H. 6. 3 That it it ſhall not be allowed, by the beſt Opinion; For tho' the Parties are demandable at this Day, yet the *Entry ſhall be general, and ſhall have Relation to the fourth Day*; and then there is no Day to allow the Protection.

Iſſue againſt two, and *they appeared at the Day*, *and the Jury alſo*, and *for Shortneſs of Time they were adjourned till in Craſtinum* &c. And at the next Day, the *one caſt Protection*, *which here Date the firſt Day*, and the *other caſt Protection*, *which bore Date the ſecond Day*, and it was doubted whether they ſhall be allowed or not; Becauſe they have appeared at firſt, and caſt no Protection, and are not now demandable, therefore cannot caſt Protection. Quære; For tis ſaid there, That in M. 28 H. 6. 1. the Protection was allowed in ſuch Caſe. Br Protection, pl. 9. cites 27 H. 6. 4

15. If at the Return the Parties and Jurors appear, and the Court commands them to appear when they ſhall be demanded, if they ſhall be demanded four Days after, Protection lies for the Defendant, and it ſhall be entered ſpecially.

16. 13 *R. 2. cap.* 16. Enacts, That *no Protection with the Clauſe of Quia Profecturus ſhall be allowed in any Plea, wherein the Suit was commenced before the Date of ſuch Protection; Except in a Voyage, where the* Br. Protection, pl. 82. —A Protection Prote-

turæ, Regularly, must not be purchaſed. *harging the Plea; But this faileth

King goeth in Perſon, or other Voyage Royal, or in the King's Meſſages. Howbeit this Act will not infringe Protections with the Clauſe of Quia Moratur; And if the Party protected tarry more than a convenient Time in the Country, without going to the Service, or return from the Service, the Chancellor having Notice thereof, ſhall Repeal his Protection.

when he goeth in the King's Service in a Voyage Royal; and that is twofold, either touching War, and that is only when the King himſelf, or his Lieutenant, that is Frorex, goeth, or when any goeth in the King's Ambaſſage, Pro Negotio Regni, or for the Marriage of the King's Daughter, or the like; This alſo is called a Voyage Royal, but a Protection Morturæ may be purchaſed, and caſt, Pendente Placito. Co. Lit 130. b (k) —— One had Benefit of a Protection, for that he was ſent into the King's Wars, in Company of the Protector, into France, the greateſt Part thereof being then under the King's actual Obedience; So as the Subjects of England were employ'd into France for the Defence and Safety thereof: In which Caſe it was obſerved, That ſeeing the Protector Pro Rex went, the ſame was adjudg'd a Voyage Royal. 7 Rep. 8. a. in Calvin's Caſe, —— Cites 3 H. 6 tit. Protection 2 —— So the Lord Talbot went with a Company of Engliſhmen into France, then alſo being for the greateſt Part under the actual Obedience of the King, who had the Benefit of their Protections allowed them. 7 Rep. 8 a. in Calvin's Caſe. —— Cites 8 H. 6. 16. b. —— * S. P. Jenk. 94 pl. 83. cites 20 E. 3. Protection Fitzh 83. &c. 155.

17. In Debt, it was ſaid, That in *Treſpaſs againſt the Baron and Feme*, the *Sheriff returned that the Baron Non eſt inventus & capi Corpus upon the Feme*, and Protection was caſt for the Baron the ſame Day, and was allowed; For he had a Day by the Roll tho' he had no Day by the Return of the Sheriff. Br. Protection, pl. 79. cites 3 H. 6. 3.

18. In *Præcipe* quod reddat, the *Tenant made Attorney*, yet he may caſt Protection after, notwithſtanding that he had made Attorney. Br. Protection, pl. 71. cites 2 E. 4. 15.

19. A Protection does not lie *to diſturb an Arreſt, or the Execution of it*; For the Judges ought to allow it firſt, which cannot be without the View of it firſt in Court. Jenk. 94. pl. 83.

(C) *What Perſons* ſhall have Protection, and *againſt whom.*

Quia Profecturus.

S. P. Br. Protection, pl. 16. cites 40 E. 3. 18

1. **Protection lies for the** Praiee in Aid **alone.** 37 H. 6. 32. b.

—— This was in a Scire Facias on a Fine, and per Cur. it well lies, and yet the Statute De iis quæ recordata ſunt are to ouſt Delayes. Br. Protection, pl. 63. cites 37 H. 6. 32. —— Br. Protection, pl. 58. cites 24 E. 3. 26. Contra, that it does not lie for the Prayee in Aid; For then the Plaintiff will not ſue Reſummons, and ſo Delay of Juſtice; Quod nota bene.

In *Replevin*, the *Termor Plaintiff prayed Aid of his Leſſor*; and the beſt Opinion was, that the *Prayee* ſhall not be by Protection, no more than the Plaintiff who prayed ſhall be; For the Avowant cannot have Reſummons againſt them; and alſo they are Plaintiffs, and are to recover Damages againſt the Avowant, and *no Plaintiff* ſhall be by Protection. Br. Protection, pl. 85 cites 5 H. 5. 5.—*But* S. P. 16. *in Treſpaſs* the Prayee in Aid was by Protection; For there he was to join to the Defendant, and not to the Plaintiff, as here in Replevin, note the Diverſity. Ibid.

Quia moraturus.

A *Priſoner in Execution in the Fleet* was thought a Man very neceſſary to ſerve the Queen in her Wars, and the Court was moved by the Attorney, Per Mandatum Concilii, whether the Queen might licence him with a Keeper to *go to Berwick* to defend it; But all the Juſtices of B. R. and C. B. held That ſhe could not

2. **Protection Quia moraturus does not lie for** a Man in Execution **upon a Condemnation.** D. 4. 5. Ma. 162, 50.

not be diſmiſſed by Protection Quia morantur ſupra Silva Cuſtodia &c. D. 162. b. pl. 50. Trin 4 & 5. P. & M. Anon. —— Dal. 23 pl. 2. S. C. —S. P. Jenk. 213. pl. 52.— Co. Litt. 130. a.

3. **Protection does not lie for any** Officer in Courts of Record. 7 H. 4. 3. Br. Protection, pl. 34. cites S. C.

that in Debt it was agreed by Thirne and all his Companions, that Protection ſhall not be allowed for any Officer *of the Receit*; Quod nota, and this it ſeems touches the Receipt, or becauſe he ought to be always Reſident. —— S. P. Nor for any other Officer in any Court of Record, whoſe Attendance is neceſſary for the King's Service or Adminiſtration of Juſtice. Co. Litt. 130. b. (h)

(D) What Perſon *in reſpect of Eſtate* ſhall have them.

1. A **Protection lies for the** Garniſhee at the Return of the Scire Facias, **becauſe he is not Plaintiff before he appears, and Declaration is made.** 3 H. 6. 18. S. P. Co. Litt. 130 b. (f) —— S. P. Br. Protection, pl. 10.

cites 40 E. 3. 18. —— He is not Plaintiff till he has made Title to the Thing demanded. Br. Protection, pl. 1.

2. But after Plea pleaded **no Protection lies for him, for then he is Actor.** 9 H. 6. 36. b. 20 H. 6. 29 b. Br. Protection, pl. 5. cites S. C.

3. **In a Replevin** before Avowry **made Protection lies for the Defendant; For before Avowry he is not Actor.** 3 H. 6. 18. * Fol. 523

Br. Protection, pl. 1. cites S. C.

4. In Quod ei deforceat **a Protection lies for the Defendant** before he has maintained the Title of the firſt Record; **For before this he is not Actor.** 3 H. 6. 18. Br. Protection, pl. 1. cites S. C.

5. **In Replevin, Protection does not lie for the Plaintiff but** after Avowry **made.** 17 E. 3. 24. **See for Protection for** Garniſhee 20 H. 6. 29.

(D. 2) *For what Cauſes* or Things they may have it, [and who, and when.]

1. **IN** Appeal **Protection lies for the Plaintiff.** 17 E. 3. 24.

2. **A Prohibition does not lie for one** before he is Party to the Action. 14 H. 4. 16. Br. Protection, pl. 33. cites S. C.

3. As **if a Man** prays to be received, **and** Plaintiff ſays that he has nothing in Reverſion; **At the ſame Day, nor at another Day, before the Iſſue is tried for him, a Protection does not lie for him; For he is not Party to the Action before.** * 14 H. 4. 16. † 21 E. 3. 13. **Adjudged.** S. P. Co. Litt. 130 b. (f) * Br. Protection, pl. 32. cites S. C. — † Br. Protection, pl. 43. cites S. C. and that he is not Party till he is received. — S. P. pl. 62. cites 37 H. 6. 2.

4. **But in a Summons** Ad Auxiliandum **a Protection lies for the Prayee before Joinder in Ad.** * 3 H. 6. 30. b. † 8 H. 6. 16. b. **Adjudg'd.** * Br. Protection, pl. 2 cites S. C. S. P. Notwithſtanding it was ſaid that the Protection is Quod ſit Quietus de omnibus Placitis & Querelis, and he is not Party, nor is he yet joined. Br. Protection, pl. 48 cites † S. C.

5. But

5. But otherwiſe it is, if the Sheriff returns Non eſt inventus, for then he has not a Day in Court. 17 E. 3. 66. adjudged.

* S. P. Per Bab. For he is Party, and may be eſſoigned, and Judgment in Value ſhall be given againſt him upon his Default; and therefore Protection lies. And ſo was the Opinion of the Court. Br. Protection, pl. 2. cites 3 H. 6. 30.

6. So Protection lies for the* Vouchee upon Return of the Summons ad Warrantizandum ſerv'd before Entry into the Warranty; for the Demandant has made himſelf Privy by the Grant of the Voucher. 3 H. 6. 30. Curia. 49. b.

7. So Protection lies for Garniſhee at the Return of the Scire facias. 3 H. 6. 49.

It does not lie for Vouchee till in Judgment of Law he be made Privy. And if Demandant counterpleads the Voucher, then until it be adjudged for the Vouchee, a Protection cannot be caſt for him Co. Litt. 130. b. (f)

8. A Protection does not lie for the Vouchee, if the Summons be not ſerv'd at the Day of the Return. 27 E. 3. 79. b. adjudged.

9. A Protection does not lie for an Attorney in a Plea. 19 H. 6. 51.

10. In an Information for Barretry, it was ſaid the Defendant ſtood upon his Protection. But per Cur. There is no Protection in Caſe of *Breach of the Peace*, nor *againſt a Rule of this Court*. Freem. Rep 359. pl. 458. Mich. 1673. B. R. Anon.

(E) How many. [Or the *ſeveral Sorts* of Protections.]

Mo. 239. Warram's Caſe.—— Protection is either *General* or *Particular*. The General Protection extends generally to all the King's Subjects, Denizens and Aliens

1. THERE are only two Sorts of Protections, Quia Profecturus and Moraturus. 39 H. 6. 38. Curia.

2. Protections are in diverſe Forms, and of diverſe Effects, and the King may grant them for diverſe Cauſes. And there are 4 *Manners* of Protections *with the Clauſe Volumus*. One is a Protection called *Quia Profecturus*, and another Protection *Quia Moratur*. And the 3d is a * Protection which the King by his Prerogative may grant, and the Time is *where a Man is Debtor unto the King*, the King may grant unto him that he ſhall not be ſued nor attached, but taketh him into Protection until he hath paid the King's Debt. But otherwiſe now *by* the Stat. of 25 *E.* 3. 12. [which ſee at (A. 2)] F. N. B. 28. (B).

within the Realm, whoſe Offences have not made them incapable thereof. And there is a *Particular* Protection by Writ, which is of two Sorts, One *to give a Man* an *Immunity from Actions* or Suits, and the other for *Safety of his Perſon, Servants, Goods, Lands and Tenements*, whereof he is lawfully poſſeſs'd from unlawful Moleſtation and Wrong. The firſt is of Right and by Law, the ſecond are all Ex Gratia (ſaving one) For the General Protection implies as much. Co. Litt 130 And then divides Particular Protections in the ſame Manner as here, and ſays that theſe are Excellent Points of Learning, and that the Cauſe of granting the two firſt is of two Natures, the one concerns the Service of War, as the King's *Soldiers* &c. the other Wiſdom and Counſel, as the King's *Ambaſſador or Meſſenger pro Negotiis Regni*; both theſe being *for the Publick Good* of the Realm, private Men's Actions and Suits muſt be ſuſpended for a convenient Time; for *Jura Publica anteferenda Privatis*.——* As to the third Protection cum clauſula Volumus, The King by his Prerogative regularly is to be preferr'd in Payment of his Duty or Debt by his Debtor before any Subject, altho' the King's Debt or Duty be the latter; and the Reaſon hereof is, for that Theſaurus Regis eſt Fundamentum Belli, & Firmamentum Pacis And thereupon the Law gave the King Remedy by Writ of Protection to protect his Debtor, that he ſhould not be ſued or attached until he paid the King's Debt; but hereof grew ſome Inconvenience, for to delay other Men of their Suits, the King's Debts were more ſlowly paid; and for Remedy thereof was made the Statute of 25 Ed. 3. Co. Litt. 131. b. (l)

The 4th Protection Cum Clauſa Volumus, is when a Man

3. There is *another* Protection cum clauſula Volumus, and that is *when the King ſendeth a Man in his Service into the Wars beyond the Seas, or into the Marches of Scotland, and there he is detained and kept Priſoner*; he ſhall have a Special Protection, reciting the whole Matter; and in the

the End of the ſame Protection ſhall be ſuch Clauſe, † *Præſentibus minime valituris poſt deliberation. præd. R. a priſ. præd. ſi contingat ipſum iterum liberari ab eadem.* F. N. B. 28. (c)

† ſent into the King's Service beyond Sea is impriſoned here, ſo as neither Protection Profecturæ or Moraturæ will ſerve him; and this hath no certain Time ſed; whereof you ſhall read at large in the Regiſter, and F. N. B. Co. Litt. 131. b.——‡ So likewiſe *Si contingat iter illud non accipere, vel infra illum Terminum a Partibus tranſmarinis redire.* Co. Litt 131. b.

4. It appeareth by the Regiſter, fol. 280. That there are diverſe Manners of Forms of Protections. *Where a Man feareth to travel* the Country *with his Merchandiſes, or* to *collect the Alms for the Poor* of an Hoſpital, or of the Church, then they may purchaſe Letters Patent of the King's Protection, commanding the King's Subjects for to Defend them, and to Maintain, Aid and Aſſiſt them. F. N. B. 29. (D)

5. The Protection Cum clauſula *Volumus*, which is of Right, *is, That every Spiritual Perſon may ſue a Protection for him and his Goods*, and for the Farmers of their Lands and their Goods, that they ſhall not be taken by the King's Purveyor, nor their Carriages or Chattels taken by other Miniſters of the King, which Writ doth recite the Statute of 14 Ed. 3. Co. Litt. 131. b. (p)

6. Lord Coke ſays of theſe Protections he cannot ſay any Thing of his own Experience; for albeit Queen Eliz. maintained many Wars, yet ſhe granted few or no Protections; and her Reaſon was, that he was no fit Subject to be employed in her Service that was ſubject to other Men's Actions, leaſt ſhe might be thought to delay Juſtice. Co. Litt. 131. b.

7. *Quia ipſe in Guerris noſtris in Flandria detentus* exiſtit per unum annum duraturus. 3 Lev. 332. Trin. 4 W. & M. C. B. Barrudale v. Lord Cutts.

(F) For what Perſons it lies. [*Corporation &c.*]

Protection does not lie for a Corporation Aggregate, as for * * S P Nor for other Corporation; for it cannot be intended that all are in the ...yor and Commonalty, because this is to ſave their Ap...roper Perſon, and ſuch Corporation cannot appear in ..., and therefore is out of the Cauſe of Protection. † 19. b. 30 E. 3. 1. Dubitatur.

...e of the King &c. Br Protection, pl. 76. cites 21 E. 4. 20.——Corporations *Aggregate* of many ...re not capable of theſe two Protections, viz. Profecturæ or Moraturæ, becauſe the Corporation it ſelf is inviſible, and reſts only in Conſideration of Law. Co. Litt. 130. a b (d) cites ſame Cases ——† Br Eſſoign, pl. 114. cites S. C.

(G) Againſt what Perſon. [*King* &c.]

1. IF the King brings an Action, a Protection does not lie againſt him. 21 E. 3. 13. b. Br Protection, pl. 44. cites S. C. accordingly

2. But ſee 33 E. 3. Protection 98. A Protection lies againſt the King in an Action brought by him, unleſs it be a Plea which touches the Crown. 34 E. 3. Protection 122. Accordingly. Serjeant Hawkins ſays, That there ſeems to be near the ſame Number of Authorities on each Side of the Queſtion, Whether a Defendant in an Action Tam Quam can take Advantage of a Protection? But he further ſays, There is no great Need nicely to examine theſe Matters, ſince generally it is expreſsly provided by Penal Statutes, That neither Wager of Law nor Protection ſhall be admitted in any Suit brought upon them. 2 Hawk. Pl. C. [illegible]

26. pl 61. And there he cites, in the Margin, for the Affirmative Fitzh. Protection 98, 122. Keilw. 135. b. And for the Negative he cites Fitzh. Protection 61, 105. 21 E. 3. 13. pl. 12. Co. Litt. 131.

S. P. Tho' ſhe a Perſon exempted. Br. Protection, pl. 44 cites 21 E. 3. 13.

3. If the Queen brings an Action, a Protection lies againſt her. 21 E. 3. 13. b. 34 E. 3. Protection 122. ——— Fitzh. tit. Protection, cites S. C.

Fol. 324.

(H) For whom it lies *for a Collateral Reſpect.*

See (C) — S. P. But not to be eſſoigned; for the one affirms him to be at large, and the other to be in Priſon.

1. It lies for a Man who is upon Mainprize, tho' he is in a Manner in Priſon. * 9 H. 6. 58. 22 E. 3. 4. Adjudg'd. Br. Protection, pl. 7. cites * S. C. —— In Debt upon Bond the Defendant caſt a Protection, upon which the Plaintiff demurr'd. It was objected, That this Protection was not good becauſe the Defendant was *admitted to Bail*, and ſo is intended always in Priſon, and ſo it is mention'd in the Record; and then the Protection being quia Moratur in Portubus Zealand is againſt the Record. Le. 185. pl. 258. Hill. 31 Eliz. B. R. Osborn v. Kirton.

Aſſumpſit for Work done. Proceſs continued to the Exigent,

2. So if a Man who comes in by the Exigent be lett to a Mainprize, yet a Protection lies for him. 22 E. 3. 4. Adjudg'd. 7. b. Adjudg'd. at the Return whereof a Protection was brought into Court under the Great Seal to ſtay the Outlawry, for that he (the Defendant) is *detained in our Wars in Flanders, to continue for one Year, if in our Service he ſhould ſo long remain, beyond Sea*; therefore the *King wills, Quod ipſe ſit Quietus from all Suits*, Pleas &c. *except* Pleas of Dower Unde nihil habet, Quare Impedit, and Aſſiſe of Novel Diſſeiſin and Attaint; It was objected, That this Writ is not to be allowed, being brought in upon the Exigent, which is the King's Suit; and the Words (*Licet tangat Nos*) *are not in the Protection*, but Non Allocatur; and the Protection was allow'd. 3 Lev. 332. Trin. 4 W. & M. C. B. Barrudale v. Lord Cutts.

Protection is not allowable for him who comes in upon the Capias Utlagatum. 3 Lev. 332. Barrudale v. Lord Cutts.

3. One *taken upon a Capias Utlagatum* after Judgment, had a Protection, but being brought to the Bar of C. B. his Creditor moved, That he might be charged in Execution; Hobart Ch. ſaid, and the Court agreed thereto, That becauſe the Capias Utlagatum is the King's Suit, and for the Subject but in the ſecond Degree, therefore the King may diſcharge it, but hardly by a Protection, eſpecially not being deliver'd or made known to the Coroners. Hob. 115. Hill. 13 Jac. Sir Tho. Sherly's Caſe.

4. Upon a *Capias Utlagatum* the *Sheriff returned*, That the Party who was arreſted had *a Protection from* Lord Stafford, who is *a Lord of Parliament*. But by Winch J. only in Court, the Return is clearly naught; and Day was given to amend his Return, and this was granted by Hobart Ch. J. at another Day in the ſame Term. Win. 24. Mich. 19 Jac. Anon.

(I) Not for him who *can't appear.*

1. If at the Summons Ad Warrantizandum ſicut alias returnable no Writ be returned, no Protection lies for the Vouchee, becauſe he could not appear if he was preſent, inaſmuch as the Land is not now to be loſt. 30 E. 3. 23. Adjudg'd.

(K) Not

(K) Not for the *Plaintiff.*

See (D) pl. 2. &c.

1. A Protection does not lie for him who is Plaintiff or Demandant in a Suit. 19 H. 6. 51. 17 E. 3. 24. The Plaintiff cannot caſt a Protection,

for the Protection is always for the Defendant, and ſhall be caſt for him, if it be not *in ſpecial Caſes where the Plaintiff becometh Defendant.* F. N. B. 28. (G)

It cannot be caſt for the Demandant or Plaintiff, *becauſe the Tenant or Defendant cannot ſue a Re-ſummons or a Re-attachment*, but the Plaintiff only that ſued out the Summons or Attachment &c. muſt ſue alſo the Re-ſummons or Re-attachment. And ſo it is of an Actor, in Nature of a Plaintiff &c. as the *Garniſhee after Appearance*, and an Avowant, and the like. Co. Litt. 130. b (g)

2. If a Man be outlaw'd in an Action of Treſpaſs, and purchaſes his Charter of Pardon, and ſues a Scire Facias againſt the Plaintiff, a Protection does not lie for the Defendant in the Scire Facias, for he is Plaintiff, for this is but to bring him in to Count. 38 E. 3. 1. S. P. Per Finch, but Per Wiching contra. Br. Protection, pl. 41. cites S. C.——— After the Plaintiff has counted, a Protection in this Caſe lies for the Defendant, but not before. F. N. B. 28. (G) in the new Notes there (a) cites 43 E. 3. 36. —— It lies for the Garniſhee at the Day of the Return of the Scire Facias, but not after he has made Title. F. N. B. (G) in the new Notes there. (a) cites 3 H. 6. 18. & 9 H. 6. 36.

3. So in ſuch Scire Facias a Protection does not lie for the Plaintiff, before the Plaintiff in the firſt Action has counted againſt him, for before this he himſelf is Plaintiff. 43 E. 3. 36.

4. But after the Plaintiff in the firſt Action has counted againſt him, a Protection lies for the Plaintiff in the Scire Facias, for the Scire Facias is but to bring him in to Count. 43 E. 3. 36.

5. In a Replevin after Avowry no Protection lies for the Defendant, becauſe he is Actor. 17 E. 3. 24. * 38 E. 3. 1. * Br. Protection, pl. 41. cites S. C. accordingly.——— S P. For he is become Actor; and e contra where he pleads Ne Priſt pas, there Protection lies. Br. Protection, pl 55 cites 22 H. 6. 28. —— Ibid. pl 86. cites S. C.

* F. N. B. 28. (G) in the new Notes there. (a) cites S. C. & 25 E. 3. 43.

6. But otherwiſe it is before Avowry.

7. In a Replevin a Protection does not lie for the Plaintiff. 24 E. 3. 27. S. P. For then the Plaintiff will not ſue Re-ſummons, and ſo Delay of Juſtice; quod nota bene. Br. Protection, pl. 58. cites S. C. —— F. N. B. 28. (G) in the new Notes there. (a) —— S P. cites 20 R. 2. Fitz. Protection 106. 5 H. 5. 5. 24 E. 3. 26. Contra 17 E. 3. 24. a Per Shard.

8. In a Replevin if the Plaintiff hath Aid of him in Reverſion at the Summons return'd, a Protection does not lie for the Praier (becauſe he is Actor.) 24 E. 3. 27. S. P. Br. Protection, pl. 58. cites S. C.

9. In an Audita Querela againſt the Conuſee of a Statute for ſuing Execution againſt the Defeazance of the Statute, ſcilicet where he has performed the Conditions, no Protection lies for the Plaintiff in the Audita Querela, becauſe he is Plaintiff and Actor. * 47 E. 3. 5. b. 24 E. 3. 24, 35. b. Adjudged. S. P. For the Defendant ſhall caſt it, and not the Plaintiff. Br. Protection, pl. 28 cites 47 E. 3. 5 —— S. P. Ibid. pl. 41. cites 38 E. 3. 1. And per Wiching the Defendant in the Audita Querela is Defendant, and not Actor. Quære.——— * F. N. B. (G) in the New Notes there (a) cites S. C. and alſo ſays that it lies not for the Defendant in this Action, and cites 13 E. 3 Fitzh. Protection, 71. But ſays, this is to be intended *when the Eſtate is to be executed*, and not when it is already executed, and the Suit is to have Execution; For it ſeems there, that if it ſo appears by the Writ the Protection is allowable at the Venire Facias, and cites 47 E. 3. 3, 4

10. In an Audita Querela againſt the Conuſee for ſuing Execution againſt his own Releaſe, a Protection does not lie for the Conuſee after the Conuſor has ſhewed his Matter, for now the Conuſee is Actor, and this Plea of the Conuſor is only an Anſwer to bar the Conuſee

Conuſee of Execution. 47 E. 3. 5. b. 13 E. 3. Protection. 71. Adjudged. 38 E. 3. 1.

Br. Protection, pl. 27. cites 47 E. 3. 5.

11. If the Conuſee of a Statute ſues Execution againſt his Leaſe upon a Feoffee of Part of the Land, and the Feoffee ſues Scire Facias againſt the Conuſee at the Return thereof, the Conuſee ſhall have a Protection caſt for him. 47 E. 3. 4.

Br. Protection, pl. 41. cites S. C. — F. N. B. 28. (G) in the

12. In a Quod ei deforceat no Protection lies for the Tenant, after that he has ſhewed his Right according to the Nature of his Writ, becauſe he is Actor. 38 E. 3. 1.

New Notes there (a) cites S. C. & P. but ſays that it lies for him before he has made Title, and cites 43 E. 3. 6. And that after Title ſo made for the Tenant, it lies for the Plaintiff, and cites 20 R. 2. Protection, 106. 5 H. 5. 5.

(L) In what *Actions*.

Fol. 325.

1. A Protection Quia Profecturus lies in a Quod permittat. 56 H. 3. Itinere Stafford Rot. 8. Adjudged.

S. P. Br. Aid del Roy. pl. 106. cites F. N. B —

2. Protection does not lie in an Aſſize. 39 H. 6. 39.

Br. Protection, pl. 53. cites 21 H. 6. 42. by the Statute of E. 3. 7. — And the ſame of *Attaint*. Ibid.

Both.

S. P. Br. Protection, pl. S. cites 27 H. 6. 1.

3. They lie not in a Quare Impedit * 39 H. 6. 39. 10 H. 4. 6. 43 Aſſis. 21. per Thorpe for the Miſchief of the incurring of Laps in the mean Time.

* Br. Protection, pl. 67. cites S. C. accordingly. — Fitzh. tit. Protection, pl. 15. cites S. C. & P. per Choke and Pryſot.

Br. Protection, pl. 16. cites S. C. —

4. Protection lies in a Scire Facias upon a Fine. 40 E. 3. 18. b.

Co Litt. 131 (y) — S. P. Notwithſtanding the Statute which ouſts the Delays. Br. Scire Facias, pl. 217. cites S. C. — Fitzh. tit. Protection. pl. 93. cites S. C.

* Fitzh. tit. Protection, pl. 33. cites S. C.

*5. So it lies in a Scire Facias upon Charter of the Pardon of Outlawry, after a Count upon the firſt Original. 43 E. 3. 36.

† Fitzh. tit. Protection, pl. 30. cites S. C.

† 6. Protection lies in Writ of Right of Dower. 43 E. 3. 6. b.

* Br. Protection, pl. 19. cites S. C. accordingly. — S. P. Br. Aid del Roy, pl. 106. cites F. N. B — Jenk. 50. pl. 95. cites S. C. For this would tend to ſtarve the Widow.

7. Protection does not lie in Writ of Dower Unde nihil habet, for the haſty Remedy, becauſe ſhe has nothing to live upon. * 43 E. 3. 6. b. 17 E. 3. 22. b. Adjudg'd. 39 H. 6. 39.

Br. Protection, pl. 19. cites S. C. — Jenk. 50. pl. 95. that it does not lie in a Quod ei deforceat brought by Tenant in Dower, where ſhe had loſt her Dower by Default.

8. But it lies in Quod ei deforceat, where ſhe claimed to hold in Dower, for this is grounded upon her own Poſſeſſion. 43 E. 3. 6 b.

Fitzh. tit. Protection, pl. 30. cites S. C.

9. So it lies in Writ of Entry ſur Diſſeiſin brought by Feme, where ſhe makes Title to hold in Dower, for this is of her own Poſſeſſion. 43 E. 3. 16. b.

11. In

10. In Dower, if the Vouchee denies the Deed of the Heir, by which the Demandant recovers immediately, and the Tenant and the Vouchee go to Iſſue upon the Deed, a Protection does not lie for the Vouchee, becauſe the original Plea is a Plea of Dower (and ſo is of the ſame Nature) 17 E. 3. 22. b. Adjudg'd. Fitzh. tit. Protection, pl. 49. cites S. C.

11. If Dower be aſſign'd to a Feme in Chancery, and after it is Evicted by an Elder Title, and ſhe brings a Scire Facias againſt the Tenant to be endowed of the other two Parts in Chancery, a Protection does not lie for the Tenant, Quia Placitum datis. 43 Aſſ. 32. Adjudg'd. Br. Scire Facias, pl. 161 cites S. C. — Br. Protection, pl. 68. cites 43 E. 3. 32. S. P. and ſeems to mean the S. C.

12. In Scire Facias againſt Conuſee of a Statute Merchant for ſuing Execution againſt his own Releaſe, a Protection lies for the Conuſee, tho' it does not lie in the Suit to have Execution of the Statute. 47 E. 3. 4. S. P. For the Conuſee is Defendant in this Scire Facias, tho' he was Plaintiff in ſuing Execution. Br. Protection, pl. 80. cites 47 E. 3. 4. — Nor in Scire Facias to have Execution on a Judgment Godb 366. pl. 457. Hill. 2 Car. B. R. Buther v. Murrey. — Lut. 167. S. C.

13. In Scire Facias in Nature of an Aſſiſe, Protection does not lie, becauſe he ſhall not have more Advantage in this than in the Aſſiſe. 3 H. 4. 16. b. Br. Protection, pl. 87. cites S. C.

14. The ſame Law in Scire Facias againſt a Lord upon Reverſal of an Attainder. 3 H. 4. 16. b.

15. A Protection lies for the Defendant in a Quid Juris clamat. 17 E. 3. 68. Adjudg'd.

16. In a Writ of Error, and Scire Facias thereupon, to reverſe a Fine, tho' Error be aſſign'd in the Fine, becauſe he was within Age at the Time of levying it, yet a Protection lies for the Defendant; but the Plaintiff ſhall be immediately inſperred for the Miſchief, that he may be of full Age before the Year is ended. * 21 E. 3. 24. b. Adjudg'd. 21 Aſſ. pl. 10. 22 E. 3. 6. b. Adjudg'd. * Fitzh. tit. Protection, pl. 62. cites S. C.

17. If upon a Capias awarded againſt Conuſor of a Statute Merchant, the Sheriff returns, That he is dead, the Feoffee of the Conuſor of the Land liable to the Statute, upon ſhewing thereof to the Court, ſhall not have his Protection Quia Profecturus allow'd, becauſe he has not any Day in Court. 33 E. 3. Protection 115.

18. In an Elegit within the Year in B. R. a Protection, by which the King has taken into his Protection Lands and Chattels, was allow'd for him againſt whom the Judgment paſs'd, tho' he had not Day in Court. 13 E. 3. Protection 72. Fol. 320.

19. 1 E. 1. Rot. Patentium Membrana 15. Rex ſuſcepit in Protectionem & Defenſionem ſuam Willielmum de Appleſield, homines Terras ac Redditus & omnes Poſſeſſiones ſuas in Hibernia, uſque ad Feſtum Purificationis proximo futurum, et Rex vult quod prædictus Willielmus interim quietus ſit de omnibus Placitis, exceptis Placitis de Dote, Aſſiſa Novæ Diſſeiſinæ, & Ultimæ Preſentationis. Ibidem autem Protection for Jo. De Nevil for all Pleas except the ſaid 3 Pleas. Ibidem autem, Protection for the Maſter and Brethren of St. Thomas the Martyr, of Acon in Ireland, ſimply for all Pleas without ſuch Exception. Ibidem autem, Protection accordingly.

20. Membrana 16. Protection quia Profecturus granted to P. cum Clauſula, quod interim quietus ſit de omnibus Placitis, exceptis Tribus &c. et exceptis Placitis quæ coram Juſticiariis &c. Membrana Protectionis cum Clauſula quod quietus ſit de omnibus Placitis, exceptis Tribus &c. & exceptis Loquelis &c. Præſentibus minime Valituris.

21. Membrana 19. Protection cum Clauſula, exceptis Tribus, & exeptis Placitis, & Querelis in Itineribus Juſticiariorum noſtrorum interim ſummoniendis.

The King shall not grant Protection in this Case by reason of this Statute.

22. 7 *H.* 4. 4. Enacts, That *in an an Action of Debt brought against the Goaler which letteth a Prisoner escape, a Protection shall not lie.* Per Prisot. And Brook says, That the Statute saying, that Protection shall not lie, is as much as to say, That the King shall not dispense with the Statute; quod nota. Br. Parliament, pl. 30. cites 39 H. 6. 39.

(L. 2) Cast in what *Court*.

1. A Prohibition shall be allow'd in a Court of *Antient Demesne, or in other Court of Record*, as London &c. and when the *Plea is removed* the Protection may be allow'd. F. N. B. 28. (K)

(M) For what *Causes* it may be granted. Quia Profecturus.

See Fleta. Lib. 6. cap. 7. De Causis Excusationum; and cap. 8. De Essoniis ultra Mare, and Britton, cap. 122, 123, 124.

1. * Quia Profecturus to F. and there Moraturus in Negotiis Regni is not sufficient Cause without shewing some especial Retainer by the King, or Indenture, as Ambassador, or † such special Cause. 39 H. 6 39. Curia.

The *Cause* of granting a Protection *must be express'd in* the Protection, to the End it may appear to the Court, That it is Pro negotiis Regni, or Pro bono Publico Co Litt. 130.

* S. P. And the Business of the Realm shall not serve, unless it was certainly express'd what Business. Br. Protection, pl. 67. cites S. C.

† S. P Godb. 366. pl. 457. Hill. 2 Car. B. R. Busher v. Murrey E. of Tullibardin.

2. A Protection has not been seen for the going to Rome to be Procurator of the King. 39 H. 6. 39.

3. It may be Quia Profecturus ad Curiam Romanam de Licentia Domini Regis. 56 H. 3. Rot. 8. The Prior of Little Malberne's Case. Adjudg'd.

4. 1 E. 1 Rot. Patentium Membrana 15. Protectio concessa J. de Nevil, & pluribus aliis qui in occursum Regis ex licentia Regis profecturi sunt ad partes transmarinas & habent literas Regis de Protectione duraturas usque ad Festum omnium Sanctorum proximo futurum, cum Clausula quod interim quieti sint de omnibus placitis exceptis tribus & est triplicata.

Both.

5. If the Possessions and Chattels of any Man be taken into the Protection of the King without Cause, this shall not conclude or delay any Man of his Action. 11 H. 6. 10.

6. But if the King takes a Man into his Protection because he is in his Service in his War, this Protection shall be good. 11 H. 6. 10.

7. 1 *R.* 2. 8. Enacts that *No Protection with the Clause of Volumus shall be allowed for Victuals taken or brought upon the Voyage or Service whereof the Protection makes Mention, neither yet in Pleas of Trespass or in Contracts made after the Date of the said Protection.*

(N) For

(N) For what Cauſes it ſhall be granted in Reſpect of the *Place* where.

Fol. 32.

Moraturus.

1. **Quia Moraturus ought to be** upon a certain Place, **as upon Victualling of Calais, or the like.** 39 H. 6. 39.

Br. Protection, pl. 67. cites S. C. —

The Protection, as well Moraturæ as Profecturæ, *muſt be regularly to ſome Place out of* the Realm of *England, and* that muſt be *to ſome certain Place*, as ſupra ſalva Cuſtodia Caſtelæ &c. Co. Litt. 130. b. (q)

2. Quia Moraturus ſuper altum Mare, **is not good.**

S. P. Becauſe uncertain.

Br. Protection, pl. 67. cites 39 H. 6. 39. —— S. P. Becauſe the Sea cannot ſtay, and by Conſequence he cannot ſtay upon the Sea. F. N. B. 28 (I) cites Trin. 36 H. 6. —— S. P. And alſo becauſe a great Part of the Sea is within the Realm of England. Co. Litt. 130. b (q)

3. Quia Moraturus in obſequio noſtro in partibus Walliæ **is not good, becauſe** Wales is within the Realm. 7 H. 4. 14. **Dubitatur.**

S. P. Day of Advisement was given to the Demandant, and in the mean Time the Protection was expired, and the Demandant prayed Seiſin of the Land, and could not have it; for the Day of Adviſement was given to the Demandant, and not to the Tenant upon the Protection. Br. Protection, pl. 33. cites S. C. —— A Protection to Wales is not good Co. Litt. 130. b. (o) —— S. P. Jenk. 66 pl. 24 becauſe it is in the peaceable Poſſeſſion of our Lord the King —— And where the Protection was *Quia moratur in Partibus Zealand in Obſequio noſtro*, it was ſaid by Tanfield to be no Cauſe of Protection; for the uſual Form (and ſo is the Law) is that ſuch a Perſon is employed *in Negotio Regni* for the Defence of England &c. For if the King will give Aid to another Prince's Subjects employed in ſuch Service, they ſhall not have Protection. Le. 185 pl. 258 Hill. 31 Eliz. B. R. Osborn v. Kirton.

4. Protection of *Voyage Royal in* **Ireland* ſhall not be allowed; for *it is within the Juriſdiction of this Realm.* But *otherwiſe* it is *of Scotland*; for there is War between us. Per Moyle J. Br. Protection, pl. 72. cites 7 E. 4. 27.

* S. P. Becauſe it is in Peaceable Poſſeſſion of our Lord the King.

Jenk. 66. pl. 24 —— But Co. Litt. 130. b. (q) ſays it may be to Ireland or Scotland, becauſe they are diſtinct Kingdoms.

5. *And* Protection *ſuper ſalva Cuſtodia* lies there; and otherwiſe not. Per Littleton. Br. Protection, pl. 72.

6. *And* Protection call *Quia moratur with E. W. Deputy of the Duke of Clarence* is good, if the Duke by his Commiſſion has Power to make a Deputy. Br. Protection, pl. 72. cites 7 E. 4. 27.

7. The King's Protection containing this Cauſe (quod defendens *profecturus eſt verſus Scotiam, moraturus ſuper defenſionem caſtri de Carliſle*) is not good to ſave the Default of a Defendant in a Suit, becauſe Carliſle is within the Kingdom of England. By all the Juſtices of England; The King in his Kingdom is preſumed to be ſufficiently defended with Arms, and every Subject is bound to aid the King to ſubdue his Enemies and Rebels. Jenk. 66. pl. 24.

S. P. Co. Litt. 130. b. (o)

8. The Regiſter of Writs is, That a Protection is good with this Clauſe, *Quia in Exercitu profecturus pro ſervitio Regio verſus Scotiam*; *and* is alſo good for the Defence of *Calais*, or of any Part of France ſubdued by the Engliſh. Jenk. 66. pl. 24.

9. In Debt the Defendant ſhew'd forth a Protection Quia Profecturus with the Lord Hunſdon *to Berwick*. Dyer doubted if the Protection did lie, but ſaid that it ſhould rather be Moraturus than Profecturus; for a Profecturus *to Calais was never good, but ſuper Victualeationem Calecii*; but Harper contra; for Berwick is out of the Realm. 3 Le. 20. pl. 43. Paſch. 14 Eliz. C. B. Chriſtmas's Caſe.

(O) For

(O) *For what Time* it is to be granted. Both.

1. 1 E. 1. Rot. Pat. Membrana 15. PRotectio duratura uſque ad Feſtum Purificationis proximo futurum.

2. Ibidem, Protectio quia Profecturus duratura uſque ad Feſtum omnium Sanctorum proximo futurum.

3. Ibidem autem protectio duratura uſque ad [Feſtum] Paſchæ proximum.

4. Ibidem protectio pro H. qui in occurſum ſe transfert duratura uſque adventum Regis in Angliam.

Br. Protection, pl. 67. cites S. C.—* Arg. Noy 177. cites S. C.——A Protection is not to be for more than a Year and a Day after the Date thereof; and then if Need be, a new Protection muſt be ſued forth. F. N. B 28. (D)——S. P Co. Litt. 130. b. (n)——It may be reviv'd by Reſummons, if the Protection be not repeal'd before. Jenk 27. pl. 55.

5. **Protection lies * not for more than** one Year **at a Time; but when the Year is ended, the** King **may grant it** for another Year, **and ſo on** in Infinitum. 39 H. 6. 39. 40.

6. **But it lies for** an intire Year, **and if there be a Reattachment within the Year, it ſhall abate.** 40 E. 3. 18.

S. P For a Man may bring Writ bearing Date the ſame Day, that his firſt Writ abated. Litt. 130. b. (n)—— Quære. Br. Jours &c. pl. 12. cites S. C.——Br. Brief, pl. 40 cites S. C.——S. P Co.

7. **If a Protection be caſt, which bears Date** 7 Jan. duratura for 1 Year, **Garniſhment may be** 8 January the next Year; **for this is a Day after the Year, or it may be** 7 January, **for it ſhall be intended to be purchaſed after the Time in the Day of the Grant of the Protection.** 40 E. 3. 18.

8. A Protection granted to one &c. *until he be returned from Scotland*, was diſallowed for the Uncertainty of the Time. Co. Litt. 130 b. (p)

9. The Lady M. had a Protection of the King, and the Protection was granted *for the King and his Succeſſors*; and yet by the Judgment of the Court it is gone by Demiſe of the King. Lat. 58. Paſch. 1 Car. Lady Mollineux's Caſe.

(P) *At what Time* it may be *caſt*.

Regularly a Protection cannot be caſt *but when the Party hath a Day in Court*, and when if he had made Default, it ſhould ſave his Default; therefore when *Execution* is to be granted *againſt Body, Lands or Goods*, no Protection can be caſt, becauſe the Defendant hath no Day in Court. Co. Litt 130 b. (l)

1. **If a Summons** ad Auxiliandum **iſſues againſt Peace in Ad, and the Sheriff returns** Quod mandavit Ballivo &c. qui nullum reſponſum dedit, **a Protection does not lie for the Peace at the Day of the Return, becauſe he had not Day in Court.** 17 E. 3. 66. **adjudged.**

See (B) pl. 5.

2. **If the Inqueſt be taken at the** Niſi Prius, **no Protection lies at the Day in Bank, becauſe they [are] one Day.** 21 E. 3. 51.

See (B) pl. 5.—Br. Protection, pl.

3. **If Defendant makes Default at the** Niſi Prius, **by which the Inqueſt is taken, a Protection does not lie for him at the Day in Bank,** becauſe

because they are one Day in Law. 3 H. 4. 13. b. Contra 18 E. 3. 58. 5. cites 20 E. 3. and P. 33 E. 3.

S P. For the Party shall not plead a Release mesne; quod nota. But cites 21 E. 3. contra, that Protection was allowed in such Case.——*In Plea Real* the *Tenant made Default at the Nisi Prius*, and *at the Day in Bank Protection was cast and allowed*, and *no Petit Cape awarded*. Br. Protection, pl. 50. cites 9 E. 3. at the End. ——*And* M. 19 E. 3. the Parties were at Issue in *Account*, and *at the Nisi Prius the Defendant made Default*, by which the Inquest was taken by Default, and remained; *and at the Day in Bank Protection was cast*, and allowed. Br. Protection, pl. 50.

Protection was *cast at the Day of Nisi Prius*, and the *Justices took the Inquest by Default*, and *at the Day in Bank Repellance was cast*, by which the Plaintiff prayed Judgment, and could not have it; for the Protection was allowable at the Day when it was cast, and therefore it shall serve this Day; by which if they had had Power to allow Protection at the Nisi Prius, it had *saved the Defendant's Default*, and their Want of Power shall not put the Party to Mischief to award the Inquest by his Default; by which it was awarded, that the *Plaintiff shall sue Process against the Inquest upon the first Issue* &c. And note, That at this Day of Nisi Prius aforesaid, the Defendant made Default, and a Stranger cast the Protection for him, and the Inquest, notwithstanding this was taken by Default, found for the Plaintiff, and all was void at the Day in Bank for the Reason aforesaid; quod nota. Br. Protection, pl. 64. cites 14 H. 6. ——Br. Enquest, pl. 25. cites S. C.——And this tho' in some Respects, the Day of Nisi Prius and Day in Bank are all one. Br. Enquest, pl. 25. cites 21 H. 6. 20. *But* where *Protection is cast at the Day of the Nisi Prius, and the Justices do not take the Inquest, but record it, and at the Day in Bank the Protection is disallowed*, there the Inquest shall be taken by Default; for in this Case the Default never was sav'd; Contra Fitz.——In *Action personal* in B. R. against T. S. they were at Issue, and *at the Nisi Prius the Plaintiff appeared, and the Defendant was demanded, and made Default*, by which it was *entered Quod defendens exactus non venit sed quod H. N cast Protection for him*, and so all was recorded; and before the Day in Bank the Plaintiff sued Repeal, and at the Day in Bank cast it in Court, and prayed that the Protection be annull'd; and so it was, and the Inquest awarded by Default; the Reason seems to be inasmuch as the Default was recorded before the Protection was cast. Br. Protection, pl. 71. (bis) cites 4 E. 4. 1.——Br. Enquest, pl. 41. cites S. C.

Quia Profecturus.

4. If Defendant in an Action * prays an Imparlance, when he is demanded to come to his Answer, a Protection Quia Profecturus of a more ancient Date than the Appearance, may be cast for him. 29 E. 3. 41. adjudged.

* Orig. is (Issue d'un parler, but in the Year-book it is Quant le Defendant q'issuit enparler fuit d'd &c.)

Quia Moraturus.

5. If the Defendant prays to Imparle when he is demanded to answer, a Protection Quia Moraturus in obsequio, of elder Date than his Appearance, lies not for him. 29 E. 3. 41. Fol. 328.

Both.

6. In an Account, if the Defendant comes in upon the Capias, and the Plaintiff counts against him, and he defends, he can't cast a Protection Quia Profecturus after, because he has entered the Plea. Contra 13 E. 3. Amercement. 18. adjudged. If a Man hath a Protection, and notwithstanding pleads a Plea,

yet *at another Day of Continuance after* that, a Protection may be cast; so at a Day after an Exigent; but after Appearance he cannot cast a Protection in that Term until a new Continuance be taken. Co. Litt. 130. b. (m)

7. If the Defendant pleads, and the Plaintiff imparles, a Protection lies for the Defendant the next Day, notwithstanding the Pleading before. 44 E. 3. 16. Br. Protection, pl. 25. cites S. C.——Br. Jours, pl. 10. cites S. C.

8. Note, That in Scire facias a Protection purchased *pending the Writ*, shall not be allowed, but where he *goes in a Voyage Royal*, that is with him who conducts the King's Host, or with the King's Lieutenant, and S. P. F. N. B. 25. E.

not with him who goes with the King's Son into Ireland; for it may be that it was no Journey of War, as it seems. Br. Protection, pl. 34. cites 11 H. 4. 7.

9. Protection *cast at the Nisi Prius, and repealed at the Day in Bank, shall save the Default of the Defendant*; and *contra of Protection cast at the Day of Nisi Prius, and disallow'd at the Day in Bank.* Note the Diversity, because it is apparent. Br. Protection, pl. 51. cites 21 H. 6. 20.

10. Where a Man *has Nisi Prius and Assise, against one and the same Person*, and *at the Day the Defendant appears to the Assise*; yet *at the same Day he may cast Protection Quia Moratur, in the Nisi Prius.* Br. Protection, pl. 51. cites 21 H. 6. 20.

(Q) *How.* Quia Moraturus.

Br. Protection, pl. 66. cites 38 H. 6. 23. — Co. Litt. 131. a. (g)

1. If a Protection, Quia Moraturus, be cast by the Party himself in Person, then he ought to shew Cause, as to say, That he came into these Parts to buy Victual or other Necessaries for the Castle, for which Purpose he stays here; But when it is cast by a Stranger, 'tis sufficient for him to say, by Protection. 38 H. 6. 23. b. per Moyle.

* Br. Protection, pl. 67. cites S. C. accordingly.

2. In such Protections there ought to be an *Exception of Dower, Quare Imp* and *Assise*. Arg. Noy 177. cites * 39 H. 6. 39.

3. A Protection may be cast for the Party *by a Stranger*, as well as by the Party himself. F. N. B. 28. (E)

(R) *Allowing, and Disallowing of Protection. Who* shall be *Judge.* [Pl. 1, 2, 3, 4,] [And the Effect of Allowing, or Disallowing it, pl. 5, 6, 8.]

The *Courts of Justice, where the Protection is cast*, are to Allow or Disallow of the same, be they Courts of Record, or not of Record, and not the Sheriff, or any other Officer or Minister. Co. Litt. 131. a. (e)

1. If Protection comes to the Sheriff for a Man who is in his Custody, if he delivers him, he shall be amerc'd; For he is not a Judge to allow it; but he ought to return the Protection and Body into Court, and there it shall be allowed. 38 H. 6. 23.

2. So if he takes a Man who has a Protection. 6 H. 4. 9. b. Curia P. 10 Ja. B. *Doctor Barrow's* Case, Curia Dubitatur, 11 H. 4. 57.

See (B) 1.

3. At the Nisi Prius, a Judge can't Allow nor Disallow Protection before his Associate come, and if it be cast before the one, before the other comes, this shall not serve when the other Judge comes, without new Prayer to be allow'd. 43 E. 3. 20. b.

4. At the Nisi Prius, the Judge cannot Allow nor Disallow a Protection. 48 E. 3. 7. b. 17 E. 3. 22. b.

Br. Protection, pl. 30. cites S. C. accordingly. — Br. Enquest, pl. 8. cites S. C.

5. But the Judge of Nisi Prius, when the Protection is cast, may take Inquest de Bene Esse, and if the Protection be allowed at the Day in Bank, then the Verdict shall serve for nothing; But if it be disallowed it shall be good. 48 E. 3. 7. b.

— Br. Nisi Prius, pl. 7. cites S. C. — S. P. Br. Deceit, pl. 6. cites 35 H. 6. 43. per Prisot. — When Protection is cast, he ought to Surcease. [illegible] Br. Protection, pl. 15. cites 35 H. 6. 58. per Curiam.

6. When

6. When Protection is caſt at Niſi Prius, the Juſtice is to Record the Default and Protection; and ſo at the Day in Bank, if the Protection does not lie, this ſhall be a Default. 17 E. 3. 22 b.

If a Protection be caſt at the *Niſi Prius* for one, and *before the Day in Bank, it is repealed by Inſpeximus*; yet becauſe it was once well caſt, it ſhall ſave his Default; But if the Protection be *diſallow'd*, either *for Variance, or that it lay not in the Action*, or the like, there it ſhall *turn to a Default*. Co. Lit. 130. b. (I)

7. If the Protection be caſt for Birton, where the Record is Burton, the Protection ſhall be diſallow'd. 25 E. 3. 43. adjudg'd. See (S)

8. 33 E. 1. Enacts that *A Challenge ſhall be entered againſt a Protection of the King's Servant; And if the Country paſs againſt him that caſt the Protection, it ſhall turn to a Default, if he be Tenant, and if he be Demandant, he ſhall loſe his Writ, and ſhall alſo be amerced to the King.*

9. Protection was *Quod Prærogativa noſtra Regia Suſcepimus in Protectionem noſtram Regiam, Corpus, Terras & Bona de W. & Nolumus quod inquiratur, Nec quod Prærogativa noſtra arguetur.* Wray Ch. J. thought the Protection not allowable; For there are but two Protections, Quia Moraturus, and Quia Profecturus; and tho' he would not argue the Prerogative, yet as Judge, he would conſider of it; And he thought that ſuch Prerogative as tends to the great Prejudice of the Subject, is not allowable; to which all Agreed; For which Reaſon 'twas diſallowed. Mo. 239. pl. 374. Paſch. 29 Eliz. C. B. Warram's Caſe.

(S) For what Cauſe; For *Variance*.

Fol. 529

See (R) pl. 7

1. IF in the Protection he is nam'd Chivalier, and in the Writ Miles in Latin, this is not ſuch Variance as to diſallow the Protection. 42 E. 3. 9. Br. Protection, pl. 18. cites S. C. — S. P. For it is not Variance in Effect. Br. Protection, pl. 8. cites S. C.

2. But if there be any Variance between the Protection and the Writ in the Name of him by whom it is caſt, this ſhall not be allowed. 44 E. 3. 2. 7 H. 6. 22.

3. But if the Protection be caſt by A. B. Clark and (Clark) is more than is in the Writ, yet it ſhall not be diſallowed for this Surpluſage. 2 H. 4. pl. 1. Where the Protection was *J. by Kirton* only, and the Bill and Declaration were John Kirton *of A. Gentleman*; this was held to be no material Variance, being only in the Addition; For before the Statute of 1 H. 5. Additions were not neceſſary in any Actions. Le. 185 pl. 258. Hill. 31 Eliz. B. R. Osborn v Kirton

4. If a Writ be brought againſt W. de Triage, and a Protection Quia Moraturus is caſt for W. Triage, leaving out (de) tho' it be caſt in the Abſence of the Party, yet it ſhall not be allowed, becauſe it cannot be intended the ſame Perſon. 11 H. 4. 70. Adjudged. Br. Protection, pl. 35. cites S. C. — Br. Variance pl. 33 cites S. C. And becauſe it was *purchaſed pending the Writ*, and M. Triage and M. de Triage cannot be intended one and the ſame Perſon, therefore by Award the Protection was diſallowed, and Petit Cape awarded, Quod nota.

5. And this can not be aided by Averment that he is the ſame Perſon. Adjudg'd. 11 H. 4. 70.

6. If in an Action a Man be named R. C. nuper de K. and in the Protection caſt by him Nuper de K. is left out, this ſhall not be allowed. 19 H. 6. 48. Treſpaſs [illegible] the Defendant caſt Protection, Quod ſuſcepimus in Protectionem noſtram [illegible]

cut, and therefore the Protection was disallowed, and the Defendant was demanded, and appeared by Attorney, and the Inquest taken. Br. Variance. pl. 45. cites 19 H. 6. 4

7. In Debt against J. C. Executor of W. if a Protection be cast for J. C. leaving out (Executor) yet it shall be allowed, because this is not Part of his Name; and if there are 2 of the same Name, the Plaintiff may shew it. 29 E. 3. 40. b. Adjudged.

Br. Variance, pl. 32. cites S. C.— Br. Protection, pl. 84. cites S. C. Contra it seems if it bears Date after the Writ.

8. If there be a Variance between the Writ and Protection, yet if the Protection be of elder Date than the Writ, the Protection shall be allowed; for no Default is in the Defendant, because the Writ is not according to the Protection. 11 H. 4. 57. 70. b.

9. If there be more in the Protection than there is in the Writ, tho' the Writ be of elder Date than the Protection, yet the Protection shall be allowed. 25 E. 3. 41. b.

N. B. There is no Plea to in Roll.

11. As if he be named J. the Son of J. de Mohun Knight, and in the Protection he is named J. the Son of J. de Mohun de Burrocke, Knight, and so more is in the Protection than in the Writ, yet the Protection shall be allowed. 25 E. 3. 41. b. Adjudged.

12. If a Variance be between the Process and the Original in an Action, and a Protection is according to the Process, yet it shall not be allowed, because the Protection ought to be always according to the Original, and not to the other Process. 11 H. 4. 70. b. Adjudg'd.

13. If there be a Variance between the Protection and the Writ in the Surname of the Party, because less is in the Protection than in the Writ, yet the Protection shall be allowed. 27 E. 3. 88. b. Adjudg'd.

14. If the Writ be against Simon de Kimardesly, and the Protection is for Simon de Kimardeslee, yet it shall be allowed. 1 E. 3. 11. b. tho' it was purchased after the Writ.

Cro. J. 477. S. C. the Defendant was ordered to answer, and when it should come to Execution they would advise.

15. If Gerrard Malines be sued, and he casts a Protection of elder Date than the Writ, in which Protection he is called Garret Malines, tho' Garret and Gerrard are all one Name, yet if this be not averred to be one, the Protection shall not be allowed. P. 16. Ja. B. R. between Travers and Malines. Adjudged.

Br. Protection, pl. 56. bites S. C.

16. Variance was between the Writ and the Protection, but it *does not appear there what Variance*, and for the Variance the Protection was disallowed. Br. Variance, pl. 103. cites 44 E. 3. 2.

Where the *Record* was Trespass against *A. B. of O. in the County of H. Esq*; and the *Protection was A. B. of O. Esq; in the County of H.* Alias Dictus A. B. of O. Passon said, It shall not be allow'd for the Variance; but Ascue and Fulth. said, Yes; for it has *sufficient Intendment* to be one and the same Person. Br. Variance, pl. 47. cites 22 H. 6. 3.——— Br. Protection, pl. 54. cites S. C.

17. If there be Variance *between the Record and the Protection*, it is not allowable; for this is never allowable. Br. Protection, pl. 59. (bis) cites 4 H. 6. 9.

Br. Protection, pl. 47. cites S. C.

18 In Trespass, the Original was Richard *Molineux*, and the Protection Richard *Molyney*, and therefore was disallow'd for the Variance. Br. Variance, pl. 41. cites 7 H. 6. 22.

Br. Protection, pl. 56. cites S. C.

19. Where the *Defendant has several Additions by Alias Dictus*, if *Protection* be cast for him, which *accords to one of the Names* and not with the other, yet the Protection is good; quod nota; by all the Justices. Br. Variance, pl. 48. cites 22 H. 6. 50.

20. *At the Nisi Prius, at the 4th Day, the Parties were demanded, and appeared by Attorney*; and the *Defendant's Attorney cast Protection*, and they were *adjourned* till the next Day, and there the Plaintiff was ready to have

have alleged *Variance*, becauſe *Addition of the Name of the Defendant in the Writ was not in the Protection*; and the Court was in Opinion to have diſallow'd the Protection for this Variance; by which the ſame Day the Attorney caſt other Protection, bearing Date the ſame Day. Br. Protection, pl. 10. cites 28 H. 6. 1.

(T) [Allow'd or not.] *For what Cauſe.* Quia Profecturus. [In reſpect of the Time of the Repeal thereof. Pl. 11, 12, 13.]

Fol. 330.

1. WHEN this Protection is to be allow'd, if it be alleg'd, That the Party has been beyond Sea, (after the Purchaſe of the Protection, and is return'd) the Protection ſhall be diſallow'd. 44 E. 3. 4.

S. P But where it is once allow'd, and he goes and returns within the Term, yet it ſhall not be allow'd by way of Plea, as it is agreed there. Br. Protection, pl. 24. cites 44 E. 3. 12.

2. But if the Protection be to go only with A. who is returned at the Time of the Allowance, yet if A. be ready to go beyond Sea again the Protection ſhall be allow'd. 44 E. 3. 12.

Br Protection, pl 24. cites 44 E. 3. 12.

3. But if the Protection be to go with B. if it be alleg'd when the Protection is to be allow'd, That he continued ſtaying in England, (it ſeems that it is intended, That B. is gone) the Protection ſhall be diſallow'd. 47 E. 3. 6. b.

S P. But if it be allow'd it can't be repeal'd within the Year. Br Protection, pl 29. cites 47 E. 3. 6

4. If a Sheriff returns a Cepi Corpus againſt B. yet if a Protection Quia Profecturus be caſt for him after, it ſhall be allow'd. 14 H. 4. 1. b.

Br Protection, pl. 36. cites S. C.

5. When the Protection is to be allow'd, if the King ſends a Writ to the Court, reciting the Grant of the Protection, and that he underſtood that he is maimed, ſo that he cannot go in his Service, and therefore he commands the Juſtices to proceed in the Plea, the Protection ſhall not be allow'd. 29 E. 3. 36.

Fitzh. tit. Protection, pl. 113 cites S. C.

6. If he for whom the Protection is caſt has not been in the Service of the King, as he ought, and it appears to the Court, That there is a Neglect in him before the Allowance, the Protection ſhall be diſallow'd. 24 E. 3. 35.

7. If a Protection Quia Profecturus be caſt for the Defendant in an Action, yet if the Protection be repealed before the Allowance it ſhall be diſallow'd. 13 E. 3. Amercement 18. Adjudg'd.

Quia Moraturus.

8. If a Victualler of Calais has a Protection Quia Moraturus, and returns into England to buy Victual for the Soldiers, if he be ſued here, the Protection ſhall be allow'd. 6 H. 4. 9. b. Adjudg'd. * 11 H. 4. 57. † 19 H. 6. 35. b. Adjudg'd.

* Br. Protections, pl. 84 cites S. C. —— Fitz. pl. 49. cites S. C.

But if he ſtays about his own Buſineſs, the Plaintiff may ſue repeal of the Protection. —— *Allowing Protection Quia Moratur* in Delay of the Action of the Plaintiff, *vide* [illegible]

Middlesex, attending on his proper Business; the *Defendant said, That he came from Calais for Artillery, by Command of the Lieutenant*, absque hoc that he stay'd at B. attending on his proper Business, prout &c. Br. Traverse per &c. pl. 362. cites 20 H. 6. 10.

Debt against *J. N.* who *cast Protection*, which was allowed, and *within the Year the same J. N. brought Writ of Debt against the Plaintiff, and he tender'd his Law, and J. N. was not stinted after Appearance*, and because J. N. appeared within the Year, the first Plaintiff pray'd, That the Protection cast by J. N. be disallow'd, & non Allocatur, but shall have * Deceit. Br. Protection, pl. 88. cites 47 E. 3. 26. —— * Orig. is (Dissent)

9. **But if it appears, That such a Man** is in England, **the Protection shall not be allow'd** without alleging such special Cause of his Return. 11 H. 4. 57. But 19 H. 6. 35. b. is that **this cannot make Issue.**

Br. Protection, pl. 36. cites S. C.

10. **If it appears, That a Man is** in the Custody of the Sheriff by his Return of Cepi Corpus, **a Protection Quia Moraturus shall not be allow'd.** 14 H. 4. 1. b. **because it cannot be intended true against the Return**

Both.

11. **If a Protection be cast, and the** Justices will advise whether it shall be allow'd for Variance, **and** in the mean Time the Day of Protection passes, **yet the Protection shall be allow'd.** 10 H. 6. 6.

12. [But] **if a Protection be cast, and the Justices will advise whether it shall be allowed for** Variance till the fourth Day after, **if a** Repeal be dated after the 4th Day, **the Protection shall be disallowed.** 10 H. 6. 4. b.

Br. Jours, pl. 11. cites 35 H. 6. 58

13. **If Protection be** cast at Nisi Prius, **and it is** repealed at the Day in Bank, **it shall be disallowed.** 10 H. 6. 6. b. 11 H. 6. 14.

says it shall serve the Defendant; for it was good at the first Day, and the first Day and the other Day are all one Day in Law. Br. Jours, pl. 11. cites 35 H. 6. 58.

14. In Trespass the *Sheriff returned Cepi Corpus*, and *at the Day had not the Body*, by which *he was amerced*, and Process awarded to distrain the old Sheriff, who made the Return, and was now *removed*, who returned that he had distrained him, and that he had not the Body, and Protection Quia Profecturus was cast for the Defendant. And per Kirton, He *has no Day in Court*. Contra per Thorp clearly, and that if he comes he shall be received to plead; and by him clearly, The Protection shall be allowed; and after it was disallowed for Variance. Br. Protection, pl. 22. cites 44 E. 3. 2.

But if the Protection was *insufficient, or variant* from the Record, and they had took the Inquest, there it shall not serve the Defendant at the Day in Bank. Contra of a good Protection repealed or expired after.——And it is said there that 14 H. 6. 2. and 14 H. 4. 23. it is ruled that the Protection shall be as here in the Principal Case. Ibid.

15. In Debt the *Defendant at the Nisi Prius cast the Protection*, notwithstanding which the *Justices took the Inquest*; and *at the Day in Bank* the *Plaintiff obtained Innotescimus, and repealed the Protection*; and yet by the best Opinion the Protection is allowable, because *it was good at the Time it was cast*. For by Prisot, If the Protection *be not expired at the casting of the Nisi Prius, and is expired by the Day in Bank*; yet it shall be allowed; for all this is one and the same Day, and if it was good at one Day, it shall serve at another. Br. Protection, pl. 25. cites 35 H. 6. 58.

16. In *Debt*, the Parties were *demurr'd in Law*, and the *Opinion of the Court was with the Plaintiff*. Nele *pray'd Respite of Judgment till the next Monday to shew other Matter*; and the Court said if he cast any Protection in the Mesne Time, the Judgment shall be entered upon this Day; but if he does not cast Protection, the Judgment shall not be entered 'till the Monday. Br. Protection, pl. 32. cites 7 E. 4. 27.

17. Upon

17. Upon a Commiſſion of Oyer and Terminer againſt Hue de Chreſſey, he appeared upon the Proceſs; the Plaintiff counted againſt him, and the Defendant brought the King's Writ to the Juſtices, that Chreſſey the *Defendant was to go* along *with the King to the Marches of Scotland, to aid the King in his War*, and *the King commands the Juſtices to continue the Plea, till his* [*the King's*] *Return*. Notwithſtanding this Writ, the Judges proceeded againſt Chreſſey, and gave Judgment againſt him; this Judgment was affirm'd in Error; For the King requires that which cannot be; he requires the Continuance of the Plea till the King's Return, which is uncertain when it ſhall be, and every Continuance is to a certain Day. *Lex a Rege non eſt violanda.* Jenk. 7. pl 10.

18. No Writ of Protection can be allowed, unleſs it be *under the Great Seal*, and it is directed generally. Co. Litt. 131. a. (d)

19. Upon a Habeas Corpus to the Steward and Marſhal of the Houſe &c. for W. S. he returned Quod Domina Regina *per literas ſuas patentes ſuſcepit J. M. and his Sureties in Protectionem ſuam Regiam*; *and* farther by the ſaid Letters Patents voluit, *that if any Perſon ſhould arreſt* or cauſe him to be arreſted, that then *the ſaid Marſhal* of her Houſe, or his Deputy, *might arreſt every ſuch Perſon*, and detain him in Priſon until he ſhould anſwer for the Contempt before the Privy Council; and that the ſaid W. S. cauſed the ſaid J. P. one of the Sureties of the ſaid J. M. to be arreſted &c. whereupon the ſaid W. S. was diſcharged; and afterwards becauſe the Parties cauſed the ſaid W. S. to be arreſted again for the ſame Cauſe, an Attachment was granted againſt them. Le. 70. pl. 93. Mich. 29 & 30 Eliz. C. B. Search's Caſe.

20. *Scire facias* was brought *to have Execution on a Judgment.* The Defendant pleaded, That the King, Oct. 7. in the 2d Year of his Reign, took him into his Protection for a Year, and granted that during that Time he ſhould be free from all Manner of Plaints, except Dower, Quare Impedit, and Placita Coram Juſticiariis itinerantibus. It was argued that this was not a good Protection. 1ſt. Becauſe it *was after the Scire facias* brought, *and before the Return*, and cited 10 H. 6. 3. and 11 H. 4. 7. And a Protection pending a Suit is not to be allowed, tho' it is Quia Profecturus with the King's Son. 2dly. It does *not mention any particular Cauſe of the Grant*, as Quia Profecturus or Quia Moraturus &c. 3dly. This Court of B. R. is greater than that of a Juſtice in Eyre, which is among the Exceptions. And the Court was of Opinion that there was no Colour for allowing of the Protection Godb 366. pl. 457. Hill. 2 Car. B. R. Buſher v. Murray the Earl of Tullibardin. Lat. 19. Murrey's Caſe. The Court gave peremptory Day to ſhew Cauſe why Judgment ſhould not be given againſt him.

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*(X) In what Caſes Protection caſt for one ſhall *ſerve for others. *In Reſpect of the Perſons.*

Fol. 331. See (Z) *N.B. There is no (U) in Roll—— S. P. For it is one and the ſame Body. Br. Protection, pl. 26. cites S. C.

1. IN Action againſt Prior and Confreers, Protection for the Prior ſhall ſerve for the Confreers. 45 E. 3. 24.

2. So in Action againſt Baron and Feme, Protection for the Baron ſhall ſerve for the Feme. 45 E. 3. 24. * 43 E. 3. 23. † 48 E. 3. 7. b. * Br. Protection, pl. 21. cites S. C. accordingly ——† Ibid.

pl. 30. cites S. C.——Br. Enqueſt, pl 8. cites S.C.——Br Niſi Prius, pl. 5. cites S.C——Co. Litt. 130. b. (e) cites 35 H. 6. 3. 43 E. 3. 23. 48 E. 3. 7. 4 H. 5. Protection 107.——Br. Protection, pl. 14 cites 35 H. 6. 3.——See (Z) pl. 4. S P.

(Y) *Repeal*

(Y) *Repeal* of a Protection Moraturus.

Br. Protection, pl. 75. cites S. C.—Albeit he that had the Protection either Moraturæ or Profecturæ return into England, and haply be arrefted, and in Prifon, yet if he *came over to provide Munition*, Habiliments of War, Victuals, *or other Neceffaries*, it is no Breach of the faid Conditional Clauſe, nor againſt the Act of 13 R. 2. cap. 16. For that in Judgment of Law he, coming for ſuch Things as are of Neceſſity for the Maintenance of the War, Moratur, according to the Intention of the Protection and Statute aforefaid. Co. Litt. 131. b.

1. If a Protection Quia &c. be allowed in B. a Certiorari may be ſued to the Sheriff of London where he is, whether he be attending on the Buſineſs of the King, according to the Protection (which was Moraturus ſuper Victulatione Caliciæ) or on his own Buſineſs, and the Sheriff certifies in Chancery that he was remaining at London attending his own proper Buſineſs, by which the Party has an Inoteſcimus, directed to the Juſtices of Bank to repeal the Protection; upon ſhewing thereof to the Court, he ſhall have a Reſummons againſt him. But quære what Proceſs ſhall be made againſt the Inqueſt, whether it ſhall be tried by the ſame Pannell, or a new Venire facias. 21 E. 4. 20.

Both.

*Roll is, The Defendant comes and ſays that the (Plaintiff) was not in the Service &c. but the Year-book has neither the Word Plaintiff nor Defendant in it.

2. If a Protection be allowed, and after the *Plaintiff comes, and ſays that the Defendant was not in the Service of the King, yet the Court ſhall not repeal the Protection till the Day in the Protection. 24 E. 3. 35. adjudged.

Br. Enqueſt, pl. 18. cites S. C.—Br. Diſcontinuance of Proceſs, pl. 13. cites S. C.—Br. Default, pl. 27. cites S. C.

3. Protection *caſt at the Niſi Prius*, and *repealed at the Day in Bank*, ſhall excuſe the Default at the Day of Niſi Prius, ſo that he appears at the Day in Bank. Br. Protection, pl. 38. cites 14 H. 4. 23.

4. In *Præcipe* quod reddat *againſt Baron and Feme*, a *Protection was caſt for the Baron*, and the ſame Day *Inoteſcimus was caſt immediately to repeal the Protection, by which it was repealed*; And by all the Juſtices it was awarded *a Default*; quod nota; the Reaſon ſeems to be inaſmuch as *it was never allowable, by Reaſon of the immediate Caſting of the Inoteſcimus*, and it was Protection Quia Profecturus eſt. Br. Protection, pl. 65. cites 1 H. 6. 6.

5. Note that *Protection was allowed* in Treſpaſs, and the *next Day the Plaintiff ſhewed a Repeal*, and upon this *Re-attachment* was awarded immediately; Quod Nota, and other ſuch Matter the ſame Year, Fol. 22. where it is ſaid that the Allowance is for a Year, and therefore *cannot be repealed within the Year*, and alſo the Party may have Action of Diſceit; and this notwithſtanding, the Law was agreed to be Ut Supra, and ſeveral Precedents were ſhewed that it may be repealed within the Year; Quod Nota. Br. Protection, pl. 12. cites 34 H. 6. 4. 22.

6. A Protection may be *avoided* 3 manner of *Ways*; 1ſt. *Upon the Caſting of it* before it be allowed. 2dly. *By Repeal* thereof after it be allowed; *by diſallowing of it* many Ways; as *for that it lieth not in that Action*, *or* that he hath *no Day* to caſt it, *or* for material *Variance* between the Protection and the Record, *or* that it is *not under the Great Seal*, or the like. 3dly. After it is allowed *by Inoteſcimus*; as if any tarry in the Country without going to the Service, for which he was retained, over a convenient Time after that he had any Protection, or Repair

from

from the ſame Service, upon Information thereof to the Lord Chancellor, he ſhall Repeal the Protection in that Caſe by an Innoteſcimus. But a Protection ſhall *not* be avoided *by an Averment* of the Party in that Caſe, *becauſe* the Record of the Protection *muſt be avoided by Matter of as high Nature.* Co. Lit. 131. a. (h)

(Y. 2) *Proceedings* upon the Repeal.

1. IN Treſpaſs *at the Exigent, the Parol was put without Day by Protection*, and after came the Plaintiff with Writ of the King, that they diſallow the Protection, becauſe he *had not done the Buſineſs which he ought to do*, and *prayed Exigent de Novo*, and could not have it, but *had Pone per Vadios Secutarias*. Br. Protection, pl. 61. cites 39 E. 3, 4, 5.

2. Where the *Jury appears*, and Protection is caſt, and the *Juſtices think that the Protection is not allowable, where in Fact it is allowable*; and upon this they take the Inqueſt, and all this Matter ſhewn to the Court in Bank, the Court ſaid, That the Juſtices of Niſi Prius miſtook and thereupon the Plaintiff ſhew'd forth Repellance, which was allowed; And yet no Party was demanded, nor Proceſs awarded againſt the old Jury, but new Venire Facias awarded. Quod Nota, 2 Inqueſts upon Iſſue. Br. Protection, pl. 51. cites 21 H. 6. 20.

3. *At the Niſi Prius in Action Perſonal*, the Defendant caſt Protection, which *was recorded*, and the *Inqueſt not taken*; and *at the Day in Bank the Plaintiff caſt Repeal, which was allowed*, and the *Plaintiff prayed the Proceſs againſt the Jury*, and the Inqueſt was not awarded by Default; For the Protection ſaved the Default there, and ſo, by the Repeal, *Proceſs ſhall be now made againſt the Jury, and not a New Venire Facias awarded*, by the beſt Opinion. And this for good Reaſon; For the Jury have Day at the Day in Bank, at which Day the Protection was repealed, and ſo now the firſt Jury ſtood; quod nota bene. Br. Protection, pl. 69. cites 5 E. 4. 2.

Br. Ven. Fac. pl. 27. cites S. C. —Br. Enqueſt, pl. 35. cites S. C. —But the ſame Year, Fol 3. New Niſi Prius was awarded in ſuch Caſe.

Br Protection, pl. 69. —— *And* ſee there Fol. 3 becauſe the Juſtices of Niſi Prius *took the Inqueſt, notwithſtanding Protection* caſt, *the Taking* of the Inqueſt *was void*; And yet the Juſtices of Niſi Prius have not Power to allow the Protection. Ibid —— And the ſame Year, Fol 3. the Abbot of S. *brought Aſſiſe, and alſo in another Action had Niſi Prius againſt J. S. who appeared* at the Aſſiſe, *and caſt Protection Quia Moratur, at the Niſi Prius*, and becauſe he appeared *in Perſon* at the Aſſiſe, therefore it cannot be Quod ipſe Moratur Juſta Verba Protectionis, therefore they took the Inqueſt, and gave upon alſo *pur* at the Day in Bank; For in divers Suits a Man may appear as to the one, and be Nonſuited as to the other; and there new Venire Facias was awarded upon the Repeal, as in the Caſe abovemſt Ibid ——And the ſame Year, Fol. 4 *Diſtreſs was awarded againſt the old Jury*. But 5 E. 4. 35. *New Venire Facias* was awarded; and there it is ſaid that it had been done both Ways Quod Nota Ibid.——Br. Enqueſt, pl 35. cites S. C.

Note, by all the Juſtices, That if *at the Day of Niſi Prius* Protection be caſt, by which *the Inqueſt is diſcharged, and at the Day in Bank the Protection is repealed*; this proves that the Defendant did not go into the King's Service, and therefore 'tis as if no Protection had been caſt, nor any Appearance made at the Niſi Prius; and therefore the Diſcharge of the Jury was wrong, and the *Plaintiff ſhall have new Venire Facias, and not new Niſi Prius*; Quod Nota, per Omnes. Br. Protection, pl. 91. cites 11 H. 6. 14.

(Z) In what Caſes *Protection caſt for one*, ſhall *ſerve for the other* Defendants. *In what Actions.*

1. IN all Perſonal Actions, a Protection caſt for one, ſhall not ſerve for the other Defendants. 41 E. 3. 31. S. 40.

*Br. Protection, pl. 26. cites S. C. accordingly. —Br. Privilege, pl. 12. cites 14 H. 4. 21. b.

2. As in Treſpaſs, Protection for one ſhall not ſerve for the other Defendants. 41 E. 3. laſt Caſe. 22 H. 6. 22. 43 E. 3. 23. * 45 E. 3. 24. 4 H. 4. 4. b. 14 H. 4. 21. b. 17 E. 3. 9. 16. b. 30 E. 3. 17. admitted. 44 Aſſ. 13 admitted.

——— S. P. So *in any Action in Nature of Treſpaſs, which is in Law ſeveral, where every one may anſwer without the other*, there a Protection caſt for one, ſhall ſerve for him only, unleſs they *join in Pleading*; or if they *plead ſeveral Pleas, and one Venire Facias is awarded againſt all*, there a Protection caſt for one, ſhall put the Plea without Day for all; And therefore in former Times the Plaintiff uſed to ſue out ſeveral Venire Facias's in thoſe Caſes, for Fear of a Protection &c. Co. Litt. 130. b. (i.)

S P. For this Action is in the Nature of Treſpaſs. Br. Protection, pl. 17. cites *S. C.

3. So in Conſpiracy. 41 E. 3. Ibidem * 42 E. 3. 1.

*Br. Protection, pl. 21. cites S. C. —S. P. Br. Protection, pl. 14. cites 35 H. 6. 3.—See (X) pl. 2 S. P.

4. But in Treſpaſs againſt Baron and Feme, Protection for Baron ſhall ſerve for the Feme. *43 E. 3. 23. 17 E. 3. 8. b. 16. b. 44 Aſſ. 13.

Br. Protection, pl. 26. cites S. C. accordingly. — S. P. Co. Litt. 130. b (i)

5. In Actions Entire, not ſeverable, Protection for one ſhall ſerve for the other Defendant. 45 E. 3. 24.

6. As in Debt. 45 E. 3. 24.

7. So in Accompt. 45 E. 3. 24.

8. In Detinue. 45 E. 3. 24.

See pl. 12. Fol. 332. * Orig. is (Suer.)

9. In Mixt Actions, Protection for one ſhall ſerve for all the Defendants. 41 E. 3. laſt Caſe.

10. As in Raviſhment of Ward, Protection caſt for one, ſhall ſerve for all the Defendants; For this is an Action to recover the Body of an Infant, which is entire, and cannot be * ſever'd. 29 E. [3] 41. Adjudg'd. 41 E. 3. laſt Caſe. 3 H. 4. 5. b.

11. In Right of Ward againſt 2, Protection for one ſhall ſerve for both. 30 E. 3. 17. b.

* Orig. is (Ou) —— *In every Action or Plea Real or Mixt, againſt two*, (where Protection doth lie) a *Protection* caſt *for the one doth put the Plea without Day for all.* Co. Litt. 130 b.

12. In Real Actions Protection for one ſhall * [not] ſerve for all the Defendants.

* Br. Protection, pl. 26. cites S. C. accordingly.

13. In a Præcipe quod reddat Protection for one ſhall not ſerve for the other Defendants. * 45 E. 3. 24. becauſe they may be ſever'd. Contra 3 H. 6. 18. b. 29 E. 3. 41.

If the one and the other appears, and the one caſts Protection, this ſhall ſerve to put the Parol without Day for both; but if the one makes Default, and the other caſts Protection, Grand Cape ſhall iſſue of the Moiety; quod nota Diverſity. Br. Protection, pl. 1. cites 3 H. 6. 18. & † 21 H. 6. 41. — Ibid. pl. 6. cites 9 H. 6. 48. Contra. — † Br. Protection, pl. 52. cites S. C. That Protection caſt for the one ſhall *put the Parol without Day for both*; Per Browne Prothonotary clearly, *Be it before Appearance or after Appearance* —*And* T. 15 E. 3. *Præcipe* quod reddat was brought *againſt* 4, *one made Default upon the Grand Cape*, and the ſame Day Protection was ſhew'd forth for one of the Tenants, and the Parol put without Day for all. Ibid.— *But* note, That *he who caſt the Protection* when the Demandant pray'd Seiſin of the 4th Part of the Land, *took the Tenancy upon him*, or otherwiſe the Land had been loſt; And ſo ſee that one and the ſame Perſon appeared, and was by Protection, and all at one and the ſame Day. Ibid —*Præcipe* quod reddat, the *Tenant vouched* 2, *who enter'd into the Warranty, and vouch'd the Tenant by a ſtrange Name*, and ſhew'd Cauſe, and Proceſs granted, and *at the Day of Summons return'd, one of the Vouchees made Default and the other appeared, and Petit Cape awarded of the Moety*; and *at the Day he who made Default was by Protection*, and the other appeared; and it was pray'd, That the Protection ſhall ſerve for both; but at laſt it was adjudg'd, That it ſhall ſerve for the one only, by which the other caſt other Protection. Br. Protection, pl. 40. cites 5 H. 5. 77.

Br. Error, pl. 9. cites S. C. —— It ſhall ſerve but for himſelf only. Br. Protection, pl. 6. cites 9 H. 6. 48.

14. If Writ of Error be brought upon a Recovery in Real Action againſt the Heir, and Scire Facias againſt the Terretenant, a Protection for the Heir ſhall not ſerve for the Terretenant. 9 H. 6. 48. b.

15. Replevin

15. *Replevin againſt* 3, *Capias iſſued againſt* 2, and the *3d was by Protection*; and after Exigent iſſued againſt the 2; And ſo ſee that the Protection for the one in this Action ſhall not ſerve for the others. Br. Protection, pl. 42. cites 38 E. 3. 12.

(A. a) *On what Pleas* Protection for one ſhall ſerve for others.

1. IN Treſpaſs againſt 3, if they plead a joint Iſſue, **a Protection for one ſhall ſerve for the others.** 2 H. 6. 12. b. Br Protection, pl. 40 cites S. C accordingly. ——— S. P. As a Releaſe &c. by the Opinion of the Court. Br Protection, pl. 78. cites S. C.

2. **But otherwiſe it is if they plead** Not Guilty, **for they are ſeveral Iſſues.** 2 H. 6. 12. b. Br. Protection, pl. 40. cites S. C. accordingly. ——— Ibid. pl. 78. cites S. C That *this ſhall not put the Parol without Day for all*, but only for him for whom it is caſt; for theſe are ſeveral Pleas. — *But* Per Brown Prothonotary, & non Negatur, That *if* in Treſpaſs againſt 2, the *Defendants plead Not Guilty, and* the *Plaintiff takes one and the ſame Writ of Venire facias againſt both*; there if Protection be caſt for the one, it ſhall ſerve for all Contra, If he had taken ſeveral Venire facias's. Ibid. cites 21 H. 6. 41.

3. **Where by Iſſue or Proceſs the** Action is made intire **againſt all the Defendants, a Protection for one ſhall ſerve the others.**

4. **As in** Treſpaſs againſt divers, who plead ſeveral Iſſues, **if a Venire Facias be awarded for Trial of all the Iſſues, Protection for one ſhall ſerve for all; otherwiſe where [there are]** ſeveral Venire Facias's. 15 E. 4. 27. b. 21 H. 6. 22. 3 H. 4. 5. b. 4 H. 4. 4. **Adjudg'd** 2 H. 6. 13. 7 H. 6. 21. 11 H. 6. 38. **The Law is the ſame in** * Ravihment of Ward. 3 H. 4. 5. b. S. P. As to plead *Not Guilty*; Per Martin, For the Iſſue is ſeveral in itſelf. Br. Protection, pl. 46 cites 7 H. 6. 21. & 2 H. 6. 12. accordingly. Per Cockein and Strange. ——— S. P. Ibid. pl. 20. cites 2 H. 6. 12. For the Court cannot proceed and ſtay upon one and the ſame Venire facias. Per Strange. ——— S. P. Ibid pl. 54. cites 22 H. 6. 3. —— S. P. Ibid. pl. 78. cites 21 H. 6. 41, Per Browne. ——— * S. P. Br. Protection, pl. 81. cites 5 H. 4. 15.

5. **In** Treſpaſs upon ſeveral Pleas, **if one Venire Facias be awarded againſt all the Defendants, and Protection is caſt for one, if the Plaintiff will releaſe his Suit againſt him, the Protection ſhall not ſerve for the others.** 4 H. 4. 4. (* Quære, for it ſeems it releaſes all; and ſo it is held in 7 H. 6. 21. b. 11 H. 6. 38. * If 2 *plead, the one a Releaſe, or other ſuch Plea, there* Protection for the one ſhall put the Parol without Day for both. Br. Protection, pl. 46 cites 7 H. 6. 21 & 21 H. 6. 41. accordingly, upon *Plea of Not Guilty by ſeveral in Treſpaſs.*

(B. a) *At what Time* being caſt for one, it ſhall ſerve for others.

1. IN Real Action, if one makes Default after Default, and after caſts Protection, **this ſhall ſerve for both; for ſo long as Jointure continues, both ſhall have Benefit.** 11 E. 4. 7. b. Br. Protection, pl. 73. cites S. C. Quære, for it ſeems to be able to warrant the Moiety alone, where he and his Companion warranted the Whole Per Prothonotary. Br. Protection, pl. 73. cites S. C.

Br. Protection, pl 1 cites S. C. accordingly. Per Babb. See (E a) pl. 4.

3. In Præcipe quod reddat against 2, if one makes Default at the Summons, and a Protection is caſt for the other, this ſhall not ſerve for him who made Default, but Grand Cape ſhall be awarded againſt him; becauſe he by his Default has loſt the Advantage of the Protection. 3 H. 6. 18. b.

Br. Protection, pl. 1. cites S. C. accordingly. Per Babb.

4. But otherwiſe it had been if he had appear'd. 3 H. 6. 18. b.

Fol. 333 (C. a) *At what Time* it ſhall be ſued. *Re-ſummons.* Upon Quia Profecturus.

S. P. For the Judgment which is given cannot be defeatd by ſuch Averment, but the Demandant may have Action of Deceit. And ſee elſewhere, That upon this Matter he may ſue for a Repeal or Innoteſcimus, and upon this may have Re-ſummons, and ſhall proceed Br. Protection, pl 25. cites 44 E. 3. 4.

1. If the Parol be put Sine Die by this Protection, and after he paſſes the Sea, and returns before the Day compriz'd within the Protection, yet the other ſhall not have Re ſummons before the Day contained in the Protection is paſt. 44 E. 3. 4. Curia.

Br. Protection, pl. 29. cites S. C.

The Law is the ſame if he never paſſed the Sea. 44 E. 3. 6.

Upon Moraturus.

Br. Protection, pl. 2. cites S. C. —— Tho' the *Protection* be *allowed* by the Court *for a Year*, yet if it is *repealed by an Innoteſcimus*, the Reſummons, or Re-attachment ſhall be granted upon the Repeal within the Year; for the Protection that was allowed had the ſaid Clauſe in it; and of that Opinion are our later Books, and the Repeal by Innoteſcimus ſhould ſerve for little Purpoſe, the Law ſhould not be taken ſo. Co. Lit. 131. b.

2. If a Protection Quia moraturus be allowed, by which the Parol is put ſine Die, if the Party returns within the Year, and a Repeal is produced to the Court he ſhall have Reſummons immediately within the Year. This Plea was put Sine Die for a Year by Judgment. 3 H. 6. 40. b. Adjudged.

(D. a) A Reſummons. *How* it ought to be.

1. THE Reſummons ought to rehearſe the laſt Day, which the Plaintiff and Defendant had in Court between them. 3 H. 6. 49. b.

2. As in Detinue returnable 15 Mich. Defendant had Garniſhment, and Scire Facias againſt the other returnable 15 Martini, when a Protection is caſt for Garniſhee, by which the Plea is put Sine Die, the Reſummons may be to anſwer the Plaintiff in the ſame Manner as the Plea was 15 Mich. For the other Day after is not between the Plaintiff and Defendants but between Plaintiff and Garniſhee. 3 H. 6. 4. b.

3. So the Reſummons ſhall be for the ſame Reaſon if the Parol be put Sine Die by Protection, for the Vouchee at the Return of the Summons Ad Warrantizandum. 3 H. 6. 49 b.

4. But otherwiſe it had been if the Protection had been caſt after the Entry into the Warranty by the Vouchee, for there the Day ought to be recited. 3 H. 6. 49. b.

5. In *Waſt* at the Grand Diſtreſs the Defendant caſt Protection, and it was allowed, and at the Reſummons upon Default of the Defendant, Pone was awarded, and not Writ to inquire of the Waſt. Br. Protection. pl. 89. cites 27 E. 3. 78. & Fitzh. Waſt 13.

(E. a)

(E. a) The *Effect of Caſting a* Protection; And *Proceedings* and *Pleadings.*

1. IN *Replevin againſt three*, Protection was caſt for the one, and the Proceſs was continued againſt the others. Br. Proceſs. pl. 136. cites 38 E. 3. 12.

2. A *Formedon* was brought *againſt Husband and Wife*, they vouched A. the Sheriff returned, Quod A. *non inventus eſt, & nihil habet*, unde ſummoneri poteſt, and the *Proceſs* was *continued* againſt A. by *Alias & Pluries*, until the *Sequatur* ſub ſuo Periculo iſſued; the *Sheriff did not return the* Writ of *Sequatur at the Day*, on which it was returnable; *at which Day* the *Husband caſt* a Protection *for himſelf, and* the *Wife made Default*; the Protection was allowed in this Caſe for both. In this Caſe the *Vouchee never being ſummoned*, the *Tenants have a Day in Court Ad Audiendum Judicium* only, and no Judgment ſhall be given in this Caſe againſt the Husband and Wife, becauſe of the ſaid Protection; After the Year and Day (that is after the Protection is ended) a *Reſummons* ſhall iſſue againſt the Husband and Wife; upon this Reſummons, the *Huſband ought to ſave the ſaid Default, which the Wife made* when the Protection was caſt, otherwiſe the Demandant ſhall have Judgment at the Day of the Return of the Sequatur ſub ſuo Periculo; No Judgment ſhall be given againſt the Vouchee in this Caſe, altho' Judgment be given againſt the Tenant, for the Vouchee was never ſummoned, and without a Summons returned, no Man ſhall loſe his Land. By all the Juſtices in England. Jenk. 80. pl. 57. cites 4 H. 5.

3. In Præcipe quod reddat Protection was ſet forth Quia moratur ſuper Vitulatione Villæ Caliciæ; And there it was ageeed that there is a Statute which wills that where Protection is caſt, the *Party may have Averment, that the Defendant is out of the Service of the King at D. in ſuch a County within the 4 Seas*, ſo that he might have come; and this Averment *ſhall be entered*, and the Parol ſhall be *without Day*; and when the Plea is reſummoned, the Plaintiff ſhall averr the ſame Matter, and it ſhall be tried between the Demandant and the Tenant if he will, and if it be found for the Demandant it ſhall turn in Default of the Tenant. Br. Protection, pl. 11. cites 28 H. 6. 3.

4. A Protection *allowed for one* Defendant, *puts the Plea without Day for all* the reſt, *unleſs* it be *in ſpecial Caſes*, as in Treſpaſs, where they plead ſeveral Pleas, and he ſhall ſue ſeveral Venire Facias's upon the Iſſue joined againſt them &c. F. N. B. 28 (K)

5. In a Præcipe againſt 2, or if 2 Tenants by Warranty are, and they vouch or plead to iſſue, and one of them makes Default, yet a Protection lies for the one or other; and at the Petit Cape the Parol ſhall not be put without Day againſt the other. F. N. B. 28 (K) in the New Notes there (a) cites 5 H. 5. 7. But ſays 11 H. 4. 7. is adjudged Contra, if it was at the Grand Cape, or before Default by him. 13 Ed. 3. Protection 70. 19 E. 2. Protection 77. — See (B. a) pl. 3.

5. In Caſe of a Protection, the *Parol* is put *Sine Die*; It *lies for no longer Time than a Year and a Day*; After which Time it is *to be revived by Reſummons*, if the Protection is not repealed before. Jenk. 27. pl. 50.

6. A *Præcipe quod reddat* is brought *againſt Husband and Wife*; a Protection is *caſt for the Husband*, becauſe he is in the King's Service; at the ſame Day an *Inuoteſcimus* is delivered to the Court, by which it appears *that he is not in the King's Service*; this is a Default *in both* Husband and

Wife, and a *Grand Cape* ſhall be awarded. The Default of one of them is the Default of both; *but if the Protection had been allowed*, the Parol had been without a Day, and after the Year and Day might be revived by a *Reſummons*. Jenk. 93. pl. 81.

7. If a Protection be *allowed and repealed within the Year and Day*, a Reſummons ſhall be awarded within the Year and Day. Jenk. 93. pl. 81.

For more of **Protection** in General, ſee **Eſſoign, Privilege,** and other proper Titles.

Proteſtation.

(A) *What* it is; And what is ſuch.

Inclofure (E 2.) the King v. Upwood.

1. IN *Detinue of Charters by J. Son of M. of P.* it *is no Plea that the Plaintiff is a Baſtard*, but his Challenge ſhall be entered, and he ſhall anſwer over, and therefore it ſeems that this Entry is only a Proteſtation. Br. Proteſtation, pl. 3. cites 38 E. 3. 22.

Pl. C. 276. b. by Walſh in Caſe of Greysbrooke v. Fox, defines it accordingly, and that it ought to ſtand with the Sequel of the Plea —— S. P. Brown's Anal. 7. That it is a Saving or Excluding of a Concluſion.———S. P. Heath's Max. 26.

2. It is an *Excluſion of a Concluſion* [or Eſtoppel] that a Party to an Action may by Pleading incur; Or, it is a *Safeguard which keeps the Party from being concluded by the Plea he is to make, if the Iſſue be found for him.* Co. Litt. 124. b. (y)

*S. P. And it is in *two Sorts*. 1ſt. When a Man pleadeth any Thing which he dares not directly affirm, or that he cannot plead, for Fear of making his Plea double. As if in conveying to himſelf by his Plea a Title to any Land he ought to plead diverſe Deſcents by diverſe Perſons, and he dares not affirm that they were all ſeiſed at the Time of their Death, or although he could do it, yet it will be double to plead *two Deſcents*, of both which every one by himſelf may be a good Bar; Then the Defendant ought to plead and allege the Matter, interlacing the Word *Proteſtando*; as to ſay (by Proteſtation) *That ſuch a One died ſeiſed* &c and that the adverſe Party cannot traverſe. 2dly. Another is, When one is to anſwer to two Matters, and yet by the Law he ought to plead but to one, then in the Beginning of his Plea he may ſay *Proteſtando & non cognoſcendo ſuch Part* of the Matter *to be true*, (and then making his Plea further) ſed *pro Placito in hac parte* &c. and ſo he may take Iſſue upon the other Part of the Matter; and then he is not concluded by any of the reſt of the Matter which he hath by Proteſtation ſo denied, but that he may afterwards take Iſſue upon it. Reg. Plac. [illegible]

3. It is a * *Form* of Pleading, when one doth *not directly affirm or deny* any Thing that is alleged by another, or which he himſelf allegeth. *As* Proteſtando *that he made no Teſtament pro Placito that he made not the Plaintiff his Executor*; becauſe if he made no Teſtament he could make no Executor. Heath's Max. 26. cites Pl. C. 276. Greysbrooke v. Fox.

It is where *two Matters are pleaded*, and the *one without the other* was *not perfect Bar*, and Plaintiff may plead One by Proteſtation, and join Iſſue upon the Other; but when both are perfect Bars, he ought to demur for the Doubleneſs. Arg. Litt R. 182. in the Caſe of E of Pembroke v Green v Boſtock

(B) *Good*

(B) *Good* in what Caſes.

1. IN Juris Utrum, the *Tenant vouch'd, and ſhew'd a Deed of Lien of all the Land, except two Acres, of which the Vouchee prayed to be diſcharged*; and ſo he was, *and took Proteſtation that 20 s. Rent is iſſuing out of the Land in Demand, and of ſuch Value enter'd into the Warranty*, and had his Proteſtation enter'd in the Roll; quod nota. Br. Proteſtation, pl. 28. cites 12 E. 2. and Fitzh Voucher 264.

So in *Precipe* a Man vouch'd, the *Voucher ſaid that at the Time of the Feoffment the Land was worth only* 10 *l.* and of ſuch Value entered into the Warranty, and had his Proteſtation thereof enter'd. Br. Proteſtation, pl. 26. cites 2 E. 3. and Fitz. Voucher 190.

2. It is doubted if the *Tenant who has Eſtate upon Condition vouches*, if the Vouchee may have any *Proteſtation to aid the Condition*; becauſe the Land recovered in Value ſhall be held without Condition clearly, and without Rent; for the *Rent ſhall be recouped in the Value*; and ſuch a Proteſtation was made there *for Rent reſerved* upon the Feoffment, to have it recouped in the Render in Value. Br. Proteſtation, pl. 28. cites Fitz. Voucher 265.

3. In *Precipe of* 20 *Acres*, the *Tenant ſhall not ſay for Plea that there are no more than* 10 *Acres, but* ſhall ſay it *by Proteſtation*, and if he vouches, and the *Vouchee does not warrant but* 10 *Acres*, the Demandant may pray Iſſue of the reſt; and there the *Vouchee enter'd into the Warranty as he who had nothing by Deſcent*, and the *Tenant averr'd that Aſſets*; and all this was enter'd by Proteſtation. Br. Proteſtation, pl. 25. cites 19 E. 3. and Fitzh. Voucher 123.

In Treſpaſs, if the Plaintiff *gives Name or Quantity in his Writ, as that Clauſum fregit, viz.* 20 *or* 10 *Acres of Land* &c. the *Defendant cannot vary*, nor give another Name or Quantity, *but* may ſay *by Proteſtation that the Place is called B.* or that it contains other Quantity, *&c. pro Placito, that the Place is his Franktenement* &c. Br. Proteſtation, pl. 12. cites 22 E. 4. 17.—Br. Treſpaſs, pl. 366. cites S. C —* Orig. is (Def.)

4. The *Tenant upon his Attornment ſhall have Proteſtation enter'd, that he holds by Grant without Impeachment of Waſt*, or that he has *for* Term of *Life, and three Years over, which Term is not mentioned in the Writ of Quid Juris clamat*, and ſo ſhall ſave thoſe Things. Br. Proteſtation, pl. 23. cites 31 E. 3. and Fitzh. Quid Juris clamat 4 & 5. and 32 E. 3.

If a Man *leaſes for Life, and one Year over, in* Action of *Waſt he ſhall ſay* only that the Tenant *holds for Term of Life*, and the *Defendant may ſay Proteſtando that he holds for Life and one Year over*, & pro placito, *No Waſte done*; and well. Br. Proteſtation, pl. 16. cites 39 E. 3. 25.

5. *Account againſt J. S. one of the Companions of Malbail*, and *counted as his Receiver*, the *Defendant ſaid that he never was of the Company of Malbail.* And per Finch and Mombray, This is not to the Purpoſe, where he charges himſelf of his own Receipt, and the Defendant may take it by Proteſtation, and anſwer over; & adjournatur. Br. Proteſtation, pl. 4. cites 38 E. 3. 34.

6. In *Precipe* quod reddat, if the *Tenant comes at the Grand Cape, and is miſnamed*, he *ſhall ſave his Default*, if he can, and *ſhall have the Miſnomer by Proteſtation* to ſave himſelf afterwards. Br. Proteſtation, pl. 29. cites 40 E. 3. 2.

7. In *Precipe* quod reddat, *at the Petit Cape the Tenant cannot ſay that the Demandant has entered after the laſt Continuance*, but ought to ſave his Default, but might have his *Proteſtation of his Entry*, to ſave to him his Aſſiſe of this Entry. Br. Proteſtation, pl. 19. cites 40 E. 3. 42.

8. In *Quare Impedit* by the King *for the Heir in Ward, becauſe A. the Anceſtor was ſeiſed and preſented, and conveyed from A. to B. and from B. to C. and from C. to the Heir*, the *Defendant ſaid* that *No ſuch B.* ever was in Rerum Natura, & non allocatur, inaſmuch as the *Title is from A.* and this *B. is only in the Meſne Conveyance, and not he in whom the Privity*

is alleged; but the Defendant for Concluſion afterwards may take it by Proteſtation; quod nota. Br. Proteſtation, pl. 22. cites 43 E. 3. 7.

9. In *Waſte againſt a Guardian by the Infant by Attorney*, the *Defendant may ſay Proteſtando, that the Plaintiff is yet within Age*, to ſave to him the Wardſhip quouſque &c. and plead other Matter in Bar. Br. Proteſtation, pl. 21. cites 48 E. 3. 11.

10. *Debt upon a Leaſe* for Years *rendring four Marks* per Annum. Strange ſaid the *Leaſe was rendering one Mark only, and as to the firſt Term Riens arrear, and for another Rent-day he has been Always Ready, and tender'd the Money* &c. *and as to another Rent-day, that the Plaintiff entered into the Land leaſed.* Rolle ſaid that the Leaſe rendering but one Mark goes to all. Strange proteſtando, That the Leaſe was rendering one Mark, and proteſtando that he enter'd &c. & pro Placito, that Riens arrear Except 4 l. which he is and always was ready to pay. Quære. Br. Proteſtation, pl. 13. cites 3 H. 6. 19.

11. *Writ by ſeveral Præcipes of 20 Acres of Land againſt two*, the *one ſaid that the Land in the one Præcipe and in the other are One and the ſame Land*, and not diverſe, *and pleaded Jointenancy with a Stranger*, and the *other Defendant did the like*, and the *Plaintiff by Proteſtation that they are ſeveral Lands, and maintained his Writ*, and the Proteſtation good; for the firſt Matter alleg'd in the one Tenant and the other is not material, for it is not material to the one what is in the Præcipe againſt the other. Br. Proteſtation, pl. 15. cites 4 H. 6. 14.

12. *In Forger of Falſe Deeds, if the Defendant takes the Forging by Proteſtation, and traverſes the Proclamation which is found againſt him, there the Proteſtation ſhall not aid him*; for it is *a Thing not leaved.* Br. Proteſtation, pl. 14. cites 9 H. 6. 29.

So in Treſpaſs upon the Statute of *Forcible Entry*, the *Defendant made Bar, that he*

13. *Replevin* in A. the *Defendant ſaid by Proteſtation, that he did not take*, and *pro Placito that there is No ſuch Vill as A. within the ſame County*; Judgment of the Writ, and made Avowry to have Return; and the Juſtices were in diverſe Opinions whether he ſhall have ſuch Proteſtation, becauſe it is *Contrary to the Plea.* Br. Proteſtation, pl. 1. cites 20 H. 6. 28.

was ſeiſed till by R. diſſeiſ'd, who infeoff'd J. A. whoſe Eſtate the Plaintiff has, upon whom he entered peaceably, abſque hoc, that he diſſeiſ'd him with Force, or enter'd with Force, and the *Plaintiff alleged a Deſcent from J. A. to him, and that the Defendant entered with Force, and the Plaintiff Proteſtando that he did not confeſs any ſuch Deſcent, avoided it by Continual Claim*, and therefore the Proteſtation was ouſted; for it is *repugnant* to be Not conuſant of the Deſcent, and yet to confeſs and avoid it by a continual Claim; and ſo ſee that Proteſtation, which is repugnant, ſhall be ouſted. Br. Proteſtation, pl. 5. cites 22 H. 6. 37.

S. P. Br. Proteſtation, pl. 2 cites 38 E. 3. 13.

14. In *Præcipe in Capite* the *Tenant ſhall not ſay* for Plea, *That the Land is held of another, and not of the King, but ſhall take it by Proteſtation*, and plead other Matter. Br. Proteſtation, pl. 7. cites 37 H. 6. 26, 27.

Ads in *Formedon of the Gift of W.* the *Tenant ſaid, That*

15. Note Per Cur. That Abatement cannot be but upon Maintenance of Seiſin in Fact, and *not by Proteſtation*; quod nota. Br. Pleadings, pl. 59. cites 39 H. 6. 5.

before the Donor had any Thing J. S. was ſeiſed and gave to his Anceſtor in Tail, who by Proteſtation had ſeiſed, and W. abated and died as in the Writ, and the Tenant re-entred as Heir; and the Demandant ſaid, That W. did not abate after the Death of the Father of the Tenant, prout &c. and no Iſſue; becauſe where there is no Abatement, then it is not traverſable, wherefore he omitted the Proteſtation; quod nota. Ibid.

16. If the *Plaintiff in Quare Impedit alleges 2 Preſentments, the one in his Anceſtor, and the other in the Tenant for Life*, the *Defendant ſhall anſwer to both, and take Iſſue upon the firſt only*, and the laſt ſhall not be taken by Proteſtation but for Plea; and yet Iſſue ſhall not be joined thereof. Per Littleton & Cur. Br. Proteſtation, pl. 24. cites 7 E. 4. 20.

17. In *Replevin*, if the *Defendant ſays, That he holds of him by Homage, Fealty and Rent, and avows for the Rent*, the *Plaintiff may ſay Proteſtando, That he does not hold by Homage*, et pro Placito *that he holds by the Fealty and*

and the Rent for all Services, Abſque hoc that he holds of him by Homage, or was ever ſeiſed thereof, prout &c. Choke ask'd, Why they took Proteſtation? Briggs ſaid, Becauſe he has not avow'd for the Homage, and therefore we cannot traverſe the Seiſin thereof; whereupon Choke ſaid, Then it is well; quod nota. Br. Proteſtation, pl. 17. cites 21 E. 4. 64.

18. *Defendant in Appeal in B. R. was committed to the Fleet, becauſe the Marſhal was partial to him*; by which the *Warden of the Fleet took him by Proteſtation, That he had not been charged of Felons nor Traitors*, [and this was] to ſave his Liberty, that he ſhould not afterwards be charged with ſuch. Br. Proteſtation, pl. 18. cites 21 E. 4. 71.

(C) *Neceſſary.* In what Caſes.

1. IF *a Man has a Ward, and grants him over with Warranty*, and after the *Grantee is impleaded and vouches* the Grantor, where *the Ward is more in Value at the Time of the Voucher than it was at the Time of the Grant with Warranty*, by reaſon of other Land deſcended after, or the like; or if the Land be amended by Building, or Mines, or the like, there the *Vouchee may take Proteſtation of this Matter* when he enters into the Warranty; for otherwiſe he warrants as it is at the Time of the Voucher. Br. Proteſtation, pl. 30. cites 30 E. 3. 14. and that 19 H. 6. 46. in Effect agrees therewith.

2. In *Monſtraverunt* to ſay That the *Plaintiffs are Tenants at Will, and* that the *Manor is Frankfee*, are 2 Barrs; and therefore he ſhall have the one by Proteſtation, and the other for Plea. Br. Proteſtation, pl. 20. cites 40 E. 3. 46.

3. In Treſpaſs the *Iſſue was, If the Plaintiff was Villain to the Defendant*, and *found for the Plaintiff*, and Damages 10 l. The *Defendant removed the Record into B. R. for Error*, and the *Plaintiff in C. B. brought Debt there of the Damages recover'd*, and the *Defendant would have taken Proteſtation, That the Plaintiff was his Villein*; and Per Cur. he need not; for by the Writ of Error he is to defeat the firſt Record, and this Action is depending thereupon; and *by bringing of the Writ of Error* or Attaint, there *ſhall be no Infranchiſement*; for thoſe are to defeat the firſt Record; quod nota. Br. Proteſtation, pl. 11. cites 18 E. 4. 6.

(D) *How* to be taken, and *when, and* the *Effect* thereof.

1. WHEN *ſeveral Matters are furniſhed*, and *Iſſue taken upon the one*, if *this Point be found againſt me, all the other Matters ſhall be held confeſs'd*; *and if* it be found *for me, nothing ſhall be held confeſs'd by me*, becauſe the Iſſue cannot be taken but upon one Point only. Per Wich. and Per Green, *This may be ſaved by Proteſtation.* Br. Proteſtation, pl. 9. cites 32 Aſſ. 9.

As where Feoffment by Deed is pleaded, and the *Iſſue is taken of the Time* of the Feoffment, whether it was made in the Time of W. or not, there it is good to take the Deed by Proteſtation, for fear of *Concluſion afterwards, which ſhall not ſerve after if the Iſſue be found againſt him*; for there all the reſt is held as confeſs'd; and ſo was the beſt Opinion. Br. Proteſtation, pl. 9. cites 32 Aſſ. 9.

A Proteſtation availeth not the Party that takes it if the Iſſue be found againſt him; and therefore if the Iſſue be found for the Villein, he is infranchiſed for ever; and yet, in ſome ſpecial Caſe, albeit the Iſſue be found againſt him that makes the Proteſtation, yet he ſhall take Benefit of his Proteſtation; As if a Man entereth into a Warranty, and takes by Proteſtation the Value of the Land, albeit the Plea be found againſt him, yet the Proteſtation ſhall ſerve him for the Value. Co. Litt. 126. a. (z)

2. Where a Man *pleads a Plea, and takes another Matter by Proteſtation*, there if the *Iſſue paſſes againſt him*, the Proteſtation ſhall not ſerve. Br. Proteſtation, pl. 14. cites 9 H. 6. 59. Per Paſton.

3. In *Waſt* Martin J. ſaid to Rolf, If a Man makes *Proteſtation*, which *is a Confeſſion of the Action of Waſte*, et *pro Placito*, *ſays*, *No Waſte* done, the Confeſſion ſhall be taken, and he ſhall be condemned. Br. Proteſtation, pl. 27. cites 11 H. 6. 1.

But if a Man *makes full Defence, he affirms the Perſon to be able*, therefore ſhall defend only Tort and Force, and not Damages. Per Newton. Ibid.

4. A Man may *before Defence* take Proteſtation, That the Plaintiff is his Villein, and *for Plea that Defendant is a Counteſs not named Counteſs*, Judgment of the Writ. Br. Proteſtation, pl. 8. cites 14 H. 6. 18.

Whether one ſhall take his Proteſtation *before or after Defence*, Dubitatur. Brown's Anal. 1. But ſays, That by the Opinion of ſome, it *ought to be after the Defence*, and may *not* be *contrary in itſelf*, or *Double*, and that the *effectual Matters of the Bar ought not to be taken by Proteſtation.* —— Heath's Max. 26. S P and cites Pl. C. Gresbrooke v. Fox. But ſays, That yet in Clere Gadon's Caſe the Proteſtation was Nul Waſte; and he pleaded, That the Reverſion deſcended to another, and the like.

5. Where the *Defendant in a Replevin avows for Rent alleging, That the Plaintiff holds by Homage, Fealty, and Rent*; and the *Plaintiff for Plea, ſays, That he holds by the Rent, and thereof Nothing is Arrear, and Proteſtando that he does not hold by Homage*; there if the Plaintiff bars the Defendant of his Avowry, he ſhall be concluded afterwards to demand Homage notwithſtanding the Proteſtation, and therefore he *ſhall traverſe the Tenure*. Br. Proteſtation, pl. 14. cites 33 H. 6. 45. Per Priſot.

6. *Detinue of Charters againſt J. C. Son and Heir of J. C. of Bailment made by the Plaintiff to the Defendant*; and the beſt Opinion was, That theſe Words *(Son and Heir) are only Surpluſage*; and as to the Proteſtation thereof, Needham ſaid, If a Man makes *Proteſtation of a Thing* which is *material*, if the Plea be *found againſt him*, he ſhall be concluded of all that is material in the Record; And it ſeems that theſe Words (J. C. Filius et Heres J. C.) in Latin are Material; Contra, Danby and Choek; and concordat Littleton, tit. Villeinage, fol. 42. in his Book of Tenures. Br. Proteſtation, pl. 10. cites 10 E. 4. 12.

For more of Proteſtation in General, See at the Pleadings under the ſeveral Heads throughout this Work.

Prothonotary.

1. THE Prothonotaries were *Scribes*, *who took the Acts of the Court*, and had the ſame Name in the Courts of the Empire; and in the firſt Execution of the Court of C. B. there being only three Judges, each had his Prothonotary. G. Hiſt. of C. B. 38.

2. The

2. The Learned Sir H. Spelman, in his Gloſſ. Verbo Protonotarius, ſays, That he *is* Primus Notarius vel Princeps Notariorum, and that the Word is of a Greek and Latin Derivation, uti per Adulterium genitum. That in Foro Anglico Protonotarius is he qui vulgo Prothonotarie dicitur.

3. J. B. was elected Prothonotary for the Pleas in C. B. and was *ſworn to keep his Office in Perſon, or Clerk for him*, and *when he ſits in Court the Clerk ſhall not ſit there*; and e contra, but that both ſhall not be togther, but *out of Court he may have as many Clerks as he will*, and *if any will ſwear that he is not able to pay for the Entring of his Pleas in the Roll, then he ſhall enter them without taking any Thing*. Br. Office & Off. pl. 15. cites 15 E. 4. 26.

For more of Prothonotary in General, See the Law Dictionaries &c.

Purchaſor.

(A) Purchaſor; *Who.*

1. A. *Enters into Partnerſhip* in 5ths, with three others, for 21 Years *for Digging Mines* in A.'s Lands, A. to have two 5ths, and alſo in Conſideration of his Ownerſhip of the Land, to have a 10th. more out of the Share of the other Partners. Purſuant to the Articles, they ſearched for the Mines, and *after two Year's Time, and the Expence of about 120l. they diſcovered a valuable Mine, and worked for about three Months*; and then A. dies, and his Widow ſets up a voluntary Settlement, made after Marriage. The Court inclined that *the Partners were as Purchaſors*, and that the Voluntary Settlement ſhould not ſtand againſt them. 2 Vern. 326. pl. 315. Mich. 1695. in Canc. Shaw, & al. v. Lady Standiſh, Widow, and Sir Richard Standiſh, her Son.

2. The *Wife joins with the Husband in letting in an Incumbrance on her Jointure*, and barring the Eſtate Tail, *and* then *limits the Uſes* to the Husband for Life, Remainder to the Wife for Life, *Remainder to their Daughters*. Per Ld. K. Wright, The Daughters are not Purchaſors, ſo as to ſhut out a Judgment-Creditor of the Husband's, antecedent to the Barring of the Eſtate Tail; It might have been a good Conſideration for both, but it was *not expreſſed in the Deed, to be any Conſideration for Settling the Eſtate upon the Daughters*, but was a Voluntary Gift of the Wife to her Husband, and therefore the Daughter's Eſtate muſt be taken to be Voluntary; and ſo a Judgment-Creditor ought to have the Aſſiſtance of this Court before them. Per Ld. K. Wright. Chan. Prec. 114. pl. 100. Trin. 1700. In Canc. Bull v. Burnford.

3. Every *Leſſee* is a Purchaſor; per Ld. Chan. Macclesfield. 9 Mod. 59. Mich. 10 Geo. in the Caſe of Aſhton v. Bretland. See 2 Vern. 327.

4. A. ſeiſed in Fee, *ſettled his Eſtate in* 1712, to the Uſe of himſelf for Life, Remainder to B. in Tail, but *with Power of Revocation*, by any Writing ſigned &c. and atteſted by three &c. credible Witneſſes. *In* 1715, A. by Deed, atteſted by two Witneſſes only, reciting that he was indebted, as in a Schedule annexed, *conveyed* his Eſtate to W. R. and W. S. and their Heirs, in Truſt *to pay his* ſaid *Debts* by Profits, Mortgage, or Sale; *and after Payment* thereof, *to* pay the Overplus, and re-

convey, ſuch Part as ſhould be unfold, to A. or ſuch other Perſon &c. and for ſuch Uſes &c. as he, by any Writing ſigned and ſealed by him, and atteſted by two &c. Witneſſes ſhould direct. A. died without Iſſue, but left the ſaid B. and C. the Daughters of 2 Siſters, his Heirs at Law. The *Deed of* 1715, *was kept private till* after the Death of W. S. the ſurviving Truſtee in 1724, *and was then laid before Counſel*, who directed, That the Heir of W. S. ſhould aſſign the legal Eſtate to the Truſtees in the Deed of 1712. which was done. Afterwards, in 1726, *upon a Treaty of Marriage between Ld. Fauconbridge and B. a Marriage-Settlement was prepar'd by the ſame Counſel, as Counſel for the Ld. Fauconbridge*, who made a Settlement on B. in Conſideration of the great Eſtate in Land which he was to have with her. The ſurviving *Truſtee in the Deed of* 1712, *joined in this Marriage-Settlement*. C. brought a Bill claiming a Moiety of the Eſtate of A. as Co-heireſs with B. For that the Deed in 1715, was a Revocation of the Deed in 1712. Ld. F. pleaded, That he was a Purchaſor under the Deed of 1712, without Notice of that in 1715, and that the Settlement made by him on B. was in Contemplation of that Settlement in 1712, and that the ſurviving Truſtee in that Settlement was Party to the Marriage-Settlement; and that tho' the Purchaſe was not of the legal Eſtate, but the Truſt only, that will make no Difference, according to **Wilker and Bodington's** Caſe, 2 Vern. 599. and that neither will it differ the Caſe, tho' there was *no actual Conveyance*; For as the Truſtees in the Deed of 1712, always acted under that Deed for B. that Truſt ſhall ſubſiſt as to himſelf, who is a fair Purchaſor; and And that he ſhall not be *affected by Conſtructive Notice to his Counſel*, as having been adviſed with on theſe two Deeds in 1724; For that it muſt be intended, that at the Time of the Counſel's being concern'd for him, which was in 1726, he had forgot that he had ever ſeen this Deed of 1715, there being an Interval of 2 *Years between* his firſt ſeeing it, and his being Counſel for this Defendant. And for theſe Reaſons, the Court held, That this could not be Notice to his Lordſhip. Ld Ch. B. Reynolds, who aſſiſted the Ld. Chancellor, held, That the Ld. F. could be a Purchaſor of no more than B. had, as no actual Conveyance was made to him. The Maſter of the Rolls ſaid, That to be a Purchaſor in the Notion of Equity, there *muſt be an actual Contract, and a Conſideration paid*; And therefore, if at the Time of the Marriage the Deed of 1712, ſtood revoked, the Truſtees could be ſeiſed only of a Moiety for the Uſe of B. and conſequently Ld. F. can be a Purchaſor of no more. Ld. Chancellor decreed a Moiety of the Eſtate, and an Account of the Rents and Profits to C. ſince the Death of A. See Gibb. 207. and L. P. Conv. 391. to 402. 12 June, 1730. Fitzgerald v. Ld. Fauconberge.

(B) *Favour'd.* In what Caſes.

1. EQuity will *never aſſiſt againſt* a Purchaſor. MSS. Tab. April 4, 1707. Party, alias, Perry v. Ryley.

Mo. 169. pl. 302. Paſch. 23 Eliz. cites S. C. as lately ruled in Chancery.

2. If Execution be againſt the *Heir*, he ſhall not have *Contribution* againſt a Purchaſor, tho' In rei Veritate the Purchaſor comes to the Land without any valuable Conſideration; For the Conſideration of the Purchaſe is not material in ſuch Caſe. 3 Rep. 12. b. (k) in Herbert's Caſe. cites it as adjudg'd lately in Thomas Gaudy's Caſe.

3. The Plaintiff prefers a *Bill* in this Court againſt the Defendant, ſuppoſing *that more Lands paſſed than was intended*; But becauſe the Defendant was a Purchaſor upon valuable Conſideration, no Relief was given. Toth. 83. cites 4 Jac. Clifford v. Lawton

4. 21 Jac. cap. 19. Enacts that *No Purchaſor ſhall be impeached, unleſs the Commiſſion be ſu'd forth within 5 Years after he becomes a Bankrupt.* See Bankrupt.

5. A Purchaſor *of a Reverſion* under a Decree of the Court of Chancery, ſhall not be drawn to *take his Money again with Intereſt* becauſe of the Life dying, notwithſtanding the Pretence of the Purchaſe being made Pendente Lite. Chan. R. 76. 9 Car. 1. Kennedy v. Vanlore.

6. A Purchaſor Bona Fide, *without Notice* of any Defect in his Title at the Time of the Purchaſe, may *lawfully buy in a Statute* or Mortgage, or any other Incumbrances, and if he can defend himſelf at Law by any ſuch Incumbrances bought in, his Adverſary ſhall never be aided in a Court of Equity, by ſetting aſide ſuch Incumbrances; For Equity will not diſarm a Purchaſor, but aſſiſt him, and Precedents of this Nature are very antient and numerous, viz. Where the Court has refus'd to give any Aſſiſtance againſt a Purchaſor, either to an *Heir*, or to a *Widow*, or to the *Fotherieſs*, or to *Creditors*, or even to *one Purchaſor againſt another*. Fin. R. 103. Hill. 25 Car. 2. Seymour, alias, Baſket v. Noſworthy. S. C. cited per Maſter of the Rolls, Ch. Prec. 240.—For more of this Point, ſee Incumbrances (D)

7. The *Maxims of the Common Law*, which refer to Deſcents, Diſcontinuances, Non-claims, and to Collateral Warranties, are only the wiſe Arts and Inventions of the Law, to *protect* the Poſſeſſion and ſtrengthen the Rights of the Purchaſors. Per Finch K. Fin. R. 104. Hill. 25 Car. 2. Baſket v. Noſworthy. Cited per Maſter of the Rolls. Ch. Prec. 240.

8. Upon a Purchaſe made by M. of J. S. the *Agreement was, That a Recovery ſhould be ſuffered within 3 Years. M. paid* his Money before the Recovery ſuffered, *and took a Bond* of J. S. *that if the Recovery was not ſuffered in three Years*, then *M. re-conveying* the Lands, *ſhould be repaid* his Money; *J. S. tenders a Recovery, but before it was ſuffered, a third Perſon makes a Title to the Land*, and thereupon M. exhibited his Bill to have his Money repaid; But Ld. Chancellor ſaid he could give no Relief; For here M. hath parted with his Money, and taken a Bond for Re-payment, if the Recovery were not ſuffered in three Years, M. re-conveying his Eſtate; and here *the Recovery being ſuffered*, he hath no Pretence by his own Agreement to have it repaid; and this Court cannot help him, unleſs it ſhould take upon itſelf, where any Man had a bad Bargain, and was cheated in his Title, to help him to his Money again; and *here being no* Manner of *Fraud or Surprize* in the Caſe, if he be not helped by his Covenants, *he will not be helped in Equity*; but for the Matter of Re-conveying, he held, That if M. ſhould re-convey, ſuch Title as he had from them, be it more or leſs, or none at all, yet being a Relative to convey, it would have been well enough; But here *the Recovery being ſuffered according to the Agreement*, tho' nothing paſſed by it, he held the Party had well performed his Agreement, and ſo no Re-conveying nor Re-payment of the Money to be made. 2 Freem. Rep. 1. pl. 2. Paſch. 1675. Serjeant Maynard's Caſe.

9. If *one ſells another's Land*, and *Covenants to diſcharge it of ſuch particular Incumbrances*, and *before the Payment* of the Money, *other Incumbrances are diſcovered*, this will prevent any Suit for the Money, till all the Incumbrances are diſcharged. Arg. and ſeems to be admitted. 2 Freem. Rep. 2. pl. 2. Paſch. 1676. in Serjeant Maynard's Caſe.

10. *And* if in a Conveyance of Lands there be *no Covenants againſt any Incumbrances*, yet *if before Payment* of the Money *any are diſcovered*, the *Party may retain his Money* till they are cleared; ſaid per Mr. Keck, and agreed by Lord Chancellor. 2 Freem. Rep. 2. pl. 2. in Serjeant Maynard's Caſe. But it was ſaid by Sir J. King, that it ought to be ſo *made by the Order himſelf*, or otherwiſe the Party cannot detain the Money unleſs they be covenanted againſt. 2 Freem. Rep. 2 pl. 2. in Serjeant Maynard's Caſe. Hide accepted Land ſubject to Incumbrances per Car. to 2 Freem. Rep. 2. pl. 2. in Serjeant Maynard's Caſe.

11. A *Judgment* was *antedated* with Intention to over-reach a fair Purchaſor, who had paid all the Purchaſe Money except 70 l. which he was to keep till a certain Incumbrance be diſcharged; Decreed that on Payment of the 70 l. to the Judgment Creditor, with Intereſt from the Time it ought to have been paid to the Vendor, a perpetual Injunction be awarded, and that he either acknowledge Satisfaction, or aſſign it to the Purchaſor. Fin. Rep. 394. Trin. 30 Car. 2. Smith v. Eaton and Oldis.

12. A. purchaſed Land of a younger Brother, ſuppoſing the Elder to be dead, and took a Bond to indemnify; But the elder Brother afterwards appearing, he and the younger Brother came to an *Agreement by which the Heir was to have an Annuity paid him by the Vendor*, and ſo the Purchaſor was permitted to enjoy whilſt the younger Brother lived, but he being dead, and A. the Purchaſor alſo, the elder Brother brought Ejectment againſt the Plaintiff the Heir of A. But other Compenſations alſo being proved to be made by the younger Brother to the elder, it was decreed that the Defendant, the elder Brother, ſhould make good the Plaintiff's Title, and ſurrender and releaſe the Lands to the Plaintiff and his Heirs. Vern. 325. Paſch. 1685. Preſton v. Jervis.

13. Purchaſors who have *got an Advantage at Law, though by undue Means*, have been permitted to profit by it; Per Ld Rawlinſon, and for that Purpoſe cited the Caſe of **Burnell and Ellis**, where Ellis had *got the Deed of Rent-Charge* into his own Hands. 2 Vern. 159. Trin. 1690. in the Caſe of Hitchcox v. Sedgewick.

And he alſo cited Sir John Fagg's Caſe, who *got the Deed of Entail* into his Hands by a Trick. 2 Vern. 159. —— S. C. cited by Lord Chancellor Vern. 52. Paſch. 1682. in the Caſe of Lord Huntington v. Greenville. — *And* Lord Rawlinſon likewiſe cited the Caſe of Lord **Huntington and Greenville** firſt decreed to protect a Purchaſor, and after that a *Releaſe gained from an Adminiſtrator de Bonis Non.* 2 Vern. 159.—Vern. 49. Paſch. 1682. S. C. *So* where a *Releaſe* was obtained *from a Grantee of a Rent-Charge without any Conſideration and by Fraud*, and yet a Purchaſor was admitted to take an Advantage of it, cited per Lord Rawlinſon, 2 Vern. 159. in the Caſe of Hitchcox v. Sedgewick, as the Caſe of Harcourt v. Knowell.

14. Purchaſor brought a Bill for Writings and a Partition; Defendant inſiſted that there was *an Entail*, and the Plaintiff's Purchaſe not good; the Court gave Plaintiff Time to try his Title; Ejectment was brought, and a *Copy of a Deed of Entail* produced in *Evidence*, but the Original was loſt, and not proved to be executed; a Verdict was againſt the Entail: On the Cauſe coming on upon the Equity reſerved Defendant inſiſted he ought not to be bound by one Trial in a Matter of Right of Inheritance. Sed non Allocatur, being a Decree only for *Partition*. Tamen Quære. 2 Vern 232. pl. 211. Trin. 1691. Bliman v. Brown.

15. A. buys a *Reverſion expectant on an Eſtate for Life granted by Copy of Court Roll to B.* where in Truth *B. had no ſuch Copy nor Grant of ſuch Eſtate*, yet decreed that B. ſhall enjoy it for Life againſt A. the Purchaſor. 2 Vern. Rep. 279. in the Caſe of Walton v. E. Stamford, cites it as adjudg'd. in Prettiman's Caſe.

S. C. Hill. 1699. Chan. Prec. 108. accordingly, and takes Notice, that B. was the Brother and Heir of A.—

16. A. *deviſed to B.* the Father *for Life*, *Remainder to C.* his Son *an Infant in Fee*, *and* deviſed 400 *l. to the Son* to be paid at 21, and made the Father Executor, and left 2000 l. perſonal Aſſets, and *B.* having ſpent the perſonal Aſſets, *mortgaged* the Lands *to T. S. and made Affidavit* that they were *free from Incumbrances*, and that he was ſeiſed in Fee, *and levied a Fine* for corroborating the Mortgage, and alſo declared the Uſe thereof to him and his Heirs; the *Son having entered for a Forfeiture*, the Mortgagee brought his Bill to be relieved; and the Court decreed that the Mortgagee, notwithſtanding the Forfeiture, ſhould hold and enjoy the Lands againſt the Son during the Life of the Father. Abr. Equ. Caſes. 257. pl. 2. Willis v. Finex.

17. A Purchaſor of *S. S. Stock of an Agent that kept the Proprietors Minutes*, and who pretended a Power to ſell, and got another to *ſupply the Proprietor*, and ſign the Transfer, procur'd the ſame transferred, made Affidavit of the Sale, and had it entered in the Books, and then ran away, but before was a Man in good Credit for Subſtance &c. The Purchaſor

ſold the Stock again, tho' forbid by the Proprietor. At Niſi Prius, before Sir P. King, he directed the Jury to find for the Proprietor, which they did, but gave her no more Damages than the Value of the Stock at the Time of her buying. 8 Mod. 9. Mich. 7. Geo. 1. 1721. Monk v. Graham

18. A. entered into a *Judgment to B. and C.* which is *defeaſanced to the Uſe of D. and in the Defeazance A. covenants* for himſelf, and his Heirs, *to pay to D.* the Ceſtui que Truſt, and her Heirs; Afterwards *A. ſells Part*, and the other Part deſcended to the Heir, who married and had Children; *B.* one of the Truſtee *dies*; *C.* the ſurviving Truſtee *makes A. the Conuſor* of the Judgment *Executor*; *D.* the Ceſti que Truſt, *brings a Bill againſt the Executors of A.* the *Heir* at Law *and the Purchaſor* for Relief, *not being able to recover at Law, the Conuſor being made Executor*; but no Relief; Ld Chancellor ſaid, Tho' it be a meer Accident and Slip by the Conuſor's being made Executor, yet Equity will not interpoſe or give any Aſſiſtance to affect a Purchaſer; and bid them recover at Law, if they could. Sel. Ch. Caſes in Ld King's Time. 80 Oct. 27. 1730. Harvy v. Woodhouſe.

(C) Favoured. Plea of *being* a *Purchaſor for a valuable Conſideration.*

PUrchaſor for a valuable Conſideration without Notice ſhall not be impeached, *eſpecially where a Settlement has ſince been made in his Favour.* MSS. Tab. May 14, 1717. Rochford v. Nugent.

2. A Purchaſor that comes in *without Notice of a Rent-Charge* ſhall not be chargeable therewith, altho' given to a Charitable Uſe. Toth. 258. cites 6 Car. Maynard v. Pauperes de Eaſt-Greenſted.

3. A Bill was to be relieved on a Truſt, and charged Defendant with Notice; Defendant pleaded his being a Purchaſor for a valuable Conſideration; This was objected to as not good, becauſe he did not *ſay what the valuable Conſideration was*; *For 5 s. is a valuable Conſideration, but yet it is not an equitable one*; But the Court declared that in this Caſe the Plea was good enough. Chan. Caſes. 34. Mich. 15 Car. 2. More v. Mayhew.

2 Freem. Rep. 175. pl. 235. S. C. —But where a *Bill* was preferred *for Diſcovery of a Title and Writings*; The Defendant pleads that he was a Purchaſor for a valuable Conſideration, without Notice of the Plaintiff's Claim, and ſo demurred; Ld Chancellor ruled the *Plea* to be ill, becauſe he *did not ſet forth the particular Conſideration*; but if that had been expreſſed, it had been good; and ſo it was held in one Grigg's Caſe. 2 Freem. Rep. 43. pl. 47. Mich. 16-8. Millard's Caſe.

4. *Notice* of an Incumbrance *before the Conveyance is executed*, ſhall charge the Purchaſor. Chan. Caſes. 34. Mich. 15 Car. 2. More v. Mayhew.

The Court ſaid it had always been ſo ruled. 2 Freem. Rep. 175. pl. 235. S. C. —— Chan. Caſes 34. ſays it was ſo then lately decreed by the Lord Chancellor, in a Cauſe between Sir Wm. Wheeler and Yarraway and Nicholas.

5. Purchaſor ſhall not be affected by a *Judgment* in Equity, without *expreſs Notice* of it before the Purchaſe; Otherwiſe it is at Law. Chan. Caſes. 37. Mich. 15 Car. 2. Churchill v. Grove.

6. A Purchaſor of Lands from A. which B. makes Title to, getting the *Deeds that make out B's Title*, is not bound to *diſcover* them. Chan. Caſes. 69. Paſch. 17 Car. 2. Ferly v. Fagg.

S. C. cited 2 Chan. Caſes 23. —— S. C. cited per Ld Rawlinſon. 2 Vern. 159. as Sir John Fagg's Caſe.—Chan. Caſes 4 Anon S. P.—An Heir exhibited a Bill for Diſcovery of Evidences concerning Lands that were his Anceſtors; the Defendant ſwore that he was a Purchaſor of the Lands, and the Heir demanded a Sight of his Deeds and Writings; But Per Ld Chancellor, he ſhall not ſee them, for altho' the Heir Prima Facie hath a legal Title, he may go into a Court of

Law if he pleaſeth; but this *Court will not compel the Shewing of Writings to any Perſon unleſs he hath an equitable Title*, as a Mortgagee &c. and that is the Difference between a legal and an equitable Title. 2 Freem. Rep. 24 pl. 25. Trin. 1677. In Canc. Sir John Burlace v. Cook.

A Bill was exhibited for Diſcovery; the *Defendant pleaded*, That he was Purchaſor for valuable Conſideration, viz. ſo much &c. and *that* he had *no Notice* of the Plaintiff's Title &c. Ruled by Ld North, That the Plea, as to not having Notice by way of Plea, was not good; *but it ought to have been* as to the Notice *by way of Anſwer*, and not by way of Plea, on Debate; but yet that the Defendant being a Purchaſor, ſhould not loſe by the Formality of pleading the Benefit of his Plea, if he ſhould anſwer the whole Plea; For if he ſhould anſwer to the Time of his Purchaſe, which poſſibly was in Facto after the Plaintiff's Purchaſe, (they were indeed both of them Mortgagees) then the Plaintiff might wound him at Law; he ſhould put in a new Plea, and put in the Point of Notice by way of Anſwer, or to that Effect was the Order. 2 Chan. Caſes. 161. Hill. 35 & 36 Car. 2. Anon.

3 Chan. R. 40 Hill. 1666. S. C. Per Lord Bridgman. — But Hill. Vacation 1674, being the 2d Seal before Eaſter Term, on Motion by Mr. Noſworthy, the Plea was held good by the Lord Keeper Finch, and all the ſubſequent Proceedings ſet aſide. 2 Freem. Rep. 128. pl. 155. Seymour v. Noſworthy.

7. Plea of his being a Purchaſor for a valuable Conſideration was over-ruled, becauſe he did *not plead the Purchaſe made from one of the Plaintiff's Anceſtors*; for a Purchaſe from a Stranger, who might have no good Title, was held no good Plea. N. Ch. R. 135. 21 Car. 2. Seymour v. Noſworthy.

Plea of being a Purchaſor for a valuable Conſideration was over-ruled, becauſe Defendant did not *allege Seiſin and Poſſeſſion* in the Perſon from whom he bought. Vern. R. 246. Trin. 1684. Trevanion v. Motte.

8. A. having a long Leaſe of a Houſe, in which his Wife had ſome Intereſt, by her Conſent renews it for 81 Years, and in Conſideration of 420 l. aſſigns it to B. who aſſigns it to C. his Son, who married M. and died, leaving M. his Executrix; M. on a 2d Marriage, conveys it to Truſtees &c. A. by Bill ſets forth this Aſſignment, and that it was a Mortgage, and that *B. agreed to execute a Re-conveyance* thereof &c. and pray'd a Redemption. The *Executrix pleads* She was a Purchaſor without *Notice* of ſuch Agreement; and *in Conſideration of a Marriage with J. S.* and of *his undertaking to pay her Debts*, ſhe aſſign'd the Original Leaſe &c. ſuch a Day, to Truſtees, to the Uſe of her intended Huſband, not having any Notice of the Agreement prior to the executing the ſaid Deed on Marriage. It was decreed, That Defendants *were in Nature of Purchaſors*; and the Plea was allow'd. Finch. R. 9. Mich. 25 Car. 2. Harding v. Hardret.

9. A. indebted by Bond *deviſed a Debt to be paid* out of his Perſonal Eſtate; but if it was not ſufficient, then *to ſell his Real Eſtate and pay it*. The Eſtate was ſold, and by ſeveral Meſne Conveyances came to the Defendant, who was ſued for the Debt as charged on the Lands which he had bought. The Defendant pleaded, That he had *no Notice* of the Demand, and was a Purchaſor for a *valuable Conſideration*, that the Perſonal Eſtate was firſt liable, and that the Purchaſe-Money which was paid to 2 other of the Defendants was liable in the next Place; and that there were *other Lands*, which deſcended to one of them on the Death of A. which ought to come in Aid of him, and decreed accordingly. Fin. R. 137. Mich. 26 Car. 2. Preſcot v. Edwards, Broom & al.

10. A Purchaſor for a valuable Conſideration *without Notice* was decreed to pay *Arrears of an Annuity* charg'd on the the Lands purchaſed, tho' the ſame were *due* 30 *Years before*, and no Demand in all that Time. Fin. R. 252. Trin. 28 Car 2. Duke of Albemarle v. Counteſs of Purbeck.

11. A voluntary *Conveyance* decreed againſt a (Jointreſs) Purchaſor for for a valuable Conſideration; (but it ſeems, That *the not having Notice was the Lacheſs of* the Jointreſs &c.) See Chancery Caſes 291, 292. Mich. 28 Car. 2. Biſco v. E. of Banbury.

12. A Purchaſor from J. S. who has a *Decree againſt him in Chancery for Land*, ſhall be bound by the Decree, tho' he had *no Notice* of it. 2 Chancery Caſes 48. Hill. 32 & 33 Car. 2. Snelling v. Squibb.

13. Bill by a *Dowreſs* to remove a *Truſt Term*, the Defendant pleads himſelf a Purchaſor, but does not deny *Notice*, and ſo was ordered to anſwer. Per Lord North. Vern. 179. Trin. 1683. Bodmin v. Vandebendy. Vern. 356 — 2 Chan. Caſes 172. S. C. — Show. Parl. Caſ. 69. S.C.

14. *Bill* was brought *to prove a Will and perpetuate the Teſtimony of the Witneſſes*; the *Defendant pleaded* himſelf a Purchaſor without Notice of any ſuch Will, and inſiſted, *That unleſs there had been a Verdict* in Affirmance of ſuch Will, (nothing hindring the Plaintiff, but that if he had a Title he might recover at Law) *the Plaintiff ought not to be admitted to examine* his *Witneſſes*, thereby *to hang a Cloud over the Purchaſor's Eſtate*; and upon Debate the Court allow'd the Plea. Vern. 354, pl. 350. Hill. 1 & 2 Jac. 2. 1685. in Canc. Bechinall v. Arnold.

15. A. mortgag'd Land to B. and afterwards by his Will (having 2 Sons C. and D.) *deviſed the Equity of Redemption* to D —B. and C. join in an *Aſſignment of the Mortgage* to E. Tho' E. pleaded Want of Notice of the Will, and that C. was the viſible Heir; yet decreed, That D. ſhould have the Equity of Redemption on the Foot of the firſt Mortgage. N. Ch. R. 153. Feb. 1, 1689. Cooper v. Cooper. 2 Vern. 265. S. C. but D. P.

16. A. purchaſes, having *Notice* of a Settlement whereby B. the Vendor was *but Tenant for Life*, Remainder to his firſt &c. Son in Tail. Afterwards *A. ſells to C. who had no Notice*; B. dies, leaving a Son; the Bill was diſmiſs'd as to C. but decreed A. to account for the Conſideration-Money, which he ſold the Eſtate for, with Intereſt from the Deceaſe of B. thereout diſcounting what was due on a Mortgage prior to the Settlement which he had bought in. 2 Vern. 384. Mich. 1700. Ferrars v. Cherry. A. ſells to B. who has Notice of an Incumbrance; B. ſells to C. who has no Notice; C *ſells to D who has Notice.* The Maſter of the Rolls thought this *revived the firſt Notice to B.* but Lord Sommers held contrary. Ch. Prec. 51. Harriſon v. Forth. —— See (D) pl. 8.

17. Cowper C. ſaid, He took it to be a *Rule* in Equity, *That* where a Man is a *Purchaſor without Notice* he *ſhall not be come'd* in Equity; not only where he has a prior legal Eſtate, but where he has a better Title or Right to call for the legal Eſtate than the other; and therefore diſmiſs'd the Bill. The Caſe was; A. purchaſes of B. who had done an Act of *Bankruptcy*, but without Notice of it; Afterwards a Commiſſion is taken out, and there being a *Term ſtanding out in Truſtees*, Aſſignee brings a Bill againſt them and the Purchaſor to have the Term aſſign'd to him. 2 Vern. 599. Mich. 1707. Wilker v. Bodington. Gibb. 213. S. C. cited per Reynolds Ch. B. in the Caſe of Fitzgerald v. Ld. Falconbridge. —— L. P. Conv. 393 or 394. S. C. cited by Ld. Ch. B. Reynolds, who ſaid, That this Caſe proves that it makes no Difference whether the Party be a Purchaſor of the legal Eſtate or only of an Equitable Intereſt.

A Purchaſor for a valuable Conſideration, without Notice, having as good Title to Equity as any other Perſon, this *Court will never take any Advantage from him*; and conſequently will not grant a Diſcovery againſt him of the only Equity he has to defend himſelf by, which if he ſhould be obliged to diſcover, the other Party would immediately take Advantage of; And there certainly *may be Caſes where a Purchaſor* for a valuable Conſideration, *without Notice of* an Act of *Bankruptcy ſhall not be charged* in this Court *to diſcover any Thing*, (whether Incumbrances that he has got in, or any other Thing) but all Advantages ſhall be left him to defend himſelf by. Suppoſe 2 Purchaſors without Notice, and the 2d by Chance gets hold of an old Term, he ſhall defend himſelf thereby againſt the firſt, who ſtill is as much a Purchaſor for a valuable Conſideration as himſelf; I do not therefore think a Purchaſor for a valuable Conſideration, without Notice of the Bankruptcy, is to be relieved againſt in this Court within 21 Ja. 1. Per Ld C. Talbot. Caſes in Equity in Lord Talbot's Time 69. Hill. 1734. Collet v. De Gols and Ward.

18. A Bill was *to redeem Lands mortgag'd* in 1694 to the Defendant's Grandfather by the Plaintiff's Father *for* 500 *Years*, to be void on Payment of 126 l. and Intereſt. The Defendant pleads, That he is a *Deviſee* of thoſe Lands under his Grandfather's Will, who in 1692 purchaſed them for a 200 *Years Term without Condition of Redemption, and had enjoy'd* 15 *Years quiet Poſſeſſion.* But the Court over-ruled the Plea for the Defendant's *not anſwering ſufficiently as to the Mortgage*, and the Plea of the Purchaſe may be true, for it may be only a Term for Years to attend the Inheritance. C. Equ. R. 185. Hill. 12 Geo. Meder v. Birt.

(D) *Affected.* In what Caſes.

2 Freem. Rep. 127. pl. 148. Trin. 166-. S. C. — Fin. Rep. 26-. S C. but not S. P.

1. ORDERED, That a *Decree for a Leaſe and other perſonal Eſtate by Conſent* ſhall *bind* Purchaſors for valuable Conſideration. Per Ld. Bridgman, who ſaid, That otherwiſe you will, like Gunpowder, blow up the whole Court of Chancery. 3 Ch. R. 22. Windham v. Windham.

2. An *Eſtate* was *awarded to A.* who had Poſſeſſion purſuant to the Award, and *deviſed it to a Charity.* B. having *Notice* of the Award, and the Deviſe, purchaſed it. Decreed againſt the Purchaſor, and in favour of the Charity. Fin. R. 75. Hill. 25 Car. 2. Chard v. Opie.

S. C. 2 Chan. Caſes 28 & 87. by the Name of Hele v Hele —And Ibid. 29. by the Name of Eliot v. Hale.

3. A general *Power to make a Jointure*, and not ſaid of what Lands in particular, is not ſuch a *Lien* upon the Lands as ſhould affect a Purchaſor, tho' the Power had been *executed afterwards*, much leſs where 'tis not executed at all. Per Lord Chancellor. Vern. 406, 407. Mich. 1686. Elliot v. Hele.

4. A *Deviſee of Land gets a Decree* to hold againſt the Heir, who was ſuppoſed to have *ſuppreſs'd the Will*; the Teſtator had mortgag'd the Land, and a *third Perſon, pending the Suit, gets Aſſignment of the Mortgage, and purchaſes the Equity of Redemption of the Heir*, with Notice of the Will. The Court will not admit the Purchaſer to diſpute the Juſtice of the Decree, nor to try at Law if the Will was cancell'd by the Teſtator, or not. 2 Vern. 216. pl. 198. Hill. 1690. Finch v. Newnham.

5. *Voluntary Articles* ſhall *never* be *ſet up againſt an Abſolute Purchaſer*, altho' ſuch Purchaſer had Notice by being a Party to the Articles; but quære; for there was another Point in the Caſe, which might be the Foundation of the Judgment. MSS. Tab. Jan. 14. 1702. Powel v. Pleydell.

S. P. Admitted and affirm'd by Ld Chan. Cowper, tho' the Judgment Creditor had *no Notice of the Covenant*, becauſe from the Time of the Articles and Payment, the Seller would be only a Truſtee for the Purchaſor. Wms's Rep. 278. 279. Trin. 1715. in Caſe of Finch & al. v. Winchelſea (Earl.)

6. Lord Cowper ſeemed to be of Opinion, That in Caſe of a *Covenant to convey* Land, *the Money being paid, and afterwards the Vendor confeſs'd a Judgment to a Creditor* between the Time of the Conveyance and the Covenant, it ſhould not affect the Purchaſer, becauſe in Equity the Land is eſteemed to be ſold from the Time of the Covenant. 10 Mod. 468. cites the Caſe of Peach and Winchelſea.

But if the Conſideration paid is not ſomewhat adequate to the Thing purchaſed, as if the Money paid is but a ſmall Sum in Reſpect of the Value of the Land, this ſhall not prevail over a Meſne Judgment Creditor. Per Ld. Chan. Cowper. Wms's Rep. 282. Trin. 1715. Finch & al. v. Ld Winchelſea. ——*But a Mortgagee for a Valuable Conſideration, without Notice of ſuch Covenant*, ſhall hold Place againſt ſuch Covenantee; for there the Money is lent upon the Credit of the Land, and attaches upon the Land, which a Judgment does not; which was granted. Wms's Rep. 279. Trin. 1715. in Caſe of Finch & al. v. Ld Winchelſea.

7. Purchaſer is not to be affected with a *Concealed Conveyance.* MSS. Tab. Feb. 6. 1719. Butler v. Burk.

8. A *Church Leaſe was agreed by Marriage Articles to be ſettled* upon the Husband and Wife, and the Iſſue of the Marriage. They had iſſue; the *Husband mortgages the Leaſe to A.* and then *Husband and Wife ſurrendered the Leaſe, and a new one was granted to J. S.* Afterwards *B. purchaſes this laſt Leaſe without Notice of the Articles.* B. died, and his Executors *ſold the Leaſe to C. who had Notice of the Articles*, and gave him Collateral Security for better aſſuring his Title. The Plaintiff claimed under the Articles, and prayed that C. by Reaſon of the Notice he had of the Articles, might be conſidered as a Truſtee for him; C. pleaded his Purchaſe, and confeſs'd the Notice, but inſiſted principally upon B.'s Purchaſe

chaſe without Notice, and that he had now B.'s Title. And becauſe C. claim'd under B. who was a Purchaſer without Notice, and who had barr'd the Plaintiff's Right, and that all B.'s Right was now devolved upon C. Lord Ch. Talbot decreed for C. and ſaid it would be the ſame, tho' C. had been only a Voluntier, as B.'s Executors were, and that C.'s taking Collareral Security could not make his Caſe the worſe; but if B. had had Notice, all would be overturn'd. Caſes in Equ. in Lord Talbot's Time 187. Hill. 1735. Lowther v. Carleton.

9. A *Purchaſer with Notice alien'd to one who had no Notice.* In this Caſe, tho' the Court would not affect the Purchaſer without Notice, yet it being a Fraud, the Vendor, who was the Purchaſor with Notice, was decreed to make Satisfaction to his Vendee, who had ſued for Relief. Cited by Lord Ch. Talbot, as a Caſe which he ſaid he remember'd, Caſes in Equity in Ld Talbot's Time 188. in Caſe of Lowther v. Carleton.

10. If an *Eſtate ſubject to a Truſt* is *purchaſed from the Truſtees*, for a Valuable Conſideration without Notice, a Court of Equity cannot affect the Purchaſer, tho' they can the Truſtees; but if ſuch Purchaſor had Notice, then the Truſt goes along with the Eſtate, and the Land continues ſubject to it. Per Raymond Ch. J. Caſes in Equity in Lord Talbot's Time 260. Trin. 1732. in Caſe of Manſell v. Manſell. 2 Wms's Rep. 613. Mich. 1732. S. C. and S. P.

(E) Affected with *Payment of Debts* &c.

1. THE Opinion of the Court was, That a *Statute* was *for Performance of Covenants* ought not to take away the Poſſeſſion of a Purchaſer. Toth. 258. cites Chandler v. Dawtree, 41 Eliz. li. B. fol. 480.

2 Deviſe of Lands to A. and B. his Wife *for Life*, upon *Condition that A. his Executors*, Adminiſtrators, or Aſſigns, ſhould pay all his Debts and Legacies, and after the Deceaſe of the Survivor of them, then the Inheritance ſhould go *to C. their Son, and the Heirs Male of his Body* &c. and made A. his Executor, and died; A. B. and C. join in a Conveyance to D. A. dies, yet the Lands are liable in the Hands of the *Purchaſor* to pay the Debts and Legacies; and D. was decreed to pay Damages and Coſts, and then he was to take his Remedy againſt B. for the Profits received, (for A. died Inſolvent) which the Court declar'd were likewiſe liable to pay this Legacy &c. N. Ch. Rep. 38. 12 Car. 1. Newell v. Ward and Brightmore. A *Term in Truſt for Payment of Debts generally*, is good againſt an Heir, tho' no *Creditor be Party* to the Deed, nor Debt expreſs'd in particular, nor any Covenant in the Leaſe to pay; but Lord Keeper ſaid he would not maintain it againſt a Purchaſor. Chan Caſes 249. Hill. 26 & 27 Car. 2. Leech v. Leech.

3. If *Lands be given to a Charitable Uſe, and to diſpoſe of an Overplus*, if the Purchaſor had *no Notice*, it can't bind him, but if *Rent iſſue out* of Land, the Purchaſor muſt pay it, but will not charge him to pay *Arrears* before Purchaſe, nor lay it upon one, nor excuſe the other. Toth. 95. 96. cites M. 14 Car. Peacock v. Thewer.

4. A. deviſed Lands to his Wife for Life, and after to his eldeſt Son upon Condition that if his Wife ſhould be with Child, 80 l. ſhould be *paid by the Heir at Law* to the Child after the Mother's Death. She had a Child, and after the Mother and eldeſt Son convey'd away the Land to a *Purchaſor*. Upon *Notice* proved of the Will, the Money was decreed to the Daughter, and declared it was a Truſt deviſed to go with the Land; and yet this Will was void in Law as to the Legacy, ſeeing he who was to have the Benefit of the Breach of the Condition was Heir, and alſo the Party that ſhould pay the Legacy. 3 Ch. Rep. 93. 1649. Smith v. Atterby. So the Book is.

5. A. ſeiſed of Lands, conveys them to B. in Truſt, *for Payment of all his Debts* in general. C. the Plaintiff, being one of the *Creditors* of A. exhibits his Bill againſt D. as being a Purchaſer under that Truſt, to pay the Debts &c. It was inſiſted for D. that the Conveyance to B being general, and *none of the Creditors Parties* to it, it was therefore revocable at Pleaſure, and meerly Voluntary, and that it had been ſo adjudged by Ld. Keeper Coventry, that ſuch Conveyances are Ambulatory, and that if a Man makes a Conveyance to B. in Truſt to pay all his Debts *mentioned in a Schedule, and all other his Debts*, as to all the Debts, beſides thoſe mentioned in the Schedule, ſuch Conveyance is fraudulent againſt a Purchaſor. But it was inſiſted for D. that if the Deed to B. was revocable by A. yet D. purchaſing under that Conveyance, had confirm'd it. N. Ch. Rep. 126. 20 Car. 2 Langton v. Aſhly.

6. A. being ſeiſed of ſeveral Eſtates, grants an Annuity out of one of the Eſtates for a Valuable Conſideration, and gave a *Recognizance for ſecuring the Payment of the Annuity*; afterwards A. *ſells other Lands to B.* who had *no Notice* of this Recognizance; and after that A. ſells the Land, charg'd with the Annuity, to C. The Annuity was greatly in *Arrear*. Decreed that the Annuity ought to be paid out of the Lands purchas'd by C. they being originally charg'd; and this in Caſe of B. whoſe Lands are bound only by the Recognizance, and that the ſame ought to be paid out of the Aſſets of C.'s Eſtate, in the Hands of his Executors, and if there be a Deficiency, then D. (to whom C. had ſold the Lands) to pay out of the Profits received; but on *B.'s offering to pay the Annuity and Arrears*, it was decreed he ſhould *have the Benefit of the Recognizance to reimburſe him*. Fin. R. 130. Mich. 26 Car. 2. Pritchard, Williams, and Thomas v. Potts.

7. A. *deviſed Lands* to B. charged with Payment of 600 *l. to C. and D. at a certain Time*, and in Default A. deviſed the Lands to E.—B. and E. join'd in a *Mortgage* of theſe Lands to F. and F. ſuffered B. to continue in Poſſeſſion, and to *fell Timber*; ſo that there was not ſufficient to ſatisfy the 600 l. and the Mortgage; and by B. and E. joining, it muſt be intended that F. had Notice of the Truſt. Decreed that the 600 l be paid before the Mortgage. Fin. R. 225. Trin. 27 Car. 2. Green and Hill v. Gardner and Clavell & al.

Lord Chancellor held, That upon this Statute a Judgment ſhall have no Relation, but from the Time of the Signing, not only as againſt Purchaſors of the Lands themſelves, but alſo as againſt *Prior Judgments* entered in the Grand Seſſions of Wales, to which that Statute does not extend; and ſaid, That a Man, who truſted his Money on a Judgment, was in ſome Sort a Purchaſor of the Land, as he might take out Execution, and extend the Land itſelf; that the Rule laid down by the Statute for the Safety of Purchaſors of the Lands themſelves, was a good Rule to follow in the other Caſe, and the Relations were not to be favoured in a Court of Equity. Chan. Prec. 4-8. Mich 1715. Anon.

8. *By 29 Car. 2. cap. 3. S. 2. Any Judge, or Officer of any of the Courts at Weſtminſter, that ſhall ſign any Judgments, ſhall (without Fee) ſet down the Day of the Month and Year of his ſo doing, upon the Paper or Record &c. which he ſhall ſign, which ſhall be entered upon the Margin of the Roll of the Record of the ſaid Judgment; and ſuch Judgments, as againſt Purchaſors, Bona Fide, for valuable Conſideration, ſhall be Judgments only from ſuch ſigning.*

If a *Judgment be* ſign'd in the Vacation, yet it is entered *as of the Term before*, and none but a Purchaſor ſhall be admitted to ſay it was ſign'd as of any other Time, and 'tis the Courſe of the Court to let all Things be done in the Vacation as of the Term before. Per Holt Ch. J. 1 Salk 401. Duke of Norfolk's Caſe.——S. C. 7 Mod. 39. Trin. 1 Ann. B. R.

9. Where a Purchaſor *has Allowance in Reſpect of an Incumbrance*, this ſhall make the Incumbrance good, tho' it was before *defective*. Arg. Vern. 358. Hill. 1685. in Caſe of Lady Bodmin v. Vandebendy.

10. *4 & 5 W. & M. 20. S. 2. 3.* Enacts, That *the Clerk of the Eſſoigns of the Court of C. B. Clerks of the Dockets in B. R. and the Maſter of the Office of Pleas in the Exchequer, ſhall before the End of every Eaſter Term, alphabetically enter a Particular of all the Judgments of Debt by Confeſſion, Non ſum Informatus &c. of the Hillary Term preceding, and within 10 Days deliver Notes in Writing to the Clerks &c. the like before the End of M. haſl-*

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mas Term, of the Terms of Eaſter and Trinity, and before the End of Hilary Term, of Michaelmas Term, under the Penalty of 100*l. And that no Judgment ſhall affect Purchaſors of Lands or Mortgages, till docketed and entred as aforeſaid.*

11. An *Executor being poſſeſſed of a Term* for Years, in Right of his Teſtator, and being *indebted* to J. S. *on his own Account, agreed with J. S. his Creditor for Sale of this Term, and that the Debt ſhould be diſcounted out of the Purchaſe Money.* Upon a Bill brought againſt him by the Teſtator's Creditors, he was not allow'd to ſink his own Debt, but was decreed to pay the Money, he having Purchaſed with full Notice; That this was a Teſtamentary Eſtate, and nothing came into the Executor's Hands as an Equivalent for it, to make up the Quantum of the Teſtator's Aſſets. Cited Chan. Prec. 434. Hill. 1715. in the Caſe of Daggett v. Hoskins, as decreed by Ld. C. Cowper, when he had the Seals before.

The Purchaſor was a Creditor both of the Teſtator, for 200*l.* and Executor for 550*l.* and diſcounted both Debts, and then paid the Surplus, being 150*l.* in Money.

It was inſiſted that an Executor may ſell, and with the Money, when he has it, may pay his own Debts; and for the ſame Reaſon, he may upon Sale diſcount, and allow the Debt the Purchaſor owes him and the rather in this Caſe, becauſe he paid 150*l.* in Money, with which the Executor might have paid the Plaintiff's Debt; Yet it was decreed at the Rolls for the Plaintiff, and affirmed on Appeal to the Ld. Chancellor, he ſaying the *Defendant was a Party, and conſenting to, and contriving a Deceaſant.* 2 Vern. 616. pl 553. Mich. 1708. Crane v. Drake, & al. —— S. C. (Ut Antea) was cited and agreed by the Ld. Chan. 13 Nov. 1738. in Caſe of Augur v. Gifford. Who ſaid that he had examined the Regiſter-Book, and the Decree was there founded upon particular Proof of Fraud, which Mr Vernon's Report does not plainly and fully ſet forth.

12. A. was indebted by ſeveral Bonds, in which B. was Surety for him and alſo in another Bond alone to one to whom E. afterwards gave his own Bond alone. A. being ſo indebted, made his Will, and in the Beginning ſays, *My Will is, that all my Debts be paid, and I do charge all my Lands with Payment thereof.* Item, *I give all my Real and Perſonal Eſtate to B. his Heirs, Executors, Adminiſtrators, and Aſſign, charged nevertheleſs with Payment of all my Debts and Legacies.* And *made B. Executor.* A. *died* in 1724, B. proved the Will, and *in the ſame Year ſold* a Freehold Eſtate of A.'s to E. *In* 1725, *B. ſold a Leaſehold* Eſtate of A.'s *to F. and in* 1727, *he ſold another Eſtate* of A.'s conſiſting of both Freehold and Leaſehold, to G. *In every Conveyance A.'s Will was recited.* To one of theſe Deeds J. S. a Creditor of A. was a ſubſcribing Witneſs. At the Time of the Sales, all the Creditors either liv'd in the Town where B. lived, or within 4 Miles thereof, and the Sale was made by Outcry. All along, till 1730, the Creditors received the Intereſt at 5*l.* per Cent. regularly from B. who was a ſolvent Perſon, till 1732, when he became Bankrupt. In 1734, the Creditors of A. brought a Bill againſt B. and the Aſſignees of the Bankrupts Eſtate, for Satisfaction out of the Lands ſold by B. to E. F. and G. The Maſter of the Rolls ſaid, That with Regard to the Leaſehold Eſtate ſold to F. the Creditors cannot have Satisfaction out of that, and this was ſo plain, that it would be monſtrous to call it in Queſtion; that the Executors are the proper Perſons by Law to diſpoſe of a Teſtator's *Perſonal Eſtate*, which indeed *in ſome Caſes might be cloathed with ſuch particular Truſt, that* poſſibly *the Court in ſuch Caſes may require a Purchaſor* thereof *to ſee the Money rightly applied*; But otherwiſe, unleſs in Caſe of a *Fraud*, the Sale thereof by an Executor muſt ſtand, and the Creditors cannot afterwards break in upon it; And as to the Sales to E. and G. he obſerved, that the *general Rule is*, That *a Truſt*, †*directing Land to be ſold for Payment of Debts generally, does not bind the Purchaſor* to ſee the Money rightly apply'd; *But* if it be for Payment of certain *Debts, ſpecified in a Particular*, the Purchaſor muſt ſee a right Application; that *this Caſe differ'd*, the Lands *being only charged with Payment of Debts, and not order'd to be ſold for Payment*, but that it was the ſame Thing; otherwiſe, when Lands are charged generally, they can never be diſcharged without a Suit in Chancery, which would be very inconvenient, be-

*See Crane v. Drake, ſupra.

† An Obſervation having been made, That where Lands are appointed to be ſold for Payment of Debts generally by the

Trust may be ſaid to be perform'd as ſoon as the Lands are ſold; but that where they are only charged for Payment of Debts, that the Truſt is not perform'd 'till thoſe Debts are diſcharged.

ſides, the Circumſtances of *Acquieſcence* ſo long as *till* 1734, without inſiſting on any Charge upon thoſe Eſtates, and the *Solvency of B. till* 1732, and the Creditors *receiving their Intereſt regularly of B. till* 1730, who could not be ſuppoſed ignorant of the *Purchaſes made by Oxtory*, and they *living within* 3 *or* 4 *Miles of B.* and J. S. *a Creditor being a ſubſcribing Witneſs* to one of the Purchaſe Deeds; Nor does it appear that the Purchaſors knew to whom the Debts were owing Beſides *B.'s being a Co-Obligor* in three Bonds, and having given to another Obligee *his ſingle Bond, may be well deemed a Satisfaction for that Bond*; by all which it appears that the Creditors *relied upon B.* and therefore it is not reaſonable that they ſhould reſort now to A.'s Eſtate. His Honour diſmiſſed the Bill with Coſts, as to F. the Purchaſor of the Leaſehold only, and as to the other Defendants, without Coſts. Farn. Chan. Rep. 78. to 83. Paſch. 1740. Elliot v. Merryman.

of the Rolls obſerv'd, That this was the only Objection ſeemingly, of any Weight as to this Matter, and ſaid, That ſo far it is true, that where *Lands are charged with Payment of Annuities*, thoſe Lands will be charged in the Hands of a Purchaſor; becauſe *it was the very Purpoſe of making the Lands a Fund for that Payment, that it ſhould be a conſtant and ſubſiſting Fund*; but where Lands are not burthen'd with ſuch a ſubſiſting Charge, the Purchaſor ought not to be bound to look to the Application of the Money, and that ſeems to be a true Diſtinction. Barn. Chan. Rep. 82. in Caſe of Elliot v. Merryman.

(F) Affected by *Miſapplication of the Money.*

Where no Creditors are Parties, ſuch Conveyances are Ambulatory,

1. WHERE a *Deed of Truſt* is *for Payment of Debts* in general, a Purchaſor is not affected with any *Miſapplication* of the Money; Otherwiſe where it is for Payment of Debts particularly ſpecified. Vern. 260. Mich. 1684. Dunch v. Kent.

and if a Man make a Conveyance in Truſt to pay all his Debts, *mentioned in a Schedule, and all other his Debts*; as to all the Debts, beſides thoſe mentioned, ſuch Conveyance is Fraudulent againſt a Purchaſor. Cited N. Ch. R. 127. in the Caſe of Langton v. Aſhley. 20 Car. 2. as adjudg'd by Ld. Coventry. ——— Where Lands are to be ſold for Payment of *particular Debts mentioned in a Schedule*, the Purchaſor muſt ſee his *Money rightly apply'd*. But if more be ſold than is ſufficient to pay the Debts, that ſhan't turn to the Prejudice of the Purchaſor. Per Ld. Keeper, Vern. 323. Hill. 1684. Spalding v. Shalmer.

If the Words of a Will are thus, *I give my Lands to A. and B. in Truſt, to ſell to pay my Debts*; the Purchaſor is ſafe, and it does not concern him to ſee if the Debts are ſatisfy'd, eſpecially if there is no Schedule. 2 Chan. Caſes 223. Culpepper v. Aſton.

But if there is *Lis pendens* between the Heir and Truſtee to have an Account, 'tis ſufficient *Notice* in Law, without actual

2. A Purchaſor of Lands *deviſed to be ſold by Executors for Payment of Debts* in Caſe of Deficiency of Perſonal Eſtate, is not concerned whether there be *Sufficiency or Not*; but if he buy and pay, tho' there were ſufficient to pay the Debts out of the Perſonal Eſtate, yet he ſhall hold the Lands againſt the Heir, and the Heir ſhall take his Remedy againſt the Truſtee; and ſo if the Matter reſts in Account between the Heir and the Truſtee, his Purchaſe is ſafe, tho' the Money be *miſ-ſpent* by the Truſtee. 2 Chan. Caſes 115. Trin. 34 Car. 2. Culpepper v. Aſton.

Notice of the Suit, ſo that if he purchaſe, 'tis at his Peril; but ſuch Dependance of Suit muſt be real, and not colluſive. 2 Chan. Caſes 116. ut ante. ——— It was agreed and reſolved, that in this Caſe a Purchaſor purchaſes at his own Peril, If the Perſonal Eſtate and Profits of the Land ſhould prove ſufficient, and afterwards ſhould prove inſufficient. Chan. Caſes 223. S. C.

3. Lands (whereof Part were in Jointure) were veſted in *Truſtees by Act of Parliament, to ſell and to raiſe Money for Building and Stocking a Printing Houſe*, (burnt down in the Fire of London) *and the Surplus to purchaſe Lands to be ſettled to the Uſes of the Marriage Settlement.* Money was borrowed accordingly upon a Mortgage, and the Queſtion was between the

the Remander Man in Tail under the Settlement, and the Mortgagees, Whether any more Money ought to be charged on the Mortgage, than what was taken up and employ'd according to the Truſt of the Act of Parliament. It was decreed by Ld. C. Jefferies, that there ought not, and that an Account be taken of how much had been employ'd, and the Defendant, on paying ſo much, with Intereſt and Coſts, diſcounting the Profits received by the Mortgagees, ſhould be let in to redeem; tho' for the Mortgagees it was inſiſted, that it could not be reaſonably intended they could be privy to, and prove the laying out of the Money according to the Act of Parliament, and that no one would lend Money upon the Truſts of an Act of Parliament, if it was incumbent on him to ſee the Money laid out according to the Act, and that ſuch Conſtruction could not conſiſt with the Intention of the Act, but utterly prevent the ſame. 2 Vern. 5. pl. 3. Trin. 1686. Cotterell and Holt v. Hampſon, Bill & Al.

(G) Affected *by preſumptive Notice, and* where there is *a Settlement.*

1. PUrchaſors coming in *Pendente lite*, are bound. Toth. 259. cites 14 Car. Yeavely v. Yeavely.

2. Chancery has been always very careful not to impeach Purchaſors by *Preſumptive Notice.* As Tenant for Life, Remainder to his firſt Son, mortgaged for 1500 l. The Deed of Settlement was produced, and ſeen by the Mortgagee, who notwithſtanding lent the Money, being adviſed that *Tenant for Life*, not having then any Son born, could deſtroy the *contingent Remainder*, whereas there was a *Son born 5 Days before the Money lent*; but the Mortgagee having no Notice thereof, and having got the Deed of Settlement, this Court would not relieve againſt him, but diſmiſſed the Bill. 2 Vern. 159. cited per Rawlinſon Commiſſioner, as the Caſe of Brampton v. Barker, 1671. See (A) pl. 4.

3. *Tenant for Life ſold as Tenant in Fee*, and the very Deed of Settlement, at the Time of the Purchaſe, was produced and delivered to the Purchaſor himſelf, yet the Court would not affect the Purchaſor with *preſumptive Notice*, but diſmiſſed the Bill. 2 Vern. R. 160. cited per Commiſ. Rawlinſon, as the Caſe of Philips v. Redhill. Nov. 1679.

4. A. and M. his Wife, being Tenants for Life, Remainder to *Truſtees to raiſe* 6000 *l.* Portions, Remainder in Fee to A. by Deed *created a Term for raiſing another* 6000 *l. for ſuch Perſons as M. ſhould appoint*; with *Power for A. and M. jointly to revoke the Uſes.* They *mortg'd Part* thereof *for* 2000 *l. having* before by Deed *revok'd Pro Tanto the former Uſes*; The *Mortgage recited both the Power of Revocation, and the Execution of it. M. by Will appointed the* 6000 *l. to the Plaintiffs*, and died; afterwards *A. married Defendant, and Jointur'd the Premiſes upon her*; *In the Settlement was an Exception of the Truſt for the* 6000 *l. Portions*, and of the Mortgage, but no Mention made of the other 6000 *l.* Upon a Bill brought for the 6000 *l.* appointed by M. it was inſiſted that the ſecond Wife was a Purchaſor without Notice of this Incumbrance; But per Cur. There was ſufficient Notice in Law, or an implied Notice; For the Mortgage was excepted in the Jointure, ſo that they could not be ignorant of the Mortgage, and therefore ought to have ſeen that, which would have led them to the other Deeds, in which, if purſued from one to another, the whole Caſe muſt have been diſcovered to them. Chan. Caſes 287 to 291. Mich. 25 Car. 2. Biſco v. Banbury (Earl.)

5. Where

5. Where a Purchaſor has *Notice of a Settlement* made after Marriage, per Cur. he ought to have enquired of the Wife's Relations, who were Parties to the Deed, whether it was voluntary, or made purſuant to an Agreement before Marriage, and having Notice of the Deed, muſt at his Peril purchaſe, and be bound to the Effect and Conſequence of the Deed. 2 Vern. R. 384. Trin. 1700. Ferrars v. Cherry.

(H) Favour'd *after Length of Time.*

S. P. Toth. 223. cites Mich 2 Car. Smith v. Roſewell.—

1. AN *antient Statute* being againſt a Purchaſor, tho' no direct Proof on either Side, was decreed to be Cancelled. Toth. 258. cites 11 Jac. Dom. Burgh v. Woolf.

A Purchaſor, and thoſe under whom he claim'd, had been *in quiet Poſſeſſion 16 Years*, and then the Defendant *ſet up a Mortgage and Recognizance*, but there being no Proof to confirm, but that the Mortgage and Recognizance might both be Satisfied, the Mortgage was decreed to be delivered up and cancelled, and the Recognizance to be vacated Fin. R. 252. Paſch. 28 Car. 2. Abdy v Loveday.

2. A Man was *poſſeſſed of a Leaſe for 50 Years*, he dying *inteſtate*, the *Wife adminiſters*, and *makes a Feoffment to her own Uſe; a little before her Marriage* with a ſecond Husband, the *Feoffees ſell the Land* for a valuable Conſideration, which was enjoyed many Years accordingly; *After the Wife's Death the ſecond Husband would avoid this Purchaſe* by Reaſon of the Uſe; But the Court decreed that the Purchaſors ſhould enjoy it, notwithſtanding a Verdict at Law. Toth. 223, 224. cites Mich. 17 Jac. Banniſter v. Brook.

3. *Lands deviſed to be ſold for Payment of Legacies*, and the Sale to be made by One of the 2 Legatees, were by him ſold to A. who redemiſed the ſame to him for 6 Years, and after the 6 Years expired, A. and the Defendant, A.'s Heir, enjoyed the ſame 22 Years more, *without any Demand* of the Legacies. This quiet Poſſeſſion *for 28 Years* was held a good Title, and the Bill diſmiſs'd. Fin. R. 316. Mich. 29 Car. 2. Cuſſe v. Aſh.

S. C. 2 Chan. Caſes 174. That the Lord Chancellor was of ſuch Opinion; for the Copyhold being ſever'd from the Manor, there is no Means to bar it.

4. A. Tenant in Tail of a *Copyhold*, Remainder to himſelf in Fee, *purchas'd the Freehold* of the Lord, and then ſells to J. S. and dies; and after 30 *Years Poſſeſſion* the Son of A. ſets up a Title as *Iſſue in Tail*. Per Lord Chancellor, The Purchaſor of the Freehold ſhall attract the other Eſtate, which was but at Will; and decreed the Purchaſor to enjoy againſt the Iſſue in Tail. Vern. 393. Hill. 1685. Parker v. Turner.

But he took Time to adviſe.

(I) Favour'd *by Allowance.*

But where a *Purchaſor* of a long Term for 61 Years, which he aſſign'd to Truſtees,

1. THE *Husband made a Leaſe of the Wife's Land* to one who was ignorant of the defeaſible Title. The *Leſſee built upon the Land*, and was at great Charge therein. The Husband died, and the Wife avoided the Leaſe at Law, but was compell'd in Equity to yield a Recompence for the Building and Bettering of the Land: for it was ſo much

much the better worth unto her. Chan. Rep 5. in the Earl of Oxford's Caſe, Mich. 13 Jac. 1. cites it as the Caſe of Peterſon v. Hickman.

and alſo of the Inheritance and Reverſion, being in Poſſeſſion, had *laid out* 1000 *l. in Building*, and enjoyed the ſame till the Death of the Vendor, and then the Land was recovered by Virtue of an *old dormant Entail*, the Court would not relieve the Purchaſor who was Plaintiff, nor give Defendant any Coſts. N. Chan. Rep 51. 15 Car. 2 Needler v. Wright.——But *Allowance* for Improvements and neceſſary Reparations were made to a Purchaſor of a Term, upon decreeing it to be delivered up to Deviſees in Remainder Fin. R. 378. Trin 30 Car. 2 Tomlinſon & al v. Smith.——So where it was after a *long Time*, (the Perſon claiming having been beyond Sea 20 Years, and ignorant of his Title till after his Return) *and divers Purchaſes* made, and the laſt Purchaſor had laid out Money in Building, it was decreed that he hold till ſatisfied, diſcounting for the Profits received. 2 Lev. 152. Mich. 27 Car. 2. in Chancery, Eſſlin v. Hafely

2. A Purchaſor, who before his Purchaſe Money paid, or Deeds executed [tho' not before his Contract made] had *Notice* of a Prior Settlement, was ordered to be *allowed* what he had laid out in *laſting Improvements* upon the Tenements, tho' made pending the Suit. Jefferies C. Vern. 487. Mich. 1687. Walley v. Whaley, Gaudy and Warner.

And where it appears that Articles of a Purchaſe were unfairly obtain'd, tho' not to ſuch a Degree as to ſet them aſide, yet if, upon the Proſpect of their being perform'd, he has improv'd the Eſtate, it is reaſonable he ſhould have Allowance for laſting Improvements, provided he deliver up the Articles, and account for the Profits; but if he goes to Law he muſt not expect it. Caſes in Equity in Lord Talbot's Time, 234. 236. Hill. 1736. Savage v. Taylor

(K) *Diſputes* between Purchaſor and Purchaſor.

1. A *Parol Agreement and Poſſeſſion delivered*, was decreed to be perform'd againſt a *ſubſequent Purchaſor* with Notice, who had a Conveyance, and paid his Money. Vern. 363. Hill. 1675. Butcher v. Stapely.

2. Where a Writ of *Dower* was brought *againſt ſeveral Purchaſors*, the *Court directed that* the *Sheriff* ſhould *charge them all proportionably*, tho' otherwiſe the Sheriff might have charged all out of one Party, and the Party could have no Remedy at Law; but in Equity they ought all to be equally charged; and therefore the Court gave this Direction. Freem. Rep. 227. pl. 234. Paſch. 1677. Anon.

3. The *Plaintiff and Defendant ſeverally purchas'd the ſame Reverſion expectant on the Death of Tenant for Life.* The *Plaintiff brought a Bill to examine Witneſſes for perpetuating their Teſtimony, and to* be admitted to *try his Title in the Life of Tenant for Life.* But foraſmuch as the Purchaſor was a Defendant, the Court could do nothing in it, but diſmiſs'd the Plaintiff's Bill, and he loſt his Land for Want of examining his Witneſſes. Cited by Lord Commiſſioner Rawlinſon. 2 Vern. 159. Trin. 1690, in Caſe of Hitchcox v. Sedgwick, as the Caſe of Seybourne v. Clifton.

N. Chan. Rep. 125. 29 Car. 2. reports the Caſe thus, viz. A and M. his Wife were ſeiſed in Fee of the Lands in Queſtion, in which J. S had an Eſtate for Life. A. and M. in 1643. covenanted to levy a Fine thereof *to the Uſe of A. and M. and the Survivor of them for Life, Remainder to their firſt Son* (the Plaintiff in Tail Male, with ſeveral Remainders over. *A. ſurviv'd, and* then *forg'd another Deed, declaring the Uſes of the Fine to A. and M. and the Heirs of the Survivor. Under this Deed H. R. the Defendant purchas'd the Lands from A.* who is ſince dead, and J. S the Tenant for Life being ſtill living, the Plaintiff exhibited his Bill to perpetuate the Teſtimony of Witneſſes, to prove the true and diſprove the forg'd Deed. The Defendant demurr'd, as being a Real Purchaſor under the pretended Deed, believing it was a true and real Deed; therefore it being to draw under Examination a Matter of Forgery againſt a dead Perſon, who could not anſwer for himſelf, and to get Aid to impeach a real Purchaſor, he inſiſted he ought not to anſwer. And upon Debate it appearing that the Tenant for Life was ſtill living, ſo that the Plaintiff could not try his Title at Law, and that this Court is obliged to preſerve a Title at Law, which by ſuch Impediment could not at preſent be tried, the Demurrer was over-rul'd.

4. A. on Marriage with M. articles, *in Conſideration of 600 l. Portion* mentioned as received by him with M. an Infant, covenanted with B. and C. Truſtees, that *if he and his Wife live 7 Years*, then *at three Months* after

afterwards, to lay out 10000 *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* 10000 *l.* and *conſeſs'd a Judgment to B. and C. for Performance of Covenants*; 1500 l. Part of the 6000 l. was laid out in purchaſing an Annuity of 100 l. per Ann. 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 and Depoſiting the Tallies and Orders with him. J. S. brought a Bill to compell 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 perform'd*, 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 tack'd to a written Agreement. But Cowper C. diſmiſs'd 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.

S.C. but principally upon the Point of Advancement, and bringing into Hotchpot. Abr. Equity Caſes 249 to 254 inclusive.

5. A. by Marriage Articles, in Conſideration of the Marriage, and 4000 l. Portion, *covenanted with B. his Heirs &c. within 6 Months after Requeſt by B. to ſettle all his Lands in C.* to himſelf for Life; Remainder to Truſtees to preſerve &c. Remainder to the Wife, Remainder to the firſt &c. Son in Tail Male, *Remainder to Truſtees for* 500 *Years, to raiſe* 5000 *l. for Daughter's Portions.* The Wife died, leaving no other Iſſue than one Daughter; A. *married a ſecond Wife, and ſettled the greateſt Part of the Lands in the Articles, without giving Notice of the Articles*, and had Iſſue a Son and a Daughter by her, and died Inteſtate. It was held by the Maſter of the Rolls, that this 5000 l. ought to be made good out of the real Eſtate contracted to be ſettled, ſuppoſing that ſuch Part thereof as is left unſettled be ſufficient; but that it muſt be agreed that the Land actually ſettled by A. on his ſecond Marriage without Notice, is a good Settlement, (tho' it be a Breach of Truſt) and muſt take Place againſt the Articles, no more Lands being liable to the Articles than are omitted out of the Settlement on ſuch ſecond Marriage. 2 Wms's Rep. 436. 439. And Lord Chanc. King ſignified the Opinion of Mr. Juſtice Price to be (as to this Point) that the Lands not included in the Settlement made on the ſecond Marriage, muſt ſtand liable for raiſing the 5000 l. Ibid. 447. Hill. 1727. Edwards v. Freeman.

For more of Purchaſor in General See **Diſcovery, Fraud, Jointreſs, Marriage,** and other proper Titles.

And in what Caſes a Man ſhall be ſaid to be in, or ſeis'd as a Purchaſor, or by Deſcent, See Tit. **Deſcent, Heir** &c.

(A) Purveyance.

1. AS well *before* as after *the Conqueſt*, the King, upon his Antient Demeſnes of the Crown of England, had Houſes of Husbandry, and Stocks for the Furniſhing of neceſſary Proviſions for his Houſhold, and *the Tenants of* thoſe Manors did by their Tenures manure, till &c. and reap the Corn upon *the King's Demeſnes*, mowed his Meadows &c. repaired the Fences, and *performed all neceſſary Things belonging to Husbandry* upon the King's Demeſnes: In Reſpect of which Services, and to the End they might apply the ſame the better, they had many Liberties and Privileges, as that they ſhould not be ſued out of the Court of that Manor, nor impannell'd of any Jury or Inqueſt, nor appear at any other Court, but only at the Court of the ſaid Manor, nor be contributory to the Expences of the Knights of the Shire which ſerve at Parliament, nor pay any Toll &c. which Liberties and Immunities continue to this Day, albeit the original Cauſe thereof is ceaſed. 2 Inſt. 542. 543. cap. 2.

Hawk Pl. C. 114. cap. 47. S. 1. ſays, That this Method being found to be troubleſome and inconvenient, was by Degrees diſus'd, and afterwards the King us'd to appoint certain Officers to buy in Proviſion for his Houſhould, who were call'd Purveyors, and claimed many Privileges by the Prerogative of the Crown, and ſeem to have had the Pre-emption of all ſuch Victuals as were bought by any to ſell again.

2. S. was *Deputy Purveyor for the Toil*, and was fined for *Miſdemeanors* &c. And in that Caſe Popham Ch. J. delivered the Opinion of all the Juſtices of England in theſe three Points. 1ſt. That no Purveyor or his Deputy may *take* any Thing without *ſhewing of his Commiſſion*. 2dly. That they cannot take *Wood or Trees growing* without the Conſent of the Owners, becauſe they belong to the Freehold 3dly. That no Purveyor may take *that which a Man has provided for his own Proviſion*, but of that which is to be ſold, the King ſhall have the Buying at reaſonable Prices. Noy 101. Stockwell's Caſe,—cites 47 E. 3. 18. 11 H. 4. 28. Mag. Chart. cap. 21. and in 25 E. 3. B. R. Rot. 27. The Servants of the Marſhal were preſented for taking 12 *Carts* to carry the King's Priſoners, *where one would have ſufficed*, and they had levied 10 Marks for the Redemption of their Carts and Horſes; for which they were committed to the Marſhalſea &c.

3. 12 *Car.* 2. 24. *Par.* 12. Enacts that *no Money be taken, rated, paid, or levied for any Proviſion, Carriages, or Purveyance for the King; and that no Perſon by whatever Authority, by Colour of Purveying for the King or Queen &c. ſhall take any Thing whatſoever from any Subject, but with his free and full Conſent; that no Carriages be taken without like Conſent, that no Pre-emption be claimed &c. and the Offender, at the Requeſt of the Party griev'd, to be committed by any neighbouring Juſtice of the Peace, or the Conſtables of the Place where &c. till the next Seſſions, there to be proceeded againſt for the ſame.*

Hawk. Pl. C. 114. cap. 47. S. 3. ſays, That the Laws before made having been found by Experience not to have ſufficiently provided againſt the Oppreſſions of Perſons imployed for making Proviſions for the King's Houſhold, Carriages &c. and ſeveral Counties having been oblig'd to ſubmit to ſundry Compoſitions for their Redemption, therefore this Act was made.———But Sect. 6. ſays, That this univerſal and abſolute Reſtraint having been found inconvenient, it was enacted by 13 & 14 Car. 2. 20. which has been often continued by ſubſequent Statutes, That the Officers of the Navy may preſs Carriages for the Uſe of the Navy and Ordnance, purſuant to the Regulations therein preſcrib'd

* Quare

* Quare Incumbravit.

* Is an Original Writ, and ſhall iſſue out of the Chancery, and not out of C.B F.N.B. 48. (G)

(A) *Lies in what Caſes,* and *where.*

1. *Quare Incumbravit* ought to be ſued *in the County where the Church is,* becauſe the Wrong is done here. F. N. B. 48. (D)

S P For the Clerk of the Biſhop ſhall be ouſted, and the Clerk of the Party put in. Per Yelverton, Br. Quare Incumbravit, pl. 4 cites 38 H. 6. 15. — S. C. Cited 7 Rep. 3. a. but ſays that in the Caſe of the King it is otherwiſe, and cites 4 E. 9. 5.

2. Per Thorp, If the *Biſhop incumbers where no Debate* or Diſpute *is,* yet this Writ lies. F. N. B. 48. (D) in the new Notes there (a) cites 17 E. 3. 74. b. 21 E. 3. Quare Incumbravit. 3.

And ſo by Wilby, If the Biſhop *incumber within the ſix Months,* tho' no Plea be pending, which was admitted by Hill and Pole, and that there ſhall be a ſpecial Count, and not of a Recovery. F. N. B. 48. (D) in the new Notes there (a) cites 18 E. 3. 17. b.

3. The *King may ſue* a Quare Incumbravit *in B. R.* although the Record of Recovery be in C. B. but a *Common Perſon cannot* do ſo. F. N. B. 48. (E)

4. Quare Incumbravit may be ſued in C. B. although the *Record* be *removed into B. R. by* a Writ of *Error,* or into the Treaſury; but if the Record be in B. R. it ſeems then that the Party ſhall ſue the Quare Incumbravit there &c. F. N. B. 48. (F)

5. *After the Ne Admittas* delivered, if the 6 *Months paſs,* the *Biſhop may preſent his Clerk* for Lapſe, and ſhall not be charged by the Quare Incumbravit for that Preſentation; *But* it ſeems he *cannot admit the Clerk of the other* Man after the 6 Months paſt, for that ſhall be againſt the Writ of Ne Admittas delivered unto him; *And* alſo *if the Biſhop do preſent the Clerk of the other* Party *after the 6 Months,* who had preſented unto him before, that Preſentment makes Title to the Party, altho' it be after the 6 Months; by which it ſeems that the Quare Incumbravit lies then for the Party. F. N. B. 48. (L)

6. If a Man hath a Writ of *Right of Advowſon pending* betwixt him and another, and the *Church voids* pending the Writ, the Plaintiff ſhall not have a Ne Admittas to the Biſhop, nor the Writ of Quare Incumbravit, altho' the *Biſhop incumbers the Church*; For the Demandant ſhall not recover the Preſentment upon this Writ, but the Advowſon; and if he hath Title to preſent, he may preſent, and have a Quare Impedit if he be diſturbed. F. N. B. 48. (Q)

7. Quare Incumbravit doth *not lie but where the Plaintiff recovers by Judgment of Court.* F. N. B. 48 (E)

8. If the Biſhop do *incumber* the Church *before the* Writ of *Ne Admittas ſued,* then the Party ſhall have a Quare Impedit, and not Quare Incumbravit; for the Biſhop cannot have Notice until the Ne Admittas be delivered unto him; And if the *Biſhop after the Ne Admittas delivered* unto him *admits his Clerk, for whom it is found by the Jure Patronatus,* yet the other Party ſhall have Quare Incumbravit againſt him. F. N. B. 48. (H)

(B) *When*

(B) *When* and *How*, and *Proceedings* therein.

1. F. N. B. 48 (F) in the New Notes there (b) says, That in Quare Incumbravit it was adjudged per Thorp and Green 1. That one shall have *Oyer of the Record*. 2. That one shall *have this Writ before Judgment*. 3. That the Writ shall be *returnable in the same Court*, where the original Judgment was given. 4. That where the *Writ supposes the Plea pending touching the Church*, 'tis good. 5. That the Writ shall *not make mention of the Place where the Recovery was* had. 6. It need *not mention whether he incumbred within*, or after *the 6 Months*, but that shall come by way of Answer. 7. If one *recovers within the 6 Months*, and the Bishop incumbers, he shall have a Quare Incumbravit within the 6 Months. 8. Tis *no Plea that the Record is removed by Error*. 17 E. 3. 50. 54. 74. *or* that he *has received the Plaintiff's Clerk* at his Nomination. 21 E. 3. 3. a.

2. Quare Incumbravit doth *not lie until* the Party hath sued the Writ of *Ne Admittas* unto the Bishop. F. N. B. 48. (H) Ibid. in the New Note there (d) cites 19 E. 3. Quare Incumbravit 2 & 18 E. 3. 17. Accordant.

3. *After a Nonsuit* in Quare Incumbravit a Man may have another Writ of Quare Incumbravit. Br. Quare Incumbravit, pl. 5. cites F. N. B. 48. S. P. F. N. B. 48 (M)

(C) *Count. Pleadings*, and *Judgment.*

1. IN 21 E. 1. it was adjudged, That a Man shall have Quare Incumbravit *without making mention of any Recovery in the Writ*, *or* in the *Count*; But by the Rule of the Register he ought to mention the Recovery; and that seems to be the better Opinion. F. N. B. 48 (K) A Quare Incumbravit was brought by the Tenant of one *Audley* against the *Bishop of Exeter*, and counted that the Church avoided the 13th of April, by the Death of J. S. and that Debate arose between him and Wm. Champernoon, and that the Plaintiff recovered in a Quare Impedit; and that pending that Suit, he delivered to the Bishop a Prohibition at such a Place, and that the Bishop incumbered within the 6 Months, the Bishop pleads and shews, That the Quare Impedit bore Date the 9th of April, and so was brought in wrong to the Incumbent, sed non allocatur; For suppose it was brought living the Patron, if the Parson dies pending the Plea, and the Bishop incumber it, and afterwards the Plaintiff recovers, a Quare Impedit lies; Whereupon the Bishop, taking no Notice of the Prohibition served on him, pleads, That the Church had been void 12 Months, and that 6 Months passed before the Recovery, whereby the Bishop presented as Ordinary, Absque hoc, that he incumbered within the 6 Months, and resolved that what is said of the Time of the Avoidance shall not go to the Incumbrance; wherefore Pole &c. took *Issue, whether he incumbered within 6 Months after the Avoidance* &c. F. N. B. 48 (K) in the Notes there (a) cites 18 E. 3. 17.

2. The Plaintiff need *not count that the Bishop refused his Clerk*, for the Incumbravit is a Refusal. F. N. B. 48. (H) in the New Notes there (d) cites 18 E. 3. 17. b.

3. Note; This *Writ* has been adjudged *good*, *without saying before what Justices he recovered*. F. N. B. 48 (L) in the New Notes there (b) cites 18 E. 3. 17.

4. Quare Incumbravit was brought by T. against the Bishop of Exeter, it was *found* by Verdict of Inquest, *that the Bishop had incumbered the Church after the Prohibition of Ne Admittas* delivered to him, *and within the 6 Months after the Voidance*, to the Damage of 200 Marks, by which it was awarded, that he recover the Damages taxed by the Inquest, and a *Writ for the Plaintiff awarded to disincumber the Clerk* directed

to the Biſhop, and Thorp prayed that his *Temporalties* ſhould be *ſeiſed for the Contempt* preſented by the Verdict; but the Court denied it; Contra in *Attachment upon a Prohibition*, if the Biſhop be attainted thereof; and firſt the Biſhop would have arreſted the Inqueſt, alleging that he had received the Clerk of the Plaintiff, and at his Nomination had inſtituted him, Et non Allocatur, per Cur. quod nota. Br. Quare Incumbravit, pl. 1. cites 21 E. 3. 3.

The Day in this Writ is iſſuable. viz. as to what Day the Prohibition was delivered upon, and whether he incumbred it or not. Br Iſſues joined, pl. 58. cites 21 E. 3. 45.

5. In Quare Incumbravit the Plaintiff *counted that he brought a Prohibition to the Biſhop ſuch a Day Not to receive the Clerk to the Church pending a Plea in the Common Pleas not diſcuſſed, after which Day he incumbred the Church*, and the *Defendant ſaid that he did not deliver the Prohibition to him the ſame Day, but another Day afterwards, before which* Day *he had received T. C.* to the ſame Church, becauſe he did not know of any Plea, *Abſque hoc, that he received T. C. after the Prohibition delivered, Priſt*; and upon this the Iſſue was taken, and found for the Biſhop, and the other brought Attaint &c. Br. Quare Incumbravit, pl. 3. cites 21 E. 3. 42.

—— *The Iſſue* in that Caſe ſhall *not* be *on the Day that the Prohibition was delivered, but whether he receiv'd the Clerk before the Prohibition delivered or not.* F. N. B. 48 (H) in the New Notes there (c) cites 19 E. 3. Quare Incumbravit 2.

6. The *Patron need not ſhew the Right of Patronage to be in him*, for the Ne Admittas with the Recovery gives him the Action, tho' he be not the true Patron. F. N. B. 48 (H) in the New Notes there (d) cites 8 R. 2. Quare Impedit 199.

F. N. B. 48 (I) in the New Notes there (e) cites 21 E. 3. accordant.

7. In Quare Incumbravit he ſhall have Judgment to recover *Damages, and alſo his Preſentment*; *But* ſo ſhall he not have *in Quare non Admiſit*, but *only Damages*. F. N. B. 48 (I)

Br Quare Incumbravit pl. 5. cites S. C.

8. If a Man be *nonſuited* in Writ of Quare Incumbravit, he may have *another Writ* of Quare Incumbravit, *and may vary from his firſt Count*, and it is a good *Plea in* Quare Incumbravit, *that he did not incumber after the Prohibition delivered to him.* F. N. B. 48 (M) (N)

9. If a Man hath a *Quare Impedit depending*, and *he ſues a Ne Admittas* to the Biſhop, and afterwards the *Biſhop incumbers* the Church *within the* 6 *Months* with his Chaplain, or with the Defendant's Chaplain, then the Plaintiff ſhall have Quare Incumbravit. F. N. B. 48 (O)

For more of Quare Incumbravit in General, ſee Preſentation and other proper Titles.

Quare non Admiſit.

(A) *Lies in what Caſes,* and in what *Court.*

* This ſhould be 24 E. 3. 75. pl. 97. —See (D) pl 9.

1. IF one has *Judgment* in a Quare Impedit, and a *Writ* is awarded *to the Biſhop*, and the Biſhop refuſes *to admit* the Plaintiff's Clerk, the Plaintiff upon this collateral Matter of Refuſal may have a Writ of Quare non Admiſit. 8 Rep. 142. b. in Dr. Drury's Caſe — cites * 26 E. 3. 75. b. Per Wilby and Hill.

2. Quare

2. In Quare Impedit by the *Grantee of the next Preſentation*, the Plaintiff recovered, and had Writ to the *Biſhop*, who *returned that the firſt Preſentee of the Diſturber had reſigned, and another is in*, and the Plaintiff would have taken *Averment againſt the Biſhop that Ne reſigna pas*, and was not admitted; For the Biſhop is only an Officer in this Caſe, and has no Day in Court to plead, nor the Court cannot compel him to anſwer to the Averment of the Party without an Original, upon which the Court bid him ſue Writ of Quare non Admiſit if he would. Br. Quare non Admiſit. pl. 2. cites 21 H. 7, 8. Br. Averment, pl. 24. cites S. C. — F. N. B. 47 (I) the Note in the Marg. cites 21 H. 7. 3. S. P.

3. If a Man recovers an Advowſon, and hath a Writ unto the Biſhop to admit his Clerk, and he will not admit him; then the Party may ſue an Alias and Pluries, or Attachment &c. or may ſue a Writ *out of the Chancery*, *or* out of C. B. at his Election, De Quare non Admiſit, as well *in the Term Time*, as in the Vacation; but the beſt is in Term-Time to ſue in C. B. F. N. B. 47. (C) If the *King recovers* his Preſentment *in C. B.* yet he *may ſue* a *Quare non Admiſit in B. R.* before himſelf F. N. B. 47 (D)

4. If the Biſhop *refuſes the King's Preſentee, and afterwards admits him*, yet the King ſhall have Quare non Admiſit againſt him for that Refuſal, and *ſo* ſhall *a common Perſon* in like Manner have, as I conceive. F. N. B. 47 (L)

5. If a Man *recovers* in a Quare Impedit his *Preſentment unto a Chapel*, which is *donative*, then I think that he ſhall have a *Writ to the Sheriff* to put the Clerk who recovered into Poſſeſſion. F. N. B. 48. (A)

(B) Againſt whom.

1. IF the *Vicar-General refuſe* to admit the Clerk, the Quare non Admiſit ſhall be brought againſt the Biſhop for that Refuſal; and if the Biſhop do refuſe the Clerk, and afterwards dieth, Quare non Admiſit is maintainable againſt the *Guardian of the Spiritualties* for this Refuſal made by the Biſhop. Tamen quære. F. N. B. 47 (I)

2. Quare non Admiſit was maintainable againſt the *Biſhop's Official*. F. N. B. 47 (N) cites Mich. 9 E. 3.

3. In a Quare Impedit the Plaintiff had Judgment, and a Writ awarded to the Biſhop; If upon this Writ the *Biſhop makes a falſe Return*, the Plaintiff may have a Quare non Admiſit againſt him. D. 260. a. pl. 21. Paſch. 9 Eliz. Baſſett's Caſe.

(C) *When, and where; And *Proceedings* therein.

*See (A) pl. 3.

1. IN Quare non Admiſit the Sheriff *at the Diſtreſs returned Nihil* &c. and per Richil, becauſe *the Biſhop has Aſſets in Wales, to which this County where the Proceſs iſſued is adjoining*, therefore he ſhall be amerced, becauſe he might have diſtrained there. Br. Proceſs, pl. 30. cites 3 H. 4. 4. So *where Proceſs iſſued to the County adjoining to the County Palatine*, which all the Juſtices denied, upon which the Plaintiff ſaid that the Defendant had Aſſets in London, and prayed Proceſs there, and had Diſtreſs there; nota. Br. Proceſs, pl. 30. cites 3 H. 4. 4. — Br. Proceſs, pl. 132. cites S. C.

2. If a common Perſon do *recover* in a Quare Impedit *in C. B.* and the *Record is removed* by a Writ of Error *into B. R. and there affirmed*, then he ſhall

ſhall have a Writ unto the Biſhop there, and ought to ſue Quare non Admiſit againſt the Biſhop there upon the Record, otherwiſe not; After the Record removed by a Writ of Error, the Plaintiff, who recovered, ſhall not have Quare non Admiſit until the Judgment be affirmed in B. R. F. N. B. 47 (E)

3. *One Defendant ſhall not have Oyer of the Record.* F. N. B. (E) in the New Notes there (a) ſays Vide hic 48 F. 16 E. 3. Quare non Admiſit 3. But by Hill, if the Record be *in another Place*, the *Juſtices ſhall forceaſe till they have inſpected* the Record. See Accordant 17 E. 3. 55. by Shard, in a Quare non Admiſit in the Rolls; For the Reverſal of the firſt Judgment is a Reverſal of the 2d; but cites 26 E. 3. 35. contra, and ſays Quære hic, if it be a new Original. Note alſo 26 E. 3. 75. accordant.

4. The Quare non Admiſit ought to be ſued *in the County where the Biſhop refuſed* the Plaintiff's Clerk. F. N. B. 47 F.

- Rep. 5 S. C. cited, and that it ſhall not be brought in the County where the Church is; For Damages only are to be recovered, and the Refuſal is the Commencement of the Tort and Ground of the Action, and ſo is the Book adjudged in 38 H. 6. 14 & 15. — D. 40. pl. 69. cites 38 H. 6. 14 b. 15 E. 4. 19. a. 40 E. 3. 7. a. where the Plaintiff recovered in Quare Impedit in the County of Devon, and delivered the Writ to the Biſhop in Middleſex, and he refuſed the Clerk, and it was ruled, That becauſe the Quare non Admiſit was brought in Devon it abated, and that it ſhould have been brought where the Refuſal was; For there commenced the Plaintiff's Grief.

(D) *Pleadings* and *Judgment.*

1. IF *a Man recovers* in Quare Impedit *againſt him who has nothing*, the very Patron may diſturb the Execution, and by this the Biſhop ſhall be excuſed in Quare non Admiſit. Br. Quare non Admiſit, pl. 4. cites 7 H. 4. 25.

* S. P. F. N. B. 47 (H) But Fitzherbert ſays, he conceives that if the Archdeacon refuſes to induct the Clerk, that the Clerk ſhall have an Action on the Caſe againſt the Archdeacon, becauſe the Induction is a temporal Act; As if the Sheriff upon Habere Facias ſeiſinam will not admit him into Poſſeſſion, he ſhall have an Alias & Pluries, and Attachment againſt him; But ſome have ſaid, That he ſhall have a Citation againſt the Archdeacon in the Spiritual Court, and puniſh him there; for perhaps he *may allege a ſpecial Cauſe*, for which by the Spiritual Law he ought not to be inducted, which Cauſe cannot be determined in the Temporal Court. Ideo Quære. Ibid.

2. If the Biſhop admits a Clerk, it is good * Plea for him in Quare non Admiſit, *That he has admitted the Clerk* of the Plaintiff, *and made Letters to the Archdeacon to induct him, without ſaying that he is inducted*; For it is a good Excuſe to the Biſhop, tho' the *Archdeacon refuſes* to induct him; For there the Plaintiff ſhall have his Suit againſt the Archdeacon in the Spiritual Court, and recover *Damages* againſt him; For the Induction is ſpiritual. Br. Quare non Admiſit. pl. 3. cites 34 H. 6. 14.

S. P. F. N. B. 48. (B) S. P. ſaid by Priſot to have been adjudg'd in the Time of F. 2 quod nota; Fore there Recovery ſhall not bind the Biſhop nor the Stranger, and it may be that they Recovery is by Covin, or without Title; but as to him againſt whom the Recovery is had, it is no Plea, That it is litigious between them, for lites illæ ſunt determinatæ; by the Recovery of which, the Biſhop (as it ſeems) is bound to take Notice; quod nota, a good Caſe. Br. Quare non Admiſit, pl. 1 cites 34 H. 6. 41.

3. If a Man *recover againſt J. F. in Quare Impedit*, and has a Writ to the Biſhop, and he refuſes to admit his Clerk, and he brings Quare non Admiſit, and the Biſhop ſays, That *the Church is litigious between the Plaintiff and a Stranger*, this is a good Plea. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12 & 32. 34 H. 6. 11. 38. and 35 H. 6. 18.

4. In this Writ he *muſt recite the Recovery.* F. N. B. 47. (C)

5. In the Quare non Admiſit he ſhall recover *only Damages*, and ſhall not have his Clerk admitted by this Writ. F. N. B. 47. (G)

6. The

6. The Biſhop is *not bound to admit* the Clerk, *if the Church be full of the Preſentment of another Party* who is not Party to the Recovery. F. N. B. 47. (K)

And note, The Biſhop ſhall be excuſed, if he return the (whole) Matter on the Writ Ad admittendum Clericum; whereupon the Party may have a Quare non Admiſit againſt the Biſhop, to try the Truth of the Return; and alſo a Scire facias againſt the Incumbent, to try his Title F. N. B. 47. (K) in the new Notes there (a) cites 9 Eliz. Dyer 260 a. Baſſet's Caſe.

Alſo, If the Biſhop be inhibited by the Archbiſhop to admit the Clerk, he ſhall be excuſed, and a Writ ſhall iſſue to the Preſident of the Arches. F. N. B. 47. (K) in the new Notes there (a) cites Parl. 22 E. 3. N. 63.

7. In a Quare non Admiſit the Biſhop may *ſay*, *That he did preſent by Lapſe*. F. N. B. 47. (M)

8. Archbiſhop of York *refuſed the Preſentee of E.* 1. *becauſe the Pope, by way of Proviſion, had conferred it on another*; whereupon the King brought a Quare non Admiſit. The *Archbiſhop pleaded*, *That* the Pope had a long Time before provided to the ſaid Church, as one having Supreme Authority; and that *he neither dared, nor had Power to put out him who was in Poſſeſſion by the Pope's Bull.* But for this Contempt, in refuſing to execute the King's Command, the Lands of his Biſhoprick were ſeiſed into the King's Hands, and loſt during his Life. 5 Rep. 12. in the Caſe of the King's Eccleſiaſtical Law.

9. If one has *Judgment* in a Quare Impedit, and the *Defendant reverſes the Judgment*, and after the Plaintiff in the Quare Impedit brings a Writ of Quare non Admiſit, the Defendant may plead Nul tiel Record. 8 Rep. 142. b. in Dr. **Drury**'s Caſe, cites * 26 E. 3. 75. b. Per Wilby and Hill.

* This is miſprinted, and ſhould be 24 E. 3. 75. pl. 97. And there Stouſe ſaid, That if the Party relinquiſhes his Damages, and takes a Writ to the Biſhop, who refuſes the Preſentee, in ſuch Caſe, if the Quare non Admiſit cannot be maintain'd, the Party ſhall never reſort back again to have his Damages.

For more of Quare non Admiſit in General, See **Preſentation**, and other Proper Titles.

* Que Eſtate.

* Is as much as to ſay, Whoſe Eſtate he has. Co. Lit 121. a —— It *refers as well to the Eſtate as to the Perſon*, and ſo is the common Intendment in Pleading a Que Eſtate. Goldsb. 173. pl. 105. Palmer v. Humphrey.—A Man preſcribed in Rent in him and in thoſe Que Eſtate he has in the ſame Rent,

(A) *Pleadable of what Things.*

1. IN *Aſſiſe of Rent*, he who preſcribes in him and his Anceſtors, and in thoſe whoſe Eſtate he has, ought to ſhew Deed of the Rent; for Que Eſtate cannot be of Rent without Deed, upon which the Plaintiff ſhew'd a Deed of the Grant of the Rent to his Anceſtor, but did not ſhew any Deed of Commencement of the Rent, and therefore ill by the beſt Opinion; for a Man may preſcribe in him and his Anceſtors &c. without ſhewing Deed, but not in Que Eſtate of a Thing which cannot be granted without Deed, unleſs he ſhews Deed thereof. Contra, Of *Acquittal* in him, and thoſe whoſe Eſtate the Lord has in the Seigniory, or of *Common Appendant*, or *Eſtovers* Appendant &c. there he may preſcribe,

and it was not accepted. Br. Preſcription, pl. 68. cites 6 E. 4. 3. ——— Br. Aid, pl. 128. cites S. C. ——— But Brooke ſays, See Littleton thereof, tit. Rents, That he ought to ſhew Deed where he preſcribes in a Thing which cannot paſs by Grant without Deed, as appears there. Br. Preſcription, pl. 68.

ſcribe by Que Eſtate without ſhewing Deed. Br. Preſcription, pl. 29. cites 24 E. 3. 23, 39.

Br Formedon, pl. 10. cites 42 E. 3. 19. S. C

2. In Formedon the Tenant may *rebut by Warranty* by Que Eſtate, *without ſhewing how he has his Eſtate. Contrary*, of *Vouchee*. Br. Que Eſtate, pl. 5. cites 42 E. 3.

S. P. Co. Lit. 121. a. ——— S P. Per Coke. 2 Bulſt. 228. Paſch. 12 Jac. in the Caſe of Babington v. Matthews.

3. In *Replevin* it was ſaid by Fineux and others, That a Man cannot *preſcribe in a Thing which* * *goes by Grant by a Que Eſtate*, as a *Leet*, † *Hundred*, *Rent*, *Common* &c. *Contra*, of a Thing which may be ‡ *Parcel of* a Manor, *or appendant to a Manor or Office*, there he may preſcribe in the Principal by Que Eſtate, and then the Incident or Appendancy goes with it. Br. Que Eſtate, pl. 30. cites 12 H. 7. 16, 18.

——— S. P. Sid. 298. Mich. 18 Car. 2. Coates v. Wade. ——— Lev. 190. S. C.

* S. P But Contra of Lands. Br. Titles, pl. 53. cites 18 E. 4. 10.

† S.P. Br. Preſcription, pl 62. cites 12 H 7. 15. ——— S. P. Per Kingſmill. Ow. 146. Paſch. 40 Eliz. in the Caſe of Gooſey v. Pot. ——— S P. Per Hale Ch. B Hard. 459. in the Caſe of the Attorney General v. Meller.

‡ S. P. Mod. 232. Hill 28 & 29 Car. 2. C. B. James v Johnſon. ——— 2 Mod 144 S. C. ——— Of *all Things* which lie in Grant, and *whereof a Man cannot be ſeiſed againſt his Will*, a Man ſhall not plead a Que Eſtate. Per Williams, who calls it Littleton's Rule. Owen 146. Paſch. 40 Eliz. C. B. Gooſey v. Pot. ——— But in ſuch Caſe he ought to intitle himſelf by the Grant. Arg Bridgm. 94 Hill. 13 Jac. in the Caſe of Mande v. French. ——— *But when* the Thing that lies in Grant is *but a Conveyance to the Thing claimed by Preſcription*, there a Que Eſtate may be alleged; as for Inſtance, A Man may preſcribe, *that he and his Anceſtors, and all* thoſe *whoſe Eſtate he has in a Hundred, have* Time out of Mind *had a Leet* &c. this is good. Co. Litt. 121. a. ——— S P. Per Bridgman Ch. J. Cart 32. Trin. 27 Car. 2. C. B. in the Caſe of Gold v. Barnſly. — cites the Abbot of Strata Marcella's Caſe

If one ſays, That he was *ſeiſed of a Manor*, and that he and all thoſe whoſe Eſtate he has therein, had a *Court Baron*, that would be a void Preſcription, becauſe a Court Baron is *incident to a Manor* of Courſe, and this is the Reaſon of Lane's Caſe. Per Holt Ch. J. 12 Mod. 573. Mich. 13 W. 3. in the Caſe of Hayward v. Kinſey.

S. C. cited Ow. 16. Trin. 36 Eliz. in Thurſton's Caſe.

4. A Que Eſtate of an Intereſt in a *Term for Years from one A. B. to the Plaintiff*, by way of Title, was held not good. D. 171. b. 172. a. pl. 9. Mich. 1 & 2 Eliz. Anon.

S. C. cited Ow. 16. Trin. 36 Eliz. C. B. in Thurſton's Caſe. And alſo cited in D. 172. a. and 238. b. in the Margin of pl. 37. where the

5. In *Intruſion* brought in the Exchequer, the Defendant pleaded a Que Eſtate of a *Term from an Abbot to one A. B. and from A. B. to himſelf*. The Attorney General maintained the Intruſion, and travers'd the Leaſe from the Abbot; The Defendant had a Verdict. Upon Motion in Arreſt of Judgment it was held, That the Pleading the Que Eſtate was ill in this Caſe, becauſe in Intruſion the Defendant muſt make Title; but the Attorney not having demurr'd to it, the Queen cannot now take Advantage of the Badneſs of the Plea. D. 238. b. pl. 37. Paſch. 7 Eliz. Attorney General v. Hudſon.

Defendant in Ejectment pleaded a Que Eſtate from the Leſſee for Years of an Abbot, without ſhewing how he came to his Eſtate; And the Court held it a good Exception, and that he muſt ſhew how he came to an Eſtate in the Term, becauſe it cannot be but by lawful Means. ——— Hob. 322. in the Caſe of Ewis v the Archbiſhop of York, ſays, A Term never bears a Que Eſtate. ——— One cannot plead a Que Eſtate of a Leaſe for Years, or at Will. Co Lit. 121. a (s) ——— But Sid 298. Mich. 18 Car 2. Coates v. Wade, is, That one may *plead* a Que Eſtate of a *Term for Years*, as well as of another particular Eſtate. ——— Lev. 190. S.C.

In Covenant the *Plaintiff ſets forth a Leaſe made by the Queen to G. B.* and *brings the Reverſion to himſelf by divers Meſne Conveyances*, and the *Reſidue* of the Term to *the Defendant by the Que Eſtate*, by ſeveral Meſne Conveyances in general, Concurrentibus his quæ in Jure requiruntur; and aſſign'd divers Breaches in not repairing the Premiſes. The Defendant pleaded Non infregit Conventiones. The Plaintiff demurred. It was adjudg'd, That the Pleading an Eſtate in a Term in another Perſon under whom he does not claim, but who is a Stranger, is good, for he is not privy to the Eſtate and Conveyances to a Stranger; But to plead an Eſtate in himſelf, or in any other under whom he claims, is not good, and cited Hill. 18 E. 4. pl. 29. and D. 238. pl. 6. and that ſo it was adjudg'd. Mich. 18 Car. 2. B. R. Coates v. Ward. And that ſo are Co. Lit. 121 a and 5 Cro 22 to be interpreted. 3 Lev. [illegible] 35 Car. 2. C. B. Pitt v Ruſſel

In

6. In Treſpaſs for *taking an Amercement* the Defendant preſcribed *for a Turn or Hundred Court*, and did *not ſhew any, or what Eſtate he had therein, or before whom it was held*; The Court held, That a Preſcription to a Hundred by a Que Eſtate is not good; becauſe an Hundred is not innurable, but lies in Grant. But the Defendant ſhould have alleged, that the King, and all they who were ſeiſed of the Hundred, *have had, and Time out of Mind have uſed to have a Court* &c. 1 Brownl. 198. Paſch. 9 Jac. 1. Darney v. Hardington.

(B) Pleadable *of what Eſtates.*

1. IN *Aſſiſe* the *Tenant pleaded Gift in Tail of the Anceſtor of the Plaintiff to J. N. with Warranty, Que Eſtate he has*, and [held] no Plea, but the Aſſiſe awarded; for *he cannot have the Eſtate of the Tenant in Tail* Contra, of Feoffment with Warranty, Que Eſtate &c. Quære, If he had *averr'd the Life of the Tenant in Tail.* Br. Que Eſtate, pl. 28. cites 40 Aſſ. 28.

Br. Aſſiſe, pl. 353. cites 40 Aſſ. 28 & S. P. but in Aſſiſe they *pleaded in Bar, That A. Servant for Life, the Remainder to B. in Tail, leaſed to the Plaintiff, and di'd, and B. entr'd, Que Eſtate of the ſaid B. the Tenant has*; and admitted for a good Bar by Que Eſtate of the Tenant in Tail; quod nota; and yet it ſhall not be averr'd in his Life. Br. Que Eſtate, pl. - cites 2 H. 4. 20.

A Man may make a Bar by Que Eſtate of a Tenant in Tail, if he avers his Life, and otherwiſe not. *So of other particular Eſtates of Freehold.* Br. Que Eſtate, pl. 29. cites 5 H. -. 39. —— Br. Barre, pl. -2. cites 5 H. -. 38. S. C. —— S. P. Co. Lit. 121. a. (r)

It was agreed by the Juſtices, That a Man *cannot convey an Intereſt by a Que Eſtate of a particular Eſtate, As Tail for Life or for Years, without ſhewing how he has his Eſtate, be it on the Part of the Plaintiff or Defendant*, but ſhall ſhew how he has the particular Eſtate. Br. Que Eſtate, pl. 31. cites - E. 6.

In Treſpaſs Preſcription was made by a Que Eſtate *to Go, Ares omni tempore clauſo*, and Iſſue was taken upon the Preſcription; and becauſe *the Eſtate in the Vavaſor, who claimed from the Crown*, under whom the Defendant did claim, *was an Eſtate Tail*, the Preſcription was held not good which founded in Fee Simple; And in that Caſe he ought to have laid the Preſcription in the Crown. And it was further held, That a Que Eſtate cannot be of a Tail. Clayt. 30. pl. 52. Sir William Savile v. Grinſtitch.

A Que Eſtate cannot be pleaded of an *Eſtate in Tail*; for * none can have his Eſtate, and the Books 5 H. -. 39. a. - E. 6. tit. Que Eſtate. Br. 31. 15 E. 4. 16. a. 2 H. 4. 20. are to be reconciled on this Difference, That if a Common Perſon, being Tenant in Tail, grants totum Statum ſuum, this is good during his Life; and ſuch Grantee may plead it, and aver the Life of the Tenant in Tail; but he cannot plead it by a Que Eſtate. 1 Rep. 46. Trin. 42 Eliz. in Altonwood's Caſe. —— * For it is an Incident inſeparable to his Perſon and Blood, and cannot be transferr'd to any other. Cro. C. 428. Mich. 11 Car. in the Caſe of Stone v. Newman.

2. In Treſpaſs, if the *Defendant has recover'd Rent*, or the like, *againſt J. S.* he cannot ſay in Pleading, Per Needham, That he has his Eſtate; for he is in the Poſt, and yet he has his Eſtate and more. Br. Que Eſtate, pl. 41. cites 39 H. 6. 24.

But Ibid. pl. 48. cites 31 H. 8. Contra, Where it is ſaid for Law, That if a Man recovers Land againſt J. S. *or diſſeiſes J. S.* he may plead, That he has his Eſtate, and yet he is in the Poſt. And *Brooke* ſays, That this is the beſt Law.

3. A Que Eſtate may be pleaded of any *Eſtate of Freehold*, with an *Averment of the Life of him whoſe Eſtate* &c. and ſo the Books are to be underſtood, but not of a *Leaſe for Years*, becauſe ſuch an Eſtate cannot be gain'd but by lawful Means. But a Que Eſtate cannot be pleaded of *Franchiſes*, becauſe they are Things that lie in Grant; but otherwiſe if they are appurtenant to a Manor. And ſo is Crompton's Juriſdiction of Courts to be underſtood. Per Hale Ch. B. Hard. 459. Paſch. 19 Car. in Scacc. in Caſe of Attorney General v. Meller.

4. Tho' an Eſtate in *Borough Engliſh* be a cuſtomary Eſtate, yet a Perſon that is ſeiſ'd of ſuch Eſtate may preſcribe. 5 Mod. 266. Paſch. 3 W. 3. Richards v. Hill.

(C) Pleadable. *How.* And *Traverſable in what Caſes.*

1. IN *Aſſiſe* the *Defendant ſaid that J. N. recover'd Damages in Treſpaſs againſt the Plaintiff, and had this Land in Execution by Elegit, Que Eſtate* of the ſaid J. N. the ſaid Defendant now has, Judgment &c. Br. Que Eſtate, pl. 44. cites 38 Aſſ. 4.

2. In Aſſiſe the Tenant *pleaded in Bar by Fine levied by a Stranger to P. and S. and to the Heirs of P. Que Eſtate T. his Father had who died, and the Land deſcended to the Tenant, and gave Colour.* Brook ſays, Mirum of this Que Eſtate; for H. 2 E. 6. it was agreed in B. R. that the * Que Eſtate *ſhall not be alleg'd in one who is Meſne in the Conveyance, but* ſhall be alleg'd *in the Tenant himſelf*, viz. *Que Eſtate the Tenant has*; and yet it was permitted above; and the *Plaintiff ſaid that one S. was ſeiſed in Fee, and infeoff'd him, and travers'd* abſque hoc, *that T. had the Eſtate of P. and S.* and allowed; and yet it is ſaid elſewhere, that the Que Eſtate *is not traverſable, but where he who traverſes it claims by the ſame Perſon by whom the other claims*; and here he ſays one S. and does not ſay the aforeſaid S. nor he mentions nothing of P. and yet permitted, but nothing is ſaid to it. Br. Que Eſtate, pl. 8. cites 11 H. 4. 81.

* S. P. Co. Litt. 121. b. (u) but ſays that ſome Books are to the contrary.

3. A Man *pleaded Villeinage in the Plaintiff's*; and the *Plaintiff ſaid that at another Time J. N. Lord of the Manor of D. to which he is ſuppoſed to be Villein regardant, pleaded Villeinage in another Action againſt the now Plaintiff, in which the now Plaintiff was found Frank, Que Eſtate of the ſaid J. the now Defendant has in the ſame Manor*, and a good Plea. Br. Que Eſtate, pl. 45. cites 9 H. 6. 67.

Br. Avowry, pl. 58. cites S. C —— Where the *Defendant avow'd for 7 s. Rent* &c. the *Plaintiff ſaid that T. S. was ſeiſed of the Manor of D. and of the 20 Acres in which* &c. *as Parcel thereof, and infeoff'd by this Deed, which here is, W. before the Statute, to hold by Fealty only for all Services, Que Eſtate of T. in the Manor the Defendant has, and Que Eſtate of W. in the 20 Acres the Plaintiff has*, and *Iſſue was* join'd *that T. had nothing in the Manor at the Time of the Feoffment, and found for the Defendant*, by which he had Judgment to have Return, and none took Exception to the Que Eſtate. Br. Que Eſtate, pl. 14. cites 22 H. 6. 50. —— Br. Avowry, pl. 60. cites S. C.

4. The *Defendant avow'd and alleg'd Seiſin in J. P. of the Service, who was Tenant in Fee Simple, Que Eſtate the Plaintiff has*; and the *Plaintiff ſaid that R. was ſeiſed in Fee, and leaſed to him for Term of Years, by Virtue of whoſe Poſſeſſion* &c. *abſque hoc, that the Plaintiff was ſeiſed in Fee Tempore captionis*, and the others econtra. Fulth. ſaid *the Iſſue ſhould be, abſque hoc, that he had the Eſtate of the ſaid J. D. tempore Captionis*: But Port. ſaid No; for it may be that he is in by Diſſeiſin, and then he has not his Eſtate, and yet he is Tenant as to the Avowry; quod Newton conceſſit. Br. Que Eſtate, pl. 13. cites 22 H. 6. 34.

Br. Iſſues join'd, pl. 3. cites S. C.

5. Where a Man *pleads, That thoſe who were Parties to the Fine Nothing had at the Time* &c. *but J. N. was ſeiſed* &c. *Que Eſtate he has*, he ſhall conclude, *Et de hoc ponit ſe ſuper Patriam*, and *the other ſhall ſay, Et* ipſe *ſimiliter, without other Rejoinder.* Br. Replication, pl. 5. cites 33 H. 6. 21.

Br. Que Eſtate, pl. 33. cites S. C. —— S. P. Br. Traverſe per &c. pl. 231. cites 10 E. 4. 6.

6. It was ſaid, that where the *Demandant and* the *Tenant claim by one and the ſame Perſon*, there the Que Eſtate alleg'd in the Pleading is traverſable. Br. Traverſe per &c. pl. 221. cites 6 E. 4. 12.

—— *In Writ of Entry in Nature of Aſſiſe* the *Tenant ſaid in Effect that J. S. was ſeiſed and died ſeiſed, and C. his Daughter and Heir enter'd, and was ſeiſ'd in Fee* &c. Que Eſtate *the Tenant has, and the Plaintiff claiming by C.* &c. *where nothing paſs'd* &c. *enter'd, upon whom the Tenant re enter'd.* The *Demandant ſaid that this ſame J. S. was ſeiſed, and died ſeiſed, and C. enter'd as Heir, and took to Baron N. Villein in groſs of the Demandant, and ſhew'd how by Preſcription, and had Iſſue D. and died, and D. enter'd as Heir, by which the Demandant entered as in Land belonging to his Villein, and was ſeiſed, and diſſeiſed by the Tenant, abſque hoc that the Tenant has, or ever had the Eſtate of the ſaid C. prout* &c. and ſo has Iſſue upon the Que Eſtate; and ſo ſee the Que Eſtate traverſ'd, and yet the Demandant does

does not claim in a Manner by him by whom the Tenant claims, but he claims of himſelf in the Poſt, by Reaſon of the Villeinage of his Villein. Br. Que Eſtate, pl. 11. cites 19 H. 6. 56 —— Br. Traverſe per &c. pl. 79. cites 19 H. 6. 56. 57. S. C.

7. In Entry the *Plaintiff in the Replication may convey to the Tenant the Poſſeſſion by Que Eſtate*, without ſhewing how he has his Eſtate. *Contra in Conveyance to himſelf*, as *in Replevin a Man avows upon one, Que Eſtate of his very Tenant the Plaintiff has*, and there the Eſtate is traverſable; per tot. Cur. quod Brian and Littleton conceſſerunt; and *ſo above of the Que Eſtate of the Defendant*, this is traverſable. Br. Que Eſtate, pl. 37. cites 18 E. 4 29.

8. In Treſpaſs the Defendant juſtified for Paſture for 100 Sheep, and preſcribed *that they, and all whoſe Eſtate they had in Cridling Park Time out of Mind &c. had Common* &c. and it was holden a good Preſcription; for although it is now a Park, yet this Park ſhall be *intended to have Commencement when it was arable.* The Reporter thinks it had been better to have laid the Preſcription as Owner of ſo many Acres of arable Land &c. Clayt. 64. pl 110. Sir William Savil v. The Maſter and Fellows of Sidney College, Cambridge.

9. If the *Huſband ſeiſed in Right of his Wife* pleads *that he, and all thoſe whoſe Eſtate they had*, have us'd to have a *Common appendant*, that is naught, for the Eſtate is in the Wife; but he ought to have pleaded *that he and his Wife, and thoſe whoſe Eſtates the Wife hath*, or whoſe Eſtates *they have*, Have &c. Per Cur. Noy 66. Godbolt v. Mallet.

10. There is a Difference between the Allegation of *the Conveyance to the Matter*, and the *Matter it ſelf*; as where one, who is to convey a Title to himſelf to a Leet, *preſcribes* that he and all thoſe, whoſe Eſtate he has in the *Hundred*, have had a *Leet* &c. This is good; for the Preſcription in the Hundred is only Conveyance; but when he claims any Thing which *lies in Grant by Preſcription originally of it ſelf*, he can't preſcribe in it by a Que Eſtate. 10 Rep. 59. b. Trin. 11 Jac. in the Biſhop of Saliſbury's Caſe.

11. If a *Corporation* was *founded within Time of Memory*, then in preſcribing for a Way, they may ſay that ſuch a one was ſeiſed, and he and all, whoſe Eſtate he hath, have uſed &c. and then from ſuch Perſon to derive their Title, and ſhew the Deed. Per Doderidge J. 2 Roll Rep. 376. Mich. 21 Jac. in Caſe of Slowman v. Weſt, cites 8 E. 4. Abbot of Bermondſey's Caſe.

12. There is a Difference where a *Preſcription is to the Thing in Groſs*, and where to a * *Thing Incident*; for when it is a Thing in groſs, *as Rent or Way*, it cannot paſs but by Deed; but when a Way is incident to another Thing, as Land, in Action ſur le Caſe for ſtopping this Way it is a ſufficient Declaration to ſay that the *Corporation* was ſeiſed of the Houſe or Land, and leaſed &c. and ſo to preſcribe by Que Eſtate, is well enough; and tho' it is true that a Corporation cannot have Land without Deed, yet in Action on the Caſe one need not ſhew how the Corporation comes to the Land; and adjudged accordingly. Per 3 Juſtices againſt Doderidge J. 2 Roll. R. 397. Slowman v. Weſt.

* *Or Appendant* Palm. 387. S. C.

13. Tho' the *Plaintiff in Debt for Rent* may plead a Que Eſtate *in the Deſendant generally*, without ſhewing how, yet where a Man *claims under a Que Eſtate*, there he ought to *ſhew the ſeveral Aſſignments*, for the Defendant may traverſe any of them. Skin. 303. Mich. 3 W. & M. B. R. Tucker and Hodges.

(D) Pleadable; *By whom.*

1. IN Ward, the *Feme Defendant conveyed herſelf to the Seigniory by Downment in Chancery, after the Death of her Huſband, who held of the King in Capite, and that the Tenant and his Anceſtors held of the Baron and his Anceſtors, Que Eſtate ſhe has in Seigniory by an elder Feoffment than he held of the Plaintiff* &c. And ſo ſee a Feme, who is *Tenant in Dower, allege that ſhe has the Eſtate of her Baron* by Que Eſtate &c. where the Baron had the Fee-ſimple, and the Tenant in Dower not. Br. Que Eſtate, pl. 10. cites 21 E. 3. 41.

2. *Aſſiſe of* 10 s. *Rent*, the *Tenant ſaid that A. Que Eſtate the Plaintiff has in the Seigniory, infeoff'd B. Que Eſtate the Tenant has in the Tenancy, to hold by* 6 *d. Rent per Annum, for all Services*, and a good Barr, quod nota, a Que Eſtate *of both Parts*. Br. Que Eſtate, pl. 26. cites 28 Aſſ. 33.

The Defendant *may allege a Que Eſtate in the Plaintiff, but* the *Plaintiff cannot convey Title to himſelf* by Que Eſtate.

3. In *Aſſiſe* the *Tenant may make Title by a Que Eſtate, without ſhewing how* he has the Eſtate of the other, *contra of the Title of the Plaintiff*; For he ſhall not make it by Que Eſtate, but convey it by Grant &c. and ſhew how certainly; note the Diverſity. Br. Que Eſtate, pl. 27. cites 29 Aſſ. 19.

Br. Que Eſtate, pl. 13. cites 22 H. 6. 34 —— S. P. Co Litt. 121 a (r.)

Put in Treſpaſs againſt the Prior of Saint Jones *of Goods taken* he *ſaid that G. held of him by* 3 *d. and Fealty, and to render the third Part of his Goods at the Death of whatſoever Tenant* &c. *by Custom* &c. and *alleg'd Seiſin* &c. *by the Uſage*, and *that G. dy'd ſeiſed*, and the Plaintiff, his Executor, took the Goods, and the Defendant took them in Part of the third Part, Judgment Si Actio. The *Plaintiff ſaid, that one J. S. Que Eſtate the Defendant has in the Seigniory, infeoff'd one* W. R. *Que Eſtate he has in the Tenancy, to hold by* 4 s. *only, for all Services*, and *ſhewed the Deed*, to which the Prior was compelled to Anſwer; Note, a Que Eſtate *alleg'd by the Plaintiff*, and the Reaſon ſeems to be inaſmuch as the *Defendant has affirm'd himſelf Tenant*, and he is not to make Title to the Land here. Br. Que Eſtate, pl. 6 cites 2 H. 4. 13.

So in *Avowry for* 10 s. the *Plaintiff ſaid that J. N. Que Eſtate the Defendant has in the Seigniory, confirm'd to W. S. then Tenant* &c. *Que Eſtate the Plaintiff has in the Tenancy, all his Eſtate to hold by* 3 *d.* for all Services, and allowed; the Reaſon ſeems to be inaſmuch as the Plaintiff after Avowry is in Effect Defendant, and the Avowant is Actor, but not a Plaintiff, and the *Lord was ſuffered to traverſe the Que Eſtate in the Seigniory*. Br. Que Eſtate, pl. 47. cites 30 H. 6. 7. —— S. P. Br. Que Eſtate, pl. 1. cites 2 H. 6. 10.

But in Quare Impedit the Plaintiff *ſaid that four were ſeiſed of the Land, to which the Advowſon was appendant in Fee, and preſented, and after the Church voided, Que Eſtate of the four he had at the Time of the Vacation, by which he preſented, and the Defendant diſturb'd him*, and by the Opinion of the Court his Count is not good; For the *Plaintiff or Demandant ſhall not make Title by Que Eſtate*, but contra of the Defendant or Tenant. Br. Que Eſtate, pl. 1. cites 2 H. 6. 10. —— Br. Titles, pl. 41. S. C.

So in *Treſpaſs*, the *Defendant juſtified for common Appendant*, and the *Plaintiff ſaid that B. was ſeiſed of the one Land and of the other, in the Time of H. 6. Que Eſtate he has*, and becauſe the Plaintiff convey'd the Land to himſelf by a Que Eſtate, and *did not ſhew how* he had the Eſtate, The Opinion of Court was, that the Plea is not good, upon which he amended the Plea, and ſhew'd how, viz. by Feoffment, quod nota, as well *in Treſpaſs as in Action real, of the Part of the Plaintiff*. Br. Que Eſtate, pl. 18. cites 9 E. 4. 3.

A Que Eſtate may be *pleaded by a Plaintiff who is a Stranger* to the Eſtate; as when a Leſſor brings an Action of Debt againſt a third or fourth Aſſignee of Leſſee for Years for Rent Arrear, he may declare upon the Leaſe made to the firſt Tenant, Que Eſtate the Defendant hath; Becauſe he cannot know how the Defendant comes to the Eſtate, nor by what Conveyances, not being privy to them; per Hale Ch. B. Hard 459. in Caſe of the Att. Gen. v. Meller. —— But if Que Eſtate be *pleaded by Defendant*, he muſt *ſhew how he came by*, or to the Eſtate. Owen. 16. Thurſton's Cate.

4. In Formedon the *Tenant vouch'd J. who entered into the Warranty, and pleaded Releaſe with Warranty of the Anceſtor collateral of the Demandant whoſe Heir he is, made to W. N. then Tenant* &c. *Que Eſtate he has* &c. and a good Plea; For he is Tenant by the Warranty, and *Tenant in Law*, tho' he be not Tenant in Fact; quod nota, and it ſeems that he had the Eſtate of the ſaid W. N. before the Gift in Tail. Br. Que Eſtate. pl. 12 cites 22 H. 6. 13.

5. A Man may aver the Eſtate of one who was ſeiſed in Fee *by Diſſeiſin*; For if he diſſeiſed him he has his Eſtate and Fee-ſimple, tho' it be by Tort, and *may plead a Deed* made to the Diſſeiſee, *but he cannot Vouch nor Deraign Warranty*, but plead in Bar. Que Eſtate, pl. 33. cites 6 E. 4. 12. per Moile.

A Diſſeiſor, Abator, Intrudor, Recoverer, or any other that comes in the Poſſ

ſhall plead Que Eſtate. Co. Litt. 121. a (t)——— Where *pleading* a Que Eſtate is *but Conveyance to it*; *Freehold*, he that has a Freehold may plead it, even in Caſu Regis, and tho' the Pleader came to it by *Diſſeiſin*. Hard. 459. Attorney General v. Meller.——Cites 7 E. 6. 26. D. 253. Bro Que Eſtate 65.

6. *Leſſee* for Years *aſſigned over his Term*, and there were *divers Meſne Aſſignments*. In Debt for the Rent he ought to *make Mention of all the mean Aſſignments*, and becauſe the Plaintiff could not do it, he was compelled to Diſtrain and Avow for the Rent; for he cannot ſay he let the Land to one whoſe Eſtate the Defendant hath; So it is in Waſte. Cro. E. 22. pl. 5. Mich. 25 Eliz. C. B. Anon.

7. *Treſpaſs* againſt two for breaking his Cloſe, and killing his Fowl *in his free Warren*; the Defendants as to all, but killing the Fowl, plead Not guilty; and as to that they ſay, that the Dean and Chapter of Exeter were ſeiſed in Fee of the Manor of Brampton, of which the ſaid Warren is Parcel, and that they and all whoſe Eſtates &c had *Liberty for themſelves, their Farmers and Tenants, to Fowl in the ſaid Warren*; and that they made a Leaſe of Parcel of the ſaid Mannor to the Defendants, for 21 Years, reſerving Rent, and ſo juſtify as Tenants &c. The Plaintiff replied, De Injuria ſua Propia, upon which they were at Iſſue, and found for the Defendants; it was objected in Arreſt of Judgment, that this Preſcription was unreaſonable, it being for the Dean and Chapter, and every one of their Tenants, and they cannot preſcribe for a *Free Warren in Alieno Solo*. But it was anſwered, that tho' this Preſcription might have been ill upon a Demurrer, yet 'tis well enough after a Verdict; and in this Caſe it is not too general, ſo as that there may not be enough for the Lord; becauſe it is a Profit Apprender in Alieno Solo, and for ſuch a Profit the Tenants of a Manor may preſcribe by a Que Eſtate, excluſive of the Lord. And of that Opinion was the Court, and ſo the Defendant had his Judgment. 3 Mod. 246. Mich. 3 Jac. 2. B. R. Davis's Caſe.

8. Action on the Caſe *by Leſſee for Years of a Corporation*, for being hindred of a *Foot-way* from the Houſe to the Water-ſide, and counted by a Que Eſtate, and had Judgment. 'Twas moved in Arreſt, that a Corporation cannot preſcribe but in him and his Predeceſſors. And that in ſhewing a Que Eſtate it muſt be by *Profert of the Deed*, becauſe it cannot be without Deed. But per. 3 J. contra Doderige J. It was held good notwithſtanding, becauſe the Action is by the Leſſee, who *has not the Deed*, and it is *but a Conveyance to the Action*, which is grounded upon the Diſturbance done to him in Poſſeſſion; But if he had claimed *Rent*, or *Common in Groſs*, which cannot paſs without Deed, it had been otherwiſe. For there he could not ſhew Que Eſtate, without ſhewing the Deed how he came by the Eſtate. Cro. J. 673. Mich. 21 Jac. B. R. Slackman v. Weſt.

Palmer 385. Mich. 21 Jac. B. R. S. C. by Name of Slowman v. Weſt ——— 2 Roll. R. 397. S. C.

9. *Termor* for Years *cannot* declare on a Que Eſtate. 1 Salk. 363. Paſch. 9 W. 3. B. R. Dorne v. Caſhford.

Carth. 422. S. C. by Name of Dawney v. Cathford.

(E) Plead-

(E) Pleadable; How. *Without ſhewing how he came to the* Que *Eſtate.*

As where he pleads Recovery againſt R. by J. Que Eſtate he has

1 IF a Man *pleads ſufficient Matter in Bar by a Que Eſtate which he has*, he need not ſhew How he has his Eſtate. Br. Que Eſtate, pl. 34. cites 7 E. 4. 26. per Markham Ch. J.

; For the Recovery is ſufficient Matter, and *the Que Eſtate is only Conveyance.* Ibid.——*So of Releaſe made to another.* Ibid. —— *And* it is a good Plea *that J. S. infeoff'd W. D.* Que Eſtate he has, and *Iſſue ſhall not be of the Que Eſtate, but of the Feoffment* Ibid.——*But* it is no Plea *to ſay that J. S. was ſeiſed in Fee, Que Eſtate he has*, but he *ought to ſay How* he has his Eſtate. Ibid.

So in Aſſiſe, the Tenant pleaded Feoffment of the Anceſtor of the Plaintiff, made to J. N. in Fee, Que Eſtate he has

2. In Aſſiſe the *Tenant pleaded the Releaſe of the Anceſtor of the Plaintiff, whoſe Heir* &c. *with Warranty to A. B. then Tenant, his Heirs and Aſſigns, which A. dy'd, and his Heir entered, Que Eſtate he has*, and good, without ſhewing How he has his Eſtate, or made Aſſignment, and the other was compell'd to anſwer to the Deed. Br. Que Eſtate, pl. 25. cites 26 Aſſ. 8.

Judgment &c. and the *Plaintiff ſaid that he ought to ſhew How* he has the Eſtate of J. N. Et non Allocatur. Br. Que Eſtate, pl. 40. Aſſ. 30.

3. *Scire Facias of a Fine*, the *Tenant ſaid that the Parties to the Fine had nothing at the Time* &c. *but J. N. was ſeiſed in Fee, Que Eſtate he has, and leaſed to him for Life.* Davers ſaid, where the *Que Eſtate is to one Meſne* &c. there *he ought to ſhew how* D. had the Eſtate, but *not where the Que Eſtate is convey'd to the Tenant in the Action*; But Priſot and all the other Juſtices held it all one, and a good Plea, and no Diverſity. But per Davers, the Diverſity is that where this is convey'd to the Tenant, he need not to ſhew How, becauſe the Demandant by uſing his Writ has affirmed him Tenant, but contra of a Meſne in the Conveyance; & Adjournatur. Br. Que Eſtate, pl. 19. cites 37 H. 6. 32.

4. In Recordare Defendant *avow'd*, the *Plaintiff pleaded in Barr, and bound the Defendant by Deed of one S. Que Eſtate the Avowant has in the Seigniory*, and *did not ſhew How* the Avowant had his Eſtate, and yet good, per Cur. Br. Que Eſtate, pl. 21 cites 39 H. 6. 8.

(F) Pleadable, How; *Without ſhewing Deed.*

1. IN *Aſſiſe of Rent* the *Defendant made Default, by which the Plaintiff ſhewed to the Court that it was of Rent-Service*, and the *Aſſiſe ſaid that the Land was out of the Fee of the Plaintiff, but that the Plaintiff and thoſe, Que Eſtate he has, were always ſeiſed of the Rent, and he ſeiſed*, and the Plaintiff in Aid of the Verdict ſhewed Deed, by which he purchaſed the Rent, but not of the Commencement thereof, and it was awarded that he recover. Br. Que Eſtate, pl. 39. cites 13 Aſſ. 4.

Br. Rents, pl. 23. cites S. C.—— S. P. Br. Que Eſtate, pl. 23. cites 22 Aſſ. 53. & 31 Aſſ. 23.

2. A Man ſhall *not make Title to a Rent of which he and his Anceſtors, and thoſe Que Eſtate* &c. *have been ſeiſed Time out of Mind*, without ſhewing Specialty of the Conveyance. Br. Titles, pl. 33. cites 31 Aſſ. 23.

—— S. P. Br. Que Eſtate, pl. 16. cites 24 E. 3. —— Br. Preſcription, pl. 29 cites 24 E. 3. 23. 39. —— S. P. Br. Monſtrans, pl. 91. cites 22 Aſſ. 53. —— *But* in in Aſſiſe of *Rent*, the *Plaintiff preſcribed in him and his Anceſtors, and thoſe Que Eſtate his Anceſtors had Time out of Mind*, and it was adjudged a good Title, and Error was thereof brought, and the Judg-

ment

ment affirmed, Quod nota, without ſhewing Specialty of the Que Eſtate Brooke ſays the Reaſon ſeems to be inaſmuch as his *Anceſtor had the Eſtate which proved a dying ſeiſed, and Deſcent to the Plaintiff* Br. Que Eſtate, pl. 24 cites 23 Aſſ. 6 —— Br. Titles, pl. 26 cites S. C.

3. *But* it is good Title to the Rent *that he is Lord of the Manor of D. and that he and his Anceſtors, and thoſe, Que Eſtate he has in the Manor, have been ſeiſed of the Rent as Parcel of the Manor Time out of Mind.* Br Titles. pl. 33. cites 31 Aſſ. 23. S. P. Br. Que Eſtate, pl. 23 cites 22 Aſſ. 25. & 31 Aſſ. 23 ——

S. P. Br. Monſtrans, pl. 91. cites 22 Aſſ. 23. And ſays the Reaſon why Rent may be claimed by Que Eſtate without ſhewing Deed, where it is claimed as Parcel, or appendant to the Manor or Land is, becauſe the Manor or Land may paſs by Livery without Deed, and then the Rent goes with it. —— *No* Preſcription for *Common Appendant, Eſtovers appendant*, and the like, *or* in *Acquittal againſt a Lord*, and thoſe Que Eſtate the Lord has in the Seigniory &c. is good without ſhewing Deed. Br. Que Eſtate, pl. 16. cites 24 E. 3 —— Br. Preſcription, pl. 29. cites 24 E. 3. 23. 39.

4. It is a good Title *that he and all the Lords of the Manor* of D. *have been ſeiſed of the Rent* Time out of Mind. Br. Titles, pl. 33. cites 31 Aſſ. 23.

5. A Man cannot convey to *Rent, Advowſon, Common* &c. *which lies in Grant only* by Deed, without ſhewing Deed; Contra of Land, and Things which may paſs without Deed. Br. Que Eſtate. pl. 36. cites 18 E. 4. 10. per Littleton. Br. Monſtrans, pl 122. cites S. C.

For more of Que Eſtate in General, ſee Preſcription (Y) Replevin, and other proper Titles.

Quia Timet.

Quia timet. *Relief.* In what Caſes.

1. A Warrantiæ Chartæ, or a *Writ of Meſne* may be brought before the Party take Loſs. Hob. 217. in the Caſe of Crookhey v. Woodward.

2. Suits Quia Timet only are *proper in Law and Equity*; It is at Law of a *Warrantia Chartæ*; in Equity, as where A. grants a *Rent Charge* of 100l. per Annum in Fee, and deviſes to B. for Life, Remainder to C. in Fee, and dies; C. exhibits his Bill to compel the Tenant for Life to pay the Arrears, elſe all will fall on the Remainder, and this has been decreed; and the firſt Cauſe about *Contribution* was between and where A. had Mortgaged the Manor of Guildford for 2500 l. and then deviſed to B. for Life, Remainder to C. in Fee, C. preferred his Bill to force B. to pay his Share of the Mortgage Money, and decreed accordingly, and there have been 20 Caſes ſince of the like Nature. Chan. Caſes. 223. Hill. 25 Car. 2. in the Caſe of Hayes v. Hayes.

3. A. granted 2 ſeveral Leaſes to B. B. aſſigns 'em to C. in Conſideration of a *Bond* of 300 l Penalty, *to pay B. 20 l. per Annum* for Life, and all the Rent, as it ſhould grow due, to A. The Rent was 150 l. in Arrear to A. and *the Leaſe forfeited* thereby, and A. entered; but on Payment of the Arrears by C. and his ſilling up the Leaſe, A. in the Fine allowed C. the full Value, notwithſtanding the Forfeiture. C. ſug-

ged in his Bill a *Danger of Eviction, by reaſon of a ſecret Truſt* for the Children of B's former Wife; But B. offering to indemnify C. againſt the Claim of the Children, tho' they had exhibited a Bill concerning the Premiſes, the Court decreed Payment of the Arreats of the 20 l. per Annum to B. and to continue Payment, B. giving Security to indemnify C. to be approved by the Maſter. Fin. R. 49. Hill. 25 Car. 2. Powell Morgan and Crofts.

4. There is no Inſtance of a *Prohibition*, Quia Timet. Arg. Vent. 313. Trin. 29 Car. 2. B. R. in the Caſe of Baker v. Baker.

5. Money brought into the Exchequer was embezzell'd, the *ſucceeding Remembrancer*, fearing a Sequeſtration, brought his Bill againſt the Executor of the former, and a Demurrer to the Bill was diſallowed, and that the Plaintiff might proceed in Chancery. Chan. Caſes. 300 Mich. 29 Car. 2. Ayloff v. Fanſhaw.

Before the Day of Payment. Per Sir Tho. Powis Arg. G. Equ. R 69.

6. At any Time after the Money becomes due on the original Bond, though the *Surety* is not troubled or moleſted for the Debt, This Court will decree the Principal to diſcharge it, though the Surety has a *Counterbond*. Per Ld Keeper. Vern. 190. Mich. 1683. in the Caſe of Ranelagh v. Hayes.

7. *Covenant was to ſave Harmleſs* from Payment of the Rent to the Crown, Plaintiff ſuggeſted that he was ſued in the Exchequer, but it was not charged in the Bill here, or proved there, that the Rent was behind, yet decreed in Specie, and the Maſter to tax Damages. 2 Chan. Caſes. 146. Mich 35 Car. 2. Ranelagh v. Hayes.

(B) Quia Timet. *Actions* in Nature of it.

And *if in Precipe* quod reddat the *Tenant* makes one who enters into the Warranty, and cannot bar the Demandant, by which he has Judgment againſt the Tenant, and the Tenant over in Value, the Tenant ſhall not have in Value till the Demandant has had Execution. Ibid.

1. WHERE *a Man recovers in Precipe* quod reddat *by Default, he ſhall not have Writ of Right, nor Quod ei deforceat till the Tenant has entered.* Br. Petition, pl. 26. cites 5. E. 4. 118.

Nor *Ne injuſte vexes till the Lord diſtrains*, which two laſt Caſes were *denied* afterwards, and that a Man ſhall have them before his Vexation; *Quia timet.* Ibid.

2. A Man *ſhall not have a Curia Claudenda till he be damnified.* Br. Petition, pl. 26. cites 5 E. 4. 118.

The *Surmiſe of Damages* in the *Curia Claudenda*, nor of the *Diſtreſs* in the *Ne injuſte vexes* is not traverſable. Ibid.

3. Where a Man recovers upon falſe Verdict, *Attaint* does not lie till Execution be ſued; *Contra*, in *Writ of Error*. Br. Petition, pl. 26. cites 5 E. 4. 118.

And Writ of *Deſire* lies likewiſe,

4. Writ of *Warrantia Chartæ* lies before Damages and Recovery Pro Loco & Tempore. Br. Petition, pl. 26. cites 5 E. 4. 118.

Quia timet diſtringi Ibid.—— *And after Return awarded in Replevin* the Plaintiff may have ſecond Deliverance, before Return be made to the Defendant. Ibid.

5. A. ſells a Thing to B. with Warranty to pay for it at a Day to come, if the *Thing ſold is corrupt*, the Party may have his *Action of Deceit before the Day of Payment*, becauſe it is in A's Power to bring his Action. Arg. Brownl. 122. Trin. 11 Jac. in Caſe of Freeman v. Smith; cites 9 H. 7.

Quid

Quid Juris clamat.

(A) Lies *againſt whom.*

1. QUid Juris clamat does not lie againſt *Tenant in Tail after Poſſibility* of Iſſue extinct, tho' it be but an Eſtate for Life in Effect. Br Quid Juris clamat, pl. 1. cites 43 E. 3. 1. Br. Attornment, pl. 12. cites S. C.

2. If the *Tenant dies after Grant of the Reverſion by Fine, where the Remainder was over to another for Life, before which he attorns*, the Grantee never ſhall have Action of Waſt, nor Diſtreſs for the Rent; for it was his own Folly that he had not ſued a Quid Juris clamat, and ſhall not have it now againſt him in Remainder, as where the Remainder was over for Life, the Reverſion to the Leſſor. Per Moile and Aſhton. Br. Quid Juris clamat, pl 21. cites 34 H. 6. 6.

3. Where a Man *leaſes for Life*, the *Remainder for Life*, and after *grants the Reverſion by Fine*, and the *Tenant for Life or Grantee dies before Attornment*, if *he in Remainder for Life attorns*, it is good; but he is not compellable by this Writ. Per Choke; and therefore it ſeems that Quid Juris clamat does not *lie againſt any but againſt him, who was Tenant at the Time of the Note levied.* Br. Quid juris clamat, pl. 21. cites 34 H. 6. 6.

(B) *Writ* good, and *Proceedings.*

1. IN Quid Juris clamat the Proceſs is *Diſtringas ad attornandum.* Br. Proceſs, pl. 137. cites 21 E. 3. 1.

2. Quid Juris clamat *by 4, by Reverſion granted to them and the Heirs of the one*, and the *one of them who had nothing but for Life died pending the Writ*, and the *Tenant pleaded it; Judgment of the Writ*, and upon good Argument, becauſe nothing is to be done but Attornment, which may be made to the Survivors, and alſo becauſe he who died had nothing but for Term of Life; therefore the Writ was awarded good. Br. Quid Juris clamat, pl. 5. cites 43 E. 3. 32.

3. Quid Juris clamat againſt two, the Sheriff *return'd that the one is a Clerk, and has nothing in Lay Fee*, and the other anſwer'd that he is Sole Tenant, Judgment of the Writ, and yet Diſtringas iſſued againſt him who was returned Nihil in the ſame Land; for Iſſue cannot be taken in the Abſence of the other. Brook ſays, Quod vide Grand Miſchief for the other, who is Tenant in Fact, as to the Iſſues return'd; but he may attorn, if he will. Br. Proceſs, pl. 52. cites 34 E. 3. 20. Br. Quid Juris clamat, pl. 12. cites S. C. And they would not come to the Law in this Action.

4. In Quid Juris clamat *by* 2, if the *one is Nonſuited*, yet the *other ſhall take the Effect Attornment*, and the *other ſhall not be ſevered*, and the *Fine ſhall be ingroſs'd of the whole.* Br. Quid juris clamat, pl. 2. cites 43 E. 3. 32. Contra if for there the one ſhall be ſevered, and ſhall not ſue forth; as to the Writ varies from all others. Br. [illegible]

5. *Where Fine is levied*, the *Quid Juris clamat ought to be [illegible] before it is ingroſſed*; for after the Ingrofling no Quid Juris clamat lies, and then he S. P. And [illegible] to be

ingroſs'd when the Chirographer makes Indentures of the Fine, and delivers them to the Party to whom the Conuſance is made, and after that the Conuſee ſhall not have Quid Juris clamat againſt the Tenant for Life. F. N. B. 147. a.

he ſhall not puniſh the Waſt, nor make Avowry without having Attornment, which cannot be compell'd without Writ of Quid Juris clamat. Br. Quid Juris clamat, pl. 14. cites 22 H. 6. 13. Per Newton & Cur.

(C) Pleadings.

* The Courſe now is to admit the Defendant in Quid Juris clamat, or Per que Servitia, to make Attorney after a Plea pleaded, eſpecially where he pleads ſuch a Plea that he ſhall forfeit his Eſtate, if it be found againſt him &c. then it is clear that he ſhall make Attorney after the Plea pleaded. F. N. B. 147. (A)

1. QUid Juris clamat *againſt a Feme as Tenant in Dower*, who *ſaid as to Parcel that ſhe held for Term of Life of the Leaſe of one T. who alleged himſelf to acquit and to warrant*; Judgment, if *without confeſſing the Warranty and Acquittal* ſhe ought to attorn. Green ſaid, You hold in Dower as the Note ſuppoſes, Priſt, and the others econtra; and as to the reſt She ſaid that ſhe held in Dower, and that the Plaintiff had purchaſed the Reverſion for Term of Life only, whereas we have Warranty againſt the Grantor, who has Aſſets to render to us in Value; Judgment if to you we ought to attorn; and of this Plea the Court took Day to adviſe, and upon ſuch Iſſue the Feme may *make * Attorney* by Bill. Br. Quid Juris clamat, pl. 13. cites 21 E. 3. 48.

2. In Quid Juris clamat the *Tenant, viz. K. ſaid, that Fine was levied to D. for Life, the Remainder to K. for Life, the Remainder to the right Heirs of the ſaid D.* and that *D. granted to K. by the Deed which he ſhew'd, that he might cut and fell the Trees at his Pleaſure*; and after *D. died*, and *J. his Heir granted by Fine to the Plaintiff*, and ſaving the Advantage of the Deed, he is ready to attorn. And per Cur. This is a good Grant; for tho' D. cannot have Action, becauſe he has only for Term of Life in Poſſeſſion, yet if K. dies, then a Fee ſhall be veſted in him; and therefore he may alien the Fee by Feoffment in the Life of K. But per Thorp, contra of Releaſe. Br. Quid Juris clamat, pl. 16 cites 24 E. 3. 32.

Quid Juris clamat to attorn *upon a Fine levied of the Reverſion of the Tenant for Life*, the *Tenant pleaded that before the Note levied the Conuſor by the Deed which he ſhew'd, had releaſed to him and his Heirs all his Right*, Judgment ſi Actio. Belk. offer'd to aver that *he held for Term of Life*, as the Note ſuppos'd, & non Allocatur; upon which he *ſaid that he held of the Conuſor for Life the Day of the Note levied, abſque hoc, that he releaſed before the Note*, Priſt, and admitted for a good Plea, *without ſaying expreſsly Not the Deed of the Conuſor*; for he has denied it, for a Stranger may deny a Deed, whereupon the Iſſue was received, and the Tenant alleg'd the Deed at L. and the other pray'd Viſne where the Land is, & non Allocatur, but was of L. and Proceſs was made againſt the Witneſſes, as it was ſaid. Br. Quid Juris clamat, pl. 3. cites 44 E. 3. 34.

3. In Quid Juris clamat, the *Tenant ſaid that the Conuſor gave to him in Tail by the Deed &c.* Judgment if he ought to attorn, and *ſhew'd the Deed*; the *Plaintiff ſaid that the Tenant held for Term of Life*, as the Note ſuppoſes, Priſt, & non Allocatur; upon which he *ſaid further abſque hoc, that the Conuſor gave in Tail*, & non Allocatur. Finch ſaid, You ſhall anſwer to the Deed, as that Riens paſſa by the Deed, or the like, upon which he *ſaid that the Tenant held for Term of Life, as the Note ſuppoſes, abſque hoc that the Conuſor gave by the Deed prout* &c. Priſt, and the others econtra; and ſo note, that he was compell'd to *anſwer to the Deed, and yet a Stranger*. Br. Quid Juris clamat, pl. 11. cites 38 E. 3. 20.

4. Quid Juris clamat *againſt Baron and Feme upon the Ter[illegible] a Fine, which was, that where the Defendant held for Term of [illegible] Years, of the Grant of J. and which after the Term to him ought to revert, he attorn to the Plaintiff* &c. (And ſo ſee that it is admitted to lie [illegible] Years as upon a Leaſe for Life;) the *Defendant ſaid, that [illegible]*

ſeiſed, and leaſed to him for 8 *Years, and died, and the Tenements deſcended to S. and W. who releaſed to the Defendant in Fee, abſque hoc that the Conuſor had any Thing in the Tenements the Day of the Note levy'd*; and a good Plea, without ſhewing that he was ſeiſed at the Time of the Fine; for this is prov'd by the Plea, and is not * double, viz. that the Releaſe ſhall give Fee, and that the Conuſor had nothing; for the one is the Plea and the other is the Traverſe. Br. Quid Juris clamat, pl. 9. cites 3 H. 4. 3.

* Orig is (dd') and ſo are all the Editions of Brook, but it appears by the Year-Book that it ſhould be (Double.)

5. In Quid Juris clamat the *Defendant claim'd Fee*, and the *Plaintiff maintained that he held for Term of Life the Day of the Note levied, abſque hoc that he was ſeiſed in Fee the Day of the Note levied*; and it was ſaid, that in the Books ſuch Iſſue has been received, and in ſome Books the Tenant ſaid that he was ſeiſed in Fee, abſque hoc that he held for Term of Life prout &c. Br. Quid Juris clamat, pl. 20. cites 1 H. 7. 27.

Quid Juris clamat *againſt Baron and Feme, who demanded the View of the Land, and were cuſted*, whereupon they *ſaid that at the Time of the Fine levied they were ſeiſed in Fee*; and this is no Plea, *without anſwering if they held for Life, or not*; for it is only Argument, upon which they *ſaid, abſque hoc that they held for Term of Life the Day of the Note levied.* And a good Plea per tot. Cur. quod nota, *without ſhewing how they were ſeiſed in Fee.* And per Littleton, If it be found that they have only for Term of Life, they ſhall loſe the Land, becauſe they claim'd Fee. Br. Quid Juris clamat, pl. 15. cites 15 E. 4. 28.——Br. Quid Juris clamat, pl. 22. cites S. C.

For more of Quid Juris clamat in General, See **Attornment**, and other Proper Titles.

Quod ei * Deforceat.

* Deforciare is a Word of Art, and cannot be expreſs'd by any other Word; for it ſignifieth to withhold Lands or Tenements from the right Owner, in which Caſe either the Entry of the right Owner is taken away, or the Deforceor holdeth it ſo faſt, as the right Owner is driven from his Real Præcipe, wherein it is ſaid, Unde A. eum injuſte Deforceat, or the Deforceor ſo diſturbeth the right Owner, as he cannot enjoy his own. Co. Litt. 331. b.

1. *Weſt.* 2. *cap.* 4. 13 *Ed.* 1. ENacts, That *when Tenant in Dower in Frank-marriage, by the Courteſy, for Life or in Tail, loſe their Land by Default, and the Tenant is compell'd to ſhew his Right, they may vouch the Reverſioner, if they have Warranty; and then the Plea ſhall paſs betwixt the Tenant and the Warrantor, according to the Tenor of the Writ by which the Tenant recovered by Default; and ſo from many Actions they ſhall report to one Judgment, viz. That the Demandant ſhall recover that Demand, and the Tenant ſhall go quit.*

By this Statute, in Place of a Writ of Right, a Quod ei Deforceat is given to Tenant in Dower, in Free Marriage for Life and in Tail, upon loſing by Default.

(A) *Lies for* whom, *and againſt whom.*

1. IF *Tenant for Life loſes* his Land *in a Ceſſavit* brought againſt him *by Default*, yet he ſhall have a Quod ei deforceat by the Statute of Weſtminſter 2. F. N. B. 156. (A) cites H. 5 E. 3. & M. 9 E. 3.

2. Quod ei deforceat was brought *by the Feme, who pretended to be Tenant in Dower, who loſt by Default in Scire facias, where her Baron was not Party to the Loſs.* And ſo ſee that it lies *for him who was not Party to the Loſing;*

Loſing; And Per Belk, it lies *againſt one who was not Party to the Loſing*. Br. Quod ei deforceat, pl. 3. cites 41 E. 3. 30.

3. Quod ei deforceat was brought *by two* Men *as Heirs in Tail in Gavelkind*, which they claim'd to hold to them and the Heirs of their Bodies iſſuing; And awarded good, notwithſtanding that they cannot have Iſſue of their Bodies. Br. Quod ei deforceat, pl. 5. cites 46 E. 3. 21.

S. P. 2 Inſt 351. 4. If two *Coparceners, Tenants in Tail*, loſe their Land by Default, they *ſhall join* in a Quod ei deforceat; and yet the Default of the one is not the Default of the other. F. N. B. 155. (H) cites M. 46 E. 3.

5. If *Tenant for Term of Life, or* Tenant *in Tail* be diſſeiſed, they may have Quod ei deforceat as well as upon Recovery by Default, for the *Statute of Weſtminſter* 2. *gives it upon Recovery by Default*; but there *was a Quod ei deforceat at Common Law*, and be it *upon Diſſeiſin or Recovery by Default, all is one*; for *neither* the *Writ nor the Declaration make Mention of any Recovery*. Br. Quod ei deforceat, pl. 1. cites 33 H. 6. 46.

If the *Huſband and Wife* be *ſeiſed* of Land *in the Right of the Wife for the Life of the Wife*, 6. If a Man be *ſeiſed in Jure Uxoris*, and *another recovers againſt him by Default*, and the Baron dies, the Feme ſhall have a Cui in Vita, and not Quod ei deforceat. Br. Quod permittat. pl. 9. cites 2 E. 4. 11.

and they loſe the Land in a Præcipe quod reddat by Default, yet they ſhall have a Quod ei deforceat &c. F. N. B. 156 (A)

So if a *Woman loſe by Default*, and *taketh Huſband, ſhe and her Husband ſhall have* the Quod ei deforceat. F. N. B. 155. (F)

Ibid. in the new Notes there. (b) ſays, S. P. 44 E. 3. 43. accordant; but it is doubted 11 E. 3. & 16 E. 3. For by Pulton [illegible] Right, the Feoffee cannot tender Suit and deraign &c.

7. The Quod ei deforceat lies *againſt a Stranger to the Recovery*; if a Man recovers by Default, and makes a Feoffment, the Quod ei deforceat ſhall be brought againſt the *Feoffee*. F. N. B. 155. (F)

2 Inſt. 352. Lord Coke ſays, It may be brought againſt the [illegible] Words of the Statute are indefinite; and unleſs the Writ [illegible] could not have the Effect of his Suit, viz. The Reſtitution [illegible] pl. 5. cites 41 E. 3. 5. S. P.

S. P. 2 Inſt. 351. 8. *If Tenant in Tail loſes* by Default, and dies, his *Heir ſhall not* have the Quod ei deforceat, *but a Formedon*; for that is his Writ of Right F. N. B. 155. (F)

A Tenant for Term of Life makes Default in Præcipe, whereupon 9. If *Tenant by Receipt upon the Default of Tenant for Life* appears, and is received, and pleads, and afterwards *loſes by Action tried*, yet the *Tenant for Life ſhall have* a Quod ei deforceat; for the Judgment is given againſt him by his Default. F. N. B. 156. (B)

he in Reverſion is received, and pleads to Iſſue, and it is found againſt the Tenant by Receit, and Judgment is given for the Demandant, the Tenant ſhall have a Quod ei deforceat; for albeit there is a Verdict given, yet the Judgment is given upon the Default. 2 Inſt. 351.

S. P. But if the Tenant vouches, and the *Vouchee appears and enters into the Warranty, and* afterwards *loſes by Default*; 10. If the *Tenant for Life* in Præcipe *vouches*, and the *Vouchee will not appear*, by reaſon whereof the *Tenant loſes by Default*, he ſhall have a Quod ei deforceat by the Statute of Weſtminſter 2. albeit the Judgment be not given for the proper Default of the Tenant; for the Statute ſays, Per Defaltam generally, and not Per Defaltam ſuam. 2 Inſt. 351.

now if the Tenant loſe by the Default of the Vouchee, he ſhall not have a Quod ei deforceat, becauſe *he ſhall have Judgment to recover over in Value againſt the Vouchee*, for the Default of the Vouchee, ſo as he ſhall have Recompence; but if the Vouchee doth not appear, but makes Default, then he ſhall loſe the Land by the Default of the Vouchee; but that is not the Default of the Tenant, and therefore Quære of that Caſe. F. N. B. 156. (B)

(B) Lies

(B) Lies *in what Caſes, and when.*

1. FEME brought Writ of *Dower againſt Tenant for Life of the Rent, and recover'd by Default*, and the *Tenant for Life who loſt by Default brought Quod ei deforceat againſt the Tenant in Dower, and recover'd by Default*; upon which the Tenant in Dower *brought another Quod ei deforceat*; and ſo ſee Quod ei deforceat upon Quod ei deforceat, and that upon Recovery by Default in Quod ei deforceat, he who loſes may have another Quod ei deforceat. Br. Quod ei deforceat, pl. 13. cites 13 E. 1. and Fitzh. Voucher 286. 2 Inſt. 351. cites S. C.

2. Attaint lies *upon Recovery by Default in Aſſiſe*, and therefore it ſeems that Quod ei deforceat does not lie upon ſuch Recovery by Default; for it is by Jury, and not properly by Default. Br. Quod ei deforceat, pl. 14. cites 17 E. 3. and Fitzh. Attaint 69. See the Margin of pl. 4.

3. Quod ei deforceat was brought *upon Recovery in Aſſiſe againſt the Heir of him who recover'd*, and *he vouch'd to Warranty W. N. and pray'd that for his Nonage the Parol demur*, and *the Voucher ſtood, but the Age was oyſted*; becauſe he could not have had his Age in the firſt Action. Brooke ſays, And ſo ſee that it lies upon Recovery in Aſſiſe, and that the *Tenant may vouch in this Action, and* alſo the *Demandant* may vouch *by the Statute of Weſtminſter 2, cap. 4. De ſi eſſet Tenens*; but he ſays, It ſeems that this is after that the Tenant has maintain'd the Title of his firſt Writ, and pleaded the Recovery; and he wonders that it lies *upon Recovery in Aſſiſe*, for this is by Jury, and not by Default. Br. Quod ei deforceat, pl. 4. cites 44 E. 3. 42. S. P. 2 Inſt. 352. cites S. C.

4. In Waſte it was ſaid, That *upon Writ of Inquiry of Waſte*, if the *Defendant loſes the Land waſted*, he may have Quod ei deforceat. Per Hank. To which there was no Anſwer. But Brooke ſays, The Law ſeems to be contrary; for there it was agreed per tot. Cur. That Attaint lies, and the Party may challenge; and therefore this is a *Recovery by Verdict, and not by Default*, and then Quod ei deforceat does not lie. Br. Quod ei deforceat, pl. 7. cites 2 H. 4. 2.— But the Challenge is deny'd 21 H. 6. But Per Newton and Paſton J. there, and Markham and Portington Serjeants, Attaint lies. Ibid. In an Aſſiſe and in Waſte tho' the Tenant makes Default, yet there is a Verdict given, and upon that Verdict the Judgment is given in both Caſes, and therefore there no Quod ei deforceat lies. 2 Inſt. 351. — F. N. B. 155. (E) S. P. — S. P. Ow. 101. Paſch. 33 Eliz. C. B. Elmer v. Thatcher.— Cro. E. 263. S. C. — And 271. pl. 279. S. C.

5. If *Tenant in Tail*, or Tenant in *Dower*, or by the *Courteſy*, or for Term of *Life*, *loſe* their Lands *by Default in a Præcipe quod reddat* brought againſt them where they *were ſummoned according to Law* &c. then they have no other Remedy but this Writ of Quod ei deforceat. F. N. B. 155. (B) The Regiſter is, That this Writ for Tenant by the *Courteſy* is by Equity of the Statute of Weſtminſter 2. *But if* the *Tenant in Tail, or ſuch* other Tenant who hath a particular Eſtate, *loſe by Default where he is not ſummoned* &c. then he may have a Writ of Diſceit or a Quod ei deforceat, as he pleaſeth. F. N. B. 155. (D)

6. If a Man *loſe* any Land *by Default in a Writ of Right in a Court Baron*, he may remove that Record into C. B. and then have a Quod ei deforceat upon that Record; and ſo he ſhall have a Quod ei deforceat, altho' he do not remove the Record; But then it ſeemeth that the Quod ei deforceat ſhall be ſued in C. B. or in the Court-Baron, where he loſeth the Land, as he pleaſeth; Tamen quære. F. N. B. 155. (E)

7. In a Præcipe quod reddat if the *Tenant for Life, or in Tail appear, and* after *depart in Deſpite* of the Court, he ſhall loſe his Land, and yet *But* if Tenant in Tail, or Tenant

he

for Life, after the Mise joined in a Writ of Right depart in Deſpite of the Court, he ſhall loſe his Land, and there he ſhall not have a Quod ei deforceat, becauſe Judgment final ſhall be given againſt him in that Caſe. F. N. B. 155. (I) — S. P. 2 Inſt. 351.

he ſhall have a Quod ei deforceat; for that Recovery is by his Default, becauſe he did not appear when he was demanded. F. N. B. 155. (I)

8. If *A. & B.* be *ſeiſed of Lands, and to the Heirs of A.* and a Recovery is had againſt them by Default, *A. ſhall have a Writ of Right* of his Moiety, *and B. a Quod ei deforceat* upon the Statute of Weſt. 2. and when they recover, they ſhall be Jointenants again. 2 Inſt. 351.

9. Upon a *Nihil Dicit* no Quod ei deforceat lies. 2 Inſt. 351.

10. *Though* the *Demandant* in the Quod ei deforceat *after* the *Recovery pleaded cannot vouch*, yet the Quod ei deforceat is maintainable. 2 Inſt. 352.

11. If *Recovery* by Default be *in ſuch an Action where no Voucher lies*, yet the Quod ei deforceat is maintainable. 2 Inſt. 352.

As if the Judgment by Default be *in* a * *Scire Facias* brought *upon* a *Recovery or Fine, or in* a *Writ of Entry, or* in the *Quibus* brought againſt the Diſſeiſor himſelf, there lies no Voucher, and yet a Quod ei deforceat is given by the Stat. of Weſt. 2. upon ſuch a Recovery by Default. 2 Inſt. 352.— * S. P. Br. Quod ei deforceat, pl. 3 cites 41 E. 3. 30. —— S. P. And if the Recovery was in B. R. then he may ſue the Quod ei deforceat in C. B. F. N. B. 155. (G)

(C) *Writ* and *Pleadings*, and *Judgment*.

1. IF Lands are *given to Baron and Feme in ſpecial Tail*, the *Remainder to the Baron in Tail*; and after the *Feme dies without Iſſue*, and after the *Baron loſes by Default in Præcipe quod reddat*, he *ſhall have* Quod ei *deforceat, quod clamat tenere ſibi et Heredibus de Corpore ſuo*; For the firſt Tail was determined by the Death of the Feme without Iſſue, and then the Baron being in Effect but Tenant for Life by the *firſt, this now ſhall merge in the Remainder*; And therefore the *ſecond Tail was executed at the Time of the Recovery* by Default. Br. Quod ei deforceat. pl. 11. cites 5 E. 3, 4. per Middleton.

2. It was agreed that in Quod ei deforceat the *Writ ſhall not mention of whoſe Gift it was, though it be Quod clamat tenere ſibi et Heredibus de Corpore ſuo exeuntibus*; Contra in Cui in Vita. Br. Quod ei deforceat, pl. 6. cites 48 E. 3. 8.

S. P. 2 Inſt. 351. cites S.C. —— S. P. per Danby Br. Quod ei deforceat, pl. 9 cites 2 E. 4. 11. — In the Quod ei deforceat the Demandant counted that he was ſeiſed for Life, or in Tail, without ſhewing of whoſe Leaſe or Gift, for that the Action is brought of his own Poſſeſſion, and alledges the Eſplees in himſelf, and that

3. In Quod ei deforceat it was agreed, That the *Writ nor the Count did not make mention of any* * *Record or Recovery*; and Needham ſaid, That in Wales it is uſual in Quod ei deforceat to count in Nature of what Action he will [in a Plea of Land] quod nota, by Cuſtom there; and after the *Tenant pleaded that there is not any Record, by which it may appear that the Tenant ever recovered the Land againſt the Demandant by Default*, Et hoc &c. And a good Plea, per Danby, Moile, and Needham, tho' the Writ nor the Count do not make mention of any Recovery, becauſe the Action is given by the Statute upon Recovery by Default, where no ſuch Action was at Common Law; But Aſhton, Chock, and Davers contra, and that it is no Plea, and Ne deforceat pas is no Plea in this Action, per Cur. and after Aſhton agreed with Danby, Moile, and Needham; For it was agreed, That *no Quod ei deforceat was at Common Law*; quod nota. Br. Quod ei deforceat. pl. 9. cites 2 E. 4. 11.

4. And after the *Tenant pleaded Nul tiel Record* &c. as above *to one Foot of Land*, and the *Demandant demurred* upon it, and he *pleaded to the reſt, that F. was ſeiſed &c. and infeoffed the Tenant and J. S. the Baron, and the Demandant, and J. S. died, and this Tenant ſurvived, and the Demandant, as his Feme, claimed Dower, and entered upon him, and the Tenant ouſted her* &c. Quære of this Plea. Ibid.

5. An

5. And after it was said Anno 10 E. 4. that he *shall say that there is no Record or Recovery, by which it may appear that the Land was recovered by Default against the Demandant; For it may be that he lost by Default by Writ of Right in Court Baron, which is not any Record, and yet this is a Recovery by Default*; which see Anno 10 E. 4. 2. Ibid.—— Br. Quod ei deforceat, pl. 10. cites 10 E. 4. 2. and says it is a good Plea by the Opinion of the Justices.

and the th. Demandant has deforced him without making any Mention of the Record, and to the Tenant was d for the

Right of the Demandant &c. and either shew how he recovered against the Demandant by Formedon, or other real Action; and in the Purclose of his Plea shall say, 'That Ipse paratus est ad hoc ut recordum Jus & Titulum suum prædict' per Donum prædict' &c. unde petit Judicium, whereby the Defendant in the Quod ei deforceat is become Actor, and in Effect revives the former Action, and the Demandant in the Quod ei deforceat is become in Manner of a Tenant to the former Action, and may vouch as if he were Tenant to the former Action, because if he hath but an Estate for Life, it is not safe for him to plead in chief but to vouch him in the Reversion; therefore he can vouch no other but him in the Reversion; or if the Defendant notwithstanding, upon the Title of the former Recovery, plead to the other Bar, then the Demandant in the Quod ei deforceat shall not vouch at all, because the former Action is not revived; And if the Defendant plead the former Recovery, the Demandant may traverse the Title, or plead any thing in Bar of the Title. 2 Inst. 351, 352.

* In Quod ei deforceat the Tenant said, That the Demandant did not shew Record; Judgment; Prout allocatur; For it lies *without shewing Record*; wherenpon he challenged that the Writ did not lie for the Baron; Et non allocatur, upon which he demanded the View, and was outed; For the Suit is general; Quod nota. Br. Quod ei deforceat. pl. 3. cites 41 E. 3. 35.

6. Quod ei deforceat *against one by two*, and the *Tenant pleads as to that which belonged to the one, a Recovery had against both, the Title of which Writ he is ready to maintain*, and demanded Judgment if as to him Action &c. *and as to that which belonged to the other he should Rebut* &c. and it was debated if he shall have both, because the Recovery goes to all, Quære. Br. Quod ei deforceat, pl. 8. cites 36 H. 6. 29.

7. In Quod ei deforceat the *Demandant vouched a Stranger*, and 3 Questions arose, If he shall shew Cause, or if he shall vouch him who has nothing in the Reversion, or if he shall recover in Value, or that it be only in Lieu of Aid Prayer; Per Frowicke he *shall not shew Cause*, as appears by the Statute, *nor vouch a Stranger* by Reason of the said Statute, and he *shall recover treble Value*; For inasmuch as this Statute gives Voucher, he shall have that which appertains to the Voucher. Br. Quod ei deforceat. pl. 16. cites * 14 H. 7. 10.

Br. Voucher pl. [illegible] cites [illegible] In Quod ei deforceat the [illegible] [illegible] [illegible] [illegible] [illegible] Br.

Quod ei deforceat, pl. 15. cites 15 H. 7. 29.—— 2 Inst. 352. S. P. cites S. C. & 50. E. 3. 25.—— Nor by the Words of the Statute of Westm. 2 cap. 4 can he vouch any other besides *Tenant by the Right*. 2 Inst. 352.—— 11 Rep. 62. b in Dr. Foster's Case.

The *Tenant and Demandant may both vouch* within the Act of Westm. 2 by reason that it gives Voucher, and by Consequence he shall recover in Value. 2 Inst. 352.—— * This should be 15 H. 7. 12. b. pl. 1.

8. It is *not of Necessity that the Defendant* in the Writ of Quod ei deforceat do *plead the former Recovery*, but he may plead any other Bar. 2 Inst. 352

As the Tenant pleads [illegible] Judge [illegible] [illegible] [illegible] [illegible]

gainst the Demandant; quod nota. Br. Quod ei deforceat, pl. 9. cites 2 E. 4. 11.—— In Quod ei deforceat the *Tenant may plead in Bar*, as in other Precipe quod reddat, or may plead Recovery at his will, and *if the Tenant pleads Recovery, then may the Demandant say that the Statute of Gloucester*, here *Contra*, if *another Bar* is pleaded, *and not Recovery*, and 6 Prima Facie it is no Plea in Quod ei deforceat to plead *Nul tiel Record*; For it may be founded upon other Cases, but after Recovery pleaded a Nul tiel Record *is a good Plea*, Per Littleton for Law, which saying none denied nor affirmed. Br. Quod ei deforceat. pl. 11. cites 33 H. 6. 46.—— Br. Voucher. pl. 11. cites S. C.

9. G. and M. his Wife *brought a general Writ appointed by the Statute of Glouc.* 12 E. 1. *et Rutland*, called Quod ei deforceat, against the Defendant for Lands in Cardiganshire, *and made Protestation to prosecute it in Form of a Quod ei deforceat at Common Law*; And this was for one Messuage, 20 Acres of Land &c. which J. S. gave to M. and the Heirs of her Body; And that the Defendant deforced them, and *declares, That* the said *J. S. was seised in Fee, and gave the Lands to M. in Tail, and that he married G. the Demandant, and that the Defendant detains*; *the Tenant pleaded* in Abatement of the Writ, *That* Quod ei deforceat was

Writ formed by the Statute Weſtm. 2. cap. 4. which was ſubſequent to the Statute of Rutland, and therefore *the Demandants ought to have brought a ſpecial Writ* of Quod ei deforceat, *according to the Statute of Weſtm.* 2, and not a General Writ according to the Statute of 12 E. 1. And Judgment was there given that the Writ ſhould abate, whereupon G. and his Wife brought a Writ of Error; And per Cur. that Judgment was reverſed; For that this General Writ of Quod ei deforceat is good; And they all agreed that ſince the Statute of Rutland appoints ſuch General Writ Pro Placito Terræ, and directs a ſpecial Proteſtation to ſue it, it ſhall not be extended only to Actions which were at Common Law, or to any Statute before, 12 *Ed.* 1. but alſo Actions given by any ſubſequent Statutes, and therefore it *extends to a Quod ei deforceat given by the Statute Weſtm.* 2. therefore the Judgment in Wales being reverſed, a Rule was made that the Tenant ſhould plead next Term. Jo. 380. pl. 12. Hill. 11 Car. B. R. Griffith v. Lewis.

Quod Permittat.

(A) *Lies, In what Caſes.*

1. PRæcipe quod reddat was brought *of a Bailiwick*, and well, and yet properly a Quod Permittat lies of ſuch a Thing. Br. Demand, pl. 43. cites 34 E. 1. and Fitzh. Brief, 855.

F. N. B. 123. (F) — Quod Permittat lay always of *Common*, be it Common *certain*, *or uncertain*, and not Precipe quod Reddat; But *Præcipe quod reddat lies of Paſture for* 20 *Beaſts*, but not of Common for 20 Beaſts, per Fitzherbert; note the Diverſity. Br. Quod Permittat, pl. 1. cites 27. H. 8. 12. —— And *Præcipe does not lie of Common certain againſt Perſon of it*, any more than againſt Tenant of the Soil. Br. ibid.

2. Of *Common of Paſture* Quod Permittat lies. Br. Demand, pl. 42. cites 4 E. 2. and Fitzh. Brief 792, 793.

3. If a Man ought to Grind, and has uſed Time out of Mind to *Grind Toll free at the Mill of D.* and the *Miller takes Toll*, Action lies Vi et Armis; but if the Tenant of the Franktenement of the Mill takes Toll, in ſuch Caſe there lies a Writ of Quod Permittat, Br. Quod Permittat, pl. 5. cites 41 E. 3. 24. — And with this agrees 44 E. 3. quod nota, that is to ſay, of the Action Quare Vi et Armis.

4. A Quod Permittat ipſum Reducer' *curſum Aquæ* &c. which is *miſturned*, will well lie. F. N. B. 124. (D).

(B) Lies; *For* and *againſt whom.*

1. QUOD Permittat lies againſt the *Owner of the Water of a Paſſage over the Water.* Br. Precipe, pl. 39. cites 4 E. 2. and Fitzh. Brief 793.

2. It

2. It lies of *Common of Paſture*, *Turbary*, *Piſchary*, and *reaſonable Eſtovers*, againſt a Diſſeiſor of a Diſſeiſin made (by him and his Anceſtors) to the Plaintiff, or his Anceſtors, and not in other Degree; becauſe (†there) he ought to have a Writ in the Debet & Solet. F. N. B. 123. (H.)

† So the French Original is.

3. An *Abbot* may have a Writ of Quod Permittat of a Diſſeiſin made unto his Predeceſſor, and ſhall make mention of the Diſſeiſin in his Writ. F. N. B. 123 (H.)

4. *Tenant in Tail* ſhall have a Quod Permittat. F. N. B. 124. (B.)

5. A Man ſhall have a Quod Permittat againſt the *Tenant of the Freehold for an Act done*, or a Diſturbance done *by a Stranger*, who was not Tenant of the Soil. F. N. B. 124. (E.)

(C) *Writ, Proceſs,* and *Pleadings.*

1. THE Biſhop of Wincheſter brought 4 Writs of Quod Permittat againſt the Abbot of Hide, Quod Permittat W. Epiſcopum *Reducere curſum Talis Aquæ*, in Soka Winton quem T. nuper Abbas de Hide, Predeceſſor dicti Defend. duxerit ad Nocumentum liberi Tenementi ſui in S. Winton. And counted that whereas he had the Courſe of Water, which Courſe run directly *to his Mills* in S. the Abbot has miſturn'd the Courſe of the Water, ſo that the Mills, which uſed to grind ſo many Quarters of Bread Corn, and ſo many of other Corn, by the Day and Night, now cannot grind but only &c. and *counted divers Counts in the Writs*; and *in the one* Writ, becauſe the Plaintiff counted *that it was turn'd in his own Time*, *Ad Nocumentum liberi Tenementi ſui*; The *Defendant ſaid that there was none miſturn'd in Time of the Plaintiff, nor any T. Abbot of H. in your Time*; Priſt; and after he held him to the one, that is to ſay, that it was not miſturn'd in the Time of the Plaintiff, and becauſe the Biſhop could not deny that there was no Turning of the Water in his Time, and had counted *Ad Nocumentum liberi Tenementi ſui* &c. which *ſhall be intended in his own Time*, therefore the Writ was abated by Award, quod nota; and after, in the other Writs, he demanded the View, and had it; quod nota. Br. Quod Permittat, pl. 3. cites 2 H. 4. 13.

2. In Quod Permittat the Proceſs after Appearance is *Diſtringas ad Reſpondend.* Br. Proceſs, pl. 28. cites 2 H. 4. 14.

It was ſaid, that if the *Defendant makes Default after Appearance* in Quod Permittat, yet the Plaintiff ſhall not have *Diſtreſs to anſwer to the Default, but* to anſwer *to the Party only*; quod nota. Br. Quod Permittat, pl. 2. cites 42 E. 3. 9.

3. In Quod Permittat *Judgment by the ſecond Default* ſhall be given *to recover*, per Paſton. Br. Quem Redditum reddit, pl. 1. cites 9 H. 6. 21.

4. When *Common of Paſture* is claimed in the Land of any Perſon certain, then the *certain Number of Cattle are not put in the Writ* &c. but it is Habere Communiam in N. and ſo many Acres of Wood &c. quam habere Debet, ut Dicit &c. F. N. B. 123. (G.)

5. In a Quod Permittat of a Common the Tenant alleged *Darrein Seiſin* in the Plaintiff, and it was adjudged a good Plea to abate the Writ. But there the Plaintiff counted of the Seiſin of his Anceſtor; For a Man ſhall have a Quod Permittat of his own Seiſin, as it ſeemeth. F. N. B. 124. (C)

6. The *Proceſs* in a Quod Permittat *is Summons, Attachment, and Diſtreſs, and if* the *Sheriff* at the Summons *return Nihil*, the *Plaintiff may pray* a *Capias*, and have it. F. N. B. 124. (F) cites H. 39 E. 2.

Quo

Quo Minus.

(A) In what Cafes.

S. C. cited. Arg. Hard. 501. Paſch. 21 Car. 2 in Scacc. in Caſe of Caſtle v. Litchfield. — *So the Prior of W. to whom the King had leaſed certain Poſſeſſions for a Rent, was impleaded in the Exchequer for the Farm thereof Arrear to the King*; and he came and *ſaid, That the Prior of B. had a certain Perſion which was Arrear by 40 Years, and pray'd Writ to the King*, (which ſeems to be Quo Minus) *that he might come and anſwer it to the King in Part of the Payment, who* came and *ſaid, That this is a Franktenement, and a Choſe in Action*; and that this Writ does not lie but where one can prove Debt to the King, or Debt to him who is Debtor to the King, and of which the King may have Writ of Debt; Judgment if the Court will take Conuſance. But Belk. Contra, and ſo he relinquiſh'd it. Br. Quo Minus, pl. 1. cites 44 E. 3. 44.

1. A *Prior Alien was* made to come into the Exchequer *to anſwer to the King of his Farm*, and ſaid, *That J. N. held Part of his Goods, without which he could not ſatisfy the King*; upon which *Writ was granted* him to make him come *Ad reſpondendum tam nobis dicti prior'*. Kirk ſaid, He ought to anſwer at the Common Law to Action brought by the Prior; And Skip. [awarded him to] anſwer; for *of all that which touches the King, and may turn to the Advantage of him to haſten his Buſineſs*, this Court ſhall take Conuſance; quod nota; whereupon the Defendant anſwer'd, and claim'd them as Tithes, and the other as his Tithes &c. Br. Quo Minus, pl. 4. cites 38 Aſſ. 20.

Br. Nonability, pl. 9. cites S. C.

2. A *Monk profeſs'd, Farmer of the King, or a Feme Covert Farmer of the King, her Baron exil'd, may ſue* at Common Law in the Exchequer; and this ſeems to be *by Quo Minus*, for the Monk was ſent to the Exchequer. Br. Quo Minus, pl. 2. cites 2 H. 4. 7.

Br. Action ſur le Caſe, pl. 29. cites 2 H. 4. 11. S. C. Per Markham.

3. If *I have Eſtovers in another's Land*, and the *Tenant cuts or abates all the Wood*, I ſhall have Quo Minus. Br. Quo Minus, pl. 3. cites 2 H. 4. 9.

* *But* Quo Minus lies in the Exchequer *for him who is indebted to the King*

4. The *Debtor of the King* may have Quo Minus *for his own Debt* to pay the King, *but* he can *not* have Quo Minus *of the Debt which is due to him as* **Executor to another*, for the King cannot have thereof Execution for his Debt. Br. Quo Minus, pl. 5. cites 8 H. 5. & Fitzh. Breſe 891.

againſt the Executors of his Debtor upon Simple Contract by Common Uſage. Per Davers. Br. Quo Minus, pl. 10. cites 11 H. 7. 26.

(B) Pleadings.

1. A Prior *Farmer of the King was appealed in the Exchequer to anſwer the King of his Debt*, and *ſaid, That J. S. was indebted to him, without which he could not ſatisfy the King*; and pray'd Proceſs againſt him, and had it; and he was awarded to anſwer; quod nota. Br. Quo Minus, pl. 6. cites 38 Aſſ. 20.

2. If a *Monk Farmer of the King* be *impleaded for the Debt of the King*, and the *Abbot not named*, the Suit ſhall abate if the *Monk be not named Farmer*

Farmer of the King; and if ſo, then well; and ſuch Farmer may have Quo Minus againſt his Debtor. Br. Quo Minus, pl. 7. cites 2 H. 4. & Fitzh. Nonability 18.

3. The King had *granted the Temporalties of a Prior Alien to a Monk rendring Rent*, and to account in the Exchequer, and the *Monk maintain'd Writ of Debt in his own Name without his Abbot* againſt his Debtor in the Exchequer, *Quo minus Debitum ſuum Regi ſolvere non potuit* &c. and well maintainable; And Dixon Clerk of the Pipe ſaid, That he had 20 ſuch Actions in the Pipe. Br. Quo Minus, pl. 8. cites 8 H. 5. & Fitzh. Nonability 29. Perk. 3. S. 5. cites H. 8 H. 5. 6 S. C.

4. A Man *ſhall not wage his Law* in Quo Minus. Br. Quo Minus, pl. 5. cites it as agreed for Law. M. 34 H. 6. Brooke ſays, and ſo it was ſaid for Law in the Time of H. 8. and accordingly Fitzh. tit. Ley. 10 E. 3. and there Caſe 66. Anno 8 H. 5. the Debtor of the King brought Quo Minus in the Exchequer upon Contract, and the Defendant was ouſted of his Law for the Advantage of the King. Br. Ibid.

For more of Quo Minus in General, See Prerogative and other Proper Titles.

Rape.

(A) *What* is or ſhall be ſaid to be Rape, *and of what Perſons*; And *Puniſhment* thereof &c.

1. RAPE *is* when a Man hath Carnal Knowledge of a Woman by Force and againſt her Will; and Rapere, to Raviſh, ſignifies as ſuch as *Carnaliter cognoſcere*, and cannot be expreſs'd in legal Proceedings by other Words. 2 Inſt. 180. Co. Litt. 123 b. 124. a. S. 190. — And tho' there be Emiſſio Seminis, yet if there be no Penatration, viz. Res in Re, it is no Rape; for the Words of the Indictment are, Carnaliter cognovit &c. 3 Inſt. 60. cap. 11. —— Hawk. Pl. C. 108 cap. 41. S. 1. S. P. ſays, It muſt proceed to ſome Degree of Penetration to make it amount to a Rape, but that it is ſaid however, That Emiſſion is prima facie an Evidence of Penetration.

2. 3 *E.* 1. *cap.* 13. *The King prohibiteth every Perſon to raviſh, or take away by Force, any Maid within Age, altho' by her own Conſent, or any Wife or Maid of full Age, or any other Woman againſt her Will; and if any one will ſue ſuch Offenders within* 40 *Days, the King will do common Right; but if none ſue within* 40 *Days, the King will ſue, and the Offender, being convicted, ſhall ſuffer* 2 *Years Impriſonment, and be fined at the King's Pleaſure; and if not able to pay his Fine, ſhall ſuffer longer Impriſonment according to his Treſpaſs.* Rape was * *Felony at Common Law*, for which the Offender was to ſuffer Death, but before this Act the Offence was made leſs, and the Puniſhment chang'd, viz. From Death to the *Loſs of his Members* whereby he offended, viz. His Eyes and his Teſticles; ſo that at the making this Act, it was not Felony. And in thoſe Days, if the Offender, in the Appeal brought by her that was raviſhed, had been condemned by the Country, he ſhould without any Redemption loſe his Eyes and his Privy Members, *unleſs ſhe that was raviſhed demanded him for her Husband before Judgment*, and which was only in the Will of the Woman and not of the Man; And the ſaid Puniſhment of Loſs of Members continued till the making of this Act, which was on Purpoſe to make it puniſhable by Fine and Impriſonment at the Suit of the King unleſs ſhe ſhould purſue her Remedy within the 40 Days mentioned in the Act. 2 Inſt. 180, 181 * S. P. 3 Inſt. 60. cap. 11. —— St. Pl. C. 21. b. 22. cap. 14.

3. 13 *E.* 1. *cap.* 34. Enacts, That * *if one ravish a married Woman, Maid, or other, who does not consent neither before nor after, he shall have Judgment of Life and Member.*

* This Clause is intended of an *Appeal* to be brought *by the Party ravished*; for if she consent either before or after, she shall have no Appeal, which otherwise she may have; and there is no Law which gives a Woman an Appeal of Rape but this. And hereby the ancient Law concerning the Election given to her that is ravished is taken away. 2 Inst. 433. cap. 34. — But for more of Appeal of Rape, See (Appeal.)

So if a Man ravish a married Woman, Lady, Damosel, or other, altho' she consent after, he shall have like Judgment, if attainted at the King's Suit, and the King shall have the Suit.

4. 6 *Rich.* 2. *cap.* 6. Enacts, That *where any Woman shall be ravished, and afterwards * consent to the Ravisher, both the Ravisher and Ravished shall be disabled to have or challenge any Inheritance, Dower, or Joint Feoffment after the Death of their Husbands or Ancestors, and the next of Blood respectively shall have Title immediately after the Rape, to enter upon the Lands of the Ravisher and Ravished; and the Husband of such Woman, if she have any, and if no Husband, the Father or next in Blood shall have the Suit against such Offenders.*

* This is intended of a *free* Consent, and *not by Terror*, Doubt, or Duress. Br. Parliament &c. pl. 55. cites 5 E. 4. 6. and says, Quod nota the reasonable Intendment thereof. — Dalt. Just. cap. 160 ——— This extends not to a Feme Infant under 12 Years of Age, because at such Age she is without Discretion. Pl. C. 304. a. in the Case of Stowel v. Zouch.

5. Indictment, That J. N. such a Day and Year, at D. in the County of M. *Ad. S. Felonice cepit, & eam tunc & ibidem Carnaliter cognovit contra voluntatem suam* &c. Per Laken, Billinge, and the best Opinion, because it is not Felony but by *Statute*, which *wills, That if a Man ravishes a Dame or Damsel* &c. therefore *it ought to be Quod Rapuit*, and *not* only Quod *Cepit*. Br. Indictment, pl. 7. cites 9 E. 4. 26.

But it is a good Plea in Appeal of Rape, That the Appellee before the Time of the Ravishment supposed *kept and used her as his Concubine*. St. Pl. C. 24. a. cap. 14. cites Bracton. ——— Dalt. Just. cap. 160. S. P. And in the Margin of the last Edition 366. it is said, That 1 Hale's H. Pl. C. 631. is contrary.

6. Rape may be committed upon one who before *had been a Whore*; for Licet Meretrix fuerit ante, certe tunc temporis non fuit, cum Nequitiæ ejus reclamando Consentire noluit. St. Pl. C. 22. b. cap. 14. cites Bract. lib. 2.

Dalt. Just. cap. 160 cites S. C. — And there in the Margin of the last Edition is cited 1 Hale's Hist. Pl. C. 628. That this is no Exception at this Day.

7. If the Feme at the Time of the supposed Rape *conceives with Child* by the Ravisher, this is no Rape; for no Woman can conceive, unless she consents. St. Pl. C. 24. a. cap. 14. cites Britton, fol. 45.

One of 60 Years of Age was arraign'd 22 Jac. for the Rape of a Girl of 7 Years old and no more, and was found Guilty by apparent Evidence of divers Women, and a Surgeon, and of the Damself herself, and was Hang'd D. 304. pl. 51. Marg. Anon.

8. W. D. was indicted for the Rape *of a Girl of 7 Years old and no more*, setting forth Quod ipsam Felonice Rapuit & Carnaliter cognovit. Upon Not Guilty pleaded, he was found Guilty; but the Court doubted whether a Child of that Age could be Ravished; if she had been 9 Years old she might; for at that Age she may be Endowed. Dyer 304. pl. 51. Mich. 13 & 14 Eliz. Anon. ——The Doubt in the Case before mentioned was the Cause of making the following Act for the plain Declaration of the Law. 3 Inst. 60. cap. 11.

M. P. was indicted at Newgate Sessions for

9. 18 *Eliz. cap.* 7. Enacts that *the Benefit of Clergy is taken away from such Offenders as shall be guilty of Rape. And it is further declared, That if any Person shall unlawfully and carnally know and abuse any Woman Child under the*

the Age of 10 *Years, he ſhall be adjudged Guilty of Felony without Benefit of Clergy, whether it be done with the Conſent of ſuch Child or not.*

See Circumſpicio vir one

A. W. an Infant under the Age of 10 Years; And becauſe upon Evidence to the Jury at his Arraignment it was *not* proved that he *entered into the Child's Body*, (but the contrary) altho' he very much had abuſed her, the Jury would not find him Guilty of the Felony; whereupon, by Advice of Juſtice Jones and Juſtice Berkley, who heard the Evidence, and conceived it a foul Fact and fit to be puniſhed, an Indictment of Battery for abuſing the ſaid Infant, in lying with her, was preferr'd and found; and he was thereupon tried this Term at the Bar, and being found Guilty, was charged for the Miſdemeanor to be committed to Priſon, there to abide during the King's Pleaſure, to be *fined* 200 *Marks*, to *ſtand upon the Pillory* in Chancery-Lane in Middleſex, near the Place where the Fact was committed, with a Paper upon his Head ſignifying the Cauſe, and to be *bound with able Sureties to the good Behaviour during Life*. Cro. C. 332. pl. 17. Mich. Anno 9 Car. in B. R. Martyn Page's Caſe.

10. In Conſpiracy for a Rape, it *muſt be laid* that there was *Recens proſecutio*, otherwiſe it will argue a Conſent; and therefore, becauſe the Defendant did not indict the Plaintiff for the Rape in convenient Time after the Rape ſuppoſed to be done, but concealed it for *half a Year*, and then would have preferr'd an Indictment, it was held to be Falſe and Malicious. Godb. 444. pl. 511. Mich. 4 Car. in the Star-Chamber. Taylor v. Tomlins.

Bracton ſays, That immediately after the Fact ſhe ought to make Hue and Cry at the neighbouring Towns, and ſhew the Marks of Violence to Perſons of Reputation at leaſt. St. Pl. C. 22 a. cap. 14.——Hawk. Pl. C. 108. cap. 41. S. 3. ſays, It is a ſtrong, but not a concluſive Preſumption againſt a Woman, That ſhe made no Complaint in a reaſonable Time after the Fact.

11. A Woman went for her Husband to a Bailiff's Houſe, and being ſhewed the Rooms by one Sarah Blandford, in the Company of Leeſing who lodg'd in the Houſe, the ſaid Blandford lock'd them in a Chamber, and went away laughing, and then Leeſing raviſh'd her. The Evidence was Mrs. May the Woman herſelf, who cried out, and no Body came to her Aſſiſtance, and when the Door was open ſhe immediately complained of the Injury; but the Evidence for the Priſoner was, That *immediately after* ſhe came down Stairs *there was an open Familiarity betwixt her and the Priſoner*, and therefore it could not reaſonably be intended that they ſhould have a Difference ſo lately, which concerned his Life; and tho' a Woman cannot be raviſh'd by one Man without ſome extraordinary Circumſtances of Force, yet the Jury found them both Guilty; but they were both pardon'd. 2 Neſſ. Juſt. 93. Tit. Rape, cites 1 Geo. 1. May v. Leeſing.

12. If a Man takes away a Maid by Force, and *raviſhes her, and after* ſhe gives her Conſent, and *marries him*, yet it is a Rape. Dalt. 366. cap. 158.

Serjeant Hawkins ſays, It is ſaid, That the *Sheriff cannot inquire* of Rape, *as of Felony*, becauſe it is made a Felony by the Statute of Weſtm. 2. 34. by which it is enacted, That he who raviſh'd a Woman, ſhall have Judgment of Life and Member; but if this Statute had only repealed the 13th of Weſtm. 1. (by which this Offence, which was a Felony at Common Law, was made a Treſpaſs only) it ſeems that it would have reſtored the Juriſdiction of the Sheriff's Torn over it as a Felony, becauſe then it would have been a Felony by the Common Law again; *but* now it being a Felony only by the Statute, it is inquirable *as a Treſpaſs only* in this Court. 2 Hawk. Pl. C. 66. 67. cap. 10. Sect. 52.

For more of Rape in General, ſee **Appeal**, and other proper Titles.

Ratihabitio.

(A) Ratihabitio or Ratification, the *Effect* thereof.

1. OMnis Ratihabitio *retrotrahitur, & Mandato ſive Licentiæ æquiparatur.*

He who *commands a Treſpaſs to be done, or agrees to a Treſpaſs, Entry* &c. *done to his Uſe* by any, not any Acceſſary. Br. Treſpaſs, pl. 113

2. If a *Bailiff ſeiſes a Beaſt for a Heriot where none is due*, and the Lord agrees to the Seiſure and takes the Beaſt; he is a Treſpaſſor ab Initio, and Trover or Treſpaſs lies againſt him. Cro. E. 824. pl. 25. Paſch. 43 Eliz. Biſhop v. Lady N[illegible]ntague.

without his *mmand*, is a Principal Treſpaſſor; for in Treſpaſs there is [illegible]es 38 E. 3. 18.

Br. Juſtification, pl. 14. cites 7 H. 4. 23. S. P.

He who *diſtrains as Bailiff of a Corporation, and is not Bailiff*, may make Conuſance &c. if they agree to it, and good without Deed

3. Treſpaſs for Beaſts taken contra Pacem; the *Defendant juſtified as Bailiff of the Lord for Service in Arrear*; and the *Plaintiff ſaid, that he was not Bailiff* of the Lord *Tempore Captionis*, and *gave in Evidence that the Defendant took them claiming Heriot for himſelf, and ſo could not be as Bailiff* of the Lord *at the Time &c.* And after the Jury charged, Gaſc. ſaid, That if the Defendant at the Time of the taking claimed for Heriot to himſelf, notwithſtanding the Lord agrees after, that for Service to him due Defendant ſhall be Bailiff, this ſhall not excuſe the Treſpaſs; but if he had taken for the Lord without his Command, and the Lord agrees after, this is ſufficient, tho' he was not his Bailiff before; quod quære inde; for if he was *once a Treſpaſſor without Authority, the Agreement after cannot aid*; for an Action was veſted before. Br. Treſpaſs, pl. 86. cites 7 H. 4. 34.

Per Cur. And the Caſe was, that one of the Corporation diſtrain'd in Right of the Corporation, and had not their Deed; nota. Br. Corporations, pl. 2. cites 26 H. 8. 18. ——S. P. And ſo of another Man; for it is not traverſable whether he was Bailiff or not, if the other to whoſe Uſe &c. agrees. Br. Traverſe per &c. pl. 3. cites 26 H. 8. 8.

Diſtreſs is *made* by one *as Bailiff* who is not ſo, yet if after he, in whoſe Right he does it aſſents to it, he ſhall not be puniſh'd as a Treſpaſſor; for that *Aſſent* ſhall have Relation to the Time of the Diſtreſs taken. Per Anderſon Ch. J. Godb. 109. 110. pl. 129. Mich. 28 & 29 Eliz. C. B. Anon. cites 7 H. 4.—S. C. 2 Le. 196. Anon ——Roll R. 46. Trin. 12 Jac. B. R. S. P Lee v. . . . . cites 7 H. 4. 34 —But if the Diſtreſs be made of the Stranger's own Head, and *not as Bailiff or Servant*, he cannot in an Action brought againſt him, excuſe himſelf by ſaying he did it as Bailiff or Servant; for once he was a Treſpaſſor, and his Intent was manifeſt. Per Anderſon Ch. J. Godb. 110.

If the Diſſeiſin was *with Force*, the Force is only in J. S. the Coadjutor; but if B.

4. If J. S. *diſſeiſe A. to the Uſe of B.* who knows nothing of it, and B. aſſents to it; in this Caſe J. S. was Tenant of the Land till the Agreement of B. and afterwards B. is Tenant; but both J. S. and B. are Diſſeiſors. Co. Litt. 180. b.

agrees ſpecially to the Diſſeiſin with Force, then perhaps B. ſhall be guilty of the Force alſo. Per Dyer & Weſton J. Mo. 53. pl. 155. Paſch. 5 Eliz. Anon.

If *a Servant diſſeiſes* A. 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. Woolmore.——Keilw. 116. pl. 54.

S. P. Or I may charge him as a

5. If one *receives my Rents* without my Privity, I may have an Account againſt him; for by my Conſent afterwards I make a *Privity*.

Per

Per Manwood. Ow. 83. 84. Mich. 14 & 15 Eliz. in Caſe of Tottenham v. Beddingfield. Diſſeiſor. 12 Mod. 385. Paſch. 12 W. 3. B. R. in Caſe of Pullen v. Purbeck—cites B. R. Account 22.

6. In Conſideration of 10 *l. given by A.'s Wife to J. S.* the ſaid *J. S. promiſed the Wife* to marry her Daughter, or elſe to repay the 10 l. In Aſſumpſit by the Husband and Wife it was objected that the Payment by the Wife was void, and conſequently the Promiſe; but held that the Agreement of the Baron made the Promiſe good to the Husband, ab Initio. Cro. E. 61. Mich. 29 & 30 Eliz. B. R. Pratt & Ux. v. Taylor.

7. *Entry* made *by a Stranger of his own Head*, having no Right or Intereſt, ſhall be good *to avoid a Fine*, if made and afterwards aſſented to within the 5 Years 9 Rep. 106. a. in Dodger's Caſe. The Reporter cites it as reſolv'd Mich. 38 & 39 Eliz. in Lord Ludley's Caſe; and that of ſuch Opinion were all the Juſtices of Serjeant's Inn in Fleet-ſtreet, tho' an Aſſent after the 5 Years was held by them not to be ſufficient. Contra to Br. Entre Congeable, pl. 123. 31 H. 8. Co. Litt. 245. a. S. 401. cites S. C.—Ibid. 258. a. S. P. and ſeems to intend S. C. And ſays the Reſolution was grounded upon Conſtruction of the Statute of 4 H. 7. cap. 24.

8. If before the Statute a Man had *written* down the Words of a *Nuncupative Will* without the Deviſor's Conſent, and afterwards he had read it to the Deviſor, and the Deviſor had agreed to it; this had been as good as if wrote by his own Appointment, and had paſs'd Lands ſo deviſed. See Cro. E. 100. pl. 3. Trin. 30 Eliz. B. R. Nath v. Edmonds.

9. An Aſſent after *to a Battery* formerly done, or *to a Fact puniſhable by Statute*, as an Aſſent to a Riot or a Forcible Entry after it be done, ſhall not make a Man puniſhable. Cro. E. 824. pl. 25. Paſch. 43 Eliz. in Caſe of Biſhop v. Lady Montague.

10. If A. and B. as Servants to C. without C.'s precedent Appointment do ſeiſe the Goods of D. and the ſaid C. *approve* of the Seiſure, If A. and B. *abuſe the Goods*, tho' without his Conſent, yet C. ſhall be Treſpaſſor Ab Initio. Lane. 90 Hill. 8 Jac. in the Exchequer. Gibſon's Caſe.

11. If A. is bound to pay Money at Coventry, and *a Stranger unknown* to him *pays* the Money, and he *agrees* to it, by this he ſhall be diſcharged. Per Coke Ch. J. 3 Bulſt. 149. Mich. 13 Jac. in Caſe of Moorwood v. Dickens. So if a Stranger in the Name of the Mortgagor, or his Heir, (without his Conſent or Privity) *tenders the Mortgage Money, and the Mortgagee accepts it*, this is a good Satisfaction; and the Mortgagor, or his Heir, agreeing thereto, may re-enter into the Land. But they may diſagree to it if they will. Co. Lit. 206. b. 207. a.

12. The *Maſter's Receipt of Money for counterfeit Jewels, ſold by his Factor*, joined with his precedent Command to ſell them, ſhall charge himſelf; For an Aſſent ſubſequent, without any Command precedent, ſhall charge him as to his own Act. Arg. Cro. J. 470. Hill. 15 Jac. B. R. in Caſe of Southern v. How.—Cites 2 H. 7. 17. 2 H. 4. 18.

13. An Agreement afterwards will not make an *Arreſt* good. Per Haughton J. Godb. 360. pl. 452. Trin. 21 Jac. B. R. in Caſe of Randal v. Harvey.

14. A. came to M. in the Abſence of her Husband, and *promiſed her*. The Husband declared that A. aſſum'd to him, and it was adjudg'd that by the Agreement *of the Husband* afterwards made the Aſſumpſit became good to the Husband. Arg. Godb. 361. pl. 453. Trin. 21 Jac. B. R. in Caſe of Seignior v. Woolmore.—Cites 27 H. 8. Jordan v. Tartam.

15. When the *Servant promiſes for the Maſter*, that the Maſter ſhall forbear to ſue &c. and ſhall by ſuch a Day deliver the Bond to the Defendant &c. and Defendant promiſes to pay the Money at ſuch a Day, and the *Maſter agrees* to it upon Notice, 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. Godb. 361. in Caſe of Seignior v. Woomore.

Sid. 132. S. C. by Name of Benskin v. French.

16. If one *Promiſe to a Bailiff Ex Parte quer.* that if he would permit the Priſoner to ſtay all Night at the Houſe of him that made the Promiſe, he wou'd ſee the Priſoner forthcoming, or pay the Debt, The Aſſent of the Plaintiff afterwards is ſufficient to make the Promiſe good; and his bringing the Action proves the Aſſent. Lev. 98. Paſch. 15 Car. 2. Benſon v. French.

So if one *enter into an Office*, he ſhall be looked upon as Bailiff of the right Owner, if he pleaſe;

17. In many Caſes where one *enters by Colour of Authority without any Right*, yet, if it be for the Good of him that has Right, he may make that Colourable Right or Act good; *As* if one enter *upon an Infant*, he may *charge him as Guardian*, *or bring Diſſeiſin* at his Pleaſure. Arg. 12 Mod. 363. Paſch. 12 W. 3. B. R. in Caſe of Pullen v. Purbeck.

For if he, to whom a Wrong is done, will take it as no Wrong, the Wrong-Doer ſhall not have Power to hinder himſelf from being charged as one having lawful Title or Authority; and his own Acceptance was ſo binding, that tho' it were all evicted after, yet he had no Remedy. 12 Mod. 363. In Caſe of Pullen v. Purbeck.

So in an Account for *Money received to Plaintiff's Uſe* Defendant ſhall not be admitted to ſay that he is a Wrong-Doer; and therefore ſuch an Action will not lie againſt him. 12 Mod. 363. in Caſe of Pullen v. Purbeck.

18. A Precedent *Aſſent* of the Plaintiff will excuſe an *Eſcape* ſuffered by the Sheriff, but an Aſſent ſubſequent will not; and therefore he has either his Remedy againſt the Sheriff, or may retake the Party. 1 Salk. 271. Mich. 4. W. & M. B. R. Scott v. Peacock.

19. *Executor aſſents to a Receipt by a Stranger* of Money due to the Teſtator; this is as an Appointment, and diſcharges the firſt Debtor, and the Executor's bringing his Action againſt the Stranger for Money had and receiv'd to his Uſe is an Aſſent. 6 Mod. 131. Trin. 3 Ann. B. R. Jenkins v. Plombe.

As to the Effect of a *ſubſequent Aſſent*, with Regard *to Forcible Marriages*, See Marriage (H. a.) The Queen v. Swanſon, & Al.

For more of Ratihabitio in General, See **Actions** (Z) pl. 10, 11. **Treſpaſs**, and other proper Titles.

Rationabili Parte Bonorum.

(A) *Good*; What is. And *what Actions* lie thereof, and when.

F. N. B. 122. (L)

1. ACTION of Rationabili Parte Bonorum *lies by the Common Law and is a Common Law throughout the Realm for Femes and Infants againſt the Executors of the Father.* Br. Rationabili Parte, pl. 6. cites F. N. B. & Lib. Intrationum, in the Writ de Rationabili Parte Bonorum, and Fitzh. Detinue 52. 30 E. 25.

2. *Diſtinc-*

2. *Detinue* was brought by T. B. of certain Goods, and *ſhewed that the Uſage of Suſſex was, that when the Father died poſſeſſed of* certain *Goods* and Chattles *inteſtate*, that *his Heir ſhall have his reaſonable Part of them*; and that his Father died inteſtate, being poſſeſſed of certain Goods and Chattles, which came to the Hands of the Defendant. And it was argued, if it be a reaſonable Cuſtom or not; Morris ſaid, ſuch Cuſtom has been *allowed in Eyre* &c. Br. Rationabili Parte, pl. 4 cites 39 E. 3. 9 10.

3. A Feme brought a *Writ of Detinue of the Moiety of the Goods of her Baron* for her reaſonable Part by the Cuſtom, and the Defendant was compelled to anſwer to it. Br. Rationabili Parte, pl. 3. cites 21 H. 6. 1. 2.

3. The younger Son brought a Writ De Rationabili Parte Bonorum againſt his Father's Executor, and *counted of the Cuſtom in the County of N. And ſhew'd all ſpecially*, and the Concluſion was, *that he detain'd particular Goods of the Plaintiff, which appertained to him as his Part* and Portion: And upon *Non Detinet* pleaded it was found that the Plaintiff was entitled 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. The Queſtion was, Whether a Rationabili Parte Bonorum was *within the Statute of 21 Jac. of Limitations*, and it was adjudged for the Plaintiff, that it was not. 1ſt. Becauſe this Action is an Original Writ in the Regiſter, and it is not mentioned in the ſaid Act; and tho' the Iſſue is Non Detinet, yet *this is no Action of Detinue*, for a Writ of Detinue lies not for Money, unleſs it be in Bags; but a Rationabili Parte Bonorum lies for Money in Pecuniis numeratis, as in the Book of Entries, Rationabili Parte Bonorum; And this Action lies not before the Debts be paid; And the Reaſon is, that thereby it might be known for what it ſhould be brought, and this in many Caſes requires longer Time than the Statute gives. 2dly. Statutes are not made to extend to thoſe Caſes which ſeldom or never happen, as this Caſe is, but to thoſe that frequently happen; alſo this Statute tolls the Common Law, and ſhall not be extended in Equity. And upon all theſe Reaſons the Court gave Judgment for the Plaintiff. Hutt. 109, 110. Trin. 6 Car. Shervin v. Cartwright. F N B. 122. (L in the Notes, cites S. C. For that the *Writ* is *not Dolet, but Detinet.*

5. The Cuſtom of London is good againſt a *Deed of Truſt to the Uſe of a laſt Will.* Ch R. 84. 10 Car. 1. Nott v. Smithies.

(B) Count and *Pleadings.*

1. DEBT was brought *by the Baron and Feme, upon the Cuſtom of the County of Northampton, againſt the Executors of the Father of the Feme to have her Portion of the Goods of her Father, becauſe ſhe was not advanced by her Father*; and the *Defendant ſaid, That ſhe was married in the Life of her Father, and by her Father*, and the others e contra. Caſley ſaid, *Not ought to ſay* that ſhe was married *and had a reaſonable Advancement of the Goods of her Father*; Upon which the Executors ſaid, That ſhe was married by her Father, and had a reaſonable Advancement, Prift; And after the Iſſue was taken, Whether ſhe was advanced by her Father, or not? Br. Rationabili Parte, pl. 8. cites 3 E. 3. & Fitzh. Dette 156.

2. *Detinue* was brought *by a Feme againſt the Executors of her Baron of the Moiety of the Goods of her Baron, becauſe he had no Children, and counted upon the Cuſtom of the Realm*; and therefore it ſeems that it is a Common Law. Br. Rationabili Parte, pl. 7. cites 31 E. 3. & Fitzh. Reſponder 6 & 15. 17 E. 3. 9 & 76. 30 E. 3. 25. Ibid. & M. 30 E. 3. 21. he counted upon the Cuſtom of the Realm alſo; And M. 30 H. 6. In Rationabili Parte Bonorum againſt Executors Cateſby demanded [illegible] *[illegible]* of

the Court; for the *Cuſtom is there, That if the Baron dies*

Ibid. p. 95. the Feme *counted upon the Uſage*, but *did not ſay of the Realm nor of the Country or County*; But it ſeems that the *Moiety is not by the Common Law, but the third Part.* Br. Ibid.

without Iſſue, the Feme ſhall have the Moiety of the Goods; *and if he has Iſſue, but a 3d Part after the Debts and Funeral Expences paid*; and the Feme Plaintiff has demanded the Moiety, and *has not alleg'd, That the Baron dy'd without Iſſue*; and by favour of the Juſtices it was amended. Per Danby, The Plaintiff has as good Title to have thoſe Goods as to have Land at Common Law. Then Catesby demanded Judgment of the Count, becauſe ſhe has *claimed by Cuſtom, and has not ſhewed that it continued.* Br. Rationabili Parte, pl. 5. cites 7 E. 4. 20, 21

By Magna Charta 18. Debt for the King ſhall be levied of the Goods &c. and the Surplus to the Executors, to perform the

3. Rationabili Parte by a Daughter, and counted *by Cuſtom of the Vill of W. That Sons and Daughters ſhould have a reaſonable Part of the Goods of the Father*; and the *Defendant ſaid, That ſhe has the Reverſion of* 10 *l. Land per Ann. by Deſcent from the ſame Father, which ſhe may ſell to marry her, and ſo ſhe is ſufficiently advanced*; Judgment &c. Thorp ſaid to the Defendant, You have accepted an Action which is againſt Law; and Per Mombray, The Lords in the Parliament do not grant that the Action is maintainable. Br. Rationabili Parte, pl. 2. cites 40 E. 3. 38.

Will of the Deceaſed, Salvis tamen Uxori & Pueris ejus Rationabilibus partibus ſuis; And ſee alſo that the Writ De Rationabili Parte Bonorum is by the Common Law by theſe Words (Salvis &c.) And it was ſaid for Law, Mich. 31 H. 8. That this has been often put in Ure as Common Law, and never demurr'd to; and therefore it ſeems to be the Common Law. Ibid. pl. 6 — Br. N. C. 387. Anno 31 H. 8. pl 164. cites S. C.

In Rationabili Parte Bonorum *againſt 3 Executors* the *one came* and *two made Default*; and Per. Cur. he who appears ſhall

4. Rationabili Parte Bonorum *againſt three Executors*; the Plaintiff *counted Secundum conſuetudinem Comitatus de D.* the *one Executor appear'd and confeſs'd* the Action, and the *other two made Default*; and the Plaintiff *recovered by the Equity of the Statute*, which wills, That in Action of Debt the Executor who firſt comes ſhall anſwer; And ſo ſee that he counted Secundum conſuetudinem Comitatus. *Quære, If it be not the Common Law of all England*; And ſee thereof the Statute of Magna Charta, cap. 18. Br. Rationabili Parte, pl. 1. cites 28 H. 6. 4.

anſwer, and ſhall not ſtay for his Companions; For Per Choke, *Where Ne unques Executor, ne unques adminiſter'd as Executor is no Plea*, (as it is here) there *he who firſt comes ſhall anſwer.* Br. Rationabili Parte, pl. 5. cites 7 E. 4 20, 21.

2 Inſt. 33. S. P.

5. It appears by the Regiſter and many other Books, That there *muſt be a Cuſtom alleg'd in ſome County* &c. to enable the Wife or Children to the Writ De Rationabili Parte Bonorum; and ſo it has been reſolv'd in Parliament. Co. Litt. 176. b.

For more of Rationabili Parte Bonorum, See **Cuſtoms of London, Diſtribution,** and other Proper Titles.

Receiver.

(A) Receivers. And of appointing Receivers by the Court of Chancery, and Caſes relating to them.

After he has *made up his Accompts*, (which is to be done before a Maſter) the

1. RECEIVER *is an indifferent Perſon* between the Parties, *appointed by the Court to receive the Rents*, Iſſues, or Profits of Land or other Thing in Queſtion in this Court, pending the Suit, where it does not ſeem reaſonable to the Court that either Party ſhould do it; And he is to account for ſuch his Receipt when the Court ſhall require him. And to ſecure

ſecure his doing ſo, he is commonly *ordered to enter into a Recognizance with Sureties* in ſuch a Sum as the Court directs. P. R. C. 299.

Court upon Motion and Affidavit of Notice of the Motion, and *Certificate* from the Maſter, that he has accompted &c. *will order his Recognizance to be diſcharged.* P. R. C. 299.

2. *Truſtees for an Infant* of ſeveral Collieries of great Value *appointed J. S. to manage* the ſame *during the Minority of the Ceſty que Truſt*, and allowed him a Salary, ſometimes more, ſometimes leſs as they ſaw Occaſion. *J. S. paſs'd his Accompts* regularly *every Half Year*, and the ſame were from Time to Time allowed by the Truſtees; He ſhall not be obliged to accompt over again when the Infant comes of Age. Chan. Prec. 535. pl. 330. Trin. 1720. Clavering's Caſe.

3. A. is made Receiver of the Rents of an Eſtate, out of which an *Annuity is payable Quarterly to B. who orders the Money to be lodged in J. S.'s Hands* from Time to Time, for her Uſe; *A. lodges Money with J. S. before the Day of Payment*, and *at the Day J. S. fails.* Decreed Per Lord Macclesfield, That this was no Payment to B. A. having Power over the Money in the mean Time till the Time of Payment; and therefore as between him and B. he muſt bear the Loſs; but as to the Owner of the Eſtate and A. he thought that A. (on making up his Accompts with the Owner, an Infant, when he comes to Age,) would be allowed it the ſame as if he had been bringing up the Money, and had been *robbed of it.* Ch. Prec. 558. Lady Shaftsbury's Caſe.

4. A. at the Inſtance of all Parties concerned was by the Court appointed Receiver; *after in the Midſt of a Vacation* he *commits Waſte*; *all Parties* concern'd *ſerve him with a Paper, diſcharging him* from being Receiver on that Account; On a Motion for Attachment for turning him out, he being appointed Receiver by the Court, the Chancellor ſaid, Tho' the general Propoſition may be true, that an *Attachment* is to go where a Perſon appointed Receiver by the Court is turn'd out, yet it may be otherwiſe when attended with theſe Circumſtances; So *denied* the Motion. Caſes in Equity in Lord King's Time 59. Mich. 12 Geo. 1726. Bell v. Spereman.

5. A. *by Will charged Copyhold Lands in Fee with Payment of his Debts.* The Lands lay in England, but the Teſtator's *Heir was an Infant and lived in Scotland.* On a Bill by the Creditors for Payment the Heir appears, but was in Contempt for not anſwering: But as the Proceſs after an Attachment is for a Meſſenger to bring up the Body to anſwer, which in this Caſe could not be, the Defendant being in Scotland and an Infant; (whereas had he been of Age, the Plaintiff might proceed to a Sequeſtration of the Land, and ſo have Remedy) Ld. Ch. King ſaid, That the Court ought to lend its Aſſiſtance to prevent a Failure of Juſtice; and for want of an Anſwer would ſtop the Rents in the Tenants Hands, and directed that an Anſwer be put in by ſuch a Time, or Cauſe ſhewn why Proceſs ſhould not iſſue againſt the Defendant as if of Age, or why a Receiver ſhould not be appointed of the Premiſſes. 2 Wms's Rep. 409. Paſch. 1727. Leg v. Turnbull.

For more of Receiver in General, See **Account**, and other Proper Titles.

Recital.

(A) *What* is or Amounts to a Recital. *How much* neceſſary, *and the Effect* thereof.

1. IF a Man makes a Grant, and afterwards *confirms the ſaid Grant, reciting it*, yet if the *Deed of Grant is loſt*, the Deed of Confirmation will not be ſufficient Pleading, even tho' the Confirmation is of Record. See Br. Faits, pl. 21. cites 12 H. 4. 23.

2. Indenture between Lord and Tenant, reciting, That the *Tenant held* of the Lord *by Homage, Fealty, and* 10 *s. Rent, the Lord confirms* his Eſtate *Salvo Antiquo Dominico & Servitio*; and it was held, That tho' it was indented, and both ſealed, yet becauſe it is Recital, and all the Words of the Lord only, therefore it ſhall not *eſtop* the Tenant to plead Hors de ſon fee. Br. Faits, pl. 4. cites 35 H. 6. 34.

3. Recital cannot *make a firſt Leaſe good, which was not good before*, or in a better Condition than it was before; becauſe the firſt Leſſee is a Stranger to the 2d Deed, and therefore cannot take Advantage of it; and by the better Opinion Recital of a Deed is not material. Dal. 13. pl. 23. Paſch. 7 E. 6. Anon.

4. No one is bound in his Declaration to recite more of a Record than induces his Action, and *makes for his Purpoſe*. Jenk. 323. pl. 34.

5. Recital of itſelf is nothing, but being conſider'd and join'd with the reſt of the Deed is material; and ſo a Recital, That * *whereas he is poſſeſs'd &c.* amounts to an *Agreement* or Undertaking that he is poſſeſs'd. Per Clench. Le. 122. Trin. 30 Eliz. B. R. Severn v. Clark.

* Lutw. 493 to 496. Hilton v. Smith. —— So *Exception* in a Leaſe amounts to an Agreement. Le. 117 pl 158. Trin. 30 Eliz. B. R. Arg in the Caſe of Page v. Paxlin. —— 2 Brownl. 213. Hill. 7 Jac Arg in the Caſe of Proctor v. Johnſon. Contra. —— Recital ſhall not make a Covenant. Arg. 2 Freem. 4 Trin. 1676. in the Caſe of Sir Francis Hollis v. Sir Robert Carr.

6. Bond *was* conditioned *to pay* 10 *l. being for a Rent of certain Lands*; Defendant alledged, That the Obligee (the Plaintiff) had entered on the Land, and ſo ſuſpended the Rent, whereupon the Plaintiff demurred, and adjudged for him; For this being but a Recital that it was for Rent, it is not material; It ſeems the ſame tho' he had applied it by pleading to the Leaſe &c. Hob. 130 pl. 170. Trin. 11 Jac. St. John v. Diggs.

7. *Teſtatum exiſtit* is only Recital. 2 Salk. 515. Paſch. 2 W. & M. B. R. Woodward v. Clif.

8. A. having a Wife and 7 Sons deviſed 50l. a-piece to 6 of them, viz. A. B. D. E. F. G. omitting C. and dies, R. marries the Widow, but by Articles before Marriage (reciting that A. Father of the ſaid A. B. C. D. E. F. and G. had by his Will bequeathed Cuilibet ipſorum predict' A. B. D. F. and G. *(omitting C.)* the Sum of 50 l.) covenants with S. (a Friend of the Wife) to pay to the aforeſaid A. B. D. E. F. G. *Separales Legationes vel Summas 50 Librar'*. R. paid A. B. D. E. F. and G. their ſeveral 50 l. but the Breach was aſſigned in not paying C. 50 l. when he had *expreſſly covenanted* to pay the ſaid C. and the reſt the ſaid ſeveral Legacies or Sums of 50 l. Sed non allocatur; For in the Recital of the ſaid Requeſt there is nothing mentioned to have been bequeathed to C. and tho' He covenanted

to

to pay C. as well as the reſt, yet 'tis Legationes vel *Summas prædictas*, and there being no Legacy to C. and that appearing by the Recital of the Will, the Covenant ſhall not oblige R. to pay him any thing. 2 Vent. 140. Hill. 1 & 2 W. & M. C. B. George v. Butcher.

9 It was inſiſted that if a Patent recite a *former Grant*, one muſt prove the Grant to be ſurrendered; But it was anſwered, that *if they took Advantage of the Recital, they muſt admit all that was recited*, as well the Surrender as the Grant; and of that Opinion was the Court. 2 Vent. 171. Paſch. 2 W. & M. C. B. Earl of Mountague v. Lord Preſton.

For more of Recital in General, ſee **Eſtoppel, Grant,** and other proper Titles.

Recognizance.

(A) *Who may take* Recognizance; *at what Place*; and *How* to be made Perfect.

Fol 393

1. **If a** Maſter of the Chancery **takes a Recognizance of J. S. yet it is void, if it be not afterwards** inrolled in Chancery. **B. 8. Ja. B. between** *Muckerfield and Butterfield.* **Per Curiam.**

Recognizances in the Court of Chancery are commonly acknowledged before a *Maſter*. P. R. C. 300 —— Tho' the *Court may permit the Inrolling* a Recognizance *after the Time elapſed*, yet it is always done *with Caution not to prejudice any intervening Purchaſor*. Per Ld Chancellor. 2 Vern. 751. Hill 1716. Bothomly v Fairfax —— Wms Rep. 334 to 340. S. C —— 2 Vern. 234. Trin. 1691. Fothergill v. Kendrick.

And whenever they are inrolled after the 6 Months, the Special Order is to do it *Nunc pro tunc*. Arg. ſaid that this is the Courſe of the Petty Bag. Wms. Rep. 340. in the Caſe above.

2. So **if any** Juſtice of any of the Courts at Weſtminſter **takes a Recognizance, if it be not afterwards** inrolled in Court, **it is void. Hobart's Reports.** 273.

3. **The** Juſtices **of the Courts at Weſtminſter may take a Recognizance** in any Place in England. **Hobart's Reports, between** *Hall and Winkfield.* 264.

And the Time of H. 5. Anno 4. Recognizance was taken at Rippon in the County of York, the 28th of September, Anno 4 H. 5. which is out of Term, and ſeveral ſuch like Records are in C. B. as well out of Term as in Term, and out of Court, in the Time of H. 4. H. 5. H. 6 and almoſt all other Kings; Quod nota, and ſee the Entries the reof. M. 4. H. 5. Ro. 119 & H. 13 H. 13 H. 6 320 & P. 2. H. 6. Ro. 125. Br. Recognizance. pl. 20. ſays that Hill. 4 Mar. it appeared by ſearching the Records of C. B. —— S. C. cited Hob. 195. in the Caſe of **Hall v. Winckfield**, and that it was agreed that the *ſeveral Judges* may take Recognizances out of Term in any Part of England, as it was reſolved 4to Mariæ upon View of Precedents —— S. C. cited Vaugh. 103 —— Arg. Vent 360. cites S. C —— Brownl. 69. S. C. but not S. P. —— Mo. 883. pl. 1241. Mich 15 Jac. S. C. but not S. P.

4. A *Judge or Juſtice may* take Recognizance of the Party, but the * *Sheriff cannot* take any thing more than an Obligation; Per Littleton, *tho' it be upon Supplicavit* of the Peace; But *Danby contra*, the Reaſon ſeems to be *inaſmuch as the Supplicavit to the Juſtices of Peace, and to our Judge the Sheriff, is as a ſpecial Commiſſion to the Sheriff*, and *Commiſſioners of Record may* take Recognizance, as it is ſaid elſewhere. Br. Judges. pl. 11. cites 9 E. 4. 31.

Br. Recognizance, pl 5. cites S. C. — *Every Juſtice* of Record may take Recognizance. Br. Recognizance. pl. S. cites 1 H. 7. 20. — Any Judge of B. R. or C. B. might take a Recognizance by the Common Law. Per Holt Ch. J. Ld Raym. 2 Rep 1141. Paſch. 4 Annæ in the Caſe of Faulkaw v Morton —— S. P. Per Holt 11 Mod 53. pl. 27 Paſch. 4 Ann. B. R. Anon

* The

* The *Justices to take Surety of the Peace* before him by Recognizance, becauſe he is a Conſervator of the Peace by the Common Law, *as long as his Authority is by Commiſſion of Record*, Quod vocet Rex &c. A. B. Clerk, Juſtices conſervatorum Pacis Domini Regis &c. And yet the Pleas which he holds in his County, which is not by Writ of Juſticies, are not of Record; quod nota, and therefore *Quære* of this Opinion; But *Juſtices of Peace* are Courts of Record, and the like in the Old Nat. Brev in the Writ of Si recognoſcat, after the Writ of Audita Querela, that the Sheriff may take Recognizance in the County; and if he does not part, and Writ comes to the Sheriff of Si recognoſcat, and the Party upon this confeſſes the Debt Arrear, the Sheriff ſhall diſtrain him for the ſame Sum. Br. Recognizance, pl. 18. cites F. N. B. 81.

In *Scire Facias before the Sheriff* in the County, if the *Defendant comes and acknowledges himſelf to owe ſuch a Sum to the Plaintiff*, Writ ſhall go to make Execution thereof, and ſo a Recognizance in the Courts, which is no Court of Record; *Quære* of this at this Day; *For* it appears there that *this Acknowledgment is taken upon Plea before the Sheriff by Writ, and it ſeems to be by Juſtices*, and then the Sheriff *is Juſtice by Commiſſion*; For Juſticies is a Commiſſion. Br. Recognizance pl. 16. cites F. N. B. 132.—F. N. B. 132. (B) 135. (A)

So if the Conſervator of Ireland. Ib.

5. The *Parliament* ſitting may take Recognizance; and the Caſe was of the *Lords and not of the Houſe* of *Commons*, and therefore Quære of the Houſe Commons; it ſeems all one. Br. Recognizance, pl. 8. cites 10 H. 7. 2.

S. P. Br. Recognizance pl. 14.

6. The *King himſelf cannot* take Recognizance; For he *cannot be Judge himſelf*; but ought to have a Judge under him to take it. Br. Recognizance, pl. 14.

S. P. 2 Hawk. Pl. C. 68. cap. 15. S. 29.

7. *None can* take Recognizance *but Juſtices of Record or Commiſſion*, as Juſtices of the 2 Benches, Juſtices *of the Peace* &c. For *Conſervator of the Peace*, which is by the Cuſtom of the Realm, *cannot* take Surety of the Peace by Recognizance, *but by Obligation*. And ſo of *Conſtable*. Br. Recognizance, pl. 24.

But every Commiſſioner cannot take Recognizance as it ſeems; For their Power is expreſſed certainly in their Commiſſion Br Recognizance pl. 8. cites 1 H. 7. 20 —— *But every one, who has Commiſſion to ſet as Juſtice for the Commonwealth, as Juſtices of Peace* &c. may take Recognizance. Ibid. —— *Contra* it ſeems of *Commiſſioners between Party and Party to examine Witneſſes*; Quære if they are of Oyer and Terminer. Ibid.

9. A Recognizance was *made to* Sir Nicholas Bacon *the Keeper of the Great Seal and 2 others*, and the Recognizance was *taken before himſelf*; The Juſtices held, That it was void as to Sir Nicholas Bacon, but good as to the others. D. 220. b. pl. 14. Paſch. 5 Eliz.

S. C. Le 132. pl. 178

10. In Debt on a Recognizance *taken in London* the Plaintiff declared, That the Mayor there had uſed there to take Recognizances by Cuſtom of all except Infants and Feme-Coverts, and upon any Day except Sundays, and certain other Days ſpecially named, and that this Recognizance was taken there *before the Mayor*; It was objected, That this was an unreaſonable Cuſtom; Becauſe it does * not except Perſons Non Sanæ Memoriæ; And it was farther objected, That none can take Recognizances but Juſtices of Record, who have Authority by Patent &c as the Juſtices of the Benches and of the Peace have by Commiſſion; and that the Mayor is not a Judge of Record, but by Cuſtom; Sed non Allocatur; For the Cuſtom is good; and *the Cuſtoms* of London *are confirmed by Act of Parliament*. Another Exception was taken, that this Cuſtom extends as well to Strangers as Citizens, for Matters within the City; and for this Reaſon Gawdy held it was not good. Cro. E. 186. pl. 11. Trin. 32 Eliz. B. R. Chamberlaine v. Thorpe.

*Roll. 567. S. C —— and ſays they are excepted by the reaſonable Conſtruction of Law. Le 132. pl. 188. S. C

11. It was argued, That a Recognizance taken in the *Court of Admiralty* to ſtand to the Order of the Court is void, and Serjeant Harris ſaid, That it had been ſo adjudged; And Warburton ſaid, that it is not a Court of Record. Noy. 24. Record v. Cornelius Jobſon.

S. P. Arg. Vent. 360. in the Caſe of Perry v. Bowes

12. It muſt be *entered upon the Roll*; for till then it is not a perfect Record; but when it is entered, it is a Recognizance from the Acknowledgment. Hob. 195. 196. pl. 248. Hall v. Winkfield.

13. A Recognizance cannot be taken *by an Officer out of Court*, without a *ſpecial Cuſtom*. Reſolv'd. Freem. Rep. 355. pl. 446. Mich. 1673. Cane's Caſe.

14. One *Juſtice of Peace* may take Recognizance *for the Peace*, alſo *for the Good Behaviour* (by the Commiſſion) and this he may take, *either upon*

upon Deſcretion, or upon *Complaint* made to him, or upon a *Suggeſtion* delivered to him. So One may bind by Recognizance ſuch as do *declare any Thing againſt a Felon*, *to appear at the Aſſizes or Seſſions*, there *to give Evidence* againſt the Offender: And ſo in diverſe other Caſes. And One may bind by Recognizance ſuch as keep any Common Houſes or Places for unlawful Games that they keep the ſame no longer; And alſo ſuch as play at unlawful Games contrary to the Statute of 33 H. 8. cap. 9. that they uſe the ſame no more. So One may bind by Recognizance to appear at the next Seſſions, to anſwer their ſaid Offences; and Perſons convicted for Taking or Deſtroying any Pheaſants, Partridges, Fowl or Hare, that they offend not thereafter in any of the Particulars any more. Dalt. Juſt. cap. 168.

15. One of the *Clerks of the Inrollments*, or a Deputy, is to *attend the Acknowledging*, *Vacating*, or Canceling all Deeds and Recognizances. P. R. C. 300.

16. A *Coroner* cannot take Recognizance. See 2 Hawk. Pl. C. 33. cap. 8. S. 5.

(B) Enter'd into. *By whom*, and *How*.

1. ALL Leaſes, Grants, Recognizances, and Deeds *by Covin* [illegible] *ſhall bind the Parties*, becauſe it is warranted *by the Statute*; as if he make his Will that his Executors, or J. S. and W. B. ſhall ſell the Land. 2 and 3 E. 6. That a Statute Merchant or Recognizance, or Elegit ſued againſt Ceſty que Uſe, ſhall bind the Feoffees, and ſhall be taken by the Letter of the Statute of R. 3. which wills that all Feoffments, Leaſes, Grants, Releaſes &c. by Ceſty que Uſe, ſhall be good; quod nota per Keble & tot. Cur. Brook ſays, Quod Mirabile for the Statute of 19 H. 7. cap. 15. which provides Execution to be made againſt the Feoffees of Ceſty que Uſe of the Land in Uſe, to have Execution upon Recognizance, Statute Merchant, Statute Staple &c. rehearſes that Men were defrauded of their Executions in this Caſe before the ſaid Statute. Br. Recognizance, pl. 13. cites 9 H. 7. 26.

2. A Recognizance *may be acknowledged upon Condition*; *but if* it be *acknowledged ſimply*, *and after they will have Condition*, this cannot be; but they *may make thereof Defeaſance by Writing*; and this may ſerve as well as a Condition would do; quod nota; and it is ſo in Uſe. Br. Recognizance, pl. 11. cites 36 H. 6. 6.

3. A Recognizance may be *payable at ſeveral Days*, and *may be to Joint* * 2 Inſt. 395. S. P. and Mary cites 8 Co. 73. a. — As if two acknowledge a Recognizance of 100 l. [illegible] to S. B. that is to ſay, the one and the other, the Conuſee may ſue ſeveral Scire facias's againſt the Conuſors upon the Recognizance. 2 Inſt. 395.

and ſeveral. Br. Recognizance, pl. 17. cites F. N. B. 20.

4. A *ſpecial* Recognizance may by expreſs Words *bind the Lands of the Conuſor in One County only*. 2 Inſt. 395.

5. An *Information* filed *without Recognizance* entered into *by the Party* is ill; but the Court cannot take it off the File. 12 Mod. 154. Mich. 9 W. 3. P. R. King v. Lambert.

6. In Civil Actions it is not neceſſary for *Defendant to join* in a Recognizance *of Bail*. And in Criminal it may be diſpens'd with by the Court. 1 Salk. 3 pl. 7. Trin. 1 Ann. B. R. Smith v. Villers.

7. If a Man upon a Writ of Error would enter into a Recognizance *to move the double for the Sum*, it would be good. Per Holt Ch. J. Ld. Raym. 2 Rep. 1141. Patch. 4 Ann. in Caſe of Fanſhaw v. Morriſon.

8. Tho' by the Statute of 16 & 17 *Car.* 2. *cap.* 8. (for preventing Arreſts of Judgment, and ſuperſeding Executions) *Executors* are not oblig'd to enter into Recognizances *upon Writs of Error brought by them upon Judgments obtained againſt them*, yet a Recognizance entered into conditioned to proſecute the Writ with Effect, and pay &c. was held good and Judgment accordingly in C. B. and the ſame was afterwards affirmed in B. R. For per tot. Cur. If a Man will *voluntarily enter into ſuch a Recognizance, it is good at Common Law.* Ld. Raym. 2 Rep. 1459. Hill. 1 Geo. B. R. Johnſon v. Laſerre.

(C) Recognizance *forfeited*, tho' not according to the Letter of it.

Yelv. 59. Barnes v. Worlich. S. C.

1. THE Cognizor of a Statute was taken in Execution, and brought an Audita Querela, ſuppoſing the Statute to be void by the Statute of Uſury; and he entered into a Recognizance with Sureties to appear in Michaelmas Term &c. *Et quod Stabit Juri in ea parte proſecutur cum effectu*; Iſſue being join'd upon this Surmiſe, it was afterwards adjudged inſufficient to diſcharge him; and thereupon a Scire facias was brought upon the Recognizance; and the Breach aſſigned was, that the Cogniſor had not paid the Condemnation-Money, nor render'd himſelf Priſon, & ſic non ſtetit Juri. Upon Demurrer it was objected, That Breach was not well aſſign'd, becauſe the Recognizance was only Appearance, Et ad Proſequendum cum Effectu, and *ſays nothing of rendering himſelf, or paying the Condemnation-Money.* Adjudged that the Recognizance being ad Comparendum & Standum Juri, it ſhall be taken ing to the Courſe of the Court, which is not only to appear & pay the Condemnation-Money, or render himſelf to Priſon Conſtruction ſhall be made of thoſe Words *Ad Standum Juri* wiſe the Plaintiff, who had Execution, might be defeated for to appear and to proſecute with Effect is no more tha proſecute without being Nonſuit; and ſince the Statute 10. made to remedy this Miſchief, the Practice has been t in this Manner, Ad Standum Juri, which *is intended to ſa demnation*; and the Breach was held well aſſign'd. Cro. J. Paſch. 3 Jac. B. R. Worlich v. Maſſey.

The Party's *not appearing* according to his Recognizance is Cauſe of Forfeiture thereof, let the Cauſe or Reaſon of his Abſence be what it will. 10 Mod. 153. Paſch. 12 Ann. B. R. in Caſe of the Queen v. Ridpath.

2. One was bound by Fleming Ch. J. *to appear* in B. R. Croke the Court to have his Appearance reſpited, in Regard that he *was ar ed in the Interim at the Suit of another, and impriſoned*; ſo that he c not appear. Williams J. ſaid, If a Man be bound by Recognizance appear in a Court of Record, if before the Day of his Appearance he arreſted *at the Suit of the King*, and before the Day of his Appearance he is impriſoned, this ſhall diſcharge his Recognizance; but if he be arreſted at the Suit of another, and impriſoned, ſo that he cannot keep his Day, he by this hath broken his Recognizance; and this is the Difference to be obſerved for good Law. But the reſt of the Court ſeem'd to incline that in this Caſe he ſhould be diſcharged, becauſe he was arreſted and impriſoned before the Day; ſo that it was not in his Power to appear. Williams J. ſaid he might have entered Bail upon the ſecond Arreſt and Impriſonment, and ſo have enlarged himſelf, and appeared; but the other Judges contra, that by Reaſon of his Impriſonment he is to be diſcharged of his Appearance. 1 Bulſt. 170. Trin. 9 Jac. Anon.

3. The

3. The Defendant enter'd into a Recognizance *to try an Indictment removed*. The Recognizance is not forfeited, unleſs the *Proſecutor gives Rules*. 1 Salk. 370. pl. 4. Trin. 5 W. & M. B. R. The King &c. v. Ball.

4. *So* if one gives a Recognizance *to proſecute a Writ of Error with Effect*, the Defendant muſt give Rules and Nonſuit the Plaintiff; or otherwiſe there is no Forfeiture. 1 Salk. 370. in Caſe of the King &c. v. Ball.

S. P. the Defendant muſt give a Rule below, to certify the Record in Caſe it is not certified, and then nonſuit him for Want of certifying it; Or in Caſe the Record is certified, he does not forfeit his Recognizance, unleſs you nonſuit him here above. Ld. Raym. 2 Rep. 1140. Paſch. 4 Annæ. B. R. in Caſe of Fanſhaw v. Morriton.

5. If a Perſon enters into a Recognizance *to go to Trial* of an Indictmen, and by his own Act *procures a wrong Venire Facias*, by which the Indictment is quaſh'd; Holt ſaid this was a Forfeiture of his Recognizance, it being *a Trifling with the Court*, and an ill Practice in putting the Proſecutor to a great Charge. 11 Mod. 4. pl. 20. Paſch. 1 Ann. B. R. Anon.

(D) *Diſcharg'd*, Reſpited, or Compounded; In what Caſes.

1. RECognizance *may be diſcharged* 20 *Years after*, and *if the Party comes and admits Satisfaction*, the *Recognizance ſhall be ſtruck out of the Rolls*, *notwithſtanding the Parties have not Day in Court*, *as it is ſaid there*; to which there was no Anſwer; the Cauſe may be, becauſe Recognizance may commence by Aſſent of Parties without Proceſs, and by the ſame Reaſon may be ſtruck out, and vacated without Proceſs; And to ſee that it is admitted there, that Recognizance may be *ſtruck out of the Rolls*. Br. Recognizance, pl. 1. cites 50 E. 3. 18.

Br. Confeſſion, pl. 9. cites S. C.

2. One who ſet up Stalls in his Yard for Bone-lace Makers, and took ſo much per Stall, was *Indicted* as *for uſing a Market*, and had entred into a Recognizance to try; but upon pleading Guilty, and *upon ſubmitting to the Fine*, the Recognizance was diſcharged. 12 Mod. 235. Mich. 10 W. 3. The King v. Moor.

So where upon a Certiorari to remove an Indictment the Defendant enter'd into a Recognizance to try it at the next Aſſiſes, which he could not do, by Reaſon of the *abſence of ſome of the Witneſſes*; this appearing to the Court upon *Affidavit*, a Rule to ſtay the Extreating the Recognizance was granted, upon Payment of Coſts, and entring into a Rule to try it at the next Aſſiſes following; eſpecially ſince the Proſecutor can get nothing by the Extreat of the Recognizance, but now he gets the Coſts. 8 Mod. 288 Trin. 1 Geo. 1. The King v. Smart.

3. A. was bound by Recognizance to appear, for Printing a ſeditious Libel concerning the Scots Colony at Darien; and it appearing that an *Indictment had been found* againſt him *at the Old Baily*, *which he had traverſed*, and was to anſwer there, his Attendance was diſcharged here. 12 Mod. 348. Paſch. 12 W. 3. The King v. Bell.

4. J. S. and others of the City of Coventry were bound by Recognizance, and appear'd for 2 Terms, and *no Proſecution* being had againſt them, it was moved to diſcharge the Recognizance, or Diſpenſe with their Appearance. But the Court ſaid they could not do it, and all that they could do was to *reſpite* the Recognizance. Farr. 97 Mich. 1 Ann. B. R. Anon.

5. My Lord D. ſtood bound by Recognizance to appear here the firſt Day of this Term; and Sir Simon Harcourt excuſing his Non-Appearance by Reaſon of Sickneſs, mov'd that his Recognizance might be diſcharged, the *Attorney General* having Orders, and being in Court ... ſati-

conſenting thereto. But Holt Ch. J. ſaid, notwithſtanding ſuch Conſent, my Ld D. *not appearing in Perſon*, the Court could not diſcharge the Recognizance, but ſaid, they could reſpite it till the next Term, which was done accordingly. 11 Mod. 200. pl. 1. Hill. 7. Ann. B. R. The Queen v. Lord Drummond.

6. R. enter'd into a Recognizance with Sureties to appear the firſt Day of Term, *Ad Reſpondendum* &c. (and in the mean Time to his good Behaviour) *and not to depart without Licence of the Court.* An *Information* is preferr'd againſt R. *by the Attorney General, who*, for ſome Defect in the Pleading, *enter'd a Nolle Proſequi, and then exhibited another.* The Court was of Opinion that the *Recognizance extended to all Crimes whatſoever, that he ſhould be charged with*, and that if it ſhould have Relation to any particular Crime only, it muſt be mentioned in the Recognizance, which in this Caſe is only Ad Reſpondendum, generally; That the Inconvenience is not ſo great as is pretended, the Bail in this Caſe being bound in a Sum certain, and not to ſtand in the Place of the Principal, as in Civil Caſes; and that the Nolle Proſequi is neither a Bar nor Diſcharge. 10 Mod. 152. Paſch. 12 Annæ. B. R. The Queen v. Ridpath.

7. If a Recognizance is *eſtreated in the Exchequer*, becauſe not punctually comply'd with, yet, if the *Party appears and takes his Trial next Seſſion*, he may compound for a very ſmall Matter in the Court of Exchequer; Becauſe the Effect, tho' not the exact Form of the Recognizance, is comply'd with; Judges of Oyer and Terminer are the proper Judges whether Recognizances ought to be eſtreated or ſpar'd; and it is for the Advantage of Publick Juſtice that they ſhould have ſuch Power, if upon the Circumſtances of the Caſe they ſee fit. 10 Mod. 278. Hill. 1 Geo. 1. The King v. Tomb.

(E) *What Writ or Action* lies upon it; and where. *Proceedings* and *Pleadings.*

A Releaſe of a Recognizance was *pleaded to be Ante Executionem Scire Facias*, which is naught; For it might be made before the Action brought, and the Plea true, and then the Releaſe is void. 10 Mod. 8. Paſch. 11 Ann. B. R. Rogers v. Wood.—Cites 5 Co. Rep. 70. Hoe's Caſe. 1 Inſt. 265. Goldsb. 166. Moore. 469.

1. SCIRE *Facias upon a Recognizance of Debt in Chancery*, the *Defendant pleaded a Releaſe* of all Actions Real and Perſonal, and a [illegible] Plea; and the *Plaintiff deny'd the Deed*, and Iſſue was join'd thereon, and therefore the Record and all the Iſſue and Proceſs was *ſent into B. R. to try*, and there they were at the Niſi Prius, and *at the Day the Plaintiff was Nonſuited*, and after brought *another Scire Facias in the ſame Bench, and well*, quod nota; For There is the Record; but contra if the Tenor of the Record only had been ſent, and not the Record itſelf. Br. Scire Facias, pl. 128. cites 24 E. 3. 73.

Br. Coufeſs and Avoid, pl. 26. cites S. C.

2. A Man may avoid Recognizance *by ſaying that there is another Perſon of the ſame Name.* Brook ſays, Quære, if a Fine may be avoided in the ſame Manner. Br. Recognizance, pl. 6. cites 21 H. 7. 21.

S. C. 2 Le. 84. pl. 112. and there 88. Manwood Ch. B. ſays, he admits the Rule, That where there is no Capias ad

3. Queſtion was, Whether a *Ca. Sa.* would lie upon a Recognizance taken in Chancery, a *Scire Facias being returned* upon it. All the Barons were of Opinion that the Proceſs was well awardable, and maintainable by the Common Law; For it being a Debt on Record, there is no Reaſon but his Body ſhould be liable to Execution upon it, as upon a common Obligation; and this Capias is not by the Statute of W. 2. cap. 45. or 25 E. 3. but by the Courſe of the Common Law, and the Courſe of Chancery; and Precedents are uſually there after Scire Facias, and their

Courſes

Courſes are to be maintained as of other Courts. Cro. E. 164. Mich. 31 and 32 Eliz. in the Exchequer. Ognel v. Paſton. Reſpondendum, there is no Ca. Sa.

But then that ought to be intended in Caſes where there is an Original, and Meſne Proceſs before Judgment; and that it is a good Rule that it is a Debt upon Record, and therefore a Capias lies.——Mo. 274. pl. 428. S. C ——— S. C cited Arg. Godb. 403. as Ognell's Caſe. ——— In the *Common Pleas*, upon a Recognizance entred into there, a *Fieri Facias*, or *Elegit* may go, but *no Capias* lies; But *otherwiſe in this Court* a Capias lies; For here the Bail is Body for Body. 11 Mod. 45. pl. 7. Paſch. 4 Ann. B. R. Anon.

4. A Recognizance is *ſuable* in the Courts at Law, either by Action to be brought on it, or more properly by an Original in C. B. but if it is entred into purſuant to an Order of Chancery, it muſt be ſued only by a *Scire Facias* in Canc. Per North K. Vern. 313. Paſch. 1 Jac. 2. Grant v. Stone.

5. Debt brought on Recognizance *cognovit ſe deberi* was held to be well. 12 Mod. 600. Mich. 13 W. 3. B. R. Beech v. Trevors.

6. In Debt in B. R. the Plaintiff declared of a Recognizance *taken in the Court of C. B. coram Georgio Tirby Mil'* &c. and the Defendant pleaded Nul tiel Record, and the *Record produced was taken before Juſtice Nevil in his Chamber* in London, *and by him brought and delivered into Court*. Adjudged that the Plaintiff had failed of his Record; for in Pleading the Record muſt be deſcribed as entered on the Roll, which in this Caſe was before Juſtice Nevil in his Chambers. In B. R. they enter all Recognizances as taken in Court, but C. B. enter them ſpecially; So that their Recognizances bind from the Caption, but thoſe of B. R. from the Time of Entry, and upon thoſe in C. B. a Scire facias may be brought either in London or Middleſex, but on thoſe in B. R. in the County of Middleſex only; therefore theſe differ in Subſtance. And as to the Uſage of declaring this Way which was inſiſted on, the Ch. J. ſaid it was againſt Law. 2 Salk. 659. Mich. 2 Ann. B. R. Cherley v. Wood. 6 Mod. 42. S. C. ——— S. C. 2 Salk. 564. pl. 4 by Name of Shuttle v. Wood. ——— S. C. Ld. Raym. 2 Rep. 956. by Name of Shettle v. Wood. Trin. 2 Ann. And it being urged at another Day that the Precedents in C. B. are all as this Count is, Holt Ch. J. anſwer'd, That if they proceed Hand over Head, that is nothing to us; and that they ſhall not ſet up a Preſcription againſt Law, upon Pretence of their Uſage. And Powell J. agreed.

If a Recognizance appears to be *taken at a Judge's Chambers in Fleet-ſtreet* &c. it makes it Local. Per Powell J. Quod fuit conceſſum. And the Court ſeem'd to agree that it is a Record where it is taken, and ſo Local. 11 Mod. 224. Paſch 8 Ann. B. R. in Caſe of Buſton v. Ridley.

(F) *Execution.* In what Caſes, and How.

1. Execution upon a Recognizance ſhall be ſued by *Elegit*. Br. Recognizance, pl. 7. cites * 38 Aſſ. 5. Upon a Recognizance the Conſtor

pray'd *Elegit of the Land that the Conſtor had the Day of the Conſtmce, or ever after*; and it was not granted but that he ſhould have it. *But* it is ſaid elſewhere, that *if the Sheriff return that the Conſtor had nothing the Day of the Recognizance acknowledged, but purchas'd after*, then he ſhall have it, as is pray'd above, but not before ſuch Return; and with him agrees the ancient Tenures, Tit. Tenant by Elegit; but at this Day it is uſual to have of the one and the other at firſt, as I take it. Br. Recognizance, pl. 4 cites 24 E. 3. 37.——*Br. Entry Cong. pl. 77. cites S. C.

2. In *Scire facias* upon a Recognizance the *Defendant was return'd dead*; whereupon there was another *Garniſhment againſt the Tertenants*, who were *return'd warn'd*, and they *did not come*, upon which Plaintiff *had Elegit*. Brooke ſays, And ſo ſee Execution againſt them upon the firſt Garniſhment; and ſo is the Law *Contra* it ſeems *upon a Nihil* return'd. Br. Scire facias, pl. 86. cites 38 E. 3. 13. Br. Recognizance, pl. 2 cites S. C.

(G) Equity.

1. THE Defendant acknowledged a Recognizance, which was *taken away privately*; the Plaintiff had Relief, either that the ſaid Plaintiff ſhall have his Money, or elſe the Recognizance to be inroll'd. Toth. 267. cites 22 Eliz. Charnock v. Charnock. 22 Eliz. li. A.

No Recognizance ſhall be *inroll'd after ſix Months* elapſed, *except* the Court ſee fit to grant it *upon Motion* in open Court. P. R. C. 302.

2. A Recognizance without Condition, in 20 Years inroll'd, [*not inroll'd in 20 Years*] yet upon *Affidavit*, (*that he who acknowledged it was living*) the Court ordered that it ſhould be inroll'd. Toth. 263. cites about 40 Eliz. fo. 195. inter Roll & Roll, & Long & Owen, eodem Termino, fo. 205. li. a. 11 & 12 Eliz.

For more of Recognizance in General See **Bail, Statute,** and other Proper Titles.

* Record.

* The Records of every Court are the moſt effectual *Proofs of the Law* in Things created *in ſuch Court.* Arg. Pl. C. 320. Mich. 9 & 10 Eliz. Caſe of Mines.

(A) Records. Defeating Records. [*Or Cancelling them for Covin or Deceit.*]

1. IF a Man brings Aſſiſe againſt another, and the Tenant to the Writ to abate this Writ cauſes a Writ of a higher Nature brought in the Name of the Plaintiff, and makes Anſwer for him as Attorney, upon ſhewing this Deceit to the Court the Record ſhall be cancell'd. 17 E. 3. 12. b. 51. b.

2. If a Man *ſues another by Writ of Debt to the Exigent, upon which he is Outlaw'd*, and *a Man raſes the Original and the three Capias's and the Exigent, and makes Part in London and the reſt in Middleſex, and writes in them W. B. for J. B.* this is adjudged Felony by the Statute of 8 H. 6. 12. which is, That *if a Record in any of the Banks, or in the Exchequer, be ſtolen, carried away, or avoided, by which Judgment ſhall be revers'd*, that *this ſhall be inquired by Clerks of thoſe Courts and others, and ſhall be judg'd by the Juſtices of thoſe Courts, and ſhall be ordered as Felony*; and this Raſure avoids all the Record, ſo that it cannot be redreſs'd by Error; and it is a greater Offence than if Part only had been avoided, *and all who aſſent to it are Felons*; but becauſe Part was made in London, and Part in Middleſex, and *London cannot be joined with any*, and alſo *ſpecial Commiſſions ſhall be in London for Felony there*, which cannot be by this Statute becauſe it gives the Trial by the Clerks of thoſe Courts and others, and the Judgment to be by the Juſtices of thoſe Courts, and not Commiſſioners in London; therefore *the Offenders were not arraigned of Felony, but* were *puniſh'd for Miſpriſion*; for in Felony there is Miſpriſion; quod nota. Br. Corone, pl. 173. cites 2 R. 3. 9. 10.

3. At

3. At the Iſſue *Venire Facias iſſued*, and the *Sheriff return'd Nul breve*, upon which it *was entered of Record* that the Sheriff Non miſit breve, and after *there iſſued an alias Ven. fac.* and *Jury return'd and paſs'd for the Plaintiff*, and *after the firſt Ven. fac. was found upon the File*; and by Advice of all the Juſtices it was ouſted as ſuſpicious, and the Plaintiff recover'd. Br. Record, pl. 2. cites 26 H. 6. 16. Br. Venire facias, pl. 1. cites S. C.

4. He that is to *defeat* a Record, muſt always commence his *Suit againſt* him that is *Privy* to the Record; but when he has revers'd it againſt him, he ought to have always a *Scire facias* againſt him that is Tertenant; for it may be he hath ſome Matter to bar him of Execution; and otherwiſe he ſhall not be bound, unleſs he be made privy by a Scire facias, or that 2 *Nihils be return'd.* Cro. E. 471. (bis) pl. 33. Mich. 37 & 38 El. B. R. Cary v. Daney.

(B) Good. *What* is, *and when*, and what ſhall be ſaid a Record.

1. RECord *is* a Memorial or Remembrance in Rolls of Parchment, of the Proceeding and Acts of a Court of Juſtice, which hath Power to hold a Plea according to the Courſe of the Common Law, of Real or mix'd Actions, or of Actions quare vi & Armis, or of Perſonal Actions, whereof the Debt or Damage amounts to 40s. or above, which we call Courts of Record, and are created by Parliaments, Letters Patents, or Preſcription. Co. Litt. 260. a.

2. In *Aſſiſe* the *Tenant pleaded in Bar*, the *Plaintiff made Title by Recovery in Writ of Dower*, and the *Defendant ſaid that Ne unques accouple in Lawful Matrimony*; and the others econtra; and it was *certified by the Biſhop that ſhe was accoupled* &c. and the *Aſſiſe remained without Day, and after was re-attach'd*, and after *B. R. came into the ſame County, ſo that all Aſſizes were adjourn'd there*, and the *Plaintiff ſhew'd the Record Sub pede Sigilli, and pleaded this Plea, and pray'd the Aſſiſe.* Et per tot. Cur. When it comes before them Sub pede Sigilli, this is a good Record, tho' it was taken before other Juſtices, and they ſhall proceed upon it. Br. Record, pl. 42. cites 28 Aſſ. 52.

3. *Rolls of the Commiſſary* are not Records. Br. Viſne, pl. 17. cites 44 E. 3. 31. 32.

4. *Plea in the Spiritual Court in Prohibition*, if it be of Tithes or of the Lay Chattle, is tried per Patriam; and ſo note that their Pleas are not of Record. Br. Record, pl. 12. cites 44 E. 3. 32. Sentences of Divorce in Spiritual Court, and ſo in other Matters, are not Judgments or Matters of Record. West. Symb. Exec. 48.

5. Where the *Biſhop certifies that J. S. is no Baſtard*, this is no Record. Br. Record, pl. 26. cites the Printed Abridgments of Aſſiſe, fol. 73.

6. A *Verdict* cannot make a Record. Br. Repleader, pl. 61. cites 11 H. 4. 52.

7. If a *Tales* be awarded and *mark'd upon the Screwl, and not enter'd in the Roll*, or falſe Latin &c. the Juſtices may amend it the ſame Term; but contra in another Term, for then the Roll is the Record; Note the Diverſity. Br. Record, pl. 20. cites 7 H. 6. 30. Br. Error, pl. 68. cites 7 H. 6. 28. S. C. And Cheney C. J. ſaid, that the ſame Term that Judgment is given, the Record is in the Care of the Juſtices, and not in the Roll; for the Roll the ſame Term is not the Record, but the Remembrance of the Juſtices. —— Br. Amendment, pl. 32. cites 7 H. 6. 29. S. C.

8. A *Fine* is a Record, *tho' it be not ingroſs'd*, and ſhall be executed, and a Quid Juris clamat lies upon it; Per Newton, Quod non Negatur. Br. Record, pl. 78. cites 22 H. 6. 13.

Br. Teſtament, pl. 4. cites S. C. — S. P. Br. Adminiſtrator, pl. 11. cites 44 E. 3. 16. — Br. Ordinary, pl. 4. cites S. C. — Br. Record, pl. 12. cites S. C. — S. P. Went. Off. Exec. 48.

9. A *Teſtament is not* Matter of Record at the Common Law, *notwithſtanding the Probation*; for a Man *may deny the making the Parties Executors*, and ſhall try it Per Patriam. Br. Record, pl. 28. cites 22 H. 6. 52.

10. An *Exigent* is a Record, *tho'* it be *not entred in the Roll*; quod nota. Br. Exigent, pl. 32. cites 38 H. 6. 1.

Br. Mainprize, pl. 72. cites S. C.

11. If a Man finds *Mainprize*, which is *written in a Bill, but is not enter'd in the Roll in this Term*, yet it *may be enter'd after in this Term or in another Term*; quod nota, as it happen'd in the Caſe of **Dampage**, and ſo *the Bill is a good Record*; and the Juſtices of C. B. accordingly. Br. Record, pl. 58. cites 8 E. 4. 5.

It was ſaid in the Time of H. 8. That of a Record in

12. A Man *cannot vouch a Record of Recovery of Debt, or ſuch like, in a Baſe Court*, for *it is not a Record, but a Roll*, ſcil. Loquela. Br. Failer de Record, pl. 8. cites 9 E. 4. 42.

C. B. he might have vouch'd it there, and had Day to bring it in; But contra *in Curt Baron*, for there it *is a Recovery but no Record*; for it is no Court of Record. Br. Record, pl. 66.

Where Recovery in a baſe Court is removed into Bank by Writ of Falſe Judgment, yet this is not of Record to have Execution. Br. Record, pl. 40. cites 39 H. 6. 3. — *But* if the *Judges affirm the Judgment or reverſe it*, then this is of Record when they have meddled with it; and then lies Execution upon it, or Writ of Error; And ſo ſee a good Manner to make a Judgment of a baſe Court to be Matter of Record. Nota bene. Ibid.

13. A *Statute* is a Record, *but an Obligation* is only Matter in Fact. Br. Conſcience, pl. 23. cites 22 E. 4. 6.

Writ of Error is to remove the Record; the Original is no Part of

14. *After the Original* the *Roll is the Record*, and *not the Writ*; and therefore Variance between the Diſtringas and the Roll cannot be amended. Br. Record, pl. 77. cites 2 R. 3. 11.

it, that remains with the Cuſtos Brevium, but the Record with the Prothonotary. Jenk. 164. pl. cites S. C.

15. Where an *Act of Parliament or other Record* is *reverſed by Er-* otherwiſe, and after this *is vouched for a Record*, there the Ju- certify that there is no ſuch Record; for when it is revers'd, it is n- cord. Br. Record, pl. 50. cites 4 H. 7. 22. at the End of the Caſe.

16. The *Roll in Ancient Demeſne is no Record*, and therefore the Writ to remove it ſhall be Loquelam et Proceſs', and not Recordum 39 H. 6. by all the Juſtices; and yet the Form of the Regiſter in this Caſe is Recordum illud habeas &c. Br. Record, pl. 70. cites F. N. B. 71.

17. If the *Seal of the King* is *put to any Patent* or Writing made in the Name of the King without Warrant, this is Matter of Record immediately, and ſhall bind the King. Pl. C. 76. a. Trin. 6 E. 6. in the Caſe of Wimbiſh v. Ld. Willougby.

18. No Bill, Anſwer, or other Pleading ſhall be ſaid of Record, or of any Effect in Court *till* it be *filed* with ſuch of the 6 Clerks with whom it ought to remain. P. R. C. 302.

19. The *Eſtreat in the Exchequer* is not a Record, but only Minutes to make a Proceſs upon it for the King. Per Cur. Ld. Raym. Rep 243. Trin. 9 W. 3. Moor v. Riſdell.

20. A *Recognizance* is a Record upon the taking it before the Inrollment. Per Powel J. And he ſaid, That the Inrollment was by a Statute in Queen Elizabeth's Time. And the Court ſeem'd to agree, That it is a Record where it is taken, and ſo local. Adjornatur. 11 Mod. 223, 224. Paſch. 8 Annæ. B. R. Bulton v. Ridley.

21. An

21. An *Agreement was on Marriage to become a Freeman* of London, and that Agreement being *entered among the other Proceedings and Orders of the Court of Alderman*, (which being a Court of Record) is become a Matter of Record, as much as a Fine would be if levied there; for it is the Concord between the Parties. Per Lord Ch. Macclesfield. Wms's Rep. 715. Trin. 1721. Frederick v. Frederick.

(C) *Falsified or Avoided*; By whom. In what Cases. And how.

See Falsifying Recoveries.

1. A *Fine by Collusion*, as where there are 2 of the same Name, and the one levies a Fine of the Land of the other, in this Case the other shall avoid it *by Plea*. Br. Fines. pl. 115. cites 27 Ass. 53. & T. 33. H. 8. A Fine levied, or Judgment entered in Pursuance of an Usurious Contract may be avoided by an Averment of the corrupt Agreement, as well as any common Specialty, or Parol Contract, Hawk. Pl. C. 248. cap. 82. S. 20.

2. *Record of Outlawry of divers* Persons *was certified in the Exchequer*, among whom *one was certified Outlaw'd, and was not Outlaw'd, and that his Goods forfeited were in the Hands of J. N.* and upon Procels made against him he came, and *find that he was not Outlaw'd*, and *Parcel of the Record came by Writ of the Chancery out of B. R. into the Exchequer*, and *Green Justice of B. R. came into the Exchequer, and said he was not Outlawed, but that it was Misprision of the Clerk*; Skipwith said, 'Tho' all the Justices would record the contrary, they shall not be credited, when we have recorded that he is Outlawed; Quære what Remedy is for the Party; it seems it is by Writ of Error, inasmuch as there is no Original against him, but only Record of Outlawry without Original. Br. Record pl. 45. cites 38 Ass. 21.

3. *Capias Pluries returned upon the Plaintiff was nonsuited*, and *the same Term an Exigent issued upon the same Original in another Roll*, the *Defendant prayed Remedy*, and *'tis said that the Nonsuit shall have Regard to the Day of the Writ returned*, & Curia conceſſit, and the same Day the Exigent shall be said to issue, And per Thirn. and Hank. this Matter *is not sufficient* to avoid a Record, and Markham said that all may be well redressed in this Place, for *Erronice emanavit*, Et sic pendet; And so it seems to be Error and not void, and a Superiedeas shall serve as it seems. Br. Error. pl. 33. cites 2 H. 4. 23, 24.

4. In a Court of Record, where the Record *makes mention of one Manner of Judgment*, it shall not be assigned for Error *That the Court gave another Judgment*. Br. Error. pl. 78. cites 21 H. 6. 43. A Man may assign *Error, That whereas the Court gave one Judgment, they ought to have given another Judgment* Br. Error pl. 148. cites 2 H. 4. ——— *But* a Man *cannot say that they did not give such Judgment contrary to the Words of the Record* Br. Ibid. ——— *Nor* say *that the Judgment entered* in the Roll *was not given by the Justices*, but entered in the Roll by the Clerk, *or that the Jury was not sworn as the Record supposes*. Br. Ibid. ——— *Nor that* the Jurors *gave other Verdict than is entered in the Roll*. Br. Ibid. ——— *Nor where the Roll is that the Jury gave Verdict for the Plaintiff*, he shall not say *that they gave Verdict for the Defendant*, for a Man shall not be received to falsify the Record. Br. Ibid. ——— *So* where it is recorded *that Capias was awarded*, the Party shall not assign for Error *that no Capias* was awarded, or say that Distress was awarded, for he shall not falsify the Record. Br. Error. pl. 78. cites 21 H. 6. 43 ——— *And* if the *Sheriff returns summoned*, the *Party* shall *not* be received to *say that he was not summoned*, for he cannot contradict the Return of the Sheriff directly. Per Fairfax. Br. Error pl. 148. cites 2 H. 4 ——— *And* he shall not say *that he was not attached*. Br. Ibid. ——— *But* may *say that which stands with the Return*, as to say *that he was not summoned according to the Law of the Land, or not attached by 15 Days*. Br. Ibid. ——— *Or* he may assign Error *in a Thing apparent, or Matter in Fact out of the Record*; but shall not falsify the Record, as it is said elsewhere, and note a Diversity. Br. Error. pl. 78. cites 21 H. 6. 43.

5. If [illegible]ion be sued upon an Erroneous Record, or if such Record is *shewed where a* plea[illegible] Party has no Remedy to avoid it but by Error; For *by Error it is to be tried, and*

diverſe Default were aſſigned in the Record, cites 33 H. 6.

a good Record *till it be reverſed*; Quod nota. Br. Record, pl. 4. cites 34 H. 6. 2.

non allocatur; For it is good, till it be reverſed by Error or otherwiſe. Br. Record. pl. 4.

Br Deceit pl. 7. cites 35 H. 6. 46.

6 A Man *may confeſs and avoid Matter of Record*; For in Deceit the *Tenant ſaid that thoſe who appeared as Summoners and Vijours upon their Examination denied the Summons and taking* into the Hands of the King by the Grand Cape, *and were not the ſame Perſons*, but others of the ſame Name. Br. Record. pl. 10. cites 35 H. 6. 43.

7. Error was brought *upon Rediſſeiſin*, and it was alleged for *Error, that the Sheriff had returned that he, with the Guardians of the Peace and the Coroners, took the Inqueſt at the Place where the Tenements are, whereas the Sheriff came not to the Tenements*; Per Mordant, 'tis Error; for the *Sheriff is Judge and Officer* here, and that which he does as Judge cannot be contradicted againſt the Record, otherwiſe of that which he does as Officer; now he comes to the Land as Officer, and therefore this may be aſſigned for Error; and as to making Proceſs he is an Officer; But the Court to the contrary, and that the Sheriff does this as Judge, and therefore it ſhall not be contradicted. Br. Error. pl. 148. cites 7 H. 7. 4.

8. Where a Bill of *Indictment* of Felony was *found Ignoramus*, a *Judge* of Record *procured it to be raſed, and* to be *indorſed, Billa vera*; This Offence is not puniſhable by the Law; For that would tend to falſify and avoid a Record. Jenk. 162. pl. 7.

9. Tho' the Party *cannot* falſify a Record *in Error*, yet *in a Collateral Action*, as in Treſpaſs, or falſe Impriſonment, *he may*, where he is taken in Execution upon ſuch Judgment. Sid. 94. pl. 20. Mich. 14 Car. 2. B. R. Mullens v. Weldy.

(D) *Produced* by whom; How, and when.

So of other Records, as Fine &c. For if he fails at the Day he cannot loſe any Land. Ibid.— But Contra of the Outlawry before. Shard. 29 E. 3. therefore Quære.

1. IN Aſſiſe it was ſaid, That *he who has nothing in the Land ſhall not plead Outlawry, without ſhewing it immediately*. Br. Record. pl. 41. cites 9 Aſſ. 10.

2. It ſeems that *where a Record is pleaded*, and *the other pleads No Record*, it it ſuffices to ſhew the Record immediately, exemplified under the Seal &c. and he ſhall not be put to another Day to bring in the Record by Certiorari and Mittimus, when he has the Record there exemplified ready; Quod nota. Br. Record. pl. 43. cites 29 Aſſ. 1.

3. *If* a Man pleads Matter of Record, and *concludes in Bar*, he ſhall have *Day to bring in* the Record; *but if* he concludes *to the Writ*, he ſhall ſhew it *immediately*. Per Frowicke Ch. J. Br. Record. pl. 36. cites 21 H. 7. 9.

(E) *Cer-*

(E) *Certify'd* by whom; And how.

1. WHEN a *Juſtice is diſcharged*, or his Authority ceaſes, he *may not certify a Warrant in his Hands without* certifying it by *Writ*, and *ſo if he be made Juſtice again*, becauſe his Power was once ceaſed; And *ſo* it ſeems *of other Records* in his Hands. Br. Record. 64. cites 8 H. 4, 5. Br. Garrant d'Attorney, pl. 10. cites S. C.

2. In *Dower* the *Tenant ſaid that the Land is ſeiſed into the Hands of the King*; this is no Plea, *without ſhewing Record* of it, upon which a Baron of the Exchequer brought in Record of it, whereupon they ſurceaſed, and yet it was *certified without Writ, and without Day in Court.* Br. Record. pl. 71. cites 11 H. 4. 79.

3 *Record of Court Baron* ſhall be certified *by all the Suitors*, and not by Part of them only; Quod nota bene in Falſe Judgment. Br. Record. pl. 66. (bis) cites 22 H. 4. 23.

4. If *Certiorari* iſſues *to Juſtices of Peace to ſend the Indictment of J. N.* and *in the ſame Indictment* 20 *others are indicted*, yet this is a good Certificate of the Record, and the Juſtices of the Peace *ſhall not mention any Thing of the others in their Certificate.* Per Markham Ch. J. Br. Record, pl. 57. cites 6 E. 4. 5.

5. *Juſtices of the Peace ſhall not bring into B. R. any Record but* that which is *Executory*, and no Acquittance of Felony which is *Executed*; but this *ſhall come in by Writ by Certificate thereof.* Br. Record, pl. 59. cites 8 E. 4. 18. Br. Corone, pl. 151. cites S. C.

6. If *Aſſiſe is taken before the one Juſtice of Aſſiſe, the Clerk of the Aſſiſe not expecting the coming of the other Juſtice* of Aſſiſe, yet *the other Juſtice by Certiorari* may certify the ſame Record. Br. Record, pl. 81. cites 11 H. 7. 5.

7. In *Debt upon Recovery of Damages in Aſſiſe* the *Defendant pleaded Nul tiel Record*, upon which the *Plaintiff cauſ'd it to come into Bank by Certiorari to be exemplified under the Great Seal of England, and ſent into C. B.* and ſo well. Br. Record, pl. 82. cites 13 H. 7. 21.

(F) *Failer* of Record. *The Effect* thereof.

1. IN Aſſiſe the *Baron and Feme pleaded Record in Bar, and failed* at the Day, and *the Aſſiſe was againſt them and two others who had pleaded Nul tort*, and upon the Failer the *Plaintiff pray'd his Judgment, and releaſed his Damages, and had* Judgment, notwithſtanding the Plea of the other two is not try'd. Brook ſays, Quod *mirum*, it Law! for he recovers the Land againſt all four by the Judgment, whereas the Plea of the other two is not yet tried. Br. Failer de Record, pl. 7. cites 44 E. 3. 23.

2. In Conſpiracy the *Defendant ſaid, That he was indicted before the Juſtices of Peace in N.* whereupon *Nul tiel Record being pleaded*, the *Court made a Writ to the Juſtices of Peace to certify it*; and at the Day *Nul Breve was return'd*, and the *Court gave Day* over; and at the Day the *Defendant made Default*, upon which the Court awarded a Writ of Enquiry of Damages; quod nota. Br. Record, pl. 16. cites 7 H. 4. 31.

3. In Debt the Defendant *pleaded Outlawry* in the Plaintiff, and concluded Judgment Si Actio &c. The Plaintiff replied Nul tiel Record, and thereupon they were at Iſſue; and before the Day given to bring in the Record, the *Plaintiff got the Outlawry to be reverſed*, ſo that the Defendant failed of the Record at the Day; And the Queſtion was, Whether *ſcire facias* out- But in Debt upon a Contract the Defendant *pleaded* an Outlawry

lawry in Bar; the Plaintiff *replied Nul tiel Record*, Defendant had a Day given to bring it in, but failed to produce it; And *Judgment was given againſt him abſolutely*, and not a Reſpondeas ouſter. Per tot. Cur And all the other Judges were of the ſame Opinion. Cro. C. 566. Hill. 15 Car. B. R. Dawſon v. Lee.

ther this Failer ſhall be peremptory? The Opinion of the Court was, That *he ſhould anſwer over*. 2 Roll. Rep. 38. Trin. 14 Jac. B. R. Stubbs v. Denham.

(G) Of *making up Records*. And denied in what Caſes.

Br. Error, pl. 104. cites 38 H. 6. 10.

1. A *Record ought to be made* in Aſſiſe *of every Juror ſworn*, and *of every Writ awarded*, and *of every Continuance and other Thing from Day to Day*, tho' the Aſſiſe does not take effect the firſt Day; and otherwiſe it is Error, by the Opinion of all the Juſtices; quod nota. Br. Aſſiſe, pl. 104. cites 39 H. 6. 17. & 38 H. 6. 11.

2. The Defendant was *indicted* at the Aſſizes for *forging the Stamps*, and appeared there upon his Recognizance to anſwer the ſaid Indictment, and pleaded Not Guilty, and *upon his Trial he was convicted*; *but upon a Motion in Arreſt of Judgment it was ſet aſide*. Afterwards he exhibited a *Bill in Chancery* againſt the Proſecutor of the Indictment, who *pleaded this Conviction* of Forgery *in Bar to the ſaid Bill*, and now the Plaintiff in Chancery moved the Court of B. R. that the Record might be made up with the Arreſt of the Judgment; for by a Miſtake of the Clerk of Aſſiſe that was not recorded, nor did there any Notes thereof appear in his Books, but only that he was bound over by Recognizance to appear at the Aſſiſes, and that he did accordingly appear and ſaved his Recognizance; all which Matter was evident to the Court by the Records of the Aſſiſes; but yet they would make no Rule for the Record to be made up with the Arreſt of Judgment, becauſe a Precedent of this Nature might be of *dangerous Conſequence*; and therefore deſired the Cauſe might be put into the Paper, and ſpoke to again, that it might be judicially determined. 8 Mod. 45. Paſch. 7 Geo. the King v. Self.

(H) *Entry* of Record. *Power of the Court* as to Entry or Alteration of Records. And of Records being entered upon a wrong Roll.

S. P. Br. Challenge, pl. 60. cites 29 H. 6. 9.

1. IN *Treſpaſs* the *Court ſuffered ſeveral Jurors, who were challeng'd for their Franktenement, to be ſworn, who had not* 40 *s. per Ann. becauſe they thought the Damage to be but* 20 *l. whereas the Record was* Damages *of* 40 *l.* which the *Defendant ſeeing, notified it to the Court, and pray'd that it might be tried again*; upon which the Court would not record that which was done before, but try'd all again; and then thoſe who were ſworn before were ſtruck out now for Inſufficiency of Franktenement. And ſo ſee at the ſame Time it is in the Election of the Court whether they will record it or not. Br. Record, pl 23. cites 19 H. 6. 9.

2. If an *Exigent* be *return'd Outlaw'd*, *which iſſued 25 H. 6. and* the *Defendant pleads Nul tiel Record*, and the *Clerk eo inſtante enters the Outlawry in the Roll Anno* 38 *H.* 6. this is good; for Per Aſhton, If the *Exigent* be *return'd outlaw'd*, tho' it be not enter'd, it *may* be *enter'd at any Time*; And Per Moyle, If there be ſuch Exigent, it is a good Record; quod nota. Br. Record, pl 68. cites 38 H. 6. 1

3. In

3. In Annuity, the *Parſon Defendant pray'd Aid of the Patron and Ordinary*, who were *returned ſummon'd*, and the *Ordinary was Eſſoign'd*, and the *Patron not, nor any Default recorded upon him*; and *in the Roll of Pleas Mention was that both were Eſſoign'd, but not in the Roll of Eſſoign*; and by the beſt Opinion, becauſe it is not expreſſed in the Roll of Eſſoign, where it ought to be expreſſed, therefore it is not good in the Roll of Pleas; *Quære*, for it was not adjudg'd. Br. Record, pl. 55. cites 4 E. 4. 26.

4. A. Judgment *entred in the Roll of one Office, which ought to be in the Roll of another*, is not void, but *Error* and voidable. Br. Error, pl. 88. cites 9 E. 4. 3.

S. P. Per Bingham and Nele. Br. Record, pl. 31. cites 4 E. 3. 9.—*As* in *Præmunire* the *Judgment was entred in another Term.* Laken ſaid, it is enter'd in the Roll of the Filizer, who ought not to enter any ſpecial Judgment, but the Prothonotary ought to enter it, and therefore it is no Record; For if the Filizer of one County enters Proceſs of Outlawry in the Roll of another County, this is void; and ſo if Clerk of the Aſſiſes in C. B. enters Plea in his Roll, it is no Record; For it does not belong to his Office. Per Billing and Yelverton, the ſeveral Offices were ordain'd, becauſe Men might be ſure where they might ſearch for the Suit. And all the Juſtices ſaid that they did not remember that any ſuch Judgment was given, but yet *becauſe it was enter'd, and the King intitled, they would not alter it.* Br. Record, pl. 31. cites 4. E. 3. 9.

5. *During the Term* wherein any judicial Act is done, *the Record remains in the Breaſt of the Judges* of the Court, and in their Remembrance; *and* therefore the Roll *is alterable* during that Term as the Judges ſhall direct; *but when that Term is paſt, then the Record* is in the Roll, and *admits no Alteration*, Averment or Proof to the contrary. Co. Lit. 260. a.

In Ejectment the Defendant being called to confeſs Leaſe, Entry and Ouſter, made Default, which was recorded, which the Plaintiff would afterwards have waived, ſuppoſing it to be in the Breaſt of the Court during the Term. But, per Holt C. J. There is *a Diverſity between an Act of the Court* done upon Record, *and an Act of the Party* recorded by the Court, as Nonſuit or Default: For in the firſt Caſe, it is in the Breaſt of the Court, and may be alter'd by them during the Term; but in the latter Caſe, a Nonſuit &c once recorded cannot be alter'd by the Court, becauſe it would be a Means of introducing Falſity of Facts into Records. 2 Salk. 566. pl. 6. Trin. 2 Annæ. B R. Turner v. Barraby.

6. The Plaintiff brought an Action upon the Statute 21 H. 8. cap. 13. for 25 l. for Non Reſidency by the Defendant for 5 Months. It was *moved* on the Behalf of the Defendant, *that a Recordatur might be entred to hinder* any *Alteration* of the Record; But per Cur. that Practice is not now in Uſe; but Cook Chief Prothonotary ſaid, that *the Uſe heretofore of entring a Recordatur was, (Recordatur, that this Record is without Alteration* or Interlineation); and then if there were any Alteration afterwards, it would appear upon the Record to have been made after the Recordatur entred. *But now the Practice is to make a Rule of Court*, that all Things ſhall continue in Statu quo; *and then it ſhall be tried by Affidavit*, whether there has been an Alteration or not. Ld. Raym. 210, 211. Paſch. 9 W. 3. Birt v. Rothwell.

(I) *Remov'd*; In what Caſes; How and when; Or, In *what Court it ſhall be ſaid to remain.*

1. *WHere the Record itſelf remains, there the Action ſhall be brought.* Br. Record, pl. 30.

As Scire Facias upon a Recognizance in Chancery was brought there, and the *Defendant pleaded Releaſe of all Actions real and perſonal*, and the *Plaintiff denied the Deed, and they were at Iſſue*, upon which *all was ſent into B. R.* viz. *the Record, the Action, and the Proceſs*; For the Chancery cannot try Iſſue by Jury, and the *Plaintiff was Nonſuited at the Niſi Prius*; upon which after he *brought another Scire Facias in B. R.* and Exception was taken, that it ought to be in the Chancery, Et non Allocatur; For no Record remains there, but all was removed into B. R. viz. the Record, and not the Tenor of the Record. Br. Record, pl. 30. cites 24 E. 3. 73. —— Br. Lien. pl. 56. cites S. C.

2. *In Præcipe quod* reddat, as *Formedon, in London Releaſe with Warranty was pleaded, and Aſſets in a foreign County deſcended in Fee*, upon which they are *at Iſſue*, and *Writ came to remove the Record from London to Bank, to try the foreign Iſſue.* And ſo it ſeems there, that it ſhall not be remov'd 'till Iſſue be join'd. Br. Iſſues Joines, pl. 74. cites 48 E. 3. 21.

Br. Charter de Pardon, pl 25. cites 36 H. 6. 24. S. C.

3. If an *Amercement is aſſeſs'd in Banco, and eſtreated into the Exchequer to levy the Amercement*, and *they write for the Amercement*; yet the Record remains in Bank, and not in the Exchequer, and there ſhall be traverſ'd, and there the Pardon of it ſhall be pleaded and allow'd, and not in the Exchequer. Br. Record, pl. 35. cites 36 H. 6. 24. and 37 H. 6. 21.

Br. Record, pl 34 cites 37. H. 6. 16. 28. S. C.

4. Scire Facias to have Execution in Writ of Annuity; The Caſe was, That after Judgment in C. B. the Defendant removed it by Writ of Error into B. R. and after the Record, among other Records, was remov'd into the Treaſury or Receit; and after the Plaintiff brought Certiorari out of the Chancery, directed to the Chamberlain and Treaſurer, to certify it in Chancery, and from thence it came by Mittimus into C. B. and the Plaintiff pray'd Execution. And per Moyle J. the Court of *Chancery writes* only *Pro Tenore Recordi*, and not *Pro Recordo illo*; But in Caſe of the *Juſtices of Aſſiſe*, there they *ſhall certify Recordum & Proceſſum*, and not Tenorem; and *when Records are remov'd into the Receit, thoſe* which are *of B. R. are intitled (Recorda Regis)* and thoſe of C. B. *(Recorda de Banco).* Br. Executions, pl. 71. cites 37 H. 6. 16. but it ſhould be, 37 H. 6. 16. and 28 b. 39. a.

5. If a Man *recovers in Aſſiſe of freſh Force Land and Damages*, and the *Defendant has nothing to ſatisfy the Damages in the ſame City or Borough*, the Plaintiff may *remove the Record by Certiorari into Bank*, and there he ſhall have Execution of the Damages recover'd. Br Recognizance, pl. 51. cites F. N. B. 243.

6. In *Aſſiſe* in B. R. the *Tenant pleaded that the Plaintiff has Writ pending againſt him in Banco, of another Nature than the Aſſiſe*; Judgment of the Aſſiſe; and the *other ſaid Nul Tiel Record*, upon which they were at Iſſue; there the Defendant ſhall remove the Record *out of Bank into Chancery, by Certiorari out of the Chancery directed to the Juſtices of C. B.* to certify it into Chancery, *and* to ſend it *by Writ of Mittimus to the Juſtices of B. R.* And it ſeems, that *in every* other *Caſe, where Record is vouch'd in another Court*, it ſhall come in ſuch Manner, or by *Exemplification under the Great Seal.* Br. Record, pl. 74. cites F. N. B. 244.

7. Upon *Conuſance granted* the Original ſhall not be removed out of the ſuperior Court, nor ſhall the Record, but *only a Tranſcript*; ſo that upon a Reſummons, upon a Failure of Juſtice in the inferior Court, the ſuperior Court may proceed. By all the Counſel. Jenk. 31, pl. 61.

Sid. 466. Bridyard v. Thomas. S. C. —— Raym. 189. Rinch v..... S. C.

8. If there are *divers* Records between the ſame Parties, the *Inferior Court* may remove which they pleaſe, they being warranted by the *Writ* (which *expreſs'd none in certain*) ſo to do; And if *Judgment* ſhall be *given after the Teſte, and before the Return*, the *Record* ſhall be well removed. But if *Judgment* be *entred after the Writ is returnable*, the Writ only is to be returned, and that no Judgment is yet given. Vent. 96. Mich. 22 Car. 2. B. R. Prydyerd v. Thomas.

13. If the *Record vary from the Writ of Error*, yet the inferior Court ought to remove it. Note. Vent. 97. Prydyerd v. Thomas.

(L) Re-

(K) *Remanded;* In what Cafes.

1. WHEN a Record is *removed into B. R. by Writ of Error*, this ſhall never be remanded, and without the Record thoſe of the *Franchiſe cannot hold Plea*; and yet *when Conuſance is granted, they ſhall not ſend the Original but the Tranſcript, upon which the Franchiſe ſhall hold Plea.* Note the Diverſity. Br. Record, pl. 13. cites 44 E. 3. 37. *But* in this Caſe *B. R. awarded Execution of a Fine by Scire Facias, and the Bailiffs of E. demanded Conuſance, and were Ouſted for the Reaſon aforeſaid*; and yet in *antient Demeſne*, where Parol is remov'd, inaſmuch as the *Tenant claims to hold at Common Law*, there after Trial it *ſhall be remanded.* Ibid ——Br. Conuſance, pl. 13. S. C.

2. *Foreign Voucher in Cheſter*, and *foreign Releaſe in a Franchiſe*, ſhall be try'd at Common Law. Per Brudnel J. and remanded. Br. Trial, pl. 59. cites 21. H. 7. 35. Brooke ſays *Quere of the Releaſe*; For it ſeems that this *ſhall go to the Juriſdiction*; For both the Courts are at Common Law. Ibid. —— *Contra* of *Iſſue joined in Chancery, and ſent into B. R. to be try'd.* Ibid.——*Or Record in C. B. removed into B. R.* by Writ of Error, or otherwiſe; For thoſe ſhall not be remanded. Ibid. —— *So* per Fineux Ch. J. of *Record remov'd by Error out of Cheſter.* Ibid.——Br. Traverſe de Office, pl. 19. cites S. C.

(L) *Count. How* the Count upon a Record ought to be. *And Pleadings.*

1. IN *Aſſiſe* the *Defendant ſaid that he is Villein to B.* upon which the *Writ abated*, and the *Plaintiff brought another Aſſiſe againſt him and B. his Lord*; and *the ſame Defendant pleaded Villein to another*, and the *Plaintiff eſtopp'd him by the firſt Record*; and he *ſaid that Nul tiel Record*, and *the ſame Record was found before the ſame Juſtices immediately*; and this is peremptory, per Stove J. Br. Failer de Record, pl. 9. cites 22 Aſſ. 12.

2. In *Debt* brought *upon Recovery of* 10 *l. Damages*, in Writ of Entry of Land, the Plaintiff in his Declaration ought to *rehearſe the Original Writ, and all the ancient Record ſuch as it is.* Br. Count, pl. 39. cites 22 H. 6. 38. He who declares upon a Record *ſhall releaſe all the Record and Proceſs*, and ſhall not mention the Iſſue till Niſi Prius, but *ſhall ſhew the Venire facias, and the Return and Service of it, and then may ſay, Abinde continuatur Proceſſus per Juratos*; and well, and not before. Br. Count, pl. 17. cites 34 H. 6. 4.

3. Where *Parcel of the Record makes for* a Man, *and Parcel againſt him*, he may in his Pleading, or in his Declaration, take that which makes for him, and relinquiſh the reſt. Per Davers J. which Aſhton and Priſot denied; for per Aſhton, In pleading of a Record a Man *ſhall commence at the Original, and ſhall make Mention of the Summons and Severance, if any was*; and where *two recover and one ſurvives, he ſhall make Mention of both* in ſuing his Execution; for a Recovery by two is not a Recovery by one. Br. Pleadings, pl. 51. cites 30 H. 6. 5. *And* per Priſot, in pleading of a Record a Man ſhall commence at the Original, and ſhall make *Mention of the Voucher, and every Writ of Proceſs, and of every Continuance, and of Garniſhment* &c. Ibid ——*And in Raviſhment of Ward, and in Quare Impedit*, if he ſues Execution of greater Damages, he ſhall make Mention of all the Record. Ibid.——*And* where *Judgment* is given, & *quod ceſſet Executio*, yet he ſhall make Mention of this alſo, tho' it be againſt him. Ibid.——*And in Scire facias to one for Life*, the *Remainder of Part to the Plaintiff, and the Remainder of the reſt to J. S.* he ſhall make Mention of all in his Execution in Scire facias Ibid

4. In

Br. Action ſur le Caſe, pl. 13. cites S. C.

4. In Treſpaſs upon the Caſe, the Plaintiff *counted that the Defendant is Clerk of the Juries, and* that he *brought Writ of Entry againſt J. N. And rehears'd the Proceſs, the Plea and the Iſſue, & deinde continuato Proceſſu between the Parties &c. Oct. Hill. quarto Die, the Defendant aſſum'd upon himſelf for ſuch a Sum to inrol the Jury and the Niſi Prius, and did not inrol it; ſo that where the Jury paſs'd for him,* the *Judgment was omitted.* And per Cur. Becauſe he *declares upon Part of the Record,* he ought to declare upon All in certain, and not (deinde continuato Proceſſu;) quod nota, whereupon &c. But per Aſhton, He need not to have gone beyond the Niſi Prius, but to have commenced there where the Default was, and no further; but where he meddles with the Record, he ought to ſhew the Venire facias awarded, and how it is ſerv'd, and then Continuato proceſſu per Jur. had been good; and otherwiſe not, per Priſot, quod Cur. conceſſit. Br. Record, pl. 5. cites 34 H. 6. 4.

He ought to *ſhew where it is* that the Court may have it *As apud Weſtmonaſterium in Com. Midd.*

5. Note, it was agreed that in B. R. the *Record is* (*Placita coram Rege apud talem locum*) and therefore when a Man pleads a Record of this Court, he ſhall ſhew where the King's Bench then was, becauſe the Day is paſs'd, ſo that it is certainly known; but the *Proceſs there is* (*Ulicunque tunc fuerimus in Anglia.*) Br. Pleadings, pl. 10. cites 34 H. 6. 27.

Per Cur. 12 Mod. 318. Mich. 12 W. 3. Anon.

But when he pleads the *Return of the Sheriff*, he ſhall ſay that J. S. Sheriff &c. return'd it *before Sir John Priſot and others his Companions Juſtices* &c. Ibid.

6. In Aſſiſe, the Pleading of a Record *is not to ſay* that *ſuch a Day he purchaſed ſuch a Writ, but* that he *purchaſed the Writ by this Teſte ſuch a Day and Year,* and ſhall *not* ſay that it was *returnable before Sir John Priſot and his Companions Juſtices of C. B. but that it was returnable before the Juſtices of C. B. without naming them.* Br. Pleadings, pl. 41. cites 37 H. 6. 14. Per Priſot.

But of ſuch Recovery the other *ſhall not ſay Nul tiel Record, but Nul tiel Recovery*; for it is no Record, and ſhall be tried per Pais. Br. Failer de Record, pl. 8. cites 9 E. 4. 42.

7. A Man *cannot vouch a Record of Recovery of Debt, or ſuch like, in a Baſe Court*; for *it is not a Record, but a Roll,* ſcil. Loquela; and therefore if he declares upon ſuch Record, *he ought to ſhew it exemplified*; but Quære inde. Br. Failer de Record, pl. 8. cites 9 E. 4. 42.

If a Record is *pleaded in Bar*, it muſt be intirely and certainly *recited*, becauſe the Record only is the Matter of the Subſtance and the Effect of the Bar, which muſt be full and perfect; but if the Recital of the Record be *only Conveyance to*, and not the Effect of the Bar, it need not be ſo certainly. Per Montague Ch. J. Pl. C. 65. b. Mich. 4 E. 6. Dyve v. Maningham.

8. A Patent or Record *ſhall not be pleaded by Rehearſal, but by Matter in Fact.* Br. Pleadings, pl. 110. cites 21 E. 4. 44.

(N) *Averment* againſt Records.

1. A MAN cannot aver againſt a Record, as that a *Deed Inroll'd* in May, but enter'd as inroll'd in April before, was not inroll'd in May but in April. Ow. 138. Hill. 30 Eliz. Sir Thomas Howard's Caſe.

A Man may take *Averment*, which ſtands with the Record, and which does not impugn any Thing appearing within the Record, and which is only as to the Operation of it. 4 Rep. 71. Hynde's Caſe.

2. Every Record *imports a Truth* in itſelf, and tho' an *Averment* may be againſt the *Operation* of a Record, yet the Court inclin'd that it cannot be againſt the *Matter* and Subſtance of the Record itſelf. Le. 183. Hill. 31 Eliz. B.R. Holland v. Franklin.

3. In

3. In *Caſe* againſt the Sheriff *for an Eſcape upon Meſne Proceſs*, Plaintiff declared of a Capias in Treſpaſs by him *againſt R. H.* upon which he was arreſted, and afterwards eſcaped; the Defendant *pleaded in Bar, that after the* Time of the ſuppoſed *Eſcape, H. by the Conſent* and Leave *of the Plaintiff himſelf did appear at the Day of Return of the Writ, Prout per Recordum ejuſdem Comparentiæ &c. apparet, & hoc paratus eſt Verificare.* The Plaintiff *replied Nul tiel Record* of the Appearance of the ſaid H. *per quod liquet* &c. *that H. appeared by the Conſent* and Leave of the Plaintiff. Upon Demurrer to this Replication, it was objected that it was ill, becauſe the alleging the Appearance of Defendant was ſufficient, and the alleging the Aſſent &c. was immaterial, and that traverſing the Appearance only had been ſufficient. On the other Side it was urg'd that the Bar was ill, and for that Purpoſe were cited Hob. 210. Welby v. Canning. Lat. 149. Calſe v. Bingles. Jo. 138. S. C. and 2 Roll. Rep. 119. Worſley's Caſe. But the Parties amended by Conſent. Lutw. 71. Trin. 2 Jac. 2. Benſon v. Muſgrave.

(N) Of Pleading *Nul tiel Record.*

1. IN Aſſiſe, if a Man pleads Nul tiel Record, and *ſuch Record is found in this Court*, or certified, he ſhall not have other Anſwer after; for it *is Peremptory*, per Stouſe. And it was of a Record alleg'd, by which the Tenant at another Time had confeſs'd himſelf to be Villein of a Stranger, whereupon he abated the Writ of Aſſiſe. Br. Record, pl. 73. cites 22 Aſſ. 12.

2. In *Aſſiſe* the *Defendant intitled himſelf by Fine, and that the Eſtate of the Plaintiff was Meſne between the Fine and Execution*, and the *Plaintiff intitled himſelf by Releaſe by Fine with Warranty of the Anceſtor of him who recovered by the Fine alleg'd in the Bar, and ſo the Execution upon the Fine in the Bar, by which the Tenant claims, is falſe and feint in Law*; to which the *Defendant ſaid Nul tiel Record of any ſuch Fine* by which the Plaintiff claims; and whereas the Plaintiff vouch'd Record of the Fine, now the *Plaintiff ſhew'd forth the Record Sub pede Sigilli*; and pray'd the Aſſiſe of the Damages: And the Opinion of the Court was, That he ſhall have it; for the Pleading of Nul tiel Record, where the Plaintiff now ſhew'd the Record, is as ſtrong as if the Defendant had travers'd the Title of the Plaintiff, and this had been found againſt him by the Verdict. Br. Record, pl. 43. cites 29 Aſſ. 1.

3. In *Aſſiſe*, if the *Tenant pleads Recovery againſt a Stranger, and that the Eſtate of the Plaintiff is Meſne between the Date of his Writ and the Judgment*, he ought to allege the Date of his Writ; and if he miſtake the Date, the Plaintiff may reply Nul tiel Record. Per Finch. Br. Record, pl. 15. cites 48 E. 3. 11.

4. *Notwithſtanding the Certification of the Tenor* of the Record, the Defendant may plead Nul tiel Record; quod nota. Br. Monſtrans, pl. 50.

As Debt upon a Recovery of 10 *l. Damages in Treſpaſs in Court of Piepowders at G.* and the *Tenor* of the Record *was made to come into Chancery by Certiorari, and ſent into Bank by Mittimus*, and Declaration upon the Record (cujus tenor &c. was compriz'd in the Count.) And Rolfe offer'd to demur, becauſe he did not ſhew the Record itſelf; But the Court held the contrary, wherefore he paſs'd over, and pleaded Nul tiel Record. Br Monſtrans, pl. 50. cites 7 H. 6. 18.——Br. Record, pl. 19. cites S C.

5. Writ upon the *Statute of Marſhalſea*, that whereas none ſhould be ſued in the Marſhalſea, if one Party was not of the Kings Houſe, the Party had there vexed him &c. Hull pleaded *Nul tiel Record*, but per Caundiſh this is *no Plea*; For the Steward is in a Manner *Party*, and there is

no Reaſon that He ſhall certify it, but *it ſhall be try'd by Averment*, however he durſt not demur, but *ſaid that Such Record* &c. and *pray'd to have Record*. Br. Record. pl. 21. cites 7 H. 6. 33.

Br. Conſpiracy, pl. 36. cites S. C.

6. Nul tiel Record *of an Indictment* is a good Plea *in Writ of Conſpiracy*. Br. Record. pl. 1. cites 9 H. 6. 26.

Br. Forger de Faits, pl. 1. cites 9 H. 6. 26.

7. 'Tis no Plea in a *Bill of Diſceit*, but he ſhall anſwer to the Tort. Br. Bille. pl. 9. cites 19 H. 6. 29.

Where *Record* is *pleaded in the ſame Court* where the Record remains, there the other cannot ſay Nul tiel Record, becauſe the Record is apparent in the ſame Court. Br. Record. pl. 52. cites 9 H 7. 9. Per Brudnel and Keble. —— S. P. But if it remains in another Court, he may plead, That Nul tiel Record. Per Brian Ch. J of C. B. Br. Record. pl. 75. cites 5 H. 7. 24.

8. *Debt* was brought *in C. B.* in the County of Middleſex *of Damages recovered in Writ of Entry in the ſame Bank upon Writ of Entry brought in the County of S. where the Land lay.* The *Defendant pleads Nul tiel Record here in C. B.* And per Markham, Fulth. and Port. this is no Plea; For tho' the Record be removed into B. R. by Writ of Error, yet the Action lies here, and ſo if the Judgment be affirmed there; but Nul tiel Record Generally is a good Plea; upon which the Defendant pleaded accordingly. Br. Record. pl. 27. cites 22 H. 6. 38.

9. *Debt* was brought *upon Recognizance*, the *Defendant ſaid Nul tiel Record*, and a Recognizance was certified *upon Condition*, and yet the Plaintiff recovered notwithſtanding he did not declare of the Condition. Br. Pleadings, pl. 51. cites 30 H. 6. 5.

But if a Man declares *of the Eſcape* of a Man condemned, *or upon Fine or other Record*, and *concludes Prout, and does not rely upon the Record* there, Nul tiel Record is no Plea. Br. Traverſe per &c. pl. 332. cites 38 H. 6. 28, 29.

10. In *Debt upon Eſcape* againſt Bailiff, Sheriff, &c. inaſmuch as he ſuffered the Priſoner condemned to eſcape, Nul tiel Record is a good Plea; Quod nota bene. Br. Record. pl. 72. cites 30 H. 6. 6.

S. P Hawk. Pl. C. 22. cap 83. S. 39. —— S P. And *ſo in Decies tantum* Nul tiel Record is a good Plea, and in thoſe Caſes, and in others founded upon the Record, ſuch Iſſue ſhall be tried by the Record, and not per Pais per Heydon. Br. Record. pl 56. cites 5 E. 4 3.

11. In *Maintenance* Nul tiel Record is a good Plea; Per Davers and Priſot. Br. Record. pl. 37. cites 36 H. 6. 12.

The adverſe Party cannot plead Nul tiel Record, becauſe it appears to the Court that there is ſuch a Record, but inaſmuch as it is in Nature of a Conveyance, the Party may deny the Operation thereof; therefore he may plead Non conceſſit, and prove in Evidence that the King had nothing in the Thing granted or the like, and ſo it was adjudged. Co. Litt. 260. a.

12. *If a Man pleads a Patent, and ſhews it, Quære if the other can deny* that Nul tiel Record. Br. Record. pl. 39. cites 38 H. 6. 34.

Br. Trialls. pl 51. cites 9 E. 4 43. S. C.

13. In *Debt*, if a Man *counts upon Recovery in a Court Baron of Damages of* 100 *Marks*, or in a Court of Ancient Demeſne, Nul tiel Record is no Plea, but he *ſhall ſay Nul tiel Recovery*, and it ſhall be try'd per Pais; For if the Rolls are burnt, yet the Plaintiff ſhall recover. Br. Record. pl. 32. cites 9 E. 4. 42.

14. Where a Man ſhews Record *Exemplified under the Seal of the Exchequer or of C. B.* the other may ſay Nul tiel Record againſt it, Contra, if he ſhews Exemplication under the Seal of the Chancery; note the Diverſity. Br. Record. pl. 83. cites 16 H. 7. 11. per tot. Cur.

Nul tiel Record is not pleadable againſt an *Act of Parliament*, tho' in Truth *the Record be embezzelled*, if the Act be General, becauſe every Man is privy to it. Per Cook Ch. J. Godb 178. Mich. 8 Jac C. B. Jolly Woolſey's Caſe.

15. Againſt a *General Act of Parliament*, or ſuch Act whereof the Judges ought Ex Officio to take notice, the other Party need not plead Nul tiel Record; For of ſuch Acts the Judges ought to take Notice; But if it be *Miſ-recited*, the Party ought to *demur* in Law upon it. 8 Rep. 28. The Prince's Caſe,

16. If Nul tiel Record be *pleaded in Bar, it is an Iſſue, and Judgment ſhall be given upon Failure* of it. Per Cur. Het. 18. Paſch. 3 Car. C. B. in the Caſe of a Recuſant Convict.

17. In *Debt* upon Bond *in Briſtol*, the Defendant *pleaded* in Bar a *Judgment upon the ſame Obligation in B. R. Et hoc paratus eſt verificare per Recordum illud remanens in B. R.* The Plaintiff *replied Nul tiel Record &c.* The Defendant *rejoined, Quod habetur tale Recordum, & hoc paratus eſt verificare per Recordum illud*; *but* pleads further *That he cannot have the Record out of B. R. Unde petit Judicium ſi Curia de Briſtol alterius procedere vult.* The Court there gave Judgment againſt the Defendant for Failer of Record; It was aſſigned for Error, That the Court ought not to have given Judgment upon Failure of the Record, at leaſt not without a Demurrer upon the Plea; but the Court affirmed the Judgment. Lev. 222. Trin. 19 Car. 2. B. R. Pitt v. Knight.

Knight v. Pitt. S. C. Sid. 329 Paſch. 19 Car. 2. B. R reports the Defendants Repinder thus, viz. *Quod habetur tale Recordum prout per Recordum in B. R apparet, but becauſe he cannot have the Record in this Court, he demanded Judgment if the Court there would proceed*; And reports that the next Term it was held that he that will join Iſſue upon Record ought to ſay, Et hoc paratus eſt verificare prout per Recordum illud — Or — Verificare prout Curia hic conſideraverit, and that to are all the Precedents —— The Reporter afterwards adds a Nota, That upon New Debate in Mich Term following the Court altered their Opinion again, and affirmed the firſt Judgment, notwithſtanding it was (*Prout per Recordum Plenius liquet*) But they agreed that the uſual Way in this Caſe is to omit the laſt Part, viz. (Plenius liquet) —— S. C. Saund. 96. Says the Judgment was affirmed by the Court againſt their own Opinion; And that this Term the Court was of Opinion that the Record of B. R might have been certified to Briſtol by Certiorari & Mittimus.

18. A *Scire Facias* was awarded againſt the Defendants upon a Recognizance, which they entered into as Bail for a Plaintiff in a Writ of Error, that he ſhould proſecute it with Effect, or pay the Money, if the Judgment were affirmed; They plead, That he did proſecute it with Effect, and that the Judgment was not yet affirmed; The Plaintiff replied *Proteſtando*, That they did not proſecute with Effect, *Pro Placito*, That the Judgment was affirmed by the Juſtices of the Common Bench, and Barons *De Grada de la Coif, et hoc paratus eſt verificare per Recordum*; To which the Defendants demurred generally, Becauſe it was not alleged, That there were 6 Juſtices and Barons preſent when the Judgment was affirmed; For 27 Eliz. cap. 8. which gives them Authority, requires that there ſhould be 6 at the leaſt. Sed non allocatur; For the Defendant ſhould then have pleaded *Nul tiel Record*, For if there were not 6, their Proceedings were *Coram non Judice*. Vent. 75. Paſch. 22 Car. 2. Barret v. Milward.

19. In Treſpaſs for *Aſſault* &c. by the Defendants *Simul cum J. B.* the Plaintiff declared of aſſaulting and impriſoning him *on the 15th Day of May* &c. *and detaining him in Priſon* 20 *Days* &c. the *Defendants pleaded* in Bar *That the ſaid Aſſault* &c. *was done by them Conjunctim with the ſaid J. B. and that the now Plaintiff brought an Action in C. B. againſt the ſaid J. B. alone* for the ſaid Treſpaſs &c. *and had a Verdict and Damages, which he had paid*; the Plaintiff *replied, Nul tiel Record*; the Defendants rejoined, Quod habetur tale Recordum, and prayed that it might be inſpected; Upon its being brought into Court, a Variance was alleged between the Record pleaded, and the Record in this Action; For the Plaintiff has now declared of an Aſſault done on the 15th Day of May, and for impriſoning him 20 Days, whereas the *Record* againſt J. B. *was* for an Aſſault done on the *14th Day of May, and* for *impriſoning him* 10 *Days only*; and becauſe the Defendant *had not preciſely averred in his Plea, That it was eadem Tranſgreſſio*, the whole Court were of Opinion that it was a material Variance, and that the ſaying, That the Treſpaſs aforeſaid was done by them Conjunctim &c. was not ſufficient of itſelf without ſuch Averment as before. 2 Lutw. 944. Hill. 9 W. 3. Rowell Dyon and Walmiley.

But where the Record, as removed by a Writ of Error, run thus, *Quia in Record*, et Proceſſu acetiam in Redditione Judicii *Loquele* que fuit in Cur. noſtra coram vobis & Sociis veſtris Juſtic. no-ſtris de Banco *per breve* noſtrum *inter J. S. and* 31 *Defendants* tunc *ſummon'*, Error intervenit &c. Whereas by the Record returned it appeared that *the Action was between Plaintiff and* 32 *Defendants, and a Verdict againſt* 32, but that *the* 32 *Defendants had Judgment as to* 31 *only* and

and this was objected as a Variance between the Record deſcribed, and the Record returned; and that the Treſpaſs by 31 Defendants muſt be a different Treſpaſs from that by 32 Defendants, the Court held the Record well removed; That the Word (*Inter*) in the Writ of Error *may refer to* (*Lequele*) *as well as* (*Breve*) and if ſo, the Court will refer it to that which will uphold the Writ of Error; and (Breve) is only uſed to ſhew whether the Suit was commenced by Writ or Bill; Beſides, when one of the Defendants dies, 'tis no longer a Writ againſt him, and 'tis the ſame as if he had never been named; Laſtly, that *the Identity of the Treſpaſs does not depend on the Number of the Parties*; for the Treſpaſs may be the ſame be it committed by 5 or 10 Perſons; And the Judgment was affirmed. 10 Mod. 367. Hill. 3 Geo. 1. B. R. Cook v. Dutcheſs of Hamilton

2 Salk 466. S. C. The Court held the Demurrer ill; Becauſe by the Demurrer.

20. *Scire Facias again Bail*, who pleaded that there was *no Capias againſt the Principal*; Plaintiff *replied*, and ſet out a Capias *Prout Patet per Recordum*; the Defendant *rejoined* Nul tiel Record; Plaintiff *ſurrejoined* that there was *ſuch a Record, and prayed a Day to bring it in*; whereupon the Defendant demurred. Per Holt, this Way of Pleading is out of the common Courſe; there are *two Ways of pleading* of a Record, either by *craving Oyer* of a Record, and if it is not given it is a Failure; or he may *plead Nul tiel Record, and then a Day is given to bring it in*, but this Surrejoinder is a 3d Way, and a new one; But it was adjudged well enough, and Plaintiff had Judgment 12 Mod. 215. Mich. 10 W. 3. B. R. Moor v. The Manucaptors of Garret.

12 Mod. 351. S. C. —— Ld. Raym. Rep. 550. Paſch. 12 W. 3. B. R. & C accordingly. But Holt Ch. J. ſaid, That final Judgment ought not to be ſigned, but only a Quod *reſpondeat Ouſtre*; for *Failer of Record is not peremptory*.

21. In an Action of *Battery and falſe Impriſonment* brought in B. R. the Defendant pleaded *in Abatement* another Action depending for the ſame Matter in the ſame Court; The Plaintiff replied, *Quod non habetur aliquod tale Recordum & petit quod Recordum illud &c. inſpiciatur*, without giving Liberty to the Defendant to rejoin *Quod habetur tale Recordum*. And upon Demurrer to this Replication the Plaintiff had Judgment, becauſe this being a Record of the ſame Court in which it was pleaded the Plaintiff might pray, That it might be inſpected by the Court, if any ſuch there was, as 'tis reported in * Dier, which was the Precedent by which the Plaintiff was guided in this Caſe. Et per Curiam, Upon this Plea the Plaintiff might have pray'd *Oyer* of the Record pleaded; and for want of *Oyer* might have ſigned Judgment, which is the quickeſt Method of Proceeding. Carth. 517. Hill. 11 W. 3. B. R. Creamer v. Wickett.

—— *But* if the Defendant pleads an *Action depending in another Court* for the ſame Cauſe in Abatement, and Nul tiel Record is pleaded; *if there was ſuch Record at the Time* of the Pleading *of the Plea*, tho' the Action was afterwards diſcontinued, yet the *Plea is good*, becauſe it was true at the Time of the Pleading; But if a Man pleads a Recovery by Judgment in Bar of an Action, and the ſaid *Judgment is reverſed after the* Pleading of the *Plea*, now the *Plea is ill*, becauſe now it is No ſuch Record ab initio. Per Holt Ch. J. Ld. Raym. Rep. 254. Mich. 9 W. 3. Green v Watts.

* Dier 227, 228.

S. P. Rep. of Pract. C. B 56. Paſch. 3 Geo. 2. Fox v. Lewing.

22. In *Debt on Judgment* Defendant *pleads, That the Plaintiff had recovered a Judgment in B. R.* Plaintiff *replies Nul tiel Record, and delivers the Iſſue with a Day* given in it *for the Defendant to bring in the Record* at his Peril. *Defendant inſiſts that the Replication* of Nul tiel Record *ſhould not be delivered in the Iſſue Book and Day given to bring in the Record, but that the Plaintiff ſhould give him the Replication by itſelf in Form, and give a Rule to rejoin*; therefore moved, That the Plaintiff ſhould take back the Iſſue delivered, and deliver a Replication in Form, and alſo repay the Money he took for the Iſſue. But upon a Rule made to ſhew Cauſe the Court were of Opinion that *a Rejoinder in this Caſe is totally unneceſſary after a compleat Iſſue joined, and the Delivery of the Iſſue was right*, and diſcharged the Rule. There is no Difference between a Record of this Court pleaded and a Record of another Court, the Iſſue is compleat upon the Replication without the Rejoinder. *Where the Defendant avers the Record*, and the *Plaintiff gives* him a *Day to bring it in*, the *Concluſion* of the Replication *is* as follows, viz. *Et hoc paratus eſt verificare qualitercunque* &c. *Et dictum eſt prefat' Def' quod habeat Record' ill' hic in Octab. Pur' Beatæ Mariæ ſub periculo ſuo* &c. *Idem dies dat' eſt prefat. quer' hic* &c. *Where the Plaintiff avers* the Record, the *Concluſion* of the Replication *is* thus, viz. *And prays that that Record may be ſeen and inſpected*

ſpected by the Juſtices here &c. And becauſe the ſaid Plaintiff hath not now that Record ready here in Court, he is directed That he have that Record here in 8 Days of St. Martin. The ſame Day is given to the ſaid Defendant here &c. Notes in C. B. 240, 241. Paſch. 9 Geo. 2. Newberry v. Strudwick.

23. The Plaintiff *declared on a Recognizance of Bail without ſetting forth the Condition*; the Defendant *demurred generally*, and the Court gave Judgment for the Plaintiff. The Recognizance in the Declaration does not appear to be Conditional, but Abſolute; if Conditional, the Defendant might have pleaded Nul tiel Record. Notes in C. B. 246. Mich. 11 Geo. 2. Croſſe v. Porter.

(O) Of Pleading *Prout Patet* per Recordum.

1. WHere a Man counts and pleads, and concludes *Prout Patet de Recordo, or Per Finem*, thoſe Words are void, if he *does not plead the Record or Fine certain.* Br. Nugation, pl. 17. cites 38 H. 6. *As* in *Debt* the *Plaintiff counted of a Recovery of* 20*l. and that he had the Party in Execution, and counted all in certain, and* that the Party condemned was committed to the Cuſtody of the *Marſhal*, and he *permitted him to eſcape Prout Patet de Recordo coram vobis*, Satisfaction *not being made to the Party, by which the Action* &c. the *Defendant ſaid, That he did not go at large*; Priſt, and ſo to Iſſue, and found for the Plaintiff; and the Defendant alleg'd in Arreſt of Judgment, That inaſmuch as the Plaintiff counted of Eſcape, Satisfaction not being made, Prout conſtat coram vobis de Recordo, it ought to have been try'd by the Record, and not per Pais; and yet the Plaintiff recover'd by Award; for thoſe Words, *Prout patet coram vobis de Recordo, are void where* the Plaintiff does *not count certainly upon the Record*, how the Eſcape appears there, or plead the Record thereof in certain; and *ſo* where he concludes his Plea *Prout patet per Finem*, quod nota. Br. Repleader, pl. 27. cites 38 H. 6. 29.

2. In Debt upon an *Obligation* with *Condition to appear* in the Court of B.R. ſuch a Day &c. the Defendant *pleaded*, That *the Court was adjourn'd to Hertford, and that he appear'd there*; and adjudg'd to be ill, becauſe he ſaid not, Prout patet per Recordum; for tho' he appeared, yet if this Appearance be not enter'd upon Record, he forfeits his Obligation; and if he does not conclude with Prout Patet, the Plaintiff cannot have an Anſwer & ſay Nul tiel Record. And of that Opinion was all the Court. Cro. E. 460. (bis) Hill. 38 Eliz. pl 16. Corbet v. Cook.

3. Scire facias againſt the *Bail upon a Writ of Error*, according to the Statute 3 Jac. The Defendant upon Oyer *pleaded*, That the Plaintiff in Error *proſecuted it with Effect, and that* thereupon the *Judgment was reverſed & hoc paratus eſt verificare*; and upon Demurrer to this Plea it was adjudg'd ill, becauſe he ought to have concluded, Prout Patet per Recordum. Raym. 50. Mich. 13 Car. 2. B. R. May v. Spencer. G. brought a *Scire facias* againſt H. as Bail to J.S. in an Action in the Palace Court wherein G. got Judgment; and this was to ſhew Cauſe why G. ſhould not have Judgment generally &c. The Scire facias *recited the Judgment* of the inferior Court *Sicut per Inſpectionem Recordi nobis conſtat.* It was held, That the Scire facias was ill by reaſon of this Recital; for if the Defendant pleads Nul riel Record, it ought to be tried by the Record itſelf, and not Per Inſpectionem Recordi; but it ought to have been Prout Patet per Recordum; And for theſe Reaſons the Scire facias was abated. Ld Raym. Rep. 216. Paſch. 9 W. 3. Guilliam v. Hardy.

4. 16 & 17 *Car.* 2. 8. Enacts, That *after a Verdict Judgment ſhall not be ſtay'd nor revers'd for Want of* Prout Patet per Recordum, *but ſuch Defect ſhall be amended.*

5. *Scire facias to execute a Judgment.* The Defendant *pleaded*, That *he was taken in Execution upon the Judgment, and brought to the Bar and acknowledg'd to be in Execution, and* afterwards was voluntarily *permitted by the Sheriff to eſcape.* The Plaintiff demurr'd and had Judgment, becauſe the Plea did *not conclude the Committitur, Prout Patet per Recordum*; for Sid 333 S.C. but not S.P.

'tis Matter of Record, and muſt be ſo pleaded. 'Tis true Writs are alſo Matters of Record, but they need not be ſo pleaded, becauſe they may be loſt, and perhaps never are returned. 1 Lev. 211. Paſch. 19 Car. 2. B. R. Alanſon v. Butler.

6. In *Aſſumpſit* upon a Bill of Exchange the Defendant *pleaded an Outlawry* in Bar, but becauſe he *concluded* his Plea with *Et hoc paratus eſt verificare* inſtead of Prout Patet per Recordum, Judgment was given for the Plaintiff. 3 Lev. 29. Mich. 33 Car. 2. C. B. Hage v. Skinner.

7. Action againſt the Warden of the Fleet, who *pleaded* Salvis ſibi omnibus Advantagiis ad Billam præd' &c. *that he was an Officer of the Court of C. B.* and that no Officer of that Court can be ſued but Coram Juſticiariis C. B. The Plaintiff *replied, That Tempore exhibitionis Billæ the Defendant was in Cuſtodia Mar' Mareſc' in quodam Placito debiti ad Sectam A. B.* And upon Demurrer it was *held, That Prout Patet* per Recordum *is only Matter of Form, and helped by a General Demurrer*; becauſe where a Record is pleaded without ſuch a Concluſion, the other Side may anſwer Nul tiel Record; beſides *this is no Plea after an Imparlance.* 1 Salk. 1. Mich. 8 W. 3. B. R. Duncomb v. Church.

Ld Raym. 2 Rep. 138. S. C.

8. The Defendant entered into a Recognizance before a Judge of C. B. *that if the Plaintiff in Error ſhould be nonſuited, or the Writ diſcontinued or the Judgment affirmed, then he would pay* &c. and now a Scire facias was brought upon this Recognizance &c And the Defendant craved Oyer, and *That the Plaintiff in Error did proſecute the Writ, and aſſigned Errors, Et quod Placitum ſuper prædict' breve de Error' adhuc pendet indeterminatum*; the Plaintiff *replied, That the Judgment was affirmed abſque hoc that Placitum pendet indeterminatum*; And upon Demurrer to this Replication the Plaintiff had Judgment in C. B. And now the Defendant brought a Writ of Error; The Court held, That the Defendant's Plea was only by way of Excuſe; and that it had been ſufficient for him to have pleaded, That the Errors were aſſigned, and that Placitum inde pendet indeterminat.' 2dly, They held that this was in the Negative, and therefore the Defendant need not conclude with a Prout Patet per Recordum; but he *ought to have ſaid, That the Record was certified into B. R.* in ſuch a Term, *and quod Superinde Talis fuit Proceſſus fuit, quod judicium Affirmatum fuit Prout Patet per Recordum*; And if it was not ſo, then the Defendant might have rejoined Nul tiel Record. And this Replication was adjudged ill; 1ſt, Becauſe it *makes that a Matter of Inducement, which ſhould have been the Point in Iſſue.* 2dly, Becauſe *the Traverſe puts a Matter of Record to be tried by the Country*; and thereupon the Court was going to reverſe the Judgment, but an Exception was taken to the Writ of Error, for which it was quaſhed. 2 Salk. 520. Paſch. 4 Annæ. B. R. Fanſhaw v. Morriſon.

9. 4 & 5 *Annæ* 16. Enacts, That *upon Demurrer joined in any Court of Record no Exception ſhall be taken for Omiſſion of* Prout patet per Recordum, *but the Court ſhall give Judgment without regarding ſuch Defect, except ſhewed for Cauſe.*

10. The Defendant *in falſe Impriſonment juſtified under a Writ* taken out at ſuch a Time; The Plaintiff demurr'd and had Judgment in C. B. Becauſe the Defendant did not conclude his Plea with Prout Patet per Recordum, nor traverſe his impriſoning the Plaintiff at any other Time. Upon Error it was argu'd, That if the Action had been againſt the *Sheriff*, and he had *juſtified under the Writ*, he muſt have concluded his Plea with Prout Patet per Recordum, becauſe it would not be a Record if he had not returned the Writ; but tho' he never return it, it is ſtill a good Juſtification for the Defendant in this Action; And it is not abſolutely neceſſary for a Defendant to conclude his Plea ſo, becauſe a Writ may be loſt. Per Cur. The Original gives Juriſdiction to this Court, ſo that if it be not returned, the Court has no Juriſdiction in this Caſe, and the Cauſe cannot properly be ſaid to be in Court; But if the *Sheriff never returned the Writ*, how could the Defendant in this Action plead Prout Patet per Recordum?

Recordum? therefore his Plea muſt be good without ſuch Concluſion; and if his Plea be good, then the Traverſe would be immaterial; And ſo the Judgment in C. B. was revers'd. 8 Mod. 30. Hill. 7 Geo. 1721. Carvel v. Manley.

(P) Pleadings. *Profert or Monſtrans.* Neceſſary in what Caſes, and when.

1. IN Aſſiſe 'twas ſaid, That *he who is not Tenant* ſhall not have a Day to certify Record of *Outlawry*, *Fine*, *nor other Record*, but ſhall ſhew it preſently; For if he ſhould have a Day, and fail at his Day, he can loſe nothing by the Failure. Br. Monſtrans, pl. 89. cites 19 Aſſ. 10.

2. In Aſſiſe the *Tenant pleaded a Recovery by a Stranger* againſt W. N. *which Eſtate* of the Recoveror *he has*, and the Eſtate of the Plaintiff was Meſne between the Diſſeiſin; upon which the Stranger recover'd; And pray'd Judgment if Aſſiſe &c. and a good Plea without ſhewing the Record; for 'tis ſaid elſewhere, That he ſhall have Day to bring it in. Br. Monſtrans, pl. 90. cites 22 Aſſ. 28.

3. In Aſſiſe the Tenant intitled himſelf, inaſmuch as W. was ſeiſed in Fee, and was bound to him in a *Statute Merchant*, and he ſued *Execution*, and ſhewed how in Form &c. and ſhewed the Statute; But it is ſaid that he need not, for the Execution *is of Record*; quod nota. Br. Monſtrans, pl. 95. cites 24 Aſſ. 2.

4. In Aſſiſe, a *Recovery in Writ of Right Patent* in Court of the Lord is no Bar without ſhewing of the Record, *exemplified ſub Sigillo Cancellariæ*; quod nota; upon which the Aſſiſe was awarded: The Reaſon ſeems to be becauſe this Recovery *is not of Record*, whereas if it had been of Record, he might have had a Day given to bring it in. Br. Monſtrans, pl. 97. cites 28 Aſſ. 14.

5. In Aſſiſe the Defendant *pleaded Outlawry of Felony* in the Plaintiff; Judgment, if he ſhall be anſwered; and the Opinion of the Court was, that he ſhall well have the Plea without ſhewing *Record* thereof; quære. Br. Monſtrans, pl. 98. cites 29 Aſſ. 61.

But in Indictment of Murder Outlawry was pleaded in one of the Indictors in Treſpaſs; and becauſe he had not the Record ready, and the Court conceiving it to be alleg'd in Delay of Juſtice only, therefore they ordered the Defendant to anſwer. Cro C. 147. Hill. 4 Car. Sir William Withipole's Caſe. ——— 2 Hawk. Pl. C. 219. cap. 25 S. 29. cites S. C.

6. In Debt upon a *Recovery in another Court* the Plaintiff ought to ſhew the Record *at the firſt Day*; quære inde. Br. Monſtrans, pl. 131. cites 11 H. 4. 12.

Ibid pl 159 Contra, that *it is not of Neceſſity to ſhew the Record at firſt*. For per Jenney, In an Action of *Debt in Bank, upon a Recovery of Damages in a Plea of Land in Ancient Demeſne*, the Plaintiff may declare upon a Recovery by Record of a foreign Court, without ſhewing the Record; and *if the Defendant pleads Nul tiel Record*, the *Court may write for the Record*, quod non negatur. Br. Monſtrans, pl. 159. cites 9 E. 4. 42. 43.

7. Where a Man pleads a Record to the Writ, *he ſhall ſhew it immediately*. Br. Brief, pl. 8. cites 3 H. 6. 15.

8. *Debt upon a Recovery of* 10 *l. Damages in Treſpaſs in Court of Piepowders at G.* and the *Tenor* of the Record *was made to come into Chancery by Certiorari, and ſent into Bank by Mittimus*, and a Declaration upon the Record, Cujus tenor. &c. was comprized in the Count. Rolf. offered to demur, becauſe he did not ſhew the Record itſelf; But the Court held contra

A Man may count upon a Record of *Damages in Debt* brought thereof, without

shewing Record; for it it be not true, the other may say that Nul tiel Record, and the Plaintiff shall cause it to be certified. Br. Monstrans, pl 112. cites 12 H. 7. 11. Per Butler.

tra to him, wherefore he pass'd over, and pleaded Nul tiel Record; quod nota. Br. Monstrans, pl. 50. cites * 7 H. 6. 18.

In Trespass the Plaintiff *recover'd Damages*, and the *Defendant removed the Record into B. R. for Error*, and after the *Plaintiff brought Debt of the Damages recovered in this Court*; he ought to *recite* in this Court *that the Record is removed into B. R.* for Error, and shall not shew the Record; *but when* the Defendant *pleads Nul tiel Record*, the Plaintiff shall shew it *sub pede Sigilli* at his Peril; quod nota. Br. Monstrans, pl. 121 cites 18 E. 4. 7. ——Br. Count, pl. 68. cites S.C.——Br. Record, pl. 61. cites 18 E. 4. 6. 7. S C But says that if the *Defendant reverses the first Record*, by this he shall reverse the Action of Debt.——* Br. Record, pl. 19. cites S. C.

9. If a Man *challenges a Juror by Matter of Record*, as that he has been Attainted &c. he shall shew Record thereof *presently*. Br. Monstrans, pl. 132. cites 33 H. 6. 1.

10. *Debt* was brought *in Bank upon Recognizance* taken *before the Mayor of Hereford*, and the *Defendant pleaded Nul tiel Record*; and well: And so see that the Action lies without shewing the Record, as it seems there. Br. Dette, pl. 128. cites 36 H. 6. 2.

11. In Quare Impedit, if the *Defendant intitles himself by Grant of the King to J. N. for Life of the Advowson of B.* and that *the King after granted the Reversion to three in Fee, who granted it to the Defendant*; there if he will plead the Grant for Term of Life, he ought to plead it certainly in Date, Year, Place and Day, tho' it does not belong to him; for if the other will reply Nul tiel Record, *it cannot be certified unless it be pleaded certainly*. And so it seems there, that if one pleads Letters Patent, and shews them, yet the other may say that Nul tiel Record, and then *he shall certify it under Exemplification sub Magno Sigillo*. Br. Record, pl. 39. cites 38 H. 6. 34.

Br. Dette, pl. 132. cites S. C.

12. A Man may bring an Action of Debt *in C. B.* and declare *upon a Recovery of Debt* or Damages in London, Ancient Demesne, *or other Franchise, without shewing Record*; and if the Defendant pleads Nul tiel Record, it suffices to certify the *Tenor of the Record*, without the Record itself. Br. Monstrans, pl. 84. cites 39 H. 6. 4.

A Man *shall not plead Record, unless* it were *in the same*

13. If a Man would plead to have Advantage thereof himself, he ought to have the Record *in Pugno, unless it be in the same Court where the Record is &c.* Br. Monstrans, pl. 123. cites * 19 E. 4. 9.

Court where the Record itself remains, *without shewing the Record Exemplified under the Great Seal of England*, if it be denied; for it ought to come into Chancery by Certiorari, and there to be exemplified under the Great Seal; *for if* it be *exemplified under the Seal of the Common Pleas, Exchequer*, or the like, *those are but Evidence to the Jury*. Br. Record, pl 65 cites 22 H. 8. and 28 Ass. 14.

* Br. Record, pl 62. cites S. C.

14. If a Man pleads *Record in the same Court where they are inroll'd*, the Party may plead them without shewing them, and it is sufficient *notwithstanding they were never pleaded before*; and so it is used in the Exchequer. Br. Monstrans, pl. 124. cites 21 E. 4. 48. 49.

15. There is a *Difference between Letters Patents and other Records*; for per Brian, The Demandant must shew the Letters Patents; but if a Fine or other Record be denied, they may come in by Certiorari and Mittimus; But contrary of Letters Patents; for if they be shewn, they shall not be denied. Br. Monstrans, pl. 112. cites 12 H. 7. 11.

16. Where a Man shews Record *exemplified under the Seal of the Exchequer or Common Pleas*, the other may say Nul tiel Record against it. Contra, if he shews Exemplification under the Great Seal of the Chancery; note the Diversity. Br. Record, pl. 83. cites 16 H. 7. 11. Per tot. Cur.

17. He that pleads in *Disability by Record*, must bring in the Record, or a Certificate immediately, *sub pede Sigilli*; as in Excommunication, the Certificate of the Bishop under his Seal; in Outlawry, to plead the Outlawry Hic in Curia Prolat'; And 13 H. 6. 15. One shall not plead *in Abatement* a Record or any other *Dilatory Plea*, without having it in

Court

Court. 3 Lev. 334. Trin. 4 W. & M. C. B. Lord Petre v. the Univerſity of Cambridge.

18. G. brought an Action of *falſe Impriſonment* againſt B. The Defendant *juſtified under a Judgment* given againſt the Plaintiff *by the College of Phyſicians*, and a Fine impoſed by them, and Commitment to Priſon. And it was *moved* in Behalf of the Plaintiff, *that* the King's Bench would make an Order, that *the Regiſter of the College* of Phyſicians *ſhould permit the Plaintiff to have Copies of the Proceedings* and Judgment, to enable the Plaintiff to reply to the Plea of the Defendants, who were Cenſors of the College. *Sed non Allocatur. For* per Curiam, the King's Bench cannot oblige the College of Phyſicians to permit the Plaintiff to have any Copy of their Proceedings; for they act in a Judicial Manner by Authority of an Act of Parliament, and therefore it ſhall be preſumed that they have done Right; and *this Record may be pleaded without a Proſert* in Curia, and therefore no Oyer can be prayed of it, and therefore the Defendants ſhall not be bound to give a Copy; For it would be in Effect to diſcover their Evidence. 2d Raym. Rep. 252, 253. Mich. 9 Will. 3. Dr Gronvelt v. Dr Burrell &c.

19. Serjeant Hawkins takes it to be agreed, that *Nient-ſoits acquit*, being a Plea in Bar, and the Record not in the Cuſtody of, nor the Property of him that pleads it, there is no need to plead it with a Profert *Hic in Court cum Pede Sigilli*; but the Defendant ſhall have a Day given him to bring it in. Hawk. Pl. C. 369. cap. 35. S. 2. S. P. 2 Hawk Pl. Cr. 367. cap. 35. S. 65.

(Q) *Tenor of the Record.* Sufficient in what Caſes.

1. UPON *Recovery of Annuity againſt a Parſon* by a Prior, *the Tenor of the Record was removed by Certiorari into Chancery, and ſent into Bank by Mittimus, and Scire Facias to have Execution awarded out of it*, and good by Award; For the Chancellor will not write to the Treaſurer for the Record, but for the Tenor of the Record, quod nota. Br. Record, pl. 4 cites 34 H. 6. 2.

2. *Scire Facias Super Tenorem Tenoris* Recordi, ſent *out of Chancery into Bank*, was ſu'd *to have Execution upon Recovery of an Annuity*, and the Reaſon that it was *Super Tenorem Tenoris* was, *becauſe that before the Record was remov'd out of Bank after the Recovery, the Tenor of it was ſent into Chancery to be Exemplified, and there was filed, and they never take off the File any Tenor when it is fil'd, but to ſend the Tenor of the Tenor*; nor when they have the Tenor, they will not write to the Treaſury for the Tenor again; But when the Tenor is ſo in Chancery to be exemplified, there the ſame Term they will ſend the ſame Tenor; but if it be *once filed*, or if the *Term be paſſed*, there they will not ſend the Tenor, but the Tenor of the Tenor, quod nota. Br. Record, pl. 9. cites 34 H. 6. 51. *And* by Cumberford Prothonotary in Anno 2 or 1 of this King, they awarded Execution upon the Tenor of the Tenor. Ibid. —— And, per Priſot, If *it does not appear by the Mittimus Where the principal Record is*, they cannot proceed; For *if it appears that the Record is in the Treaſury*, then they will proceed here upon the Tenor of the Tenor; for the Treaſury cannot award Execution; but it may be, that the Record is remov'd into B. R. by Writ of Error, and affirm'd, and then he may ſue Execution there; And it may be, that *it remains yet in this Court, and then Execution ought to be awarded upon the Record, and not upon the Tenor of the Tenor*; Therefore they will not proceed till they be aſcertain'd where the Record is. Br. Record, pl. 9. cites 34 H. 6. 51. —— *And* if it *be written to the Juſtices of Aſſiſe, they ought to certify the Record itſelf*; For otherwiſe they ought to award Execution, and ſo two Executions, which ſhall not be ſuffered, per Priſot. Br. Record, pl. 9. cites 34 H. 6. 51. and 37 H. 6. 31. accordingly. *Quære Legem* of the principal Caſe.

3. Where a Man *recovers in Ancient Demeſne Land and Damages, or before Juſtices of Aſſiſe or in Eyre*, and the *Tenor of the Record is removed into Chancery by Certiorari, and ſent into C. B. by Mittimus*, Br. Sci fa pl. 159 cites S. C. —— Br. Executions, *Plaint if*

pl. 75. cites S. C.

Plaintiff ſhall not have Execution without the Record itſelf; for the firſt Court where the Record itſelf remains may award Execution there, and ſo *two Executions*, which is inconvenient; *Contra upon Tenor* of Record ſent *out of the Treaſury*; for there are no Juſtices which may award Execution in the Treaſury. Br. Record, pl. 40. cites 39 H. 6. 3.

So where a *Man pleads a Record*, and the *other ſays* That * *Nul tiel Record*,

4. And there it is agreed by all the Juſtices, That *Debt* may be brought *in Bank for Damages recover'd in Ancient Demeſne, or in a Franchiſe, and* there *if the Defendant pleads no ſuch Record*, it ſuffices to certify the Tenor of the Record. Br. Execution, pl. 75. cites 39 H. 6. 3, 4.

there it ſuffices to certify the Tenor of the Record. Ibid —— Br Record, pl. 40. cites S. C. for this proves that there is ſuch a Record.——*But* it is *not* ſufficient *to award* † *Sci. fa. without the Record itſelf.* Br Execution, pl. 75 —— Brooke ſays, And ſo ſee that Action of *Debt of the Damages lies without the Record itſelf to have Execution*, and yet *not to have Sci. fa.* Note a Diverſity; and alſo it may be, that the Record itſelf is reverſed by Error, Diſceit, or otherwiſe; and therefore *Execution ſhall not be awarded upon the Tenor of a Record unleſs in Caſe of a Certificate out of the Treaſury.* Br. Executions, pl. 75. —— And Per Priſot *Attaint does not lie upon* the Tenor of the Record, but one ought to have the Record itſelf. Br. Record, pl. 40. cites S. C.

* Serjeant Hawkins ſays, It ſeems to have been generally holden, That wherever the Purport of a Certiorari is not to proceed upon the Record to be removed, but only to try an Iſſue of Nul tiel Record, it is ſufficient to certify the Tenor of the Record, whether the Certiorari require a Certificate of the Record itſelf, or of the Tenor of it only. 2 Hawk. Pl. C. 295. cap. 27. S. 76.

† S. P. Br. Record, pl. 80. cites 29 Aſſ. 23.

For where *Aſſiſe, Formedon, Precipe quod reddat* &c. *are pending*, and *Writ comes* to the Juſtices, *rehearſing that the Land is ſeiſed into the Hands of the King*, they ſhall ceaſe

5. *A General Writ was directed to C. and B.* Juſtices of Aſſiſe, *to be Juſtices in ſeveral Counties, and to take Aſſiſes* in ſeveral Counties; and *a Writ of Aſſiſe was delivered to them in the Circuit*, and the *Plaintiff appeared*, and the *Defendant not*; *but one as Bailiff appeared for him, and ſhewed a Writ of Aſſociation, proving and reciting, that the King by Patent had aſſigned B. to be Juſtice with them by Aſſociation*; but *did not ſhew the Patent of it, nor did B. come*; And if the ſhewing of the Writ reciting an Aſſociation, without the Patent of Aſſociation, be ſufficient to make the two firſt Juſtices credit and obey it, or not, was the Queſtion? And by ſome, the Writ ſuffices to make them ceaſe to proceed without the Third, who is Aſſociate. Br. Record, pl. 53. cites 5 E. 4. 129.

by this, without further Notice; and yet it may be that it is a falſe Rehearſal, and that there is no ſuch Seiſin, nor here no ſuch Patent of Aſſociation. Ibid. ——*So* where *a Man ſays, that an Attorney appears without Warrant*, and *Writ comes out of the Chancery, reciting that there is a Warrant*, there this ſuffices, without ſhewing the principal Record. Ibid ——*So* where Writ comes *to the Sheriff or Collector* of the Cuſtom, *reciting that the King by Patent had given to W. S. 31 and Writ of Delivery reciting that it be delivered to him*, he ought to obey it, and pay the Party, without ſhewing the Patent of Record of it; and yet it may be, there is no ſuch Patent. Ibid.——*So where Capias iſſues* to the Sheriff, *againſt J. N. and* after *he delivers a Superſedeas* to the Sheriff, *reciting that the Defendant has appear'd in Court, and found Mainprize*, and therefore Superſedeas &c. he ſhall obey it, tho' the Defendant never ſo appear'd in Banco, nor found ſuch Mainprize. Ibid. —— *But* by ſome the Writ is not ſufficient, without ſhewing the Patent; For the ſhewing of *a Writ of Allowance, reciting a Pardon of Felony is not ſufficient* without ſhewing the Pardon itſelf; *but ſhewing of Pardon, without Writ of Allowance, ſuffices*, but it ſeems that is not always; For the Pardon ought to be ſhewn in this Court to be allowed. Ibid. —— *But in the Caſe above, the very Record did not appear to this Court, where the Writ of Recital is brought*; and deny'd the Caſe of the Liberate to the Collector. Ibid —— But *the beſt Opinion* was, That the *Writ reciting the Aſſociation ſuffices*; For the Patent of Aſſociation belongs to B. who was Aſſociate to them, which B. did not come, and therefore the Patent cannot be ſhewn by him. Ibid. —— *But* ſee the ſame Year, fol. 137. that it was agreed in the ſame Caſe, that *the Writ, without the Patent and Commiſſion, is not ſufficient for B. to ſit, nor for the old Juſtices to admit him*; For a Juſtice cannot be made by Writ, but by Patent and Commiſſion, which ſhall be read in Court when B. who is Aſſociate, appears, before that the old Juſtices ſhall admit him; But a Juſtice may be diſcharged by Writ. Note the Diverſity. Ibid.

6. Where a Man *traverſes Office in Chancery at Iſſue*, and it is *ſent into B. R. to be try'd*, the Tranſcript only ſhall be ſent into Bank, but the Record itſelf ſhall remain in Chancery, quod nota; and therefore if he relinquiſhes the Traverſe, he cannot traverſe de Novo in B. R. Br. Record, pl. 60. cites 14 E. 4. 6.

This Caſe is D. 186. b. pl. 4. Mich 2 & 3 Eliz.

7. Upon Non Damnificatus the Plaintiff replied, That he was damnified by a Judgment had againſt him upon a Plaint in London, the Defendant rejoined Nul tiel Record; And being at Iſſue, the Plaintiff

at

at the Day brought in the Tenor by Mittimus; Adjudg'd a Failure of the Record. Nelf. a. 824. pl. 3. cites Dyer 187. and reports, That upon this Certification of the Tenor, notwithſtanding the Judgment was Quod habeat Recordum tali Die ſuo Periculo, the Certificate was allowed, and the Plaintiff recovered thereupon.

8. In Aſſiſe the Defendant pleaded *Outlawry* in the Plaintiff, who replied Nul tiel Record; and being at Iſſue, the Defendant brought *in the Tenor* by Mittimus, by which it *appeared*, That there was *a Variance in the Day of the Return of the Exigent, and in the Place where the Outlawry was pronounced*; and by reaſon of the Variance aforeſaid, and alſo becauſe the Plaintiff brought in the Tenor of a Revocation &c. of the ſaid Outlawry by Mittimus (which Revocation appeared to be after the ſaid Plea pleaded) it was adjudg'd a Failure of the Record. D. 187. b. pl. 8. Mich. 2 & 3 Eliz. Anon.

(R) *Offences* relating to Records, and the Puniſhment thereof.

1. 8 *H. cap.* 12. ENACTS, That *if any Record, or Parcel of the ſame, Writ, Return, Panell, Proceſs, or Warrant of Attorney, in the King's * Courts of † Chancery, Exchequer, the one Bench or the other,* The Miſchief before this Statute was, That whereas Records are of ſuch high Nature and Credit, as they import in themſelves abſolute Verity without Contradiction; to the End, that there might be an End of Contention and Controverſy, and Men might reſt in Safety and Repoſe; certain Clerks, and other Perſons, did oftentimes imbezel Records, or ſome Parcel of them, and ſometimes a Writ, Return, Panel, Proceſs, or Warrant of Attorney, or eraſe or vitiate the ſame; by Reaſon whereof divers Judgments were avoided or reverſed, whereby no Man (as the Statute ſays) had any Thing in Surety. This was a great Miſpriſion, for which the Offenders therein might be puniſhed, either at the Suit of the King, by Indictment; or at the Suit of the Party, by an Action upon this Caſe. 3 Inſt. 71.

* This Act extends not to any other Court or Place, than is here named. 3 Inſt. 71.

† This muſt be underſtood of the Court of Chancery, which proceeds according to Courſe of the Common Law, as in Caſe of Privilege, of Scire Facias upon Recognizances, Traverſes of Offices, and the like: For as to theſe it is a Court of Record, but as to the Proceeding by Engliſh Bill in Courſe of Equity, it is no Court of Record; for thereupon no Writ of Error lies, as in the other Caſes. 3 Inſt. 71. ——— It extends to Chancery, ſo far only as it proceeds according to the Courſe of the Common Law. Hawk. Pl. C. 113. cap. 45. S. 3.

*Or in his * Treaſury to be † voluntarily ſtolen, taken away, withdrawn or avoided,* * The King's Treaſury is called Theſauraria Regis, the Place where the King's Treaſure is kept. This Treaſure is twofold, viz. his Money or Coin; and another, that is far more precious and excellent, and thoſe are the ſacred Judgments, Records, and other Judicial Proceedings, under the ſafe Cuſtody of the Treaſurer and Chamberlains of the Exchequer; and this Treaſury is partly in the Exchequer, and partly in the Tower of London; for there are ancient Rolls of the Treaſury remaining in the Tower, and therefore this Act, intending to include both the one and the other, ſaith generally, En Sa Treaſorie. 3 Inſt. 71, 72.

† In the Indictment upon this Statute, beſides Felonice, the Word [Voluntary] muſt of Neceſſity be uſed, to agree with this Act. Here are four Words uſed, (ſtoln, carried away, withdrawn, or avoided); ſo as the Senſe is, if any Record, or Part of it, Writ, Return, Pannel, Proceſs, or Warrant of Attorney &c. be ſtol'n, carried away, withdrawn, or avoided &c. And this Word [Avoided] is a large Word, and doth include Eraſing or Clipping, or cutting of the Side or other Part of the Roll, or any other Kind of Avoiding the ſame. 3 Inſt. 72.

**By any Clerk, or by other Perſons,* This Act does not extend to any Judge of the Court, both becauſe it beginneth with a Clerk &c. and becauſe by the Statute of 8 *R.* 2. [cap. 4] *a Penalty is inflicted upon a Judge &c. for making any falſe Entry, Eraſing any Roll, or changing any Verdict* ‡. See the Statute, for it extends alſo to Clerks; only this is to be obſerv'd in that Statute, that where it is ſaid (the King and his Council) it is intended of the Court of Juſtice, where the Matter depends; For the Judges are the King's Council for Judicature and Proceedings, according to Law and Juſtice. 3 Inſt. 72. ——— ‡ S. P. *To the Diſherſon* [illegible] they are highly puniſhable at Common Law for *other Offences of the like Nature*; as for inverting a Bill of Indictment, not

not found by the Jury among thoſe which were found, and ſuch like ——Hawk. Pl. Cr. 113. cap. 45. S. 2.——S. P. 3 Mod. 60. Paſch. 1 Jac. 2. B. R. The King v. Marſh.

Juſtice Ingham ſaid in the Reign of Ed. 1. See Marks for a Fine, for that a poor Man being fin'd in an Action of Debt at 12 s. 4d. The ſaid Juſtice, mov'd with Pity, cauſed the Roll to be Eras'd, and made it 6 s. 8 d. 3 Inſt. 72.——Hawk. Pl. Cr. 113. cap. 45. S. 2.

This Caſe Juſtice Southcot remembered, when Catlyn Ch. J. of the King's Bench in the Reign of Queen Eliz. would have ordered a Raſure of a Roll in the like Caſe, which Southcot, one of the Juſtices of that Court, utterly deny'd to aſſent unto; and ſaid openly, That he meant not to build a Clock-houſe; for (ſaid he) with the Fine that Ingham paid for the like Matter, the Clock-houſe at Weſtminſter was built, and furniſhed with a Clock, which continues to this Day. 3 Inſt. 72.

* This Act extends only to Records, whereon Judgment is given.

* *By Reaſon whereof any Judgment ſhall be reverſed, that ſuch Stealer, Taker away, Withdrawer, or Avoider, their † Procurors, Counſellors and Abettors, ‖ thereof indicted, and by Proceſs thereupon made thereof duly convicted by their own Confeſſion,*

whether Judgment be given in Caſes Criminal at the Suit of the King upon Indictment, or at the Suit of the Party in an Action, or in Action Real, Perſonal or Mixt, or of the like Nature; This Act extends thereunto, if Judgment be afterwards given, and to *Outlawries*, for there Judgment is given per Juſticium Coronatorum. For it is not material whether the Act be done againſt this Statute either before or after Judgment, ſo Judgment be given. 3 Inſt. 72.

† The Word (*Reverſe*) is here taken, not only where the Judgment is made erroneous, and to be reverſed by Writ of Error, but where the Judgment is to be annulled, and made void, as it finds not, or may be reverſed or annulled by Plea. See the Book 1 & 2 R. 3. fol. 12. a. how expounded with this Statute. 3 Inſt. 72.——‡ Br. Coron. 113. (114) cites 3 E.——It was reſolv'd by Haughton J. That if a Record be falſified in the Point, and ſo the Judgment, in which the Error was, be made perfect, the Delinquent could not be impeach'd after for Felony for the Raſure, becauſe the Statute ſays, If the Raſure be ſuch that the Judgment be defeated. But Montague Ch. J. and Yelverton J. held the contrary clearly, and that the Erazing the Record is the Offence which makes the Felony, and not the getting Judgment thereby. 2 Roll Rep. 82, 83. Paſch. 18 Jac. B. R. Whiting v. Abington.——Hawk. Pl. C. 113. cap. 45. S. 5. accordingly; For theſe Words in the Statute are taken to have the ſame Purport, as if it were ſaid, whereby any Judgment ſhall be annull'd, or loſe it's Force and Effect; For it is plain that the Statute cannot intend an actual Reverſal by Writ of Error, becauſe it ſpeaks of Stealing or carrying away, or avoiding of Records, which make it impoſſible that the Judgment ſhould be reverſ'd at all; Becauſe no Writ of Error can remove a Judgment which appears not.

‖ This Act expreſly extends to *Acceſſaries before*, and leaves Acceſſaries after to the Conſtruction of Law, yet may there be Acceſſaries after the Fact; For whenſoever an Offence is made a Felony by Act of Parliament, there ſhall be Acceſſaries to it both before and after, as if it had been a Felony by the Common Law; and therefore, tho' this Act expreſſeth Acceſſaries before, yet it takes not away Acceſſaries after, but leaves them to the Law, contrary to the Opinion of Juſtice Stanford. 3 Inſt. 72, 73.——Hawk. Pl. Cr. 112. cap. 45. S. 5. according to Ld. Coke's Opinion.

If the Acts that make this Felony be *committed partly in one County, and partly in another, but not ſo as to amount to a compleat Offence in either, within the Statute*, the Party cannot be indicted for a Felony; becauſe the two Counties cannot join in an Indictment, and that which is done in one, cannot be found in another, but he may be indicted of a *Miſdemeſnor in either County*. Hawk. Pl. C. 113. cap. 45. S. 6. cites 2 R. 3. 10. b. 11. 3 Inſt. 73. St. Pl. C. 56.

* Here is a Party Jury, the one half to be of the Officers and Clerks of Court &c. for their Knowledge, and for the better Information of the others.

*Or by Inqueſt to be taken of lawful Men, * (whereof the one half ſhall be of the Men of any Court of the ſame Courts, and the other half of others) ſhall be judged for Felons, and ſhall incur the Pain of Felony; * and that the Judges of the ſaid Courts of the one Bench, or of the other, have Power to hear and determine ſuch Deſaults before them, and there to make due Judgment as there is ſaid.*

3 Inſt. 73.——* This Clauſe *is in Nature of a Commiſſion* to the Juſtices of either Bench, *if the Offence be committed in the Shire where the Benches ſit*, and the Juſtices of either Bench have a concurrent Authority, and which of them enquire firſt ſhall proceed; *but if* the Felony be committed *in another County*, than where the Benches ſit, (as for Example, in Surry, Hertfordſhire &c. there *the Juſtices muſt to have a Commiſſion*. But if the Bench ſit in Middleſex, and the Felony is done in London, in which Caſe a Commiſſion is requiſite as is aforeſaid, ſome have ſaid, that by the Charters of *London*, confirm'd by Parliament, the Mayor ought to be Principal in the Commiſſion, and the Mayor is none of the Judges authoriz'd by this Act, to hear and determine this Felony, but the Juſtices of the one Bench or other; and therefore the Statute being Penal, and to be taken ſtrictly, no Proceeding can be; Sed Sabinum reſert; For the Charters of the City of London extend only to ſuch Offences committed in London, whereof the Mayor, with others by Commiſſion, may enquire of, hear, and determine; and not to ſuch Offences ſo annexed by Authority of Parliament to other Perſons, (as in this Caſe to the Juſtices of the one Bench or the other) as the Mayor is not warranted by the ſaid Act to enquire &c. And therefore a Commiſſion in this Caſe may be made to the Juſtices of the one Bench or the other, omitting the Mayor. Ne curia Regis Deficeret in Juſtitia Exhibenda. 3 Inſt. 73.——Hawk. Pl. C. cap. 45. S. 8.

2. An

2. An *Attachment iſſued againſt an Aſſociate*, for *mending a Record after a Motion in Arreſt of Judgment* for the ſame Fault which he amended; but upon making the Record as it was before the Amendment, and paying Coſts, the Court Ex Gratia ſuperſeded the Attachment. 8 Mod. 226. Hill. 10 Geo. 1724. Anon.

For more of Record in General, See Error, Judgment, Trial, and other proper Titles.

Recovery.

(A) *Bound* or Advantaged by it; *Who.*

1. PRæcipe quod reddat againſt *Tenant for Life*, and he *diſclaim'd*, upon which the *Demandant entred*, and well; the Tenant for Life dy'd, now he in *Reverſion is not bound* by it, becauſe the Judgment upon Diſclaimer is not that the Demandant recover, but that the Writ abate; *Contra of Judgment of the Land*, for this binds the Entry of him in Reverſion; otherwiſe upon a Diſclaimer. Br. Judgment, pl. 132. cites 36 H. 6. 29.

2. Note, That every one who *comes in under* a Recovery *by Judgment, as Servant, Aſſignee* &c. ſhall be bound by the Recovery, and every one who comes in by him who recovers by Judgment, as Tenant at Will, Leſſee &c. ſhall have the Advantage to plead it againſt him who is Privy. Br. Judgment, pl. 119. cites 2 E. 4. 16.

(B) *Of one Thing; Where* it ſhall be a Recovery *of another, as Part* of the Ancient Eſtate.

1. IF *an Advowſon* be *appropriated to the Abbot*, and *A. B. brings Writ of Right of Advowſon by elder Title than the Appropriation is, and recovers* the Advowſon of the Parſonage, where a *Vicar* is *endow'd*; there he ſhall recover both the Vicarage and the Parſonage. Br. Judgment, pl. 138. cites 16 E. 3. and Fitzh. Grants, 56.

Brooke ſays, the Reaſon ſeems to be inaſmuch as *before the Appropriation there was no Vicarage*, for the Vicar was made and endow'd when the Appropriation was made; and by *Recovery by elder Title than the Appropriation* was, it is now made a Parſonage again alone, and *the Vicarage diſſolv'd by this Judgment.* Br. Judgment, pl. 138.

2. If a Man *demands Rent Service* and recovers, he *ſhall recover the Services alſo*; and yet they are not compris'd in the Writ. Br. Demand, pl. 45. cites 44 E. 3. 19.

(C) Pleadings; How.

But he cannot plead a *Fine*, and the Eſtate of the Plaintiff

1. A Man may plead *a Recovery, and the Eſtate of the Plaintiff Meſne between the Title of the Writ and the Recovery.* Br. Pleadings, pl. 141. cites 21 H. 6. 17.

Meſne *between the Fine levied and the Execution thereof.* Ibid

But otherwiſe 'tis in another Action, as *Formedon &c.* For there upon ſuch Recovery pleaded he *ſhall ſay, that the Gift was Meſne between the Title and Recovery.* Ibid.

2. Treſpaſs upon 5 R. 2. The Defendant *pleaded a Recovery in Ceſſavit againſt a Stranger, and the Poſſeſſion of the Plaintiff Meſne between the Title of the Ceſſavit and the Recovery*; And per Cur. *where the Recovery is pleaded in an Action Poſſeſſory, as* in this Action of *Treſpaſs, Aſſiſe &c.* he *ſhall ſay that the Poſſeſſion was Meſne between the Judgment and Execution*; For the Defendant had no Cauſe to enter before the Judgment. Br. Pleadings, pl. 130. cites 21 E. 4. 52.

3. *In Debt upon Recovery* the Plaintiff *may commence at the Judgment, or at the Original, at his Pleaſure.* Quod fuit conceſſum. Per tot. Cur. Br. Pleadings, pl. 112. cites 21 E. 4. 54.

S P. And that he ought to aver his Title of *[upon which he brought] his

4. Where a Man *pleads a Recovery by Default*, he ought to *aver that the Tenant was Tenant of the Franktenement at the Time of the Recovery.* Br. Pleadings, pl. 116. cites 21 E. 4. 65. & 22 E. 4. 30. that it is traverſable.

Writ. Br. Pleadings, pl. 6. cites it as ſaid for Law. 24 H. 8. And ſo it appears in the Book of Entries.—Br. C. N. 64. S. C.—*But* if the Recovery was *by Action try'd*, he *need not to take the one Averment nor the other.* Br. Pleadings. pl. 6. cites 24 H. 8.—*But* it was ſaid that *in Quod ei deforceat*, he who pleads the Recovery *by Default need not to aver the Party Tenant of the Franktenement at the Time of his Writ*; For it is proved that he was Tenant at the Time &c. by the bringing of the Quod ei deforceat; For it is *the Effect of this Action*, becauſe the Demandant in this Action loſt by Default, in the firſt Action. Ibid. ——*But* he, who pleads Recovery *in Writ of Waſte* by Default, *need not to aver the Party Tenant*; For Nontenure in this Action is no Plea Ibid.—— Br. N. C. 64. S. C.—*Orig. is, Son Title de ſon Brev.

5. In Formedon, if the Tenant [pleads a *Recovery*] *by a Stranger againſt him by Confeſſion of the Action*, he need not to *aver that the Recovery is upon good Title.* Br. Brief, pl. 542. cites 10 H. 7. 1.

6. There is *a Diverſity in pleading of a Recovery between the Plaintiff in Aſſiſe, and the Tenant*; For the *Tenant may plead a Recovery, and the Eſtate of the Plaintiff Meſne between the Title of his Writ and the Judgment, without ſhewing How*; *but if the Plaintiff pleads Recovery ſo*, there *he ought to ſhew how the Eſtate of the Tenant was Meſne*, viz. *by Abatement, Diſſeiſin, or other defeaſible Title*; Note the Diverſity. Br. Pleadings, pl. 2. cites 27 H. 8. 14. Per Fitzherbert J.

7. There is a *Diverſity* where a *Judgment is ſeveral*, and where it is *Intire*; For where 40 *Acres are recovered*, it is ill to *plead a Recovery of* 20 *Acres*; *but* it ſhould be pleaded *of* 40 *Acres whereof* 20 *are Parcel.* Comb. 253. Paſch. 6. W. & M. B. R. Gold v. Burket.

For more of Recovery in General, See Bar, and other Proper Titles.

Recovery Common.

(A) * Recovery Common. *What* Thing ſhall be *dock'd by it.*

* The Riſe of Common Recoveries ſeem to be from Dalton Lombard's Caſe. Pig. of Recov. cites 44 E. 3. 21. and ſays that my Lord Coke

1. IF Tenant in Tail be, the Remainder or Reverſion in Tail or in Fee to the King, and Tenant in Poſſeſſion ſuffers a Common Recovery; this cannot dock the Eſtate in Remainder or Reverſion of the King; Becauſe it is but a Conveyance, and ſo Eſtate of the King cannot be [barred.]

in Mary Portington's Caſe. 10 Rep. 37. b. cites ſeveral Caſes that from Edward the 3d's Time the Judges were of Opinion, That a Common Recovery was a good Bar to an Eſtate Tail. Ibid. — But Jenk. 259. pl. 4. ſays they were introduced in H. the 8th's Time, and were never heard of before ——— But 6 Rep. 40. in Wildman's Caſe, ſays they were introduced about the 12th of E. the 4th's Time. — And 1 Vent 299. in Caſe of Brown v. Waite ſays, That from 12 E. 4. Taltarum's Caſe Common Recoveries have been held not to be reſtrained by the Statute De Donis.

The true *Reaſon* of Common Recoveries being Bars, *is not the Recompence, but that they are Common Conveyances*; Per Wylde J. 2 Lev. 29. and there p. 30. Mich. 23 Car. 2 in the Caſe of Hudſon v. Benſon. Hale Ch. J. ſaid, That the *Recompence in Value is the Reaſon of the Bar* by Common Recoveries *againſt the Iſſue in Tail but not as to Reverſioner or Remainder Man*; But the Reaſon of That is, That the Recoveror in Suppoſition of Law is in of Eſtate Tail, and in Judgment of Law it ſtill has a Continuance; as at Common Law the Donee poſt Prolem ſuſcitatam might have aliened and barred the Donor; And a Common Recovery *is as a Conveyance excepted out of the Statute De Donis*; and the Recoveror is in of the Eſtate the Donee had; but the Iſſue in Tail is barred to claim it in reſpect of the ſuppoſed Recompence by the Recovery, and the Eſtate Tail having in Judgment of Law Continuance, no Charge upon the Reverſion or Remainder can take Place after the Recovery ſuffered by Tenant in Tail. ——— Freem. Rep. 363. pl. 465. S. C. and P. by Hale, who ſaid that a Recovery by Tenant in Tenant *operates by Way of* Continuance, and *Protraction of the Eſtate Tail*, ſo that where is before there was a Poſſibility that the Remainders might come into Poſſeſſion, now that Poſſibility is deſtroyed, as is ſaid in Capell's Caſe, and for that Reaſon all Charges created by the Remainder Man fall to the Ground.

2. But if Tenant in Tail, the Remainder or Reverſion in Tail to a Stranger, the Remainder or Reverſion in Fee to the King, and Tenant in Poſſeſſion Tail ſuffers a Common Recovery, This ſhall bar all the Eſtates before the Eſtate of the King.

Fol. 394.

As to barring the Remainder or Reverſion in the King. See (Z)

3. But if there be Tenant in Taile, the Remainder in Taile to the King, the Remainder in Fee to a Stranger, and Tenant in Tail in Poſſeſſion ſuffers a Common Recovery, This ſhall bind the Eſtate in Poſſeſſion, and the Remainder in Fee, tho' the Eſtate of the King is not touched by it. 9. 37 El. B. This Point was one of the Points in the Serjeant's Caſe.

Lutw. 849. in his Notes upon the Caſe of Holford v. Brown in Queen Elizabeth's Time, the Entry whereof is there ſet forth, ſays this may be collected from 2 Rep. Sir Hugh Cholmley's Caſe.—Tenant in ſpecial Tail, the Reverſion being in the King, ſuffered a Common Recovery; The Queſtion was, Whether the Heir was barred; The Juſtices inclined [ſemble] that it was a Bar, but no Diſcontinuance of the Tail, nor of the Reverſion againſt the King; And Englefield ſaid, That he had known it held a Bar by good Adviſement; But Shelly doubted. D. 32 pl. 1. Paſch. 28 & 29 H. 8. Anon.

4. If Baron ſeiſed in Right of his Wife for Life, Remainder in Tail to B. Remainder to C. and Baron bargains and ſells the Land to another, againſt whom a Præcipe is brought, who vouches him in Remainder, and ſo a Common Recovery paſſes; This ſhall bind the Remainders, tho' not the Feme, becauſe the Bargainee was a good Tenant to the Præcipe. 39. 10. Ja. B. per Curiam.

Pig of Recov. 39. cites S. C.

5. If

Cro. J. 592 S. C.—*Executory Devise* is not barred by Common Recovery. Snow v. Cutler.—S. P. Lev. 136. by Bridgman Ch. J. Cart. 53 Trin. 18. Car. C. B in the Case of Smith v. Farnaby.—S. P. and so of *Springing Uses*. Pig. of Recov. 12. but says, It must be own'd that People have been very ingenious in perplexing the Law; For those are Terms barbarous and unknown to the Common Law.

5. If a Man devises Land to B. his younger Son and his Heirs, and that if he dies without Issue living A. his eldest Son, then the Land shall remain over to A. in Fee, (which is an Estate in Fee, and not in Tail, and only a Possibility in A. to have it if B. dies without Issue;) And after B. suffers a Common Recovery living A. and then dies without Issue; This Recovery does not bind this Possibility; But A. shall have the Land notwithstanding the Recovery; Because the Recovery in Value cannot go to the Possibility; For by such Means every Contingent may be destroyed. M. 18. Ja. B. R. between *Brown* and *Pells*. Adjudged per Curiam, Contra Doderidge, upon a special Verdict.

6. *Tenant for Life*, the *Remainder over*, or Tenant *in Tail*, the *Remainder over*, is impleaded by Writ of Entry En le Post, and he *vouches a Stranger*, the Demandant recovers against the Tenant, and the Tenant over in Value; this shall bind him in Remainder, per Montague J. and others; For the *Recompence shall go* to him in Remainder; But yet in the Case of the Lord Zouch and Stowell in Chancery, the Law was determined otherwise by all the Justices, as it is said; the Reason seems to be inasmuch as when he vouches a Stranger, the Recompence shall not go to him in Remainder; Contra, if he vouches the Donor or his Heir who is Privy; But at this Day most put it in Use to bind the Remainder. Br. Recoverie, pl. 28. cites 27 H. 8.

Adjudg'd that such Lease was barred. Lev. 36 Goodin v. Clark.—Sid. 102. S. C.—But upon citing this Case, Holt Ch. J. said, That that Case is ill reported in Lev. and that the Case is thus in his Notes: There was a Lease for 500 Years, made for raising of Portions for Daughters, to begin after the Death of Baron and Feme, without Issue Male and then *by another Deed an Estate in Special Tail* Male was given to Baron and Feme, and both these separate Deeds were made by the same Person; and there were 2 principal Questions, one of which was, Whether the Lease was barred by a Recovery suffered by the Tenants in Tail, and not expectant upon it, it was not, being created by another Deed precedent to the Entail, and not expectant upon it, it was also agreed, as Levinz has it, if the Issue die without Issue, the Term should begin; Powell J. agreed the Case of Goodier and Clerk, which he remembered well, because it was remarkable that a Tenant in Tail could not bar Estates, which were to begin after the Entail ended, which was thought very mischievous; For by that Means a Tenant in Tail might deceive a Purchasor, which he said he should doubt of. Holt's Rep. 625. in the Case of Andrews v. Stroud.

7. Hale Ch. J. said, That 9 Eliz. it was doubted, If there was *Tenant in Tail Remainder for Years*, and Tenant in Tail had suffered a Common Recovery, whether the Lease for Years should be barred; because it was said, That *No Recompence* in Value could go to the Lease, it being a Chattle; But he said that constant Experience had been taken that the Lease shall be barred. 2 Lev. 30. Mich. 23 Car. 2. B. R. in the Case of Hudson v. Benson and Baron.

(B) Recovery Common. In what Cases [an Estate] shall be dock'd by the Recovery. [*And by whom.*]

Cro. E. 388. Barton v. Lever.—Jo. 74. Roll. Rep. 123. in the Case of Herbert Bion.

1. IF Tenant in Tail levies a Fine, and after the Proclamations passed, suffers a Common Recovery, tho' the Tail was barred before the Recovery, yet this shall dock the Remainders, and so no Tail at the Time of the Recovery, because it is Common Assurance. Tr. 13 Ja. B. R. per Coke said to be one *Barton's* Case.

2. But

2. But if Tenant in Tail be attainted of Treaſon, and after ſuffers a Common Recovery; This ſhall not dock the Remainders; Becauſe it is not any Common Aſſurance. Tr. 13. Ja. B. R. per Coke and others.

Roll R. 125 in the Caſe of Herbert v. Binion, cites Barton's Caſe.

For the Tail is veſted in the King without Office, and if he dies, and the Heir of his Body is vouched, Remainder is not barred; For the Tail did not deſcend, but veſted in the King. Jenk 251 pl 41.

3. If Tenant in Tail be attainted of Treaſon, and the King grants the Land to J. S. who bargains and ſells to B. againſt whom a Præcipe is brought, who vouches J. S. and ſo Common Recovery had; this ſhall not bar the Remainder, becauſe J. S. does not come in in Privity of the Tail. M. 11 Ja. B. Per Hubbard.

(C) Recovery Common. *What Eſtate* ſhall be ſaid to be *bound by Common Recovery, with ſingle Voucher.*

A Recovery may be had either without any Voucher, or with ſingle, double, or treble Voucher. If there be a Recovery

1.* If a Common Recovery be ſuffered by a ſingle Voucher, it ſhall not bar any Eſtate but that of which the Tenant againſt whom the Præcipe was brought, was ſeis'd actually, or in Law and not in Right only.

had *without any Voucher*, the Iſſue in Tail is not barr'd; For the Recompence in Value being the Reaſon of barring the Iſſue, a Recovery by Default, Confeſſion, or Nient Dedire, *binds not the Iſſue*; for he has no Recompence, and is not Eſtopp'd by his Father's Judgment, for he claims Paramount the Eſtoppel per formam Doni; and therefore in this Caſe the Iſſue may falſify. Pig. Recov. 108.—* Pig. of Recov. 109. S P.

2. If Tenant for Life, the Remainder in Tail be, and a Stranger diſſeiſes the Tenant for Life, and then infeoffs him in Remainder, againſt whom a Præcipe is brought, and he ſuffers a Common Recovery, this ſhall not bind the Remainder in Tail, becauſe he was not ſeiſed thereof at the Time, but had only a Right thereto, and ſo the Recompence in Value cannot go to it. Co. 3. *Lincoln College* 59. Reſolved.

Fol. 395.

So if *Tenant in Tail* be *diſſeiſed*, and *ſuffers* a Common *Recovery with ſingle Voucher*, *or* if *Tenant in Tail makes* a *Feoffment* of the Land, and *takes back* an Eſtate to himſelf *in Fee or* in *Tail*, *and ſuffers a Recovery with ſingle Voucher*, the Entail is not barr'd. Pig. of Recov. 116.

3. If Tenant for Life be, the Remainder in Tail to another, and he in Remainder enters upon the Leſſee and diſſeiſes him, and after a Præcipe is brought againſt him, and ſuffers a Common Recovery; it ſeems that this ſhall bind the Tail; for this Diſſeiſin does not diveſt the Tail, nor turn it into a Right, as appears by 9 H. 7. but he is a Diſſeiſor for the Eſtate for Life only, but as to himſelf he is ſeiſed by Force of the Tail; for the Eſtate of Frankfenement and Reverſion cannot ſtand together diſtinctly. Contra Co. 3. *Lincoln College* 59.

4. Tenant in Tail covenanted to ſtand ſeiſed (in Conſideration of a Marriage to be had with his Son and the Daughter of J. S.) *to the Uſe of himſelf and his Heirs, till the Marriage had, and* after *to himſelf for Life*, and after *to the Son and his Wife in Tail*, and ſuffers a ſingle Recovery to this Purpoſe: They die without Iſſue. Adjudg'd that the Remainder depending on the firſt Eſtate Tail is not barr'd; for the *ſingle Recovery* binds only the Eſtate in Poſſeſſion, and then it coming in this Caſe *after the Tranſmutation of the Poſſeſſion* by the Cove-

Brownl. 193. S. C.—Far. 18. Machin v. Clerk—2 Salk. 619. S.C.

Covenant, when he was not ſeiſed in Tail, does not bind the Remainder. It was agreed by all the Juſtices, That tho' ſuch Covenant alters the Eſtate Tail as to himſelf, yet as to all Strangers he remains Tenant in Tail; for if he takes Feme after ſuch Covenant to ſtand ſeiſed to the Uſe of himſelf for Life, ſhe ſhall be endowed. Yelv. 51. Mich. 2 Jac. B. R. Frethwater v. Rois.

(D) Recoveries Common. [*By*] *what Perſons*, and to whom may be ſuffered.

[*Baron and Feme*, pl. 2. 3. 5. 7. 8. 9. 10. *Infant*, pl. 4. 6. 11. 12.]

5 Rep. 6 b. 6 Rep. 77.— Cro. E. 670. reports, That the *Remainder was to his eldeſt Son in Tail*, Remainder *to his ſecond Son in Tail*, Remainder *to himſelf in Fee*, and that the *Præcipe* was brought *againſt the Tenant for Life, and the eldeſt Son*, and vouch'd the common Vouchee. Anderſon, Walmſley and Kingſmill held, That it is not any Bar to the Eſtate Tail, nor to the Remainder; for the Land recover'd in Value ſhall be in the ſame Degree as the Land loſt is; for when a Joint Præcipe is brought againſt Tenant for Life, and him in Remainder, it ſuppoſes them to be Jointenants, and the Judgment ſhall be accordingly, and the Recovery in Value ſhall be according to the Action; whereupon he recovered in Value jointly, and ſo ſhall the Execution be alſo, and then the Recovery in Value being accordingly, it is in the ſame Degree as the Eſtate Tail was, and ſo no Bar to the Iſſue in Tail, nor to the Remainder; for the Cauſe of the Bar is the Aſſets recovered in Value, and none ſhall be admitted to ſay that the Aſſets recovered in Value ſhall go in other Manner than the Record is.——* Theſe Words ſeem ſuperfluous.

1. D. 8 El. 252. 97. *Kniveton*, cites Co. 3. *Cuppledick* 6. Tenant for Life, (* and he in) Remainder in Tail Remainder to the right Heirs of Tenant for Life, [Tenant for Life] and he in Remainder ſuffer a Common Recovery, in which they vouch the common Vouchee; this ſhall not bind the Tail, becauſe he in Remainder is not Tenant to the Præcipe; and cites alſo, that according to this was adjudged in Banco *Leach* and *Cole* 41. 42 El. Rot. 1703.

4 Le. 26. 92. and 222. S. C. by Name of Owen and Morgan's Caſe.—— Mo. 210. S. C. by Name of Owen's Caſe.

2. Co. 3. [5] *Owen Morgan*; Eſtate is made to the Baron and Feme, and to the Heirs of the Body of the Baron; Common Recovery is had againſt the Baron, who vouches the common Vouchee, [and] ſurvives his Wife and dies without Iſſue, yet adjudged that it is not good, becauſe at the Time of the Recovery there were no Moieties between him and his Feme, and the Remainder depends upon the entire Eſtate, and the Baron was not ſeiſed by Force of the Tail, and Præcipe brought againſt him only.

——And. 162. S. C.——Each having the entire Eſtate, the *Remainder depends on the particular Eſtate they both jointly have*, without Diviſion; and when the Husband alone takes the Tenancy on himſelf, tho' it is good by Eſtoppel, yet not according to the Intereſt he has in the Land; and when he is vouch'd and enters into Warranty, he ſhall be *intended Donor of that particular Eſtate which* the Tenant *had when he vouch'd*, and of no other Eſtate; and this is a *Sole Eſtate only by Eſtoppel*, and not a joint Eſtate by Entireties with his Wife; and as the Vouchee comes in, ſo the Recompence goes, which is only to the ſole Eſtate of the Husband, and not to the Remainder; for that does not depend on a Sole but Joint Eſtate; ſo that by reaſon of the Recompence the Remainder is not barr'd, it is at large notwithſtanding the Eſtoppel, which goes not in Privity to him in Remainder, being a Stranger to the Tenant; and there is no Occaſion to falſify, becauſe the Title is falſe. Pig. of Recov. 70. cites 5 Rep. 5. 3 R. 6. 9 R. 140. 2 Roll. Abr. 395. Stiles 320. 4 Le. 26. 1 And. 44. 162. Gouldſ. 26. Dal. 37.

6 Rep. 32. Fitzwilliam's Caſe. S. P.—— *A. and M.*

3. Co. 3. *Cuppledick* 6. Baron and Feme ſeiſed to them and the Heirs Male of the Body of the Baron, Remainder in Tail to B. Reverſion to the right Heirs of the Baron; the Baron levies a Fine, Conuſee ſuffers Recovery, and vouches the Baron, who vouches the common Vouchee,

Vouchee, and ſo the Recovery had; and reſolved that this Recovery ſhall bind the Tail, becauſe he comes in in Privity of the Tail.

his Wife were *Joint-tenants for Life*, Remainder *to the Heirs of the Body of A.* Remainder *to B. in Tail Male. A. alone ſuffered a Recovery, and vouch'd the common Vouchee.* Agreed that this is no Bar as to the Moiety of the Lands whereof the Wife was Tenant for Life, or to the Eſtate Tail which A. had expectant upon the Eſtate of M. or to the Remainder of B. Becauſe as to this Moiety there was no Tenant to the Præcipe. 3 Rep. 1. 5. b. Trin. 25 Eliz. Marquis of Winchester's Caſe.

If Lands are given *to Husband and Wife*, and the *Heirs of the Body of the Husband*, Remainder to a Stranger, and the *Husband diſcontinues* by Fine or Feoffment, or grants the Land by Leaſe and Releaſe, or Deed of Bargain and Sale inroll'd, and a Writ of Entry is brought againſt Conuſee, Feoffee, or Grantee, and he *vouches the Husband alone, who vouches the common Vouchee*; this Common Recovery is good, and *bars* the Eſtate Tail, and *all* Remainders, *but* not *the Wife's Eſtate*. Pig. of Recov 67.

But if Lands are given *to Husband and Wife, and the Heirs of their two Bodies*, Remainder over to a Stranger, and the Husband alone diſcontinues, and a Recovery is ſuffered; this is no Bar to the Entail or Remainders. Pig. of Recov. 67, 78.

But if Lands are given to *Husband and Wife, and the Heirs of their Bodies begotten*, and a Writ of Entry is brought againſt the Tenant of the Præcipe made by them, and they *come as Vouchees*, and vouch the common Vouchees; this is a good Common Recovery. Pig. of Recov. 70.

4. Common Recovery againſt Infant by Guardian ſhall not bind him, becauſe it is a Common Conveyance. Co. 10. *Mr. Port.* 43.

A *Common Recovery* ſuffered by Infant *by Guardian* is good; but *if by Attorney*, erroneous after full Age, becauſe it ſhall be tried per Pais, if the Warrant of Attorney was made by him when an Infant. Sid. 321. Reby v. Robinſon.——Becauſe he may have *Remedy* againſt the Guardian by Action of the Caſe, but has no Remedy againſt the Attorney, as was adjudged 4 Jac. in Caſe of Holland v. Lee. Godb. 161. Zouch v. Mitchell.

In order to the ſuffering a Common Recovery by an Infant, and to make it valid, there ought to be a *Privy Signet and Sign Manual*, ſignifying the King's Pleaſure, upon an Application to him, and other Friends of the Infant, that a Common Recovery might be ſuffered, and then the Infant and his Friends are examined in Court as to the Circumſtances of the Caſe, and their Conſent, and thereupon a Recovery is ſuffered; and many Recoveries have been ſuffered thus, as may be ſeen Lev 83. and Hob. 197. in Blount's Caſe.—— Jenk 299. pl. 60. upon this Caſe ſays, That this Caſe is not to be drawn into Example —— Tho' the King grants a Privy Seal, yet it is in the Diſcretion of the Court whether they will permit it to paſs, and the Judges do not permit it but when it will be advantageous to the Infant; and tho' it be permitted to paſs, yet it is avoidable by Error. Per Cur. Ld. Raym. Rep. 113. Mich. 8 W. 3. in Caſe of Hulbert v Watts.

It was long dubious whether a Common Recovery ſuffer'd by an Infant by Guardian was good; and in Mary Portington's Caſe, 10 Rep 42. the better Opinion ſeems to be, That ſuch Recoveries are erroneous; but that Point is now ſettled, and it hath been the common Practice to do it by *Privy Seal*, on weighty Reaſons, which has *ſome Reſemblance with the Civil Law*, where the Imperial Authority ſupplies the Defect of Legal. Upon producing this Privy Seal to the Court of Common Pleas, they admit a Perſon of known Ability and Integrity to be Guardian; and on ſhewing the Reaſons for ſuffering a Common Recovery, and proving that it is *for the Infant's Advantage*, it is done in open Court: And in this Caſe the Judges have uſed to *examine very ſtrictly* into the preſent Entails, (and take the Conſent of thoſe in Remainder) and into the Ends and Purpoſes of ſuch Recovery, and to be attended with the Writings and Parties in Court, or at their Chambers, before they admit a Guardian, and ſuffer the Recovery to be paſſed in Court. Pig. of Recov. 64. 65.

And this *Admittance by Guardian*, and the Reaſon of it, *is grounded on M. 9 Edw.* 4 pl 10. Pig. of Recov 65.

5. If Baron and Feme ſuffer a Recovery, this ſhall bind the Feme. Co. 10. *Mr. Port.* 43.

On all Recoveries there was a *Writ to examine Feme Coverts*, and the firſt Mention of ſuch Examination is 43 *E.* 3. 18. But now it is wholly diſuſed in Common Recoveries, tho' it ſtill remains in Fines. Pig. of Recov. 66.

6. If an Infant ſuffers a Common Recovery, in which he comes in as Vouchee in proper Perſon; this ſhall not bind him, but he may reverſe it for this Cauſe in a Writ of Error. Hill. 1650. between *Arlett and Walker*, per totam Curiam, agreed upon a ſpecial Verdict, but Judgment was given upon a Special Verdict againſt him, becauſe it could not be avoided by Entry without Writ of Error. Intratur. Tr. 1649. Rot. 200.

A Common Recovery, ſuffered by an Infant in Propria Perſona, was revers'd. Cro. E 323. Hopton & Ux. v. Jones

7. *A. and M.* his Wife *Tenants in ſpecial Tail*, Remainder *to B. in Tail*, Remainder *to C. in Fee*; *A. alone levied a Fine to D.* and *died leaving Iſſue*; the *Wife entered*; ſhe is in of her Eſtate-Tail, and tho' the Iſſue in Tail were barr'd by the Fine, yet by her Entry *B. and C. are remitted* to their ſeveral Remainders, *and D. is ouſted* of all his Eſtate; and *if ſhe*

daſſes

ſuffer a Recovery againſt herſelf as Tenant in Tail, and vouch the common Vouchee, *the old Remainders of B. and C. are barr'd*, but *not her own Eſtate Tail.* Per Hobart Ch. J. Hob. 259. in Caſe of Duncomb v. Wingfield.

S. C. mentioned in Pig. of Recov. 1. 2. And ſays that from this and ſome other Caſes there cited by him, it may be obſerved, that the Husband, whether ſeiſ'd jointly with his Wife, either by Moieties or Entireties, or ſeiſ'd only in her Right, may create an Eſtate of Freehold during the Coverture, and thereby make a good Tenant to the Precipe without her Joining; and that this now is in conſtant Experience and Practice, and ſaves the Charge of a Fine.

8. *A.* ſeiſed in Fee, *having* 3 *Sons*, *B. C. and D.* did, upon the Marriage of D. with Jane Searle, *covenant to ſtand ſeiſed to* the Uſe of *himſelf for Life*, Remainder *to D. and Jane, and the Heirs Male of their Bodies*, Remainder to *D. and the Heirs Males of his Body*, Remainder *to C. and the Heirs Male of his Body*, Remainder *to B. and the Heirs Male of his Body*, Remainder *to the right Heirs of A.* the Father; A. died, *D.* in the Life-time of his Wife *ſuffered a Common Recovery without her*, and ſold the Lands to W. R. Then C. died without Iſſue. D. had Iſſue by Jane one Son and no more, named James, who dies, leaving Iſſue four Daughters, but no Son; B. had Iſſue Thomas, who after the Death of D. and Jane entered and conveyed to the Defendant; the Queſtion was, Whether this Recovery ſuffered by D. as Vouchee alone, without his Wife Jane, ſhould bar the Eſtate Tail; it was agreed that it was not barr'd in toto, Jane not being vouch'd, according to * Cuppledike's Caſe, and † Owen and Morgan's Caſe there cited; but if it ſhould be barr'd for a Moiety, the Settlement being made before Marriage, when they took by Moieties, might be doubted, as it was in Cuppledike's Caſe. But the Eſtate Tail to D. and Jane being determined by their Death, and D. having a Remainder to himſelf and to the Heirs Male of his Body, that Remainder was totally barr'd, and all the Remainders over; For the Remainder in Tail to D. paſs'd by the Recovery, and is in Suppoſition of Law in Eſſe, and precedent to all the ſubſequent Remainders, according to Capel's Caſe. 1 Rep. and ‡ Benſon and Baron's Caſe, lately adjudged in C. B. 3 Lev. 107. Mich. 34 Car. 2. C. B. Hollet v. Sanders.

* See pl. 3. —— † See pl. 2. —— ‡ This Caſe is in 2 Lev. 28. by the Name of Hudſon v Benſon and Baron. Mich 25 Car. 2. B.R.

S. C. Sid. 247. pl. 12. but neither there, or in Raym. 126. is any Mention of any Recovery ſuffered after the Death of the Husband, tho' that ſeems to have been the Caſe; but the only Point in thoſe Books was, Whether it was an Eſtate Tail executed in the Wife? And held that it was. The Caſe of Merrel v. Rumſey.

9. A *Fine* was levied to the *Uſe of the Husband and Wife during their Joint Lives*, Remainder *to the Heirs of the Body of the Wife by the Husband* to be begotten; afterwards *he died*, and the *Widow married* again *and ſuffered a Recovery*; Adjudged that the Iſſue of the firſt Husband was barr'd by this Recovery, tho' the Limitation was to the firſt Husband and the Wife during their Joint Lives; becauſe the Freehold did not determine by the Death of the Husband, but the Eſtate Tail was executed in her, ſub modo. 3 Neſt. a. 52. pl. 9. cites Raym. 126.

10. A Man ſeiſed of Lands in Fee levied a Fine to the Uſe of *himſelf for Life*, and after to his *Wife and the Heirs of her Body by him begotten*, they both, *having Iſſue, ſuffer a Recovery*. Pig. of Recov. 80. 81. cites Co. Litt. 365. b. where it is ſaid to be void; but Mr. Pigot ſays, He cannot ſee how this can be Law; for the Husband and Wife joining may bar the Iſſue by a Recovery; and cites Cro. J. 475. —— See Jointreſs &c. (I) pl. 21. Kirkman v. Thompſon, and the Note there.

Note Serj. Maynard obſerved, That the Petition was inartificially drawn as above; for that a Fine could not be

11. The King was petitioned by the Husband of an Heireſs for a *Privy Seal*, directing his Juſtices of England and Wales to take a Fine or Common Recovery, as there ſhould be Occation, from the Wife, notwithſtanding her Minority, ſhe being now 18 *Years old*, in order to the Settling her Eſtate to Uſes, ſo that the Husband might be ſure of an Eſtate for Life, though his Wife (who was now big with Child) ſhould die; whereupon the King *referr'd it to the Lord Chancellor*, who on hearing Counſel for and againſt it, declar'd he thought the Petition reaſonable,

and

and that he would report the ſame accordingly. Vern. 461. Sir Henry Mackworth's Caſe. taken from an Infant, or was it

ever done; but that a Common Recovery might be had as deſired by the King's ſpecial Direction. Vern. 461. in Sir H Mackworth's Caſe.

12. Upon a Petition by A. being 19 Years old, for Leave to ſuffer a Common Recovery to bar his Siſter, who was next in Remainder and his Heir, ſhe having married his Footman, The Judges, to whom it was referr'd, obſerv'd upon the Precedents produced of like Recoveries by Infants, That 7 of the Petitions were *by Fathers on the Marriage of their Sons, and an equal Recompence given*; whereas here was neither Father nor Marriage, and that this had been carried too far already; and ſo diſallow'd it. 1 Salk. 567. Sir John St. Alban's Caſe.

(E) Of *what Thing*. *What Eſtates* may be *barred* by it.

Fol. 396.

1. **Common Recovery ſhall not bind** Eſtate Tail. **Cook** 10. *Port.* 37. b.

2. **Common Recovery ſhall bind Eſtate** [Tail] **all** Reverſions **and** Remainders, **and all** Leaſes and * Charges by them. **Co.** 1. *Capell* 63. **Co.** 3. 61. **Co.** 6. *Muldmay* 42. * See (G)

3. **By the** Judgment **in Common Recovery**, without Execution, **the Tail is bound. Co.** 1. *Shelley* 106. **Co.** 3. 3. **D.** 23 **El.** 376. 10 Rep. 38. See Execution (I)

4. By Common Law **Common Recovery ſhall bind the** Tail, Reverſion being in the King. **Co.** 10. 48. [38] 33 **H.** 8.

5. **But** not the Reverſion of the King. 33 **H.** 8. **S.** 224. See (Z)

6. In diverſe Caſes Things *in Abeyance* may be barr'd and deſtroy'd; *As* if *Tenant in Tail* be *diſſeiſed, and releaſes to the Diſſeiſor*, Now Littleton ſays, That the Eſtate Tail is in Abeyance; yet it may be barr'd by a Common Recovery, in which the *Tenant in Tail is vouch'd*. Per Gawdy J. 1 Rep. 175. b. (g) 136. in Chudleigh's Caſe.

7. *So* if *Tenant in Tail be*, the *Remainder to the right Heirs of J. S.* if Tenant in Tail ſuffers a Common Recovery, the Remainder is barr'd. Per Gawdy J. 1 Rep. 136. a. (a) 6 Rep. 42. a. (c) in Muldmay's Caſe.—cited per Doderidge J. Palm. 139. as adjudg'd. H. 24 El. C. B. Copwood's Caſe.—— S. C. cited 2 Roll Rep 217. 221. in the Caſe of Pells v. Brown.

(F) By *what Names*.

1. **If a Man be ſeiſed of** a reputed Manor, which is not a Manor in Fact, **and he ſuffers a Common Recovery of it** by Name of the Manor, **it ſhall paſs well enough; For this Common Recovery is a Common Aſſurance. Dubitatur M.** 40 & 41 **El. B. R.** between *Ewer* **and** *Heydon*. By Name of a Manor a *Reputed Manor* ſhall paſs even in *the King's Caſe*; and ſaid,

That the King had made Grants of the Manor of St James, which was but a Manor in Reputation. Per Hide Ch. J. in delivering the Opinion of the Court Lev 28. Thinne v. Thinne.

Indenture was to ſuffer a Recovery of a Manor, and all Lands reputed Parcel; the Recovery is ſuffer'd of the Manor; the *Lands reputed Parcel* ſhall paſs 1 Lev. 27. Paſch. 13 Car 2. B R Thinne v Thinne —— Becauſe it appears by the Verdict, That it was the *Intent of the Parties* that it ſhould paſs; And becauſe the *conſtant Practice* and received Opinion ſince Sir Moyle Finch's Caſe, had been that Lands reputed Parcel ſhould paſs. Sid. 190 Thinne v. Thinne.

(G) Dock'd by it, what. *Charges or Incumbrances.*

Dal. 74. pl. 49. S. C.

1. IF one *deviſes Lands to A. in Tail*, Remainder *to B. in Tail*, Remainder *C. in Tail, and if they all die without Iſſue, that* then *the Land ſhall be ſold by his Executors*; A. dies without Iſſue, B. enters and ſuffers a Recovery by Writ of Entry En le Poſt againſt him, and dies without Iſſue; and then C. dies without Iſſue; The Executors are barr'd from making a Sale without Doubt. Per Dyer and Welſh. Mo. 73. pl. 201. Trin. 6 Eliz. Anon.

4 Le. 150 pl. 203. S. C. — Mo 154. pl. 298 S. C. by the Name of Hunt v. Gately. — And. 282. pl. 290. S. C. — Goldsb. 5. pl. 11. S. C. — Poph. 5. S. C. — Jenk. 250. pl. 41. S. C. — S. C. cited by Doderidge J. Cro J. 592. in the Caſe of Pells v. Brown. — 2 Rep. 52. b. cites S. C. — This Caſe and the Reaſons in it were approved by Hale Ch. J. and the whole Court. 2 Lev. 50. Mich. 23 Car. 2. B. R. in the Caſe of Hudſon v. Benſon and Baron ——— S. C. cited Pig. of Recov. 118. and ſays, It is becauſe at Common Law the Remainder was only a Poſſibility of Reverter till the Statute of Donis; and on that Statute the Judges by Conſtruction turn'd this Poſſibility into a Fix'd Eſtate, called a Remainder or Reverſion; Now as a Recovery was a Conveyance excepted out of the Statute, and an inherent Privilege annexed to the Eſtate, and as by it the Tenant in Tail could have barr'd the Remainder, ſo he may all Charges of the Remainder Man. And as the Grantor of that Charge had been bound by the Common Recovery, ſo had thoſe that claim under him; For the Recoveror in a Common Recovery is in of an Eſtate that he has gained under Tenant in Tail in Poſſeſſion, which Eſtate is no ways ſubject to the Charge of him in Remainder or Reverſion, and the Charge of him in Remainder can only be good in reſpect of the Poſſibility that the Land may come in Poſſeſſion, which being deſtroy'd by the Recovery, the Remainder is gone, and cites Capell's Caſe. But he ſays, The more ſolid Reaſon ſeems to be, that by the Recovery the *Eſtate Tail* is extended, and the Recoveror in of an Eſtate, that *by Supervention of Law continues for ever*; ſo that the Eſtate having a perpetual Continuance, no Charge of him in Reverſion can take Place; and refers to the Caſe of Benſon v. Hodſon. 2 Lev. 28. where this is explained by Ld. Ch. J. Hale; and ſays, That the Caſe on Ld. Derwentwater's Recovery was accordingly determined upon the Act of 4 Geo. 1. by the Judges delegated to hear Claims on the forfeited Eſtates; where it was reſolved, That he took no new Eſtate by the Recovery by way of Purchaſe, but was in of his Old Eſtate, which by the Operation of the Recovery was extended into a Fee Simple, and diſcharged of the Statute De Donis, and the Limitations and Reſtraints introduced thereby; which Reaſon, he ſays, ſuits with Common Experience.

2. A. Tenant in Tail, *Remainder to B. in Tail*; *B. granted a Rent-Charge*; *A. ſuffer'd a Recovery*, and declar'd the Uſes to J. H. and his Heirs, *and died without Iſſue*; The Grantee of the Rent diſtrain'd, and J. H. brought Replevin. Reſolv'd by all the Juſtices of England, That J. H. is not ſubject to the Rent granted by B. the Remainder Man in Tail; For J. H. is in of an Eſtate derived from the Tenant in Tail in Poſſeſſion, which Eſtate is not ſubject to the Charge of him in Remainder; Beſides, the Charge of him in Remainder is good in Law by reaſon of the *Poſſibility of the Lands coming into Poſſeſſion*, and Then the Poſſeſſion ſhall be charg'd; For the Remainder of itſelf is a Thing not manurable, neither can a Diſtreſs be taken in it, as it ought to be taken, upon the ſame Land; And ſo a Condition is tacitly annex'd to the Charge of him in Remainder, viz. That it ſhall take Effect when the Remainder comes into Poſſeſſion; and the Charging a Remainder can be only in reſpect of the Poſſibility of its coming into Poſſeſſion, which Poſſibility is deſtroy'd by the Recovery. And the Grantee cannot falſify the Recovery, not being ſuffer'd by him who was chargeable with the Rent, and the Recovery bars the Remainder; ſo that neither he nor any claiming under him can falſify. And ſo it was reſolv'd, That no *Leaſe*, *Rent*, *Common*, *Recognizance*, nor other *Charge*, *Intereſt*, *or Eſtate made by the Remainder Man* ſhall charge the Poſſeſſion of the Recoveror. 1 Rep. 61. b. Paſch. 23 Eliz. Capell's Caſe.

Pig. of Recov. 124 & 125. cites S. C. — *A. Tenant for Life*, Remainder *to*

3. A. *Tenant for Life*, *Remainder in Tail* to B. The Remainder Man leaſes for Years to begin after the Deceaſe of the Tenant for Life. A. ſuffers a Recovery with *Voucher of B.* and dies. The Leaſe is not deſtroy'd, but Leſſee may falſify by Common Law, and alſo by the Statutes; *But if B.* who had the Inheritance, *had ſuffer'd a Common Recovery*, that ſhould have deſtroy'd all the Remainders and Reverſions thereupon depending.

pending, and all the Eſtates deriv'd out of ſuch Remainder; But Tenant for Life has no ſuch Power; And here the *Recovery is had againſt the Tenant for Life and with the Voucher of Tenant in Tail.* Cro. E. 718. pl. 45. Mich. 41 & 42 Eliz. C. B. Pledgard v. Lake.

B. in Tail, Remainder to C. in Tail, Remainder to the right Heirs of the Defendant

; provided, *That A.* ſhall *have Power to make Leaſes for Years in Poſſeſſion, Reverſion, or Contingency*; A. *made a Leaſe* for Years *to commence after the Death of B. without Iſſue.* Per Hale Ch. J. B. may bar this Leaſe by a Common Recovery, tho' this ariſe precedent to the Eſtate Tail, becauſe 'tis in Continuance of the Eſtate of B. Raym. 236. Mich. 26 Car. 2. B R. Benſon v. Hodſon. —— Freem Rep. 365. S C reports, that the Chief Juſtice held, That in ſuch Caſe the Leaſe would not be barr'd by the Recovery.

4. *Rent granted* by Tenant in Tail is not barr'd by a Common Recovery by him. Cro. E. 793. Mich. 42 & 43 Eliz. in the Caſe of White v. Weſt.

So if Tenant in Tail grants a Rent charge to begin after his Deceaſe without Iſſue, and afterwards ſuffers a Common Recovery, and dies without Iſſue, 'tis a good Rent and ſhall bind the Recoveror &c. Arg. 4 Le. 153 in Capel's Caſe, alias Hunt v. Gately. —— S P. Pig. of Recov. 125.

A gave Land to B. in Tail, rendring Rent; B. ſuffered a Common Recovery, with Voucher, to the Uſe of a Stranger and his Heirs. It was ſaid to have been lately held, in the Caſe of **Ld. Delawar**, That in ſuch Caſe, notwithſtanding ſuch Common Recovery, the Donor ſhould have the Rent, tho' his Reverſion was gone. But Coke was of Opinion, That the Rent was gone; For it was incident to the Reverſion, and there is no Queſtion but the Reverſion is gone. 3 Le. 261. pl. 349. Hill. 32 Eliz. in the Court of Wards. Anon. —— S. P. And that it is not barr'd, becauſe the *Eſtate of Him that ſuffers the Recovery is charged with the Rent.* Per Hale Ch. J. Mod. 169. in the Caſe of Benſon v. Hodſon.

5. *A. was ſeiſed in Fee* of Land; *A. and B. levy a Fine to J. S.* who *rendered in Tail to B. rendring Rent*; and by the ſame Fine 'twas limited, That *if B. died without Iſſue*, Tenementa prædicta integre *remanebunt to A. and his Heirs.* B. ſuffers a Common Recovery. Reſolv'd, That it was a Reverſion and not a Remainder in A. and that the *Rent* was not extinct, becauſe A. was *always in Poſſeſſion* thereof; and 'tis *diſtinct from the Land*; And that, whereof one is in Poſſeſſion, cannot be deveſted by a Recovery againſt another Perſon. And here is *no Recompence* for the Rent; for that goes only for the Land, and is not like the Caſe of a *Rent granted out of a Remainder*; for that never was in Poſſeſſion, nor a Thing executed; and tho' the Reverſion, to which this Rent was annex'd, is gone, yet the Rent continues. Cro. E. 768, 792. Mich. 42 & 43 Eliz. White v. Weſt alias Geriſh.

2 And 1 Ro. pl. 92 S C. accordingly. —— Noy 9. S. C. Adjornatur. —— Hale Ch. J. agreed this Caſe, That the Rent reſerved upon the Gift in Tail is not barr'd, but *remains as a Collateral Charge* upon

the Land diſtrainable of Common Right; but if there had been a *Condition of Re-entry*, it had been barr'd. Twiſden J. doubted if the Rent be not barr'd in Geriſh's Caſe; But Hale totis Viribus ſaid, That it is not barr'd. 2 Lev. 30. in the Caſe of Hudſon v. Benſon.

6. A *Rent de novo* was deviſed *to A. in Tail*, Remainder *to B. in Fee.* Adjudged that a Common Recovery barr'd the Eſtate-tail, and likewiſe the Remainder in Fee. Sid. 285. Paſch. 18 Car. 2. B. R. Smith v. Farnaby.

Cart 52 Trin 18 Car. 2. S. C. accordingly; only that the 2d Remainder was in Tail. —— Lev. 144. S. C Mich. 16 Car. 2. accordingly; only makes the Limitation to A. for Life. —— S C. cited per Holt Ch. J. 12 Mod. 513. Paſch. 13 W. 3. Anon. And ſaid, That it was ſo reſolv'd upon ſolemn Argument.

A. ſeiſed in Fee *deviſed* his Lands *to J. W. and the Heirs of his Body*, Remainder *to the right Heirs of A.* upon *Condition* that J. W. and his Heirs ſhould *pay an yearly Rent-charge* of 15 l. per Annum *to B.* and to the Heirs of her Body, *and* 15 l. a Year *to C* and the Heirs of her Body, and that if either of them ſhould die without Iſſue, then the *Survivor ſhould have the whole for Life, and* that *after* her Death *the whole* 30 l. per Ann. *ſhould be paid to the Heirs of the Body of ſuch Survivor*; A. died, and afterwards *B.* levied a Fine, and *ſuffered a Common Recovery in which ſhe was Vouchee*, and declared the Uſes to G. M. in Fee, who granted it to the Defendant P. and his Heirs; that the Tenant attorned to him, and the Rent being Arrear, he diſtrained for it. The Plaintiff replied in Bar to the Avowry, that B. died without Iſſue before any Rent was due; And upon Demurrer the Court was of Opinion for the Avowant; for they held that a Remainder might well be of a *Rent de Novo*, and alſo that by the Recovery in this Caſe the Eſtate in the Rent was enlarg'd, and that the Recoveror was thereby in of an Eſtate in Fee-ſimple. No Judgment was given, but the Matter was ended by Agreement of the Parties. 2 Lutw 12 ſ. Mich. 6 W. & M. Weeks v. Peach.

7. A

Pig. of Recov. 155. cites S. C— Chan. Rep. 98. Porter v. Emery. S. P.

7. A Recovery *subſequent*, ſuffer'd to a *Collateral Purpoſe* by Tenant in Tail, ſhall make *good all precedent Incumbrances* and Acts. Chan. Caſes 120. Hill. 21 & 22 Car. 2. Goddard v. Complin.

——If Tenant in Tail makes a *Leaſe not warranted* by the Statute, or enters into a *Judgment* or *Recognizance*, and then ſuffers a Common Recovery, the Leaſe and other Incumbrances are all good, which were before defeaſible by the Iſſue; for the Recoveror comes in ſubject to all Incumbrances of Tenant in Tail, and the Recovery opens, as we call it, and lets in all the Incumbrances; and therefore when a Man has to do with a Tenant in Tail that it is incumber'd with Judgments &c it is very dangerous, tho' he ſuffer a Common Recovery; for all the precent Judgments take Place of the Security he gives. Pig. of Recov. 120, 121.

Tenant in Tail, incumber'd with Statutes and Judgments, makes a *Mortgage* of Part of his Eſtate *for* 500 *Years*, and after *to corroborate this Term*, *levies a Fine ſur conceſſit for* 500 *Years with Proclamations to the Mortgagee*: And the Queſtion was, Whether this Fine ſhould enure to the particular Advantage of the Mortgagee, or let in Prior Incumbrances. Sir Edward Northy was of Opinion the Fine let in all prior Incumbrances. Serjeant Lutwich, after great Conſideration, was of a contrary Opinion; but it ſeems Sir Edward Northy's Opinion is the better; for let us take the Caſe without the Fine, and then ſee what Operation the Fine has. It is plain that, during the Life of Tenant in Tail, any prior Incumbrance was preferable to the Mortgage for 500 Years, and the Mortgagee could never avoid the prior Incumbrance, then what does *the Fine* do? that *bars the Iſſue and gives the Conuſee a Title*, *as long as Tenant in Tail* has *Iſſue of his Body*, ſo that the Eſtate, which before was good only for Tenant in Tail's Life, and avoidable by his Iſſue, now bars the Iſſue, and is enlarg'd and made more extenſive; and what Reaſon can there be, that the Eſtate thus enlarg'd ſhould not have Continuance for other Incumbrances, as well as the Mortgage? I really can ſee none; Suppoſe this had been a Fine ſur Conuſance de Droit come ceo, with Proclamations, of the whole Eſtate, none will ſay but this lets in the Incumbrances, as long as Tenant in Tail had Iſſue of his Body, and they ſhould be preferr'd according to their Priority, what Difference is there then between a Fine Sur Conuſance de Droit come ceo, and a Fine ſur conceſſit, with Proclamations? Truly none as to the barring the Iſſue, only one is a Bar during the Term granted by the Fine Sur Conceſſit) and the other is a Bar as long as there is Iſſue; ſo that it ſeems *the Incumbrances will take Place before the Mortgage*; but the Caſe being never reſolv'd, as I know of, deſerves Conſideration; *But it* in this Caſe *Tenant in Tail had ſuffered a Recovery of Part*, *and declared the Uſe to the Mortgagee* for 500 Years, no Doubt all prior Judgments had been let in. Pig. Recov. 121, 122, 123.

Mod. 168. S. C by the Name of Benſon v. Hodſon.

8. A. infeoff'd J. N. and J. S. to the Uſe of *himſelf in Tail Male*, Remainder *to B. in Tail*, Remainder *to his own right Heirs*; Provided that *if B. dies*, *and there be no Iſſue Male of his Body*, then *C. ſhall have a Rent*-Charge of 200 l. a Year, *until ſhe ſhall have received* 2000 *l.* and Charges, the firſt Payment to be made at the firſt Day of Payment, which ſhall be after the ſaid Contingents. *B. made a Leaſe for* 1000 *Years*, and afterwards he levied a Fine and ſuffered a Recovery, and died without Iſſue Male, by which all the Contingents happened. B. levied a Fine and ſuffer'd a Recovery. It was argued that this Contingent Rent-charge is not bar'd, becauſe it was *not in Eſſe when the Recovery was ſuffer'd*, and ſo no Recompence in Value (by Reaſon whereof Common Recoveries are Bars) can go to it; and cited Cuppledike's Caſe, and Capel's Caſe and Whitlock's Caſe. But it was reſolved that the Rent was barr'd, the Recovery barring all Eſtates which are chargeable with it, admitting it to ariſe out of the Seiſin of the Feoffees, according to Whitlock's Caſe. But it was *agreed* that *if it had been by Grant precedent to the Feoffment*, the Recovery had not barr'd it. And it was ſaid that Capel's Caſe rules this Caſe, and that all Objections were made there as can be made here; that the reaſon of Common Recoveries is not the Recompence, but that they are Common Conveyances: That the Land cannot be chargeable during *the Term for* 1000 *Years*, becauſe it *was derived only out of the Eſtate Tail in B. which is determined*, before which this Charge could not ariſe. And Judgment accordingly in Lancaſter, and afterwards affirm'd in B. R. And all the Court agreed to Capell's Caſe, and the Reaſon of it. 2 Lev. 28 to 31. Mich. 23 Car. 2. B. R. Hudſon v. Benſon and Baron.

2 Lev. 30. Per Hale Ch. J.—— 2 Roll R. 221. Contra

9. If a *Condition* be *for Payment of Rent*, a Common Recovery will not bar it; but if a Condition be for *doing a Collateral Thing*, it is a Bar. Per Hale Ch. J. Mod. 111. Paſch. 26 Car. 2. B. R. in Caſe of Benſon v. Hodſon.

Per Mountague Ch. J.—*Condition*, *that runs with the Land*, cannot be barr'd by a Common Recovery; but a *Collateral* Condition may; as if Donor reſerve a *Rent*, with a Condition to re-enter, a Recovery will not bar it; but if it be to re-enter for Nonpayment of a *Sum in grois*, it is otherwiſe. 2 Salk. 569. Trin. 3 Ann. B. R. Page v. Hayward.——In ſuch Caſe the Rent remains, but the Condition is gone, be-

cauſe

cauſe the Reverſion is deſtroyed. Per Hale Ch. J Freem. Rep. 364. pl. 466. in Caſe of Benſon v. Hudſon.

10. All *Charges made upon the Eſtate Tail*, will continue upon thoſe that claim under Tenant in Tail (as the Recoveror does) tho' the Iſſue will avoid them. Per Hale Ch. J. Freem. Rep. 365. pl. 466. in Caſe of Benſon v. Hudſon.

As if Tenant in Tail grants a Rent, and then makes a Leaſe according to the Statute, or ſuffers a Recovery, the Leſſee or Recoveree are chargeable with the Rent. Per Hale Ibid. *So* if *Feme Tenant in Tail* grants a Rent, and *takes Husband and dies*, the Husband *Tenant by the Courteſy* is chargeable with the Rent, becauſe he comes in under the Eſtate of Tenant in Tail Per Hale. Freem. Rep 365. ut ſupra.

11. Father *Tenant for Life*, Remainder *to the Son in Tail*, Remainder *to the right Heirs of the Son*. The *Son in the Life-time of his Father makes a Leaſe for Years, and then ſuffer'd a Common Recovery, and died without Iſſue*: In this Caſe theſe Points were held clearly. 1ſt. That when the Son makes a Leaſe for Years, this operates as well out of his Remainder in Fee as out of his Eſtate-tail; ſo that when he dies without Iſſue, this is a good Leaſe againſt the Heir in Fee, unleſs the Iſſue of Tenant in Tail had entered and avoided it. 2dly. When Tenant in Tail makes a Leaſe for Years, and then ſuffers a Recovery, this works by Way of *Corroboration upon the Leaſe*, and makes that good. Freem. Rep. 310. pl. 379. Mich. 1675. Anon.

(H) *Good*, or Not. *In Reſpect of the Place* where the Lands lie.

1. A Seis'd in Tail, among other Lands, of 2 Marſhes called Knightſwick and Southwick, lying in an Iſland called Camby in the Pariſh of North Benfleet, ſuffered a Recovery, in which South Benfleet and many other Pariſhes were named, and alſo Camby, but the Pariſh of North Benfleet was omitted; and whether the Lands in North Benfleet Paſs'd or No? was the Queſtion, upon a Trial in Ejectment at the Bar. And all the Court agreed, That the *Town* and Pariſh *being omitted*, tho' Camby was a *Lieu Conus*, yet being *in a Town*, the Recovery did not extend to it. That a Common Recovery in a Town, Pariſh, or Hamlet, is good, and perhaps in a Place known *out of the Town*, Pariſh or Hamlet; but to admit a Recovery of Lands in a Place known in a Town &c. would be abſurd; for there is no Town in which there are not 20 Places known. Hutt. 106. Mich. 5 Car. Baker v. Johnſon.

This Caſe was denied Per North Ch. J. who ſaid that it had been long diſputed whether a *Fine* of Lands in a Lieu Conus was good, but that in K. Ja. 1ſt's Time the Law was ſettled in that Point, that it was good; And by the ſame Reaſon a Recovery ſhall be good, for they are both amicable Suits, and *Common Aſſurances*, and as they grew more in Practice, the Judges have extended them farther. 2 Mod. 49. in Caſe of Lever v Hoſier.

2. J. was Tenant in Tail of *Lands in Shrewsbury and Cotton*; both are *within the Liberties of the Town* of Shrewsbury. J. ſuffered a Recovery of all his Lands in both Vills; but the *Præcipe was of two Meſſuages and Cloſes thereunto belonging* (theſe were in Shrewsbury) *and of &c. (mentioning thoſe in Cotton) lying and being in the Vill of Shrewsbury*, and the Liberties thereof. The Queſtion was, Whether the Lands lying in *Cotton*, which *is a diſtinct Vill, and not named in this Recovery*, do paſs or not? It was inſiſted that they did not, becauſe tho' the Writ of Covenant upon which a Fine is levied is a Perſonal Action, yet a Common

S. C. by the Name of Lever v. Hoſier adjudged accordingly. 2 Mod 47. Tho' it was inſiſted that there is no Præcipe in

the Regiſter to recover Lands within a Liberty, neither is

Recovery is a Real Action, and the Land itſelf is demanded in the Præcipe. But adjudged that the Lands in Cotton did paſs. Mod. 206. pl. 37. Trin. 27 Car. 2. C. B. Jones v. Wait.

there any Authority in the Law Books for ſuch a Recovery, and that Liberties in the Judgment of Law are Incorporeal; and conſequently it would be abſurd to ſay that the Lands which are Corporeal ſhould be therein contained. But North Ch. J. ſaid, That the Jury have found Cotton to be a Vill in the Liberty of Shrewsbury, and ſo it is not Incorporeal.

Judgment was given for the Defendant, for that it appearing plainly by the Deed of Bargain and Sale, that the Intent of the Parties was, that the Recovery ſhould extend to all his Lands, as well in the Pariſh of Rippon as in the Vill of Rippon, that the Deed and the Recovery, according to Cromwell's Caſe, ſhould

3. B. bargains and ſells all his Lands lying in the Pariſh of Rippon to the Defendant, and covenants to do farther Acts &c. for Aſſurance; then a Common Recovery is ſuffered *of* 100 *Acres* of Land, lying *in Rippon*; and the Jury find that the Pariſh of *Rippon did contain ſeveral Vills, amongſt which one was called by the Name of Rippon, but B. had no Lands in that Vill*; and they find farther, that the *Intent* of the Parties *was, that all the Lands in the Pariſh of Rippon ſhould paſs*. The Queſtion was, Whether or no this Recovery ſhould paſs the Lands which lay out of the Vill of Rippon, but in the Pariſh of Rippon? And the whole Court were of Opinion, that as this Caſe is, the Lands in the Pariſh of R. ſhould paſs. 1ſt. Becauſe otherwiſe the Recovery would be void, it being found that B. had no Lands in the Vill of R. 2dly. It appears plainly to be the Intent of the Parties, that this ſhall be intended the Pariſh of Rippon, (not becauſe the Jury have found it, for the Judges ſaid they would not regard that) but becauſe it *appears by the Indenture of Bargain and Sale, that it was intended the Pariſh of Rippon*; and here that Deed and this Recovery make but one Aſſurance, according to Cromwell's Caſe. 2 Co. And ſhall be conſtrued in Congruity to the other, as one Part of a Deed ſhall by another; and altho' a Place ſpoken of ſimply is intended a Vill, and Stabitur Præſumptioni donec probetur in contrarium, yet here is ſufficient Proof that it is intended the Pariſh of Rippon, and not the Vill of Rippon; and ſo Judgment was given Niſi. Freem. Rep. 227. 228. pl. 235. Trin. 1677. C. B. Adeſon v. Sir John Otway.

be looked upon as one Aſſurance, and that one ſhould be explained by the other. Freem. Rep. 241. Hill. 1677. pl. 282. C. B. Addiſon v. Sir John Otway.——Mod. 250. S. C.——2 Mod. 253. S. C. adjudged.——2 Vent. 31. S. C. by Name of Sir John Otway's Caſe.

(I) Good or not. In Reſpect of the *Perſons* ſuffering it, *or their Eſtates.*

1. IT was held, that if *Feoffees to the Uſe of the Eſtate Tail*, or other Uſe, are impleaded, and *ſuffer a Common Recovery*; this ſhall bind the Feoffees and their Heirs, and Ceſty que Uſe and his Heirs, where the Buyer or Recoveror has no Conuſance of the firſt Uſe. But per Fitzherbert, This ſhall bind, tho' he has Conuſance of the firſt Uſe. Br. Recovery, pl. 29. cites 29 H. 8.

It was held that a Recovery *againſt Ceſty que Uſe in Tail* ſhall not *ſerve but for his Life*: wherefore it is only a Grant of his Eſtate. Br. Feoffments al Uſes, pl. 48. cites 20 H. 8. Grafeley's Caſe.——Ibid. pl. 56. cites S. C.——*But* it was held by ſeveral in Chancery Temp. E. 6 that the Recovery ſhall bind the Iſſue, if *Ceſty que Uſe in Tail* be *vouched* in the ſame Recovery. Br. Feoffments al. Uſes, pl. 56.

2. *And* by ſeveral, if *Ceſty que Uſe in Tail* be *vouched* in a Recovery, and ſo the Recovery paſſes, this ſhall bind the Tail in Uſe: And this ſeems to be by the *Statute* 1 *R.* 3. *which excepts Tenant in Tail*, For that is *intended Tenant in Tail in Poſſeſſion*, and *not Ceſty que Uſe in Tail*; for Ceſty que Uſe in Tail is not Tenant in Tail. Ibid.

A Fine or Recovery of a *Ceſty que Truſt* ſhall bar and transfer the Truſt, as it ſhould an Eſtate at Law, if it were upon a Conſideration. Reſolved by the Lord Chancellor, the Maſter of the Rolls, and

Windham J. But had it not been for the Conſideration Windham J. doubted of it, becauſe he ſaid he look'd upon this Court as Remedial to thoſe that come in upon a Conſideration &c. Chap. Caſes 49. Paſch 10 Car 2 Goodrich v. Brown.——2 Freem. Rep 180 S.C. and P. and that ſuch Recovery operates as ſtrongly as an Eſtate at Law, and to the ſame Purpoſe, if upon any Conſideration.

If *Ceſty que Truſt in Tail* ſuffers a Common Recovery, this bars the Entail and all the Remainders Vern. R. 13. North v. Way.——2 Ch. Caſes 78 North v. Champernon——Tho' there was *no Tenant to the Præcipe*, but only the Ceſty que Truſt in Tail was in *Poſſeſſion under the Truſtee* who had the Freehold in him, but was no Party to the Recovery; yet decreed a good Bar, and a Difference was taken if there had been a Ceſty que Truſt *for Life before the Truſt in Tail*, ſo that in Caſe the Eſtate in Law had been executed according to the Truſt, and conſequently the Tenant in Tail could not have bar'd the Remainder in Fee if he had ſuffered a Recovery, there Ceſty que Truſt in Tail ſhould not bar the Remainder by a Common Recovery, if there was no Tenant to the Præcipe 2 Ch. Caſes 63. Trin. 33 Car. 2 North v. Williams——This Caſe of Champernoon v. North, was agreed by Lord Keeper. Wms's Rep 91. Paſch. 1706——Ch. R. 245. Digby v. Morgan——9 Mod. 143.—— Abr. Eq. Caſes 393 cites Sir Fr. Gerard's Caſe.——Vern. 13. cites Walſhborn v. Downes.

3. A. Tenant in Tail, Remainder to J. S. in Fee. A. was *Sheriff of the County where the Lands lay*, and ſuffered a Recovery with the Common Voucher over; a *Releaſe of Error* and Writs of Error by A. will not hinder the Remainderman, or even the Iſſue in Tail from bringing a Writ of Error or a Formedon. D. 188. pl. 8. Sir Ralph Rowlet's Caſe.

4. A Tenant for *Life*, Remainder *to B. for Life*, Remainder *to 1ſt and 2d Son of B. in Tail*, Remainder *to C. D. and E.* in like Manner. B. has a Son born, B. C. D. and E. levy a Fine to A. living the Son; A. makes a Feoffment; the Son dies, another Son being then born. Reſolved the Contingent Remainder ſtands good to the 2d Son, it being preſerved by the Right continuing in the eldeſt Son till the Birth of the 2d. 2 Lev. 35. Hill. 23 & 24 Car. 2. B. R. Loid v. Broking. 1 Mod 92.

5. A. *deviſed* his Lands *to* his youngeſt Daughter, and to the Heirs of her Body, Remainder to the eldeſt Daughter and the Heirs of her Body, with diverſe Remainders over, *provided that if his ſaid Daughters*, or any of them, or any others to whom he had thereby deviſed any Remainder, *ſhould* willingly or advisedly conclude and *agree to and for the doinging [sic] whereby the Lands might not deſcend according to the Limitations* in his ſaid Will, that *then ſuch Perſon or Perſons ſhould be excluded* from having ſuch Eſtates, and that the Eſtates limited to them ſhould be void, as if ſuch Daughter had not been named in his ſaid Will, or had died without Iſſue. The youngeſt Daughter married, and then ſhe and her Husband ſuffered a Common Recovery to the Uſe of them and their Heirs. Adjudged that the youngeſt Daughter, being Tenant in Tail, could not be reſtrained by any Proviſo or Limitation from ſuffering a Common Recovery, becauſe it is incident and tacitly annex'd to ſuch Eſtate, and therefore it is repugnant to the Gift to reſtrain her by any Condition or Limitation. 10 Rep. 35. a. Trin. 11 Jac. Mary Portington's Caſe. Jenk. 223. pl. 29. S. P.

6. *Tenant in Tail*, Remainder *in Tail*, Remainder *in Fee*; The *Tenant in Tail is attainted of Treaſon*. Office is found. The *King* by his Letters Patents *grants the Lands to A. who bargains and ſells* the Land by Deed *to B.* Afterwards *B. ſuffers a Common Recovery*, in which the *Tenant in Tail is vouch'd, and afterwards the Deed is inroll'd*. Upon this being put as a Queſtion to Lord Hobart, when he took his Place as Chief Juſtice of C. B. he held, That it was no Bar of the Remainder, becauſe before Inrolment nothing paſs'd, but only by way of Concluſion; And the Bargainee was no lawful Tenant to the Præcipe. Godb. 218. pl. 314. Mich. 11 Jac. C. B. Anon. S.C. cited Pig. of Recov. 53. but ſays, That notwithſtanding the Opinion in Godbolt 218. It ſeems there is ſuch a Scintilla Juris in the Tenant in Tail after an Attainder, that by a Common Recovery, if there be a good Tenant to the Præcipe, he may barr the Iſſue, Reverſions and Remainders; For if the King pardons the Party, and reſtores the Lord, tho' the Attainder is in Force, he may bar the Entail.

7. A. gives in Tail to *B. an Alien*, the Remainder *to C. in Fee*. Afterwards *B. ſuffers a Common Recovery*, and then *an Office is found*. B. dies without For till Office found he was [illegible], and

There was a good Tenant to the Præcipe.

without Iſſue. The Recovery ſhall bind C. in the Remainder. Noy 137. Anon.

Pig. of Recov. 74. cites S. C.—— By ſuch Gift B was Tenant in Tail, tho' the Eſtate Tail after his Death is not deſcendible to his Iſſue. 9 Rep. 141. a. Per Cur. in Beaumont's Caſe.

Litt. Rep. 348. S. C.

8 The *Father purchaſes Land in the Son's Name*, an Infant of 17 Years, and he would have ſuffer'd a Recovery as Tenant to the Præcipe, but the Court would not ſuffer him. Het. 163. Mich. 6 Car. C. B. Anon.

9. If an *Outlaw* ſuffers a Common Recovery, it will bar the Eſtate Tail, becauſe of the intended Recompence only; and the Tenant might have counterpleaded the Vouching of ſuch Perſon, and ſo it is his own Fault. Arg. Keb. 30. in the Caſe of Plunket v. Holms.

10. A. by Will *deviſed all his Lands to C. and his Heirs, in Truſt to pay Debts; and then* in Truſt *for B. his Grandaughter and the Heirs of her Body*, Remainder *to C and his Heirs, upon Condition that he marry B.* and gave C. his Perſonal Eſtate in Truſt for B. until ſhe attain 21. and made C. Executor, and died. *B. refus'd to marry C.* and *married J. R.* And afterwards, at her Age of 21. *B. and J. R. made a Bargain and Sale to W. R.* to make him Tenant to the Præcipe in order to ſuffer a Common Recovery, in which B. and J. R. were vouch'd, and the Uſes were declar'd to the Iſſue of the Marriage, Remainder to her own right Heirs. One Queſtion was, If the Intereſt of B. and her Husband was barrable by a Common Recovery? The Lord Chancellor took Notice that it had been ſaid, That a *Legal and Equitable Intereſt cannot be incorporated together*; but he ſaid, That Objection could not affect this Caſe; for tho' legal and equitable Eſtates cannot be incorporated, yet A. has not limited an Equitable Eſtate [firſt] and then the Legal Eſtate, but has at firſt given the whole Fee; that it happens indeed, that the laſt Part of the Equitable Intereſt may be conſidered as merg'd by coming to one and the ſame Perſon, who had the whole legal Eſtate in him; but that it would be hard, that by coming to C. tho' not abſolutely, (becauſe the Heir, upon the Condition broken, might have taken the whole equitable Intereſt out of him) that this ſhould prevent their Incorporation; And therefore he thought it an Equitable Eſtate in C. as well as that which was in B. and conſequently that B. and her Husband had a Power to bar it. Caſes in Equity in Ld. Talbot's Time 164. Hill. 9 Geo. 2. Sir John Robinſon v Comyns.

(K) In reſpect of the *Limitation*.

1. FEoffment was made by A. who *took back an Eſtate for Life, Remainder* to him who ſhould be *his Heir at the Time of his Death*, and to the Heirs Male of his Body begotten. A Recovery ſuffer'd by Tenant for Life ſhall be a Bar; for the Remainder was in Abeyance. 3 Le. 51. Paſch. 15 Eliz. C. B. Anon. Cited to have been adjudg'd.

But 'twas held that C. might avoid the ſaid Recovery by the Common Law; becauſe the *Recompence cannot extend*

2. *Feoffment in Fee by A.* to the Uſe of *himſelf for Life*, and afterwards of *his eldeſt Son in Tail*, Remainder to *his right Heirs*; A. at the Time of the Feoffment had no Son; A. ſuffered a Common Recovery, and afterwards had Iſſue B. a Son, B. dy'd living A. but left a Son named C. A. dy'd. 'Twas held, That C. ſhall not avoid this Recovery by the Statute 32 *H.* 8. For there was *no Remainder at the Time of the Recovery had* veſted in C. And the Statute is, That ſuch Recovery ſhall be void againſt all Perſons to whom the Reverſion or Remainder ſhall then

then appertain, i. e. At the Time of ſuch Recovery. 2 Le. 224. 19 Eliz. in C. B. Anon.

to ſuch Remainder, which is *in Eſſe*. Ibid. —— 2 Le. 178. pl. 218. Mich. 31 Eliz. C. B. S. P.

3. *Tenant for Life, Remainder for Life, Remainder in Tail* [to Tenant for Life] *Remainder in Fee*; The *firſt Tenant for Life ſuffers a Recovery*, the Remainder in Tail is barr'd, tho' the 2d Eſtate for Life be no Party. Brownl. 36. Anon.

4. Deviſe to *A. the eldeſt Son for Life*, and if he *die without Iſſue living at the Time of his Death*, then to *B. and his Heirs*; *But if A. have Iſſue living at his Death, then to A. and his Heirs.* A. ſuffered a Common Recovery. It was adjudg'd, That all the Remainders are barr'd. Raym. 28. Mich. 13 Car. 2. B. R. Plunket v. Holmes.

Sid. 4. S. C. — Lev. 11. Hill. 12 & 13 Car. 2. S. C. And there it was reſolv'd,

That A. took only an Eſtate for Life, the Remainder to his Heirs not executed; and that tho' he be Heir to whom the Reverſion ſhall deſcend, this ſhall not merge the Eſtate for Life contrary to the expreſs Deviſe and Intent of the Will; but ſhall leave an Opening, as they term'd it, for the Interpoſition of the Remainders, when they ſhall happen to interpoſe between the Eſtate for Life and the Fee; and compar'd it to Fulmer's Caſe in 1 Rep. where, tho' Robert the Deviſee for Life was Heir, yet the Remainder to his next Heir Male was Contingent, and not an Eſtate for Life merg'd by the Deſcent of the Reverſion; And ſo the Eſtate here of A. being for Life only by the Deviſe, the Remainder to B was a *Contingent Remainder*, and barr'd by the Recovery. —— S. C. cited Pig. of Recov. 126. And ſays, The Reaſon is, *becauſe the Recovery deſtroys the Particular Eſtate*, which is the Prop of the Contingent Remainder; for wherever a Contingent Remainder is limited to depend on an Eſtate of Freehold, which is capable to ſupport a Contingent Remainder, it is always conſtrued to be a Remainder, and not an Executory Deviſe; And where the Remainder is contingent, if the Particular Eſtate, whereon it depends, is deſtroy'd, the Remainder is gone.

(L) Good in reſpect of Limitations to *Truſtees to preſerve Remainders.*

1. A. Seiſed of Lands in Fee deviſed them to his Son B. *Remainder to the 1ſt Son of B. and the Heirs Male of ſuch firſt Son*, and ſo to the 2d, 3d &c. *Remainder to J. S. and R. S. for their Lives, in Truſt for the Securing the ſeveral Remainders before limited*; B. before any Son born, makes W. S. Tenant for Life, and ſuffers a Common Recovery; and afterwards had Iſſue C. a Son, and D. a Daughter. The Truſtees being living, the Eſtates are not barr'd by the Recovery; for Per Finch C. The Law will manage and marſhal the Will *according to the Intent*, which was here to preſerve the Contingent Remainders by a Limitation to Truſtees; But that Limitation being in Place after the 1ſt Remainders, if it ſhould ſtand ſo, it cannot preſerve them; therefore it muſt be *conſtrued before the contingent Eſtates*. 2 Chan. Caſes 10. Mich. 31 Car. 2. Green v. Hayman.

2. Upon the Settlement of an Eſtate the Limitation was *to R. D. for 99 Years, if he ſhould ſo long live*; and after his Death or other ſooner Determination of the Eſtate to him limited, *to J. S. and J. N. and their Heirs, during his natural Life*, in Truſt *to ſupport Contingent Remainders* &c. and after the End or other ſooner Determination of the ſaid Term, to the Uſe of *the firſt and other Sons of the ſaid R. D. in Tail Male*, Remainder *to E.* for 99 Years, if &c. Remainder to the Truſtees in like Manner, and to the 1ſt &c. Sons of E. —— *R. D. had a Son, and they two levied a Fine and ſuffered a Recovery* of the Premiſſes, in which the Son was Vouchee; The Son died; then R. D. died, leaving no other Son, but 4 Daughters. It was held, That the Freehold being in the Truſtees and not in the Son, the Remainder to E. is not barr'd by this Recovery, but with-

This was afterwards affirm'd in the Houſe of Lords. —— A Man ſeiſed in Fee) by Deed and Recovery ſettles his Eſtate to the Uſe of *his ſon for Life, Remainder*

M. his Daughter for 99 Years, if five lives so long, Remainder *to Truſtees* and their Heirs, *to preſerve contingent Remainders*; and *after the Determination of the ſaid Term, or the Death of M.* then *to the* Uſe of the *Heirs of the Body of the ſaid M.* lawfully to be begotten; *and for Default* of ſuch Iſſue, then *to* the Uſe of *A. for 99 Years*, if ſhe live ſo long, Remainder *to the ſaid Truſtees and their Heirs, during the Life of the ſaid A.* but *in Truſt for the Heirs of the Body* of the ſaid *A. lawfully to be begotten*; and after the Determination of that Eſtate, and the Death of the ſaid A. then *to the only Uſe of the Heirs of the Body of the ſaid A.* with like *Remainders to B. and C. and D.* with like Limitations to the Heirs of their Bodies, *Reverſion to a Stranger in Fee*; Grantor dies, *M. enters, and has a Son that attains to* 21 Years of Age; the Mother and Son cannot in this Caſe ſuffer a Common Recovery, and thereby bar the Remainders; For the Remainder to the Heirs of the Body of M. being ſupported by the Freehold limited to the Truſtees, was a Contingent Remainder, and no Entail executed; And ſo no Recovery can be where there is no Entail. It is true a Common Recovery would bar the Contingent Remainder, *if the Truſtees*, who were in Truſt for the Heirs of her Body, *joined*; but that *would prejudice M. and her Son; for on her Death he, that has the next Remainder veſted, would have the Eſtate*; So the barring the contingent Eſtates would be no Advantage, but a Diſadvantage to M. and her Sons, and all the contingent Remainders. Pig. Recov. 132, 133, 134. ——— See Remainder, Dormer v. Forteſcue.

notwithſtanding the Son's coming in as Vouchee. Mich. 14 Geo. 2. B. R. Smith on the Demiſe of Dormer v. Parkhurſt & al.— Alias Dormer v. Forteſcue.

(M) Good. In reſpect of the Limitation *to Baron and Feme.*

1. LANDS are given to *Baron and Feme, and the Heirs of their 2 Bodies*; they have Iſſue 2 *Sons*, R. the Eldeſt and T. the Youngeſt, the *Baron makes a Feoffment to the Uſe of R.* and his Wife, and the Heirs of the Body of R.— *R. infeoffs G.* his Baſtard in Fee; The Wife of R. dies, and then the Father of R. dies; *Præcipe was brought againſt G. who vouch'd R.* who vouch'd the common Vouchee, and ſo a Recovery paſs'd. R. dy'd; then *the Mother of R. dy'd.* The Brother of R. brought Formedon. The Recovery was pleaded, but held to be no Barr; for the Right of the Tail was in the Mother during her Life, which after the Recovery deſcended to T. the Son, and upon which he might have Formedon. T. 25 H. 8. And. 44. Anon.

The *Huſband* conveys Lands to J. S *in Truſt for the Wife and the Heirs of her Body*, and for want of ſuch Iſſue, in Truſt for the Husband and his Heirs within 11 H. 7.

2. *Baron and Feme* are *Jointenants of the Gift of the Father of the Baron* before Marriage, *in Conſideration of Marriage intended* between them; and after they re-aſſur'd the Land by *Fine to the Father*, who *render'd to the Son and his Wife, and the Heirs of their 2 Bodies.* The Son died, and the Wife ſuffered a Recovery, and held good as to the *Moiety* which ſhe gave by the Fine; but as to the Moiety which the Son gave by the Fine, that was within the Statute of 11 *H.* 7. of Diſcontinuances. Mo. 715. Mich. 32 & 33 Eliz. The Queen v. Savage; alias Simmonds's Caſe.

The Husband dies without Iſſue; the Wife ſuffered a Recovery; 'Tis a Forfeiture. Abr Equ. Caſes 220. Trin. 1700. Symſon v. Turner.

3. *Grandfather* covenanted to *ſtand ſeiſed* to the Uſe of *himſelf* and M. his *Wife for their Lives*, Remainder to the *Heirs Male of the* Grandfather *on the Body of the ſaid M. begotten*, with Remainders over; The Grandfather ſuffered a Common Recovery, and dy'd; M. ſurvived. To prove the Recovery void it was inſiſted, That Owen and Morgan's Caſe was not Law; for if Baron and Feme had an Intirety, then each had the Whole; and the Baron might make a Tenant to the Præcipe for the Whole. Pemberton contra, That Caſe was never yet queſtioned. The Wife's Eſtate hinders the Intail from executing in the Baron; ſo that 'tis only a Kind of Contingent Eſtate after the Death of the Wife, and the Intail cannot be tacked to the Eſtate for Life of the Husband during the Life of the Wife; becauſe during her Life there is an intervening Eſtate; and

and it was accordingly adjudg'd. 2 Salk. 563. pl. 2. Paſch. 2 W. & M. C.B. Clithero v. Franklin & Ux'—— cites 3 Rep. 6. Pl. C. Manxel's Caſe 8, 9. 1 Cro. 380. 1 Sid. 83.

(N) Good. In reſpect of the *Eſtate* being *alter'd.*

1. IF *Tenant in Tail diſcontinues*, and *retakes other Eſtate*, and ſuffers a Recovery upon the Voucher, and recovers over in Value, and dies, this Recovery ſhall not bind the Iſſue in Tail; for the Recompence ſhall go only in lieu of his Eſtate which the Tenant had at the Time of the Recovery, which was another Eſtate, and not the firſt Tail; and therefore the Recompence ſhall not go in lieu of the firſt Tail, of which the Tenant was not ſeiſed at the Time of the Recovery, and ſo no Bar. Br. Recovery, pl. 19. cites 12 E. 4. 15.

S. P. Arg. Mo. 250. pl. 402. in the Caſe of Briſcot v. Chamberlaine — *But* if the Tenant in Tail diſcontinues, and a Man *recovers against the Diſcontinuee*, and he *vouches the Tenant in Tail*, and ſo Recovery is had, this ſhall bind the Tail; for the Voucher ſhall bind all Titles which the Vouchee has in Right or otherwiſe; quod nota Diverſity, and that this is of Double Voucher, which is more ſure. Br. Recovery, pl. 19. cites 12 E. 4. 15.—— Br. Faux de Recov. pl. 30. cites 12 E. 4. 14. S. C. Per Brian.

2. The Iſſue in Tail *ſhall not be bound by a Recovery with Judgment in Value had againſt his Anceſtor*, if he was in of other Eſtate at the Time of the Recovery, than of the ſame Tail; For the Recovery in *Value cannot come in Lieu of the Tail*, as he was not ſeiſed by the ſame Tail at the Time of the Judgment; Per Choke, Brian, and Littleton; *Quod* per Brian, it does not come in Lieu *unleſs the Tenant in Tail vouches the Donor*; *Quod Nota* this is *otherwiſe* taken *at this Day*. And ſo ſee the Cauſe of Falſifying, inaſmuch as the Tenant was not ſeiſed by the Tail at the Time of the Recovery, and the Deſcent, and the Entry of the Heir after the Recovery, and the *Non-executing of the Recovery in the Life of him who ſuffered the Recovery*, to ſave the Remitter; for otherwiſe he is put to his Formedon, and ſhall falſify therein. Br. Faux. Recov. pl. 30. cites 12 E. 4. 19.

Where Tenant in Tail is in of another Eſtate, and ſuffers a Common Recovery as Tenant, that will not bar any Reverſion or Remainder; For they cannot be barred but when the Eſtate Tail upon which they depend is barred, and this ſhall bar the Eſtate of Tenant in Tail, who is Party to the Recovery. 8 Rep. 77. b. 78. Trin. 7 Jac. in Ld Stafford's Caſe.

3. *Recovery by Writ of Entry in the Poſt by the ſingle Voucher*, does not give any Eſtate but what the Tenant in Tail has in Poſſeſſion at the Time of the Recovery, ſo that if he was in of other Eſtate than the Tail, there the Tail is not bound againſt the Heir. Br. Tail et Dones &c. pl. 32. cites 23 H. 8.

4. A Recovery by *Diſſeiſee Tenant in Tail* ſhall not bar his Iſſue. 2 Le. 58. Mich. 30 Eliz. in the Caſe of Ards v. Smith. al. Lincoln Coll. Caſe.

5. A. *deviſed to E. a Feme for Life*, Remainder *to B. in Tail*, Remainder *to his right Heirs*; *E. and B. intermarried, and levied a Fine with Proclamations with Render to them and the Heirs of the Body of the Baron*, and afterwards *they ſuffered a Recovery as Tenants to the Uſe of B. and his Heirs*. B. infeoff'd C. the Defendant, and died without Iſſue, whereupon the right Heir of A. entered; It was agreed, That the Fine made no Diſcontinuance; becauſe the Conuſor was not ſeiſed in Tail in Poſſeſſion, but in Right of his Wife: Beſides, the Recovery neither bars the Iſſue in Tail, nor the Remainders; Becauſe the Tenant was in of another Eſtate than that to which the Recompence ſhould go, and not of the Eſtate Tail antiently deviſed; But the Fine with Proclamations ſhould bar the Iſſue in Tail, if any there were; and alſo the Remainder to the right Heirs, if it was ſettled in the Feme Tenant for Life at the Time

Cro. E. 827 Paſch. 41 El. C. B. S. C. —— Ow. 129. S. C. and Anderſon conceived that the Remainder-Man might enter; For that *all paſſed from* the Te- *nant for*

Life, *and at is for Forfeiture* Time of the Fine levied. Mo. 634. Hill. 43 Eliz. C. B. Peck v. Channell.

Confirmation of B and ſo the Eſtate Tail being ſpent, he in Remainder ſhall enter for Forfeiture; and the Recovery ſhall be no Bar, becauſe it was of another Eſtate; and Judgment was given for the Plaintiff; ſo that his Remainder was neither diſcontinued by the Fine, nor his Entry taken away by the Recovery.

See (C) pl. 4. 6. Tenant in Tail *covenants to ſtand ſeiſed to the Uſe of himſelf* for Life &c. This makes no Alteration of Eſtate in the Tenant in Tail, ſo that a Recovery by him as Tenant ſhall bar the antient Entail. Mo. [illegible] pl. 940. Trin. 44 Eliz. Freſhwater v. Rois.

7. A. was ſeiſed in Fee *to the Uſe of J. S. in Tail*; *J. S. infeoffed B and C. who re-enfeoffed J. S. and J. N. and R. S. to the Uſe of J. S. during his Life*, Remainder *to Richard his Son in Fee*; Richard had Iſſue and died, and then W. R. brought *Writ of Entry againſt J. S. who vouched &c.* and the Recovery paſſed. J. S. died. J. N. and R. S. entered and enfeoffed the Son and Heir of Richard, and it was held that the Recovery was not good to bind the Feoffees longer than during the Life of J. S. And. 44. pl. 112. Anon.

If *Lands are given to J. S. and his Heirs Male of the Body of his Wife*, and he *has Iſſue a Son*, and his *Wife dies*, and he *diſcontinues and takes back* an Eſtate *to him and his Heirs Female of his ſecond Wife, and after diſcontinues again and takes back* an Eſtate Tail *to him and the Heirs of his body*; and after *diſcontinues again*, and a Writ of Entry is brought againſt the *laſt Diſcontinuee*, and he *vouches Tenant in Tail*, and he vouches the Common Vouchee, this Common Recovery bars all the Eſtates Tail. Pig. of Recov. 116.

8. Tenant in Tail makes *Feoffment*, *and retakes* to him and the Heirs of his Body of his ſecond Wife, and *makes a ſecond Feoffment*, *and retakes* to him and his Heirs of his third Wife, and makes a *third Feoffment*, *and comes in as Vouchee*, and Recovery is had, this bars all the Tailes; For he comes in of all his Rights. Per Jones J. 2 Roll. R. 418. Hill. 21 Jac. B. R. in the Caſe of Sheffield v. Ratcliffe.

9. If there are *Baron and Feme Tenants in Tail*, and the Baron levies a Fine, and dies, and the *Feme ſurvives*, and ſuffers a Common Recovery; This is a Bar, tho' no Recompence in Value can go to the Eſtate Tail, being diſturbed by the Fine before. 2 Lev. 29. Mich. 23 Car. 2. B. R. in the Caſe of Hudſon v. Benton. cites 9 Rep. Beamond's Caſe.

10. A. Tenant in Tail, Remainder in Tail to B. A. grants a *Leaſe to D. for 99 Years, if 3 lives* &c. with a Covenant for Leſſee to renew, and then *mortgages to C. in Fee*, then the Leaſe determined, and A. made a new Leaſe purſuant to the Covenant &c. *Tenant in Tail, and Mortgagee join in a Conveyance of the Equity of Redemption to J. S. to make him Tenant to the Præcipe*, and thereupon a Common Recovery was ſuffered, in which *A. was vouched*, and he vouched over the Common Vouchee, and died without Iſſue. Per Cur. 'Tis true *the Mortgage* is a *Truſtee for the Mortgager*, but that is only ſo far as he derives under his Title, and has no Relation to the Remainder over; And to ſay that the *Remainder Legal Eſtate* ſhall be *barred by a Recovery*, ſuffered *by a Ceſty que Truſt Particular Eſtate*, is going farther than ever that Point has been [illegible], and ſeems to croſs the Intention of the Statute De Donis; For by that Statute this Remainder is veſted; beſides, this Recovery was ſuffered by a *Ceſty que Truſt in Tail*, which is but a particular [illegible], who at that very Time had it in his Power to have had the Legal [illegible] of the Mortgage; A Trial of Law was directed as to [illegible] the Remainder; and after the Trial an Injunction was [illegible] the Hearing the Cauſe. 9 Mod. 143. Paſch. 11 Geo. in Canc. [illegible] v. the Earl of Montrath.

So if the Conuſee or *Grantee makes a new Eſtate to the Tenant in Tail, or he Diſſeiſes the* Conuſee or *Grantee, and then grants to another*, and a Præcipe is brought againſt the *Grantee*, and he *vouches* the Tenant in Tail, and he vouches the Common Vouchee, by this all the Eſtates are barr'd. Pig. of Recov. 116.

11. If *Tenant in Tail levies a Fine*, *or* makes any *other Conveyance*, and a *Præcipe is* brought *againſt the Grantee*, who *vouches Tenant in Tail*, and he *vouches over*, this bars the Eſtate Tail. Pig. of Recov. 116.

12. If

12. If *before the Statute of Uſes A.* had been *Tenant in Tail*, and had *made a Feoffment* in Fee *to B.* and *B.* had made a Feoffment *to C. to the Uſe of A. and his Wife, and the Heirs of their two Bodies*, and the *Wife* had *died*, and *A.* had *entered on C.* the Feoffee, *and made a Feoffment in Fee*, and a Præcipe had been brought againſt the *Feoffee*, who had *vouched A.* and he the Common Vouchee, this had barred all the Eſtates. Pig. Recov. 117.

13. If a Writ of Entry be brought againſt *Tenant in Tail*, and he *vouches the Common Vouchee*, and a Common Recovery is had, this is good, and bars the Eſtate Tail, if *the Tenant* be *then in Poſſeſſion* of it. Pig. of Recov. 144.

So if the Lands be given to *A. in Tail*, Remainder to the *right Heirs of B. then living*, and a Writ of Entry is brought againſt *A.* and he *vouches the Common Vouchee*; this is a good Recovery, and bars the Eſtate Tail and Remainder. Pig. of Recov. 144. 115.

(O) Good. In reſpect of the *Vouchees*.

1. WHERE the Recovery in Value may go in Lieu of the Tail, there it is a Bar of the Tail to the Iſſue; As when *Tenant in Tail is ſeiſed* by the Tail, and *ſuffers Recovery upon a Voucher*; But if he ſuffers ſuch Recovery, where he is *ſeiſed of another Eſtate, and not of the Tail*, there this ſhall not bind the Tail againſt the Iſſue in Tail; *But* where *a Stranger* is ſeiſed and is impleaded, and *vouches the Tenant in Tail*, and ſo a Recovery paſſes, this ſhall bind the Tail, and all other Titles. Br. Voucher. pl. 115. cites 12 E. 4. 14, 15. Br. Faux. de Recov. pl. 115. cites S. C.

2. The *Double Voucher is* to make the Tenant in Tail diſcontinue, and then to bring the Writ of Entry againſt the Feoffee, (which Diſcontinuance tolls the Entry;) and then the Feoffee ſhall vouch the Tenant in Tail, and he ſhall vouch over, and ſo ſhall loſe &c. and this ſhall bind all Intereſts and Tails which the Vouchee had; whereas if he be Tenant, and vouches, the Recovery ſhall bind the Poſſeſſion only, and not all Rights and Intereſts, as it ſhall do when the Tenant in Tail is vouched. Br. Tail et Dones &c. pl. 32. cites 23 H. 8. See the Notes on pl. 5.

3. *Recovery againſt Baron and Feme by Writ of Entry in the Poſt* where the *Feme is Tenant in Tail, and they vouched over*, and ſo the *Demandant recovered* againſt the Baron and Feme, and *they over in Value*; this ſhall bind the Tail and the Heir of the Feme. Br Recovery, pl. 27. cites 23 H. 8. and ſays, This Aſſurance was made by the Advice of Brudenell and other Juſtices. S. C. cited by Holt Ch. J. Pig of Recov. 198. in the Caſe of Page v Hayward, as mentioned by Ld Ch. J. Bridgman in a MSS. Rep. of the Caſe of Murrel v. Osborn, and ſays that the only Difference between this Caſe and that of Eare v. Snow in Pl. C. is, that in this Caſe the Baron muſt be named, but in that of Eare v. Snow the Feme needed not have been named.

4. It was held, that where *Tenant for Life* is, the *Remainder over in Tail, or for Life*, and *Tenant for Life is impleaded, and vouches* him in *Remainder, who vouches over one who has Title of Formedon*, and ſo the Recovery paſſes by Voucher: There the Iſſue of him who has Title of Formedon may bring his Formedon, and recover againſt the Tenant for Life; For the *Recompence ſuppoſed ſhall not go to the Tenant for Life*, and therefore he may recover; for his *Anceſtor warrants only the Remainder*, and not the Eſtate for Life, and therefore the Tenant for Life cannot bind him by the Recovery, for he did not warrant to him; and therefore in ſuch Caſe, the ſure Way is to make the *Tenant for Life pray Aid of him in Remainder, and to join them, and vouch him who has Title of Formedon*, and ſo to paſs the Recovery; For there the Recompence ſhall go to both. Br. Recovery, pl. 30. cites 30 H. 8. *A.* was *Tenant* of the Lands *for Life, Remainder to B. in Tail, Remainder to C. for Life* &c. *B. Leaſed and Released* all his Eſtate *to A.* then a *Præcipe was brought againſt A. A. vouched B. and C. and they* vouched *the Common Vouchee*, and the Recovery was perfected. The Queſtion was, If this Recovery was good to bar the Intail? And Holt held that it was, tho' C had but an Eſtate for Life; but he reſerved it for a Point for his farther Conſideration. See Pl. Com. Manxels Caſe 524. Eare v. Snow; and 3 Co. Cuppledike's Caſe. And afterwards he gave his Opinion accordingly, after Conſideration had. Ld Raym. Rep 753, 754. 1 Ann. 1702. 2. Jennings v. Rogers.

Br. Faux. de Recovery, pl. 30 cites 12 E. 4. 19 and 13 E. 4. 1. S. P. —— If a Recovery be with *Double Voucher, and* the Tenant in Tail *comes in as Vouchee*, then it *bars all* the Eſtates he has in Poſſeſſion, and all others, tho' diſcontinued and turn'd to a Right; ſo that a Common Recovery with a double Voucher is in all Caſes moſt ſafe; And the true *Reaſon of the Difference* between a Common Recovery with Single and Double Voucher is, that in a Common Recovery with Single Voucher brought againſt Tenant in Tail, who vouches over the common Vouchee, if the Party be in of another Eſtate, the Iſſue after Tenant in Tail's Death may plead Nient Tenant Tempore Brevis nec unquam Poſtea, and ſo the Recovery void; for he is not eſtopped; For at the Time of the Writ not being Tenant of the Eſtate Tail, he can have no Recovery over of that Eſtate; for he was not ſeiſed of it, (and a Common Recovery does not Prove the Tenant was ſeiſed of an Eſtate Tail, but Suppoſes it) and at the Time of the Recovery he being *in of another Eſtate*, the Iſſue has Right to the firſt Entail, notwithſtanding the Recovery; and if the Iſſue enters after the Death of Tenant in Tail, he is remitted; So if Tenant in Tail *diſcontinue in Fee, and Re-purchaſes* the Land, *and grants a Rent, and dies*, the Iſſue ſhall hold it diſcharged; and tho' the Anceſtor has Judgment to recover in Value againſt the common Vouchee, that binds not the Iſſue; For he cannot recover in Value of the firſt Entail, for that was diſcontinued, and a new Eſtate taken; and the Donor cannot Warrant by reaſon of the firſt Entail; becauſe the Tenant is in of another Eſtate; and this Recovery in Value cannot go to the Eſtate Tail, becauſe the Tenant was in of another Eſtate; and whether the Tenant in Tail ſhall recover in Value againſt the Donor, or his Heirs, or againſt a Stranger, by reaſon of a Releaſe with Warranty, is all one; For the Land recovered in Value againſt the Donor, (who by Suppoſition in Law is always ſuppoſed to be Vouch'd by the Donee, who ſuffers the Common Recovery,) or Releaſor, muſt be an Eſtate Tail, as well in one Caſe as the other; but if he who recovers in Value was not in of the Eſtate Tail, then the Land recovered in Value cannot go in Lieu of the Eſtate Tail; For it is a Rule, That an Eſtate Tail ſhall never be avoided by a Recovery in Value, if that which is recovered in Value comes not in Lieu of the Eſtate Tail, which it does not in this Caſe, and therefore it defeats not the Eſtate Tail, but that deſcends to the Iſſue; and by his Entry getting the Poſſeſſion, that, accoupled with the Right, remits him; and this, being no more than a Recovery on a falſe Title, amounts only to a Diſcontinuance. Pig. of Recov. 109, 110, 111, 112.

5. If *Tenant in Tail makes Feoffment*, and a Common *Recovery is had againſt Feoffee*, who vouches *Tenant in Tail*, who vouches over, the Tail ſhall be barr'd; becauſe when he *comes in as Vouchee*, he ſhall be in the Degree of Tenant in Tail, and the Recompence which he has or may have, ſhall go in Tail, and therefore ſuch Manner of Recovery is the moſt ſure Way to bar the Tail; For if *Præcipe* quod reddat be brought *immediately againſt him to whom the Land is entail'd*, and *he vouches*, and the *Vouchee makes Default*, and ſo a Recovery is had according to the common Courſe, if the *Tenant in Tail at the Time of the Recovery is not ſeiſed of the ſame Tail, but of another Tail, or of a Fee, or other Eſtate*, in ſuch Caſe *the Tail, whereof he is not ſeiſed at the Time of the Recovery, is not barr'd*; as is held by the better Opinion in 12 E. 4. and adjudg'd in 13 E. 4. fol. 1. Becauſe the Recovery in Value goes according to ſuch Eſtate whereof he is ſeiſed, and not in Recompence of the Eſtate whereof he then is not ſeiſed. Pl. C. 8. in Manxell's Caſe.

Anderſon Ch. J. denied this Caſe to be Law, and that yet where one, who has Nothing, joins with one who is Tenant, he is but Tenant by Eſtoppel, and a Tenant by Eſtopple ſhall not draw a Recompence in Value; But Glanvil ſaid, That this Caſe was adjudged by good Advice. Cro. E. 670. Paſch. 41. Eliz. C. B. in Caſe of Leech v. Cole.—S. C. of Eare v. Snow, cited Hob. 2. in Caſe of Roll v. Osborn —— S. C. cited by Holt Ch. J. Pig. of Recov. 195, 196. Trin. 3 Annæ. in Caſe of Page v. Hayward; and he cited the Caſe of Murrell v. Osborne, in 1657, out of a MSS Report of Ld Ch. J. Bridgman, where in a Formedon in Remainder expectant upon an Eſtate Tail the Tenant in Tail pleaded in Bar a Common Recovery on a *Præcipe againſt Grantee of Tenant in Tail, (in Remainder) in which Tenant in Tail and a Stranger were jointly Vouch'd*, and Vouch'd over the common Vouchee; and it was reſolv'd, That this was a good Recovery, and bound all the Remainders.

6. *Baron* was *ſeiſed of an Eſtate Tail*, and a *Recovery was had againſt him and M. his Wife, and they vouched over*; The Wife had no Eſtate in the Lands, and but only a Chance of Dower, in Caſe ſhe ſurviv'd her Baron; This Recovery ſhall bar the Tail, and it ſhall be taken, That ſhe was named for no other Purpoſe than to bar her of Dower. Pl. C. 514. Hill. 20 Eliz. Eare v. Snow.

And 2 Sal. pl. 283. S. C.— Cro. E. 570. S. C. — 10 Rep. 43. b. S. C.

7. *Tenant for Life*, Remainder *in Tail*, Remainder *in Fee*. The *Tenant for Life ſuffered a Common Recovery by Voucher of Remainderman in Tail, who vouch'd the common Vouchee.* The Queſtion was, Whether the Remainder in Fee was bound? Becauſe the Statute of 14 Eliz. is, That Recoveries ſuffer'd by Tenants for Life ſhall be void againſt thoſe in Reverſion or Remainder, and that the Proviſo extends only to bind the

thoſe in Remainder, who aſſent of Record. But becauſe the Tenant in Tail was vouch'd, the Juſtices of B. R. held, that the Remainder in Fee was bound, as well as if the Tenant in Tail had been the firſt Tenant to the Præcipe, and ſo it was adjudg'd; and upon Error brought in the Exchequer Chamber, the Judgment as to this Point, was held good by all except Walmſley, but was reverſed for other Matter. Mo. 690, pl. 953. Paſch. 32 Eliz. Wiſeman v. Jennings.

8. A. Tenant for Life, Remainder to his Iſſue in Tail, *Remainder to his 8 Siſters in Tail*, Remainder over; *A. and 4 of the 8 Siſters join in a Common Recovery*, living the other four, *in which the ſaid 4 Siſters are Vouchees* without the others: The *Uſes* thereof were declared to A. for Life, Remainder to his Sons in Tail, *Remainder to B. his Elder Brother in Tail*, Remainder to the 4 Siſters, Vouchees in Tail. A. died without Iſſue; one of the other 4 Siſters died without Iſſue; *The elder Brother entred and ſuffered a Common Recovery*, in which the 3 *ſurviving Siſters, not Vouchees, are vouch'd*, and limited other Uſes, and died without Iſſue. The Siſters enter and convey to ſeveral Perſons, and more of them die without Iſſue. It ſeems that by the firſt Recovery the Eſtate of the 3 Siſters is not put to a Right; and it ſeems alſo, that by the elder Brother's Recovery the Contingency is deſtroy'd, and that he has gained a new Eſtate. And Quære, If by the Suffering the Common Recovery by the 3 other Siſters, viz. by their *coming in as Vouchees before they made any Entry*, their Right is not barr'd. Sid. 241. Lady Morgan's Caſe.

The 8 Siſters were Tenants for Life with ſeveral Inheritances, according to Lit. Per Cur. And per Twiſden J. one of the 8 being dead, who was not one of the Vouchees, the *other* 3 *might enter.* It was inſiſted that whereas after the Recovery, *A. entred generally*, (which could not *Reveſt the Right of the 3 Siſters not Vouchees* in the firſt Recovery, in Regard of the Uſe limited to B. the eldeſt Brother thereon, and his ſuffering a ſecond Recovery, and he Vouching the other 3 Siſters,) B. may limit what Uſe he pleaſe. But per Keeling J. The 3 *Siſters not having entred*, this ſecond Recovery *operates in Extinguiſhment*; eſpecially they *having only a Right at the Time of the Voucher*; to which Hide Ch. J. agreed; and no Uſe can be limited by the laſt Recovery by the 3 Siſters. And agreed per Cur that the *Eſtates of the 4* is not turned to a Right, but *confirmed by the ſecond Recovery, unleſs the Deed of Uſes be otherwiſe*, which, being produced, appeared ſo to be as to 130 Acres. So that as to theſe 130 Acres, the Defendant (who claim'd under the 3 Siſters) was found Not Guilty; and the Plaintiff, who claim'd 3 Parts of the 4 Siſters Vouchees in the firſt Recovery, recovered thoſe three Parts. Keb. 863 Morgan v. Culpepper, & al.

9. Tenant in Tail, and he in Remainder, may be vouch'd *jointly*, but it is more regular to vouch firſt the one, and then the other, that the Recovery in Value may not be joint, but enure ſeverally. 2 Salk. 571. per Holt Ch. J. Trin. 3 Annæ. B R. Page v. Hayward.

10. If Tenant vouches a *Stranger*, *who vouches Tenant in Tail*, and he enters into Warranty, it is good. 2 Salk. 571. per Holt. Ch. J. Page v. Hayward.

See Pig. of Recov. S. C. and S. P. and the Reaſons thereof, 187, 188 &c. in the Report there of the S. C.

11. *Tenant in Tail*, coming in as Vouchee, *comes in* in Privity of all Eſtates he ever had. Per Holt Ch. J. 2 Salk. 571. Page v. Hayward.

Pig of Recovery, 114. S. P.

(P) Good; Notwithſtanding the *Death of one of the Parties.*

1. A *Tenant in Tail to him and the Heirs Males of his Body* has *two Sons*, he *makes a Leaſe for Life*, and afterwards *ſuffers a Common Recovery to* the Uſe of *himſelf for Life*, Remainder *to B. for 24 Years*, Remainder *to A. and the Heirs Males of his Body, and to the Heirs Males of the Bodies of the ſaid Heirs Males.* The *eldeſt Son dies, his Wife enſeint with a Son born afterwards*, called Henry; *A. dies in the Morning*, the 9th Day of October, *the firſt Day of full Term*, (which then began the 9th of October); *at which Day*, the 9th of October, *the Recovery*

21 El. 1 Rep. 88. Shelly's Caſe. — And 69. S. C. — Mo 136. 141. S. C. — D. 373. pl. 15. S. C. — S. C. cited & ſee Sid 229

was ſuffer'd, A. having before *conſtituted an Attorney* to appear for him. This Recovery afterwards was *returned Executed*; and after theſaid Execution, the Wife of the elder Son had a Son called Henry as aforeſaid; Reſolved, That Henry has a Right to this Land, and not the younger Son of A. by all the Judges of England. 1ſt. The Death of A. does not deſtroy the Recovery; for the *Writ of Entry was returnable Oct. Mich.* and the Recovery has Relation *to* the firſt Day of the ſaid Return, which is the 7th of October, *the Day of the Eſſoign*; and A. was then alive. 2dly. The younger Son, before the Recovery executed, was ſeiſed of the *firſt Intail*; for this *was not barred before the Recovery was perfected*; Yet the youngeſt Son ſhall not have this Land: For *after the Execution* of the Recovery *the old Intail ceaſes, and the* ſaid *new Intail* limited upon the Uſe of the Recovery *ſhall take Effect*, and the youngeſt Son is in of this ſecond Intail, which he has by Deſcent; and therefore the Son of the eldeſt Son ſhall have it, and avoid this Deſcent to the younger Son. 3dly. Altho' A. had nothing of the ſaid ſecond Intail, (becauſe it was not executed in his Life-time); yet this Recovery barring the firſt Intail, the ſaid Uſe of the ſecond Intail deſcends upon the ſecond Son; which is again *deveſted* by the ſaid Henry. And altho' the Father, viz. A. died, and had nothing in the ſaid Uſe or Intail when he died, yet *upon the Original Limitation, and* Original *Agreement, A was to be Tenant in Tail by the ſecond Intail.* As in Caſe of an Exchange, One of the Exchangers enters and dies, and the Heir of the other, who had not entred, Enters after his Fathers Death; he has it by Deſcent, altho' his Father had nothing in it. 4thly. The Recovery aforeſaid (altho' the Land was in Leaſe for Years) does *not veſt any Freehold in the Recoveror before Execution* of the Recovery; If A. had *died before the Eſſoign-Day*, the Recovery might have been avoided; for there was *no Tenant to the Præcipe.* So of a Covenant to levy a Fine, the Death of the Conuſee before the Return of the Writ makes the Fine levied erroneous; For the Original Writ abates by ſuch Death. Jenk. 249. pl. 40.

(Q) Made Good, or Void; By *Matter Ex poſt Facto.*

1. *Recovery againſt Baron and Feme, by Writ of Entry in the Poſt*, where the *Feme is Tenant in Tail, and they vouch over*; if the *Feme dies and the Baron ſurvives*, this ſhall not bind the Iſſue in Tail; For the *Recompence* ſhall go to the Survivor, and then it ſhall not bind the Iſſue in Tail. But Brook ſays, this Opinion does not ſeem to be Law; For the Recompence ſhall go as the firſt Land which was recovered ſhould go, and Voucher by Baron and Feme ſhall be intended for the Intereſt of the Feme. Br. Recovery, pl. 27. cites 25 H. 8.

Cited Roll R. 306. Bridgm. 76. Arg. S. C. cited.—

2 A Recovery, ſuffered *after an erroneous Fine*, ſhall bar the Iſſue in Tail from having a Writ of Error to reverſe that Fine. And an Erroneous Recovery ſhall *bar a Writ of Error of the Fine*, until it be reverſed; but a *Void Recovery* is no Bar. Cro. E. 390. Paſch. 37 Eliz. B. R. Barton v. Lever, & Al.

So a *Fine levied after an Erroneous Recovery*, and 5 Years paſs'd, is a Bar to Defendant's bringing a Writ of Error. Roll R. 35. Trin. 12 Jac. B. R. Benfield v Bartlemew.

(R) Made

(R) Made Good; In *Equity*.

1. RESOLV'D, That whereas A. the Perſon that ſuffer'd the Recovery, was *Tenant for Life in Point of Law*, and there had been an *Agreement* (*precedent* to the Recovery) by the Anceſtor ſince dead, *for Settling* of the Premiſſes *ſo as to make the Tenant for Life Tenant in Tail*, that the Recovery ſhall be *good in Equity*, *and ſhall work upon the Agreement*. Chan Caſes, 49. Paſch. 16 Car. 2. Goodrick v. Brown. S. C Freem. Rep. 180. accordingly, For by the Articles to ſettle the Eſtate on A in Tail, A had a Truſt in Tail in the Eſtate, and therefore the Court allowed of this Recovery; And tho' it was objected that A. ought to have firſt exhibited his Bill, and have got his Eſtate decreed to him in Tail, according to the Articles, yet the Court made no Anſwer thereto, but decreed as above.

2. A. *deviſed Lands to B. for Life*, *Remainder to the firſt Son* of B. and the Heirs Male of his Body; and ſo to other Sons, *Remainder to J. S. and J. N. for their Lives*, *in Truſt for ſecuring the ſeveral Remainders before limited*. A. died. *B. before any Son born*, by Leaſe and Releaſe makes W. H. Tenant for his Life, and ſuffers a Common Recovery; the Truſtees J. S. and J. N. are living. It was objected in Favour of the Recovery, that B. 'till a Son was born, was Tenant in Tail, and that the Eſtate to the Truſtees was *a Remainder after*, and not before the Entail to B and ſo is barr'd by the Recovery, and could not preſerve itſelf, much leſs could it preſerve the Contingent Remainders precedent. But Finch C. decreed to the contrary; For the Law will *marſhall the Will* according to the Intent, which here was *to preſerve Contingent Eſtates*, tho' limited in Place after the Contingencies, and ſo ſhall be conſtrued *before* them. 2 Ch. Caſes, 10. Mich 31 Car. 2. Green v. Hayman, Rook, & al. See Abr. Equ. Caſes 386. per Harcourt C. Trin. 11 Annæ. Frewin v. Charleton.

3. Equity will never aſſiſt to avoid a Common Recovery, upon Pretence that there is *no Tenant to the Præcipe*, eſpecially when *ſuffered by an Heir at Common Law*, *to bar a Voluntary Settlement*. MSS. Tab. Feb. 13, 1706. Eyton v. Eyton.

4. A Fine and *Recovery mention'd only two Meſſuages*, but the *Deed of Uſes mention'd two Meſſuages*, *by Name of all other the Meſſuages of the ſaid* A. in S. The Deed of Uſes ſhall be the Meaſure of what paſſes, and not the Fine and Recovery. MSS. Tab. Feb. 13, 1706. Eyton v. Eyton.

5. Where a Fine and Recovery is *of ſo many Acres in S.* the Parties intereſted ſhall have their *Election* in what Part of the Eſtate it ſhall operate, MSS Tab. March 27th, 1723. Lord Blaney v. Mahon.

(S) *Bar. Of what* Things. *Or of what* it may be *ſuffered.*

1. IT lies of an Acre of Land.—— Of an Acre of *Land covered with Water*. 12 H. 7. 4.— Of a *Water-Pit*. 10 E. 3. 14 E. 3. 842. F. N. B. fol. 191. (H)—Of a *Paſſage over the Water*. F. N. B. 191. (I.) — Of a *Bailiwick*. 34 E. 3. 423. — Of an *Office*. 27 H. 8. 12.— * Of an *Advowſon of a Church*, or of the *4th Part of the Tithes*. 34 E. 3. —— Of a *Portion of Tithes*. Dyer, fol. 84. pl. 83. —— Of a *certain Parcel of Land*. Dyer 84. pl. 83. — Of the *Wardſhip* of Land, and of the Heir; or of the Land only. Reg. 161. 22 E. 3. fol. 19. Weſt's Symb. tit. Recoveries 77. a. S. 2. cites as above. * See Infra.

2. It lies of all Manner of *Eccleſiaſtical or Spiritual Profits*; as of Rectories, Portions, * *Penſions*, Tithes &c. Stat. 32 H. 8. cap. 7. — Of all and all Manner of *great and ſmall Tithes* within the Vill or Hamlet of B. in the Pariſh of A. howſoever growing, happening, and yearly renewing * It may be De *Annuo Proficuo ſive Reditu*, &c

Caſe Recoveries are Common Aſſurances. Pig. of Recov. 96. cites 5 Rep. 40. Poph 22. 2 Vent. 32. 2 Roll. Rep. 67.

newing within the Vill or Hamlet of B. in the Parish of A. Thel. lib. 8. cap. 9. S. 2. — Of the *4th Part of Tithes and Oblations* of the Parish of St. Peter &c. 16 E. 3. — Of a *certain Portion of* Tithes or *Land, not ſhewing how much.* 1 H. 4. fol. 1. Dyer, fol. 84. pl. 83, 84, 85, & 86. Weſt's Symb. tit. Recoveries 77. a. S. 2.

See pl. 3. in the Notes.

3. It lay in ancient Times of a *Hide-Land* or Plough-Land. 4 E. 3. 171. — Of an Oxland or *Oxgang.* 6 E. 3. 291. — Of 6 *Foot of Land in Length, and 4 in Breadth.* 14 Aſſ. 13. — Of a *Toft* or *Scite of a Mill.* 14 E. 3. — Of the *Hundred* of C. and *Bailiwick* of B. 34 E. 1. — Of a *Paſture for 6 Sheep or Oxen.* 3 E. 3. 23. 4 E. 2. — Of a *Rood of Land.* 3 E. 5 — Of an * *Advowſon.* 34 E. 1. — Of a *Moiety of a Rood of Land.* 41 E. 3. — Of a *Shop.* Reg. fo. 3. a. — Of *4 Acres of Alder-Wood.* 11 Aſſ. 13. — Of *Turbary* by the Name of *Moor.* 6 E. 3. 387. Weſt's Symb. tit. Recoveries 77. a. S. 2.

* Poph 22. Paſch. 35 El. Crocker and York v. Dormer. — 5 Rep. 40. Dormer's Caſe. S. C. — S. P. Pig. of Recov. 96. cites 4 Rep. 74. — Writ of Entry en le Poſt does not lie of an *Advowſon.* D. 311 b. pl. 84. in the Caſe of Andrews v. Blunt. — Common Recovery may be of an *Advowſon appendant* to a Manor. Ibid. Marg. cites Caſeb. 25 Eliz. B. R.

A Recovery of an *Advowſon* or *Perſon*, tho' it be not proper, yet being ſuffered hath been adjudged good, becauſe 'tis but a Common Aſſurance. Cro. C. 250. in the Caſe of Pavely v. Eaſton. cites 5 Rep. 40. Dormer's Caſe.

A Common Recovery is held good of an Advowſon, and no Reaſons are to be drawn from the Viſne or the Execution of the Writ of Seiſin; Becaute it is not in the Caſe of Adverſary Proceedings, but by Agreement of the Parties, where it is to be preſum'd that each knows the other's Meaning. Per North Ch. J. 2 Mod. 49. Trin. 27 Car. 2 in the Caſe of Lever v. Hoſier.

Mr. Pigot ſays, That it muſt be underſtood of an Advowſon Appendant to a Manor; But ſays, He does not ſee how it can be of an Advowſon *in Groſs* ſince the Parſon has the Freehold, and therefore it ought not to be by Writ of Entry en le Poſt, but *by Writ of Right of Advowſon*, and has been, and is ſo practiſed, unleſs by ſome few Attorneys, who act without Knowledge or Advice.

4. It lies not of a *Ditch*, nor of a *Pool*, nor of a *Fiſhery.* 8 E. 3. 381. — Nor of an *Advowſon of Tithes of a Carucate of Land.* Reg. fol. 29. — Nor of *Common of Paſture.* 27 H. 8. fo. 12. — Nor of *Eſtovers.* 2 E. 3. — Lies not of an Oxland or *Oxgang of Marſh Ground.* 13 E. 3 fo 3. — Nor of *Homage and Fealty*, nor of *Services* to be done. 6 E. 2. — Nor of a *Selion* or Ridge of Land, for the Uncertainty; Becauſe a Selion ſometimes contains an Acre, ſometimes more, ſometimes leſs. E. 1 — Nor of a *Garden*, * *Cottage*, or *Croft.* 14 Aſſ. 13. 8 H. 6. 3. 22 E. 4. 13. — Nor of a *Yard Land.* 13 E. 3. — Nor of a *Quarry*, a *Mine*, or *Market.* 13 E. 3. for they are not in Demeſne, but Profit only. — Nor of an *Upper Chamber.* 3 H. 6. fo. 1. Weſt's Symb. 77. b. S. 3.

* A Cottage *is of no Regard in Law*, and therefore a Common Recovery cannot be ſuffered of it, as it may of a Meſſuage. Quod fuit conceſſum. Sid. 17 & 18. Hill. 12 Car. 2. in the Caſe of Poll v. Bunting.

5. A Common Recovery may be of an *Honour*, *Iſland*, *Barony*, *Caſtle*, *Meſſuage*, *Cartilage*, *Dove-Houſe*, *Land*, *Meadow*, *Paſture*, *Underwood*, *Chapel*, *River*, *County*, *Warren*, *Rectory*, *View of Frankpledge*, *Waif*, *Eſtray*, *Felons Goods*, *Deodands*, *Furze*, *Heath*, *Moor*, *Tithe* &c. Pig. of Recov. 96.

And the Recovery, tho' *erroneous*, ſhall bar alſo a Writ of Error of the Fine, until it be reverſed. But a *void Recovery* is no Bar. Ibid.

6. A Recovery had after an *erroneous Fine* ſhall bar the Iſſue in Tail from having a *Writ of Error to reverſe the Fine.* Cro. E. 388. Paſch. 7 Eliz. B. R. Barton v. Lever.

If Mortgagee ſuffers a Recovery, the Eſtate of the Mortgagee remains untouch'd by the Recovery; becauſe his Right to the Land mortgag'd is or [illegible]

7. If *Mortgagee ſuffers a Recovery* and *vouches the Mortgagor*, and the Mortgagor vouches a Stranger, the *Condition* is not gone. Arg. Roll. Rep. 219. cites P. 34 El. in C. B.

and if the Condition be perform'd, the Mortgagor may enter, notwithſtanding the Recovery againſt the Mortgagee. Per Montague Ch. J. 2 Roll. Rep. 222 Mich. 18 Jac. B. R. in the Caſe of Pell v Brown.

8. *Dower* is not barr'd by a Common Recovery. Arg. 4 Le. 152. in Capell's Caſe.

9. A. was Tenant in Tail, with *Power to make a Jointure*, and ſuffered a Recovery to the Uſe of himſelf in Fee; And whether by this the Power ſhould be deſtroy'd, was the Queſtion. And it was reſolved by the whole Court, That it was; That a Recovery did not only bar the Eſtate, but all Powers annexed to it; For the Recompence in Value is of ſuch ſtrong Conſideration, that it ſerves as well for Rents, Poſſibilities &c. going out of and depending upon the Land as the Land itſelf. Vent. 225. Mich. 24 Car. 2. B.R. the King v. Melling.

S. if Tenant for Life with Power to make a Jointure, ſuffers a Common Recovery, it was held, That the Power was deſtroy'd; yet a *Collateral Power* (as for an Executor to ſell Land) cannot be deſtroy'd, according to Digg's Caſe, 1 Rep. But *Powers appendant* to Eſtates, as to make Leaſes, Jointures &c. are deſtroy'd by the Alteration of the Eſtate to which it is annexed in Privity, according to 1 Rep. Albany's Caſe; ſo that the Common Recovery being a Forfeiture of the Eſtate for Life, by Conſequence 'tis an Extinguiſhment of the Power. Ibid.—— 2 Lev. 61. S. C.

10. If *Leſſee for Years* is made *Tenant to the Præcipe* for ſuffering a Common Recovery, his Term is not extinguiſh'd; becauſe 'twas in him for another Purpoſe. Per tot. Cur. Mod. 107. Paſch. 25 Car. 2. Fountain v. Cook.

2 Roll Rep. 245. Farrows and Curſon v. Farmer and Ferrars.

11. If there be a Limitation of a *Uſe upon Condition*, and *Ceſty que Uſe ſuffers a Recovery*, that will not deſtroy the Condition, becauſe *the Eſtate is charg'd with it*; For the Recoveror can have the Eſtate no otherwiſe than he that ſuffered the Recovery had it, and therefore there is an Act of Parliament to enable Recoverors to diſtrain without Attornment; therefore ſo long as any one comes in by that Recovery, he comes in Continuance of the Eſtate Tail; and by coming in ſo, he is liable to all the Charges of Tenant in Tail. Per Hale Ch. J. Mod. 109. Paſch. 26 Car. 2. in the Caſe of Benſon v. Hodſon.

S. P. by Anderſon Ch. J. Ow. 137. Hill 43 Eliz. C. B. in the Caſe of Peck v. Charnell.

12. *Perpetuities* cannot be barr'd by a Common Recovery &c. Becauſe they *have no Dependance on the particular Eſtate*. Per Powell J. 12 Mod. 282. cites it as adjudg'd in the Caſe of Pell v. Brown.

13. *Money to be raiſed after the Determination of an Eſtate Tail* may be barr'd by a Common Recovery ſuffered by the Tenant in Tail. *But* otherwiſe *where the Eſtate firſt limited is a Fee*; as to A. and his Heirs, *Provided, if A. dies without Iſſue of his Body, then he gives* 200*l.* to B. to be paid within 6 Months after the Death of A. and in Default of Payment as aforeſaid, then he deviſed the Lands to B. for Payment; For in this laſt Caſe, the Eſtate being a Fee, no Recovery can be ſuffered thereof, and conſequently there may be Danger of a Perpetuity. See Wms's Rep. 200. in a Note of the Reporter on the principal Caſe there of Nichols v. Hooper. Paſch. 1712. and Lev. 35. in Trin. 13 Car. 2. B. R. Gooding v. Clerk.

14. It may be of a *Rent de Novo*; and therefore if one grants a Rent to B. Remainder to C. in Tail, by a Common Recovery the Remainder to C. may be barred. Sid. 285. Paſch. 18 Car. 2. B.R. Smith v. Farnaby.

Lev. 144. S.C.

(T) *Bar*, or Transfer of what Eſtate.

Reſolved accordingly by all the Juſtices. 1 Rep. 63. Capell's Caſe.

1. IF there be Tenant in Tail *Remainder*, *for Years*, Hale Ch. J. ſaid, It was doubted 9 Eliz. if Recovery by the Tenant in Tail ſhould bar the Leaſe for Years; becauſe it was ſaid that no Recompence in Value could go to it being a Chattle, but conſtant Experience has been that the Leaſe ſhall be barred. 2 Lev. 30. Mich. 23 Car. 2. B. R. in the Caſe of Hudſon v. Benſon and Baron.

2. A Man made a Gift in *Tail determinable on Non-payment* of 1000 l by Donee, the Remainder over in Tail to B. with divers other Remainders, Tenant in Tail *before the Day of Payment* of the 1000 l. ſuffers a Common Recovery, and doth not pay the 1000 l. Yet becauſe he was Tenant in Tail when he ſuffered the Recovery, by that he had barred all, and had an Eſtate in Fee by the Recovery. Per Hale Ch. J. Mod. 111. Paſch. 26 Car. 2. in the Caſe of Benſon v. Hodſon.

2 Roll. Rep. 221. Per Dod that the Fee is barred; but Mountague Ch. J. Contra.

3. If Tenant in Tail be with a Limitation, *ſo long as ſuch a Tree ſhall ſtand*, a Common Recovery will bar that Limitation. Per Hale Ch. J. Mod. 111. Paſch. 26 Car. 2. in the Caſe of Benſon v. Hudſon.

4. In ſome Caſes an Eſtate that is to take *Commencement upon a Contingency after Determination of an Eſtate Tail* cannot be barred; As if *A. ſeiſed in Fee makes a Leaſe for* 1000 *Years to commence after B's Death without Iſſue, and then a Gift in Tail is made to B.* and the Heirs of his Body; B. cannot bar this Leaſe for Years, becauſe it was a Charge upon the Land before the Eſtate of Tenant in Tail was created. Cited by Hale Ch. J. Freem. Rep. 364. pl. 466. as held in Clark's Caſe, and ſaid that this was Judge Bartlett's Contrivance; For if the Leaſe for Years had been created by the ſame Conveyance with the Eſtate Tail it was held in that Caſe, That it might have been barred by a Common Recovery.

5. *A Covenant to ſtand ſeiſed for* 20 *Years, Remainder to the Heirs of the Body of the Covenantor* is an *Executory* Remainder, and to be barred by a Common Recovery. Arg. 4 Mod. 257. Hill. 5 W. & M. B. R. in the Caſe of Goodright v Corniſh.

Fig. of Recov. 176 to 182. S. C. accordingly.

6. N. S. *deviſed Land to* his Neice *M. B. and the Heirs Male of her Body*, upon *Condition that ſhe marry with and have Iſſue Male by one ſurnamed Searle*, and *in Default* of both theſe Conditions, he deviſed it *to E. C. in the ſame Manner*, and in Default thereof *to G. S.* for 60 Years if he ſo long live, Remainder to the Heirs Male of the Body of the ſaid G. and their Iſſue Male for ever; M. & E. together with E's Husband, joined in a Fine to make J. S Tenant to the Præcipe, who vouched the ſaid M. and E. and her Husband, and alſo the Wife of the Teſtator, and her Husband (ſhe being again married) and vouched them all jointly, and they vouched the Common Vouchee, and ſo a Common Recovery was had; adjudged, that this is a good Eſtate-Tail in both M. and E. and though the Words are *expreſs Words of Condition*, yet they *ſhall be taken to be a Limitation*; ſo that the Meaning of the Teſtator is, if ſhe hath no Iſſue Male by a Searle, then the Eſtate ſhall remain over; that the Eſtate Tail in this Caſe does not ceaſe by marrying one who is not a Searle, becauſe the *Remainder over is limited in Default of both Conditions*; for they may ſurvive the firſt Husband, and afterwards marry a Searle, becauſe there is a *Poſſibility, as long as they live.* If the Eſtate had been to M. and the Heirs Males of her Body to be begotten by a Searle, provided and upon Condition that if ſhe marry any but a Searle, that then the Lands ſhall remain to W. R. and his Heirs; In ſuch Caſe a Common Recovery before Marriage would bar the Eſtate Tail and Remainder,

mainders, and the marrying afterwards with another, would not avoid the Recovery; And the Court took a Difference between a collateral Condition, and a Condition running with the Land. 2 Salk. 570. Trin. 3 Annæ B. R. Page v. Hayward.

(U) *Tenant to the Præcipe. Neceſſary* in what Caſes; *and why.*

1. THO' there be *no Tenant to the Præcipe*, yet the Recovery is good by way of *Eſtoppel againſt the Party* that ſuffered it, tho' not againſt Remainder Men, Strangers &c. Per Cur. 10 Mod. 45. Mich. 10 Annæ B. R. in Ld Say and Seal's Caſe. Pig. of Recov. 55. ſays that he finds this ſaid in ſeveral Law Books but he takes it to be *where he that ſuffers the Recovery is Tenant in Fee*; For Eſtoppel bind not the Iſſue in Tail becauſe he claims Paramount Per Formam Doni.

Plowden in Manxwell's Caſe elaborately urges this Point, and endeavours to prove that a Common Recovery may be good, where there is no Tenant to the Præcipe; Now all his Arguments ſeem to centre in this, that all Parties and Privies to the Recovery are eſtopped, to ſay there was no Tenant to the Præcipe againſt the Admittance on Record; But it is plain that *Eſtoppels bind not the Iſſue in Tail*; and the Law is now ſettled, that if there be no Tenant to the Præcipe, the Common Recovery is void, and the Iſſue in Tail *may ſaſſify*, that is reverſe it for this Error; For the Recovery in Value goes to him that has the Loſs, or loſes the Tenancy; and he that loſes may aver againſt a Stranger that he loſt nothing, ſo ſhall recover nothing; And if ſo a Fortiori, the Iſſue in Tail who *comes Paramount of all Incumbrances* and Eſtoppels *may aver Nient Tenant Temporis Brevis*. Pig. of Recov. 32, 33. cites 3 Rep. 5. 6. 65. a. 12 Edw. 4. 12. 19 Cro Car. 359 Cro. E. 21. Mo 255. 4 Le 23.

But if one that has a *Rem. Inder in Fee* ſuffers a Common Recovery, it bars him and eſtops his Heirs, tho' there is no Tenant to the Præcipe. Pig. of Recov. 33. cites Sid. 31. Cro. E. 21. *And that is a Way of Right* a Recovery may be good without a Tenant to the Præcipe. 1 Vent. 37. by Serj. Maynard Arg.

But in a Warrantia Chartæ, he who brings the Writ muſt be Tenant of the Land the Day of the Writ purchaſed; and it is a good Plea to ſay Nient Tenant dudel Brief; *So* if one *Releaſes with Warranty*, he may vouch him that releaſed: but it is a good *Plea* to ſay Releaſee *had nothing in the Time* of the Releaſe. Pig of Recov. 33, 34. cites Hob. 21. 24.

A Tenant to the Præcipe is neceſſary, becauſe the Eſtate Tail of the Vouchee is barred only in reſpect of the Aſſets recovered, or which by Poſſibility may be recovered in Value; Now till the Demandant ſues Execution againſt the Tenant to the Præcipe, the Tenant *to wit have Execution* againſt the Vouchee, nor the Vouchee againſt his Vouchee; And if the Tenant to the Præcipe had nothing in the Land, no Execution can be ſued againſt him, *and if no Execution can be ſued* againſt him *no Recovery can be had over in Value, and conſequently no Recompence* to bind him, and ſo the Recovery can be no Bar. Pig. of Recov 31, 32.

And to inforce this, Littleton in Talarum's Caſe, ſays, When there is *no Tenant* to the Præcipe there is *no Recovery*, becauſe there is none againſt whom the Demandant may recover the Land, and a Recovery proves not the Tenant ſeiſed, but ſuppoſes it. Pig. of Recov. 32.

2. If there be Tenant for Life Remainder in Tail, Remainder in Fee, if he in *Remainder in Tail* ſuffers a Common Recovery, it bars not the Entail, becauſe no Tenant to the Præcipe; But if he in *Remainder in Fee* ſuffers a Recovery that bars his Heirs. Pig. of Recov. 37, 13. cites D. 252. * 2 Roll's Abr. 395. Mo. 356. * See (D) 1 which ſeems to be the Caſe cited in Roll's Abr. and the other References ſeem to be miſ printed.

(W) *Tenant to the Præcipe. Good*, or not.

1. IF a Man makes a *Leaſe for 8 Years upon Condition that if the Leſſee does not pay 20 l. within 2 Years next after, the Leſſor ſhall have Fee*; the Termor cannot be impleaded by Præcipe quod reddat before the Leſſor has failed of Payment; For he has only a Term, and no Frankt-enement before Failure. Feoffment de Terres. pl. 71. cites 12 H. 2.

2. *Baron and Feme Jointenants* of a Manor, Remainder to the Heirs of the Body of the Husband. Remainder to H. N. in Tail. A Recovery was ſuffered *by Baron alone of all* the Manor, *in which he was Tenant* to the Præcipe, *without naming the Wife*. H. N. dies; Baron dies without Iſſue; Feme dies. Reſolved upon Error brought, That as to the Moiety of which the Feme was Tenant for Life, the Recovery was no Bar againſt the Iſſue of H. N. For as to that the Baron was not a Tenant to the Præcipe, but the Recovery operated by way of Eſtoppel only, which could *not bind the Iſſue in Tail*, who claim Per Formam Doni. 3 Rep. 13. b. Trin. 25 Eliz. Marquis of Winton's Caſe.

And. 162 S. C.

3. Lands were rendered by Fine to *Baron and Feme, and the Heirs of the Body of the Baron*, Remainder to J. S. The Baron alone during the Life of the Feme cannot make a Tenant to the Præcipe. Mo. 210. Trin. 27 Eliz. Owen's Caſe, alias, Owen v. Morgan.

The Alien is a good Tenant to the Præcipe *till Office found*. Arg. 10 Mod. 124.

4. An *Alien Tenant in Tail*, Remainder in Fee to J. S. ſuffers a Recovery to his own Uſe in Fee, and then an Office is found; The Remainder is barred, and the King ſhall have the Fee Simple. Goldsb. 102. pl. 7. Anon.

Hill 11 Ann. C. B. in the Caſe of Thornby v Fleetwood.

5. If *Baron and Feme* are *ſeiſed of the Wife's Land for Life of the Wife Remainder to Husband and Wife in Tail*, and the *Baron* bargains and ſells the Land by Deed inroll'd, and a Præcipe is brought againſt the Bargoinee, and he vouches them in Remainder, 'tis a good Recovery to bar the Eſtate Tail. Brownl. 36. Anon.

A Perſon attainted is a good Tenant to the Præcipe until Office found. Arg. 10 Mod. 124. in the Caſe of Thornby v. Fleetwood

6. Tenant in Tail, Remainder in Tail, Remainder in Fee. *Tenant in Tail was attainted* of Treaſon, the *King granted the Eſtate to A.* who *bargained and ſold by Deed to B.* [to make him Tenant to the Præcipe] then *B. ſuffered a Recovery*, in which the *Tenant in Tail was vouched, and then the Deed was enrolled*. The Ld. Ch. J. Hobart was of Opinion, That this did not bar the Remainder; becauſe before Inrolment nothing paſſed but by Concluſion only; And the Bargainee was no lawful Tenant to the Præcipe. Godb. 218. pl. 314. Mich. 11 Jac. C. B. Anon.

—— The *Bargain and Sale* whereby the Tenant to the Præcipe was made *was not inrolled till after the Recovery* was compleated; Ld C Talbot ſaid, As to that, if the Ld Hobart's Opinion as cited from Godbolt's Reports had been Law, ſome judicial Authority would certainly have followed it; if there be no Inrolment, then the Bargain and Sale are void; but if there be an Inrolment within 6 Month's, then it is good by Relation. Caſes in Equ. in Ld. Talbot's Time 167 Hill. 9 Geo. 2. Sir John Robinſon v. Comyns.

But if the Præcipe is brought againſt *Tenant for Life and Remainder-man in Tail*

7. If A. be Leſſee for Life, the *Remainder to B. in Tail*, and a Præcipe is brought againſt B. if B. gets a *Surrender from Leſſee for Life*, at any Time before the Recovery, it is a good Recovery, and the Præcipe is now made good. Noy 126. Anon.

, and they vouch the common Vouchee, it is no Bar to the Eſtate Tail. Cro. E. 659. Paſch. 41 Eliz. Leech v. Cole ——— If Tenant for Life ſurrender to the immediate Remainder-man, who ſuffers a Recovery, the Remainder is bar'd. And. 276. in Caſe of Wiſeman v. Jennings.

Hob. 196. S. C.

8. If *Infant by his Guardian* ſuffers a Common Recovery, he being Tenant to the Præcipe, this ſhall bind him. Ley 82. 83. Trin. 15 Jac. Blunt's Caſe

If an *Infant makes a Tenant* to the Præcipe, he can do it no otherwiſe than *by Fine or Feoffment*, ſince all other Deeds made by an Infant are void. Pig. of Recov. 65.

9. The *Father purchaſes Land in his Son's Name*, an Infant of 17 Years, and he would have ſuffered a Recovery as Tenant to the Præcipe, but the Court would not ſuffer him. Het. 163. Mich. 6 Car. C. B. Anon.

10. A *Leaſe* was made *for Life*, but *Livery* being *made on the ſame Day it bore Date*, it was void. The *Leſſee entered* and paid the Rent as it grew due; the *Leſſor died*; his *Heir (without Entry) ſuffers a Recovery*. It was inſiſted that the Leſſee was no Diſſeiſor but a Tenant at Will, his Leaſe being void; but if he had been a Diſſeiſor, yet the Heir having ſuffer'd a Recovery, he and all claiming under him are Eſtopp'd, to ſay that he was not Tenant to the Freehold. And to that Opinion the Court inclined; and Judgment Niſi Cauſa. Cro. C. 388. pl. 21. Mich. 10 Car. B. R. Bull v. Wyatt. But this was afterward adjudged an abſolute Diſſeiſin, becauſe Leſſee entered claiming his Eſtate for Life; but it had been otherwiſe had he *claimed as Leſſee at Will*. Roll. 631. Diſſeiſin (I) pl. 7. Kenelm Digby v. Jordan.——See Eſtoppel (E) pl. 3. and (K) pl. 3.——S. C. of Bull v. Wyat, cited Pig. of Recov. 124. And ſays he finds in ſeveral of the Law Books it is ſaid, That in ſome Caſes a Recovery may be good without a Tenant to the Præcipe *by Eſtoppel*; but ſays he takes this to be where he who ſuffers the Recovery is Tenant in Fee; for Eſtoppels bind not the Iſſue in Tail, becauſe he claims Paramount. Per Formam Doni, and that ſo is this Caſe of Bull v. Wyatt.——Pig. of Recov. 199. cites S. P. Per Holt Ch. J. Trin. 3 Ann. B. R. in Caſe of Page v. Hayward.

11. If a *Bargain and Sale* of Lands be made *to A. and his Heirs*, the *Bargainee* has an Eſtate before Entry, and is a good Tenant to the Præcipe in a Common Recovery. Per Bridgman. Cart. 78. Trin. 18 Car. 2. C. B. Thomaſin v. Mackworth. See pl. 6. and the Notes.

12. A. *Tenant in Tail*, Remainder *to B. in Tail*. *A. made a Leaſe to J. S. rendring a Pepper-corn Rent, and afterwards a Releaſe*, in order to make him Tenant to the Præcipe to ſuffer a Common Recovery, in which A. was to be Vouchee. A Recovery was afterwards had to the Uſe of A. and his Heirs. It was inſiſted, That there was no good Tenant to the Præcipe; for the *Leſſee never entered, and* the Reſervation of the *Pepper-corn is not ſufficient*, being to be paid out of the Profits of the Land, and it is a Thing of no Value. North Ch. J. was of that Opinion, and diſtinguiſh'd between an Aſſignment of an Eſtate for Life or Years, and a Grant of a Leaſe for Years by one ſeis'd in Fee-ſimple, that in the firſt Caſe the Tenure and Attendance, and being ſubject to the ancient Forfeitures and Payment of Rent, if any, is ſufficient to veſt an Uſe in the Aſſignee; but in the other Caſe, unleſs the Leſſor gives Poſſeſſion, and the Leſſee enters, the Leſſor muſt raiſe an Uſe, and the Land muſt be united to it before a Rent can reſult out of it. But Windham J. ſaid that this being in the Caſe of a Common Recovery, we muſt ſupport it, if poſſible, and that in the Caſe of Sutton's Hoſpital. 10 Rep. 34. a. the Reſervation of 12 d. was held to be a ſufficient Conſideration to raiſe an Uſe to the Hoſpital, which is as inconſiderable in reſpect to a great Eſtate as a Pepper-corn is to this. The other two Juſtices delivered no Opinion. And at another Day North Ch. J. ſaid he had viewed the Precedent of Sutton's Hoſpital, and that there the Reſervation of a Rent was mentioned in the Deed as a Conſideration, which he ſaid would perchance make a Difference between that Caſe and this. But the Court would further adviſe. Mod. 262. Trin. 29 Car. 2. C. B. Barker v. Keate. S. C. 2 Mod. 249. and is, that as no Money was mentioned to be ſaid in the Leaſe, ſo the Releaſe thereupon was only for diverſe good Conſiderations, and that afterwards Judgment was given by the whole Court that the Word (Grant) in the Leaſe will make the Land paſs by Way of Uſe; that the Reſervation of a Pepper-corn was a ſufficient Conſideration to raiſe an Uſe to ſupport a Common Recovery, That this Leaſe being within the Statute of Uſes, there was no Need of an actual Entry to make the Leſſee capable of the Releaſe; for by Virtue of the Statute he ſhall be adjudged to be in actual Poſſeſſion, and ſo a good Tenant to the Præcipe; and Judgment accordingly in Mich. Term following.——S. C. Freem. Rep. 249. pl. 266. and there pag. 252. North Ch. J. ſaid, That if the Truth of this Caſe had been found by the Verdict, there would have been no Queſtion in it; for this Recovery was to ſupport a Mortgage, tho' it was not ſo found; and that would have been a ſufficient Conſideration.

13. A *Stranger* may be Tenant to the Præcipe *with the Tenant in Tail*, tho' the Stranger had nothing in the Land; for the Recompence in Value ſhall go to him that loſt the Eſtate, and being a Common Aſſurance, it is to be favourably expounded. Vent. 358. Mich. 33 Car. 2. Anon. Skin. 5 Perkins v. Hardy. S. C.

14. *A. Tenant in Tail*, Remainder *to B. in Tail*, Remainder over &c. Vent. 355. *A. makes a Leaſe to J. S. for the Life of J. S.* not warranted by the Sta-

tute,

S. C. but no Com-mon Law, but what is cho-ked with-in the Sta-tenth Sec. is to Shin. 2. 3. and 1 Vent. 355. 356.

tute, *and dies without Iſſue, leaving B. in Remainder his Heir*, to whom the Reverſion in Fee deſcends. *B.* (being now Tenant in Tail, with Remainder in Fee) *leaſes to W. R.* (living J. S.) *for 99 Years, to commence after the Death of J. S* reſerving Rent. *J. S. ſurrenders to B. (and C. a Stranger) upon Condition, and dies.* Then a *Præcipe is brought againſt B.* (*and C.* the Stranger) and a Recovery with ſingle Voucher had (to the Uſe of B and her Heirs, and afterwards the Condition is broken and) J. S. the Leſſee enters, (B. grants the Reverſion, and afterwards J. S. dies) the Defendant the Heir of B. diſtrains for the Rent, and W. R. the now Leſſee brings a Replevin; and upon an Avowry and Pleadings thereupon this Caſe was diſcloſed to the Court of C. B. and Judgment given there for the Avowant; and now upon Error brought that Judgment affirm'd in B. R. And the Court held plainly that *B.'s accepting the Surrender was no Remitter*, as likewiſe that he being Tenant to the Præcipe, the Recovery did not bind the Eſtate Tail, *he not being ſeiſed at the Time of the Recovery of an Eſtate Tail, but of a Conditional Fee*; but if he had *come in as Vouchee*, it had barr'd. Skin. 2 & 62. Mich. 33 & 34 Car. 2. B. R. Paulin v. Hardy.

15. Tenant to the Præcipe in a Common Recovery *was ſeiſed by a Fine.* After the Recovery ſuffered *the Fine was reverſed*, yet it was held a good Recovery; for there was a Tenant to the Præcipe at the Time. 2 Salk. 568. Paſch. 5 W. & M. B. R. Loyd v. Evelin.

16. An *Eſtate pur auter Vie*, tho' it be made Aſſets by 29 Car. 2. yet it remains ſtill a Freehold, and the Adminiſtrator is Tenant to the Præcipe. Arg. Comb. 389. Mich. 8 W. 3. B. R. Oldham v. Pickering.

G. Equ. R. 16. S. C.—Hold Cr. at the Bottom, cites Trin. 4 Geo. 2. 1883 b. Buckl. Hegg, That prima facie the Fine

17. A Fine levied, and a Common Recovery ſuffered, wherein the *Conuſee was Tenant, but no Uſes of the Fine* were *declared*. It was held that at the Common Law the Uſe was always intended to be to the Conuſee, and that he was in by the Fine immediately, and ſo a good Tenant to the Præcipe. And that the Statute of Frauds extends only to Uſes to a third Perſon. 2 Salk. 676. Paſch. 8 W. 3. Lord Angleſea v. Lord Altham.

ſhall paſs the Eſtate to the Conuſee, and that to bring back the Eſtate to the Conuſor, the Conuſor muſt ſhew that the Intent was not to give it to the Conuſee; for elſe the Conuſee ſhall be deem'd to take the Eſtate by the Common Law. And this Caſe of Lord Angleſea v. Lord Altham was there held to be good Law.

The firſt Clauſe in the *Statute of Frauds* is general, that *all Uſes muſt be manifeſted by Writing*, and if it had ſtopp'd here, a Fine or Feoffment had cut off all Reſulting Uſes, tho' there had been no Conſideration but the 24 Clauſe *excepts all Truſts and Confidences that* ariſe or *reſult by the Conſtruction of Law*; and I take it, that the Conuſee is in at Common Law. The Intent here is manifeſt; for the Conuſee being Tenant to the Præcipe, Tenant in Tail coming in as Vouchee admits him as ſuch. Per Holt Ch. J. Mod's Rep. 757. Lord Angleſea v. Lord Altham.——11 Mod 216. Lord Altham v. Lord Angleſea.

Comb 425.—S. C. by the Name of Williams v. Lacy.—Cu. th. 452. S. C. affirm'd in B. R. per tot. Cur. And ſays, It was agreed that if once there had been a good Tenant to the Præcipe, his *Alienation afterwards* could not hurt; nor if he

18. A *Writ of Entry* was brought againſt Miles Corbett, *returnable Quindena Martini*, who appeared. The *Demandant declared* againſt him, and he *vouched* one Lacy *the Tenant in Tail*. A *Summons ad audendum iſſuit, returnable Octab. pur.*, but *before the Return, and after the Teſte*, (viz.) 1 Januarii, Lacy the *Tenant in Tail granted the Land to Miles Corbet, by Leaſe and Releaſe for Life*. At the Return of the Writ of Summons, *Lacy* appeared and entered into the Warranty, and *vouched the common Vouchee*; and ſo a Common Recovery was had againſt him, which was held good in C. B. It was inſiſted for Error, that Miles Corbett was not Tenant to the Præcipe at the Time of the Return of the Writ of Entry; but adjudged, That if the Tenant to the Præcipe *gains a Freehold before Judgment, it is ſufficient*; for it cannot be ſaid a Recovery againſt him that had nothing, and therefore a Writ muſt be made good by a ſubſequent Purchaſe, and ſo may a Voucher, and the rather becauſe the Defendant may have a good Cauſe of Action, tho' the Tenant has not the Land; for *it is no Deſt' any Tenant to the Præcipe, unleſs Defendant's Fault. The Caſe of Fee Tail, &c. Mich. 33 & 34 Car. 2. B. R. Paulin v. Hardy.*

Alton;

Action; and consequently it is sufficient if the Tenant has the Land to render at any Time before Judgment. 2 Salk. 568. Trin. 11 W. 3. B. R. Lacy v. Williams.

should suffer another Recovery against him upon a Paiſne Title;

for that would be fraudulent.—S. C. argued and adjudged in C. B. Lord Raym. Rep. 227. Trin. 9 W. 3. Williams v. Lacy.——S. C. argued, and Judgment affirm'd in B. R. Ld. Raym Rep. 475.——If there is a Tenant to the Præcipe *Pendente Placito* before Judgment, it is well enough, tho' there was none at the Time of ſuing out the Præcipe And per Holt Ch J. a Tenant has been made frequently *after the Return* of the Præcipe and a Voucher. Show. 347. Paſch. 4 W. & M Samborne v. Belk —For even in adverſary Writs, if the Tenant was not Tenant at the Time of the Writ, but was ſo before the Return, it was well. Pig. of Recov. 29 ——It is good with this *Diverſity*, that if the Tenant *comes to the Land by his own Act*, he can never plead it to abate the Demandant's Writ, but has made the Writ good; *but* if he comes to the Land *by Act in Law*, he may abate the Writ by pleading Non-tenure; as if a Son has a Præcipe brought againſt him in the Life of his Father, and his Father dies, he may plead Non-tenure if the Land deſcended to him by his Father's Death. Pig. of Recov. 31. cites 1 H. 6. 12 5 H. 5. 9. 8 E. 3. 82 37 H. 6. 16. 3 H. 7. 8. 41 E. 3. 5.——S. P. Noy 126. Anon. cites 41 E. 3. 5 a. b. and 35 H. 6. 4.

But where a *Writ* of Entry was *returnable Quindena Martini*, 26 Nov. being a Monday, the Term ended the Wedneſday following, the *Leaſe and Releaſe* were *dated* the *26th and 27th* of November, and the *Recovery taken on Wedneſday the 28th* at the Common Pleas Bar, and ill; for it appeared on the Face of the Recovery, that there was no Tenant to the Præcipe, the Writ of Entry being *returned before the Releaſe bore Date*; and tho' the Prothonotaries and ſome able Men held it good, yet on Advice it was held erroneous Pig. of Recov 58.——Mr. Pigot ſays, That upon Conſideration of this Caſe the Recovery is certainly void; for ſince a Recovery was ſuffered of that Term, on the 26th of November, viz. Quinden. Martini, it cannot be otherwiſe preſumed, but *that the Tenant* on the Day *appeared to the Writ, and Judgment was then given*, and the Releaſe bearing Date the 27th of November, it plainly appears there was no Tenant to the Præcipe, becauſe Judgment was given Quinden. Martini; and tho' the Judgment was taken at Bar the 28th, and ſo noted by the Serjeants, yet *the Judges take* no *Notice* of that, and *of nothing but what appears on the Record*. Pig. of Recov 58. 59.

19. Where the *Tenant appears on the Return of the Writ of Entry, and a Recovery is then had*, in ſuch Caſe the Tenant *muſt have the Freehold at the Return of the Writ*, becauſe it is a Recovery then ſuffered. Arg. 2 Salk. 569. Trin. 11 W. 3. B. R. in Caſe of Lacy v. Williams, cites 41 E. 3. 5. 8 E. 3. 32. 10 E. 3. 21.

But otherwiſe where there is a Voucher or Interpleader, as in the principal

Caſe; for it is ſufficient if he *becomes Tenant before Judgment* Arg. 2 Salk. 569 in Caſe of Lacy v. Williams, cites ut ſupra.——And per Holt Ch J. accordingly, and Judgment given accordingly in C. B. was affirm'd in B R.

20. Tenant *for Life*, Remainder *in Tail*, Remainder *in Fee*; Tenant in *Tail levies a Fine*. This has for ever hinder'd the Tenant for Life and Remainder in Tail from deſtroying the Remainder in Fee; becauſe the Fine has turn'd his Eſtate into a baſe Fee, and has deſtroyed all Privity of Eſtate; ſo that if *Tenant for Life and Remainder in Tail* would make a Tenant to the Præcipe, yet they *cannot vouch the Remainder-man in Fee*, without he will voluntarily enter into it. 11 Mod. 121. pl. 7. Trin. 6 Ann. 1707. Anon.

21. A. on the Marriage of B. his Son with W. conveyed Lands to J. N. and J. S. and their Heirs in Truſt, and *to the Uſe of A. for Life*, Remainder to the Uſe *of B. for 99 Years, if &c.* Remainder *to J. N. and J. S to preſerve Contingent Remainders*, Remainder to the Uſe *of the firſt &c. Son of B. by W. in Tail Mail ſucceſſively*, Remainder to the Uſe *of the Heirs of the Body of B.* (who is ſtill living) Remainder to the Uſe *of the right Heirs of A.*—A. died. B. had Iſſue C. who with the *Heirs of* J. S. *the ſurviving Truſtee joined in a Deed of Bargain and Sale inroll'd for making a Tenant to the Præcipe*, and a Recovery was ſuffered to the Uſe of C. in Fee, who deviſed all his Eſtate to Truſtees for Payment of his Debts, and died, leaving Iſſue a Son; but J. S. the *ſurviving Truſtee* having by Will *deviſed* to K. and his Heirs, all ſuch Eſtate as the Lord had beſtowed upon him, he deviſed Part to J. S. and his Heirs, and *all the reſt of his Real Eſtate to his Wife and her Heirs*. It was held by the Maſter of the Rolls, That the legal Eſtate being in J. S. in the Eye of the Law, it was His Eſtate and His Property, and therefore tho' a Truſt Eſtate, yet it paſs'd by the Deviſe of *His Eſtate*,

Eſtate; and this being on a Bill to compel a Purchaſor to accept the Purchaſe upon this Title, his Honour ſaid that he would not, nor did he think it reaſonable for a Court of Equity to compel it; and therefore decreed back a Depoſit which the Purchaſor had made. 2 Wms's Rep. 198. Mich. 1723. Marlow v. Smith.

22. Ld. C. Talbot taking Notice of its having been ſaid, That a *Feme Tenant in Tail and her Husband* cannot make a Tenant to the Præcipe *without a Fine*, he ſaid, That whatever the Caſe might be where a Huſband is *merely ſeiſed in Right of his Wife*, it was not neceſſary [in the principal Caſe] for him to determine; becauſe in this Caſe the Husband by his Intermarriage [and having Iſſue] is *become entitled to an Eſtate by the Courteſy*, and therefore *he alone*, without his Wife's Joining, *might make a good Tenant to the Præcipe*. Caſes in Equity in Ld. Talbot's Time 167. Hill. 9 Geo. 2. Sir John Robinſon v. Comyns.

Affirm'd in the Houſe of Lords.

23. A. was Tenant *for 99 Years if he ſo long live*, Remainder to Truſtees to ſupport Contingent Remainders, and then *to the firſt &c. Sons of A.*— A. and his Son cannot make a good Tenant to the Præcipe to bar the After-Remainders, the Freehold being in the Truſtees, who did not join. Mich. 14 Geo. 2. B R. Smith of the Demiſe of Dormer v. Parkhurſt.— Alias Dormer v. Forteſcue.

24. If a Common Recovery be to be ſuffered of a *Manor*, wherein are many Leaſes for Lives of Part of the Manor, tho' the Practice has been to get Surrenders from the Leſſees, that is only Abundans Cautela; and I take it not to be neceſſary; and I think the Recovery good, tho' the *particular Tenants for Lives did not ſurrender*; for the *Reverſion* of the Land leaſed for Lives *remains ſtill Part of the Manor*; and the Fine or Deed that made the Tenant to the Præcipe, carried the entire Manor to him, as well Reverſions as Poſſeſſions; for the Manor *being an entire Thing*, the Freehold thereof was in the Tenant to the Præcipe. Pig. of Recov. 41, 42.

As for Example, If after *Leaſe and Releaſe* executed *to make* the *Tenant to the Præcipe*, the *Tenant ſurrenders to the Releaſor*, this is void; for he has no Reverſion for the Surrender to operate upon. Pig. of Recov. 50.—

25. If the *Land*, of which the Recovery is intended to be ſuffered, is *not Part of a Manor*, and is *in Leaſe for Life*, then it *muſt be ſurrendred* to him that has the Reverſion or Remainder before he makes a Tenant to the Præcipe; or if the Surrender be after the Conveyance, which makes the Tenant to the Præcipe, then to the Tenant to the Præcipe; And by miſtaking this, ſeveral Recoveries have been ſet aſide. Pig. of Recov. 50. cites a Caſe left to be determined by Counſel between the E. of Pembroke and Ld. Windſor.

But tho' where there is a Leaſe for Life [of Lands which are] no Part of a Manor, that [Leaſe] muſt be ſurrendered to make a good Tenant to the Præcipe; Yet no *Term for Years* hinders him that has the Freehold from ſuffering a Common Recovery; becauſe the Law has little Regard to Terms for Years, which are only Chattels. And by the Statute of Glouceſter, cap. 11. Leſſee for Years in London may falſify a Common Recovery, whereby the Judgment is not to be ſtay'd, but the Execution ſuſpended during the Term. Pig. of Recov. 50, 51.

(X) Tenant to the Præcipe. *Pleadings. And in what Caſes* a good Tenant ſhall be *intended.*

After *Length of Time* a good Legal Tenant to the Præcipe ſhall be *preſum'd.* 9 Mod. 143

1. IN Ejectment it appeared, That *Part of the Land was leaſed for Life*, and the Recovery with a ſingle Voucher was ſuffered by him in Reverſion, and ſo no Tenant to the Præcipe for thoſe Lands. But in regard the *Poſſeſſion* had followed it *for a very long Time*, the Court ſaid they would *preſume a Surrender*. Vent. 257. Paſch. 26 Car. 2. B. R. Anon.

Paſch. 11 Geo. in Canc. Webber v. the Earl of Montrath.

2. The

2. The Plaintiff intitled himſelf to an Advowſon by a Recovery ſuffered by Tenant in Tail; and in Pleading this Recovery, he *alleges* two *to be Tenants to the Præcipe*, but does *not ſhew How* they came to be ſo, or what Conveyance was made to them; ſo as it may appear, that they were Tenants to the Præcipe. And after Search of Precedents, as to the Form of pleading Common Recoveries, the Court inclined that it was not well pleaded, but delivered no Judgment. 2 Mod. 70. Paſch. 28 Car. 2. C. B. Wakeman v. Blackwell.

S.C. cited by Serjeant Lutwich 2 Lutw. 1549, 1550. in the Caſe of Leigh v. Leigh. Hill. 3 W. & M. and obſerves, That the Court did not deliver any Judgment; and ſays, It muſt be confeſs'd, that the uſual Form of Pleading is to ſhew How the Tenant became Tenant. But from what he had been ſaying otherwiſe before [which ſee pl. 3.] he makes a Quære, If it be of Neceſſity always to ſhew ſpecially How the Tenant was made Tenant; But ſays, That if ſuch ſhort Pleading ſhould be allow'd, (as not to ſet it ſpecially forth) he ſees not any Inconvenience which would enſue; for ſhould it be pleaded, That there was not any Tenant to the Præcipe, then Iſſue might thereupon be taken, as appears by Rast. Ent. tit. Formedon in Execut. 3. & 21 E. 4. 7, 8.

And there he makes another Quære alſo, If a Common Recovery *to Uſes* may not be pleaded thus, viz. *to ſay, That a Writ of Entry &c. was proſecuted againſt J. S. and J. N. then Tenants of the Freehold &c.* and then to proceed in ſuch a Manner as is mentioned in the Caſe of Lumlock v. Pyrr. (Latch. 963.) And ſays, He does not apprehend any Reaſon why it might not be ſo briefly pleaded, as well as Judgments in other Caſes. But then (he thinks) it would be neceſſary to *ſhew that the Recovery was executed either by Entry or by Hab. fac. Seiſinam return'd*; for till this is done, the firſt Eſtates are not altered. Ibid. 1550. cites Jo. 10. Awbury v. Ld. Bridgwater, and 1 Rep. Shelley's Caſe, and 2 Lev. 31. Hudſon v. Benſon and Baron.

S. C. of Wakeman v Blackwell, Mod. 218. Mich. 28 Car. 2. C. B. reports the Pleading to be thus, (viz.) That J. W. the Grandfather of the Plaintiff was ſeiſed in Fee of the Manor &c. and that a Præcipe was brought againſt O. & P. *Ad tunc Tenentes liberi Tenementi*, who appeared and vouched the ſaid J. W. and that a Recovery was had to the Uſe of J. S. under whom the Defendant claimed. It was inſiſted for the Defendant, That 'tis not neceſſary the Tenant to the Præcipe ſhould have a Freehold at the Time of the Writ bought, 'tis ſufficient if he hath it at the Time of the * Return, that the Demandant is eſtopped to ſay, That there was not a Tenant to the Præcipe, becauſe the Writ is only abatable if brought againſt one that is not Tenant. And as long as it is not abated, but is pleaded to &c. it ſhall conclude, All who are Parties or Privies, and all claiming under them; That Here is an Eſtoppel with a Recompence; for W. the firſt Vouchee might have counterpleaded the Lien, and extorted the Warranty; but having vouch'd over, he is paſt that Advantage, and concluded by being made a Party by Voucher; That the Court muſt intend here, That O. and P. the Tenants to the Præcipe, came in by Conveyance; becauſe W. came in upon the Voucher, which he would not have done if there had not been a Lien. To which it was anſwer'd, and ſo adjudg'd, that *Ad tunc Tenens is a ſufficient Averment* in the Pleading a Common Recovery, which is always favoured in Law; but it is not good alone, when in the ſame Sentence a Matter is ſet forth, which is inconſiſtent with it, and plainly contradictory; that as to Duncomb and Winfield's Caſe in Hob. that was upon a Special Verdict, where many Things may be intended, which ſhall not be ſo in Pleading; and as to Lincoln-College Caſe, the Writ is ſaid to be brought againſt Edward Chamberlain in one Part of the Record, and the Mother is ſaid to be Tenant in another Part of the Record, and by the other Party; But here in the ſame Sentence, Uno Flatu, there is a flat Contradiction.

* If he were not Tenant at the Return of the Writ, he might abate the Writ by *Non Tenure*; but if in that Caſe he had *vouched over*, then as to himſelf he admitted the Writ good; but then the Vouchee might *counterplead* the Tenancy; but if the Vouchee does not counterplead the Tenancy, 'tis good againſt them all by Eſtoppel. Pig. of Recov. 29.

3. In every Common Recovery it ſhall be * *intended*, that there was a good Tenant to the Præcipe till the contrary is ſhewn of the other Part; And ſo it was reſolv'd in the Caſe of Grillat v. Stanhope. 2 Cro. 454 & 455. upon Evidence. 2 Lutw. 1549. Hill. 3 W. & M. in the Caſe of Leigh v. Leigh.

Rather than a Recovery ſhall be loſt for want of a Tenant to the Præcipe, the Court *intends that the Tenant was in by* ‡ *Diſſeiſin*; it being alleg'd, That the Tenant in the Recovery was then Tenant of the Franktenement. 2 Lutw. 1549. in the Caſe of Lee v. Lee, cites this as Lincoln-College Caſe. 3 Rep. 58. b —— *Per* ſuch *Intendment was, becauſe* Eſtate of Franktenement were alleg'd to be in others, which ſhall not be intended to be ſurrendered. So that by theſe Authorities, it ſeems, That it is not of Neceſſity Prima facie always to *allege How* the Tenant in a Common Recovery *became Tenant*; but that it might be ſufficient to ſay, That the Writ of Entry was brought againſt *A. and B. tunc Tenentes liberi Tenementi* &c. And the Caſe of Wakeman v Blackwell [which ſee pl. 2.] does not oppugn what is ſaid before, which may be underſtood *when nothing appears to the contrary*. 2 Lutw. 1549. in the Caſe of Lee v. Lee.

* S. P. by Gould J. and as well in a New Recovery as an Old one. C. in Equ. G. R. 18. in the Caſe of Ld. Angleſea v Ld Altham.

‡ If the Tenant was in by Diſſeiſin, then it does not bar the Iſſue; but if by *Surrender*, it bars it. And. 32. Chamberlain v. Lincoln-College.

(Y) Tenant

(Y) Tenant to the Præcipe. *Not Good, yet the Recovery Good.*

1. 13 *El.* 5. *S.* 4. (which was made for avoiding fraudulent Gifts and Conveyances) Enacts, That *Common Recoveries againſt Tenants of the Freehold ſhall be good notwithſtanding this Act, and ſo ſhall all Eſtates made for the Procuring of a Voucher in Formedon.*

2. A. ſeiſed of Lands by Deed indented and inroll'd between him of the one, and B. and C. of the other Part, in Conſideration of 20 l. paid by B. and C. bargain'd and ſold the ſaid Manors to B. and his Heirs, to the Intent that B. ſhould ſuffer the ſaid C. and R. S. to recover the ſaid Lands againſt him, to the Uſe of A. for Life, Remainder to his Son in Tail, with diverſe Remainders over. The Recovery was accordingly ſuffered, *E. and F. being Tenants of the Freehold of the ſaid Lands*, the Reverſion to him againſt whom the Recovery was. *E. and F. dy'd.* — *A. enters*, and leaſed to the Plaintiff. 2 Points were moved; 1ſt, If the Recovery *ſuffered againſt him in Reverſion where the Freehold was in a Stranger*, ſhall bind the Reverſioner and his Heirs. 2dly, If the Uſes expreſſed in the Indenture of Bargain and Sale be good. Per Cur. the Limitation of Uſes is good; and the Recovery is good againſt him in Reverſion and his Heirs, and Judgment accordingly. Cro. E. 21. Trin. 21 Eliz. C. B. Webb v. Necton.

4 Le. 84 3. If A. gives in Tail to *B. an Alien*, the Remainder to C. in Fee, and B. ſuffers a Common Recovery, and after Office is found the Alien dies without Iſſue, yet the Recovery ſhall bind C. in Remainder. Noy 137. Anon.

4. Recovery againſt *Ceſty que Uſe* is void. Arg. 2 Roll Rep. 135. Trin. 21 Jac. in Ld. Sheffield's Caſe.

S. C. cited by Holt Ch. J. who ſaid, It was obſcurely reported in Sty 319 but that he had a Report of it in a MS of Lord Ch. J. Bridgman's, thus, viz Where the Husband and Wife were ſeiſed of a Reverſion in Fee, expectant upon Eſtate for Life, and made a Feoffment in Fee to make a Tenant to the Præcipe; but that happened to be void, becauſe Tenant for Life continued all the while in Poſſeſſion; but there was a Præcipe brought againſt the *Feoffee*, and he *vouched the Huſband and Wife, and they vouched over the Common Vouchee*; and it was held to be good. Pig. of Recov. 198, 199. in the Caſe of Page v. Hayward.

5. Tenant *for Life*, Remainder *to Huſband and Wife, and their Heirs*, the *Huſband and Wife ſuffered a Common Recovery*; the Heirs of the Wife ſhall be barred, tho' *ſhe was not Tenant to the Præcipe, and* tho' it did *not appear that ſhe was examined*; and ſhe is concluded to ſpeak againſt this Recovery; for ſhe joined with her Husband in it, and the Record is perfect, and the Recompence in Value ſhall go to her Heirs; and ſhe being Party and privy to it, her Heirs ſhall be bound by it. Sty 319. Hill. 1651. Lockoe v. Palfriman.

6. Where after a Recovery the *Deeds were ſuppreſs'd* by the Tenant for Life, ſo that it could not be made out if he ſurrendered to enable the Recovery or not. It was decreed for the Recovery without a Trial. Per Finch C. Chan. Caſes 297. 2 Mich. 28 Car. 2. Gartſide v. Ratcliff.

7. *Ceſty que Truſt in Tail* ſuffered a Recovery, and No Tenant to the Præcipe; but he being *in Poſſeſſion* under the Truſtee, (who had the Freehold in him, but was no Party to the Recovery) ſo that Ceſty que Truſt in Tail was the Tenant, Finch C. decreed it a good Bar. And he took a Difference, That if there had been a Ceſty que Truſt of a *Truſt for Life before the Truſt in Tail*, ſo that in that Caſe the Eſtate in Law had been executed according to the Truſt, and conſequently the Tenant in Tail could not have barr'd the Remainder in Fee, if he had ſuffer'd a Recovery, there Ceſty que Truſt in Tail ſhould not bar the Remainder by a Common Recovery,

Recovery, if there was no Tenant to the Præcipe. 2 Ch. Cafes 64. Trin. 33 Car. 2. North, and Champernon v. Williams.

8. It has been commonly receiv'd, That a Common Recovery cannot be fuffered where the *Vſe* is *expectant on an Eſtate for Life (not made Tenant to the Præcipe)* which is true in a Writ of *Entry in the Poſt*, which is commonly uſed. And the true Reaſon is, becauſe ſuch Writ ſuppoſes a Diſcontin, which cannot be when there is a Tenant for Life in Poſſeſſion; But a Common Recovery in ſuch Caſe *in a Writ of Right* would be good. Per Serjeant Maynard. Arg. Vent. 300. Hill. 33 & 34 Car. 2. in the Caſe of Moor v. Pitt.

9. If a *Deviſe* be made *to A for 60 Years, if he ſo long live*, and from and after the Death of A. to B. A.'s eldeſt Son in Tail; A. is no good Tenant to the Præcipe; but in Regard, the *Teſtator had an equitable Title only* in himſelf, and the Eſtate in Law ſtood out in an Infant, Per Lds. Commiſſioners, The Recovery is ſufficient, and that even a Bargain and Sale would have done it. 2 Vern. 131. Hill. 1690. Beverly v. Beverly.

10. 14 *Geo.* 2. Enacts, That *All Common Recoveries ſuffer'd, or to be ſuffer'd, without conveying the Freehold veſted in Leſſees, or others claiming under them, in Order to make a Tenant to the Præcipe, ſhall be Valid and Effectual.*

Provided that Nothing in this Act ſhall make Valid any Common Recovery, unleſs ſuch as are intitled to the firſt Eſtate for Life, or other greater Eſtate (in Caſe there be no ſuch Eſtate for Life in being, in Reverſion or Remainder, next after the Expiration of ſuch Leaſes) have, or ſhall, become able Convey, or join in Conveying an Eſtate for Life, at the leaſt to the Tenant to the Præcipe.

And that nothing therein contain'd, ſhall Prejudice the Eſtate of any Leſſees, or Perſons claiming under them.

And further Enacts, That *where any Perſon &c. hath or have purchaſed, or ſhall purchaſe, for a valuable Conſideration, any Eſtate or Eſtates in Lands &c. whereof a Recovery &c. is, or ſhall be neceſſary to be ſuffered, in Order to compleat the Title, ſuch Perſon &c. and all Claiming under him &c. having been in Poſſeſſion of the purchaſed Eſtate, or Eſtates, from the Time of ſuch Purchaſe, ſhall and may, after the End of 20 Years from the Time of ſuch Purchaſe, produce in Evidence the Deed or Deeds, making a Tenant to the Writ or Writs of Entry, or other Writs for ſuffering a Common Recovery &c. and declaring the Uſes thereof; and the Deed or Deeds ſo produced, (the Execution thereof being duly proved) ſhall, in all Courts of Law and Equity, be deemed and taken as a good and ſufficient Evidence for ſuch Purchaſor and Purchaſors, and thoſe claiming under him, her, or them, that ſuch Recovery or Recoveries, was or were duly ſuffered and perfected, according to the Purport of ſuch Deed or Deeds, in Caſe no Record can be found of ſuch Recovery or Recoveries, or the ſame ſhall appear not to be regularly entred or Record; Provided that the Perſon or Perſons, making ſuch Deed or Deeds as aforeſaid, and declaring the Uſes of a Common Recovery &c. had a ſufficient Eſtate, and Power to make a Tenant to ſuch Writ or Writs as aforeſaid, and to ſuffer ſuch Common Recovery or Recoveries.*

That from and after the Commencement of this Act, every Recovery already ſuffered, or hereafter to be ſuffered, ſhall be deem'd Good and Valid to all Intents and Purpoſes, notwithſtanding the Fine, or Deed, or Deeds, making the Tenant to ſuch Writ, ſhould be levied or executed after the Time of the Judgment given in ſuch Recovery, and the Award of the Writ of Seiſin as aforeſaid; provided the ſame appear to to be levied or executed before the End of the Term, Great Seſſion, Seſſion, or Aſſiſes, in which ſuch Recovery was ſuffered, and the Perſons joining in ſuch Recovery, had a ſufficient Eſtate and Power to ſuffer the ſame as aforeſaid.

(Z) *The King Bound*; In what Caſes, *By Fine or Recovery.*

1. 32 H. 8. 36. PRovides *againſt a Fine being a Bar to the Reverſion of Eſtates entailed by the King's Letters Patents, or by Act of Parliament.*

2. If *Tenant in Tail of the Gift of the King ſurrenders his Letters Patents*, this ſhall not extinguiſh the Tail; For the Inrolment remains of Record, out of which the Iſſue in Tail may have a Conſtat, and recover the Land; in Caſe of the **Earl of Rutland**; by which they made another Device, that the *King ſhould grant to him the Fee-Simple alſo, and then a Recovery againſt him would bar the Tail*; contra if the Reverſion be in the King. Br. Surrender, pl. 51. cites T. 32 H. 8.

A Fine with Proclamations, where the Remainder or Reverſion is in the King, *is no Diſcontinuance*; therefore there the *Iſſue* in Tail *may enter after the Death of the Tenant in Tail.* Br. Aſſurances, pl. 6. and cites this Statute of 34 H. 8. cap. 20. But ſays, That before that Statute a Recovery was a Bar againſt the Tenant in Tail and his Iſſue, but not againſt the King, but now, by this Statute, it ſhall not bind the Iſſue. Br. Aſſurances, pl. 6 — S P. Br Diſcontinuance of Poſſeſſion, pl. 32. — Before this Statute, a Common Recovery barred the Eſtate Tail created by the King's Letters Patents, whereof the Reverſion continued in the King 2 Rep. the 6th Reſolution in Wiſeman's Caſe; and with this Reſolution agrees the 33 H. 8. tit. Recovery in Value. Br. pl. 31 & 29 H. 8. D 32 pl. 1.

3. 34 & 35 H. 8. 20. S. 2. Enacts that *No feigned Recovery hereafter to be had by Aſſent of Parties, againſt any Tenant or Tenants in Tail, of any Lands, Tenements, or Hereditaments, whereof the Reverſion or Remainder, at the Time of ſuch Recovery had, ſhall be in the King, ſhall bind or conclude the Heirs in Tail, whether any Condition or Voucher be had in any ſuch feigned Recovery, or Not; but that after the Death of every ſuch Tenant in Tail, againſt whom ſuch Recovery ſhall be had, the Heirs in Tail may enter, hold, and enjoy the Lands, Tenements, and Hereditaments, ſo recovered, according to the Form of the Gift in Tail, the ſaid Recovery notwithſtanding.*

Pig of Recov. 85. ſays, It is *Vexata Quæſtio*, how far at Common Law a Remainder veſted in the King, was deveſted by Recovery and Diſcontinuance; and this very Act was made to prevent theſe Recoveries binding the Iſſue, but extends only where the Gift was by the King, or his Procurement. *Before the Statute of Donis*, when the King created a Conditional Fee, there *was no Reverſion, but a Poſſibility* in the King; and if the Donee had Iſſue, and aliened, the King's Poſſibility was barred as well as that of a Common Perſon; *but the Statute* of Donis *turned that* Poſſibility *into a Reverſion*, ſo that the Queſtion is, If at this Day, one make a Gift to A. in Tail, Remainder to B. in Tail, Remainder to the King in Fee; if in this Caſe A. ſuffers a Common Recovery, this Bars A. and his Iſſue, and the Remainder to B. but not the King's Reverſion, for that cannot be diſcontinued or put to a Right, or pluck'd out of him by the Act of a third Perſon; and therefore the *Difference* ſeems to be, that by an *Act in Law*, a Remainder or Reverſion may be deveſted out of the King, but not by *Act of the Party*; As if there be Tenant in Tail, Remainder to A in Fee, Tenant in Tail diſcontinues in Fee, and takes back an Eſtate to himſelf for Life, Remainder to the King in Fee, Tenant in Tail dies, the Iſſue is remitted, and the Remainder pulled out of King, and veſts in A. But the Act of the Party as a Fine or Common Recovery, ſhall never diveſt any Eſtate Remainder or Reverſion out of the King; but if the *Recovery is on good Title againſt Tenant in Tail, and the King has the Remainder by Defeaſible Title*, there it ſhall diveſt the Remainder out of the King, and reſtore and remit the Right Owners. Plowd 483, 553. Dyer 344. 2 R 53. 8 R. 76. 1 Inſt. 354.

S. 3. The Heirs of every ſuch Tenant in Tail, againſt whom any ſuch Recovery ſhall be had, ſhall take no Advantage for any Recompence in Value, againſt the Voucher or his Heirs.

S. 4. This Act ſhall not extend to prejudice the Leſſee or Leſſees of any ſuch Tenant in Tail made in Writing, indented of any Manors, Lands &c. for 21 Years, or three Lives, or under, whereupon the accuſtomed Rent or Rents, is or ſhall be Yearly reſerved, during the ſame Terms or Term; But the ſame Leſſee or Leſſees, ſhall enjoy his or their Term or Terms, according to the Statute of 32 H. 8. 28. this Act notwithſtanding.

S P. Br Fecovery, pl. 31 cites 33 H. 8. — Co

4. If the King had made a Gift in Tail, and the Donee had ſuffered a Common Recovery, this ſhould have barred the Eſtate Tail in Littleton's Time, but not the Reverſion or Remainder in the King. And ſo

if ſuch Donee had levied a Fine with Proclamations after the Statute of 4 H. 7. this had barred the Eſtate Tail, although the Reverſion was in the King,; but ſince Littleton wrote, a Common Recovery had againſt Tenant in Tail of the King's Gift, or ſuch a Fine levied by him, the Reverſion continuing in the Crown, is no Bar to the Eſtate Tail, by the Statute of 34 H. 8. And where the Words of the Statute be (*whereof the Reverſion or Remainder, at the Time of ſuch Recovery had, ſhall be in the King*) theſe 10 Things are to be obſerved upon the Conſtruction of that Act,

Litt. 325. a. S. P.—— 2 Rep. 16 a Wiſeman's Caſe 8 Rep. 71. b 78. Ld Salford's Caſe.

1ſt. That *the Eſtate Tail muſt be created by a King*, and not by any Subject, *albeit the King be his Heir to the Reverſion*; for the Preamble ſpeaks of Gifts made to Subjects; and none can have Subjects but the King; and alſo in the Preamble it is ſaid, (for Service done to the Kings of the Realm) and the Body of the Act referreth to the Preamble; And therefore if the Duke of Lancaſter had made a Gift in Tail, and the Reverſion deſcended to the King, yet was not the Eſtate Tail reſtrained by that Statute; and ſo of the like. Co. Litt. 372. b.

2 Rep. 15. b. in Wiſeman's Caſe. Pig. of Recov. 81. cites S. C. & P.

2dly. If the *King grant over the Reverſion*, then a Recovery ſuffered will bar the Eſtate Tail, becauſe the King had no Reverſion at the Time of the Recovery. Co. Litt. 372. b.

The *King, to enable his Donee to make a long Leaſe, by Fine granted his Reverſion, and after the Fine reſumed it.* It was reſolv'd, That the Leaſe was good againſt the Iſſue. 2 Jo. 251. cites it as the Caſe of Gardner v. Cambridge, put by Charlton J. And there Sir Tho. Jones, in his Argument in the Earl of Derby's Caſe, obſerves, That as the Alteration of the Eſtate of the Donee may loſe the Protection of the Statute, ſo the Alteration of the Eſtate of the Donor may deprive the Iſſue of it, according to the Caſe; But he ſaid he much doubted, whether the Donee's Fine, after the Regrant to the King of the Reverſion, would not have been avoidable by the Iſſue in Tail by the Statute of 34 H. 8. For that Act does not require that the Reverſion always continue in the King, but it *ſuffices, if the Reverſion be in the King at the Time of the Recovery ſuffer'd, or Fine levied.*

The *King makes a Gift in Tail*, ſaving the Reverſion to himſelf, and afterwards *gives Leave to the Tenant* in Tail *to ſuffer a Recovery, and* to that Intent, *paſſes the Reverſion out of himſelf*, and lodges it in others, *to have it re-invested* to him *after the Recovery ſuffered*, which is done accordingly. It was adjudged by all the Barons, upon Advice with the other Judges, that in ſuch Caſe, the Tenant in Tail, or his Iſſue may bar this Reverſion by a Common Recovery, and that it is not within the Statute 34 H. 8. Becauſe the Reverſion was once ſevered from the Crown, and the Privity of the Eſtate gone, and the Statute is to be *extended* to reſtrain *where the Reverſion continues in the ſame Plight* as it was in at the firſt, *without any Alteration.* Hard 479. Trin. 17 Car. 2. In the Exchequer. The Earl of Cheſterfield's Caſe——S. P. Pig. of Recov. 88.

3dly. If the *King makes a Gift in Tail*, the Remainder in Tail, or grants the Reverſion in Tail, *keeping the Reverſion in the Crown*, a Recovery againſt Tenant in Tail in Poſſeſſion ſhall neither bar the Eſtate Tail in Poſſeſſion, by the expreſs Purview of the Statute, nor by Conſequence the Eſtate in Remainder or Reverſion; For that the Reverſion or Remainder cannot be barred, but where the Eſtate Tail in Poſſeſſion is barred. Co. Litt. 372. b.

4thly. If a *Subject make a Gift in Tail*, the *Remainder to the King in Fee*, albeit the Words of the Statute be (whereof the Reverſion, or Remainder of the ſame &c.) yet ſeeing the Eſtate in Tail was not created by the King, as hath been ſaid, the Eſtate Tail may be barred by a Common Recovery. Co. Litt. 372. b.

A ſeiſed of Land, gave them by Fine before 32 H. 8 to J. S. in Tail, Remainder to the King in Fee. J. S. had Iſſue 3 Daughters, B. C. and D.— B. in Time of Queen Eliz. levied a Fine with Proclamations &c. and died without Iſſue. It was agreed, that this was ſufficient to bar every Heir to this Entail, by 32 H. 8. which ſpeaks of the Reverſion, and not of the Remainder being in the King, and this Fine makes no Diſcontinuance; but Fine with Proclamations is a Bar, and makes Fee-ſimple in the Conuſee determinable upon the Eſtate Tail, without touching the Remainder; for this ſtill remains in the Queen. And the Words in 34 H. 8. 20. That the Heirs of Tenant in Tail in Lands, whereof the Remainder or Reverſion is in the King at the Time of the Recovery, may enter &c will not reſtrain the general Words of 32 H. 8. And 46. pl. 118. Mich. 15 & 16 Eliz. Rot. 1748 Anon —— 3 Le. 50. pl. 84. Mich. 16 Eliz. C. B. Seems to be S. C. and adjudg'd, That the Iſſue was barred, and yet the Remainder in the King was not diſcontinued; For by that Fine, an Eſtate in Fee determinable upon the Eſtate Tail, did paſs to the Conuſee. Jackſon v. Davy —— 4 Le. 40. pl. 108. S. C. and in the ſame Words —— Mo. 115 pl. 251. Paſch. 2 Eliz. S. P. Anon —— Bendl. 223 pl. 254 S. C. with that of And. 46 and ſays, That it makes no Diſcontinuance of the Tail.

Tail, to paſs any Remainder out of the King, but to *leave a Fee ſimple to the Conuſee, determinable upon the Iſſue in Tail.*——But in the Margin there is a Nota, that this is not to be called a Fee determinable, but a *Fee Tail*; for which ſee Trin. 15 Eliz. Pl. C. 555, 558. in Walſingham's Caſe.

Tenant in Tail to him and his Heirs Males, the Reverſion to the King, ſuffered a Common Recovery, or levied a Fine. The Juſtices inclined that this bars the Heir, tho' it be no Diſcontinuance of the Tail, nor of the Reverſion in the King. Engleſield ſaid, That he knew it to have been by good Advisement held a Bar; But Shelly doubted. D. 32. pl. 1. Paſch. 28 and 29 Eliz. Anon. —— S. C. cited Arg. Ard. 171.

2 Rep. 15. b. (c.) Wiſeman's Caſe. —S. P. and S. C. cited Pig. of Recov. 87.

5thly. If *Prince Henry, Son of Henry the 7th*, had *made a Gift in Tail*, the *Remainder to Henry 7th, in Fee*, which Remainder, by the Death of Hen. 7. had *deſcended to H.* 8. ſo as he had the Remainder by Deſcent, yet might Tenant in Tail, for the Cauſe aforeſaid, bar the Eſtate Tail by a Common Recovery. Co. Litt. 372. b.

2 Rep. 15. b. (c) 16. a (b) in Wiſeman's Caſe.

6thly. The Word (*Remainder*) in the Statute, is no vain Word; for the Words of the (*Preamble*) be, The *King hath given or granted, or otherwiſe provided, to his Servants* and Subjects. The Word (*Reverſion*) in the Body of the Act, *hath Reference to* theſe Words, (*given or granted,*) and (*Remainder*) hath Reference *to* theſe Words, (*otherwiſe provided.*) *As* if the * *King in Conſideration of Money*, or Aſſurance of Land, or for other Conſideration, *by Way of Proviſion, procure* a Subject by Deed indented and inrolled, to make *a Gift in Tail to one of his Servants* and Subjects, *for Recompence of Service*, or other Conſideration, the *Remainder to the King in Fee*, and all this appears of Record, this is a good Proviſion within the Statute, and the Tenant in Tail cannot, by a Common Recovery, bar the Eſtate Tail. *So* it is *if* the Remainder be *limited to the King in Tail; but if* the Remainder be limited to the King † *for Years or* for *Life*, that is no ſuch Remainder, as is intended by the Statute, becauſe it is no Remainder of Continuance as it ought to be, as it appears by the Preamble, and it ought to have ſome Affinity with the Reverſion, wherewith it is joined. Co. Litt. 372. b.

* S. P. But if the King for Money, gives in Tail, the Eſtate Tail may be barred by ſuffering a Common Recovery. D. 32. Mary. pl. 1. cites Hill. 5 Car. per Coventry, Hide and Richardſon in Canc. Ld Nottingham v. Ld Mounſon. —— † Pig. of Recov. 88, 89. S. P.

8 Rep. 78. a. Trin. 7 Jac. Ld. Stafford's Caſe. —— Hob. 333. in Mathewes's Caſe, calls this an indirect and oblique Strain upon this Statute of 34 H. 8. —— 2 Show. 117. Trin. 32 Car. 2. in the Caſe of Murry v. Eaton, Ld Ch. J. Pemberton ſays, That tho' the Ld. Hobart calls it an oblique and indirect Strain, yet it has obtained to this Time, and that it ſeems to have a great Foundation in the very Act of Parliament itſelf; For it is plain by the Preamble, that it was the Alienation of the Land they intended to hinder, and not the Manner of the Alienation, and it had been to little Purpoſe to hinder the Aliening by Recovery, if they had left him Power to bar his Iſſue by a Fine, and that theſe Words (any other Thing or Things) ſhew their Intention, not only to hinder Recoveries, but any Thing elſe that might be made uſe of to bar the Iſſue; and ſo it ſeems wiſely done to extend that Statute, as they did, to Fines. —— Skin. 95, 96 S. C and S. P. by Pemberton Ch. J.

7thly. *Where a Common Recovery cannot bar* the Eſtate Tail, by Force of the ſaid Statute, there *a Fine* levied in Fee, in Tail, for Lives or Years, with Proclamations according to the Statutes, *ſhall not* bar the Eſtate Tail, or the Iſſue in Tail, where the Reverſion or Remainder is in the King as is aforeſaid, *by Reaſon of* theſe Words in the ſaid Act, (*the ſaid Recovery, or any other Thing or Things hereafter to be had, done,* or ſuffered by or againſt any ſuch Tenant in Tail, to the Contrary notwithſtanding) which Words include a Fine levied by ſuch a Donee, and reſtrains the ſame. Co. Litt. 372. b. 373. a.

8thly. *But where a Common Recovery ſhall bar* the Eſtate Tail, notwithſtanding that Statute, there *a Fine* with Proclamations *ſhall* bar the ſame *alſo*. Co. Litt. 373. a.

9thly. Where the ſaid latter Words of the Statute be (*had, done, or ſuffered, by or againſt any ſuch Tenant in Tail*) the Senſe and Conſtruction is, where Tenant in Tail is *Party or Privy to the Act*, be it by Doing or Suffering that which ſhould work the Bar, *and not by mere Poſſeſſion, he being a Stranger to the Act.* Co Litt. 373. a.

As if Tenant in Tail of the Gift of the King, the Reverſion to the King Expectant, is diſſeiſed, and the * *Diſſeiſor levy a Fine* and 5 Years paſs, this ſhall bar the Eſtate Tail; and ſo if a collateral Anceſtor of the Donee Releaſe with Warranty, and the Donee ſuffer the Warranty to deſcend, without any Entry made in the Life of the Anceſtor, this ſhall bind the Tenant in Tail, becauſe he is not Party or Privy to any Act, either done or ſuffered by or againſt him. Co. Litt. 373. a.

* S. P. by Anderſon, that the Iſſue ſhall be bound; For he is not helped by Statute of 34 H. 8. which the other Juſtices agreed unto; But Walmſley ſaid, This Caſe is to be well adviſed upon; for he conceiv'd it was to be remedied by the Equity of the Statute; and that otherwiſe it would be a Common Miſcheif, that Donee in Tail of the King, would ſuffer a Diſſeiſin, and the Diſſeiſor ſhould levy a Fine and thereby bar the Iſſue. Cro. E. 595. pl. 40. Mich. 39 & 40 Eliz. C. B. Stratfield v. Dover.——Mo. 467. pl. 665. S. C. by Name of Dover v. Stratfield, takes no Notice of what was the Opinion of Anderſon, or the other Juſtices, but only of that of Walmſley, and ſtates the Caſe of a Gift in Tail by H. 7. to Verney, whoſe Heir was diſſeiſ'd, and a Stranger being in Seiſin, levied a Fine with Proclamations and 5 Years paſſed, the Reverſion always remaining in the Crown, it ſhall bind only the Iſſue ſuffering it.

10thly. Albeit the Preamble of the Statute extend only to Gifts in Tail, made by the Kings of England before the Act, viz. (hath Given and Granted &c.) and the Body of the Act referreth to the Preamble, viz. (that *no ſuch Feigned Recovery hereafter to be had* againſt ſuch Tenant in Tail;) ſo as this Word *(ſuch)* may ſeem to couple the Body and the Preamble together; yet in this Caſe, (ſuch) ſhall be *taken for (ſuch in equal Miſchief*, or in like Caſe,) and by divers Parts of the Act it appears, that the Makers of the Act intended *to extend it to Future Gifts*; and ſo is the Law taken at this Day, without Queſtion. Co. Litt. 373. a. 2 Rep. 15. b. Wiſeman's Caſe.

5. A. made a Gift in Tail to B. *Remainder to C. in Fee; C. granted his Remainder to J. S. for Life, the Remainder to the Queen, upon Condition* to be void on Non-payment of Money; A. ſuffered a Common Recovery. Reſolv'd, That the Recovery bars not only the Eſtate Tail of B. but alſo the Eſtate for Life of J. S. notwithſtanding the Remainder in Fee was in the Queen; For this is not within the Statute of 34 H. 8. becauſe the Eſtate Tail was not of the Gift of the Queen, or of any of her Progenitors Kings of England. 2 Rep. 52. a. b. in Sir Hugh Cholmley's Caſe, cites it to have been adjudg'd 15 & 16 Eliz. in Caſe of Jackſon v. Drury, and 27 Eliz. C. B. Wiſeman v. Jennings.

6. A. ſeiſed in Fee, *for Continuance in his* Name and Blood, *and for other good Conſiderations*, Covenanted to ſtand ſeiſed to the Uſe of *himſelf in Tail Male*, Remainder to the Uſe of *B. his Brother in Tail*, Remainder over to other Brothers in Tail, and for Default of ſuch Iſſue to the Uſe of *the Queen, her Heirs and Succeſſors, Kings and Queens of this Realm*. A. died, leaving Iſſue, who ſuffered a Common Recovery. And it was adjudg'd that the Iſſue of that Iſſue was barred by ſuch Recovery. 1ſt. Becauſe the Words (other Good Conſiderations) are too general, without a Special Averment to raiſe an Uſe. 2dly. The Contiance in his Name and Blood, was not a Conſideration to raiſe an Uſe to the Queen. 3dly. Neither would it have been ſufficient, had it been expreſs'd in Conſideration that the Queen was the Head of the Commonwealth, and had the Care of preſerving the Peace of the Realm &c. For there is wanting *Quid pro Quo*. 4thly. Had the Conſideration been ſufficient to raiſe an Uſe to the Queen, yet this would not have brought the Eſtate Tail within the Protection of this Act of 34 H. 8. For no Eſtate Tail is preſerved by the ſaid Act, unleſs *created by the King's Letters Patents, or of his Proviſion*, and not of the Proviſion of a Subject only. 2 Rep. 15. a. b. Wiſeman's Caſe.——Als. Wiſeman v. Barnard. Mo. 105. S. C. and 142. S. C.——S. P. Pig. of Recov. 89. Nov. 132.

7. A. *Tenant in Tail*, Remainder *to B. in Fee*; *B.* by Deed enrolled, *granted his Remainder to the Queen* in Fee, during the Life of A. *and after his Death, as long as any of his Iſſue Male ſhould live. A. ſuffered a Recovery*, (under which the Plaintiff claimed) and died without Iſſue, and then B. entred; Adjudg'd, That notwithſtanding his Grant to the Queen, the Common Recovery had barr'd B.'s Remainder; beſides it Anon. S. C. reports, That the Grant to the Queen by B. as here was, with a

Proviſo, That upon Payment of 20 s. it ſhall be void. A. ſuffers a Common Recovery, and dies without Iſſue. He tenders the 20 s. was void in itſelf, becauſe it could never come in Poſſeſſion; For by the Death of A. without Iſſue, the Remainder to the Queen was determined; but *if the Reverſion had been granted to her, inſtead of the Remainder*, it had been otherwiſe; becauſe, during the firſt Entail, there ſhall be an Attendancy for the Services and Wardſhip &c. of the Iſſue of the Donee. Yelv. 149. Mich. 6 Jac. B. R. Poole v. Needham.

And reſolv'd, That that Recovery by A. hath barred the Remainder in Fee; becauſe the Grant to the Queen was void; For it was impoſſible that ever it could take any Effect by that Grant to the Queen; and Judgment was given accordingly. Noy. 132 Anon.—— S. P. Pig. of Recov. 89.

8. It ſeems by Hobard Ch. J. upon the 34 *H.* 8. 20. That if a Man *pleaded generally*, that his Anceſtor was *Tenant in Tail of the King's Proviſion, and the Reverſion or Remainder in the Crown* when he ſuffered the Recovery; this is not good without Pleading the *ſpecial Matter*, How the Eſtate Tail grew, and the Recovery was ſuffered. Hob. 299. in the Caſe of Slade v. Drake.

9. *Donee in Tail of the King's Gift*, the Reverſion being in the King, *makes a Gift in Tail*; and afterwards the *ſecond Donee ſuffers a Recovery*. Reſolv'd, That his Iſſue was not within the Privilege of 34 H. 8. Cited by Sir Thomas Jones, in his Argument in the Exchequer Chamber, in the Caſe of the Earl of Derby, as 13 Car. 1. The Earl of Ormond's Caſe, which he ſaid he agreed, and that there was very good Reaſon for the Reſolution; For the ſecond Donee's Eſtate, as far as it could, diſaffirm'd the Reverſion of the King, tho' it could not take it out of him, and his Poſſeſſion was injurious to the Eſtate given by the King, and therefore there was no Colour to allow it the Protection of the Act. 2 Jo. 250.

2 Jo. 237. S. C —— Poll 491. S. C —— Show. 104. &c. S. C —— Skin. 95 &c. S. C by Name of the Earl of Derby's Caſe.

10. Richard the 3d. by Letters Patent, granted certain Lands to Thomas Earl of Derby and his Son, Habend. to the Earl in *Tail Male*. Afterwards a Diſpute ariſing between Earl William and the Daughters of Ferdinando his Brother deceaſed, concerning the Title to the ſaid Lands, a Reference is had by Conſent, and an Award made. Then they obtain an *Act of Parliament*, 4 Jac. recited to be in Confirmation of the ſaid Award, and *for the determining all Controverſies*; whereby *a new Eſtate for Life* is limited to Alice the Counteſs Dowager of Ferdinando, and then to Earl William for Life, (who by the former Letters Patents was *Tenant in Tail*,) and his firſt &c. and ſeventh Son (whereas before it was the *Iſſue generally*) in Tail Male, and for Default of ſuch Iſſue, then to the other Perſons then living, (who before would have Remainders in Tail) for their Lives, and their Iſſue in Tail Male, ut ſupra; with a *Proviſo*, *ſaving* all ſuch Right, Title, Intereſt, or *Reverſion, as the King might have* in the ſaid Premiſſes After this, a ſucceeding Earl of Derby, for valuable Conſideration grants away theſe Lands to J. S. and for further Aſſurance, levies a *Fine with Proclamations*. Adjudged by 8 Juſtices againſt 3, in the Exchequer Chamber, That the New Eſtate Tail ſhall have the ſame Protection as the Old Eſtate had before the Statute of 4 Jac. 1. That the Reverſion ſtill remains in the Crown, notwithſtanding thoſe Alterations, and conſequently that a Fine levied by Tenant in Tail is no Bar to his Iſſue; For that this was not a new Grant by Act of Parliament, but *only a Confirmation* and Eſtabliſhment of the old Grant of *R.* 3. by the Letters Patent, and ſo within the 34 *H.* 8. being a Gift in Tail of the Proviſion of the Crown. Raym. 338. Hill. 31 & 32 Car. 2. in the Exchequer. Murrey v. Eyton.

11. W. Earl of Derby, ſeiſed of the Manors of L. &c. and N. &c. *convey'd* the ſame to J. N. and J. S. *with Intent that they ſhould convey* the ſame *to Queen Eliz. and* that *ſhe ſhould re-grant* the ſame to the ſaid Earl *in Tale Male*, with Remainder to Sir G. S. in Tail Male, and *the Reverſion to remain in the Crown*. J. S. and J. N. conveyed accordingly; and

and the Queen, for divers good Cauſes &c. and at the Petition of the ſaid W. *re-granted* to be held of the Queen, her Heirs and Succeſſors, *by the Service of one Knight's Fee.* An Act of Parliament made 4 *Jac.* 1. *Enacted that thoſe to whom the Limitations were made, ſhould enjoy, and that the King ſhould hold ſuch Eſtate, Title, Intereſt, and Reverſion, as if the Act had not been made.* Afterwards, upon an Award of a Rent-Charge of 600 l. a Year to C. S. in Tail Male &c. *King Charles* 1. *granted the Reverſion* back *to enable the Grant of the Rent-Charge*, and the *Reverſion*, within one Year, *to be again limited to the Crown.* After this W. and his eldeſt Son covenanted to levy a Fine, to make good the Rent-Charge; and that the Lands chargeable therewith, ſhould be to the Uſe of W. in Tail Male, Remainder to Sir G. S. in Tail Male, Remainder to J. Ld. S. (eldeſt Son of W.) his Heirs and Aſſigns. The Fine was levied. The Reverſion was not re-granted to the Crown. The Manors afterwards deſcended to W. G. R. Earl of D. who by Leaſe and Releaſe convey'd to T. and H. and their Heirs to make a Tenant to the Præcipe to ſuffer a Common Recovery, in which W. G. R. Earl of Derby, was vouch'd and vouched the Common Vouchee; W. G. R. died. In an Ejectment brought by the Daughters and Coheireſſes of W. G. R. Earl of Derby, againſt the Heir Male of the Body of C. S. and younger Brother of the ſaid W. G. R. Earl of Derby, deceas'd, Ld. Ch. B. Ward was of Opinion with the younger Brother, (the Heir Male of C. S.) as to the Manor of L. &c. on the Statute 34 H. 8. which reſtrains the Tenant in Tail of the Gift of the Crown, from Aliening; But the other 3 Barons held the Intail in this Caſe, was a *fraudulent Contrivance, not within the Meaning of this Statute.* Pig. of Recov. 201. to 213. Trin. 6 Annæ, in the Exchequer. Johnſon of the Demiſe of John. E. of Angleſea, & Ux. and Lady Eliz. Stanley, Spinſter v. James Earl of Derby, & al.

(A a.) *Revers'd*, Falſified, or Stay'd. *For what*, and *How.*

1. A common Recoveay may be defeated, fruſtrated and reverſed, which is called Falſifying, many Ways; as by *Entry and Plea*, by *Action and Plea*, by *Plea only.* Pig of Recov. 156. By *Entry and Plea*, when the Party's Entry is not taken away by the Recovery, and he brings his Aſſiſe, and the Recovery is pleaded againſt him, and he pleads Matter to avoid the Recovery. Pig of Recov. 156.

By *Action and Plea*, that is when the Entry of the Party that has Right, is taken away by the Recovery, and on a real Action brought, the Recovery is pleaded in Bar of the Right, this may be falſified by Plea, and ſo by Action only, or by Plea only. Pig of Recov. 157.

2. If a ſingle Recovery and a Fine be againſt the Tenant, the *Writ of Entry* muſt *bear Date*, and Teſte *before the Writ of Covenant*, and be returned before. Weſt's Symb. 77. b. Sect. 3. But if a Writ of *Covenant* be brought *againſt the* Tenant and a *Writ of Entry againſt the Demandant*, then *the Writ of Covenant muſt bear Date*, and be returned *before the Writ of Entry*, and this is called a Double Voucher. Weſt's Symb. 77. b. Sect. 3.

3. The original *Writ of Entry* was returnable *Oct. Michaelis*, which was the *9th of October*, and the *Ded. Pot. de Attorn. faciend.* bore Date the *11th of October*, and the *Mittimus* thereof in Bank bore Date the *30th of Octob.* which was after the Relation of the Judgment, which is Octabis Michaelis, tho' the Entry was Quod *Poſtea iſto eodem Termino* the Demandant came, and the *Tenant Solemniter exactus non venit ſed Defaltam fecit, &c.* and ſo it ſhould be, tho' the Writ was returnable the laſt Day of the Term; For Poſtea iſto eodem Termino may be the Time

ſame Day that the Count and Defence is made; And then in this Caſe the *Warrant of Attorney was after Judgment given* contrary to the Suppoſal of the Writ of Ded. Pot. which is *Cum breve noſtrum pendeat &c.* And the Writ is not pending after Judgment given; And ſo the Recovery was held erroneous. Per Curiam. D. 220. pl. 13. Sir Nich. Bacon's Caſe.

The Grantee of the Rent cannot falſify the Recovery. 1 Rep. 61. b. Capel's Caſe. —And. 282. Hunt v. Gately —— Mo. 154. S. C.—— 4 Le. 150. S. C.——— Poph. 5. S. C.

4. *A Tenant in Tail, Remainder in Fee to B.* Or the Reverſion in Fee to B. *B. makes a Leaſe* for Years, *or grants a Rent-Charge*, or acknowledges a Statute; *A.* afterwards *ſuffers a Common Recovery, and dies without Iſſue:* This Leaſe, Grant of a Rent, or Statute, are avoidable by the ſaid Common Recovery, otherwiſe the Recovery would be of no Effect to the Purchaſor; and the Recovery is paramount to the ſaid Leaſe, Rent-Charge and Statute. Jenk. 250. pl. 41.

5. Husband and Wife levied a Fine of Lands of the Wife, ſhe being within Age, and afterwards they ſuffered a Common Recovery; the *Husband died*; the Widow married again; and her Husband and ſhe brought a *Writ of Error* to reverſe this Fine and Recovery; The Court was of Opinion to reverſe the Fine, but would adviſe on the Recovery, becauſe it was had againſt them after Appearance, and not by Default. Goldsb. 181. pl. 116. Hill. 43 Eliz. Sir Henry Jones's Caſe.

6. 23 Eliz. 3. Sect. 2. Enacts, That *no Fine, Proclamations upon Fines, or Common Recovery, ſhall be reverſable by Writ of Error, for Falſe Latin, Raſure, Interlining, Miſ-entring of any Warrant of Attorney, or of any Proclamation, Miſ-returning, or not returning of the Sheriff's, or other Want of Form in Words, and not in Subſtance.*

7. A Recovery erroneous for *Want of Original* is not void, but voidable by Error, and till it be reverſed, he in Remainder has not any Right in it, but the Eſtate Tail is barred by it. 3 Rep. 3. Trin. 25 Eliz. in the Marquis of Winchelſter's Caſe.

S. C. Poph. 22. by Name of Crocker and York v. Dormer.

8. The Writ of Entry was *De uno Annuali Reddito ſive Penſione 4 Marcarum* exeunt' de Eccleſia ſive Rectoria &c. It was inſiſted that this was erroneous, becauſe of the Uncertainty, the Demand being in the Diſjunctive (of a Rent or Penſion) but adjudged that the Writ is good enough, and that there is no Uncertainty; For that Redditus and Penſio (as this Caſe is) are ſynonimous Words, the laſt Words (exeunt' de Rectoria) proving it to be a Rent; For were it an Annuity it would not be iſſuing out of the Rectory; But in ſuch the Parſon ſhall be charged in reſpect of the Rectory. 5 Rep. 40. a. 41. a. Paſch. 35. Eliz. B. R. Dormer's Caſe.

9. Writ of *Error* was brought *to reverſe a Common Recovery ſuffered in* the *County Palatine* of Lancaſter; The Error aſſigned was, That it was ſuffered *by Husband and Wife, the Wife being under Age, and* that ſhe *appeared*, and entered into Warranty *as Vouchee per Attornatum, when it ſhould be by Guardian*, or in Propria Perſona at the leaſt; and this was held to be Error; But Haughton J. ſaid, That at the Time of Suffering this Recovery, this was held to be No Error, but that it has been reſolved otherwiſe ſince, and that this Matter had been argued here ſince his being a Judge. 2 Roll. Rep. 85. Paſch. 17 Jac. B. R. Lady Darcy's Caſe.

10. A Common Recovery was ſuffered, and a *Writ of Entry was not filed*, and for this a Writ of Error was brought; And it was moved that it might be examined whether any Writ was filed or not; But the Court denied it, but *if it appears by Record that a Writ was filed*, then they would conſider whether a New Writ ſhould be filed or not; and they ſaid that if a Recovery be exemplified by the Statute of 23 *Eliz.* 3. tho' *ſome Part of it be loſt*, yet it is aided. Litt. R. 299. Mich. 5 Car. C. B. Anon.

11. In

11. In Error to reverſe a Common Recovery in Wales, upon the Scire Facias the Sheriff returned ſeveral *Tertenants*, who *pleaded ſeveral Pleas*, the One, *That he is only Tenant for Years* of the Demiſe of one Owen; Another, *That there are other Tertenants* of the Land viz. A. B. &c. not named in the Writ, Judgment of the Writ; Another pleaded, *That the Plaintiff had entered into Part pending the Writ.* Upon Demurrer to theſe Pleas, the Court held them to be Frivolous, and awarded that they plead in Chief. Raym. 55, 56. Mich. 14 Car. 2. Wynne v. Loyd.

12. Error was brought of a Common Recovery had at the Grand Seſſions in Wales upon a Quod ei deforceat in Nature of a Writ of Right, 1ſt, becauſe the *Summons is dated Subſequent to the Ded. was* Poteſtatem; but this was not much relied upon, by reaſon it had been diſallowed 39 Eliz. in Gregham's Caſe; 2dly, Becauſe here *was no Warrant of Attorney at the Time of the Appearance*; For it appears to be Teſted after the Appearance; But to this it was anſwered, That the *Vouchee may appear by himſelf, or by Attorney, tho' there be not any Summons or other Proceſs againſt him*, and that ſo are 18 E. 2. Fitzh. Voucher 230. 5 E. 3. Fitzh. Voucher 197. 13 H. 7. 24 and other Books, and that therefore the Common Recovery is good, and the Proceſs void; And the Court after ſeveral Arguments ſaid, that a Common Recovery, being a common Aſſurance, they *would intend another Warrant of Attorney made in due Time*, and ſo the Common Recovery was affirmed; Nota, That this was a Writ of Error brought by the Vouchee. Sid. 213. pl. 12. Trin. 16 Car. 2. B.R. Win v. Floyd.

Ley 135. Paſch. 16 Car. 2. B. R. S. C. & P. and ſays, It was anſwered it ſhould be intended here that the Vouchee being preſent in Court, made the Attorney, and ſo the Summons ad Warrantizandum, the Ded. Poteſtatem, and the Warrant made thereupon, is void; And of this Opinion was the Court, and ſaid they would not reverſe a Common Recovery, if by any Means they could make it good, and ſo affirmed it.

13. If *Error* be *brought to reverſe* a Recovery, there muſt be a *Scire Facias againſt the Heir and Tertenants.* 3 Mod. 274. Hill. 1 W. & M. B. R. Anon.— The Court awarded a Scire Facias againſt the Tertenants (the Heir was an Infant) Carth. 112. Paſch. 2. W. & M. B. R. Earl of Pembroke's Caſe.

14. A. upon a Commiſſion had made an Attorney in order to ſuffer a Recovery this Term, which was done the laſt Aſſiſes at York.— A Motion was in Behalf of the Heir in Tail to *ſtop the paſſing* of the Common Recovery, and ſeveral Affidavits were produced to ſatisfy the Court that A. (ſince the laſt Aſſiſes) *died* in Ireland, and the Court being ſatisfied of the Truth thereof, did ſtay the paſſing the Recovery, and ſaid if it ſhould paſs it would be *erroneous.* 2 Vent. 90. Mich. 1 W. & M. C. B. Sir Thomas Gower's Caſe.

15. A Common Recovery was ſuffered, in which *a Feme Covert was Vouchee, and under Age, and appeared by Attorney*, and the ſame was reverſed Niſi Cauſa at the End of the Term. 5 Mod. 209, 210. Paſch. 8 W. 3. Stokes v. Oliver.

16. Common Recovery may be avoided by there being *no Tenant to the Præcipe*, or if the Writ is brought *againſt a Stranger that had nothing*, and he vouches Tenant in Tail in Poſſeſſion, or becauſe *he that hath the Eſtate and Right is not Party* or privy to the Recovery. Pig. of Recov. 165.

As when a Writ of Entry is brought *againſt the Diſſeiſor*, and he vouches a *Stranger*, or if another have a *Term or Intereſt* at the Time of the Common Recovery, there they may ſalſify to ſave their Intereſt; or if it be by *Coin* by Tenant for Life to diſinherit the Reverſioner, or if there be an *Error of Subſtance* in the Recovery, a Writ of Error lies. Pig. of Recov. 165.

17. 10 & 11 *W. & M.* 3. 14. Enacts, That *no Fine, Recovery, or Judgment ſhall be reverſed for Error unleſs Writ of Error be brought within* 20 *Years.*

18. 14 *Geo.* 2 *Enacts that every common Recovery already ſuffered, or hereafter to be ſuffered, ſhall, after the Expiration of* 20 *Years from the Time of*

the ſuffering thereof, be deemed good and valid to all Intents and Purpoſes, if it appears upon the Face of ſuch Recovery, that there was a Tenant to the Writ; and if the Perſons joining in ſuch Recovery had a ſufficient Eſtate and Power to ſuffer the ſame, notwithſtanding the Deed or Deeds for making the Tenant to ſuch Writ, ſhould be loſt or not appear.

Provided always, That this Act ſhall not extend to make any ſuch Common Recovery heretofore ſuffered valid, and effectual in Law, which hath been avoided by any lawful Act or Means, or which ſhall hereafter be avoided by Entry duly made on or before the 16th Day of January 1740. or by Judgment or Decree had or obtained upon ſome Action or Suit at Law or in Equity, commenced or to be commenced on or before the ſaid 16th Day of January, and proſecuted with due Diligence; but every ſuch Common Recovery ſhall remain, and be of ſuch Force and Effect only as the ſame would have been if this Act had never been made.

Provided that nothing in this Act contained, ſhall be conſtrued to prejudice or affect any Queſtion of Law which may ariſe upon Common Recoveries not remedied or intended to be remedied by this Act; but all ſuch Common Recoveries ſhall remain and be of ſuch Force and Effect only, as the ſame would have been if this Act had never been made.

(B. a) *Error* to reverſe a Common Recovery. *By whom* it may be *brought.*

1. WHERE a Common Recovery is avoidable, it muſt be avoided *by him that is barr'd* by the Recovery; As by the *Iſſue of Tenant in Tail*, or if none, by the *Remainder-man*, or *Reverſioner* by Writ of Error. Pig. of Recov. 165.

But quære if he in *Remainder in Tail* ſhall have Writ of Error, *if the Iſſue of the firſt Tail fail*, by the Statute of R. 2. or by the Common Law, becauſe *he is not Privy in Blood* to the Tenant in Tail that loſt the Land erroneouſly. And it ſeems by the Opinion in P. 4 H. 8. fol. 1. that he may. D. 188. Sir R. Rowlet's Caſe.

2. Tenant in Tail (being Sheriff of the County where the Lands lay) ſuffered a Common Recovery, and *releaſed all Errors*; and upon Error brought by him (by Conſent) there was Judgment againſt him, yet ſeveral Juſtices thought that this was no *Bar to his Iſſue, or to him in Remainder*, to bring a Writ of Error or a Formedon; for ſuch Releaſes do not bar the Right of Entail &c. D. 188. Sir R. Rowlet's Caſe, cites 4 H. 8. 1. accordingly.

This Act extends not to any Recovery, unleſs it be by Agreement or Covin. Co. Litt. 362. a —— If there be Tenant for Life, the Remainder in Tail, the Reverſion or Remainder in Fee, and Tenant for Life be impleaded by Agreement, and he vouches Tenant in Tail, and he vouches over the Common Vouchee, this ſhall bar the Reverſion or Remainder in Fee, altho' he in Reverſion or Remainder did never aſſent to the Recovery, becauſe it was not the Intent of the Act to extend to ſuch Recovery, in which the Tenant in Tail was vouch'd; for he has Power by Common Recovery, if he were in Poſſeſſion, to cut off all Reverſions or Remainders. And ſo if Tenant for Life had ſurrender'd to Tenant in Tail, he might have barr'd the Remainders and Reverſions Expectant upon his Eſtate. Co. Litt. 362. a

3. 14 *Eliz.* 8. Enacts that *all Recoveries had or proſecuted (by Agreement of the Parties, or by Covin) againſt Tenants by the Courteſy, Tenant in Tail after Poſſibility of Iſſue Extinct, for Term of Life or Years, or of Eſtates determinable upon Life or Lives, or any Lands, Tenements or Hereditaments, whereof ſuch particular Tenant is ſo ſeiſed, or againſt any other, with Voucher over of any ſuch particular Tenant, or of any having Right or Title to any ſuch particular Eſtate, ſhall from henceforth (as againſt the Reverſioners, or them in Remainder, and againſt the Heirs and Succeſſors) be clearly void.*

Le. 270. S. C. by the Name of the

4. Baron and Feme Jointenants, Remainder to the Heirs of the Body of the Husband, Remainder to B. Baron ſuffers a Common Recovery

alien

alone of all, in which he was Tenant to the Præcipe, without naming the Wife; B. the *Remainder-man* is *attainted* of Treaſon, and executed, and by Act of Parliament *forfeited* to the King *all his* Manors &c. Reverſions, *Remainders*, Uſes, Poſſeſſions, Offices, *Rights*, Conditions, *and all other his Hereditaments*. The Recovery being erroneous, the *King* brought a Writ of Error to reverſe it. But adjudged, That the Writ was not given to him by any Words in the Act of Forfeiture, the Party having no Right of Entry, but only a Right of Action, which does not paſs by thoſe general Words. 3 Rep. 2. Trin. 25 Eliz. The Marqueſs of Winchester's Caſe.

Gerard v. Boyboroke. — But admitting the Writ of Error had paſs'd to the King by the Words of the Act, yet it could not paſs from him to a *Patentee* by a General Grant *of the Manor* cum Pertinentiis, *and of all his Intereſt, Claim and Demand thereof in*, notwithſtanding the Clauſe De Speciali Gratia &c. For if the King could grant it, it muſt be by Virtue of his Prerogative, (for no Common Perſon could do it) and then it ought to be by expreſs and preciſe Words. Reſolved 3 Rep 4 b. The Marqueſs of Winchester's Caſe.

5. A Writ of Error was brought to reverſe a Common Recovery, and a Scire Facias iſſued out againſt all the *Tertenants* who *made Default*, and the Recovery was revers'd; and it appearing afterwards that the *Plaintiff in the Writ of Error had no Title, there being a Remainder-man before him*, the Court *revers'd the former Reverſal*. Per Cur. 5 Mod. 396. Paſch. 10 W. 3. Anon.

(C. a) Pleadings.

1. THE Defendant pleaded a Recovery *by Writ brought De Tenementis prædictis*, which is not the uſual Way of pleading them, but ſpecially to aver that the Writ was of *ſo many Meſſuages, ſo many Acres of Land, Meadow or Paſture in certain*, and upon ſuch Writs only Recoveries of Lands are paſs'd. And becauſe it did not appear to the Juſtices by the Record before them, that the Writ upon which the Recovery was had, contained any Certainty of Meſſuages or Acres, the Judgment given in a former Action in B. R. was revers'd in the Exchequer-Chamber. Mo. 691. pl. 953. Paſch. 32 Eliz. Wiemin v. Jennings.

2. Common Recoveries are ſo uſual, and their Form and Order of Proceeding ſo notorious by Appearances the firſt Day, & Gratis &c. that the *Law takes Conuſance of them*; and therefore the Judges Ex Officio, *without Allegation of the Party*, will *take Notice that they are* Recoveries *had by Conſent* of the Parties *for Aſſurance* of Lands. 5 Rep. 41 Paſch. 35 Eliz. The laſt Reſolution in Dormer's Caſe.

3. If he in *Reverſion* ſuffers a Recovery to diverſe Uſes, his Heir cannot plead that his *Father had nothing in the Land* at the Time of the Recovery; for he is *eſtopp'd* to ſay, That he was not Tenant to the Præcipe. And it was agreed, That it was a good Recovery againſt him by Eſtoppel. Quære this Caſe. Godb. 147. Paſch. 3 Jac. C. B. Duke v. Smith.

4. In a *Scire facias* upon a Judgment againſt the Earl of Derby, the Sheriff *returned* the Earl of Bridgwater and Anne his Wife *Tertenants* of the Manor of B. *They pleaded* that *H. 7. was ſeiſed* of the Manor and Lands in Fee, *and granted* the ſame *to George Lord Strange in Tail Male*; *and that it deſcended to his Son Thomas, and from him to Ferdinando*, who dying without Iſſue Male, it *deſcended to William* Earl of Derby as Heir Male, *who levied a Fine thereof to Earl of Bridgwater* and Anne his Wife. The *Plaintiff* replied, and *confeſs'd the Entail and Deſcent to Thomas, who ſuffered a Common Recovery to the Uſe of himſelf and his Heirs, and that he entered Secundum Recuperationem prædict.* and was ſeiſed in Fee, *and that*

Exception was taken to the Pleading a Common Recovery, becauſe it did *not ſet forth that it was executed*; For if there was no Execution it

the Eſtate Tail continues till barr'd by ſuing of Execution; but this was over-rul'd; for if no Execution be ſued, then the Recovery is to the Uſe of him againſt whom it was ſued, ſince no other Uſe appears

it deſcended from him to Ferdinando in Fee &c. The *Defendant rejoined that the ſaid Recovery was never executed*; and upon a Demurrer to the Rejoinder, Judgment was given againſt the Plaintiff; For, 1ſt. A Judgment without Execution doth not alter the Eſtate, but that in the mean Time the Tenant in Tail continues ſtill ſeiſed in Tail, and ſo it deſcended to his Iſſue, and ſuch Iſſue till Execution had, ſhall avoid all Charges made by the Tenant in Tail. But when Execution is ſued, ſuch Charges ſhall revive. 2dly. Here was not any good Execution pleaded of the Recovery; for he pleads that Ceſty que Uſe entered *Secundum Recuperationem prædict.* but it *ſhould have been, by Virtue of the ſaid Recovery*. Jo. 10. Mich. 18 Jac. C. B. Aubrey v. Lord Bridgwater.

1 Lev 32. Mich. 23 Car 2. B. R. in Caſe of Hudſon v. Benſon and Baron. —— But the Reporter makes a Quære of this Reaſon; for before Execution how can any Uſe of the Recovery ariſe? —— S. C. Cited 3 Lev. 103. in Caſe of Hollet v. Sanders.

For more of Recovery Common in General, See **Amendments, Executions, Remainder, Voucher,** and other proper Titles.

Recuſant.

See (E) (P)

(A) *Forfeiture. What* ſhall be forfeited by Recuſancy. And *to whom.*

The Defendant was indicted upon the Statute 23 Eliz. of Recuſants, *by the Name of W. S. of Southwark, Gent* and after Judgment a Writ of Error was brought, and aſſign'd for Error that in the Indictment he is *not named of any Pariſh*, but of Southwark generally, in which Place there are many Pariſhes; and ſince by the Statute Part of the Penalty is to be applied towards the Relief of the Poor of that Pariſh where the Offence was committed, therefore it ought to appear of what Pariſh the Defendant is. But the Court held it to be well; for *all the Penalty belongs firſt to the Queen*, and the Inhabitants of the Pariſh where the Offence was committed, are to ſue in the Exchequer for their Third Part, upon a Surmiſe that the Offence was done in their Pariſh. Paſch. 26 Eliz. B R. 2 Leon. 167. Scott's Caſe —— See (P) pl. 1.

1. 23 *Eliz. cap.* 1. *S.* 11. ENacts that *all Forfeitures incurr'd by this Act, ſhall be divided into three equal Parts, one Third to the Queen for her own Uſe, one other Third to the Queen for Relief of the Poor of the Pariſh where the Offence is committed, and the other Third to him that will ſue for the ſame.*

S.C. Le 97. pl. 126. Mich. 30 Eliz. in the Exchequer, by the Name of Saliard v. Everatt. Manwood conceived that they were liable, by reaſon of thoſe Words, (All other the Lands &c. liable to ſuch Seiſure &c.) And Clark B ſeemed to be of the ſame Opinion; but no Judgment —— S. C cited Hard 433. in Caſe of the Duke of York v. Sir John Marſham —— *But* the Statute of 35 *Eliz.* 2. *S.* 4. Enacts that *if the Offender againſt that Act ſhall have any* Copyhold *Eſtate, he ſhall forfeit the ſame during his Life to the Lord of whom it is holden, if ſuch Lord be not a Popiſh Recuſant, nor ſeiſed upon Truſt to the Uſe of any Recuſant. And in ſuch Caſe the Forfeiture ſhall be to the King.*

2. It was adjudged that *Copyhold* Lands are not within the Statute of the 29 Eliz. by reaſon of the Prejudice that may come thereby to the Lord, who has not committed any Offence, and therefore ſhall not loſe his Cuſtoms and Services. Ow. 37. Salherd v. Evered.

The *King has a Fee-*

3. The King ſhall *have the two Parts of the Lands* forfeited for Recuſancy *as a Pledge and a Nomine pœnæ*; and the * Profits thereof ſhall not be

be accounted to go to the Payment of any Part of the Debt, but ſhall be retained until the Debt of 20 *l. per Month, be ſatisfied in ſome other Manner.* Cro. E. 845. Trin. 43 Eliz. in Cam. Scacc. Gage's Caſe.

ſimple in the Lands; for he has them to him and his Heirs

and Succeſſors till Conformity, with Satisfaction of the Arrearages. Per Coke Ch. J. 4 Le. 239. Mich. 7 Jac. C. B. Ward's Caſe.

* But the 1 *Jac.* 4. *S.* 4. Enacts that *the Profits ſhall go towards the Payment.*

4. 3 *Jac.* 1. 4. *S.* 8. Enacts that *every Offender not repairing to Church after their Conviction, ſhall pay into the Chequer, in ſuch of the Terms of Eaſter and Michaelmas as ſhall happen next after ſuch Conviction, the Sum then due for the Forfeiture of* 20 *l. per Month, and yearly after that (in the ſame Terms) according to the Rate of* 20 *l. per Month, except where the King ſhall be pleaſed to take two Thirds of their Lands and Leaſes in Lieu thereof, or that they conform themſelves and come to Church.*

S. 11. *The King may refuſe* 20 *l. per Month, and take two Third Parts of his Lands and Leaſes; but here he ſhall not include the Recuſant's Manſion-houſe, nor demiſe his two Parts to a Recuſant, or to any other for a Recuſant's Uſe. And the King's Leſſee for his two Parts ſhall give ſuch Security againſt committing of Waſte, as by the Court of Exchequer ſhall be thought ſufficient.*

S. 37 *The Offences made Felony by this Act, ſhall not cauſe Loſs of Dower, Corruption of Blood, or Diſherſion of Heirs.*

5. *Tenant for Life*, being *a Recuſant, conſented, that he* in *Remainder ſhould fell Timber* which he did, and ſold it, and the Vendee brought the Money into the Exchequer for the Opinion of the Court, whom it belonged to, and the Court held that the Recuſant was not intitled to it, but he in Remainder; and it was order'd to him upon giving Bond to repay it, if the Court ſhould ſee Cauſe; But the Court were clear that the King was not intitled to the Trees ſo cut down. 1 Bulſ. 133. Paſch. 9 Jac. Anon.

6. It was reſolved, That the Statute of the 23d Eliz. which inflicts the *Penalty of* 20 *l. per Month does not repeal* the 1ſt of Eliz. which gives *the Forfeiture of* 12 *d. for every Sunday &c.* But that both ſhall be paid; For both may ſtand together; beſides, the 12 d. is given only to the Poor, but the 20l. to the King &c. 11 Rep. 63. b. Mich. 12 Jac. Dr. Foſter's Caſe.

And this appears by the Stat. 3 *Jac.* 4. which gives a ſpeedier Remedy for the Recovery of the 12 d. by Diſtreſs. Roll. R. 94 S. C.

7. A. being *the King's Ward died, leaving* 2 *Siſters and Coheirs* of full Age, the Eldeſt went Abroad in her Brother's Life-Time, and there became and remained *a Nun Profeſt*, whereby ſhe was diſabled by the Statute 3 Jac. to take any Benefit of her Lands, till ſhe returned and received the Sacrament; And it was reſolved by Montague, Hobart, and Tanfield, that *her Siſter ſhall not ſue out Livery of the Whole*, but that the King ſhall hold a Moiety till the other ſhould conform and take the Oath required. Ley 59. Paſch. 15 Jac. in the Court of Wards. Tredway's Caſe.

Jen. 297. S. C. — Hob 73. S. C. ſays in Margin, That Tanfield Ch. B. continued of a contrary Opinion.

8. In *Debt* upon Bond, *Defendant pleads Recuſancy* according to 21 Jac. 5. per Cur. Debt of a Recuſant is not forfeited to the King as in Outlawry, But if he fail of Payment of the Penalty impoſed by the Statute, Then &c. Het. 18. Paſch. 3 Car. C. B. in the Caſe of a Recuſant Convict.

9. A *Security taken in Truſt for* a Recuſant Convict is liable to the King's Debt of 20 l. per Month. N. Ch. R. 132. 21 Car. 2. in the Caſe of Attorney-General v. Sands.

10. *Eſtates Tail* are not within the Statute of Recuſancy. Per Levins J. 2 Show. 112 Trin. 31 Car. 2. in Cam. Scacc. in the Caſe of Murry v. Eyton.

* See (D)
† See 3 Car. 1. cap. 2. S. 4 at (N)

(B) *Forfeitures* Determined, or * *Diſcharged.* And † *Reſtitution* in what Caſes.

1. IF one be convicted on the Statute of Recuſancy, tho' he *reconcile himſelf* after to the Biſhop, yet he ſhall not be *reſtored to the Profits* of his Lands taken before; And tho' on the Death of a Recuſant an Affidavit is made, and upon this a Diſcharge is obtained; yet it is a Rule of the Court that a *Commiſſion* ſhall be awarded firſt to *inquire his Death.* Savil. 130. pl. 201. Anon.

And afterwards Trin. 34 Eliz. Anderſon and Walmſley gave Judgment for the Plaintiff, Periam not being reſolved. Ibid.

2. A *Termor* for Years being *outlawed* upon the Statute of Recuſancy, by which *his Term was* forfeited to the Queen, the Lord Treaſurer and Barons of the Exchequer *ſold* it for 10 *l.* and afterwards the Outlawry was reverſed; And Anderſon and Walmſley conceived that the Termor ſhould have his Term again, and not the Money for which it was ſold; But Periam doubted. Cro. E. 278. pl. 3. Paſch. 34 Eliz. B. R. Eyre v. Woodſine.

And. 275. pl. 285. S. C. Becauſe he could not come in no Senſe to that which he loſt, unleſs he had his Leaſe; For againſt the Queen he could not be ſatisfied becauſe he loſt by the Outlawry, as he may in the Caſe of a Common Perſon be.— S. C. cited 2 Vern. 313. Hill. 1693. in the Caſe of Peyton v. Ayliff.

3. 35 *Eliz.* 2. *S.* 15. Enacts, That *if any Perſon offending againſt this Act ſhall before Conviction come to ſome Pariſh Church on ſome Sunday or Feſtival, and make a publick Submiſſion and Declaration of his Conformity as is appointed by this Act he ſhall be diſcharged from all Penalties and Forfeitures.*

S. 16. *Every Miniſter or Curate where ſuch Submiſſion ſhall be made, ſhall enter the Submiſſion in a Book, and within* 10 *Days certify the ſame to the Biſhop of the Dioceſe.*

Raym. 466. cites S. C. in the Caſe of Okeden v. Reynell. [But the Book is miſprinted, as citing 1 Roll Rep 94.]—

4. Upon a Motion to all the Judges, upon the Statutes 33 H. 8. and 23 and 28 Eliz. if a *Tenant in Tail* becomes Recuſant, and is *convicted by Proceſs, and not by Judgment had upon a Trial or Confeſſion*, and afterwards dies, whether *his Iſſue ſhall avoid the Seiſure* of the Queen? They all agreed that he ſhould, becauſe it is not a Debt upon a Judgment, as 33 H. 8. requires; But if Judgment had been given, the Iſſue ſhould be bound. Mo. 523. pl. 691. Mich. 39 & 48 Eliz. Anon.

If a Recuſant *Tenant in Tail doth not pay his* 20 *l. a Month*, and 2 Parts of his *intailed Lands be ſeiſed* for that Cauſe, and he afterwards *dies*, the Juſtices conceived that the Iſſue in Tail ſhould not have the Lands out of the Queen's Hands before that Debt be ſatisfied; But that the *Iſſue* ought to be *charged with that Debt*; Sed dubitatur. Cro E. 846 Trin 43 Eliz. in Cam. Scacc. in Gage's Caſe.

If a Recuſant be Convict, and *dies before the King is ſatisfied* of the Penalty, and before that he has *ſeiſed the Lands*, then he ſhall not ſeiſe after his Death. Per Counſel Arg. ſays it was ſo reſolved within 3 Years in the Exchequer. 2 Roll. Rep. 25. Paſch. 16 Jac B R Parker v. Webb.

There are 2 *Ways of convicting* Recuſants; If it be *by Proclamation* his Eſtate may be *ſeiſed* on the King's Election of a 3d Part, or by Way of *Diſtreſs for* 20 *l per Month*; but when he dies his Land ſhall be diſcharged in the Hands of his Heir; For the Words Tenement or Hereditament won't reach it; but otherwiſe when convicted *by Trial on a Venire*, and Judgment againſt him thereupon; For then he becomes a Debtor to the King, and thereby Eſtates Tail are *forfeited* to the King by the Word Hereditaments. Per Levins. 2 Show. 112. Trin. 32. Car. 2. in Cam. Scacc. in Caſe of Murry v. Eyton.

5. 1 *Jac.* 1 *cap.* 4. *S.* 3. Enacts, That *if any Recuſant die, his Heir being no Recuſant, ſuch Heir ſhall be diſcharged of all Penalties in reſpect of his Anceſtor's Recuſancy; And if the Heir be a Recuſant, and after ſhall become conformable and repair to Church, and ſhall take the Oath of Supremacy before the Archbiſhop or Biſhop, ſuch Heir ſhall be diſcharged of all Penalties.*

S. 4. If the Heir of any Recuſant ſhall be within the Age of 16 Years at the Deceaſe of his Anceſtor, and ſhall after his Age of 16 Years be a Recuſant, ſuch Heir ſhall not be diſcharged of the Penalties, until he ſubmit or reform himſelf, and repair to Church, and take the Oath of Supremacy.

3 *Jac.* 1. 4. *S.* 17. *Provides, That the Party conforming himſelf ſhall from thenceforth be admitted to diſcharge or reverſe an Indictment.*

7. If Recuſant *brings Action*, and Defendant pleads that he is Recuſant Convict, and then the Plaintiff *conforms*, which is certified under the Seal of the Biſhop, and upon this the Defendant is ordered to plead in Chief, and then the Plaintiff *relapſes*, and is *convicted again*, the Defendant cannot now plead his Diſability again. Agreed per Cur. Litt. Rep. 238. Hill. 4 Car. C. B. Anon.

(C) Forfeitures. *Prevented*, or not, by Conveyances.

See Univerſities.

1. 23 *Eliz. cap.* 1. *S.* 13. *ALL fraudulent Aſſurances made ſince the Beginning of the Seſſions, or hereafter to be made, to evade the Penalties inflicted by this Statute are hereby declared void.*

A *Conveyance* was *made the* 19th *of Eliz.* before the making of this Act of all the Party's Land *to Feoffees* and their Heirs *upon Condition that they ſhould maintain him and his Family, prefer his Daughters in Marriage, pay his Debts, and account for the Surplus* of the Profits of the Year's End; *with a Clauſe of Revocation.* Afterwards the Statute was made and the Party convicted of Recuſancy, and a Commiſſion iſſued to inquire of his Lands, the Jury upon this Caſe would not find that he had any Lands; but upon Reference to all the Judges of England, Whether theſe Lands were within the Statute, it was reſolved by all, that notwithſtanding the Conveyance, the Lands were liable; and the Jurors, for giving their Verdict againſt the Evidence, were committed and fined 50 l. each. 3 Lee 147. Hill. 28 Eliz. in the Exchequer. Sir John Southwell's Caſe.

2. * 28 *or* 29 *Eliz.* 6. *S.* 1. Enacts, That *every Grant, Conveyance, Leaſe, Incumbrance, and Limitation of Uſe out of any Lands &c. to be had or made by any Perſon who ſhall not repair to ſome Church, or Chapel, or uſual Place of Common Prayer, contrary to the* 23*d of Eliz.* 1. *and which ſhall be revocable at the Pleaſure of ſuch Offender, or is directly or indirectly to or for the Behoof or Maintenance, or at the Diſpoſition of any ſuch Offender, whereby or in Conſideration whereof, ſuch Offender and his Family ſhall be maintained or relieved, ſhall be utterly void againſt the Queen, as to the levying and paying of ſuch Sums, as any Perſon ought to pay or forfeit for not coming to Church as aforeſaid, and ſhall be ſeiſed to her Majeſty's Uſe as is thereafter mentioned in the ſaid Act.*

* The Statute called the 28*th of Eliz.* and referred to be that Name in the 35th of Eliz. is the ſame with the 29th of Eliz. it being in ſome Books called the 28th, in others the 29th; but (as it ſeems) *more properly the* 29*th*; For the Seſſion wherein it was made was by Prerogation held the 15th of Feb. 29 Eliz. Cawley. 123. —— But in 3 Lev. 333. Lord Petre v. th. University of Cambridge &c where the Defendant *pleaded the Statute as the* 29*th of Eliz. it was held ill*; For that the Parliament commenced the 28th of Eliz. — 2 Lutw. 1117. S. C. —— And 1 Lutw. 205, 208. Percival v. Mitchell ſays the Roll of Parliament was ſearched, and it appeared to be the 28th of Eliz.

3. *Securities* taken *in other Men's Names, after an Act of Parliament ſubjecting the Eſtates* of Recuſants *to a Forfeiture*, ſhall be preſumed in Law to be ſo taken, to the Intent to defeat the King of the Forfeiture. 12 Rep. 2. Ford and Sheldon's Caſe.

(D) *Coin-*

See (B)

(D) *Conformity.* When, Where and How it may be.

In Debt for 20 l. per Month for not coming to Church, brought upon the Statute 23 Eliz.

1. 23 *Eliz. cap.* 1. *S.* 10. PRovides *that any of the Offenders againſt the ſaid Act, who ſhall before Judgment Submit and Conform themſelves to the Biſhop of the Diocеſe, or in open Aſſiſe or Seſſions, ſhall be diſcharged of every the Offences therein contained (except Treaſon and Miſpriſion of Treaſon) and of all Pains and Penalties incurr'd for the ſame.*

At the Trial, *after the Jury ſworn, and before Verdict* given, the *Defendant came into Court, and did there ſubmit*, recognize, acknowledge, and confeſs that he had offended &c. *and proved that he had conformed ſince the Suit brought* &c. and did promiſe to conform &c and alleg'd that he was never indicted or proſecuted for any Offence of this Nature before. The Queſtion was, Whether this Conforming diſcharges the Action and Verdict, which was given for 40 l. It was inſiſted that it did not, becauſe the Plaintiff in an Action Tam Quam had an Intereſt by the Verdict, which ſhall not be diveſted within the Intent of that Clauſe in the Statute, becauſe it refers only to Caſes where the Party is indicted or arraigned, and not to Actions. But it ſeems that thoſe Words ſhall be taken diſtributively, (i. e.) Arraignment in Caſe of an Indictment, and a Trial in all other Actions. But no Reſolution was given, but it was adjourn'd for farther Conſideration. Raym. 391. Trin. 32 Car. 2. B. R. Okeden al. Obeden v. Keynell.——2 Show. 179. S. C. adjornatur ——The S. C. came on again Paſch. 34 Car. 2. Raym. 465 And the whole Court reſolved that the Action and Verdict was diſcharged. And the Reporter (who was one of the Judges) gives for Reaſon. 1ſt. Becauſe the Conforming was before Trial. 2dly, Becauſe *by Verdict the Plaintiff acquires no Debt or Duty till Judgment.* And to the Objection that this will diſcourage Proſecutors, he ſays that it is no more Loſs to him than if the Recuſant had died, and that the Proſecutor undertook this Suit ſubject to the ſame Hazard. And 2dly, As Proſecutors are not to be us'd hardly, ſo *Converts are to be encouraged*, which made the Ld. Ch. J. Coke in Dr. Foſter's Caſe, intercede for Foſter to the King after Judgment, cited 2 Bulſt. 325. And did prevail, cited 1 Roll Rep. 95.——2 Jo. 187. 188. S. C. accordingly.—S. P. But no Judgment. Hard. 62 Trin. 1656. The Protector v. Aſhfield.

Outlawry for Recuſancy determines of Courſe by Conformity. Arg. 2 Vern. 314 in Caſe of Peyton v. Ayliff.

2. Several Perſons being Indicted and *Outlaw'd* upon the 23 Eliz. for not coming to Church, came into B. R. in order to make their Submiſſion, and conform. But the *Court would not receive their Submiſſion till* they had got *the Outlawry pardoned*; which they afterwards did, and ſhew'd the Pardon in Court, and then made their Submiſſion, and were diſcharg'd. 4 Le. 54. pl. 188. Mich. 27 Eliz. B. R. Anon.

3. Conformity by coming and *continuing at Church* in Time of Divine Service is ſufficient, *without being before the Ordinary.* Cro. J. 366. Hill. 12 Jac. B. R. Sivedale v. Lenthall.

4. T. a *Popiſh Recuſant* being indicted, *came into Court, and brought* with him *a Teſtimonial of his Submiſſion*, according to the Statute of the 35 Eliz. *and there in the Preſence of the Court upon his Knees*, he *made another Submiſſion*, according as the Clerk of the Crown read to him. Jones ſaid privately to Whitlock, This is the Courſe of the Court, but there is no Statute which obliges Submiſſion in this Manner in the Court. Lat. 16. Paſch. 2 Car. Thoroughgood's Caſe.

5. Conformity may be *at the Seſſions*, as well as certified by the Biſhop by the Statute. Sti. 26. Tr. 23 Car. B. R. Lord Arundell's Caſe.

But King C. admitted the External Acts pitch'd upon by the Act of Parliament, as a ſufficient *Evidence* of Conformity.

6. Parker C. would not accept his *receiving the Sacrament twice*, as Evidence of Converſion. 10 Mod. 513. Hill. 9 Geo. 1. Cartwright v. Cartwright. 10 Mod 538. Trin. 11 Geo. 1. Hill. v. Filkins & Ux.

(E) Abſenting

(E) Abſenting from Church.

See (A)

1. 1 *Eliz.* 2. S. 14. ENacts that *all Perſons inhabiting within the Queen's Dominions, that ſhall not reſort to their Pariſh Church or Chapel accuſtomed upon every Sunday and Holiday, and * there abide orderly and ſoberly during the Time of Common Prayer, Preachings, or other Service of God, ſhall incur the Cenſures of the Church, and forfeit 12 d. for every Offence to be levied by the Churchwardens by Diſtreſs, to the Uſe of the Poor.*

The Defendant being indicted for Recuſancy in not coming to Church, it was objected, That the Words of the Statute are, (All Perſons inhabiting within the Realm) and that it was *not averr'd that the Party did inhabit within the Realm.* Sed non allocatur; for if it were otherwiſe, it ought to be ſhewed on the Part of the Defendant. Godb. 148 Mich. 3 Jac. B. R. Anne Mannock's Caſe

* Theſe Words are in the Diſjunctive, and yet they are *to be taken Conjunctively*; ſo that one is not to depart as ſoon as the Service is ended, if there be Preaching, but *one ought to continue there the whole Time* And an Indictment being in the Conjunctive, was held good. Godb. 148. Mich. 3 Jac. B. R. Anne Mannock's Caſe.

It ſeems that if a Man goes to Church, and ſtays from the Beginning to the End of the Service, yet he may be within the Penalty of the Statute, if he *does not behave* himſelf there *Diligently, Decently, Soberly and Orderly*, according to the Words of the Act; as if he *talks or walks about* during Service. Per Coke Foll. R. 93. in Dr. Foſter's Caſe.

2. 23 *Eliz. cap.* 1. *S.* 5. Enacts that *every Perſon above the Age of* 16 *Years, who ſhall not repair to Church &c. as required by* 1 *Eliz. cap.* 2 *ſhall forfeit* 20 *l. for every Month, he ſhall be abſent; and beſides the ſaid Forfeiture every Perſon who ſhall be abſent* 12 *Months, after Certificate thereof by the Ordinary, Juſtices of Aſſiſes and Gaol-Delivery, or Juſtice of Peace of the County where the Offender ſhall dwell or be, he ſhall be bound with two ſufficient Sureties in the Sum of* 200 *l. for his Good Behaviour, and ſo remain until he ſhall conform and come to Church, according to the ſaid Stat.* 1 *Eliz.*

Tho' the Penalty of 20 *l. per Month* for abſenting from Church, is by the 23 El. cap 1. Sect. 5. *given to the King*, yet the general Clauſe in * Sect. 9. which directs that all the Forfeitures limited by the Act ſhall *be diſtributed into* 3 *Parts*, extends to this Penalty, as well as to the other Penalties of the Act which were not particularly given to any Perſon; ſo that an Informer may ſue for a third Part. Adjudged upon Demurrer. 11 Rep 60. Mich 12 Jac Foſter's Caſe.——Roll. R 89. S C.——S. P For that tho' the firſt Words ſeem to contradict the latter, yet the Intent of the Law is to be conſidered, which was that a Diſtribution ſhould be made. And. 138. Cuff v. Vachel.——* It ſhould be S. 11. which ſee at (A) pl 1

The Defendant was indicted upon the Statute 23 Eliz. of Recuſancy; and it was objected that the Words of the Statute [*Non habens aliquam rationabilem Cauſam*] were omitted. But it was reſolved that theſe Words need not be put into the Indictment, but that the contrary ought to be ſhew'd on the other Side 2 Le. 5. Trin. 32 El. B R. Dormer's Caſe.

The Court held, That the 23 Eliz. *extends to all Sorts of Recuſants, Proteſtant* as well as *Popiſh*. And per Ibben J. in the Beginning of Charles the 1ſt's Time, all the Judges of England held that Proteſtant Recuſants were within that Statute. And per Sanders Ch. J. Courts *cannot take Notice of the Ground of their Recuſancy*, but muſt puniſh them for not coming to Church. But the Cauſe why they did not cannot be look'd into. Skin. 99. Hill. 35 Car. 2. B. R. The King v. Hurſt.

3. * 28 *or* 29 *Eliz* 6. *S.* 2. Enacts that *every Conviction for any Offence in not coming to Church &c. contrary to* 23 *Eliz. ſhall be in the King's Bench, or at the Aſſizes or General Gaol-Delivery, and ſhall be ſtreated into the Exchequer before the End of the Term next enſuing.*

*See (D) pl. 2 —— This Statute confines the Information only to the Court of *King's-Bench*, or Juſtices of *Aſſiſe*, or *General Gaol-Delivery*. Reſolved 11 Rep. 61. Mich 12 Jac B. R. in Dr Foſter's Caſe.——Upon an Information in the *Court of C B* againſt a Recuſant, it was mov'd in Arreſt of Judgment that it did not lie in that Court; but after Time taken to conſider, the contrary was adjudged, and the Reſolution or rather Opinion mentioned in Lord Coke, was denied to be Law. Hob. 204 Mich. 15 Jac. C. B. Pie v. Lovel.

S. 4. *Every Offender in not repairing to Divine Service as aforeſaid, who ſhall be thereof once convicted, ſhall in ſuch of the Terms of Eaſter and Michaelmas as ſhall be next after ſuch Conviction, pay into the Exchequer after the Rate of* 20 *l. for every Month contained in the Indictment wherein ſuch*

It was adjudged upon Demurrer, that the Proſecution and

Penalty given to the Informer by the 23 *Eliz.* is *not taken away by the* 28 *Eliz.* For tho' this last Statute directs, That all Convictions upon

such Conviction shall be; and shall also for every Month after such Conviction, without any other Indictment or Conviction, pay into the Exchequer at twice in every Year, viz. in Easter Term and Michaelmas Term, after the Rate of 20 *l. for every Month after such Conviction. And if Default shall be made in any Part of the Payments aforesaid, then the Queen may by Process out of the Exchequer, take and seise all the Goods, and two Parts as well of the Lands liable to such Seizures, or to the Penalties aforesaid, leaving the third Part only of the same Lands for the Maintenance and Relief of the Offender and his Family.*

the former shall be estreated into the Exchequer, and a Power is given for the King to seise for the Penalty, yet it appears to be made in Furtherance, and not in Repeal of the first, and is in the Affirmative only; neither does it limit the Penalty to any new Person, but *only gives the King a better Remedy* than he had before, and therefore does not extend to the Case of a Popular Action or Information. 11 Rep. 60. b. Mich. 12 Jac. Dr. Foster's Case.———Roll. R. 92. S. C.——Hob. 205. Pie v. Lovel. S. P.

It was adjudged that the *Prosecution given to the Informer by the* 23 *Eliz.* is *not taken away by the* 35 *Eliz.* which directs that

4. 35 *Eliz. cap.* 1. *S.* 9. Enacts that *all the Pains, Duties, Forfeitures or Payments which shall accrue, grow, or be payable by Virtue of the Act of the* 23 *Eliz. shall be recovered and levied to her Majesty's Use by Action of Debt, Bill, Plaint or Information, or otherwise in any of the Courts of King's Bench, Common Pleas, or Exchequer, in the same Manner as by the Course of the Common Law any other Debt due by such Person, in any other Case should or may be recovered, wherein no Essoign, Protection, or Wager of Law shall be allowed.*

all Forfeitures arising from the former, shall be recovered to the King's Use by Action of Debt &c. For the Design of this Act was only to give the King a more effectual Remedy than before. 11 Rep. 60. b. Mich. 12 Jac. Dr. Foster's Case.———Roll. R. 92. S. C. And per Cur. The Statutes of the 1 *Eliz.* 23 *Eliz.* 28 *Eliz.* and 35 *Eliz.* are woven together, and dependant upon one another; and may all stand together, and neither in Words or Meaning does the one repeal the other.

5. 3 *Jac.* 1. 4. Enacts that *none shall keep or retain any Person in their House (Servant or other) which shal. forbear to come to Church by the Space of a Month together, on Pain to forfeit* 10 *l. for every Month they so keep them. Howbeit Children may relieve their Father or Mother, and Guardians their Wards or Pupils.*

(F) Bulls, Agnus Dei's, Crosses, &c. Books &c.

But the Statute of 5 Eliz. 1. is *not* to be extended to *Publick Booksellers*, who sell, nor to those who read such Books as Gregory de Valencia, or Bellarmine, or any other *Books which treat of the Controversies of Religion*, and do not *particularly*

1. IF any one *brings into England Books written abroad* against the King's Supremacy, in Behalf of the Jurisdiction of the See of Rome, knowing the Contents, Or if one secretly *delivers them when brought to others*, knowing the Contents thereof; both these are Offenders within the Act of 5 Eliz. 1. Per all the Judges of both Benches, except 3. the Ch. Baron being present.—If any Person *receives* such Books knowingly, *and reads them privately*, without any Thing further, either by Conference or Allowance, this was held by all the Judges present, except two, to be no Offence; But if he afterwards reads *and confers upon them with any other* Person, *and in such Discourse* by any Speech or Words *allows such Books to be good*, he is clearly within the Danger of the Law, by the Opinion of all. So if one *hearing the Contents of such* Books from others, by any open Discourse *commends or approves them*; or if one having them in his Custody, and *knowing the Contents, conveys them secretly to his Friend*, in order to be read by him, and to persuade him to be of the same Opinion, it was resolved that both these are within the Danger of the Act, especially the first. So if one *prints* them *within the Realm, and utters* them, or if one *prints them here, and sends them beyond Sea*, as if made abroad, and they

they are afterwards bought, read, and conferr'd upon, ut supra, it was held that these Offences are within the Act. Resolved at Serjeant's-Inn. Dy. 281. b. Anon. 282. pl. 22. Hill. 11 Eliz.

relate to the Pope's Supremacy in the King's Dominions. Jenk. 236. pl. 12

2. 13 *Eliz.* 2. *S.* 2. 3. Enacts that *the Procuring or Publishing Bulls, or reconciling any to Rome, shall be High Treason.*

S. 5. *If any Person shall conceal such Bulls &c. he shall incur the Penalty of Misprision of High Treason.*

S. 6. *If any Person shall bring into this Realm any Token or Thing called an Agnus Dei, or any Crosses, Pictures, Beads &c. and shall offer the same to be worn or used, both he and the Receiver shall incur a Praemunire.*

3. 3 *Jac.* 1. *cap.* 5. *S.* 25. Enacts that *no Person shall bring from beyond the Seas, nor shall print, buy, or sell any Popish Primers, Ladies Psalters, Manuals, Rosaries, Popish Catechisms, Missals, Breviaries, Portals, Legends, and Lives of Saints, containing Superstitious Matter, printed or written in any Language whatsoever, nor any other Superstitious Books, printed or written in the English Tongue, on Pain of forfeiting* 40 *s. for every Book &c. and the Books to be burnt.*

(G) Feme Covert and Widow.

1. IT was never doubted but that the Statute 1 *Eliz.* 2. *against hearing of Masses*, extends to Feme Coverts. Hob. 97. in the Case of Moor v. Hussey.— cites Dy. 203. 2 Eliz.

2. It was resolved by all the Judges, That a Feme Covert is within the Act of 1 *Eliz.* 2. and shall forfeit 12 *d. for not repairing to Church* every Sunday and Holiday. 11 Rep. 61. b. in Dr. Foster's Case —cites 35 Eliz. Hob. 97. S. P. in the Case of Moor v. Hussey.

3. It was likewise resolved, That tho' 23 *Eliz.* is more penal, and inflicts *Imprisonment for Nonpayment*, yet that Feme Coverts are within it. 11 Rep. 61. b. in Dr. Foster's Case.— cites 35 Eliz. Hob. 97. S. P. in the Case of Moor v. Hussey.— And tho' by this Statute the Husband could not be charg'd with the Forfeiture, where the Feme was indicted, yet this might be helped by the Manner of her Imprisonment, viz. *by Close Confinement* from all Company, *and hard Fare* Per Manwood Ch. B. Sav. 25. 24 Eliz. Anon.

4. 35 *Eliz.* 2. *S.* 18. Enacts, That *all Married Women shall be bound by every Branch of this Act, except that relating to Adjuration.*

5. 3 *Jac.* 1. *cap.* 4. *S.* 40. Enacts, That *none shall be punished for his Wife's Offence, neither shall any Woman be charged therewith any Penalty or Forfeiture, by Force of this Act, for any Offence which shall happen during her Marriage.*

6. 3 *Jac.* 1. 5 *S.* 9. Enacts, That *No Person, whose Wife is a Recusant, shall exercise any publick Office &c. by himself or Deputy, unless he and his Children above* 9 *Years of Age, and his Servants, shall repair to the Church once a Month, and such of them as are of meet Age receive the Sacrament at such Times as are required by the Law, and bring up his Children in the True Religion.*

S. 10. *A Widow Recusant forfeits* 2 *Thirds of her Dower, and is disabled to be Executrix or Administratrix of her Husband, or to have any Part of her Husband's Goods.*

7. 7 *Jac.* 1. *cap.* 6. *S.* 28. Enacts, That *if a Married Woman, being a convicted Recusant, do not conform within* 3 *Months after Conviction, she shall be committed to Prison by a Privy Counsellor, or the Bishop of the Diocese if she be a Baroness; but if any other of a lower Degree, then shall she be bound and committed*

Upon Information of Recusancy in the Exchequer, a Writ issues to the Sheriff to take the Party and commit him to Prison, unless he find Sureties for his Appearance, and Conformity. Jenk. 236. pl. 12

Wife for 20 l. per Month, for the Wife's not coming to Church,

committed by two Juſtices of Peace, (1 Quor.) and there ſhall remain until ſhe conform, as aforeſaid; unleſs the Husband, for the Wife's Offence, will pay unto the King 10 l. for every Month, or yield the 3d Part of all his Lands, at the Choice of the ſaid Husband.

It was moved in Arreſt of Judgment, That an *Information* did not lie *againſt Husband and Wife* for the Recuſancy of the Wife, becauſe the Statute 3 Jac. cap. 6. appoints, That upon ſuch Conviction ſhe ſhall be committed; and if the Husband will redeem her, he ſhall pay 10 l. per Month; ſo that this laſt Statute abrogates the former, ſo as that he is not to be charged with her Recuſancy, but at 10 l. per Month; and that only in Caſe he is willing to redeem her. But it was held, That it does not alter any of the former Laws; but directs, That if a Feme Covert Recuſant, being convicted, does not after 3 Months conform herſelf, ſhe ſhall be committed, unleſs the Husband will pay 10 l for every Month ſhe ſhall be out of Priſon, and not conform. Cro. J. 529. Paſch. 16 Jac. B. R. Parker v. Curſon.

The Lands of the Baron ſhall be ſequeſter'd by the Statute for the Recuſancy of the Wife, if he do not *render her to Priſon, and diſcharge* the ſame. Reſolv'd in the Star Chamber. 4 Le. 249. pl. 405. Trin. 12 Jac. Egerton's Caſe.

8. The Husband is chargeable for the Recuſancy of his Wife, and there *needs no Conviction* [*of Him*] But before an Information he ſhall not be chargeable for her, but where he is *nam'd with her.* Per Coke Ch. J. 4 Le. 239. Mich. 7 Jac. C. B. Ward's Caſe.

So held by Wray, Manwood, and all the Judges of Serjeants Inn; and the Difference was taken between an Indictment and a Qui tam Proſecution.

9. Before the Statute 35 Eliz. if a Feme Covert had been convicted of Recuſancy upon an Indictment, (which was the only Method for the King to proceed) the *Forfeiture* could not be *levied upon her Husband*, becauſe he was not Party to the Suit; but the Forfeiture to the Informer, (who might proceed either by Action or Information) was recoverable againſt the Husband, by making him a Party; as was reſolved at a Meeting of the Judges. And therefore 35 Eliz. was made, which enables the Crown to proceed by Action &c. and ſo charge the Baron, as a Common Perſon might. Per Cur. 11 Rep. 61, 62. Mich. 12 Jac. in Foſter's Caſe. Sav 25. 24 Eliz. Anon. —— But after the Death of the Baron ſhe might have been charg'd. Roll. Rep. 94. in Foſter's Caſe.

It was held, That the *Feme cannot join Iſſue without the Baron.* 2 Roll Rep. 90

10. *Debt* was brought *againſt Husband and Wife* for the Recuſancy of the Wife, and the Husband would have appeared by Superſedeas alone; But the Court reſolved, That either *Both muſt appear* or Both be outlaw'd. Hob. 179. Loveden's Caſe. Sir George Curſon's Caſe.— But it appearing by the Docket, That they both pleaded, and that it was but a Miſpriſion of the Clerk, it was amended. Cro J. 530. S. C. by the Name of Parker v. Curſon.

(H) Injunctions, Inconveniencies and Reſtrictions.

1. 35 *Eliz. cap.* 2. S. 3. ENACTS, That *every Perſon not repairing to Church ſhall not paſs or remove above 5 Miles from Home, on Pain of forfeiting his Goods and all his Rents and Annuities during his Life.*

S. 6. *Recuſant to deliver in his Name to the Miniſter of the Pariſh, and Conſtable of the Town.*

S. 8. *Recuſant not worth 40 l. to abjure the Realm if he ſtir above 5 Miles from home; And if he refuſe to make ſuch Abjuration, or return, he ſhall be adjudg'd a Felon without Benefit of Clergy.*

S. 13. *Provided, That if any Perſon reſtrained from travelling ſhall be required by Proceſs to make his Appearance, he ſhall not incur any Forfeiture for travelling on ſuch Occaſions.*

2. 3 *Jac.* 1. 5. *S.* 2. Enacts, That *no Recuſant ſhall come to Court on Pain of* 100 *l. unleſs he be commanded by the King, or by Warrant from the Privy Council.*

S. 4.

S. 4. Recusants to depart 10 Miles from London; And in Case they live in London, or within 10 Miles thereof, they shall give in their Names to the Mayor or some Justice of Peace.

S. 7. It shall be lawful for the King, or three of his Privy Council, to give Licence to a Recusant to travel above 5 Miles from his Place of Abode. And if any such Person shall have Occasion to go above 5 Miles, upon Licence of 4 Justices of Peace, with the Assent of the Bishop, or of the Lieutenant, or any Deputy Lieutenant within the County, it shall be lawful for such Person to go about such his Business.

A Recusant Convict was indicted for *departing above 5 Miles from his Abode.* The Defendant pleaded a *Licence under the Seals of 4 Justices* of the Peace, *one of whom was the Deputy Lieutenant*; And upon Demurrer the Court held, 1st, That the Licence ought to be under the Hands and Seals of 4 Justices, besides the Deputy Lieutenant, and 'tis not sufficient that he be one of the 4; for the Statute ought to be strictly pursued, and the *Deputy Lieutenant's Assent ought to be by itself*, without the other 4. 2dly, It must be pleaded *under their Hands as well as Seals*, and the Licence *must shew the particular Cause of the Licence*, and not in a general Manner, As, for urgent Causes. Cro J. 352. Mich 12 Jac. B. R. Maxfield's Case —— 1 Roll Rep. 108. the King v. Macclesfield S. C. —— Mo. 850. pl. 1127. Manfield's Case S. C.

S. 26. The Houses of every Popish Recusant Convict, or of every Person whose Wife is a Popish Recusant Convict, may be search'd for Popish Books and Relicks; and if any be found, the same shall be burnt; and if it be a Crucifix, or other Relick of any Price, it shall be defac'd at the Quarter-Sessions, and restor'd to the Owner.

S. 27. All such Armour, Gunpowder, and Ammunition, as any Popish Recusant shall have, shall be seised, except such necessary Weapons as shall be allowed him for the Defence of his House.

S. 28. If any Recusant who shall have Armour or Ammunition, shall refuse to discover the same, he shall forfeit the same, and be imprisoned for three Months.

3. *1 W. & M. 9. S 2. Any Person within 10 Miles of London, not being a Merchant Foreigner, refusing the Declaration against Transubstantiation, shall be adjudged a Recusant Convict.*

Provided, That this Act shall not extend to Tradesmen, or those who had their Dwellings within that Compass 6 Months before the 13th of February 1688. not having any other Dwelling-Place, so as they certify their Names and Place of Abode to the Sessions before the 1st of August 1689.

S. 5. Nor to any Foreigner, being a Menial Servant to any Ambassador or Publick Agent.

4. *1 W. & M. 15. S. 4.* Enacts, That *any Papist or reputed Papist, refusing to make Declaration against Transubstantiation, appointed by 30 Car. 2. shall keep no Arms &c. other than shall be allowed him by the Quarter-Sessions for the Defence of his House and Person.*

S. 5. But shall, within 10 Days after such Refusal, deliver them to some Justice of Peace, on Pain of 3 Months Imprisonment, and Forfeiture of the treble Value.

S. 6. And any Person who shall conceal, or be privy to the Concealing such Arms, shall suffer 3 Months Imprisonment, and forfeit treble the Value.

S. 9. No Person, who refuses the Declaration as above, shall keep a Horse above the Value of 5l.

5. *11 & 12 W. 3. 4. S. 7.* Enacts, That *if any Popish Parents shall refuse to allow any Protestant Child a Maintenance suitable to his Ability, the Court of Chancery shall make such Order therein as shall be agreeable to the Intent of this Act.*

(I) Marriage, Baptiſm, Burial.

1. 3 *Jac.* 1. *cap.* 5. *S.* 13. ENACTS, That *every Man who, being a Popiſh Recuſant Convict, ſhall be married otherwiſe than in ſome open Church or Chapel, and otherwiſe than according to the Orders of the Church of England, by a Miniſter lawfully authoriz'd, ſhall be diſabled to have any Eſtate as Tenant by the Courteſy; And that every Woman, being a Popiſh Recuſant Convict, who ſhall be married in other Form than as aforeſaid, ſhall be diſabled to claim her Dower, or Jointure, or Widow's Eſtate &c. And every Woman, being a Popiſh Recuſant, who ſhall be married otherwiſe than according to the Church of England, ſhall not only be diſabled to be an Executrix or Adminiſtratrix of her Husband, but alſo to have or Demand any Part of her Husbands Goods or Chattels, by any Law, Cuſtom, or Uſage whatſoever.*

Sec. 14. *That every Popiſh Recuſant, who ſhall not cauſe his or her Child to be baptized within one Month after its Birth, by a lawful Miniſter &c. ſhall forfeit* 100*l. &c.*

Sect. 15. *That if any Popiſh Recuſant, not being Excommunicate, ſhall be buried in any other Place than in the Church or Church-Yard, or not according to the Eccleſiaſtical Laws of this Realm, the Executors &c. of ſuch Recuſant, knowing the ſame, or the Party that cauſeth him to be ſo buried, ſhall forfeit* 20*l. One* 3*d to the Crown, one* 3*d to the Informer, and the other to the Poor of the Pariſh.*

(K) Saying and Hearing Maſs.

1. 23 *Eliz. cap.* 1. *S.* 4. ENacts, That *every Perſon convicted of ſaying or ſinging Maſs, ſhall forfeit* 200 *Marks, and be committed to the next Goal for one Year, and until he ſhall pay the Penalty; And every Perſon willingly hearing Maſs ſhall forfeit* 100 *Marks, and ſuffer* 1 *Years Impriſonment.*

2. 11 & 12 *W.* 3. *cap.* 44. *S.* 3. Enacts, That *if any Popiſh Biſhop, Prieſt, or Jeſuit ſhall ſay Maſs, he ſhall ſuffer perpetual Impriſonment in the Houſe of any Foreign Miniſter, ſo as ſuch Prieſt be not a natural born Subject.*

S. 5. *Provided that this Act ſhall not extend to Popiſh Prieſts ſaying Maſs.*

(L) Prieſt &c.

1. 27 *Eliz.* 2. *S.* 3. ENACTS, That *No Jeſuit, Seminary Prieſt, or other Prieſt, Deacon, or Religious or Eccleſiaſtical Perſon whatſoever, born in the Queen's Dominions, and ſo made, ordained, or profeſſed by any Authority derived from the See of Rome, ſhall come into, be, or remain in any Part of her Majeſty's Dominions, unleſs in ſuch ſpecial Caſes as are provided for in this Act on Pain of being adjudged Guilty of High Treaſon.*

It *need not be ſhewed* in the Indictment *whether* Defendant was *made a Jeſuit &c. beyond Sea, or within the Realm*; For wherever it was, it is within the Act, if he was made *by the pretended Authority of the See of Rome*, but it muſt appear to have been by ſuch pretended Authority. Reſolved by many of the Judges Popl. 94. Southwell's Caſe.

It

It must appear in the Indictment that Defendant was *born Infra Ligeancum Angliæ*; and this is sufficient *generally, without shewing where*. Resolved by many of the Judges. Poph. 94. Southwell's Case.

In a Prosecution upon this Statute (against Jesuits who continue in the Realm contrary to it) tho' there is a Proviso in behalf of such as are *detained here thro' Infirmity of Body*, and cannot go abroad without imminent Danger of their Lives, and that *Precise is referred to in the Body and Enacting Part* of the Act, yet *the Indictment need not to take any Notice of it*; For it is to be considered merely as a Proviso, and the Defendant, if he can, must take Advantage of it. Resolved by several of the Judges. Poph. 93. Southwell's Case.

By a Special Verdict it appeared that the Defendant, being *one in Popish Orders*, and *sailing towards Ireland, was by Tempest driven into England*; And it was insisted that he was not within the Act, first, because tho' he was going into Ireland, he did not get thither, 2dly, because he did not come into England voluntarily, but was driven here by the *Act of God*; And the Court being of this Opinion, there was Judgment for the Defendant. Raym. 377. Trin. 32 Car. 2. B. R. The King v. Ocullean

S. 4. *Every Person who shall be willing to receive such Jesuit &c. shall be adjudged a Felon without Benefit of Clergy.*

It is not Felony only to receive a meer Stranger who is a Jesuit. Per Doderidge. Lat. 2. in Sir Simon Clerk's Case.

S. 10. *Saving for Priests &c. submitting themselves, and taking the Oath of Supremacy.*

S. 13. *Every Person knowing that any such Jesuit &c. is within the Realm, and shall not discover the same within* 12 *Days to some Justice of Peace or higher Officer shall make Fine and be imprisoned at the King's Pleasure: And if any Justice &c. to whom such Matter is discovered shall not within* 28 *Days make Information thereof to some of the Privy Council he shall forfeit* 200 *Marks.*

2. 35 *Eliz. cap.* 2. *S.* 11. Enacts, That *if any Jesuit or Priest being examined by any Person lawfully authorized thereto shall refuse to answer directly whether he be a Jesuit or Priest, he shall be committed to Prison until he make direct Answer thereto.*

The Defendant was *committed by the Secretary of State, till* he should be *delivered by due Course of Law*, for refusing to answer, Whether he was a Jesuit or not; And it was objected, 1. That the Commitment ought to be *by* * *Justice of Peace* (which does not appear in this Case) For the 35th of Eliz. being general by those, who have Authority, must refer to the Statute of 23th of Eliz. 2. which is that (a Justice of Peace may commit) 2. That the Commitment ought to have been (*till he shall make a direct Answer*) according to the Words of the Statute, and not (till he shall be delivered by due Course of Law) For being a particular Authority, it ought to be pursued; And upon this Objection he was discharged, but then † the *Court examined him*, whether he was a Jesuit or no, and upon his answering that he was not, he was dismissed Skin. 369 Mich. 5 W. & M. B. R. Yaxley's Case

* Carth. 291 S. C. reports that this Objection was over-ruled —— † The Court held that they had Power to examine him, being not excluded by Negative Words. Cumb. 224. S. C. —— Salk. 351. S. C

3. 3 *Jac.* 1. 5. *S.* 1. Enacts, That *any Person who shall first discover to a Justice of Peace any Person who shall entertain or relieve any Jesuit &c. or discover where any Mass has been said, and the Priest or any of the Persons within* 3 *Days present, shall be discharged from all Penalties for such Offence, and have a third Part of the Forfeitures incurred by such Offence, so as the Sum do not exceed* 150 *l. and then he shall have* 50 *l. only.*

4. 11 & 12 *W.* 3. 4. *S.* 1. Enacts, That *every Person who shall apprehend a Popish Priest &c. and prosecute him till he be convicted shall have a Reward of* 100 *l.*

(M) Reconciliation, and Relapse.

1. 23 *Eliz.* 1. *S.* 2. ENACTS, That *all Persons who shall have or pretend to have Power, or shall by any Means put in Practice to absolve, persuade, or withdraw any of the Queen's Subjects from their* 3 Jac. 1. S. 22 to the same Purpose *natural*

ys. &c.— See pl. 3. S. 23, 24.

natural Obedience, or to withdraw them from the Religion established, to the Romish Religion or to move them to promise Obedience to the See of Rome, or shall do any Overt-Act to that Intent or Purpose, shall be adjudged Guilty of High Treason.

S. 3. Their Aiders and Maintainers who do not discover them within 20 Days to some Justice of Peace or higher Officer, shall be adjudged guilty of Misprision of Treason.

The Defendant was indicted for Recusancy, and before Conviction, submitted, but afterwards relapsing, he was indicted again, and then submitted, and was afterwards indicted the 3d Time for a Relapse; Upon this it was moved to have it *certified into the Exchequer*; And per Williams J the Statute directs it to be so done in case of a Relapse, and accordingly a Rule of Court was made for the certifying it into the Exchequer. 1 Bulf 133. Pasch 9 Jac Francis Holt's Case.

2. 35 *Eliz.* 2. *S.* 6. Enacts, That *if any Offender discharged by Conformity by Virtue of this Act shall afterwards relapse, and again become a Recusant in not coming to Church he shall lose the Benefit he might otherwise by Virtue of this Act have had upon his Submission.*

3. 3 *Jac.* 1. 4. *S.* 2. Enacts, That *a Recusant that conforms shall within one Year after, and so once in every Year (at least) receive the blessed Sacrament, in Pain to forfeit for the first Year* 20 *l. for the second* 40 *l. and for every Default after* 60 *l. And if after he hath received it, he make Default therein by the Space of a whole Year he shall forfeit* 60 *l.*

S. 23. *If any Person within the King's Dominions shall be absolved or withdrawn or reconciled, or shall promise Obedience to any such pretended Authority, Prince, or State, such Persons, the Procurers, Counsellors and Maintainers shall be adjudged Traitors in in Cases of High Treason.*

The Oath of Allegiance mentioned in this Act is set aside, and another appointed by 1 W. & M. Stat. 1. cap. 8.

S. 24. *This last Clause shall not extend to any reconciled as aforesaid, (for and touching the Point of so being reconciled only) that shall return into this Realm, and within* 6 *Days after before the Bishop of the Diocese, or two Justices of Peace (jointly or severally) of the County where he shall arrive submit himself to the King and his Laws, and take the Oath of Supremacy, therein mentioned; which said Oaths the said Bishops and Justies respectively shall by this Act have Power to minister to such Persons, and shall certify them in the next General Sessions, in Pain of* 40 *l.*

(N) Seminaries and Schools.

1. 23 *Eliz. cap.* 1. *S.* 6, 7. Enacts, That *none shall keep a Schoolmaster which absents himself from Church, or not allowed by the Bishop or Ordinary, in Pain of* 10 *l. for every Month he so keeps him; and such Schoolmaster shall be for ever disabled to teach Youth, and shall suffer one whole Year's Imprisonment without Bail.*

2. 27 *Eliz. cap.* 2 *S.* 5. Enacts, That *Persons bred in Seminaries who shall not return on Proclamation shall be Guilty of High Treason if they return after.*

S. 6. *If any Person shall send Relief to a Seminary he shall incur the Penalty of a* Præmunire.

3. 3 *Car.* 1. *cap.* 2. *S.* 1. Enacts, That *if any Person under the Obedience of the King shall go or send any Child &c. beyond the Seas, to the Intent to be trained up in any Abbey, Popish University, or School, or House of Jesuits, or in any private Popish Family, and shall be there by any Popish Person instructed in the Popish Religion to profess the same, or shall send any Money or other Thing under the Name of Alms, towards the Relief of any Abbey or Religious House, every Person so sending, and every Person sent being convicted shall be disabled to sue in Law, or Equity, or to be Committee of any Ward, or Executor or Administrator, or capable of any Legacy or Deed of Gift, or to bear any Office, and shall forfeit all his Goods and Chattels, and all his Lands during Life.*

S. 2. No Perſon ſent as aforeſaid, that ſhall within 6 Months after his Return conform to the Church of England, and receive the Sacrament ſhall incur the Penalties.

S. 3. Offences againſt this Statute may be inquired, heard and determined before the Juſtices of B. R. or Juſtices of Aſſiſe, or Goal Delivery, or of Oyer, and Terminer, of ſuch Counties where the Offenders did laſt dwell, or whence they departed out of this Kingdom, or where they were taken.

S. 4. If any Perſon ſo ſent ſhall after his Return conform to the Church of England, and receive the Sacrament, he ſhall have his Lands reſtored.

4. 11 & 12 *W.* 3. 4. *S.* 3. Enacts, That *if any Papiſt ſhall teach School, or take upon him the Education or Boarding of any Youth, he ſhall ſuffer perpetual Imprisonment.*

S. 6. *A Reward of* 100 *l. to any who ſhall diſcover the ſending a Child to a Seminary.*

(O) Diſability.

1. 3 *Jac.* 1. 5. *S.* 8. ENacts, That *no Recuſant ſhall practice Law, or Phyſick, or exerciſe any publick Office.*

S 10. *Diſables married Women who do not receive the Sacrament within a Year before their Husband's Death, to be Executrix, or Adminiſtratrix to their Husbands, and to have any Part of their Husbands Goods.*

A Popiſh Recuſant Convict made his Wife, another Popiſh Recuſant, his Executrix, and they would ſuffer her to prove the Will in the Spiritual Court; and a *Prohibition* being moved for upon the Statute of Eliz. it was granted; For ſhe is diſabled by the General Clauſe, and not enabled by the Proviſo. 6 Mod 239. Mich. 3 Ann. B. R. Ride v Ride.

S. 11. *And every Popiſh Recuſant Convict ſhall ſtand and be reputed to all Intents and Purpoſes diſabled as a Perſon excommunicated, until he ſhall conform, come to Church, and receive the Sacrament, and take the Oaths of Allegiance appointed by another Act of this Seſſions; But he may ſue for two Thirds of the Lands not ſeiſed.*

S 16. *Children ſent beyond Sea are diſabled to inherit, unleſs they take the Oaths.*

S. 22, 23. *Diſables Recuſants from being Executors or Guardians &c. but the next of Kin to whom the Land cannot deſcend, not being a Recuſant ſhall have the Land as Guardian.*

Tho' a Recuſant forfeited in Chivalry was diſabled from being Guardian, yet if he had *granted the Seigniory* to another not being a Recuſant, the *Grantee ſhould have had the Guardianſhip*; for now the Cauſe is removed. Per Jones J. Jo 19 Hill 20 Jac C. B. in Caſe of Standen v. Univerſity of Oxford ——— So if the *King* had *ſeiſed the Seigniory* as Part of his 2 Parts of the Recuſant's Lands, the *next of Kin*, notwithſtanding the Words of this Act, *ſhould not have the Ward of*, as he would in caſe it had remained in the Hands of the Recuſant. Ibid. 21.

2. 1 *W. & M.* 26. *S.* 2. *Diſables Perſons refuſing the Declaration againſt Tranſubſtantiation to preſent to any Living &c.*

3. A Papiſt in Ireland cannot *make a Will*, but his Land ſhall deſcend to all his Sons Equally; but if the Heir conform within a Year after his Age of 21 he may enter. MSS. Tab. cites June 22, 1717. Burk v. Morgan.

4. By Act of Parliament in Ireland *Lands leaſ'd to a Papiſt at leſs than 2 Thirds improved Value*, and for any Term above 31 Years, are forfeited to the Diſcoveror. MSS. Tab. cites March 8, 1719. Cuſack v. Buckley.— March 10, 1724. Latin v. March — March 8, 1724. Eyre v. Burk.— Jan. 18, 1724. Blake v. Blake.

(P) Actions and Indictments, How; and within what Time.

In an Information for not repairing to Church &c. upon the Statute of 23 Eliz. cap. 1. it was resolv'd, That if the Party be convicted upon an Information, there the Informer shall have the Penalty according to the Statute; But if the Party before the Information be convicted of it upon an Indictment, at the Suit of the King, there the King shall have all the Penalty to himself, by 28 Eliz. 6. and the Informer and the Poor shall have nothing.

1. AN Action Qui tam was brought by the Queen and another upon the Statute of 23 Eliz. cap. 1. against Vachel for not coming to Church; and being found against the Defendant, it was moved in Arrest of Judgment, because the *Queen and the Party join'd* in the Action, whereas *by the first Part of the Statute all the Forfeitures were given to the Queen*; and tho' the Statute seems to make a Division, limiting *one Part to the Queen's Use, another to the Poor, and the 3d to him that will sue* for the same, yet this cannot any how give such Action as here is brought; for by the first Words the whole seems to be given to the Queen, and give no Colour for the Informer's Joining, any more than the other Words, which give the 3d Part of the Forfeiture to the Party suing &c. and that this does not give Action, but an Action for the 3d Part only, and that in other Statutes the Forfeitures are expressly given to the King and the Party that will sue &c. and that therefore the Makers of the Act did not intend that the Queen and the Party should join. But to this it was answer'd, That this Act must have a reasonable Intendment, and the Intent of this Forfeiture to be disposed into 3 Parts, One to the Queen's and another to the Party's Use cannot take Effect if all be forfeited to the Queen, as the Words of the 1st Part import; for it would be absurd to sue for a Thing not belonging to him but to another; And that by the last Part, Suit is given to the Party, which is likewise absurd if the Makers intended him nothing, and therefore tho' the first Words seem to oppugn the last, yet the Intention of the Makers is to be construed to be, That the Queen and the Party suing shall have the Forfeiture in Common in such Proportions as the Statute limits; and otherwise they would not have given an Action of Debt &c. to him that will sue, unless he might have Part of the Forfeiture. Whereupon Judgment was given for the Queen and the Informer, scil. That they recover &c. Notwithstanding the Statute says, That every Party who does not pay within the 3 Months &c. shall be committed to Prison. And. 138. pl. 190. Mich. 27 & 28 Eliz. The Queen and Cuff v. Vachel.

Noy 117. Pasch. 3 Jac. B. R. Grimstone v. Stones.

2. The Defendant was *indicted* upon the Statute of 23 Eliz. cap. 1. *for withdrawing several Persons from the Religion* established in England, and to promise Obedience to the Church of Rome; and for that [illegible] was withdrawn from the Obedience of the Queen. It was objected, That the Prosecution was *not within a Year and a Day* after the Offence, whereas there is a Proviso in the Act, That all Offences against the Act shall and may be inquired of within the Year; But it was held by Wray and Gawdy, That this Proviso concerns *only such Offences which are cognizable before Justices of Peace*, as Spiritual Offences, as the not coming to Church &c. but does not extend to restrain Proceedings against Treason. 1 Leon. 238. Mich. 32 & 33 Eliz. B. R. Guildford's Case.

3. An *Information Qui tam* was brought for Recusancy in not receiving the Sacrament *for 3 Years*; and it was objected in Arrest of Judgment, That by the Statute of 31 Eliz. No Informer can sue but within one Year after the Offence; But the Court held it to be *well enough for the King*, tho' it was *not good as to the Informer*. Cro. J. 360. Hill. 12 Jac. in the Exchequer, Syvedale v. Lenthall.

4. Exceptions were taken to an Indictment for hearing Mass, because it was said, That the Offenders *were present*, and *does not say with whom, or to what Purpose*; *nor* is it said, They were present *at a Religious Account*, or *with any Priest that read it*; *nor* is it said, *The Intention ad audiend'*.

dend'. 2dly, It is ſaid, *Audiverant Maſſam*, which is no Latin Word but for a Lump, and then 'tis Nonſenſe; Miſſa is the true proper Word for the ſame, and ſo are the Dictionaries; and from hence 'tis plain the Anglice cannot help it; for wherefoever the Engliſh Word has a proper Signification, and a true Latin Word to expreſs it by, and the Latin Word has no colourable Senſe of that, 'tis not good; and this is the common Rule in Conſtruction of Anglices, as to ſay Equus Anglice, a Man, would be ſtark naught; and if the Anglice be reckoned Surplufage and void, then 'tis naught certainly; for 'tis Audivit Maſſam, a Lump. But the Court would not quaſh it, but bid them demur to it; for that they would not quaſh an Indictment for ſuch an Offence, no more than they would for Perjury; and bid them try it, or demur at their Peril, which they would &c. 2 Show. 216, 217. pl. 220. Trin. 34 Car. 2. B. R. The King v. Evelv & Ux'.

5. The Statute of 1 Eliz. 1. S. 9. (which directs, That Perſons impriſoned for any Offence committed by Preaching, Teaching, or Words only, ſhall be diſcharged, unleſs indicted within *One Half Year* after the Offence committed) is not to be underſtood of 6 Months, at 28 Days to the Month, but of Half a Year *according to the Kalendar*. Cawley 13.

6. Lord Coke ſays generally, 4 Inſt. 331 That *no Perſon ſhall be impeach'd* for any Offence by Preaching, Teaching, or Words, *unleſs lawfully indicted within the Space of Half a Year*. But the Statute does not warrant this; for where it limits the Time to Half a Year, it ſpeaks of one *impriſon'd and not indicted* within that Time; and was made in favour of Liberty, to prevent a long Impriſonment upon a groundleſs Accuſation, and that he ſhould not continue any longer upon the ſame Impriſonment; but cannot extend to the Caſe of one who was never impriſoned. But now by the Statute of 23 Eliz. the Time as to all Offences againſt this Act is enlarg'd to a Year and a Day. Cawley 14.

7. It was moved in Arreſt of Judgment, on a Verdict upon the Statute of 23 Eliz. for not coming to Church for 11 Months, becauſe the Statute requires the Proſecution thereon to be brought within a Year and a Day, but *this Action was brought 3 Weeks after the Year*, and the Verdict was for the Whole. But Mr. Juſtice Powell ſaid, That this was putting the other Side in Mind of curing this Miſtake, they not having enter'd up their Judgment; for he ſaid, If they *enter'd up their Judgment for no more than was within the* Time limited by the Act, viz. For no more Months than were within the *Year*, then it would not be Error. 11 Mod. 45. pl. 4. Paſch. 4 Annæ B. R. Anon.

(Q) Pleadings.

1. ONE was proſecuted in a Qui tam &c. upon the Statutes of 1 & 23 Eliz. for not coming to Church, he being of the Age of 16 Years. The Trial was in London, and the Defendant found Guilty. It was moved in Arreſt of Judgment, That this Iſſue is not triable, becauſe *no Place was alleg'd where the Offence was done*, But the Court held the Trial good, becauſe this Action was for a Non-feaſance, ſcil. Not coming to any Church, the which cannot be done in any Place; but had it been for a Thing done, then a Place muſt have been alleg'd. And. 138. pl. 190. Mich. 27 & 28 Eliz. The Queen and Cuff v. Vachel.

2. In Information for not repairing to Church &c. upon the Statute of 23 Eliz. cap. 1. The Defendant pleaded, *That he was indicted at the Aſſiſes &c. before A. and B. Juſtices &c.* and it was held a good Bar, and

and that ſo it was adjudg'd in the Exchequer and in the King's-Bench accordingly. Noy 117. Paſch. 3 Jac. B. R. Grimſtone v. Stones.

But the Reporter makes a *Quære*, for that it would be very prejudicial to Informers, if, after they have attach'd and appropriated the Suit to themſelves, the King can deveſt them of it by bringing an Indictment. —— But *after a Conviction at the Suit of the King*, either upon the Statutes of Eliz. or jac. the *Informer is barr'd* of commencing any Suit. 11 Rep. 65. b. S. C. —— And after a *Conviction at the Suit of the Informer*, the *King's Suit is barr'd*, and the Defendant may diſcharge himſelf by pleading *Autrefoits Convict*. Ibid.

3. If, *pending an Information* Qui tam, the *Defendant is convicted by Indictment* at the King's Suit, he may plead this Conviction *Puis Darrein Continuance*. Per Coke Ch. J. Roll Rep. 95. Mich. 12 Jac. in Dr. Foſter's Caſe.

4. C. brought an Action of *Treſpaſs* againſt G. who *pleads* the Statute of 3 *Jac.* 5. of Recuſancy, *That if any Popiſh Recuſant be convicted, that he ſhall be taken* in Law *as an Excommunicate Perſon*; and *averr'd, That the Plaintiff was convicted at ſuch a Place* &c. unde petit Judic. of the Bill; The Plaintiff demurs, Quia Placitum illud Minus ſufficit. certum & iſſuabile in Lege exiſtit &c. And the Court [was of Opinion] for the Plaintiff, That the Plea is naught. 1ſt, Becauſe there is *not ſhewn before what Juſtices* he was convicted; ſo that if it had been denied, the Court might know to whom to write for a Certificate of it. 2dly, He hath *not averr'd* his Plea with an *Hoc paratus eſt verificare by Record*. 3dly, The Concluſion, as *Judgment of the Bill*, is alſo naught. But of the 3d Part there was ſome Doubt. But at length by the Court a Reſpondeas ouſter was awarded. And ſo it was alſo in Trin. 2 Car. B. R. Rot. 894. **Ratcliffe** v. **Bewcock**, upon that Statute, the Defendant concluded Judgment *Si Actio*, where it ſhould have been, *if he ſhall be anſwered*, and cited 24 E. 3. 26. 34 H. 6. 8. 11 Rep. 52. Clench the Clerk ſhewed a Record Paſch. 2 Car. B. R. Rot. 331. Where the Defendant after Imparlance pleads Outlawry in the Plaintiff, and demands Judgment of the Bill; And Judgment was, That he ſhall anſwer further; And the Court agreed to that. Noy 89. Trin. 2 Car. B R. Dr. Cademan v. Grendon.

5. In *Debt* brought upon an Obligation, the Defendant *pleads, That the Plaintiff is a Recuſant, and convicted* according to the Statute of 21 Jac. cap. 5. and demanded *Judgment of the Action*. The Plaintiff *replies Nul tiel Record*; and a Day was given to bring in the Record. Crowley J. demanded what Courſe he would take to make the Record come in; and ſaid, That *the Indictment was before the Juſtices of Peace*; And the Court ſaid, That the Defendant *ought to have pleaded Judgment if he ſhall be anſwered*; for the Diſability is only quouſque &c. And the Direction of the Court for the bringing in the Record, was, That a *Certiorari ſhall be directed* out of that Court *to the Juſtices of Peace* where the Indictment was taken; For Precedents were alleg'd, That that Court ſent a Certiorari to the Juſtices of Aſſiſe (a fortiori) to certify that in the Exchequer, and ſo come by Times into that Court &c. Hetl. 13. Paſch. 3 Car. C. B. The Caſe of a Recuſant Convict.

6. In Ejectment for the Rectory of B. the Caſe was, That the Earl of S. being a Popiſh Recuſant Convict, preſented the Leſſor of the Plaintiff, who was inſtituted and inducted; but the *Record* of *the Conviction being burnt*, the Defendant offer'd to *prove it by the Eſtreat* made thereof in the Exchequer; *and by an Inquiſition found and returned* into that Court of Recuſants Lands; and it was held by Hale Ch. B. and the Court, That in ſuch Caſe a Record may be proved by Evidence, becauſe the Conviction is not the direct Matter in Iſſue, but only an Inducement to it; But then the Evidence muſt be ſtrong and cogent; and accordingly the Evidence was admitted; But then by the Eſtreat of the Conviction into the Exchequer, it appeared to have been the ſame Aſſiſes at which the Party was preſented as a Recuſant, which is not allowed either by the

the Statute of 23 or 29 Eliz. For they direct a Proclamation to be made at the same Assizes when the Indictment is taken, that the Body of the Offender shall be render'd to the Sheriff of the County before the next Assizes; And upon this it was held, That the Conviction was not sufficiently proved Hard. 323. Pasch. 15 Car. 2. in Scace. Knight v. Dauler.

7. In *Assumpsit* for 18 l. upon an Infimul Computasset, the Defendant *pleaded, that the Plaintiff, being a Popish Recusant, was indicted* for not coming to Church for eleven Months, and *sets forth* the *Indictment and Conviction* at large, *and concluded Prout Patet per Recordum*, and *pleaded the Conviction to be Secundum formam Statuti* in Hujusmodi Casu &c. Unde petit Judicium si Respondere debet, cum hoc, That the Plaintiff, being a Popish Recusant Convict, had not conformed; and upon a Demurrer to this Plea, it was objected that the Statute 3 Jac cap. 5. disables no Persons but Popish Recusants, Convicted of Popish Recusancy, and that such shall, upon Conviction, be Ipso facto Excommunicated; But that *in this Indictment* there *are no Words of Popish Recusant*, or Convict of Popish Recusancy, whereas other Persons may refuse to come to Church, and be thereof convicted, but not disabled by this Statute; and to this the Court agreed. But this Indictment being in the usual Form, and the Plea saying, that the Plaintiff being Papalis Recusans was indicted, and that the Conviction was Secundum Formam Statuti, with an Averment that he being a Popish Recusant Convict, has not conform'd, is sufficient to shew what Recusancy it is, and adjudg'd the Plea good. 3 Lev. 66. Trin. 24 Car. 2. Ricaut v. Tomlin.

In Assumpsit &c. for Money received, the Defendant pleaded in Abatement, *that the Plaintiff was a Recusant Convict* for not coming to Church; the Plaintiff rep'd, that the King had Pardon'd the Conviction, The Defendant demur'd, it was objected that the Plea was ill, because the Defendant did *not aver that the Plaintiff was a Popish Recusant*; for the Statute, 3 Jac. cap. 5. doth not make any Recusant Convict to be Excommunicate, but only Popish Recusant Convict. North and Windham inclined that an Averment of being a Popish Recusant, will not serve, unless it be expressed in the Indictment itself that he is a Popish Recusant. But Windham and Levins contra, That it may be supply'd by Averment; For the Indictments have been generally so here, without expressing that he is Popish Recusant. A Respondeas Ouster was awarded by the whole Court, for Want of the Averment. 3 Lev. 11 Pasch. 33 Car 2. C. B. Rot 475. Countess of Portland v. Cole. —— Ibid. 12 at the End of the S. C says there was a like Case in the same Term Rot 223.

8. If *a Man is indicted* on the Statute of Recusancy, *Conformity* is a good Plea; but not *if an Action* of Debt is brought. Mod. 213, pl. 46. Pasch. 28 Car. 2. C. B. Anon.

9. Tho' the Statute of Recusancy says, That an *Outlawry* for Recusancy, shall not be reversed for *Want of Form*, yet in Serjeant Trinder's Wife's Case, 1 W. & M. it was adjudg'd that it should be, that the Statute might be made Sense: But an *Indictment or Information* for Recusancy, shall not be *quash'd* for Want of Form. But yet on Traverse of the Fact and Bail given, the Outlawry shall be reversed for Form; but on the Reversal of an Outlawry in an Information for *sending Children beyond Sea to be bred Papists*, the Defendants must plead Instanter. 5 Mod. 141. Mich. 1 W. 3. The King v. Hill.

10. In Case against the Defendant, he pleaded *a Conviction of Recusancy at the Sessions*, in Disability of the Person of the Plaintiff, and *concluded Prout Patet de Recordo*. Upon Demurrer it was objected, that this Conclusion made the Plea ill; for the Conviction of Recusancy being at the Sessions, which is a Record of of another Court, it *should be pleaded with a Profert hic in Curia sub Pede Sigilli*; besides, this Record being made by the Clerk of the Peace, is traversable, for he is no more than a ministerial Officer, and therefore 'tis not a Record to conclude the Judgment of this Court, and so ought not to be pleaded here as a Record. To which it was answered, That if the Record of itself be made the Disability, then it ought to be pleaded (as objected on the other Side) Sub Pede Sigilli; but *this Record did not make the Disability, but is only an Evidence of it*. 'Tis true, the Clerk of the Peace in Certifying this Record, is but a ministerial Officer; but 'tis not a material Ob-

jection for the Plaintiff to ſay ſo, becauſe he hath an Opportunity to to traverſe it, and to try the Fact; but here the Plaintiff, by demurring to this Plea, hath owned the Fact, which otherwiſe ought to have been proved by the Record. But this was denied by the Council for the Plaintiff, who argued, That by the Demurrer the Fact was not confeſſed; for the Plaintiff *demurred, becauſe* the *Defendant had not pleaded the Fact*, and *not the Fact pleaded.* 8 Mod. 43, 44. Paſch. 7 Geo. 1722. Calvin v. Fletcher.

11. Another Objection was, That the Statute 3 *Jac. cap.* 4. *gives the Seſſions Power to make Proclamation againſt Recuſants to render themſelves &c. or if they do not, and that the Default is recorded, that ſhall be taken for as ſufficient a Conviction as a Trial by Verdict*; now the Defendant hath not pleaded that any ſuch Default was recorded at the Seſſions; therefore this being in a Criminal Caſe, wherein the utmoſt Certainty is required, this Plea cannot be good without purſuing all the Circumſtances required by the Act. The Anſwer was, That the *Statute requires the Conviction ſhould be certified into the Exchequer, with ſuch convenient Certainty that the Court may award Proceſs thereon*; and the Defendant hath pleaded, that it was certified there, which could not have been done unleſs the Default had been Recorded at the Seſſions. 8 Mod. 44. Calvin v. Fletcher.

12. Another Objection was, that the Defendant did *not ſet forth that* the *Plaintiff had not taken the Oaths ſince the King's Acceſſion* to the Crown; for if in Fact, he had taken them ſince that Time, then the Statute doth not extend to him; therefore this Matter ought to have been ſpecially ſet forth, like a precedent Condition by him who is to have the Benefit of it, (viz.) That the Plaintiff was a Perſon on whom the Act Attaches. *For by the Statute* 1 *Geo.* it is enacted That *all Perſons who ſhall take and ſubſcribe the Oaths in the Manner appointed by that Act, are indemnified from any Penalties and Incapacities &c. incurred by any former Neglect.* The Anſwer was, That by the next Clauſe in that Statute it appears that this doth *not extend to any* Perſon, *other than ſuch who entitle themſelves to any Offices or Places of Truſt*, for thoſe only are indemnified from any Incapacity incurred, and may bring any Action if they have taken the Oaths ſince the King's Acceſſion to the Crown. Sed Adjournatur. 8 Mod. 44, 45. Calvin v. Fletcher.

See (P.)

(R) Proceſs and Conviction.

One Phorbes of Glouceſter, was indicted at the Quarter-Seſſions in this Manner, viz. Civit. Glouceſt. ſſ. Memorand' quod ad Generalem Seſſ. Pacis Tent' apud Civitatem Glouceſt' in Com. ejuſdem Civitatis, 13 Die Januarii, Anno Regni Domini Car. 2. &c. 30 Coram Johanne Wagſtaff, Ar. &c. Juſticiariis ipſius Domini Regis ad Pacem &c. Nec non &c. Per Sacramentum S. F. &c. [of the Jury] Bonorum & Legalium hominum, [not ſaying Com. Prædict'] ad inquirend' &c. Præſentat' exiſtit, quod Jacobus Phorbes de Civit. Glouc' Gen. 1 Die Januarii, 30 Car 2. Apud Civit. Glouceſt. prad' fuit Ætatis of 16 Years and more, and did not come to Church &c. Infra Spatium Sex Menſium Integrorum extunc Prox' Sequen &c. Et ſuper hoc, facta hic in eadem Curia publica Proclamatio pro Domino Rege ſecundum Formam Statuti, that the

1. 3 *Jac.* 1. 4. S. 7. ENACTS That *Juſtices of Aſſiſe, Gaol Delivery, and Peace have Power to hear and determine all Offences againſt this Act; as well for not receiving the Sacrament according to this Act, as alſo for not coming to Church according to the former Laws; and likewiſe to make Proclamation that they ſhall render themſelves to the Sheriff or Bailiff of the Liberty where they are, before the next Aſſiſe, Gaol Delivery or Seſſions reſpectively: And if at the next Aſſiſe or Seſſions, the Offender ſhall not make Appearance, that Default, being Recorded, ſhall be taken for as ſufficient a Conviction in Law of the Offence, as if upon the ſame Indictment a Trial by Verdict had been had, and found againſt him and Recorded.*

the said James Phorbes render himself to the Sheriffs of the said City before the next General Quarter Sessions to be held for the said City, which he had not done, of which he is convicted. Upon this Conviction, Phorbes brought a Writ of Error, and tho' the Conviction was very strict, yet it being no Judgment, a Writ of Error lies not thereupon; For the Stat. 3 Jac. cap 4 Directs that after Proclamation made, and upon every Default recorded, it shall be as sufficient Conviction in Law, as if a Verdict had been found at a Trial upon an Indictment and recorded, so that it is no Judgment; but the Statute gives Process upon it for the Forfeiture, and the proper Remedy is to quash it in the Exchequer. The Faults in the Record are; 1. That the *Session is held* 13 *Jan.* 33 *Car.* 2. *and the Party is indicted* at the Sessions, *for not coming to Church from* 1 *Jan.* 33 *Car.* 2 *for* 6 *Months*, which is in all but 13 Days after the Sessions held, and so impossible. 2. The Indictment is *Per Sacramentum Recusant & Legatum Juratum, but not* (*Com' Pred'*) both which were held Faults to have quashed the Indictment, but not without 8 H. Conforming, as that Stat. of 3 Jac. requires; and so Defendant was left to have his Remedy in the Exchequer. Raym. 434 Pasch. 33 Car. 2. B. R. Phorbes's Case. —— See (Q) pl. 11. —— See (S.) pl. 3, 4

S. 9. *Every Conviction shall, before the End of the Term next following, be certified into the Exchequer, in such convenient Certainty that the Court may thereupon award Process for the Seizure of all the Offenders Goods, and two Parts of his Lands and Leases, in Case the* 20 *l. per Month be not paid as aforesaid.*

S. 35. *The Sheriff upon Lawful Writ, may justify to break an House for the Taking of a Recusant Excommunicate.*

2. Every Popish Recusant, being convicted, may be attach'd by a Writ *De Excommunicato capiendo*, being by the Stat. 3 Jac. 5. Excommunicated, being convicted. Per Coke Ch. J. and agreed to per Omnes. 2 Bulst. 155. Mich. 11 Jac. The King v. Griffith & Holland, & al.

3. Upon an Information against a Recusant for the Penalty it was objected that the Party had not been convicted, and so not liable to the Forfeiture. But it was resolved by the Court upon Demurrer, that a Conviction *upon the Case Prosecutus* which is *brought for the Forfeiture, is a sufficient* Conviction within the Words and Meaning of the Act. And that so it had been held by all the Judges of England. 11 Rep. 59. Mich. 12 Jac. Dr. Foster's Case. 1 Roll. R. 90. S. C. —— S. P. resolved upon the Authority of that Case. Roll R. 234. Mich. 13 Jac. B. R. The King v. Law. —— 3 Bulst. 87. S. C.

4. Whether the Recusant be convicted *upon Verdict, Confession, or Demurrer*, it is a Conviction within the Meaning of the Act. Resolv'd upon Demurrer. 11 Rep. 60. Mich. 12 Jac. Foster's Case. Roll. R. 89. S. C. and P.

5. Upon an Information for Recusany for 11 Moths, it appeared at the Trial at the Bar that Defendant was *sick for a great Part of the Time*; *But* it being alleg'd that the Party was *a Recusant both before and after*, the Court said that should be no Excuse; For it shall be intended an obstinate Forbearance: Whereupon Defendant was found guilty for all the Time. Cro. J. 529. Pasch. 16 Jac B. R. Parker v. Curson, & Ux.

6. An Informer made his *Demand as* for a Recusancy *for* 11 *Months*, when *of his own Shewing it appear'd to be for* 23 *Months*, except one Day. And so it was objected in Arrest of Judgment, that it appeared not for which of the Months, the Forfeiture was demanded; Sed non allocatur; For tho' he has not demanded so much as he might, yet it is well enough, and for the Defendant's Advantage; and the Recovery shall be intended for the 11 first Months; and the Adding of more is not material. Cro. J. 529. Pasch. 16 Jac. B. R. Parker v. Curson, & Ux. 2 Roll R. 90 S. C. by the Name of Sir Geo. Curson's Case.

7. In an *Action Qui Tam*, upon the Stat of 23 Eliz. the Defendant demurred to the Declaration, and after Joinder in Demurrer the *King died*; yet it was resolved that *none of the Proceedings were abated*; For it is merely the Suit of the Party, and therefore, by the Stat. 1 E. 6. it is not Discontinued. Cro. C. 10. Trin. 1 Car. C. B. Lionel Farrington's Case. Hutt 82. S. C. by the Name of Farrington v. Arundel. Upon Conference with all the Judges of Serjeant's Inn

(S) Error

8. Error in Prosecution &c.

1. F[illegible] Persons were indicted upon the Statute 23 Eliz. and the Indictment [illegible] Church. It was objected that the Indictment was not good; For this Uterque [illegible] them, and not where they are many, as here, and so is [illegible] and consequently nothing laid to their Charge; [illegible] the Justices doubting thereof, demanded the Opinion of the [illegible] One of them, and is so [illegible] shall not be taken [illegible] in an [illegible] Le. 241. [illegible] 33 Eliz. B. R. [illegible] Case.

[illegible] Indictment of Recusancy [illegible] and held [illegible] 1 Eliz. [illegible] 23 Eliz. [illegible] Case [illegible] it is Eggleton's Case, and Popham said the Reason was, because the Statute of 23 Eliz. depends upon the 1 Eliz. For it is that every one that refuses to go to Church, against the Form of the Statute of 1 Eliz. shall forfeit 20 l. &c.

[illegible] — The Lord [illegible] Non [illegible] 33 and [illegible] Popham [illegible]

[illegible] 3 Jac. 1. cap. 4. [illegible] 16. No Indictment [illegible] Church [illegible] Months [illegible] Ordinary [illegible] Default [illegible] Default [illegible] Process [illegible] Court [illegible] Damage [illegible] Laws of England [illegible]

[illegible]

[illegible] 4. Error [illegible] Indictment of Recusancy [illegible] Exception [illegible] That the Indictment [illegible] Parish [illegible] It is [illegible] That [illegible] Quod non [illegible] But the Court held, That [illegible] material, and it was quashed without any Exception [illegible] the Statute of 3 Jac. 4. being express, That [illegible] Default [illegible] But [illegible] the Judgment [illegible] apparently to the King's Prejudice [illegible]

reverſ'd. Cro. C. 504. Trin. 14 Car. B. R. The Marqueſs of Winchester's Caſe.

And becauſe the Judgment was *Forfeit* inſtead of *Forfeiture*, it was held not good

(T) Diſability to Purchaſe &c.

1. A Prohibition was prayed, becauſe in a Bill in the Court of Requeſts, to carry an Agreement into Execution, it appeared that the Plaintiff was a Recuſant convict, and ſo a Perſon excommunicate. But per Cur. The Defendant has anſwered him there, admitting him a Perſon able, and it is now *too late to have that Plea*. And a Prohibition was denied. Noy 68. Anon.

2. 11 & 12 *W.* 3. *cap.* 4. *S.* 4. Enacts that *if any Perſon educated in the Popiſh Religion, or profeſſing the ſame, ſhall not within* 6 *Months after he or ſhe attain the Age of* 18 *Years, take the Oaths of Allegiance and Supremacy, and alſo ſubſcribe the Declaration ſet down and expreſs'd in an Act made in the* 30*th of Charles* 2. *to be by him or her made, repeated and ſubſcribed in the Court of Chancery or B. R. or Quarter-Seſſions of the County &c. where ſuch Perſon ſhall reſide, every ſuch Perſon ſhall, in Reſpect of him or her ſelf only, and not as or in Right of any of his, or her Heirs or Poſterity, be adjudged incapable and made incapable to inherit or take by Deſcent, Deviſe or Limitation, to be in Poſſeſſion, Reverſion, or Remainder, any Lands, Tenements or Hereditaments within England, Wales, or Berwick upon Tweed, and that every ſuch Perſon is of ſuch Power, Capacity or Faculty as if he did not take the ſaid Oaths, and make, ſubſcribe and deliver the ſaid Declaration in Manner as aforeſaid, the next of his or her Kindred, which ſhall be a Proteſtant, ſhall have and enjoy the ſame Lands &c. without being accountable for the Profits by him or her received during ſuch Enjoyment thereof, as aforeſaid; but in Caſe of any wilful Waſte committed on the ſaid Lands &c. by the Perſons ſo having or enjoying the ſame, or any other by his or her Licence or Authority, the Party delinquent, his or her Executors and Adminiſtrators, ſhall and is to undergo treble Damages for the ſame, againſt the Perſon committing ſuch Waſte, his or her Executors or Adminiſtrators, by Action of Debt in any of His Majeſty's Courts of Record at Weſtminſter; and that from and after the* 10*th Day of April* 1700. *every Papiſt, or Perſon making Profeſſion of the Popiſh Religion, ſhall be and is hereby made incapable to purchaſe either in his or her own Name, or in the Name of any other Perſon or Perſons, to his or her Uſe, or in Truſt for him or her, any Manors, Lands, Profits out of Lands, Tenements, Rents, Terms, or Hereditaments within England, Wales, or Berwick upon Tweed, and that all and ſingular Eſtates, Terms, and any other Intereſts or Profits whatſoever out of Lands, from and after the ſaid* 10*th Day of April, that ſhall be made, ſuffered, or done, to or for the Uſe or Behoof of any ſuch Perſon or Perſons, or upon any Truſt or Confidence mediately or immediately, to or for the Benefit or Relief of any ſuch Perſon or Perſons, ſhall be utterly void and of none Effect, to all Intents, Conſtructions and Purpoſes whatſoever.*

* It is remarkable, that this Clauſe extends only to the Caſe of a Papiſt's purchaſing at the Age of 18, and not to the Caſe of a Papiſt's purchaſing after he is of that Age, and has taken the Oaths &c. and ſubſcribed the Declaration &c. which is the Caſe of every Papiſt in England, except Minors. 2 Wms's Rep. 554. Pasch. 1728. Vernon v. Bethell — It has been held, That a Papiſt cannot purchaſe a Perpetuity in Poſſeſſion, Reverſion or Remainder, by Deed or Will, and that it was agreed, That where an Anceſtor dies ſeiſed of an Eſtate of Inheritance, it deſcends upon *and veſts in his Heir (tho' a Papiſt) for the Benefit of his Heirs*; and that the next *Proteſtant* Kin *has only a Right to* the Perception of *the Profits during the Non-conformity* of the Heir. 3 New Abr. 799. Pasch. 1738. C. B. Mallom v. Bringloe

A *Deviſe* to a Papiſt is a *Purchaſe* within this Act, but that is where ſuch Papiſt is a Stranger to the Inheritance, but not where a corrective Eſtate or Intereſt comes to the Heir at Law by Deviſe, for that is but a *Modification* of that Eſtate which would otherwiſe deſcend to him, ſo is 11 & 12 *W.* 3. and conforms within 6 Months after. 9 Mod. 150. in the Houſe of Lords, Rogers v. Ratcliffe — 8 Vin. cited by Ld. C. Parker. 2 Wms's Rep. 9. in Caſe of Hill v. Filkins

A Papiſt *alone* 18 *and an half Years or ſole*, is not capable of taking Lands by a Deviſe, and the Word (*Purchaſe*) in the latter Clauſe, is uſed in *Contradiſtinction to the Word* (*Deſcent*) notwithſtanding it was urged that the Expreſſion of (*Purchaſed by a Papiſt*) etc. fully when the Words following, viz. *in his own Name, or in the Name of any other in Truſt for him*) would be intended where ſuch Papiſt took

ſed does ſomething for himſelf; whereas in Caſe of a Deviſe, or Settlement upon him, the Perſon taking is merely paſſive, and may know nothing of the Matter before it is done. And it is now ſettled by the Houſe of Peers, that either a *Deviſe or Settlement* to a Perſon profeſſing the Popiſh Religion, of above 11 and 1 half Years of Age, *is void*, and the Perſon not capable of Taking; the Act intending utterly to diſable the Papiſt of that Age to take any new Acquiſitions, or what was not his ancient Inheritance. 2 Wms's Rep. 4 5. cites the Caſe of Roper v. Ratcliff.

But if ſuch Papiſt was *above* 18 *and* 1 *half before the making the Statute*, ſo as it was impoſſible to comply with the Statute, then ſuch Perſons are not within the Clauſe, nor ſhall ſuffer by it. 2 Wms's Rep. 361. 364. Trin 1726. Carrick v. Errington.——2 Wms's Rep. 364. ſays that this Decree was afterwards affirm'd on Appeal to the Houſe of Lords.

A *Deviſe of the Perſonal Eſtate* to a Papiſt under 18, who afterwards turns Proteſtant, was admitted to be good. 2 Wms's Rep. 7. Paſch 1722. in Caſe of Hill v Filkins.

A. *deviſes Lands to Truſtees and their Heirs*, to the Uſe of *the eldeſt Son of B. for* 2 *Years next after her* (A.'s) *Death*, and *if within theſe two Years the ſaid eldeſt Son ſhould become a Proteſtant*, then *to the Uſe of ſuch eldeſt Son in Tail Male*; and for Want of ſuch Conformity, then to the Uſe of the 2d. and every other Son of the ſaid B. being a Proteſtant, and to the Heirs Males of their Bodies being Proteſtants, *and for Want of ſuch Conformity in any of the Sons*, or if they ſhould die without Iſſue Male, *then to the Uſe of the eldeſt Daughter of B. being a Proteſtant, and to the Heirs of her Body, being Proteſtants*; Remainder to the 2d &c. Daughter of B. being a Proteſtant in Tail, Remainder to the eldeſt Son of C. (who actually was a Proteſtant.) A had ſeveral Sons and Daughters, the *Sons were and continued Papiſts*, but the *eldeſt Daughter* at *above* 18 *and* 1 *half Years old conform'd*. Ld C. Macclesfield held, That the Conformity was a Condition precedent to the taking the Eſtate, and that the Act of 11 & 12 W. 3. 4. does not affect this Caſe; for this Deviſe is not to a Papiſt, but excluſive of a Papiſt, and that if ſhe be a ſincere Convert, ſhe is intitled to take; but in Regard there might be *ſome Doubt of the Sincerity of her Converſion*, he directed it to ſtand over. 2 Wms's Rep. 132. Paſch. 1723. Cartaret v. Cartaret.

And it appears by what was ſaid in the above Caſe by the Court, tho' not taken Notice of in the State of the Caſe, that the *Will charged the Lands with Annuities to ſeveral of the Brothers and Siſters*; and it being ſaid that they were *Papiſts*, Lord Chancellor directed the Maſter to inquire what Age they were of at A.'s Death, and when the Annuities were to veſt; and ſaid that if they were above 18 and 1 half, the Deviſe to them is void, but *if ſo young as* 3 *or* 4 *Years old, and ſo incapable of Profeſſing the Popiſh Religion, they ſhall retain the Annuities till* 18 *and* 1 *half*, from which Time the Annuities are to go to the Proteſtant Kindred, till the Death or Conformity of the Annuitants. But his Opinion was, That *if they were* 13 *or* 14 *Years old at the veſting of theſe Annuities*, then they might be looked upon as capable of Profeſſing the Popiſh Religion, and if in Fact they did profeſs it, they were incapable, and the Deviſe to them void. 2 Wms's Rep. 134. 135.——10 Mod 512. S. C.

† The Statute *extends to Truſts as well as Legal Eſtates*; and therefore where a Remainder was limited to Truſtees to preſerve Contingent Remainders, and to let the firſt Remainder-man, who was a Papiſt, take the Remainders and Profits during his Life; this laſt is a void Truſt, tho' the Truſt to preſerve the Contingent Remainders to the firſt &c. Son of the Papiſt, is good. Per Lord Ch. King. 2 Wms's Rep 361. Trin 1726. Carrick v. Errington.

‡ By the expreſs Words of this Act, a Term *for two Years*; nay, for ought I can ſee, a Term for *one Year*, or for any certain Time, is prevented from being made to Papiſts. Per Pratt Ch. J. 9 Mod. 192. in Caſe of Roper v. Radcliffe ——Perhaps for Half a Year. Ibid. 193 —— And the Truſt of a Term is as much within the Act as the legal Intereſt of a Term. Per Pratt Ch. J. Ibid. 192.

Lord Dover, being poſſeſs'd of a long *Term for Years*, made his Will, and his Lady, who was a Papiſt, *Executrix* thereof. And it was reſolved by my Lord Chancellor, That notwithſtanding the Diſabling Act of 11 & 12 W. 3. The Term veſted abſolutely in her, and this was not a Purchaſe within that Act. And he ſaid that a Papiſt may be Tenant in Dower, or by the Courteſy, becauſe in all theſe Cases it is *by Operation of Law*, and not by any *Act of the Party*, that the Eſtate comes to him. 3 New Abr. 799. The Caſe of Lord Dover's Will.

S C Cited 2 Wms's Rep 5.—— S. C. Cited per Lord C. King. 2 Wms's Rep. 362. in Caſe of Carrick v. Errington, and ſo ruled by his Lordſhip; and agreed, and given up by the Counſel on all Sides

3. *Lands deviſed to* a Papiſt is a Purchaſe within the 11 & 12 W. 3. And if Lands are deviſed to *pay Debts* and Legacies, and a Papiſt is made *Reſiduary Legatee*, or is Heir at Law, the Lands ſo deviſed ſhall as to them be deem'd as Lands, becauſe ſuch by Payment of the Debts &c. may ſtop the Sale, and require a Conveyance, tho' as to Creditors and other Legatees, ſuch Lands ſhall be deem'd as Money. 9 Mod. 167. Roper v. Radcliffe, in the Houſe of Lords; and ſo revers'd a Decree of Ld. Ch. Harcourt.

4. A Papiſt being *Tenant in Tail ſuffered a Common Recovery*, and declared the *Uſes to himſelf and his Heirs*. This was held not to be a Purchaſe within the Statute of 11 & 12 *W.* 3. 4. 9 Mod. 172. Hill. 5 Geo. Ld. Derwentwater's Caſe.

A Papiſt *Proſeiſed in Jure Uxoris*, and

5. If a Papiſt is *ſeis'd of a defeaſible Eſtate*, and *levies a Fine with Proclamation*, and 5 Years paſs without any Claim, the Eſtate is now become

come indefeaſible; this is an Alteration of the Eſtate, but no Body will ſay it is a *Purchaſe*. 9 Mod. 175. in Lord Derwentwater's Caſe.

being intitled to be Tenant by the Curtesy joined in a Line with his Wife. And it was *decreed that he could take no larger Eſtate* under the Fine than he had before, *tho' as large a one he might*. Caſes in Chanc. in Lord King's Time. 30. Trin. 11 Geo. 1. Withrington v. Banks and Cotesworth.

6. A Papiſt *ſettles Land* on his Son *with a Power of Revocation*, and after he executes that Power, ſo that the Eſtate is veſted in the Father; this is an *Alteration of Eſtate*, but was never yet call'd a *Purchaſe*. Arg. 9 Mod. 175. in Lord Derwentwater's Caſe.

7. Papiſts cannot take by Leaſe or Grant, and conſequently they cannot take a *Mortgage*. And it is within the expreſs Words of the Act; for it is an Intereſt in Land, and on Nonpayment the Eſtate is abſolute in Law, and his Intereſt is good in Equity to intitle him to receive and enjoy the Profits till Redemption or Satisfaction; and on a Foreclosure he has the abſolute Eſtate both in Law and Equity. Per Pratt Ch. J. 9 Mod. 196. in the Caſe of Roper v. Radcliffe.

S. P. Arg. 9 Mod. 175. in Lord Derwentwater's Caſe. A Mortgage was made to a Papiſt, who aſſigned to a Proteſtant for a full Conſideration. An Ejectment was brought againſt the Aſſignee by a ſubſequent Mortgagee, who recovered by Reaſon of the Diſability of the firſt Mortgagee. All this appeared upon a Bill brought in Chancery; and my Lord Chancellor was of Opinion, that a Mortgage to a Papiſt is void. But in this Caſe the Aſſignment to the Proteſtant, and the Trial in Ejectment, were both before the 3 Geo. 1. which, were it otherwiſe, would it ſeems have made an Alteration. 3 New Abr. 799. Mich. 1729. Pelham v. Fletcher.

8. A Remainder was limited by A. to B. a Papiſt *for Life*, *Remainder to Truſtees to preſerve &c.* Remainder *to the 1ſt &c. Son* of B. *in Tail Male*, Remainder *to C. a Proteſtant*, in like Manner; Remainder *to his own right Heirs*. The right Heirs were two Siſters, Proteſtants. Lord C. King held, That the Rents and Profits of the Premiſes, from the Death of A. the Grantor, ſhould go to the Siſters during the Life of B. for if it ſhould go to C. it could not afterwards go back to any Sons of B. who might be Proteſtants; and that this being an Hardſhip and *Wrong to a third Perſon*, and tho' in Favour of C. the next in Remainder, in order to let him in to take the Profits immediately, it was inſiſted that the Settlement being by Leaſe and Releaſe, the whole Eſtate paſs'd out of the Grantor, and could not return to him again, but muſt go to the next in Remainder; and that this being a Truſt which is a Creature of Equity, the Court ought to let C. into Poſſeſſion, and that in Caſe B. ſhould leave Proteſtant Sons, the Court might then order the Truſt for them; yet his Lordſhip ſaid he would not take ſuch extraordinary Power on himſelf, and the Intent of the Statute was more plainly complied with by conſtruing the Truſts void as to the Papiſts only, without letting the next Proteſtant Remainder-man into Poſſeſſion before his Time, and ſo prejudice the Sons of B. 2 Wms's Rep. 361. Trin. 1726. Carrick v. Errington.

MSS. Rep. cites 15 Mar. 1728. Errington v. Carrick.

9. A *Bill* was brought, praying *that Defendant might diſcover whether J. S.* (*under whoſe Will the Defendant claimed*) *was a Papiſt*, or not. The Defendant pleaded the *Statute of* 11 & 12 *W.* 3. And the Lord Chancellor was of Opinion, That he was not obliged to diſcover; That there is no Rule better eſtabliſhed, than that a Man ſhall not be obliged to anſwer to what may ſubject him to the Penalty of an Act of Parliament. And there can be no Doubt but this is a Penal Law, inflicting Diſabilities or Incapacities. If a Bill is brought *againſt the Perſon* for a Diſcovery whether he is a Papiſt or not, he is not bound to diſcover; and where is the Difference between him and *the Perſon claiming under him?* Beſides, what ſways with me very much, is the great Inconvenience that would follow ſhould this Plea be diſallowed; we ſhould have nothing in this Court but Bills of Diſcovery whether ſuch and ſuch Perſons were Papiſts, an Incapa-

Tho' it is objected, That this is *not the Caſe of a Forfeiture, becauſe* the Eſtate was *never veſted*, and therefore can never be devested, yet it falls under the ſame Reaſon and

Disability to hold at all by Act of Parliament, is certainly

or not. And Nobody knows what Confusion would follow; therefore the Plea must be allowed. 3 New Abr. 799. Trin. 12 Geo. 2. Smith v. Read.

as much a Penalty as the Forfeiture of an Estate by a Person who had a Right to enjoy it before the Forfeiture. Per Lord Chancellor. Ibid.

(U) How a Papist is Affected by 11 & 12 W. 3. 4.

Persons 18 Years old at the Time of making the Stat. 11 & 12 *W.* 3. are within the Intent and Meaning, tho' out of the Letter of the Act; However, such Persons being Heirs at Law, are proper to

1. A Papist under the Age of 18, at the Time of making the Statute 11 & 12 *W.* 3. 4. may take either by Descent or Purchase, and *the Word Purchase in this Statute* is only a *Modification of the Estate*, and shall not be taken in the full Extent of the Word; for these Purchases are *intended only by the Statute, by which Papists enlarge and extend their Landed Interest*, and not where by Deeds of Settlement the ancient Family Estate is new modell'd, without making any new Acquisition. So that even at this Day a Purchase by Limitation in a Settlement, or by a *Devise to* a Papist under the Age of 18 Years, is good; so as such Papist within 6 Months after he comes to that Age, conform and take the Oaths &c. otherwise he loses the Pernancy of the Profits during his Life only. Per 4 Commissioners Delegates against 1. 9 Mod. 180. Hill. 5 Geo. Ld Derwentwater's Case.

make Application to Chancery, to set aside a Conveyance got by Fraud. 9 Mod. 35 Trin. 9 Geo. Carrick v. Errington.

An Estate forfeited for Rebellion by the next of Kin, was restored to the Heir at Law on his becoming Protestant,

2. The *Heir at Law*, tho' a Papist, is *capable to take the Inheritance*; for it is in him, tho' the next Protestant of Kin hath the *Pernancy of the Profits* till the other becomes a Protestant, and the * *Trust limited to support Contingent Remainders*, cannot be said to be a Trust for a Papist, nor shall the Remainder-man take immediately. Arg. said to be settled in Case of Roper v. Radcliff. 9 Mod. 34. Trin. 9 Geo. in Case of Carrick v. Errington.

and taking the Oaths. 9 Mod. 54 Trin. 9 Geo. Sir Lawrence Anderton's Case.——Lands were devised to a Papist under 18, who before 18 conformed. The next Protestant Heir sued for the Land, but held that the Devise is good, and tho' he had not conform'd, yet the *Inheritance is in* the Papist, and shall *descend to his Heirs*, and he shall maintain an *Action of Waste*, by Virtue of the Stat. 11 & 12 *W.* 3. *cap.* 4. *Par.* 5. 6 against the next Protestant Heir, who is intitled to take the Profits during the Disability. 9 Mod 156. Trin 11 Geo. Hill v. Filkins.——2 Wms's Rep. 6. Pasch. 1722. S. C.——Parker C. held, That being a Papist at the Death of the Testator, the Estate would never vest; but King C. held, That *conforming at* 18 made the Devisee capable. 10 Mod. 536. Hill v. Filkins

* Tho' the *first Limitation* of an Estate is to a Papist, who is disabled by the 11 & 12 *W.* 3. 4. yet it is not such a void Limitation, as that the *Remainder* shall immediately *vest*, as if the first was dead without Issue. Per Cur. 9 Mod 34. Trin. 9 Geo. in the Case of Carrick v. Errington, cited there as settled in the Case of the Dutchess of Hamilton——Ld. C. King held, That the Remainder shall take Effect presently in the same Manner as if a Remainder were limited to a Monk for Life, or to one that refuses to take, or if such Remainder-man had been dead, and no such Limitation had been 2 Wms's Rep. 562 Trin. 1726. Carrick v. Errington.

But per Cur. That Decree was made on some extraordinary Circumstances.

3. A Papist must be *accountable* for the Profits since the Time of the Original Purchase; cited to have been so resolved in Dom. Proc. in Case of Blake v. Blake. 9 Mod. 146. Trin. 11 Geo. in Case of Winter v. Birmingham.

9 Mod. 147. in Case of Winter v. Birmingham.

The Act of 11 & 12 W. 3. is a bare

4. If Papists *take Conveyance to their own Trustees*, and it be undiscover'd, all is well; or if it be discovered, the Conveyance if it is true is

void

void by the Act, but then *it revests again in the first Owner or Trustees.* Per Pratt Ch. J. 9 Mod. 194 in Case of Roper v. Radcliffe. Disability. Ibid 199. — It creates only a Disability, but makes no Forfeiture; it prevents a Vesting, but divests nothing that is vested Ibid. 200.

For more of Recusant in General, See **Dissenters, Prerogative** (P. a) &c. **Universities,** and other proper Titles.

* Redisseisin and Post Disseisin.

* Is only an Inquest of Office Per Knivet J. Br. General Issue, pl. 36. cites 40 Ass. 23. — Br. Redisseisin, pl. 5. cites S. C

(A) Statutes.

1. 20 *H.* 3. *cap.* 3. ENACTS, That *if any be disseised of their* † *Freehold, and* ‡ *before the Justices of Eyre have recovered Seisin by* ‖ *Assise of Novel Disseisin,*

† This Word (Freehold) *extends to Land, Rent, Common,* or the like, whereof if a Man be disseised, he may have an Assise of Novel Disseisin 2 Inst. 82, 83. — Co Litt. 154. observes, That Littleton in few Words hath made a good Exposition of the Word (Liberum Tenementum) in this Statute where in S. 233. he expounds it to extend to a *Rent-Seck or Rent-Charge,* For tho' they are against Common Right, yet a Man has a Freehold in them.

‡ Justices in Eyre are *named only for Example,* and because Assises were taken most commonly before them; and tho' the Assise be taken in B. R. or Court of C.B or before Justices of Assise, yet it is within this Statute; for tho' the Words be special, yet the Reason of the Law is general; Et quando Lex est specialis, Ratio autem generalis, Generaliter Lex est intelligenda. 2 Inst. 83 — S. P. Co. Litt. 154. a. That the Statute is to be intended, before any other Justices that have Authority to take Assises, which, he says, is worthy of Observation, being a Penal Law — F N B 188. (D) S. P.

‖ This Branch *extends not to an Assise of Mort d'Ancestor, or Darrein Presentment,* or *Juris utrum*; But if a Man recovers in a Writ of Redisseisin upon that Recovery, he shall have a Redisseisin and the like as often as he is redisseised. 2 Inst 83. cap. 3. ——— Upon a Plaint in the Nature of a *Fightforce,* according to the Custom of a City or Borough, and a Recovery thereupon had, a Redisseisin does not lie; for no Redisseisin lies but where the first Plea began by Writ. 2 Inst. 83 cap 3. —— S. P. And also in ancient Demesne there are no Coroners. Co. Litt. 154. a. —— Here Assise is taken for the Verdict of the Assise, as Littleton expounds the same, Vel per Recognitionem &c. or by Confession. Then the Question is, What if the Recovery were upon Demurrer, or by pleading of a Recovery and Failer of it, or by any other Matter? And seeing Littleton speaks generally, it must be understood of all Manner of Recoveries in an Assise of Novel Disseisin; and so it is confirmed by the statute of W. 2. cap. 26. Co. Litt 154. a. —— And therefore if a Man sue a *Writ of Right close in ancient Demesne,* and makes Protestation to sue in the Nature of Assise of Novel Disseisin, and recovers in that Writ, and after he is redisseised, he shall not have a Writ of Redisseisin; because the first Recovery was not by Writ of Assise of Novel Disseisin. Co Lit. 154. —— S P. F. N. B. 189. (G) for that Writ lies not upon an Assise at the Common Law.

Or by Confession of them which did the Disseisin, * *and the Disseisee hath had Seisin delivered by the Sheriff,*

* And *so* it is *if the Plaintiff* in the Assise *enters* and executes the Recovery by Entry. 2 Inst. 83. — Tho' the Statute mentions Seisin had by the Sheriff, yet Littleton, S. 233 mentions only (Execution had) generally; so as whether it be by the Sheriff or the Party, so as an Execution or Possession be had, it suffices. Co. Litt. 154. a.

If the * *same Disseisors, after the Circuit of the Justices, or in the mean Time, have disseised the same Plaintiff of the same* † *Freehold,*

* So as it must be the same Disseisors; But here *Idem* is taken for *Non alii,* and therefore if the *Recovery* in the Assise were *against* 2 Disseisors, and *one* of them *redisseises* him again, he shall have a Redisseisin against him; for he is not Alius *Et* if the *Recovery* had been *against one,* and *he and another redisseise* the Plaintiff, he shall not have a

Redisseisin,

Redisseisin; for here is Alius: And he cannot have a Redisseisin against the former Disseisor alone, because he is Jointenant with another. Co. Litt. 154. a. b.

If 2 *Coparceners* be *disseised*, and *recover* in an Assise, if after they *make Partition*, and after *they are severally disseised*, they shall *have several Redisseisins*; and *so* it is *of Jointenants*, for *they are Inden conquerentes* & non Alii. Co. Litt. 154. b —— Also a Redisseisin does lie *against the Disseisor* who redisseises, *and* against *another to whom he made Feoffment after the 2d Disseisin*; for otherwise the Redisseisor might prevent the Plaintiff of his Redisseisin. But in an *Assise against A. and B.* in which *A. is found Disseisor and B Tenant*, and the Plaintiff recovers, and after *he, who was found Tenant, disseises* the Plaintiff, he shall not have a Redisseisin, because he did disseise him but once. Co. Litt. 154. b.

† If the *Lessee recovers a* Rent when it is a *Rent-Service*, and *after* the Rent *becomes a Rent-Seck* by Surplusage, and the same Person doth redisseise him of the Rent, he shall have a Redisseisin; for the *Substance* of the Rent *remains*, tho' the Quality be altered. Co. Lit. 154. b.

If *Tenant in special Tail recovers* in Assise, and after *becomes Tenant* in Tail, *after Possibility* of Issue extinct, *and then is redisseised*, he shall have a Redisseisin; for albeit the State of Inheritance be altered, yet the *same Freehold remains*. Co. Lit. 154. b.

* The Reason of this Punishment is, That Interest Reipublicæ ut sit finis Litium; otherwise great Oppression might be under the Colour and Pretext of Law. For if there should not be any End of Suits a rich and malicious Man would by Actions and Suits infinitely vex one that has Right, and at length compel him to purchase his Peace by relinquishing his Right. And the Reporter says, That this Mischief is the Consequence of the introducing Trials of Rights and Titles of Inheritance and Franktenement in Personal Actions, in which there is no End of Suits; and that this has introduc'd many great Inconveniencies (which are there enumerated.) 6 Rep. 9. Mich. 40 & 41 Eliz. in Ferrer's Case.

† See the Statute of Marlebridge, cap. 8. After.

*And thereof be convicted, they shall be forthwith taken and * committed, and † kept in the King's Prison until the King hath discharged them by Fine, or by some other Mean;*

And this is the Form how such Convict Persons shall be punished; When the Plaintiffs come into the Court of our Lord the King, they shall have the King's Writ directed to the Sheriff, in which must be contained the Plaint of Disseisin framed upon the Disseisin;

* This is spoken in the Plural Number; therefore where there are two or more Coroners, he ought to take at least two; but *where there is but one*, if he take him it is sufficient within the Meaning of this Statute, tho' regularly the Plural Number is not satisfied with one. 2 Inst. 84. —— Bridgm. 119 in the Case of Evans v. Watkins, cites 23 Ass. 7. That if he goes with one Coroner only where there are more, it is not good. And that the Law is the same if he take not others with him according to 26 E. 3. 5.

*And then it shall be commanded to the Sheriff, That he, * taking with him the Keepers of the Pleas of the King's Crown, and other lawful Knights, † in his proper Person, shall go into the Land or Pasture whereof the Plaint hath been made; And that he make before them, by ‡ the first Jurors and other Neighbours and lawful Men, diligent Inquisition thereof; And if they find him disseised again (as before is said) then let him do according to the Provision aforementioned; but if it be found otherwise, the Plaintiff shall be amerced, and the other shall go quit;*

Two Coroners were in the County, *the one* of them *was sick* and so could not come, *the Writ* of Redisseisin *was directed to the other*, who executed the same alone. Upon the Redisseisin the *Sheriff returned, That he took with him one* of the Coroners, *the other being sick*, and so could not come; and all this appears by the Record to be so. Per Doderidge J. This Statute assigns a Number certain, and the same is not to be diminished; That if there had been 4 Coroners, and he had taken two of them with him, this had been good, and the Statute well pursued; but not here, as this Case was, taking but One Coroner with him. The whole Court agreed with him herein, That this was a clear Error; and thereupon the Judgment given in the Redisseisin was reversed. 2 Bulst 93. Trin. 11 Jac. Penson v. Knight.

† So that if he does not go in Proper Person, and return accordingly, it is all void; because he does not pursue the Statute, Quia stricte &c. Br. Parliament, pl. 93. cites 7 H. 4.

‡ This must be understood where there were Juratores in the Assise; for if there were none, then it must be tried only Per Alios; As if the Disseisor plead a Record, and fails of it; or if he plead a Bar, and confesses an immediate Ouster, upon which the Plaintiff doth demur, and Judgment is given for Plaintiff, and after the Plaintiff is redisseised, the Plaintiff shall have a Redisseisin; and it shall be tried only Per Alios, because there were no Jurors at all in the former Assise; For the Statute (albeit it be Penal) shall not be so literally expounded, that if it cannot be tried Per Primos Juratores, that it shall not be tried at all; for Verba intelligi debent cum effectu. But where there were any Jurors it shall be tried by them and others; and where there were none, then by others alone; But if there were Jurors in the Assise, and they all die, and after he which recovered is redisseised, there (by the Act of God) the Redisseisin fails. And so it is, if all the Jurors be dead * saving one, because the Words of the Statute be, Per Primos Juratores, & alios; and so note a Diversity where there were never any Juratores at all, for there the Statute could by no Possibility have wrought but upon others only; but where there were once Juratores, and the Party neglects his Time, and by the Act of God

[illegible]

they fail, there the Redisseisin fails, because it cannot be tried Per Primos Juratores, (which sometimes were in Esse) & alios, as the Statute speaks. 2 Inst. 94. —— * S. P. F. N. B. 189. (H)

Neither shall the Sheriff execute any such Plaint without special Commandment of the King.

In the same Manner shall be done to them that have recovered their Seisin by Assise of Mort d'Ancestor.

And so shall it be of all Lands and Tenements recovered in the King's Court by Inquests, if they be disseised after by the first Deforcors, against whom they have recovered any wise by Inquest.

Here is the *Post Disseisin* given where the Recovery in a Mort d'Ancestor, or in any other Real Action, is by Verdict; and in this Case the Recoveror shall have a Post Disseisin against the former Tenant being Deforceor, that disseised him after the Recovery; But if the Recovery be by Reddition or Default &c. he shall have a Post Disseisin upon the Statute of West 2 cap. 26. Nota, Here (Eodem modo) are Words of great Operation; for they imply, That there must be Idem Conquerens de eodem Tenemento, & Idem Tenens, against whom the Recovery was had after the same Manner as is before said in Case of a Redisseisin. 2 Inst. 84.

2. 52 *H.* 3. *cap.* 8. Enacts, That *they which be* * *taken and imprisoned for* † *Redisseisin, shall not be delivered without special Commandment of our Lord the King, and shall make Fine with our Lord the King for their Trespass.*

* The Statute of Merton, cap. 3. gave the Redisseisin, and Post Disseisin, the Words of which Statute being, In Prisona Dominis Regis detineantur quousque per Dominum Regem, vel aliquo alio modo Deliberentur. Upon these Words, Vel aliquo alio modo Deliberentur, they were delivered by the Common Writ De homine Replegiando; for the Liberty of a Freeman is so much favoured in Law as there is ever a benign Interpretation made for the Benefit thereof. Now this Statute doth enact, That they shall not be delivered Sine speciali Præcepto Domini Regis; that is, By the King's Writ, reciting the special Matter, and for a Fine with the King therefore to be made. And if he that is attainted in a Redisseisin be in Prison, this Fine that this Act speaks of, as some have said, ought to be assessed in the Chancery; to which end, he must have a Certiorari to remove the Record thither; and out of the Chancery, to have his Writ to discharge him; for Sine speciali Præcepto Domini Regis is intendable by Writ (say they) in the Chancery. 2 Inst. 115 —— S. P. Dalt. Sher. 346. cites 8 H. 8. f. 1. And says, This was the Opinion of the Court, (except Inglefield) 18 H. 8. f. 1. because the Words of the Statute of Marlebridge are, That such Offenders shall not be delivered without the *King's special Commandment*, which cannot be but in Chancery. But he held, That the Justices of C. B having the Record before them (by a Certiorari) had Power to assess the Fine, and to award such a special Writ out of that Court to the Sheriff to let the Prisoner at large; and that such a Writ, issuing out of that Court, was the special Commandment of the King; and that the *Meaning of the Statute was only to prohibit the Sheriff to assess the Fine, and not* to prohibit the Justices, who are *Justices of Record.*

And therefore if one be attainted in a Redisseisin, and is at large, the Party may have a Certiorari to remove the Record into C B and by Capias out of that Court he may be taken; And some do hold, That this Court cannot assess the Fine, nor make the special Writ. 2 Inst. 115.

If a Man be convicted before the Sheriff, upon a Redisseisin and Post Disseisin, then he shall not be delivered out of Prison without the King's special Command, and then he ought to sue a Certiorari to remove the Record into B. R. and there to agree with the King for his Fine; and thereupon he shall have a Writ to the Sheriff to deliver him out of Prison. F. N. B 190 (F) —— 2 Inst. 115. cites S. C.

† This does extend as well to the Post Disseisin as Redisseisin. 2 Inst. 115.

And * *if it be found, That the Sheriff delivereth any contrary to this Ordinance, he shall be grievously amerced therefore. And, nevertheless, they which are so delivered by the Sheriff without the King's Commandment, shall be grievously punished for their Trespass.*

* That is by way of Indictment and Conviction of the Sheriff, and so it is of the Party that procures himself to be delivered in that Manner also; but no Action can be grounded upon this Act. 2 Inst 115.

3. 13 *E.* 3. *cap.* 26. Enacts, That *in Writs of Redisseisin from henceforth double Damages shall be awarded, and the Redissesors shall be replevisable hereafter by the Common Writ.*

And like as in the Statute of Merton, the same Writ was provided for such as were disseised after they had recovered by Assise of Novel Disseisin of Mort d'Ancestor, or other Juries,

By the Statute of Merton, both the Writ of Redisseisin and of the Post Disseisin were

Even

given. This Statute is an Act additional in 3 several Points. 1ſt, Where the Statute of Merton gave but Single Damages this Act doth give Double Damages both in the Redisseisin and the Post Disseisin; but the Jury is to give the Single, and the Court is to double them. 2dly, Where notwithſtanding the Statute of Merton and of Marlebridge, cap 8. he might be replevied by the Common Writ, yet by this Act he cannot ſo be. 3dly, Where the Statute of Merton extended only to Redisseisins upon Recoveries in Aſſiſe of Novel Diſſeiſin by Verdict of the Recognitors, and to Poſt Diſſeiſins upon Recoveries by Verdict only, this Act extends to Recoveries by Default, Reddition, aut alio Modo, as upon Demurrer &c. ſo as hereby the Redisseisin and Poſt Diſſeiſin lies in many more Caſes than they lay before. 2 Inſt. 416, 417.

Even ſo from henceforth the ſame Writ ſhall further hold Place for them that ſhall recover by Default, Reddition, or otherwiſe, without Recognition of Aſſiſes or Jurates.

If an Aſſiſe be brought againſt A. and B. and A. is found Diſſeiſor and B. the Tenant, and the Plaintiff recovers, and B. the Tenant diſſeiſes the Plaintiff again, the Plaintiff ſhall have no Redisseisin but a Poſt Diſſeiſin, becauſe a Redisseisin lies not but againſt him that was Party to the former Diſſeiſin. 2 Inſt. 417.

(B) Lies. In what Caſes.

1. UPON Recovery *in Aſſiſe of Freſhforce* Redisseisin does not lie; for there are no Coroners. Contra it ſeems *in London*, for there are Coroners; For there the Writ of Redisseisin is to the Sheriff Quod aſſump. tecum Cuſtod. Placitorum Coronæ noſtræ &c. But London is a *County in itſelf*. Contra of other Boroughs, which uſe Freſh-force. Br. Redisseisin, pl. 8. cites 14 E. 2. Vet. N. B. tit. Redisseisin.

F. N. B. 188. (B) in the new Notes there. (a) cites 40 Aſſ. 23.

2. If a Man *recovers Rent* in Aſſiſe, *and after* comes and *takes Diſtreſs*, and *Reſcous is made to him*, he ſhall have thereof Redisseisin. Per Knivet. Brooke ſays, Quære inde, for it ſeems that he is not ſummoned, As where the Sheriff by Recovery puts him in Seiſin by a Twig, Clod &c. But Contra where the Party is not diſtrained, and does not get other Seiſin, as it ſeems. Br. Redisseisin, pl. 5. cites 40 Aſſ. 23.

S P. F. N. B. 190. (E) cites M. 15 H. 7. 8. — If a Man *recovers* Lands or Tenements *in Value againſt the Vouchee* in a Præcipe quod Reddat *by Default*, and after he is put in Execution by the Sheriff, the *Vouchee diſſeiſes him* of the ſame Lands which he ſo recovered in Value, he ſhall have a Poſt Diſſeiſin of that Land ſo recovered in Value againſt the Vouchee. F. N. B. 190. (C) — S. P. Br. Redisseisin, pl. 9. cites 5 E. 2. and Vet. N. B. tit. Poſt Diſſeiſin.

3. If a Man *recovers* Land *by Default in Scire facias*, and after *is diſſeiſed by the ſame Man*, he ſhall have Poſt Diſſeiſin as well as if he had recovered in Præcipe quod Reddat. Quod nota, Br. Redisseisin, pl. 2. cites 15 H. 7. 8.

Co. Lit. 154. b. is, That if a Man recovers Land, to which Common is Appendant or Appurtenant, and after he is redisseiſed of the Common, he ſhall have a Redisseisin of the Common, for it is tacitly recovered in the Aſſiſe. — S. P. F. N. B. 189. (F) — If a Man recover by Aſſiſe of Novel Diſſeiſin, *Common* of Paſture, or other *Profit Apprender* in the Soil of another, or any *Office* or *Corody*; if he be redisseiſed, he ſhall have a Redisseisin. F. N. B. 188. (L)

4. The Writ of Redisseisin lies *where* a Man *recovers* by Aſſiſe of Novel Diſſeiſin, *Land-Rent or Common*, and the like, *and is put in* Poſſeſſion thereof *by Verdict*, *and afterwards* he *is diſſeiſed* of the ſame Land, Rent, or Common, by him by whom he was diſſeiſed before, then he ſhall have this Writ upon the Statute of Merton, cap. 3. F. N. B. 188. (B)

5. If a Man recover by Aſſiſe of Novel Diſſeiſin any *Land* or Tenement *before the Bailiffs of any Liberty*, where they demand Conuſance of Pleas before Juſtices of Aſſiſe, and the Juſtices grant the ſame, becauſe the Lands are within that Liberty, and afterwards he be redisseiſed of the ſame Land, then he ſhall have a Writ of Redisseisin. F. N. B. 189. (A)

6. A Man

6. A Man shall have a Redisseisin upon a Recovery *in Assise of Nusance* De *Stagno* injuste levat' &c. or De *Cursu Aquæ diverso*, or De *Via arctata* & obstructa. F. N. B. 189. (A) And the like Writs are in the Register of Redisseisin for the *Misturning of a Mill*, or of a *Way*, or of an *Office*, and the like. F. N. B. 189. (C)

7. If a Man *recovers by Redisseisin*, and afterwards is *disseised again* by him by whom the first Redisseisin was before, he shall have a *new Redisseisin*; and so one Redisseisin after another every Time he is redisseised. F. N. B. 189. (D)

8. The Writ of Post Disseisin is given by the Statute of Westminster 2. cap. 26. And lies where a Man *recovers* Lands or Tenements by a Præcipe quod Reddat, *by Default or Reddition*, and afterwards he is ousted again by him against whom he recovered &c. then *he shall have* that Writ of *Post Disseisin*; *but if he recover by* Assise of *Mort d'Ancestor or Juris utrum*, *or in* those *Actions which pass by Juries* and Verdicts, then he shall have his Writ founded upon the Statute of Merton, cap. 3. of Post Disseisin. F. N. B. 190. (A)

9. A. recovered in Novel Disseisin against B. certain Lands in H. and had Execution. B. enter'd upon A. and ousted him, and redisseised him. *A. re-entered, and afterwards brought Redisseisin.* Per Cur. A. may maintain his Writ notwithstanding his Entry, and on the Conviction of the Defendant, he shall be *fined and imprisoned, and render double Damages.* Le. 69. pl. 90. Mich. 29 & 30 Eliz. C. B. Thacker v. Elmer. Goldsb. 64 pl. 3. S. C. — Cro. E. 323. Charter v. Friend. — S. P. And if the Defendant has any Cause of Remedy it is by Audita Querela.

10. Tho' the Writ be Redisseisitus *de eodem Tenemento*, yet Redisseisin *lies of Part.* Goldsb. 76. Thatcher's Case. Redisseisin lies where a Man is disseised of Part of the Land recovered by him in a Novel Disseisin. F. N. B. 188. (G) — Co. Lit. 154. b. S. P.

(C) Lies for and against whom.

1. A Man *recovered in Assise against a Feme sole*, and *she took Baron*, who after *disseised the Plaintiff*, and he *brought Redisseisin against the Baron and Feme*, and recovered; and the other *brought Writ of Error* and reversed the Judgment; for he *was not Party to the first Judgment*, and therefore is no Redisseisor; nor does the Statute give Imprisonment nor double Damages against him who was not Party to the first Disseisin; and also he may *have special Writ supposing the Redisseisin was by the Feme only*; For where a Man recovers in Assise against N. and after is disseised by N. and T. he shall not have Redisseisin against both. By which the Judgment was revers'd, and the Plaintiff restored to the Land with the Profits in the mean Time. Br. Redisseisin, pl. 1. cites 9 H. 4. 5. Hob. 66. Trin. 7 Jac. in the Case of Moor v. Hussey. cites 9 H. 4. 5. S. C. fay, If a Woman commit a Disseisin and be convicted, and then commits a Redisseisin, and then marries, she shall be charged in Redisseisin, and her Husband named with her for Conformity; but he must not be charged as a principal Actor in the Wrong done, no more than for a Trespass done by his Wife before he married her, yet he shall satisfy the Damages.

If Husband and Wife be disseised and recover by Assise, and the Husband dies and the Wife takes another Husband, and they be disseised again, by the Register they shall have a Writ of Redisseisin, altho' the Husband was not disseised before; and the Writ wills, That the Sheriff enquire whether they were disseised before, and so the Husband was not; but that is not material, because it is the Right of the Wife, and she was disseised before; but if the Wife lose in the Assise of Novel Disseisin and afterwards takes Husband, and they redisseise the Plaintiff, he shall not have a Writ of Redisseisin. F. N. B. 188. (E) cites H. 9. 4 —— Co. Lit. 154. b. cites S. C.

F. N. B. 188. (E) in the new Notes there (b) cites 9 H. 4. 5. and says, It seems one may have a special Writ *supposing that the Wife Dum sola was redisseised*, but *not that the Husband and Wife only seised*; and says, Quære Post 191. and that the Wife only shall be taken

Br. Scire facias, pl. 70. cites S. C. — A Rediſſeiſin lies a

2. *And* if a Man *recovers* in Aſſiſe, and *is rediſſeiſed by him again, who aliens to another*, he cannot have Rediſſeiſin *againſt both*. Per Tirwhit. Br. Rediſſeiſin, pl. 1. cites 9 H. 4. 5.

gainſt him who committed the Rediſſeiſin, and againſt another who was not Diſſeiſor, if he be Tenant of the Land. F. N. B. 188. (F) — If one recovers in an Aſſiſe and is rediſſeiſed by the Diſſeiſor, another Rediſſeiſin lies. Per Thirning. F. N. B. 188. (F) in the new Notes there (c) cites 9 H. 4. 5. — And ſays, note this Judgment in Rediſſeiſins Quod recuperet Seiſinam Suam. Raſt. Entr. 548.

Br. Scire Facias, pl. 70. cites S. C That he may have

3. *But* it was ſaid, That he may have Rediſſeiſin *againſt the Diſſeiſor*, and *Scire Facias againſt the Tertenant*. Br. Rediſſeiſin, pl. 1. cites 9 H. 4. 5.

Rediſſeiſin againſt the Diſſeiſor, and Scire Facias againſt the Alience, per Tirwhite; But Brooke ſays Quære; For it ſeems that by Rediſſeiſin, a Man ought to recover the Land, which cannot be againſt the Diſſeiſor, no Tenant being named.

4. A Rediſſeiſin ſhall be maintainable *againſt any of the Diſſeiſors*. F. N. B. 189. (E.)

And ſo Tenant *by Elegit* ſhall have an Aſſiſe of Novel

5. *Tenant by Statute-Merchant or Staple*, ſhall have an Aſſiſe of Novel Diſſeiſin if he be ouſted; and alſo a Rediſſeiſin, if he he be Re-diſſeiſed. F. N. B. 189. (I.)

Diſſeiſin, and a Rediſſeiſin if he be ouſted, by the Statute of Weſtm. 2. cap. 18. F. N. B. 189. (I)

6. Writ of *Poſt-Diſſeiſin* ought to be brought *by thoſe who firſt recovered, or* by *ſome of them, and of the ſame Land*, which was recovered, *or* of *Part thereof*, or *againſt* thoſe, or *ſome of them againſt whom the Recovery was*. F. N. B. 191. (A.)

7. If a Man Recover by a Præcipe quod reddat, and after he is *diſſeiſed by him againſt whom he recovered*, and the *Diſſeiſor doth make Feoffment*, and *takes back* an Eſtate *to him and another*; he who firſt recovered ſhall have a Poſt-Diſſeiſin againſt him, and his Jointenant, as it ſeems, and he ſhall be puniſhed by the Statute, if it be found againſt him. F. N. B. 191. (A.)

(D) Writ, Pleadings, Proceedings, and Judgment.

F. N. B. 188. (c) in the new Notes there (b) cites 23 Aſſ. 7. That if there be *but one Coroner in the County*, he may take it, otherwiſe all muſt join. 23 H. 6. 1.

1. THE Form of the *Writ is*, and alſo the Statute Wills, Quod *aſſumpſit tecum Cuſtodibus* Placitorum Coronæ Noſtræ & al. leg. Miliit. in propria Perſona tua accedas &c. Et coram eis per Primos Jur. & per al. legales Homines diligenter fac. Inquiſic. &c. And becauſe the *Writ wanted* (*legal. Milit.*) and alſo was *taken by one Coroner*, where the Statute is Cuſtodibus Placitorum Coronæ Pluraliter, and alſo (*Primos Jur.*) *was wanting in the Writ*, therefore notwithſtanding that the Sheriff took the Jury Per Primos Juratores, & per Alios, this is without Warrant, and cannot make the Writ good; and therefore the Writ was abated by Award, quod Nota. Br. Rediſſeiſin, pl. 3. cites 23 Aſſ. 7.

And note a Rediſſeiſin *taken before the Sheriff and one Coroner*, it is not good. Alſo note this Clauſe, *Aſſumptis tecum* &c. *was omitted*, and therefore the Writ abated. 26 E. 3. 57. And herein the Sheriff is Judge. 1 H. 4, 5. but if there are 4 *Coroners, but one is dead*, the *Sheriff ought to return this.*

2. A Writ of Rediſſeiſin granted *on a Recovery in B. R. was ſued in Chancery*, and held good by the Award of Court. F. N. B. 188. (D.) in the new Notes there (a) cites 26 E. 3. 57.

3. In Rediſſeiſin it was found by the Sheriff for the Plaintiff, and he ſued Writ to the *Sheriff* to return it, who *returned that he had found Rediſſeiſin, and made Execution to the Plaintiff*; and the *Plaintiff ſaid that he had not made Execution*, and pray'd Garniſhment againſt the Tenant and had it return'd immediately, and becauſe the *Writ rehearſed that he recovered by Aſſiſe by which he was ſeiſed, and after* the Writ *was Scire Fac. Quare execut Aſſiſæ pred. habere not debet*, and ſo contrariant, therefore the Writ was abated by Award. Br. Rediſſeiſin, pl. 4. cites 30 Aſſ. 35.

4. *Jointenancy* is a good Plea in Rediſſeiſin. F. N. B. 188. (F.) in the new Notes (c) cites 33 E. 3. Rediſſeiſin 7. Co. Litt. 154. b. S. P. For a Stranger ſhall not be ſubject to double Impriſonment, and double Damages—The Tenant may plead to the Writ, as Jointenancy, or the like, or in Bar, as a Releaſe, or the like, or he may give it in Evidence. 2 Inſt. 83.

5. Per Cand. In Waſt and Rediſſeiſin *in divers Vills*, the *Sheriff* and Coroner *ſhall go to the Vills, but they may take the Inqueſt in one Vill only*. And he *returned* in Rediſſeiſin, *Quod acceſſit to D. & ibidem cepit Inquiſitionem*, and good; For it may be that he came to the other Vills, and took the Inquiſition at D. Br. Rediſſeiſin, pl. 5. cites 40 Aſſ. 23. S. P. For the *Writ is* Quod *accedas ad Locum Vaſtat.* &c. which is obſerved by coming to the Place; tho' the Inquiry and Verdict was at another Place, quod Nota. Br. Rediſſeiſin, pl. 7. cites 11 H. 4. 6. ——— It ſeems that if the Writ be *Accedas ad Villam ubi Tenementa prædicta ſunt* &c. it is Erroneous. 11 H. 4. 6. 94 Adjudg'd. But if the Rent iſſues out of ſeveral Lands in diverſe Vills, it is ſufficient to take the Rediſſeiſin in one Vill only. 40 Aſſ. 23. But the View ought to be made in all

6. If the Diſſeiſor has a *Releaſe* to plead, he ſhall not plead it in the Rediſſeiſin, but ſhall give it in Evidence, per Knivet J. And of the Releaſe lies Audita Querela by ſome; For he ſhall have no Anſwer in the Rediſſeiſin by ſome. Br. Rediſſeiſin, pl. 5. cites 40 Aſſ. 23. Br General Iſſue, pl. 36. cites S. C — S. P. Br. General Iſſue, pl. 97. —It ſeems that the Sheriff may receive Pleas herein as a Releaſe &c. F. N. B. 188. (C) in the new Notes there (c) cites Kelw. 125. S. C.

7. *So* if he has a *Fine Mean* he ſhall not plead it, but *ſhall have Superſedeas*; per Knivet J. Br. Rediſſeiſin, pl. 5. cites 40 Aſſ. 23. Br General Iſſue, pl. 36. cites S. C. ——— S. P. Br Superſedeas, pl. 22. cites 40 Aſſ. 22. ——— S. P. Br General Iſſue, pl. 97.

8. The *Panel is challengeable*, but *not the Array*, as it ſeems, becauſe the Sheriff is Judge here. F. N. B. 188. (C) in the new Notes there (c) cites 9 H. 4. 5. Per Keble, The Party ſhall have his Challenges to the Jury; but Quere if he ſhall have Challenge to the Array, for being favourably made by the Sheriff. Kelw. 125. b. pl. 85. Caſus incerti Temporis. Cites in Marg. 40 Aſſ. pl. 23.

9. In a Rediſſeiſin *againſt Husband and Wife*, the *Writ ſhall be thus* in the End, *Et idem A. damna ſua in Duplum quæ occaſione illius Rediſſ. ſuſtinuit de Terris ipſorum B. & S. & Catallis ipſius B. in Ball' tua*; becauſe the Wife has not any Chattel F. N. B. 188. (H.)

10. If the *Sheriff will not execute the Writ* of Rediſſeiſin, he ſhall have an *Alias* and a *Pluries* directed to him, and if he then do it not, he ſhall have an *Attachment* againſt him to the Coroners &c. *and* upon the ſame, *Diſtreſs infinite*. F. N. B. 188. (I.)

11. If *he who loſes* the Land *by Default or Reddition* in a Præcipe quod reddat, do after *diſſeiſe him who recovered*, and *make a Feoffment*

in

in Fee *unto another*, or for Life, It ſeems he who recovered ſhall have a *Poſt-Diſſeiſin againſt him who diſſeiſed him again*, altho' he be not Tenant of the Land; for *in* a Writ of Poſt-Diſſeiſin, the *Demandant ſhall not have Judgment to recover the Land* &c. *but* the Sheriff *ſhall* put and *reſtore the Plaintiff to his Poſſeſſion*, if he find the Diſſeiſin &c. *and* ſhall *take the Defendant and keep him in Priſon until* &c. F. N. B. 191. (A)

12. It ſeems that *Non-tenure* is no Plea for the Defendant *in* a Writ of *Poſt-Diſſeiſin*, but he ought to anſwer the Diſſeiſin &c. when he comes in upon the Scire facias &c. And if he make Default upon the Scire facias returned, the Sheriff ſhall take the Inqueſt. Tamen quære. F. N. B. 191. (B)

13. Rediſſeiſin *lies in Middleſex or London*. By all the Court. And Walmſley ſaid, That there be Writs in the Regiſter accordingly. Goldsb. 76. Thatcher's Caſe.

14. In Rediſſeiſin the Plaintiff *ſhall recover Damages as* they are *aſſeſs'd by the Jury*, and not by the Aſſiſe. Goldsb. 76. pl. 7. Hill. 30. Eliz. Thatcher's Caſe.

For more of Rediſſeiſin and Poſt Diſſeiſin in General, See Diſſeiſin and other proper Titles.

Reference to Words.

1. D. 8. 9 El. 255. 4. A Man makes a Leaſe for Years, and after binds himſelf by Obligation with Condition, that if he ſuffers the Leſſee peaceably to enjoy the Land during the Term, and that without Trouble, Vexation, or Denial of the Leſſor, or any other Perſon, that then the Obligation ſhall be void. Per Curiam. The Word Suffer ſhall rule all the Reſidue of the Sentence; ſo that upon the Entry of a Stranger upon the Leſſee without Procurement of the Leſſor the Obligation is not forfeited.

Covenant that the Indenture of Leaſe at the Time of Aſſignment *is a good*, true, and indefeaſable *Leaſe, and that he ſhall enjoy* &c. *without the Lett* or Interruption *of Defendant or any claiming from*, by, or under him, are ſeveral diſtinct Sentences. 2 Sannd. 58 Paſch. 19 Car. 2 Gainford v. Griffith. — See Sid. 328 Gamsford's Caſe.

2. D. 7. El. 240. 43. A Man aſſigns a Leaſe for Years, and covenants and grants that he had not made any former Grant, or any Thing by which this Leaſe may be in any Manner fruſtrated (But that) the ſaid Aſſignee and his Executors by Virtue of this Grant and Aſſignment may quietly enjoy the Premiſſes during the Term without Diſturbance of him or of any Perſon; By 3 Juſtices againſt 1 the Words (but that &c.) depend upon the firſt Words, and is not any new Matter or Sentence, and therefore the Entry of the Stranger by ancient Title has not broke the Covenant.

D. 14 b. 72. 3. *If A. die before Michaelmas* 1620 *without Iſſue of his Body then living* &c. Then Living ſhall refer to the Feaſt and not to the Death. And. 1. Paſch. 26 & 27 H. 8. Bold v. Molineux.

4. Writ

4. Writ was dated *Primo Martii* was returnable Die Lunæ *in Quarta Septimana Quadrageſſimæ proximo futur'* Primus Dies Martii that Year was in Quadrageſſima Quarta *proximo futur'* ſhall relate to Septimana, becauſe the Word Quadrageſſimæ in this Place was void; Had it related to Quadrageſſimæ the Return would not have been till Lent 12 Month. Mo. 365. Paſch. 23 Eliz. & Mich. 36 & 37 Eliz. Burton v. Lever and Brownlow.

5. The King granted to A. and D. and their Heirs *all thoſe Meſſuages* &c. *late in the Tenure of J. S. ſituate* &c. *in the City of W. and in the Suburbs thereof, and out of the City within the Juriſdiction and Liberties thereof belonging to the late Priory of* &c. which ſaid Meſſuages &c. in the ſaid City and Suburbs belonging to the ſaid late Priory, were of the clear yearly of 40 l. Reſolved that the Words (All *thoſe* Meſſuages &c.) *make a neceſſary Reference* by reaſon of the Word *(Thoſe) as well to the Vill as to the Tenure of the* ſaid *J. S.* ſo as if the one or the other fails, the general Grant is void; For (Thoſe) is not ſatisfied till the Sentence be ended, and governs all the Sentence to the full Period. 2 Rep. 32. b. Mich. 36 & 37 Eliz. Dodington's Caſe. S. C. Poph. 60. by the Name of Hall v. Peart.

For more of Reference to Words in General, ſee **Grants**, (H. a. 13) **Parols**, **Prerogative** (I b.) &c. and other proper Titles.

Refunding.

(A) By what Perſons.

1. WHERE *Truſtees for Payment of Debts* out of Lands deviſed for that Purpoſe had *preferred ſome Creditors in Payment*, ſo as the others were left unpaid by the Aſſets being all exhauſted, as where they paid Debts by Specialty only, when they ought to have paid Simple Contracts, Pari Paſſu, and in Proportion; It ſeems that it was decreed that thoſe Creditors who had received their Monies ſhould not refund any Part of the Money received by them; but that on a Bill of Review, this Decree was reverſed per Ld North. 35 Car. 2. See 2 Chan. Caſes. 54. a Note in the Margin of the Caſe there of Gell, & al. v. Adderley.

2. A. an Attorney, lying ill of the Sickneſs of which he afterwards died, *takes B. of his Clerk*, and receives 120 l. and by Articles agrees with the Father of B to *return* 60 l. of the *Money* if he died within a Year. A. died within three Weeks. The Executor of A. was decreed to pay back 100 Guineas. Vern. 460. pl. 437. Trin. 1687. Newton v. Rowle. See (B) pl. 1.

3 A. was indebted to B. by Mortgage in 400 l. Principal Monies and died. B. died leaving J. S. *Executor*. On a Bill in Chancery, for Payment of Debts of A. out of Lands charged with the ſame, the Maſter reported 700 l. due on the ſaid Mortgage, and the Executor *received* the whole 700 *l. But afterwards it appeared that* 353 *l.* 13 *s.* 1 *d. had been paid to B. the Teſtator by A. in his Life-time*; whereupon the Truſtees and Cefty que Truſt, an Infant, brought a Bill to be relieved againſt this Over-payment; The Executor Defendant pleaded all the former Proceedings, and alſo

alſo that he, *before any Notice of the Over-payment, as Executor of B. had paid away the* 700 *l. in the Debts of B.* The Maſter of the Rolls decreed the Executor to repay the Surplus, and he to be at Liberty to *ſue ſuch Creditors*, as thro' Miſtake he had paid, *to Refund*; And this Decree was affirmed by Ld Chan. Cowper, and compared it to the Caſe of a Judgment obtained by the Executor, and after reverſed for Error, and to that of a Decree which is after reverſed by Appeal; tho' he ſaid that in the laſt Caſe of an Appeal if the Defendant had *delayed* the Appeal, *and willingly ſtood by whilſt the Executor paid away the Money to the Teſtator's Creditors* it would be otherwiſe: For this would be drawing the Executor into a Snare. Wm's Rep. 355. Trin. 1717. Pooley v. Ray.

(B) In what Caſes; And where the Payment was illegal, and not to be countenanced.

Br. Contract. pl. 12. cites 21 E. 3. 11 is (Salary) Br Conditions, pl. 106. cites S. C.

1. WHERE a Man *enfeoffed W. till* 8 *l. was levied* to inſtruct him in Cellery in 3 Years, and the *Feoffor died within* 3 *Weeks*, yet he ſhall hold the Land till the 8 l. ſhall be levied, for 'tis *no Default in the Feoffee*; Quod nota, in Aſſiſe. Br. Aſſiſe pl. 230. cites 21 Aſſ. 18.

—— *And* if a Man *gives 6 l. to J. S. to inſtruct W. P.* &c. and *W. P. dies preſently*, there the Donor ſhall not have an Action to rehave his Money; and yet the other can not deſerve it, but there is no Default in the Party who took it. Per Thorp. Br. Contract &c. pl. 12. cites 21 E. 3. 11.—See A. pl. 2.

2. A. for 600 l. *purchaſes B's Intereſt and Poſſibility* in ſuch an Eſtate to him and his Heirs; The Land is *evicted*. A. is not intitled to have his 600 l. back, but his Bill was diſmiſſed. Fin. Rep. 288. Hill. 29 Car. 2. Maynard v. Moſely.

3. Croſs Bill was brought for Creditors to take their proportionable Shares, but the *Debts having been paid* to them and Releaſes given by them, it was diſmiſſed. 2 Chan. Rep. 173. 31 Car. 2. Tucker v. Searle.

4. A. *ſells a Place in the Guards for* 400 *l.* to B. who enjoyed it 3 Years, and then is *turned out*, and ſuggeſted in the Bill, but not proved, to be by A's Means or Procurement; Ordered that what Money had been received, ſhould be repaid. 2 Chan. Caſes. 82. Hill. 33 & 34 Car. 2. Coniers v. Hammond.

5. If an Executor *pays a Debt on a Simple Contract*, there ſhall be no Refunding to a Creditor of an higher Nature. 2 Vent. 360. Paſch. 35 Car. 2. Hodges v. Waddington.

But tho' it was afterwards decreed per Commiſſioners, that the 2 l. per Cent. over-value ſhould ſink ſo much of the Principal Mortgage Money, yet if the Principal and Intereſt were over-paid, the Parties muſt ſhake Hands; For in ſuch Caſe there ſhould be no Refunding. Ch. Prec. 50. Paſch. 1692. Walker v. Penry.—— 2 Vern. 145. S. C.

6. A *Mortgagee received Intereſt* on an old Mortgage *after the Rate of* 8 *l. per Cent after the Statute for reducing it to* 6 *l.* per Cent. Decreed, and ſo confirmed a former Decree that the 8 l. per Cent. paid ſhould be retain'd, and that the 2 l. per Cent. ſhould not be diſcounted nor applied towards Satisfaction of the Principal, tho' it had been ſo paid for 15 Years after the making the Statute. 2 Vern. 42. 78. Paſch. & Trin. 1688. Walker v. Penry.

For more of Refunding in General, ſee Debts, Executors, and other proper Titles.

Rege

* Rege Inconſulto.

Fol. 397.

* Mo. 854. Arg. ſays, There are 4 *Manner of Writs* of Rege Inconſulto 1. *at the Prayer of the Party*, and this Counter-pleadable, 12 H. 7. 43. 9 H. 6. 3. 2dly, *At the Prayer of the Counſel of the King*,

† (A) Rege Inconſulto.

1. IN Aſſiſe, if the King ſends his Writ of Rege Inconſulto to the Juſtices, ſhewing good Matter in the Writ; but there is a Clauſe in the Writ that Sives conſtare poterit, that the ſame Land put in View in this Aſſiſe be Parcel of the Land which he has mentioned, Quod ulterius non procedatur &c. The Juſtices are not bound to ſtay till this Matter be inquired. 40 Aſſ. 14. Admitted.

cites; R. 2. Aid del Roy, pl. 62. Pl. C. 143. 3dly, *Ex Officio Curiæ*, cites 16 H. 7. 12. 10. Pl. C. 243. 4thly, Is *Writ of Prerogative* (as in the Principal Caſe) cites 9 E. 3. 342. where the Inhabitants of Northumberland were ſo troubled by the Scots that they could not pay their Rents and Services to their Lords; whereupon diverſe Ceſſavits were brought, and the King ſent Writ of Prerogative, that no Writ of Ceſſavit ſhall be tried till the War ended ——It was there agreed, That a Writ at the Suit of the Party ought to make Title to the King; and that a Writ granted *to ſurceaſe perpetually*, is ill, unleſs it be *after Search and Title found for the King*. Mo. 844. pl. 1158. Paſch. 13 Jac. in Caſe of Brownlow v. Cop and Michel.——This Writ cannot extend to more than what is compriſed in the Office. Reſolved 9 Rep. 16. Hill. 28 Eliz. Anne Bedingfield's Caſe ——Le. 284. pl. 385. Hill. 29 Eliz. C B. S C. and P ——4 Le. 81. pl. 184. S. C. and in the ſame Words——S C. Cited Roll Rep. 207. Arg. in Caſe of Brownlow v Michel and Cox. ——† There is no Letter to this in Roll.

2. But in this Caſe, if the Juſtices inquire by the Aſſiſe, and they find that the Land put in View is not Parcel &c. they may proceed; for this is expreſly limited by the Writ. 40 Aſſ. 14.

Br. Superſedeas, pl. 21 cites S. C. But ſays that if the Aſſiſe find that it is not Parcel, yet the Court ſhall not proceed without Procedendo. Per Cur.

* (A. 2) *In what Caſes* it lies.

* This in Roll is (A)

1. 4 E. 1. Rot. Clauſarum M. 4. Rex Juſticiariis de Banco &c. reciting that where G. of C. was outlawed of Felony, and his Goods forfeited ad nos devenerunt & nos quendam Librum de eodem Bonis R. M. dedimus, & Margareta, quæ fuit uxor ipſius G. eundem Librum verſus Mariam de S. per Breve noſtrum, de quo non eſſet de Bonis prædicti G. Forisfactis, coram vobis exigit, Vobis mandamus, quod prædictam Mariam de Libro prædicto a quoquo minime impleditari, ſed ipſam inde quietam eſſe permittatis. Teſte Rege apud Wigorn.

2. No Proceeding ought to be where the King may have *Evident Damage*; and in ſuch Caſe Stranger or Privy may have a Rege Inconſulto. Jenk. 7. cap. 11. cites 1 E. 3. 7.

A Writ of Rege Inconſulto does not lie but when it appears plainly to the Court, that the Party's Title is *in Diſaffirmance of the King's Title*. Hard. 159. Paſch 13 Car. 2. in the Exchequer, Anderſon v. Arundel.

3. In *Præcipe quod reddat* againſt the Prior of B they were at Iſſue, and *at the Day that the Inqueſt came, the Prior ſhewed Writ, by which the King had ſeiſed the Land, by Reaſon that the Prior is a Prior Alien*, and under the Obedience of the King of France, & quod ita *Circumſpecte agatis*

tis & Habeatis, quod faciatis Nihil in Noſtri Dampnum. Skip. ſaid he is not to ſurceaſe, and therefore may take *Verdict, and repute Judgment.* Stone ſaid, We aſſert that the King has Seiſin, therefore ſue to the King; and the *Inqueſt was diſcharged,* and after the *Demandant obtained Procedendo, and had Re-ſummons.* Br. Procedendo, pl. 9. cites 21 E. 3. 24. and 44.

4. A Man *held of the King in Ireland in Capite, and died, his Heir within Age.* The *King ſeiſed,* and after the *Advowſon,* which was *purchaſed by the Anceſtor of the Heir, became void* in the Meſne Time, and the *Grantor of the Anceſtor preſented,* and the *King brought Quare Impedit in the Court there,* and the *Preſentee* came here and *purchaſed Ratification,* and had writ to the Juſtices of Ireland to ſurceaſe; and becauſe the *Serjeants* of the King ſaw that it would be a Prejudice to the King and to the Heir, they *prayed the Chancellor to repeal the Ratification and Procedendo* to the Juſtices of Ireland, and had it. Quære how the Ratification may be ſo repealed, it ſeems that the King was deceived in it, and therefore void. Br. Procedendo, pl. 12. cites 45 E. 3. 19.

5. *Aſſiſe againſt* 3, there *one ſaid that J. N. was thereof ſeiſed in Fee, and was attainted of Treaſon, and the Land ſeiſed into the King's Hands, and demanded Judgment ſi Rege Inconſulto,* and the Aſſiſe was taken, the King not Conſulted, and therefore this was aſſigned for Error; and becauſe *another was found Tenant,* therefore well, and no Error. Contra, If he who pleaded had been found Tenant; for where the *Tenant ſaid that the King granted to him for Life, the Reverſion to the King, and prayed Aid of the King,* he ſhall have it, for otherwiſe it is Error; becauſe *there if the Tenant had Fee-ſimple before, the King had by this gained the Reverſion and the Fee;* Contra, where one pleads this who is not Tenant; note the Diverſity. Per Gaſcoigne and Huls. Br. Error, pl. 41. cites 8 H. 4. 14.

S. C. Cited Cro. E. 417. in Caſe of Sale Leſſee of Nevil v. Barrington. ——And And. 281. in Caſe of Blo. field v. Harvey —— S. C. Cited Mo 843. 844. —— Jenk. 163. pl. 9. cites S. C. —— So in *Treſpaſs for Breaking his Cloſe, and trampling his Graſs,* againſt one who claimed Common in a certain Waſte Parcel of a Manor of the Temporalties of the Biſhop of Lincoln, which came into the King's Hands pending the Suit, the Defendant ſhewed it, and had Aid of the King before Iſſue join'd, as he ſhould have where the King is Party &c. 2 R. 3. 13. pl. 35. cites 4 H. 6. —[And the Margin there cites 4 H. 6. 11. but quere if the ſame Point is there, and 10 b. pl. 4. and 11. b. pl. 7. are both upon the like Point as to Aid of the King, but quære if any Thing be ſaid there as to the Rege Inconſulto.] But Cro. E. 417. in the Caſe of Sale Leſſee of Nevil v. Barrington, it was ſaid by Coke Attorney General, and not denied, That when the Defendant will not pray in Aid, this Writ is in * Nature thereof to inform the Court how it concerns the Queen, and to inhibit their Proceedings until &c. —— * 9 Rep. 16. a. S. P. in Anne Bedingfield's Caſe —— And in Caſes where the *Eſtate* of the Party is *ſo fickle that he cannot pray in Aid,* as Incumbent, Bailiff, Copyholder, there Writ ſhall iſſue to the Juſtices to ſurceaſe Rege Inconſulto, or the *Parties in their Pleas may conclude, Judgment if they ſhall proceed Rege Inconſulto.* Arg. Mo. 842. pl. 1138. in Caſe of Brownlow v. Cop and Michel, cites 4 H. 6. 8. 9 H. 6. 2. 28 Aſſ. 59. 19 H. 7. 10. and D. 258.

If the Defendant in a *Perſonal Action* pray in Aid of the King, and the Aid be granted, now the Judges ought not to proceed until Procedendo in Loquela comes unto them, and then they may proceed and try the Iſſues joined; but yet they ſhall not give Judgment until a Writ cometh to them to proceed to Judgment. F. N. B. 153. (E)

Br. Procedendo, pl. 1. cites S. C. But per Cheyney J. after the

7. Note, It was agreed, That where the *King certifies to the Juſtices of Aſſiſe, that the Lands are ſeiſed into his Hands,* they ought to ſurceaſe, notwithſtanding that it *be not alleged by either Party.* And per Vampage, If in the Aſſiſe the Party alleges that the Lands are ſeiſed into the Hands of the King, and it is found, and notwithſtanding this the Juſtices proceed,

and

and after they *have Procedendo*, and give Judgment, it is Error, becauſe they *have not a Procedendo in Loquela*; quod fuit Conceſſum per Cur. Br. Error, pl. 8. cites 9 H. 6. 41.

Plea pleaded the Party cannot allege that the Tenements are in the King's Hands.——And the Principal Caſe was, That the firſt Juſtices in Aſſiſe had *Procedendo in Loquela after Seiſin of the King*, and after the *Parol was without Day by the Not coming of the Juſtices*, and after *General Re-attachment came*, and the *new Juſtices took the Aſſiſe, and adjourn'd it for Difficulty*; and upon this *a Writ came, certifying that the Tenements were in the Hands of the King, commanding them that they do not proceed Rege Inconſulto*; and therefore by all the Juſtices, They cannot proceed without Procedendo ad Judicium; but it is agreed there, that the *taking of the Aſſiſe was good*, notwithſtanding that they had not Procedendo in Loquela, becauſe *by the General Re-attachment* nothing was revived but the firſt Original, and not the Seiſin of the King, and therefore they might proceed till they were certified by Writ, that the Tenements were in the Hands of the King. Br. Procedendo, pl. 1. cites 9 H. 6. 40.—Jenk 97. pl. 89. cites S. C.——F. N. B. 153. (I) in the new Notes there (b) cites S. C.

8. In Diſceit the *Defendant*, *who firſt recovered by Default*, *ſaid that the Tenements were ſeiſed into the Hands of the King after the Recovery*, *by Virtue of an Office*, and demanded Judgment ſi Rege Inconſulto; and the Summoners were return'd warn'd, and appeared, and the Tenant ſhew'd Writ, proving that the Lands were ſeiſed as above: And by ſome, The Hands of the Juſtices are cloſed, ſo that they cannot do any Thing, but yet at the laſt they were *examined de bene eſſe*, viz. If Procedendo came, then to be in Force, and otherwiſe to be void; and this for the Miſchief, becauſe if the Summoners and Veiors die, then the Action is gone; and in *Writ of Error by an Infant*, *upon a Fine levied within Age*, if the Land is ſeiſed into the Hands of the King, yet they ſhall examine the Age, by Reaſon of the Miſchief. Per Littleton. Br. Diſceit, pl. 6. cites 35 H. 6. 43.

But per Laicon, In *Attaint*, if the Land be ſeiſed into the Hands of the King, they ſhall not proceed to the Grand Jury. Br. Diſceit, pl. 6. cites 35 H. 6. 43

9. In *Ejectment* of Land, Parcel of a Manor, the Parties were at Iſſue, and the *Jury ready at Bar*, a *Writ* was delivered in Court to the Juſtices, *reciting the Attainder of the Duke of Norfolk*, and Philip Earl of Arundel, for Treaſon, *and* alſo an Office, finding that the ſaid Duke being ſeiſed of the ſaid Manor, made *a Feoffment* thereof *to the Uſe of himſelf for Life*, with ſeveral *Remainders in Tail*, Remainder *to his own right Heirs*; and reciting alſo another Office, finding that the ſaid Earl at the Time of the Attainder, was ſeiſed of the Remainder to him and the Heirs Males of his Body at that Time, and that Ejectment was brought, and Iſſue joined &c. commanding the Judges not to proceed Regina Inconſulta; It was inſiſted, that the Court was not to delay the Trial, becauſe this was only a Perſonal Action, wherein the Queen could receive no Prejudice, as it was admitted ſhe might if it had been in a Real Action: And ſome of the Juſtices held, That there is *no Difference* in Reaſon *between a Real and a Perſonal Action*; for if the Queen is ſeiſed in Fee upon an Attainder of Treaſon, and makes a Leaſe for Life, and a Formedon is brought againſt the Leſſee, the Plaintiff ſhall not proceed, becauſe his Remedy is by Petition; but in ſuch Caſe if the Plaintiff ſhould proceed to Trial againſt the Tenant for Life, and Evidence ſhould be given to the Jury which concerns the Queen's Title, and a Verdict ſhould be found againſt the Tenant for Life, this might be very prejudicial to the Queen in another Trial between her and the Party upon the ſame Title, and yet the Land ſhall not be recovered againſt the Queen in a Suit againſt the Tenant for Life; and the Reaſon is the ſame in a Perſonal Action. And. 280. pl. 289. Mich. 34 & 35 Eliz. Bloſield v. Havers.

S. C. Cited Mo 421. pl. 583. in Caſe of Nevil v. Barington, by the Name of Bloſield v. Earl of Kent.——S. C. Cited 2 Inſt. 209. And Lord Coke ſays, It holds in all Points where Tenant or Defendant prays not in Aid, but if a Writ De Domino Rege Inconſulto is brought, and directed to the Judges, and it appears to the Court, that the Cauſe is not available or ſufficient in Law, the Court ought to diſallow the Writ, and to proceed in the Cauſe; and if the Cauſe appear to the Court to be juſt and lawful, (as in our Books it appears to be) and not brought for Delay, then the Judges ought to forceaſe &c;

10. In *Ejectment* Iſſue was join'd, and the Jury ready to try it, and then a Writ came to the Juſtices, forbidding them to proceed Regina Inconſulta, in Nature of Aid, and it was allowed after great Debate. Mo. 421. pl. 583. Mich. 37, 38 Eliz. B. R. Nevil v. Barington.

S. C. cited Mo 842, 843. pl. 1158 in Caſe of Brownlow v. Cop & Michel.——Cro. E. 415. Mich. 37 and 38 Eliz. B R. S. C by Name of Dale Leſſee of Sir [illegible]

p. Lenton, where the Case was that Defendant was *Tenant in Tail, with divers Remainders over, to Act upon the Statute*, It was urg'd that this was a *very remote Case* to have Relief, and that by the Statutes 2 E. 3. cap. 8. & 11 R. 2. cap. 1. Justice ought not to be hinder'd by the King's Writ, either under the Great or Petit Seal, and that therefore this Writ shall not be any Cause of delaying this Suit; But it was answer'd by Coke Att. Gen. That this was not to delay or hinder, but to do Right; for it is neither Law nor Justice that the Queen should be prejudic'd in her Inheritance without being made Party, which ought to be by Her Prayer, otherwise this Writ will be granted. And the Justices held that this Writ ought to obey'd, since it appears here (tho' it be only in a Personal Action) that the Queen may be prejudiced in her Title, which is recited in the Writ; and here Trial of Right is to be decided in Chancery, where her Records are to prove her Title; And so held, that they ought not to proceed without a Procedendo

S. C. cited Arg. Mo. 283. pl. 1158 in Case of Brownlow v. Cop S. Michel.

11. *In* Action of *Waste*, *after special Verdict for the Plaintiff*, the Queen by Writ, reciting that she being seised of the Land in the Declaration mentioned, by Letters Patent granted it to D. and his Heirs, rendring Rent; and that A. brought Action of Waste against D. and supposed that he had committed Waste in the Land which he held for Life of A. of the Grant of the Queen, to the Disherison of the said A. commanded the Justices not to proceed Regina Inconsulta; Whereupon they by Agreement, after Argument by all of them, forceas'd to proceed. Cited And. 281, 282, pl. 239. in Case of Blofield v. Havers, as Hill. 38 Eliz. Arden v. Darcy.

(B) In what Cases it shall be granted; *Without Writ.*

1. IN a Scire Facias out of a Fine against a Prior, if the Tenant pleads the Release of the Ancestor of the Demandant to his Predecessor, to which the Demandant says that the Predecessor had nothing at the Time &c. upon which they are at Issue, and at the Day that the Inquest comes, the King's Serjeant shews the Charter of H. 1. by which he had given the Land to the Predecessor of the Prior and his Successors in Frankalmoign *Ita Libere sicut Corona illud Tenuit*, and demands Judgment if the King not consulted &c. yet the Inquest shall be taken, and if it be found for the Demandant, he shall recover. 7 R. 2. Fits of the King, 62. Adjudged.

2. In an Action by an Abbot against the Bailiffs of Southampton, for taking of Toll against the King's Charter to be free of Toll &c. and the Bailiffs say that they are the Farmers of the King of the Toll of Southampton, and that they have been seised of the Toll of the said Abbot always since the said Charter of Exemption, upon which they are at Issue, Et quia videtur Curiæ quod Inquisitio illa Domino Regi Inconsulto pro eo quod idem Dominus Rex quæ Pars eiusdem Inquisitionis esse debeatur cum predicti Ballivi non habeant, nisi Nomine ipsius Domini Regis in præmissis Placitando, et ita præcedere non debuerunt Dicta Partibus prædictis & etiam Juratoribus coram ipso Domino Rege & eius Consilio, huic a Day &c.

3. In an Action by the Bishop of Winton against [illegible] for * Fol. 398. Chasing in his Chase, as Minister of the King against the express Charter of the King, the Defendant claims to chase there, as Incident by Custom to his Place, as Constable of a Castle of the King, and says that he has used to chase there since the Old Charter, upon which they are at Issue, Et quia videtur Curiæ quod Inquisitio illa Domino Rege inconsulto [illegible] Domini Regis pertinent quam quod per [illegible] Placita vel alia inde audiendo debet nisi [illegible], [illegible]

pla-

prædictæ, quæ eſt ipſius Domini Regis, & ad quam prædictus Defendens dicit prædictam Libertatem pertinere, Dictum eſt Partibus quod ſequantur verſus Dominum Regem quod præcipiat procedere ad prædictam Inquiſitionem capiendam ſi Voluerit vel quod alio modo faciat voluntatem ſuam in Loquela prædicta.

4. 18 E. 1. Liber Parliamentorum 15. Dominus Rex præcipit Juſticiariis ſuis de Banco quod cum Viduæ poſt Mortem Virorum ſuorum petant Dotem ſuam per Breve Domini Regis coram ipſis Juſticiariis de Terris & Tenementis quæ fuerunt Virorum ſuorum in manu Domini Regis exiſtentibus Nomine Cuſtodiæ tutelæ Minorum ætatum hæredum virorum ſuorum prædictorum, & etiam cum tales Hæredes ſic in Cuſtodia Domini Regis exiſtentes Vocati fuerunt ad Warrantiam in Placito Dotis, quod nemo Placitetur in Placitis illis procedant ſecundum Legem Communem Regni & quod Partibus Juſtitiæ faciant Complementum ac ſi Hæredes ibi eſſent in Cuſtodia alterius Perſonæ extraneæ hac non expectata quod inde ſequantur cum Domino Rege &c.

5. When the Parties come in Chancery, if any Intereſt can be ſhewn in the King, altho' it be enter'd that it was only a *Surmiſe*; yet a Procedendo ſhall not be granted 'till the King's Title be diſcuſs'd. F. N. B. 153. (F.) in the new Notes there (b.)

A Rege Inconſulto may be awarded *upon the Suggeſtion of a Surmiſe* to the Plea, *as Amicus Curiæ*, upon Cauſe ſhewn, that the King may have Prejudice. Jenk. 97. pl. 89.

6. If Title appears for the King *by Examination of the Eſſoiner*, the Juſtices ought to forceaſe. Arg. Mo 843. pl. 1138. in Caſe of Brownlow v. Cop, & Michel. — Cites 1 H. 7. 29.

(C) In what Caſes it lies; *Counterplea.*

1. IN Action, if the Tenant ſays that the King is Tenant of the Land, and demands Judgment Rege Inconſulto &c. it is no good Counterplea, that the King is not Tenant; for the Tenant has ſettled the Inheritance in the King. 8 H. 4. 14. b.

2. But in Aſſiſe againſt two, and he who is not Tenant pleads this Plea, there this is a good Counterplea; for there his Continuance can ſettle nothing in the King. 8 H. 4. 14. b.

3. If it appears to the Court that the King has ſeiſed the Land without Title, the Rege Inconſulto ſhall not be allow'd. Co. 9. *Anne Bedingfield*. 16. (Yet note that the Party is put to Petition by ſuch Seiſure.)

4. In Aſſiſe, if the Tenant ſets forth a Patent of the Duchy Land of Lancaſter for Life, the Reverſion to the King, yet the Aſſiſe ſhall be taken; (For as to this Land he is but as a Common Perſon.) 11 H. 4. 85. b.

5. B. brought *Aſſiſe of the Office of making Superſedeas*'s which A. claim'd by Patent of the King. A Writ reciting the Grant was ſent to the Juſtices not to proceed Rege Inconſulto; It was inſiſted that becauſe the *Writ contain'd no Title to the King* of the Thing in Demand, nor any Prejudice which might happen, the Juſtices ought not to forceaſe; and that the Writ is *founded upon a void Patent*, and therefore not to be allowed; 1ſt. Becauſe this is a New Office, as appears by the Words Creamus, Eriginus, Conſtituimus, in the Patent, and which ſays that De Cætero it ſhall be an Office; 2dly. Becauſe to this new Office is annex'd an ancient Thing, viz. the ancient Fees, and if this Office had been granted without Fee it had been void, and the Suit ſhould [illegible] S. C. Argued. Mo. 842. pl. 1138. and Aſh ſays, the Patent accepted, and Michel was ſworn to the Office; and the King granted [illegible] Prince & all that he

would never make another Grant of any other Branches or Members of Offices.

ſtay'd by ſuch Writ; For the Party could have no Benefit, nor the King any Prejudice by it. See Roll Rep. 188. Paſch. 13 Jac. and Ibid. 206. Trin. 13 Jac. and Ibid. 288. Hill. 13 Jac. the Arguments in the Caſe of Brownlow v. Michell & Cox. Adjornatur.

(D) *Procedendo in Loquela.* What will be good Cauſe to deny it in Chancery.

If it appears of Record, as by the King's Writ &c. that the King has (Claims) Intereſt; and if it be *after Verdict*, the Juſtices ſhall not give Judgment; contra, if it be only a Nude, or *have Surmiſe of the Party*, de hors; but ſee 3 H. 6. 6. Aid not to be granted in *Trespass*, without *Prayer of the Party*. F. N. B. 153. (F.) in the new Notes there (a.) cites 11 H 4 71.

1. If Aid be granted of the King for a certain Cauſe, if in Chancery this Cauſe appears not good, yet if it appears to the Chancellor that there is any other Cauſe by which the King has Right, it will not grant a Procedendo. 3 H. 6. 6. nor ought it 4 H. 6. 19.

If the Tenant in a Præcipe prays *Aid* * Fol. 399 *of the King, by Reaſon of* the *Warranty*, the Warranty *ſhall be tried in the Chancery*, and a Writ ſhall be ſent into C B to take the Enqueſt; but *if* they plead in Chancery, and there *it appears, that the Demandant has Right*, the King ſhall not have a Writ to C. B. reciting the Matter, and commanding them to Superſede &c. becauſe *Judgment ſhall be* there given, *Quod Tenens eat inde ſine Die*. F. N. B. 153. (E) in the new Notes there (a) cites 38 E. 3. 14. And per Thorpe there, The Right ſhall not be try'd in Chancery, but in Caſe where the *King has the Reverſion*, and the Parſon may, but does not, pray in Aid &c 38 E. 3. 19. and therefore if the King has a Releaſe of the Annuity, and pleads it, it ſhall not be brought into Chancery; for the Aid is granted only to maintain or ſupport the Parſon, altho' he pleads it. 19 H. 6. per Newton. See 13 H. 4. 3.

2. If the Tenant has Aid in Nature of Voucher of the King, and in Chancery, upon pleading it appears that the Demandant has not any Right to recover, no Procedendo ſhall be granted; But a Writ ſhall be directed to the Bank, quod * Superſedeant Omnino, and upon this it ſhall be awarded in Bank, that the Tenant ſhall go ſine Die. 38 E. 3. 14. b.

If it *appears* to Judges of * *Record*, that the Lands are ſeiſed into the King's Hands, *or* if it appear to the Court *by pleading or ſhewing of the Party*, that the King hath Intereſt in the Land, or ſhall have Rent or Service, there the Court ought to ſtay until they have from the King a *Procedendo* in Loquela; and if the Procedendo be *directed unto any of the Judges* to proceed, it is good, although it be *not* directed *unto them all*. F. N. B. 153 (F)

3. If Aid be granted of the King where it ought not, As in an Aſſiſe if the Bailiff ſays that a Leaſe was made to his Maſter for Life, the Remainder to the King upon which he has Aid of the King; tho' the Aid ought not to be granted, Yet a Procedendo ſhall not be granted out of the Chancery before the Title of the King be examined; For any one may ſhew any other Matter to prove the Title of the King. 8 H. 7. 11.

* In Aſſiſe by the *Teſtimony of the Eſcheator*, or by *Affirmance of the Juſtice in another Writ*. F. N. B 153 (F) in the New Notes there (a) cites 11 H. 4. 39.—— S. P. Roll Rep. 207. in the Caſe of Brownlow v. Michell cites 9 H. 7. 10.

4. If Aid be granted upon a Leaſe made by the King dated the 28th of June, and the Proceeding ſuppoſes the Leaſe to bear Date the 20th of June, this Writ does not give any Warrant to the Court to proceed. 26 E. 3. 32.

5. In *Præcipe quod reddat* the *Tenant had Aid by Reverſion*, now upon this the *Grant ſhall be diſcuſſed in the Chancery*, and when it is tried, *and*

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the Parties at Issue, there *Procedendo ad Captionem Inquisitionis shall go to the Bank.* Br Procedendo, pl. 5. cites 38 E. 3. 14.

6. In *Dower* the *Tenant vouched an Infant in Ward of the King*, and demanded Judgment Rege Inconsulto, and Day was given Ad interloquendum cum Rege, and after *came Procedendo*, and *the Infant appeared and pleaded in Abatement of the Voucher, because the King had granted the Ward before the Voucher* &c. And per Mombray, where Procedendo comes upon such Writ Rege Inconsulto, he shall not proceed to the Judgment but only in Dower Br. Aid del Roy, pl. 18. cites 46 E. 3. 19.

7. If the *King* by his Writ *certifies* to the Justices *that the Lands are seised into his Hands* &c. then they shall stay until the Writ De Procedendo in Loquela be afterwards sent unto them. F. N. B. 153. (F.)

(E) Procedendo ad Judicium. What will be good Cause to deny it in Chancery.

1. If upon Aid granted by the King, a Procedendo *in Loquela* be granted out of the Chancery, the Title after appears to the Court for the Demandant to recover yet he shall not have Judgment before a Procedendo ad Judicium comes to the Court. 7 R. 2. Aid del Roy, 61. Upon Aid of the King, or Plea of Judgment Rege Inconsulto &c.

the Procedendo shall be *in Loquela after the Cause of Aid or view*, but *not* Procedendo *ad Judicium, unless in* Case of *Error only*; For there after the Aid granted and examined the Procedendo shall be Ad Judicium; For the *Cause of the Dower shall be discussed in the Chancery before the Procedendo granted.* Br. Procedendo, pl. 2. cites 40 E. 3. 15. —— S. P. F. N. B 153 (E) in the New Notes there (a) cites 40 E. 3. 29. And adds, that in *all Pleas but* those of *Dower* where Aid of the King is granted, there is a Cause of Ques *est pour avoir Judicium* Rege Inconsulto; And says, Nota, that the Right to be in the Procedendo in Dower *once proffs Charte is passed* to Judgment, otherwise if the Writ only commands to do right Reason, Judgment shall be given, and cites 20 E. 3. 58. —— S. P. Br. Aid del Roy pl. 18. cites 46 E. 3. 19.

If any Man prays in Aid of the King *in a real Action*, and the *Aid is granted*, it shall be awarded, that he *sue unto the King in Chancery*, and the Justices to C. B. *shall stay until* the Writ of *Procedendo in Loquela comes* unto them, and then they may proceed in the Plea, until it be come that they ought to give Judgment for the Plaintiff, and then the Justices *ought not to proceed to Judgment until the Writ comes* to them to proceed to Judgment, which is called a Writ *De Procedendo ad Judicium*. F. N. B. 153. (E)

2. In Quare Impedit by the King, if the King commands by Writ not to proceed, and after the King sends to the Court, that the Defendant shall have the Effect of his Presentment, the Defendant shall have Judgment to have Writ to the Bishop without other Authority to give Judgment; For this cannot be any Prejudice to the King For in every Judgment, where he is Party, his Right is saved. 18 E. 3. 57. Quære.

3. In Assise, if after the Procedendo in Loquela, an Issue be tried for the Plaintiff, yet when the Transcript of the Record comes into Chancery, if it appears that the Trial is not good, because the Venue was not well awarded, the Procedendo ad Judicium shall not be granted. 13 H. 4. 3.

4. A Procedendo ad Judicium was Quod *ad Finalem Discussionem procedant*, and thereon the Judges gave Judgment. F. N. B. 153 (E) in the New Notes there (a) cites 29 E. 3. 12. & 3 E. 3. 3.

5. In Aid Prayer they proceeded to Judgment in *Scire Facias to repeal Letters Patents* upon Procedendo in Loquela, and no Procedendo was ad Judicium. Br. Procedendo, pl. 3. cites 7 H. 4. 33. But Brooke says, see S. H. 4. 21 that after Procedendo the Tenant said nothing, and it was said that the Plaintiff sued Procedendo ad Judicium, and had Judgment. Br. Ibid

(F) In what Caſes the Juſtices may proceed Rege Inconſulto.

In Aſſiſe, if the *Party at the firſt Day alleges that the Tenements are in the King's Hands*, and it is found by Examination of the Eſcheator, the Party ſhall ſue to the King, and the Juſtices ſhall ſurceaſe, and yet if they proceed it ſhall not bind the King; But yet they ſhall ceaſe, becauſe Evidence may be found againſt the King by the Iſſue; And if it be alleged that the Tenements are in the King's Hands, and yet the Juſtices proceed without Procedendo in Loquela, it is Error; Per Vampage. And it ſeems there that they *ought firſt to have Procedendo in Loquela, and after a Procedendo ad Judicium.* Br. Aſſiſe, pl. 3. cites 9 H. 6. 40.

1. IN Aſſiſe, the *Tenant ſaid that the Eſcheator had ſeiſed the Land* in the King's Hands, Judgment whether Rege Inconſulto; The Eſcheator ſhall be thereof examined, and if it be true, they ſhall ſue to the King, and the Eſcheator ſhall ſhew Cauſe of the Seiſure; For if the Eſcheator ſeiſes without Cauſe, Aſſiſe lies againſt him, and in the Aſſiſe againſt him it ſhall be tried whether he had Cauſe or not, and if the Cauſe be true or not. Br. Aſſiſe pl. 257. cites 24 Aſſ. 7.

2. Where the *King has any Intereſt* they ſhall not proceed till the King be conſulted, which was affirmed by ſeveral. Br. Aid del Roy, pl. 101. cites 1 H. 4. 10.

3. Reattachment, if the *King certifies to the Juſtices* of Aſſiſe, *that the Tenements are ſeiſed into his Hands* commanding them not to proceed Rege Inconſulto, they ought to ſurceaſe, notwithſtanding that no Party alledged it; per Paſton, quod fuit conceſſum. Br. Aſſiſe, pl. 3. cites 9 H. 6. 40.

For more of Rege Inconſulto in General, ſee Aid of the King, and other proper Titles.

(A) Regiſtring Acts.

In a Caſe between 2 Purchaſors of Lands in Yorkſhire where the 2d *Purchaſor Laying Notice of* the *firſt Purchaſe, but that it was not Regiſter*, went on and purchaſed the ſame Eſtate, and *got his Purchaſe regiſtered*, yet it was decreed, that having Notice of

1. 2 *Anne cap.* 4. *S.* 1. ENacts, That *a Memorial of all Deeds and Conveyances made after the 29th of Sept.* 1704. *and of all Wills &c. made in the* Weſt-Riding of Yorkſhire *may be regiſtred.*

S. 2, 3, 4, 5, 6. *Regiſter's Office to be kept at Wakefield. Directs how the Regiſter is to be elected, and when and what is to be done during Vacancy by Death.*

S. 7. *Memorials of Wills to be under Hand and Seal of one of the Deviſees, his Guardian or Truſtee, atteſted by* 2 *Witneſſes, one whereof ſhall prove on Oath the ſigning and ſealing ſuch Memorial, which Oaths the Regiſter is impowered to adminiſter.*

S. 8. *Memorials ſhall contain the Day and Year of the Date, the Names, Additions and Abodes of the Parties and Witneſſes, the Hereditaments, the Places where ſuch Hereditaments lie, that are thereby conveyed, or deviſed; and the Deed, Conveyance, or Will ſhall be produced at the Time of entring the Memorial; and the Regiſter ſhall thereon endorſe a Certificate of the Day, Hour, and Time of ſuch Entry, and the Page where entered; and the Regiſter or Deputy ſhall ſign ſuch Certificate, which ſhall be allowed as Evidence; The Page of Regiſter Book, and the Memorials entered, ſhall be numbred,*

bred, and the Time of the Day when regiſtred, entered in the Margin of the Regiſter and Memorial.

S. 9, 10, 11, 12, 13, 14, 15. 22. *Relates to the Regiſters &c. Oath and Securities, Times of Attendance, Fees, and Penalties on Miſbehaviour.*

S. 16. *This Act not to extend to Copyhold or Leaſehold Eſtates, at Rack Rent not exceeding* 21 *Years where the Actual Poſſeſſion goes with the Leaſe*

S. 17. *Manors, Lands &c. to be but once named in the Memorial &c. where there are more Writings than one for making the Conveyance &c.*

S. 18. *A Memorial of Deeds &c. made in London, or other Place* 40 *Miles diſtant, which concern any Lands in the Weſt-Riding may be regiſtered on Affidavit, and the Regiſter to give Certificate thereupon.*

S. 19. *Puniſhes Forging or Counterfeiting Memorials or Certificates, and Perſons forſwearing themſelves.*

S. 20. *Memorials of Wills entered in* 6 *Months after Death of Deviſor dying in England &c. or in* 3 *Years after his dying beyond Sea to be valid.*

S. 21 *In Caſe a Deviſee by ſome inevitable Difficulty without his wilful Neglect, is diſabled to exhibit a Memorial within the Times before limited, then the Regiſtry thereof in* 6 *Months next after Attainment of the ſaid Will, or Probate thereof or Removal of the ſaid Difficulty ſhall be a ſufficient Regiſtry.*

S. 23. *This Act to be deemed a publick Act.*

2. 5 *Ann. cap.* 18. *S.* 1. 2. 3. *Enacts, That from* 24*th June* 1707. *All Bargains and Sales of Lands &c. in the Weſt-Riding of Yorkſhire, inrolled in Regiſter's Office at Wakefield, ſhall be good in Law, as if inrolled at Weſtminſter; That the Inrollments be in Parchment, and ſhall be allowed in all Courts, and ſuch Inrolment be deemed entering a Memorial thereof.*

S. 4 *That no Judgment &c. (unleſs entered into in the Name of, and on the King's proper Account) ſhall affect any Manors &c. in the Weſt-Riding, but from the Time that a Memorial thereof be entered in Regiſter's Office, expreſſing in Caſe of a Judgment the Names of Plaintiffs, and Names and Additions of Defendant's Sum recovered, and Time of Signing; and in Caſe of Statutes and Recognizances, the Date, the Names and Additions of Cognizors and Cognizees, Sums, and before whom acknowledged: The Party deſiring the Entry ſhall leave with the Regiſter or Deputy, to be filed in the Office, a Memorial of ſuch Judgment, Statute or Recognizance, ſigned by the proper Officer for ſigning ſuch Judgment &c. or in whoſe Office ſuch Statute ſhall be inroll'd reſpectively, together with an Affidavit ſworn before a Judge at Weſtminſter, or Maſter of Chancery, that ſuch Memorial was ſigned by ſuch Officer, for which Memorial ſuch Officer is to be paid* 1 *s. and no more.*

S. 5. *Regiſter to enter ſuch Memorials, and give a Certificate, if required.*

S. 6. 7. 8. *Relates to the Security given by the Regiſter, his Fees, and Penalties on forging or counterfeiting Entries and Perjury.*

S. 9. *All Certificates by this or the former Act, required to be given in Caſe of Searches, ſhall be ſigned by Regiſter or Deputy, in Preſence of* 2 *Witneſſes.*

S. 10. *On Certificate that Money due on Mortgages &c. is paid, Regiſter to make an Entry thereof &c.*

S. 11. *Proviſo that if Judgment &c. be entered in* 30 *Days after the ſigning or Acknowledgment, all the Lands that ſuch Defendant or Cognizor had at the Time of the Signing or Acknowledgment, ſhall be bound thereby.*

S. 12. *This Act to be deem'd a Publick Act.*

3. 6 *Ann. cap.* 35. *S.* 1. *Enacts, That a Memorial of all Deeds and Conveyances, and of all Wills and Deviſes, whereby any Manors, Lands &c. in the* Eaſt-Riding *of Yorkſhire, or Town and County of the Town of Hull may be affected, may be regiſtered, and that Deeds not ſo regiſtered ſhall be adjudged fraudulent and void.*

S. 1. *Eſtabliſhes the Method of regiſtering ſuch Memorials; and that the Regiſter Office to be at Beverly.*

S. 27. *Mortgages, Judgments &c. whereof Memorials are entered, and afterwards Monies due thereupon be paid, Regiſter may make an Entry in the Margin, that ſuch Mortgages &c. is diſcharged.*

S. 28. *Proviſo if Judgment &c. be regiſtered within* 30 *Days after ſigning, all the Lands which Cognizor &c. had at the Time, ſhall be bound.*

S. 29.

the firſt Purchaſe, tho' it was not regiſtered, bound him, and that his getting his own Purchaſe firſt regiſtered was a Fraud, the Deſign of thoſe Acts being only to give Parties Notice, who might otherwiſe without ſuch Regiſtry, be in Danger of being impoſed on by a Prior Purchaſe or Mortgage, which they are in no Danger of when they have Notice thereof in any Manner, tho' not by the Regiſtry Decreed by my Lord Chancellor King. Abr. Equ. Caſes. 358. pl. 12. Blades v. Blades.

S. 30. *In all Deeds of Bargain and Sale, to be inroll'd in Purſuance of this Act, whereby any Eſtate of Inheritance in Fee-ſimple is limited to the Bargainee and his Heirs, the Words Grant, Bargain and Sell, ſhall be adjudged an expreſs Covenant to the Bargainee, his Heirs and Aſſigns, from the Bargainor for himſelf, his Heirs, Executors, and Adminiſtrators, that the Bargainor was ſeiſed of an indefeaſible Eſtate in Fee free from Incumbrances, (Rents and Service due to the Lord of the Fee excepted) and for quiet Enjoyment againſt Bargainor, his Heirs and Aſſigns, unleſs limited by expreſs Words contained in ſuch Deed, and that the Bargainee, his Heirs, Executors, Adminiſtrators and Aſſigns, may in an Action aſſign Breaches, as if ſuch Covenants were expreſsly inſerted.*

S. 31. *Every Leaf of the Regiſter-Books ſhall be ſigned by two Juſtices of the Riding appointed at the General Quarter-Seſſions, and an Entry thereof from Time to Time ſhall be made by the Clerk of the Peace in the Order-Book of the Seſſions, and ſigned by the Juſtices that ſign the Regiſter-Books, and an Entry ſhall be made and ſigned as aforeſaid, of the Number of the ſaid Books, and how call'd or mark'd, and how many Pages each contains.*

S. 33. *This Act to be deemed a Publick Act.*

S. 34. *From 29th September* 1708. *all the Proviſions, Clauſes &c. in this Act, and contained in the above recited Acts, to affect all Honours, Manors &c. within the* West-Riding, *as if the ſame were inſerted in the ſaid Acts.*

4. 7 *Ann. cap.* 20. *Another like Act made for the Publick Regiſtering of Deeds, Conveyances, and Wills, and other Incumbrances which ſhall be made of, or that may affect any Honours, Manors, Lands, Tenements, or Hereditaments within the County of* Middleſex, *after the 29th September* 1709.

Provided not to extend to Copyhold or Leaſes &c. [as in the other Acts] or to any the Chambers in Serjeant's-Inn, the Inns of Court, or Inns of Chancery.

Judgment, Statute, or Recognizance, other than ſuch as ſhall be entered into in the Name, and upon the proper Account of his Majeſty, his Heirs and Succeſſors, ſhall affect or bind any Honours &c. being in the ſaid County, but only from the Time that a Memorial of ſuch Judgments &c. ſhall be entered at the ſaid Regiſter's Office, as by the ſaid Act is directed.

5. 8 *Geo.* 2. *cap.* 6. *Another like Act was made for the Publick Regiſtering of all Deeds, Conveyances, Wills, and other Incumbrances that ſhall be made of, or that may affect any Honours, Lands, Tenements or Hereditaments, within the* North-Riding *of the County of York, after the 29th Day of Sept.* 1736.

Rehearing.

1. THE Court would not rehear a Cauſe after *Decree ſigned and inroll'd*, notwithſtanding the ſaid Cauſe had been opened ſince the Inrolment in Order to Rehearing, and diſcharged the Order for Rehearing. 2 Chan. Rep. 361. Coltman v. War.

2. A Plaintiff in a Bill of *Reviver omitted making the Wife a Party*, who before was a Defendant with her Husband, and where the Husband claimed only in her Right; but becauſe ſeveral *Motions were afterwards made in her Name* in the Suit, *and a Commiſſion was executed in her Name* ſince the Decretal Order, *and named her Defendant in the Title of ſeveral Orders*, and the Order was confirm'd; this Omiſſion was held to be no

Cauſe

Cauſe for a Rehearing, the Defendants having made her a Party by the Proceedings, and all having ſubmitted to it, her Name muſt be uſed as a Defendant throughout the Cauſe. Chan. Rep. 252. 16 Car. 2. Peachy v. Vintner.

3. Rehearing *granted on Suggeſtion*, that ſpecial Matter, diſcloſed in the Replication, *came not in within Time* ſo as to be examined to and put in Iſſue, and that the now Defendant had diſcover'd full and ſtrong Proof. But Finch C. took Notice how dangerous it would be, if *after Publication* paſs'd, and People ſeeing where a Cauſe pinch'd, they ſhould be let look out Witneſſes to bouliter up the faulty Parts of their Cauſe. Vern. 47. Paſch. 1682. Jones v. Purefoy.

4. *Upon the Plaintiff's petitioning* to rehear, the *Cauſe is open as to the whole and every Part of it, with Reſpect to the Defendant*; while in Reſpect to the Plaintiffs, it is only open as to thoſe Parts of it complained of in the Petition. Per Lord C. Cowper. Wms's Rep. 300. Mich. 1715. in Caſe of Rawlins v. Powel.

On a Rehearing *nothing is open'd but what is petition'd againſt.* Sel. Chan Caſes in Lord King's Time. 13 Trin. 11. Geo. 1 1725. Colcheſter v. Colcheſter —S. P. Ibid. 24 Trin. 11 Geo. 1. And if all do not petition, then it is open to the Petitioners only. Hayward v. Colley.

5. No *Proofs* to be read at a Rehearing that were *not read at the firſt Hearing*. MSS. Tab. cites Feb. 23. 1706. or 1726. Williams v. Lane.

For more of Rehearing in General See **Review**, and other Proper Titles.

Relation.

(A) Relation.

1. **If a Man** dies poſſeſs'd of **certain** Goods, **and after** a Stranger takes them and converts **them to his own Uſe, and then** Adminiſtration is granted to J. S. **this Adminiſtration ſhall relate to the** * **Death of the Teſtator, ſo that J. S. may maintain an Action of Trover and Converſion for this Converſion before the Adminiſtration granted to him. Trin. 10 Car. B. R. between** *Lockſmith and Creſwell* **adjudged, this being moved in Arreſt of Judgment, after Verdict for the Plaintiff. Intratur. Hill. 9 Car. Rot. 729.**

For this is to *puniſh an unlawful Act*; but Relations ſhall never *deveſt any Right legally veſted in another, between the Death of the Inteſtate and the Commiſſion of Adminiſtration.* As in Caſe of *Rent due to Inteſtate*, and then the Goods of the Tenant are taken in *Execution*, and then after the Money levied, Adminiſtration is granted to J. S. the Court of B. R. denied to make a Rule on the Sheriff to pay J. S. a Year's Rent out of the levied Money, purſuant to the 8 *Ann.* 14 Arg. C. Equ. R. 224. cites 4 Geo. 1. Waring v. Dewberry.

* S. P. Br. Relation, pl. 15. cites 36 H. 6. 8.—S P. By the Opinion of the Court. Br. Relation, pl. 29. cites 18 H. 6. 22. and Fitzh. Adminiſtr. 2 ——S P Ibid. pl 34. And there the Adminiſtrator *may have Action of Treſpaſs againſt him who meddles with the Goods before, without Authority.* But *contra againſt the Servant of the Ordinary*; for *he meddled by Authority*, in Reſpect of the Adminiſtration; cites S. C——Ibid. pl. 46 cites S. C.

2. **If a** Man ſeiſed in Fee **of Land,** grants to the King in Fee by Deed, **and after the** King before the ſaid Deed is inroll'd, regrants it to him

Hob. 225. pl. 294. Trin. 15 Jac. C.—

Brownl. 162. S. C. him in Fee by Letters Patents, and after the Deed of Grant made to the King, is inroll'd; this ſhall ſo relate by the Inrolment to the firſt Act, that it ſhall make the Grant of the King * good. Fol. 4to. Hobart's Reports, between *Needler* and the *Biſhop of Wincheſter*. Caſe 293.

2 Brownl. 250. in S. C. 3. *Leaſe for Life on Condition to have Fee* when the *Condition is performed*; He has Fee from the Commencement of the Leaſe, as by one and the ſame Grant, and as one and the ſame Eſtate. 8 Rep. 77. Trin. 7 Jac. C. B. in Lord Stafford's Caſe.

A. made a Leaſe for Years of Land, to J. S. an Alien, upon Condition on Payment of 100 l. to A during the Leaſe, then B. to have Fee. Afterwards the King made B. a Denizen, and after that B paid the 100 l. This was all found by Office; Dyer cited it as ſaid by Frowike in his Reading, that the King ſhall have Fee. But it is ſaid there (under Correction) that the Law ſeems to be otherwiſe; for the Condition being that on Payment he ſhould have Fee, the Fee ſhall not veſt till the Payment; for tho' the Condition ſhall have Relation to the Livery to avoid Incumbrances, yet as to the veſting of the Fee it ſhall have Relation only to the Time of the Payment; for the Condition is, If he pay that then he ſhall have Fee, and he cannot have it before, and then when the Fee was veſted in him he was Naturalis, and had Capacity as a Subject; ſo that the Time when the Condition was made is not ſo much to be reſpected as the Time when the Fee veſted: and when that veſted, he was capable as a Subject. Pl. C. 482. b. 483. Mich. 17 & 18 Eliz. in Caſe of Nichols v. Nichols.

4. Relations cannot *take away the Freehold*, but *ſave Incumbrances*. Arg. 2 Roll. R. 326. Paſch. 21 Jac. B. R. in Lord Sheffield's Caſe, cites Pl. C. in Nichol's Caſe, that where Tenant for Life was upon Condition to have Fee, and the Reverſioner was attaint, and the Tenant for Life performed the Condition, and Office was found; this ſhall not relate to take away the Effect of the Condition.

5. *Inquiſition upon an Outlawry* in Debt was *taken in Berks*, the *Defendant* came in *as Tertenant*, and *pleaded that he had obtained a Judgment againſt the Perſon outlawed in C. B. at Weſtminſter in the County of Middleſex*, in a Plea of Debt for 600 l. *and that afterwards in the ſame Court of C. B. at Weſtminſter in the County of Middleſex he prayed an Elegit to the Sheriff of the County aforeſaid*, and had a Moiety of the Lands in Berks found in the Inquiſition delivered to him, and avers them to be the ſame; upon Demurrer amongſt other Things, it was objected that theſe Words, Sheriff of the *County aforeſaid*, muſt relate to the County of Middleſex, that being *Proximum antecedens*, and if ſo, the Sheriff of the County of Middleſex cannot deliver Lands in Extent in the County of Berks. But it was anſwered, That the Rule Ad proximum antecedens fiat Relatio hath many Reſtrictions, and does not always hold; but Relation ſhall be had *Secundum ſubjectam Materiam*, and ſo as to avoid Incongruity and Abſurdity. Judgment was given for the Defendant. Hard. Mich. 1756. The Attorney General v. Buckeridge.

6. In a Special Verdict in *Ejectment*, the Declaration was *of ſeveral Meſſuages in the* ſeveral *Pariſhes of St. Michael, St. James, St. Peter, and St. Paul*, and *that Part* of the Premiſes *lay in the Pariſh of St. Peter and St. Paul, but* that there is *no Pariſh called St. Peter, nor* none called the Pariſh of *St. Paul*. The Court held clearly, that the Copulative (*Et*) *ſhall relate to that which* is real, and *has an Exiſtence, Ut res magis valeat*, not to make St. Peter's one Pariſh, and St. Paul's another, but to make both one Pariſh, and the Words (Several Pariſhes) are ſupplied by the other Pariſhes before mentioned; ſo that if there is any ſuch Pariſh as St. Peter and St. Paul, it ſhall relate to that. Hard. 336. Mich. 15 Car. 2. in the Exchequer, Ingleton v. Wakeman.

(B) Relation. Shall *not Defeat Meſne* Lawful *Acts.*

1. IF a Meſne Anceſtor, to whom a Right deſcends, makes a Releaſe and dies, The Heir, tho' in Action Anceſtrell he ſhall claim of the Poſſeſſion, and as Heir to the Anceſtor Paramount the Releaſe, yet the Releaſe ſhall bind; for he ought to make the Deſcent by the Meſne Anceſtor. 7. H. 4. 19. b. S. C. cited Arg. Carth. 125. in Caſe of Kellow v. Rowden. — See Releaſe (H.) pl. 5.

2. Office found after the *Heir of the Tenant of the King had ſuffered a Recovery by Title, or made a Feoffment*, ſhall not defeat the *Recovery*, nor the *Feoffment*, *nor* the *Seiſin of the Baron to give the Meſne Dower*; and ſo Note that it has not Relation to defeat Meſne Acts, but only to give the King the Profits. Br. Relation, pl. 18. cites 1 H. 7. 17 & 4 H. 7. 1. *Contra of ſuch Acts done after Office found*, but thoſe which were done before the Office found, ſhall not be avoided by the Office which comes after. Ibid.

3. Where *Judgment or Recovery affirms the firſt Poſſeſſion*, this ſhall not avoid Meſne Acts, as Recovery *in Waſt* or *Ceſſavit*, this ſhall not avoid a Charge granted before; For thoſe affirm the firſt Poſſeſſion; *Contra* of Reverſal by *Error*, *Attaint*, *or* Writ of *Diſceit*, Thoſe diſaffirm the firſt Poſſeſſion, therefore thoſe ſhall avoid Meſne Acts. Br. Dette, pl. 139. cites 4 H. 7. 13.

4. *A.* by Parol, *gave a Manor (to which an Advowſon was apendant)* with the Appurtenances *to B. and made Livery* on Parcel of the Land; *before Attornment* the Grantor *granted the Advowſon* to another, *and then Attornment is had* to the Grant of the Manor &c. All the Juſtices held, That the Attornment ſhall have Relation to make good the firſt Grant. And. 256. Trin. 30 Eliz. Rot. 2024. Long v. Heming. Cro. E. 209. Mich. 32 & 33 Eliz. S. C. — Sav. 103. S. C. — Le. 227. pl. 289. S. C. — 4 Le. 216. pl. 349. S. C. Adjournatur.

5. Office found of *Ideocy ſhall* have Relation to the *Birth* of the Ideot, to avoid all Meſne Acts done by the Infant, as Feoffments, Releaſes &c. 4 Rep. 126. b. Paſch. 1 Jac. B. R. in Beverley's Caſe. — Cites 32 E. 3. &c. tit. Sci. Fac. 106. and Stamf. Prerog. 34. b. & F. N. B. 202. (E.) S. P. 8 Rep. 170.

6. A. acknowledged *a Statute* to B. the 22*d of January*, and afterwards confeſſed a *Judgment* to C. the 23*d* of January next enſuing. And it was reſolved that the Judgment by Relation will defeat the Statute; For Judgment has Relation to the Eſſoin Day, and that is the 20th of January. Het. 72. Mich. 3 Car. C. B. Stamford v. Cooper.

(C) *Notes;* And Conſtruction.

1. SEMPER *ita fiat Relatio ut valeat Diſpoſitio.* 6 Rep. 76. b. in Sir George Curſon's Caſe.

2. The Relation *of Acts of Parliament* is Violent. If a Bargain and Sale be, the Inrolment after will make Acts before good; but a Relation *by Common Law* will not make an Act good, which was before void. Arg. Godb. 376. in Brooker's Caſe. — Cites 3 H. 7. St. Leger's Caſe. Petition 18.

3. In

And therefore if one be diſſeiſed, and the *Diſſeiſor makes a Feoffment to one who makes a Leaſe*, and the *Diſſeiſee Re-enters*, in this Caſe *he ſhall not puniſh the Feoffee nor his Leſſee* by Action of Treſpaſs; but he ſhall puniſh all Meſne Treſpaſſors to the Diſſeiſor, who intermeddle without Title, and this Entry of the Diſſeiſee defeats all Meſne Eſtates and Charges between the Diſſeiſin and the Re-entry. Arg. And 352. in Caſe of Butler v. Baker. Cites it as agreed 7 E. 4. 18 & 21 E. 4.

3 In Caſes of Relation, they many Times ſhall have Relation to *make or defeat a Thing to ſome Reſpects*, and to other [Reſpects] the ſame Thing ſhall not relate, and ſhall be taken always *as Reaſon allows*. Arg. And. 352. Mich. 29 & 30 Eliz. in Caſe of Butler v. Baker.

Relation in an Award is *not to the next Antecedent*, but to that which Accords. 3 Lev. 239. Trin. 1 Jac. 2. C. B Barns v. Harvey.

4. Relation ſhall always be *Ut Sententia non Impediatur*, and not to the laſt Antecedent. Arg. Cro. E. 113. Mich. 30 & 31 Eliz. in Caſe of Butcher, alias, Boocher v. Samford.

13 Rep. 21. Menvil's Caſe. —— Relations are Fictions in Law which *are always accompany'd with Equity*, per Ventris J. Arg. 2 Vent. 200. Trin. 2. W. & M. C. B. in Caſe of Thompſon v. Leach. —— But it is as true that there is ſometimes Loſs and Damage to Third Perſons conſequent upon them, but then it is what the Law calls *Damnum abſque Injuria*, which is a known and ſtated Difference in the Law. Ibid.

5 Relation *is a Fiction of Law*, to make Nullity of a Thing ab Initio (to a certain Intent) which in Rei veritate had Eſſence, and rather for Neceſſity, *Ut Res Magis Valeat quam pereat*. 3 Rep. 28. b. Mich. 33 & 34 Eliz. B. R. in Caſe of Butler v. Baker.

And therefore if a Man make Feoffment of a Manor, by Deed or without Deed, and a long Time after the Livery, the Tenants Attorn to the Feoffee; the Attornment in this Caſe for Neceſſity, Et ut Res Magis Valeat, ſhall have Relation by Fiction of Law to paſs ab Initio; For otherwiſe the Tenements ſhall never paſs; And if they paſs not Ab Initio by Fiction of Law, they ſhall not be Parcel of the Manor, according to the Purport and Intent of the Feoffment, if they ſhall paſs at ſeveral Times; But yet this Relation ſhall not charge the Tenants for Arrearages in the mean Time. 3 Rep. 29. a in Caſe of Baker v. Butler. ——S. P. Co. Litt. 310. b.

So if Feoffee upon Condition grants a Rent-Charge out of the Land, and after the Grantee brings a Writ of Annuity; now this was Annuity Ab Initio between the Grantor and the Grantee, but as to the Feoffor, who by the Grant was intitled to enter for the Condition broken, this ſhall not have any Relation to his Prejudice. 3 Rep. 29. a. b. in Caſe of Butler v. Baker.

6. As Relations ſhall *extend only to the ſame Thing, and to one and the ſame Intent*; ſo they ſhall extend *only between the ſame Parties*, and never ſhall be ſtrain'd to the Prejudice of a 3d Perſon, who is not Party or Privy to the ſaid Act. 3 Rep. 29. a. in Caſe of Baker v. Butler.

S. C. and P. cited Arg. 3 Bulſt. 253 —— Doderidge J. denied this Caſe of the Ceſſavit. Palm 41. Paſch. 1 Car. B. R. in Caſe of Cornwallis v. Hammond.

7. Where to the Perfection or Conſummation of a Thing, 2 *Accidents are requiſite*, and the one happens in the Time of one, and the other in the Time of another, in ſuch Caſe neither the one nor the other ſhall *take Benefit* of this; becauſe Both did not fall in the Time of any one of them, and Both are requiſite *to the Conſummation of the Thing*. As if Lord and Tenant, be by certain Rent, and the Tenant ceaſes for one Year, and then the Lord grants away his Seigniory, and then the Tenant ceaſes for another Year, in this Caſe neither of them ſhall take Benefit of this Ceſſer. 2 Rep. 92. b. 93. a. Trin. 43 Eliz. in Bingham's Caſe.

8. Where the *Commencement, Progreſſion, and Conſummation* of a Thing, are *neceſſary to go together*, there all of them are to be reſpected. Per Fleming Ch. J. 3 Bulſt. 11. Hill. 12 Jac. in Caſe of the King and Waller v. Hanger.

(D) Of

(D) *Of what* Things in General. And *to what Time.*

1. A Man *tender'd to be Attorney for the Defendant at the Niſi Prius*, and the *Juſtices received him Conditionally*, ſcil. *if the Defendant would aſſent to it, and after the Defendant aſſented to it*; this *ſhall have Relation to the Niſi Prius before*, quod nota bene, Matter of Record accepted upon Condition, and this in a Præcipe quod reddat. Br. Relation, pl. 26. cites 7 H. 4. 3 & 8 H. 4. 3. accordingly.

2. A Man is *arreſted in London*, and after *Writ is returned againſt him returnable in C. B.* the *Teſte of which* Writ *is before the Plaint in London, and the Return is after*; and therefore this ſhall have Relation to the Teſte, and ſo the Defendant ſhall have Privilege of C. B. Br. Relation, pl. 28. cites 9 H. 6. 54.

3. *Patent* of the King, *Pardon* &c. which are *Matters of Record*, ſhall have Relation *to the Date or Teſte*, and *Matters in Fact*, as *Releaſe, Obligation* &c. *to the Delivery* of it. Br. Relation, pl. 13. cites 37 H. 6. 21.

4. If a Man be *bound for the Tenants of D.* it ſhall be *intended* the Tenants *which D. had at the Time* of the Obligation made. Br. Relation, pl. 39. cites 39 H. 6. 6.

5. Where the *Teſte of the Writ of Appeal of Death is within the Year*, and the *Return and the Demiſe of the King is after the Year*, there by *Reattornment* the Year ſhall be ſaved by Relation to the Original. Br. Relation, pl. 24. cites 10 E. 4. 13.

6. *Remainder to the right Heirs of W. N. who is alive, and after dies*, ſhall then paſs a Principio. Br. Relation, pl. 20. cites 1 H. 7. 31.

7. In *Ejectment* a Verdict was for the Plaintiff; a *Motion in Arreſt of Judgment* was made 4 *Days after*; and it *being a ſpecial Matter of Law*, the *Court took Time to adviſe*, and *in the mean Time one of the Plaintiffs died*. It was objected that the *Favour of the Court ſhall not prejudice the Party*; for after the firſt 4 Days the Judgment ought to have been given preſently; and in this Caſe the Judgment ſhall have Relation to the Time when it ought to have been given, at which Time that Plaintiff was alive; and ſaid that it was lately ſo adjudged in Derick James's Caſe, who died the Day after the Verdict, and yet Judgment was not ſtay'd. Le. 187. pl. 264. Trin. 31 Eliz. B. R. Iſley's Caſe.

8. *Bond by two, ſigned by one at one Day, and by the other at another Day*, ſhall relate to the firſt Delivery. Cro. E. 622. 623. pl. 15. Mich. 40 & 41 Eliz. Collins v. Harding.

9. Grant of *Trees then growing* ſhall not refer to the *Date*, but to the Delivery of the Grant: So Covenant to pay for *Corn then laden*, if there are 10 Months between the Date and the Delivery. Per Fleming. Cro. J. 264. Mich. 8 Jac. B. R. in Caſe of Offley v. Hicks.

10. A *Judgment* ſhall relate to the *Eſſoin-Day*. Cro. Car. 102. Hill. 3 Car. C. B. Standford v. Cooper. Het. 72. Mich. 3 Car. S. C.—Hutt. 95. Sandford v. Cooper. S. C.——1 Rep. 94. Shelly's Caſe.

11. When * *two Times* are *requiſite to the Perfection of an Act*, it ſhall be ſaid upon their Conſummation, to receive its Perfection from the firſt, as D. 246. of a Fine levied by a Feme Sole. Arg. Cro. J. 449. Mich. 15 Jac. B. R. in Caſe of Baskervill v. Brockett.

* So of *two Deeds*. 2 Rep. 93. in Bingham's Caſe. —— 1 Rep. 100. in Shelly's Caſe. —— 10 Rep. 49. Lampet's Caſe. —— Jo. 428. per 2 Juſt. in Caſe of Harper v. Burgeſſes of Derby —— *But* where 2 *Ceremonies* are neceſſary for the Perfection of a Thing, it is not there of any Validity until the laſt be effected, and that it ſhall not relate &c. for then it ſhould be to the Prejudice of a third Perſon. Cro. J. 451. Arg. cites the laſt Caſe put in Butler and Baker's Caſe. 3 Rep. 35. 36. a.

(E) *Acts subsequent* relate *to precedent.* In what Cases.

Br. Relation, pl. 1. cites S. C.—So it is a Man *buys Land for Years, upon Condition* that if he performs certain Conditions, that then *he shall have Fee*, there if he performs the Condition he shall have Fee by the first Delivery. Br. Non est Factum, pl. 5. cites 27 H. 6. 7. Per Danby.

1. WHERE a Man delivers an *Obligation to be as an Escrow* to deliver to the Obligee as his Deed, after certain Condition performed, there upon the Delivery after the Condition performed, it shall have Relation to the first Delivery to be his Deed; so that *if the Obligor in the mean Time, between the first Delivery and the second* Delivery *dies*, yet it shall bind him by Reason of the *Relation.* Br. Non est Factum, pl. 5. cites 27 H. 6. 7. Per Danby.

Br. Relation, pl. 1. cites S. C.—*But* if an *Infant* deliver an Escrow to deliver as his Deed, after certain Conditions perform'd, and the *Conditions are perform'd at his full Age*, and then the Bailee delivers it, this shall not bind; for the first Delivery and Commandment was during his Nonage, and therefore it shall not bind as a Deed: Note the Diversity. Br. Non est Factum, pl. 5. cites 27 H. 6. 7. Per Danby.

2. *And* if a *Feme Sole* make such a Delivery as an Escrow &c. and *after takes Baron*, and then the Condition is performed, and the Bailee delivers it as a Deed, it shall bind the Feme. Br. Non est Factum, pl. 5. cites 27 H. 6. 7. Per Danby.

3. A Man *devised his Land to be sold by his Executors*, and died, the *Heir entered*, and *justly*; *and after he charg'd the Land*, and then the *Executor sold*; the Vendee shall hold discharg'd; for the Sale in this Respect shall have Relation to the Death of the Testator, but not as to the taking of the Mesne Profits; quod nota Diversity, by the Opinion of Brudnel in Replevin. Br. Relation, pl. 30. cites 14 H. 8. 10.

4. Every *Execution* has in Judgment of the Law Relation and Retrospect *to the Judgment*, as appears in 1 Rep. 94. b. Shelly's Case. 7 Rep. 38. in Lillington's Case.

5. In *Privity of Right* the Law shall not have Relation to the *first Act.* Arg. Roll. R. 139. Hill. 12 Jac. B. R. in Case of The King v. Hanger.

6. Execution of all *Things executory* respect the Original Act, and shall have Relation thereto, and all make but one Act, tho' done at several Times. Per Choke and Montague. Ch. J. Cro. J. 512. Mich. 16 Jac. B. R. Havergill v. Hare.

7. When the Writ of *Libertate* is sued, it has Relation to the Writ of *Extent*, and they are Quasi but one Extent, and the Goods are so bound by the Extent and Apprizement, that the Conusor has no more Property in them but Secundum quid, and not Simpliciter, that is if the Conusee refuse to accept them; For it is a *Conditional Writ* to deliver them to the Conusee if he will accept them, and when he accepts them they are bound Ab Initio. Cro. C. 150. Hill. 4 Car. in the Case of Audley v. Halsey.

As if Tenant for Life makes a Feoffment with Warranty, and with Letter of Attorney, and afterwards Livery is made; in this Case in the Eye of the Law, the Feoffee shall be said to be seised in Fee before [by] the Grant. Ibid.

8. Where there are *divers Acts* concurrent *to make a Conveyance*, Estate, or other Thing, the *Original Act shall be preferred*, and *to this the other Act shall have Relation.* Per Barkley and Jones Jo. 423. Hill. 14 Car. B. R. in the Case of Harper v. the Bailiffs of Derby.

9. *Bail taken at different Times*, the first is De bene esse, and no compleat Bail till the last is taken, and so shall not relate to the Time of the first Recog-

Recognizance taken. 8 Mod. 188. Mich. 10 Geo. 1. Croft v. the Bail of Harris.

(F) *Eſtates Subſequent* relate to Precedent.

1. IN Entry in Nature of Aſſiſe, it was agreed that a Man may plead *Recovery* in Bar *and the Eſtate of the Plaintiff Meſne* &c. and well; For this is *founded upon Title*, and therefore ſhall have Relation before; *But* it is no Plea to plead a *Fine* in Bar and the Eſtate of the Plaintiff Meſne between the Conuſance of it and the Execution; For it ſhall not have Relation before the Execution; Quod nota Diverſity. Br. Relation pl. 27. cites 21 H. 6. 17. — And there 8 E. 3. is vouched to be ſo ruled. Ibid.

2. *Entry for Condition broken* makes a Man, by Relation, in as of his firſt Eſtate ſo, as if the Poſſeſſion had been never out him. Arg. 2 Roll. Rep. 469. Mich. 22 Jac. in Caſe of Nicholas v. Simmonds.

3. Where an *Eſtate is executed by Virtue of a Power*, the Eſtate ſhall riſe from the Original Creator of the Eſtate, and ſhall be as preceding. Per Bridgman Ch. J. Cart. 111. Mich. 18 Car. 2. C. B. in the Earl of Bath's Caſe.

If an *Eſtate ariſes* to One *on a Contingency*, or a *Power* reſerved *on a Fine or Feoffment* to Uſes, when once raiſed or veſted, it relates to the Fine or Feoffment, as if immediately limited thereupon; Arg. Show. 507. cites 1 Rep. 133. 156.

4. If the *Husband diſcontinues the Wife's Eſtate*, and then the *Diſcontinuee conveys back* the Eſtate *to the Wife* in the Abſence of the *Husband*, who ſo ſoon as he knows of it *diſagrees* to it, this ſhall *not take away the Remitter* which the Law wrought upon her firſt taking the Eſtate from the Diſcontinuee; Becauſe ſhe is in of a *Title paramount* to the Conveyance, to which the Diſagreement relates. Arg. Show 307. * cites Init. 356. Jo. 78. and ſays the ſame Rule holds for Agreement, and of that Opinion was the whole Court of Common Pleas.

* Co. Litt. 356. b S. 677.

(G) *Torts Subſequent.* Relation.

1. WASTE was brought of *Waſte done Meſne between the Fine and the Attornment*, and by the Opinion of the Court it does not lie; For the Attornment ſhall not have Relation to the levying the Fine. Br. Relation, pl. 5. cites 48 E. 3. 15.

If a Reverſion is expectant on an Eſtate for Life and in the Interim *between a Grant and Attornment Leſſee commits Waſte*, tho' the Attornment relates to make the Grant good Ab Initio, yet the Relation being a Fiction in Law will not make the Leſſee puniſhable for Waſte. Arg. Godb. 388. cites 18 *H.* 6. 23.

2. *Leſſee* for Years *fells Trees for Repairs, and afterwards ſells them*; it is *Waſte*, not for the ſelling them only, but *for the Felling*; For by this Act done it is plain from the Beginning, to be unlawful; For the Sale is only a Declaration of his ill Intent to benefit himſelf by ſelling the Trees to the Injury of the Leſſor. Godb. 28. pl. 37. 27 Eliz. C. B. Anon.

3. In a Thing of *Tort* the Law has Reference to the *firſt Act*. Arg. Roll. Rep. 139. Hill. 12 Jac. B. R. in Caſe of the King v. Hanger.

(H) *Mar-*

(H) *Made good* by it; What is.

Br. Faits Enroll pl. 8. cites 1 H. 7. 3. — Br. Relative pl. 52. S. C. cites 1 H. 7. 30, 31. per Brian and Catlow. —

1. IF a Man makes a *Leaſe for Life by Deed*, the *Remainder to the King*, and makes Livery and Seiſin, the Remainder does not paſs immediately; but if the Deed is afterwards inrolled, then the Remainder ſhall be in the King from the Time of the firſt Livery. Pl. C. 31. b. in the Caſe of Colthirſt and Bejuſhin Paſch. 4 E. 6. per Hales J. cites 1 H. 7. 19. according to the old Books, but in the New Books it is Trin. 1 H. 7. 31. per Brian.

Br. Relation pl. 20. cites S. C.

Poph 89. S. C. — * 13 Rep. 22. Menvill's Caſe —

2. Relations in ſeveral Caſes ſhall *aid Acts in Law*, as in Caſe of * Dower &c. but *not Acts of Parties*, viz. to make void Acts of the Parties good by Relation or Fiction of Law. 3 Rep. 29. Butler v. Baker.

And therefore if a Man enfeoffs an Infant or Feme-Covert, and afterwards gives, or grants, or deviſes the Land, or any thing out of the Land to another, and after the Infant or Baron diſagrees, this without Doubt ſhall have Relation between the Parties Ab Initio, to this Intent, viz. that the Infant or Baron ſhall not be charged in Damages, or receive any Prejudice; But *ſhall never make a void Grant or Deviſe of the Party good.* 3 Rep 29. a. in Caſe of Butler v Baker —— *Nor to defeat collateral Acts*, which are lawful, eſpecially if they concern *Strangers.* 15 Rep. 21.

Per Popham Ch. J. Such Deſcent will not have Relation to *toll an Entry* of him that Right hath, becauſe it was not an immediate Deſcent in Deed, but only upon the Operation of Law which gave Wardſhip &c. but not to prejudice any third Perſon. Ibid.

3. If after the Death of the Husband the Wife *waives a Joint art made after Marriage*; This puts the Inheritance intirely in the Husband, and in his Heir in Relation to divers Reſpects, yet as to other Reſpects he ſhall not be ſaid in them with ſuch Relation. Poph. 90. Butler v. Baker.

4. Relation ſhall never *make an Act good*, which was void for Defect of Power. Arg. and the Court ſeemed ſtrongly of that Opinion and Judgment afterwards accordingly. Vent. 304. Hill. 28 & 29 Car. 2. Abram v. Cunningham.

2 Lev 34. Parſons v. Pierce. — Mod. 91 S. C. Pollex 45.

5. *A. and B. Femes, are Jointenants. A. infeoffs J. S.* and makes *Livery within View, and directs him to enter, and then marries J. S. before Execution*; J. S. enters after Marriage; Reſolved that this Livery is well executed after Marriage, and the Entry hath a ſtrong Retroſpect to the Livery, and ſhall be pleaded as a Feoffment when ſhe was Sole. Vent. 186. Hill. 23 & 24 Car. 2 B. R. Parſons v. Perus.

(I) *Defeated* by Relation. *What* Eſtates or Things.

1. WHERE the *Inheritance of the Crown with all Preheminences* and Prerogatives were given to King H. 7. yet this *did not extend to reſume Liberties and Franchiſes* of other Manors; By all the Juſtices. Br. Relation, pl. 19. cites 1 H. 7. 13.

2. In Quare Impedit, where the *King is intitled to the Advowſon by Office by Death of his Tenant, the Heir being within Age and in Ward* of the King by Tenure in Capite, this Office ſhall have Relation to the Death of the Tenant of the King; ſo that if there be a Meſne Preſentment the King ſhall avoid it by Relation. Br. Relation, pl. 11 cites 14 H. 7. 22.

3. If

3. If A. *covenants to levy a Fine Oct. Pur. Beate Marie* 1 *Car.* and the Covenantor *acknowledges a Statute February the 4th*, in the ſame Year, and the Fine is levy'd according to the Covenant, the Conuſee ſhall avoid the ſaid Statute by Relation *to the Eſſoin Day*, which was prior to the 4th of February. Jenk. 250. pl. 40.

4. Relation ſhall not *defeat Collateral Things executed.* Per Coke Ch. J. Roll. Rep. 191. cites the Caſe of Cotter v. Wingate.

S. C. cited Arg. Lane 37. by the Name of Wingate v. Hall.

5. Tenant for Life, Remainder to his 1ſt Son in Tail, Remainder to Sir Simon L. in Fee. Tenant for Life (before the Birth of any Son) *executed a Deed of Surrender* of all his Eſtate and Title, to Sir Simon L. and delivered this Deed to T. S. to the Uſe of Sir Simon; and all this was done without the Knowledge of Sir Simon.— Afterwards a Son was born, and after that Sir Simon L. hearing of the Surrender, *aſſented* to it. Ventris J. thought that by the Delivery of the Deed the Eſtate paſs'd to, and veſted immediately in Sir Simon L. and ſhould wait there till his Diſſatient, becauſe the Law will intend his Aſſent being for his Benefit; but all the other Judges in C. B. and B. R. were e contra, and Judgment accordingly; but that Judgment was revers'd in Domo Proc. againſt the Opinions of all but Atkins Ch. B. Carth. 250. Mich. 4 W. & M. B. R. Sir Simon Leech's Caſe.

The Reverſal in the Houſe of Lords was upon the Point of Lunacy. See Show. Parl. Caſes 150. 154.

6. No Relation to a precedent Act can work ſo ſtrong as *to deveſt an Eſtate veſted*, which was *created* by Conveyance *Antecedent to the Deed, to which* the Relation muſt be. Arg. Admitted Show. 298. in the Caſe of Leach v. Thompſon.

7. *Huſband and Wife made* a *Feoffment of the Lands of the Wife*, and were after *divorced*; it was a Diſcontinuance; for between themſelves Relation made a Nullity, but never as to a third Perſon. 12 Mod. 273. Paſch. 11 W. 3. B. R. Per Holt Ch. J. in the Caſe of Cage v. Acton.

(K) *Favour'd* in what Caſes; And *bound* by it, Who.

See Laitat. (A) pl. 3.— Treſpaſs (K) pl. 3, 4, 5.

1. *A Conſtable took a Man who ſtruck another*, and after *ſuffered him to go*; and after the *Party ſtruck died of the Blow.* This Eſcape *is not Felony*, and yet it ſhall have Relation * to the Striking, in reſpect of him who ſtruck; Ex prima Cauſa Oritur omnis Actio; but ſhall not have ſuch Relation *in reſpect of the Conſtable* who ſuffered the Eſcape. Br. Relation, pl. 7. cites 11 H. 4. 12.

* Orig. is (Al Comp) but the Year-Book is (Coup.)

2. When an *erroneous Judgment* is *reverſed* by Writ of Error, As to the *Meſne Profits* the ſame ſhall have Relation, by Conſtruction of Law, to the Time of the firſt Judgment given; and that is *to favour Juſtice and advance the Right of him that had Wrong by the erroneous Judgment.* 13 Rep. 21. in Menvil's Caſe.

But if any *Stranger has done a Treſpaſs in the mean Time*, he who recover'd, after the Reverſal of the Recovery, ſhall have an Action of Treſpaſs againſt the Treſpaſſors; and if the Defendant pleads, That there is no ſuch Record, the Plaintiff ſhall ſhew the ſpecial Matter, and maintain his Action; *for as unto the Treſpaſſors*, who are wrong Doers, the Law ſhall *not make any* Conſtruction, by way of *Relation Ab Initio, to excuſe them*; for then the Law, by a Fiction and Conſtruction, ſhould do wrong to him that recovered by the firſt Judgment; for as the *Law chargeth the Recoveror with all the meſne Profits, ſo it gives him Remedy, notwithſtanding the Reverſal, againſt all Treſpaſſors in the Interim*; for otherwiſe it would, by Conſtruction of Relation, diſcharge Tort feaſors, and charge him that recovered with the Whole. And ſo he that reverſes the Judgment ſhall have Action for all the Meſne Profits againſt the Recoveror, and the Recoveror ſhall have Action of Treſpaſs againſt the Treſpaſſors. 13 Rep. 21. 22. in Ninian Menvil's Caſe.

The King ſhall not be over-reach'd by Relation;

3. Relation ſhall in no Caſe conclude *the King*. Arg. Parl. Caſes 74. in the Caſe of the King v. Baden.

As in the Caſe of *Money of an Outlaw paid into the Exchequer* when the Outlawry is reverſed; Now by Relation the Money was the Property of the Party all the Time, but ſuch Relation doe not over-reach the Prerogative of the King. Per Holt. Skin. 615. Mich. 7 W. 3. B. R. in the Banker's Caſe.

If a Gift is made to the King by Deed inroll'd, and before Inrollment he grants away the Land, the Grant is void; yet the Inrollment by Relation makes the Lands to paſs to the King from the Beginning. Arg. Godb. 376. cites 3 Rep. Butler v. Baker.

3 Lev. 282. S. C. Per 3 Juſtices.— 3 Rep. 29. b. in the Caſe of Butler v. Baker.

4. 'Tis a general Rule, That Relation ſhall *not do Wrong to Strangers*. Per Ventris, J. 2 Vent. 200. Trin. 2 W. & M. C. B. in the Caſe of Thompſon v. Leach.

For more of Relation in General, See Dower, Execution, Faits, Fines (A. a. 2) Forfeitures, Grants, Judgments, Releaſe, Statutes, and other Proper Titles.

Releaſe.

(A) By *Enlargement*. Of what *Things* it may be.

In Aſſiſe of *Rent* the *Tenant ſhew'd, That his Father was ſeiſed thereof, and granted it to W. N. who granted it to the Plaintiff*; and after *W. N. died without Iſſue*. Judgment &c. The *Plaintiff ſaid, That after the Grant* made in Tail the *Grantor releaſed all his Right to the Tenant in Tail, and to his Heirs, and ſo he had Fee*; and pray'd the Aſſiſe. Et Adjornatur. Br. Aſſiſe, pl. 370. cites 44 Aſſ. 7.

1. If a Man ſeiſed of a Rent in Fee grants it for Life, he may enlarge it by Releaſe. 43 Aſſ. 8. Admitted. 44 Aſſ. 7. Admitted.

A Man *ſeiſed of Rent granted it to J. S. in Tail*, and after the *Grantor releaſed to the Grantee and his Heirs*, (for it was ancient Rent) by which the Grantor had Tail in Poſſeſſion, and Fee in Reverſion, and the *Grantee granted totum Statum ſuum in the Rent to W. N.* and his Heirs, and died; the Grant is determined; For his Eſtate is that which he had in Poſſeſſion, which is only Tail; Quere. Br. Grants, pl. 159. cites 43 Aſſ. 8.

(B) Releaſes by Way of Enlargement. *To whom*.

1. If one gives to 2, and to the Heirs of the Body of the one, the Donor may enlarge their Eſtates by a Releaſe to them. 45 Aſſ. 7. admitted.

2. If there be Leſſee for Life, the Remainder for Life, the Remainder in Fee, he in Remainder in Fee may enlarge the Eſtate of the Leſſee by Releaſe. 44 Aſſ. 35. Per Finch. Admitted.

3. If

3. If there be Leſſee for Life, the Remainder in Tail, the Remainder in Fee, he in Remainder in Fee may enlarge the Eſtate of the Leſſee by Releaſe, notwithſtanding the Meſne Eſtate. 44 Aſſ. 35. Per Finchd. admitted.

4. If Leſſee for Life, Reverſion for Life are, Reverſioner in Fee may releaſe to the Reverſion for Life. 48 E. 3. 16.

5. If Leſſee for Life, the Remainder for Life are, the Reverſion in Fee may releaſe to the Remainder for Life. 48 E. 3. 16.

If a Man leaſes for Life, the Remainder over for Life, and after he releaſes all his Right to him in Remainder, *and his Heirs*, *he has gained* the Fee by this Releaſe. Per Perſey and Finch quod non negatur; but per Finch, He ſhall not have Action of Waſte againſt the Tenant for Life without Attornment; quære inde, for contra per Perſey. Br. Releaſes, pl. 76. cites 48 E. 3. 16.

6. If Leſſee for Life, the Remainder in Tail are, the Donor may releaſe by Enlargement to the Leſſee. 9 H. 6. 54. It ſeems the Book intends it there.

7. If Leſſee for Life, the Remainder in Fee to the Tenant for Life, are, The Tenant for Life by his Releaſe to the Remainder may transfer his Remainder in Fee to him in Remainder in Tail, but not his Eſtate for Life. H. 7 Ja. B. between *Francis and Pack*, per Curiam.

2 Brownl. 254. ſeems to be S. C. —*Tenant for Life cannot releaſe to him in Remainder*, but he muſt ſurrender. D. 251. pl. 91. Hill. 8 Eliz. Stepkin v. Lord Wentworth.—See Lev. 145. Maſon v. Tredway accordingly, but contra as to Leſſee for Years, but no Judgment. —S. C. Keb. 807. pl. 77. Mich. 16 Car. 2. B. R. adjornatur.

8. If Tenant in Dower grants over her Eſtate, he in Reverſion may enlarge the Eſtate of the Grantee by Releaſe. (Per note that notwithſtanding the Grant over, the Privity continues between Reverſioner and Tenant in Dower, for Waſte he's againſt her. 11 H. 4. 6. 11. admitted. 18 E. 3. 40. 18 Aſſ. 56. adjudged.

Fol. 401.

9. If Leſſee for Life or Years grants over his Eſtate, Leſſor may enlarge the Eſtate of the Grantee by Releaſe in Fee, or for his own Life. 18 E. 3. 40. Adjudged. 21 Aſſ. 21. admitted.

If A. makes a *Leaſe for Life*, and *Leſſee for Life makes a Leaſe for Years*, and *A. releaſes to the Leſſee* for Years, and his Heirs; this is void, becauſe here is not the Conſent of the Tenant for Life, who is immediate Tenant to the Reverſioner, and ought to attorn; and therefore this Eſtate ought to paſs by Grant and Attornment. G. Treat. of Fen. 65.——S. P. Co. Litt. 270. b. 273. a.

So it is if a Man *leaſes for* 20 *Years*, and the *Leſſee aſſigns for* 10 *Years*. G. Treat of Ten. 65.——S. P. Co. Litt. 273. a. That *a Releaſe to the ſecond* Leſſee and his Heirs, is *void*, *becauſe* there is *no Privity*.——*But* in ſuch Caſe, a Releaſe *to the firſt Leſſee* is *good*, for he had an actual Poſſeſſion, and the Poſſeſſion of the Leſſee is his Poſſeſſion. Co. Litt. 270. a.——S. P. Per Tyrrel J. Carth. 62. in Caſe of Geary v. Bearcroft, cites Litt. S. 69. 70.——*But if Donee in Tail makes a Leaſe for Years*, and the *Donor releaſes to the Leſſee and his Heirs*, this Releaſe is void to enlarge the Eſtate, becauſe there is no Privity. Co. Litt. 273. b.——* Orig. is (No) but it ſeems to be miſprinted.

Leſſee for Years cannot make a Leaſe for Years, within the Statute of Uſes, and by this Means to give Poſſeſſion to make him capable of a Releaſe of the Reverſion. Per Powell J. Lutw. 570. Hill. 9 W. 3. in Caſe of Chaloner v. Davis.

10. So he may by Confirmation. 17 E. 3, 31. b. 31 Aſſ. 13. admitted.

Br. Charge, pl. 29. cites S. C.

11. If Baron and Feme are Leſſees pur auter Vie, Leſſor may enlarge their Eſtate by Releaſe for their own Lives. 18 E. 3. 40. adjudged. 18 Aſſ. 56.

If a *Feme Covert* be *Vicount for Life*, a Releaſe *to the Huſband and His Heirs*, is good; for there is both Privity and an Eſtate in the Huſband; whereupon the Releaſe may ſufficiently enure by Way of Enlargement; for by the Intermarriage he gains a Freehold in his Wife's Right. Co. Litt. 273. b.——Keilw. 129. pl. 07.

12. If a Man has Execution of Land upon an Elegit, it ſeems that he in Reverſion, for whoſe Debt it was extended, cannot enlarge his Eſtate by a Confirmation to him to have for Life, for Want of Privity.

Br. Charge, pl. 29. cites S. C.

Privity between them; for the Tenant by Elegit comes in by Act in Law. Contra 31 Aſſ. 13. admitted.

13. So he cannot enlarge his Eſtate by Releaſe to have for Life for Default of Privity. Contra 31 Aſſ. 13. admitted.

14. If a Man ſues Execution upon an Elegit of my Land, and after I who have the Reverſion in Fee confirm to him his Eſtate, he may after enlarge his Eſtate by Releaſe to have in Fee, for the Confirmation has created a Privity between them. 31 Aſſ. 13. admitted.

By whom.

15. If the Father leaſes for Life, and dies, the Heir to whom the Reverſion deſcends may enlarge the Eſtate by Releaſe. 18 E. 3. 40. by Admittance. 43 Aſſ. 8. admitted.

16. If Leſſee for Life be and afterwards the Reverſion is granted by to Fine Baron and Feme, and to the Heirs of their Bodies, the Remainder in Fee to the Baron, and the Baron and Feme by Fine releaſe all their Right to the Leſſee, and after die without Iſſue; this is a good Enlargement of the Eſtate of the Leſſee, and this ſhall bar the collateral Heirs of the Baron. 30 E. 3. 4. b.

Releaſe of the Eſtate of Inheritance or for Life, is not good to *Leſſee for Years without Privity*; as if Tenant in Fee, or for Life, releaſes to Leſſee for Years of his Diſſeiſor. Fin. Law 8vo. 44 b.

17. If Leſſee for Life be the Remainder in Fee, he in Remainder may enlarge the Eſtate of the Leſſee by a Releaſe. 44 Aſſ. 17. Admitted.

But Releaſe *of Termor for* Years, *to Leſſee for Years of Him who ejected him*, is good; For Privity there is not requiſite. Fin. Law 8vo. 44. b.

18. If a *Man enters* into Land *of his own Wrong, and take the Profits*, he is a Diſſeiſor, and a Releaſe to him is good; or if the Owner conſented thereunto, then he is Tenant at Will, and that Way alſo the Releaſe is good; but there is a *Diverſity when one comes to a particular Eſtate in* Land *by the Act of the Party, and when by Act in Law*; For if the Guardian holds over, he is an Abater, becauſe his Intereſt came by Act in Law. Co. Litt. 271.

S P That it is good to the Tenant for Years, becauſe the Tenant for Years holds of the Reverſioner and pays him the Services, and ought to attorn to his Grants, and not he in Remainder for Life; and therefore where Tenant for Years accepts a Releaſe of the Reverſion, it muſt in Conſequence be good; and in that Caſe, *a Releaſe to him in the Remainder for Life* is good, becauſe the Leſſee, in the Original Infeudation, took the Eſtate for Years, ſubject to ſuch Remainder for Life, and therefore there *needs no Conſent from the Leſſee for Years*, to enlarge the Eſtate into a Fee. But a Man muſt *not only have an immediate Relation, but* he muſt have *the notorious Poſſeſſion* of the Eſtate, as Tenant for Life has by the Feudal Contract; for if he has not the Poſſeſſion, but has *aſſigned* it *over* to another, there can be no ſuch notorious Poſſeſſion upon which a Releaſe ſhould enure; For it would deſtroy the Solemnity of Contracting, if the Releaſe ſhould paſs the Eſtate, and charge the Tenant, when the Party was not really in Poſſeſſion. G. Treat. of Ten. 65, 66.

19. If a Man makes a *Leaſe for Years, Remainder for Life*, a Releaſe by the Lefior *to the Leſſee for Years, and to his Heirs*, is good; becauſe he has both a Privity and an Eſtate, and the Releaſe *to him in the Remainder for Life and his Heirs*, is good alſo. Co. Litt. 273. a.

He is liable to an Action of Waſt &c. Becauſe the *Eſtate is created merely by the Law*, yet he is not capable of a Releaſe, becauſe he *has no Notorious Poſſeſſion in Fact*, which may be enlarged into a Fee. G. Treat. of Ten. 66

20. If a *Tenant by the Curteſy grants over the Eſtate*, yet he is Tenant as to an Action of Waſt, Attornment &c. and yet a *Releaſe* to him and his Heirs *cannot* enure to *enlarge his Eſtate*, who hath no Eſtate at all. Co. Litt. 273. a.

21. If I *grant the Reverſion of* my *Tenant for Life* to another for Life, *and after Releaſe to the Grantee* and his Heirs, he has Fee-Simple. Co. Litt. 273. a.

22. Releaſe cannot be made to *Leſſee of a future Term*, ſo as to increaſe the Eſtate, yet he is capable of a Releaſe of the Rent, becauſe of the Privity between them. Arg. Show. 381. cites 1 Inſt. 46.

23. A *Leaſe* was made 3 H. 8. *to A. B. and C. at Will*; afterwards *A. died, B. and C. took a new Eſtate by Indenture to them and their Heirs* in Anno 4 H. 8. but *no Warrant* of Attorney *to make Livery* could be proved. The Indenture recited the former Leaſe, [as] by Indenture made 3 H. 8. and the Death of A. and that B. and C. had ſurrender'd the Indenture, and that it was only cancelled; The Court was of Opinion that the former *Eſtate at Will was determined*, the ſecond Indenture could not enure as a Confirmation to [illegible] enlarge a Fee-ſimple to the Leſſees, as it might if the Eſtate at Will [illegible] been determined. D. 209. b. pl. 20. Hill. 10 Eliz. Anon.

The Reporter makes a Quere, If the Tenancy at Will was gone by the Death of A. or Not? becauſe nothing ſurviv'd by his Death &c.

and ſays that the Opinion of a Grant made by the Leſſor to the Leſſee at Will for Term of Life, was held, 14 Eliz. as a good Confirmation to enlarge the Eſtate without Livery. Ibid.

24. *A. leaſed to B.* for Years; Afterwards *A. before Entry* by B. *releaſed to B. all his Right*; this Releaſe is void, becauſe the Leſſee had not Poſſeſſion of the Land at the Time of the Releaſe made, but only a Right to have it by Virtue of the Leaſe. 5 Rep. 124. b. Paſch. 3 Jac. C. B. in Stayn's Caſe. S. P. Co. Litt. 46. b 270. a. S. P. Litt. S. 459. *But if the Leſſee enters, and has Poſſeſſion* by Force of the Leaſe, then ſuch Releaſe by the Leſſor, or by his Heir, is ſufficient, by Reaſon of the Privity by the Leaſe ſetween them &c. —— Pl. C. 483. a. cites S. C.

25. If an *Advowſon* be *granted for Years*, the Patronage for Years is in Grantee, and he may accept a *Releaſe in Fee* of the Patron in Fee; per Jones J. Jo. 19. Hill. 20 Jac. C. B. in Caſe of Standen v. The Univerſity of Oxford & Whitton. *But* if 1, 2, or 3 *Advowſons are created*, the Patronage is not ſevered, nor can ſuch Grantee accept of a Releaſe in Fee of the Patron in Fee; per Jones J. Jo. 19. Ibid

26. If an *Infant makes a Leaſe for Life*, and the *Leſſee aſſigns it* over to to another *with Warranty*, the *Infant* at Full Age *brings a Dum fuit infra Ætatem* againſt the *Aſſignee*, and he *vouches the Aſſignor*, who enters into the Warranty; the Demandant cannot Releaſe in Fee ſo as to enlarge the Eſtate, becauſe the *Vouchee has no Poſſeſſion*. G. Treat. of Ten. 66, 67. S. P. Co. Litt. 272. b. 273. a.

(B. 2.) To whom; By Enlargement; *by what Words.*

1. LORD *and Tenant* were *by Fealty, and* 10*s. Rent*, the *Lord releaſed to the Tenant all his Right in the Land, ſaving to the Lord the Rent*; and by the Opinion of all the Juſtices, this ſhall be a Rent-Service, as it was before the Releaſe, and he ſhall have Fealty and then the Releaſe is void, notwithſtanding that the Deed of a Man ſhall be taken more ſtrongly againſt himſelf; And ſo ſee that the *Saving is Repugnant* to all the Deed, and yet the Deed ſhall not ſerve. Br. Releaſes, pl. 55. cites 12 E. 4. 11.

2. A Releaſe *by the Leſſor to the Leſſee for Years*, without other Words, gives the Leſſee for Years an Eſtate for Life. Jenk. 200, pl. 18.

3. If a Releaſe be made *to Tenant by Statute Staple or Merchant*, or *Elegit*, by him in the Reverſion of *all his Right in the Land*, by this a S. C. cited by Vent. Free-

Freehold paſſes for the Life of him to whom the Releaſe is made; for that is the greateſt Eſtate that can paſs, *without* apt *Words of Inheritance.* Co. Litt. 273. b.

tris J. 2 Vent. 328. in Caſe of Dignton v. Greenvill.

4 To a Releaſe that enures by Way of Enlargement of the Eſtate, there is not only required *Privity, and an Eſtate* alſo, but *ſufficient Words* in Law to raiſe or create a new Eſtate. Co. Litt. 273. b.

Cro. C 335. S. C and reports the Releaſe to be *to the Grantee and his Heirs*, and afterwards recites it to be * *by him* (viz. the Reverſioner) *and his Heirs*; but that it was *not to him and his Heirs*, ſo that only an Eſtate for Life (of Tenant for Life) paſſing by the Grant, the Releaſe cannot enlarge it. ——— * Quære if (by) ſhould not be (for).

5. If *Tenant for Leaſe grants in Fee*, and the *Reverſioner in Fee releaſes to the Grantee*, but does *not ſay for* him and *his Heirs*, this Releaſe gives only an Eſtate for Life. And if Tenant for Life dies, and the Releſſor dies, and then the Grantee levies a Fine, this is a Forfeiture to him that is next in Reverſion. Jo. 328. Mich. 9 Car. B. R. Dikes v. Ricks.

6. As in Feoffments there was required the Word *Heirs* to *diſtinguiſh the Feud from ſuch as were not Hereditary*; ſo it muſt be inſerted in Releaſes that only come in Place of the Feoffment, in Caſes where the Poſſeſſion was transferr'd before. G. Treat. of Ten. 67.

(B. 3) At what Time. *Before Entry, or out of Poſſeſſion.*

1. IF A. makes a *Leaſe for* 100 *Years* to B. *and B. makes a Leaſe for* 50 *Years* to C. and after A releaſes to B. in Fee; this Releaſe is good, and yet B. has not any actual Poſſeſſion. Co. R. on Fines 6. cites 12 E. 4. 6.

2. *But* in the ſame Caſe a *Releaſe made to C. is void*; for tho' he has Poſſeſſion, yet he hath *no Privity*, and yet a Leaſe made by Tenor by Fine made *to the Tenant in Statute Staple*, or *Merchant*, or by *Elegit*, is good; and *yet* there is *no Privity*. Co. R. on Fines 6. cites 25 E. 3.

3. If A. makes a Leaſe *for Years to B.* and *before B. enters*, *A. by Fine releaſes to B. and to his Heirs*, now this is a void Releaſe; for A. againſt his own Fine might ſay that B. had not entered into the Land before the Fine levied; and yet 31 Aſſ. 24. it is adjudged Contra in ſuch a Caſe; but other Books are to the contrary. Co. R. on Fines 6. cites 16 H. 7. 5. 5 E. 3. 37. 3 H. 6. 23. 46 E. 3. 13. 15 H. 7. 14. 47 E. 3. 27. &c. accordingly.

Where the Words of a Leaſe were, *Demiſe, Grant, and to Farm let* for ſix Months, rendering a Pepper-corn, if demanded,

4. If a Man *leaſes Land for Term of Years, and releaſes to the Termor all his Right before the Leſſee enters*; this Releaſe is void, notwithſtanding the Privity, becauſe he *wants Poſſeſſion*. Br. Releaſes, pl. 92. cites Lib. Littleton, Tit. Releaſes.

5. *But if he had entered before the Releaſe*, this had been a good Eſtate for Life: Note the Diverſity. Br. Releaſes, pl. 92. cites Lib. Littleton, Tit. Releaſes.

It was agreed by all, That if it did operate only as a Leaſe at Common Law, the Party was not capable of taking an Enlargement of his Eſtate by a Releaſe, until actual Entry, according to Co Litt 46. And they all but North Ch. J. inclined that this Leaſe did operate by the Statute; for they ſaid it had been often adjudg'd, That tho' there were not the Words (Bargain and Sell) yet it would operate by Way of Uſe, there being a ſufficient Conſideration. Freem. Rep. 249. 250. pl. 266. Paſch. 16 & 8. C B. Barker v. Keete.

There is a *Diverſity between a Leaſe for Life, and* a Leaſe for *Years*; for before the *Entry of Leſſee for Years*, a Releaſe cannot be made to him; but if a Man makes a Leaſe for Life, the Remainder for Life, and the firſt Leſſee dies; a Releaſe to him in the Remainder, and to his Heirs, is good before he enters to enlarge his Eſtate, becauſe he has an Eſtate of *a Freehold* in Law in him, which may be enlarg'd by Releaſe before Entry. Co. Litt. 270. b.

6. If a Man makes a *Leaſe for Years, the Remainder for Years*, the firſt Leſſee enters; a Releaſe to him in the Remainder for Years, is good to enlarge his Eſtate. Co. Litt. 270. a.

And yet he in Remainder had *not any Poſſeſſion*. Co. R. on Fines 6.——*But* if a Leaſe be by Indenture *in July*, *Habend.* the Land at the Feaſt of *St Michael* proximo *per* 21 *Years*, and the Leſſor *releaſes* to the Leſſee *before* Michaelmas *all his Right*, this Releaſe is void; for he had not Poſſeſſion before. Co. R. on Fines 6. cites Mich. 32. E. 4. 37.

7. If a *Leaſe for Years be made to two*, albeit the Leſſor before they enter cannot releaſe to them to enlarge their Eſtate, yet one of them may before Entry releaſe to the other. Co. Litt. 270. b.

(B. 4) To whom. By Way of Enlargement. *How it operates.*

1. IF A. makes a *Leaſe to B. for Life, Remainder to C. for Life*, Remainder *to D. for Life*, and A. by his Deed releaſes all his Right *to B. C. and D.* in this Caſe thoſe in Remainder are not Jointenants with the Tenant for Life, and yet the Releaſe is good to them all. And. 32. cites it as held Per Mountague Ch. J. Trin. 7 E. 6. But ſays, Quære how it ſhall be good, and how it ſhall take its Effect.

2. Nothing paſſes by a Releaſe *to the Leſſee in Poſſeſſion*, but by Way of Enlargement of the Eſtate of the Leſſee; for it does *not operate to give a new Eſtate of the Reverſion*, but to increaſe the Eſtate in Poſſeſſion, according to the Words of it: So it works *not by Merger of the firſt Intereſt*, but by enlarging of it. But it is true, after the Releaſe the Leaſe doth * not exiſt diſtinct from the Eſtate by the Releaſe; for tho' it does not continue as a Term, yet it is Part of the Intereſt that he now has in him by the Releaſe; for it is not like a Grant to a particular Tenant by him in Reverſion, which does drown the particular Eſtate. Arg. Far. 47. in Caſe of Shortridge v. Lamplugh.

* Poſſeſſion and Reverſion are diſtinct Things; and he that has the Leaſe has nothing in the Reverſion, and he that has the Reverſion has nothing in the Leaſe. Arg. Pl. C. 423. in Caſe of Bracebridge v. Cooke.

*(G) Releaſes. What *Things* are releaſable *by any Words*.

*N B. There is no Letter in Roll between (B) and (G)

1. A Man cannot releaſe that of which he has no Intereſt in Right nor in Deed, as if a Man ſeaſes that whereas you ſhall be bound to me in 20 l. I releaſe you, now it is void. 21 E. 4. 46. b.

For it is againſt the Nature of a Releaſe to take Effect *in Futuro*. Per Gawdy J. Goldsb 167. cites the Caſe of Read v. Bearblock ——A Releaſe cannot *operate but upon* an Eſtate, Intereſt or Right. Per Doderidge J. Roll. R. 197. in Caſe of Quick and Harris v. Ludborrow ——3 Bulſt. 30. S. C. and S. P.

A Releaſe with theſe Words, *Quæ quovismodo in futuro habere petero*, are void in Law; for no Right paſſes but the Right which the Releſſor had at the Time of the Releaſe. Arg. Brugm 76. cites Litt. Releaſes 106.—Per † Trevor Ch. J. Gibb 234. in Caſe of Baxter v. Cake ——But a Releaſe *with Warranty* will bar a future Right. Per eundem. Ibid.——† S. P. 11 Mod. 151. 152. in Caſe of Archer v. Bokenham S. C.

2. After one has found Surety of the Peace, all the Lieges of the King have Intereſt; and therefore he, againſt whom it is found, cannot releaſe it, nor the King. (And ſo by Conſequence no one [can]) 21 E. 4. 40.

3. If my Tenants have uſed Time whereof Memory &c. to chuſe, one of them to collect my Rents for one Year, and another for another Year,

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Year, and ſo on, I may diſcharge one of my Tenants only thereof, and the others ſhall not be further * charged than before: for when it comes to his Courſe who is diſcharged, I my ſelf ſhall collect it. 21 E. 4. 45. b. 47. b.

4 Le. 135. pl. 202. in Greedon and Albany's Caſe, cites S P adjudg'd 25 Eliz. in one Falſor's Caſe —— * Jo. 480. S. C. —— A ſeiſed of Lands in W. and B. *deviſed* the *Lands in W. to D. his Wife for Life*, and afterwards *to T. his youngeſt Son in Fee*, and deviſed the *Lands in B. to D.* likewiſe *for Life, and* afterwards *to* B. the Plaintiff, *his eldeſt Son in Fee*, and that *if either T. or B. die before they enter, the Survivor to enjoy the whole to him and his Heirs.* D. entered, B in the Life-time of D. releaſed all his Right to T. the youngeſt Son, with Warranty; T. died in the Life of D. Adjudged that B. had an Intereſt veſted in him by the Deviſe, but not executed till it happen upon the Death of the Wife; and that this Releaſe with Warranty was a good Bar to B. And Hobart Ch. J. who delivered the Opinion of the Court, ſaid that this is not like to a *Releaſe by an Heir in the Life of his Father*; for the Heir in ſuch Caſe is a Stranger, and has no Title at all, and yet his Releaſe *with Warranty* bars him. Butt 60. Howell v. Auger —— Hovel v. Augur. Jo. 16. Hill. 20 Jac. C. B. S. C. accordingly; and that it was held that ſuppoſing it a *Fee-ſimple in Contingency upon the firſt Fee ſimple to T.* yet the Releaſe had extinguiſh'd it, and that too, by Reaſon of the Warranty, is a much ſtronger Caſe than Lampit's Caſe. 10 Rep. 47. b. 48. —— Win. 30. S. C. ſtated by the Name of Hall's Caſe. And Ibid 54. S. C. by Name of Hol's Caſe, argued Mich. 20 Jac. but nothing ſaid by the Court.

4. If Leſſee for 31 Years deviſes all the Term which ſhall remain after the Death of B. his Wife, to C. his Son, and makes B. his Executor, and dies, B. aſſents to the Legacy, and then C. in the Life of B. grants and releaſes, with all ample Words of All Right, Term, Leaſe &c. to him in Reverſion in Fee; this is a good Releaſe to him in Reverſion, as well [as] in *Lampet's* Caſe to the Tenant in Poſſeſſion, for this is only to extinguiſh a Poſſibility of a Term, which may be as well merged in the Reverſion as in the Poſſeſſion. Tr. 13 Car. B. R. between *Johnſon and Trumpard* per totam Curiam adjudged upon a Special Verdict found in London before Brampſton, who was then of another Opinion. Intratur Mich. 11 Car. Rot. 500. And the Reaſon of Brampſton was, becauſe the Poſſibility of C. was not created out of the Reverſion, but out of the Leaſe for Years after it came from the Reverſion; But the other Juſtices held, That it is all one, and if B. who has all the Term, either as Legatee or as Executor, had join'd in this Releaſe, it had been a good Releaſe without Doubt; and this Poſſibility is a Charge upon the Land, and if it were not for this intervening Poſſibility, Leſſor ſhall have it in Poſſeſſion by the Death of B. and therefore this Releaſe enures to the Reverſion by Way of Exoneration of the Poſſibility; and it was agreed that if B. had been ouſted, and Reverſioner diſſeiſed, and after C. had releaſed to the Diſſeiſor, it [would] extinguiſh his Poſſibility.

As if there be *Lord and Tenant by Homage, Fealty and Rent*, and the *Lord releaſes the * Fealty and the Rent*; this is void for the Fealty, becauſe the Homage remains, and the Fealty is incident to it. 13 R. 2. but the Lord may grant by Deed that he will not have Fealty by two or three Years. Br. Releaſes, pl. 47. cites 5 E. 4. 4. —— S. P. And ſo of Diſtreſs. Br Releaſes, pl. 52. cites 7 H. 4. 11.

5. An *Incident* cannot be releaſed, *unleſs by general Words.* Br. Incident, pl. 26. cites 52 Aſſ. 6.

6. *Damages in Detinue before Judgment* cannot be releaſed. Br. Damages 138. cites 11 H. 6. 29.

Yelv. 215. S. C. cited. 7. A *Nomine Pœnæ* waiting on a Rent cannot be releaſed 'till the Rent be behind; for the Not paying the Rent makes the Nomine Pœnæ a Duty. Brownl. 116. in the Caſe of Bridges v. Enion. —— cites 5 E. 4. 42.

8. A Thing *not in Eſſe*, as a *Leaſe* for Years *to begin at a Day to come*, can't be releaſed. 4 Le. 134. Arg. cites Lit. 105. and 4 H. 7. 10.

9. If a *Treſpaſſor takes my Goods I may releaſe them* to him, *but not give them to him*; for he hath *a Right* to them, *but not a Property in them.* Per Brian J. Br. Dones &c. pl. 24. cites 6 H. 7. 9.

10. *Extent by Elegit* may be aſſign'd or ſurrender'd, but it cannot be releaſed; for a Releaſe ſuppoſes the Releaſor to be out of Poſſeſſion, and a Surrender ſuppoſes him in Poſſeſſion. Jenk. 269. pl. 85.

11. *Chaſe*

11. *Cloſe actions* may be releaſed or confirmed to him that is in *Poſſeſſion*, and to none elſe. Pin. Law 8vo. 107.

12. The next *Avoidance* was *granted to A. and B.* the *Church became void*, and afterwards *A. releaſed to B.* all his Eſtate, Right, and Title. Adjudg'd, That the Releaſe was void; for after the Avoidance it is merely a Thing in Action, and ſo annex'd to the Perſon that it cannot be releaſed; but a Releaſe before Avoidance is good. Cro. E. 173. Hill. 32 Eliz. Brooksbie's Caſe. And. 223. pl. 241 S. C. The Releaſe was of all Right and Demand which he had in the Advowſon and Preſentation. And the Court held, That when the Church voided the next Avoidance is had, and ſo their Chattel determined, and then a *Power remains in them to preſent*, the which cannot be releaſed by the one to the other any more than it can be granted to any; for it is nothing but a Right, and not any Chattel in Poſſeſſion. —— Ow. 85. S. C. Adjudg'd accordingly. —— S. C. adjudg'd accordingly. Le. 167. pl. 232. Brokesby v. Wickham and the Biſhop of Lincoln. —— S. C. 3 Le. 250. pl. 345. —— S. P. Co. Lit. 270. b. cites Paſch. 38 Eliz. C. B. Bennet v. the Biſhop of Norwich.

13. There is a *Diverſity* between a *Duty certain upon a Condition ſubſequent*, and a Duty *uncertain at firſt, and upon Condition precedent to be made certain after*. The firſt may be releaſed before the Day of Performance of the Condition, but the other cannot be releaſed, becauſe in the mean Time it is no more than a mere *Poſſibility*. 5 Rep. 70. b. 71. Per Cur. Paſch. 34 Eliz. B. R. in Hoe's Caſe. *So* there is a Diverſity between a *Duty defeaſable by Act ſubſequent*, and where it *ceaſes by Act ſubſequent*. In the firſt Caſe it may be releaſed, for it was in Eſſe before any Act done; but in the other Caſe it is not in Eſſe, and therefore cannot be releaſed; As if one covenants to inſeoff me before Michaelmas, a Releaſe of *Covenants* before Michaelmas is no Bar to an Action of Covenant brought after Michaelmas, for there was no Cauſe of Action at the Time of the Releaſe made. But if an Obligation be for Performance of that Covenant, a Releaſe of all Actions is a Diſcharge of that Bond; for it was a Duty defeaſable. So if I grant to you, That if *B.* ſue to him Act I will pay him 20 l. you are bound. If you releaſe to me all Actions, and afterwards *B.* performs the Act, the 20 l. is due, and an Action will lie for it; for it was not in Eſſe at the Time of the Releaſe. Per Popham. Cro. E. 570. Mich. 39 & 40 Eliz. in B. R. in the Caſe of Hoe v. Marſhall.

14. *Suit of Court* is inſeparably incident to a *Court Leet*, which cannot be releaſed. Brownl. 185. Trin. 4 Jac. Pott v. Ingram.

15. A Preſcription was made, That all the Inhabitants of ancient Meſſuages in ſuch a Vill ſhould have *Common* within the Vill, *by reaſon of* their *Commonancy*. Such Common cannot be releaſed; for tho' one Inhabitant ſhould releaſe it, a ſucceeding one might claim it. Cro. J. 152. Hill. 4 Jac. B. R. Smith v. Gatewood.

16. A *Poſſibility* cannot be releaſed. Brownl. 110. Trin. 9 Jac. Neal v. Sheffield. Co. Lit. 265. a. *Arrears Annuity to be paid on the Birth of the next Child*, which may never happen; and becauſe it is no Debt or Duty it cannot be diſcharged. Brownl. 110. Neal v. Sheffield. —— Yelv. 192. S. C.

So if an Award be, That *A. ſhall give B. at Midſummer a Load of Hay*, then on Delivery of the Hay *B. ſhall give A.* 10 l. the 10 l. cannot be releaſed before the Day, becauſe it reſts merely in a Poſſibility and Contingency; for it becomes a Duty on Delivery of the Hay only, and not before. Brownl. 115, 116. Hill. 9 Jac. in the Caſe of Bridges v. Lnion.

17. An *uncertain Thing* cannot be releaſed; As a Releaſe of all Actions, Duties, and Demands, before Judgment is no Diſcharge of Bail. 10 Rep. 51. Mich. 10 Jac. in Lampet's Caſe. —— cites 5 Rep. 70. b. Hoe's Caſe.

18. A *future Right or Poſſibility* which may be releaſed, *ought to have Foundation* and *Original Inception*, and to be a Neceſſary and *Common* Poſſibility. See 10 Rep. 50. b. in Lampett's Caſe. —— And Winch. 55. Hoe's Caſe. *A future Power of Revocation* cannot be releaſed, tho' it may be defeated by Deed. 1 Rep. 113. Hill. 28 Eliz. B. R. Albany's Caſe. —— A *mere future Right* cannot be releaſed. Per Lord Macclesfield. Ch. Prec. 546. pl. 339. Mich. 1720. in the Caſe of Kemp v. Kelley.

19. If a Feoffment in Fee be to the *Uſe of ſuch as J. S. ſhall name*, J. S. cannot releaſe this Nomination. Per Coke Ch. J. 3 Bulſt. 30. in the Caſe of Quick and Harris v. Ludburrow. Roll. R. 157. S. C. & P.

Roll R. 197. S. C. & P.

20. If I deviſe, That my *Executors ſhall ſell my Land*, they cannot releaſe this *Power*. Per Haughton J. 3 Bulſt. 31. in the Caſe of Quick v. Ludburrow.

21. If A. be *bound* to B. by his Promiſe *to perform two Things*, B. may well diſcharge him of Part, and ſo make it ſeveral; Per Haughton J. But Per Doderidge, If it be *One entire Thing*, it ſeems he cannot diſcharge *Part* of it by his Releaſe. 3 Bulſt. 232. Mich. 14 Jac. in the Caſe of Elken v. Waſtell.

Brownl. 18. S. C. Hill. 15 Jac. per 3 Judges for the Plaintiff and one for Defendant —— Hutt. 17. S. C. accordingly by Winch and Hutton J. contra Hobart Ch. J. —— Godb. 211. pl. 380. S. C. and reports that Hobart Ch. J. and Warburton J. were againſt Winch and Hutton J. that the Marriage was a Releaſe of the 100 l. —— Hob. 216. pl. 280. S. C. Hobart thought the Marriage an Extinguiſhment of the Promiſe, but that the other Juſtices were of another Mind.

22. A. ſaid to a Feme Sole, *Marry my Friend W. and if you over-live him I will give you* 100 *l.* They intermarried, and the Huſband releaſes to A. *all Demands*, and dies. This Releaſe bars not the Wife, becauſe during the Life of the Husband it was not a Thing in Demand; but it might well be releaſed by apt and *ſpecial Words*, tho' it was to take Effect by Contingency in Futuro. Per Altham Serjeant and Winch J. aſſented. Noy 26. in the Caſe of Smith v. Stafford.

Vent. 39. Trin. 21 Car. 2 B. R. Anon has a Nota, That a Man cannot releaſe a Debt by his Will.

23. A *Bond* cannot be releaſed *by Will*, becauſe a *Will* is no Deed, tho' it be ſigned and ſealed. Sid. 421. pl. 11. Trin. 19 Car. 2. B. R. Pigeon v. Harriſon.

10 Mod. 425. S. C.

24. A. deviſed to M. his Wife for Life, and after *to D. and his Heirs, provided if C. within* 3 *Months after M's Death pay to D.* 500 *l.* then the Lands *to remain to C. and his Heirs*; It was held by the Ld Chancellor and Maſter of the Rolls Mich. 1718. That C. might have releaſed, or extinguiſhed his Right. Ch. Prec. 489. pl. 303. Paſch. 1718. Marks v. Marks.

25. A *Right veſted* cannot be releaſed; and this was ſaid to be a General Rule. 8 Mod. 105. Mich. 9 Geo. in the Caſe of the Chamberlain of London v. Lopez.

26. A. *deviſed Lands in Truſt for the eldeſt Son of B. for* 2 *Years, and if within thoſe* 2 *Years he ſhould become a Proteſtant then to him in Tail Male*, but *for Default of ſuch Conformity*, then *to the Uſe of the ſecond &c. Son of the ſaid B. being a Proteſtant, and to the Heirs Male of their Bodies being Proteſtants*, and for Default of ſuch Conformity in any of the Sons, or if they ſhould die without Iſſue Male, then *to the Uſe of the eldeſt Daughter of B. being a Proteſtant, and the Heirs of her Body being Proteſtants*, Remainder to the ſecond Daughter &c. Remainder to C. (who actually was a Proteſtant) Ld Chan. Macclesfield ſaid, That ſuch Brothers and Siſters could not releaſe their *Right to any Intail given them by the Will*, foraſmuch as without a Fine they could not bar their Iſſue. 2 Wms's Rep. 132. 135. Paſch. 1723. Carteret v. Carteret.

(H), What *Perſons* may releaſe.

See Good Behaviour (D)

1. HE againſt whom Surety of the Peace is found cannot releaſe it; For every one has Intereſt; For he is bound to keep the Peace againſt him, and all the Lieges. 21 E. 4. 40.

2. If

2. If A. covenants with B. that C. ſhall pay 10 l. annually to D. D. cannot releaſe this to C. in Diſcharge of the Covenant, becauſe he is a Stranger to the Covenant; For when a Man binds himſelf, that a Thing ſhall be performed to a Stranger, he takes upon himſelf that a Stranger ſhall accept it. Pl. 13. Ja. B. R. between *Pauck and Lushamore*. Adjudged. Roll Rep 196. S. C. ſays Judgment was entered as he thinks — 3 Bulſ. 29. S. C adjudged clearly. — And in this Caſe if *D. takes J. N. to her Husband*, J. N. cannot releaſe this Payment, he having no Right at all therein. Ibid.

If A. is bound to B. to pay 20 s. to the Uſe of J. S. there J. S. may releaſe the Bond; becauſe the Uſe is expreſſed in the Bond. Contra if it does not appear in the Bond. Br. Obligation pl. 72. cites 36 H. 8. — S. P. Jenk. 221 pl. 75

If A. is bound to J. S. to the Uſe of C. there C. may have a Subpœna againſt J. S. to bring an Action to the Uſe of C. per Moile and Davers, and by them if my Feoffee in Uſe be diſſeiſed I ſhall have a Subpœna againſt him to bring Aſſiſe. Br. Conſcience &c. pl. 9 cites 2 E. 4. 2.

A. was bound in a Statute Staple to B. and C. and after C releaſed to A. all Executions, Accounts and Recognizances, for which B. brought a Subpœna againſt C. and A. becauſe A. had notice that the Releaſe was made to the Uſe of A. and ſo a Fraud in A. But becauſe C. might have releaſed A. and it is lawful for every one to aid himſelf, therefore A. was diſcharged, and the Subpœna ſtood againſt C. Br. Conſcience &c. pl. 17. cites 11 E. 4. 8.

If a Bond be made to A. to the Uſe of A. and B. B. cannot releaſe it; For he is Not Party to the Deed, and it is but an equitable Truſt for him remediable in Equity, if A. will not permit him to have any of Part of the Money. Lev 235. Hill. 18 & 19. Car. 2. B. R. Offley v. Ward. — So a Bond to A. the Servant to the Uſe of B. the Maſter for Goods of the Maſter ſold by A. cannot be releaſed by B. 8 Mod. 116. Arg. in the Caſe of Lowther v. Kelly. cites Cro. J. 655. — Bond to the Uſe of A for Life and after to B. B. cannot releaſe it during A's Life; but if it was to his own Uſe only it had been good in Equity. Lit. Rep. 149. Paſch. 4 Car. C. B. Anon

3. Baron alone may releaſe a Waſte done by Leſſee for Life before Coverture upon Leaſe made by the Feme. 42 E. 3. 18. Admitted; But the Action of Waſte was brought by the Baron and Feme, to it is barred during Coverture (But Quere if it ſhall be Bar after Coverture againſt the Feme.) *Baron and Feme jointenants in Fee*, and after they *let all by Indenture*, and after the *Baron releaſed to the Leſſee and his Heirs*, this is no Diſcontinuance; and yet it gives Freehold to the Leſſee during the Life of the Baron without Doubt. Br. Releaſes pl. 81. cites 29 H. 8.

4. In Treſpaſs, or Detinue by the Villein, the Releaſe of the Lord is a good Bar. 18 H. 6. 23. b.

5. If a Right deſcends he may releaſe it, and it ſhall bar the Heir, who ought to make him Heir in the Deſcent tho' he claims in the Action Anceſtrell or the Poſſeſſion Paramount. 7 H. 4. 19 b. Releaſe or Confirmation is not available, unleſs he who makes it has a *Right in Him at the Time* of the making of them. Per Markham, quod nemo negavit. Br. Releaſes pl. 23. cites 19 H. 6. 62 in the Caſe of the Rector of Edingden.

6. If A. has Judgment againſt B. for Debt or Damages, and after extends the Land of B. for this Debt, and then aſſigns over the Land extended to C. for all his Eſtate therein, and after A. releaſes to B. the Judgment, this ſhall avoid the Extent, ſo that B. may have an Audita Querela againſt C. the Aſſignee, and therein ſhall avoid the Extent, becauſe B. notwithſtanding the Aſſignment continues privy to the Judgment, and might, after the Aſſignment, have acknowledged Satisfaction of the Judgment, and ſo defeat the Eſtate of the Aſſignee, and this Releaſe is all one as if he had acknowledged Satisfaction of the Judgment. Pl. 7. Car. B. R. between *Flower and Elgar*. Adjudged upon a Demurrer. Cro. C. 214. S. C — S. C. Jo. 258. accordingly; but if the Term which was extended had been ſold in Part of Satisfaction of the Judgment, and afterwards the Plaintiff had releaſed to the Defendant, the Term ſhould not be develled.

7. If a Commonalty be diſſeiſed and after every one releaſes for himſelf, it is not good, becauſe it ought to be by their Common Seal. 19 H. 6. 64. b.

8. If the Prior or *All et releaſes to the Tenant for Life All Actions*, this is no Bar againſt the Succeſſor, becauſe it was not by the Abbot or Prior and their Covent. Br. Releaſes pl. 64. cites 42 E. 3. 22.

O. If

9. If a Man be *diſſeiſed of a Manor*, and the *Diſſeiſor releaſes the Services to a Tenant* who holds of the Manor, and the Diſſeiſee re-enters, this Releaſe ſhall not be a Bar to the Diſſeiſee to have the Services; for the Re-entry ſhall defeat all Meſne Acts made by the Diſſeiſor. Br. Releaſe, pl. 91. cites 4 H. 7. 13. Sands v. Peckham.

So if he had releaſed *all his Right*, quod nota, and from hence it appears that *ſo* Releaſe *in Tenant in Fee Simple*, ſhall be a Bar to the Heir. Ibid. —— A *Releaſe of the Anceſtor* is a Bar *as well to the cuſtomary Heir in Gavelkind or Borough Engliſh, as to the Heir at Common Law*; For the Heir cannot have the Land whereof the Anceſtor by whom &c. releaſed it; But Warranty ſhall not be a Bar but to the Heir at Common Law; Note the Diverſity. Br Releaſes pl. 68. cites 21 E. 3. 31.

10. If the *Father, Tenant in Tail, brings Formedon, and is barred by Falſe Verdict*, and after releaſes all Actions, and dies, this is no Bar to the Iſſue in Tail to have Attaint. Br. Releaſes pl. 80. cites F. N. B. 108.

11. He *who has Property* in a Thing cannot releaſe, but he *may give*. See Br. Executions, pl. 118. Per Brook.

12. A Pariſhioner is ſued in the Spiritual Court for Reparations of the Church; A Releaſe to him by *One Churchwarden only*, without the other, is not good; And in our Law it is the ſame. Jenk. 305, pl. 78.

And 117. pl. 212. S. C. by Name of Ruſſel v. Peart. —— S. C. Mo. 156. pl. 289. ſays, That Plowden was ſtrong in Opinion againſt the Judgment, but Wray Ch. J. ſaid to him, That he had conferr'd with all the Juſtices of England, and they had agreed to give Judgment for the Infant; becauſe the Releaſe being without Conſideration, the Infant would charge himſelf in a Devaſtavit. — S. C. cited Roll Rep. 330. —— And. 117. pl. 164. in an Anonymous Caſe.

13. An *Infant Executor* may make a Releaſe upon a true Satisfaction, but not otherwiſe. 5 Rep 27. b. Hill. 26 Eliz. B. R. Ruſſel's Caſe.

14. *Obligee dies in the Province of York*, but the *Obligation was in the Province of Canterbury*; Adminiſtration was granted to A. in the Province of York; A Releaſe by A. to the Obligor was held not good. Cro. E. 472. pl. 25. Hill. 38 Eliz. B. R. Byron v. Byron.

Comb. 8. S. C. by the Name of Cloſe v. Veux. — But was, That the Leſſee releaſed *the Coſts*.

15. An *Ejectment* was brought, and Recovery had upon it, and after the Leſſor brought an Action of *Treſpaſs for the meſne Profits*, and the *Leſſee releaſed the Action*; but the Court ſet it aſide, and ſaid, That the *Leſſee is a Perſon in Truſt*, and ſet up by the Practice of the Court, and is in the Nature of an Officer of the Court, and ſhall be within the Power and Controll of the Court; and therefore the Money which was in the Sheriff's Hands was ruled to be delivered. Skin. 247. Hill. 1 & 2 Jac. 2. B. R. - - - v. Cloſe.

S. C. Roll Rep. 240. pl. 15 Mich 13 Jac. B. R. And tho' it was inſiſted to have been after a Withernam granted, Coke Ch. J. ſaid, It was not material.

16. A Releaſe by *one Servant*, who with two others had made a *Diſtreſs for a Rent-Charge*, is not good to bar the Maſter or Grantee, eſpecially before Avowry; for he had nothing to ground the Releaſe upon; But had it been after the Avowry, perhaps it would be otherwiſe. 3 Bulſt. 110. Mich. 13 Jac. B. R. Flint v. Langhorn.

Nelſ. Ch. R. 17. S. C.

17. A Releaſe *by an Attorney in his own Name* is void. 3 Ch. R. 91. 17 Car. 1. Earl of Suffolk v. Greenvill.

18. A Debt was owing to a *Teſtator*, who by his Will *made B. and C. Executors, and deviſed the Debt to D. — B. and C.* proved the Will and *releaſed the Debt*. D. brought his Bill againſt the Executors and againſt the Debtor, to be relieved againſt their Releaſe, charging them with Practice &c. The Defendants pleaded this Releaſe, and upon arguing it the Plea was allowed, and the Bill diſmiſs'd. N. Ch. R. 56. 1649. Matthews v. Thomas & al.

S. P. Bridgm. 124. Arg. cites 25 Aſſ. 7.

19. A Releaſe of Right and Title to Land by one that had no Right or Title to the Land, but only an *Inception of a Right*, which may happen to take Place In Futuro, is of no Force; As a Releaſe by a Conuſee or Debtee. Arg. 2 Mod. 108. Paſch. 28 Car. 2. in the Caſe of Morris v. Philpot

20. *A. promiſed B.* That *if B.'s Son would marry A.'s Daughter A. would pay him* 1000*l.* B. may releaſe; But it is doubtful whether B. can releaſe *after Marriage*, becauſe then it is veſted in the Son, as Seroggs Ch. J. ſaid. Vent. 333. Mich. 30 Car. 2. B. R. in the Caſe of Dutton v. Poole.

21. *Action* upon the Statute of *Hue and Cry* by a *Servant who was robbed of his Maſter's* Money; And Levinz argued, That he ſhould not have the Action; for by that Means he might prejudice his Maſter by releaſing the Action. And took a Difference between a Servant, and a Common Carrier, and a Sheriff; For the two laſt have a ſpecial Property, and may have Trover; But Per Cur. He ſhall not releaſe. 12 Mod. 54. Trin. 6 W. & M. Comes v. Hund' de Bradley. But the Servant may bring the Action. Comb. 263. S. C. Combs v. the Hundred of Brackley — 4 Mod. 305. Releaſe was

S. C. as to the Servant's bringing the Action —— [And it ſeems that the Matter of the Releaſe was only a Thing Obiter upon the Argument of the Counſel.]

22. A *Commiſſary* releaſed *the Adminiſtration Bond* after it was put in Suit at Law, and Iſſue joined; ſo that the Defendant pleaded this Releaſe Puis Darrein Continuance. It was inſiſted, That if it was in the Commiſſary's Power to releaſe this Bond the Statute would be of no Force. And Per Powell J. The Doctor has not done well in giving this Releaſe, and it is a *Breach of Truſt*. Quære, Quid inde venit. Holt's Rep. 660. Hill. 7 Ann. Butler v. Hammond.

(I) *To whom* a Releaſe may be. *In reſpect of Eſtate.*

Fol 405.

See (K) — Preſentation (K) pl. 1. — (L) pl. 10, 11, 12.

1. ONE Jointenant of a Reverſion depending upon a Leaſe for Life may releaſe to the other. 14 H. 4. 32. b.

S. P. But if the *Rent* be arrear, the One cannot releaſe his Intereſt in the *Arrearages* to the other. This Caſe was put by Walmſley Serj. Le. 167. pl. 232. in the Caſe of Brokesby v. Wickham.

2. If one Tenant in Common releaſe to the other, Nothing paſſes thereby; becauſe he had nothing before in the Moiety of the Releaſor. 19 H. 6. 26. 10 E. 4. 3. b.

3. One Coparcener may releaſe to the other; For each is ſeiſed per My & per Tout, and ſhall join in Aſſiſe. 21 E. 3. 27. Admitted 38. If there are two *Coparceners*, and the *one enters in the Name of both*, and *the other releaſes to him*, this countervails Entry and Feoffment, and is good Cauſe of Voucher. Br. Releaſes, pl. 16. cites 21 E. 3. 27. —— *Contra*, where the *one enters in his own Name only*, and claims to him alone, and the other releaſes to him; for this is only an Extinguiſhment of the Right, and no making of the Eſtate. Br. Ibid.

4. If one particular Man of a Corporation diſſeiſes me to his own Uſe, and I after releaſe to the Corporation, nothing paſſes; becauſe the Corporation had nothing at the Time in the Land. 8 H. 6. 1. b. S. P. And ſo if a *Mayor and Commonalty* diſſeiſe me, and *I releaſe to one or more of the Commonalty*, this is no Bar for the Mayor and Commonalty. Br. Releaſes, pl. 69. cites S. C. —— S. P. For it is another Body. Br. Releaſes, pl. 62. cites 20 H. 6. 9.

5. If A. ſeiſed in Fee of Land, bargains and ſells it to J. S. in Fee by Deed inroll'd, to whom a Stranger, who has a Right to the Land, releaſes before Entry made in the Land by the Bargainee; This is a good Releaſe, becauſe he has a Frankteneſment in Law before Entry. Mich. 13 Car. B. R. between *Hobbyn* and *Slack*. Per Cur. Reſolved upon Evidence at Bar. See Eſtate (I) pl. 6. S. C

6. Where a Man *leaſes Land for Term of Life*, and after *grants the Reverſion to J. B. for Term of Life*, a *Releaſe of all his Right to the ſaid J. B. in the Remainder* by the Leſſor is good, tho' it be but Eſtate for Life. Br. Releaſes, pl. 85. cites Fitzh. Quid Juris clamat 1.

7. In Recordare it was agreed, That *a Stranger to the Avowry* may plead Releaſe of all the Services. Per Hank and Hill clearly. Br. Releaſes, pl. 13. cites 14 H. 4. 7.

8. In Formedon a Man *leas'd for Life*, and after *granted the Reverſion to* 7, and the *Tenant attorn'd*; and after 4 *of the* 7 *releaſed all their Right &c. to the other* 3, and after the *one of the* 3 *releaſed to the* 2, And Per Cur. Thoſe are good Releaſes, and ſhall make the Right to paſs. Br. Releaſes, pl. 60. cites 14 H. 4. 32.

So it was agreed, That where a Parſon is charged with an Annuity out of his Church, upon his Perſon, as Parſon of the Church, a Releaſe made *to the Patron during the Time of Exertion* is good to extinguiſh the Annuity. Br. Releaſes, pl. 33. cites 21 H. 7. 41. —— S. P. Co. Lit. on Fines 6. cites S. C. & 2 E. 3. S. & 8 H. 6. 24. —— S. P. Co. Lit. 266. a. — S. P. 1 Rep. 112. in Albany's Caſe.

9. If a Man *recovers in Writ of Annuity againſt a Parſon*, and *he who recovers releaſes to the Patron*, this is a good Releaſe. Per Cott J. Quod mirum! For the Church is charged, and the Patron may join in Aid, but has not properly any Reverſion in him there; Quære, How it ſhall enure. Br. Releaſes, pl. 19. cites 8 H. 6. 24.

S. P. *After Entry into the Warranty.* 10. If the *Demandant releaſes to the Vouchee*, this ſhall enure well; for he is Tenant in Law to him. Br. Releaſes, pl. 2. cites 20 H. 6. 29. Br. Releaſes, pl. 53. cites 7 E. 4. 13. —— S. P. Br. Releaſes, pl. 9. cites 8 H. 4. 5. Per Strene, Quod fuit conceſſum. —— S. P. Lit. S. 491. —— S. P. Co. Lit. 265. b.

Releaſe made by the Demandant to the Vouchee, or *by another*, is good againſt the Demandant; For he is Tenant in Law after the Entry into the Warranty, and may render the Action, or levy a Fine. Br. Releaſes, pl. 43. cites 5 H. 7. 41. Per Townſend J. —— But *out of a Stranger releaſes to him*; for he has nothing in the Land, ſo that Releaſe of the Right cannot enure. Br. Releaſes, pl. 2. cites 20 H. 6. 29. — S. P. Br. Releaſes, pl. 53. cites 7 E. 4. 13. —— S. P. Co. Lit. on Fines 6. cites Same Caſes, and 10 E. 4. 15. & 22 H. 6. 15. & 8 H. 4. 2.

After Receipt or Entry into Warranty by the Vouchee, Releaſe *by the Demandant to the Tenant by Receipt* or Vouchee, is good; but Releaſe to them *by any Stranger* is not good. Per Coke Ch. J. who ſaid, It was ſo without Queſtion. 8 Rep. 151. b. in Edward Altham's Caſe.

If *after the Vouchee has enter'd into Warranty*, and becomes Tenant in Law, *or after Collateral of the Demandant releaſes* to the Vouchee with Warranty, he ſhall not plead this againſt the Demandant; for the Releaſe by the Stranger is void. Co. Lit. 284. b.

But Br. Releaſes, pl. 54. ſays, That a Releaſe to Tenant at Will of his Right, is good, for the Privity which is between them, and cites 7 E. 4. 27. Per Choke. — S. P. Co. Lit. 270 b. —— *But if I ſuffer a Man to occupy at my Will without Leaſe*, and after releaſe to him all my Right, this is not good; becauſe there is no Privity. Ibid —— Br. Releaſes, pl. 58. cites 7 E. 4. 27.

11. In Aſſiſe *Releaſe* made *to the Tenant at Will* was pleaded; and the Opinion of the Court was clear, That it was not good. The Reaſon ſeems to be, Inaſmuch as he may enter and infeoff him. Contra, Upon a Termor &c. who has an Intereſt certain. Br. Releaſes, pl. 48. cites 2 E. 4. 6.

A Releaſe *to Tenant at Will after a Leaſe for Years made by him*, is void; and ſo is a Confirmation, becauſe the *Privity is determined*. Cro. E. 830 Paſch. 43 Eliz. C B Shaw v Barber. — And Walmſley J. ſaid, That it had been ſo reſolved againſt the Opinion in 12 E. 4. 12. Ibid.

So where a Stranger releaſes to him in Reverſion. Per Finchden and Sidenham. Br. Releaſes, pl. 50. cites 5 E. 4. 1

12. If a Man *leaſes for Term of Life*, and *grants the Reverſion to two*, the *Tenant attorns*, and the *one of the Grantees releaſes to the other*, this is good. Br. Releaſes, pl. 50. cites 5 E. 4. 1.

13. A Releaſe made *to the Pernour of the Profits* is good. Per Vavaſor J. And he may plead it in Action brought againſt him upon the ſpecial Matter ſhewn. Br. Releaſes, pl. 42. cites 3 H. 7. 2.

14. A Releaſe to *Tenant at Sufferance* is void, becauſe he has a Poſſeſſion without Privity. Co. Lit. 270. b.

So if Leſſee for Years dies ever in Term &c. a Releaſe to him is void, becauſe there is no Privity between them; And ſo are the Books to be underſtood that ſpeak of this Matter. Co. Lit. 270. b.

So where B. was *Leſſee of an Houſe for Life*; *Proviſo*, *That if B. clearly departed out of London*, and dwelt in the Country, *that then he ſhall have a Rent out of the ſaid Houſe*. B. wholly departed out of London, and dwelt in the Country, a Releaſe by the Remainder-Man to B. tho' before the Entry of the Remainder-Man on B cannot enure to enlarge the Eſtate of B which by the Proviſo was determin'd before Entry, and ſhe was only *Tenant at Sufferance*; And tho' the Words (To ceaſe) or (That it ſhall be void) are not mentioned, yet being in a Will, 'tis implied in the Words (That then ſhe ſhall have) which cannot be if her Eſtate be not determined, and ſo the Releaſe to her not good, tho' ſhe continued in Poſſeſſion. Cro. E. 238 pl. 5. Trin. 33 Eliz. B. R. Allen v. Hill. —— 3 Le. 152 pl. 214. S.C. —— S. C. cited Cro. J. 170. in the Caſe of Butler v. Duckmanton. — And Brownl. 207. in S. C. —— S.C. cited G. Equ. R. 257.

15. He in the *laſt Remainder* may releaſe *to him in the firſt* Remainder, but *non e contra*. Per 3 Juſtices. Dal. 32. pl. 17. 3 Eliz. Anon.

16 *Leſſee for Life* cannot releaſe *to* him in *Remainder*. D. 251. pl. 91. Hill. 8 Eliz. Stepkin v. Ld. Wentworth.

Dal. 32. pl. 17. S.C.—— S. P. by Yelverton J. Brownl. 208. in the Caſe of Butler v. Duckmanton.—— *So* if *Tenant for Life* releaſes *to him in Reverſion*, this Releaſe is void; for it cannot enure as a Releaſe, becauſe the Tenant for Life is in Poſſeſſion; neither can it enure as a Surrender, becauſe it wants proper Words to make it a Surrender. Per Anderſon Ch. J. who ſaid, It had been ſo adjudg'd. Cro. E. 21. Trin. 28 Eliz. C.B. in pl. 2. Anon. — S. P. Cro. J. 169. Trin. 5 Jac. B. R. in the Caſe of Butler v. Duckmanton.

17. A. married M. They had 2 *Sons*, both *named John*, *born in Wedlock*, but *A. always believed*, *That* John *the Eldeſt was begot by one Mayo*, and not by himſelf; *and* therefore he *always called him* (and made others do ſo too) by the Name of *John Mayo*. *M. and* 3 Afterwards *J. S. to whom M. and others were Coheireſſes*, *died without Iſſue*, and upon Office found after his Death, *John the youngeſt Son was found Heir in Right of M.* together with the others; whereupon *he ſued Livery with the other Coheirs*, and they went all together to the Manors, and *held Courts* (by the Steward appointed by J. S.) in all their Names, naming them by their proper Names; and all the *Tenants attorned*, and paid their Rent to their Common Bailiff. Afterwards *John the Elder Son releaſed to John the Younger*, *by* Words of *Give and Grant of all his Right*, Title, Claim, Intereſt, and Demand, *to him and his Heirs*, but *No Livery was made*. One Queſtion was, Whether any Act before mentioned had gained any Tenancy by Diſſeiſin, Abatement, or Intruſion, in the Younger Brother, upon which a Releaſe might enure? And it ſeemed to the Court, That it had not gained any Tenancy of the Lands in Leaſe for Life or Years, or in Tail, nor in the Copyholds ſo long as they continued their Poſſeſſion without Expulſion or Removement. But the Reporter adds a Quære as to the Copyholds. D. 302. pl. 302. pl. 43. Trin. 13 Eliz. Vivion's Caſe.

Ibid. 302. b. pl. 44. ſays, That Mich. 15 Eliz. the Opinion in this Caſe were again conſidered and affirmed.

18 Releaſe to *Copyholder in Fee*, who was admitted by the Lord, and in Poſſeſſion, is good, and no Prejudice to the Lord, he having his Fine for Admittance, and Releſſee was in by Title, viz. By Admittance; and ſo the Releaſe enures as Extinguiſhment. 4 Rep. 25 a. b. Paſch. 31 Eliz. B.R. Kite v. Queinton.

19. A. *deviſed* Land *to M. his Wife for* 15 *Years*, *if ſhe ſo long lived*, Remainder to B. in Tail, Remainder *to C.* (who was Heir of the Teſtator) *in Fee*; *M. married* C. The Term of 15 *Years expired*, and then *B.* who was the Remainder-Man in Tail, *releaſed all his Right and Intereſt* in the ſaid Land *to C.* but afterwards entered upon C. and leaſed to the Plaintiff; Adjudg'd, That *C. continuing in Poſſeſſion after the End of the Term*, *was but Tenant at Sufferance*, and had no other Title to hold by, till Entry was made upon him; And that a Releaſe made to Tenant at Sufferance is not good to veſt any Eſtate for Want of Privity between them; And adjudged for the Plaintiff. Cro. J. 169. Trin. 5 Jac. B.R. Butler v. Duckmanton.

Brownl. 207. S.C. and the Releaſe was adjudged void chiefly becauſe it was made to him in Remainder & take Effect upon a Poſſeſſion, and there was no Privity, and he had but a bare Poſſeſſion.—— S. P. Co. Litt. 270. b.

20. A *Tenant for Life*, Remainder *in Tail* to B. Remainder *in Fee* to C.—— A *Releaſe by C. to A.* is a void Releaſe, becauſe of the Meſne Remainder in Tail; Per Fenner, who cited 30 E. 3. And no Anſwer was given to it. Brownl. 207, 208. Trin. 5 Jac. in the Caſe of Butler v. Duckmanton.

21. A. deviſed a Rent-Charge with Clauſe of Diſtreſs, and died, the Great Grandſon makes a Feoffment to B.—— *Deviſee of the Rent* releaſed all Actions, Debts, and Demands to the Great Grandſon, and after diſtrained the Beaſts of B. for the *Rent behind before the Feoffment* It ſeems the Releaſe is not good, becauſe the Deviſee had no Cauſe of Action, at the Time of the Releaſe made, againſt him to whom it was made, nor Demand againſt him; otherwiſe if the Releaſe had been made to the *Feoffee*, for he was ſubject to the Diſtreſs, and this is a Demand. 2 Brownl. 190. Trin. 10 Jac. C. B. Strobridge v. Forteſcue and Barrett.

He may take it as Tenant at Will. Arg. Hard. 401. cites Co. Litt.——

22. A Releaſe to *Ceſtyque Uſe* is good as Littleton ſays in his Chapter of Releaſes; and it is now of a * *Truſt* as of an Uſe before the Statute. Arg. Cart. 162.

* Godb. 299. cites Litt. 464.

(I. 2) Good, or not, *to one who has No Right, or only a bare Right.*

1. IF there be Lord and Tenant, and the *Tenant* be *diſſeiſed*, and the *Lord releaſes to* the *Diſſeiſee all* the *Right* which he has in the Seigniory or in the Land, this Releaſe is good, and the *Seigniory is extinct*, by reaſon of the Privity which is between the Lord and the Diſſeiſee; For * if the Beaſts of the Diſſeiſee be taken, and the Diſſeiſee ſues a Replevin of them againſt the Lord he ſhall compel the Lord to avow upon him; For if he avow upon the Diſſeiſor, then upon the Matter ſhewn the Avowry ſhall abate, for the Diſſeiſee is Tenant to him in Right and in Law. Litt. S. 454.

* This Part of the Avowry is *altered by* 21 H. 8. 19. & 11 Geo. 2 cap. 19. S. 22.

2. If *Land be given* to a Man *in Tail*, *reſerving Rent* to the Donor and his Heirs, if the *Donee* be *diſſeiſed*, *and after* the *Donor releaſes to* the *Donee* and his Heirs all his Right in the Land, and *after* the *Donee enters* upon the Diſſeiſor the *Rent is gone*; becauſe the Diſſeiſee at the Time of the Releaſe made, was Tenant in Right and in Law to the Donor; and the Avowry of Fine-Force ought to be made upon him by the Donor for the Rent behind &c. *but* yet *nothing of the Right of the Lands*, viz. of the Reverſion, *ſhall paſs* by ſuch Releaſe, becauſe the Donee to whom the Releaſe is made, had nothing in the Land but a Right, and ſo the Right of the Land could not then paſs to the Donee by ſuch Releaſe. Litt. S. 455.

So if a *Leaſe* be made to one for Life, reſerving *Rent* to the Leſſor and to his Heirs, if the *Leſſee is diſſeiſed*, and after the Leſſor *releaſes to the Leſſee and his Heirs all his Right in the Land*, and after the Leſſee enters albeit in this Caſe the *Rent is extinct*, yet nothing of the Right of the Reverſion ſhall paſs; Cauſa qua ſupra. Litt. S. 456.

3. If A. be *very Lord and B. very Tenant in Fee-Simple*, and *B. makes a Feoffment* in Fee to J. S. who never becomes Tenant to the Lord, if the Lord releaſe to B. all his Right &c. this Releaſe is void, becauſe B. has no Right in the Land, and he is not Tenant in Right to the Lord, but only Tenant as to make the Avowry, and he ſhall never compel the Lord to avow upon him; For the Lord ſhall avow upon the Feoffee if he will. Litt. S. 457.

4. There

4. There is a *Diverſity between* a *Seigniory or Rent Service* and *Rent-Charge*; For a Seigniory or Rent Service may be releaſed and extinguiſhed to him that has but a Right in the Land, becauſe of the *Privity* between the Lord and the Tenant in Right; For he is not only as Tenant to the Avowry, but if he die his Heir within Age, he ſhall be in Ward, and if of full Age, he ſhall pay Relief, and if he die without Heir the Land ſhall eſcheat; But there is no ſuch Privity in caſe of a Rent-Charge; For there the Charge only lies upon the Land. Co. Litt. 268. a. *There is another* Diverſity *between a Seigniory* and a *Bare Right to Land*; For a Releaſe of a Bare Right to Land to one that has but a Bare Right is void; But a Releaſe of a Seigniory to him that has but a Right is good *to extinguiſh* the Seigniory. Co. Litt. 268 a.

(K) To whom a Releaſe may be *without Eſtate Actual, in reſpect of Privity.* See (I)

1. IF Abbot and Covent alien in Fee, and Founder releaſes all his Right in all Actions to the Abbot, it ſeems this ſhall bar him of his Contra Formam Collationis; For this Action lies only againſt the Abbot, and therefore there is ſufficient Privity between them. Contra 14 H. 4. 32. b. But Quere.

2. A Releaſe made of all Errors to him who is Party or Privy to the Judgment is good Barr of a Writ of Error. 9 H. 9. 48. b. tho he has nothing in the Land.

3. So a Releaſe is good to the Tenant of the Land, tho' he be not privy to the Record. 9 H. 6. 48. b. *But a* Releaſe *to Tenant of the Frank-tenement in Law* is not good. Br. Releaſes pl. 53 cites 7 E. 4 13.

4. If A. leaſes for Years to B. reſerving Rent, and after before Entry by B. A. releaſes the Rent to B. this is good for the Privity, tho' B. has not any actual Eſtate till Entry but only an Intereſt. Co. Litt. 46. b.

5. In *Writ of Entry* the *Tenant pleaded Releaſe of the Demandant made to him of all Actions and Rights*, and the *Demandant ſaid that he had nothing in the Franktenement at the Time of the making of the Deed*, Priſt; and the *other ſaid that he had*, Priſt; and per Belknap the Tenant ſhall ſhew what he has in the Franktenement. Br. Releaſes pl. 7. cites 49 E. 3 28. *For* if * *Diſſeſor leaſes the Land to J. N. for Years, and the Diſſeiſee leaſes to the Termor all his Right*, this is not good, becauſe it is only a Chattle, and there wants Privity, per Belknap, But per Hanmer it ought to be anſwered that the Tenant had *nothing in Demeſne, nor in Reverſion at the Time of the making of the Deed*, and ſo to avoid it to all Intents, and not to ſay, Nothing in in the Franktenement only. Et adjornatur. Ibid. —— * Co. R. on Fines 6. cites S. C.

6. Where the *Lord or Donor in Tail releaſes to the Diſſeiſee, or to the Iſſue in Tail after Diſcontinuance, to hold by leſs Services*, or releaſes all the Rents and Services, this is good, tho' the Tenant be only Tenant as to the Avowry, and has nothing in Poſſeſſion; *Contra as to* paſſing of *Reverſions in Fee* Simple. Br. Releaſes pl. 14. cites 14 H. 4. 37, 38. & Libro Littleton tit. Releaſes, accordingly. Br. Avowry pl 48. cites S. C —— Co. R. on Fines 6 cites S. C.

7. If A. makes a *Leaſe for* 100 *Years* to B. and B. makes a Leaſe *for* 50 *Years to C.* and after A. releaſes to B. in Fee, this Releaſe is good, and yet B. has not any Actual Poſſeſſion. Co. R. on Fines 6. cites 12 E. 4. 6. *But* in the ſame Caſe a *Releaſe made to C. is void*; For tho' he has Poſſeſſion, yet he hath *no Privity* and yet a Leaſe made by Leſſor by Fine *to the Tenant in Statute Staple*, or *Merchant*, or by *Elegit* is good, and *yet* there is *no Privity*. Co R on Fines 6. cites 25 E. 3.

8. If *Diſſeiſor makes Feoffment in Fee to the Uſe of a Stranger*, a Releaſe by the Diſſeiſee *to the Diſſeiſor or Caſtj que Uſe*, is not good; for there is neither Privity nor Poſſeſſion. Per Rede. Br. Releaſes, pl. 46. cites 9 H. 7. 25.

9. *Tenant in Tail makes Feoffment*; tho' he has no Right, yet a Releaſe to him by the Donor, is good for the Privity. Per Coke Ch. J. Quod fuit conceſſum, per Damport & Curiam. Roll. Rep. 57. Trin. 12 Jac. B. R. in Caſe of Benfield v. Bartlamere.

(K. 2) Where a Releaſe of a Right is good to one who has *neither Freehold in Deed or in Law.*

In ſuch Caſes as a *Right* may be conveyed from one to another, there it may be releaſed to *the Tenant of the Land*; and in ſome Caſes it will merge and extinguiſh, and in ſome it will enure by Way of Mitter &c. But in all Caſes to the Tenant of the Land; but in no Caſe can it be given to one who has not the Poſſeſſion *or Reverſion* in the Land *in Deed or in Law*. Arg. 2 Roll. R. 315. Paſch. 21 Jac. B. R. in Caſe of Sheffield v. Ratcliffe.

1. IN *Releaſes of all* the *Right* which a Man has in certain Lands &c. &c. *Releſſee muſt have* the *Freehold in Deed, or in Law*, at the Time of the Releaſe made &c. For in every Caſe where Releſſee hath the Freehold in Deed or in Law, at the Time of the Releaſe &c. there the Releaſe is good. Litt. S. 447.

2. If *Diſſeiſor lets the Lands for* Term of *his Life*, *ſaving the Reverſion* to him, if the *Diſſeiſee* or his Heir *releaſes to the Diſſeiſor* all the Right &c. this Releaſe is good, becauſe Releaſee had in Law a Reverſion at the Time of the Releaſe made. Litt. S. 449.

3. Where a *Leaſe* is made *to A. for Life*, Remainder *to B. for the Life of J. S.* Remainder *to C. in Tail*, Remainder *to D. in Fee*; if a *Stranger which hath Right* to the Land *releaſeth* all his Right *to any of them in the Remainder*, ſuch Releaſe is good, becauſe every of them hath a Remainder in Deed veſted in him. Litt. S. 450.

For a Releaſe of a Right to one that *has a bare Right* regularly, is void; for he to whom a Releaſe is made of a bare Right in Lands and Tenements, *muſt have either a Freehold in Deed or in Law in Poſſeſſion, or a State in Remainder or Reverſion in Fee or Fee Tail, or for Life.* Co. Litt 265. a.

4. If the *Tenant for Life is diſſeiſed* (the Poſſeſſion being in the Diſſeiſor) and afterwards, he that Right has, *releaſes to one of them, to whom the Remainder was made*, all his Right, this Releaſe is void, becauſe he *had* not a Remainder in Deed at the Time of the Releaſe made, but *only a Right of a Remainder.* Litt. S. 451.

As in a *Præcipe quod reddat*, if the *Tenant alien* the Land *hanging the Writ*, and after the Demandant releaſes to him all his Right &c. this Releaſe is good, becauſe he is ſuppoſed to be Tenant by the Suit of the Demandant, and yet he has nothing in the Land at the Time of the Releaſe made. Litt. S. 490.——S. P. Co. Litt. 266. a. (d)

5. A Releaſe of all the Right &c. in ſome Caſe is good *to* him who is *ſuppoſed Tenant in Law*, tho' he hath nothing in the Tenements. Litt. S. 490.

S. P. But if *Diſſeiſor and Diſſeiſee join* in a Releaſe to ſuch Leſſee, the ſame is good; for firſt it ſhall enure as the Releaſe of the Diſſeiſor and then of the Diſſeiſee. Le. 255. pl 363. Trin 33 Eliz. B. R. This Caſe was put in the Caſe of Weſton v. Garmon ——S. P. For there is no Privity nor Eſtate on which the Releaſe of Diſſeiſee may enure, unleſs the Law takes it that the Releaſe of the Diſſeiſor firſt enures, and then the Releaſe of the Diſſeiſee. Arg. Pl. C. 540 b. in Caſe of Paramour v. Yardley.

6. If the *Diſſeiſor makes a Leaſe for Years*, the Diſſeiſee cannot releaſe to the Leſſee, becauſe he has no Eſtate of Freehold. Co. Litt. 266. a.

(K. 3) *Privity. Requiſite* in what Caſes. *And what* is *ſufficient* Privity.

1. WHere the *Plaintiff binds the Defendant to the Acquittal, as Heir of his Mother*, and the *Defendant pleads Releaſe to his Father and his Heirs*, and that he is Heir between the ſame Father and Mother, this is no Bar. Br Releaſes, pl. 15. cites 38 E. 3. 10.

2. If I being within *Age, leaſe Land* to another *for* 20 *Years*, and after he *grants the Land* to another *for* 10 *Years*, *if I releaſe to the Grantee of my Leſſee* &c. *when* I am *of full Age*; this Releaſe is void, becauſe there is no Privity between him and me &c. *but if I* * *confirm his Eſtate*, then this Confirmation is good; but if my Leſſee grant all his Eſtate to another, then my Releaſe made to the Grantee is good and effectual. Litt. S. 547.

* An Infant was poſſeſs'd of a Term, his Father being his *Guardian leas'd* it for 20 Years,

and afterwards the *Infant at full Age releaſed to Leſſee all his Right*, by Indorſement on the Leaſe. Per Wray Ch. J. When the Father leas'd he did it as Guardian to his Son, and it was not any Ejectment of his Son, but it was a Leaſe in Behalf of the Son, tho' the Son might avoid it; then when the Indorſement is ut ſupra, the ſame is a good Aſſignment. 2 Le. 221. pl. 278. Paſch. 16 Eliz. C. B. Anon.

3. It is a certain Rule, That when a Releaſe enures by Way of *enlarging an Eſtate*, there muſt be Privity *of Eſtate*, as between Leſſor and Leſſee, Donor and Donee. Co. Litt. 272. b. For Examples in this Rule ſee (B)

4. To Releaſes that enure by Way of *Mitter l'Eſtate*, there muſt be Privity of Eſtate at the Time of the Releaſe. Co. Litt. 273. b. S. P. But a Releaſe ſhall enure by

Way of *Mitter le Droit*, without Privity; As if the Diſſeiſor makes a Leaſe for Life, and after the Diſſeiſee releaſes to the Tenant for Life. Co R. on Fines 6.

5. To a *Releaſe of a Right* made *to any that has an Eſtate of Freehold in Deed or in Law*, no Privity at all is requiſite. Co. Litt. 275. a. *As if a Diſſeiſor makes a Leaſe for Life*; if the Diſſeiſee *releaſe to the Leſſee*, this is good, becauſe the Leſſee has an Eſtate of Freehold, albeit there be no Privity. Co. Litt. 275. a.——S. P Co. Litt. 206. a——So if a *Diſſeiſor makes a Leaſe to A. and his Heirs during the Life of B.* and *A dies*, a Releaſe by the Diſſeiſee *to his Heir, before he does actually enter*, is good. Co. Litt. 275.

6. When the *Lord* by his Releaſe *abridges the Services of the Tenant*, Privity is requiſite Co. Litt. 305. b

7. A Releaſe *of Inheritance, or of Eſtate for Life*, is not good to one that is but Leſſee for Years without Privity; As if Tenant for Life or in Fee releaſes to the Leſſee for Years of his Diſſeiſor. *But* the Releaſe *of a Term for Years* to the Leſſee for Years of him that doth eject him, is good enough; for there needs no Privity. Fin. Law. 8vo. 115.

8. A. ſeiſed of a *Rent-charge in Fee, iſſuing out of the Land of the Wife*, releaſes the Rent *to the Baron and his Heirs*; the ſame ſhall enure to the Wife Arg. 4 Le. 90. cites 14 H. 8. 6. 38 E. 3. 10.

9. The Lord releaſes, and grants his *Seigniory to the Husband, who is ſeiſed of the Tenancy in Right of the Wife*, to him and his Heirs; the Husband dies, and his Heir diſtrains for the Rent upon the Lands; It was held that it ſhall enure as a Grant, which is moſt beneficial to the Grantee, and it is agreeing with the Intent of the Deed, that the Husband and his Heirs ſhall have it. Cro. E. 163. pl. 3. Mich. 31 & 32 Eliz. C. B. Anon.

10. Right or Title to Inheritance or Freehold, be it in Præſenti or Futuro, may be Releaſed 5 Ways. 1ſt. To the *Tenant of the Freehold* in Deed, or in Law, without any Privity. 2d. To the Tenant *in Remainder*. 3d. To him in *Reverſion* without any Privity, but Eſtate cannot be enlarged without Privity. 4th. To him that has *a Right only in* Reſpect of Privity; As if Tenants be diſſeiſed, the Lord may Releaſe S. P Co. Litt. 268. a.

thr

the Services in Reſpect of Privity and Right, and without any Eſtate 5thly. In Reſpect of *Privity* only, *without Right*; as if Tenant in Tail makes Feoffment in Fee, the Donee after the Feoffment has not any Right, yet in Reſpect of the Privity only, the Donee may releaſe to him the Rent, and all the Services; ſo the Defendant may releaſe to the Vouchee in reſpect of Privity only; but no Eſtate can paſs by a Releaſe, but to him who has Eſtate in Privity, and not in reſpect of Right or Privity only. 10 Rep. 48. a. b. Mich. 10 Jac. in Lampet's Caſe.

11. An Eſtate may be convey'd by Releaſe or Confirmation to a *Tenant by Copy of Court Roll*, and the Uſe limited to him and his Heirs is good. 13 Rep. 55. Sammes Caſe.

(L) *By what Words* it may be made. Words, which ſhall *amount to a Releaſe.*

1. ONE Coparcener gives the Land by Dedi & Conceſſi, it ſhall enure by Releaſe if it cannot by a Feoffment. 10 E. 4. 3. b.

2. If an Indenture be, that the one Party renunciavit, to the other Totum Commune in certain Land; this is a good Releaſe of the Common, tho' it be not Totum Jus quod habet in Communia; or, Renunciavit Communiam. 9 H. 6. 35 b. Curia.

Releaſe (Z) pl. 2. — 2 Roll. R. 398 442. 452. 455 S. C. — Jo. 55. S. C. — * Fol. 454 — Cro. J. 636 S. C.

3. If A. Feme Sole, and B. are Jointenants for Life, and A. takes Baron, and after A. and the Baron levy a Fine to B. by which A. and the Baron concedunt the Land, & totum & quicquid &c. to B and his Aſſigns for Life of A. and this with Warranty, and then B. dies during the Life of A. In this Caſe he in Reverſion may enter, becauſe this Fine enures as a Releaſe to * B. Tr. 22. Ja. B. R. between *Euſtace and Seaweu*, per Curiam upon a ſpecial Verdict, and afterwards, Mich. 22 Ja. adjudged accordingly.

and that it enures by Way of Releaſe, and the rather becauſe of the Words therein, (Et illa ei reddidit.)

Vid. pl. 68. cites 1 H. 7. 14. and is according to Brook.

4. *Scire Facias* upon Recovery of *an Annuity*, the *Defendant ſaid that after the Recovery the Plaintiff had delivered to him the ſame Deed of Annuity*, upon which he recover'd *in Lieu of a Releaſe*, and ſhew'd the Deed, and the Plaintiff demurr'd; Brook makes a Quære if it be any Bar *againſt Matter of Record*, and ſays it ſeems that it is not. Br. Barr pl. 5. cites 3 H. 6. 40.

A Man was *Bound in* 100*l.* The *Obligee granted* to him *that he ſhall be*

5. If a Man be *bound to J. S. in* 40*l.* and he *by his Deed grants* to him *that he will never ſue Action upon this Obligation*, the Debtor ſhall have it by Way of Anſwer, in Lieu of Releaſe; per Martin; But per Babb, he ſhall have thereof Covenant; but Brooke ſays it ſeems, that he *may Rebutt* clearly. Br. Releaſes, pl. 17. cites 7 H. 6. 46.

quite diſcharged of it, and that if he is vexed for it, that the Obligation ſhall be void; And it was held that this is a good Acquittance by the firſt Words, That he ſhall be quite diſcharged of it, and that the other Words are void, and no Condition but ſuperfluous. Br. Barr, pl. 54 cites 21 H. 7. 30. —If a Man be *bound that he ſhall not ſue J. S.* and he dies, *His Executor may ſue him.* Br. Conſcience &c. pl. 1. cites 27 H. 8. 16.

Debt upon a Bond by the Executor of the Obligee, upon Oyer of the Bond, it appear'd *A. B. and C.* were *bound jointly and ſeverally* to the Obligee; the Defendant pleaded a Releaſe made by the Obligee to B one of the Obligors; and upon Oyer of the Releaſe, it appeared that the *Obligee covenanted with B not to ſue him* upon this Obligation; the Plaintiff demurs; and adjudg'd that a Covenant not to ſue one of the Obligers, where there are ſeveral, is no Diſcharge againſt the others (Q.) Judgment for the Plaintiff; Abſente Holt. 11 Mod. 254. Mich. 8 Annæ B. R. Fitzgerrard v. Traut.

6. A Releaſe of all *Advantages on Account*, is a good Bar in Action of Debt upon Account. 8 Rep. 152. a. in Altham's Caſe, cites 9 E. 4. 49.

7. If he in Reverſion on a Leaſe for Years, grants his Reverſion to his Leſſee for Years by Words of *Dedi, Conceſſi, Feoffavi*, and a Letter of Atterney is made to make *Livery and Seiſin*, the Donee cannot take by the Livery; For that the Leſſee has the Reverſion preſently. Per Wray and Catline J. 3 Le. 17. pl. 39. Mich. 14 Eliz. C. B. Anon. D. 111 pl. 3 — D 36. b. 22. Marg.

8. If *A. releaſes to B. all Actions which J. S. has againſt B.* it is a good Releaſe, and the Words (which J. S. has againſt B.) are *Surplusage*, and void; For by Words ſubſequent, a Deed may be qualify'd and abridg'd, but not deſtroy'd. Arg. Bridgm. 102. cites * D. 56. 6. * This ſhould be D. 56. b. pl. 22 By Words ſubſequent, one may Qualify and Abridge, but not Deſtroy. Arg in Caſe of Read v. Bullock.

9. A. ſeiſed of 3 Acres, grants a Rent-charge out of them to B. A. infeoffs C. of 2 of the Acres; B. the *Grantee Covenants and grants with C. that he will not charge the 2 Acres*, for the ſaid Rent, with any Diſtreſſes. Afterwards D. the Tertenant of the 3d Acre being diſtrained, brought Replevin. As to the Covenant and Grant being a Releaſe, the Court was divided, but agreed, that if it be a Releaſe, D. may plead it; for by that the Rent is extinguiſh'd. Noy. 5 Butler v. Monnings. S. C. cited Show. 231. in Caſe of Cuſwil v. Edwards.

10. An Obligee's *acknowledging himſelf on good Conſideration ſatisfied, or diſcharged* of all Bonds, Debts and Demands, is in Judgment of Law a good Releaſe; and tho' the Word (Diſcharged) is not properly a Word of the Part of the Obligee but of the Obligor, becauſe the Obligor is to be diſcharged; yet when the Obligee confeſſes himſelf to be diſcharged of all Bonds by the ſaid Obligor, this amounts to as much as that the Bonds themſelves ſhall be diſcharg'd. 9 Rep. 52. b. 53. Mich. 8 Jac. C. B. Hickmot's Caſe. S. C. cited Arg. Show. 231. in Caſe of Cuſwil v. Edwards.

11. If B. be bound to A. in an *Obligation of 200 l. Conditioned for Payment of 104 l.* at a Day certain, and afterwards A. makes a Releaſe to B. by Name of All that Obligation of 200 l. for Payment of 100 l. This Releaſe does not diſcharge the Obligation condition'd for Payment of 104 l. for tho' a greater Sum includes a leſs, as to a Tender, yet the Debt and Duty is intire, and cannot be diſcharged by a Releaſe of a leſs Sum. All. 71. Trin. 24 Car. B. R. Chace v. Gold.

12. If one Jointenant *Gives, Grants and Confirms* to the other, This operates as a Releaſe, according to 1 Inſt. 301. b. and other Books, That either the Word (Dedi) or (Conceſſi) makes a Releaſe. Sid. 452. Paſch. 22 Car. 2. B. R. Cheſter v. Willon. S. C. accordingly, where the Words were (*Grant, Bargain and Sell.*) Vent.

78. Cheſter v. Willon. —— Raym. 182. S. C. where the Words were (Grant, Bargain, Sell, *and Confirm.*) Adjudg'd a Releaſe. —— 2 Saund. S. C. where the Words are (Grant, Bargain, Sell, Aſſign, Set over, and Confirm.) And adjudg'd clearly, That it paſſed the Purparty. And there is a Note, That the Word (Conceſſi) is of a general Extent, and may amount to a Grant, Feoffment, Gift, Leaſe, Releaſe, Confirmation, or Surrender; And cited Litt. S. 531. & Co. Litt 301. and 302. a.

13. A Releaſe of *all Titles* will paſs a Right to the Land. See Mod. 99, 100. pl. 4. Mich. 25 Car. 2. B. R. by Hale Ch. J. in the Caſe of Auſtin v. Lippencourt.

14. *Articles* of Agreement *were made between A. B. C. & D. Tenants of a Manor, for* the better *regulating their Common*, and to limit the Number of Beaſts which each ſhould put in. *A. broke the Articles* by ſurcharging, *B. brought* an *Action* upon the Articles againſt A. *To which A. pleaded, That* after the Articles *the Plaintiff and one J. S.* (a Stranger) after the Executing the ſaid Articles, *did releaſe* to the Defendant, his Heirs, Executors &c. All Actions, Suits, Bills, Bonds, Writings obligatory, Debts, Duties, Quarrels, Controverſies, Treſpaſſes, Damages, and Demands whatſoever &c. which they or either of them ever had, or then had, or might

might have &c. It was *held*, That the Releaſe was *no Bar* to the Plaintiff's Action; and that it could never be the Intent of the Parties to releaſe theſe Articles, J. S. being a Stranger, and no Party to them; Beſides, had the Articles been intended to have been releaſed, ſome Mention would have been made of the Common in the Releaſe. Raym. 392. Trin. 32 Car. 2. B. R. Cartledge v. Mawdlin.

S. C. cited. Arg. Show. 331 —— Letter of Licence not to ſue under Pain of forfeiting of the Debt, *is* no Releaſe *but a Defeaſance, and* ſuch a one there *may be by another Deed.* Per Holt Ch J. Show. 334. Mich. 3 W. & M. in the Caſe of Carvill v. Edwards, cites Mo. 811. —— Carth. 210. Carivel v. Edwards.

15. *Letter of Licence* was under the Hand and Seal of the Plaintiff, whereby he gives the Defendant Liberty for 3 Months; and covenants, That *if he ſue* or moleſt him *in that Time the Defendant ſhould be acquitted* of the Debt. The Plaintiff ſued him. Held, That being *under Seal*, and the Plaintiff's own Agreement, it was not barely a Covenant, but a Releaſe upon Condition; And Judgment accordingly. 2 Show. 44. pl. 411. Mich. 1 Jac. 2. B. R. Macbeth v. Cobb.

S. C. cited Gilb. 55. in the Caſe of Philips v. Knightly.

16. *Obligee* reciting the Bond, *covenants to ſave the Obliger harmleſs*; it is an abſolute Releaſe; And if upon a Contingency, it is a conditional Releaſe, becauſe it has an expreſs Relation to the Bond. 2 Salk. 573. Hill. 10 W. 3. B. R. in the Caſe of Cleyton v. Kinaſton.

But per Holt Ch. J. The Intent of the Parties ſhall *never alter the Rule of Law.* Ibid 294.

17. The Law will not work a Releaſe *contrary to the Intent of the Parties.* Per Gould J. 12 Mod. 290. Paſch. 11 W. 3. B. R. in the Caſe of Cage, alias, Gage v. Acton.

(L. 2) What Act by one that has a Right ſhall be ſaid a Releaſe in Law of his Right or Action.

1. RElеaſes *in Law* are more mildly taken againſt the Releaſor than Releaſes in Deed. Per Turton J. 12 Mod. 291. cites Co. Lit. 264, 265.

But if the *Defeaſance and the Releaſe of the Right* are *delivered Simul & Semel*, this is good. Br. Releaſes, pl. 34. cites Perk. 138. —— *So if* the Releaſe be *upon Condition compriz'd in it, if* it be by *Deed indented*, the Defeaſance is good, and deſtroys the Force of the Releaſe. Br. Ibid. —— *But* it ſeems that *he who releaſes may plead the Condition without ſhewing the Deed*; and then, when it is ſhewn, the Party may have Oyer of it, and may pray that it be enter'd De Verbo in Verbum; and then it is of Record, and then he may plead the Condition. Ibid.

Where *Releaſe is Simple, and Indenture of Defeaſance comprehends a Condition in Fact* alſo upon it, there if the Releaſe and Indenture of Defeaſance are *delivered at one Inſtant*, it is ſufficient upon the Performance of the Defeaſance to defeat the Releaſe. Per Treſilian and Wich, Quod Curia non Negavit. Br. Releaſes, pl. 39. cites 43 Aſſ. 12.

2. *A Simple Releaſe and Defeaſance delivered with it is good; but delivered after, is not* good. Br. Releaſes, pl. 34. cites 17 Aſſ. 2

3. If A. *releaſes to B. all his Right in the Land which B. has by Diſſeiſin done to A.* and *after B. grants to A. That if he pays* 10*l. at ſuch a Day, that the Releaſe ſhall be void, and he may re-enter*; this ſhall not avoid the Releaſe, becauſe *the Right is gone Simpliciter before.* But it ſeems clear, That if the Condition had been in the Releaſe, that then the Condition had been good. Br. Releaſes, pl. 39. cites 43 Aſſ. 12. and 43 Aſſ. 44.

Contra it ſeems *if he was the Ser-*

4. If a Man *releaſes to another, and delivers it to J. S. to deliver to the Party*, this does not take Effect before the Agreement of him who ſhall have

have it; for the Stranger is only a Servant to him who made the Releaſe; quod nota. Br. Releaſes, pl. 45. cites 8 H. 6. 13. Per Huſſey and Brian Ch. Juſtices.

cant or Executor of him to whom the Releaſe is made. Ibid

5. If the *Lord diſſeiſes the Tenant, and makes a Feoffment in Fee* by or without Deed, this is a Releaſe of the *Seignory*. Co. Lit. 264. b.

A Feoffment by Deed extends to every may in Evidence be uſed as a Releaſe. Clayt. 32. pl. 55. 11 Car. Ballard v. Slow.

6. If the *Diſſeiſee diſſeiſes the Heir of the Diſſeiſor, and makes a Feoffment in Fee* by, or without Deed, this is a Releaſe in Law of the Right; And ſo of a Right in Action. Co. Lit. 264. b.

7. If the *Obligee makes the Obligor Executor*, this is a Releaſe in Law of the Action, but the Duty remains, for the which the Executor may retain ſo much Goods of the Teſtator. Co. Lit. 264. b.

8. If a *Feme Obligee takes the Obligor to Husband*, *this* is a Releaſe in Law. Co. Lit. 264. b.

So if there are 2 Feme Obligees, and the one takes the Debtor to Husband. Co. Lit. 264 b —— *But* if a Feme *Executrix takes the Debtor to Husband*, this is no Releaſe in Law; for that ſhould be a Wrong to the Dead, and in Law work a Devaſtavit, which an Act in Law ſhall never work; And ſo was adjudg'd in the King's-Bench, Mich. 30 & 31 Eliz. Co. Lit. 264. b.

9. An *Award that all Suits ſhall ceaſe* hath the Effect of a Releaſe, and the Submiſſion and Award may be pleaded in Diſcharge as well as a Releaſe. 2 Mod. 228. Paſch. 29 Car. 2. B. R. Strangford v. Green.

10. In Debt upon a Bond of 1000 l. the Defendant pleaded a Covenant by the Plaintiff, whereby he *covenanted not to ſue* for the ſaid Debt upon the ſaid Bond for and *during* the Term of 99 *Years*. Upon Demurrer to this Plea it was naught; for it is but a meer Covenant, and doth not enure as a Releaſe or Deleaſance. 2 Salk. 573. Trin. 1 W. & M. B. R. Ailoff v. Scrimſhaw.

Show. 46. S. C. reports, That the Defendant pleaded a * *Letter of Licence to go abroad for 7 Years without Moleſtation*, and a Covenant not to ſue him, and that *if he ſhould go then he ſhould be diſcharged and releaſed of the Debt.* And by Holt Ch. J. If it be a *Covenant Perpetual*, it is *a abſolute Releaſe*, but if it be a Covenant not to ſue within a particular Time, it is no Releaſe, and you muſt take your Remedy upon your Covenant. And adjudged per tot. Cur for the Plaintiff.——Carth. 63. S. C. adjudg'd. And per Cur. If the Covenant be that the Obligee ſhall not put the Bond in Suit at any Time, it is pleadable as a Releaſe, becauſe in Effect it is ſo.—S. P. In delivering the Judgment of the Court. Trin. 13 W. 3. in Caſe of Lacy v. Kinaſton; but ſaid, That if *A and B are jointly and ſeverally bound to C.* in a Sum certain, and *C. covenants with A. not to ſue him*, that ſhall not be a Releaſe but a Covenant only, becauſe he covenants only not to ſue A. but does not covenant not to ſue B for the Covenant is not a Releaſe in its Nature, but only by Conſtruction to avoid Circuity of Action, becauſe tho' he covenants not to ſue one, he ſtill has a Remedy, and then it ſhall be conſtrued as a Covenant, and no more. And without his Covenant he might have ſued one of them without the other; and therefore there being nothing in the Covenant to preclude from that Benefit, he has it ſtill left in him. 12 Mod. 551. 552.

* Carth. 64. at the End of the Caſe ſays, Nota, In the Argument of this Caſe it was allowed by all, That a Letter of Licence containing the Words following, (viz.) That if the Creditor ſue &c. within ſuch a Time, *that his Debt ſhall be forfeited*, ſuch Licence is pleadable in Bar.——S. P. Cro. E. 552. Mich. 36 & 37 Eliz. C. B. Deux v. Jefferies.——And. 327. pl. 316. S. C. by Name of Dowſe v. Jefferies.——S. C. cited D. 140. Marg. pl. 39.

(L. 3) Miſtake or Miſrecital.

1. DEBT by S. againſt B. who *pleaded Releaſe of all Actions which the Defendant had againſt the Plaintiff* Noverint &c. me S. remiſiſſe &c. B. omnes Actiones quas idem B. habet verſus S. where it ſhould be all Actions quas the Plaintiff has againſt the Defendant; and it was demurr'd, and the Plaintiff recover'd. Br. Releaſes, pl. 56. cites 14 E. 4. 2.

2. In

Contra of Title of Honour, as Knight, Duke &c. For this is Parcel of the Name.

2. If a Man releaſes *to W. N. Woman* all Actions *whereas he is a Gentleman*, the Releaſe is good, and the *Addition void*. Br. Releaſes, pl. 58. cites 21 E. 4. 72.

Ibid.

3. One condemned in Debt paid Part of the Money to the Plaintiff, who gave him an *Acquittance* for the Sum received (*in theſe Words*) *Received ten Pounds in Part of a greater Sum*, wherein I am condemned [*Recovered by me*] *by Judgment given by the Juſtices of Aſſiſe* in Derbyſhire, *whereas the Judgment was* in Truth *given in Bank*, as it ought; The Queſtion was if this Acquittance be ſufficient in Law, by reaſon of this Miſrecital, to bring an Audita Querela, the Plaintiff having ſued a Ca. Sa. And it ſeemed not; for no ſuch Judgment was given. D. 50. b. pl. 6. Mich. 33 H. 8. B. R. Anon.

(L. 4) *In Mixt Actions.* What ſhall be a good Releaſe in Mixt Actions.

So of Releaſe of Actions Real; for it is mix'd Brooke ſays, Quære inde; for this is a ſtrange Reaſon, and he ſays he has the Book at large which is in Doubt. Br. Annuity, pl. 43. cites 2 H. 4. 13. and Fitzh. Releaſe 48. —— Co. Lit. 285. a. ſays a Releaſe of Actions Real, or of Actions Perſonal, is a good Plea in Writ of Annuity.

1. IN Writ of Annuity, a *Releaſe of all Actions Perſonal* is a good Plea, tho' the Annuity be to the Plaintiff and his Heirs. Br. Annuity, pl. 43. cites 2 H. 4. 13. & Fitzh. Releaſe 48.

Note a Diverſity between the Act of the Party and an Act in Law; for a Man by his own Act can not alter the Nature of his Action; and therefore if the Leſſee for Life or Years does waſte, now is an Action of Waſte given to the Leſſor, wherein he ſhall recover two Things, viz. The Place waſted, and treble Damages; in this Caſe if the Leſſor releaſes all Actions Real, he ſhall not have an Action of Waſte in the Perſonalty only; And if he releaſes all Actions Perſonal, he ſhall not have an Action of Waſte in the Realty only. Co. Litt. 285. a.

2. *Tenant for Life* (*or* Leſſee *for Years*) *does Waſte*, and the Leſſor ſues Action of Waſte, the Action is in the Realty, becauſe the Place waſted ſhall be recovered; and alſo in the Perſonalty, becauſe treble Damages ſhall be recovered for the wrongful Waſte done by the Tenant; and therefore in this Action a Releaſe of Actions Real is a good Plea in Bar, and ſo is a Releaſe of Actions Perſonal. Litt. S. 492.

A Releaſe of Actions Real, or of Actions Perſonal, is a good Plea *in Writ of Waſte*, *and* in * *Aſſiſe* which are Actions mixt, and ſo it ſeems in *Quare Impedit*. Br. Releaſes, pl. 92. cites Lib. Littleton, Tit. Releaſes. —— S. P. Co. Litt. 285 a. — *Ent.* Br. Waſte, pl. 29. is that a Releaſe of all Actions Perſonal is no Plea *in Waſte*; for it is *an Action mixt, and brought in the Realty*; and cites 42 E. 3. 21. 22. — * *But Diſſeiſor in Aſſiſe* may plead Releaſe of Actions Perſonal, but not of Actions Real; for this is for the Tenant; for the *Tenant* may plead the one or the other; and it ſeems alſo that Quare Impedit is a Mixt Action. Br. Releaſes, pl. 92. cites Lib. Littleton, Tit. Releaſes.

(M) What *Thing* may be releaſed *by expreſs Name.*

1. IF the Recognizee of a Statute releaſes to the Conuſor all his Right in the Land, and all Manner of Actions which by reaſon of the Statute he ſhall have in the ſame Land; this ſhall be a good Diſcharge of the Land. 15 Aſſ. 7. 25 E. 3. 51.

2. A Covenant not broken may be releaſed by Releaſe of all Covenants. Tr. 16 Ja. B. R. in *Witton and Bic's* Caſe, agreed per Curiam. Co. 1. *Albany* 112. b. Co. 10. *Lampett* 51. b.

5 Rep. 11. in Hice's Caſe —— *But* Releaſe of *all Covenants* is no Diſcharge of *a Bond for Performance* of Covenants after that the Covenants are broken; for the Obligation being forfeited, is not diſpens'd with. D. 57. b. pl. 28. Mich. 35 H. 8. in Caſe of Read v. Bullock.

3. If Leſſee for Years grants over his Eſtate, reſerving a Rent during the Term; this Rent ſhall be releaſed by Releaſe of all Rents. Tr. 16 Ja. B. R. in *Witton and Bic's* Caſe. Agreed per Curiam.

Poph. 136. S. C.

4. If A. recovers in Treſpaſs againſt B. in B. R. and after B. brings Writ of Error, and then pending this Writ A. releaſes to B. *all Executions, and after the Judgment is affirm'd, and new Damages given to A. for the Delay upon the Statute of 3 H. 7. the ſaid Releaſe ſhall not bar A. to have Execution of thoſe Damages, becauſe he has not any Right to have the Execution, nor to any Duty at the Time of the Releaſe made. D. 12 Ja. B. R. between *Childe and Durrant* abridged.

But it is a Diſcharge of the *Fee Damages and Coſts*. Cro. J. 137. S. C. — Roll. Rep. 11. S. C. — But Yelv. 215. Brown. 221. and Bulſt. 157. Durrant v. Child are upon a different Point. —— * For more as to Executions ſee (O. 3)

(N) What ſhall be releaſed by Releaſe of All *Suits*.

1. By ſuch Releaſe a Man ſhall be barr'd to ſue Execution of a Recovery or Damages by Fieri Facias, Elegit or Capias; for the Court will not grant them without Prayer of the Party, which is a Suit. 19 H. 6. 4.

Br. Releaſes, pl. 21. cites S. C. —— 8 Rep. 153. b. in Altham's Caſe, cites 9 H. 6. 4. But it ſeems miſprinted, and that it ſhould be 19 H. 6. as in Roll. —— S. P. Co. Litt. 291. a.

2. If A. recover Debt or Damages againſt B. and after releaſes to him all Suits, this ſhall bar him to have Execution by Capias or Elegit. 26 H. 6. Execution 7.

Br. Releaſes, pl. 8. cites 26 H. 6. and Fitch Execution. S. C. Per Newton J.

3. By Releaſe of all Suits, a *Writ of Error* is gone. Lat. 110. Cole's Caſe.

(O) What ſhall be releaſed by Releaſe of All *Debts and Duties*. [*Or, All Debts or Duties.*]

1. If [a Man] releaſes all Duties, this does not bar a Writ of Account, becauſe there is not any certain Duty before the Account made. 20 H. 6. * 8. b.

S. P. For Duties extend to Things certain, and which ſhall fall out upon the Account, is uncertain; and tho' the Latin Word is Debita, yet the Duties extend to all Things due that are certain, and therefore diſcharge Judgments in Perſonal Actions, *and Executors* alſo. Co. Litt. 291. a. —— * This ſeems miſprinted for (6) b.

2. If A. recovers Debt or Damages againſt B. and after releaſes to B. all Duties, this ſhall bar him to have Execution by Capias or Elegit; becauſe the Duty is extinct. 26 H. 6. Execution 7.

Br. Releaſes, pl. 8. cites 26 H. 6. and Fitch Execution. S. P. Newton J. —— 8 Rep. 153. b. in Altham's Caſe.

3. If a Feme releaſes to another all Actions of Debt, this ſhall bar her of a Writ of Rationabili Parte bonorum which ſhe had Right to have. 17 E. 3. 17. b.

S. P. And therefore the Diſcharge of the Debt which is the Cauſe, diſcharges the Execution which is the Effect. Co. Litt. 76. a.

4. If a Conuſor of a Statute Merchant be in Execution and his Lands alſo, and after the Conuſee releaſes to him all Debts, this ſhall diſcharge the Execution; becauſe the Debt is the Cauſe of the Execution. Co. Litt. 76.

(P) What ſhall be releaſed by Releaſe of *All Actions*, [*or, All Manner of Actions.*]

Br. Releaſes, pl. 31. cites S. C. per Kirton —— This Caſe was queſtioned by Powell J. whether it be good Law at this Day, but he admitted that if there had been no other Debts for the Releaſe to work upon, then it had releaſed the Debt due to the Plaintiff as Executor. Ld Raym. 2 Rep. 1326. Mich. 9 Annæ. Hutchinſon v. Savage.

1. If a Man releaſes all Actions by this he ſhall releaſe as well Actions which he has as Executor as other. 39 E. 3. 26.

S. P. per Gawdy J. Goldsb. 107. Fol. 405. 2 By a Releaſe of all Actions he ſhall not releaſe an Annuity. 39 H. 6. Annuity. 45.

3. But ſuch Releaſe ſhall releaſe the Arrearages incurred before. 39 H. 6. 43.

in the Caſe of Hoo v. Marſhal. cites 4 E. 4. 40 —— In Debt for the *Arrearages of an Annuity*; the Defendant pleaded a Releaſe of all Actions before the Day of Payment and after Oyer of the Deed, it was demurred thereupon, and held to be no Plea, becauſe a Releaſe cannot diſcharge a Duty which was not then in Being; wherefore it was adjudged for the Plaintiff. Cro Eliz. 89. pl. 20. Trin. 44 Eliz. in C. B. Tuke v. Cheek. —— Bulſt. 178. S. P. by Williams J. and the whole Court inclined to be of the ſame Opinion.

Grantor of an *Annuity in Fee*, upon the firſt Day of Payment paid it to the Grantee, who gave him an Acquittance, and at the End thereof was a Releaſe of all Actions; At the next Day of Payment, the Annuity being in Arrear, the Grantee brought a Writ of Annuity; The Grantor pleaded this Releaſe in Bar; and upon Demurrer to the Plea, it was infiſted for the Defendant, that by the Releaſe of all Actions the Annuity was determined; becauſe an Annuity ſeems to be a Thing in Action, and the Party had no Remedy to recover it but by Action; and therefore if the Action is releaſed, the Thing itſelf is ſo too, but adjudged, that tho' that is true, yet it *is not a Thing in Action*, for before the Day of Payment no Action lies in this Caſe. Mo. 133. pl. 279. Trin. 25 Eliz. Digg's Caſe.

If a Man has an *Annuity* for Term of Years for Life or in Fee, and he, *before it be in Arrear*, releaſes all Actions, This ſhall not releaſe the Annuity; For it is not merely in Action, becauſe it may be granted over. Co. Lit. 292. b.

S. P. Br. Releaſes pl. 57. cites 18 E. 4. 7. — Br. Scire Facias pl. 188. cites S. C. & Litt. tit. Releaſe accordingly —— Contra Litt. S. 504 That if *a Man recovers Debt or Damages*, and he *releaſes to the Defendant* all Manner of Actions, yet he may lawfully ſue ſue *Execution by Capias ad ſatisfaciendum*, *or* by *Elegit or Fieri Facias*; For Execution upon ſuch a Writ cannot be ſaid an Action. —— *For* regularly an *Action is ſaid in his proper Senſe to continue till Judgment* be given, and after Judgment then does Proceſs of Execution begin, and therefore a Releaſe of all Actions regularly is no Bar of *Execution*; For the Execution begins when the Action ends, and therefore the Foundation of the firſt is an Original Writ, and determines by the Judgment, and Writs of Execution are called Judicial, becauſe they are grounded upon the Judgment. Co. Lit. 289. a.

4. If a Man recovers Damages in Aſſiſe, and after releaſes to the Recoveree all Manner of Actions, this ſhall releaſe his Execution by Scire Facias, ſo that he ſhall not have this Execution upon this Judgment contrary to this Releaſe. 1 E. 3. 26. b. Admitted by Iſſue. 2 E. 3. 30. Same Caſe.

S. P. Co. Litt. 291. a. 5. If J recover againſt J. and have his Body in Execution, and after releaſe to him all Actions, yet he ſhall remain in Priſon, becauſe the Plaintiff

Duty

Duty remains, and is not extinguiſhed by the Releaſe. 26 H. 6. Execution. 7.

after Judgment releaſes to the

Defendant all Actions, and his Body is afterwards taken in Execution, he ſhall not have an Audita Querela upon it; For Execution is no Action. 8 Rep. 153. in Altham's Caſe. —— For Execution begins when the Action ends. Co. Lit. 289. a.

6. In *Annuity*, *Releaſe of all Actions Ratione Debiti Compoti, ſeu alterius cujuſcunque Contractus* is no Plea where the Plaintiff counts *by Preſcription*; For it may be before Time of Memory. Br. Annuity, pl. 42. cites 12 R. 2. and Fitzh. Releaſe 29.

7. Where an *Abbot aliens*, ſo that *Contra Formam Collationis lies*, Releaſe of all the *Right* to the Abbot is not good; For he has nothing in the Land; Contra of Releaſe of all *Actions* to him; For Action lies againſt him. Br. Releaſes, pl. 14. cites 14 H. 4. 37, 38.

8. Releaſe of all Actions will not extinguiſh *Executions*; Quod nota. Br. Releaſes, pl. 87. cites 26. H. 6. & Fitzh. Execution, 7.

But a Releaſe of all Actions was

admitted a good Bar of *Execution upon Statute Merchant*, and yet Execution is no Action, Br Barre pl 35. cites 24 E. 3. 27 —— S P. Brooke ſays the Reaſon ſeems to be inaſmuch as the Plaintiff may have Action of Debt upon it; Contra Littleton in his Chapter of Releaſe; For Statute is only an Execution. Br. Statute Merchant, pl. 47. cites 29 E 3. 22.

9. If a Man ſues an *Appeal of Felony of the Death of his Anceſtor* againſt another, tho' the *Appellant releaſes* to the Defendant *all Manner of Actions Real and Perſonal*, this ſhall not aid the Defendant; for that his Appeal is not an Action Real inaſmuch as the Appellant ſhall not recover any Realty in ſuch Appeal; neither is it an Action Perſonal, the Wrong being done to his Anceſtor and not to him; but if he releaſe to the Defendant *all Manner of Actions*, then it ſhall be a good Bar in an Appeal. Litt. S. 500.

10. In an *Appeal of Robbery*, if the Defendant will plead a Releaſe of the Appellant of all Actions Perſonal, this ſeems no Plea; For an Action of Appeal, where the Appellee ſhall have Judgment of Death &c. is higher than any Action Perſonal is and is not properly called an Action Perſonal; and there if the Defendant will plead a Releaſe of the Appellant to bar him of the Appeal, in this Caſe he muſt have a Releaſe *of all Manner of Appeals, or all Manner of Actions*, as it ſeemeth &c. Litt. S. 501.

So it is of Appeals *of Rape*, of *Arſon or Burning*, of *Felony or Larceny*; For therein alſo is Judgment of Death, and

are within Littleton's Reaſon. Co. Lit. 288.

11. If after the Year and Day the Plaintiff ſue a *Scire Facias why the Plaintiff ſhould not have an Execution*, it ſeems ſuch Releaſe of all Actions ſhall be a good Plea in Bar; But ſome hold the contrary, becauſe a Scire Facias is a Writ of Execution, and is to have Execution &c. But becauſe upon the ſame Writ the Defendant may plead divers Matters after Judgment given to oust him of Execution, as Outlawry &c. This may well be ſaid an Action &c. Lit. S. 505.

'Tho' a *Scire Facias* is a Judicial Writ, yet becauſe the Defendant may thereupon plead,

12. *So* in a *Scire Facias upon a Fine* a Releaſe of all Manner of Actions is a good Plea in Bar. Lit. S. 506.

this Scire Facias *is accounted* in Law to be

in *Nature of an Action*, and therefore a Releaſe of all Actions is a good Bar of the ſame. Co. Lit. 292 b. —— A Scire Facias is an Action; For a Releaſe of all Actions is a Bar of a Scire Facias, which is a Writ given by the Statute in Lieu of a New Original, therefore Judgment on a Scire Facias ſhall have the ſame Effect as upon a New Original. Arg. and of that Opinion was the Court. Comb 355. Mich. 9 W. 3. B. R in the Caſe of Woodyer v. Greſham.

13. If a Man by his Deed be bound to another in a certain Sum of Money, to pay at the Feaſt of St. Michael next enſuing; If the *Obligee before the ſaid Feaſt releaſe the Obligor all Actions*, he ſhall be barred of the Duty

For the Debt is a Thing conſiſting in

for

ly to Action; and therefore no Action lies for the Debt, becauſe it is Debitum in præſenti quamvis ſit ſolvendum in futuro, yet *becauſe the Right of Action is taken from him* the Releaſe of all Actions is a Diſcharge of the Debt itſelf. Co. Lit. 292. b. —— 5 Rep. 28. Paſch. 1 Jac. C. B. in Middleton's Caſe. — S. P. 8 Rep. 153. a. in Altham's Caſe.

for ever, and yet he could not have an Action at the Time of the Releaſe made. Lit. S. 512.

Godb 12. pl. 17. Pas. 21. 24 Eliz. C. B. And. 8. P. For until the Releaſe diſcharges only Arrearages, becauſe the Covenant is executory. —— This Releaſe ſhall not bar the Eſtate or the Rent, becauſe it was neither Debitum nor Solvendum at the Time of the Releaſe made; For the Land be evicted from the Leſſee before the Rent becomes due, the Rent is avoided; For it cannot be paid out of the Profits of the Land, and it is a Thing not merely in Action, becauſe it may be entered for; But the Leſſor before the Day may acquit or releaſe the Rent. Co. Lit. 292. b. — 8 Rep. 153. b. in Altham's Caſe.

13. *But* if a Man *leaſes Land for a Year rendring at* Michaelmas 40 s. and afterwards before the Feaſt he releaſes to the Leſſee all Actions, yet after the Feaſt he ſhall have an Action of Debt for the Non-payment of the 40 s. notwithſtanding the ſaid Releaſe. Lit. S. 513.

15. By a Releaſe of all Manner of Actions, all Actions, as well *Criminal as Real, Perſonal and Mixt*, are releaſed. Co. Lit. 287. b.

S. P. 8 Rep. 153. b. in Altham's Caſe.

16. If a Man by Deed *covenants to build an Houſe* or make an Eſtate, and *before the Covenant broken* the Covenantee releaſes to him all Actions, Suits and Quarrels, this does not diſcharge the Covenant itſelf; becauſe at the Time of the Releaſe Nihil fuit Debitum there was no Debt or Duty, or Cauſe of Action in being; But in that Caſe a Releaſe of all Covenants is a good Diſcharge of the Covenant before it be broken. Co. Litt. 292. b.

17. If a Man be *indicted by Conſpiracy*, and after releaſes to the Conſpirators all Actions, and *after that* the Party indicted is arraigned upon this Indictment, and *by Trial acquitted*; Gawdy J. doubted whether this Releaſe would bar him in an Action of *Conſpiracy* or not. Goldsb. 167. in the Caſe of Hoo v. Marſhal

It is not a Releaſe of *Covenants not broken* And. 94. pl. 188 Mich. 25 & 26 Eliz. Diggs v. Clute.

18. There is a *Difference* between a *Duty upon a Contingent and* a Duty *abſolute*; For if I *covenant to infeoff* you of the Manor of D. before ſuch a Day, and bind myſelf by *Obligation to perform the Covenants*, and *before the Day* you releaſe to me all Actions, there the Obligation is diſcharged but not the Covenant; For the Obligation was an abſolute Duty, and the Covenant but contingent. Per Popham Ch. J. Goldsb. 168. in the Caſe of Hoe v. Marſhal.

Ow. 71. S. C.

19. By a Releaſe of all *Actions, Duties, and Amerciaments*, it ſeems admitted, That a *Relief and Heriot*, which were in Queſtion, were releaſed. Cro. E. 370. pl. 10. Paſch. 37 Eliz. B. R. Rotherham v. Crawley.

S. P. Br. Entre Cong. pl. 169. cites 19 H. 6. 4 — Br. Releaſes, pl. 21. cites

20. *Diſſeiſee* releaſes *to Diſſeiſor* all Actions, this is no Releaſe of his *Right of Entry*; For when a Man has ſeveral Means to come at his Right he may releaſe one of them eſpecially, and yet take Benefit of the other. 8 Rep. 151. b. 152. in Altham's Caſe.

S. C. Per Newton, Quod non Negatur. — S. P. Co. Lit. 268. a. —— But if a Man has not any Means to come to the Land but by way of Action, there by a Releaſe of all Actions his Right by Judgment of Law is gone incluſively; becauſe by his own Act he has barr'd himſelf of all Means to come at it. 8 Rep. 152. a. in Altham's Caſe. — S. P. Co. Lit. 268. a

So if Diſſeiſee releaſes all Actions *to the Heir of the Diſſeiſor*, his Right is gone by Judgment of Law. 8 Rep. 152. in Altham's Caſe. —— Co. Lit. 286. a. S. P.

S. P. Co. Lit 292. b.

21. *Bond to pay* Money *at 4 ſeveral Feaſts*; 3 of the 4 *are paſs'd*; Releaſe of all Actions *before the laſt* Feaſt diſcharges all; *Otherwiſe* of *Rent*. 8 Rep. 153. in Altham's Caſe.

S. P. Co. Lit 285. a.

22. By Releaſe of all Actions all *Cauſes of Action* are releaſed. 8 Rep. 153. a. b in Altham's Caſe.

For the Act in Law ſhall never ex-

23. If I releaſe all Actions *to my Diſſeiſor*, yet *after the Diſſeiſor's Death* I may have Writ of Entry in the Per & Cui *againſt the Heir* of the Diſſeiſor

ſeiſor; For this Action was not in Eſſe at the Time of the Releaſe made. 10 Rep. 51 b. in Lampet's Caſe.

tend the Act of the Party any further than his expreſs Words, becauſe Æquior eſt Diſpoſitio Legis quam Hominis. 8 Rep. 152 in Altham's Caſe.

24. Releaſe of all Actions *to Bailee* of Goods in Writ of Detinue againſt *Bailee's Executors*, they *ſhall not take Advantage of this Releaſe*; For this is a New Action founded upon their own Detainer. 10 Rep. 51. b. in Lampet's Caſe, cites 22 H. 6. 1.

25. By a Releaſe of all Actions a *Replevin* is releaſed, and the Avowant is Defendant, tho' in ſome Reſpect he is Plaintiff. Per Doderidge j. 2 Roll. Rep. 75. Hill. 16 Jac. in the Caſe of Lodar v. Samuel.

(Q) What Things ſhall be releaſed by Releaſe of *Actions Real.*

1. **This Releaſe ſhall be a good Bar of a Quare Impedit; for it is in a Manner Real, for thereby the Inheritance ſhall be recovered.** 9 H. 6. 57.

Br Releaſe, pl. 61. cites S. C. Per Martin.

2. If an *Aſſiſe of Novel Diſſeiſin* be arraign'd againſt the Diſſeiſor and the Tenant, the *Diſſeiſor* may well plead a Releaſe of *Actions Perſonals* to bar the Aſſiſe, but not a Releaſe of Actions Reals; For none ſhall plead a Releaſe of Actions Reals in Aſſiſe but the Tenant. Litt. S. 494.

8 P. Br. Releaſes, pl. 92. cites 5 Eliz. Litt. tit. Releaſes.

3. Such Releaſe to one who is only a Reverſioner Expectant on a Franktenement does not extinguiſh *Dower*; For Actio eſt jus Prolequendi in Judicio quod alicui debetur, and the Feme cannot ſue againſt him to recover Dower by Judgment; becauſe he is not Tenant to the Præcipe, nor could he render Dower to her; for at the Time of the Releaſe another was Tenant of the Franktenement. 8 Rep. 151. a. b. Altham's Caſe.

4. *When Land is to be recovered* or reſtored *in a Writ of Error a* Releaſe of all Actions Real is a good Bar. Co. Litt. 288. b.

5. If a *Judgment* is *given in a Real Action*, a Releaſe of all Actions Real is a good Bar *in a Writ of Error* brought thereupon. Co. Lit. 288. b.

So if a *Judgment* be given *upon a Falſe Verdict in a Real Action*, a Releaſe of all Actions Reals, is a good Bar *in an Attaint*. Co. Lit. 289. a.

6. Releaſe of Actions Real, *after Grantee has made Election to bring Annuity*, is no Releaſe or Bar in Annuity; Contra of Actions Perſonal, where Grantee has made Election to take it as a Rent. Jo. 215. pl. 3. Mich. 5 Car. B. R. Bodvell v. Bodvell.

S. C. Cro. C. 170. 171.

(R) What Things ſhall be releaſed by Releaſe of *Actions Perſonal.*

1. **By this Releaſe an Annuity ſhall be barr'd.** 21 E. 4. 84. 19 H. 9. 41. b. **Dubitatur** 2 H. 4. 13.

It is ſaid in ſome Books that a Releaſe of all Actions Perſonal, is no Plea in a Writ of *Annuity*. Het. 81. in Caſe of Gerard v. Boden — Where Annuity was granted with Clauſe of Diſtreſs, but did not ſay for himſelf and his Heirs, it was held clearly to be a Bar. Cro. C. 171. in Caſe of Bodvell v. Bodvell. — Jo. 214. 215 S. C. accordingly, and that tho' Co. Litt. 285. a. S. 492. ſays it is a Mixt Action, yet the Court there held it to be a Perſonal Action only. — *But* it is no Plea *in Writ of Debt of Annuity granted for Term of Years for the Arrears*

Sue as the after the Releafe; for this is no Chofe in Action, nor Duty till the Day of Payment comes. contra of Obligation. Br. Releafes, pl. 47. cites 5 E. 4. 41.———Br. Annuity, pl. 34. cites L. 5 E. 4. 40. S. C.

2. This Releafe fhall be a good Bar of an Action of Covenant brought to levy a Fine (admitting the Covenant broken before the Releafe) for this is not Real but Perſonal. 10 H. 6. 13.

S. P. Br. Releafes, pl. 15. cites 9 H. 6. 52. Per Fettiplace.

3. This Releafe is a good Bar of Aſſiſe. 12 H. 6. 4. 19 H. 6. 42. 17 Aſſ. 25. 19 Aſſ. 3. adjudged.

4. If the *Diſſeiſee releaſes to the Diſſeiſor*, or to the *Tertenant all Actions Perſonal*, yet he may well enter. Brooke ſays *Quere* if he had releaſed all Demands. Br. Releafes, pl. 35. cites 17 Aſſ. 25.

5. A Releaſe of Actions Perſonal is no Plea in *Precipe quod reddat*; contrary *in Aſſiſe*. Br. Aſſiſe, pl. 72. cites 21 H. 6. 17.

6. Releaſe of Actions Perſonal is no Plea in Writ of *Entry in Nature of Aſſiſe*; for this is Præcipe quod reddat, and ſhall allege Lifnes. Br. Titles, pl. 12. cites 21 H. 6. 18.

7. If a Man *leaſes* for Years *rendring Rent*, and that the Tenant ſhall forfeit 20 *s. Nomine pœnæ for Nonpayment at the Day* &c. Releaſe of all Actions Perſonal made to the Tenant before the Penalty is forfeited, is no Bar; for it is neither a Duty nor a Chofe in Action till the Tenant fails of Payment. Br. Releafes, pl. 47. cites 5 E. 4. 41. Per Arden.

Br. Ab. Arg. cites Cro. 636.

8. If *a Man by Wrong takes away my Goods*, it *I releaſe to him all Actions Perſonals*, yet *I may* by the Law *take my Goods* out of his Poſſeſſion. Lit. S. 457.

But a Releaſe of Actions Perſonals is no Bar to a Writ of Right of Ward, nor Writ of Account, nor Writ of Deceit of Charters is a good Bar; and yet ſuch Action for Deceit of Charters ſounds in the Realty. Co. Lit. 280. b.

9. If I have any Cauſe to have a *Writ of Detinue* of my Goods againſt another, tho' I releaſe to him all Actions Perſonals, yet I may by the Law *take my Goods* out of his Poſſeſſion; becauſe no Right of the Goods is releaſed to him, but only the Action &c. Litt. S. 458.

10. In *Appeal of Maihem*, a Releaſe of all Manner of Actions Perſonals is a good Plea in Bar, becauſe in ſuch an Action he ſhall *recover nothing but Damages*. Litt. S. 502.

* So note a Diverſity between the Writ of Error the Plaintiff ſhall recover, or be reſtored to *any Perſonal Thing*, as Debt, Damage &c. then the Releaſe of all Actions Perſonal is a good Plea, becauſe the Plaintiff is to recover, or be reſtored to ſomewhat in the Perſon[illegible] the Plaintiff *ſhall not be reſtored to any Perſonal* or Real Thing, there a Releaſe of all Actions Real or Perſonal, is no Bar. Co. Lit. 288. b.

11. If a Man be *Outlaw'd in an Action Perſonal by Proceſs upon the Original*, and brings a *Writ of Error*, if he at whoſe Suit he was outlaw'd will plead againſt him a Releaſe of all Manner of Actions Perſonal, this ſhall be no Plea; * for by the ſaid Action he ſhall recover nothing in the Perſonalty, but only to reverſe the Outlawry; but a Releaſe of the Writ of Error is a good Plea. Litt. S. 503.

12. There is a *Diverſity* between *Real Actions*, where *in Damages are to be recovered at the Common Law*, as in Aſſiſe &c. and where Damages are *not* to be recovered by the Common Law *but are given by the Statute*; for there a Releaſe of all Actions Perſonal is not any Bar, as in the Writ of *Dower*, *Entrie ſur Diſſeiſin en le Per* &c. *Mordancſtor*, *Aid* &c. Co. Lit. 285. a. b.

So if Debt &c. or Damages are recovered in Perſonal Action by Iſſue Verdict, and the Defendant brings a *Writ of Attaint*, a Releaſe of all Actions Perſonal is a good Bar of the Attaint; for thereby the Plaintiff is to be reſtored to the Debt &c. or Damages which he loſt. Co. Lit. 289. a.

13. If the *Plaintiff in a Perſonal Action recovers* any Debt &c. or Damages, *and be outlawed after Judgment*; there in a Writ of *Error brought by the Defendant upon the Principal Judgment*, a Releaſe of all Actions Perſonal is a good Plea. Co. Litt. 288. b.

14. If

14. If a Writ of *Audita Querela* be brought by the Defendant in the former Action, *to diſcharge himſelf of an Execution*, A Releaſe of Actions Perſonal is a good Bar; becauſe he is to diſcharge himſelf of a Perſonal Execution. Co. Litt. 289. a.

(S) Of all Actions *Real and Perſonal.*

1. SUCH Releaſe will be a good Bar of a Writ of Error upon Judgment in Real Actions. 9 H. 6. 47. b.

2. A Releaſe of all Actions Real and Perſonal, ratione Debiti, Compoti ſeu Rationc alicujus Contractus, ſhall not releaſe an Annuity by Praſcription. 12 R. 2. Annuity 42. Agreed.

3. *Scire Facias upon a Recognizance* of Debt *in the Chancery*, the Defendant pleaded Releaſe of all Actions Real and Perſonal, and a good Plea; and ſo was the Opinion of Littleton in his Book. Br. Releaſes, pl. 27. cites 24 E. 3. 73.

4. In Appeal by a Feme of the Death of her Husband, the Defendant pleaded *Releaſe of the Feme after the laſt Continuance of all Actions Real and Perſonal*; and the Plaintiff demurr'd; and the beſt Opinion was, that Real is a Thing durable, as Land or Rent, and Perſonal is Damages &c. But per Huls, Perſonal is as well the Puniſhment of the Perſon as Damages, and the Puniſhment here is by Death, therefore a good Bar. Contra Littleton, tit. Releaſe; therefore Quære. Br. Appeal, pl. 29. cites 9 H. 4. 2.

A Releaſe of all Actions Real and Perſonal, cannot bar an *Aſſiſe of Land*; becauſe that Releaſe extends to Common or Civil Actions, and not to Criminal Co. Lit. 285. b.

(T) Of all his *Right.*

1. IF a Man has Title to have a Writ of Error upon a Recovery in a Real Action, if he releaſes all his Right, this ſhall extinguiſh the Writ of Error. 9 H. 6. 47. b. 48. b.

2. If Leſſor releaſes to Leſſee all his Right in the Land, the Rent reſerved upon the Leaſe is gone thereby. 19 H. 6. 23.

This will extinguiſh the Rent; per Hale Ch. J. Freem. Rep. 367. pl. 470. Paſch. 1674. Anon.

3. So if the Lord releaſes to the Tenant all his Right in the Land, the Rent Service is gone thereby. 19 H. 6. 17.

A Rent of 3s. Rent, the Lands of *ſaid that the Land was held of the Plaintiff's Father by* 1s. 6d. per Annum, and Fealty, and the Father by a Deed releaſed *all his Right and Title had in the Land.* Judgment ſi contra Factum Patris, cujus Heres eſt Aſſ. &c. Per Tot. It may be that we demand a Rent-charge, or Rent-Seck, and alſo jointly 1s. 6d. and therefore as to the Reſt we have Title. Wich ruled them to Anſwer; for the Releaſe of all the Right *extinguiſhes all the Rent*, be it more or leſs. Quod nota. Br Aſſiſe, pl 360. cites 41. Aſſ. 5.

4. So if the Grantee of a Rent-charge releaſes to the Tertenant all his Right in the Land, the Rent is gone. 19 H. 6. 17.

5. If a Man covenants with me to grant to me a Rent out of his Land, if I after releaſe all my Right in the Land out of which &c. yet this ſhall not bar me of my Writ of Covenant. 14 H. 6. 12. b.

6. If the Conuſee of a Statute releaſes to the Conuſor, being ſeiſed of the Land ſubject to the Statute, all his Right in the ſaid Land, yet this does not diſcharge the Land; becauſe the Land is not charged by the Statute,

Statute, but the Body of the Conuſor, and the Land only chargeable by Reaſon thereof. * 25 Aſſ. 7. 25 E. 3. 51. b. 45 E. 3. 22. b. all one and the ſame Caſe. Cook. 10 Lampet, 47. b.

* Br. Releaſes pl. 37. cites S. C. — In Aſſumpſit by A he declared, that *J. S.* being *bound* to him *in a Recognizance* of 1000 l *enterd'd B* (the Defendant) of his Land who *in Conſideration that the Plaintiff would aſſign his Recognizance to him, promiſed for the Plaintiff* Sol. Defendant pleaded Non Aſſumpſit. It was found that the *Conuſor*, at the Time of the Recognizance, was *ſeiſed of the Land ſold to the Defendant, and of another Life called H.* and that he *made a Feoffment to H. of that Life*, and that A the *Plaintiff*, *releaſed to the ſaid H all his Right*, Intereſt, and Demand *in H.* and *afterwards A. inſeoffed the Defendant*, who promiſed ut ſupra. It was ſtifled that by this Releaſe of all his Right and Demand in W. to H. who had Part of the Land chargeable with the Recognizance, the whole Recognizance was diſcharged, and then it could not be aſſigned over; and that a Releaſe of all his Right in the Land diſcharges the Recognizance, tho' before Execution; But the whole Court reſolved, That the Releaſe to H. is no Diſcharge; for when that was made, it being before Execution ſued) he had no Right nor Cauſe of Demand in the Land; becauſe the Land is not the Debtor but the Perſon, and is charged only in reſpect of the Perſon. And adjudg'd for the Plaintiff; and the Juſtices of C. B. being conferred with, thought the Releaſe *not any Exchange of the Execution*. Cro. E. 551. pl. 2 Paſch. 37 Eliz. B. R. Barrow v. Gray.

Fol. 446.

7. If a Term for Years of Land be deviſed to one for Life, the Remainder to another, by which he in Remainder has a Poſſibility of a future Intereſt, he may well, by Releaſe of all his Right, extinguiſh his Poſſibility; becauſe it is a near Poſſibility that he ſhall ſurvive the other, and this Expoſition is for the Quiet of the Poſſeſſion to extinguiſh the Poſſibility. Co. 10. *Lampet*, 47. b. Lovedg's. But there is Title and Intereſt alſo.

But ſuch executory Intereſt can *not be granted to a Stranger*, during the Life of the firſt Deviſee. 10 Rep. 47. b S. C. — 4 Rep. 66 — If a Man *leaſes for Life*, the *Remainder over to J. S. in Tail*, and after *J. S. releaſes all his Right to the* * *Tenant for Life*, his Eſtate is not enlarged thereby; Per Cur. For *neither Eſtate Tail nor Fee Simple can be given by ſuch Releaſe*. Br. Releaſes, pl. 95 cites 13 H. 7. 10. — * So where it was to Tenant for Life (*and his Heirs*) this is only for Term of Life of him who releaſed by reaſon of the Tail. Br. Releaſes, pl. 82. cites 43 Aſſ. 45.

8. So it ſeems if a Term be deviſed to one ſo long as he ſhall have Iſſue of his Body, the Remainder over, he in Remainder may releaſe his Poſſibility by releaſe of all his Right; for tho' this Poſſibility is not ſo near as the other before, yet this is, by reaſonable Intendment, a Poſſibility which may happen, otherwiſe it would not be a good Remainder.

9. So it ſeems if a Man deviſes his Term to another, ſo long as he ſhall have Iſſue of his Body, and dies, by which his Executor has a Poſſibility of Reverſion, that he may releaſe this Poſſibility by Releaſe of all his Right, for the Cauſe aforeſaid.

10. Waſt *againſt Tenant for Life* of the Caſe of his Anceſtor, the *Tenant pleaded Releaſe of the Anceſtor, of all his Right for him and his* * *Heirs to the Tenant for his Life, ſo that he nor his* * *Heirs any Right may Challenge, Claim, or Demand, during the Life of the Tenant*; And the beſt Opinion was, that it is no Plea; for yet the Tenant has but for Term of his Life only, and if he aliens, he in Reverſion may enter, and by a Releaſe nothing can depart but that which is in Action, or in Eſſe, at the Time; and this Waſt was done after; but contra, of Grant; for if the Leſſor grants that the Tenant ſhall not be impeach'd of Waſt, or may do Waſt, this is good. Note the Diverſity. Br. Waſt, pl. 30. cites 42 E. 3. 23. 24.

* All the Editions are (Anceſtors) but the Year Book is (Heirs.)

Cro. E. 216. S. C. — Le. 300. pl. 411. Trin. 31 Eliz. B. R. Stile v. Miller. S. P. — Ow. 39. S. P. Stile v. Miles.

11. *Tithes* are not extinguiſhed by a Releaſe of all Right of Land; for they are not iſſuing out of Land, nor are they extinguiſhed by Unity of Poſſeſſion. Le. 248. pl. 386. Mich. 33 Eliz. B. R. The Biſhop of Lincoln v. Cooper.

Land was given to A on Condition; if A releaſes to the Tenant by Fine all his Right, yet the Condition remains. And. 84. cites the Caſe of Denham v. Dormer.

12. *Title by Condition* or Alienation in *Mortmain* is extinguiſhed by Releaſe of all his Right. 8 Rep. 153. b. in Altham's Caſe.

13. If

13. If a Man quitclaims a Right *before the Right happens*, the Quitclaim is void. 10 Rep. 17. b. in Lampet's Caſe.

14. If a Man releaſe all his Right in ſuch Land, this will not diſcharge a *Judgment not executed*, becauſe ſuch Judgment doth not give or veſt any Right, but only makes it obnoxious or liable to Execution. 3 Salk. 298. Trin. 13 W. 3. B. R. Lacy v. Kinaſton.

(U) What Things may be releaſed by Releaſe of *All Demands*.

1. A Releaſe of all Manner of Demands is the beſt Releaſe to him to whom it is made that he can have, and ſhall enure moſt to his Advantage. Litt. 117. Bridgm. 124.

2. A. recovers againſt B. in B. R. in Action of Treſpaſs, and after B. brings Writ of Error in the Exchequer-Chamber, and pending this A. releaſes to B. all Demands; and after the Judgment is affirmed, and new Damages there given to A. for the Delay upon the Statute of 3 H. 7. the laſt Releaſe ſhall not diſcharge thoſe Damages, becauſe nothing was given to him at the Time of the Releaſe made, nor any Acceptation of any Duty. P. 12 Ja. B. R. between *Child* and *Durant*. Rolliſ. See (M) pl. 4. S. C.

3. If A. takes a Diſtreſs for Rent as Bailiff to B. and by his Command, upon the Land of C. and after releaſes to C. all Demands, and then C. brings Replevin againſt A. who makes Conuſance in right of B. and as his Bailiff; he may well do this, and ſhall not be eſtopped by the laſt Releaſe, becauſe at the Time of the Releaſe made he had not any Suit nor Demand againſt C. but only had taken a Diſtreſs in the Right of another Man. P. 13 Ja. B. R. Flint v. Langhorne. Palm. 119, 121. S. C. accordingly. But if this Releaſe had been made after the Avowry, Coke Ch. J. ſaid, That perhaps it might have been another Caſe. —— Roll Rep. 246. S. C. accordingly.

4. So ſhould it be tho' the Releaſe was made after the Replevin brought, and before the Conuſance made by him. P. 13 Ja. B. R.

5. So ſhould it be tho' the Releaſe was made after a Withernam brought, and before Conuſance made. P. 13 Ja. B. R. between *Flint* and *Langhorne*. Rolliſ. Palm. 119, 121. S. C. accordingly. —— Roll. Rep. 246. S. C. accordingly.

6. By this Word all Manner of Demands are extinct and gone. Litt. 117.

7. By this Releaſe all Actions Real are extinct and gone. Litt. 117. S. P. Litt. S. 528.

8. By this all Actions Perſonal are extinct. Litt. 117. S. P. Litt. S. 528.

9. By this all Actions of Appeal are gone and extinct. Litt. 117. S. P. Litt. S. 528.

10. By ſuch Releaſe all thoſe a Right of Entry, and every Thing which is imply'd therein, is releaſed. 6 E. 7. 15. Co. Litt. 291. b. —— He that releaſes all Demands excludes himſelf of all *Actions, Entries, and Seiſures*. 8 Rep. 154. a. in Aldham's Caſe — cites Br. Releaſes, pl. 62. 34 H. 8. Chauncy's Caſe.

If a Conuſee of a real Action releaſes all Demands, this *extends to Inheritances, Rents, Right of Entry* &c. for all theſe are included in Demands. Br. Charters de Pardon, pl. 67. cites 6 H. 7. 15. —— *But* if the King releaſes all Demands, or pardons them, this ſhall not extend to any Inheritance. Ibid. —— Br. Prerogative, pl. 62. cites S. C. —— Br. Releaſes, pl. 44. cites S. C. —— Ibid. pl. 92. cites S. C.

11. If a Man has a Title of Entry into any Land or Tenement by ſuch Releaſe his Title is gone. Litt. 117. Cr. 16 Ja. B. R. in S. P. Litt. S. 528. And

Witton * and *Bic*'s Caſe. Agreed Per Curiam. Co. Litt. 291. S. 509. 34 H. 8. Brook's Releaſes 90. Contra 19 H. 8. Per Fitz-James.

* Fol. 407. Lord Coke in his Comment upon that Section, ſays, That (Title) is taken in the largeſt Senſe, including Right alſo. Co Litt. 292. a.

S. P. Litt. S. 510 — S P. Co. Litt. 291. b.

12. By ſuch Releaſe made to the Tenant of the Land, a Common of Paſture ſhall be extinct. Litt. 117.

G. C. was poſſeſs'd of an Indenture, and loſt it, and *J. S.* found the ſame Indenture to whom the ſaid G releas'd all Actions and Demands; and after the ſaid *J. S.* gave the ſame Indenture to *J. T.* and after the ſaid *G. C. brought Action of Detinue againſt J. T.* who *pleaded that the ſaid J. S. found the Indenture, and that the ſaid G. C. releaſed to the ſaid J. S. all Actions and Demands, and after the ſaid J S. gave the ſaid Indenture to the ſaid J. T.* Judgment if Actio; and it was agreed in C. B the Caſe being of Land demanded there, that this is a good Bar, and that the Releaſe of all Demands ſhall exclude the Party from ſeiſing the Thing, and from his Entry into the Land, and from the Property of the Chattle which he had before; and it was moved in B. R. and they were of the ſame Opinion, and ſaid that the Reaſon is inaſmuch as *Entry into Land, and Seiſure of the Goods are Demands in Law*; quod nota; and Littleton in his Chapter of Releaſes accordingly. But Fitzjames Ch. J. was of the contrary Opinion. 25 H. 8. But all here were againſt him. Br. Releaſes, pl. 9. cites 34 H 8.

13. If A. poſſeſs'd of Goods loſes them, and they come to the Hands of B. by Force of which he is poſſeſſed of them, and ſo poſſeſſed A. by Deed releaſes to B. all Actions &c. and Demands Perſonal, which at any Time before Habuit, vel habere potuit againſt B. for any Cauſe, Matter or Thing whatſoever &c. This ſhall bar A. of the Property of the Goods; ſo that B. has the abſolute Right in them by this Releaſe. 9. 13 Car. B. R. between *Fordan and Saunders* per Curiam, adjudged upon a Demurrer; But note, That this was not much urg'd to the Court, but the Principal Queſtion was upon the Pleading in which this Releaſe was admitted good to alter the Property. Intratur. Hill. 12 Car. Rot.

Aſſe of Rent out of Land, the *Tenant pleaded a Releaſe*

14. A Rent between very Lord and very Tenant, may be releaſed by Releaſe of all Demands before Day of Payment; for it lies in Demand always. 40 E. 3. 48.

from the Plaintiff *of all his Right in the Moiety of the Manor of D. and all Actions and Demands, and at this Time no Rent was due*, nor Arrear; and yet by the Opinion of the Court it is a good Bar, by Reaſon of this Word Demands; wherefore the Plaintiff was Nonſuited. Br. Bar, pl. 61. cites 20 Aſſ. 5 — Br. Releaſes, pl. 30. cites S. C

By Releaſe of all Demands, all *Frankteneements* and Inheritances Executory are releaſed, *as Rents* &c. 8 Rep. 154. in Altham's Caſe.

S. P. Litt. S. 510.— Lev. 100.

15. Litt. 117. A Rent-Service ſhall be releaſed thereby.

Littleton is to be intended of Rent Service *in groſs*, as a Seigniory; Per Windham, Mallet and Foſter J. Paſch. 15 Car. 2. B. R. in Caſe of Henn v. Hanſon.

16. Aid to marry a Daughter may be releaſed by thoſe Words, before it be due, if he recites that where he holds by Fealty, Rent, Eſcuage, and Aid, to marry his Daughter, and he releaſes all Demands, except Rent and Fealty. 40 E. 3. 22. b. (But quere if it be not an Incident inſeparable.)

By a Releaſe of all Manner of Demands, a Rent-charge is extinct.

17. By a Releaſe of all Demands, a Rent-charge in Fee may be releaſed to the Tenant of the Land, tho' nothing of the Rent be Arrear at the Time of the Releaſe; for the Rent is always in Demand. 20 Aſſ. 5. Cur. Litt. 117.

Litt. S. 510.——Releaſe of all Demands, is no Releaſe of *Rent upon Leaſe for Years* not then due. 1 Lev. 99. Hen v. Hanſon.

18. A Statute Merchant may thereby be releaſed before the Day of Payment. 40 E. 3. 48. Co. Litt. 291. b.

19. Againſt ſuch a Releaſe a Man ſhall not ſue Execution of a Judgment for Damages by Scire facias. 19 H. 6. 4. adjudged. By ſuch Releaſe *all Manner of Executions* are gone. Litt. S. 508

20. By ſuch Releaſe Execution of a Judgment for Damages ſhall be diſcharged; becauſe the ſuing of a *Fieri Facias* or other Writ of Execution is a Demand; for it ſhall not be granted without Demand of the Recoveror, nor the Sheriff diſburs'd; and therefore againſt ſuch Releaſe he ſhall not ſue Execution by Fieri Facias, Capias, or Elegit. 19 H. 6. 4.

21. By a Releaſe of all Demands a Covenant before it is broken ſhall not be releaſed; for before the Breach it is not in Demand. Intratur. H. 4 Ja. B. R. between *Hancock and Field* adjudged. But this was adjudged Tr. 5 Ja. B. R. where the Covenant was to leave the Land well repaired at the End of the Term. Cro. J. 1[illegible] S. C.——S. C. Cited Roll. R. 386. in Caſe of Huxley v. Harriſon.——

Releaſe of all Demands will not releaſe a *Covenant* in a Leaſe for Years, *to repair and leave in Repair* &c. becauſe in a Covenant Damages ſhall be only recovered, which are not due, nor is a Suit lawful for them before the Covenant broken. Noy 123. Hancock v. the Executors of Crouth.

22. If a Man promiſes A. that if ſhe marry J. S. that he will pay to her a certain Sum after the Death of J. S. and after A. takes J. S. to Baron, and then J. S. releaſes all Demands to him who made the Promiſe; this ſhall not diſcharge the Aſſumpſit, but the Feme ſhall have Action thereupon after the Death of the Baron. Notwithſtanding the Releaſe, becauſe it was not broken at the Time of the Releaſe; for it is to be paid after the Death of the Baron, and ſo it was only in Covenant at the Time of the Releaſe; for this Promiſe was but a Covenant without Deed. Hill. 6 Ja. B. R. between * *Belcher and Hudſon.* Rot. 332. adjudged. This Caſe was cited by George Crooke. H. 16 Ja. B. R. in *Witton and Bee's* Caſe, and then agreed per Curiam, which ſee alſo cited † Hobart's Reports 279. *If A. before Marriage had promiſed all Demands, the Debt* [illegible] *and ſo void,* becauſe it was only Contingent. Per Gould and Turton. Contra Holt Ch. J. 1 Salk. 237.

Hill 11 W. 3. B. R. in Caſe of Gage, alias Gray v. Acton.—* Yelv. 156 S.C.—† Hob. 216. pl. 280. in Caſe of Smith v Stafford.

23. If a Man promiſes A. in Conſideration that he will ſell to his Son ſuch Merchandize at ſuch a Price, that if his Son does not pay it at the Feaſt * of St. Michael next enſuing, he himſelf will pay it, and after before Michaelmas A. releaſes all Actions and Demands to him who made the Aſſumpſit; this ſhall not releaſe the Aſſumpſit, for till Michaelmas comes it is not known whether his Son will have paid it or not, and till Default of Payment by him the other is not bound to pay it, and ſo it is a meer Contingent till Michaelmas, which cannot be releaſed. Hill. 16 Ja. B. R. between *Briſcoe and Ayer* adjudged. * Fol. 405. *Contingent Debts* are not diſcharged by Releaſe &c. Yelv. 165. Neal v. Sheffield.—Yelv 215.—If A *promiſe to pay* 40 *s. to B. during Life*, a Releaſe of all Quarrels, Controverſies and Demands which he had or may have, will not diſcharge this *Annuity*, becauſe the Execution of the Promiſe was not to be till the Rent ſhould be due; but if by expreſs Words he had releaſed all Promiſes or all Actions which he had or might have, then the Promiſe had been releaſed; for the Promiſe being a ſpecial Cauſe of Action, cannot be releaſed till it come *in Eſſe*. Yelv. 156. Trin 7 Jac. B. R. Belcher v. Hudſon.——Cited 3 Mod. 208. in Caſe of Cole v. Knight.

Releaſe of all Demands will not releaſe a *Promiſe unbroken*, or *future Acts*. See 1 Salk. 171. Paſch. 13 W. 3. B. R. Thorp v. Thorp.

24. If Leſſee for Life grants over his Eſtate by Indenture, reſerving Rent during the Continuance of the Eſtate, and after releaſes to the Aſſignee all Demands; this ſhall diſcharge the Rent aforeſaid, for he had a Frankeſtenement of the Rent in him at the Time, and may demand Cro J. 486. Pl. 6. S. C.—Bridgm. 123. S. C.—2 Roll. R.

demand all the Frankſtenement by an Aſſiſe. Tr. 16 Ja. B. R. in *Witton and Bie's* Caſe, agreed per totam Curiam.

2. S. C. by Name of Byer's Caſe. —S. C. cited Vent. 314. in Caſe of Tothill v. Ingram.

The Leſſee having aſſign'd over all his Eſtate, this Rent is not extinct as to the Reverſion, but it is by Conſtruction only; and this Releaſe diſcharges this Contract, and all Demands concerning it.

25. So if the Leſſee for Years grants over by Indenture all his Eſtate, reſerving a Rent during the Term, and after releaſes to the Aſſignee all Demands, this ſhall releaſe the ſaid Rent; for tho' he cannot have an Action to demand all the Eſtate, yet this is an Eſtate in lieu of the Rent, and aſſignable over; and in an Action of Debt for any Arrearages after, he ſhall claim it as a Duty accrued for the ſaid Eſtate, and it ſhall not be ſaid that the Duty ariſes annually upon the taking of the Profits; but this had its Commencement and Creation by the Reſervation and Contract, which was before. Tr. 16 Ja. B. R. between *Witton and Bie* adjudged upon a Demurrer per totam Curiam præter Haughton, who doubted a little, becauſe all the Eſtate cannot be demanded by an Action, as in the Caſe of the Frankſtenement Leſſee, quod vide. D. 16 Ja. B. R. Agreed per tot. Cur. Cro. J. 486. pl. 6. S. C.——S. C. Poph. 136. but reports it as adjudg'd upon the Import of the Word (Demands) barely, without taking Notice of that Point in Cro. J. 486.

Mo. 544. pl. 725. S. C. and S. P. accordingly.— 15 Rep. 57. S. C. but that is upon another Point in that Caſe about Apportionment.

26. If Leſſee for Years rendring Rent be, and the Leſſor grants over the Reverſion, and Leſſee attorns, and after Leſſee aſſigns over his Eſtate, and after the Aſſignee of the Reverſion releaſes all Demands to the firſt Leſſee, yet this ſhall not releaſe the Rent; for no Privity of Eſtate is between them after the Aſſignment, nor is Contract at any Time. (And Privity of Contract is not ſufficient to make ſuch Releaſe good.) Mich. 40. 41 El. B. R. between *Collins and Harding* adjudged. —— Cro. E. 606. pl. 6. Paſch. 40 Eliz. B. R. S. C. and S. P. And that the Releaſe was no Cauſe to bar this Action, the Releaſe being of all Demands until the Date of the Deed, and this Rent was not Arrear till afterwards.

27. But if this Releaſe had been made to the Aſſignee it had extinguiſhed the Rent. Ibidem. Agreed.

See pl. 17.

28. If he who has a Rent-Charge in Fee releaſes to the Tenant of the Land all Demands from the Beginning of the World till the Making of the Deed of Releaſe, yet this ſhall diſcharge all the Rent as well that which is to come as that which is paſt. 20 Aſſ. pl. 5. Per Curiam.

See pl. 24.

29. So if Leſſee for Years grants over all his Eſtate by Indenture, reſerving a Rent, and after releaſes to the Aſſignee all Demands from the Beginning of the World to this preſent Time, yet this ſhall releaſe all the Rent to come. Tr. 16 Ja. B. R. between *Witton* and *Bie*; adding 9. But this Point was not moved to the Court, but the Counſel relinquiſhed it. See Hill. 42 El. B. R. between *Beckingham* and *Hunter*. So if Leſſor makes ſuch Releaſe to his Leſſee for Years, it ſhall extinguiſh all the Rent. D. 40 & 41 El. B. R. *Collins* and *Harding*.

S. C. cited Lev. 100. in the Caſe of Henn v. Hanſon.

30. Releaſe of all Demands will bar a Demand of a *Relief*, becauſe the Relief is by reaſon of the Seigniory, to which it belongs. Cro. J. 170. in the Caſe of Hancock v. Field. — cites 40 E. 3. 22.

31. A Releaſe of all Demands by a Lord to his Tenant is a good Bar, and Extinguiſhment of his *Seigniory*. Per Bridgman. Bridgm. 124. cites 5 E. 4. 42.

32. A. makes *Feoffment on Condition*, and before the Condition broken releaſes to the Feoffee all Demands. Per Saunders Ch. B. and others, in the Court of Wards, the Condition is gone and extinct, ut Audivi. Dal. 95. pl. 22. 15 Eliz. Anon.

33. A. brought Action againſt B.— C. was *Bail* for B. Judgment was had againſt B. and he not paying the Money nor rendring his Body, a Scire facias was brought againſt C. who *pleaded* in Bar a *Releaſe of all Demands* made to him *by A. after the Taking the Bail, and before Judgment* given againſt B. Gawdy and Popham held it no Bar, becauſe it was only a Poſſibility; But Clench and Fenner e contra, becauſe the Recognizance was acknowledg'd before the Releaſe, and the Uncertainty was only upon the Condition thereof; Adjornatur. Mo. 469. pl. 672. Mich. 39 & 40 Eliz. Hoe v. Marſhall.

S. C. Goldsb. 160. pl. 98. the Bail-Bond was not only for Payment of the Condemnation Money, but alſo Et concedit quod prædictum Debitum levetur de Terris & Tenementis &c. fuit. Judgment was given, That the Releaſe was no Bar. —— S. C. Cro Eliz. 529. accordingly: and that afterwards Clench (ut Auditr) chang'd his Opinion, and agreed with Popham and Gawdy; whereupon (upon Petition) Fenner) Judgment was given for the Plaintiff.—— 5 Rep. 70. b. S C adjudg'd no Bar, becauſe the Words of the Bail-Bond are conditional, viz. (Si contingeret, That the Defendant does not pay &c. or render his Body &c.) ſo that no certain Duty can be till Judgment given; for this Recognizance does not create a Duty immediately, but ſhall produce a Duty afterwards upon a Contingent.

34. A Releaſe of all Demands does not extend to ſuch *Writs by which nothing is demanded* in Fact or in Law, but which lie *only to reverſe* the Plaintiff *by way of Diſcharge*, and not by way of Demand. 8 Rep. 154. in Altham's Caſe, in a Nota of the Reporter, cites 11 H. 4. 6. Treſcuillard's Caſe; where a Releaſe of all Demands is no Bar in Writ of *Error to reverſe an Outlawry*.

35. A. *recovers* the Arrears of Rent *at Niſi Prius*, but *before the Day in Bank A. releaſed* to the Defendant all Demands. Per Hobart, If it had been in the Caſe of the King, the Defendant at the Day in Bank might have pleaded it; for he cannot have Audita Querela againſt the King. But otherwiſe in the Caſe of a Common Perſon. Noy 26. Ford v. Mead.

36. *Rents-ſeck*, all *mixt Actions*, a * *Warranty*, which is a Covenant Real, and all other *Covenants Real and Perſonal*, *Eſſoyers*, all Manner of *Commons* and *Profits Apprender*, *Conditions* before they are broken or performed, or after; *Annuities*, *Recognizances*, *Statutes* Merchant or of the Staple, *Obligations*, *Contracts* &c. are releaſed and diſcharg'd by Releaſe of all Demands. Co. Litt. 291. b.

* S. P. Bridg. 124, 125. in the Caſe of Pitt v. Dyer. And yet it is Executory; And the Reaſon is, That by ſuch Releaſe all the Means, Remedies, and Cauſes that any hath to Lands &c. are extinct, and conſequently the Right and Intereſt in them. —— S P. 8 Rep. 154. in Altham's Caſe. cites cap. Warranties, fol. 150.

37. In Debt upon Bond for Performance of *Covenants in a Leaſe* for Years, *wherein* there *was a Rent reſerved*, the Defendant pleaded Conditions performed; the Plaintiff replied, and aſſigned a Breach in Non-Payment of Rent reſerved; the Defendant pleaded thereto a Releaſe of all Demands. Reſolved by Foſter Ch. J. and Mallet and Windham J. That the Rent is not diſcharged by this Releaſe, and diſtinguiſhed between *Rent reſerved upon a Leaſe and Incident to the Reverſion*, this being Executory, and renewing out of the Land every Year, and a *Rent in Groſs, and ſever'd*, which depends only upon the firſt Contract, without any Regard to the Taking the Profits of the Land; But Twiſden J. contra. But Judgment was given for the Plaintiff. Sid. 141. pl. 16. Paſch. 15 Car. 2. B. R. Henn v. Hanſon.

Lev. 99 S C. accordingly. — A *growing Rent* is not releaſed by a Releaſe of all Demands. 2 Salk. 578. Hill. 2 W. & M. Stephens v. Snow. — 2 Show. 90. Carthage v. Mumby. S P

A Releaſe of all Demands will not releaſe any Thing of a Rent more than the *Arrearages then due*; Per Hale Ch. J. Freem. Rep 367. pl. 470. Paſch. 1674 Anon.

Ld. Ch J. North ſaid, He remember'd the Caſe of Penn v. Harriſon, adjudg'd in B. R. that ſuch Releaſe had not releaſed his Rent Service; which he obſerves to be contrary to Littleton; but ſays, That Diſtinguenda ſunt Tempora; For now it is the Form of a General Releaſe to put it in, and is not intended to extend ſo far. Freem Rep. 194 pl. 198. Paſch. 1675 in the Caſe of Hayes v. Hickenſtaff.

38. In *Covenant* by A. againſt B. *for Payment of an Heriot after the Death of J. S. or* 40 *s.* at the Election of A.— B. pleads, That A. releaſed to him

Mod. 216. Pitt v. Buccram v. Lowell.

S. C. but not upon the Point of the Releaſe —— 2 Mod. 93. S. C. but D. P. —— 2 Lev. 210. Ingram v. Trevil v. Ingram.

him all *Actions and Demands* &c. But this *Releaſe was* made *in the Life-Time of J. S. and* there was *an Exception therein of Heriots*. It was inſiſted, That neither the Heriot nor the 40s. were in Demand when the Releaſe was given; And by the Exception it appears, That the Intention was not to releaſe the Heriot; And the Court were all of that Opinion. And ſo Judgment was given for the Plaintiff. 2 Mod. 281. Mich. 29 Car. 2.

Brap. S. C. & P. of the Releaſe, but nothing is ſaid of the Exception; Adjornatur. —— Vent. 314. Tothill v. Ingram. S. C. Trin. 29 Car. 2. but no Mention of the Exception. Adjornatur.

(U. 2) What ſhall be releaſed by a Releaſe of *All Demands, joined with other Words.*

Br. Incidents, pl. 3. cites S. C. Contra, if it was by ſpecial Words. Brook ſays, Note the Difference by the beſt Opinion of the Court.

1. IF the Lord releaſes all Actions and Demands to the Tenant, except the Fealty and Rent, yet this ſhall not extinguiſh an *Incident*, *As reaſonable Aid*; *nor* the *Relief for Double the Rent*, unleſs it be by expreſs Words. Br. Avowry, pl. 18. cites 40 E. 3. 20.

2. In Treſpaſs the Defendant pleaded, That F. was ſeiſed in Fee, and *leaſed* to him *at Will*; and afterwards *releaſed* to him *all Accounts*, *Suits*, *and Demands ab Initio Mundi* until the Day of the Date, by Virtue whereof he was ſeiſed for Life &c. Reſolved per tot. Cur That the Eſtate was not enlarged. And the Plaintiff had Judgment. Cro. E. 268, pl. 7. Hill. 34 Eliz. B. R. Seyman v. Okeley.

Cro. J. 300. pl. 3. Paſch. 10 Jac accordingly, but no Judgment was given. Tynan v. Bridges. — Bridges v Einan S. C. Yelv. 214.

3. In an Action of *Debt for Non-Performance of an Award made for Payment of Money at a Day to come*, there is no preſent Debt nor any Duty before the Day of Payment is come; and therefore it is not to be diſcharged by a Releaſe of all Actions and Demands before the Day. Per Williams J. And the whole Court inclined to be of the ſame Opinion, but the Matter was ended between the Parties. Bulſt. 178. Eynan v. Bridges, alias Bridges v. Onion. Hill. 9 Jac. B. R. Per totam Curiam. —— *But* a *Bond* conditioned *to pay Money at a Day to come* is a Debt and Duty preſently, and may be diſcharged by a Releaſe of all Actions and Demands before the Day of Payment. Cro. J. 300. Tynan v. Bridges.

4. If a Man *deviſes* to one 20 *l. when he comes to the Age of* 21 Years, and dies; the Legatee, after the Age of 21 Years may releaſe this Legacy, and yet by a Releaſe of all Suits and Demands, it is not releaſed. 10 Rep. 51. b. Mich. 10 Jac. in Lampet's Caſe.

See (M) to (U) inclusive. — (B. a) pl. 2.

(U. 3) Executions releaſed by what Words, and what is releaſed by the Words *All Executions.*

1. MAintenance was *found againſt the Defendant to the Damage of* 10 *l.* and *before the Execution the Defendant got a Releaſe of the Plaintiff made to him and H. K. of all Actions*, *Suits*, *and Demands* Quæ verſus eos vel eorum alterum habeo &c. Newton Ch. J. ſaid

ſaid this Word (*Action*) does not extend to Execution; But *Suit* extends to it; For no Execution is awarded but at the Suit of the Plaintiff, and *Demand* extends to Execution; Per Yelverton, the Releaſe ſhall not ſerve but of Joint Actions againſt the Defendant and H. K. but Newton contra; For it *extinguiſhes joint* Actions, *and ſeveral Actions*, and the two ſhall have Advantage thereof jointly, and each by himſelf ſhall have Advantage thereof ſolely, *tho' theſe Words (vel eorum alterum) was out of the Deed.* Br. Releaſes, pl. 21. cites 19. H. 6. 3.

2. If a Man *be condemned to the Party, and to make Fine to the King*, and the *King releaſes to* him *all Actions, Suits, and Demands*, yet the Fine ſhall be paid; per Cur. For the King ſhall not have Action of it, but the Court ſhall make Execution thereof ex Officio. Br. Releaſes, pl. 21. cites 19 H. 6. 3.

3. If one releaſes all *Duties and Suits* he ſhall neither have Elegit, or Capias ad Satisfaciendum. Br. Releaſes, pl. 87. cites 26. H. 6. & Fitzh. Execution 7.

By Releaſe of all *Debts or Duties* he is to be diſcharged out of Execution; Becauſe the Debt or Duty in itſelf is diſcharged. Co. Lit. 291. a.—— By Releaſe of all *Suits* as well Executions as Actions are releaſed. 8 Rep. 153. b. in Edward Altham's Caſe.—— S. P Co. Lit 291. a.

4. H. *the Lord of the Manor entered into a Statute to M.* and afterwards *M. releaſed to H. then Tenant of the Manor, all Demands, Actions, Suits, and Executions*, which he had or might have in the ſaid Manor; And all the Juſtices agreed that he who is intitled to have Execution upon a Statute, may by his Releaſe diſcharge it before Execution ſued, notwithſtanding that he to whom the Statute is made had no Right to the Manor till Execution had; and that a Releaſe of all Right in the Land by the Conuſee before Execution does not extinguiſh the Execution, yet in this Caſe there are Words ſufficient in the Releaſe to diſcharge the Execution; For Executions and Demands are diſcharged. And. 133. pl. 182. Hide v. Morley.

Cro E. 40. pl. 2 Trin. 27 Eliz. C. B. S C. —S. C. cited Cro. E. 552. Paſch. 39 Eliz. B. R. in Caſe of Barrow v. Gray But there Popham ſaid that he had conferred with the Juſtices of C. B concerning this Judgment, and that they did not remember any ſuch Judgment; But were of Opinion that ſuch a Releaſe was not any Diſcharge of the Execution.—[In the Caſe cited Cro. E. 552. the Words of the Releaſe mentioned there as in the Caſe of Hyde v. Morley are only (all his Right, Intereſt, and Demand in the Land) and the Word (Executions) is not mentioned there, as it is in And. 133. and Cro. E. 40.]

5. A Releaſe *of Executions* is a good Bar *in a Scire Facias*. Co. Litt. 290. b.

6. A Releaſe *of Executions* bars the *King*. Co. Lit. 291. a.

7. If *Judgment* be given *in* an Action *of Debt*, and the Body of the *Debt is taken in Execution* by a Capias ad Satisfaciendum, and after the Plaintiff *releaſes the Judgment*, by this the Body ſhall be diſcharged of the Execution. Co. Lit 291. a.

8. If Execution be ſued upon a Recognizance by Elegit, and the *Conuſee by Deed makes a Defeaſance*, that if the Conuſor do ſuch an Act, that then the Recognizance ſhall be void; by this the Execution is diſcharged. Co. Litt. 291. a.

9. It was reſolved that Releaſe, *after Error* brought, made to the Principal Debtor, and his Bail *of all Actions, Executions and Demands* is a good Bar to a *Scire facias againſt the Bail*; becauſe the Debt and Duty remains notwithſtanding the Error brought, and it is not like to a bare Poſſibility. Mo. 852. pl. 1161. Trin. 14 Jac. B. R. Harriſon v. Huxley.

1 Roll. R. 386. S. C. by Name of Hukeſley v. Harriſon. Adjornatur; but mentions the Words of the Releaſe to be All Actions, Debts, Duties, and Demands.—— Cro. J. 401 S C adjornatur; But ſays the Releaſe was of all Debts, Judgments, and Executions —— 2 Bulſt. 250. Paſch. 12 Jac. S C. The Court was clear of Opinion that the Debt was diſcharged, and that this being pleaded by the Bail is a good Plea; but the Court would not then over-rule the ſame, but the Parties ſeeing the Opinion of the Court reſted ſatisfied; but it is not mention'd there by what Words the Releaſe was made.

(U. 4.) By *other Words, or general* Words.

1. A Man cannot diſpenſe with *Suit to the Leet* unleſs by ſpecial Words. Br. Incidents, pl. 28. cites 8 E 2.

2. An *Incident* cannot be releaſed unleſs by ſpecial Words; And the ſame of *Reaſonable Aid*. Br. Incidents, pl. 26. cites 52 Aſſ. 6.

3. *Fealty* cannot be releaſed by general Words. Br. Incidents, pl. 25. cites 12 E. 4. 11.

All Cauſes of Actions are releaſed thereby, albeit no Action be then depending for the ſame. Co. Litt. 292. a.

4. If a Man releaſe *all Quarrels* (a Man's Deed being taken moſt ſtrong againſt himſelf) it is as beneficial as all Actions; for by it all Actions Real and Perſonal are releaſed. Co. Litt. 292. a.

5. If a Man releaſe *omnes Loquelas*, it is as large as omnes Actiones; For Omnis Actio eſt Loquela, and it *extends* as well *to Actions in Courts of Record* as Baſe Courts; For the Writ of Error ſays, In Recordo & Proceſſu &c. Loquela quæ fuit inter &c And ſo the Writ of Falſe Judgment ſays, Recordare facias Loquelam; where the Judgment was given in the County Court. Co. Litt 292. a.

6. Omnes *Exactiones* ſeem to be large Words; For Exactio derivatur ab Exigendo, & Exigere ſignifies To Enquire or Demand. Co. Lit. 292. a.

5 Rep. 71. S.C.—Godb. 166. S. C. — S. C. cited Cro. J. 171.

7. A Releaſe of *all Debts, Duties, Actions, and Demands* will not diſcharge a *Bail's Recognizance*, if given before Judgment; but it is a good Bar to a *Scire facias*. Cro. E. 581. Mich. 39 & 40 Eliz. Hoe v. Marſhal.

S. C. 2 Roll. Rep. 162. Clerk v. Thompſon accordingly Per Montague Ch. J. & Doderidge J. ——

8. Baron *before Marriage promiſes to leave his Wife worth* 500 *l.* Per Houghton, She cannot releaſe this, even before Marriage, by Releaſe of all *Actions and Demands*; but by Releaſe of all *Promiſes or Covenants* ſhe may. Per Houghton. Palm. 99. Paſch. 17 Jac. B. R. Thompſon v. Clerk.

Cro. J. 571. S. C. adjudged for the Plaintiff; And ſays, It was affirmed in the Exchequer-Chamber, That the Action lay againſt the Executor of the Baron.

S. C. Lord Raym. 2 Rep. 786. accordingly.

9. Releaſe of all *Demands to the Perſonal Eſtate of an Inteſtate*, made by the Obligee to the Adminiſtrator, does not releaſe a *Bond*; For a Bond is not any Right or Demand to the Perſonal Eſtate, 'till Judgment and Execution ſued out; But otherwiſe if the Releaſe of all Demands had been to the Perſon of the Adminiſtrator. 2 Salk. 575. Trin 1 Ann. B. R. Topham v. Tollier.

10. A Releaſe of *all his Eſtate* will extinguiſh the Right. Arg 11 Mod. 90. pl 13.

See (M) pl 2. — (P) pl. 16, 18. — (R) pl. 2. — (T) pl. 5. — (U) pl. 21, 22.

(U. 5.) *Covenant.* What Words will releaſe it.

1. *Covenant* againſt the Maſter of the Friars *for not performing of Maſſes in ſuch a Chapel*, againſt the Covenant &c. The *Defendant pleaded Releaſe of all Services to be done in the ſame Chapel*; and a good Plea; and yet Maſſes are Oriſons, and not properly Services. Br. Releaſes, pl. 8. cites 2 H. 4. 6.

2. If

2. If a Man by Indenture covenants to do a future Act, and before the Covenant broken, the Covenantee releaſes *All Actions, Quarrels and Demands*, and after the Covenant is broken, the ſaid Releaſe is no Bar in Action of Covenant; becauſe the Covenant was to be perform'd *in Futuro*, but a Releaſe of all Covenants had been a good Bar; for the Covenant was in Eſſe & Præſenti. 10 Rep. 51. b. Mich. 10 Jac. in Lampet's Caſe. ——cites 35 H. 8. D. 57. & 4 Eliz. in the Report of Benloes.

It has been held over and over again, that a Releaſe of *all Demands* will not extinguiſh and diſcharge a Covenant not broken, per Hales Ch. J. 1 Mod. 99. Mich. 25 Car. 2. B. R. in Caſe of Auſtin v. Lippencott.—Releaſe of all Demands, Writings obligatory &c. does not releaſe *Covenants not broken*; For that is releaſable only by ſpecial Name. 2 Show. 90. Hill. 31 and 32 Car. 2. B. R. Carthage v Manby.—Godb. 12 S. P.—Cro. J. 170. Hancock v. Field S. P.—Jenk. 202 pl. 26 cites 5 E. 4 41.

3. A Releaſe *of all Covenants* until ſuch a Day, is no Diſcharge to *Covenants which were broken before*; For being broken before, there was no Covenant as to them; per Hobart J. Hutt. 17. in Caſe of Smith v. Stafford, cites D. 57.

D. 57. Trin. 35 H. 8 the Caſe of Read v. Bullock.

4. *All manner of Actions Perſonal, Suits, Quarrels, Debts, Executions and Treſpaſſes*, which I ever had, have, or hereafter may have, againſt the ſaid A. for or by Reaſon of any Matter or Cauſe from the Beginning of the World to the Day of making this preſent Releaſe. This is no Bar to Action of *Covenant*, for Covenant broken after the Releaſe. Mo. 34. pl. 112. Trin. 4 Eliz. C. B. Hawle v. Kirkby.

And. 8. pl. 16. S. C. accordingly —* Bendl. 126. pl. 192. S. C. —— D. 215. b pl. 2. Mich. 4 & 5 Eliz. Hall v. Kirby, accordingly — S. P. Cro. J. 171. in Caſe of Hancock v Field ——— Cited Lev. 100. in Caſe of Henn v. Hanſon ———Per Gawdy J. Gold. 100 cites 5 El. 217.

5. *Acquittal* and Diſcharge *of all Reparations* is as well for the Time paſt as to come, and amounts to as much as if he had releaſed the Covenant; but after Covenant broken it is no Diſcharge of the Forfeiture; per Manwood, to which Dyer and Mounſon agreed. 3 Le. 69. pl. 105. Mich. 20 Eliz. C. B. Anon.

6. A. Covenanted with B. *to pay* B. 40l. per Ann. *for* 21 *Years* afterwards B. releaſed to A. *all Actions*; The Queſtion was, whether the whole Covenant was diſcharged? All the Juſtices held that *only the Arrears* were; becauſe the Covenant was Executory yearly, to be executed during the Term of 21 Years, and he may have ſeveral Actions of Covenant every Time it is behind; For nothing ſhall be diſcharged by this releaſe of all Actions, but that which was in Action or a Duty at the Time of the Releaſe made. Godb. 11. pl. 17. Paſch. 24 Eliz. C. B. Anon.

7. *Grantee in Fee after Aſſignment* releaſes to the Grantor All Covenants, this is no Diſcharge of *Covenants running with the Land*, as Covenant for further Aſſurance &c. Cro. C. 503. Trin. 14 Car. B. R. Middlemore v. Goodall.

8. A Releaſe of *All Debts, Duties and Demands* is no Releaſe of Covenants that were not broken; nor is any other Word but the Word Covenant. Agreed. Freem. Rep. 235. pl 245 Mich. 1677. Anon.

9. *A.* had *Covenanted and broke his Covenant* in his Life-time, *and dies*, and makes the Defendant Executor. The *Plaintiff releaſes all his Right and Demand to the Teſtator's Eſtate*, and brought Action of Covenant; and the Defendant, who was the Executor, pleaded this Releaſe: And the Queſtion was, Whether this Releaſe was a good Bar to the Action of Covenant, or whether it ſhould only be extended ſo as to Bar the Plaintiff's Claim to any of the Eſtate in Specie? Adjournatur. Freem. Rep. 474. pl. 649. Mich. 1678. Morris v. Wilford.

(U 6) *Dower.* Releaſed, by what Words; And to whom.

1. THE Baron makes a Leaſe for Life and dies; The Releaſe made by the Wife of her Dower *to him in Reverſion*, is good; albeit ſhe has no Cauſe of Action againſt him in Præſenti. Co. Litt. 265. a.

2. A. ſeiſed of Land in Fee deviſed the Whole to his Wife for 4 Years, the Remainder to J his Heir in Fee. The Wife, within the 4 Years, releaſes to the Heir *All Actions and Demands*; this it ſeems tolls her Dower; per Weſton J. Dal. 52. pl. 26. 5 Eliz. Anon.

3. In Dower, Tenant pleads Releaſe of Demandant to B. in Poſſeſſione Tenementorum prædict' exiſtent' and becauſe he does not ſay that he was *Tenens Liberi Tenementi*, it was held to be no Plea, and adjudg'd for the Demandant. Cro. J. 151. Hill. 4 Jac. B. R.

4. A Mother having Right of Dower *to encourage a Marriage of her Son with M. N.* releaſed her Dower, and *ſhews the Releaſe to the intended Wife and her Relations*; It ſhall bind the Mother, tho' the Releaſe was obtain'd by a fraudulent Suggeſtion of the Son; per Lords Commiſſioners. 2 Vern. 133. Hill. 1690. Beverly v. Beverley.

(W) *How* it may be *made*, *and what* may be *reſerved* upon it.

1. A Man cannot releaſe * *upon Condition*, nor † *for a Time*, but always in ſuch Caſe the Condition is void, and the Time is void, and ſhall enure to Releſſee for ever; becauſe every Releaſe goes always by way of Extinguiſhment; Per Fineux & Tremaile. Kelw. 88. a. pl. 2. Hill. 22 H. 7. Anon.

* Man cannot *releaſe a Right, or Chiſe en Action upon Condition, and reſerve the Thing to the Condition*; For all is gone by the Releaſe, and the Condition is void; Quære inde &c. By the Opinion of Fineux. Br. Releaſes, pl. 32. cites 21 H. 7. 24.

A Releaſe *on Condition that Releſſee ſhall pay to Releſſor*, ſo much Money is not good; But if a Releaſe be ſo made, that if Releſſee pay ſo much *at ſuch a Day to come, then he releaſes* &c. This is a good Releaſe; Per Treby Ch. J. Lutw. 638. cites 21 H. 7. 28. & 30.

Kelw. 89. pl. 8. S. P per Fineux. — But 2 Show. 446. pl. 411. Wadſworth v. Cobb, where in Debt Defendant pleaded a Letter of Licence for 3 Months, in which the Plaintiff covenanted, That if he ſhould ſue in that Time the Defendant ſhould be acquitted of the Debt, and that the Plaintiff did ſue him; the Plaintiff demurred; It was held per Cur. That it being under Seal, and the Plaintiff's own Agreement, it was not barely a Covenant, but was a Releaſe upon Condition; And Judgment accordingly for the Defendant.

† A Releaſe *for one Hour* to Tenant in Fee Simple as to the *Title of the Land* is good for ever, and yet it is contrary of a *Rent*. Br. Lect. Stat. Limit. 75.

2. The *Lord Paramount* cannot releaſe to the *Tenant Paravaile* ſaving to him *Part of the Services*; But the Saving in that Caſe is void. Co. Lit. 305. b.

But the Lord upon his Releaſe &c to the Tenant cannot ſave a *New Kind of Service*. Co. Lit. 305. b.

3. *But* if there are *Lord and Tenant by Fealty, and 20 s. Rent*, the Lord may releaſe all his Right in the Seigniory ſaving Fealty and 10 s. Rent. Co. Lit. 305. b.

(W. 2) How it may be made. *By Will.*

1. A *Will* cannot releaſe a Thing created by Deed, and ſo diſcharge Creditors. Per 3 J. Sty. 287. Trin. 1651. Style v. Tully.

2. A Man cannot releaſe a *Debt by his Will.* Vent. 39. Trin. 21 Car 2. Anon. Tho' a Will cannot (as was allow'd) enure as a Releaſe, even ſuppoſing it to be ſealed and delivered, *for Want of taking Effect in the Teſtator's Life-Time*, yet, provided it were *expreſſed to be the Intention* of the Party *that the Debt ſhould be diſcharged*, the Will would operate accordingly; And L. C. Cowper ſaid that in ſuch Caſe it would be plainly a abſolute Diſcharge of the Debt, tho' the Teſtator had ſurvived the Legatee. Wm's Rep 85. Mich. 1705. in the Caſe of Elliot v. Davenport.

A Releaſe by Will can only operate as a Legacy, and muſt be Aſſets to pay Teſtator's Debts, and if a Debt ſo releaſed by Will be afterwards received by the Teſtator himſelf in his Life-Time, the Legacy is extinct; and ſuch Releaſe by Will intimates no more than that the Executors ſhould not after his Death give any Trouble or Moleſtation for the Debt. Per Ld Chan. King. 2 Wm's Rep. 332. Hill. 1725. Rider v. Wager.

3. Whether a Releaſe by Will *of all Debts, Accounts, Reckonings, and Demands whatſoever*, will transfer the Property of Goods which the Releſſee had in his Poſſeſſion at the Teſtator's Death? The Court directed that Defendant ſhould admit ſome of the Goods come to his Hands, to enable the Plaintiff to bring his Action at Law. Per Lords Commiſſioners. 2 Vern. 118. Mich. 1689. Fish v. Jeaſon.

4. A. devis'd to B. a *Legacy* of 100 l. and by Will releaſed to her *all Debts and Demands, and after the Date of the Will lends her* 100 *l.* Per Lds. Commiſſioners, If the Executor can recover it by Law he may, we will not take away his Remedy, if any he has, nor will give him any Aid in Equity; and therefore decreed Payment of the Legacy. 2 Vern. 130. Paſch. 1690 Robert v. Bennet.

5. Where Debtor is made Executor the Debt is *extinguiſh'd*, not by Way of Releaſe, but by Way of Legacy. Per Powel J. 1 Salk. 303, 304. Hill. 1 Ann. B. R. in Caſe of Wankford v. Wankford. But, per Holt Ch. J. it does not amount to a Legacy, but to a Payment and a Releaſe. Ibid. 306.

(X) By Deed; *How*; In what Caſes *it ought to be by Deed.*

1. If A. contracts with B. for a certain Conſideration to deliver to him ſuch a Thing, at a Day to come; this Contract cannot be releaſed by *Parol without Deed. Tr. 12 Ja. B. R. between *Blackhead and Cock*, per Curiam. Cro. C. 279. Langden v. Stokes. *Fol. 429.

2. Releaſe of a *Right in Chattels* cannot be without Deed. per Anderſon Ch. J. Le 283. pl. 383. Hill. 29 Eliz. C. B. in Caſe of Jennor v. Hardy.

3. *Aſſumpſit for* 5 *l.* upon Exchange of a Horſe, *to be paid upon Requeſt.* The *Defendant pleaded, that before the Action* brought, *the Plaintiff did exonerate* him of this Agreement; Reſolv'd it was *no* good *Plea*; For tho' a Parol Agreement may be diſcharged by Parol, before Cauſe of Action accrued, yet after that it cannot be diſcharged but by Deed; and here the Cauſe of Action did accrue at leaſt upon Requeſt, and therefore he ſhould have pleaded the Exoneration before the Requeſt. Freem. Rep. 230. pl. 239. Trin. 1677. Edwards v. Weekes.

(X. 2.) The *ſeveral Sorts*; *And how they* may *Enure.*

* *As* if there are *three* Joint-tenants, and *one releaſes* by his Deed *to one of his Companions* &c Litt S 304 — See (Z.) —— † *As* where *Diſſeiſee* by his Deed, *releaſes* all *his Right to one of the Diſſeiſors*, he ſhall hold alone. Litt. S. 306. —— ‡ *As* if *Diſſeiſor* infeoffs *two*, *and Diſſeiſee releaſes to one* of them, it ſhall enure to both. Litt. S. 307. —See (Y.)— ‖ See (A) &c.

1. A *Releaſe may enure* 4 manner of *Ways*, viz. 1ſt. By Way of **Mitter l'Eſtate*. 2dly. By Way of †*Mitter le Droit*. 3dly. By Way of ‡*Extinguiſhment*. 4thly. By Way of *Creation or* ‖ *Enlargement* of an Eſtate. Co. Litt. 193. b.

2. There is a *Diverſity* between a Releaſe *in Deed* and *in Law*; For if the *Heir of* the *Diſſeiſor makes a Leaſe for Life*, and the *Diſſeiſee releaſes his Right to* the *Leſſor for his Life*, his Right is gone for ever; *But* if the *Diſſeiſee diſſeiſes the Heir of the Diſſeiſor*, and makes a Leaſe for Life, by this Releaſe in Law the Right is releaſed but only during the Life of the Leſſee. For a Releaſe *in Law* ſhall be expounded more favourable according to the Meaning and Intent of the Parties, than a Releaſe *in Deed*, which is the Act of the Party, and ſhall be taken moſt ſtrongly againſt himſelf. Co. Litt. 264. b.

(Y) Extinguiſhment. *How* it ſhall *enure*; *By Way of Extinguiſhment.*

Br. Counterple de Voucher, pl 29. cites 21 E. 3. 27.

1. IF the Eſtate of him who releaſes be turn'd a Right, this ſhall enure by Way of Extinguiſhment. 21 E. 3. 37.

Voucher (F. a) pl. 11. & (P) pl. 2 S. C. —— Br. Counterple de Voucher, pl 29. cites S. C.

2. As if Land deſcends to 2 Coparceners, and one enters into the Whole, claiming in her own Right alone, and after the other releaſes to her, this enures by Way of Extinguiſhment. 21 E. 3. 27.

3. If there be *Lord and Tenant*, and the *Tenant* is diſſeiſed, and the *Diſſeiſee purchaſes the Seignory*, and *releaſes*, by Deed or Fine, *All his Right in the Land*, *ſaving* to him *his Seignory*; the Seignory by ſuch Releaſe is not extinct; *But if* in the ſame Caſe, *the Lord hath nothing in or out of the Land*, *but only the Seignory*, and makes ſuch Releaſe, ſaving his Seignory, ſuch ſaving is void; becauſe the *whole Operation* ſhall be *reſtrain'd* by the Saving. Co. R. on Fines 7. cites 9 E. 3. 12 E. 4. Colledge Lingfield's Caſe.

Co. R. on Fines, 7. cites S. C. and Litt. 112 20 H. 8 42 E. 3. 18 E. 3. 11 H 4. And ſays, That if the Lord *releaſes* to the Tenant *for* Term of his *Life*, this does not extinguiſh the whole Seignory, becauſe the Lord departs from an Inheritance in Poſſeſſion. Co. R. on Fines, 7.——*But* if there be Lord and Tenant, and the *Lord releaſes all his Right* which he hath *in the Land*, *or* all the Right which he hath *in the Seignory to the Tenant*, by Deed or by Fine, the Seigniory is extinct for ever, without theſe Words, (his Heirs) Co. R. on Fines, 7.

4. If Lord and Tenant are, and the *Lord releaſes all his Right to the Tenant and the Heirs of his Body*, by this the Seigniory is ſuſpended during the Tail; Brook ſays, 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 inaſmuch as the Releaſe goes *by Way of Making of Eſtate of the Seigniory*, which is in the Lord at the Time of the Gift, and then it ſhall enure *by Way of Grant*. Br. Releaſes, pl. 86. cites 13 E. 3. & Fitzh. Voucher 120.

5. *Contra* where he who releaſes, has *only a Right at the Time* of the Releaſe made. Br. Releaſes, pl. 86. cites 13 E. 3. & Fitzh. Voucher 120.

6. The *Lord may releaſe the Services to the Tenant, for Term of Life of the Tenant*, and after the Death of the Tenant the Lord ſhall have the Services again; For the Ground in Littleton, That if a Man *releaſes for one Hour to him who has the Fee-ſimple, that it ſhall ſerve for ever*, is where the Thing which the Tenant has is releaſed; and the Tenant here had the Land, but not the Services, and therefore by ſuch Releaſe the Services are not extinguiſhed for ever. Br. Releaſes, pl. 96. cites 13 E. 3. & Fitzh. Voucher 120.

7. If ſeveral *Jointenants* are, and *One releaſes to the reſt, or All releaſe to One*, there thoſe who take the Releaſe are in by the firſt Feoffor, and not by him who releaſed. Br. Releaſes, pl. 63. cites 40 E. 3. 41.

8. A *Releaſe to him who is in by Title* goes by Way of Extinguiſhment of Right. Br. Mortmaine, pl. 38. cites 11 H. 4. 88.

9. Where the *Lord releaſes Part of his Services*, yet the reſt remain; ſo that a Man cannot plead Hors de ſon Fee. Br. Avowry, pl. 40. cites 14 H. 4. 2.

10. If a Man *leaſes Land for Term of Life rendring Rent*, and after releaſes Part of the Rent; this is good, and the reſt of the Rent is not extinct; quod nota. Br. Releaſes, pl. 83. cites 9 E. 4. 8. and Fitzh. Aſſ. 159.

11. If *Cognee* of a *Fine of Land in Ancient Demeſne at Common Law*, releaſes *to Cognee in Poſſeſſion* by his Deed, or confirms his Eſtate by his Deed, the Cognee ſhall retain and have the Land, tho' the Fine be *annull'd*, becauſe the Releaſe or Confirmation, made to him in Poſſeſſion, makes his Eſtate firm and rightful againſt Releſor and his Heirs. 10 Rep. 50. in Lampet's Caſe, cites F. N. B. 98. and ſays this Opinion was affirm'd there for good Law Per tot. Cur. S. C. and P. cited Cro. C. 478. in Caſe of Parker v. Willis.

12. If *Leſſee for Years be ouſted*, and he in the Reverſion diſſeiſed, and the *Leſſee releaſes to the Diſſeiſor*; the Diſſeiſee may enter, for the Term for Years is extinct and determined. Co. Litt. 275. b. *But otherwiſe it is in Caſe of a Leaſe for Life*; for the Diſſeiſor has Diſſeiſor has a Freehold whereupon the Releaſe of Tenant for Life may enure, but he no Term for Years whereupon the Releaſe of the Leſſee for Years may enure. Co. Litt. 275 b. and 276.

13. If the Diſſeiſee releaſes to the Diſſeiſor by Deed indented, or by Fine for Life or in Tail, *after the Eſtate for Life ended, or Gift in Tail determined*, the Diſſeiſee may enter again, tho' only *a naked Right* paſſes by the Releaſe. Co R. on Fines 7.

14. A. made a *Feoffment* to W. R. of 2 Acres to the Uſe of himſelf for Life, Remainder to B. in Tail, Remainder to C. in Tail, Remainder to D. in Fee, *Proviſo if E. die without Iſſue*, then *A. by Deed might revoke the ſaid Uſes. A. enfeoffs J. S. of one Acre*, and *as to the other Acre A. by Deed revokes* &c. to W. R. and B. C. and D. *the ſaid Power* and Authority: *E. died without Iſſue*. The whole Court agreed, That had this been a preſent Power of Revocation, as the uſual Powers of Revocation are, A. might have extinguiſh'd this Power by a Releaſe to any who had Eſtate of Franktenement in the Land in Poſſeſſion, Reverſion or Remainder; and therefore the Eſtates which before were defeaſible, are by ſuch Releaſe made abſolute. 1 Rep. 110. b. Hill. 28 Eliz. B. R. Grendon v. Albany. 4 Le. 133 pl. 252. S. C. adjudged. — Ibid. 219. pl. 354. S. C. reported in the ſame Words.

15. *Leſſee* for Years *deviſed the Term to his Wife for Life*, the *Remainder* of the Years *to J. S. who* by Deed *releaſed* all his Right, Intereſt, Term of Years, Poſſeſſion and Demand in the ſaid Land *to him who had the Reverſion in Fee*. And per 3 J. The Poſſeſſion was extinguiſh'd in the Reverſion; ſo that the Reverſioner, after the Death of the Wife, may enter and have good Right; but Brampſton e contra; but afterwards he

chang'd his Opinion, and Judgment was given accordingly. Jo. 389. pl. 8. Paſch. 12 Car. B. R. Johnſon v. Trumper.

(Y. 2) Enure. By Way of Extinguiſhment *totally*, or *partly* ſo, and partly by Enlargement.

So of a Seigniory. Ibid. cites Fitzh. Extinguiſhment 2.

1. IF a Man has *a Rent-charge out of* 20 *Acres*, and *releaſes all his Right in one Acre*, this extinguiſhes all the Rent. Br. Releaſes, pl. 18. cites 34 Aſſ. 15. and Fitzh. Aſſ 318.

Note two Things: 1ſt. By the Releaſe of all the *Right in the Land* the *Seigniory* is extinct, as well as by the Releaſe of all the Right in the Seigniory; for the Seigniory iſſues out of the Land. 2dly. By the Releaſe of all his Right in the Seigniory or the Land, the whole Seigniory is extinct, without any Words of Inheritance. Co. Litt. 280. a.——* Nor can one Man be both Lord and Tenant. Co. Litt. 280. a.

2. Releaſes, which enure by Way of Extinguiſhment againſt all Perſons, *are* where he, to whom the Releaſe is made, cannot have that which to him is releaſed; *As* if there be *Lord and Tenant*, and the Lord releaſes to the Tenant all the Right which he hath in the Seigniory, or all the Right which he hath in the Land &c. this Releaſe goes by Way of Extinguiſhment againſt all Perſons, becauſe the * Tenant cannot have Service to receive of himſelf. Litt. S. 479.

For a Man cannot have Land, and a Rent iſſuing out of the ſame Land; nor can a Man have Land, and a Common of Paſture iſſuing out of the ſame Land; but in the Caſe of the Right of the Land the Tenant of the Land may take and enjoy it for ſtrengthning his Eſtate therein. Co. Litt 280. a.——A and B. *Joyntenants* of Land, out of which a Rent of 20 l. per Ann. iſſued to the King, and he in Conſideration of Money paid by B. *Granted, Remiſed, Releaſed and Renounced to B. and his Heirs the ſaid Rent* &c. Per Dyer, The Patentee may uſe this as a Grant or Releaſe and Extinguiſhment as he will, eſpecially the Habendum being *Habend. & Percipiend Reditum prad.* to him and his Heirs. D. 319 b. pl. 10. Mich. 14 & 15 Eliz. Anon.

3. *So* it is of a Releaſe made *to the Tenant of the Land of a Rent-charge or Common* of Paſture &c. becauſe the Tenant cannot have that which to him is releaſed &c. So ſuch Releaſes ſhall enure by Way of Extinguiſhment always. Litt. S. 480.

4. *A. Leſſee for Years*, Remainder *to B. for Life*, Remainder *to C. for Life*; He in *Reverſion in Fee releaſed to all three and their Heirs.* By this Releaſe each of them has got a Reverſion in Fee in the ſame Land, but the firſt Leſſee ſhall have the Sole Poſſeſſion, as he had before. Bendl. 36. pl. 65. Trin. 7 E. 6. Per Mountague Ch. J. of C. B. Anon.

5. Where a Releaſe is ſaid in ſome Caſes to enure by Way of Extinguiſhment, *it is to be underſtood* either in Reſpect of him that makes the Releaſe, or in Reſpect that by Conſtruction of Law it enures not only to him to whom it is made, but to others alſo who are Strangers to the Releaſe, which is a Quality of an Inheritance extinguiſhed. Co. Litt. 279. b.

6. There is a Diverſity where a Releaſe enures by Way of Extinguiſhment *of an Inheritance which is in Poſſeſſion*, and may be granted over, and a Releaſe of a *Right*, or an *Action*, to Lands which cannot be granted over; for the Lord may releaſe his Seigniory to the Tenant of the Land for Life, or in Tail, Et ſic de cæteris: But ſo cannot one releaſe a Right or an Action; for if it be releaſed but *for an Hour*, it is extinct for ever. Co. Litt. 280. a.

7. *Feme Meſne intermarries with the Tenant Paravaile*; if the *Lord releaſes to the Feme*, the Seigniory only is extinct; but if he releaſes to the Husband, both Seigniory and Meſnalty are extinct: And in this Caſe, if the

the Lord releaſe to the *Husband and Wife*, it is a Queſtion how the Releaſe ſhall enure, but it is no Queſtion but that a Releaſe may be made to a Meſnalty, or a Seigniory ſuſpended in Part of the Eſtate. Co. Litt. 280. a.

8. If the *Tenancy be given to the Lord, and a Stranger, and to the Heirs of the Stranger*, and the *Lord releaſes to his Companion all the Right in the Land*; this Releaſe not only paſſes his Eſtate in the Tenancy, but extinguiſhes alſo his Right in the Seigniory, and ſo one Releaſe enures to extinguiſh ſeveral Rights in one and the ſame Land. Co. Litt. 280. a.

9. If there be *Lord and Tenant by Fealty and Rent*, the *Lord grants the Seigniory for Years*, and the *Tenant attornes*, and the *Lord releaſes his Seigniory to the Tenant for Years, and to the Tenant of the Land generally*, the whole Seigniory is extinct, and the State of the Leſſee alſo; but *if the Releaſe had been to them and their Heirs*, then the Leſſee had had Inheritance of the one Moiety, and the other Moiety had been extinct; and the Reaſon of this Diverſity is, becauſe when the Releaſe is made generally, it can enure to the Leſſee but for Life, becauſe it enures by way of Enlargement of Eſtate, and being made to the Tenant of the Land it enures by way of Extinguiſhment, and then there cannot remain a particular Eſtate in the Seignory for Life; But when the Releaſe is made to them and their Heirs, each one takes a Moiety, the one by way of increaſing the Eſtate, and the other by Extinguiſhment Co. Litt. 280. a.

(Y. 3) Enure as a Grant.

1. A Man *leaſed for Term of Life*, the *Remainder over in Tail*, the *Remainder to W. for Term of Life*, the *Remainder in Fee to the firſt Tenant for Life*, and after the *firſt Tenant* for Life *had Iſſue, and died*, and the *Tenant in Tail entered*, to whom the *Heir of the firſt Tenant for Life, who had the Fee Simple in Remainder, releaſed all his Right*, and after the *Tenant in Tail died without Iſſue*, and his Heir collateral entered by Colour of the Releaſe, upon whom he in Remainder for Life entered, and the other brought Aſſiſe, and by all the Juſtices he is barrable; for that the Releaſe may give the Fee Simple, yet it ſhall not determine the Eſtate of him in Remainder for Term of Life; But *Quære if he can give the Fee Simple.* Br. Releaſes, pl. 71. cites 29 Aſſ. 50.

See (Y) pl. 4 — (Y. 2) pl. 3. in the Note. — Where a Grant ſhall enure as a Releaſe See Grants (S. 2)

2. If *Diſſeiſor gives in Mortmaine by Licence* of the King and Chief Lord, and the *Diſſeiſee releaſes to the Abbot all his Right*, the chief Lord or the King cannot enter; For this *countervails Entry and Feoffment.* Br. Mortmaine, pl. 18. cites 11 H. 4. 88.

But where an Abbot is diſſeiſed, and the King or Chief Lord releaſes and confirms to him, *and after the Diſſeiſor releaſes to the Abbot all his Right*, it ſeems that the King or chief Lord may enter; For *this countervails Entry and Feoffment*, and then it is a New Mortmain. Quere in S. C. Ibid.

3. In Dower it was touched that if the *Diſſeiſee releaſes to the Diſſeiſor*, the *Diſſeiſor is in by him*, and ſhall not have the View in Writ of Dower; And ſo ſee that a Releaſe makes one Degree. Br. Releaſes, pl. 28. cites 9 E. 4. 6.

4. The Lord releaſes and grants his *Seignory to the Husband who is ſeiſed of the Tenancy in Right of the Wife* to him and his Heirs, the Huſband dies, and his Heir diſtrains for the Rent upon the Lands, it was held that it ſhall enure as a Grant which is moſt beneficial to the Grantee, and it is agreeing with the Intent of the Deed that the Huſband and his Heirs ſhall have it. Cro. E. 163. pl. 3. Mich. 31, & 32 Eliz. Anon.

(Z) How

(Z) How it ſhall enure. By *Mitter le Eſtate.*

See Voucher (F. a) pl. 11. & (P) pl. 2 — * Br. Counterple de Voucher pl. 29 cites S. C.

1. IF 2 Coparceners are ſeiſed of Land, and one releaſes to the other in Fee with Warranty; this paſſes by way of Mitter le Eſtate. * 21 E. 3. 27.

—— When 2 ſeveral Perſons *come in by the ſame Feudal Contract*, one may diſcharge to the other the Benefit of ſuch Feudal Contract by Releaſe; becauſe no Notoriety is needful, ſince in the Prior Feudal Contract, there was Notoriety ſufficient, and ſuch Releaſe is is called a Releaſe by Mitter le Eſtate; Thus 2 Coparceners come into *one intire Feud deſcending from their Father*, and therefore they may releaſe privately to each other, without any Notoriety by Feoffment; Becauſe they take by the former Contract and Deſcent to them, which eſtabliſhes them in the Poſſeſſion without a Notoriety. G. Treat. of Ten. 67.

See Jointenants, (A) pl. 1. S. C. — Releaſe (L) pl. 3. S. C — 2 Roll. R. 398. 444. 472. 485. S. C.

2. If A. Feme Sole and B. Jointenants for Life are, and A. takes C. to Baron, and after A and C levy a Fine to B. by which they grant the Land to B. & quicquid habent &c. and his Aſſigns with Warranty, and after B. dies living A. yet the Leſſor may enter into the Whole, and there ſhall not be any Occupant of any Part, becauſe this Fine enures as a Releaſe, not by Mitter le Eſtate, but by way of Extinguiſhment. Cr. 22. Ja. B. R. between *Euſtace and Scarron.* Adjudged upon a Special Verdict.

3. *Two Tenants in Common made Compoſition to preſent by Turn* to the Advowſon, and after the *one releaſed to the other all his Right* in the Advowſon, and admitted for Good, and this by reaſon of the Privity of the Turn as it ſeems, but it is not much to the Purpoſe. Br. Releaſes, pl. 77. cites 39 E. 3. 37.

4. If *three* are *ſeiſed in Fee jointly, and leaſe for Term of Life*, and after *two releaſe to the third*, this is a good Releaſe, and he ſhall maintain Action of Waſte alone. Br. Releaſes, pl. 75. cites 46 E. 3. 17.

(Z. 2) Where it ſhall enure by way of Mitter l'Eſtate, without any Words of Inheritance.

But if there are 2 *Jointenants*, and the *one* of them *releaſe* all his Right *to the other*, this does not to all Purpoſes enure by way of Mitter l'Eſtate; For it *makes no Degree*, and he to whom the Releaſe is made ſhall for many Purpoſes be adjudged in from the firſt Feoffor, and this Releaſe ſhall veſt all in the other Jointenant without theſe Words (Heirs) Co. Litt. 273. b. —— *But* if there are 2 *Coparceners* and the one releaſes all her Right to the other; This ſhall enure by way of Mitter l'Eſtate, and ſhall make Degree, and without theſe Words (Heirs) ſhall paſs the whole Fee Simple Co. Litt. 273. b.

1. IF there are 3 *Jointenants*, and *one releaſe to one of the other all his Right*, this enures by way of Mitter l'Eſtate, and paſſes the whole Fee Simple without theſe Words (Heirs.) Co. Litt. 273. b.

2. If 2 *Coparceners* be of a Rent, and the *one* of them *takes Husband to Husband*, the other may *releaſe to her* notwithſtanding the Rent be in Suſpence, and it ſhall enure by way of Mitter le Eſtate, and the *may releaſe alſo to the Tertenant*, and that ſhall enure by way of *Extinguiſhment*; but if ſhe releaſe *to her Siſter and to her Husband*, it is good to be ſeen how it ſhall enure. Co. Litt. 273. b.

And 45. pl. 114 Hill. 10 Eliz accordingly

3. If *Baron and Feme, and a third Perſon* are *Jointenants* in Fee, and the *third Perſon releaſes to the Baron* all his Right, without ſaying To have and to hold to him and his Heirs, yet the Baron has Fee Simple, and

and the Feme ſhall take nothing by this Releaſe, as has been adjudged, and yet ſhall enure by *Mitter l'Eſtate*. Co. R. on Fines. 7. cites Eſcot's Caſe. Eſcott's Caſe —— Bendl. 195. 232. S. C.

adjudged.—— Co. Litt. 273. b. S P. And ſo it would be, had the Releaſe been made to the Wife.—— But where Baron and Feme purchaſed *to them and the Heirs of the Baron, and of the third Perſon*, the Court held that ſuch Releaſe ſhall enure to the Baron only, and not to the Feme, and that the Word (Heirs) need not be expreſſed; But had the 3d Perſon made a Releaſe to the Feme there muſt have been Words of Inheritance, becauſe the Eſtate which ſhe had in Jointure before was only an Eſtate for Life. D 263. pl 34 Trin 9 Eliz. Anon.

(Z. 3) *Conſtrued*; How In General.

1. FOR the Conſtruction of a Releaſe, it was argued that 1ſt. the Intention of the Parties is principally to be regarded, and *Ex Præcedentibus & Conſequentibus optima fit Interpretatio.* 2dly, A Releaſe is Particular, and may by Inference of other Words have a *General Senſe*, yet *Particular Conſtruction* ſhall be made, *Niſi impediatur Sententia, or Intentio Partium.* 3dly, *Expende Circumſtantias* & Intentio intelligetur. Hett. 15. in Abree's Caſe.

2. There is a *Difference* where a Thing is *uncertain to which a Certainty is added*, and where it is *certain*; For if I releaſe all my Right in all my Lands in Dale, which I have by Deſcent of the Part of my Father; If I have Lands in Dale by Deſcent of the Part of my Mother, and none from my Father, the Releaſe is void; But if the Releaſe had been of *Whatſoever in D. which I have by Deſcent of the Part of my Mother whereas it is of the Part of Father*, the Releaſe is good, becauſe the Thing was certainly expreſſed in the firſt Words, and ſo the reſt was *ſuperfluous*, and need not be averred. Per Cur. Pl. C. 191. b. in the Caſe of Wrotteley v. Adams. Ibid. 305. in Caſe of Earl of Leiceſter v. Heydon.

3. A Releaſe *in Law* ſhall be expounded more favourable according to the Meaning and Intent of the Parties, than a Releaſe *in Deed*, which is the Act of the Party, and ſhall be taken moſt ſtrongly againſt himſelf. Co. Litt. 264. b.

4. If upon a general Releaſe Releſſee gives Releſſor a Bill of Exchange, *Note* &c. *bearing even Date with the Releaſe*, the Releaſe ſhall *not diſcharge* them. Per Holt Ch. J. 12 Mod. 401. Paſch. 12 W. 3. Anon.

(A. a) Limitation. [*Or, Reſtriction by Conſtruction.*]

1. IF an Executor releaſe by ſuch Name, [viz.] J. S. Executor releaſes all Actions; this is not any Limitation of the Releaſe, but this ſhall releaſe as well Actions which he has in his own Right, as that which he has as Executor. 39 E. 3. 26. b. Br. Releaſes, pl. 31. cites S. C.—S C. of 39 E. 3. 26. b. cited per Cur. But ſaid

that where there is a *particular Recital* in a Deed, *and then general Words follow*, the general Words ſhall be qualified by the ſpecial Words. Ld. Raym Rep. 235 236 Trin. 9 W. 3. C. B. in Caſe of Thorpe v. Thorpe, cites 2 Saund. 4 5 3 Keb 45 50. Ld Arlington v. Merrick 1 And. 64. Mo. 133. by Anderſon; And therefore in the principal Caſe Judgment was given accordingly.—Upon Error brought of the Judgment in the Caſe of Thorpe v Thorpe, the Rule ſaid down, ut ſupra, of the particular Recital, and then general Words following, that the general Words ſhall be qualified by the ſpecial, was inſiſted upon by the Counſel in Support of the Judgment, with this Difference, that where there are general Words all alone in a Deed of Releaſe, they ſhall be taken moſt ſtrongly againſt the Releſſor, and that ſo it had often been adjudged. But to this Point the Court gave no Opinion, tho' the Judgment is to be given upon this Point only. Ld Raym Rep 663. 664. Paſch. 13 W. 3. B R. Thorpe v Thorpe A ſ...

A *Suit* was depending *in the Exchequer between B. and J. S. upon an Account* between them, relating to a Trade carried on in Barbadoes. *Pending this Suit A. dies, and makes B. Executor. J. S. was likewiſe accountable to B.* for Monies received by him. *B. and J. S. compromiſ'd the Suit in the Exchequer, and* thereupon *B. gave him a Releaſe.* Afterwards *B. as Executor of A. ſued J. S. in Chancery, on the Account between A. and J. S.* to which J. S. pleaded the Releaſe. It was in Proof that this Releaſe, tho' given after A.'s Death, was not given as Executor to A. but only upon the particular Account between B. and J. S. The Court ſet aſide the Releaſe as to ſuch Demand, and ordered that it ſhould not be pleaded in Bar, nor given in Evidence in any Suit concerning the Eſtate of A. Fin. Rep. 443. Hill. 32 Car. 2. 1679. Calvert v. Calvert, Bean &c.

One of the *Executors of a Creditor* by Judgment for 6000 l. *is Legatee of the Debtor* for 5 l. and gives a Receipt for the Legacy, and by it diſcharged the Executor of the Debtor of and from the ſaid Legacy, and from all Actions, Suits, and *Demands whatſoever* which he had againſt him as Executor *for any Matter whatſoever*, from the Beginning of the World &c. This extends only to the Legacy which was in his own Right, and not to the Debt which he had as Executor. Show. 150. Paſch. 2 W. 3. B. R. Knight v. Cole.——3 Lev. 273. S. C.——Carth. 118. S. C.—S. C. cited Per Powel J. who ſaid he was Counſel therein. Ld. Raym. Rep. 235. 236. Trin. 9 W. 3. C. B. in Caſe of Thorp v. Thorp.——So of a *Truſtee*. Lev. 272. Stokes v. Stokes.

2. If a Man gives by Deed a Rent in Tail, and after his Heir releaſes to the Leſſee and his Heirs all his Right in the Land to perceive according to the ſaid Deed, ita quod he or his Heirs ſhall claim nothing therein againſt the ſaid Deed; it ſeems that this is a Limiting Releaſe, ſcil. a Confirmation of the firſt Grant, and not an Enlargement. 43 Aſſ. 8. Dubitatur.

3. If a Man receives 10 l. of another, and by his Deed acknowledges the Receipt thereof, and thereof releaſes acquits and diſcharges him, and of all Actions, Suits, Debts, Duties &c. and Demands. By this Releaſe nothing is releaſed, but the 10 l. and the Action and Demands thereof; for the laſt Words have Reference to the firſt, and ſo limited by them. * Cr. 5 Ja. B. R. cited by Tanfield to be adjudged.

S. P. In the Caſe of an *Executor*. Show. 150. Knight v. Cole —— S. C. Carth. 119. And there ſaid, that it had been adjudg'd of late, That where a *particular Cauſe* or Conſideration *is mention'd* in a Releaſe, it ſhall reſtrain the general Words following, which are only Words of Courſe.——* S. C. cited 3 Mod. in Caſe of Cole v. Knight.——And alſo in S. C. Knight v. Cole Show. 151. But there 155. Holt Ch. J. ſaid he thought that Caſe not to be Law, and that it was only cited by Tanfield.

4. If A. be obliged in 20 l. to B. by Bill for Payment of 10 l. and does not pay it at the Day, and after B. releaſes to him all Actions of 10 l. this does not releaſe the Bill, becauſe the Action is to be brought for 20 l. inaſmuch as the Releaſe was after the Forfeiture. D. 1 Ja. B. between Waller and Barrell.

Fol. 410. But if it had been *Uſque ad the Making*, it had been otherwiſe. D. 307. ——If A makes a *Statute to B. dated* 10 *June*, and B. makes a *Releaſe, dated* 9 *June, to the Day of the Date*, but *delivered* 11 *June*, yet the Statute is not releaſed. D. 307. a. pl. 61. Hill. 13 Eliz. Hedley v. [illegible].

5. If an Obligation be dated and delivered the 23 Jan. 5 Ja. and Obligee make a Releaſe, which is dated 22 Jan. 3 Ja. but it is delivered after 23 Jan. 3 Ja. And by this Deed he releaſes to the Obligor all Actions Uſque diem hujus præſentis temporis; this Releaſe ſhall not diſcharge the Obligation, for (Hujus præſentis temporis) ſhall be taken the preſent Time when the Deed was dated. D. 7 Ja. B. Per Curiam.

Releaſe of all Demands *uſque* 26 *April*, is no Releaſe of a *Bond dated the ſame Day*. 2 Mod. 280. Nichols v. Ranſell.——So Uſque *ad Diem datus*. Adjudged. 2 Roll. R. 255. Mich. 12 Jac. B. R. Green v. Wilcoks.

6. Releaſes are to be conſtrued *Secundum ſubjectam Materiam* at the Time of the making of them. See 2 Chan. Caſes 126. in Caſe of Bovey v. Smith and Bony, and the Caſes here following.

7. If one *releaſe all Actions to ſuch a Day*, which is *paſt*, the Releaſe is void as to any Thing which ſhall happen after the Releaſe, and good for the Reſidue. D. 56. b. pl. 21. Trin. 35 H. 8. in Caſe of Read v. Bullock.

Ow. 71. S. C. ſays, That Coke alſo urg'd that the

8. In *Debt upon Bond*, the Defendant pleads a Releaſe; and upon the Pleading the Caſe appeared to be, that there were *Cross ſuits between* the Plaintiff (*Lord*) *and* the Defendant, being his *Tenant for Life*, and *an Heriot*; and they having ſubmitted it to Arbitrament, it was *awarded* that

that there ſhould be *a Releaſe* made of them; and in Performance of this Arbitrament a Releaſe was made *by theſe Words*, Of all *Reliefs, Duties and Amerciaments*; and this Releaſe was pleaded in Bar of *this Obligation*, which *was not put in Arbitrament, nor intended to be releaſed*. And upon all this Matter diſcloſed, it was demurred; and Coke Attorney General mov'd that it ſhould not be a Bar, for this Word *Duties* being *placed betwixt Reliefs and Amerciaments*, ſhall be *intended Duties of ſuch a Nature*, and not to any other, and therefore it ſhall not extend to this Bond. But the Court held the contrary; for altho' the Intent was not to extinguiſh it, yet (Duty) extends thereto in Extremity of Law, wherefore it ſhall be an Extinguiſhment and Diſcharge of the Bond. And thereupon it was adjudged for the Defendant. Cro. E. 370. pl. 10. Paſch. 37 Eliz. B. R. Rotheram v. Crawley.

Plaintiff ſhould not be barr'd by this Releaſe, becauſe Deeds ought to be expounded according to *the Intent of the Parties*; and the Intent of the Party was to releaſe no Duty, but the *Relief* which alone was in Queſtion; but adjudg'd a good Bar.

9. In Debt upon an Obligation, the Defendant pleaded a Releaſe made to him after his entering into the Bond, viz. *All and all Manner of Errors, and all Manner of Actions, Suits, and Writs of Error whatſoever, which I the ſaid (Plaintiff) for any Matter or Thing &c. And I am by theſe Preſents excluded of Writs or Suits, Actions of Error, or Suits againſt him the ſaid (Defendant) &c.* Richardſon and Hutton thought the Intention was to releaſe no other Actions but Errors. Het. 9. 15. Paſch. 3 Car. Abree v. Page.

S. C. cited Raym. 390. in Caſe of Parſons v. Cetterel, as Adjudged that it extended only to Writs of Error; but that the Caſe of Rotheram v. Crawley. Cro. E. 370. and Ow. 71. ſeem otherwiſe.——S. C. cited Arg. 3 Mod. 277. in Caſe of Cole v. Knight.——And cited Show. 152. Arg. in Caſe of Cole v. Knight.

10. A Releaſe *of an Eſtate* being *not known*, was reſolved againſt an Executor. Toth. 265. cites 7 Car. Willon v. Grove.

11. In Covenant for Non-payment of *Rent* reſerved in a Leaſe for Years, the Defendant pleaded a Releaſe *of all Demands* at a Day before the Rent in Queſtion was due. The Plaintiff replied that the Releaſe was *in Performance of an Award of all Matters in Controverſy* between Plaintiff and Defendant. It was inſiſted that this Releaſe was no Bar, becauſe (among other Things) it was not within the *Intent of the Arbitrators and Parties, the Award being made of other Matters, and this Rent not then due, or in Controverſy*. And of this Opinion were Foſter, Windham and Mallet, but Twiſden J. contra. But Judgment was given for the Plaintiff. Lev. 99. Paſch. 15 Car. 2. B. R. Hen v. Hanſon.

S. C. Sid. 141. pl. 16. accordingly. And that a Releaſe, and the general Words therein ſhall be reſtrain'd and bound up according to the Intent of the Parties.

12. A. *poſſeſs'd of a Term for Years, aſſign'd the ſame to Truſtees, and* afterwards *purchaſed the Inheritance*; and being on a Treaty of Marriage with M. he *covenanted to ſtand ſeis'd* to the Uſe of himſelf and M. for Life *for a Jointure*. A. died; M. entered, and upon Agreement made with A.'s Executors, as to her Claim out of the Perſonal Eſtate of A. *ſhe releaſed to the Executors all the Perſonal Eſtate* of A. and all Demands for the ſame. M. continued the Poſſeſſion; afterwards the *Inheritance was vested*. Reſolved that the Releaſe ſhould not bar or prejudice M's Title in Right to the Leaſe; and ſhe was decreed to hold for ſo many Years as ſhe liv'd during the Term. Chan. Caſes 46. 47. Paſch. 16 Car. 2. Bawtrey v. Ibſon.

13. A *Bond* was *taken by J. S. in* the *Name of the Plaintiff in Truſt for the Children of J. S.* and an *Action* of Debt *was brought* againſt the Defendant, *in the Plaintiff's Name on this Bond*. The Defendant *pleaded a Releaſe, That whereas J. had arreſted the Defendant in* the *Name of the Plaintiff without his Knowledge, he by this releaſes* to the Defendant *all Demands on his own Account*. Adjudged that the Bond was not hereby releaſed; for tho' it was taken in the Name of the Plaintiff, yet it was not on his own Account, but upon the Account of the Children of J. S. and the Words, (Upon his own Account) were put in to ſome Purpoſe, which could

Nokes and Stokes v. Vent 35. S. C. but ſomewhat differently ſtated, as that there were two Obligees; and in Action brought

by both, the Defendant pleaded the Releaſe of one of them as a Bar to both; but adjudged as here for the Plaintiff.——S. C. cited by Dolben J. 3 Mod. 279. in Caſe of Cole v. Knight.

could be no other, but to diſtinguiſh Demands in his own from thoſe in the Right of, or in Truſt for others. Lev. 272. Trin. 21 Car. 2. in B. R. Stokes v. Stokes.

14. W. being *to releaſe his Intereſt in a Parcel of Land*, the *Releaſe* was ſo penn'd that it *extended to* releaſe his Intereſt in *almoſt* 2000 *l. per Ann.* which he did not intend; and he *had Relief in Chancery*. Freem. Rep. 302. pl. 366. Mich. 1673. Wentworth's Caſe.

15. A Bill was brought by A and B. and their Wives againſt J. S. and W. R. for an Account of Rents and Profits of a Real and Perſonal Eſtate received by the Defendants, to which J. S. pleaded a Releaſe to him, his Heirs, Executors &c. by A. and another in the like Manner by B. of *all his, and their Lands and Tenements, Goods and Chattels, and particularly the Manors and Lands therein mentioned, of and from all Actions, Claims and Demands whatſoever.* The Plaintiff inſiſted that theſe Releaſes were to *extend only to the Portions of the Wives, which J. S. had paid*; and it appeared on pleading the Plea, that J. S. did not ſet forth that there was any Diſcourſe between them, concerning the Eſtate or Lands in Queſtion, at the Time the Releaſes were executed. The Court ordered the Word (Plea) to be ſtruck out, and the Defendants to anſwer, but not as to the Part which demands an Account of the Rents and Profits of the Lands, unleſs the Court upon the Hearing ſhould think fit to decree an Account thereof. Fin. Rep. 117. Hill. 25 Car. 2 1673. Ld Herbert of Cherbury & Ux. & al. v. Mountague.

16. *A. on his Marriage with M. executed a Bond* of 10000 l. to Truſtees, condition'd *to leave M.* 6000 *l.* &c. if ſhe ſhould ſurvive him. The Truſtees after the Marriage delivered the Bond to M. who lock'd it up in a Cabinet, which *A* broke open, and *cancell'd the Bond*; and afterwards *ſeveral Suits* were carried on *between the Truſtees and A.* which *were referr'd to Arbitration*; whereupon *Releaſes were order'd* to be given by the Truſtees to A. who gave Releaſes accordingly, and A. ſoon after died. Upon a Bill brought by M. for Relief as to the ſaid Bond againſt the Executor of A. the Defendant pleaded the Award and Releaſes; But the Bond not being concern'd therein, and the Releaſes given upon the *Award having no Relation to the Bond, nor* there having been *any Diſcourſe about it*, nor any Recompence made or intended to M. by that Award in Satisfaction of the Bond; The Court decreed M. to have Satisfaction out of A's Eſtate, and as much Benefit of the Bond as if it had not been cancell'd. Fin. Rep. 184. Mich. 26 Car. 2. 1674. Brown v. Savage.

S. C. 2 Chan. Caſes 124. Accordingly L. Ch. Nottingham ſaid, As to the Releaſe and Arbitrament, it appeared, tho' the Releaſe was of all Actions and Demands, yet it appeared that the Arbitrament, Submiſſion, and the Releaſe was made on Differences only,

17. The Plaintiff, an *Heir at Law*, *imagining* that by the Will of his Anceſtor *the whole Inheritance was deviſed from him*, whereas the Words carried an Eſtate for Life only, and not the Inheritance from him; and afterwards *Differences ariſing* between one of the Truſtees (who had ſold the Inheritance for a full Conſideration, and a Fine thereof levied) and the Heir, *an Award was made*, and 200 *l. awarded to the Heir, and he to give a General Releaſe of all Actions Real and Perſonal*; But no Notice was taken in the Award of Breach of the Truſt, whereby the Reverſion belong'd to the Heir. The *Plaintiff received the* 200*l. and releaſed* accordingly. The *Truſtee* 10 Years afterwards *purchaſed back the Inheritance*, and the ſame came to the now Defendant. The Heir exhibited his Bill to have an Execution of the Truſt, and the Inheritance to be decreed to him. Ld. C. Nottingham heard this Cauſe twice, and decreed it both Times for the Plaintiff; but the Decree not being ſigned and enrolled, it was re-heard by Ld. K. North. It was inſiſted for the Defendant, That the Breach of Truſt was releaſed by the Words; but it was ſaid, That after ſo many (viz. 30) Years, it was too late to enquire, whether that was intended to be releaſed, or not? But it was ſaid, That it was made

made in Purſuance of an Award, which concerned Matters in Accompt between the Cestyque Truſt and that Truſtee only; nor was it pretended, That the Heir had received any Satisfaction for the Inheritance; and that had this Releaſe been intended to have releaſed the Breach of Truſt, it would have been made to all the Truſtees, and not to one only, they all having join'd in the Conveyance by which they broke their Truſt. Ld K. North took Notice of the great *Length of Time*, and of the *Purchaſe being made for a full Conſideration, and* of the *Acquaintance of the Plaintiff*; and ſaid, That tho' it was hard to diſmiſs the Bill after 2 Decrees for the Plaintiff, yet he was not ſatisfied he could decree for him, and that the Bill muſt ſtand diſmiſs'd. Vern. 144. pl. 139. Hill. 1682. Bovey v. Smith.

concerning other Matters, viz. The Shares of the Parties of the Perſonal Eſtate of another dead Perſon; and was for them and their Executors, to the Parties and their Executors, and not Heirs; And that the Plaintiff had given a diſtinct Releaſe before the Purchaſe made, of all Actions Real and Perſonal; yet there was no Occaſion proved, why that Releaſe ſhould be made, nor any alleged; and there were other Dealings between them, and therefore preſumed not to relate to this Matter; And ſo the Decree paſſed for the Plaintiff. Afterwards the Lord Chancellor declared at another Day, That he had conferred with the Ch. Juſt. of B. R. who was of the ſame Opinion.

18. A. was *Leſſee by Deed of* D. of 263*l. a Year, and Tenant at Will of* S. of 22*l. a Year*. Upon Payment of Half a Year's Rent of the Great Farm, the Leſſor's Steward *gave a Receipt in full for Half a Year's Rent due at Lady laſt*, whereas *nothing was paid of the Rent of the Land held at Will*. The Leſſor brought a Bill for Relief, but it was diſmiſs'd by the Maſter of the Rolls; becauſe (as he thought) the Leſſor might have his Action at Law for the other Rent; But on Appeal brought, the Lord Chancellor doubted if he had any Remedy at Law, as both theſe Lands might formerly have been held together; and the general Words in the Leaſe might poſſibly extend to S. contrary to the Intent of the Parties; And ſaid, If the Leſſor ſhould not recover at Law he muſt relieve here; ſo that it would be ſending him to Law in order to have a New Bill; And ſo decreed an Accompt. Sel. Caſes in Equ. in Ld. King's Time 1. Mich. 1724. Ld. Lucy v. Watts.

19. *So* where a *Tenant got a Receipt in full to the Date*, and a Bill was brought for an Accompt; tho' the Tenant inſiſted, That he was not obliged to any Accompt previous to the Receipt, becauſe his Vouchers might be loſt, and not preſerved on Account of the Receipt; and ſo might ſuffer without his own Default, but by relying on the Receipt. But there *being great Reaſon to believe the Receipt was got thro' Fraud or Miſtake*, and that he had not paid all due to the Time, an Accompt was ordered to be taken previous to the Receipt, and to pay Coſts. Sel. Ch Caſes in Ld. King's Time 2. cited by Mr. Talbot Mich. 11 Geo. 1. as decreed about 2 or 3 Terms before, in the Caſe of Bacon v. Harris.

(A. a. 2) Conſtrued How. *Extended beyond the Words.*

1. IF a Man *has Cauſe of Action*, and *releaſes all Actions to the Tertenant for Term of Life of the Tenant*, the Action ſhall be gone for ever; Per Newton and Hody Ch. Juſt. But Per Paſton, He ſhall have Action after the Death of the Tenant for Life, which Brooke ſays does not ſeem to be Law. Br. Releaſes, pl. 22. cites 19 H. 6. 17. 23.

2. If I releaſe to *a Diſſeiſor for an Hour*, it ſhall ſerve for ever; Per Elliot. Br. Barre, pl. 54. cites 21 H. 7. 30.

So if I releaſe Action or Duty for one Day, it ſhall ſerve for ever; Per Elliot. Br. Barre, pl 54. cites 21 H. 7. 30

(B. a) *At what Time* it may be *made.*

Hob. 206 pl. 260. S. C.— Hutt. 11. S. C. Adjudg'd — Sparke v. Richards S. C. Noy 22. accordingly. — S. C Brownl 51. but mentions the Releaſe as made after the Sheriff had made his Return; and therefore obſerves, That the Defendant had concluded his Demurrer ill; becauſe by demurring to the Defendant's Plea, which was grounded upon a Releaſe, he ſhould have demanded Judgment, if the Defendant ſhould be admitted to plead a Releaſe made after the Sheriff's Return.—Mo. 886. pl. 1244. S. C. but S. P does not clearly appear.

1. If the Sheriff levies Money at my Suit upon a Levari facias upon a Recognizance, and after I make a General Releaſe to him, and after he returns the Writ in Bank ſerved, and after I bring an Action of Debt againſt the Sheriff for the Money, he may well plead this Releaſe in bar of the Action, tho' I ground my Action upon the Return which was after the Releaſe; for this was a Duty to me immediately upon the Levying of the Money, which was before the Releaſe made. D. 15 Ja. B. between *Speake* and *Richards*. Adjudged. Hobart's Reports 280. Same Caſe.

2. If the Conuſor of a Statute Merchant be in Execution, and his Land alſo, and the Conuſee releaſes to him all Debts, this ſhall diſcharge the Execution; for the Debt was the Cauſe of the Execution, and of the Continuance thereof till the Debt finiſhed; and therefore the Diſcharge of the Debt, which is the Cauſe, ſhall diſcharge the Execution, which is the Effect. Co. Litt. 75. where he vouches 20 Aſſ. pl. 7. (But it ſeems that this does not warrant this Opinion.)

Br. Non eſt Factum, pl. 5. S. P. cites 27 H. 6. 7. Contra. — S. P. Goldsb. 167 & 168. in the Caſe of Doo v. Ward all, cites 5 H. 7. 27. notwithſtanding that 27 H. 6. 7. is contrary.

3. If A. delivers an Obligation to B. as an Eſcrow (in which he is bound to C.) to be delivered as his Deed to C. after certain Conditions performed, and after C. releaſes to A. before the 2d Delivery, this is void; becauſe tho' after the 2d Delivery it ſhall relate to the 1ſt Delivery, where there is a Neceſſity, ut Res Magis valeat, quam pereat, yet as to Collateral Acts it ſhall not relate at all. Co. 3. *But. Bak.* 36.

In ſuch Caſe the Son ſhall not be barr'd by his Confirmation without *Warranty* Arg. Bridgm. 96.

4. No Right doth paſs but the Right which the Releaſor hath at the Time of the Releaſe; As if the Son releaſe to the Diſſeiſor of his Father all the *Right* which *he hath, or may have*, and the Father dies, the Son may enter; becauſe he had no Right in the Life of his Father, but only a Deſcent to him after the Releaſe by the Death of his Father. Arg. Bridgm. 76. cites 13 E. 1. 10 E. 2.

—— But if the Son *diſſeiſe* the Father, and makes a *Feoffment* in Fee in the Life of the Father, yet he is bound, tho' he had *No Right at the Time*. Per Dyer Ch. J. 2 Le. 20. pl. 25. in Brend's Caſe.

5. Debt upon *Arrears of Annuity*; The Defendant pleaded *Releaſe of all Actions before any Arrears were due*, and no Plea; Per Cur. Br. Dette, pl. 215. cites 5 E. 4. 4.

6. If a Man *makes Indenture of Leaſe to J. S. in July, to hold the Land at the Feaſt of St. Michael next, for Term of 9 Years*, and the * *Leſſor releaſes to the Leſſee before Michaelmas all his Right*, the Releaſe is void; For he has no Poſſeſſion before Michaelmas. Br. Releaſes, pl. 59. cites 22 E. 4. 37. Per Brian & Neal J.

* Orig. is (Diſſeſor)

7. The *Diſſeiſee's* Releaſe *to the Bargainee of the Diſſeiſor before Inrollment*, is void. Roll. Rep. 425. cites 10 Eliz. Mocket's Caſe.

8. *After* a *Verdict* for the Plaintiff in Ejectment, *and before the Day in Bank*, the Plaintiff releaſed; and at the Day in Bank the Defendant pleaded this Releaſe, and ſhew'd it to the Court. Reſolved, That he had not any Day to plead it, nor had he any Remedy but by Audita Querela,

Querela, if the Plaintiff ſued Execution; Wherefore it was adjudg'd for the Plaintiff. Cro. J. 646. pl. 10. Mich. 20 Jac. B. R. Stamp v. Parker.

9. *Bargainee before Entry* may releaſe, Aſſign, or Surrender. Car. 66. Per Bridgman Ch. J. Paſch. 18 Car. 2. C. B. in the Caſe of Geary v. Bearcroft.

10. Releaſe by an *Aſſignor* to the Debtor, *after Aſſignment* to a Stranger, unleſs it be without Notice, and on Conſideration to releaſe, will not hurt the Aſſignee. See Chan. Caſes, 169. Trin. 22 Car. 2. in Caſe of Hurſt v. Goddard.

11. *Leſſor after Aſſignment of Reverſion*, releaſed *to Leſſee all Covenants and Demands*, yet Aſſignee may have Action of Covenant for Rent due after the Aſſignment, for it runs with the Reverſion. 2 Jo. 102. Paſch. 30 Car. 2. B. R. Harper v. Bird. Adjudg'd for the Plaintiff; For the Court will intend the Action brought upon the Reddendum, which is a Covenant in Law, and runs with the Reverſion at Common Law before the Statute 32 H. 8. and paſſes by the Grant of the Reverſion; and therefore Leſſor could not releaſe it after the Aſſignment. 2 Lev. 206. S. C.

12. *Conuſee of a Statute extended aſſigns the ſame*; yet per Serjeant Maynard, the Law is clear and certain, that the Conuſee himſelf, his Executors, Adminiſtrators, or Aſſigns, may, notwithſtanding * releaſe or diſcharge, ſuch Statute, and it ſhall be good and binding in Law; which ſeems admitted by the Counſel of the other Side, but they inſiſted that after Aſſignment the Conuſee is but *as a Truſtee* for the Aſſignee, and muſt be anſwerable to him for the *Breach of Truſt*. Vern. 50. pl. 49. Paſch. 1682. Earl of Huntington v. Greenvill. *Jo. 238. S. P. Adjudged. Flower v. Elgar.—— S. C. & S. P. adjudged. Cro. C. 214. pl. 2. Paſch. 7 Car.

13. An Orphan cannot *releaſe her Cuſtomary Share*, it being a mere future Right, nor can the Husband do it; Per Ld Macclesfield; But whether ſuch Releaſe will not *amount to a Compoſition* or Agreement in Barr of her future Right, or be, as they call it, A Compounding for her Cuſtomary Share, was not determined. Ch. Prec. 546. pl. 338. Mich. 1720. Kemp v. Kelſey. Decreed that it is a Bar; per Ld Macclesfield. Ch. Prec. 594. pl. 357. Trin. 1722. S. C.

(C. a) *To what* Thing it ſhall *Enure*.

1. 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 Feoffee 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 a Right to recover it by a Cui in Vita. 18 E. 3. 39. 18 Aſſ. pl. 2. Curia.

(D. a) In

(D. a) In what Caſes the Releaſe *of one* Perſon *ſhall be of others.* For what *Thing.*

2 Sid. 41. Hill. 165[illegible]. in Caſe of Abbot v. Biſhop.

1. IF there are diverſe Obligees, and one releaſes, this barrs all. 2 D. 4. 16. 19 D. 6. 47.

———*Pond to B and C. Solvend. the one Moiety to B. and the other to C* is a ſeveral Obligation, and the Releaſe of one ſhall not prejudice the other, nor can one bar the other of his Action; per Browne J. Mo. 64. pl. 175. Trin. 6 Eliz.

2. In Debt by Baron and Feme, and a 3d Perſon, the Releaſe of the Baron before Coverture bars all. (It ſeems it is to be intended that Baron was Debtee with the others before Coverture.) 7 D. 4. 14. b.

3. The Releaſe of the Baron is good Bar of the Debt due to the Feme before Coverture. 17 E. 3. 66.

* Fol. 411.

4. If ſeveral Obligors, [are] and the Obligee deliver the Obligation into an Indifferent *Hand, upon Condition if one of the Obligors releaſe to the Obligee; yet this does not bar the others to demand the Obligation, if the Condition be not performed; for they claim no Duty, but only a Diſcharge. 2 D. 4. 16. b.

S. P. And ſo of Acquittance of the one; For this is as a Debt or other Perſonal Thing. Br Releaſes, pl. 66. cites 48 H. 3. 12.

5. If 2 Conuſees of a Statute act, and one releaſes to the Conuſor, this ſhall extinguiſh all the Statute againſt the other alſo. 21 Aſſ. 23. The one Conuſee purchaſes the Land, this ſhall diſcharge the Land againſt the other.

Where *two Executors* are, and the *one alone has the Poſſeſſion of the Goods*, and J. S. takes them, and he brings Action of Treſpaſs alone, as he may, and the Defendant pleads the Releaſe of the other Executor, this is a good Bar. Br. Releaſes, pl. 26. cites 10 H. 7. 4 ——— S. P. Br. Releaſes, pl. 84. cites 48 E. 3. 14.

6. If 2 Executors ſell the Goods of the Teſtator for a certain Sum, and take an Obligation for this Sum, the Releaſe of one of them ſhall bar both. 17 E. 3. 66. Adjudged.

5 Rep 97. b. Mich. 39 and 40 Eliz. C. B. The Countes of Northumberland's Caſe.

7. If one Executor releaſes Damages recover'd by Teſtator, this ſhall bar the other. 21 E. 3. 13. b.

8. In a Qua. Imp. brought by diverſe, the Releaſe of one of the Plaintiffs pending the Writ, ſhall not abate the Writ, but ſhall go in Bar as to him who releaſed only, and the other Plaintiffs ſhall have Advantage thereof; becauſe it is a Thing intire, and in the Realty. Co. 5. *Countes of North.* 97. b. Adjudged.

——Mo 455. pl. 625. S. C.—2 And. 48. pl. 3[illegible]. S. C. by the Name of Cecil & al. v. Hall. & al.

9. If 2 recover Damages in a Real Action, the Releaſe of one ſhall not bar the other of the Damages; becauſe the Damages were recovered for the Profits, and ſo Reall. 47 Aſſ. 3. per Finch.

Cro J. 116, 117. pl. 5. S. C. adjudg'd, for the Reaſon here, and that their being join'd in the

10. If a Man recovers in Ejectione Firmæ againſt two, the Releaſe of one of them ſhall not be any Bar of the Writ of Error of the other; becauſe it is not to recover any Thing, but to have Reſtitution of that which he had loſt by the Judgment. Tr. 4 Jac. B. R. between *Sutſon* Plaintiff, and *Furbe and Blunt* Defendants. Gawdy's.

firſt Action was by the Act of the Plaintiff, and not by their own voluntary Act; and therefore there is no Reaſon that the Act of one ſhould charge or prejudice the other: for then by ſuch Practice any one might be charged, and ſhould have no Remedy to diſcharge himſelf. But had they been Plaintiffs in the Record by their own Act, as in Debt upon an Obligation, and had been barred in Judgment, and then had brought a Writ of Error, a Releaſe of one ſhould bar the other; For as the one might have releaſed the Obligation, or diſcharged the principal Action which ſhould bar the Companion, they being joint Plaintiffs by their voluntary Act, ſo the Releaſe of the Writ of Error by the one, ſhall bar the other. Blunt & Furly v. Sutton.

11. If

11. If A. conveys Land in Fee to B. by Indenture, and covenants with B. his Heirs and Aſſigns, to make any other Aſſurance upon Requeſt, for the better Settlement thereof upon B. his Heirs and Aſſigns; and after B. conveys the Land to C. who conveys it to D. who requires A. to paſs another Aſſurance, according to the Covenant, and upon Refuſal brings Action of Covenant as Aſſignee to B. If B. releaſes the Covenant after Action brought, this ſhall not bar D. of his Action, which was well attached. Tr. 14 Car. B. R. between *Middlemore and Goodale*, per Curiam, upon Demurrer. But Judgment given againſt the Plaintiff for other Cauſe. Intratur. Hil. 12 Car. Rot. 229. Cro. C. 503. S. C. accordingly, and that the Covenant goes with the Land, and the Aſſignee by the Common Law, or at leaſt by the Statute ſhall have Benefit of it. But the Breach of the Covenant being in the Time of D. and the Action being brought by him, and ſo attach'd in his Perſon, B. cannot releaſe this Action, in which D. the Aſſignee is intereſted —— Jo. 406. S. C. but not S. P.

12. But in the ſaid Caſe, after Requeſt made by D. and Refuſal by A. and before any Action brought by D. B. may releaſe the Covenant in the ſaid Caſe of *Middlemore and Goodale*, the Court ſeemed to agree this. Cro. C. 503. S. C. accordingly. — Jo. 406. S. C. but not S. P.

13. In *Treſpaſs by two, of Goods carried away*, the Defendant pleaded the *Releaſe of the one*; this is a good Bar as to both, becauſe it is an Action Perſonal. Br. Releaſe, pl. 94. cites E. 3. Itin. Nor.

14. Aſſiſe *againſt an Infant*, who *pleaded a* Deed of *Releaſe of the Anceſtor of the Plaintiff*, *whoſe Heir he was*, *with Warranty* made *to one J. S. and to his Heirs*, *whoſe Eſtate he has*, the *Plaintiff ſaid that the Land was leas'd to the ſaid J. S. for Life*, the *Remainder to the Plaintiff in Tail*, and the Releaſe was made to the ſaid J. S. the Remainder continuing in him, which J. S. is dead, and he entered into his Remainder, Judgment if the Warranty binds. And the *Tenant ſaid that the Remainder over in Fee*, *after the Tail determined*, *was to the ſaid J. S. to whom the Releaſe was made*. And the Opinion of the Court was againſt the Tenant, and that *the Releaſe ſhall enure to all the Eſtates*. Br Aſſiſe, pl. 21. cites 44 E. 3. 10.

15 Releaſe by one Church-warden, of *Coſts recovered* in the *Spiritual Courts* by both, is not good againſt the other. Mar. 73. pl. 112. Mich. 15 Car. Anon. Yelv 172. 173. Hill. Jac. B. R. S. P. accordingly. Starkey v. Barton & Gore. —— S. C. cited Arg 5 Mod. 390. in Hawkins's Caſe.

16. Releaſe of one *Defendant in Error* ſhall not diſcharge the reſt; but a Releaſe by *one Plaintiff* is a Bar to all, becauſe they have not a Joint Intereſt but a Joint Burden. 3 Mod. 135. Trin. 3 Jac. 2. B. R. Hacket v. Herne.

17. A. and B. were *Defendants in Ejectment*; and they both *entered into* the Common *Rule*, and *at the Trial A. appeared*, and confeſs'd Leaſe, Entry &c. *but B. did not*. After Evidence given the Plaintiff was Nonſuited, and *Coſts taxed* for the Defendants. Per Cur. A. and B. are both intitled to the Coſts, and *B.* (tho' he did not appear) *may releaſe* them to the Plaintiff. But if Covin ſhould appear between the Plaintiff and *B.* as to releaſing the Coſts, the Court ſuppoſed they might correct ſuch Practice. 2 Vent. 195. Trin. 2 W. & M. C. B. Fagg v. Roberts & al.

18. *Trover againſt two*, one pleaded Not Guilty, and a *Verdict againſt one*, the other pleads a Releaſe of all Actions; the Releaſe diſcharges both, ſo no Judgment againſt the other. 4 Mod. 379. Hill. 6 W. & M. B. R. Kiffin v. Willis & Evans.

See (F. a) S. P.

(E. a) In what Caſes a Releaſe *of One* ſhall enure *for Others.*

In Perſonal Actions one Jointenant may releaſe the whole, but if the Perſonalty be mixt with the Realty, it is otherwiſe. 2 Rep. 68. a. Hill. 43 Eliz. B. R. Per Popham Ch. J. in Tooker's Caſe.

1. If one Jointenant of a Rent in Fee releaſes all his Right, yet this does not paſs the Moiety of his Companion. 21 E. 3. 58. b.

See (D. a) pl. 10.

2. In an Ejectment by two, the Releaſe of one ſhall not bar both, becauſe it favours of the Realty. Tr. 4 Ja. B. R. in *Sutton's* Caſe held.

3. If *Statute Merchant* is made *to Baron and Feme*, and the *Baron releaſes all Executions*, or makes other Releaſance; this ſhall diſcharge both, and ſhall be a Bar to the Feme for ever. Br. Releaſes, pl. 66. cites 48 H. 3. 12.

The other ſhall recover the whole, becauſe it is a Thing intire.

4. In *Writ of Right of Ward for the Body* brought by two, the Releaſe of the one ſhall not prejudice the other, but ſhall give to his Companion all the Ward. 2 Rep. 68. in Tooker's Caſe, cites 35 E. 3. 10 and 30 H. 6. Bar. 59. Br. Garde, pl. 13. cites 45 E. 3. 10.

5. If *two join in Action*, and after *one is ſummon'd and ſever'd, and after releaſes*, this is a Bar to his Companion. Br. Releaſes, pl. 84. cites 48 E. 3. 14.

S.P.Br.Aſſiſe, pl. 476. cites 15 Aſſ. 11. But Brook makes a Quære of the Damages, for they are intire——S. P. And per Jenney, The intire *Damages* ſhall be gone; for they *are intire*. Br. Aſſiſe, pl. 392. cites 18 E. 4. 14.——* It is miſprinted for 30 H. 6.——S. C. cited Arg. Cro. E. 65——S. C. cited 2 Rep. 58 in Tooker's Caſe; for tho' the Aſſiſe is an Action miſ'd in the Realty and Perſonalty, yet Omne majus trahit ad ſe Minus.——S. P. Per Cur. Lord Raym. Rep. 523. Trin. 9 W. 3. C. B. in Caſe of Thorp v. Thorp.

6. Aſſiſe *by two againſt two*, and *one pleads a Releaſe of Actions Perſonal of one of the Plaintiffs*, it is a good Bar againſt him, and not againſt the other Plaintiff. Br. Aſſiſe, pl. 475. cites 30 * E. 6. and Fitzh. Bar 39 & 59.

See (E. a) S. P.

(F. a) In what Caſes the Releaſe *of One ſhall be of Others.*

Fol. 412.

S. C. cited in a Nota of the Reporter, 2 Lutw. 1143. in the Caſe of Campion v. Baker.

1. In a Treſpaſs Vi & Armis againſt two, if the one be condemned by Nihil Dicit, and the other by Verdict, and the one releaſes all Errors after Judgment given, and after they join in a Writ of Error; in this Caſe the Releaſe of one ſhall bar both of the Writ of Error. Tr. 7 Ja. in the Exchequer. *Cheſter's* Caſe adjudged in Writ of Error. (It ſeems becauſe they might have had ſeveral Writs of Error.)

2. In a Replevin by A. againſt B. if B. makes Conuſance in Right of C. for Damage feaſant, as the Franktenement of C. to which A. pleads in Bar of the Conuſance, and this adjudged againſt him upon Demurrer for B. to have a Return irreplegiable with Coſts and Damages; In a Scire Facias to have Execution of Coſts and Damages brought by B. if A. pleads the Releaſe of C. in whoſe Right Conuſance was made of all Demands &c. it is not any Bar for the Coſts and Damages againſt B. inaſmuch as C. is not Party to the Suit, nor would be liable to any Coſts and Damages if it had been adjudged againſt B. but only B. liable to them, and therefore B. ought to have the Coſts and Damages he being only Party to the Suit,

Suit, and for that Reaſon the Releaſe of C. ſhall not barr him. Hill. 14 Car. B. R. between *Sibley and Rawlins*, which concerned Gaſter Vere of the Middle-Temple. Adjudged upon a Demurrer. Intratur Mich. 14 Car. Rot. 350.

3. Two *Parceners* have Title to a Writ of *Ward* of the Body. One releaſeth. This is no Bar to the other, but ſhe ſhall recover the Entire againſt both. Arg. Cro. E. 65. cites 45 E. 3. 10.

4. Judgment was againſt 2 Defendants in *Action ſur Caſe* Quare erexerunt ſtagnum &c. and Damages given; After Error brought one releaſes *Errors*; this ſhall not hurt the other; for they are joint Sufferers. Jenk. 263. pl. 95.

So in *Ejectione Firmæ*, where *judgment againſt* 2 is given; and ſo in *Audita Querela* brought by 2, where a Statute is extended upon Both. Jenk. 263. pl. 65. —— *But* if 2 Men bring a *Writ of Error in the Realty*, and the Tenant pleads the Releaſe of one, it is a good Bar againſt Both; Becauſe the Error in the Record is releaſed. Per Popham Ch. J. Ow. 22. in Caſe of Wright v. Mayor of Wickham — S. P. by Popham Ch. J. Cro. E. 469. (bis) pl. 25. Paſch. 38. Eliz. B. R. in S. C.

5. In *Replevin againſt* 6, *one* of them *avowed in his own Right* for an Amerciament in a Leet, and the other 5 *made Conuſance as his Bailiffs*, Judgment was given againſt the 6, whereupon they all 6 brought a Writ of Error, and the *Defendant in* the Writ of *Error*, (who was Plaintiff in the Replevin) *pleaded in Bar a Releaſe of all Errors, by one of the 5 pending the Writ*; It was adjudged no Bar. Cro. E. 648, 649. pl. 4. Hill. 41. Eliz. B. R. Razing &c. v. Ruddock.

Adjudged. 6 Rep. 25. a. Ruddock's Caſe —— Jenk. 271. pl. 90. S. C. adjudged and affirmed in Error; For this Releaſe is to *exempt him from Damages and Coſts* given againſt them when they were Defendants. —— Two Jointenants are Plaintiffs *in* * *Treſpaſs*, an Erroneous Judgment is given againſt them; they bring a Writ of Error for this Erroneous Judgment; the Releaſe of one of them deſtroys the Whole; For upon this Writ of Error they ſhould *recover Damages* for the Treſpaſs; and ſo of Debt with *Damages for* the *Debt*, and alſo they ſhould be diſcharged of the Coſts given againſt them. In the principal Caſe they are Defendants, and the Writ of Error is in the firſt Place, and Principally to diſcharge them from Damages and Coſts, and not to give a Return of the Cattle; An Avowry *ſaved* for the Avowant for Damage feaſant gives a Return of the Cattle, with Damages and Coſts; But where 2 avow, and Judgment againſt them, and they bring a Writ of Error, and one releaſes, the other ſhall have a Return, they in the principal Caſe being Defendants in the Replevin, loſe Damages and Coſts; if they had been Plaintiffs, in Treſpaſs or Replevin, and barred by an erroneous Judgment, upon a Writ of Error or Attaint ſuch Judgment ſhould be given, as ought to be given in the Original Action; but they brought the Writ of Error as Defendants; and alſo they took the Diſtreſs for an Amerciament in a Leet, and no Damages are to be recovered in it, if it be found for the Avowant; The Caſe is the ſame of ſeveral Defendants, if the Avowry had been for Damage Feaſant; where Error is brought by ſeveral Defendants, the Releaſe of one ſhall not bar the others; For they are forced to join in Error. So in Attaint. Jenk. 271, 272. pl. 90 cites Cro. 120.

* *But* where 2 Jointenants are *Plaintiffs in Ejectment*, or *Defendants in a Real Action*, the Releaſe of one ſhall not bar the other, but the other ſhall proceed *as to her Moiety*. Jenk. 263. pl. 65.

6. The *Difference* is where *an Action is brought by ſeveral for Diſcharge of themſelves*, the Act of the one, as Nonſuit or Releaſe, ſhall not prejudice his Companions to bar them to proceed in the Suit; As in Audita Quer. by ſeveral, the Nonſuit of One ſhall not bar the Reſt; But where an Action is brought *to charge another*, if the Action is brought by ſeveral the Releaſe or Nonſuit of one ſhall bar the others. Cro. E. 649. Razing, Scot, & al. v. Ruddock. —— Where the Ground of the Action is a Joint Intereſt, which may be releaſed. 6 Rep. 25 b. S. C.

As if 2 bring *Error* to reverſe a Judgment if the Releaſe of one is pleaded, he may be *ſevered*, and the other may proceed Cro. E. 469. (bis) in the Caſe of Wright againſt the Mayor &c. of Wickham. — *But if one that has a Right brings an Action againſt Two*, and *One pleads a Releaſe*, this is good to Both. Ibid. An Action of *Aſſault* and *Battery and falſe Impriſonment* was brought *againſt* 4 Defendants; The Plaintiff had Judgment, and they brought a *Writ of Error*; The Plaintiff in the Action pleaded the Releaſe of one of them, and to this Plea all 4 jointly demurred, The Opinion of the Court was, That Judgment might be given ſeverally; For they being *compelled by Law to join* in a Writ of Error, the Releaſe of one ſhall not diſcharge the reſt of a perſonal Thing; *but* where Gifts are *to recover in the Perſonalty*, the Releaſe of one is a Bar to all; but it is not ſo in Point of Diſcharge. 3 Mod. 119. Paſch. 2 Jac. 2. in B. R. 1686. Anon.

7. If 2 are *Plaintiffs in Debt*, and they are *barred by an Erroneous Judgment*, and Coſts are taxed againſt them, and they bring *Error* to avoid the

S. C. cited 3 Mod. 118. S. P. ſeems to be [illegible]

thoſe Coſts, the Releaſe of the one ſhall bar the other; For it was their Folly to join in the firſt Action. Per Popham. Cro. E. 649. in the Caſe of Razing, Scot, & al v. Ruddock.

7. G. brought *Caſe againſt 2 for keeping ſo many Cones* in a Warren by them erected, *whereby the Plaintiff loſt the Benefit of his Common* in the Land adjoining. After a Verdict and Judgment for the Plaintiff, the Defendants brought a Writ of Error in B. R. G. pleaded in Bar a Releaſe by one of them, and *concluded in Bar to Both*; And upon a Demurrer it was ruled that the Plea was not good, becauſe it concluded againſt Both, whereas he that did not releaſe is not barred; but he ſhould have concluded againſt him only who releaſed. Palm. 319. Mich. 20 Jac. B. R. Greeſley v. Lee and Taylor. —— Et e Contra.

See (D. a) S. P.

(G. a) In what Caſes Releaſes *to one* ſhall *enure to another.*

When divers do a *Treſpaſs*, the ſame is joint or ſeveral at the Will of him to whom the Wrong is done, yet if he releaſes to one of them all are diſcharged, becauſe his own Deed ſhall be taken moſt ſtrongly againſt himſelf. Co. Litt. 232. —— For tho' a Treſpaſs be joint to this Purpoſe, viz. That he may ſue one or all, yet when 2 join in a Treſpaſs, they ſo make one Treſpaſſer as that either of them is well anſwerable for his Fellow's Fact as well as himſelf; and therefore a Releaſe to one diſcharges the whole Treſpaſs; And alſo a Releaſe is as good a Satisfaction in Law as a Satisfaction in Deed. Hob. 66. pl. 69. Cocke v. Jennor. —— Brownl 189. Cook v. Jerman S. C held a good Plea, and that a Satisfaction by one is a Satisfaction by all. —— S. P Cro. J. 444. Hill. 11 Car. B. R. That if a Releaſe be made to one Treſpaſſor, and the other had it to plead, they ſhall take Advantage thereof to diſcharge themſelves accordingly. —— S P. Br. Attaint pl. 91. cites 15 E. 4. 1.

1. If a Treſpaſs be done by 2, if a Releaſe be made to one, he ſhall not have Action againſt the other. 8 H. 6. 15. 39 E. 3. 17. 27 E. 3. 83. Admitted by Jſſue Mich. 13 Ja. B. Between *Cook and Genour*. Hobart's Reports. 90. Same Caſe adjudged in Treſpaſs of Battery. Litt. tit. Condition. S. 370. 11 H. 6. 29. 20 H. 6. 12. 33. 14 H. 8. 10. b.

2. If an Arbitrement be between one of the Treſpaſſors and the Plaintiff, and [there is] a Performance of it; This bars the Action of the Plaintiff againſt the other, becauſe this is a Satisfaction. 8 H. 6. 15. 7 H. 4. 31. b.

But if *Mayor and Commonalty diſſeiſes me*, and I *releaſe to* 20 or 30 *of the Commonalty by proper Names*, yet this is not good to the Mayor and Commonalty. Br. Corporations, pl. 24. cites 8 H. 6. 1. 14.

3. If a Treſpaſs be done by a Corporation aggregate, a Releaſe to a particular Man of the Corporation ſhall bar the Action of the Plaintiff againſt the Corporation. 8 H. 6. 15. Contra 20. H. 6. 9.

S. P. Br. Prerogative, pl. 124. cites 2 R. 3. 4. & 34 H. 6. 3. — So tho' the Obligee releaſes to one, *Proviſo that the other ſhall not take Benefit of it*, yet this is a void Proviſo; And ſo in Caſe of a *Treſpaſs* if the other can get the Releaſe to produce it. Per tot. Cur. Litt. R. 191. Mich. 4 Car. C. B. in the Caſe of Everard v. Herne.

4. If 2 are bound jointly to A. in a certain Sum, and A. releaſes to one, this ſhall be a Releaſe of the other alſo; For it is a Satisfaction acknowledged to be made by one.

S. P. Co. Litt. 232. a — Hob. 10. pl. 20. Fryer v. Gildridge —— Mo 855. pl. 1174. Trin. 13 Jac C B S C. —— S. P. And if the joint Remedy is gone, the ſeveral Remedy is gone alſo. Agreed per Cur. But Holt Ch. J who delivered the Opinion of the Court, ſaid they did not determine that on Covenant, where the joint Remedy failed, there could not be a ſeveral Remedy. 2 Salk. 574. Hill. 10 W. 3. B. R. in the Caſe of Clayton v. Kynaſton.

5. So if 2 are bound jointly and ſeverally, and the Obligee releaſes to one, This ſhall enure to both for the Cauſe aforeſaid.

6. So

6. So if A. and B. are named as Obligors jointly and ſeverally, and A. only ſeals it, and then the Obligee releaſes to A. and after B. ſeals the Deed; It ſeems that the ſaid Releaſe ſhall enure to him, tho' it was not his Deed at the Time of the Releaſe; For now this is a joint and ſeveral Deed; For the Releaſe does not defeat the Deed, but is only a Bar by Plea, and Both were bound for one and the ſame Debt, the which is ſatisfied by the Releaſe, and therefore a good Diſcharge of both. Tr. 16 Ja. B. between *Dunſter* Plaintiff againſt *Pridie and Knight* Defendants; This was a Doubt between the Serjeants and the Court. Dubitatur M. 31, 32. El. B. R. between *Mannings and Townſend.* Cro. E. 161. Judgment for the Plaintiff unleſs Cauſe.

7. If 2 receive for me a certain Sum of Money jointly, and after each of them binds himſelf to account for the Whole, and after I bring a Writ of Account againſt them by divers Præcipes, and count ſeverally againſt them as my Receivers of the ſaid Sum, my Releaſe made to one of them of all Debts and Accounts ſhall be a Releaſe of the other alſo. 2 E. 3. 40. b.

8. If 2 recover in a Real Action againſt J. S. and after J. S. releaſes all Errors to one of them; This ſhall releaſe his Writ of Error againſt the other alſo; For he has releaſed the Errors in the Record. M. 38, 39 El. B. R. in *Wright's* Caſe. Agreed by Popham. S. P. by Popham Ch. J. Cro. E. 469 (bis) pl. 27 Paſch. 38 Eliz. B. R. in the Caſe of Wright v. the Mayor &c. of Wickham.

9. Diſceit *againſt* 3, and the *one appeared*, and the *others made Default*; the *Plaintiff releaſed to him who appeared, and pray'd Judgment againſt the others.* Per. Cur. You cannot; For now you have confeſs'd your Action falſe, becauſe you have releaſed to him who is preſent; but if he had made Default alſo, then you might have releaſed to him, and pray'd Judgment againſt the other 2. Br. Diſceit, pl. 31. cites 9 H. 4. and Fitzh. Diſceit 20. S. P. Br. Default, pl. 19. cites 9 H. 4. 3.

10. If a Monk or *Feme Covert and J. S. are bound*, and the Obligee releaſes *to the Feme Covert* or Monk, J. S. ſhall have no Advantage thereof. Br. Faits, pl. 23. cites 14 H. 4. 31.

11. If the Plaintiff releaſes *to one of the Executors*, this ſhall ſerve him who waites. Br. Dette, pl. 177. cites 11 H. 6. 7 & 16.

12. Præcipe quod Reddat is brought againſt A. who vouches B. and B. enters into the Warranty, and then the Defendant releaſes all his Right to A. — A. cannot plead this; For Continuance now in Court is between the Defendant and the Vouchee, and the Defendant ſhould count againſt the Vouchee; This *Vouchee* may plead this Releaſe, and may alſo *plead it as if made to himſelf, it being made to the Tenant after the Vouchee had entered into the Warranty*; For now he is Tenant in Law of the Land. Jenk. 100. pl. 95. cites 14 H. 6. 7. 19. 5 H. 7. 38.

13. If 2 *are bound to the King jointly or ſeverally*, and the *King releaſes to the one*, all the Debt is determined; Per Priſot and Danby. But Per Ashton, He ſhall have the whole Debt of the other. Quære. Br. Releaſes, pl. 67. cites 34 H. 6. 3. *Per* Per omnes, If 2 *are Accountants to the King*, and he *releaſes to the One*, thoſe of the Exchequer will not allow it to the other. Ibid. — If 2 are *Joint Debtors* to the King, and he *pardons to the One Omnia Debita*, this ſhall not ſerve for the other, by ſome. Br. Releaſes, pl. 80. cites 2 R. 3. 4 — Br. Prerogative, pl. 124 cites S. C. — And Br. Releaſes, pl. 40. ſays 1 H. 7. 13. is, That it ſhall not ſerve for the other; Per Catesby. But contra of a Common Perſon; By him.

14. A Releaſe of the *Default of the one* is a Releaſe for all; quod nota. Br. Summons in Terra, pl. 10. cites 3 E. 4. 21.

15. If a Man *gets Poſſeſſion of my Rent by Diſtreſs upon my Tenant*, and *I releaſe to him*, yet *I may diſtrain the Tenant* for the ſame Rent; For he is not my Diſſeiſor, but at Pleaſure. *Contra, If I bring Action againſt him* thereof, then the Releaſe ſhall be a Bar; for I affirm him Diſſeiſor. Br. Releaſes, pl. 70. cites 15 E. 4. 8. Per Littleton.

Br. Appeal, pl. 111. cites S. C. For in Appeal every one ſhall ſuffer Death.

16. In *Appeal againſt* 2, *Releaſe* of the Plaintiff made to the one *of all Felonies and Executions thereof*, is no Bar for the other; For Execution of one of them is not for all, for it is ſeveral in itſelf. Contra, in Treſpaſs. Br. Releaſes, pl. 74. cites 21 E. 4. 72.

——— S. P. Co. Litt. 232. ——— S. P. *But in Treſpaſs Execution of Damages againſt the One* ſhall ſerve for the other. Note the Diverſity. Br. Releaſes, pl. 78. cites 2 R. 3. 9. ——— Br. Ibid. pl. 89. cites S. C. —— Br. Appeal, pl. 120. cites S. C. —— S. P. For tho' Treſpaſs may be ſatisfied by Recompence by one, yet no Recompence ſerves for a Life loſt. Jenk. 137. pl. 82. cites 11 H. 4. 16. & 21 R. 3 9.— Jenk. 165. pl. 18.

In Appeal *againſt Acceſſary and Principal* there is no Privity, nor ſhall Releaſe to the One ſerve the other. Br. Attaint, pl 91. cites 13 E. 4. 1.

17. If the *Diſſeiſor makes a Leaſe for Life*, and the *Leſſee infeoffs* 2, and the *Diſſeiſee releaſes to one* of the Feoffees, this ſhall bar the Diſſeiſor, but yet he ſhall not hold his Companion out. Co. Litt. 277.

18. Where ſeveral Perſons enter into *ſeveral Covenants in the ſame Deed*, a Releaſe to one of the Covenantors will not diſcharge the others. See Cro. E. 408. 470. (bis) pl. 22 546. Hill. 39 Eliz. C. B. Matthewſon v. Lydiat.

19. If *Treſpaſs* be brought againſt 3, and Judgment is given againſt one, and the Plaintiff enters a *Noli Proſequi againſt the other* 2; if the Noli Proſequi had been before Judgment, it had diſcharged the whole Action. The ſame if Judgment had been againſt all 3, and the Plaintiff had enter'd Noli Proſequi againſt the 2; For Nonſuit, or Releaſe, or other Diſcharge of one, diſcharges the reſt. Hob. 70. pl. 81. Hill. 11 Jac. B. R. Parker v. Lawrence & al.

20. *Where* a *Lien is Joint or Several at Election* of the Party, there a Releaſe to One is a Releaſe to Both; for the other may plead it to Debt againſt him upon Bond &c. 12 Mod. 551. in the Caſe of Lacy v. Kynaſton.— cites Co. Litt.

(G. a. 2) Enure. Where *given to a Stranger* ſhall *enure to* one that is *Privy*.

1. IF *Diſſeiſor dies diſſeiſed*, and his *Heir is in by Deſcent*, *and is diſſeiſed by E.* and the *firſt Diſſeiſee releaſes to E.* now if the Heir of the Diſſeiſor re-enters, he ſhall take Advantage of the Releaſe; And ſo ſee a *Diverſity* between him who has *Title of Entry*, *and* him who has *Right of Entry*. Br. Releaſes, pl. 46. cites 9 H. 7. 25.

2. In *Debt againſt the Heir* he may plead a *Releaſe* made *to the Executors*. Br. Releaſes, pl. 25. cites 14 H. 8. 4. Per Fitzherbert J.

3. A *Bond* was condition'd, That *if J. S. ſhould become an Apprentice* to the Obligee, and tranſport his Goods beyond Sea, and make a good Return of them; *and ſhould make Account* thereof, *and pay the Money* on ſuch Account within ſuch a Time, that then &c. *The Obligee releaſed to the Apprentice.* Per tot Cur. The Obligation is ſaved by this Releaſe if the Releaſe was made before any Forfeiture; But otherwiſe, if made after; For then ſuch Releaſe to the Apprentice did not diſpenſe with the Bond made by the Obligor, (who was a Stranger to the Releaſe) becauſe an Obligation once forfeited cannot be ſaved by any Act or Releaſe made or done to a Stranger. 3 Le. 45. pl. 65. Mich. 15 Eliz. C. B. Anon.

(G. a. 3) *To one* that is in of one Eſtate. In what Caſes it ſhall *enure to another*, who is *in of another Eſtate.*

1. IF there be *Lord Meſne and Tenant*, and the *Meſne grants the Meſnalty to one for Term of Life*, and after the *Lord releaſes to the Tenant of the Land all the Right which he hath in the Land*, there the *Meſnalty is extinct*; for the Services which the Meſne 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. Per Babb. Ch. J. Quære inde; and ſo ſee Releaſe between the Lord and the Tenant extinguiſhes the Meſnalty. But it ſeems that if there be any Surplus, he ſhall have it. Br. Releaſes, pl. 20. cites 8 H. 6. 24.

2. *In Præcipe* quod reddat, if the Tenant vouches, the *Vouchee* may plead Releaſe made to the Tenant after the laſt Continuance & e converſo. Per Yaxley and Brian. Br. Releaſes, pl. 46. cites 9 H. 7. 25.

3. *And in Contra formam Collationis* by the Founder, the *Feoffee may plead Releaſe made to the Abbot*, in Scire facias brought againſt him. Br. Releaſes, pl. 46. cites 9 H. 7. 25.

4. If a Man *has a Rent-charge out of the Land of a Feme Covert*, and *releaſes to the Baron* all the Right which he has in the Land to the Heirs of the Baron, yet *this ſhall enure to the Feme and her Heirs*; for this ſhall enure by Way of Extinguiſhment. Per Port. Quære. Br. Releaſes, pl. 25. cites 14 H. 8. 4.

5. Regularly it holds true, That when a *Naked Right* of Land is releaſed *to one that has Jus Poſſeſſionis, and another by a Meſne Title recovers the Land from him*, the Right of Poſſeſſion ſhall draw the Naked Right with it, and ſhall not leave a Right in him to whom the Releaſe is made. Co. Litt. 266. a.

If the *Heir* of the *Diſſeiſor* being *in by Deſcent be diſſeiſed by A.* and the *Diſſeiſee releaſes to A.* now A. has the meer Right to the Land Co. Litt. 266. a.—*But* if the *Heir* of the Diſſeiſor *enters* into the Land, *and regains the Poſſeſſion*, that ſhall draw with it the meer Right to the Land, and ſhall not regain the Poſſeſſion only, and leave the meer Right in A. but by the Recontinuance of the Poſſeſſion the meer Right is therewith veſted in the Heir of the Diſſeiſor. Co. Litt. 266. a.—*But* if the *Donee in Tail diſcontinues in Fee*, now the Reverſion of the Donor is turned to a Naked Right, and if the *Donor releaſes to the Diſcontinuee, and* dies, and the *Iſſue in Tail recovers* the Land againſt the Diſcontinuee he ſhall leave the Reverſion in the Diſcontinuee; for the Iſſue in Tail can recover but the Eſtate Tail only, and by Conſequence muſt *leave the Reverſion in the Diſcontinuee*; for the Donor cannot have it againſt his Releaſe. Co. Litt. 266 a ——*But* if the *Diſſeiſee enters upon the Heir of the Diſſeiſor, and enoffs him in Fee*, and the *Heir* of the Diſſeiſor *recovers* the whole Eſtate, that ſhall draw with it the meer Right, and leave nothing in the Feoffee. Co. Litt. 266 a.

(H. a) In what Caſes a Releaſe *of Part* ſhall enure to the other Part.

Fol. 413. See Error (C c)

1. IF A. be bound in a Statute of 1000 l. to B. and B. makes a Releaſance, that if A. pays to him 100 l. at Eaſter, and 100 l. at another Day, then the Statute ſhall be void, and after A. pays 100 l. to B. who makes a Diſcharge by Deed, by theſe Words, I have received 100 l. Part &c. of which I have diſcharged, releaſed and acquitted the ſaid A. This Diſcharge and Releaſe of this Part is not any Releaſe of the Reſidue. 9. 37 El. B. R. between *Cook and Bacon* adjudged and affirm'd in a Writ of Error. Cro. E. 182. Paſch. 32 Eliz. B. R. S. C.—And. 235. Mich. 32 & 33 Eliz. Rot. 1662. S. C.

2. If A. be bound to B. in an Obligation of 400 l. whereof the Condition is for Payment of 200 l. and the Obligation is forfeited, and

and then the Obligee releaſes to the Obligor 300 l Parcel of the 400 l. by theſe Words, Remiſe, Releaſe and Acquit; this is a good Releaſe of this Parcel, and ſhall not releaſe all the Obligation. P. 10 Car. B. R. between *Barkley and Parkes* adjudged upon a Demurrer, per Curiam. Intratur P. 9 Car. Rot. 262. And the Court ſaid that a Man may releaſe Part of a Rent iſſuing out of Land, without releaſing all.

3. If A. in Conſideration that B. ſhall marry C. his Daughter, promiſes to pay 100 l. to B. at certain Days; and further to give him ſo much as he ſhould after give to any of his other Daughters, accounting the ſaid 100 l. therein; and B. marries C. accordingly, and after B. releaſes by Deed to A. the ſaid Promiſe as to the ſaid 100 l. and after A. gives 200 l. to another Daughter, and then B. releaſes all Promiſes touching the ſaid 100 l. yet this does not releaſe the Demand as to the Increaſe of the Portion, ſcilicet, The other 100 l. which he gave over and above the ſaid 100 l. Mich. 14 Car. B. R. between *Warren and Carr* adjudged in Writ of Error upon ſuch Judgment in B. upon Demurrer. Intratur. Tr. 14 Car. Roſ. 216.

Co R. on Fines 7. Marg. cites S. C.

4. Lord may releaſe *to the Tenant Parcel of the Services*, and yet the reſt remain. Per Hank, quod non negatur; quod nota. Br. Releaſes, pl. 13 cites 14 H. 4. 7.

5. If a Leaſe be upon Condition *that Leſſee ſhall plow 3 Acres every Year*, if the Leſſor diſcharges him of *plowing one* or two of the Acres, yet he ſhall plow the reſt. Per Periam J. Mo. 205. cites 4 H. 7. 6.

Co R. on Fines 7.

6. If a Man has a *Rent-charge* of 20 s. he may releaſe 10 s. to the Tenant of the Land, and reſerve the other 10 s. for he deals only with what is his own, viz. the Rent, and deals not with the Land as in the Caſe of *Purchaſe* of Part; or if ſuch Grant be to J. S. and the Tenant attorns, by this the Rent-charge is divided. Co. Litt. 148. a.

Mo. 413. S. C. ſays Judgment was revers'd for this Point only; but quære —— If a Man be *diſſeiſed of 2 Acres*, he may releaſe his *Right in one* of them, and yet enter into the other. Co. Litt. 214. a. —— If one has an Action to the Land, and he ſuſpends or extinguiſhes it in Parcel, it is extinct for the whole, but if he has Right to the Land, he may releaſe or ſuſpend it in Part, and it remains good for the Reſidue. Mo. 413. pl. 569. Trin. 37 Eliz. Wright v. the Mayor &c of Wickham.

7. There is a Difference between a *Choſe en Action* and a Choſe *en Droit*; the firſt cannot be divided, but the other may; as if a *Diſſeiſee* of 20 Acres releaſe all his Right in 5 Acres, this does not extinguiſh all his Right in the Reſidue, but in the 5 Acres only; but of a Choſe en Action, which is merely intire, no Apportionment can be. Arg. Owen 21. 37 Eliz. B. R. in Caſe of Wright v. The Mayor of Wickham.

8. If a Recovery be againſt A. for 20 Acres, and A. releaſes *all Errors for one Acre*, he ſhall not have Error for any; for the Record is intire. Per Chamberlain Juſt. Palm. 247. Mich. 19 Jac. B. R. in Caſe of Darcy v. Jackſon, cites the Caſe of Wright v. the Mayor &c. of Wickham.

If a Man has *two Acres in Execution*, and he releaſes *one*, it enures to both; Per Richardſon, but Harvey contra. Het. 70. Hill 3 Car. C. B. in Caſe of Wiggons v. Darcy. ——So where a Man had *Judgment* to recover 150 l. and releaſes 20 l. of it, and after ſued Execution, the other brought an Audita Querela upon the Releaſe, and defeated the Execution; but where the Apportionment is by Act in Law, it is otherwiſe. Arg. Owen 21. in Wright's Caſe.

9. When *Execution is had of* 20 *Acres*, by Releaſe of one Acre, the Execution is gone, and is a Diſcharge of Land and Body. Arg. And. 266. in Caſe of Linacre v. Rhodes.

10. When a Man has diverſe Means to come to his Right, he may *releaſe one*, and yet *take Advantage of the other*. 8 Rep. 152. in Altham's Caſe.

13 Rep. 65. S. C. but but not S. P.

11. If a Man has *Common* in 100 Acres, by a Releaſe of his Right of Common *in one Acre*, his whole Right is extinguiſhed. Brownl. 180. Morſe v. Wells.

——2 Brownl 297. S. C. but not S. P.——In Caſe of Common of *Paſture*, Common of *Eſtovers and all Things againſt Common Right*, the Grantee may Releaſe Parcel of them to the Tenant of the Land.

(I. a) In what Caſes a Releaſe *of one Thing* ſhall enure *to another [Thing]*.

1. IF a Man levies a Fine of certain Land, and after enters into Part of the Land, and makes Feoffment thereof, which is a Releaſe in Law of his Writ of Error, to reverſe the Fine as to this; yet this ſhall not releaſe his Writ of Error for the Reſidue. H. 38, 39. El. B. R. between *Wright* and the *Mayor of Wickham*, per Curiam. Tr. 5 Ja. B. R. between *Wright and Jennings*, per Curiam. Præter Canfield. Cro. E. 469. (Bis.) S. C. — Mo. 413. S. C. — Ow. 21 S. C. Per Cur. And they took a Difference between Suſpenſion and Extinguiſhment; For peradventure if he ſuſpend his Action as to any Part for any Time, this is a Suſpenſion to all; but Extinguiſhment of Part is a Bar to that Part only.

2. If the Obligor takes from the Obligee the Obligation with Force, and after the Obligee releaſes to him all Debts, this releaſes the Action of Treſpaſs alſo; for in the Treſpaſs he ſhould recover the Value of the Debt. 49 E. 3. 13. b.

3. If two deliver an Obligation in which one is bound, into an Indifferent Hand, if the Obligee releaſes all Debts, this will bar him of Detinue when the Obligee comes by Garniſhment. 49 E. 3. 13. b. Dubitatur. 2 H. 4. 16. Admitted.

4. If the Lord releaſes to his Tenant the Diſtreſs for the Services, yet the Services remain. 1 H. 4. 1. b. 3. b. If there be Lord and Tenant, and the *Tenant holds 3 Acres by 3 s.* and the *Lord releaſes all his Right in one Acre*, all the Seigniory is extinct, and yet if he grants all the Services, iſſuing out of one Acre, nothing ſhall paſs. Co. R. on Fines 7. cites 20 H. 6. 34 Aſſ. pl. 15. 7 E. 4.—— So if the Lord releaſes all his Right in the Land, his Seigniory is gone. Admitted, Arg. Win. 122. per Hutton J. Hill. 22 Jac. in Caſe of Cooper v. Elgar.

5. So if he grants in Fee that he will not Diſtrain. 1 H. 4. 1. b. 3. b.

6. So if he holds by Homage, Fealty and Rent, and the Lord grants that he ſhall not do Fealty, yet the Reſidue remains. 1 H. 4. 1. b.

7. If a Man brings Appeal of Maihem, and after releaſes the Action, this Releaſe ſhall bar him to have an Action of Battery of the ſame Battery. 43 Aſſ. 39.

8. If Diſſeiſee releaſes to Diſſeiſor all Actions Perſonal, yet he may enter into the Land. 19 Aſſ. 3.

9. If a Rent-charge iſſues out of 3 Acres of Land, and he who has the Rent releaſes all his Right in one Acre, the Rent is all extinct; becauſe all iſſues out of every Part, and it cannot be apportioned. 21 E. 3. 58. b. 34 Aſſ. 15. per Thorpe. Fol. 214. *But* in Aſſiſe *of Rent reſerved upon a Leaſe for Life*, the *Tenant pleaded a Releaſe of Part* of the Rent, *and another Anſwer to the Reſidue*, and well, quod nota; for the Releaſe of Part does not determine the whole Rent. Br. Aſſiſe, pl. 428. cites 9 E. 3. 8.

10. If a *Conuſor of a Statute Merchant* be *in Execution*, *and his Land alſo*, and the Conuſee releaſes to him *all Debts*, this ſhall diſcharge *the Execution*; For the Debt was the Cauſe of Execution, and of the Continuance of it, till the Debt was ſatisfied, and therefore *Ceſſante Cauſa ceſſat Effectus*. Co. Litt. 76 a.

11. A Releaſe of a *Condition* is *not* a Releaſe of the *Obligation*. 12 Mod. 93. In Caſe of Cage and Aſton.

(K. a) How it ſhall enure; In what Caſes *Jointly*, and in what *Severally*.

1. IF a Man releaſes to two all Actions quas Conjunctim habet againſt them, this ſhall enure only jointly. 19 H. 6. 4.

Severally.

Br. Grant, pl. 148 cites S. C. —Br. Releaſes, pl. 21. cites S. C. ——

2. If a Man releaſes to J. S. and J. D. all Actions which he has againſt them, or either of them, this ſhall enure Severally as well as Jointly. 19 H. 6. 4.

Releaſe to two enures to *Joint and Several Actions*. Lat. 161. in Meriton's Caſe, cites 2 R. 3. 12.

Br. Jointenants, pl. 66. cites S. C.— S. P. So if I have Writ of *Treſpaſs againſt one, and an* Action of *Debt againſt another, and an* Action of *Treſpaſs* [illegible] *of them*, and I *releaſe* unto them *All Actions, Suits, and Demands*, Quæ verſus eos vel eorum alterum habeo &c. This ſhall ſerve all thoſe Actions, Quod nota; For if two have Goods in Common, and give unto me Omnimoda Bona ſua, thereby paſs all the Goods which they have in Common, and alſo all the Goods which they have ſeverally, and the Words Et eorum alterum are only Surpluſage. Br. Releaſes, pl. 21. cites 19 H. 6 3. S. C.

3. If a Man releaſes to J. S. and J. D. all Actions, Suits and Demands, which he has againſt them, Vel eorum Alterum, this ſhall enure Severally as well as Jointly, and ſhall diſcharge all &c. which he has againſt any of them. 19 H. 6. 4. Quia.

Br. Done &c. pl. 12. cites S. C. ——Br. Releaſes, pl. 21. cites 19 H. 6 3. S. C.

4. So would it be if the Words (vel eorum alterum) were out of the Deed. 19 H. 6. 4.

See (A. a) pl. 1.

5. If a Man makes a Releaſe to another by Name of J. S. Executor, this ſhall releaſe all Actions which he has in his own Right as well as thoſe which he has as Executor. 19 H. 6. 4.

In Modum recipientis.

Br. Jointenants, pl. 66. cites S. C.— Br. Releaſe, pl. 21. cites 19 H. 6. 3. S. C.

6. If a Releaſe be made to 3 Tenants in Common of Land, this ſhall enure to them in Common, according to their ſeveral Intereſts. 19 H. 6. 4. b.

7. If I bring *Treſpaſs againſt N.* and after *I releaſe unto him and W. S.* I ſhall be barred againſt N. Per Newton quod conceditur. Br. Releaſes, pl. 21. cites 19 H. 6. 3.

5 Rep. 7. b. (d) is, That in this Caſe notwithſtanding the joint Words, all Actions which the Releaſor has againſt the Releaſee ſolely [ſeparately and diſtinctly] are releaſed, moſt beneficially for him to whom the Releaſe is made, and moſt ſtrongly againſt him who makes it; and that joint Words of Parties ſhall be taken, in ſome Caſes by Conſtruction of Law, reſpectively and ſeverally. —And agreeable to this is 9 E. 4 42. cited by Brooke tit. Releaſes, pl. 29

8. A Releaſe of all Actions, *which the Releaſor hath againſt the Releaſee and another*; this releaſeth only the Actions which he had againſt the Releaſee, becauſe the Deed ſhall be conſtrued moſt beneficially for him to whom it was made. 3 Nelſ. Abr. 72. pl. 3. cites 5 Rep. 7. In Juſtice Windham's Caſe.

(L. a) *To Tenant for Life*, where it ſhall *enure to him in Reverſion or Remainder.*

1. IN Aſſiſe, the *Tenant pleaded Releaſe with Warranty of the Anceſtor of the Plaintiff whoſe Heir he is to one, Que Eſtate he has to him and his Heirs*, Judgment &c. and the *Plaintiff ſaid that he to whom the Releaſe was made, was Tenant for Life, the Remainder in Tail to the Plaintiff, and that the Tenant for Life, who got the Releaſe, is dead, and he entered as in his Remainder, and ſo the Warranty determined*; and the *Tenant ſaid that the Remainder in Fee for Default of Iſſue of the Plaintiff* was *to the Tenant for Life, and his Heirs*; et non Allocatur; But the Opinion of the Court held Contra, and the Reaſon ſeems to be inaſmuch as that which is releaſed ſhall enure to all the Eſtates, and the Warranty is determined by the Death of the Tenant for Life; For the Warranty cannot enlarge the Eſtate of the Party, nor ſhall enure to the Rent. Br. Releaſes pl. 6. cites 44 E. 3. 10.

2. If Diſſeiſor makes a *Releaſe* to one *for his Life, Remainder to another in Fee*, if Diſſeiſee *releaſes to Tenant for Life all his Right* &c. this Releaſe ſhall enure as well to him in Remainder as to Tenant for Life; becauſe the Tenant for Life comes to his Eſtate by Courſe of Law, and therefore this ſhall enure by way of Extinguiſhment of the Right of Releſſor &c. And by this Releaſe Tenant for Life hath no greater Eſtate than he had before the Releaſe made him, and the Right of Releſſor is altogether extinct; and inaſmuch as this Releaſe cannot inlarge the Eſtate of Tenant for Life, it is Reaſon that this Releaſe ſhall enure to him in Remainder &c. Litt. S. 308.

If a *Diſſeiſor make a Leaſe for Life*, and *Diſſeiſee releaſes all his Right to the Leſſee*, this Releaſe ſhall enure to him in the Reverſion, albeit they have ſeveral Eſtates. Co. Litt. 275. b. —— *But* if a *Diſſeiſor makes a Leaſe for Life*, the *Remainder in Fee*, albeit they to ſome Purpoſes are as one Tenant in Law, yet if the *Diſſeiſee releaſes all Actions to the Tenant for Life* after the Death of the Tenant for Life he in the Remainder ſhall not take benefit of this Releaſe; For it extends only to the Tenant for Life. Co. Litt. 275. b. —— So if the *Diſſeiſor makes a Leaſe for Life*, and the *Diſſeiſee releaſes all Actions to the Leſſee*, this enures not to him in the Reverſion; ſo a *Difference* between a Releaſe of *Rights* and of *Actions*. Co. Litt. 275. b.

3. Where a Releaſe is made *to Tenant for Life in Tail*, this ſhall enure to them in Reverſion, or to them in Remainder, as well as to the Tenant of the Freehold; and they ſhall have as great Advantage thereof if they can ſhew it. Litt. S. 453.

4. If there *Lord and Tenant* and the *Tenant makes a Leaſe for Life the Remainder in Fee* if the *Lord releaſes to the Tenant for Life*, the Rent is wholly extinguiſhed, and he in the Remainder ſhall take Benefit thereof. Co. Litt. 279. b.

5. So when the *Heir of a Diſſeiſor is diſſeiſed*, and the *Diſſeiſor makes a Leaſe for Life, the Remainder in Fee*, if the *firſt Diſſeiſee releaſes all his Right to the Tenant for Life*, this is ſaid to enure by way of Extinguiſhment, becauſe it ſhall enure to him in the Remainder, who is a Stranger to the Releaſe, and yet in Truth the Right is not extinct, but follows the Poſſeſſion. Co. Litt. 279. b.

6. If the *Feoffee upon Condition makes a Leaſe for Life the Remainder in Fee*; If the *Feoffor releaſes the Condition to the Leſſee for Life*, it ſhall enure to him in Remainder, as well as in the Caſe of the Right or of a Rent &c. Co. Litt. 297. b.

7. If a *Feme Diſſeiſoreſs make a Feoffment in Fee to the Uſe of A. for Life, and after to the Uſe of herſelf in Tail*, and the *Remainder to* the Uſe of *B. in Fee*, and then *takes Husband the Diſſeiſee*, and *he releaſes to her all his Right*. This ſhall enure to B. and to his own Wife alſo; For by Littleton's Rule it muſt enure to all in the Remainder. Co. Litt. 297. b.

(M. a) To

(M. a) To Reverſioner or Remainder-Man, Where it ſhall enure to Tenant for Life.

S. P. Becauſe there is *Privity*. 10 Rep. 93. in Dr. Leyfield's Caſe cites S. C.

1. EVery Releaſe made *to him which has a Reverſion or a Remainder in Deed*, ſhall aid him who has the Freehold, as well as him to whom the Releaſe was made, if the Tenant hath the Releaſe in his Hand to plead. Litt S. 552.

2. If 2 *Diſſeiſors* be, and they *make a Leaſe for Life*, and the *Diſſeiſee releaſes to one of them*, this ſhall enure to them both, and to the Benefit of the Leſſee for Life alſo; For he cannot by the Releaſe have the ſole Poſſeſſion and Eſtate; for Part of the Eſtate is in another. Co. Litt. 276. a.

See (Y. 5) pl. 2.

(N. a) *To one Diſſeiſor.* Enure how. *By way of Entry and Feoffment.*

1. TWO *Diſſeiſors* are, and the *Diſſeiſee releaſes to one* of them *upon Condition*, now he to whom the Releaſe is made ſhall hold his Companion out; *but if* afterwards the *Condition be broken*, they are Jointenants again. Co. R. on Fines. 6. cites 17 Aſſ.

But if my Tenant *delivers a Poſſeſſion to a Stranger for the Rent in Name of Attornment*, a Releaſe to the Stranger is utterly void. Co. R. on Fines 6.

2. If *my Tenant pays my Rent to* 2, and *I releaſe to the one* of them, this Releaſe ſhall veſt the whole Rent in him to whom the Releaſe is made. Co. R. on Fines 6. cites 18 Aſſ.

Br. Aid, pl. 67. cites S. C.

3. Where there are 2 *Coparceners*, and the *one enters into all in the Name of both*, and the *other releaſes to her*, this countervails Entry and Feoffment; For ſuch Entry makes the other Coparcener ſeiſed with her, and there the Entry of the one in ſuch Manner is the Entry of both, and the Seiſin of the one is the Seiſin of the other; And *e contra, where the one enters into all, claiming to himſelf*, there if the other releaſes, it is but only an Extinguiſhment of Right, and no Seiſin in the other, who did not enter. Br. Entre Cong. pl. 30. cites 21 E. 3. 27.

As where a Man is diſſeiſed, and

4. *Releaſe by him who has Entry* lawful, *is not always as an Entry and Feoffment.* Br. Releaſes, pl. 24.

the *Diſſeiſor infeoffs another to warrant C with Warranty*, and *Aſſiſe is brought againſt C.* it is no *Plea, That the firſt Diſſeiſor has releaſed to the ſecond Feoffee Tenant in Aſſiſe all his Right*; For this does not countervail Entry and Feoffment to loſe the Warranty; for the *firſt Poſſeſſion continues.* Br. Releaſes, pl. 24. cites 21 H. 6. 21. & 22 E. 4. 22. —— *So* if a Man *grants a Rent-Charge*, it is no *Plea, That he was in his Diſſeiſin at the Time of the Gift, and the Diſſeiſee had releaſed to him all his Right*; Quod Newton, Paſton, and Aſcue J. conſideratum. Ibid. —— *Per* Aſcue, There is a *Diverſity* where *the Diſſeiſee releaſes to the one, it is to his Title, and* where he releaſes *to one of them without Title.* Ibid. —— *So if two Diſſeiſors, and I releaſe to one*, he ſhall be adjudg'd to be in by me of the Whole, and ſhall hold his Companion out. Ibid.

And therefore the ancient Law was, That if the Diſſeiſor had made Feoffment in Fee with War-

5. In all Caſes when a Man is *in of ſuch Eſtate, to which a Warranty may be annex'd at the* Time of *Creation of the Eſtate*; if the Releaſe be made to ſuch Eſtate, ſuch Releaſe ſhall not enure by way of Entry and Feoffment; For this is the Reaſon of the Diverſity put by Littleton, ſc. When the Diſſeiſor infeoffs 2, if the Diſſeiſee releaſes to one of them he ſhall hold his Companion out; The Reaſon is, for the Poſſibility of the Warranty; For if this ſhall enure by way of Entry and Feoffment,

it

it ſhall deſtroy the Warranty, which was much favour'd in ancient Books. Co. R. on Fines 6. cites 21 H. 6. 41. & 22 H. 6. 22.

ranty, or had given in Frankmariage, which implies a Warranty, the Diſſeiſee could not have enter'd upon him for Salvation of the Warranty, as is held in 1 Aſſ. 13. 27 Aſſ. 31. 29 Aſſ. 54. and an ancient Book in 20 H. 7. and Br. tit Aſſiſe 432. Co. R. on Fines 6.—*But* in all Caſes when 2 *are in merely by Tort*, without any Title, there (as Litt. often ſaid) a *Releaſe* made *to the one ſhall enure only to him*, and he ſhall hold his Companion out. Co. R. on Fines 6. —— *And therefore* if *Leſſee for Years makes Feoffment in Fee to* 2. and after the *Leſſee releaſes to one* of them, he to whom the Releaſe is made ſhall not hold his Companion out, and yet they are Diſſeiſors. Co. R. on Fines 6 — *But* if *a Man makes a Leaſe for Life*, and after the *Leſſor makes* Charter of *Feoffment to* 2, *and* a Letter of Attorney to the one to make *Livery*, who makes it accordingly; and after the *Leſſee releaſes to one* of them, he to whom the Releaſe is made ſhall hold his Companion out; For this *puts the Right* only to him to whom the Releaſe was made. Co. R. on Fines 6.

6. *When the Entry* of a Man *is lawful*, and he releaſes to him who is in by Tort, and without Title, ſuch Releaſe countervails Entry and Feoffment. Br. Releaſes, pl. 92. cites Littleton tit. Releaſes.

But if the *Diſſeiſor leaſes* the Land *for Term of Life*, and after the *Leſſee alians in Fee*, and the *Diſſeiſee releaſes to the Alienee*, then the Diſſeiſee cannot enter. Ibid.

7. If a *Diſſeiſee releaſes to one of the Diſſeiſors*, to ſome Purpoſe this ſhall enure by way of Entry and Feoffment, viz. As to *hold out his Companion*. Co. Litt. 278. a.

But not as to a Rent-Charge granted by him; For if the Diſſeiſee had enter'd and infeoff'd him, the Rent-Charge had been avoided. Co. Litt. 278. a. b. — But it is a *certain Rule* when the Entry of a Man is congeable, and he releaſes to one who is in by Title, it ſhall never enure by way of Entry and Feoffment, either to avoid a Condition with which he accepted the Land charg'd, or his own Grant, or to hold out his Companion. Co. Litt. 278. b.

8. An *Uſe* cannot be out of a Releaſe by the Diſſeiſee; For ſuch Releaſe to ſuch Purpoſe ſhall not enure as an Entry and Feoffment. Arg. Le. 148. in the Caſe of Read v. Naiſh, cites 10 E. 4. 5.

(O. a) To one Diſſeiſor. Enure *to his Companion.*

1. IF a Man be *diſſeiſed by* 2, and he *releaſes to one of them*, he ſhall hold his Companion out of the Land, and by ſuch Releaſe he ſhall have the ſole Poſſeſſion and Eſtate in the Land. Litt. S. 472.

This is to be underſtood where Tenant in Fee-Simple is diſſeiſed, and releaſes; *For* if *Tenant for Life be diſſeiſed by* 2, and he releaſes to one of them, this ſhall enure to them both; For he to whom the Releaſe is made has a longer Eſtate than he that releaſes, and therefore cannot enure to him alone, to hold out his Companion; For then ſhould the Releaſe enure by way of Entry and Grant of his Eſtate, and conſequently the Diſſeiſor, to whom the Releaſe is made, ſhould become Tenant for Life, and the Reverſion veſted in the Leſſor; which ſtrange Tranſmutation and Charge of Eſtates, in this Caſe, the Law will not ſuffer. Co. Litt. 275. b.

2. If *Donee in Tail* be *diſſeiſed by* 2, and releaſes to one of them, it ſhall enure to them both. Co. Litt. 276. a.

3. *But* if the *King's Tenant for Life* be *diſſeiſed by* 2, and he releaſes to one of them, he ſhall hold out his Companion; for the Diſſeiſor gained only the Eſtate for Life. Co. Litt. 276. a.

S. P. Becauſe he can only be diſſeiſed of an Eſtate for Life, ſince the Reverſion in the King cannot be deveſted. G. Treat. of Ten. 54.

4. If *Tenant for Life* be diſſeiſed by 2, *and he in the Reverſion and Tenant for Life join in a Releaſe to one* of the Diſſeiſors, he ſhall hold his Companion out, and yet it cannot enure by way of Entry and Feoffment. Co. Litt. 276. a.

But if Tenant for Life who is diſſeiſed, and he in the Reverſion, *ſeverally releaſe their ſeveral Rights*, their ſeveral Releaſes ſhall enure to both the Diſſeiſors. Co. Litt. 276. a.

If Tenant for Life, and he in *Remainder, join in a Releaſe to one Diſſeiſor*, he ſhall hold out his Companion; Becauſe when the Poſſeſſion is notoriouſly in them both, each of them is capable of a Releaſe, and when one has obtained a Releaſe, it makes his Poſſeſſion rightful; and his holding out his Companion makes it immediately Notorious, That the Eſtate is in him alone. G. Treat of Ten. 53.

5. If 2 Men *gain an Advowſon by Uſurpation*, and the right Patron releaſes to one of them, he ſhall not hold out his Companion, but it ſhall enure to them both; For ſeeing their Clerk came in by Admiſſion and Inſtitution, which are judicial Acts, they are not meerly in *by Wrong*; For an Uſurpation ſhall cauſe a *Remitter*, as appears in F. N. B. 13. (M) Co. Litt. 276. a.

But if there are 2 *Feoffees from Diſſeiſors*, and the *one takes Husband*, and the *Diſſeiſee releaſe to the other*, ſhe is ſole ſeiſed, and ſhall hold out the Husband and Wife. Co. Litt. 278. a.

6. If a *Man* be *diſſeiſed by* 2 *Women*, and *one* of them *takes Husband*, and the *Diſſeiſee releaſes to the Husband*, this ſhall enure to the Advantage of both the Diſſeiſors; becauſe the *Husband was no Wrong Doer*, but in a Manner in by Title. Co. Litt. 276. a.

S.P. Becauſe he cannot make it Notorious, That the Eſtate is in him alone; becauſe he cannot hold out his Companion during the Continuance of the Leaſe for Years. G. Treat of Ten. 54.

7. If 2 *Diſſeiſors make a Leaſe for Years*, and the Diſſeiſee releaſes to one of them, this ſhall enure to both; For by the Releaſe he cannot have the ſole Poſſeſſion. Co. Litt. 276. a.

But if 2 *Diſſeiſors* be, and they *infeoff another, and take back an Eſtate for Life or in Fee*, albeit they remain Diſſeiſors to the Diſſeiſee, As to have an Aſſiſe againſt them; yet if he releaſe to one of them, he ſhall hold out his Companion; *becauſe their Eſtate in the Land is by Feoffment.* Co. Litt 278. a.

8. *Mortgagee upon Condition, having broke the Condition*, is *diſſeiſed by* 2. The *Mortgagor* having Title of Entry for the Condition broken, *releaſes to the one* Diſſeiſor. Albeit they are in by Wrong, yet the Releaſe ſhall enure to them both for 2 Cauſes, 1ſt, They are *not Wrong Doers to the Mortgagor but to the Mortgagee*, and by Littleton's Caſe it appears, That Wrong is done to him that made the Releaſe. 2dly, He that makes the Releaſe has *but a Title* by Force of a Condition. And Littleton's Caſe is of a *Right*. Co. Litt. 176. a.

9. If 2 *Jointenants make a Leaſe for Life, and after do diſſeiſe the Tenant for Life*, and he releaſes to one of them, he ſhall hold out his Companion; for the Diſſeiſin was only of an Eſtate for Life. Co. Litt. 276. a.

10. If *two Jointenants* are *diſſeiſed by two*, and *one releaſes to one* of them, he ſhall *not hold out his Companion*, becauſe he cannot hold him out of the whole; for he has not the whole Right, and ſo there can be no Act of Notoriety whereby the Eſtate may appear to be in one Diſſeiſor. G. Treat. of Ten. 54.

(P. a) To one Feoffee of a Diſſeiſor enure *to* his *Joint Feoffee*.

S.P. Litt S. 472.—S. P. Becauſe coming in by the legal Notoriety of a Feoffment, That muſt be defeated by an Act of equal Notoriety, before the Title can be altered; becauſe the Feoffment muſt ſtand good, as an Act that gives Warning to all Perſons in whom the Freehold ſubſiſts, till by ſome Act of equal Solemnity it appears that the Freehold is in another G. Treat. of Ten. 51. —— *So* if the *Diſſeiſor makes a Leaſe for Life*, and the *Leſſee infeoffs two*, and *the Diſſeiſee releaſes to one* of the Feoffees, this ſhall bar the Diſſeiſor, but yet he ſhall not hold his Companion out Co Litt. 277. a.——Le. 262. pl 349. Anon.———And 45 S C. Martin v. Savery.

1. IF *Diſſeiſor infeoffs two*, and the *Diſſeiſor releaſes to the one Feoffee* all his Right; this ſhall enure to both, and is *as an Extinguiſhment of the Right*. Br. Releaſes, pl. 24. cites 21 H. 6. 41. and 22 H. 6. 22.

2. Where

2. Where a *Diſſeiſor makes a Leaſe for Life*, the *Remainder in Fee*, and the *Diſſeiſee releaſes to* the *Tenant for Life*, *or* to the *Remainder-man*, this enures to them both, becauſe coming in by Feudal Conveyance it cannot be altered, unleſs it were defeated by an Act of Equal Notoriety. G. Treat. of Ten. 51. 52.

(Q. a) To the Feoffee of Diſſeiſor. Enure *to extinguiſh a Condition* created on a Feoffment by the Diſſeiſor.

1. IF *Diſſeiſor makes a Feoffment in Fee upon Condition*, and the *Diſſeiſee releaſes to the Feoffee*, and the Condition is broken, the Diſſeiſor may enter notwithſtanding the Releaſe; for the Condition eſtopps the Feoffee. Br. Releaſes, pl. 46. cites 9 H. 7. 25. S. P. Litt S. 476. cites Pach. 9 H. 7. by the Opinion of all the Juſtices.——Here the Entry of the Diſſeiſee is congeable, and yet the Releaſe does not avoid the Condition, becauſe the *Feoffee is in by Title*, and may have a Warranty. Co. Litt. 277. b.——If Diſſeiſee releaſes to the Feoffee *with Warranty*, and Diſſeiſor enters for Condition broken, now Diſſeiſor ſhall *rebut* by that Warranty, and not vouch. Per Southcot J. 2 Le. 218. in Humfreſton's Caſe.

2. Littleton expreſſes a Diverſity between a *Condition in Deed* and *in Law*; for where the Diſſeiſee releaſes to the Feoffee or the Tenant for Life, the Condition in Law is taken away. But otherwiſe in Caſe of a Condition in Deed Co. Litt. 277. b.

3. If the *Feoffee upon Condition makes a Feoffment in Fee* over, *without any Condition*, and the *Diſſeiſee releaſes to the 2d Feoffee*, the Condition is deſtroyed by the Releaſe before the Condition broken, or after; for the Eſtate of the 2d Feoffee was not upon any expreſs Condition, and he may have Advantage of the Releaſe, becauſe it is not againſt his own proper Acceptance. Co. Litt. 277. b.

(R. a) Of Diſſeiſee. Enure *to avoid Grants* &c. to, or by the Diſſeiſor, by Alteration of his Eſtate.

1. IF a Man is diſſeiſed of Lands, and the *Diſſeiſor grants* a *Rent-charge* out of the ſame Land &c. tho' the Diſſeiſee afterwards releaſes to the Diſſeiſor &c. yet the Rent-charge remains in Force; becauſe a Man ſhall not have Advantage by ſuch Releaſe, which ſhall be againſt *his own Grant*. Litt. S. 477. Here is implied *Conveyance, or any other Profit* out of the Lands; and the Reaſon is, becauſe he ſhall not avoid his own Grant by a Releaſe which he himſelf has acquired ſince the Grant. Co Litt. 277. b.——*But* if the *Diſſeiſor after his Grant of* the *Rent-charge be diſſeiſed*, and the *Diſſeiſee releaſe to the 2d Diſſeiſor*, he ſhall avoid it (as appears by Litt. S. 473.) Co. Litt. 278. a.——So if *A. and B. are Joint Diſſeiſors*, and *B. grants a Rent-charge*, and the *Diſſeiſee releaſes to A. all his Right*, A ſhall avoid the Rent-charge, becauſe it was not granted by him. Co. Litt. 278 a.

2. If there are *two Diſſeiſors*, and they *are diſſeiſs'd*, and *they releaſe to their Diſſeiſor*, *and* after *diſſeiſe him again*, and then the *Diſſeiſee releaſes to one or both of them*, yet the 2d Diſſeiſor ſhall re-enter; for they ſhall not hold the Land againſt their own Releaſe; for Litt. here ſays that they ſhall not avoid their own Grant, and by like Reaſon they ſhall not *avoid their own Releaſe*. Co. Litt. 278. a.

3. If

3. If the *Lord before the Releaſe* had *confirmed the Eſtate of the Diſſeiſor to hold by leſſer Services*, the Diſſeiſor ſhall take Advantage of it; and *ſo of Eſtovers* to be burnt in the Houſe, and ſo *of a Warranty* made to him. Co. Litt. 278. b.

4. If the *Heir of the Diſſeiſor endow his Wife Ex Aſſenſu Patris*, and the *Diſſeiſee releaſe to the Diſſeiſor*, he cannot avoid the Endowment. Co. Litt. 278. b.

(S. a) To him that is in by Wrong. Enure *to purge and toll all Meſne Eſtates*, and Titles.

* S P. Br. Releaſes, pl. 92. cites Lib. Litt. Tit. Releaſes; for *when the Entry* of a Man *is lawful*, and he releaſes to him who is in by Wrong, and without Title, as above, ſuch Releaſe countervails Entry and Feoffment. Note a Releaſe *by one, whoſe Entry is lawful, to him that is in by Wrong*, ſhall purge and take away all Meſne Eſtates and Titles. Co. Litt. 276. b.

1. IF I be diſſeis'd, and my Diſſeiſor is diſſeiſs'd, and *I releaſe to the Diſſeiſor of my Diſſeiſor*, I ſhall not have an Aſſize, nor enter upon the Diſſeiſor, becauſe his Diſſeiſor has my Right by my Releaſe &c. and ſo it ſeems in this Caſe, If there be * 20 diſſeiſed one after another, and I *releaſe to the laſt Diſſeiſor*, this Diſſeiſor ſhall bar all the others of their Actions and their Titles, becauſe in many Caſes when a Man has lawful Title of Entry, tho' he doth not enter he ſhall defeat all Meſne Titles by his Releaſe &c. but this holds not in every Caſe. Litt. S. 473.

S. P. Br. Releaſes, pl. 92. cites Lib. Litt. Tit. Releaſes — If the *Diſſeiſor makes a Leaſe for Life, and* the *Leſſee makes a Feoffment in Fee*, and the *Diſſeiſee releaſes to the Feoffee*, the Diſſeiſor ſhall not enter upon the Feoffee; for tho' the Releaſe to one Joint Feoffee of a Diſſeiſor ſhall not exclude the other, yet a Releaſe to the Feoffee of a Tenant for Life in this Caſe, ſhall take away the Entry of the Diſſeiſor for the Alienation, which was made to his Diſinheritance, he having the Inheritance by Diſſeiſin, ſo as he could have no Warranty annexed to it, and Tenant for Life has forfeited his Eſtate. Co. Litt. 276. b.

2. If *my Diſſeiſor lets the Tenements*, whereof he diſſeiſes me, *for Life*, and after the *Tenant for Life aliens in Fee*, and *I releaſe to the Alienee* &c. then my Diſſeiſor cannot enter Cauſa qua ſupra, tho' at one Time the Alienation was to his Diſinheritance &c. Litt. S. 474

The Reaſon of this Caſe is, becauſe the Entry of the Heir is congeable, and the Abator is in the Land by Wrong. Co Litt. 277.—

3. If *Diſſeiſee dies*, his *Son* being *within Age*, and the *Diſſeiſor dies ſeiſed*, and the Land deſcends to his Heir, and a *Stranger abates*, and after the *Son of the Diſſeiſee at full Age releaſes* all his Right *to the Abator*, in this Caſe the Heir of the Diſſeiſor ſhall not have an Aſſiſe of Mortdanceſtor againſt the Abator, but ſhall be barr'd, becauſe the Abator has the Right of the Son of the Diſſeiſee by his Releaſe; and the Entry of the Son was congeable, for that he was within Age at the Time of the Deſcent &c. Litt. S. 475.

If the *Heir of* the *Diſſeiſor* be *diſſeiſed*, and the *Diſſeiſee releaſes to ſuch Diſſeiſor*, and after the *Heir recovers* againſt ſuch Diſſeiſor, the Right of Propriety goes along with it; becauſe when the Heir recovers, he defeats the Poſſeſſion of the Diſſeiſor as if it had never been, and then can he never recover in any Action; for in the Writ of Right he muſt lay the Poſſeſſion in himſelf, or ſome of his Anceſtors; and this he cannot do in this Caſe, for here never was any Poſſeſſion in him, but what was totally defeated and deſtroyed; and he cannot recover by the old Poſſeſſion of the Diſſeiſee, for that was turned into a Naked Right, which could not be transferr'd but to a real and true Poſſeſſion; and here being no Poſſeſſion but ſuch as ſtands defeated, it is the Conveyance of a naked Right, which cannot be, and were it allowed would be a particular Cauſe of Maintenance in theſe Caſes. G. Treat of Ten. 55. 56.

But in this Caſe if the Diſſeiſee releaſes his

4. If a Man be *diſſeiſed by an Infant, who aliens in Fee*, and the *Alienee dies ſeis'd*, and his Heir enters, the *Diſſeiſor being within Age*, now is it in the Election of the Diſſeiſor to have a Writ of Dum fuit infra ætatem,

or a Writ of Right againſt the Heir of the Alienee, and which Writ of them he ſhall chuſe he ought to recover by the Law &c. and alſo he may enter into the Land without any Recovery; and in this Caſe the Entry of the Diſſeiſee is taken away &c. Litt. S. 478.

Right to the Heir of the Alienee, and after the Diſſeiſor brings a Writ of Right againſt the Heir of the Alienee, and he joins the Miſe upon the meer Right &c. the Great Aſſiſe ought to find by the Law that the Tenant has more meer Right than the Diſſeiſor &c. for that the Tenant hath the Right of the Diſſeiſee by his Releaſe, the which is the moſt ancient and moſt meer Right; for by ſuch Releaſe all the Right of the Diſſeiſee paſſes to, and is in the Tenant Litt. S. 478 — S. P. Br Releaſes, pl. 92. cites Lib. Tit. Releaſes. — *For* in this Caſe, if he bring his Writ of Right, the Diſſeiſor ſhall be barr'd, but *if he had entered upon the Heir of the Alienee*, he ſhould have enjoyed the Land for ever; for in that Caſe the Heir of the Alienee, after ſuch an Entry, ſhall never have a Writ of Right. Co. Litt. 278. b.

5. If *A. diſſeiſe B. who infeoffs C. with Warranty, who infeoffs D. with Warranty*, and *E. diſſeiſes D. to whom B.* the firſt Diſſeiſee *releaſes*. This defeats all the mean Eſtates and Warranties; Becauſe the Releaſe of B. is made to a Diſſeiſor, and his Entry is lawful. Co. Litt. 276. b.

6. If a Makes a Leaſe for Life, and the *Leſſee for Life is diſſeiſed*, and that *Diſſeiſor is diſſeiſed, and* he in the *Reverſion releaſes to the 2d Diſſeiſor*, the firſt Diſſeiſor ſhall enter upon the 2d Diſſeiſor, and his Entry is lawful; and if the Leſſee for Life re-enter, he ſhall leave the Reverſion in the firſt Diſſeiſor; And the Reaſon is, Becauſe the *Entry* of the Diſſeiſor at the Time of the Releaſe made *was not lawful*. Co. Litt. 277. a.

(T. a) *What* ſhall be ſaid to be *releaſed, in Reſpect of the Words.*

1. A *Vowry for reaſonable Aid to make his Son a Knight*, who was of 15 Years of Age, and that the Plaintiff held of him by Fealty and 4 Marks Rent, and the Vill is of the Annual Value of 15 l. and the *Plaintiff pleaded Releaſe of the Anceſtor of the Defendant, and Confirmation to hold by Fealty and 4 Marks, for all Actions and Demands*; And Per Thorp, He ſhall not have Aid to make his Son a Knight, by Reaſon that all is releaſed except Fealty and 4 Marks Rent; But contra Wich and the beſt Opinion; for this *Thing was not in Eſſe at the Time* &c. And alſo it is *Incident to the Seigniory, and no Part of the Services*; and therefore *cannot be releaſed but by expreſs Words*; And he ſaid, ſuch a Deed was pleaded in Avowry for Tenure in Socage for Relief of Double the Rent after the Death of the Tenant in Socage, and Releaſe of all Actions, Services and Demands, except Fealty and Rent was pleaded in Bar; and notwithſtanding this, Return was awarded. But it was agreed, That by expreſs Words the Incident may be releaſed. And Per Cur. If a Man holds by Homage, Fealty, and Rent, and the Lord releaſes, the Fealty is not void; Becauſe it is incident to the Seigniory, and cannot be ſever'd. Br. Releaſes, pl. 5. cites 40 E. 3. 22.

2. If a Man *leaſes for Life*, and after *releaſes all his Right to the ſaid Tenant for Term of Life of the ſame Tenant, and that he nor his Heirs will not Demand, Challenge, or Claim any Right in this Land for Term of Life of the Tenant*; and after *he dies*, and the *Tenant does Waſte*, and the *Heir brings Waſte, and the Tenant pleads the ſame Releaſe*: And it was held no Bar; For nothing was extinguiſhed by this 2d Releaſe, but that which was in Action at the Time of the Releaſe made, and ſo was not this Waſte; and yet he might have granted for him and his Heirs, That he ſhould not be impeached of Waſte. And ſo a *Diverſity* between *Grant and Releaſe*; For by this Releaſe he ſhall not have a greater Eſtate than

he had before, and the Fee remains in the Leſſor. Br. Releaſes, pl. 65. cites 42 E. 3. 23.

See (A. a) pl. 1.

3. If a Man *releaſes to me all Actions and Demands by the Name of J. S. Executor of W. P.* by this all Actions which he has as Executor, and all other Actions are releaſed. Br. Releaſes, pl. 21. cites 19 H. 6. 3. Per Aſcue.

S. C. cited 5 Rep. 7. b. (d) in Juſtice Ulmdham's Caſe, That it ſhall be

4. If I releaſe *to B. all Actions which I have againſt him and C.* by this all Actions which I have againſt B. alone and jointly, are extinct; Per Needham, Littleton, and Moile J. Br. Releaſes, pl. 29. cites 9 E. 4. 42.

taken moſt beneficially for the Releaſee, and moſt ſtrongly againſt the Releaſor. —— *Otherwiſe* it is if it had been *All Actions quas conjunctim habeo* &c. Br. Releaſes, pl. 29 cites 9 E. 4. 42. —— *Ad.* Per Moil, If I releaſe to B. all Actions, it is good *without* thoſe Words, (*Quas habeo & ejus ipſum*) For this is only the Form of the Scrivener. Ibid.

Tot Per Brian, Where a Pardon is made *to one by his proper Name, where he is Executor*,

5. There is a Diverſity *between a Releaſe and Pardon of the King and of a Common Perſon*; and yet if the King pardons to J. N. Omnia Debita, and does not name him Sheriff, yet if it be Ex certa Scientia, et mero Motu, it ſhall ſerve as well for his proper Debts as for the Debt as Sheriff. Br. Releaſes, pl. 40. cites 1 H. 7. 13.

yet this ſhall not extinguiſh Debt as Executor. Ibid.

A. is bound in a *Bond dated the 3d of January*, and by *Releaſe dated the 2d* Day of the ſame Month, releaſed all Actions &c. from the Beginning of the World until this preſent Day, and deliver'd

6. A *Statute* Merchant was *acknowledg'd the 26th of July*, and the *next Day after*, by a *Releaſe dated the 25th of July*, (as if it had been executed the Day before the Statute was acknowledg'd) the Conuſee *releaſed to the Conuſor all Debts, Actions, Demands, and Executions*, from the Beginning of the World *to the making of theſe Preſents*, (viz. the *Releaſe*) which *was delivered the 27th Day*, being the Day after the Statute was acknowledg'd; But the Conuſee fearing Miſchief, [and the XXVII. being in Roman Figures] cauſed the two Minims to be raſ'd, and ſo made it XXV. and it is indors'd and witneſs'd as deliver'd on the 25th. This is in Law a Diſcharge of the Statute; For the Day of the Delivery is the Day of the Making. *But* if the Releaſe had been (*Until the Day of the Date* hereof) the Statute had continued in Force unreleaſed. D. 307. a pl. 67. Hill. 14 Eliz. Anon.

the Releaſe after he had delivered the Bond. Per Coke Ch. J. A Releaſe of all Actions until the Date ſhall not diſcharge a Duty after, but a Releaſe *Usq; Confectionem Præſentium* diſcharges Duties after the Date, and before the Delivery; But he conceived, That the Day of this preſent Time ſhall be the Day of the Date; and it ſhall not be *acer'd*, That it was delivered 20 Years after; and it ſhall not wait on the Delivery of the Deed. 2 Brownl. 300. Anon. —— Cro. E. 14. Paſch. 25 Eliz. C. B. Sir William Drury's Caſe, S. C.

7. *Account was ſtated*, and the Defendant gave *Bond for the Balance*, with Sureties. — 2 Days after, ſome Things being forgot, a further Accompt was adjuſted, and General Releaſes given to each other, which were not intended to releaſe the Bond; And it appearing ſo to the Court by ſeveral Circumſtances, it was decreed, That the ſaid Releaſe ſhould be *ſet aſide*, and no Advantage taken of it as to the Bond. N. Ch. R. 48. 1649. Merrick v. Harvey.

5 Rep. 7. Ho.'s Caſe.— The Plaintiff declared, That the

8. Where a Releaſe is the *Conſideration of a Promiſe*, this does not releaſe the Promiſe by a General Releaſe. Palm. 218. Porter v. Philips.— cites Hancock v. Field.

Defendant had and held of him, by way of Mortgage, two Cloſes of Copyhold Lands; and that there was a *Diſcourſe* between them *concerning* the *Plaintiff's releaſing his Equity of Redemption* therein to the Defendant, *and* concerning *divers Sums of Money due* from the Plaintiff to the Defendant upon the ſaid Mortgage; Upon which the Plaintiff did *agree* with the Defendant, *That he would releaſe* to him *the ſaid Equity of Redemption*; *in Conſideration of which*, the *Defendant did agree with the Plaintiff to pay him 7 l. above all that was due*; and that, in Conſideration the Plaintiff had promiſed the Defendant to perform all of his Side, the Defendant promiſed the Plaintiff to perform all of his Side; and ſaith, That he did not perform all on his (the Plaintiff's) Side, but that the Defendant paid 11 s. of the ſaid 7 l. and no more &c. To this the *Defendant pleads* in Bar, That long after the Promiſe, viz. 29 July, 1694.

the

the Plaintiff did, by Indenture made between him and the Defendant, *releaſe to the Defendant all Manner of Actions, Suits, Debts, Duties, Sum and Sums of Money, and all Demands* whatſoever, which he ever had, or he, his Heirs, Executors, or Aſſigns, ever ſhould have, for or by reaſon of any Thing, Matter, or Demand whatſoever. Upon Over of this Deed of *Releaſe*, it *did recite the ſaid Mortgage, and releaſed all Preciſes therein, and all his Eſtate, Right, Title, and Intereſt in the ſaid Cliſe, both in Law and in Equity; Then follows the foregoing Clauſe.* And upon this the Plaintiff demurs, and Judgment for the Plaintiff in C. B. 'Twas agreed per Cur. That the Promiſe was not diſcharged by this Releaſe. It was urged at the Bar, That if the Plaintiff might have founded an Action upon a mutual Promiſe and Agreement, before any Performance on his Part, that certainly this Releaſe would have barr'd; and the Conſequence is very true and neceſſary, if that were the Caſe; And by the ſame Reaſon, if he could not bring an Action before ſuch Time as he had made a Releaſe, there is no Colour for the Releaſe to bar him; For *till he makes the Releaſe in this Caſe if he has no Title to the Land*, then till Releaſe there is no Right of Action; and then they do *not lie in Demand till Releaſe*, and that a Releaſe of all Demands will not releaſe a Thing that does not lie in Demand at that Time. 12 Mod. 456, 459, 460. Paſch. 13 W. 3. Thorp v. Thorp. — S. C. 1 Salk. 171. — Lutw. 245. accordingly. — Ld. Raym. Rep. 235, 662. accordingly — S. C. cited 8 Mod. 293

9. A. was Tenant for Life, Remainder to B. his Son in Fee; and in the ſame Deed was a Grant of an *Annuity* of 100 l. per Ann. *to B. during the Life of A.* — B. releaſed to A. *all Arrears of Rent, Annuities, Titles, and Demands, which he had by Virtue of that Deed.* The Queſtion was, Whether this Releaſe paſſed the Inheritance as well as the Annuity? Hale Ch. J. thought a Releaſe of all Demands would not extinguiſh a Rent, but that had it been of *all Demands out of the Land*, it had been another Thing; and ask'd the Counſel what he ſaid to this Releaſe of *all Titles*; For he ſaid, It appear'd in expreſs Terms, That B. releaſed not only the Arrears of the Annuity, but the Thing itſelf; and not only ſo, but all other Titles *by Virtue of that Deed*; That B. had a Title to the Annuity, and a Title to the Remainder; And here he releaſed the Annuity and all other Titles which he had by that Deed, or otherwiſe howſoever. Adjornatur to hear Counſel of the other Side. Mod. 99, 100. Mich. 25 Car. 2. 1673. in B. R. Auſtin v. Lippencott.

3 Keb. 243. S. C. Adjornatur. — In this Caſe Hale Ch. J. put the following Caſe; A is Tenant for Life, Remainder to B. for Life, B. releaſes to A. all the Title which he has by Virtue of that Deed; And then ask'd Whether this had not paſs'd B's Eſtate for Life. Mod. 100.

(U. a) *Where* to paſs a Fee by Releaſe *there muſt be Words of Inheritance.*

1. IF the *Diſſeiſee releaſes to the Diſſeiſor for Life or in Tail*, this *ſhall put the Right* in the Diſſeiſor for ever; Becauſe a *naked Right paſſes* from the Diſſeiſee, and not any Thing in Poſſeſſion. Co. R. on Fines 7. cites 6 E. 3. 45 E. 3.

2. If there be Lord and Tenant, and the *Lord releaſes all the Right* which he hath *in the Land*, or all the Right which he hath *in the Seigniory to the Tenant* by Deed or by Fine, the Seigniory is extinct for ever without theſe Words (his Heirs.) Co. R. on Fines 7. cites Litt. 112. 26 H. 8. 42 E. 3. 13 E. 3. 18 E. 3. 11 H. 4. Br. Releaſes 86.

3. If there are 2 *Jointenants* in Fee, and the *one releaſes to the other* all his Right, and does not ſay, To have and to hold, to him and to his Heirs, yet this Releaſe gives a Fee-Simple. Co. R. on Fines 7. cites 19 H. 6.

But if there are 2 *Coparceners*, and the one releaſes to the other all his Right, an Eſtate in Fee-Simple ſhall not paſs by ſuch Releaſe. Co. R on Fines 7.

4. When a Releaſe enures by way of *Enlargement* of an Eſtate, no Inheritance either in Fee-Simple or Fee-Tail can paſs without apt Words *of Inheritance*. Co. Litt. 273. b.

5. Regularly,

5. Regularly when a Man, to whom a Releaſe is to be made, *has a Fee-ſimple at the Time of* ſuch Releaſe made of all Right &c. there need no Words of Inheritance. Co. Litt. 274. a.

6. A *Mortgagee* by Leaſe *for 500 Years*, deſigning that the Mortgagor ſhould releaſe unto him his Equity of Redemption, and to make the Term abſolute, *obtained a Releaſe* from the Mortgagor *of all his Right, Title and Intereſt in the Land*; this Releaſe did extinguiſh the Term for Years, and turned it into an Eſtate for Life; For no Eſtate being expreſſed, it is intended an Eſtate for Life. Freem. Rep. 474, 475. pl. 650. Mich. 1678. gives *it* as a Memorandum of an Opinion of Mr. Sanders upon a Caſe he was adviſed with upon.

(W. a) Relation.

1. IF A. and B. *conſpire to indict* C. by Means whereof C. is indicted; and C. releaſes to them *all Actions*, and *afterwards he is arraigned* and found Not Guilty; per Keble the Releaſe is good, but Gawdy contra; but per Omnes, if it had been of all Manner of Conſpiracies before the Acquittal, it had been good. Kelw. 113. b. pl. 48.

2. If A. is *bound to B in 20l.* to be paid 1ſt. May, and before the Day B. releaſes to A. *all Actions*, the Releaſe is good; For when the Day of Payment is come, it ſhall have Relation to the Commencement; per Keble. Kelw. 113. b. pl. 48.

3. If A. *forges* falſe Deeds of B.'s Land, and B. releaſes to A. *all Actions*, and afterwards A. proclaims the Deeds, the Releaſe is no Bar in Writ of Forger of Falſe Deeds; becauſe the Proclaiming, and not the Forger, is all the Cauſe of my Action. Kelw. 113. b. pl. 48.

(X. a) Pleadings.

1. LOrd, Meſne and Tenant, the *Lord avows upon the Meſne for reaſonable Aid* to make his Son a Knight, *where the Lord has 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.

2. In Quare Impedit, the *Plaintiff alleged that two had the Advowſon, and made Compoſition to preſent by Turn, that the one preſented*, viz. *A. and the other, ſcil. B. granted to the Plaintiff the next Preſentation; and after the Church became void, and the Plaitiff preſented, and A. diſturbed him*; and *A. pleaded a Releaſe from B. of all his his Right*, Judgment &c. It ſeems that it is no Plea if he *does not ſay that he releaſed before the Grant made to the Plaintiff*, and the *Plaintiff ſaid that he did not releaſe before the Grant*, and the other e contra, quod nota; becauſe the other Party had alledged that he releaſed before the Grant, and per Belknap, as fully as he alledged it, ſo fully may the other traverſe it. Br. Negativa, pl. 29. cites 39 E. 3. 37.

3. *Ne Releſſa Pas within the four Seas*, is no Plea. Br. Negativa &c. pl. 14. cites 7 H. 6. 14.

4. If

4. If *Diſſeiſee releaſes to Diſſeiſor all his Right*, the Diſſeiſor in Writ of Entry after this Releaſe ſhall be ſuppoſed to be in in the Per, by the Diſſeiſin. Br. Releaſes, pl. 22. cites 19 H. 6. 17. 23.

5. Entry &c. the *Tenant pleaded a Leaſe for Years, and Releaſe in Fee to his Poſſeſſion*; and the Opinion was that he *ſhall plead certain what Day the Leſſor leas'd*; for it may be that it was made to commence 4 Years to come, and then a Releaſe made Meſne is not good, quod nota. Br. Pleadings, pl. 154. cites 32 H. 6. 8.

6. Where a Man pleads Releaſe *of all his Right which he has in all thoſe Lands which he had of the Gift and Feoffment of R.* he ought to *averr that thoſe Lands at the Time of the Releaſe were the Lands which he had of the Gift of the aforeſaid R.* Br. Releaſes, pl. 49. cites 2 E. 4. 28. Pl. C. 101. b. S. P. per Cur. in Caſe of Wroteſley v. Adams. —— Ibid. 395. a. S. P. in Caſe of the Earl of Leiceſter v. Heydon. —— *But* if he releaſes *all his Right which he has in one Acre in B. called S. which late was R. H.'s where it never was R. H.'s*, yet the Releaſe is good, becauſe there is a ſpecial Name; otherwiſe it is as above of *general Words*. Note the *Diverſity*. Br. Releaſes, pl. 49. cites 2 E. 4. 28. —— D. 50. b. pl. 8. Mich. 33 H. 8. S. P. by Horwood Attorney-General.

7. The Plaintiff *in Writ of Error* cannot plead Releaſe of the Defendant, nor in *Quod ei Deforceat*, nor in *Scire Facias upon Charter of Pardon*, nor in *Avowry*; For in thoſe Caſes the Defendant is not become Actor to any Intent. Quære in * *Quare Impedit*, and in *Detinue upon Garniſhment*; for it ſeems all one. Br. Releaſes, pl. 73. cites 17 E. 4. 43. * In a Quare Impedit a Releaſe of Actions Perſonal is a good Plea, and ſo is a Releaſe of Actions Real. Litt. S. 493. cites Hill. 9 H. 6. 57. per Martin, Quod fuit conceſſum.

8. *Error* was ſu'd *of a Judgment in B. R.* and the *firſt Judgment* was *affirmed*, and *before the Affirmance thereof the Plaintiff in the Writ of Error pleaded a Releaſe of the Defendant*, which was pleaded in the firſt Action, *of all Actions, Suits, Executions, and Errors after the laſt Continuance*, & non Allocatur; for he is Plaintiff, and cannot plead in Bar. Br. Error, pl. 182. cites 21 E. 4. 38. 39.

9. *In Treſpaſs*, if the Defendant pleads a Releaſe of the Plaintiff, he ought to *ſay that it was after the Treſpaſs*. Br. Pleadings, pl. 69. cites 3 H. 7. 2.

10. In an *Aſſiſe of Novel Diſſeiſin*, a Releaſe of Actions Perſonal is a good Plea; becauſe it is mixt in the Realty and in the Perſonalty; but if ſuch an Aſſiſe be arraigned againſt the Diſſeiſor and the Tenant, the *Diſſeiſor* may well plead a Releaſe of *Actions Perſonal* to bar the Aſſiſe; but not a Releaſe of Actions Real; for *none ſhall plead a Releaſe of Actions Real in an Aſſiſe but the Tenant*. Litt. S. 494. A *Diſſeiſor that has Nothing in the Land*, cannot plead a Releaſe *of Actions Real*; becauſe he has no Eſtate in the Land, and none ſhall plead a Releaſe of Actions Real in an Aſſiſe, but the Tenant of the Land. Co. Litt. 285. b. —— *But* he may plead a Releaſe of Actions Perſonal; becauſe Damages are to be recovered againſt him, and therefore for his Defence he may plead it. Co. Litt. 285. b. —— The *Tenant in an Aſſiſe* ſhall plead a Releaſe of Actions Perſonal *to the Diſſeiſor*, For that Plea proves that the Plaintiff has no Cauſe of Action againſt him. Co. Litt. 285. b.

11. *In ſuch Actions Real which ought to be ſued againſt the Tenant of the Freehold*, If the Tenant has a Releaſe of all Actions Real from the Demandant made unto him before the Writ purchaſed; and he pleads this, it is a *good Plea for the Demandant to ſay*, That he who pleaded the Plea *had nothing in the Freehold at the Time of the Releaſe made*; for then had he no Cauſe to have an Action Real againſt him. Litt. S. 495.

12. If a *Diſſeiſor makes a Leaſe for Life the Remainder in Fee*, and the *Diſſeiſee releaſes* all Actions *to the Tenant for Life*; After the Death of the Tenant for Life, he in the Remainder ſhall not plead the ſaid Releaſe. Co. Litt. 285. b. So if the *Heir of the Diſſeiſor makes a Feoffment in Fee to 2*, and the Diſſeiſee *releaſes to one of the Feoffees* all Actions, and he dies, the Survivor ſhall not plead this Releaſe. Co. Litt. 286. a.

13. If the Diſſeiſee releaſes to the Diſſeiſor *all Actions Reals*, and the *Diſſeiſor makes a Feoffment* in Fee, and an Aſſiſe is brought againſt them, the *Feoffee* ſhall not plead a Releaſe to the Diſſeiſor, becauſe he *is not privy* to the Releaſe; For a Releaſe of Actions ſhall only extend to Privies. Co. Litt. 285. b.

14. A. *recovers* the Arrears of Rent *at Niſi Prius*, *but before the Day in Bank A. releaſes* to Defendant all Demands. Per Hobart, if it had been in the Caſe of the King, the Defendant at the Day in Bank might have pleaded it; For he cannot have Audita Querela againſt the King; but otherwiſe in Caſe of a Common Perſon. Noy 26. Ford v. Mead.

15. In Debt or Treſpaſs, the Defendant pleaded a Releaſe of all Actions in B. and upon Over it was *enter'd in hæc Verba*, and it appeared that there *were ſome Exceptions in the Releaſe*, and therefore the Plaintiff had Judgment; For by Sir R. Crew this *could not be intended to be ſame Releaſe*, by reaſon of the Exception; And per Whitlock, for any Thing which appears, it might be that this very Action is excepted; And becauſe it ſhall not be intended the ſame Releaſe the Plaintiff had Judgment upon Demurrer. Palm. 411. Paſch. 1 Car. B. R. Marjorum v. Avis.

16. A Releaſe of a *Recognizance* was pleaded to be *Ante Emanationem Scire Facias*, which is Naught; For it might be made before the Action brought, and the Plea true, and then the Releaſe is void. 10 Mod. 87. Paſch. 11 Ann. B. R. Rogers v. Wood.

(Y. a) Relieved or ſet aſide in *Equity*.

1. THE Defendant would avoid the Payment of Money upon a Bond, becauſe the Plaintiff *made* a *Releaſe the ſame Day after the Bond entr'd into*; relieved here. Toth. 89 cites Mich. 12 Car. Top v. Berts.

See (A. a) the Caſe at large.

2. A Releaſe ſet aſide *by a ſubſequent Accident* having Relation to the Original Equity. Chan. Caſes. 46. Paſch. 16 Car. 2. Bawtry v. Ibſon.

3. If one will ſeal a Releaſe or other Aſſurance *to one in Poſſeſſion for never ſo unequal a Conſideration*, it ſhall not be relieved by Reaſon of a New Title diſcovered, unleſs there be ſome *ſpecial Fraud*; As if A. having Title, and B. in Poſſeſſion, B. conveys the Land to A. in Truſt for B. and then gets A. to convey the Land to him as in Execution of the Truſt whereby A. extinguiſhes his Title. Per North, K. 2. Chan. Caſes. 160. Hill. 35 & 36 Car. 2. Hobert v. Hobert.

Ibid 32. v. Gee v. Spencer.—

4. A Releaſe ſhall be avoided where there is *Suppreſſio Veri*, or *Suggeſtio Falſi*. Vern. 20. pl. 12. Mich. 1681. Jervois v. Duke.

Ibid. 86. pl. 75. Mich. 1682. Gray v. Bull —— See Fraud. Broderick v. Broderick.

5. A Man poſſeſſed of a Leaſe for 3 Lives of a Rectory, deviſed the Rectory by his laſt Will, but that being void, it came to his 3 Daughters as Coheirs and ſpecial Occupants. There being a Suit touching this Rectory in Chancery, the Husband of one of the Daughters *fearing to be in Law*, and *being made to believe that he ſhould be forced to pay Coſts*, releaſed the Arrears that ſhould be coming to him for his Share of the Rectory to the other Siſters, who were to bear the Charge of the Suit; his Share of the Arrear amounted to 1000 l. This Releaſe was ſet aſide, and **Luxford**'s Caſe cited that a *Miſapprehenſion* in the Party ſhall avoid his Releaſe. Vern. 32. pl. 28. Hill. 1681. Gee v. Spencer.

6. A Mother having *Right of Dower* was prevailed upon, by *Falſe Suggeſtions* of a conſiderable Legacy being left her by her Husband's Will in Lieu thereof, to releaſe the ſame, whereas ſuch Sum was given her by his Will but not meant nor intended to be in Lieu of Dower. The Son being about to marry ſhews this Releaſe to the Feme and her Relations, and then the Marriage was had, and a *Jointure* made. The Mother is bound by it; Per Lds. Commiſſioners. 2 Vern. 133. pl. 129. Hill. 1690. Beverley v. Beverley.

7. *Obligor* on Payment of 20 l. to the Obligee who was ſuperannuated and very weak and forgetful and incapable of tranſacting any Buſineſs, procured a Bond and Notes for about 250 l. to be delivered up to him, *on Pretence of Poverty and Kindred*, to the Obligee; but neither being proved, he was ordered to account for the Bonds and Notes. 9 Mod. 118. Mich. 11 Geo. Lucas v. Adams.

(Z. a) In what Caſes a *Releaſe and Confirmation differ.* Confirmation good where a Releaſe is not.

1. IF I let Land *to J. S. for his Life*, and *J. S. leaſes* to another *for* 40 *Years*, by Force of which he is in Poſſeſſion, if I by my Deed *confirm the Eſtate of Tenant for Years*, and after the *Tenant for Life dies during the Term* of Years I cannot enter into the Land during the ſaid Term. Litt. S. 516. S. P. G. Treat of Ten. 60. And ſays, That a Releaſe paſſes away the Right from the Releaſor, and by that Means may conſequentially ſtrengthen the Eſtate; but a Confirmation primarily ſtrengthens the Eſtate, and conſequently ſo far as the Eſtate continues, makes it good againſt the Confirmer. G. Treat. of Ten. 69.

2. *But* if I by my Deed of *Releaſe* had releaſed *to the Tenant for Years in the Life-Time of the Tenant for Life*, this Releaſe ſhall be void, becauſe then there was *not any Privity* between me and the Tenant for Years; For a Releaſe is not available to the Tenant for Years, but where there is a Privity between him and him that releaſeth. Litt. S. 517.

3. If I be diſſeiſed, and the *Diſſeiſor makes a Leaſe* to another *for Years*, if I releaſe to the Termor, this is void; but if I confirm the Eſtate of the Termor, this is good and effectual. Litt S. 518. I cannot releaſe to the *Termor* of the Diſſeiſor, becauſe he *is a perfect Stranger* to the Freehold; ſo that the Releaſe is to one that has no Right or Poſſeſſion of his own, and therefore it is to him a Releaſe of a naked Right, but I may confirm that Eſtate which is already in Being in him. G. Treat. of Ten. 70.

4. If I be diſſeiſed, and I *confirm the Eſtate of the Diſſeiſor*, he hath a good and rightful Eſtate in Fee-ſimple, *tho'* in the Deed of Confirmation *no Mention* be made *of his Heirs*, becauſe he had Fee-ſimple at the Time of the Confirmation; for in ſuch Caſe if the Diſſeiſee confirm the State of the Diſſeiſor, to have &c. to him and his Heirs of his Body engender'd, or to him for his Life, yet the Diſſeiſor hath a Fee-ſimple, and is ſeiſed in his Demeſne as of Fee, becauſe when his Eſtate was confirm'd, he had then a Fee-ſimple, and ſuch Deed cannot change his Eſtate without Entry made upon him. Litt. S. 519. A *Confirmation to a Diſſeiſor in Tail* or for any particular Eſtate, *is* of the like Force, *as a Releaſe* to a Diſſeiſor during ſuch Eſtate, which in both Caſes *is good for ever.* Co. Litt. 296. b.

5. If *the Eſtate of the Diſſeiſor* be *confirmed for a Day*, or for an Hour, *he has a good Eſtate in Fee-ſimple*, becauſe his Eſtate in Fee-ſimple was once confirmed Quia Confirmare idem eſt, quod firmum facere &c. Litt. S. 520. G. Treat. of Ten. 71. S. P. without the Word (Heirs) becauſe the Diſſeiſor has the Fee; and when that Eſtate is aſſented to, the Diſſeiſee can never afterwards deſtroy it. 6. If he *confirm the Term* of the *Leſſee* of the Diſſeiſor *for ſome Part* of the Years, he can of deſtroy

defeat it during the whole Term, becauſe the Term is confirmed; and the laſt Words being derogatory from his own Grant, muſt be rejected; but if he confirms the Land to the Termor, for Part of the Term, and no longer, this is good, becauſe the Party that had Right did not totally aſſent by expreſs Words, as he did in the two former Caſes; for if he did, no derogatory Clauſes from ſuch Aſſent could be admitted; but his Aſſent was originally but Partial, and not to the whole Eſtate, and therefore it cannot, contrary to the expreſs Words, be carried any farther. G. Treat. of Ten. 71.

10 Rep. 93. b. in Dr. Leyfield's Caſe.—— If a Man releaſes to Tenant for Life all his Right, this enures to him in the Remainder, becauſe he parts with his whole; and he that has but an Eſtate for Life by the Feudal Conveyance cannot have the whole Fee. But if a Man confirms the Eſtate for Life, it is an Approbation and Aſſent to that Eſtate only; and therefore the Aſſent being no farther than to the Eſtate for Life, it cannot be carried to ſtrengthen the Remainder. G. Treat of Ten. 71.

6. If my *Diſſeiſor makes a Leaſe for Life*, the *Remainder over in Fee*, if I *releaſe to the Tenant for Life*, this *ſhall enure to him in the Remainder*; but if I *confirm* the Eſtate of the Tenant for Life, yet after his Deceaſe I may well enter, becauſe nothing is confirmed but the Eſtate of the Tenant for Life; ſo that after his Deceaſe I may enter. But when I releaſe all my Right to the Tenant for Life, this ſhall enure to him in the Remainder, or in the Reverſion; becauſe all my Right is gone by ſuch Releaſe. Litt. S. 521.

S. P. And a Confirmation of the Remainder muſt imply an Aſſent to all Means neceſſary to ſupport it. G. Treat. of Ten. 71.

7. *But* if the *Diſſeiſee confirm the Eſtate* and Title *of him in the Remainder*, *without any Confirmation made to Tenant for Life*, the Diſſeiſee cannot enter upon the Tenant for Life, becauſe the Remainder is depending upon the Eſtate for Life; and if his Eſtate ſhould be defeated, the Remainder ſhould be defeated by the Entry of the Diſſeiſee; and there is no Reaſon that he by this Entry ſhould defeat the Remainder againſt his Confirmation &c. Co. Litt. S. 521.

For more of Releaſe in General ſee **Conveyances, Fines, Grant, Surrender**, and other Proper Titles.

Remainder.

(A) Remainder. What Perſons may make a Remainder to whom, and by what Names. [What ſhall be ſaid a *Remainder*, and what a *Reverſion.*]

S C. cited Le. 102. pl. 133. —— * Mich 10 & 11 Eliz. but Catlyne Ch. J. contra, and that Dyer and Saunders Ch.

1. D. 7 El. 237. 31. Fine is levied to Baron and Feme, and to the Heirs of the Baron, he being ſole ſeiſed before, and they render to the Conuſor for the Life of the Baron, **Remainder** to a Stranger for Life, **Remainder** to the right Heirs of the Baron. **The Baron dies; he in Remainder for Life dies. By the Opinion in the Court of Wards, and the 3 Chief Judges, this** is no Remainder, but the ancient Reverſion, **becauſe the Baron cannot limit a Remainder to his own right Heirs, where the** Fee never was out of him; yet it was ad-

adjudged contra in Banco Regis, per 3 * Juſtices. And here 15 E. 3. is cited, where Fine was levied to the † Baron.

* B. were against the Judgment; and the Matter was afterwards compromis'd by the Arbitration of Dyer, and Gerrard Attorney General. D. 23°. b. pl. 31.——† As that which the Baron and Feme had, and they granted and render'd to hold for their Lives, and after their Deceaſe the Remainder to the Heirs of the Baron; but the Fine was not received, becauſe a Man cannot entail a Remainder to his Heirs living himſelf, and this by Reaſon of the Reverſion ſaved. Nota. D. 23°. b. pl. 31. 32.

2. A. gives *to B. for Life*, the *Reverter to J. S.* this is a good Remainder. Br. Done &c. pl. 36. cites 1 H. 5. 8. and Fitz. Tit. Sci. fac. 57.

So *Robbott* for *Remembrance*. Ibid. cites Fitz. Tit. Feoffments 61. T. 18 E. 3. 28.——S. P. Br. Grants, pl. 35. cites 21 E. 3. 49. And ſays the Reaſon ſeems to be, becauſe the *Deed of every one is moſt ſtrong againſt himſelf.*

3. A. made a *Feoffment* in Fee *to the Uſe of B. and his Heirs*; afterwards the *Feoffees made Feoffment to others, to the Uſe of* the ſaid *B. and his Wife for Life of the Wife, and afterwards to* the ſaid *B. and his Heirs*; B. died. Per Curiam, This laſt is in Nature of a Reverſion, and not of a Remainder; for when the firſt Feoffees had inſeoff'd others to the Uſe of B. and his Wife, for the Life of his Wife, and afterwards to his Heirs, who was Ceſty que Uſe of the Fee-ſimple, the ancient Uſe of the Fee was not chang'd nor alter'd, but remained &c. and ſo was in Nature of a Reverſion. And. 2. pl. 3. Hill. 27 H. 8. Buckenham's Caſe.

Bendl. 16. pl. 21. S. C. accordingly.—— D. 36. b. to 13. a. Trin. 28 H. 8. S. C. The Abbot of Bury v. Buckenham accordingly.

4. *Leaſe for Life*, and afterwards the Leſſor reciting that Leaſe, demiſed the Remainder to another, Habendum the ſaid Remainder after the Determination of the firſt Leaſe for 20 Years. Adjudged that the Reverſion did paſs by the Name of the Remainder, and that there ought to be an Attornment. 3 Nelſ. Abr. 90. pl. 1. cites 32 Eliz. Dyer 46.

This Caſe in D. was not adjudg'd, but is left with a Quære. It is D. 36. b. pl. 1. Paſch. 31 & 32 H. 8. The Abbot of Kenilham's Caſe.

5. A Man made a *Feoffment, before the Statute of* executing *of Uſes*, to the Uſe of *himſelf for Life*, the *Remainder to W. in Tail*, the *Remainder to the right Heirs of the Feoffor*; the *Feoffor died*, and *W. died without Iſſue*, the right Heirs of the Feoffor within Age, he ſhall be in Ward for the Fee deſcended; for the Uſe of the Fee-ſimple was never out of the Feoffor. Br. Garde, pl. 93. cites P. 32 H. 8.

So where a Man gives in *Tail*, the *Remainder to the right Heirs of the Donor*, the Fee is not out of him. Ibid.——S. P. Br. Done &c. pl. 15. cites 4 H. 6. 29.——*Contra* where a Man makes a *Feoffment in Fee upon Condition to re-enfeoff Him*, and the *Feoffee gives to the Feoffor for Life*, the *Remainder over in Tail*, the *Remainder to the right Heirs of the Feoffor*; for there the *Fee out of the Uſe of it was out of the Feoffor*; and therefore in ſuch Caſe he has a *Remainder*, and *not a Reverſion*. Br. Garde, pl. 93. cites 32 H. 8.

6. Where the Eſtate is *limited in other Manner than the Law would limit it*, it is a good Remainder; for a Remainder to the right Heirs of his Body is good. So a Man may limit a Remainder to his own right Heirs, and the Heirs of a Stranger. Arg. Roll. Rep. 317. in Caſe of Lane v. Pannel, cites 7 Eliz. D.

7. *A. by Deed reciting that B. held a* Cloſe &c. of him *at Will, granted* the ſame Cloſe *to him for Life*, rendring Rent; and by the ſame Deed granted *the Reverſion to C.* in Fee. It was adjudged that B. had an Eſtate for Life by Way of Confirmation, and that a good Eſtate in Remainder is accrued to C. by this Deed; but it is not a Grant of the Reverſion, and therefore it ſeems that the Rent is payable to A. during the Life of A. And. 23. pl. 46. Mich. 13 & 14 Eliz. The Abbot of York's Caſe. Quære.

5 Le. 15. pl. 35. S. C.—— S. P. By Portman J. D. 22. b. pl. 40.

8. A. made a *Feoffment* in Fee *to the Uſe of himſelf for Life*, Remainder over *to the Uſe of T. S. for Life*, Remainder *to the right Heirs of the Feoffor*. Agreed per Cur. That the Fee is in the Feoffor, and that the Uſe limited to the Heirs of the Feoffor, is in the Nature of a Reverſion, and not of a Remainder to his Heirs, becauſe it proceeds from himſelf, and it is his own

S. P. 5 Le. 25. pl. 51. 15 Eliz. In the Court of Wards. Anon. —— Ibid. pl. 52.

own Act, and therefore he may alien the Land. And. 256. pl. 264. Anon.

S. P. in the ſame Court, and ſame Year. Oliver Coke Ch. J Caſe of Smith v Trigg. Breer's Caſe.—Ibid 54. pl. 78 the ſame Caſes reported in the ſame Words —S. P. By Roll. R. 239. in Caſe of Lane v. Pannel.— S. P. 8 Mod. 23. Mich. 7 Geo. 1721. in the

S. C. By the Name of Maunchel v. Dodenton. And. 197. pl. 232.

9. A. makes a *Leaſe to B. for* 31 *Years*; afterwards *A. deviſes that B. ſhould hold for* 31 *Years reckoning the Years of the firſt Term not expired as Parcel* of the ſaid Term of 31 Years &c. and deviſes the Inheritance to a Stranger. By the better Opinion of the Court, the Fee-ſimple paſs'd in Point of Reverſion; for if it ſhould be a Remainder, then the Rent which is reſerved upon the Leaſe by the Will, ſhall not be incident to ſuch Remainder, and therefore the Law ſhall qualify it into a Fee-ſimple. 2 Le. 33. pl. 40. Hill. 29 Eliz. C. B. Machel alias Michel v. Dunton.

10. A. the Grandfather, B. the Father, and C. the Son. A. being ſeiſed of Land in Fee, deviſed it *to B. for Life, Remainder to C. and the Heirs Males of his Body*, Remainder *to his own right Heirs Males, and the Heirs Males of his Body* begotten. A. and B. died, *C. died without Iſſue Male, leaving* only *D. a Daughter.* D. and her Husband ſold the Lands to J. S. in Fee. It was argued that this was a Fee-ſimple, becauſe immediately upon the Death of A. the Remainder veſted in B. as right Heir, and veſted in him as Fee-ſimple, which could not be turn'd into an Eſtate Tail by any ſubſequent Matter. And ſo it was adjudg'd. Cro. Eliz. 96. pl. 12. Paſch. 30 Eliz. B. R. Smith v. Haws.

And. 288. S. C Adjudg'd.— Cro. E. 321 Read v Errington S. C. — Le 182.

11. A *Fine* was levied, and the Uſes declared to the Uſe *of his Wife for Life*, and after *to B. his Son, and the Heirs Male of his Body*, Remainder to the Uſe of *the Right Heirs of the Conuſor*; This upon Conference of all the Judges of England was adjudg'd a Reverſion. Mo. 284. pl. 437. Paſch. 32 Eliz. B. R. Fenwick v. Mitford.

S. C. ——— No Alteration is made of the *Reverſion*; becauſe the Uſe never ſeparates from the Poſſeſſion, himſelf being the Perſon that ought to take; which Caſe is adjudg'd the ancien. Reverſion. Mo. 310. in Engliſfield's Caſe, cites Fenwick v. Mitforth.— S. C. cited 13 Rep. 56. Mich. 7 Jac. in Samme's Caſe.— S. C. cited Carth. 273. Paſch. 5 W. & M. B. R. in the Caſe of Tipping v. Coſin —— S. C. cited Chan Prec. 341. Trin 1712 in the Caſe of Eure v. Howard —— S. C. Co. Litt. 22. b.

So if A. levies a *Fine to the Uſe of himſelf for Life*, then to the Uſe of *B. his Son in Tail*, then to the Uſe of the *right Heirs of A.*— A. has Fee expectant on the Eſtate Tail as a Reverſion, and not as a Remainder. 2 Rep 91. b Trin. 43 Eliz. Bingham's Caſe.—— Mo. 607. pl 841. S. C. — Jenk. 267. pl. 77. S. C ——— *But* a Fine by A. to B. *to the Uſe of A in Tail, Remainder to Conuſee in Fee*; This is a Remainder and not a Reverſion, tho' B. had Fee before; For the Indenture guides the Uſe, and the Fine and Indenture make but *one Aſſurance.* Jenk. 267. pl. 77. Bingham's Caſe.

12. If A. ſeiſed of Land in Fee makes a *Feoffment to the Uſe of himſelf and Wife, and the Heirs of their 2 Bodies begotten*, the *Remainder to the right Heirs of the Husband*, and the Husband dies, an Heriot ſhall be paid; For the ancient Uſe of the Reverſion was never out of the Husband. Owen 152. Paſch. 36 Eliz. Butler v. Archer.

S. C 2 And. 197. pl 17. among the Caſes in the Court of Wards.— Jenk. 248 pl 38. S. C.

13. *A. infeoff'd J. S. and J. N.* in Fee, to the Uſe *of himſelf for* 40 *Years* without Impeachment of Waſte during the Life of A. and afterwards to the Uſe *of C. 2d Son of A.* in Tail Male; and for Default &c. to the Uſe *of the Right Heirs of A.* for ever. Reſolved by the major Part of the Juſtices; and decreed, That the Uſe limited to the Right Heirs of A. was the old Uſe, and not a new Uſe; And that C. dying without Iſſue Male has ſo determined the particular Franktenement, upon which the Remainder to the right Heirs ſtands, that the Remainder by this reverts to the Donor. Mo. 718. pl. 1006. the Earl of Bedford's Caſe.

This is a Reverſion; For being one Fine it

14. Fine Sur Conuſance &c. Come ceo &c. The Conuſee renders to another in Tail, reſerving Rent; and by the ſame Fine grants *quod Tenement. predict. cum Pertinen. remanerent* to Conuſor and his Heirs; this paſſes

paſſes a Reverſion with the Rent. 2 And. 131. pl. 76. Mich. 41 & 42 Eliz. Anon. enures as if it had been at ſeveral Times; and *it ſhall be intended as rendring the Tail at one Time, and the Reverſion at another Time*; and ſo is the uſual Courſe of Fines, and ſo hath always been expounded. But it is not ſo in *Grants by Deed*. Cro E. 792. White v. Weſt alias Geriſh, S. C. — Ow. 126. S. C.

15. If A. covenants to ſtand ſeiſed or makes Feoffment to the Uſe of *himſelf for Life*, then of *his Wife for Life*; and *if ſhe be diſturbed by his Heir*, then *to the Uſe of the Wife and her Heirs*. A Remainder in this Caſe limited to his own right Heirs is void, and is the old Reverſion, and not a Remainder. Mo. 742. pl. 1022. Mich. 41 & 42 Eliz. Barton's Caſe. S. C. cited in the Caſe of Wood v Reignolds. Cro. E. 705. as reſolved by the two Ch. Juſtices in the Court of Wards. Hill. 42 Eliz. in the Caſe of Leigh v. Burton.

16. A. ſeiſed in Fee *before* 27 *H.* 8. *infeoff'd divers Perſons in Fee, to the Uſe of himſelf and Wife, and the Heirs of their 2 Bodies begotten; and for Default of ſuch Iſſue, to the Uſe of A. and his Heirs in Fee*; and *after the Statute they had Iſſue*. A died, leaving B. a Son, an Infant. Saunders Ch. J. was of Opinion, That the Son ſhould be in Ward; For that the Fee-Simple deſcended in Nature of a Reverſion, and not as a Remainder; becauſe the Limitation of the Uſe of the Fee was void. But Dyer makes a Quære; For he ſays, It ſeems to him, that this Uſe in Fee-Simple is created De Novo upon a Feoffment in Fee, which Uſe never was before; and that it is not like to Buchanham's Caſe, who had Feoffees to his Uſe in Fee, and the Feoffees executed an Eſtate in Fee to the Uſe of his Wife for Life, the Remainder to B. and his Heirs, and B. died, his Heir within Age, there perchance the Heir ſhould be in Ward in his Mother's Life; Becauſe the Uſe limited in Remainder was void as a Remainder, but was the ancient Uſe, and ſo deſcended in Nature of a Reverſion; Ideo Quære bene. D. 133. b. 134. a. pl. 6, 7, 8. Mich. 3 P. & M. Anon.

17. *Fine Sur Conuſance de Droit come ceo &c.* by A. to B. who *render'd to A. in Tail, Remainder to himſelf in Fee*: A. died without Iſſue, and B. brought a Scire facias to execute the Remainder. This was held to be a Reverſion and not a Remainder in B. For by this Fine the Reverſion is *executed*, and ſo a Scire facias will not lie to execute the Remainder as it would on a *Fine Executory*, but he ſhall be driven to a Formedon in Reverter. D. 199. pl. 55. Gale v. Gale. Dal. 29. pl. 4. S. C. but ſeems imperfectly ſtated.

18. If I infeoff J. S. *to the Uſe of himſelf in Tail, Remainder to my own right Heirs*, this is a Reverſion. Hob. 27. in the Caſe of Roll v. Osborn. Jenk. 248. pl. 38.— Jenk. 267 pl. 77.— The Limitation to my own right Heirs is only *Clauſula Clericalis*, and ſignifies nothing. Per Tracy J. 3 Chan R. 185. in the Caſe of Litton alias Strode v. Falkland.

19. A. ſeiſed in Fee of Bl. Acre, covenants to levy a Fine to J. N. & J. S. and their Heirs *to the Uſe of himſelf for Life*, and after *to ſuch Uſes as he ſhould by Writing declare; and for Want* thereof, in Truſt *for him and his Heirs*, a Fine was levied. Afterwards A. married M. and they had Iſſue B. and A. being ſeiſed in Right of M. of Wh. Acre in Fee, they by Deed and Fine convey'd it to T. R. and W. R. and their Heirs, in Truſt, to the Uſe *of A. for Life*, then of *M. for Life*, Remainder to *B. in Tail Male*, Remainder to the *right Heirs of the Survivor of A and M. for ever*. Afterwards A. M. and B. (on the Marriage of B. with N.) and W. R. and T. R. by their Direction, convey Bl. Acre and Wh. Acre, and other Lands, to G. and H. and their Heirs; as to Bl. Acre, to the Uſe *of A. for 99 Years, if he ſo long live*, Remainder *to Truſtees to preſerve Contingent Remainders*, Remainder *to M. for Life*, Remainder *to B. for 99 Years*, if &c. Remainder *to Truſtees to preſerve &c.* And as to White Acre, *to A. and M. for Life of them and the Survivor* of them, Remainder *to B. for 99 Years*, if &c. Remainder *to Truſtees and their Heirs, during his Life, to ſupport &c.* Remainder *to N. for Life for her Jointure*, Remainder of *the* G. Equ R 20 to 25. Mich. 9 Ann. S.C. by Name of Curt v. Edward. Where the Ld. Keeper order'd a Caſe to be ſtated on theſe ſeveral Points out of the Deeds, and then he would conſider of them, and give his Opinion; and if it [illegible]

desire the Assistance of some of the Judges in it; but inclined pretty strongly, That A had Power to subject all these Lands by Will, as his old Reversion undisposed of; and said, They

Male, and as the several Estates before limited should respectively determine, *to the first Son of B. of the Body of N.* to be begotten, *and of the Heirs Male of the Body of such first Son lawfully issuing*, and so to the 2d, 3d &c. Remainder *to the Heirs Male of B.* Remainder *to the right Heirs of A. for ever.* Afterwards a Fine was levied. B. and N. had Issue C. a Son, and D. a Daughter; Then M. dies, and then B. dies without other Issue than C. and D. Afterwards A. by Will *devises all his Manors, Lands, Tenements, and Hereditaments, in Possession, Reversion, Remainder, or in Expectancy whatsoever*, to Trustees and their Heirs, for Payment of his Debts. *A. dies*, then *C. dies without Issue, leaving D.* Ld. Harcourt held strongly, That the Devise by A. was good, and that he might subject all these Lands by Will, as his old Reversion undisposed of. Ch. Prec. 338. Trin. 1712. Eure v. Howard.

might argue to the contrary from Sun-Rising to Sun-Setting, but he thought they would not alter his Opinion. ——— S. P. came before Lord Cowper afterwards, who sent it to be try'd in Ejectment, and then argued at Law; and said, He thought it a nice Point. Ch. Prec. 435. Stanhope v. Thacker.

Fol 415.

(B) *Of what Things* or Estates *Remainder may be.*

S. C. cited 3 Le. 195. pl 244. Hill 29 Eliz C B. and Anderson and Rhodes J. held accordingly.

1. D. 8 Eliz. 253, 102. A Lease by Indenture was made to Cecil pro Termino 41 Annorum, si tam diu vixerit; and if he dies within the Term E. shall have the Term pro Residuo Termini Per Catlin and Dyer, This Remainder is void; Because the Term cannot remain for the Residue after it is determined, and the same Case in Effect 1 Rep. 153. b. per Cur. Rector of *Chedington's* Case. But the Remainder is limited Pro & durante Residuo dicti Termini prædictorum 80 Annorum, and yet not good; But where it is during tot Annis de prædictis 80 Annis, 'tis otherwise; for there it is a good Remainder.

Jenk. 30. pl. 58. S. P. — *Devise* of a

2. A Rent De Novo may be granted for Life, the Remainder over, and this shall be a good Remainder. 7 H. 4. 6. b.

New Rent in Tail, Remainder in Fee, is good. Lev. 144. Smith v. Farnaby. ——— Sid. 285. pl. 20. Pasch. 18 Car. 2. B. R. S. C and it is good by way of Remainder, and so a Judgment of C. B. was affirm'd.

The Grant for Life and the Remainder, being both *by one Deed*, was held good. Br. Done &c. pl. 58. cites 8 H. 4. 19. But Ibid pl. 54. cites 15 E. 4. 9. contra; For that which commences by the same Grant for Term of Life cannot remain to another. But Brooke makes a Quære. ——— Such Grant was held good by Littleton; But Brian e contra. Br. Grants, pl. 45. cites 15 E. 4. 8. but Brooke thought it good if all is by one Deed.

If a *Rent De Novo* be granted out of Land by A. to B. for Life or in Tail, Remainder to C. in like manner, it hath been held, That tho' this Limitation to C cannot be good by way of Remainder, because A had no Estate in the Rent remaining in him when he made the Grant to B. yet it should be *good by way of New Grant and Creation to commence futurely*; But this cannot be so but with a *Difference*; For if the Grant were *by Indenture between A. of the one Part, and B. only of the other Part*; Now C being no Party to the Deed, can take nothing by it, except by way of Remainder; but if he were Party to the Indenture, or if the Grant were *by Deed Poll*, to which all Men are alike Parties, then it may perhaps enure as a future Grant to C. Wentw. Off. Exec. 234, 235.

(B. 2) Remainder *of Terms* by Deed. Good.

1. A Sfignee of a Lease in Trust to assign it over to Trustees to Uses agreed upon, in which himself was to have Estate for Life, and after to his Children, and for Default, to his Sisters, assigns the Lease with

with *Limitations in Tail, Remainder over*, (in Truſt) which, tho' void in Law, yet is good by Intent in *Equity*, and the Aſſignee's Executor ſhall not have it, yet ſuch Executor ſhall pay the Teſtator's Debts out of the Profits, if he hath not *Aſſets*. Chan. Rep. 15. 2 Car. 1. Powel v. Moulton.

2. Remainder of a Term limited *to Baron and Feme, and to the Children of their 2 Bodies* to be begotten, is no *Entail* in Law, nor have the Iſſue living at the falling of the Remainder any joint Eſtate with Baron and Feme. Chan. Rep. 111. 13 Car. 1. Ireland v. Pain.

3. The Lord Chancellor and the Judges did deliver this general Opinion, That the Limitation of a Term *to ſeveral* Perſons *in Remainder one after the other*, if ſuch Perſons be *all in Being, and particularly named*, can in no wiſe tend to the Entail of a Chattel, or creating of a Perpetuity, but the limiting of it to a Perſon not in Being, does; And where a Perſon has ſuch a Truſt of a Poſſibility in the Remainder of a Term limited after Perſons all in Being, he has good Power to declare and make a Diſpoſition of the Truſt of ſuch a Poſſibility, *but* the Limitation of a Remainder in Poſſibility of a Chattle Real *to the Heir of a Perſon limiting, the ſame* is a void Limitation; and the Eſtate in Point of Intereſt does revert and fix in the Perſon that made ſuch void Limitation. Pollexf. 31, 32. Jan. 30. 14 Car. 2. Goring & al. v. Bickerſtaff & al.

S. C. & ſo agreed to by all the Counſel in one uniform Opinion — Chan. Caſes S. S. C.

* But tho' the Truſt of a Term may be limited *to divers Perſons, that are in Being* one after another, becauſe the ſame is transferrable, yet it cannot be good *beyond* 2 *Limitations to a* 3*d Perſon not in Being*. Chan. Caſes 33. in the Caſe of Sackvill v. Dobſon.

It was agreed per Counſel, and ſo declar'd per Cur. That the *General Rule* that had hitherto obtain'd, was, That you might limit a Term to as many Perſons as you would, one after another, that were *in Eſſe* at the Time of the Limitation, and one Step farther to a Perſon not in Eſſe; but that there could be *but one Contingent Remainder* of a Term for Years. Vern. 255. Paſch. 1684. in the Caſe of Maſſenburgh v. Aſh.

4. Limitation of the Truſt of a Term was *to Baron and Feme, and the longeſt Liver of them for Life*, and after *to the Eldeſt Iſſue of them*, they had then no Iſſue. This is a good Limitation; and the Limitation to Baron and Feme, and the longeſt Liver of them, is but one Limitation. Chan. Caſes 33. Mich. 15 Car. 2. Sackvill v. Dobſon.

5. *Truſt* of a Term *to A. for Life* then to his eldeſt *Iſſue Male* is a good Remainder. Pollex. 26. Cotton v. Heath.

6. A. having Iſſue B. and C. and the Defendant D. his Sons, and being poſſeſſed of ſeveral Boillaries of Salt Water for ſeveral Terms of Years, by 2 Deeds *aſſigned* the ſame *to* T. W. and T. S. *in Truſt for himſelf for* 60 *Years if he ſo long lived*, and after in Truſt *for M. his Wife for* 60 *Years, if ſhe* ſo long lived, and afterwards *as to Part in Truſt for B. in Caſe he ſurvived A. and M.* for the Reſidue of the Terms, *and directs the Truſtees to aſſign to B. accordingly, and if B. dies, living A. and before Aſſignment, leaving a Son, then to aſſign the whole Term to B's eldeſt Son*, and *if no Son to B's Daughters* if any, and *if B. dies without Iſſue before Aſſignment*, or having Iſſue, *if his Iſſue die before Aſſignment, then* in Truſt *for C. and the Heirs of his Body*, and *for Default* of ſuch Iſſue, *in Truſt for D. for the Reſidue of the Term*; And *as to the Reſidue after the Death of A. and M. in Truſt for C.* in caſe he ſurvive A. and M. for all the Reſidue of the Terms, and directs the Truſtees upon Requeſt to aſſign the ſame accordingly; and *if C. before Aſſignment dies having Iſſue, then* to aſſign *to his eldeſt Son*, if any, and if none, to his Daughters, and *if C. dies without Iſſue, and before Aſſignment*, or having Iſſue, and his Iſſue dies before Aſſignment, then the *Truſtees to permit B. and the Heirs of his Body*, and *for Want thereof to D. and the Heirs of his Body*, and for Want thereof to the Executors &c. of C. to hold the ſame during the Reſidue of the Terms. *B. died without Iſſue in the Life-time of A. and M.* and then *A. and M. died*, and *C. ſurvived, and* entered, and *enjoyed the Whole, and died before any Aſſignment* made to him *without Iſſue* Inteſtate, and Adminiſtration of his Eſtate was granted to the Plaintiff Elizabeth

Chan. Caſes 131, 132. S. C. accordingly. — S. C. cited by Ld Nottingham 3 Chan. Caſes, 35, 36. in the Duke of Norfolk's Caſe — And alſo 2 Chan Rep. 239. in S. C. — 2 Vern. Rep. 65. Mich. 1692. in the Caſe of Stanley v. Leigh the Maſter of the Rolls cited this Caſe of Theed v. Saunders, And takes Notice that it was cited but ſhort-

Mr. Fo. C. Notinghame's Case, fol. 35. [It should be 35, 36.] and Mr. Hovenden obſerved, That in that Caſe there was a Double Contingency precedent to the veſting the whole Truſt of the Term, viz. not only his dying without Iſſue be one Aſſignment; But if he had Iſſue, the dying of ſuch Iſſue before Alienation; If he had Iſſue a Son, that Son would not have taken at his Death, but if he had died before he attained to have taken any Aſſignment of the Term, and the Father had died without any other Iſſue, the Truſt of the Term would have gone to C. Beſides, there was living wife out Iſſue of B. precedent to C's taking, which perhaps might take in Grandchildren or Daughters. In theſe Contingencies being of Neceſſity to happen within the Compaſs of 2 Lives, and no contingent Eſtate ever veſting, this ſolemn Reſolution held the Limitation void to be a good Limitation.

Elizabeth his Relict. The Lord Keeper, aſſiſted by Mr. J. Twiſden, Mr. J. Rainsford, and Mr. J. Wild, agreed in Opinion, and declared that the Eſtate limited to B. being but in Nature of a Contingency, no Eſtate ever veſted in him, and that Elizabeth, as Adminiſtratrix of C. was well intitled to the Truſts of all the Term, and decreed the ſame accordingly. Pollex. 35, 36. 1 July 21 Car. 2. Wood & al. v. Saunders & al.

S. C. Mod. 114, 115. Ld Keeper Finch held it a void Remainder, becauſe it doth depend upon ſo many, and ſuch remote Contingencies, for otherwiſe it would be a Perpetuity; And he ſaid he would allow one Contingency to be good, viz. That to the 1ſt Son, tho' the 1ſt Son was not in Eſſe at the Time of his Deceaſe. And he ſaid, he did deny my Lord Coke's Opinion in Sharrington's Caſe, which ſays that if a Leaſe is ſettled to one, and the Heirs Males of his Body, which he dies the Eſtate is determined for he [viz. Ld Coke] ſaid it ſhall go * to his Executors —— * 10 Rep. 87. a. b. in Lutterell. 3. 58. 2. Co. ſays, The Heirs ſhall not have it but the Executors, becauſe it is a Chattel only, which cannot be entailed. —— S. C. of Burges v. Burges Patch. 26 Car. 2. Chan. Caſes 229, 230. but Ld K. Finch held that the Limitation void, becauſe it was a remote Truſt, and rendered the Reaſons of —— Lord Keeper ſo ordered accordingly —— S. C. cited by the Maſter of the Rolls, 2 Wms's Rep 624. Mich. 1732. in the Caſe of Stanley v. Leigh.

The Maſter of the Rolls, in the Caſe of Stanley v. Leigh, Mich 1732. cited this Caſe of Burges v. Burges and remarked upon it, that it ought to be conſidered that this was a Decree of Ld. Nottingham's, and that the Time when the Principle laid down by him afterwards in the Duke of Norfolk's Caſe, of a Man's having as much Power over a Term as over an Inheritance, was not obtained, and it is very probable that it did occur to him; Beſides, that it is eaſy to imagine he would make large Conceſſions in order to leſſen the Number of Reſolutions he was to encounter in the Duke of Norfolk's Caſe; Now theſe Conceſſions too were made in the firſt Argument, and the 2d Argument ſhews plainly that he grew ſtronger in his Opinion as to a Man's having as much Power over a Term as an Inheritance. 2 Wms's Rep 625.

7. A poſſeſſed of a *Truſt* of a Term, ſettled the Eſtate by Deed *to Himſelf for Life*, then to his *Wife for Life*, then *to 1ſt*, 2d &c. Sons of their Bodies, and the Heirs Male of the Body of ſuch 1ſt, 2d &c. Sons, and if no Sons, *then to Daughters*. A. and his Wife died; there was a Daughter living at the executing the Truſts, and ſhe was *the only Child*, and living at the Death of the Father and Mother; decreed the Limitation to the Daughter void. Pollex. 40. 25. May 1674. Burgeſs v. Burgeſs.

Chan. Caſes. 239. S. C. — S. C. cited Vern. 492. in the Caſe of Hayward v. Rogers

8. *A aſſigns* a Term in Truſt that *himſelf ſhould receive the Profits* during his Life, then that M. his *Wife ſhould for her Life*, then *that B. his firſt Son ſhould for his Life*, and after B's Deceaſe that D's Child or Children ſhould for Life, and for Want of ſuch Iſſue, or after the Death of ſuch to permit C. &c. as is limited above to *B.* and then to permit D. during her Life, and after, in the ſame Manner as to B. and for Want of ſuch Iſſue, or after the Deceaſe of ſuch Child or Children of D. to permit the Executors or Adminiſtrator of M. Wife of the ſaid A. to receive the Profits during the Reſidue of the ſaid Term, and then to permit another, and ſo on. The Lord Keeper declared that the ſaid *Truſts being expreſſly limited for Life* do not tend to a Perpetuity, and the Remainders are all good. Pollex. 38. Mich. 1674. Oakes v. Chichester.

Fin. Rep 181. S. C. accordingly.

9. A. poſſeſſed of a Term for 80 Years in Lands, aſſigned the ſame to W. R. and W. S. upon theſe Truſts; That B. ſhould enjoy the ſame during his Life, and then M. his Wife during her Life, and after, to permit ſuch Child and Children, as the ſaid B. and M. ſhould have of their Bodies begotten, and their Child or Children, and

their

their Aſſigns, to enjoy the ſame for the Reſidue of the 80 Years, and *for Default of ſuch Iſſue, then to* permit *the Heirs of the ſaid* A. and their Executors &c. to enjoy the Premiſes for the Reſidue of the Term then to come. B. entered and enjoyed, and made his Will, and the Defendant M. his Executrix, and died; ſhe proved his Will; C. was the only Iſſue and Heir of B. and ſurvived his Father, and afterwards died without Iſſue, and Adminiſtration of his Eſtate was granted to the Defendant M. Afterwards A. made his Will, and the Plaintiff K. his Executor, and died, and they proved his Will; The Ld Keeper declared the Limitation in Truſt to the Heirs of A. which is to take Place after the Meſne Remainders of B. and M. cannot by Preſumption of Law take Place during the 80 Years, and tends to a Perpetuity, and therefore void, and the whole Intereſt veſted in the Defendant and her Aſſigns, and allowed the Plea, and as to the Caſe diſmiſſed the Bill. Pollex. 42. Mich. 26 Car. 2. Knight v. Knight.

10. A Remainder after Limitation of a Term *to an Iſſue Male* is void in Law. 2 Chan. Rep. 120. 28 Car. 2. Still v. Linn.

11. A. being poſſeſſed of a Term of 200 Years, ſettled it by Deed upon ſuch Truſts as he ſhould afterwards declare by another Deed. A. by another Deed declared and limited the Truſt of the Term *to C. his ſecond Son, and the Heirs Males of his Body, provided if B. his eldeſt Son die without Iſſue, or his Wife exſtant, living C. ſo that the Earldom of Arundel deſcends on C.* then *the* ſaid *Term ſhall remain to D. his third Son, and the Heirs Males of his Body*, with *like Remainders in Tail to his other Sons ſucceſſively*; Afterwards *B.* the eldeſt Son *died without Iſſue in the Life-time of C.* ſo that the Contingency of the Earldom deſcending on C. did happen; The Queſtion was, Whether this Limitation of the Term in Remainder to D. was good or not, it being [illegible] to veſt in him till after the Death of B. without Iſſue, and living C. Ld. Ch. J. Finch decreed this a good Limitation, but the 2 Chief Juſtices and the Chief Baron, who aſſiſted him, were of a contrary opinion. 3 Chan. Caſes. 1. &c. 34 Car. 2. The Duke of Norfolk's Caſe, or, the Doctrine of Perpetuites.

S. C. argued by Sir Henry Pollexfen. Pollex. 223. to 251 —— This Decree was afterwards reverſed 15th of May, 35 Car. 2. but was afterwards viz. [illegible] June [illegible] by the Houſe of Lords, and the Decree of the Lord North's

reverſed. —— Charles Howard v. the Duke of Norfolk. S. C. 2 Chan. Rep. 229.

12. There is a great *Difference* as to Limitations of *Terms in Groſs*, and ſuch as *attend the Inheritance*; The 1ſt. cannot be limited to one *after the Death of another without Iſſue*; but the latter may, if the Inheritance be ſo limited, but not elſe. Per the 3 Ch. J. 2 Ch. R. 233. 34 Car. 2. in the Caſe of Howard v. D. of Norfolk.

The Truſt of a Term in Groſs can be limited no *otherwiſe in Equity than the Eſtate of a Term in*

Groſs can be limited in Law. Per Ld. C. Nottingham. 2 Ch. R. 235. in the Caſe of Howard v. Duke of Norfolk.

13. Settlement of a Term on a Marriage in Truſt to the *Huſband for Life, Remainder to 1ſt Son till* 21. then *to ſuch 1ſt Son for the Remainder of the Term*, but * *if he the 1ſt Son die before* 21, then *to the 2d, and every other Son in the ſame Manner*; And *if no ſuch Son*, or *if all die before* 21, then *to J. S.* This is a good Remainder. Vern. 234. 304. Paſch. & Hill. 1684. Manſenburgh v. Aſh.

2 Chan. Rep. 275. S. C. and ibid. 282. Four Judges were of Opinion That all the Remainders and Contingencies in the Deed of Truſt being limited and confined to fall within the Compaſs of 21 Years, are good, and the Lord Keeper declared himſelf of the ſame Opinion —— S. C. cited Arg. Gibb. 316 —— * See Chan. Prec. 15. Martin v. Long. 1690. in the Caſe of a Deviſe.

14. A Term was limited *to A. for Life*, then *to B. for Life*, then *to ſuch Child as B. ſhould leave at his Death, and for Want of ſuch Child to C.* —Quare if the Remainder to C. be good. Vern. 461. Trin. 1687. Heyward v. Rogers.

15. A

* Jo 213. Baker v Lee.

15. A. poſſeſſed of a Term for Years *grants the Term to B. for Life Remainder to C.* the Remainder is void; But in the Caſe of a *Will*, or an * *Aſſignment by way of Truſt*, the Remainder over is good. Arg. 2 Vern. 332. pl. 316. Mich. 1696. in the Caſe of Hide v. Parrot.

S. C. cited Arg. Cibb 22 ——— Wm's Rep. 98. ——— C but Lord C Cowper ſaid it muſt be admitted that if the Limitation of the Term had ever veſted, the Remainder over had been void; but this is no more than a Limitation of a Truſt of a Term two Ways, viz. If there be a Son by the Marriage, then to that Son; but if a Daughter and no Son, then to that Daughter; and that this is not too remote a Contingency being *confined to a Life in Being.* —— 1 Salk 156. S. C. by Name of Higgins v. Derby. But the Limitation there is expreſſed to be *to the firſt Son of the Bodies of B. and M. and the Heirs Male of the Body of ſuch firſt Son &c.* And that Ld C. Cowper was of Opinion, that had the Limitation to the Sons ever took Effect, and the Eſtate veſted, the Remainder to the Daughter had been void; but as there was no Son, it was good; But that upon reading the Settlements it appeared to be thus, viz. *And in Default of Iſſue Male of the Body of B. then to Daughters*; And therefore it was held that B. took an Eſtate Tail, and ſo the Limitation to the Daughters void, being after a plain Limitation in Tail to B. —— Ld C. Talbot in the Caſe of Clark v. Clark ſaid that this Caſe of Higgins v. Dowler is very imperfectly reported, and was upon a Demurrer where Things are not argued with that Nicety which they are upon arguing the Merits of a Cauſe. Cases in Chan. in Ld Talbot's Time. 26. Paſch. 1734 ——— 2 Wm's Rep in Caſe of Stanley v. Leigh, the Maſter of the Rolls cites this Caſe of Higgins v. Dowler, of which he ſays he has a farther MSS. Report; And in his Argument there ſays it is obſervable, that tho' the 2 printed Books (viz. Vern and Salk.) differ in wording the Limitations, yet they agree in the Point reſolved by Ld Cowper, and the only one argued before him, which was, That the Limitations of the Truſt of a Term by a Marriage Settlement to the Father for Life, Remainder to the firſt, and other Sons, and the Heirs of their Bodies reſpectively, Remainder to the Daughters, were good, and there happening to be no Son, the Remainder to the Daughters would take Effect; That none of the Reports ſay what became of it, but all agree that the Point was ſo reſolved; and that by ſome Notes taken by Mr. Goldesborough the Regiſter then in Court, of which his Honour had a Copy, it appeared to have really been ſo, and according to thoſe Reports as to the Eſtate veſting, or not veſting; But as to what Salk. ſays about reading the Settlement, and finding the above Words in it, and that by reaſon of them the Limitation to the Daughters was held void, that that could be no Ingredient in the Judgment of the Court; For on arguing the Demurrer the Court can not go out of the Pleadings; and ſo that this muſt be a Miſtake, and that he ſuppoſes the Bill was read, and not the Deed. 2 Wm's Rep. 626, 627. Mich. 1732.

16. A. poſſeſſed of a Term for 999 Years, demiſed to J. S. for 860 Years *in Truſt for her ſelf for Life*, then *to B. her Son for Life* Remainder *to M. the Wife of B. for Life*, then *to the 1ſt Son* during the Reſidue of the Term; and *in Default of Iſſue* of ſuch 1ſt Son, then *to the 2d, and other Sons of B. and M.* equally to be divided between them, and in Default of Iſſue of B. and M. then *to B.* during the Reſidue of the Term. Ld C. Cowper was of Opinion that as there *never was any Son, but only a Daughter*, the Limitation was good to the Daughter; that in caſe of an *expreſs Deviſe to the 1ſt Son during the Reſidue of the Term Remainder to the Daughter*, if there be *no Son*, the Remainder to the Daughter will take Place; and where it is deviſed *to the firſt Son in Tail*, that gives him the whole Term only by Conſtruction in Law, and an Eſtate by Conſtruction of Law cannot be greater, or of more Force to make void a Remainder, than an expreſs Limitation of the Remainder of the Term. 2 Vern. 600. Mich. 1707. Higgens v. Dowler.

17. A. on Marriage of B. his Son with M. with whom he had 250 l. Portion, aſſigned a Term of 1000 Years, *in Truſt to permit B. to take the Profits for his Life*, and after *to permit M. for her Life*, Remainder *to the Heirs of the Bodies of B. and M.* for the Reſidue of the Term. M. dies leaving Iſſue. B. aſſigned to J. S. who brought a Bill, but upon the Reaſon of the Caſe of **Peacock and Spooner**, in which it was decreed that the Heirs of the Body ſhould take as Purchaſors, it was diſmiſſed at the Rolls; But upon Appeal to the Ld Keeper, and after Search of Precedents, it was decreed for J. S. the Aſſignee, that the whole Term veſted in B. and that the Heirs of the Bodies of B. and M. could not take as Purchaſors; That if the *legal Eſtate had been ſo limited*, B. muſt have taken the Whole, and the Truſt of a Term muſt be governed by the ſame Rule. 2 Vern. 668. Hill. 1710. Webb v. Webb.

2 Vern. 692. S. C.

8. A. poſſeſſed of an *Exchequer Annuity of 14 per Cent. for 99 Years* covenants with Truſtees to pay it to his Wife for her ſeparate Uſe, and and after their Deaths to the Child or Children begotten between them, and for Default to his own Executors or Adminiſtrators, for the Reſidue;

Ld. C.

Ld. C. Cowper held that it may be good *to accrue* [illegible] tho' it might not be ſo by way of *Limitation*. 2 Ch. Rep. 197. Trin. 1 Geo. Baile v. Grey.

19. A. ſeiſed in Fee, *grants to J. S. his Executors &c. for 99 Years in Truſt for himſelf and M. his Wife for Life*, and after the Death of the Survivor, *for the Heirs of their Bodies*, to enter in Truſt *for the Heirs of the Body of A.* and in Default of ſuch Iſſue in Truſt *for the Heirs of the Survivor of A. and M.* They have Iſſue B. a Son. *A. dies*, then B. an Infant without Iſſue. *M. marries A. and B. dies without Iſſue to J. N.* The Queſtion was if the Aſſignment was good to J. N. or if the Term ſhould be attendant on the Reverſion and go to the Heir at Law; But on Conſideration of this Caſe the Maſter of Rolls decreed for J. N. the Aſſignee of M. and that the Term ſhould not be attendant on the Inheritance; For that the Party who raiſed this Term, and had *Power to ſever it* from the Inheritance, ſhewed his *Intention* to do by limiting the Truſt to the Survivor of him and his Wife, and the Heirs of the Survivor, which tho' it was a void Limitation, yet ſufficed to ſhew his Intent to ſever ſuch Term from the Reverſion. Wm's Rep. 360 3-6. Trin. 1717. Hayter v. Rod.

20. A. poſſeſſed of a Term of 1000 Years deviſed it *to Truſtees for ſo many Years thereof, as B. his Son ſhould live*, and after his Death *in Truſt for the Iſſue Male of B. lawfully begotten for ſo many Years of the ſame as ſuch Iſſue ſhould live*; And when the Iſſue Male of B. ſhould happen to be extinct, then *in Truſt for his 2d Son C. for Life, Remainder* in Truſt *for the Iſſue Male of C.* for ſo many Years &c. the *Eldeſt to be preferred before the Youngeſt*, Remainder *to the Iſſue Male of the Name and Family of the Clares, which ſhould be next of Kin for all the Reſidue of the Term*; And *made B. ſole Executor and Reſiduary Legatee*. A. died. *B. died without Iſſue Male*. Ld C. Talbot ſaid that two Queſtions had been made. 1. Whether B. took Eſtate Tail or for Life only? 2dly, Whether if he took for Life only, the ſubſequent Accident of his dying without Iſſue Male, or rather his never having had any Iſſue Male would let in the Limitation to C. the ſecond Son; As to the firſt, he was of Opinion that B took but an Eſtate for Life, and diſtinguiſhed this Caſe from that of Lady v. Welling, which was in Caſe of a Freehold, which may and muſt deſcend to the Iſſue; but in the Principal Caſe it is only of a Leaſehold, which, without a particular Proviſion can never deſcend, but muſt go in a Courſe of Adminiſtration, and here it is expreſly limited to B. for Life, and ſhall not be inlarged by any ſubſequent Words, eſpecially when *in the Limitation to C.* he explains what he meant by Iſſue in the firſt Part; For there *he gives* it * *To the firſt and every other Son, and the Heirs Male of their Bodies*; So it is plain that he intended that every Iſſue to be born of B. ſhould take, and ſo the Limitation to C. too remote, and cannot take Effect. 2dly, That the *ſubſequent Accident of B's dying without Iſſue Male will not leave the Caſe*; And decreed the Term [illegible] to B. he being Reſiduary Legatee of A. his Father, in Truſt for the Infant, who was B's Executor. Caſes in Chan. in Ld Talbot's Time. 21 to 27 Paſch. 1734. Clare v. Clare.

(C) *Upon what Eſtate* it may be be limited.

1. A Remainder is not good without a particular Eſtate in the [illegible] Creation.

Eſtate to his *Tenant for Years*, the *Remainder in Fee*, the Remainder is void, becauſe [illegible] Years was made before the Remainder, and not at the [illegible] of the Remainder made [illegible] take it as a Grant of the Reverſion, in which he is not Party to the Deed. Arg. Pl. [illegible] 4 E. 6. In Caſe of Colethirſt v. Bejuſhin. See (C. 2)

2. If a Grantee of a Rent-charge grants it to the Tenant of the Land for Years, the Remainder over to [illegible]

Remainder, because the particular Eſtate is ſuſpended in the Commencement. D. 3 and 4 Ma. 140. 41.

3. If a Seigniory be granted to the Tenant for his Life, the Remainder over, this is a void Remainder. D. 3 & 4 Ma. 140. 41.

Br. Grants, pl. 133. cites S. C. — Br. Deviſe pl. 5. cites 9 H. 6. 23.

4. If I leaſe Land to a Man who is not capable as to a Monk for Life, the Remainder over in Fee, the Remainder is not good, becauſe there is not any particular Eſtate. 9 H. 6. 24. b.

S. P. —— S. P. per Coke Ch. J. 2 Bulſt. 292. cites S. C. —— S. P. per Mountague Ch. J. Pl. C. 35. a. in Caſe of Colethirſt v. Bejuſnin.

If *during the Vacation* of the Abbey of Dale, a *Leaſe for Life, or a Gift in Tail be made*, the *Remainder to the Abbot* of the Dale and his Succeſſors, this Remainder is good, if there be an Abbot made during the particular Eſtate. Co. Lit. 264. a.

5. So if a leaſe be made to J. S. for Life, where there is not any ſuch in rerum Natura, the Remainder over, the Remainder is not good, becauſe there is not any particular Eſtate. 9 H. 6. 24. b. Deviſe fundamentum &c.

Br. Grants, pl. 133. cites S. C. — Br. Deviſe, pl. 5. cites 9 H. 6. 23.

6. But if a Man deviſe to one for Life who is a Monk, the Remainder over, the Remainder is good, becauſe the Intent ſhall be taken in a Deviſe. 9 H. 6. 24. b.

S. P. per Coke Ch. J. 2 Bulſt. 292. cites S. C. —— S. P. per Lords Commiſſioner Maynard. 2 Vern. 139. pl. 137. Paſch. 1690. in Caſe of Lower v. Needham.

So if *Tenant for Life be in Rerum Natura at the Time of the Deviſe, and he in Remainder not*, yet this is good if he in the Remainder be in Eſſe at the Time when the Remainder falls; as a Leaſe for Life to J. N. the Remainder to the right Heirs of W. N. who is alive at the Time &c. Br. Deviſe, pl. 5. cites 9 H. 6. 23.

7. So if the Deviſe be to J. S. for Life, where there is no ſuch in rerum Natura, the Remainder over, the Remainder is good. 9 H. 6. 24. b.

If a Man *leaſes for Life*, and after *confirms the Eſtate of the Leſſee, Remainder over in Fee*, this is a void Remainder, * becauſe this cannot commence but with the making of the Eſtate; *but* where a Man leaſes for Term of another's Life, and after *confirms the Eſtate of the Tenant* of the Land *for his Life*, the *Remainder over in Fee*, this is a good Remainder, for there the *Eſtate of the Land is charged and enlarged*; and yet there are no Words of Gift nor of Grant. Br. Done &c. pl. 45. cites Doct. and Stud. Lib. 2. cap. 20. fol. 94. —— * For the Confirmation does not enlarge nor change the Eſtate Precedent. Br. Eſtates, pl. 80. cites S. C.

8. If the Eſtate of Leſſee for Life is confirmed in Tail, the Remainder over, this is a good Remainder. 21 E. 3. 49. b.

9. A Man *leaſed to a Feme for Years*, and *ſhe took Baron*; the *Leſſor by Deed per Conceſſit, remiſi & quietum clamavi confirmed their Eſtate to them, and to the Heirs of their Bodies*, the *Remainder to the right Heirs of the Baron*, it is a good Tail, and a good Remainder. Br. Eſtates, pl. 85. cites 6 E. 3. 19.

10. A. granted the *Reverſion of a Tenant in Dower to B. for Life, Remainder to J. S. in Fee*, this is a good Remainder. Br. Done &c. pl. 53. cites 41 E. 3. 28.

It is no Fee but a ſpecial Occupancy. Hob. 323.

11. If an Eſtate be made to J. S. *and his Heirs during the Life of J. N.* this is only an Eſtate for Life, upon which a Remainder may depend by the Common Law; per Coke at the End of Chudleigh's Caſe. 1 Rep. 140. b. cites 11 H. 4. 42. a. 39 E. 3. 25. b. 7 H. 4. 46. a. 8 H. 4. 14. b. 7 E. 3. 48. b. D. 253. a.

12. If there be *Mayor and Commonalty* of D. and the *Mayor dies*, a *Grant made to the Mayor and Commonalty* of D. is void; *but* in that Caſe, if a *Leaſe for Life* be made, the *Remainder to the Mayor and Commonalty* of D. the Remainder is good, if there be a Mayor elected during the particular Eſtate. Co. Litt. 264. a.

13. Co-

13. *Covenant to ſtand ſeiſed* to the Uſe of himſelf *for Life, Remainder to B. for 89 Years, if C. ſo long ſhould live, Remainder after C's Death to D. in Tail.* Adjudg'd, that the Remainder to D. is good, it being upon a Term of 89 Years, which is longer than the Law intends a Man can live, ſo that the Law takes Notice of the Life of a Man, but if it had been *for* 10 *Years*, if C. ſo long ſhall live, then the Remainder had been a void Remainder. Arg. Litt. R. 350. 34 Eliz. C. B. in Keeble's Caſe cites Lord Derby's Caſe.

14. *A.* is *Leſſee at Will*, Leſſor leaſes to *B. for Years*, Remainder *to B. in Fee*, this is good *without Livery*; For Poſſeſſion countervails Livery. D. 269. b. pl. 20. Marg. cites Paſch. 38 Eliz. C. B. Cooper v. Callambill.

And for the ſame Reaſon it was held by Walmſley upon Evidence,

that a Gift in Tail &c. to Leſſee at Will, *or Tenant at Sufferance*, is good without Livery and S. Hill. Noy. 56. Cooper v. Columbel

15. *Covenant* to ſtand ſeiſed *for Acquaintance* Sake, to the Uſe of *A. for Life*, and after *for Conſanguinity to* the Uſe of *B. in Tail or Fee*; the *Remainder is good*, and yet the particular Eſtate is not altered, but remains in the Covenantor during the Life of the Cesty que Vie. Arg. Mo. 310. in Engleſield's Caſe.

16. A Remainder cannot be limited or expectant on a *limited and qualified Fee-ſimple*; for all the Eſtate of the Land is in the Feoffee. 10 Rep. 97. b. A Note of Ld Coke in Seymour's Caſe

17. If Lands are given to one and his Heirs *as long as J. S. has Iſſue of his Body, the Remainder over*, this is a Fee-ſimple determinable, and the Remainder is void; Per Doderidge J. 3 Bulſt 184. Trin. 14 Jac. B. R. in Caſe of Cooper v. Franklin.

Roll Rep. 333. S. P. by Doderidge J. and agreed to by Coke Ch. J.

Hill. 13 Jac. B. R. in S. C.—S. P. Arg Roll. Rep. 351 in Caſe of Bennet v. Sir Richard Lewkenor.

18. A. ſeiſ'd in Fee made a *Leaſe* to J. S. and W. R. to hold to them *for* 40 *Years, if A. ſo long liv'd*, in Truſt for A. to receive the Profits during her Life, *and that after her Death one Moiety* ſhould be *to B.* and *the other* Moiety *to C.* their Executors, Adminiſtrators and Aſſigns ſeverally and reſpectively, *for the Term of* 1000 *Years*. The Court did object, and doubt that the Remainder was void, becauſe, 1ſt. It ſhould not paſs to them by Way of preſent Eſtate, becauſe they were *not Parties to the Deed*. 2dly. It cannot be a Contingent Remainder, being a Remainder for Years depending on an Eſtate for Years, and there *cannot be a Contingent Eſtate for Years*, becauſe a Leaſe for Years operates by Way of Contract, and therefore the particular Eſtate and the Remainder Eſtate operate as two *diſtinct Eſtates* grounded on ſeveral Contracts. Raym. 140. 150, 151. Paſch. 1653. C. B. Corbet v. Stone.

19. Deviſe *to A. for* 15 *Years, Remainder to the right Heirs of J. D.* is not good, but a Deviſe to A. for 15 Years, Remainder *to the firſt Son of J. D.* is good, becauſe Deviſor takes Notice that he hath not a Son, and intends a future Act. Per Bridgman Ch. J. Raym. 83. Mich. 15 Car. 2. C. B. in Caſe of Bate v. Amherſt and Norton.

20. A Deviſe *to an Infant En Ventre ſa Mere, for* 15 *Years*, if it be with a *Remainder over*, is good by Way of Executory Deviſe. Per Bridgman Ch. J. Raym. 83. Mich 15 Car. 2. C. B. in Caſe of Bate v. Amherſt.

21. An *Eſtate at Will* may, without Doubt, be limited to commence *after the Death of another*. Sid. 347. Mich. 19 Car. 2. B. R. in Caſe of Geary v. Bearcroft.

22. An *Eſtate* for Life ſettled *by Deed* of A. to B. will not ſupport a Contingent *Remainder* given *by Will* of A. to B. See 4 Mod. 316. Mich 6 W. & M. B. R. Moor v. Parker.

23. If a Gift be made *to A. and his Heirs while ſuch a Tree ſtands*, no Remainder can be limited over, and yet there may be a Poſſibility of

Reverter.

Reverter. 1 Salk. 31. pl. 9. Per Cur. Hill. 19 W. 3. C. B. in Caſe of Eyres v. Faulkland.

(C. 2) *Where* it may be limited *without a particular Eſtate.*

Deviſe without Particular Eſtate to ſupport it; for it ſhall deſcend to the Heir till the Contingent happens, and is not like a Remainder at Common Law, which muſt ſpring out Eo Inſtante that the particular Eſtate determines. Per North Ch. J. And the Caſe was, that Lands were deviſed to A. till B. ſhould attain his Age of 21, and after he ſhall have attained his ſaid Age, then to A. and his Heirs for ever; and if he dies before that Age, then to the Heirs of the Body of B. and their Heirs for ever. It was held that a Fee veſted in A. preſently; ſo that tho' A. died before 21, his Heir ſhall take. 2 Mod. 289. Hill. 29 & 30 Car. 2. C. B. Taylor v. Biddal ——S. C. Freem. Rep. 243. pl. 256. ſays the Court inclined accordingly, but does not mention that Judgment was given.

1. A Particular Eſtate is *not neceſſary in a Deviſe*; for if a Deviſe be to *A. for Life*, where there is *no ſuch Perſon*, Remainder to B. in Fee, B. ſhall take, tho' there is no Eſtate precedent. Per Harper J. Pl. C. 414. Mich. 13 & 14 Eliz. in Caſe of Newys v. Larke.

2. If Land is deviſed *in Tail*, Remainder *in Tail*, and the *firſt Deviſee diſagrees*, he in Remainder ſhall have it. Per Harper J. Pl. C. 414. in Caſe of Newys v. Larke.

3. Remainder *to a Uſe* does not want a *particular Eſtate* to ſupport it, for they are two ſeveral Eſtates; ſo that there is no Neceſſity by Way of Uſe for the one to have Aid of the other. Arg. Mo. 310. in Engleſield's Caſe.

Mich. 43 Eliz. B. R. to be S. C. Payne v. Hearle, adjudged accordingly.—S. C. cited 3 Rep. 2. Wms's Rep. 44. S. P. Trin. 1722. in Caſe of Gore v. Gore.

4. A. *deviſed* Lands *to M. for 5 Years, to commence at Michaelmas next after the Death of Teſtator*, Remainder *to N. and his Heirs*, A. died before Michaelmas; this cannot take Place Eo Inſtante, that A. died, becauſe of the Term for Years coming between A.'s Death, and the Commencement of the Leaſe; but being in the Caſe of a Deviſe, the Freehold in the mean Time ſhall deſcend to the Heir of the Deviſor; and ſo the Remainder adjudg'd good. Cro. E. 878. pl. 8. Paſch. 44 Eliz. B. R. Pay's Caſe.

Skin. 351. S. C.—4 Mod. 153. Mich. 4 W. & M. S. C. adjudged accordingly, and ſays that Judgment was affirm'd in Parliament.—Show. Parl. Caſes 104. S. C. affirm'd ——Carth. 262. Hill 4 W. & M. in B. R. adjudged.

5. Husband and Wife covenant to levy a *Fine of the Wife's Land to* the Uſe of *the Heirs of the Body of the Husband on the Wife begotten.* Here is no Eſtate for Life to the Husband by Implication, becauſe the Eſtate was the Wife's, to which he is a Stranger; and ſo the Limitation void; for taking it as a Remainder, there is no precedent *Eſtate of Freehold to ſupport it.* 2 Salk. 675. Hill. 3 W. & M. B. R. Davies v. Speed.

12 Mod. 446. S. C.—Skin. 582. S. C. adjudged.—Comb. 334. S. C. accordingly ——4 Mod. 275. S. C. adjudged accordingly.——2 Salk. 465. S. C. adjudg'd accordingly. And the Court held that it is the ſame of the Grant of a new Rent.

6. A Grant of a *new Office in Futuro*, is good and is not a Grant of a Remainder or Reverſion, ſo as to need the Support of ſome particular Eſtate, but it is only a Grant of a Future Intereſt, or of an Intereſt to commence in Futuro, when there is one in Poſſeſſion. Carth. 350. Trin. 7 W. 3. B. R. in Caſe of the King v. Kemp.

(C. 3) *What* is a *ſufficient* Particular Eſtate. *Want of Freehold.*

1. A. Seis'd of Lands in Fee, makes a *Leaſe for Years to B.* Remainder *in Tail to C.* Remainder to the *right Heirs of B.* in this Caſe B. has nothing in the Fee, it is a *Contingent Remainder* to the Heir of B. If *C. dies without Iſſue in the Life-time of B.* the Remainder is void, for the Foundation and Support of this Contingent Remainder fails, becauſe it ought to have a Freehold to ſupport it when the Remainder falls out; and in this Caſe it is not ſo, for C. died without Iſſue in the Life-time of B. and B. during his Life cannot have an Heir; in this Caſe a Leaſe for Years made by B. is of no Effect any longer than for the Years firſt limited to him, for he has nothing in the Remainder. Jenk. 248. pl. 38.

A *Contingent Remainder can never depend on a Term of Years*, becauſe of the Abeyance of the Freehold Agreed per Cur. 1 Salk. 220. 9 W. 3 C. B. in Caſe of Scattergood v. Edge. 1 Rep. 135. Per Gawdy J. in Chudleigh's Caſe.

2. A. levied a *Fine* to B. and C. with *Remainder to A. for 80 Years, if* he ſhould ſo long live, the *Remainder to D.* All the Juſtices held, That all the Remainders are void, becauſe the Eſtate of Franktenement during the Life of A. does not paſs by Render out of the Conuſees; but the compleat Inheritance remains in the Conuzees. Mo. 488. pl. 686. Paſch. 38 Eliz. Holcraft's Caſe.

The Reporter makes a Quære if the Render had been for Years, and by other Indenture, the Uſe declared over from the Conuſees, if this had been a good Uſe by the Principles of the Law Ibid.

3. A. *deviſed to Truſtees and their Heirs till J. S. ſhall be* 21, *and then to J. S, and for Want of ſuch Iſſue then to J. N.* J. S. died before 21. Per Maynard Ld Commiſſioner, This is not ſuch a Remainder as tho' the Particular Eſtate fail, the Remainder ſhall be void. The Fee is deviſed to the Truſtees, and lodged in them, and no abſolute Term carried out, but only a Direction how to diſpoſe the Profits till J. S. be 21. 2 Vern. 138. pl. 137. Paſch. 1690. Levet v. Needham.

4. A. ſeiſed in Fee, by *Deed and Fine* conveys to Truſtees *for 70 Years, if A. ſo long live*, Remainder to Truſtees for 3000 Years, and *after the Death of A.* then to his firſt &c. Sons in Tail Male, whether this is a good Remainder to the firſt &c. Son? The Court took Time to conſider. 2 Vern. 370. pl. 334. Mich. 1699. Penhay v. Hurrell.

But where after the 70 Years to A. the *Remainder* was limited *to Truſtees for the Life of A.* Remainder to the Wife for her Jointure, Remainder to the Heirs of the Body of A. &c the Tail veſted in A.'s eldeſt Son. 2 Vern. 754. pl. 659. Mich. 1717 Elie v. Osburn.

5. A. ſeiſed in Fee *deviſed to B.* his eldeſt Son *for 50 Years, if* he ſo long ſhould live; *and as for my Inheritance after the ſaid Term, I deviſe the ſame to the Heirs Males of the Body* of B. and for *Default of ſuch Iſſue, then to C.* This Deviſe to the Heirs Males of the Body of B. is void in its Creation; Becauſe for Want of an Eſtate of Freehold to ſupport it, it is void as a Remainder, and the Remainder to C. takes Effect preſently. 1 Salk. 226. Hill. 5 W. & M. B. R. Goodright v. Cornish.

And it cannot be an Executory Deviſe; For then the Limitations over are void 4 Mod. 259 S. C. adjudg'd; For it is limited *expreſsly as a Remainder.* 12 Mod. 53. S. C——Comb. 254 adjudg'd Paſch. 6 W. & M. B. R.—— Skin. 408. S. C *And for Default of Iſſue of B.* the 1 *to C for Life, and after C's Deceaſe to C's Son in Tail*, and ſo on B. ſuffered a Recovery, and died. It was held that this Recovery did not bar C. for *B.* had no Freehold, but *was only Tenant for Years* with a *Contingent Remainder*, which was void, not having a Particular Eſtate to ſupport it; ſo that the Franktenement was veſted in C and tho' the Fee deſcends to B yet he remains Tenant for Years, and there can be no Poſſeſſion; for B has the Franktenement ——2 Vern. 735. in the Caſe of Newcomen v. Barkham, cites the Caſe of Long v. Beaumont in the Houſe of Lords, where a Deviſe was to the Heirs Male of Elis. Long by Lucy begotten, and for Want of ſuch Iſſue to his own right Heirs; and that it was there held good, altho' it was not ſaid (to the Heirs of her Body) and that the Deſcription ſupplied the Want of thoſe Words, and they were made good by Words Tantamount.——And ſee Abr. Eq. Caſes 212. S. C. [illegible]

adjudged in the Exchequer contra to the Case of Goodright Corrith, but that Judgment was revers'd in the Exchequer Chamber; and that Reversal was revers'd in the House of Lords, tho' two of the Judges were of Opinion that the Devise was void. Mich. 1-12. between Beaumont and Long.—— Wms's Rep. 220. S. C. in the Exchequer, by the Name of Darbyson v Beaumont, but S. P not taken Notice of.

6 Mod. 134. 190. 226. S. C. but a different Point.

6. In a Scire Facias on a Judgment against Tertenants, it was found by Special Verdict, That one *S. being seized in Fee, conveyed* by Leafe and Releafe *to Truftees* and their Heirs, *to the Ufe of himfelf for* 99 *Years*, Remainder to the Ufe of *Truftees for* 25 *Years*, Remainder to the *Heirs Male of his own Body*, Remainder to his *own right Heirs*; the Queftion was, Whether S. was Tenant in Tail, or only Tenant for Years: And the Court held the Limitation to the Heirs Male of the Body, to be void, becaufe there was no preceeding Eftate of Freehold limited to fupport it, and it fhall not be implied contrary to the Intent of the Conveyance; and if it could be implied, it muft be out of the Eftate given to the Heirs of the Body, which cannot be, becaufe this is a new Ufe, whereas a Refulting Ufe is always from the old Eftate and Parcel of the old Ufe; and here the Eftate takes Effect by Tranfmutation of Poffeffion out of the Seifin of the Truftees, and not like Fenwick and Sutton's Cafe, where the Owner covenanted to ftand feifed to the Heirs of his Body: And yet per Powel J. Even in that Cafe, if there had been an expreſs Eftate limited to the Covenantor, it had been otherwife. 2 Salk. 679. 680. Hill. 1 Ann. B. R. Adams v. Tertenants of Savage.

(C. 4) What is a fufficient Particular Eftate, *where there is a Freehold.*

1. If *Eafe to one for Life, Remainder to the right Heir*; this is a good Remainder to veft on the Death of Leffee for the Inception in his Life. Roll. R. 215. Per Coke Ch. J. Trin. 13 Jac. B. R. in Cafe of Harris v. Auftin, cites 7 H. 4.

2. A. leafes Land *for Life to B.* the Remainder to the *Heirs of the Body of J. D. B. in the Life of J. D. furrenders to A.* the Leffor; the Leafe, notwithftanding the Surrender, fhall fupport the Contingent to the Heirs of the Body of J. D. fo that if J. D. dies, having Iffue, in the Life-time of B. the Iffue of J. D. fhall take the Eftate. Jenk. 248. pl. 38.

3. Leffee for *Life*, Remainder for *Life*, Remainder to the *right Heirs of J. S.* Leffee for Life makes a *Feoffment* in Fee; *J. S. dies in the Life-time of him in Remainder for Life*; this *Right of Remainder for Life* fupports the Contingent Eftate. Jenk. 248. pl. 38.

4 If a *Leafe* be made *to A. for the Life of B.* the Remainder *to C. in Fee*, A. dies before [B.] *An Occupant enters*; here is a Remainder without a particular Eftate, and yet the Remainder continues good. Co. Litt. 298. a.

5. A *Rent* is granted *to the Tenant* of the Land *for Life*, the *Remainder in Fee*; this is a good Remainder, albeit the particular Eftate continued not; for *Eo Inftante, that he took the Particular Eftate, Eodem Inftante the Remainder veſted*; and the Suſpenſion in Judgment of Law grew after the taking the Particular Eftate. Co. Litt. 298. a.

6. If a Man grant a *Rent to B. for the Life of A.* the Remainder *to the Heirs of the Body of A.* this is a good Remainder, and yet it muft *veſt upon an Inſtant*. Co. Litt. 298. a.

7. If *Leffor diſſeiſes his Tenant* for Life, and after makes a *new Leafe for Life to him*, the Remainder in Fee, this Remainder is void, becaufe the Tenant for Life is *remitted* to his Eftate, which was made long before the Remainder appointed; fo that the Eftate Precedent was not made at the Time of the Remainder, and therefore the Remainder is void. Arg. Pl. C. 25. b. Pafch. 4 E. 6. in Cafe of Colchirch v. Penhallin.

8. If

8. If the *Heir endowes* his Mother, the *Remainder in Fee*, the Remainder is void, tho' Livery and Seiſin is made to the Feme, becauſe the Dower has Relation to the Death of the Baron, Cauſa qua ſupra. Arg. Pl. C. 25 b in Caſe of Colthirſt v Bejuſlin.

9. If *Feme* is *Tenant for Life*, and *Confirmation is made to her and her Husband*, this enures as a Remainder to the Husband, and yet it does not paſs out of the Leſſor at the Time of the firſt Eſtate. Per Hales J. Pl. C. 31. b. in Caſe of Colthurſt v. Bejuſlin.

10. A. for Advancement of his Son, and of his Name, Blood and Poſterity, covenanted to ſtand ſeiſed to the Uſe of himſelf for his Life, and after *to the Uſe of his Son and ſuch Wife as he ſhall marry, and the Heirs Male of his Body*. A. dies, and the Son marries; the Conſideration raiſes the ſaid Uſe to the Wife, and the *Eſtate of the Son* will ſupport this Contingent Remainder to the Wife for the Marriage, and then the Eſtate of the Son will change from Eſtate Tail to him alone to a Joint Eſtate to him and his Wife, and the Heirs Male of his Body. Jenk. 328. pl. 52. cites Trin. 5 Jac. in the Court of Wards.

11. A Caſe upon a Demurrer, by Directions out of Chancery for the Opinion of the Judges was, viz. A. ſeiſed of Lands, ſettled them *to the Uſe of Wife for Life*, Remainder *to Truſtees*, in Truſt *to make Leaſes as a Proviſion for his Nephews and Nieces*, and in Default of Iſſue, for a Proviſion *for his own Siſters*; and in Caſe none of his Brothers or Siſters, or any of their Children be living, then immediately, or *after the Term of 21 Years ended*, to the Uſe of *B. and C. and D.* his Brothers *and the Heirs Male*, Remainder *to the Leſſor of the Plaintiff*. *A. died without Iſſue*, *B. and C. died without Iſſue Male*, but *B. had Iſſue a Daughter*, and *A. himſelf had Nephews living*. Reſolved per Cur. That all this is one Sentence, and a *Condition precedent*, *that none of his Brothers or Siſters, or any of their Children be then living*, which is not in the Caſe, and ſo all the Remainders void, and Judgment for the Defendants. 2 Lev. 157. 158. Hill. 27 & 28 Car. 2. B. R. Comberford v. Birch. S. C. 3 Keb. 543. 584.

12. *Eſtate for Life* given *by Deed* will not ſupport a contingent Remainder given *by Will*, in which there is no particular Eſtate to ſupport ſuch Remainder; ſo that in ſuch Caſe the Eſtate Tail paſſes, but he has only Eſtate for Life. 4 Mod. 316. Mich. 6 W. & M. Moor v. Parker. 1 Vern. R. 183. S. P. Arg. ——— Scot's Eſtate for Life, ſuſtained by a former Deed will not ſupport a Remainder which was not created with it, but was created by another Deed. Arg. and the Court ſeem'd to think the Remainder void; but no Judgment was given. 2 Jo. 122. Ireland v. Trin. 30 Car. 2. B. R. Key v. Garble ——— *Eſtate for Life* cannot ſupport the Eſtate of the Heirs of the Body of the Feme, if they attorn. 14 Eliz. Dyer 303. Eſtate to Huſband and Wife for Life, Remainder to the right Heirs of the Wife, the Huſband and Wife levy a Fine with Proclamations, and declare the uſes to the Huſband and Wife for Life, Remainder to the Heirs of the Huſband, and the Huſband dies without Iſſue, the Wife has Eſtate for Life, yet this is a *new Diſpoſition* of the Eſtate, and not a Remainder joined to an Eſtate. Lev. 135. 136. Snow v. Cutler ——— Ingr. 62. S. C. ——— S. P. & S. C.

13. A. upon the Marriage of B. his Son with C. ſettles Lands *to B. for Life*, Remainder *to C. for Life*, Remainder to the Heirs of their two Bodies, Remainder *to B. in Fee*. B. and C. by Deed and Fine mortgaged in Fee; and ſubject to the Mortgage, the Lands are ſettled to the Uſe of *B. for Life*, and after B's and C's Death, *to the Heirs of the Body of C. by B.* to be begotten, Remainder to the right Heirs of B. After the Death of B. C. ſuffers a Common Recovery; The Queſtion was, If the Eſtate to C. for Life by the firſt Settlement, and the Limitation to the Heirs of her Body by the ſecond, did *conſolidate*; and if it did, Whether C's Eſtate was alienable within the Statute of 11 *H.* 7. 20. Jd Wright doubted if they did not conſolidate, tho' by *ſeveral Deeds*, and ſaid the Authorities are only in the Affirmative, that if by the ſame Deed, they ſhall conſolidate, not Negatively, that if by different Deeds they ſhould not; and cited the Caſe of *Pigot*, 5 *Co.* 26. where no expreſs Eſtate for Life was limited, but ariſe by *Implication*, and there it was held that the Eſtate was conſolidated. 2 Vern. R. 4 0. pl. 422. Hill. 1704. Clifton v. Jackſon.

14. A. *deviſes all his Freehold, Copyhold and Leaſehold, and all his Real and Perſonal Eſtate* not before deviſed, *to* 3 *Truſtees, their Heirs, Executors and Aſſigns*, in Truſt *to pay his Son B. an Annuity*; and if he ſhould have any Child or Children, he gives the Reſt, and *Reſidue of the Rents* &c. of his ſaid Truſt Eſtate *during B.'s Life, for the Education* and Benefit of *B's Child or Children*; *and* then goes on, and *gives after B's Deceaſe a Moiety of the Truſt-Eſtate to ſuch* Child and *Children* as B. ſhall leave, their reſpective Heirs &c. *and gives the other Moiety to the* Child and *Children of C. his Grandſon, and every other Child and Children of D. his Daughter, their Heirs* &c. And *if B. dies without Iſſue, he gives the firſt Moiety to C. and other Child and Children of D. and their Heirs*, &c. *and directs an annual Payment to ſuch Wife as B. ſhall marry*. A. died; B. married and had Iſſue a Son and a Daughter, and died; afterwards C. married, and had Iſſue K. a Daughter, and died. It was objected that this Limitation was not good for the Daughter of C. to take by it; becauſe the Truſt Eſtate determining upon B's Death, the Limitation to C's Children was of a legal Eſtate, and being *per Verba de Præſenti*, could enure only as a contingent Remainder, and conſequently K. the Plaintiff, could never take, becauſe not in Eſſe at the Determination of the particular Eſtate by the Death of B. But Ld Chancellor ſaid, The Whole depends upon the *Teſtator's Intent, as to the Continuance of the Eſtate deviſed to the Truſtees*, whether he intended the whole legal Eſtate to continue in them, or whether only for a particular Time or Purpoſe: If an Eſtate be limited to A. and his Heirs, in Truſt for B. and his Heirs, then it is executed in B. and his Heirs; but where *particular Things are to be done by the Truſtees*, as in this Caſe, the ſeveral Payments that are to be made to the ſeveral Perſons, it is neceſſary that the Eſtate ſhould remain in them, ſo long at leaſt as thoſe particular Purpoſes require it; that no Authority has been cited to warrant the Doctrine, that in caſe of ſuch a general Limitation to Truſtees as the preſent Caſe is, that they ſhould have but a particular Intereſt, and then that Intereſt to determine; ſuch a Caſe might indeed be framed, but was never intended here, there being many Purpoſes to take effect, which might endure longer than the Life of B. and the taking it in ſo confined a Senſe, would be making a forced Conſtruction to diſappoint the Teſtator's Intent, which was to make an intire Diſpoſition of the legal Eſtate to the Truſtees; and that the Whole therefore being in the Truſtees, ſupports the ſeveral Uſes that are to ariſe out of their Intereſt, which continuing in them 'till the Birth of the Plaintiff, is good either Way, whether it be taken as a future Limitation, or as a contingent Remainder of a Truſt. Caſes in Equ. in Ld Talbot's Time. 145. Mich. 1735. Chapman v. Bliſſet.

(D) *To whom* it may be limited.

A the Cognisor being ſeiſed in Fee, levied *a Fine to the Uſe of M. his Wife for Life*, Remainder *in Tail Male to B. his Son*, Remainder *to his own right Heirs. B. died without Iſſue*; A in the Life-time of M. the Tenant for Life made a Leaſe for Years and died; Adjudged, that this Leaſe was good, for he had it as Reverſion, and the Limitation to his own right Heirs is void. Cited in Bingham's Caſe. 2 Rep. 91. b. as adjudg'd Trin. 31 Eliz. B R. in Caſe of Fenwick v. Mitforde —— S. C. Lea 182. pl 256. Adjudged a Reverſion and no Remainder; and Gawdy ſaid, that this Limitation is merely void; And Wray ſaid, It was as if he had made a Feoffment to the Uſe of one for Life, without any further Limitation——Mo. 284. pl. 437. S. C that upon Conference of all the Judges of England, it was adjudg'd that it ſhall be taken as the ancient Uſe, and that the Conuſor had never ſevered it from his Perſon. But Anderſon, Periam, Walmſley and Fenner, were e contra, and

1. IF a Man leaſes for Life, the Remainder to the right Heirs of the Donor, this is a void Remainder; becauſe he cannot make his Heir a Purchaſor without departing from the Fee out of him. D. 4 & 5 Ph. 156. 24.

and ſo were Popham then Attorney General, and Coke now Attorney General; Becauſe as they held the Fine or a Feoffment is a Determination of all the old Uſes in the Feoffor or Conuſor, and the Limitation upon the Feoffment is to be ſaid wholly New. ——— And 288 pl. 297. S. C. adjudged accordingly. ——— Read & Morpeth v. Errington. S. C. Adjudged accordingly. Cro. E. 321. pl. 15. Paſch. 36 Eliz. B. R.

2. A Remainder may be limited to the right Heirs of J. S. J. S. being dead, and his right Heir ſhall take it. * 11 H. 4. 74. By this Name. 9 H. 6. 24.

* The right Heir ſhall take it as a Purchaſor, and ſhall not have his Age. Br. Done &c. pl 11. cites S. C. ——— If a Leaſe *for Life* be made, the Remainder to the *right Heirs of J. S. J. S. being then alive*, it ſufficeth that the Inheritance paſſes preſently out of the Leſſor, but cannot veſt in the Heir of J. S. Becauſe, living his Father, he is not in rerum Natura, for Nemo eſt Hæres viventis; ſo as the Remainder is good upon this Contingent viz. if J. S. die during the Life of the Leſſee. Co. Litt. 378. a.

So if a *Rent* be granted *for Life unto the right Heirs of J. S. who is alive*, the *Remainder to T. K.* Now all the Grant is void, becauſe there is not any Perſon who may take immediately, and the Remainder cannot be good but in Reſpect of the particular Eſtate, unleſs in ſpecial Caſes. Perk. 25. S. 55.

2. So if J. S. was alive at the Time, if he dies before the particular Eſtate determines, for the apparent Expectancy which the Law has, that he ſhall have an Heir. 9 H. 6. 24. Contra 11 H. 4. 74.

S. P. For Right Heirs is a good Name of Purchaſe.

Br. Done &c. pl 25. cites 12 H. 7. 25. ——— Ibid pl 33. cites 12 E. 4. 2. pl 3. cites 32 H. 6 ——— S. P. But if there was no J. S. at the Time of the Remainder made, but *one J. S. is born afterwards*, and has Iſſue, and dies before ſuch Time as the Leaſe for Life dies, yet in ſuch Caſe the Heir of J. S. ſhall take nothing after his Death. Br. Done &c. pl. 22. cites 2 H. 7. 13. ——— Br. Grants pl. 151. cites S. C.

4. If the Eſtate be made to one for Life, Remainder to another, Remainder to the right Heirs of the Leſſee, this is a good Remainder in Fee. 11 H. 4. 74. Agreed.

Br. Done &c. pl 11. cites S. C.

5. If a Man ſurrenders a Copyhold to the uſe of J. S. for Life, the Remainder to the uſe of an Infant en Ventre ſa Mere, this is a good Remainder, * tho' he was not born at the Time of the Creation thereof. Mich. 13 Jac. B. R. Agreed.

See Copyhold. * Fol 476.

6. If a *Rent* be granted *unto J. S. for Life*, the *Remainder in Fee unto him who ſhall firſt come to Pauls the next Day in the Morning*, this Remainder is good upon Condition, viz. if J. S. doe not die before the Time, and alſo if one come to Paul's the next Day in the Morning, and if *he who firſt comes is not a* Monk, or other *Perſon* who is *diſabled to take* by the Grant. Perk. S. 56.

7. *So* if the Remainder be granted *unto him whom J. S. ſhall name, within 3 Days* &c. Perk. 26. S. 56.

(E) *By what Words* it may be created.

1. IF a Man leaſes for Life, and that after his Death, the Lands Redibunt to another, this is not a good Remainder, tho' it be Redibunt inſtead of Remainebunt. 18 E. 3. 28.

S. P. by Haughton J. Roll Rep. 319. in Caſe of Blandford v. Blandford. cites 8 E. 3. 18. but it ſhould be as in Roll. ——— Fl. C. 170. b. in Caſe of Hill v. Grange, cites S. C.

2. A. gives Land to *J. S. in Tail, and for Default of Iſſue to W. N Habendum in Tail.* It is a good Remainder by this Habendum, without a Word of Remainder; per Cur. and well, for the firſt Words of Gift extend to both. Br. Done &c. pl. 38. cites 9 E. 2. & Fitz. tit. Feoffments &c. 107.

3. If Land be given *to the Baron and Feme, and to the Heirs of them, et aliis Haeredibus eorum si Haeredes de Corporibus eorum exeuntes defecerent*; if the *Son of the Baron and the Daughter of the Feme intermarry*, and the *Baron and Feme die without Iſſue of their Bodies*, the Son of the Baron and his Feme (Daughter of the Feme) ſhall not inherit, and yet the one is Heir to the one, and the other is Heir to the other. Per Preſton. Quære & ſtude inde; for this ſeems to be a Remainder in Fee which ſhall ſurvive. Br. Tail & Dones &c. pl. 12. cites 5 H. 5. 6.

4. Leaſe for Life to A. and that *afterwards B. ſhall have the Profits*, is a good Remainder. Per Haughton J. Roll. R. 319. cites 36 H. 8. b. and ſays it is much ſtronger in a Deviſe.

Hutt. 87. S. C.—*But where a Leaſe was made to G by Deed Poll Habendum to G. and his Wife and Daughter ſucceſſively, ſicut Scribuntur & non inantur* in Ordine; G. died, and then the Wife died. Reſolved that this was a good Eſtate in Remainder to the Daughter, becauſe the ſubſequent Words Sicut Scribuntur &c. make their Eſtates certain enough, and ſhall be taken to be, Sicut ſcribuntur & nominantur in eodem Charta. Godb. 220. pl. 320. Mich. 11 Jac. C. B. Hill v. Grubham.—S. C. Lee. 246. pl. 402. Grubham's Caſe accordingly.

5. J. S. made a Leaſe *for Life to A.* Habendum *to A. and B. and C. and D. for Term of their Lives, and the Lives of either of them ſurviving ſucceſſively*; adjudged that B C nor D. can take by way of Remainder, which cannot be joint, becauſe of the Words (ſucceſſively &c.) and in Succeſſion they cannot take for the Uncertainty, who ſhall begin and who ſhall follow. Hob. 313. pl. 390. Trin. 27 Eliz. B. R. Rot. 850. Windſmore v. Hobart.

(F) *Who ſhall have* the Remainder.

S. C. Roll. Rep. 238. pl. 9. Mich. 13 Jac. B. R. & ibid. 327. pl. 28. Hill. 13 Jac. B. R. & ibid. 438. pl. 3. Hill.

1. IF a Copyhold be ſurrendered to the Uſe of a Feme Covert and a Stranger, the Remainder to the Right Heirs of the Bodies of the Baron and Feme begotten, and after the Feme dies having Iſſue by the Baron, yet he ſhall not have the Remainder during the Life of the Baron; For he ought to be Heir of the Bodies of both, who ſhall take it. Reported 13 Ja. *Lane v. Pannel.* 14 Ja. Adjudged.

Jac. B. R. But the Report there (as it is printed) is not very clear, there being in the State of the Caſe, the Word (ſurrender) twice, which, in the 2d Place where it is mentioned, confounds the Senſe; but afterwards the Stranger ſurrendered his Moiety to the Baron and Feme and their Heirs, and they were admitted accordingly, after which the Baron ſurrendered it in Fee to J. D. who was admitted; after this the Feme died leaving Iſſue, and then the Baron died. Adjudged per tot. Cur. That the Iſſue cannot have Treſpaſs; For when the Stranger ſurrendered his Moiety to the Uſe of the Baron and Feme, this was a Severance of the Jointure between him and the Feme, and the Baron alienting the Whole, the Alienee had a Freehold for the Life of the Feme defeaſible by the Feme, and the other Moiety for the Life of the Stranger, and then when the Feme died, the Eſtate of the Defendant [the Purchaſor] is determined as to one Moiety, and then the Remainder of that Moiety ought to veſt [if at all] but the Iſſue (who was the Plaintiff) being Heir of the Body of the Feme begotten by the Baron could not take the Remainder limited to the Right Heirs of the Body of the Baron and Feme during the Baron's Life; For during his Life he cannot have an Heir, and he that ought to take the Remainder muſt be Heir of the Body, both of the Baron and Feme, or otherwiſe he ſhall not take (as the Court held ſtrongly) and therefore the Remainder of the Stranger as to this Moiety [is gone] and conſequently tho' the Baron afterwards died yet [the Iſſue ſhall never have it]

Dal. 20 pl. 8. 2 & 3. P. & M. S. C. —S. C. cited Le. 102 pl. 133 Paſch. 30 Eliz. B. R. in the Caſe of Allen v. Palmer.

2. So if the Baron makes Feoffment to the Uſe of his Wife for Life, the Remainder to the Right Heirs of the Bodies of the Baron and Feme the Iſſue of their Bodies ſhall not have the Remainder during the Life of the Baron, tho' the Baron has not any Eſtate in the Land. D. 1 Ma. 99. 71.

3. If a Man devises Land to 2 for their Lives, Remainder to their 2 Sons, equally to be divided, and to their Heirs, and each to be the other's Heir, and that if they both (naming them) die without Issue, that it shall remain to another; By these last Words this is an Estate Tail, and if one dies without Issue, his Part shall go to the other in Remainder. 3 Le. 12. Ja. B. Resolved per Cur. between Ingleton and Smith.

thought it was inserted in his Abridgment upon the Report of some other Person, and to confirm this, a Report was shewn by Dolben J. in a very fair MS. of [illegible] and Smith, of the same Year and Term, and in the same Court which the Judges [illegible] Case interced in the Abridgment; But the Case was of a *Surrender of Customary Lands*, and not upon a Devise; And it was agreed upon the Trial at the Bar, That if a Copyhold be surrendered to the Use of 2 Sons *in Tail*, and *to the one without Issue, to the Heir* of him that dies *without Issue*, then to the Use of *that survives*, and after one dies without Issue the Survivor shall have the Whole. 2 Jo. 274. Mich. 33 Car. 2. B. R. in the Case of Holmes v. Meynel — 2 Show. 128, 130. Mich. 33 Car. 2. B. R. in S. C. by Pemberton in Ch. J. accordingly, and that Roll was aware of Age sufficient to report at that Time — Raym. 455. in S. C. accordingly.

Cowper v. [illegible]

4. If a Man devises to J. his Son in Taile, and that if he dies without Issue, it shall remain to the Right Heirs and Posterity of the Devisor and his Name for ever equally to be divided between them, Part and Part alike, and dies, and after J. dies without Issue, there being at the Time of the Devise and at his Death 2 Daughters of the Sister of J. and one G. the Uncle of J. In this Case the Uncle, that is the next of the Name to the Devisor, yet inasmuch as he is not to be the Devisor, the Daughters being alive he cannot take it for [illegible] wife; and therefore the Devise is void, and the Daughters [illegible] the Land as tenants in Common Law. 3 Le. 12. Ja. B. Adjudged between Cannon and Clark.

renden v. Clark — Jenk. 204. pl. 42. Says, This is a new Form of Inheritance, if the Devisor should have this Land, and should have a Daughter who bore a Son to the Life of his Grandfather, or afterwards; The Fee upon the Death of the Grandfather should be in Abeyance during the Life of the Daughter, if this Estate should be allowed. Judged, and affirmed in Error.

5. If a Gift be to A. for Life the Remainder to the Heirs Males, or Heirs Females of J. S. and J. S. dies, he who shall have the Remainder ought to be Heir at Common Law of J. S. and shall have it as Heir Female, because it is the Gift, or Conveyance by which he claims the Remainder. 1 Leon. 103. B. R. Cited by Cur.

L. C. Cowper in the Case of Sir [illegible] Graham, & e Contra

2 Vern. 725. Pl. 630. Recites with the Opinion of Coke and Vaughan in Shelley's Case, and that of Hobart in the Case of Coulton v. Clark [pl. 4 above] their Opinions not to be (as he says) upon the Point adjudged; And that Reason, Right Reason and Common Sense speak against those Obiter Opinions.

6. Where a *Lease* is made *for* Term of *Life Remainder to the Heirs of W. J.* there the eldest Son of W. J. if W. J. be dead at the Death of the Tenant for Life, shall have Fee Simple by these Words (to the Heirs of W. J.) without more. Fr. Estates, pl. 4. cites 22 H. 6. 15.

7. Tenant in Tail suffered a Recovery to the Use of himself and Wife for Life, Remainder *Sectori Puero* of the Body of the Husband in Tail, Remainder over; and afterwards the said Husband and Wife levied a Fine to the Use of himself and his Wife for Life as aforesaid, Remainder to the *Eldest Child* of the Husband in Tail, Remainder over; The Wife died, and 5 Years passed. The Husband married again, and had Issue a Daughter and a Son afterwards, and then the Father died; and then 5 other Years passed; Adjudged that the Son shall have the Land and not the Daughter, by Reason of the first Limitation *Sectori Puero* [*Primo.*] Bendl. 195. pl. 233. Mich. 13 & 14 Eliz. Anon.

Dyer, pl. 36. Humfrey's Case, reports it on the 5th Year of Q. Eliz. Eadem Chil. 15 & the Report. Per 2 Judges against [illegible] — And so [illegible]

40 reports it Sectori Puero, and Judgment for the Son. — 2 Le. 219. Cr. That on the Words in English in the 2d Deed Judgment was given for the Daughter. — Mo. 75. he says it Puero, and Judgment on the English Words for the Daughter — Ow. 94. Lacey's Case, 8 Co. reports it to be Puero, and that 2 Justices held for the Son — Dyer reports that there were 2 Deeds, the first in Latin and the other in English.

3. Le. 56

So Remainder on Eſtate for Life of Lands limited (in Case said) to the Right Heirs of J. S. who has Iſſue 2 *Sons*, the eldeſt ſhall have it. Per. Wray Ch. J. 2 Le. 219. Pl. 275.

8. *Land for Life* to J. S. *Remainder to the Right Heirs of J. B. who has Iſſue* 3 *Daughters*, and dies, the eldeſt ſhall have the Remainder, and not the other with her; Becauſe ſhe is the moſt Worthy. Per Wray Ch. J. 2 Le. 219. pl. 275. Paſch. 16 Eliz. B. R. in Humphreſton's Caſe.

9. A ſeiſed of certain Lands, and having 2 Sons, deviſed Part of his Lands to *his eldeſt Son in Tail*; and the other *Part of his Lands to his youngeſt Son in Tail*, with this Clauſe in the Will, That *if any of his Sons died without Iſſue*, then *the whole* Land *ſhould remain to a Stranger in Fee*, and died, the Sons entered into the Lands deviſed to them reſpectively, and the *younger* Son *died without Iſſue*, and he to whom the Fee was deviſed entered; It was adjudged, That this Entry was not lawful, and that the eldeſt Son ſhould have the Land by the Implicative Deviſe. 4 Le. 14. pl. 51. Mich. 32 Eliz. C. B. Anon.

10. A. deviſed his Eſtate to Truſtees to convey the ſame *to B. for Life*, Remainder *to Truſtees during his Life to preſerve contingent Remainders*, Remainder *to his 1ſt Son &c. in Tail Male*, Remainder *to his Daughters &c.* And *if B. died without Iſſue*, then he deviſed *that the Premiſſes be ſettled in Fourths, viz. one 4th to C. in Fee, another 4th to D. in Fee, another 4th to E. in Fee, and the remaining 4th to F. in Fee; And in Caſe the ſaid C. D. E. and F. or any of them ſhould be dead at the Time when by the Settlement his Eſtate was to devolve upon them*, then *the 4th Part which the Perſon ſo dead ſhould have been intitled to, if living, ſhould be conveyed to the reſpective Heirs of the Perſon ſo dead.* C. D. E. and F. were Siſters of B. afterwards *dead living B.* It was objected, That the 4th Part of F. was not to deſcend to B. her Brother and Heir at Law, but be ſubject to an *executory Deviſe to ſuch Perſon as would be Heir at the Death of B. without Iſſue as aforeſaid*, and not to veſt in the mean Time; But Ld C. Parker held that this Remainder in Fee of the 4th Part veſted in B. as Heir of his deceaſed Siſter; For there being a Deviſe of the 4th Part to her in Fee, the Words directing a Conveyance to be made to her Heir in caſe of her Death, are no more than what would otherwiſe have been implied, and *Expreſſio eorum quæ tacite inſunt* [illegible] 2 Vern. Rep. 600. 606. pl. 175. Hill. 1719. Blackborn v. Edgley.

(G) How it may be created. *What* ſhall be ſaid *a Remainder, and what an* Eſtate *in Poſſeſſion.*

1. IF a Gift be to the Feme and to the Heirs of the Body of her Baron (who is dead) of her Body begotten, this is not a Remainder in their Iſſue, but he ſhall take jointly with her. 5 H. 4. 3. Quære Fitzh. Tayle. 20. Per Hankf.

2. In this Caſe the Iſſue and the Feme ſhall be Jointenants for Life, with the Remainder to the Iſſue in Taile. 2 E. 3. 28. Adjudged.

Fol. 414.

3. If a Gift be to one for Life, the Remainder to his Right Heirs, this Remainder is executed immediately, and does not reſt in Contingency, becauſe he has the Frankfenement to whoſe Heirs the Remainder is limited. 11 H. 6. 13. 38 E. 3. 26. b. 37 El. B. R. Agreed per Cur. between Clark and Daby.

But where A. ſettled Lands to the Uſe of himſelf in Tail, Remainder to B. and the *Heirs Male of his Body*, *Remainder to C. in Tail*, *Remainder in Fee to his own Right Heirs*, with a *Power of Revocation as to the Remainder to B. only*, and to limit new Uſes; And A. afterwards reciting his Power, but miſ-recites the Eſtate of B. by omiting the Words (of his Body begotten) he declared he revok'd the ſaid Uſes to B. and his Heirs Male; and in the ſame Deed limits the ſaid Eſtate *to the ſaid B. and his Heirs Males*, without ſaying of his Body

4. So if a Gift be to one for Life Remainder to his Heirs Males, this is a Fee Simple executed. 11 H. 6. 13.

Fody begotten. This was adjudged an Eſtate Tail; For were it conſtrued a Fee ſimple it would deſtroy the Remainder to C. which A. could not do. Carth 292. Mich 5 W. & M. C. R. Grimore v. Harris.

5. When the Anceſtor, by any Gift or Conveyance, takes an Eſtate of Franktenement, and in the ſame Gift or Conveyance an Eſtate is limited immediately to his Heirs in Fee or in Tail, there the Word (Heirs) is a Word of Limitation, and not of Purchaſe; For his Heir ſhall be in by Deſcent, and to the Remainder executed. 1 Rep. 104. Shelly's Caſe. 40 E. 3. 9. b. 45 E. 3. 19. 17 E. 3. 43. b. 64.

See pl. 7. in the Notes — (H) pl. 3 — Co. Litt. 22. b. S.P. — Co Litt 3-6. b. S.P. adviſe in

Words it be limited by way of Remainder. —— *As Fine* was levied *to the Father for Life*, the *Remainder to the Eldeſt Son in Tail*, the *Remainder to the right Heirs of the Father*, and the *Father dies*, and after *the Eldeſt Son died without Iſſue*, the Youngeſt Son ſhall be adjudged in as Heir to his Father of the Fee-Simple, and not as Purchaſor, by Name of Right Heirs to his Father, and the Father had only for Life. Br. Eſtates, pl. 6. cites 40 E. 3. 9. —— *But* if the *Eldeſt Son had died without Iſſue in the Life of the Father*, there the Father had been in Fee; For it was agreed, That where a Man gives Land to me for Life, the Remainder to my right Heirs, there I have Fee-Simple; quod nota. Br. Eſtates, pl. 6. cites 40 E. 3. 9. —— Br. Diſſent, pl. 6. cites S. C. accordingly, tho' the Younger Brother inſiſted, That he was in as Purchaſor; becauſe an Eſtate Tail, and an Eſtate in Fee, could not be in his Brother Simul & Semel. —— Br. Relief, pl. 2. cites S. C. —— Br. Done &c. pl. 6. cites S. C. —— Br. Nuper Obiit, pl. 1. cites S. C.

A. conveyed to the Uſe of *himſelf for Years*, Remainder to *his Eldeſt Son in Tail*, Remainder to the *Heirs of A.* tho' A.'s Meaning was, (as appears by the Words) That his Heir ſhould take as a Purchaſor, yet it was ruled according to the Rules of the Law, and not according to his Meaning, &c. That A. ſhould take it as a Fee executed in himſelf. Cro. E. 334. Trin. 36 Eliz. C. B. in the Caſe of Frederick v. Frederick, cited as ruled by the Advice of the Juſtices in the Court of Wards, in the Earl of Bedford's Caſe.

6. If a Gift be to A. for Life, the Remainder to the right Heirs of him and B. (B. being alive at the Time) It ſeems that this is executed for a Moiety; for if A. had not had a particular Eſtate limited to him before, his right Heir and the Heir of B. ſhould have it in Common; And tho' here this ſhall be executed by Operation of Law, yet he ſhall not have the Whole Remainder of the other's Moiety, not capable; For it was not limited to himſelf. Dubitatur. D. 37 Eliz. B. R. between Clark and Daby.

7. If a Man deviſes to R. his Daughter for Life, and if ſhe marry after my Deceaſe, and have Heir of her Body, that then that Heir ſhall have it after her Death, and the Heirs of her Body, that then that Heir ſhall have it after her Death, and the Heirs of their Bodies, (Per Eadem verba) and if ſhe happen to die without Iſſue, then I deviſe it to P. my Daughter; This is an Eſtate Tail executed in R. and the Iſſue of R. ſhall not have this by Purchaſe upon a Contingency; For the Word (Heir) is Nomen Collectivum, and is as much as if he had ſaid (Heirs) inaſmuch as he ſaid after (and if ſhe die without Iſſue). Dubitatur. D. 37 El. B. R. between Clark and Daby.

Mo. 593. pl. 803. Clark v. Day, is, That A. ſeiſed in Fee deviſed to R. his Daughter for Life, and if ſhe marry after my Deceaſe, and have Iſſue of her Body, lawfully begotten, *then I will, That her Heir after my Daughter's Death ſhall have the Land, and to the Heirs of their Bodies begotten*, the Remainder *to a Stranger in Fee*. It was adjudg'd, That ſhe had no Eſtate Tail, but for Life only; and that the Inheritance was in her Heirs, Purchaſe, remaining in Abeyance all her Life, and ſettling in the Inſtant of her Death; and therefore her Baron was not Tenant by the Curteſy. —— S. C. Cro. E. 515. pl. 5. Hill. 39 Eliz. ſtates it as Mo. 593. does; and there Gawdy and Fenner held, That R. had an Eſtate for Life only, it being limited expreſſly ſo, and then her Heir ſhall take as a Purchaſor; But Popham Contra; For the Eſtate is limited to the Anceſtor, and afterwards limited to the Heir, and ſhall execute in the Anceſtor, eſpecially the Words being (If ſhe have any Heirs) and therefore intended that any Heir ſhall have it. Adjornatur. —— Gawdy and Fenner held, That the Iſſue was a Purchaſor; but Popham and Clench held it an Eſtate executed in R. Ow. 148. S. C. by Name of Lilly v. Taylor —— S. C. cited by Ld Ch. J. Raymond; who ſaid, That the Caſe is really Clark v. Day, and is enter'd on the Roll Hill. 35 Litr. Rot. 40. That the ſame Caſe is reported in Ow. 148. Mo. 593. and in 1 Ro. Ab. 832. K. the Caſe was, Joan Marſh deviſed Lands to Rofe her Daughter for Life, and if ſhe have Heir of her Body, then I will, That the Heir after my Daughter's Death ſhall have the Land, and to the Heirs of their Bodies begotten; and for Default of ſuch Iſſue, Remainder over. It is ſaid in Croke, That it was at firſt agreed by all the Juſtices, That a Deviſe to one and the Heir of his Body, is an Eſtate Tail, and ſhall go to all the Heirs of the Body, Heir is Nomen Collectivum; ſo ſays 1 Ro. Ab. 832. K. according to Popham Ch. J. and Fenner. Sed Adjornatur. Moor, who is a very good Reporter, ſays, It was adjudg'd, That the Iſſue had an Eſtate for Life, and the Inheritance in her Heir by Purchaſe reſting in Abeyance all her Life, and reſting in the Inſtant of her Death. When Croke reported this Caſe he was a young Man, and Rolls had not then begun to ſtudy the Law, and had this Caſe only by Hearſay; his Judgment is often cited upon this Point, but Moor ſays it was adjudg'd; which is agreeable to my Lord Hale's Manner of citing it, when ſo

And ſo is the Caſe of Clerk and Day; but this is not truly ſtated in any of the Books. Moor comes the neareſt to it, as it is upon the Roll. The true State of the Caſe was; M. ſeiſed in Fee, deviſed Lands to her Daughter Roſe for Life; and if ſhe marry after my Death, and have any Heirs lawfully begotten, I will, That her Heir ſhall have the Lands after my Daughter's Death, and the Heirs of ſuch Heirs; ſo that upon the Whole, Iſſue is not properly a Word of Limitation, but may be taken either one Way or t'other. In a Conveyance it is a Word of Purchaſe, and not of Limitation; but in a Will it is governed and directed by the Intent of the Party; Here it is Deſignatio Perſonæ. Gibb. 24, 25. Patch. 1 Geo. 2. B. R. in the Caſe of Shaw v. Weigh.

A *Deviſe to A. and to the Iſſue of his Body* makes an Eſtate Tail, if *A. has no Iſſue at the Time*;

8. If a Gift be to One and his Eldeſt Son, if he has no Son at the Time, but born after, yet this is not a good Remainder; Becauſe he ought to have taken jointly if he had been in Eſſe at the Time, and ſo ſhall not have any Eſtate. 18 E. 3. 59. 17 E. 3. 30. Adjudged. Contra Pl. C. 29. 1 Rep. 101. Shelly's Caſe.

but if he *has Iſſue*, then it is a Joint Deviſe. But if it be *after his Death to his Iſſue*, he having Iſſue at the Time, they take by way of Remainder Per Hale Ch. J. Vent. 229. and ſaid, This Tail Point was the only Point adjudg'd in * Wild's Caſe, and there alſo againſt the Opinion of Popham and Gawdy. —— * 6 Rep. 17.

S P. Br. Deviſe. pl. 14. cites 3 H. 6. 3. But that it is contra upon a Gift;

9. If a Man deviſes Land to one for Life, the Remainder to another in Fee, and dies, and after the Deviſee for Life refuſes, the Remainder ſhall be in poſſeſſion preſently; for the Deviſee ſhall not deſtroy the Deviſe. 10 Ja. B. Per Cur.

For there if the firſt refuſes the Livery of Seiſin, he in Remainder has no Remedy; becauſe it cannot take Effect but by the Livery.

S. P. as to the Deviſe 1 Rep. 101. a. in Shelly's Caſe, cites 3 H. 6. 36. a. and that ſo it is in the Caſe of a Feoffment to the Uſe of One for Life, and after to the Uſe of another in Fee. And ſays, So note, That the Limitation in Uſes and Eſtates given by Deviſes are mate'ia together, and that ſo the Judges there took the Conſtruction of Deviſes, and of Eſtates executed in Uſe, to be all one, viz. According to the Meaning of the Parties.

Cro. E. 269. S. C.

10. The *Law delights in veſting Eſtates*, and Contingencies are odious in the Law, and are the Cauſes of Troubles; whereas the Veſting them is the Cauſe of Repoſe and Certainty. Per Coke Ch. J. 2 Bulſt. 131. cites 35 Eliz. Vaux's Caſe, and Truepenny's Caſe, alias, Baldwin v. Lock, and Juſtice Windham's Caſe.

11. Where *Gift* is made *in Tail by Fine*, *Remainder to Tenant in Tail in Fee*; the *Tenant had Iſſue 2 Sons by divers Venters*, and *died*; the *Eldeſt enter'd and died without Iſſue*, and his *Heir Collateral enter'd*, and the *Youngeſt Son brought Scire facias to execute the Remainder in Fee*, and had Execution; For the Fee was not executed in the Eldeſt Son, by Reaſon that he was ſeiſed of the Tail, and the *Fee was in Abeyance*, and yet was in him to give, charge and forfeit. Br. Execution, pl. 67. cites 24 E. 3. 30, 31.

12. Land is given *to A. for Life*, *Remainder to B. for Life*, *Remainder to the right Heirs of the ſaid A.* there A. may give or forfeit the Fee-Simple, tho' it be not veſted in him during the meſne Remainder; quod nota. Br. Done &c. pl. 55. cites 24 E. 3. 70. & P. 5 E. 4. fo. 2.

2 Le. 83. pl. 110. in S. C Arg. cites S C. and S P.

13. A. deviſed Land *to his Wife for Life*, ſo that *if ſhe be diſturb'd*, then the Land *to remain to J. S.* in Fee; Here is no Remainder till the Wife be diſturb'd. Arg. 3 Le. 182. pl. 233. in Large's Caſe. — cites 24 E. 3. Fitzh. Formedon 68.

14. Land was given by Fine *to A. B. and C.* and to the *Heirs of the Body of C.* and for Default of ſuch Iſſue *Remainder to the right Heirs of A.* C. dy'd without Iſſue, B. dy'd, and afterwards A. dy'd, his Heir brought a Scire facias out of the Fine. Adjudg'd, That it does not lie; For the Fee was veſted in A. the Defendant's Father, tho' Ex vi Verbi the Remainder was limited not to the Father but to his Heirs. Per Manwood J. 3 Le. 20. in Cranmer's Caſe. — cites 40 E. 3. 20.

15. If a Man *leaſes* his Lands *for 9 Years*, *upon Condition* that *if the Leſſee be diſturbed within the Term*, that the *Leſſee ſhall have Fee*; if the Termor aliens within the Term before Diſturbance, this is a Diſſeiſin to the Leſſor, by which he may enter or have Aſſiſe; For the Fee is not

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in him till the Condition is broken. Br. Conditions, pl. 121. cites 43 Aff. 41.

16. In Dower *Land was given to the Baron and Feme in Tail*, the *Remainder to the Heirs of the Body of the Baron*; and after the *Feme died without Iſſue*, and *he took other Feme and died*, the 2d Feme ſhall be endow'd; For the *Remainder in Tail veſted in the Baron*, by reaſon that the Donee was only Tenant for Life in Effect, after the Death of his Feme without Iſſue. Br. Dower, pl. 25. cites 50 E. 3. 4.

In this Caſe if after the Death of the Feme the *Baron loſes by Default in Præcipe quod Reddat*, he *ſhall have* Quod ei *Deforceat, quod clamat Tenere ſibi et Hæredibus de Corpore ſuo*; For the firſt Tail was determined by the Death of the Feme without Iſſue, and then the Baron being in Effect but Tenant for Life by the *firſt Eſtate, this now ſhall merge in the Remainder*; and therefore the *ſecond Tail was executed at the Time of the Recovery* by Default. Br. Quod ei deforceat, pl. 11. cites 50 E. 3. 4. Per Littleton.

17. If a Man *leaſes to A. for Life*, the *Remainder to B. in Fee*, and after the *Tenant for Life leaſes to the ſaid B. for the Life of B.* and *B. dies*, his Feme is barred of Dower, and ſo ſee that B. was not ſeiſed in Fee, nor was it a Surrender; For if A. ſurviv'd B. then A. ſhould re-have the Land. Br. Eſtates, pl. 67. cites H. 13 R. 2. and Fitzh. Dower 55.

18. Where *Eſtate* is made *to the Baron and Feme for Life of the Feme*, the *Remainder to the Baron in Tail*, the *Remainder to the right Heirs of the Baron*, he has but an Eſtate for the Life of the Feme during her Life. Br. Eſtates, pl. 45. cites 8 E. 4. 20.

19. If a Man *gives* Land *to One who has a Feme, and to a Feme who has a Baron alive, and the Heirs of their 2 Bodies begotten*, this is a good Tail; For the Feme of the Man may die, and the Baron of the Feme alſo, and then the Man and the Feme may intermarry, and ſo they are ſeiſed in Tail immediately. Br. Eſtates, pl. 22. cites 15 H. 7. 10.

A Deviſe to a Man and the Heirs of his Body by a 2d Wife, makes an Eſtate Tail executed, tho' the *Deviſee has a Wife at the Time*. Per Hale Ch. J. Vent. 228 Mich. 24 Car. 2 B. R. in the Caſe of the King v. Melling.

20. Gift *to Baron and Feme*, and to the *Heirs of the Body of the Survivor*; becauſe it is uncertain who ſhall ſurvive, the Eſtate Tail is not veſted. 10 Rep. 51. in Lampet's Caſe, cites Reg. Orig. 239. b.

Co. Litt. 26 a. it veſts not till there is a Survivor.

21. Feoffment in Fee to the Uſe of *A. for Life*, *Remainder to* the Uſe of *A. for Life*, *and the Heirs of his Body*, A. has Eſtate Tail executed in Poſſeſſion. Per Manwood J. 3 Le. 20. Hill. 14 Eliz. C. B. in Cranmers's Caſe.

22. Lands were aſſured in Fee by *Fine to A. to the Uſe of B. and his Wife*, for their Lives, *and of the longer Liver of them*, *Remainder to* the Uſe of *C. and his Wife in Tail*; and *for Want of ſuch Iſſue, to* the Uſe of *B. and his Heirs for ever*; *provided, that* if B. ſhould have Iſſue of his Body, or any Wife, which he ſhould have at the Time of his Deceaſe, ſhould be Enſeint by him, then after the Birth of ſuch Iſſue, and *after 500 Marks paid to* J. S. *within 6 Months after* ſuch *Iſſue born*, the Uſe of *the* ſaid *Lands ſhould*, after the Deceaſe of B. and his Wife, and after the ſaid 6 Months ended and expired, *be to the ſaid B. and the Heirs of his Body*; *and in Default* of ſuch Iſſue *to the right Heirs of B.* The Wife died, and the Huſband married again. It ſeemed to Plowden and Dyer, That before Performance of the Contingent B. had not any larger Eſtate than he had before. D. 314. a. pl. 96. Trin. 14 Eliz. Anon.

23. There is a Difference when a *Remainder* is *joined to the particular Eſtate by the Act of the Grantor himſelf*, and when *by any Purchaſe, Grant, or any Act after*; for in the firſt Caſe the Remainder ſhall be executed, but in the other Caſe not. Per Manwood. 2 Le. 6. pl. 7. 16 Eliz. C. B. in Cranmer's Caſe.

A. has an Eſtate for Life by Marriage Settlement, Remainder to his firſt and other Sons of the Marriage in Tail Male; he who has the Reverſion in Fee, and who is Heir A. 11, recites this Settlement in his Will, and *deviſes* the Lands *to the firſt Son of A.* According to the Settlement, *viz. A. dies without Iſſue* of that Marriage, he charges the Land with 400 l. and gives A. 100 l.

Power to make a Jointure to any ſecond Wife, and then deviſes to the firſt and other Sons of A. in Tail Male; and if he die without Iſſue, then he *deviſes* the Land *over in Fee*; the Teſtator dies, A. having *no Son at the Time of the Teſtator's Death*. A. ſuffers a Recovery. The Queſtion was, What Eſtate A. had, whether Fee, Fee-tail or for Life. Holt Ch J ſeemed to think this a Fee, and ſaid that admitting that (*Iſſue*) would be an Implication of an Eſtate to the Heirs of the Body of A. yet he could not be Tenant in Tail; for if one be *Tenant for Life by Deed, and Reverſioner deviſes to his Heirs* of his Body, this being *by ſeveral Conveyances*, the Eſtate is not executed. Skin. 558. Mich. 6 W. & M. B. R. Moor v. Parker.——S. C. 4 Mod. 316. accordingly.——Ld. Raym. Rep. 37. Paſch. 7 W. 3 Adjornatur. But by Holt Ch. J. It is impoſſible to make this an Eſtate Tail in B. for nothing is given to him by this Deviſe, but he has only the Eſtate that he had by the firſt Settlement. And he cited 29 Ed 3 where Eſtate for Life is given to A. Remainder to the Heirs of the Body of B. A. aſſigns his Eſtate to B. by which B. becomes Tenant for the Life of A. Remainder to the Heirs of his Body, yet he has not an Entail executed in himſelf, but the Remainder continues in Contingency. So here, there being two ſeveral Conveyances, this Deviſe cannot be tack'd to the Eſtate for Life limited by a different Conveyance; quod fuit conceſſum by the other Juſtices.

Per Holt Ch J. Skin. 559 S P in Caſe of Moor v. Parker.

24. *As*, a Leaſe is made to *A. for Life*, *Remainder to the right Heirs of B. B. purchaſes A.'s Eſtate*, the Eſtate in Remainder is not executed; for it is not conveyed by the Grant of the firſt Grantor, but by the Act of another Perſon after the Grant. 2 Le. 7. Per Dyer Ch. J. in Cranmer's Caſe.

25. A. makes a *Leaſe for Life to B. Remainder to A.'s Executors for* 20 *Years*, *Remainder in Fee to a Stranger*, the Remainder for Years is good; for the Leſſor cannot limit ſuch an Eſtate to himſelf, and the Executors ſhall take the Eſtate as Purchaſors, and the Term ſhall be in *Abeyance* till A.'s Death. Per Dyer Ch. J. 2 Le. 7. in Cranmer's Caſe.

4 Le. 2. S. C. but not S. P.

26. Feoffment in Fee to the Uſe of his Will, and deviſed that the Feoffees ſhall ſtand ſeiſed to the Uſe of his eldeſt Son *B. for Life*, without Impeachment of Waſte, and after his Death *to the next Heir of the Body of B. and M. his Wife*, lawfully begotten, *for* the Term of *the Life of the ſame Heir*, and after the Death of the ſame Heir to the Uſe of *the next Heir of the ſame Heir* lawfully begotten; and for Default of ſuch Iſſue *to the Uſe of the Heirs of the Body of B. and M.* and for Default *to the right Heirs of B.* Proviſo on any Alienation &c. by any of the ſaid Heirs, the Uſe ſo limited to be void, and the Feoffee to be ſeiſed to the Uſe of the Heir Apparent of ſuch Offender, as tho' he were dead; B. had Iſſue C. and D. a Son, and died; C. had Iſſue two Sons E. and F.--C. alien'd by Fine to J. S. Afterwards D. levied a Fine, and therein releas'd with Warranty to J. S. At the Time of the Fine levied by D. his Heir Apparent was E. but afterwards D. had Iſſue two Sons F. and G. Jefferies J. thought that the *Limitation from Heir to Heir* was in Effect an Eſtate Tail, and that the ſpecial Words will not make another Eſtate to paſs than what the Law wills. Per Gawdy J. Every Iſſue begotten between B. and M. ſhall have an Eſtate for Life ſucceſſively, and a Remainder in Tail expectant as right Heir of the Body of B. and M. and this Eſtate Tail ſhall not be executed in Poſſeſſion, becauſe of the Meſne Remainder for Life limited to the Heir of the Bodies of B. and M. and that theſe Meſne Remainders, tho' *Contingent* only, ſhall *hinder* the Execution of the Eſtates for Life, and in Tail in Poſſeſſion. Southcot J. to the ſame Purpoſe. Per Wray Ch. J. B. and C. have but for Life, for they are Purchaſors by the Name (*Heir*) in the *Singular Number*, but when he adds (for Want of ſuch Iſſue to the Heirs of the Body of B.) in the *Plural*, now B. has an Inheritance, and C. being the next Heir of the Bodies of B. and M. has an Eſtate for Life, and alſo being of the Body of B. has a Remainder in Tail to him limited, and the Meſne Remainder limited to others viz. to the next Heir of the Body of B. being in *Abeyance*, becauſe limited by the Name *Heir* (*his Father being alive*,) ſhall not hinder the Execution of theſe Eſtates, but they ſhall remain in Force according to the Rules of the Common Law; and that by B.'s levying a Fine the Uſe was veſted in C. and when C. levied a Fine the Uſe was veſted in D. who was then next Heir, and ſhall not be deveſted by the Birth of E. and F. afterwards, but that the Forfeiture was only of the Freehold, and not of the Eſtate

of

of Inheritance. See Le. 256. pl. 345. 18 Eliz. B. R. Manning v. Andrews.

27. *Leaſe for Life to B.* * *Remainder to B.'s right Heirs*, is a Fee executed. 4 Le. 21. pl. 67. Mich. 19 Eliz. C. B. Anon. and 138. pl. 293. S. R. Anon.

* Br Eſtate, pl. 5. cites 33 H. 6. 5 — pl. 6. cites 40 E. 3. 9 — pl. 7. cites 45 E. 3. 19.—The ſubſequent Words do merge and deſtroy it, by turning it into an Eſtate; and the *Reaſon is*, becauſe ſuch ſubſequent Words are expreſs. But it is otherwiſe where the raiſing an Eſtate in Tail &c. would contradict the expreſs Limitation, and conſequently the Intent of Teſtator &c. See Wms's Rep. 56. Hill. 1702. Bampfield v. Popham.

28. But Leaſe *for Years to B.* Remainder to his right Heirs, and Livery accordingly, the Remainder is void, becauſe there is no Perſon in Eſſe that can take by the Livery, and every Livery muſt have its Operation preſently. 4 Le. 21. and 138. Per Dyer and Manwood. Anon.

29. A. makes a *Feoffment* in Fee, to the Uſe of *himſelf for Life*, and *after his Death* to the Uſe *of his Heirs*, the Fee Simple is executed. Arg. 1 Rep. 95. b. Trin. 23 Eliz. in Shelley's Caſe.

But if the Limitation be to the Uſe of *himſelf for Life*, and *after his Death* to the Uſe of *his Heirs, and of their Heirs Female* of their Body, in this Caſe the Words (His Heirs) are Words of Purchaſe, and not of Limitation, for then the Words ſubſequent (And of the Heirs Female of their Bodies) ſhould be void. Arg. 1 Rep. 95. b.—3 Lev. 433. in Caſe of Loddington v. Kime ——It is Eſtate Tail, and not Fee-ſimple, becauſe then the Words (And to their Heirs Females) ſhall be fruſtrate. Per Richardſon Ch. J. Litt. R. 345. Mich. 6 Car. C. B. in Beck's Caſe, alias, Moreton v. Nichols.

30. A Deviſe to a Woman *ſo long as ſhe ſhall remain Sole*, and then *to remain to B.* this Remainder ſhall not begin till the Marriage. Arg. 3 Le. 182. pl. 233. Mich. 29 Eliz. B. R. in Large's Caſe.

A. deviſed Lands *to his Wife during her Life, if ſhe does not marry*; but *if ſhe does marry*, then he will'd that *B. his eldeſt Son ſhall preſently enter* after her Marriage, and enjoy the Premiſſes *to him and the Heirs Males of his Body*; and for Default of ſuch Iſſue to his Son C. and the Heirs Males of his Body &c. this was an Eſtate Tail executed in B. Raym. 427. 428. Hill. 32 & 33 Car. 2. B. R. Brown v. Cutter.——2 Show. 152. pl. 134. Brown v. Cutler. S. C. accordingly by 3 Juſtices.—Raym. 430. ſays the Ch. J. did not fit all that Term.—Luxford v. Cheeke, S. C. 3 Lev. 125. Mich. 34 Car. 2. C. B. accordingly.

31. *A. leaſed* by Indenture *to B. C. and D.* Habendum *for 3 Lives, and the Life of the Survivor*; *provided* nevertheleſs, and it is granted and agreed, *that during B.'s Life, neither C. or D. ſhall take any Profit of the Land.* Adjudged that the Proviſo does not make the Eſtate to enure by Way of Remainder, but is meerly a Collateral Covenant, and B. C. and D. notwithſtanding the Proviſo, take their Eſtates in Jointure. Mo. 267. pl. 418. Mich. 30 & 31 Eliz. Leverſage v. Cable.

Le. 31. S. C.—Cro E. 89. 107. S. C.

32. A. makes *Feoffment* in Fee to the *Uſe of himſelf for Life*, and after to the Uſe of *his firſt Son* which ſhall be *in Tail*, and for Default of ſuch Iſſue to the Uſe of *B. in Tail*, and for Default of ſuch Iſſue to the Uſe of *C. in Fee*; A. has Eſtate for Life, Remainder to B. in Tail, Remainder to C. in Fee, and no Eſtate is put in Abeyance, or left in the Feoffees; but if *afterwards A. has Iſſue a Son*, then the Poſſibility which the Feoffee had, comes to an Eſtate in Law, and now the Statute executes the Poſſeſſion, according to the Limitation of the Uſe; but if A. be *diſſeiſed before the Birth of the firſt Son*, and after he has Iſſue a Son, now nothing veſts in the Son, becauſe it ought to be an Uſe in Eſſe before the Statute can execute the Poſſeſſion. Arg. 1 Rep. 130. b. Hill. 31 Eliz. in Chudleigh's Caſe.

1 Rep. 135. 130. b. 137. Contra by 6 Juſtices For then the future Uſe cannot ariſe, becauſe an Uſe cannot ariſe out of an Uſe.

33. A. deviſed to B. and C. Lands *for Payment of Debts and Legacies, and afterwards to D.* for Life, Remainder to the firſt Son of D. in Tail, Remainder to the Heirs of the Body of B. This Eſtate Tail is not executed for the *Poſſibility of the Meſne Eſtate* that may interpoſe, and therefore is always diſjoin'd during the Life of D. ſo that of that Eſtate his

Wife cannot have *Dower*. Cro. E. 316. Hill. 36 Eliz. B. R. Cordal's Caſe.

34. If a Limitation be *to the right Heirs of J. S.* and he has Iſſue a *Daughter*, and dies, his *Feme enſeint with a Son*, who is afterwards born, yet the Daughter ſhall retain it; for the Eſtate was executed in her. Per 2 Juſt. Cro. E. 334. Trin. 36 Eliz. in the Caſe of Frederick v. Frederick.

S. P. Br. Eſtate, pl. 55 cites 35 H. 8. by all the Juſtices notwithſtanding the Words of the Statute Quod voluntas Donatoris &c. —— Br. Noſme, pl. 42. cites 37 H. 8. as held there by ſome, that ſuch Remainder cannot be veſted in the Life of the Baron; For there is no Eſtate in the Baron, by reaſon of the Eſtate of the Feme. —— Br. N. C. 37 H. 8. pl. 302. S. C.

35. Land was given to *Baron and Feme for their Lives Et Diutius eorum Viventus*, Remainder to the *Heirs of their Bodies*, This is an Eſtate Tail executed by Reaſon of the immediate Remainder. Arg. Bulſ. 220. cites it as ruled 36 Eliz. B. R. in the Caſe of Cheek v. Dale.

If B. had died in the Life of A. then A. had had a Fee-ſimple. Br. Eſtates, pl. 5. cites 33 H. 6. 5. —— S. P. Br. Ibid. pl. 59. cites 46 E. 3. 16.

36. *A Tenant for Life*, Remainder *to B. in Tail*, Remainder *to A. in Fee*; A. acknowledged a Statute and died, B. died without Iſſue; All the Juſtices conceived that the Heir of A. takes by Deſcent, and the Land liable; But adjornatur. Cro. E. 255. Mich. 36 & 37 Eliz. C. B. Pethouſe v. Crane & al.

The Eſtate Tail is executed *Sub Modo*, viz. till the Birth of the firſt Son, and then by Operation of Law the Eſtates are divided, i. e. the Baron and Feme become Tenants for their Lives, Remainder to the Iſſue Male in Tail, Remainder over; For the Eſtate for their Lives is *not abſolutely merged*, but with this implied Limitation *till they have Iſſue Male*. 11 Rep. 80. Lewis Bowles's Caſe.

37. A Man in Conſideration of Marriage covenanted to ſtand ſeiſed to the Uſe of himſelf and M. whom he intended to marry *for their Lives*, *Remainder to their firſt Son of their Bodies begotten in Tail*, *and the Heirs Male of his Body*, *and ſo on to the 4th Son &c. Remainder to the Heirs Males of the Body of Baron and Feme &c.* Per Haughton, Doderidge, and Coke, before the Birth of the firſt Son the Baron and Feme have Eſtate Tail executed notwithſtanding the contingent Meſne Remainder. Roll. R. 177. Paſch. 13 Jac. B. R. Bowles v. Berrie.

38. Feoffment to the *Uſe of A. for Life*, Remainder to the *Right Heirs of J. S.* Remainder to *J. D. and his Heirs*, it ſeems to be the better Opinion that the Fee is in J. D. Per Crooke J. Litt. R. 161. Mich. 4 Car. 2. C. B. in the Caſe of Barton v. Nichols & Smith.

Raym 36. S. C. Adjornatur —— Sid 83. Trin 14 Car. 2. B. R. adjudged. S. C. and the Reporter ſays, He heard that Judgment was affirmed upon Error brought in the Exchequer Chamber.

39. A. Tenant for Life, *Remainder to his Wife for Life*, Remainder *to the Heirs of their 2 Bodies* Remainder over, the Eſtate Tail is not executed in A. becauſe of the * *intervening Eſtate for Life* limited to the Wife, ſo that a Fine and Warranty by A. and his Wife makes no Diſcontinuance, nor the Warranty any Barr. Lev. 36. Trin. 13 Car. 2. B. R. Stephens v. Brittridge.

* But where the intervening Eſtate is *for Years*, it ſhall be no Impediment, but that the Freehold was ſufficiently joined in the Husband Simul & Semel, ſo as to intitle the Wife to Dower, tho' Ceſſet Executio till the End of the Term. N. Latw. 226. cites Perk. S. 336. [335]

Sid. 247. S. C. but reports it to be limited to the Huſband and Wife for their joint Lives, *and after the De-*

40. A Marriage Settlement was to the Uſe of the *Husband and Wife for their joint Lives*, Remainder to the *Heirs of the Body of the Wife by the Husband* to be begotten, *Remainder (the Wife ſurviving the Husband) to the Wife for Life* Remainder to the *Right Heirs of the Husband*; They had Iſſue 2 Daughters, the *Husband died*, living the Daughters and the Wife; The Queſtion was if the Daughters ſhould take or the Mother; and it was adjudged that the Mother ſhould take; For that this was an Eſtate

Eſtate Tail executed *Sub Modo*, viz. Not as to the Diviſion of the Jointure, but to other Purpoſes. Raym. 126. Paſch. 17 Car. 2. B. R. Merrel v. Rumſey.

cauſe of order of them Remainders to the Uſes of the Wife Jointure by the Husband, Remainder to the Wife for Life.

41. A. deviſed Lands to J. S. and his Heirs *for the Life of B* in Truſt for B. *and after B's Death to the Heirs Male of the Body of B. now living*, and to ſuch Heirs Male or Female as he after ſhall have of his Body; B. has Iſſue C. a Son then living, this is an Eſtate for Life to B. and C. takes the Remainder immediately, and not as a contingent Remainder. 2 Lev. 232. Mich. 30 Car. 2. C. B. James v. Richardſon.

S. C Freem. Rep 4 S. pl. 626. & 2 pl. 64. S. C. but no Judgment. — 2 Jo. 99. S. C —

Vent. 334. S. C.— Pollexf. 45. S. C.—— Raym 330. S. C. —— This Judgment was reverſed in Cam. Scacc. but that Reverſal was reverſed in the Houſe of Lords. Pollexf. 460. and 2 Lev 233.— Carth 155 S. P. (and was for another Branch of the ſame Eſtate) ſays That B. and Exchequer Chamber, and Parliament all held clearly, That it was a Remainder veſted in C immediately on A's Death, and that the Words (*Now living*,) were a ſufficient *Deſcription of the Perſon of B.* and that the other Words (viz.) *to the Heirs Males of the Body of the ſaid B.* did not only help to make up the Deſcription of the Perſon of B but were a good Limitation of an Eſtate Tail to him. Burchet v. Durdant.—— This Caſe of * Burchett v. Durdant was denied to be Law Per Holt Ch. J. 2 Salk. 569. in the Caſe of Broughton v Langley.—— * 2 Vent. 311 S. C. in Scacc. Trin. 2 W. & M. and there as to the Point whether the Remainder to the Heirs of B. now living did veſt in C or was a contingent Remainder, the Ch. B. Atkins and Juſtice Powell ſeemed to be of Opinion that the Remainder was contingent; but in regard the Point had been upon a Writ of Error brought in the Houſe of Lords upon a Judgment given in B. R. in another Caſe upon the ſame Will adjudged to be a Remainder veſted, they conceived themſelves bound by that Judgment in the Houſe of Lords.

42. A. ſeiſed of Lands in Fee made a Deed Poll as follows, viz. Know ye &c. that *in caſe I die without Iſſue that my Lands may continue in my Blood, and for the Natural Love which I bear unto my Niece J. S.* Have *given, granted, and Confirmed, and do give &c. to my ſaid Niece S. S. all my Lands to the Uſes after-mentioned, i. e. To hold to the Uſe of the ſaid A for the Time of my natural Life*, and after to the Uſe of the ſaid S. *my Niece, and the Heirs of her Body &c.* No Livery was made. Afterwards A. made a Feoffment to a Stranger, S. S. entered upon the Feoffee as for a Forfeiture, and the Court declared they were all of Opinion for S. S. the Plaintiff in Ejectment, viz. that the Conſideration, and the Deed itſelf were ſufficient to raiſe an Uſe in Remainder in Tail to the ſaid S.S. *by way of Covenant to ſtand ſeiſed.* Carth. 38. Trin. 1 W. & M. B. R. Harriſon v. Auſtin.

43. A. on Marriage ſettles Land *on himſelf for 99 Years, if he live ſo long, Remainder to Truſtees and their Heirs* to preſerve Contingent Remainders *during his Life, Remainder to the Heirs of his Body by the Wife*; They have 2 Sons B. and C.—A. is barely Tenant for 99 Years, if &c. and the *Eſtate Tail is veſted in B.* in Equity, and a Fine and Feoffment by A. and B. and the Truſtees is a Bar, and no Breach of Truſt. 2 Vern. R. 754. Mich. 1717. Elie v. Osburn.

(H) *What* ſhall be ſaid a Remainder *attach'd, and what* a Remainder *in Abeyance.*

1. IF the Baron ſeiſed in Fee of a Copyhold, ſurrendered it to the Uſe of his Feme and J. S. for their Lives, the Remainder to the Right Heirs of the Body of the Baron and Feme begotten, this Remainder is not attached in the Feme, but is in Abeyance; for he who ſhall have it, ought to be Heir of the Body of both, and the Baron cannot have Heir during his Life, and he may forfeit the Uſe, and then none ſhall have it, therefore it is Abeyance. 9 Rep. 13. Ja. *Lane* v. *Pannel.* 14 Ja. Adjudged.

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

2. So if the Baron makes Feoffment to the uſe of his Wife for Life the Remainder to the Right Heirs of the Body of the Baron and Feme, this Remainder is Abeyance. D. 1. Mar. 99. 71.

3. When

See (G) pl. 5

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A. covenants for him and his Heirs to ſtand ſeiſed

3. When the Anceſtor by any Gift or Conveyance takes an Eſtate of Franktenement, and in the ſame Conveyance or Gift, there is an Eſtate in * Fee, or in Tail to his Right Heirs mediately (viz. where there is an Eſtate for Life, or Tail interpoſed between the ſaid Eſtates) yet this Remainder ſhall attach immediately in the Anceſtor, and ſhall not be in Abeyance. 1 Rep. 104. *Shelly's* Caſe. 40 E. 3. 10. Adjudged. 11 H. 4. 74. 24 E. 3. 36. 27 E. 3. 87. b.

of Land to the Uſe of *himſelf for Life*, Remainder *to B. for Life, Remainder to the firſt Son of B. in Tail Male*, and ſo on to the 4th; *and ſo ſeverally and reſpectively to every of the Heirs Male of the Body of B. and the Heirs Male of their Bodies Remainder to C.* Proviſo if B. die without Iſſue Male, then &c. A. dies. B. enters, and ſuffers a Recovery, wherein he is vouched, and vouches the Common Vouchee; B. dies without Iſſue Male. Adjudged in B. R. that B. had but Eſtate for Life, and that the Words (every of the Heirs Male) was intended (Sons) But the Judgment was reverſed in Cam Scacc. and there adjudg'd an Eſtate Tail in B. 2 Jo. 114. Liſle v. Grey.——Pollexf. 588. S. C. ——2 Show. 6. S. C. in B. R. —— 2 Lev. 223. S.C. but no Judgment—— Raym 278. S C. but No Judgment.

If a Leaſe be to one for Life, with divers Remainders over Remainder in Fee to the

4. But when an Eſtate of Franktenement is ſo limited to B. and a Mediate Remainder to his Right Heirs, that it may be that all the Eſtates may determine in the Life of B. and the Eſtate of B. alſo, there the Remainder to the Right Heirs of B. is in Abeyance, and ſhall not attach in the Life of B. becauſe during the Life of B. he cannot have an Heir to take the Remainder.

Right Heirs of the firſt Tenant for Life, if all die the Heir ſhall be in as Heir; For by Poſſibility his Father might have had the Poſſeſſion. Br Done &c. pl. 11. cites 11 H. 4. 74.

Where Land is given *to W. N. for Life*, the *Remainder to J. S for Life*, the *Remainder to the Heirs Males of the Body of the ſaid W. N*, who *has* 2 *Sons*, the *eldeſt has Iſſue a Daughter, and dies*, and *W. N. and J. S. dies*, the youngeſt Son ſhall have the Land as Heir Male, yet he is not Heir in Fact, but his Niece is Heir to his Father; For neither the firſt Veſting, nor the Remainder is Material. Br. Noſire pl. 40. cites 37 H. 8.

For where the *firſt Eſtate for Life is executed*, *the Remainder over* Ut ſupra, the *Remainder may depend in Abeyance* till &c. Ut ſupra, but *contra of Remainder to the Right Heirs*; For none can have this but he who ſhall be Heir in Fact. Ibid.——— See (I) pl. 1.

See (K) pl. 1.

5. As if a Feoffment be made to the Uſe of A. and B. during their joint Lives, and after the Death of either of them to the Uſe of C. for Life, and after to the Uſe of the Heirs of the Body of B. tho B. has a Franktenement in Remainder to his Heirs of his Body begotten, yet this Remainder does not attach, but is in Abeyance; Becauſe if A. and C. die in the Life of B. the Eſtate of B. is determined, and the Remainder to C. ended, and yet the Remainder to the Right Heirs of the Body of B. cannot take Effect, becauſe B. cannot have an Heir during his Life, and a Remainder ſhall not attach, but ſhall be in Contingency, ſcilicet in Abeyance, when it may happen that it ſhall never take Effect.

Land leaſed to A. for Life *Remainder for Years to his Heirs*; the Remainder for Years is in Abeyance till the Death of the Leſſee, and then it ſhall veſt in the Heir as a

6. If a Man leaſes to B. for Life, the Remainder to his Executors for 11 Years; the Term for Years ſhall veſt immediately in B. ſo that he ſhall forfeit it, or may grant it; For as the Anceſtor and Heir are Correlatives in caſe of Inheritance to make a Remainder to the Right Heirs of him, who has a Franktenement before limited to him, to attach; ſo the Teſtator and Executor are Correlatives as to a Chattel to make the Remainder for Years to veſt in the Teſtator, as if it had been limited to him and his Executors. Co Litt. 54. b. where are cited Mich. 40 and 41 Eliz. B. Rot. 2215. between *Sparke and Sparke.* Hill. 42 El. in the Court of Wards *Sir John Savage's* Caſe.

Purchaſor, and as a Chattle and ſhall go to the Executor of the Heir &c. and the Tenant for Life cannot meddle with it; For it is not in him. Per Dyer 3 Le. 25. pl. 40. Hill. 14 Eliz C. B. in Cranmer's Caſe.

7. Scire

7. Sci. fac. upon a Fine that was levied to *J. and A. his Feme in Tail*, the *Remainder to A. in Fee*; the Baron and Feme *had Iſſue a Son*; The Baron died, and after the *Feme took another Baron, and had Iſſue another Son*, and died; *the Eldeſt Son enter'd and died without Iſſue*, and the *Heir Collateral* of the Eldeſt Son *enter'd* as in the Remainder in Fee, againſt whom the *Youngeſt Son of the Half Blood brought Scire facias to execute the Fee-Simple*; And the beſt Opinion was, That it well lay; For the *Fee-Simple was not executed in the Eldeſt Son*; for he was ſeiſed in Tail, and the *Fee was in Abeyance*; and therefore it was not executed in him, and now the Youngeſt Son of the Half Blood is Heir to A. of the Fee-Simple, therefore he ſhall execute it. Br. Scire facias, pl. 126. cites 24 E. 3. 30, 62. & 37 E. 3. Aſſiſe 4. Where it is adjudged for the Youngeſt Son, and yet the Eldeſt Son might have given the Fee-Simple, or * charged it, or forfeited it by Attainder of Felony, but yet it was not executed in him, therefore whoſoever is Heir to the Anceſtor when the Fee falls he ſhall have Execution thereof; quod nota.

The Remainder in Fee cannot come in Sci fin till the Tail be determined, tho' the Eldeſt might give or forfeit it. Br. Diſcent, pl. 30 cites S.C.

* The intermediate Heirs might have charg'd it by Statute, Judgment,

or Recognizance; and they were ſo ſeiſed that if a Writ of Right had been brought againſt them they might have join'd the Miſe upon the meer Right, which proves that they had a Fee, and tho' it was expectant on an Eſtate Tail, and he who claims the Reverſion as Heir ought to make himſelf ſo to him who made the Gift. Per Eyre J. 3 Mod. 250. in the Caſe of Kellow v. Rowden.

8. A. deviſ'd Bl. Acre and Wh. Acre to M. his Wife *for Life*, and after her Death *Bl. Acre to B. and his Heirs for ever, and Wh. Acre to C. and his Heirs* for ever; Item, I will that the *Survivor of them ſhall be Heir to to the other, if either of them die without Iſſue*; This is an immediate Eſtate Tail. But if it had been, That if he die without Iſſue *in the Life of* the other, or *before ſuch an Age*, that then it ſhould remain to the other; it might perhaps be a Contingent Deviſe in Tail if it ſhould happen, and not otherwiſe; But as it is it is an abſolute Eſtate Tail immediately, and the Remainder limited over. Cro. J. 695. Mich. 22 Jac. B. R. Chadock v. Cowley.

9. A. ſeiſed in Fee, had Iſſue 2 Sons, B. the Eldeſt, and C. the Youngeſt, and deviſed the Land *to B. for Life, and if B. dies without Iſſue living at his Death*, that then *the ſame ſhall remain to C. in Fee*; *but if B. ſhall have Iſſue living at his Death*, then *the Fee ſhall remain to the right Heirs of A. for ever*. B. enter'd and ſuffer'd a Common Recovery, and died without Iſſue; whereupon C. enter'd upon the Defendant, and leas'd to the Plaintiff. Reſolv'd per tot. Cur. That B. took only Eſtate for Life, the Remainder to his right Heirs not executed; and tho' B. be Heir, to whom the Reverſion deſcended, yet this ſhall not merge the Eſtate for Life contrary to the expreſs Deviſe and Intent of the Will, but ſhall *leave an Opening*, (as they term'd it) *for the Interpoſition of the Remainders*, when they ſhould happen to interpoſe between the Eſtate for Life and the Fee; and cou'd'd it to Archer's Caſe, Co. 1 Rep. Where tho' Robert the Deviſee for Life was Heir, yet the Remainder to his next Heir Male was contingent, and not an Eſtate for Life merg'd by Deſcent of the Reverſion; And ſo here B.'s Eſtate being only for Life, the Remainder to C. was a Contingent Remainder, and barr'd by the Recovery. Lev. 11, 12. Hill. 12 & 13 Car. 2. B. R. Plunket v. Holmes.

S. C. Raym. 28. and Wyndham ſaid, That until the Contingency happens, the *Fee deſcends to the Heir in fee Sett, but not to conſound the Eſtate for Life*, but ſhall leave an Opening &c. And the other Judges were all of the ſame Opinion, and Judgment

Niſi &c. — S. C. Sid. 47. accordingly, and that a 2d Reſolution was, That *here is not a Contingency upon a Contingency*, (for if it had been ſo, it would have been void according to Stafford's Caſe &c.) *But* that it is *One and the ſame Contingency operating ſeveral Ways*, ſc. If B. has Iſſue, then to him in Fee, and if he has not Iſſue living &c. then to C.

10. *Baron and Feme, Tenants for Life, Remainder to the Heirs of the Baron*; *Baron deviſes to the Heirs of the Body of the Feme, if they attain to 14 Years*, and dies; She marries again, and has afterwards Iſſue; but before this Iſſue comes to 14 Years, ſhe ſuffers a Recovery; This, if good, is not good as a Remainder but as an Executory Deviſe; and tho' the Wife has Eſtate for Life, yet this is a *new Deviſe to take Place after for*

Sid. 155. Snow v. Tuck. S. C. [illegible] mentions

Death, and is not as a Remainder join'd to an Eſtate. Lev. 135, 136. Trin. 16 Car. 2. B. R. Snow v. Cutler.

11. A. intending to levy a Fine and ſuffer a Recovery, declar'd they ſhould be to the Uſe of *Baron and Feme for their joint Lives*, and *after the Deceaſe of either of them* Remainder *to the Heirs of the Wife*, begotten *by the Huſband*, Remainder *to the Wife for Life*; Baron dies. The Court agreed, That here was no Contingent Eſtate, but that it is Eſtate Tail executed. Sid. 247. pl. 12 Paſch. 17 Car. 2. B. R. Merril v. Rumſey.

4 Mod. 282. S. C. argued. — S. C. Comb. 212. ad fin. ſays, That no Uſe can reſult to A. becauſe it is expreſly limited to the Conuſees and their Heirs during his Life, and ſo differs in this Reſpect from the Caſe of

12. *A.* ſeiſed in Fee by Deed and Fine, *ſettled Lands* on his own Marriage to the Uſe of *himſelf and his Heirs*, *until the Marriage* take Effect, and afterwards to the Uſe of *the Wife for Life*; and after her Death then to the Uſe *of the Cognizees* in the Fine *and their Heirs during the Life of A. upon Truſt, to permit and ſuffer him to take the Profits* &c. and afterwards *to the 1ſt and every Son of that Marriage in Tail Male*; *and for Want* of ſuch Iſſue, *to the Heirs of the Body of the ſaid A. and for Want* of ſuch Iſſue *to the ſaid A. and his Heirs for ever*. A. had no Iſſue Male, but had Iſſue Female one Daughter; The Daughter ſhall take by Purchaſe and not by Deſcent, ſo that a Fine levied by A. will not bar her; for the Remainder to the Heirs of the Body of A. on Failure of Iſſue Male, was a Contingent and not a Veſted Remainder; and the Limitation being of an Eſtate Tail, cannot be any Part of the old Eſtate; For that was a Fee-Simple. Carth. 273. Paſch. 5 W. & M. B. R. Tippin v. Colin.

Pibus v. Pitford. Co. Litt. 22. b and from Pibus v. Pitford. Mod. 159. Becauſe in thoſe Caſes the Party had not limited the Uſe out of him during his own Life, as here he has done in expreſs Terms; and it is too remote to imagine that the Truſtees, whoſe Eſtate is created to ſupport the Remainders, ſhould make a Feoffment to deſtroy their Eſtate, whereby to raiſe an Eſtate for Life by Inſtitution to the Feoffor. — S. C. Ld Raym. Rep. 33 Hill 6 & 7 W. & M. accordingly; and that in this Caſe the Deſign was, That the whole Eſtate ſhould be diſpoſed of, ſo that it ſhould not be in A's Power to deſtroy the Contingent Remainders; ſo that if the Court ſhould raiſe a Reſulting Uſe here it would be contrary as well to the Intent of the Parties as to the Rules of the Law.

1 Salk. 224 S. C. ſays, The Court held 2dly, That the Word (*Heirs*) is to be taken as *Nomen Collectivum* becauſe the Inheritance was annexed and limited to the Word (Iſſue) ſo that the Inheritance was in the Iſſue, and not in A. the Father. 3dly, That this Limitation to the Iſſue was not an Executory Deviſe, being after a Freehold, but a Contingent Remainder; ſo that a Poſthumous Son could never take. 4thly, That the Remainder limited to the Iſſue of A. was a Contingent Remainder in Fee, and that the Remainder to B. was a Fee alſo; but thoſe Fees are not like one Fee mounted on another, nor contrary to one another, but 2 concurrent Contingencies, of which either is to ſtart according as it happens: ſo that theſe are Remainders Contemporary, and not expectant one after another. 5thly, The Court held, That the Remainder in Fee to B. was not veſted, becauſe the Precedent Limitation to the Iſſue of A. was a Contingent Fee; and they took this *Difference*, viz. *Where the Mediate Eſtates* limited *are for Life or in Tail*, the *laſt Remainder may*, *if it be to a Perſon in Eſſe*, *veſt*; *but no Remainder limited after a Limitation in Fee*, *can be veſted*. 6thly, That the Recovery ſuffered by A. had barr'd the Eſtate limited to his Iſſue, that being contingent; and likewiſe the Remainder limited to B. and his Heirs, becauſe that was contingent, not veſted, and now never could veſt; and that A. had gain'd a perfect Fee, which would be good againſt B. and his Heirs, and likewiſe againſt all Perſons but the right Heirs of the Deſſor. — Raym. Ch. J. ſaid, That this Caſe is *wrongly reported in Leyds*, who ſays, That the Court were agreed to give Judgment for the Avowant in Replevin; but the Court conceived new Doubts, Whether they were contingent Remainders or Executory Deviſes to the Iſſue in Tail of A. &c. And that before this Point was determined the Parties came to an Accommodation, which is a Miſtake; For his Lordſhip heard the Opinion of the Court given Seriatim, viz. Paſch. 9 W. 3. in the Year 1697. That Evers Armin took but an Eſtate for Life, becauſe the firſt Iſſue Male took the Contingent Remainder. It has alſo had Decrees in other Pleas; it having been brought into the Court of Chancery, and by an Appeal thence carried into the Houſe of Lords, the Judgment given in

13. J. S. made his Will thus, viz. As concerning my Manor of P. and W. after my Debts and Legacies paid, I deviſe them *to A. for Life* without Impeachment of Waſte; and if he ſhall have Iſſue Male, to ſuch *Iſſue Male and his Heirs for ever*; and *in Caſe A. dies without Iſſue Male*, *to B. and his Heirs* (A. has only Eſtate for Life.) A. ſuffers a Common Recovery to the Uſe of himſelf and his Heirs, and dies without Iſſue Male. One Queſtion was, Whether this was a Contingent Remainder to the Iſſues of A. and his Heirs, and ſo the Remainder to B. deſtroy'd by the Recovery of A. before it happen'd; or whether it was an Executory Deviſe? This Caſe was twice argued, but before Judgment the Parties agreed and divided the Eſtate. 3 Lev. 432. Mich. 7 W. 3. in C. B. Loddington v. Kime.

in the Court of C. B. was in all thoſe Places confirmed, and not in the leaſt ſhaken, and has been ac-quieſced under ever ſince. Judgment is enter'd on the Roll in C. B. Trin. 5 W. & M. Rot. 157. as was ſaid by Eyre Ch. J. in another Caſe. This ſhews that the Word (Iſſue) is properly a Word of Pur-chaſe when the Intent of the Party is apparent. Gibb. 21, 22 Paſch. 1 Geo. 2. B. R. in the Caſe of Shaw v. Weigh —— Ld. Raym. Rep. 203. Paſch. 9 W. 3. Luddington v. Kime; And there pag. 207. all the Court held, That A. took an Eſtate for Life, the Remainder contingent to his Firſt Male in Fee.

(H. 2) What is. *Where* the *Veſting* of a Subſequent Remainder *depends on* the *Performance of a Condition*, *or* the *Happening of a Contingency* annex'd to a Meſne Remainder.

1. A Had Iſſue B. a Son, and C. a Daughter, and *devis'd* Land *to J. S. for Life*, *upon Condition*, That *if B. diſturb'd J. S.* or the Executors, of their Adminiſtration, then *the Land ſhould remain to C.* and died; Afterwards J. S. died, and C. brought Formedon in Remainder againſt B. and alleg'd, That he had diſturb'd J. S. and the Executors. B. travers'd it, and Iſſue thereupon was joined; And ſo the Condition took the Fee away from B. and put it in C. by the Allowance of the Law in Performance of the Intent of the Deviſor, tho' the Remainder did not veſt when the firſt Eſtate took Effect. Per Harper J. Pl. C. 414. a. b. in the Caſe of Lewis v. Lane, cites 34 E. 3. and the Margin cites Fitzh. tit. Formedon, the laſt Plea.

2. A Fine was levied of Lands in Tail, *upon Condition to carry the Standard of the Conuſor*; and for Default thereof *Remainder to W. N.* And Per Fitzh. J. the Remainder is good, and is in the Grantee preſently before the Condition broken, or never; For if the Remainder be not good at firſt, it never ſhall be good. But Per Montague Serj. contra; And Fitzh. after doubted. Br. Done and Remainder, pl. 3. cites 27 H. 8. 24.

3. If A. makes a *Feoffment to* the Uſe of B. *till C. ſhall come from Rome* into England; *and after ſuch Coming* from Rome into England, *to remain over in Fee*, this Remainder depends in Contingency; For it is uncertain whether C. ever ſhall come into England, or not. Arg. Quod fuit Conceſſum per tot. Cur. 3 Rep. 20. in Boraſton's Caſe.

4. A. *leaſes for Life to B. upon Condition*, That if he *pays* 10 l. at Michaelmas to the Leſſor, that he ſhall *have the ſame to him in Tail*, the *Remainder to J. D. in Fee.* The 10 l. is not paid; If now he in the Remainder ſhall have the Fee, or if the Contingent and Accruer extend as well to the Fee as to the Eſtate Tail, or if the Fee veſts preſently? Popham ſaid, That is a Moot Point; But Anderſon ſaid, You will not be able to prove that by any Book of Law, but if you were to read it is a good Point for you. Noy 46. Anon.

(I) *At what Time* Remainder ſhall attach.

1. If Leaſe for Life or in Tail be, the Remainder to the right Heirs of J. S. and Tenant for Life dies, or Tenant in Tail dies without Iſſue living J. S. the Remainder is void; Becauſe J. S. cannot have Fee during his Life, and inaſmuch as this does not take Effect du-ring Br. Done &c. pl. 9. cites 4. E. 3. [illegible]

Pull, Such Remainder is not good

ting the particular Eſtate, it ſhall never take Effect tho' he dies after and has an Heir. 9 H. 6. 23. b. 11 H. 6. 12. b.

if J. S. was alive at the Time; For if it *cannot take Effect at the Time of the Livery, it will be hard to prove that ever it ſhall.* 11 H. 4. 74. b. pl. 14.

The Remainder is *in Abeyance till J. S. dies*, and therefore good; and yet no Heir is in Eſſe at the Time of the Livery. Br. Done &c. pl. 37.

If *J. S. be afterwards attainted of Felony, and dies*; and after the *Tenant for Life dies*, the Remainder ſhall not take Effect; becauſe none can be Heir to a Man attainted. Br. Done &c. pl. 42 cites 37 H. 8.

S. C. cited by the Maſter of the Rolls, who ſaid, That tho' the Remainder in Fee is in Abeyance, yet there is a Poſſibility left in the Heir, and that where the Tenant for Life dies, living J. S. the Grantor ſhall have his Lands again for want of another Perſon to take them. Wms's Rep. 514, 515 Mich. 1718. in the Caſe of Carter v. Barnardiſton.

2. And in ſuch Caſe, inaſmuch as the Remainder cannot take Effect, the Donor ſhall have the Land again. 11 H. 6. 12. b.

It was found by a ſpecial Verdict before Baron Turton, That a Deviſe was *to A. Remainder to his firſt Son in Tail, Remainder to B.* —— A. dies, no Son being then born, but *afterwards a Son is born*; B. enters before the Son born. Judgment was given for B. in C. B. and affirm'd in B. R. upon Error, for 2 Reaſons; 1ſt, *This is a contingent Remainder* to the Son of A. and he not being born when the particular Eſtate determin'd, it became void. 2dly, The next in Remainder being B. and he having *entred before the Birth of A's firſt Son*, was in by *Poſſeſſion*, and ſhall not be put out by an Heir born afterwards. 3 Lev. 418. Mich. 6 W. & M. Reve v. Long —— But this Judgment was revers'd by almoſt all the Lords in Parliament; becauſe being in a Will they took it according to the Intent and Equity and Meaning, which they ſaid could not be to diſinherit the Heir of the Name and Family of the Teſtator by ſuch Nicety. But all the Judges were greatly diſſatisfied with this Judgment of the Lords, and did not change their Opinions thereupon, but greatly blamed Baron Turton for permitting it to be found Specially where the Law was ſo certain and clear. Ibid. —— 4 Mod. 282. S. C. —— 1 Salk. 227. S. C. —— See (L) pl. 16.

3. If a Deviſe be to one in Tail, the Remainder to the right Heirs of the Body of B. the Remainder to C. If the firſt Deviſee dies without Iſſue in the Life of B. — C. ſhall have the Remainder, and the right Heirs of the Body of B. born afterwards, ſhall never divert it; Becauſe they were not capable at the Time when it ought to attach upon them. P. 37 & 38 El. B. R. between Gibbon and Warner.

Poph. 3. S. C. Mich. 34 & 35 Eliz. in the Court of Wards; and after upon Conference with the Judges and Barons, Reſolv'd by all (but Baron Clarke) accordingly. —— S. C. 2 And. 197. pl. 17. among the Caſes in the Court of Wards —— Mo. 718. pl. 1006. S. C. —— S. C. cited Mo. 371. in Perrot's Caſe —— And 1 Rep. in Chudleigh's Caſe —— And 2 Rep. 91. b. in Bingham's Caſe —— Jenk. 248. pl. 38. 1ſt Part, S. C. —— See Uſes (O 8) pl. 3.

4. If a Feoffment be made by A. to B. to the Uſe of himſelf for 21 Years, Remainder to the Uſe of C. in Tail, Remainder to the Uſe of the right Heirs of A. and C. dies without Iſſue in the Life of A. during the 21 Years, this Remainder in Fee is void; Becauſe this is a Contingent Remainder, and A. has not any Heir during his Life; and the Eſtate for Years being no Freehold, cannot ſupport this Remainder till the Death of A. Reſolved. Popham's Reports between the Earl of Bedford and Ruſſel.

So where *A.* ſeiſed in Fee of Lands, makes *Leaſe for Years to B.* Remainder *to C. in Tail*, Remainder *to the right Heirs of B.* In this Caſe B. has nothing in the Fee; it is a Remainder contingent to the Heir of B. If *C. dies without Iſſue in the Life of B.* the Remainder is void; Becauſe it has no Freehold to ſupport it when the Remainder falls; for C. died without Iſſue in the Life of B. and B. cannot have Heir during his Life. Jenk. 248. pl. 38. 2d Part.

5. Where *Land is given to a Man and his Feme for Life*, the *Remainder to the Heirs Male of the Body of the Man*; this Remainder *cannot be veſted in the Life of the Man*; For it is not Tail in the Man, by reaſon of the Eſtate of the Feme. Br. Noſme, pl. 40. cites 37 H. 8.

6. Every Remainder which commences by a Deed *ought to veſt* in him to whom it is limited, *when Livery* of Seiſin *is made to him that hath the particular Eſtate.* Co. Litt. 378. a.

7. If Lands be granted and render'd *by Fine for Life*, the Remainder *in Tail*, the Remainder *in Fee*; none of theſe Remainders are in them in the Remainder until the *particular Eſtate* be *executed*. Co. Litt. 378. a.

(K) *At what Time it muſt or may attach. What* Remainders *are in Contingency* and not attach'd.

Fol. 419.

1. WHERE it is dubious and uncertain whether the Eſtate limited in Futuro, ſhall ever veſt in Eſtate or Intereſt, or not, there the Eſtate is in Contingency. 3 Rep. 20. * Boraſton's Caſe. 10 Rep. 85. Lovels's Caſe.

2. As if the particular Eſtate (upon which the Remainder depends) may determine before the Remainder may commence, there the Remainder is contingent. 3 Rep. 20. Boraſton's Caſe.

* The Caſe was thus; viz. A. ſeiſed of Socage Lands in Fee deviſed them *for* 8 *Years and after to his Executors to perform his Will till C ſhould attain his Age of* 21 Years, *and when he ſhould attain that Age*, that he ſhould have it *to him and his Heirs for ever.* A. died, and *C died at* 9 *Years old.* It was inſiſted by the Counſel, and agreed by the Court, That the Executors had a good Term for 12 Years, which was not determined by the Death of C. So that *the Remainder commenc'd in Poſſeſſion at the End of the Term*; and as to the Adverbs of Time, viz. (*When*) and (*Then*) they *do not* amount to *make any Thing precede the ſettling the Remainder* any more than in the common Caſe, where one leaſes for Life or Years, and after the Deceaſe of the Leſſee, or Determination of the Term, the Remainder to another, yet this Remainder veſts immediately; for when Adverbs refer to a Thing which muſt neceſſarily happen, they make no Contingency; and it is certain that every one muſt die, and every Term muſt end, ſo that they only demonſtrate when the Remainder to C ſhall take Effect in Poſſeſſion. And Judgment accordingly. 3 Rep. 19 a. to 21. b. trill 29 Eliz. B. R. Boraſton's Caſe ——S. C. cited per Cur. Cro. J. 512. Mich. 10 Jac. B. R. in Caſe of Sheriff v. Wrotham.

If one make a *Leaſe to J. S. for Life, and after the Death of J. D. to remain to another in Fee*; this Remainder depends in Contingency; for if J. S. dies before J. D. the Particular Eſtate is determined before the Remainder can commence. Arg. Quod fuit conceſſum per tot. Cur. 3 Rep. 20 a. in Boraſton's Caſe. —— Whatſoever cannot accrue at the Time of the Death of the Party who firſt dies, cannot afterwards by any Act be reviv'd, but is abſolutely extinguiſh'd. Per Cur. Cro. C. 102. pl. 3. Hill. 3 Car. in the Exchequer Chamber, in the Caſe of Biggot v. Smith, which was adjudg'd upon this Reaſon.

3. A Fine was levied to the Uſe of *A. and the Heirs Male of his Body, till* he or the Heirs Male of his Body had done ſuch a Thing; and *after ſuch a Thing done*, to the Uſe of B. in Tail, and *dies without Iſſue without any Thing done.* Adjudged the Remainder was in Contingency, and never fell; the Eſtate was Contingent, and there muſt be a Contingency happen to put it in Eſſe. Cart. 203. cites Acton v. Hoar, as cited in Lovels's Caſe. 10 Rep. Acton v. Hare. S. C. adjudg'd. Pooh. 90. Trin. 37 Eliz.

4. A. *deviſed* Lands *to E. for Life*, and after her Death *to the eldeſt Heir Male of her Body, and to the Heirs Males of ſuch Heir Male, ſo that he be* 24 Years old *at E.'s Death, but if* he be *not* of that Age, *then to her Husband till the Son come of that Age, and the Profits to be diſpos'd amongſt the younger Children.* E. died, her Heir Male being under 24. It was argued that thoſe Words (So that he be 24 Years old at the Death of E.) if the Deviſe had reſted there, would have been a Contingent Limitation upon the being 24 at that Time, but that by diſpoſing the Profits in the Interim, his Intention appears to be not to make that Limitation a Contingency to the Remainder, but upon that Suppoſal to provide for the younger Children. Adjornatur. All. 8. Paſch. 23 Car. B. R. Taylor v. Utherwood.

5. The Law is now ſettled, that in Caſe of a *Contingency that cannot in the Nature of it precede the Death of a Perſon, a reaſonable Time may be allowed ſubſequent* to the Deceaſe of that Perſon for Performance of the Condition, and a Fee limited thereupon is good. Per Jekyl, Maſter of the Rolls. 10 Mod. 422. in Caſe of Marks v. Marks, cites Show. Parl. Caſes 137. Loyd v. Carew. In which Caſe a Year was held a reaſonable Time. Ibid. S. C. cited by the Maſter of the Rolls. 2 Wms's Rep. 623. Mich. 1732. in Caſe of Stanley v. Leigh.

6. A *Deviſe* to a Man *for Life, and after to his Heir*, this is an Eſtate in Fee; but if it be, *and to the Heirs of ſuch Heir*, (*Such*) there, is a Contingent Remainder. Per Holt Ch. J. Skin. 559. Mich. 6 W. & M. B. R. in Caſe of Moor v. Parker.

(L) Contingent, or other Remainder. *Veſts at what Time.*

1. A. Makes a *Leaſe for Life on Condition to B. that if B. has Iſſue* in his Life, the Land ſhall remain over *to W. N. in Fee*; B. does *Waſte*, A. brings a Writ of Waſte, and *has Execution*; B. has Iſſue and dies. No Action of Formedon accrues to W. N. becauſe the Fee remains in A. until B. has Iſſue, and then the *Recovery defeats the firſt Entry*. Br. Lett. Stat. Limit. 84.

2. Lands given *to A. and the Heirs Male of his Body, Remainder to the right Heirs of B.* A. died without Iſſue; B. had Iſſue two Daughters L. and M. [B. died,] L. died, M. died; this Remainder is as a Purchaſe, and the *Survivor* takes Place; ſo that the Formedon lies only for the Heir of Survivor, and it is not like as if Land were given to A. for Life, Remainder to B. for Life, or in Tail, Remainder to right Heirs of A. For in this Caſe the ſaid Remainder is veſted in the Tenant himſelf, and he is the Purchaſor of it, and from him it ſhall deſcend to his Son. Otherwiſe here; for if Land is given to A. for Life, or in Tail, Remainder to the right Heirs of J. S. and after J. S. dies, his Wife *Privement enſient* with a Son, and the Remainder falls, and after the Son is born, the Daughter ſhall retain the Lands againſt the Son for ever. Dal. 69. pl. 39. 6 Eliz. Stowell & Bamfield v. Earl of Hartford.

1 Le. 14 pl. 32 Mich. 5 Eliz. C. B. S. C.

3. Feoffment to the Uſe of Feoffor for Life, and after his Death to his *firſt Son which ſhall be born* afterwards, for his Life, and ſo to ſeveral Perſons, and after to the Uſe of *J. D. in Tail*. Reſolved that all the *Uſes limited to Perſons not in Eſſe are Contingent*, but the Uſes *to Perſons in Eſſe ſufficiently*, and yet theſe Contingent Uſes when they happen, veſt *by Interpoſition*, if the firſt Eſtate for Life which ought to ſupport them, be not diverted. Hutt. 119. in Caſe of Napper v. Sanders, cites 1 Rep. 133. in Chudleigh's Caſe.

Ibid. 118. cites 37 H. 6. 5.

4. If a Deviſe or Uſe be limited to *A. for Life, Remainder to B. in Tail*; if *A. dies*, the Remainder veſts preſently. Per Coke. Arg. Le. 195. Mich. 31 & 32 Eliz. in Lord Paget's Caſe.

So if Land is given to J. S. till B. (A.'s Son) *comes of Age*, the Remainder veſts preſently. Arg. Le. 195. in Lord Paget's Caſe.

Fortescue is not to be found in the Year Book.

6. Covenant to ſtand ſeiſed *to the Uſe of Salisbury Plain for the Life of A. Remainder to W. R.* W. R. ſhall take preſently. Per Manwood Ch. B. Le. 195. in Lord Paget's Caſe.

Ibid. 118. *Eſſex's* Caſe; but when the Uſe is limited *to a Baſtard*, the Remainder over, there the Remainder ſhall not come in Poſſeſſion ſuddenly; for he is a Perſon capable, but not by Conveyance in Conſideration of Natural Affection. Per Manwood Ibid. 197.

Ibid. 118. cites 3 E. 3 Land's Caſe.

7. A. leaſes for Life, *Remainder to himſelf in Tail, Remainder to a Stranger in Fee*; the Meſne Remainder to A. himſelf is void, and the Remainder over ſhall be immediate to the Eſtate for Life. Arg. Le. 197. in Lord Paget's Caſe.

S. C. Yelv. 9. 10. And there Popham ſaid, (and which was agreed to Per Cur.)

8. A *Rent* was *granted* to J. S. *pur auter Vie, with Remainder over*. If Grantee dies, the Remainder ſhall take Place preſently, becauſe the Rent for Life determines by the Death of the Grantee. Per Popham. Mo. 664. pl. 907. Trin. 44 Eliz. B. R. Salter v. Butler.

That tho' the Grantee dies, ſo that the Rent determines in Intereſt as to the Perception thereof, yet inaſmuch as the Tertenant during this Time holds the Land charged, it ſhall ſerve to ſupport the Remainder. Mich. 44 & 45 Eliz. Salter v. .... ——Noy 40. S. C. but not exactly S. P. ——Cro. E. 901. S. C. but not exactly S. P.

Hob. S. P. adjudg'd.

9. Feoffment to the Uſe of *A. for Life*, then to the Uſe of *Truſtees for 99 Years, if A. ſo long live*, and *after A.'s Death to B. in Tail*. Mich. [illegible]

Adjudged that the Remainders vest presently, and that the Possibility that A might over-live the 99 Years, will not make the Remainders Contingent. Hutt. 119. cited per Cur. as the Lord Derby's Case. And that upon a Special Verdict found at Lancaster, in a Case between Fillingson and another, about 8 Jac. and often argued at Serjeant's-Inn, it was afterwards adjudged a good Remainder, and not Contingent. PP. - Car. Napier v. Sanders.

10. A. levied a Fine to the Use of himself and the Heirs of his Body, and for Default of such Issue to the Use of *B. and the Heirs Male of his Body, until B. should go about to Sell, Alien &c.* and *after the Effate of B.* and the Heirs Male of his Body *by any such Attempt determined* &c. then to the *Use of the Heirs Male of the Body of B.* And *for Default of such Issue* then to the *Use of C.* in Tail, *until* &c. as before, and after to the *Use of D.* in Tail, as is before limited to C. It was agreed per tot. Cur. That no Remainder can enure over to C. without an Attempt precedent by B. to determine his Estate, because the Estate of C. is not limited to begin, but upon such an *Attempt precedent*. Popn. 97. Arton v. Hare. But otherwise where the Estate is limited to C. voidable by B. Litt. R. 159. Pere 22 a. Mildmay's Case.

11. A. seised in Fee has two Sons, B. and C.—A. makes Feoffment to the Use of himself for Life, and after *to C.* the 2d Son *for Life, Remainder* after his Death *to the Use of the 1st Son of C. which should have Issue Male of his Body, and to his Heirs for ever; and for Want of such Issue* the Remainder *to the right Heirs of C. for ever.* Adjudged that this Remainder to the younger Son who should have Issue, is but a Contingent Remainder, and a Remainder to the right Heirs vested in C. Cro. Car. 304. Pasch. 10 Car. B. R. Boreton, or Moreton, or Bowton v. Nichols &c. Litt. R. 159. 2 Sid. 3 S. 395 Mich. 4 in Mich. 6 Car. C. B. 8 C. B. the Case of [illegible] v. Nicols & [illegible]

— Gould J. in Case of Ide v. Cock, cites S. C. and [illegible] the Question was, If it was a [illegible] Limitation, or a Contingent Fee-simple? And that it was [illegible] tingent Fee, the Remainder over had been void. Vid. Rep. 11. And [illegible] that the Words *Said Issue*) must there be taken to be [illegible] and he admits that it is a Contingent Estate, but yet it might be a [illegible] pag. 76. Powell J. cites S. C. and says it was not resolved or [illegible] ther the Estate limited was a Fee-simple or a Fee Tail; for if the [illegible] sufficient, and for the mean Time the Remainder in Fee was [illegible] never happened. And tho' the Limitation to the first Son of C. was [illegible] was *only a Description of the Person*, yet the Words (such Issue) might [illegible] the Words (Heirs Males) which may help the Resolution.

12. A. seised in Fee, in Consideration of a Marriage between B. his Son, and M. and of 1000*l.* Marriage Portion, and for the Affection he bore to his Relations, covenanted to stand seised *to* the Use of *himself for Life, Remainder to B. and W. S.* 2 Strangers and their Heirs *during the Life of B. to support Heir Apparent, Remainder to the eldest Son of B. successively in Tail Male*, Remainder *to C. in Tail Male*, Remainder *to D. in Tail Male* &c. A. dies before B. has Issue Male born, but afterwards B. has Issue J. Per North Ch. J. It seems that this Remainder immediately after the Death of A. vests in C. as Lewis Bowles's Case is, 11 Rep. [illegible] Resolvatur. Raym. 247. Hill. 30 & 31 Car. 2. C. B. Eagles v. Bolton.

13. A. Tenant of a Copyhold Tenement *to* the Use of *himself for Life*, and after to the Use of *his youngest Son, and the Heirs of his Body, if he attain to the Age of 18 Years*; and if he die before he attain to that Age without Issue Male, then *to his* [A.'s] *right Heirs*. The Question was, If this was a Contingent Remainder, or if it should attach immediately upon the Death of Tenant for Life? And held that it attach'd immediately, because of the Intention of the Party, and held to be the same with Sir Julius Cæsar's Case, in Jo. 359. 2 Show. 398. Pl. 370. Mich. 36 Car. 2. B. R. Stocker & Ux. v. Edwards. Edwards v. Hammond. 3 Lev. 132. Trin. 35 Car. 2. C. B. [illegible] ms to be S. C. tho' [illegible] see the Lord was [illegible] to be [illegible] Bought Ex- [illegible] and [illegible] Son and [illegible] be void at 17 [illegible] a Condition [illegible] Years of Age be [illegible] Estate, and it was held, That tho' by the first Words [illegible] pre- [illegible] cedent, yet [illegible] and the Words taken together, it was not so, but a Devise to [illegible] diately, but to be defeated by Condition subsequent, if he does not attain the [illegible] Words

the *Surrender* mentioned to be made to the Use of A. for Life, and after *to the* [illegible] his Heirs (which by the [illegible] the same Point) if &c. as in the other Case; and that [illegible] Years of Age by [illegible] Estate, and it was held, That tho' by the first Words [illegible] pre- [illegible] cedent, yet [illegible] and the Words taken together, it was not so, but a Devise to [illegible] diately, but to be defeated by Condition subsequent, if he does not attain the [illegible] Words

ſembled it to the Caſe of * Spring v. Cæſar, and ſo it was adjudg'd in Mich. Term following.——* See Condition (F) pl. 12.

14. Deviſe *to A. for* 60 *Years, if A. ſo long live, and from and after the Death of A. to B.* his eldeſt Son *in Tail*, whether this be a Contingent or a Veſted Remainder? Per Lds Commiſſioners, It would be hard to conſtrue the Meaning of the Words to be from and after his Death within the Term; for ſuppoſe A. ſhould outlive the Term, ſhould B. take in the Life of A.? That would be contrary to the Words and Intent of the Teſtator. Suppoſe it had been 6, 7, or 8 Years inſtead of 60, could there be any Room then for ſuch Conſtructions? And at what Number of Years is ſuch Conſtruction to begin? 2 Vern. 131. pl. 129. Hill. 1690. Beverly v. Beverley.

Ld Raym. Rep. 3. S. C accordingly.

15. Deviſe to *A for* 50 *Years, Remainder to the Heirs Male of A. Remainder to B.* The Remainder to B. takes Effect preſently. 1 Salk. 226. Hill. 5 W. & M. B. R. Goodright v. Corniſh.

1 Rep. 129. b. 134 b (f) 138. Chudleigh's Caſe. ——2 Rep. 51. (g) Cholmley's Caſe ——2 And. 39. Baldwin v. Smith, als. Archer's Caſe.——Cro. E. 453. S. C.——1 Rep 66 b. S. C.——2 Lev. 39. Purefoy v. Rogers.——But the Statute 10 & 11 W. 3. cap 16. S 1. Enacts that *where any Eſtate is by Marriage or other Settlement limited in Remainder to, or to the Uſe of the firſt or other Sons of the Body of any Perſon, with Remainder over to, or to the Uſe of any other Perſon, or in Remainder to, or to the Uſe of Daughters, with Remainder to any other Perſons, any Son or Daughter of ſuch Perſon born after the Deceaſe of the Father, may take ſuch Eſtate in the ſame Manner as if born in the Life-time of the Father, altho' no Eſtate be limited to Truſtees to preſerve the Contingent Remainder.*

16. Contingent Remainder muſt *veſt during the Particular Eſtate, or Eo Inſtante*, that it determines. 1 Salk. 228. Paſch. 6 W. & M. B. R. Reeve v. Long.

17. After a *Contingent Meſne Remainder is once limited*, no Eſtate after limited can be veſted; but when a Contingent Meſne Remainder is not in Fee, but *only for Life, or in Tail*, an Eſtate after limited by ſubſequent Words may be veſted. Adjudged. 3 Salk. 300. Doddington v. Kyme, [but ſhould be Loddington v. Kyme]

And therefore a Limitation *to A. for Life, Remainder to the* Uſe of [the *Heirs of*] J. S. and J. N. tho' J. S *dies firſt before* J. N. yet the Heirs of J. N. ſhall take, tho' it be veſted in the one before the other hath a Capacity to take; but had the particular Eſtate determined after the Death of J. S. and before that of J. N. there perhaps the Heirs of J. N. ſhould never take; and in this Caſe they are Jointenants for Life, and Tenants in Common of the Inheritance. Cumb. 467. Matthews v. Temple.

18. Conveyance to the Uſe of A. (the Husband) for Life, Remainder to B. (the Wife) for Life Remainder to all the Iſſues Female of their 2 Bodies, and *to the Heirs Male of the Bodies of ſuch Iſſues Female*; A. and B. have *Iſſue a Daughter*. Reſolv'd the Remainder in Tail is not ſo attach'd in this Daughter, as not to *be diveſted for a Moiety by an After-born Daughter*; for this Limitation being by Way of Uſe, ſprings out of the Eſtate, according to the Capacity of the Perſon in whom it is to reſt. Comb. 467. Hill. 10 W. 3. B. R. Matthews v. Temple.

(M) Contingent Remainder. *What is.*

It's being uncertain whether the Remainder will veſt Eodem Inſtanti,

1. A Contingent Remainder *never is but* in Caſes *where the Particular Eſtate may determine before the Contingency may happen.* Sid. 247. Per Cur. in Caſe of Merrel v. Rumſey.

that the precedent Particular Eſtate ſhall end or not, makes it a Contingent Remainder. Arg. Raym. 144. cites 3 Rep. 20. Boraſton's Caſe, and 10 Rep. 15. Lampett's Caſe

A Contingency is when it is *uncertain whether the Thing will take Effect, or not*; as when an *Eſtate is limited to a Perſon not in Eſſe*, as a Leaſe for Life, Remainder to the right Heirs of J. S. who is alive; for it is uncertain whether J. S. ſhall ever have an Heir. 2dly. When there is a *Collateral precedent, or ſome other Accident*, which ought to happen before it can take Effect, which is uncertain whether ever it will

will happen or no. As if a *Leaſe for Life* be made, and that *if A. pay* 10*l. then the Remainder to the right Heirs of A. or if B. ſurvive, then the Remainder to the right Heirs of B.* In theſe Caſes it is uncertain whether the Money will be paid, or the Accident happen. 3dly When a Remainder is ſo limited that it is *uncertain whether it will continue during the Continuance of the Particular Eſtate*; for if it cannot veſt during the Particular Eſtate, or immediately when the Particular Eſtate determines, it is void. Arg. Poller. 56, 57. in Caſe of Weale v. Lower.

2. By Indenture between J. S. of the one Part, and A. B. C. and D. of the other Part, J. S. demiſes Land *to A. for* 80 *Years, if A. ſhould live ſo long*, and ſhould not alien the Term; *and if A. die or alien within the Term*, then J. S. granted the Premiſſes *to B. for ſo many Years of the ſaid Term* as ſhould be then to come, *if* he ſhould ſo long live, and not alien; and in like Manner to C. and if *C. die or alien*, then J. S. granted it to D. his Executors and Aſſigns, for ſo many Years as ſhould be then to come. Adjudged that this is a good Poſſibility in D. to have Term for Years, but *B.* and *C dying in the Life of A.* the Poſſibility to D. could not take Effect, becauſe the Contingency is to D. *upon the Ceſſer of Eſtates of B. and C. who never had any Eſtate*, becauſe of their dying in the Life of A. Mo. 478. pl. 684. Mich. 37 & 38 Eliz. B. R. Loyd v. Wilkinſon. 1 Rep. 152. Mich. 4 & 41 Eliz. S. C. by the Name of the Rector of Chedington's Caſe.

3. A. had 2 Sons B. and C. and levied a *Fine* to the Uſe of himſelf for Life, *Remainder to B.* his eldeſt Son *for Life*, and after *to the firſt Son of the Body B. and his Heirs Male*, and ſo to 4 Sons ſucceſſively in Tail; *And if it ſortune the ſaid 4th Son to die without Iſſue Male, then to remain to C.* A. dies. B. dies without Iſſue Male, leaving a Daughter. Adjudged that the Uſe veſts in C. tho' B. had no Iſſue Male, and B's having Iſſue Male was no Condition precedent. Mo. 486. pl. 686. Patch. 38 Eliz. Holcroft's Caſe. S. C. cited Arg. Mo. 525. in Ld Buckhurſt's Caſe.

4. *Deviſe to A. in Tail, provided if A. or any of his Iſſue alien, then for Default of ſuch Iſſue* the Premiſſes *ſhall remain to B. in Tail.* Per omnes J. præter Walmſley J. The Remainder cannot ariſe unleſs there be both Death without Iſſue, and Alienation. Mo. 773. pl. 1067. Trin. 2 Jac. C. B. Lovice v. Goddard. Cro. J. 61. pl. 5. Hill. 2 Jac. B. R. S. C. cited that Daniel, Kingſmil, and Anderſon held as here, and that ſo it is a Conditional Limitation which is void and repugnant to make Remainder to commence after the Alienation of an Entail; But that Walmſley and Warberton held it an Expreſs Limitation of the Entail, and of the Remainder expectant thereupon, and not to begin upon the Alienation, and Judgment was given according to the Opinion of the 3 Juſtices. —— But Mo. 774. ſays, That that Judgment was reverſed in B. R. Mich. 3 Jac. —— S. C. 1 Rep. 78. Patch. 11 Jac. and there Pag. 86. The Ch. J. was of the Opinion of the 3 Juſtices, but ſays that this Point was not reſolved. —— Brownl. 163. S. C. argued, but no Judgment.

5. A Fine was declared to the Uſe of *A. for Life*, Remainder to the Uſe of *the Heirs Males of A.* on the Body of M. begotten, Remainder *to J. S. in Tail*, Remainder to the *Right Heirs of A.* in Fee; And *if the ſaid A. ſhould happen to die living the ſaid M.* then the Fine ſhould be *to the Uſe of the ſaid M. for Life, and after her Deceaſe to Uſes aforeſaid*; Reſolved, That A. dying, living M. he has an immediate Eſtate for Life, and ſo ſettled by the Law. Ley. 54. Mich. 14 Jac. Bollock's Caſe.

6. Deviſe to *A. for Life*, then *to B. in Tail, and if my* 3 *Daughters, and either of them over-live A. and B. then they to have it, and after them I give it to J. W. &c.* B. died, and 2 of the Daughters died, living A. then A. died. The Queſtion was, If this was a Contingent Eſtate, and if ſo, Whether it were performed by 2 of the Daughters dying in the Life-time of B. And it was reſolved that it was no Contingent Limitation, but only ſhews when it ſhould commence, which is well enough performed. Cro. J. 416. Hill. 14 Jac. B. R. Webb. v. Herring. Roll Rep. 39. S. pl. 25. S. C. adjudged. —— S. C. cited 3 Bulſt. 192. adjudged. —— S. C. mentioned 45. pl. 1. S. C. adjudged. —— S. C. Bridgm. 84. Adjudg'd.

7. A *Fine* is levied *by A. to* the Uſe of *himſelf for Life*, Remainder *to his 1ſt Son*, and to *the Heirs Males* of his *Body* begotten &c. *and ſo on to his 6th Son ſucceſſively*, Remainder *to the Right Heir Male* (in the Singular Number) *of the Grantor, to be begotten after the ſaid 6th Son, and of his Heirs Male*;

It was ruled upon Evidence at Bar, That this Limitation to the Heir Male was only a Contingent Remainder, and not an Eſtate Tail in A. becauſe it was limited to particular Perſons. Palm 359. Paſch. 18 Jac. B. R. Waker v. Snow.

This Caſe was again argued in Chancery, the Ld Chancellor having at the Inſtance of Hale Ch J. called in other Judges to his Aſſiſtance, and they all agreed in Opinion with Hale. Pollexf. 69. S. C.

8. A. ſeiſed in Fee of 3 *Acres*, inſeoff'd G. and H. whereof 2 *Acres* were to the Uſe *of himſelf for Life*, and the 3*d Acre* to the Uſe *of himſelf for the Life of B. his Son*; and after the Death of B. then the 3*d Acre* was to be to the Uſe *of K. the Wife of B for Life*; and the other 2 *Acres after the Death of A. and M. his Wife* to the Uſe *of B. for Life*, and *after the Death of A. M. and B.* to the Uſe *of K. and of ſuch Iſſue Male or Female, as the ſaid B. ſhould beget on her*, until ſuch Iſſue ſhould be of the Age of 21 Years, and no otherwiſe; *And if B. ſhould have no Iſſue by her, then* to the Uſe *of K. for Life, and after the Death of A. M. and K. all the Lands to* the Uſe of *B. and the Heirs Males of his Body, to be begotten on K. and for Default* of ſuch Iſſue *to the Heirs of B. for ever. B. has Iſſue C.* a Daughter yet living, and makes a Leaſe of all the Lands by Indenture to the ſaid G. *for 500 Years to commence after A's Death, and after grants by Fine to the ſaid G. for 500 Years*, and then he and M. die. Upon a Reference out of Chancery to the Ld Ch. J. Hale, he held, That as to the 3*d Acre limited to K. for Life, the Remainder* therein was not Contingent, but *was veſted*; Becauſe by the Limitation after the Death of A. M. and K. being conſtrued *Diſtributively*, it ſhall be taken that as to the 3d Acre the Eſtate of B. commenced in Poſſeſſion after the Death of A. and K. only; For in this Acre M. had nothing; and as to the other 2 Acres where M. had an Eſtate for Life, there it ſhall be taken commence after the Death of A. and M. Pollexf. 54 & 67. Jan. 3. 1672. Weale v. Lower.

But tho' it did not appear in the Caſe yet upon Examination it appeared that *by another Deed M. had an Eſtate for Life*, and then, ſo Ld. Ch J. Hale ſaid, the Uſe ſhall not be contingent; but the mentioning that the Commencement thereof ſhould be *after the Death of M. is only an Expreſſing when B. ſhould take the Profits in Poſſeſſion, and not a Contingency.*

9. *A. made a Feoffment* to the Uſe of *himſelf for Life, and after the Death of him M. and his Wife* to the Uſe *of* B. (eldeſt Son of A.) *for his Life, and after the Death of A. M. and B.* to the Uſe *of B. and the Heirs Males of his Body*, and for Default of ſuch Iſſue to the Uſe *of the Heirs of B. — B. had Iſſue a Daughter*, and then by Fine and Indenture *granted to G. for 500 Years.* B. dies. M. dies. A ſurvived. Upon a Reference out of Chancery to the Ld Ch. J. Hale, and after hearing the Arguments of Counſel, his Lordſhip was of Opinion, That the Eſtate as above, limited to B. was a Contingent Remainder. Pollexf. 55 & 65. Jan. 3. 1672. Weale v. Lower.

Pollexf. 66. S. C.

10. Leaſe *to A. for Life, and after the Death of A. and M. his Wife*, the Remainder *to B. his Son and his Heirs*, this is a Contingent Remainder; For the particular Eſtate being only for the Life of A. and the Remainder not to commence till after the Death of A. and M. this may determine by the Death of A. before M. And ſo it would have been in ſuch Caſe at Common Law; And tho' it had been by way of Uſe, yet could not the Remainder be preſerved without a particular Eſtate. Admitted, Arg. Pollexf. 57. in the Caſe of Weale v. Lower.

11. Ld. Ch. J. Hale took a *Difference between a Contingent Remainder by way of Uſe, and a future Uſe, or an Eſtate in Futuro by way of Uſe.* Pollexf. 65. in Caſe of Weale v. Lower.

12. *As* if a *Feoffment* be made *to the Uſe of A. for Life, and after the Death of A. and B. to to* the Uſe of *C. in Fee*, this is a Contingent Remainder to C. Pollexf. 65. Weale v. Lower

13. *But if* a Feoffment be made *to the Uſe of C. and his Heirs after the Death of A. and B.* this is no Remainder, but a Future Uſe, and the Feoffee is ſeiſed in Fee-ſimple, and not of a Freehold diſcendible, determinable upon the Deaths of A. and B. Pollexf. 65. in Caſe of Weale v. Lower.

14. *So* if the Limitation of an Uſe be *that after* 2 *Years, or* after the *Death of J. S. it ſhall be to the Uſe of J. N. in Fee*, the Feoffor has the Fee-ſimple remaining in him until this future Uſe comes in Eſſe. Pollex. 65. Weale v. Lower.

15. If a *Leaſe* be made *of Bl. Acre to A.* of *Wh. Acre to B.* and of *Gr. Acre to C. and* that *after the Death of A. B and C it ſhall remain to D. and his Heirs*; In this Caſe D. ſhall not have a Contingent Remainder, but the Conſtruction ſhall be *Relative*. Pollex. 67. in the Caſe of Weale v. Lower.

16. If a *Feoffment* be made *to the Uſe of A. for* 99 *Years, if he ſhall ſo long live, and after his Death to* the Uſe of *B. in Fee*, this ſhall not be contingent, but it ſhall be *preſumed that his Life will not exceed* 99 *Years*; *But* it would be otherwiſe if it had been *made but for* 21 *Years*. cited per Hale Ch. J. to have been ſo ruled. Pollex. 67. in Caſe of Weale v. Lower.

17. A. ſeiſed in Fee of Lands in Ogborne, *deviſed* them *to B. for Life*, if he ſhould be *living at the Death of A. the Teſtator*, but *if not*, then *to C. for Life*, if he ſhould be *then living*; and *if not*, then *to remain to the next Heir Male of the Body of C.* and *for Default* of ſuch Male, then *to the next Heir Male of the Body of B.* Remainder over in Tail Male, *to the Intent that his Land might (if pleas'd God) continue in his Name for ever.* A. died, then *B. died leaving Iſſue C.* and the Queſtion was, *Whether C. took any Eſtate by this Will*; It was argued that he did not; for by the Expreſs Words nothing was given to him unleſs B. had died in the Life-time of A. which he did not, for he ſurvived; neither could he take by the Deviſe to the Heir Male of the Body of B. his Father, becauſe it is a Limitation by way of Remainder, which with the particular Eſtate is but one Eſtate, and if the one does not veſt, the other never ſhall; and *(if C. dies)* ſhall be intended (if he dies before A.) and not generally, it being certain that he ſhall die; and that no Remainder ſhall take Effect till C's Death, and that not happening before or at B's Death, when the particular Eſtate determined, it never ſhall take Effect: But it was anſwered, That the Clauſe *(And for Default of ſuch Iſſue then to the Heirs Male of B.)* is not Contingent but *ſtands abſolutely, and is a good Limitation*, and after B's Death took Effect in C. the Defendant; The Court was of Opinion that C. the Defendant had an Eſtate by the Deviſe; And judgment was given, Quod querens nil capiat per Billam. 2 Jo. 111. Trin. 30 Car 2. B. R. Gold v. Goddard

18. It was held, That if *Land* be *given to the Feme durante viduitate and* after *to the Heirs of her Body*, that this is an Eſtate Tail executed in the Feme, and not Contingent, Sid. 247. in Caſe of Merril v. Rumſey. *But* if Land be given *to the Baron and Feme during the Coverture*, Remainder *to the Heirs of the Body of the Baron*, this hath been held to be a Contingent Remainder: Per Jones J. Sid. 247. in Caſe of Merril v. Rumſey, cites 4. E. 3. 22. 21. Fitzh. Breve 81. 82. Perkin 8. 337.

19. Deviſe of a Term *to his Wife for Life*, and after her Death *to the Child ſhe was then Enſeint with*, and *if ſuch Child died before* 21, then he deviſed *one third Part to the Wife*, her Executors &c. and the other two Parts to other Perſons, and made her Executor. The Wife's being Enſeint, is not neceſſary to intitle her to the 3d Part. G. Equ. R. 74. Hill. 8 Ann. Jones v. Weſtcomb. Chan. Prec. 316. Mich. 1711 S. C.

20. A. conveyed Lands *to the Uſe of himſelf for* 99 *Years, if* he ſo long live, Remainder *to Truſtees and their Heirs during his Life* &c. Remainder to the Uſe of *the Heirs of his Body*, Remainder *to himſelf in Fee*. Lord C. Cowper ſaid, That this was plainly a Contingent Remainder being limited to the Heirs of the Body of A. who can have no Heir during his Life; for Nemo eſt Hæres Viventis; and that the Meaning of the Limitation is to carry the Settlement as far as may be, and beyond the Limitation to the firſt Son. Wms's Rep 387. 388. Mich. 1715. Elle v. Osborn.

(N) Con-

See (C. 3) (C. 4)

(N) Contingent Remainder. *Supported how.*

1 Rep. 134. b. in Chudleigh's Caſe —— Such Limitation *before 27 H.* 8 had been good; for the Feoffees remain Tenants of the Freehold but ſince the Statute it is void; for then Frankfenement ſhall be in Suſpence, for nothing may remain in the Feoffees. Per Gawdy J. 1 Rep. 135. in Chudleigh's Caſe.

1. AN Uſe is limited to A *for Years, Remainder* to the Uſe of the Heirs, or Wife, of B. which ſhall be; it is void, becauſe it would have been void, if limited in Poſſeſſion. Arg. Parl. Caſes 107. in Caſe of Davis v. Speed. cites D. 190. Poph. 3. 4. & 82.

2. Chudleigh's Caſe, 1 Rep. 128. a. Dyer 340. Pl. C. 252. b. do all ſay that the Entry of the Feoffees is not requiſite, but *when the Eſtate and Seiſin, out of which the Uſe ſhould ariſe, is diſturb'd* or altered by Diſſeiſin, Feoffment, or the like, *or alienated to one that hath Notice*; and the Reaſon there given is, becauſe the Uſe, which might be executed by the Statute, ought to be an *Uſe in Eſſe*, and not a Right to an Uſe; for the Eſtate cannot be transferr'd by the Statute to one who has but a Right to an Uſe, but to him who is actually Ceſty que Uſe. Arg. Pollex. 96.

3. *A.* is *Tenant for Life*, Remainder *to B. for Life*, Remainder *to C. W. for Life*, Remainder *to a Contingent, and A. and B. join in a Fine*, yet the *Right of Entry of C. preſerves the Contingent Eſtates.* Per Hale Ch. J. Mod. 92. Mich. 22 Car. 2. B. R. in Caſe of Zouch v. Clare.

A. Tenant for Life, Remainder *to B. for Life*, and *to his 1ſt and 10th Sons in Tail*, Remainder *to the right Heirs of C. B. had a Son*, and then *B. and C. joined in a Fine to A.* (the Son of B. being then living) then A. *made a Feoffment*, and afterwards *B. had Iſſue a 2d Son*, and then his *eldeſt Son died.* The only Queſtion was, whether by the Feoffment of A. the Contingent Remainder to the 2d Son was deſtroyed, he being born at the Time of the Feoffment. It was adjudged per tot. Cur. That it was not, but that *the Right of the Remainder*, which was *in the firſt Son*, had *preſerved it till the Birth of the 2d Son.* 2 Lev. 35. Hill. 23 & 24 Car. 2. B. R. Loyd v. Brocking.——S. C. Vent. 188. accordingly.

* So if there be *Tenant for Life*, with a Contingent Remainder over, and Tenant for Life be *diſſeiſed*, the whole Eſtate is diveſted, but the *Right of Entry in the Tenant for Life* ſhall ſupport the Contingent Remainder; *but* if Tenant for Life be diſſeiſed, and a *Contingent Remainder depending* upon his Eſtate *does not veſt before a Deſcent is caſt*, then it is gone, becauſe it is *turn'd to a Right of Action*, tho' now it may be *preſerved* longer, by the *Stat. of H.* 8. whereby, except a Diſſeiſor be 5 *Years in Poſſeſſion*, a Deſcent will not take away his Entry. 12 Mod. 174. Thomſon v. Leach.

* 2 Lev. 35. Loyd v. Brocking.

5. *A Right of Action* cannot ſupport a Contingent Remainder; but there muſt be a *Particular Eſtate actually in Being*, or a *preſent* * *Right of Entry*, but a *future* Right of Entry is not ſufficient. Vent. 189. in Marg. ſays it was ſo held per Cur. in the Caſe of Thomſon v. Leach.

1 Salk. 226. S. C.

6. A *Term of Years* will not ſupport a Contingent Remainder, tho' the Term and Remainder are both deviſed by a Will. 4 Mod. 255. Hill. 5 W. & M. B. R. Goodright v. Corniſh.

But C. dying alſo with out Iſſue, upon a Reference to the Judges of B. R. by

7. A. *deviſed* Lands *to Truſtees and their Heirs for* 500 *Years* for the Payment of 50 *l. per Ann. to B. his eldeſt Son for Life*, Remainder from and after the Determination of the ſaid Term *to the Uſe of the firſt Son of the Body of B.* in Tail, Remainder *to C.* the 2d Son of A. in Tail, Remainder *to D.* the 3d Son of A. in Tail. B. had no Son born at A.'s Death. The Judges of B. R. thought the Remainder to the firſt Son of

B.

B. void, and that the Remainder to C. was a veſted Remainder; but Parker C. inclined to ſupport it, if poſſible. But then the Diſpute was agreed. 10 Mod. 501. Trin. 8 Geo. 1. Gore v. Gore.

Talbot C. in a Suit by D. they thought the Remainder good,

and that an *Interim Eſtate* till the Birth of a Son of B. (and who is ſince born) deſcended to B. and ſo the Contingent Remainder ſupported. (Ut Audivi)

8. A ſpecial Verdict found as follows, viz. A. and B his Son and Heir apparent, being ſeiſed in Fee of Lands in S. and T. by Feoffment and common Recovery, in Conſideration of a Marriage intended between B. and M. and 5000 l. Portion, ſettled the Premiſſes to the following Uſes, viz. To the Uſe of A. till the Marriage, and after, *as to the Lands in S. to* the Uſe of B. *and his Aſſigns for* 99 *Years, if* he ſhould ſo long live, and from *and after* the Death of B. or other ſooner Determination of the Eſtate to him limited, *to* the Uſe of *Truſtees and their Heirs*, during the natural Life of ſaid B. *to ſupport the contingent Remainders*, Remainder as to *Part to the Uſe of M. in Jointure*; and as to all the *Reſt* of the Premiſſes *to A. for Life*, Remainder *to the Uſe of the ſaid B. for* 99 *Years, if* he ſhould ſo long live, Remainder *to Truſtees to ſupport* Contingent Remainders, Remainder *to firſt &c. Sons of B. by M. in Tail Male*, Remainder *to the Uſe of firſt &c. Sons of B. by any other Wife* in Tail Male, *Remainder to A. for Life*, and after his Deceaſe *to the Uſe of C. 2d Son of A* and his Aſſigns *for* 99 *Years, if C. ſhall ſo long live*; and from *and after* the Death of C. or other ſooner Determination of the Eſtate herein limited to C. for 99 Years as aforeſaid, then *to the* Uſe of *Truſtees* and their Heirs, for and during the natural Life of C. upon Truſt *to ſupport Contingent Remainders*, and to make Entries as Occaſion ſhall require, but to permit the ſaid C. and his Aſſigns to take the Rents &c. during the Term of his natural Life; and after the End, or other ſooner Determination of the ſaid Term, *to the* Uſe of *the firſt, and other Sons of the ſaid C. in Tail Male*, and after ſeveral other Meſne Remainders *to* E. Father of the Leſſor of the Plaintiff, *for* 99 *Years, if* he ſhould ſo long live, Remainder *to Truſtees to ſupport &c.* Remainder *to firſt &c. Sons in Tail Male. C.* by the Deaths of the preceding Remainder-Men, *became poſſeſſed* of the Premiſes for 99 Years, if he ſhould ſo long live, Remainder as above limited. C. had a Son D. and no other Iſſue Male. *C.* being ſo poſſeſs'd, afterwards he, *together with D. his Son, levied a Fine, and ſuffered a Recovery* of the Premiſſes. *D. died without Iſſue in the Life of ſaid C.* Afterwards C. died without Iſſue Male, leaving 4 Daughters, H, I, K, and L. The Leſſor of the Plaintiff, the neareſt ſurviving Remainder-Man, made his actual Entry within 5 Years, and being ſo ſeiſed, demiſed to the Plaintiff &c. The Queſtion was, Whether the Common Recovery ſuffered, in which D. was vouch'd, was a good Bar? The *Tenant to the Præcipe* was *made by C.* (who was a *Leſſee for* 99 Years, if he ſo long lived) *and by D.* the Son, *to whom the Remainder was limited in Tail.* And tho' C. was only Tenant for 99 Years, if he ſo long lived, yet it was inſiſted, 1. That by this Fine a Freehold paſs'd; for that it was not void, but voidable. 2dly. That tho' the Fine levied by C. did convey no Freehold, yet that D. joining in the Recovery, there was a good Tenant to the Præcipe, notwithſtanding the Limitation to the Truſtees for preſerving the Contingent Uſes; for that the Limitation over to them, was either a void Remainder in it's Creation, or elſe it was Contingent and never Veſted. And it was likewiſe *inſiſted, That the Limitation paſſed* no Eſtate to the Truſtees, but *only a Right of Entry.* But to this it was ſaid by the Ch. J. who delivered the Opinion of the Court, That 1ſt. As to the Fine levied by C. no Caſe has been cited to prove it good; and the Law is now clear and ſettled, that *ſuch Fine of a Tenant for Years*, by Reaſon of the Imbecillity of his Eſtate, *Nihil Operatur*, and that it will be a

good Plea in ſuch Caſe Quod Partes Finis nihil habuerunt; So is 5 Co. 124. 3 Co. 78. Hard. 400. And ſo it was held in the Caſe of **Dunt v. Bourne**, Salk. 339. which he ſaid he cited from a MS. of Lord Holt, where, upon taking Notice of the different Operations of a Fine and of a Feoffment, he ſays that if Tenant for Years makes a Feoffment in Fee, the whole Eſtate of him in the Reverſion is diveſted; but if he levy a Fine Nihil Operatur, by which Words it is plain that he meant no Freehold paſs'd; for he puts a *Feoffment in Oppoſition to a Fine*; and therefore ſince a Feoffment does diveſt the Eſtate, there can be no Doubt but that Nihil Operatur muſt ſignify that the Fine diveſts no Eſtate. And this Opinion of Lord Holt is likewiſe agreed to be Law by Ld C. Macclesfield, in the Caſe of **Carter v. Barnardiſton**, P. Wms's Rep. 519. and ſuch Fine is ſaid to be void. So that here is the Opinion of Lord Coke, Lord Holt, and Lord Macclesfield, with the Concurrence of ſeveral other Judges in Support of this Side of the Queſtion, and not one Authority to be found to the contrary. Taking it then, that this Fine had no Effect to paſs the Freehold, the next Thing to be conſidered is the Conſequence of D.'s joining in the Recovery. And as to that, it is certain that if there was any Freehold in D. this Recovery will be a good Bar. If he had not, then the Title will be in the Leſſor of the Plaintiff. And ſaid, that the Court were all of Opinion that the Freehold was not in D. and that the Remainder to the Truſtees was not void, nor Contingent; nor is this Limitation to be conſtrued as giving only a Right of Entry to the Truſtees, as has been inſiſted at the Bar. 1ſt. *It is not a void Remainder.* The true Deſcription of a Remainder is, That it is a Remainder or Remnant of an Eſtate in Lands or Tenements, expectant upon a particular Eſtate created together with the ſame, and at the ſame Time. Co. Litt. 143. And it is ſo expectant upon the Particular Eſtate, that unleſs it can take Effect when the Particular Eſtate determines, it is void. The Reaſon given to prove this a void Remainder is, That the Remainder to the Truſtees being limited to the Truſtees *to commence after C.'s Death, and then afterwards to hold during his Life*, this was repugnant; and were there no other Words in the Settlement, poſſibly there might be ſome Force in that Objection. But here are other Words in the Limitation; for it is from and after the Death of C *or other ſooner Determination of his Eſtate, then to Truſtees.* And he apprehended that thoſe Words, (Or other ſooner Determination of the Eſtate) are a full Anſwer, becauſe by them there is plainly a *Remainder* limited, which *may take Effect by Surrender*, or *Forfeiture*, or *Effluxion of Time* in C.'s Life-time; and ſo here are Words to make this a Reaſonable Limitation, and Poſſible to take Effect. Upon this Head was cited by the Counſel for the Defendants the Caſe of **Cumberford and Birch**, 2 Lev. 157. to prove, That where there is an Eſtate limited upon two Diſjunctives, which cannot ſtand together, (becauſe if one happens the other cannot) that in ſuch Caſe it ſhall take Effect upon neither, but the Settlement ſhall rather be conſtrued to be void. There the Settlement was with a Proviſo, That if none of the Brothers of the Grantor, or their Children, were living at ſuch a Time, then to his Brothers ſucceſſively. And the Court held it a void Limitation. But that Caſe does not come up to the preſent; for the true Reaſon upon which the Court then founded their Opinion was, That the Death of the Brothers and their Children was conſidered as a Condition precedent; and it appeared in the Cauſe, that the Children of the Brothers were living, and ſo the Condition not performed on which the Remainder was limited; and it was not determin'd upon the Foot of the Neceſſity of the Remainders taking Effect upon both Diſjunctives. Now here, by (*the Death of C.* &c.) it was never intended that the Remainder ſhould veſt on the Death of C. but (as appears by the expreſs Words) on a Determination of the Eſtate for 99 Years before his Death. 2dly. But it is ſaid, Suppoſing that this Remainder is not void in its Creation, and that it might have taken Effect one Way

or

or other, yet it was Contingent, and is now become void by Event, becauſe it is not limited to commence abſolutely from the End of the 99 Years, but from ſome other ſooner Determination, which is uncertain, and not only as to the Time when ſuch Determination may happen, but whether it ever may happen, For C. may well have been preſumed to have outlived the Term. But He thought that this is a Miſtake, and that there is no Warrant for ſuch a Poſition by any Rules of Law. *Contingent Remainders are of 3 Sorts.* 1ſt. When it is a Limitation *to one not in Eſſe*; for in that Caſe if the Remainder-man never does come in Eſſe, it is a void Remainder. 2dly. *When the Particular Eſtate may determine before the Remainder can commence*, as an Eſtate to A. for Life, and from and after the Determination of his Eſtate, then to C. during the Life of A. This is good by Contingency; that is, if A. forfeit his Eſtate by Alienation, or otherwiſe, in his Life-time. 3dly. When there is a Limitation Precedent, or *ſomething to happen (before the Remainder can take Effect)* which may never happen, As a Remainder to commence when J. S. ſhall return to England from Rome. Now the preſent Remainder cannot be ſaid to be Contingent within any of theſe Deſcriptions; for, 1ſt. Here are Perſons in Eſſe to take. 2dly. The Remainder does not depend on the Death of C. but it is expreſsly limited from &c. other ſooner Determination; ſo that immediately from the Expiration of the Particular Eſtate, the Remainder is to commence. 3dly. Nor is here any precedent Condition to be performed, in Order to give the Truſtees Title. But it only depends on ſuch Facts which determine the Particular Eſtate from the Nature of the Eſtate itſelf, and which were underſtood to be ſo when the Remainder was originally created, viz. That all Eſtates for Years, if the Party ſo long live, may determine not only by the Death of the Party, or Effluxion of Time, but by Surrender or Forfeiture: And ſuch Determinations the Law takes Notice of, and will expect, as appears by 2 Co. 51. 1 Saund. 151. as a Leaſe to A. for Life, Remainder to another during the Life of A. this is good, becauſe by Poſſibility the Remainder may take Effect by the Tenant for Life's aliening or committing a Forfeiture; and this Poſſibility is therefore conſidered as an Intereſt in the Grantor, which he may limit, and is that Sort of Eſtate which Truſtees have for preſerving Contingent Uſes, and it is not a meer Right of Entry, nor a Contingent Remainder, but a veſted Eſtate to take Effect by thoſe Ways and Methods of Determination to which the Particular Eſtate was ſubject when it was created. And for this Co. Lit 42. puts a Caſe, which he apprehended explains this very much, viz. If Tenant for Life makes a Leaſe by Deed, or without Deed, to him in the Remainder, or Reverſion in Tail, or in Fee, for the Life of him in the Remainder or Reverſion, and after he in the Remainder takes Wife, and dies, his Wife ſhall not be endowed; for the particular Tenant ſhall enjoy the Land again; becauſe it cannot be a Forfeiture, he in the Remainder being privy, and it cannot be a Surrender, becauſe his whole Eſtate was not given. Now in the preſent Caſe what is there remaining in the Grantor? It is a *Poſſibility of the Leſſee's dying in the Life-time of the Leſſor, or of his Forfeiting or Surrendering* the Eſtate. And yet my Lord Coke ſays, This *is a Freehold*, and gives this as an Inſtance, that where there may be ſeveral Freeholds derived out of the ſame Eſtate, tho' at the ſame Time, it is but a Poſſibility, and ſufficient to prevent the Wife of him in the Remainder from being endowed; and agreeable to this is Duncomb's Caſe. 3 Lev. 437. A. Tenant for Life, Remainder to J. S. and his Heirs for the Life of A. Remainder to A. in Tail. The Court held there, That the Remainder to J. S. (tho' but a Poſſibility) was ſuch an Interpoſing Eſtate between the firſt Eſtate limited to A. for Life, and the laſt Eſtate limited to him in Tail; That A. could be conſidered as no more than a bare Tenant for Life, and that conſequently his Wife could not be endow'd, which ſeems to be our very Caſe as to this Point; for he took it that J. S. could be no other

there

there than a Truſtee for preſerving the Contingent Uſes. Having ſaid thus much to ſhew upon what Grounds Limitations to Truſtees made in common Form muſt operate, he ſaid he would conſider what Conſtruction the Limitation in the preſent Caſe ought to have; and he thought they always operate in the Manner expreſs'd in this Limitation, viz. That Part of the Limitation which is called Contingent, from the Words (Or other ſooner Determination.) The Common Kind of Limitation is firſt to A. for Life, and from and after the Determination of his Eſtate, then to Truſtees for the Life of A. or to A. for 99 Years, if he ſo long live, and from and after the End of that Term, then to Truſtees during the Life of A. Now in the firſt Caſe the Remainder limited to the Truſtees being to continue during the Life of A. cannot take Effect upon the Natural Death of A. nor otherwiſe than by a Surrender or Forfeiture of his Eſtate. Nor in the 2d Inſtance, otherwiſe than by Effluxion of Time, or by Surrender or Forfeiture, and perhaps in both Caſes by Civil Death. And he thought that the *ſame Objections* which have been *made in the preſent Caſe*, *might* with equal Reaſon *be made to every Limitation for preſerving Contingent Remainders.* For tho' theſe Words, (Or other ſooner Determination, are not always inſerted, yet there is *no Settlement to be found which does not import as much.* And ſo in Bridgm. 334 there is a Settlement without theſe Words indeed; but yet the Conſtruction upon it muſt be the ſame as if they were inſerted, becauſe there the Remainder is limited only during the Life, as it is here, and conſequently muſt be conſtrued to commence on a Determination of the Particular Eſtate before the Death of A. The true Meaning therefore of theſe Limitations is, That when an Eſtate is given to A. for Life, the Limitor has notwithſtanding an Intereſt remaining in him to enter upon Alienation, Forfeiture &c. which Intereſt, when conveyed to Truſtees, is a Remainder or Legal Eſtate, which they are ſaid to have for preſerving Contingent Remainders; and ſo it is called by Lord Cowper 2 Vern. 755. **Elie v. Osbourne.** So that in the common Caſe of Marriage Settlements, where an Eſtate is limited either to the firſt Taker for 99 Years, or for Life, with Remainder to Truſtees to ſupport the Contingent Remainders during his Life, they were of Opinion that by ſuch Limitation a preſent Freehold paſſes to the Truſtees [illegible] to the Term of 99 Years, in ſuch Manner that it cannot take Effect till the Determination of that Term; But that Determination muſt always be in ſome Manner or other ſooner than the Natural Death of the Particular Tenant; and tho' this Remainder may depend on the Truſtees coming into Poſſeſſion, and upon Surrender or Forfeiture, which Facts may or may not happen, yet ſuch Facts are in Law Poſſibilities not remote, and not meerly Contingencies; and it would be *of the moſt dangerous Conſequence, and might overturn moſt of the greateſt Eſtates in the Kingdom, if another Conſtruction were to prevail, becauſe it would* then *be in the Power of Ceſty que Uſe to bar any Settlement whatever, without the* Conſent of the *Truſtees.* For theſe Reaſons his Lordſhip ſaid they were all of Opinion, That a Freehold veſted in the Truſtees undiſturbed, and that no Freehold ever was in D. and therefore he was no good Tenant to the Præcipe, and conſequently that the Leſſor of the Plaintiff muſt have Judgment. Mich. 14 Geo. 2. B. R. Smith of the Demiſe of Dormer v. Parkhurſt & al.—This Judgment was affirm'd in the Houſe of Lords.

(O) Re-

(O) Remainder *deſtroyed by Act of* the *Party*.

1. THere is a Difference between a Limitation of Uſe by Feoffment &c. and a Deviſe. If there be *Deviſe to A. in Fee, and after to B. in Fee*, there is no Means to deſtroy the 2d Fee. But if a *Feoffment* be to the Uſe of A. and his Heirs, and if A. die without Iſſue, then to B. in Fee &c. Feoffment by A. will deſtroy the Fee to B. So Feoffment to the *Uſe of A. when he marries my Daughter*, if I ſell the Land before A. marries her, and after he marries her, A. ſhall not have the Land. But if it be *by Way of Remainder*, then there is no Difference between Uſe and Will, or Eſtate at Common Law. Arg. Litt. R. 254. Paſch. 5 Car. in Beck's Caſe, cites Pell and Brown's Caſe, and Archer's Caſe.

2. Baron ſeiſed in Fee makes Feoffment to the Uſe of *himſelf and his Wife, and to the Heirs of the Survivor* of them. Baron makes another *Feoffment*, and dies; the Wife enters and dies. Adjudged that the future Contingent Uſe of the Fee is deſtroyed by this Feoffment, and Judgment affirm'd in Cam. Scac. Cro. C. 102. Hill. 3 Car. C. B. Biggott v. Smith. S. C. cited Arg. 3 Mod. 309, 310. That the Fee ſhall not veſt in the Feme by her Entry after the Death of her Baron; for that ſhe had no Right, becauſe the Baron had deſtroyed the Contingent Uſe by the laſt Feoffment; ſo that it could not accrue to her at the Time of his Death ——S. C. cited by Holt Ch. J. in Caſe of Thompſon v. Leach, who ſaid, That it is Nice to an Infant; for the Right ought to be precedent to ſupport the Contingency, and that therefore in that Caſe becauſe the Right aroſe to the Wife Eo Inſtante, that the Contingency happened, the Remainder was adjudged to be deſtroy'd, and that the Caſe has always been held for Law Ld Raym. Rep 316. Hill 9 W. 3.—S. C. cited 12 Mod. 174. Per Cur. And they ſaid it is a Remarkable Caſe, and that it was held that this Contingent Remainder could not ariſe out of the Wife's Eſtate, becauſe *during the Coverture ſhe had no Right of Entry or of Action*, but the Husband had Power of the whole Eſtate, and tho' her Eſtate and the Contingency happened Eodem Inſtante, yet this was not ſufficient, becauſe the Particular Eſtate which ſhould ſupport the Contingency, ought to be precedent.

A. ſeiſ'd of Land levied a *Fine*, 35 Eliz. *to the Uſe of A.* [himſelf, as I ſuppoſe] *and his Wife* for their Lives, and *to the Heirs of the Survivor* of them; afterwards A. made a Feoffment, and died, and reſolved that it was Contingent for the Fee ſimple. Cited in Beck's Caſe Litt. Rep. 291. as Parkinſon's Caſe in the Exchequer.

3. A. was a *Copyholder for Life*, with *Remainder to his 1ſt, 2d &c. Sons in Tail, Remainder to B. in Fee*; A. *before a Son born, gets a Conveyance* from the Lord of the Manor *of the Reverſion in Fee* of the Copyhold, as thinking that would *merge* his Eſtate, and deſtroy the Contingent Remainder; The Contingent Remainder is not deſtroyed, the Freehold being in the Lord. Admitted by the Proceedings. 2 Vern. 243. pl. 228. Mich. 1691. Mildmay v. Hungerford.

4. Where a Remainder does not take Effect preſently, but *veſts in the Survivor*, it is as an Executory Deviſe, and a Recovery is no Bar. Arg. 2 Lutw. 1224. in the Caſe of Weekes v. Peach.

(P) Remainder. Deſtroy'd *by Act of Law*.

A Had 3 *Sons B. C. & D.* and deviſed *Bl. Acre to B. Gr. Acre to C. and Wh. Acre to D.* and that *if any of them died the other ſurviving ſhould be his Heir.* A. died. *B. died.* Fleming Ch. J. thought that Bl. Acre would veſt in C. & D. by way of Remainder, and that they ſhould take, tho' the Freehold by the Deſcent of the Fee was drowned. But all the others held, That in regard nothing but a Freehold paſſed by the Deviſe, the *Reverſion in Fee deſcending upon B. had drowned the Eſtate for Life*, and Bull. 61. S. C. — S. C. cited Poll. Deſ. 57. — 2 Saund. 385. in the Caſe of Purefoy v. R... and

and that his Death after *could not revive* and veſt the Remainder in C. & D. And adjudg'd accordingly. Cro. J. 260. Mich. 8 Jac. B. R. Wood Ingerſole.

Pollexf. 481. Trin. 27 Car. 2. B. R. in the Caſe of Fortiſcue v. Abbot, obſerves, That this Caſe of Wood v. Ingerſole is alſo reported in Bulſt. 61. There 'tis put, That a Man had 3 Sons, and Lands in 3 Counties, and deviſed the Lands in one County to one Son, in another to a 2d Son, and in the other to the 3d Son; and that if any of his Sons die, that then the one of them to be Heir unto the other. In Crook 'tis, The other ſurviving ſhall be his Heir; ſo that as it is penn'd in Crook it differs very much from Bulſtrode; For if the Words were as in Bulſtrode, 'tis only one of them that was to be Heir unto the other; therefore only one, and not both of the Survivors, could take; but as it is in Crook, That the other ſurviving ſhall be his Heir, it may bear a Conſtruction, That both ſhould be Heirs jointly. Now that this Caſe in Crook is not very carefully reported appears plainly, for the End of the Caſe is plainly miſtaken; For 'tis there ſaid to be adjudg'd for the Plaintiff, whereas it is apparent that it ſhould be ſaid for the Defendant. Next, Crook's own Report afterwards repeats the Words differing from the Caſe as he had before put it, and more agreeable with Bulſtrode; For he afterwards repeats them thus in the diſtinct Character whereby he intends them the very Words, (*That every one ſhall be Heir unto the other*) and upon View of the Roll, which is in Paſch. 4 Jac. Rot 155. The Words are, (And if any of my Sons die, the one to be the other's Heir) then it will be very plain that theſe latter Words will be void.

But where A. was *Tenant for Life*, Remainder *to his Wife for Life*, Remainder to his 1, 2 &c. *Sons in Tail*, Remainder to the *right Heirs of A.* and A. committed *Treaſon*, and then had a Son, and then was attainted. It was held, That whether the Son was born before or after the Attainder, the Contingent Remainder to him was not diſcharged by the Veſting in the Crown during the Life of A. becauſe of the Wife's Eſtate, which is ſufficient to ſupport it. 2 Salk. 570. Paſch. 6 W. & M. B. R. Corbet v. Tichborn.

2. A. covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to B. for Life, Remainder to the 1ſt Son of B. in Tail; *A. was attainted* and executed *for Treaſon before a Son born* to B. Reſolv'd, The Son after born was barr'd, and the Crown has the Fee-Simple, diſcharg'd of all the Remainders limited to the Son not then born &c. Mo. 815. pl. 1103. Trin. 9 Jac. in the Star-Chamber. Sir Tho. Palmer's Caſe.

Vent. 3 6. Hartt v. Hartpool. The Court ſeem'd of Opinion, That the Contingent Remainder was deſtroy'd by the Deſcent of the Eſtate Tail. But adjornatur. —— Pollexf. 206. S. C. ſays, This Caſe was never adjudg'd, but for Defaults in the Writ of Error the Court could not proceed to Judgment, but inclined to affirm the Judgment. —— Ibid. 518. Arg. in the Caſe of Garriſon v. Billap, ſays, This Caſe was not adjudg'd, but the Court much inclin'd, That the Contingent Eſtates were deſtroy'd.—Hartwell v. Kirk. Freem. Rep. 405. pl. 530. Trin. 1675. ſeems to be S. C. And there Hale Ch. J. inclin'd to think the Remainder deſtroy'd; Sed Adjornatur.

3. A. the Grandfather ſeiſed in Fee conveys to the Uſe of *himſelf for Life*, Remainder *to B.* the Father *for Life*, Remainder *to the 1ſt Son of B. in Tail*, Reverſion *to A. in Fee.* (The Grandfather) *A. dies living B. but no Son then born to B. but afterwards a Son is born, named C.* Whether by the Death of A. before the Birth of C. by which the Reverſion in Fee deſcended to B. the Contingent Remainder was deſtroy'd, was the Queſtion. It was argued, That this Deſcent was an Act in Law, which will injure no Man; and, as in * Lewis Bowles's Caſe it is ſaid, That the Tail is veſted *Sub Modo* in the Father; and after, when the Contingent happens, the Eſtates before united are divided, ſo in this Caſe ſhall it be by the Deſcent of the Reverſion, (which is an Act in Law, and does not operate more than the Original Conveyance) tho' the Eſtate for Life is merged in the Fee. But on the other Side the Caſe of Lewis Bowles was agreed; For there the Intent of the Conveyance ſhould be deſtroy'd by itſelf if the Contingent Eſtate ſhould not veſt by the Birth of the Son; But here the *Deſcent conſolidates the Inheritance; and tho' by Act of Law, yet by an Act out of the Conveyance itſelf.* And the Caſe being clear upon this Point, it was adjudg'd, That the Remainder was deſtroy'd; and ſo former Judgments in Ireland affirm'd. 2 Jo. 76. Intratur. Hill. 26 & 27 Car. 2. Hartpole v. Kent.

* Note in Lewis Bowles's Caſe the Eſtates were united at the firſt upon making of the Conveyance. Vent. 307. per the Reporter.

S. C. Pollexf. 479 to 489. and ſays, That it was adjudg'd

4. A. deviſed to 3 Sons ſeverally ſeveral Parcels of Land, and that if any die his Part ſhould go to the others. It was argued, That the *Reverſion deſcends* upon the Eldeſt, and that this deſtroys the Contingent Remainder to the others; which was admitted by the Counſel of the other Side, but

but ſaid, That it might be good by way of Executory Deviſe. Adjornatur. But the Reporter ſays, He heard that it was afterwards adjudg'd a good Executory Deviſe to the younger Sons. 2 Lev. 202 Trin. 29 Car. 2. B. R. Forteſcue v. Abbot.

accordingly for the Plaintiff —— 2 Jo. 70 S. C. adjudg'd.

5. If Tenant for Life with Contingent Remainder be, and *Tenant for Life makes a Feoffment in Fee on Condition*, and the Contingency happens before the Condition is broken, the Contingency is for ever deſtroy'd; Becauſe there muſt be a particular Eſtate in Being, or a Right of Entry when the Contingency happens. Per Holt. 2 Salk. 577. Hill. 9 W. 3. Thompſon v. Leach.

Freem Rep. 508 pl. 695. S. C. & P. — Ld Raym. Rep 314. S. C. & P. — So if before the Contingency happens the Reverſioner enters for a Forfeiture the Contingent Remainder is deſtroy'd. Per Holt Ch. J. Ld. Raym. Rep. 314. S.C.

6. If there be Tenant for Life with contingent Remainder to A. and *Tenant for Life is diſſeiſed*, and after that a *Deſcent and 5 Years caſt*; The Contingent Remainder is gone, becauſe there is nothing left to ſupport it; For the Right of Entry is turned into a Right of Action. Per Holt Ch. J. 2 Salk. 577. Thompſon v. Leach.

But without ſuch Deſcent the Remainder is good; for the particular Eſtate remains in Right, and might have been veſted. 1 Rep. 66. in Archer's Caſe. —— Palm. 254. —— Poph. 83. —— 1 Rep. 135. b. (f)

(Q) Remainder. Deſtroy'd *by Alteration of* the *Particular Eſtate. And what* ſhall be ſaid *ſuch Alteration.*

1. IT is regularly true, That when the *Particular Eſtate* is defeated the Remainder thereby ſhall be alſo defeated; but it fails in divers Caſes; For where the Particular Eſtate *and* the *Remainder depends upon one Title*, there the Defeating of the Particular Eſtate is a Defeating of the Remainder; But where the *Particular Eſtate* is *defeaſable, and the Remainder by good Title*, there tho' the Particular Eſtate be defeated the Remainder is good. Co. Litt. 298. a.

As if the *Leſſor diſſeiſes A. Leſſee for Life*, and *makes a Leaſe to B. for the Life of A.* the Remainder *to C. in Fee*; Albeit *A. re-enters and defeats the Eſtate for Life*, yet the Remainder to C being once veſted by good Title ſhall not be avoided, For it were againſt Reaſon, That the Leſſor ſhould have the Remainder again againſt his own Livery, and this is well warranted by the Reaſon of Littleton in this Caſe. Co. Litt. 298. a.

So it is if a *Leaſe* be made *to an Infant for Life*, the *Remainder in* Fee, the *Infant at his full Age diſagrees* to the Eſtate for Life, yet the Remainder is good; For that it was once veſted by good Title, for in both theſe Caſes there was a particular Eſtate at the Time of the Remainder created. Co. Litt. 298. a.

2. If A. makes a *Leaſe for Life*, *Remainder to the right Heirs of J. S.* and Leſſee for Life makes *Feoffment in Fee in the Life of J. S.* A. may enter. Jenk. 248. pl. 38. cites 9 H. 6.

So if A. makes *Leaſe for Life to B* Remainder *to the right Heirs of J. D.* — *B. in the Life of D. ſurrender'd to A.* This Leaſe, notwithſtanding the Surrender, ſupports the Contingent Remainder to the Heirs of the Body of J. D. ſo that if J. D. die having Iſſue in the Life of B. he ſhall take the Eſtate. Jenk 248. pl 38.

So if a Leaſe is made to *A. for Life*, Remainder *to B for Life*, Remainder *to the right Heirs of J. S.* — A. makes *Feoffment in Fee*, J. S. dies in the Life of B. This Right of Remainder for Life ſupports the Contingent Eſtate. Jenk. 248. pl. 38.

3. If any *Alteration of Eſtate* be before the Eſſence of the future Uſe, then the Uſe ſhall never be transferr'd in Poſſeſſion before the Impediment remov'd, and the Eſtate *re-continued*. 1 Rep 133. 31 Eliz. in Chudleigh's Caſe.

4. Land given to A. in Tail, and if J. S. comes to Weſtminſter-Hall ſuch a Day, to J. S. in Fee; if the Eſtate Tail deſcends to 2 Coparceners, who

who *make Partition.* Now if J. S. comes to Weſtminſter-Hall, the Fee ſhall not accrue; becauſe the particular Eſtate is not in the ſame Plight it was before. 4 Le. 236. pl. 374. Anon.

5. Land given to A. & B. for the Life of C. *Remainder to the right Heirs of A. or B. who ſhall ſurvive.— A. releas'd to B.*— The Remainder is deſtroy'd. 4 Le. 236. pl. 374. Anon.

As if a Widow be Tenant for Life, Remainder in Fee, upon Condition

6. *Eſtate for Life on Condition, Remainder in Fee*; By the Breach of the Condition the Entry of the Heir defeats not only the Eſtate for Life, but the Remainder alſo; For *Condition defeats* the Eſtate and all Remainders depending on it. Otherwiſe it is of a *Limitation.* Reſolv'd Jo. 58. Mich. 22 Jac. B. R. in the Caſe of Foy v. Hinde.

that the Feme continues a Widow; If ſhe marries and the Heir enters, he defeats the Eſtate of the Feme, and the Remainder alſo. But if the Eſtate was made to the Feme durante Viduitate, Remainder over, and ſhe marries; her Eſtate determines by the Limitation, and the Remainder over ſhall be good Jo. 58. per Cur. in the Caſe of Foy v Hinde.

2 Saund 380. S. C.

7. *M. a Feme Covert* was *Tenant for Life*, Remainder *to her firſt Son*; The *Reverſioner* in Fee, *before any Son born, convey'd the Inheritance by Fine to M. and her Husband*; A *Son was* afterwards *born, and then M. died.* Per Cur. Tho' if M. had ſurviv'd her Baron ſhe might have avoided and wav'd the Eſtate taken by the Fine, yet the Contingent Remainder to the Son is utterly deſtroy'd, he not being in Eſſe when the Contingent happen'd; For *M. and her Baron took by Entireties, and ſo M.'s Eſtate was merg'd before the Contingent happen'd*; and the Poſſibility which ſhe had to wave the Inheritance, and ſo to take back her Eſtate for Life, will not preſerve it; For if the particular Eſtates which ſupport Contingent Eſtates are not in Eſſe when the Contingent happens the Contingent Eſtate can never ariſe, whether it happens by Surrender, Merger, Feoffment, or any other Way; And Judgment accordingly. 2 Lev. 39. Hill. 23 & 24 Car. 2. B. R. Pureſoy v. Rogers.

As if *Tenant for Life*, Remainder *in Tail in Contingency*, Remainder *in Tail in Eſſe*,

8. In all Caſes where *the particular Eſtate is merg'd in the Reverſion* there the Contingent Remainder is gone, tho' there is *no diveſting* of any Eſtate. Per Hale Ch. J. 2 Saund. 386. in the Caſe of Pureſoy v. Rogers

be, and the *Tenant for Life, Remainder in Tail in Eſſe, levies a Fine*, this is no Diſcontinuance nor Deveſting of any Eſtate, Becauſe each gives ſuch Eſtate as he has, and yet the meſne Contingent Remainder is deſtroy'd. Per Hale Ch. J. Ibid.

S. P. 8 Rep. 75. b. Per Coke Ch. J. in Ld. Stafford's Caſe.

9. Tho' the particular Eſtate in ſome Caſes may *revive*, yet if the Contingency be once deſtroy'd it ſhall never ariſe again. 3 Mod. 310. Arg. cites 2 Saund 380. Pureſoy v. Rogers.— 1 Lev. 135.— 2 Lev. 39. —— 2 Roll. 796. Wigg v. Villars.

2 Jo 136. S. C. that the Contingent Remainder was not deſtroyed, and per 3 Juſtices

10. A. and B. *Jointenants* for Life, Remainder to the firſt Son of B. in Tail, Remainder to the other in Fee; B. *ſurrenders* to A. by the Words Give, Grant, Remiſe, Releaſe to him and his Heirs. This continues the ſame Effect in Quality; tho' not in Quantity, and Releaſe of one Jointenant to the other will not deſtroy a Contingent Remainder depending upon it. Raym. 413. Mich. 32 Car. 2. B. R. Harriſon v. Belſey.

the Eſtate continues notwithſtanding the Releaſe, which only changes the Quality, not the Subſtance of the Eſtate, and this ſhall preſerve the Contingent Remainder.—— 2 Show. 91. S. C ſays, That it was adjudged that the Remainder was deſtroyed, and ſays that afterwards it was adjudged it was not deſtroy'd. ——Vent. 345. S. C. adjornatur; but ſays it was afterwards adjudged that the Remainder was deſtroy'd. ——S. C. Freem. Rep. 484. pl. 664. argued, but Curia adviſare vult.

11. A Tenant *for Life of B.* Remainder to the *Right Heirs of B.* and after *A. grants his Eſtate to B.* ſo that he had a particular Eſtate of the Franktenement for his own Life, Remainder to his Right Heirs, yet the Remainder continued a Contingent Remainder. Skin. 408. Hill. 5. W. & M. B. R. in the Caſe of Goodright v. Cornith cited by Holt Ch. J. as a Caſe in E. 3.

12. *A Tenant for Life, Remainder to his 1ſt &c. Sons in Tail Remainder over in Tail, Reverſion to A. in Fee.* A. makes a *Leaſe for Years* by Deed to J. S. who afterwards *gave up the Deed of Leaſe to A. who cancelled it* by tearing off the Seal with Conſent of J. S. But *J. S. continued in Poſſeſſion, and* during his Poſſeſſion, *A. made a Leaſe to J. S of the ſame Lands for* 3 *Lives with Livery and Seiſin*, and afterwards *A. marries and has a Son B.* This was a Caſe referred to Ld Ch B. Gilbert for his Opinion, which was, that if the Leaſe for Years was ſtill ſubſiſting notwithſtanding the giving the Deed back, and its being cancelled, as he thought it was then the Intereſt which paſſed from A. to J. S. did *not paſs by Livery and Seiſin ſo as to work a Diſcontinuance of the Eſtate for Life, but only by way of Releaſe* to the Tenant for Years, and *by way of enlarging his Eſtate*; For it was a Reverſion depending on a Leaſe for Years, and paſſes by way of Grant and Attornment to a Stranger, and by way of Releaſe to the Tenant himſelf; And ſuch Grant and Releaſe *transfers no more than the Tenant for Life might lawfully paſs (viz.) an Eſtate during the Life of the Tenant for Life*, and conſequently the particular Eſtate for Life was in Being, when the Contingent Remainder came in Eſſe. G. Equ. R. 235. Cafes in the Exchequer in Ireland in the Time of Geo. 1. Magennis Leſſee of Cloſe v. Maccullough.

13. *Deviſe to W. R. and W. S. and their Heirs in Truſt* and *to the Uſe of D.* the Deviſor's Siſter *for Life*, Remainder to *W. R. and W. S. and their Heirs during the Life of D. to preſerve &c.* Remainder *to* the Uſe of *the firſt* &c. *Sons of D. in Tail Male*, Remainder *to J. N. in Fee.* B. married D. Afterwards *B. and D. and J. N.* (D. being enſeint of a Son ſoon after born) joined in a *Feoffment to other Truſtees to the Uſe of B. and his Heirs, and levied a Fine to the new Truſtees to the ſame Uſes.* About a Fortnight after a Son was born named C. Afterwards B. died having deviſed the Lands to E. a younger Son. D. died. C. brought his Bill to have the Benefit of the Deviſe, which was decreed; but as to this Point, it was reſolved by Ld. C. King aſſiſted by Raymond Ch. J. and Reynolds Ch. B. that the Feoffment and Fine by B. and D. did not deſtroy the Contingent Remainders to the 1ſt &c. Sons of D. but that the *Right to the Freehold in the Truſtees ſupported it.* 2 Wm's Rep. 610. 612. Mich. 1732. Manſell v. Manſell.

(R) Remainder Barred or Deſtroy'd *by Fine*, or *Recovery*.

See (Q) pl. -, 8 — And for more of this, ſee Fines — Recovery Common.

1. *A. Tenant for Life, Remainder to the Right Heirs of B.* A. ſuffers a Common Recovery in the Life of B. B. dies. A. dies. The Heir of B. is bound; For he had no Right at the Time of the Recovery. Per Manwood J. 2 Le. 18, 19. pl. 25. in Brent's Caſe.

2. A. ſuffers a Recovery to the Uſe of *himſelf for Life Remainder Seniori Puero* of the Body of A. in Tail. A. had then no Iſſue. Per Wray Ch. J. This Remainder in *Abeyance* limited Seniori Puero is not deſtroyed by an After-Fine by A. For it is in the Conſideration of the Law, and ſo preſerved by it, and therefore a Deſcent in Time of Vacation of an Abbot ſhall not bind the Succeſſor; And ſo where the Party is beyond the Seas; ſo a Remainder limited to the *Right Heirs of J. S.* a Recovery had againſt Tenant for Life, the Remainder to the Right Heirs of J. S. *who is alive* at the Time of the Recovery is not helped by the Statute of 32*H.* 8. For the Words there are (To whom the Reverſion or Remainder ſhall then appertain) and ſo the Remainder in the principal Caſe is in Cuſtody of the Law, and not in Eſſe, and is therefore privileged and preſerved, and not deſtroyed by the Fine; And *upon Iſſue had the Remainder ſhall be executed* notwithſtanding the 2d Fine, and without any Entry by the Conuſees to raiſe the Uſe; For the Remainder Seniori Puero

neither was, nor could be diſcontinued. Per Wray Ch. J. 2 Le. 218, 219. pl. 275. Paſch. 16 Eliz. Humphreſton's Caſe.

3. There is great *Difference* between a *collateral Uſe* which does not depend on the other Eſtates, and an *Eſtate limited in Courſe of a Remainder*; I agree if they are *Contingent* Remainders, the Fine will deſtroy 'em, but if there be a Collateral Clauſe, by which a Uſe is limited, as if there be a Proviſo that *if ſuch Money be not paid* it ſhall be to ſuch a Uſe, that Contingent Uſe is not deſtroyed by Fine. Arg. Het. 98. cites 1 Rep. 130. 134. Chudleigh's Caſe.

Sid 47. S. C. —Raym. 28. S. C

4. Deviſe *to A. (being Heir* at Law) *for Life*, and *if he die without Iſſue living* at his Death, Remainder *to L. in Fee*; But *if A. ſhall have Iſſue living* at his Death, the *Fee to remain to A.* Reſolved it is a Contingent Remainder, and barred by the Recovery of A. dying without Iſſue. 1 Lev. 11. Hill. 12 & 13 Car. 2. B. R. Plunket v. Holmes.

5. 22 & 23 *Car.* 2. 24. Enacts, That no Tenant in Tail *of any Fee, Farm Rents ſhall be enabled by this Act* to bar the Remainder, *nor ſhall have greater Power over the ſaid Rent than he had before.*

6. A. ſeiſed of the Manors of P. and W. *deviſed them to B. for Life without Waſte, and if he ſhould have Iſſue Male, then to ſuch Iſſue Male and his Heirs* for ever, *and after B's Death in caſe he ſhould leave no Iſſue Male, he deviſed P. to C. and W. to D. and their Heirs.* Upon an Appeal to the Houſe of Lords, it was held, upon taking the Advice of all the Judges, That the Remainder to C. in Default of B's leaving a Son was a Contingent Remainder, and conſequently barred by a Recovery ſuffered by B. whereupon they reverſed a Decree of Ld Cowper's. Wm's Rep. 505. 509. cites 22 May 1717. Coppen v. Barnardiſton & al.

(S) Contingent Remainder; *Determined*, or *Revived*.

1. A Tenant in Tail *to the Heirs Males* of his Body dies, leaving *a Daughter who has Iſſue a Son*, and then ſhe dies, living the Son, yet the Son ſhall not take. Arg. Yelv. 149. in the Caſe of Pool v. Needham.

2. For ſuch *Collateral Determination* being once interrupted ſhall never be Revived. Arg. Quod fuit conceſſum per tot. Cur. Yelv. 150. in the Caſe of Pool v. Needham.

3. A Man deſtroyed a Contingent Remainder by levying of a *Fine*. Afterwards the Fine is *annulled by Act of Parliament*; It was held that the Contingent Remainder was revived; *But* if it had been *reverſed for Error* it had been otherwiſe. cited by Northey Ld. Raym. 314. in the Caſe of Thompſon v. Leech, as held by Hale Ch. J. Mich. 24 Car. 2. B R. in the Caſe of Cole v. Levingſtone.

2 Salk. 570. S. C & P.

4. If *A.* be *Tenant for Life with a Contingent Remainder*, and *A. makes a Feoffment in Fee upon Condition*; if A. *enters for the Condition broken before the Contingency happens*, the Contingent Remainder ſhall be revived, and the Contingency, if it happens, may veſt. Per Holt Ch. J. Ld. Raym. Rep. 314. Hill. 9 W. 3. in the Caſe of Thompſon v. Leach.

(T) Remainder; *Good*, in Reſpect of the *Limitation*.

1. A. Seiſed in Fee makes a *Leaſe for Life to B. Remainder to himſelf* for Years or Life; the Remainder is void, becauſe he has an Eſtate in Fee, and he cannot reſerve a leſs Eſtate than he had before. 2 Mod. 210. Arg. in the Caſe of Southcot v. Stowell. cites 42 Aſſ. 2.

2. Lands

2. Lands are given *to the Husband and Wife, and to the Heirs of the Body of the Husband*, the *Remainder to the Husband and Wife, and* to *the Heirs of their two Bodies* begotten. The Husband dies without Iſſue; the Wife ſhall not be Tenant in Tail after Poſſibility; For the Remainder in ſpecial Tail was utterly void; becauſe it could never take Effect; for ſo long as the Husband ſhould have Iſſue, it ſhould inherit by Force of the General Tail, and if the Husband die without Iſſue, then the Special Tail cannot take Effect, in as much as the Iſſue which ſhould inherit the especial Tail, muſt be begotten by the Husband, and ſo the General, which is larger and greater, hath fruſtrated the Special, which is leſs, and the Wife in that Caſe ſhall be puniſhed for Waſt. Co. Lit. 29. b.

3. A Leaſe *to A. for Life*, Remainder *to A. for Years*, is a good Remainder. Jenk. 248. pl. 37.

4. Leaſe to A. for *Life*, Remainder *to the * Right and next Heirs of A. in Tail*, is a void Remainder; becauſe during the Life of A. it cannot poſſibly have a Being, ſo as he may take or have Eſtate by or in the Remainder, during the Life of A. the particular Tenant. 2 And. 104. pl. 56. in Caſe of Arden v. Darcy. cites it as 16 Eliz.

2 And. 3. pl. 24. Baldwin v. Smith alias Archer's Caſe. S. C. —— 1 Rep. 66. b. S. C. —— Contra. 4 Le. 21. per Dyer and Manwood J. That it is a Remainder executed in A. and not in Abeyance; For he takes the Freehold by the Livery. But if a Leaſe be for *Years*, and ſuch a Remainder is, it is void, becauſe there is no Perſon in Eſſe to take now by the *Livery*, and every Livery muſt have it's Operation preſently. —— 4 Le. 188. 19 Eliz. C. B. S. C. Adjudged. —— * If a Man makes a *Feoffment to A. for Life, Remainder to* his *Right Heirs*, this Remainder is void, and A ſhall have it as a Reverſion; *but a Remainder to the Heirs of the Body* is good: for this alters the Eſtate; per Coke. Roll R. 239. in Caſe of Lane v. Pannel

5. If a Gift be made in Tail, and that *if the Donor die without Heir, the Remainder over*, is a void Remainder. 2 And. 141. pl. 82. in Corbet's Caſe.

6. If a Remainder be limited to one *for Term of Life of the Tenant for Life*, the Remainder is good for this only Reaſon, ſcil. becauſe there is a *Poſſibility* that Tenant for Life may alien in Fee, and ſo *forfeit* his Eſtate; ſo that he in Remainder may enter for the Forfeiture, and enjoy the Eſtate during the Life of the Tenant for Life ſo forfeiting. Arg. Saund. 151. cites 2 Rep. 50, 51. Cholmley's Caſe.

So if the firſt Leaſe for Life ſhould *ſurrender*. Arg. Mo. 344. in Cholmley's Caſe.

7. If the Eſtate is limited *to A. for Life*, and *after the Death of A. and one Day after, to remain to B.* for Life, it is a void Remainder. Arg. Raym. 144. in the Caſe of Corbet v. Stone cites Pl. C. 25. [b] Colthirſt's Caſe, where that Caſe is put, and ſays it is good Law; Becauſe there is not Probability for the Remainder to veſt when the Particular Eſtate ends, which is a neceſſary Incident to every Remainder.

8. If a Leaſe be *to A. for 20 Years if B. ſo long ſhall live*, and *after B's Death, Remainder over in Fee*; this is a void Remainder, becauſe if it was good then the Fee-ſimple ſhould be in Abeyance, which the Law will not ſuffer; but if it had been a *Remainder for Years* it had been good; For that may be in Abeyance. Arg. Raym. 144. in Caſe of Corbet v. Stone.

3 Rep. 20. In Borafton's Caſe. Arg. quod fuit conceſſum per tot. Cur.

9. J. S. levied *a Fine* to the Uſe of *himſelf for Life*, and afterwards *to* the Uſe *of his two Daughers, till A. his Son return from beyond Sea, and come of Age, or Die*, which ſhould firſt happen; and then to remain to A. Afterwards A. returned from beyond Sea; Adjudg'd that this was a good Remainder; for tho' his Returning from beyond Sea, or coming of Age, was uncertain, yet *it is certain he muſt die*, and ſo it does not merely depend upon Uncertainties. Cro. E. 269. Hill. 34 Eliz. in the Exchequer. Lord Vaux's Caſe.

(U) Good,

(U) Good, in Reſpect of the *Limitor*.

1. COvenant by *Tenant in Tail* to ſtand ſeiſed to the *Uſe of himſelf for Life, Remainder to A. in Tail*, is void; becauſe the Remainder is to take Effect after his Death. 2 Salk. 619. Trin. 1 Ann. B. R. Machil v. Clerk.

2. If *Tenant in Tail Covenants to ſtand ſeiſed* to the Uſe of J. S. who is of his Blood, for his Life, *with Remainder over* to another, and *dies before the Remainder happens*, yet the Remainder is good, till it be avoided by actual Entry of the Iſſue; otherwiſe it will exiſt after the Death of the Iſſue, becauſe the Eſtate for Life had taken Effect; and the Remainder might have taken Effect during the Life of the Tenant; per Holt Ch. J. 7 Mod. 27, 28. Trin. 1 Ann. in B. R. in Caſe of Machil v. Clerk.

It has been a Queſtion, if Tenant in Tail makes a Grant with Livery, Bargain and Sale, Leaſe or Releaſe, whether it gives the Grantee, Bargainee &c. any greater Eſtate than for Life of Tenant in Tail; but it has been held, that it creates a baſe Fee in ſuch Grantee &c. which is againſt the Opinion of Litt Sect. 649, 650. and the Reaſons for it have been theſe; 1ſt Becauſe Tenant in Tail has more than an Eſtate for Life, he has the Inheritance in him, as appears by Co Litt fol. 18. a. 2dly. He has the whole Eſtate in him, and therefore theſe Sort of Conveyances are Incidents to it. 3dly It is no Prejudice to the Heir in Tail, nor againſt the Statute de Donis; the putting the Iſſue to a Formedon, is no Breach of the Statute de Donis, ſo it does not put him to an Entry, cites 10 Co. 96 Seymor's Caſe, and 3 Co. 84 the Caſe of Fines; ſuch Bargainee has a deſcendible Eſtate, and his Wife ſhall be endow'd of ſuch Eſtate. Littleton ſays the Eſtate of ſuch Releaſee or Bargainee is determined by the Death of Tenant in Tail; but, by theſe Opinions, it is not determined till the Iſſue enter, the Iſſue is not barred of his Jus Recuperandi, but till he uſes that, the other has a good Eſtate; and ſo is Winch's Rep. 5. Bridgman 92. Per Holt Ch. J. 11 Mod. 19, 22. Trin. 1 Ann. B. R. in Caſe of Machel v. Clerk.

3. *So* if Tenant in Tail make *a Leaſe and Releaſe to the* Uſe of *himſelf for Life*, with *Remainder over to another*, the Remainder over is good till avoided, tho' it be *to Commence after the Death of the Iſſue in Tail*; and the Reaſon is, becauſe it iſſues out of the Eſtate by Leaſe and Releaſe, which is good till avoided by Entry; per Holt Ch. J. 7 Mod. 28. Trin. 1 Ann. in B. R. in Caſe of Machil v. Clerk.

(W) *Good or Void.* In its Creation, or by Event.

1. IN Aſſiſe; *W. M. granted* 10 *l. Rent to N. D. out of his Land for the Life of A.* the *Remainder to R. for his Life*; and after *A. died*, and *W. M. after the Death of A. releaſed by another Deed to the ſaid R. all his Right in the Rent, and granted that whenſoever the Rent ſhall be Arrear, that the ſaid R. and his Heirs may diſtrain*; and held a good Title to R. for the Rent in Fee, by all the Juſtices, and yet by the Death of A. the Rent was extinct; for the Remainder was void by Reaſon that the Rent was extinct before by the Death of A. But becauſe the laſt Deed has this Clauſe of Grant to R. that he and his Heirs may diſtrain when the Rent is Arrear, therefore *this is a new Grant*; quod nota. Br. Rents, pl. 19. cites 8 H. 4. 19.

2. If a Man by Fine grants his Seigniory to one *for Life*, the *Remainder over in Fee*, and the *Tenant for Life dies*, and the Tenant Attornes to him in Remainder, this is good; for the Services paſſed before by the Fine; But it is contrary upon ſuch Grant by Deed, for there if it *veſts not in the Grantee for Life*, the *Remainder cannot take Effect*. Br. Grants, pl. 6. cites 20 H. 6. 7.

3. A Remainder limited on a *Contrariety*, is void. Arg. Pl. C. 29. b. Caſe of Colthurſt v. Bejuſhin. Per Hales J. As if A gives Land to *B. and his Heirs ſo long as J. S. ſhall have Heirs of his Body, and if J. S dies without Heir of his Body, that then it ſhall revert to C. in Fee*; this is a void Remainder by Reaſon of the Contrariety; For the firſt Eſtate was Fee ſimple determinable, upon which a Remainder cannot depend. Pl. C. 29. b. by Hales J. —— So if *Leaſe for Life* is made *upon Condition* that *if a Stranger pays to the Leſſor* 20 *l.* then immediately *the Land ſhall remain to the ſame Stranger*, this Remainder is void for the Contrariety; For the Tenant for Life ought to have it during his Life, and during that Time the Stranger cannot have it; but had it been limited that after the Death of the Tenant for Life, it ſhould remain to the Stranger, this had been a good Remainder; For there is no Contrariety. Pl. C. 29 b by Hales J in Caſe of Colthirſt v. Bejuſhin.

4. A Remainder limited on an * *Impoſſibility Precedent*, or upon a Thing *againſt Law*, is void. Le. 189. pl. 289. Granted Arg. in Lord Paget's Caſe. * S. P. Arg. 11 Mod. 120. pl. 5. in Caſe of Hardwick v. Gamball.

5. A Remainder ought to *paſs at the firſt by the Livery*, and ſhall not take Effect with a *Condition precedent*, nor ſhall begin on ſuch a Condition; and tho' * Colthurſt's Caſe gives Colour to the contrary, yet in that Point Anderſon Ch. J. held that Caſe not to be Law; For a Remainder *depending on a Condition precedent*, is merely void; And Per Beamond J. a *Proviſo* cannot create a Remainder, tho' it may determine a Remainder, and Judgment accordingly. Cro. E. 360. Mich. 36 & 37 Eliz. C. B. Cogan v. Cogan. See pl. 6. &c. * Pl. C. 34 b. Le. 285.

6. A Grant with Condition precedent may be as well of Things lying in Grant as of Land which lies in Livery, and may as well be annex'd to an Eſtate Tail, which cannot be merg'd as to an Eſtate for Life or Years, which may be merg'd by Acceſſion of a greater Eſtate. But ſuch *Increaſer of Eſtate by Force of a Condition precedent muſt have* 4 *Incidents* Coke Ch J. ſaid, That ſuch Foundation muſt be permanent, and *not revocable at the Will of the Grantor* or Leſſor; and

1ſt, It muſt have *a Particular Eſtate* as a Foundation whereupon the Increaſe of the greater Eſtate ſhall be built. 8 Rep. 75. a. Trin. 7 Jac. in Ld Stafford's Caſe.

therefore if one *grants an Advowſon* to another *at Will, upon Condition that if he does ſuch an Act that he ſhall have Fee*; in this Caſe the Eſtate at Will is not ſuch Foundation as the Law requires to ſupport an Increaſe of the Freehold or Inheritance; For the Grantor may determine the Will before the Condition perform'd, and ſo avoid his own Grant, and a Leaſe at Will cannot ſupport a Remainder over. 8 Rep. 75. a. in Ld Stafford's Caſe.

And if one grants Advowſon or Rent &c. *for Years upon Condition that if the Leſſee pays* 10 *s within a Year he ſhall have for Life, and if after the Year he pays* 20 *s he ſhall have Fee*, and the Leſſee pays 10 *s.* within the Year, and after the Year he pays the 20 *s.* according to the Condition, yet he ſhall have for Life only; Becauſe the Eſtate for Life at the Time of the Grant was in Contingency only, which is not a Foundation for a greater Eſtate to increaſe upon; For a *Poſſibility* cannot increaſe *upon a Poſſibility*, and the Eſtate in Fee-Simple cannot increaſe upon the Eſtate for Years; For this is merg'd by the Acceſſion of the Eſtate for Life 8 Rep 75. a. b. Trin. 7 Jac. in Ld Stafford's Caſe.

7. 2dly, That *ſuch Particular Eſtate ſhall continue* in the Leſſee or Grantee *'till the Increaſe* happens. 8 Rep. 75. a. in Ld. Stafford's Caſe. S. P. Pl C. 25. 1 in the Caſe of Colthirſt v. Bejuſhin —— If the Leſſee for Life or Years, or the Donee in Tail, who has ſuch Condition annex'd to his Eſtate, *aliens before the Condition perform'd*; *or* if Leſſee for Life or Years *ſurrenders to the Leſſor*, he never ſhall take Benefit of the Condition afterwards; For the *Privity of the Eſtate* in ſuch Caſe *muſt continue*, becauſe the Increaſe of the Eſtate muſt enure upon the Particular Eſtate as upon a Foundation; and therefore if in ſuch Caſe the Leſſee for Life or Years, or the Donee *aliens all their Eſtate and re-takes Eſtate again, and afterwards performs the Condition*, yet nothing ſhall accrue to him thereby; becauſe by the abſolute Alienation the Privity was once abſolutely deſtroy'd, which cannot be by any Re-taking of Eſtate be reviv'd; As, if one *Coparcener after Partition* makes a Feoffment in Fee, and re-takes Eſtate to him again and to his Heirs, yet the Privity of Eſtate to have Aid to deraign the Warranty Paramount is deſtroy'd Per Coke Ch J. 8 Rep. 75. b. in Stafford's Caſe, cites * 11 H. 4. 22. b. & 38 E. 3. 20. b —— But if a Man makes a Gift to one and the Heirs of his Body of his Wife begotten, with ſuch Condition, and after the Wife dies without Iſſue, ſo that he is now become *Tenant in Tail after Poſſibility*; in this Caſe, tho' the Eſtate be chang'd, yet ſince the Privity remains he may by performing the Condition have Fee afterwards 8 Rep. 75 b —— So if *Leaſe* be made *to* 2, with Condition to have Fee, and the *One dies*, the Survivor may perform the Condition and have Fee, *But* if the ſame Joint-tenants *make Partition* of the Term, the Condition is deſtroy'd; For the Eſtate in Fee muſt increaſe to them jointly, and not in Severalty. 8 Rep. 75 b. 76

* Br. Counterplc de Aid, pl. 24 cites S. C. —— Br. Aid, pl 49 cites S. C —— Br. Peremptory, pl. 10. cites S. C.

8. 3dly, It muſt *veſt at the Time of the Contingency happening*, or otherwiſe it ſhall never veſt, 8 Rep. 75. a. in Ld. Stafford's Caſe.

It was reſolv'd, That if in a Grant by the Queen the Condition be *That when A. ſhall pay to J. S. 20 s. he ſhall have Fee*, that immediately be the Payment, by the Operation of the Law, the Fee ſhould be deveſted out of the Queen and veſted in A. And this for *Neceſſity*; For if it ſhall not veſt at the Time of the Condition perform'd, it ſhall never veſt; ſo that if in the Caſe of a Grant by the Queen upon ſuch Condition, any Thing, As Office, Penſion &c. or other Circumſtance, be neceſſary, the Increaſe of Eſtate will never veſt; For if the Enlargement cannot be at the Time appointed, it never ſhall enlarge; and therefore in reſpect of the Neceſſity, the Fee Simple in the principal Caſe was reſolv'd to paſs out of the Queen without any Circumſtance; For the Law never requires Circumſtance when it will ſubvert Subſtance. 8 Rep. 76. b. Stafford's Caſe.

Every Remainder *muſt always be appointed* and limited *to take Effect after the Particular Eſtate* ended and not during the Particular Eſtate; For ſhould it take Effect during the Particular Eſtate it would be utterly void, as repugnant to the firſt Eſtate. Pl. C. 24. b. in the Caſe of Colthirſt v Bejuſhin.

S. P. Pl. C. 25. a. in the Caſe of Colthirſt v Bejuſhin.—

9. 4thly, The Particular Eſtate and the Increaſe *muſt take Effect by one and the ſame Inſtrument or Deed*, or by *ſeveral Deeds deliver'd at one and the ſame Time*, and not by ſeveral Deeds delivered at ſeveral Times. 8 Rep. 75. a. in Ld. Stafford's Caſe.

It was reſolv'd, That it muſt be by one and the ſame Grant, or by 2 Deeds deliver'd at one and the ſame Time, which in Effect is the ſame Thing; For Quæ incontinenti fiunt, ineſſe videntur; becauſe the Foundation, viz. the Particular Eſtate, and the Increaſe of the Eſtate thereupon, is only a Grant to take effect out of one and the ſame Root; and tho' it veſts at ſeveral Times, yet when it is veſted it has its Vigour and Force from one and the ſame Grant; and therefore it is well ſaid in 21 H. 6. fol. 2. a That when he has perform'd the Condition he has Fee from the Commencement of the Leaſe, as by one and the ſame Grant, and as one and the ſame Eſtate. 8 Rep. 77. Ld Stafford's Caſe.

But when an Eſtate *is to be defeated by a Remainder depending on that*, then the Remainder is not good; As, if I leaſe Land for Life, on Condition, That if the Rent be in Arrear, that the Remainder ſhall be to a Stranger; That Remainder is not good. Het. 81. Groves v. Osborn.

10. Where a Remainder *depends on a Determination of another Eſtate*, ſo that none ſhall take any Eſtate by the Remainder upon Condition, then the Remainder is good; As, if a Man gives Land to A. for Life *upon Condition* that *if J. S. pays me* 40 *s. before ſuch a Day, that the Remainder ſhall be to him*. This is a good Remainder. Het. 81 Paſch. 3 Car. C. B. Groves v. Osborn.

11. *Deviſe to A. in Tail*, Remainder *to B.* Remainder *to C.* &c. and after the Deviſor by expreſs Words deviſed *an Eſtate in Poſſeſſion to B.* This is a Revocation of all the Remainders; For the Remainder not determining by Death, but by *Ceſſer & Interpoſition of another Eſtate*, upon which the Remainder did not depend, the Remainder could not ſtand; But in a *Conveyance to Uſes* there may be Interpoſition of other Eſtates, and the Remainder ſtand good; becauſe this Remainder depends and hangs on the firſt Root; But in a *Will*, the Remainders ſettled muſt follow the Rule of Law; for after the Death of the Deviſor there is then no Root nor Spring. Per Bridgman Ch. J. Cart. 175. Hill. 18 & 19 Car. 2. C. B. in the Caſe of Rundall v. Eely.

12. A. ſettles Land to himſelf *in Tail, then to Truſtees*, and of the Reſidue *to make Leaſes for* 21 *Years*, upon Truſts for his Brother's Children; and failing ſuch, for his own Siſters; And *if none of his Brothers or Siſters, or any of their Children, be living, then* immediately, or after the 21 Years ended, *to* the Uſe of J. & R. and others *his Brothers ſucceſſively in Tail Male*, the Remainder over. A. died *without Iſſue*, and ſo did J. & R. and all the Brothers, without Iſſue; but 2 Daughters of J. and 2 *Siſters* of A. are *living*. Reſolv'd, This is all one Sentence, and a *Condition precedent*, (That none of the Daughters or Siſters, or any of their Children, are then living) which is otherwiſe here, and ſo all the Remainders void. 2 Lev. 157. Hill. 27 & 28 Car. 2. B. R. Comberford v. Birch.

S. C. reported more fully in Ld. Raym. Rep.

13. A. by Leaſe and Releaſe, convey'd Lands to the Uſe of *himſelf for* 99 *Years*, if he ſo long lived, Remainder *to B. for* 99 *Years*, Remainder to Truſtees to ſupport Contingent Remainders, *Remainder to the 1ſt*, &c.

3d

3d &c. Sons of B. in Tail Male, Remainder to A. in Tail, Remainder to A. in Fee. B. had Iſſue C. D. E. & F. and afterwards A. by his Will reciting this Settlement, *deviſed theſe Lands after the Death of B.* his eldeſt Son, dying *without Iſſue Male*, to D. and *after the Death of D. without iſſue Male*, then to E. and *if E. die without Iſſue* Male, *none of his Brothers being then living*, then *to F. and his Heirs for ever.* A died, B. ſuffered a Common Recovery, and the Leſſor of the Plaintiff, who was the only Son of F. claimed under that Recovery, and likewiſe by the Will; and the Defendant claimed under a Fine levied by D. The Queſtions were; 1ſt, Whether the Remainder deviſed to F. was Contingent? And this depended upon theſe Words (If none of his Brothers be then living.) The Court held, That theſe Words did not alter the Caſe, becauſe the Senſe had been the ſame if they had been omitted, and this had been like all other Limitations of Remainders; and it is plain the Limitation to F. cannot take Effect till all are dead, and the other Conſtruction would deſtroy all the expreſs Eſtates before deviſ'd. 2dly, Whether it is an immediate Eſtate veſted or Executory? Becauſe A. having an Eſtate Tail in Remainder, with a Reverſion in Fee expectant; This Deviſe cannot take Effect till the old Eſtate Tail be ſpent; ſo that if ever it takes Effect, it is to commence after a Dying without Iſſue, which is a void Executory Deviſe; But Per Cur. Here is an immediate Deviſe of a preſent Reverſion, and the Words (After) or (From and After) are only to denote when they are to take Effect in Poſſeſſion. And as to a 3d Queſtion Holt Ch. J. agreed, That the Eſtate Tail deviſed to C. D. & E. could never take Effect; Becauſe the Eſtate Tail in A. muſt deſcend to them, and would always interpoſe and keep back the Eſtate Tail deviſed by the Will, which being no larger muſt ſpend *Hoquis Faciebus* with the old Eſtail, and therefore it can never have Effect. And on that Reaſon he agreed, That ſuch Deviſe of a Remainder would be void. But he held it otherwiſe of a Reverſion, which is alſo in this Caſe, Becauſe there is a Seigniory and a Tenancy created; for Tenant in Tail muſt hold of him in Reverſion, and he of the Supreme Lord; So that this Deviſe has a Real Effect as to the Tenure, which is alter'd hereby. 1 Salk. 232, 233. Trin. 9 W. 3. B. R. Badger v. Loyd.

S. C. Reported by M'ri Jacob. But as to Part of what is reported there more than 2 Salk. there is a Quere interſted, if it be not miſtaken by the Reporter. It is ſaid there, p. 525. That this Judgment, upon Error brought in the Exchequer-Chamber, was affirm'd, Ex Relatione M'ri William Tully. And that afterwards a Writ of Error was brought in Parliament upon this Caſe, and that in Eaſter Vacation, 12 W. 3. the Judgment was affirm'd there, Ex Relatione M'ri Bacons Lary.

14. A Special Verdict finds a Settlement in Conſideration of natural Love and Affection, to *himſelf for Life*, then on *Truſtees to preſerve Contingent Remainders*, Remainder *in Tail Male*; *Provided*, if Tenant for *Life die without Iſſue Male of his Wife, and having Daughters*, the Truſtees *to ſtand ſeiſed for* 31 *Years*, with Intent *to raiſe ſuch* and ſuch *Legacies to the Daughters*; Provided *alſo*, That *if the next Iſſue Male in Remainder, within* 5 *Years, pay the Legacies*, that *then* the Truſtees ſhould *ſtand ſeiſed to ſuch Iſſue Male as ſhould pay* the Legacies, with *Remainders over*; Tenant for Life *dies without Iſſue Male or Female*. 'Twas objected, That if the *Term never accrued* the Remainders are void; and cited 3 Cro. 405. & Dyer 34. b. Holt Ch. J. ſaid, Tho' the Contingent Term never aroſe, yet the Remainders are good if the Precedent Eſtate to the Term for Years be ſufficient to ſupport the Remainders. Eyres argued, That this Remainder can never ariſe, it being a *Condition Precedent*, and 'tis not found that the Legacies are paid; and that the Remainders are void in their Creation. If the *1ſt Remainder* be *Contingent*, all the others *ſubſequent muſt be* Contingent. There muſt be an intermediate Time betwixt the Payment of the Legacies, being precedent to the Veſting of the Remainders; and ſo void, it not veſting Eo Inſtanti. 'Twas ſaid, That the *1ſt Remainder* was *nonentical*, viz. That *if he died without Iſſue Male*, that *then his next Iſſue Male* in Remainder &c. whether the Term ariſes or not the Law to us is the ſame; if the Condition be *impoſſible* no Eſtate can grow thereupon, and neither the Act of God nor of the Party can diſpenſe with this

Condition,

Condition, if it be precedent. Holt Ch. J. ſaid, The Payment of the Money was to let the Iſſue Male into Poſſeſſion, notwithſtanding the Term; and no Payment was intended unleſs there was a Dying without Iſſue Male, leaving Daughters. The Clauſe *(And for Default of Iſſue Male, Remainder to the Iſſue Male)* ſhould have been *(Heirs Male in Remainder)* and then there had been no Doubt. And it was adjudg'd, That the Remainder was good, and well veſted. 11 Mod. 119. Trin. 6 Ann. B. R. Hardwick v. Gamball.

15. Deviſe to his *Daughter for Life*, and after that *to A. the eldeſt Son of his Daughter and his Heirs*, and for Default of ſuch Heirs Remainder to the *right Heirs of J. S.* — J. S. being alive when the Remainder was to commence, it was void by this Event; And (the Heirs of the eldeſt Son) comprehending Heirs general, according to the legal Senſe of the Words, the Limitation to A. and his Heirs was a Fee-Simple, and ſo the Remainder to the right Heirs of J. S. void in its Creation. 1 Salk. 238. pl. 17. Hill. 7 Annæ. C. B. Aumble v. Jones.

(X) Croſs Remainders.

Note, That upon a Deviſe theſe Words (That *every one ſhall be Heir to the other*) imply a Remainder, that every one ſhall be in Remainder after the other. Br. Done &c. pl. 44. cites 7 E. 6.

1. WHere Land is deviſed to 3 Brethren in Tail, and that *one ſhould be Heir to the other*, this makes Croſs Remainders. Hob. 34. cites 7 E. 6.

See 2 Lev. 202. Forteſcue v. Abbot.

2. A. ſeiſed of Land, and having 5 Sons, *devis'd, That one Part ſhould deſcend to his Son and Heir*, and *the other* 2 *Parts* he devis'd *to his* 4 *Younger Sons, and the Heirs Male of* their Bodies begotten; *and if* they *all die without Iſſue* Male of their Bodies, or any of their Bodies, lawfully begotten, *then* he will'd, That *the ſaid* 2 *Parts ſhould revert*, remain, and come *to the Right Heirs of the Deviſor* for ever. Afterwards 3 *of the Younger Brothers died without Iſſue.* The Court were of Opinion, That the Survivor ſhall have Eſtate Tail in the whole 2 Parts; and ſo long as any Iſſue Male be of his Body, no Part of the ſaid 2 Parts ſhall revert or remain to the Heirs; For this was the very Meaning of the Deviſor by the Words of the Will. D. 303. b. pl. 49. Mich. 13 & 14 Eliz. Anon.

S C cited Arg. Bridgm. 3. in the Caſe of Pell v. Brown.

3. A. has a Son and two Daughters B. & C. by 3 ſeveral Venters. — The Son died leaving 2 Daughters M. & N. — A. deviſed Lands to B. and her Heirs for ever, and other Lands to C. and her Heirs for ever; But *if B. dies living C.* — *C. ſhall then have B.'s Part to her and her Heirs*; and *if C. dies before* 16, *B. ſhould have C.'s Part in Fee alſo*; and *if both B. and C. died without Iſſue of their Bodies, then his Son's Daughters ſhould have the Lands.* C. died without Iſſue after her Age of 16. Reſolv'd, That the Words (If B. & C. died without Iſſue of their Bodies) did not create, by Implication, Croſs Remainders in Tail to B. & C. whereby B. ſhould take C.'s Part, but C.'s Part ſhould go to the Heirs at Law M. & N. according to the Limitation of the Will; and thoſe Words were but a *Deſignation of the Time when the Heirs at Law ſhould have the Lands.* Note, That C. dying without Iſſue, the Heirs at Law by the Will had her Part without ſtaying till the other Daughter died without Iſſue. Per Vaughan Ch. J. Vaugh. 267. cites D. 330. b. Clatch's Caſe.

4. No

4. No *Implication* will make a Croſs Remainder where there is a Special Limitation made by the Teſtator himſelf. Per 3 Juſtices. D. 331. pl. 20. Hill. 16 Eliz. in Clatch's Caſe.

But a Deviſe be to 2 Brothers in Tail, and if they die to the Daughter; If one dies without Iſſue, the other ſhall not have his Part, and it is no Croſs Remainder, tho' one is Heir to the other, becauſe there is an *expreſs Eſtate*, and therefore it ſhall not be taken by Implication. D. 326. Marg. cites Paſch. 2 Jac.

So if a Feoffment is made *to* the Uſe of *A. & B. in Tail*; *and if* they *both die without Iſſue*, the Remainder *to C.* there ſhall be no Croſs Remainders by Implication; But otherwiſe it would be in the Caſe of a Will; and there if it were in the Caſe of a Will, the aforeſaid Difference was taken betwixt a Deviſe to 2 and a Deviſe to 3. Freem. Rep. 484. pl. 663. in the Caſe of Holmes v. Elliſt, cites it as the Opinion of the Ld. Ch. J. Hale Hill. 15 Car. B. R. in the Arguing of the Caſe of Hughes v. Robinſon.

In Ejectment upon a long and intricate Special Verdict, (the Ch. Juſt. ſaid, Never was the like in Weſtminſter-Hall) theſe following Points were reſolved by the Court, and declared by Hale as the Opinion of himſelf and the reſt of the Judges; 1ſt, That where one *covenants to ſtand ſeiſed to the Uſe of A. & B. and the Heirs of their Bodies, or Part of his Land*; *and if they die without Iſſue* of their Bodies, *then* that *it ſhall remain* &c. and *of another Part* of his Land *to the Uſe of C. D. & E. and the Heirs of their Bodies*, *and if they die without Iſſue* of their Bodies, *then to remain* &c. That here there are no Croſs Remainders created by Implication; For there *ſhall* * *never be ſuch Remainds upon Conſtruction of a Deed*, tho' ſometimes there are in Caſe of a Will; and cites 1 Roll. 837. 2dly, As this Caſe is there would be no Croſs Remainders if it were *in a Will*; For *Croſs Remainders ſhall not riſe* † *by Intendment*, *unleſs the Words do very plainly expreſs the Intent* of the Deviſor to be ſo; As where Bl. Acre is deviſed to A. Wh. Acre to B. and Gr. Acre to C. and if they die without Iſſue of their Bodies vel alterius eorum, then to remain; There by reaſon of the Words (Alterius eorum) Croſs Remainders ſhall be, and cites Dyer 330. But otherwiſe there would not; and cites Gilbert v. Witty and others, 2 Cro. 655. And in this Caſe, tho' ſome of the Limitations are between 2, there ſhall be no Croſs Remainders in them; Becauſe there are others between 2, and the Intent ſhall be taken to be the ſame in all. 1 Vent. 224. Mich. 24 Car. 2. B. R. Cole v. Levingſton.

* S. P. Per Southcote J. in the Caſe of Manning v. Andrews. —— S. P. 2 Show. 159. in the Caſe of Holmes v. Meynel.

† Croſs Remainders will not ariſe to more than 2 *by Implication*. 8 Mod. 262. Shaw v. Way. —— Per Raymond J. Raym. 455. Holmes v. Meynell.

5. A. ſeiſed of Copyhold Lands, ſurrendered them to the Uſe of his Will, and deviſed them to his Sons ſeverally, viz. *Black Acre to B. and White Acre to C. and Green Acre to D.* And *if B. C or D. live to* 21, *and have Iſſue* of their Bodies, *then I give* the ſaid Lands *to them and their Heirs*, in Manner as aforeſaid, *to give and ſell at their Pleaſure*; *but if one* of them *dies without Iſſue* of his Body, *then* I Will that *the other* Brothers or Brother *have his Share*, in Manner as aforeſaid; and *if all die without Iſſue*, *then to be ſold* by his Executor &c. and the Money to be given to the Poor. D. died within Age. Agreed by all, That by the firſt Words B. C. and D. had Eſtates for their Lives only; But afterwards the Juſtices reſolved, That no Eſtate Tail is created by the Will, but that the Fee-Simple is ſettled in them when they come to their lawful Age, and have Iſſue; ſo as the Reſidue of the Deviſe is void. And Judgment accordingly. 2 Le. 68. pl. 92. Trin. 27 Eliz. C. B. Brian v. Cawſen.

3 Le. 115. pl. 161. S. C. reported in the ſame Words.

6. Deviſe *of Bl. Acre to A.* the Eldeſt Son, *Gr. Acre to B.* and *Wh. Acre to C.* and if any of my Sons die without Iſſue, *then the Survivor ſhall be each other's Heir*. The Court conceiv'd, That the Eſtate limited in Remainder to the Survivor &c. is a Fee-Simple; Becauſe of the Words (Each other's Heir) And alſo, That both the Survivors ſhould not have the Land; Becauſe contrary to the expreſs Words of the Deviſe, which are (The Survivor ſhall be each other's Heir) in the Singular Number. Le. 166. pl. 230. Mich. 30 & 31 Eliz. C. B. Hambleden v. Hambleden.

Goldsb. 100. pl. 4. S. C. but has only the State of it, and that Day was given to argue it. — It was held, that all the ſurviving Brothers are *Jointenants*, and tho' it be (Survivor) in the Singular Number, yet upon the whole Matter it is to be conſtru'd in the Plural Number. 3 Le. 262. pl. 352. Mich. 32 Eliz. C. B. S. C. —— S. C. & S. P. Cro. E. 163. pl. 7. Mich. 31 & 32 Eliz. —— Savil 93. S. P. and ſeems to be S. C. But Wyndham J. thought that the Eldeſt Survivor only ſhould take. Anderſon Ch. J. thought the Deviſe void for the Uncertainty. Periam J. thought that the 2 Survivors ſhould be Jointenants, and ſo the Deviſe preſerv'd. ——. 'Twas held, That the Survivors were Jointenants. Ow. 25. S. C.

S.C. Cro. E. 468. 478. pl. 18. Mich. 39 Eliz. B. R. Adjudg'd accordingly by Popham, Clench, and Fenner; But Gawdy held, That he ſhould have Eſtate Tail. ——— Mo. 464. pl. 656. S.C. ſays, That C. enter'd before his Death, and that he had only an Eſtate for Life. And ſays, That this Judgment was afterwards revers'd in the Exchequer-Chamber for Matter of Pleading, but not for Matter of Law.

7. A. ſeiſed of Bl. Acre, Gr. Acre, and Wh. Acre, deviſed all 3 to his Wife for Life, and then *Bl. Acre to B.* his Eldeſt Son, *Gr. Acre to C.* his 2d Son, and *Wh. Acre to D.* his Youngeſt Son; and *if any die, his Part ſhall remain to the Survivors*, and *if any have Iſſue and die before he enters, his Iſſue ſhall have it.* C. had Iſſue. The Wife dy'd, and C. dy'd. And adjudg'd, That his Iſſue ſhould have nothing. Arg. Bridgm. 86. cites it as the Caſe of Bacon v. Hill.

2 Roll Rep. 281. S.C. Adjudg'd accordingly, For between the Law will not encourage a Croſs Remainder, by reaſon of the Confuſion which will enſue.

8. A Man had Iſſue 3 *Sons*, John, Robert, and Richard, and *deviſed a Houſe to each*, viz. One to John and his Heirs for ever, another to Robert and his Heirs for ever, and a 3d to Richard and his Heirs for ever; *Provided* always, That *if all* my 3 Children ſhall *die without Iſſue* of their Bodies lawfully begotten, that *then all my ſaid Meſſuages ſhall* remain and *be to Margery my Wife and her Heirs for ever. Two of the Sons died without Iſſue*; And adjudg'd by 3 Judges, Doderidge, Houghton, and Chamberlaine, That there ſhould be no Croſs Remainders. But the Ch. Juſt. was of a contrary Opinion. Cro. J. 655, 656. pl. 6. Hill. 20 Jac. B. R. Gilbert v. Witty & al.

——— S.C. cited by Bridgman Ch. J. who approv'd of the Judgment. Cart. 175. Hill. 18 & 19 Car. 2. C. B. in the Caſe of Rundil v. Eeley.

Two Croſs Remainders may well ſtand together, but 3 *cannot well ſtand together*; For that would make ſuch Confuſion as the Law abhors; and that was the Reaſon of the Judgment in the Caſe of Gilbert v. Witty, which Pemberton Ch. J. ſaid he took to be good Law. 2 Show. 139. in the Delivering the Judgment of the Court in the Caſe of Holmes v. Meynell.

Skin. 17. S.C. — 2 Jo. 172. S.C. Adjudg'd accordingly. — Freem. Rep. 483. pl. 668. Mich. 1678. S.C. cited Arg. Holmes v. Millitt. Adjornatur; but ſeems to be S.C. ——— S.C. cited, and 'tis obſerv'd by the Marginal, That it is not ſaid, *If either of them die without Iſſue* &c. S.C. cited 2 Vern. 52. in the Caſe of Sloane v. Wray. ——— S.C. cited Arg. Gibb. 15. Becauſe wherever the Iſſue claim they muſt claim as Heirs to their Mother, which cannot be till after their Mother's Deceaſe. ——— S.P. Adjudg'd accordingly, and the Words were *If any* die without Iſſue. 4 Le. 14. 32 Eliz. in C.B. Anon. ——— S.C. cited 2 Per Raymond Juſt. Raym. 454.

9. A. deviſed to his 2 Daughters and their Heirs, equally to be divided between them; *and if they die without Iſſue*, then he gives *all his Land* to his Nephew Francis in Tail Male, Remainder over. Raymond J. conceiv'd, That Francis ſhall take nothing till both are dead without Iſſue; And Judgment accordingly. Raym. 452. Mich. 32 Car. 2. B.R. Holmes v. Meynell.

But where the Deviſe was *To his 2 Daughters and their Iſſue, and in Default* of ſuch Iſſue *to J.S.* they have a Joint Eſtate for Life, and ſeveral Inheritances; and if one dies, without Iſſue there ſhall be no Croſs Remainders, but her Moiety ſhall go over to the Remainder-Man for want of ſuch Iſſue, viz. Such reſpective Iſſue. Per Ld. Cowper. Paſch. 1706. 2 Vern. 545. pl. 494. in the Caſe of Cook v. Cook.

A. deviſed his Land *to his Nieces E. and F. equally to be divided* between them *during their Joint Lives, and after the Deceaſe of them* 2, *then to the Heirs of F.* — J. cited in the Life of E. That it was adjudged a Joint-tenancy; And Per Holt Ch. J. As to have it a Croſs Remainder it is an odd kind of a Thing, the Caſe of Holmes v. Meynell has prevailed, and is not fit to be ſtirr'd now. And Powell J. ſaid, That that Caſe never went down with him, tho' affirmed in a Writ of Error; and he had heard Learned People ſpeak againſt it. Holt's Rep. 570, 571. Paſch. 6 Ann. Tuckerman v. Jefferies.

10. The Teſtator having two Sons A. and B. and 4 Daughters E. F. G. and H. deviſed his Eſtate (being in Houſes) thus, viz. *I give &c. to my Son A. my Houſes in W. and if he die, then* I give my Eſtate *to my 4 Daughters E. F. G. and H. Share and Share alike; and if any of my ſaid Daughters die before Marriage, then* I give *her or their Part to the reſt ſurviving*; and *if all my Sons and Daughters die without Iſſue, then* I give my ſaid Houſes *to my Siſter* Anne Warner, *and her Heirs.* A. entered and *died without Iſſue*; afterwards *E. died leaving a Son*, the Leſſor of the Plaintiff. In this Caſe the Court took Notice of the Caſe of Gilbert and Witty, and ſaid, That in that Caſe the Eſtate was limited diſtinctly

to 3 Sons, but in this 'tis otherwiſe; For the Teſtator had 2 Sons, and no Eſtate was limited to one of them before, Then he ſays, If all my Sons and Daughters die without Iſſue, then &c. and thus the Caſes differ, which creates the Difficulty; But no Reaſon can be given why this Court ſhould not *conſtrue Wills according to the Rules of the Common Law*, where an Eſtate by Implication is ſo incertain; For when Men are ſick, and yet have a diſpoſing Power left, they uſually write Nonſenſe, and the Judges muſt rack their Brains to find out what is intended. This cannot be an Eſtate Tail in the Daughters, and therefore the Heir muſt come in for his 4th Part. Judgment for the Plaintiff. 3 Mod. 107. Paſch. 2 Jac. 2. in B. R. 1686. in the Caſe of Hanchet v. Thelwal.

For more of Remainder in General, See **Deviſe, Fines, Recovery-Common, Uſes,** and other Proper Titles.

* Remitter.

* Remitter *is an ancient Term in the Law, and is where a Man has 2 Titles to Lands or Tenements, viz. One a more ancient Title, and another a more late Title*; and if he comes to the Land by a latter Title, yet the Law will adjudge him in by Force of the Elder Title: because the *Elder Title is the more ſure and worthy* Title; *And then when he is adjudged in by Force of his Elder Title, it is* ſaid *a Remitter* in him; for that the Law does admit him to be in the Lands by the Elder and ſurer Title; *As*, if *Tenant in Tail diſcontinues* the Tail, *and after* he *diſſeiſes the Diſcontinuee, and ſo dies ſeiſed*, whereby *the Tenements deſcended to his Iſſue* or Couſin, inheritable by Force of the Tail, In this Caſe, this is to him to whom the Tenements deſcend, who has Right by Force of the Tail, a Remitter to the Tail; Becauſe the Law ſhall not adjudge him to be in by Force of the Tail, which is his Elder Title; For if he ſhould be in by Force of the Deſcent, then the Diſcontinuee might have a Writ of Entry Sur Diſſeiſin in the Per againſt him, and ſhould recover the Tenements and his Damages, &c. But inaſmuch as he is in his Remitter by force of this Tail, the Title and Intereſt of the Diſcontinuee is quite taken away and defeated &c. Litt. S. 659.

Regularly to every Remitter there are 2 *Incidents*, viz. An *ancient Right and defeaſable Eſtate of Freehold coming together*. Co. Litt. 349. a.

(A) Remitter for *Infancy* [*or Coverture.*]

1. If Tenant in Tail infeoffs his Iſſue within Age and a Stranger, and dies, the Iſſue is remitted tho' the Eſtate of the Stranger is defeated thereby. Contra 39 E. 3. 30.

2. If a Baron makes Feoffment in Fee, and within Age re-takes Eſtate to him and his Wife for Life, he ſhall be remitted, tho' he had but a Title of Entry for his Nonage; Becauſe no Folly can be imputed to him by this Retaking, being an Infant. 41 E. 3. Remitter 11. Iſſue thereupon. 19 E. 3. Remitter 14. Adjudg'd.

3. If a Feme makes Feoffment to 2, upon Condition to re-infeoff her upon Requeſt, and after takes Baron, and they make Requeſt, and one refuſes, and the other of them infeoffs them of the Whole; Tho' they do not claim to be in of their firſt Eſtate, yet the Feoffment ſhall be a Remitter to the Moiety of him who refuſed, for which the had Title of the Entry thereinto for the Condition broken at the Time

Time of the Acceptance of the Feoffment; And no Folly can be imputed to a Feme Covert for the Acceptance of the Feoffment. 35 Aſſ. 11. Adjudg'd. 35 E. 3. Remitter 17.

Br Remitter, pl. 26. cites S. C.

4. A *Feme ſeiſed took Baron at* 15 Years of Age, *who alien'd immediately, and retook to them in Tail*; The *Feme died without Iſſue.* The *Baron enter'd.* The Heir of the Feme ouſted him, and he him re-ouſted; and the Heir brought Aſſiſe, and recover'd. The Reaſon ſeems to be; Becauſe the Feme was remitted as well for Coverture as for Nonage. Br. Entre Cong. pl. 73. cites 35 Aſſ. 12.

5. It ſeems, That *when an Infant makes a Feoffment, and the Feoffee gives to him again in Tail, he is remitted in Fee* by reaſon of the Nonage. Br. Traverſe per &c. pl. 219. cites 5 E. 4. 5.

6. An *Infant*, who is *in by Deſcent*, and a Feme Covert, to whom Entry is ſaved by the Law, if a *Stranger be remitted by Title Paramount* them, their Entry is taken away. Br. Entre Cong. pl. 117. cites 11 E. 4. 1, 2.

7. If the *Diſſeiſor infeoffs the Iſſue of the Diſſeiſee within Age*, and after the *Father dies* he ſhall have his Age; and the Reaſon ſeems to be, Becauſe the Infant is remitted. Br. Remitter, pl. 37. cites 21 E. 4. 78. Per Choke and others.

Br. Condition, pl. 134. cites S. C.

8. An *Infant Iſſue in Tail*, who *enters for Condition broken, made by his Father* when in in Fee after a Diſcontinuance, ſhall be remitted by the Nonage. Contrary at full Age. Br. Coverture, pl. 45. cites 8 H. 7. 7.

9. Where *Tenant in Tail infeoffs his Iſſue within Age*, and the *Right of the Entail* after *deſcends to the Feoffee*, whether within Age or of Age, at the Time of the Diſcent; and notwithſtanding he might have waiv'd the Eſtate gained by the Feoffment after he was of full Age, yet ſhall he be remitted; Becauſe ſuch Waiver would have been to his Loſs, and no Folly could be imputed to him when he took the Eſtate. Litt. S. 660. Hawk. Co. Litt. 437.

So if the *Diſcontinuee after the Death of Tenant in Tail makes a Feoffment to the Iſſue in Tail*, being *within Age*, who has a Right, *and to* [illegible] *in Fee*, and makes *Livery to the Infant in Name of both*; the Iſſue is not remitted to the whole, [illegible] He takes the Fee-ſimple, and after the Remitter is wrought by Operation of Law, [illegible] him but to a Moiety. Co. Litt. 350. a.

10. *Tenant in Tail infeoff'd his Heir Apparent* in the Tail within Age, *and another* Jointenant *in Fee*, and the *Tenant* in Tail *dies*; the *Heir in Tail is in his Remitter as to the one Moiety*, and as to the other Moiety he is put to his Writ of Formedon &c. Litt. S. 663.

S. P. For where the *Right of Poſſeſſion* is *diſtinct from the Right of Propriety*; there, if the *Proprietary re-obtains* the Right of Poſſeſſion *by Agreement*, he muſt hold it under ſuch Agreement; for the other having the Right of Poſſeſſion, and transferring it to the Proprietary, ſuch Proprietary muſt take the Right in the ſame Manner as the other was conveyed; for it is his own Folly and Laches, that he would contract about ſuch Right of Poſſeſſion, and not aſſert his Propriety in a Proper Action: but when he has contracted for ſuch Right of Poſſeſſion, and ſuch Right of Poſſeſſion is transferr'd, *he muſt look to the Terms of the Bargain, and* he *leaves all the Right in the Feoffor he has not contracted for.* G. Treat. of Fen. 121. 122.

11. *But* if *Tenant in Tail infeoffs his Heir Apparent*, the Heir being *of full Age* at the Time, *and dies*; this is no Remitter to the Heir, becauſe it was his Folly, that being of full Age he would take ſuch Feoffment &c. but ſuch Folly cannot be adjudged in the Heir being within Age at the Time of the Feoffment &c. Litt. S. 664.

If Tenant in Tail infeoffs his Iſſue, being within Age, and his Wife in Fee, and

12. If a *Woman ſeiſed in Fee takes Husband, who aliens* to another *in Fee*, the *Alienee lets* the ſame Land *to the Husband and Wife for their two Lives, ſaving the Reverſion to the Leſſor and his Heirs*; the Wife is in her Remitter, and ſhe is ſeiſed in Fact in her Demeſne as of Fee, as ſhe was before; becauſe *the taking back of the Eſtate ſhall be adjudged* in Law *the Act of the Husband*, and not of the Wife; ſo no Folly can be adjudged in

in her being Covert. And in this Caſe the Leſſor has nothing in the Reverſion, for that the Wife is ſeiſed in Fee &c. Litt. S. 666.

does this by is a Remitter to the

Iſſue preſently, by the Death of Tenant in Tail, tho' ſome have thought the contrary Co Litt. 351. b.

13. *So* it would be, *tho' the Leaſe had been by Indenture, or by Grant and Render in a Fine.* Hawk. Co. Litt. 442.

14. If the *Husband diſcontinues the Land of the Wife, and goes beyond Sea*, and the *Diſcontinuee leaſes the* Land *to the Wife for her Life, and delivers to her Seiſin*, and after the *Husband comes* back, *and agrees* thereto, ſhe is remitted; and yet if ſhe had been Sole at the Time of the Leaſe made to her, this ſhould not be to her a Remitter; but being Covert Baron at the Time of the Leaſe, and Livery made unto her, *this was a Remitter* to her, *becauſe* a Feme Covert ſhall be adjudged as an Infant within Age in ſuch Caſe &c. Quære in this Caſe, if the Husband when he comes back, will diſagree to the Leaſe and Livery of Seiſin made to his Wife in his Abſence, if this ſhould ouſt his Wife of her Remitter, or not &c. Litt. S. 677.

It ſeems that the Diſagreement ſhall not deveſt the Remitter. 1ſt. Becauſe the State made to the Wife; which wrought the Remitter is vaniſhed and wholly

defeated; and therefore no Diſagreement of the Husband can diveſt the State gained by the Leaſe, which by the Remitter was deveſted before 2dly, For that the Law having once reſtored her ancient and better Right, will not ſuffer the Diſagreement of the Husband to deveſt it out of her, and to revive the Diſcontinuance, and reveſt the wrongful Eſtate in the Diſcontinuee 3dly, For that Remitters tending to the Advancement of ancient Rights, are favoured in Law. Co Litt 356 b 357 a.——So it is for the ſame Cauſes if the Wife ſurvive her Husband, ſhe cannot claim in by the Purchaſe made during the Coverture, but the Law adjudges her in in her better Right. But if both Eſtates be waivable, there, albeit the Wife, Prima facie, is remitted, yet after the Deceaſe of her Husband ſhe may elect which of the Eſtates ſhe will; As if Lands be given to the Husband and Wife, and their Heirs, the Husband makes a Feoffment in Fee, the Feoffee gives the Land to the Husband and Wife, and the Heirs of their two Bodies, the Husband dies, in this Caſe the Wife may elect which of the Eſtates ſhe will; for both Eſtates are waivable, and her Time of Election and Power of Waver accrued to her firſt after the Deceaſe of her Husband. Co. Litt. 357 a.

15. If the *Husband diſcontinues the Land of his Wife*, and *after takes back* an Eſtate *to him and his Wife, and a 3d Perſon* for Term of their Lives, or in Fee, this is no *Remitter* to the Wife; but as *to a Moiety*, and for the other Moiety, the muſt after the Death of her Husband ſue the Writ of Cui in Vita. Litt. S. 676.

Albeit there is Authority in our Books to the contrary, yet the Law is

taken as Littleton here holds it Co Litt. 356. b ——Baron the *Husband*, was *ſeiſed in the Right of his Wife* for the Term of the *Life of the Wife*; they *both ſurrendred*, and *took back* the Lands *to them and the third Perſon*; And it was holden, That the Wife was not preſently remitted, but after the Death of her Husband ſhe might diſagree to the Eſtate. 3 Le. 93 94 pl. 134. Mich. 26 Eliz. 11 C. B cited per Periam J. as Sidenham's Caſe.

16. If the *Husband* had *diſcontinued the Wife's Land, and taken back* an Eſtate *to him for his Life, Remainder to his Wife for Life*; this had been *no Remitter* to her during *the Husband's Life*, becauſe while he liv'd ſhe had no Freehold. Litt. S. 680 Hawk. C. L. 453.

Here are to be obſerved. 1ſt. That a Remainder Expectant upon an Eſtate for Life, works no Remitter but when it falls in Poſſeſſion; for before this Time he can have no Action, and no Freehold is in him. 2dly That the Woman might waive the Remainder, yet be ſure ſhe is preſently by the Death of the Husband Tenant to the Precipe, it is within the Rule of Remitter, and her *Power of Waver is not material*. 3dly. That a Freehold in Law being caſt upon the Woman by *Act of Law*, without any Thing done or aſſented to by her, doth remit her, tho' ſhe be then Sole, and of full Age. Co Litt. 358. b.

17. *But upon his Death* the Freehold in Law, caſt on her againſt her Will, had been a Remitter; (and yet no Aſſiſe lies for one that is outſted of a Freehold in Law) for there is none againſt whom ſhe could bring her Action, and ſhe was Tenant to the Præcipe; nor did her Power to waive ſuch Eſtate prevent the Remitter, tho' ſhe was Sole, and of Age at the Time when the Freehold was caſt on her. Litt. S. 681. Hawk. C. L. 453.

18. A. *ſeiſed* of Lands in *Right of his Wife, for the Life of his Wife, makes Feoffment in Fee, to the Uſe of the ſaid Wife for his Life.* It was held that ſhe is remitted; and it is not like Amy Townſend's Caſe. 1 & 2 P. & M. Pl. C. 111. For in that Caſe the Entry of the Wife was not lawful, becauſe ſhe was Tenant in Tail, which Eſtate was diſcontinued by the Feoffment of her Husband. 3 Le. 93. pl. 134. Mich. 26 Eliz. C. B. Anon.

19. If a Man *enfeoffs* an *Infant or Feme Covert (that has Right of Propriety) for Life*, for *Years, or on Condition*, they are remitted to their ancient Right, and all *ſuch Conditions vaniſh*; for to a Feme Covert, or Infant, *no Folly* or Laches *can be imputed*, nor can their Acts turn to their Prejudice; ſo that when they have acquired the Right of Poſſeſſion, they are reſtored to their ancient Right of Propriety; and being not capable of contracting, the Terms and Conditions of the Feoffment do not bind them. *But if* they were *of full Age, or Diſcovert*, then *they leave in the Feoffer all the Right of Poſſeſſion*, that is *not tranſferr'd to them by the Contract*, and muſt hold the Right in the Manner tranſferr'd to them; for ſince they have no Right of Poſſeſſion but from their Bargain, it is fit that they ſhould hold according to ſuch their Contract; but in the other Caſe, it was the Folly of ſuch Parties to tranſfer the Right of Poſſeſſion to ſuch Infants as were the Proprietors, to hinder them from their Action. G. Treat. of Ten. 123. 124.

(B) *In what Caſes* a Man ſhall be Remitted *againſt the Statute* of 27 H. 8.

Roll. Rep. 260 S. C. and S. P. Per Coke Ch. J. and admitted per Cur. and the Counſel at the Bar. —— S. P. Le. 91. in Caſe of the Earl of Arundel v. Dacres. —— Sid. 65. S. P. in Caſe of Jones v. Philpot.

1. If Tenant in Tail makes Feoffment to the Uſe of himſelf and his Heirs, and dies; tho' he himſelf was not remitted by the Statute, yet his Iſſue ſhall be remitted; for the Statute does not direct the Poſſeſſion upon the Deſcent, but only upon him upon whom the firſt Attachment of the Uſe is. M. 13 Ja. B. R. between *Bridgman and Charleton.* Per Curiam agreed.

S. C. adjudged Lane 93. 96. Hil. 8 Ja. in the Exchequer; * Fol. 420. and Tanfield Ch. B. ſaid that the Iſſue of the Feoffor is remitted without Entry, notwithſtanding the Leaſe, becauſe it is not in Poſſeſſion, but a Leaſe in Remainder.

2. If Tenant in Tail makes Feoffment in Fee, to the Uſe of himſelf for Life, the Remainder to B. for Years, and dies leaving nothing of the Reverſion, and after dies, by which the Poſſeſſion deſcends to the Iſſue in Tail; the Iſſue is remitted, and is ſeiſed of the Land for Life, notwithſtanding he has the Reverſion by Deſcent. M. 13 Ja. * in the Exchequer. Adjudged per Curiam between *Brimeſton and Stanley.*

Since Littleton wrote, and after the Statute 27 H. 8. *cap.* 10. if *Tenant in Tail makes a Feoffment* in Fee *to the Uſe of his Iſſue*, being *within Age*, and his Heirs, and dies, and the *Right of the* Eſtate *Tail deſcends to the Iſſue*, being *within Age*, yet he is not remitted, becauſe the Statute executed the Poſſeſſion in ſuch Plight, Manner and Form as the Uſe was limited, Et ſic de Similibus, ſo as there is a great Change of Remitters ſince Littleton wrote. Co. Litt. 348. b.

3. If the *Iſſue in Tail, infeoff'd by his Father, grants* a *Rent or Common* out of the Land, *and then the Right of the Tail deſcends* to him, he ſhall hold the Land diſcharg'd; for the State which he had when he made the Grant, is utterly defeated. Litt. S. 660. Hawk. Co. Litt. 437.

But if the Iſſue in Tail in that Caſe *waves the Poſſeſſion, and brings a Formedon* in the Deſcender, *and recovers againſt the Feoffees*, he ſhall thereby be remitted to the Eſtate Tail; otherwiſe the Lands may be ſo incumber'd, as the Iſſue in Tail ſhould be at a great Inconvenience; *but if no Formedon be brought, and that*

that Iſſue dies, his Iſſue ſhall be remitted, becauſe a State in Fee-ſimple at the Common Law deſcended unto him. Co. Litt 348. b.

4. If *Tenant in Tail had made Feoffment to his Uſe in Fee, before the Statute of Uſes* made Anno 27 H. 8. *and died before the ſaid Statute, his Heir within Age*, and *after the Statute is made before the full Age of the Heir*, by which the Heir is in by the Statute, *he ſhould not be remitted by this. Contra* of Diſcent *ſince the Statute*; for this ſhall make a Remitter. Fr. 23 Remitter, pl. 49. cites 34 H. 8. Per Cur. Br. N. C. 34 H. 8. pl. 251. S. C.— S. C. Cited D. 54. b pl.

5. *Tenant in Tail before* 27 *H. 8. made a Feoffment to* the Uſe of *his Wife for Life*, Remainder *to his Son and Heir in Fee*. Then the *Statute is made*, the *Husband and Wife die*; the *Son enters*, it ſeems he is not remitted; for the Statute makes the Poſſeſſion in him as *the Uſe* was *before*, and this *was of Fee-ſimple*. But his Iſſue ſhall be remitted. D. 54. pl. 21. Mich. 34 H. 8. Anon.

6. H. 8. gave Land *to A. and M. his Wife*, and to *the Heirs of A. who made a Feoffment to the Uſe of himſelf and his Wife for Life*, and after their Deceaſe to the Uſe *of their youngeſt Son for Life*, *and after his Deceaſe to the Uſe of himſelf and his Heirs*. A. died, his Heir within Age; the Woman ſhall be eſtopped her ancient Eſtate. She is remitted, and the 3d Part ſhall not be in Ward; For *the Wife had Election to be in according to the Statute of* 27 *H. 8. or by* the Statute of 32 *H. 8.* inaſmuch as her Entry was thereby congeable. D. 191. b. pl. 22. Mich. 2 & 3 Eliz. Hawtrey's Caſe.

7. If *Diſcontinuee* of Eſtate Tail *enfeoffs the Iſſue within Age*, and *Tenant in Tail dies*, the Iſſue ſhall be remitted in an Inſtant; But this is not Deſcent of the Tail within the Statute. Agreed by the Juſtices. Mo. 255. pl. 401. Mich. 29 & 30 Eliz. in the Caſe of Butler v. Baker.

8. A. *Tenant in Tail makes a Feoffment* in Fee, *to the Uſe of himſelf for his Life*, the Remainder *in Tail to his eldeſt Son*, with divers *Remainders over*; with a *Proviſo*, That *if any of the Entakees do any Act* to interrupt the Courſe of any Entail limitted by the ſaid Conveyance, then *the Uſe* limitted to ſuch Perſon *ſhall ceaſe, and go to him who next is Inheritable*; And afterwards, *A. dies*, his *eldeſt Son* to whom the Uſe in Tail was firſt limited *enters*, *and does an Act againſt the ſaid Proviſo*, *and* yet held himſelf in and made Leaſes; the Leſſees enter, the Leſſor *dies ſeiſed*, *his Heir being within Age*, and in Ward to the Queen; It was holden by Shuttleworth Serjeant, Yelverton, Godfrey, Owen and Coke, who were of Council with the Heirs General of the Defendant, that here is a Remitter, for by this Act againſt the Proviſo, the Uſe, and ſo the Poſſeſſion does accrue to the Infant Son of him to whom the Uſe in Tail was limited by the Tenant in Tail; Then when the Tenant in Tail, after his ſaid Feoffment holds himſelf in, this is a Diſſeiſin; For a Tenancy by Sufferance cannot be after the Ceſſer of an Eſtate of Inheritance, but admit that he be but a Tenant at Sufferance, yet when he makes Leaſes for Years the ſame is clearly a Diſſeiſin, and then upon the whole Matter a Remitter, and *altho the Infant takes by the Statute, yet the Right of the Tail deſcending* to him *afterwards by the Death of his Father does remit him*. 1 Le. 91. pl. 117. Mich. 29 & 30 Eliz. At Serjeant's Inn. The Earl of Arundel v. Ld Dacres.

9. *As* if *Tenant in Tail makes a Feoffment in Fee to the Uſe of himſelf for Life*, the *Remainder in Tail to his eldeſt Son inheritable to the firſt Entail*, notwithſtanding that the eldeſt Son takes his Remainder by the Statute, and ſo is in by Force thereof, yet when by the Death of his Father the Right of the Entail deſcends to him, he is remitted. 1 Le. 91. Mich 29 & 30 Eliz. at Serjeant's Inn. The Earl of Arundel v. Ld Dacres.

10. A *Grandfather Tenant in Tail, before* the Statute of 27 *H. 8. made a* [illegible] *Feoffment to the Uſe of himſelf for Life*, the *Remainder to a Stranger in Tail*, [illegible] the Remainder *to the Right Heirs of the Grandfather*; the *Grandfather died*, [illegible] the *Father died before the Statute*, *after the Statute* the *Stranger* [illegible] Eſtate [illegible]

in Tail to W. R. Remainder to B. (eldeſt Son of A. the Iſſue in the firſt Entail) in Fee. J. S. died without Iſſue, his Wife Privement Enſeint of a Son. B. enter'd The Iſſue of W. R. is born and entered upon him, and brought Aſſiſe, but not maintainable D. 129. Marg. pl. 63. cites Plow. Queries 8.

Eſtate Tail executed by the Statute *without Iſſue, his Wife being with Child*; The Son entered as Right Heir of the Grandfather; afterwards the Iſſue in Ventre &c. is born. Quære if the Son be remitted, he being the firſt in whom any Remainder in Poſſeſſion veſted by the Statute, and this is of a Fee-ſimple, in which Eſtate he muſt neceſſarily be deemed in, wherefore &c. D. 129. pl. 63. Hill. 2 & 3. P. & M. Bonvil v. Payn.

A *Tenant in Tail General, before the Statute* 27 H. 8 *made a Feoffment in Fee* to the Uſe of himſelf for Life, *Remainder* to the Uſe of *B. his Heir* apparent, *and the Heirs Males of his Body*; *and for Want of ſuch Iſſue to C. in Tail with* ſeveral *Remainders over.* Remainder to the Right Heirs of A. *After A's Death the Statute was made, by which* B. the firſt in Remainder *is ſeiſed, and died, leaving* Iſſue *only one Daughter*; The Queſtion was, if C. might enter, and that depended wholly upon another Queſtion, (viz.) Whether B. who was inheritable to the old Entail, and in Remainder of the New Entail, and in Poſſeſſion by the Execution of the Statute was remitted or not? It ſeems he was not, and ſo was the Opinion of the Juſtices of Aſſiſe; For the Plaintiff recovered Judgment upon this Matter found D. 77. b pl. 39. Mich. 6 E. 6. Rayner v. Rayner.

Sid 63. pl. 33. S. C. adjudged.

11. *Baron and Feme tenants in Special Tail* of the Proviſion of the Baron, *Remainder to the Heirs of the Baron*; They have 2 Sons, and make *Feoffment in Fee* to themſelves for Life, Remainder to the 2d Son in Fee. Baron dies; The Wife enters and enfeoffs the 2d Son in Fee. The Wife, upon her Baron's Death is remitted; For tho' ſhe comes in by the Statute by Way of Uſe, ſhe cannot be remitted by the Limitation of Uſe by the Statute according to Townſend's Caſe Pl. C. yet her Entry being lawful, ſhe is remitted by her Entry, and then if this 2d Feoffment by her makes a Diſcontinuance, the Entry of the firſt Son was lawful as for a Forfeiture by the Statute of 11 H. 7. and if it was not a Diſcontinuance (as they held it was not, being made to him who had the Reverſion in Fee by the firſt Feoffment) nor forfeited, then the Entry of the Eldeſt Son is lawful, as Heir to the firſt Entail, the firſt Diſcontinuance being purged by the Remitter of the Feme, ſo that either Way the Entry of the firſt Son was lawful. Lev. 49. Mich. 13 Car. 2. B. R. Jones v. Philpot.

(C) In what Caſes a Man ſhall *not* be *Remitted* for Collateral Reſpect. *For Covin.*

Br. Remitter, pl. 45. cites S. C — Jenk. 46. pl. 88. cites S. C and ſays it was reſolved by all the Sages in Parliament, that this Covin makes him a Diſſeiſor of his own Land.

1. If a Man who has Right of Action to certain Land cauſe another to diſſeiſe the Tenant to the Intent and of Covin to recover it from him, and he recovers it from him accordingly by Action try'd, yet he ſhall not be remitted to his ancient Right by Reaſon of the Covin. 41 Aſſ. 28. Adjudged.

So if N. had had entered upon M. of his Aſſent, and N. had brought Formedon and recovered, and ſo ſee that this does not make a Remitter. Ibid.

2. Aſſiſe *againſt N. and M.* where *M. is Tenant*, and *he infeoffed N. pending the Writ*, and *brought Formedon againſt him, and recovered upon Elder Gift, and pleaded this, and the Eſtate of the Plaintiff Meſne* &c. It is *a Good Plea that M. infeoffed N. pending the Aſſiſe, and the other brought Formedon by Aſſent and Covin between them, and recovered.* And the Plaintiff in the Aſſiſe recovered. Br. Remitter, pl. 22. cites 25 Aſſ. 1.

Where Infant had Title of Action, and *made A enter and ouſt the Tenant a-*

3. *Tenant in Tail by Fine aliened in Fee with Warranty, and died, his Iſſue with Age*, and *J. S. ouſted the Alienee, and cauſed the Infant to bring Scire Facias againſt him upon the Fine*, and recovered, and it was held by ſome, that the Infant was remitted, by Reaſon of the Nonage, notwithſtanding the Covin, and the Alienation was with Warranty, and

Aſſets

Affets defcended. Brooke fays, Tamen quære, for the Book is not much to the Purpofe thereof. Br. Remitter, pl. 44. cites 27 Aff. 74.

tion, and the *Tenant confeffed the Action*, and the Court would not give Judgment by Reafon of the Covin. Quod nota; Br. Remitter pl. 47. cites the written Book. of 39 E. 3.

4. *Tenant in Tail difcontinued in Fee, and died*, and *B. by Covin entered to the Intent to infeoff the Heir within Age*, and after he *infeoffed the Heir in Tail within Age*, which *Heir was not of Covin* &c. and yet by 6 Juftices this is no Remitter, becaufe he who is in by him who did the Covin, fhall be in the fame Plight as he who did the Covin; But Engell. and Portington Contra. Quere; For it feems that it is a Clear Remitter. Br. Remitter. pl. 7. cites 19 H. 8. 12.

Jenk. 193. pl. 98. cite S. C. That the Infant is not remitted tho' he knew nothing of the Covin; By all the Judges of England —— Pl. C. 51. Arg. cites S. C —— But if the Son *procures* others to diffeife the Difcontinuee and infeoffeth (he then being *within Age*) he fhall not be remitted; Becaufe this Diffeifin is a Tort, which commences by the Infant himfelf. Arg. 2. And. 39. pl. 25. in the Cafe of Bannefter v. Truffel.

5. A *Feoffment within the Statute of* 1 *R.* 2. 9. will not make a Remitter in Prejudice of a 3d Perfon, as it feems. Br. Feoffment, pl. 19.

6. If the *Husband difcontinues the Lands of his Wife*, and the *Difcontinuee is diffeifed*, and after the *Diffeifor leafes the* fame Lands *to the Husband and Wife for* Term of *Life*, this is a Remitter to his Wife. * *But if* the *Husband and* his *Wife was of Covin* and Confent *that the Diffeifin fhould be made*, then it is no Remitter to his Wife, becaufe fhe is Diffeiforeſs; *But if the Husband was of Covin*, and Conſent to the Diffeifin, *and not the Wife*, then fuch Leafe made to the Wife is a Remitter, for that no Default was in the Wife. Litt. S. 678.

* S. P. Jenk. 193. pl. 98. —— S. P. Arg. 2 And. 30. pl. 25 — It is regularly true that a Feme Covert cannot be a Diffeiforeſs by her Commandment or Procurement precedent, nor by her Aſſent or Agreement fubſequent, but by her actual Entry, or proper Act ſhe may be a Diffeiforeſs; And therefore ſome do hold that Littleton muſt be intended, that the Husband and Wife were preſent when the Diſſeiſin was done, and that Littleton is good Law, albeit ſhe was abſent; For that if her Procurement or Agreement be void by a Wrong, to make a Remitter unto her, in this ſpecial Caſe ſhe ſhall fail of her End, and be remitted ſhe ſhall not be, but in this Special Caſe ſhe ſhall be holden as a Diffeiforeſs by her Covin and Conſent Quere tamen hic of the Remitter; And here it appears, that albeit the Husband be of Covin and Conſent &c. yet if the Wife was not aſſent, ſhe ſhall be remitted, becauſe there was no Default in her Co. Litt. 357. b. Co. Litt. 35. ſays, That in this Caſe the Covin ſhall ſuffocate the Wife's Right which appertained to her, and ſo the wrongful Manner ſhall avoid the Matter which is lawful.

7. *A. and B. Jointenants are intituled to a real Action againſt the Heir of* the *Diſſeiſor*. *A. cauſed the Heir to be diſſeiſed*, againſt whom *A. and B. recover*, and ſue Execution *B. is remitted*, for that he was not Party to the Covin, and ſhall hold in Common with A. but A. is not remitted, for the Reaſon that Littleton here ſhews. Co. Litt. 357. b.

(D) Remitter *by Deſcent.* Diſcontinuance of Other Anceſtor.

1. IF the Baron diſcontinues the Land of his Feme, and retakes to him in Fee, and after the Death of his Wife, dies, by which it deſcends to the Heir of the Feme (that is to ſay) their Iſſue, who enters, he is remitted to the Eſtate in Right deſcended by his Mother. 21 E. 3. 36. b.

2. In Dower; *Baron and Feme Tenants in Tail had Iſſue* 2 *Sons*; the *Baron* S. P. For it *died*, the *Feme leaſed to the eldeſt Son for* Term of *Years*, *and* after *released to him and his Heirs with Warranty*, and *he took Feme and dyed without* ſeems that the *Reſt* and *Iſſue*, and *the*

Iſſue, and after the *Mother dy'd*, and the *youngeſt Son entered*, and the Feme of the eldeſt Son brought Writ of Dower, and recovered by Award, which was againſt the Opinion of the ſeveral; For, as it ſeems, the youngeſt Son is remitted to the Tail Quacunque Via Data, which is elder than the Title of the Feme Demandant. Br Remitter pl. 14. cites 24 E. 3. 28 58.

Tail, is only a Grant of his Eſtate. Br. Dower, pl. 50. cites 24 E 3. 28.

3. If the *Iſſue in Tail diſſeiſes the Diſcontinuee of his Father, and* thereof *enfeoffs his Father*, and the *Father dies ſeiſed*, and the Iſſue in Tail enters, he ſhall not be remitted &c. Perk. S. 202. cites 18 H. 8. 5.

4. If the *Husband and Wife* be *Tenants in ſpecial Tail*, and they *levy a Fine at the Common Law, and* after the Husband and Wife *take back* an Eſtate *to them and their Heirs*; in this Caſe the Eſtate Tail is not barr'd, and yet againſt a Fine levied by herſelf, ſhe cannot be remitted, becauſe thereupon ſhe was examined; but in that Caſe, if the Land deſcends to her Iſſue, he ſhall be remitted. Co. Litt. 353. b.

Ow. 21. 37 Eliz. B. R. in Wright's Caſe.

5. An *Erroneous Fine* binds till it is revers'd, and he who has Title to reverſe a Fine by Error, has not thereby directly a Title to the Land; for if it deſcends to him, it works no Remitter. Skin. 14. Arg. cites Ow. 21. Agreed.

(E) What ſhall be a Remitter.

Baron levies Fine of his Wife's Land, and dies, and the Feme accepts a Leaſe for Years of the ſame Land, it was reſolv'd that this was a Remitter. Per Harriſon Reader of Lincoln's Inn. Lent. 1632. cited D. 190. Marg pl. 22

1. If Leaſe for Life be, Remainder in Special Tail to the Baron and Feme, Baron dies, and a Stranger enters and intrudes the Feme, and then Leſſee dies; the Feme is not remitted to the Tail. (For ſhe has the other Eſtate by Title.) 49 E. 3. 22. b. Admitted.

2. If Leſſee for Life, the Remainder for Life are, and he in Remainder diſſeiſes the Leſſee, and then the Leſſee dies, he in Remainder ſhall be remitted to his Eſtate, and the Reverſion in Leſſor. 19 H. 6. 22.

3. In Aſſiſe the Caſe was, That *Baron and Feme ſeiſed in Tail*, the *Baron made Feoffment*, and the Baron and Feme *had Iſſue two Sons, who had Iſſue two Sons*; the *Baron died*, the *Feme entered upon the Feoffee with his Aſſent, claiming only at Will, and died*, and *the two Sons died*, and the *one Son entered upon the Feoffee claiming to the Uſe of him and his Companion*; the Feoffee brought Aſſiſe againſt him who enter'd, omitting the other, and good, and had Judgment to recover; for by the *Entry of the Feme*, as above, ſhe did *not gain Franktenement*, and then by her Death there is no Deſcent nor Remitter to the Heir, and then the Entry was not lawful; and therefore the Claim did not veſt any Thing in his Companion, and therefore he need not to name the Companion in the Aſſiſe. Contra if the Entry had been lawful, as it ſeems there. Br. Remitter, pl. 13. cites 24 E. 3. 42.

4. O. S. brought Aſſiſe againſt E. And the Caſe was, That B. was *ſeiſed of the Land*, and *held of E. the Defendant, and gave the Land to R. T. Baſtard, and to J. his Feme, and to the Heirs of R.* and *R. and J. had Iſſue Cicelie*; R. died, and *J. ſurviv'd*; and after *O. the Plaintiff took C. to Wife*; and then *J. the Mother of C. gave the Land to C. and O. her Baron* now Plaintiff *in Tail, ſaving the Reverſion to herſelf for Term of her Life*, the *Remainder over to O.* the Plaintiff *in Fee*, and C. was now within Age; and after *C. died without Heir of the Part of the Father, but had Heir of the Part of the Mother*; the *Lord entered for Eſcheat*, becauſe

C.

(ad no Heir of the Part of the Father, and by his Pretence C. was re-
i d, and in her beſt Right by the *taking of the Eſtate Tail, with her*
i *om J.* which *made a Forfeiture, and gave Cauſe of Entry to C. and*
ti e is in, *the Law adjudges her in in her beſt Right*; *and* of
t O. brought Aſſiſe againſt E. the Lord; and by the beſt Opi-
ni *forfeiture the Feme is remitted*, and ſee Lib. Aſſiſ. the Plain-
ti ed But *quære* of the Forfeiture during the Life of the
B he takes with the Feme, there can be no Remitter
ner is Life; *for the Feme has no Power during the*
Life of the by *Forfeiture, and the Baron ſurvey'd the Feme*;
and ſome reſt no Surrender, but quære inde; for the *Baron*
took with the Feme, whereof he has no Surrender during the Life of the
Baron, therefore quære. Fr. Remitter, pl. 15. cites 39 E. 3. 29

5. In *Ejectione Cuſtodiæ*, the Caſe was, That a *Man was ſeiſed in General Tail by Fine*, and *made a Feoffment*, *and retook in Special Tail to him and his firſt Feme*, and *his Iſſue*, the *Feme died*, and he *took another Feme, and died*, the *King ſeiſed by Reſcous in Capite*, and *endowed the Feme*, the *Iſſue came and ſhewed the Special Tail, and had Scire facias* againſt the Feme, *and recover'd* againſt her *by Default*, and *ſhe took another Baron, and ſhe and the ſecond Baron brought Quod ei Deforceat* againſt the Heir, and *he pleaded the Special Tail*, and *ſhe would have remitted the Heir by the elder Tail, and ſo concluded him to ſay, but that her Baron was always ſeiſed in General Tail*; & non allocatur; for per Thorp clearly, The *Baron was not remitted*, and then ſhe was not ſeiſed of ſuch Eſtate whereof the Feme may be endowed; for of ſuch Special Eſtate her Iſſue is not Inheritable, nor ſhe Dowable, by which ſhe averr'd Continuance of the Poſſeſſion by the firſt Tail, and ſo to Iſſue, quod nota Br. Dower, pl. 9. cites 41 E. 3. 30.

6. Where an *Abbot has an Advowſon*, and *at the Avoidance the King preſents*, *and ſo again at another Avoidance*, there the Abbot is put to his Petition for the Advowſon, yet if the *King recites the ancient Right of the Abbot, and grants the ſame Advowſon to the Abbot and his Succeſſors*, the Abbot is remitted to his ancient Right. Br. Remitter, pl. 31. cites 2 H. 7. 17.

7. If *Tenant in Tail infeoffs a Woman in Fee, and dies*, and *his Iſſue within Age takes the ſame Woman to Wife*; this is a Remitter to the Infant within Age, and the Wife then has nothing; for Husband and Wife are but as one Perſon in Law; and the Husband cannot ſue a Formedon, unleſs he ſue againſt himſelf, which ſhould be inconvenient; and in this Caſe the Law adjudges the Heir in his Remitter, for that no Folly can be adjudged in him being within Age at the Time of the Eſpouſals &c. And if the Heir be in his Remitter by Force of the Entail, it follows that the Wife has nothing &c. for Husband and Wife being as one Perſon, the Land cannot be parted by Moieties, and therefore the Husband is in his Remitter of the whole. But otherwiſe it is if ſuch Heir was of full Age at the Time of Eſpouſals, for then the Heir has nothing but in Right of his Wife &c. Litt. S. 665.

8. If *Tenant in Tail of Land deviſable diſcontinues, and retakes in Fee*, and *deviſes to a Stranger*, and dies, the Heir is not remitted; for nothing is deſcended to him; for the *Deviſe tolls the Deſcent*. Br. Remitter, pl. 52. cites P. 4. M. 1.

9. If *Feme Leſſee for Life loſes by Default in a* Feign'd or *falſe Action*, the Leſſor's Reverſion is diveſted, and he cannot bring Waſte while the Recovery continues in Force; but if the *Feme marries*, and the *Recoveror makes a Leaſe for Life to the Husband and Wife*, the Wife is remitted and the firſt Leſſor alſo, and then he may have an Action of Waſte. But if the Recoveror bring Waſte againſt the Husband and Wife, the Husband has no Remedy but to make Default, and ſuffer the Wife to be receiv'd. The Cauſe why the Wife is remitted in this Caſe is, for that ſhe may have a Quod ei Deforceat againſt the Recoveror by Weſtm. 2. 4. which

gave

gave this Writ to Tenant for Life and Tail losing by Default, but at Law her Right was remediless, and consequently she could not be remitted. Hawk. C. L. 447. 448.

S. C 3 Le. 53. pl. 76. Mich 15 Eliz. C B And the Justices were of Opinion that she is not remitted.

10. A. seised in Fee, made a *Lease to J. S. and his Wife for Life of the Wife, Remainder to the right Heirs of the Baron*; afterwards the *Baron made a Feoffment to the Use of himself and his Wife for their Lives*, the *Remainder to his right Heirs*, and died; the Wife held in. The Court thought that the Feme was not remitted, but was in, according to the 2d Feoffment. Quere the Reason; for Harper said that the Discontinuance was out of the Statute of 32 *H.* 8. Dal. 100. pl. 32. 15 Eliz. Vavasor's Case.

11. Neither *Action without Right*, or *Right without Action*, with a Descent &c. shall make a Remitter, the 1st is apparent, and resol. 'd per Cur. 3 Rep. 3. Marq. of Winchester's Case.

12. Where a Judgment and my Right do *meet together*, I shall be in in my Right. Per Coke Ch. J. 3 Bulst. 47.

13. There is a naked Possession, distinct from the Right of Possession and Propriety, or else there is a Right of Possession distinct from the Right of Propriety; Now where there is a *naked Possession, distinct from the Right of Possession and Propriety, as between Disseisor and Disseisee*, where the Entry is congeable; there if the *Disseisee takes back the Possession* from the Disseisor, he is remitted; For it cannot be otherwise, than that when he has taken back the Possession he should be seated in his old Right; For he who has really the Title, cannot claim from a Disseisor that has no Title at all; and it would be very absurd and unreasonable, that the Disseisee by accepting his own Possession should transfer back any Right to the Disseisor; But where the *Disseisor transfers* it *back* for Life, or Years, *by Deed indented*, or by Matter of Record, there the Disseisee is not remitted; For if a Man by Deed indented takes Lease of his own Lands, it shall bind him to the Rent and Covenants; Because a Man can never be allowed to affirm that his own Deed is ineffectual, since that is the greatest Security on which Men rely in all Manner of Contracting; The same Law, if it had been *by Matter of Record*; For that is of its own Nature uncontroulable Evidence, which a Man cannot be allowed to controvert. G. Treat. Ten. 120, 121.

(F) *In what Cases* there shall be a Remitter.

Cro. E. 906. pl. 12 in the Case of Waller v. Campion. Mich. 44 & 45 Eliz. cites Clifford's Case, but there the Court

1 If a Man leases for Years to commence at a Day to come, and the Lessee enters before the Day, by which he is a Disseisor, he shall not be remitted to his Term if he continues the Possession after the Day; For the Law will not deem a Tortious Fee for a lawful Term, which is but a Chattle, and not esteemed in Law. D. 37. El. 25. R. between *Scarlet and Fuller* abridged. D. 7. E. 6. 89. 109. Lord *Clifford's* Case. D. 32. El. 25. R. between *Alexander and Dyer*. Per Curiam agreed.

said it shall be intended that the Occupying before the Lease was by Agreement [But this seems to be with Respect only to the Charging the Lessee with Payment of the Rent by Reason of the Privity of Contract, and the Entry by Lessee in the Case of Alexander v. Dyer Cro. E 169 pl. 6. 2 Le. 99. pl 121. and that of Waller v. Campion was of an Entry on the Day from which by the Lease was to commence, tho' the Entry was agreed to be a Disseisin. See the Books cited.]

2. Where a Man *seised in General Tail makes Feoffment, and retakes to him and his first Feme in Special Tail*, and *has Issue*, and the *Feme dies*, and he *takes another Feme and dies*, the King seises for the Ward, and

cites 18

endows the Feme, against whom the Iſſue recovers by Seiſin, Fact, or Default, against whom ſhe brings Quod ei deforceat, now ſhe ſhall not have Dower; For tho' the Heir be remitted, yet his Entry was taken away, but was ſeiſed of ſuch Special Tail whereof the Feme is not Dowable, per Thorp clearly, by which the Feme averred the Continuance of the Seiſin in her Baron by the firſt Tail, and ſo to Iſſue; Quod nota. Br. Remitter, pl. 5. cites 41 E. 3. 30.

3. *No Remitter can be but in Reſpect of Right and Poſſeſſion.* Br. Remitter pl. 12. cites 19 H. 6. 59. Br. Entry Cong. pl. 33. cites S. C.

New Poſſeſſion and Old Right muſt meet in the Heir to make a Remitter. Hob. 346. in the Caſe of Sheffield v. Ratcliffe —— 2 Roll. R. 431. per Hutton J. in S. C. —— 2 Roll. R. 435. in the Caſe of Wood v. Shirley —— The Poſſeſſion muſt be gained Rightfully, and not by Covin. 2 Roll R. 54. per Doderidge J.

An Iſſue muſt work a Remitter to recover his Right, for albeit a *Right to Land*, there can be no Remitter, becauſe one Right cannot work a Remitter to another; For regularly to every Remitter there be two Incidents viz. an Ancient Right and a Defeaſible Eſtate of Freehold in the Poſſeſſion. Co. Litt. 348. a. —— *Title, Right and Poſſeſſion muſt, con Simul & Semel.* Br. Remitter, pl. 12. cites 19 H. 6. 59.

Where no Poſſeſſion was but in the Perſon of the Iſſue, then *Right only does not make a Remitter* without lawful Poſſeſſion alſo. Br. Entre Cong. pl. 33. cites 19 H. 6. 59.

Where the Property comes to the Right of Poſſeſſion, without any Fault or Folly of his own; As where the *Right of Poſſeſſion is caſt* upon him *by the Law*, or he or his comes to the Right of Poſſeſſion *by Feoffment made by, or during Coverture*, where no Folly can be imputed to him; ſuch Property is remitted and ſeated in its Ancient and former Right; For the *Right attached to the more worthy, to the leaſt ſeiſed is loſt*; And therefore when the Property has by ſuch Manner gained the Right of Poſſeſſion, it is *ſeiſed*, for the Repoſe of Mens Inheritances, to be only a *Reſpect of Poſſeſſion*, *and not there to have a Remitter*; and the rather, *becauſe it is incompatible with the Nature of Right to regain the Property*; And when any Perſon has title or gives the Right to his Son, if any Elder will controvert it by any Elder Action, it is fit he ſhould recover, that the more Right may be decided. This if the *Heir of the Inſeoffee*, be *ſeiſed of the Land*, before the Right of Poſſeſſion can regain the Right of Poſſeſſion; For in *Act of Parliament can make no Remitter*; but ſuch *Right muſt be ſeiſed*, then *the Heir* has the Right of Poſſeſſion, and ſo *Right and Poſſeſſion*, Right of Poſſeſſion, *Poſſeſſion only*, *he is ſeiſed in his Ancient Right*, for the Reaſonableneſs thereof. C. Treat. of Ten. 122, 123.

4. When the *Right in the Tail* is *extinct*, there cannot be a Remitter. Br. Remitter, pl. 12. cites 19 H. 6. 59.

5. If *Diſſeiſee* comes *upon the Land*, and *in Tail's Diſſeiſee*, this is a void Feoffment, and a Remitter. Br. Property, pl. 27. cites 7 E. 4. 15. S. P. For the Diſſeiſee has a Right of Entry before. Br. Remitter, pl. 50. cites 34 H. 8.

6. *After Diſcontinuance of a Manor to which Advowſon is appendant the Heir in Tail is remitted, and his Clerk ſhall* [and the Queſtion was] Whether his Iſſue in Tail be remitted to the Advowſon notwithſtanding that the Manor to which &c. be not re-continued; And the beſt Opinion was, That a Man *cannot be remitted to that which is Incident or Appendant*, as to Advowſon or the like, *till he has the Principal*, *but* he may be remitted *to Parcel as to an Acre* of the Manor &c. For *Advowſon is but Parcel and Appendant*. Br. Remitter, pl. 32. cites 5 H. 7. 35. * S.P For he can have no Action to recover the Thing appendant &c. till he has recovered the Principal to which it is appendant.

the Diſſeiſee of a Manor to which &c. grant the Advowſon to Tenant in Tail and his Heir, and he dies, yet is not the Iſſue remitted; *But* a Remitter *to the Principal* is a Remitter *to the Appendant*, tho' they were *ſeiſed before the Remitter*. As if Diſcontinuee grants the Manor to Tenant in Tail and his Heirs having the Advowſon, and the Tenant in Tail dies, and Manor deſcends to the Iſſue, he is not only remitted to the Manor but to the Advowſon alſo; ſo if a Diſſeiſor ſurrenders to Diſcontinuee, and Diſſeiſee re-enter into the Manor, to which &c. he re-continues the Advowſon. Hawk. Co. Litt. 339, 419.

7. He who *takes a Gift by Act of Parliament* of any Land ſhall not be remitted nor his Heirs; For where the Land is given expreſsly to any Perſon by Name by Act of Parliament, which is a Judgment, *he and his Heirs ſhall not have other Eſtate than that which is given by the Act.* Br. Remitter, pl. 50. cites 29 H. 8. per Englefield J. * S. C. cited Litt. S. 748. Br. Entry Cong. pl. 33. cites S. C.

one has Iſſue a Son and Heir in Tail, and the ſame Land is afterwards given to him by Parliament Heir in Tail, by the Act of Parliament all other Title is excluded. For a Parliament cannot be forejudged by Fine. Litt. S. in the Caſe of Burton v. Sturgeon —— S. C. cited Rep. 40. b. per Cur. in the Caſe of Canterbury's Caſe. Trin. 38 Eliz. B. R. But the Act of 34 Statute of Weſt. 2. 1. Inſtit. —— S. C. cited Arg. Show. 212. Pafch. 3. [illegible]

8. If the *Diſcontinuee* be an *Infant*, *or* a *Feme Covert*, and *Tenant in Tail* after Diſcontinuance *diſſeiſes them*, and dies diſſeiſed, the Iſſue ſhall be remitted without Reſpect of the Privilege of Infancy or Coverture. Co. Litt. 348. a.

As if *Tenant in Tail ſuffer* an *Erroneous Common Recovery*, and afterwards *diſſeiſes Recoveree*, and dies, *his Iſſue* ſhall not be remitted; For while the Recovery ſtands in Force, the Eſtate Tail is barred. Per tot. Cur. 3 Rep. 3. in the Marquis of Wincheſter's Caſe. —— S. P. Co. Litt 349 b.

9. An *Action without* a *Right* can *not* make a Remitter. Co. Litt. 349 b.

As if B *purchaſes an Advowſon*, and ſuffers an *Uſurpation*, *and 6 Months* to *paſs*, and then the *Uſurper grants* the Advowſon *to B. and his Heirs*, and *B. dies*, yet is not his Heir remitted; becauſe his Right to the Advowſon was remedileſs, viz. a Right without an Action Co. Litt. 349. b.— For he cannot have a Writ of Right of Advowſon becauſe neither he nor his Anceſtors ever preſented; but it ſeems that there ſhall be a Remitter in this Caſe by * - Q. A. which gives the Patron a Quare Impedit, notwithſtanding an Uſurpation. Hawk. Co. Litt. 439. —— * This is the Statute of 7 Ann. cap. 18.

10. *Nor* a *Right without* an *Action* cannot make a Remitter. Co. Litt. 349. b.

S. C cited Godb. 411. Arg.

11. *Tenant in Tail makes Feoffment in Fee* to the Uſe of himſelf and his Heirs, and after makes his laſt Will in Writing, and *deviſes* the Land *to his Wife in Fee*, and dies, the Sons ſhall not be remitted to the Entail, becauſe no Freehold deſcends to him by Reaſon of the Deviſe. Held by 3 Juſtices, and affirmed by 4 others; And yet there is a Dying ſeiſed in the Father of a Fee-ſimple, but the Deviſe cut off the Deſcent. D. 221. pl. 16. Paſch. 5 Eliz. Biſhop v. Biſhop.

* S. P. For he cannot ſue himſelf, and the other is Tenant of the Freehold; and therefore the Law adjudges him in his Remitter ſeiſ. in ſuch Plight, as if he had lawfully recovered the ſame Lands againſt another &c. Litt. S. 661.

12. No Remitter ſhall be but where if the *Right and Poſſeſſion* were *in ſeveral Perſons*, he that has Right may have Action to recover the Poſſeſſion; For by Litt 147. one of the principal Cauſes why the Eſtate Tail ſhall be remitted, is becauſe there is * no Perſon againſt whom he may ſue his Formedon. 3 Rep. 3. as in the Marquis of Wincheſter's Caſe.

And 43. pl. 109. S. C. —— S. C. cited And. 172 in the Caſe of Zouch v Bamfield.— S C. cited 2 And. 177.

13. Tenant in Tail diſſeiſes Diſcontinuee, and levies Fine to a Stranger, and *retakes Eſtate by Render in Fee*, and before all the Proclamations paſſed the Diſcontinuee enters and makes Claim, and after the Proclamations paſs, and within 5 Years after he enters and makes Claim, and after Tenant in Tail dies ſeiſed, the Heir is not remitted, and this by the Statute of Fines 32 H. 8. which bars him and his Heirs by the ſaid Fine. Mo. 115. pl. 257. Paſch. 20 Eliz. Anon.

pl. 109. in Danvers's Caſe.—Bendl. 122. pl. 156. Trin. 4 Eliz. S. P. And (were it not for the Difference of the Year) ſeems to be S. C. —— S. C. cited out of Bendl. 3 Rep 91. a. in the Caſe of Fines.

14. In ſome Caſes a Remitter may be *againſt the King*. Arg. Godb. 312. cites Pl. C. 488, 489. 553. But that is where the King is *in by Matter of Law by Conveyance*, but not where he is in *by an Act of Parliament*. Ibid.

15. No Remitter againſt a Matter of *Record*. Arg. Godb. 312. in Caſe of Sheffield v. Radcliffe.

16. If *Iſſue in Tail diſſeiſes the Diſcontinuee*, *and cuſtoſs the Father* who dies ſeiſed, and the Land *deſcends*, *to the Feoffor*, the Iſſue ſhall not be remitted. 2 And. 39. pl 25.

17. There can be *no* Remitter *without an Entry*. Per tot. Cur. 2 Bulſt. 32. Mich. 10 Jac. Horewood v. Holman.

18. Lord Ch. J. Saunders declared, That there can be no Remitter *againſt a Party's Non-Acceptance*, *where the Perſon is of full Age*, *and his Entry not lawful*. 2 Show. 245. pl. 243. Mich. 34 Car. 2. B. R. in Caſe of Hardie v. Pawling.

(G) Where

(G) Where a Man ſhall be Remitted, *upon* Taking an Eſtate. Where *Title of Entry.*

1. IF an Infant aliens in Fee, and retakes at full Age an Eſtate to him and his Wife; this is not any Remitter. 41 E. 3. Remitter 11. Iſſue thereupon. 19 E. 3. Remitter 14 Iſſue thereupon.

2. If an Infant aliens in Fee, and at full Age retakes an Eſtate without Deed, becauſe he has but a Title of Entry for Infancy, yet he ſhall not be remitted; for he had Election to make the Feoffment good, the which is affirm'd by this Acceptance. Contra 3 H. 6. 19. Br. Remitter, pl. 25. cites S. C

3. But if a Ward inſeoffs his Guardian in Socage, and at full Age accepts an Eſtate &c. from the Guardian, he ſhall be remitted, becauſe the Entry of the * Guardian upon the Feoffment of the Ward, was a Diſſeiſin, and to the Ward had a Right of Entry. 35 Aſſ. 8. adjudged. * Fol. 421.

4. If a Man who has Title of Entry into Land for a Condition broken, retakes an Eſtate to him, if he does not claim to enter for the Condition broken, but by the Eſtate, he is not remitted, becauſe the Eſtate is not void till Election, which is not yet made. 35 Aſſ. 11. adjudged. Co. Litt. 347. b. 348. a. S. P. Becauſe it is but a bare Title of Entry, for

which no Action is given, whereas a Remitter muſt be to a precedent Right.

5. If a Man of Non ſinæ Memoriæ makes Feoffment, and retakes an Eſtate for Life, he ſhall not be remitted, becauſe he in Reſt cannot avoid his own Feoffment, for that he was Non ſine Memoria. Contra 25 Aſſ. 4. Admitted 25 E. 3. Remitter 23. F. N. B. 202. (A) that he is remitted.

6. If a Man leaſes Land for Years to him that has Title of Entry for a Condition broken, he is not thereby remitted, unleſs at his Pleaſure, if he will claim to be in of the firſt Eſtate. 44 E. 3. Remitter 22.

7. If he who has a Title of Entry for an Eſcheat, takes an Eſtate of the Tertenant, it is not a Remitter. 34 H. 8. S. 252. becauſe he had but Title of Entry. Br. N. C. pl. 252. —— Br. Remitter, pl. 50. cites S. C

8. So if he who has Title of Entry for Alienation in Mortmain, takes Eſtate of the Lord; this is no Remitter, becauſe he has but a Title to it, and no Right. 34 H. 8. S. 252. —— Co. Litt. 347. b. 348. a. S. P.

9. So if he who has Title of Entry by the Statute of R. 2. for the Conſent of a Feme to the Raviſher, takes Eſtate of the Land, yet he ſhall not be remitted. 34 H. 8. S. 252. Br. N. C. S. 252. —— Br. Remitter, pl. 50. cites S. C.

10. In Aſſiſe; Land was given *in Tail to the Baron and Feme, and to the Heirs of the Body of the Feme by Fine*, who had *Iſſue a Daughter* named A. and the *Baron died*, and the *Feme took another Baron*, who *levied another Fine*, and *retook to them* by the ſame Fine, *and to the Heirs of their two Bodies*, who had *Iſſue another Daughter* named K. and died, and the youngeſt Daughter entered, and the eldeſt entered with her, and the youngeſt ouſted her, and the eldeſt brought Aſſiſe. And per tot. Cur. The Entry of the Plaintiff is not lawful; for tho' the *youngeſt Daughter* be *remitted to the Moiety*, inaſmuch as the Right *of the Moiety and the intire Poſſeſſion deſcended to her*, yet becauſe *nothing deſcended to the eldeſt Daughter but the Right of the Moiety, and no Poſſeſſion*, and no Remitter may be but *in Reſpect of a Right and Poſſeſſion*, therefore her Entry is not lawful; wherefore ſhe brought Formedon, and relinquiſh'd the Aſſiſe; quod nota. Br. Entre Cong. pl. 33. cites 19 H. 6. 59. Br. Remitter, pl. 12. cites S. C — S. C. cited Pl. C. 240. a. in Caſe of Willion v. Berkley, per Brown J.

11. If I have *Right to enter*, and after the *Poſſeſſion is caſt upon me by Courſe of Law*, I ſhall be remitted whether I will or no; as if my Fa-

ther

ther diſſeiſes me, and after dies ſeiſed, this is a Remitter whether I will or not; but where I come to the Poſſeſſion by divers Means *by my own Act*, it is at my Election to be remitted or not; As if A. diſſeiſes me, and after enfeoffs me by Deed with Warranty, there I may be in as Feoffee, and take as Feoffee, if I pleaſe, and A. ſhall be bound by his Warranty; but if I will I may claim by my Entry, and ſo be in my Remitter Agreed per tot. Cur. Kelw. 41. pl. 17. Mich. 17 H. 7. Anon.

12. If *Tenant in Tail has Iſſue 2 Sons of full Age*, and *he lets the Land tailed to the eldeſt* Son *for* his Life, the *Remainder to the younger* Son *for his Life, and dies*; in this Caſe the eldeſt Son is not in his Remitter, becauſe he took an Eſtate from his Father; but if the *eldeſt* Son *dies without Iſſue* of his Body, then this is a Remitter to the younger Brother, becauſe he is Heir in Tail, and a Freehold in Law is eſcheated and caſt upon him by Force of the Remainder, and there is none againſt whom he may ſue his Action. Litt. S. 682.

13. So if *Diſſeiſor dies ſeiſed*, and *the Tenements deſcend to his Heir, and he makes a Leaſe to a Man for Life*, the *Remainder to the Diſſeiſee for* Term of *Life*, or in Tail, or in Fee, the *Tenant for Life dies*, Now this is a Remitter to the Diſſeiſee &c. Cauſa qua ſupra &c. Litt. S. 683.

If the Son be Conuſant, and agrees to the Feoffment &c. this is no Remitter to him. And therefore if the Feoffment was made by Deed indented, and *the Son with the other ſeals the Counterpart, and then the Diſſeiſor makes Livery to the other according to the Deed*, and the other dies, the Son is not remitted, becauſe he was Conuſant of the Feoffment, and agrees to the ſame; and Littleton ſaith in the Caſe that he puts, That there was no Default in the Son, becauſe he agreed not to the Feoffment in the Life of the Father; And ſo it ſeems, that if *A. be ſeiſed in Tail*, and *has Iſſue 2 Sons*, and *by Deed indented between Him* of the one Part, *and the Sons* of the other Part, *makes a Leaſe to the eldeſt for Life*, the *Remainder to the 2d in Fee, and dies*, and the *eldeſt* Son *dies without Iſſue*, the 2d Son is not remitted, becauſe he agreed to the Remainder in the Life of the Father, *Or if* the *like Eſtate had been made by Parol*, if *in the Life of the Father the Tenant for Life had been impleaded, and made Default*, and *he in the Remainder had* been *received*, and thereby agreed to the Remainder after the Death of the Father, and the eldeſt Son without Iſſue, the 2d Son ſhould not be remitted, becauſe he agreed to the Remainder in the Life of the Father; all which is well warranted by the Reaſon yielded by our Author in this Section. Co Litt. 359. b.

14. Note, If *Tenant in Tail infeoffs his Son and another* by his Deed *of the Land intailed in Fee*, and *Livery* of Seiſin *is made to the other according to the Deed*, and the *Son not knowing of this, agrees to the Feoffment*, and after *he which took the Livery* of Seiſin *dies*, and the *Son does not occupy* the Land, nor takes any Profit of the Land *during the Life of the Father*, and after the *Father dies*, now this is a Remitter to *the Son*, becauſe the Freehold is caſt upon him by the Survivor; and no Default was in him, becauſe he *did never agree* &c. *in the Life of his Father*, and he has none againſt whom he may ſue a Writ of Formedon &c. Litt. S. 684.

Here appears a *Diverſity* between a *Right of Entry*, and a Right of *Action*; for

15. Where the Entry of a Man is congeable, tho' at full Age, he *takes an Eſtate* to him *for Life*, in *Tail*, *or* in *Fee*; this is a Remitter, if ſuch Taking be *not by* * *Deed indented*, *or by Matter of Record*, which ſhall conclude or eſtop him; for if a Man be diſſeiſed, and takes back an Eſtate from the † Diſſeiſor without Deed, or *by Deed-poll*, this is a Remitter to the Diſſeiſee &c. Litt. S. 693.

if a Man of full Age having but a Right of Action, takes an Eſtate to him, he is not remitted; but where he has a Right of Entry, and takes an Eſtate, he by his Entry is remitted, becauſe his Entry is lawful; and if the *Diſſeiſor enfeoffs the Diſſeiſee and others*, the Diſſeiſee is remitted to the whole, for his Entry is lawful; Otherwiſe it is if his Entry was taken away. Co Litt 363. b.

A. is *diſſeiſed of a Manor* whereunto an *Advowſon is appendant*, an *Incumbent uſurps the Advowſon*, if the *Diſſeiſee enters into the Manor*, the Advowſon is recontinued again, which was ſever'd by the uſurpation. And ſo it is, if *Tenant in Tail* be of a Manor whereunto an Advowſon is appendant, the Tenant in Tail *diſcontinues in Fee*, the *Diſcontinuee grants away the Advowſon in Fee, and dies*, the *Iſſue in Tail diſcontinues the Manor by Recovery*, he is thereby remitted to the Advowſon; and in both Caſes he has Right has, ſhall take effect when the Church becomes void. Co. Litt. 363. b.

The Patron of a Benefice is outlawed, and the Church becomes void, an Eſtranger uſurps, and 6 Months paſs, the King recovers in a Quare Impedit, and removes the Incumbent &c. the Advowſon is recontinued to the rightful Patron. Co. Litt. 363. b.

* Here it appears, that if the Diſſeiſor by Deed indented makes a Leaſe for Life, or a Gift in Tail, or a Feoffment in Fee, whereunto Livery of Seiſin is requiſite, yet the Deed indented ſhall not ſuffer the Livery

Livery made, according to the Form and Effect of the Indenture, to work any Remitter to the Feoffee, but ſhall ſtop the Diſſeiſee to claim his former Eſtate: And if the Diſſeiſor upon the Feoffment reſerve any Rent or Condition &c. the Rent or Condition is good; and the Reaſon wherefore Deed Indented ſhall conclude the Taker more than the Deed-Poll, is, for that the *Deed poll is only the Deed of the Feoffor*, Donor and Leſſor, *but* the *Deed indented is the Deed of both Parties*; and therefore as well the Taker as the Giver is concluded. Co. Litt. 363. b.

† Where a *Diſſeiſor leaſes the Land to the Diſſeiſee for Life by Indenture*, this is * [not] a Remitter to him, for by this he confeſſes the Deed; but by his Entry to take Livery the Law [has] ſo Operation and does admit him againſt his own Acceptance. Adjudged upon the Conference between the Barons and all the Juſtices. Cro. Eliz. 20. pl. 6. Paſch. 25 Eliz. C. B. Beauchampe v. Dale. —* The Word [not] is not in the Original, but it ſeems it ſhould be there.

But if *Diſſeiſor leaſes the* Land *to Diſſeiſee* by Deed Poll, or without Deed, *for Years*, and Diſſeiſee enters, this Entry is a Remitter; for where the Entry of a Man is congeable, [if a Leaſe is made to him] tho' he declares openly by Words in Pais, That he claims nothing in the Land but by Force of the Leaſe, yet this is a Remitter, for ſuch Diſclaimer in Pais is not material; but by ſuch Diſclaimer in Court of Record is he concluded &c. Litt. S. 675.

16. If a *Man leaſes* Land *for Life to one who aliens* to another *in Fee*, and the *Alienee makes an Eſtate to the Leſſor*, this is a Remitter to the Leſſor, becauſe his Entry was congeable &c. Litt. S. 694.

17. Where *a Man lets his Tenements decay, or converts Tillage Land into Paſture*, againſt the Statute of 4 H. 7. *and makes an Eſtate for Life to his Lord*, he ſhall not have other Eſtate; for he had only a Title of Entry, and not Right of Entry. Quære; for it was not adjudg'd. Br. Remitter, pl. 50. cites 34 H. 8.

18. *Tenant in Tail hath Iſſue two Sons B. and C.* and *infeoff'd C.* of the entail'd Lands, and *died*, leaving *his Wife Enſeint. B. entered*, and afterwards the *Iſſue was born*. The Iſſue cannot re-enter, becauſe the eldeſt Son was remitted, and in of his ancient Right before the Iſſue any Thing had; for then there was not any Perſon capable to take by Deſcent, or otherwiſe. And. 31. pl. 76. Hill. 1 & 2 P. & M. in C. B. Anon. S. C. 3 Le. 2. pl. 5. And ſo it was adjudged accordingly.

19. *A.* was *Tenant for Life*, Remainder *to B. his Son for Life*, Remainder *to the Right Heirs of the Body of A. — A. & B. raiſe Eſtate to A's Brother* and *Uncle of B. in Fee. A. died.* The *Uncle died without Iſſue.* The Queſtion was, Whether B. who was Heir in Tail to A. his Father, and alſo Heir at Law to the Uncle, as to the Fee deſcended, be now remitted? Becauſe, if he is, it will hinder the Uncle's Wife of Dower; But if the Livery, in which B. join'd with A. be the Livery of B. that will prevent the Remitter, ſo as during his Life he ſhall be adjudg'd ſeiſed of the Lands in Fee-Simple by Deſcent from the Uncle, and then Dower lies; for that is the ſame Eſtate whereof the demands Dower. The Court doubted if it was the Livery of B. or not; and note, that the *Feoffment was without Deed.* Le. 37. pl. 48. Mich. 28 & 29 Eliz. C. B. Partridge v. Partridge.

20. Upon Evidence, it was ſaid per Cur. abſente Poph. That if *Tenant in Tail*, Remainder *in Fee, diſcontinues*, and *reakes an Eſtate in Fee*, and *deviſes it to his Wife for Life*, *Remainder to B. for Years*, *Remainder in Fee to him that had the Remainder in Fee before*, and *dies without Iſſue*; the Wife enters and dies; he in Remainder is remitted, and may enter upon the Deviſee for Years, and will avoid the Leaſe, tho' his Remainder be created by the ſame Will. Noy 48. Rooke v. Sprat, cites 9 H. 6. 43. Remitter *avoids* a *Leaſe for Years without Entry.* 15 E. 4. 6.

21. If *Baron levies Fine of his Wife's Land*, and dies, and the Feme *accepts a Leaſe for Years* of the ſame Land; this is a Remitter. Cited by Harriſon in his Reading at Lincoln's-Inn, in Lent 1632, as reſolv'd Trin. 15 Jac. Rot. 988. Duncomb's Caſe.

22. *A. Tenant in Tail*, Remainder *to B. in Tail*, Remainder over &c. *A. made a Leaſe to J. S. for the Life of J. S.* not warranted by the Statute, *and dies without Iſſue, leaving B. the Remainder-man his Heir, to whom the Reverſion in Fee deſcends. B.* (being now *Tenant in Tail, with the Remainder in Fee*) *leaſes to W. R.* (J. S. ſtill living) *for* 99 *Years, to commence after the Death of J. S.* reſerving Rent. *J. S. ſurrenders to B.* Note, Hoſt of Counſel againſt the Judgment, as to this Point, and then Judgment was given

Doubleneſs of Pleading. See Ibid — Vent. 355. 358. Anon. S. C. but adjornatur.

and C. (a Stranger) upon Condition, and dies. It was inſiſted that by the Surrender B. was remitted, and that the Condition was no Hindrance, and that as to the Rule, that *when a Perſon of full Age takes an Eſtate into which he could not enter, there is no Remitter*, it is to be intended *where the Eſtate has Continuance*, but that here the Eſtate for Life by Surrender is merged, and that the Condition could not hinder its merging, and ſo by Conſequence B. is ſeiſed again in Tail. But the Court held plainly that B. was not remitted by accepting the Surrender. Skin. 2. Mich. 33 Car. 2. B. R. & 62. Mich. 34 Car. 2. Paulin v. Hardy.

23. If *Tenant in Tail diſcontinues for Life, and grants the tortious Reverſion to a Stranger, and Tenant for Life ſurrenders to that Stranger*, now Tenant in Tail is ſeiſed again in Tail. Sic Dictum fuit per Pollexfen. Skin. 3. in Caſe of Paulin v. Hardy.

(G. 2) Where a Man ſhall be Remitted upon taking an Eſtate. Where *Right of Entry*.

1. IN Aſſiſe it was found, That Land was *given to Baron and Feme in Tail*, the *Baron went of the Country*, the *Feme infeoff'd O. who leas'd to the Feme for Life*, the *Baron died*, and the *Feme died without Iſſue*, and the *Donor entered*, and O. ouſted him, and the Entry of the Donor adjudged lawful; for the Feoffment of the Feme was a Diſſeiſin to the Baron, and by the retaking of the Eſtate ſhe was remitted, and therefore the Reverſion in the Donor, and his Entry lawful. Per tot. Cur. Br. Remitter, pl. 17. cites 9 Aſſ. 20.

But if *Baron and Feme aliens the Right of the Feme to an Infant who infeoffs them*, and the *Baron dies*, the Feme is remitted, and the Entry of the Infant toll'd. Per Littleton. Br. Remitter, pl 34. (bis) cites 11 E. 4. 1.

2. In Aſſiſe, if the *Baron and Feme purchaſes in Fee*, the *Baron after aliens in Fee*, and after *they enter with the Aſſent of the Alienee who is within Age*, and the *Baron dies*, the Feme is not remitted; for *they were Diſſeiſors* by their Entry, inaſmuch as *the Aſſent of the Infant is void*; but M. 9. in Cui in Vita, if the Baron and Feme had been inf off'd, and after the Baron died the Feme had been remitted. Br. Remitter, pl. 18. cites 11 Aſſ. 14.

3. If the *Tenant for Life loſes by Judgment, and* after he *reverſes this Judgment*, by this the Reverſion is veſted in him in the Reverſion again; quod nota. Br. Remitter, pl. 19. cites 16 Aſſ. 16.

4. Where *Baron is ſeiſed and takes Feme*, and *he aliens and retakes to him and his Feme in Tail, and dies*, the *Lord enters for Ward, and leaſes the Ward to J. N. who endows the Feme of the third Part, which ſhe accepts*; This is a Remitter to the Feme, and ſhe may recover the other two Parts by Aſſiſe, and the Acceptance of the Dower no Impediment. Br. Remitter, pl. 20. cites 17 Aſſ. 3.

5. *Baron and Feme ſeiſed in Jure Uxoris*, the *Baron made Feoffment*, and the *Alienee Re-enfeoff'd the Baron and Feme, and the Heirs of the Feme*; and *ſhe dy'd without Iſſue*, and her Heir Collateral ouſted the Baron, and he brought Aſſiſe and recovered; For tho' the *Feme by the retaking was remitted*, and the Heir might have enter'd if ſhe had ſurviv'd the Baron; yet now as the Baron ſurviv'd, therefore becauſe he ſhall loſe the Warranty if the Heir ſhall have the Remitter, for that Reaſon *for Safe-guard of the Warranty* the Baron recover'd; *Quod Mirum.* Br. Remitter, pl. 21. cites 21 Aſſ. 2.

6. Land *deſcended to 2 Femes*, and *they made Purparty*, and the *one took Baron who alien'd in Fee, and re-took an Eſtate to him and his Feme*; and

and after the *Feme dy'd without Iſſue*, by which *the other Siſter entr'd*, and the Baron brought Aſſiſe, and the Aſſiſe awarded, and that it ſhall not be a Remitter, *by Reaſon of the Warranty* of the Baron made to him, upon the Gift to him and his Feme, *which ſhall be loſt by the Remitter*, if he ſhould be remitted. *Quære* inde, becauſe it is *contrary at this Day*. Br. Remitter, pl. 41. cites 21 E. 3. 26

7. If the *Diſſeiſor infeoffs the Diſſeiſee, and two others*, the Whole accrues to the Diſſeiſee, and nothing veſts in the others; For his Entry was lawful, and he remitted, and then the Livery is void. Contra if his Entry had not been lawful. Br. Remitter, pl. 23. cites 29 Aſſ. 26.

If Diſſeiſor makes Feoffment or other Eſtate to the Diſſeiſee and to two others, the Diſſeiſee is remitted by Reaſon that his Entry *was lawful*. Br. Remitter, pl. 51. cites Fitz. Tit. Remitter, fol 153

But *contra where the Entry* of a Man *is toll'd*, as *by Diſcontinuance, Deſcent* &c. and Eſtate is made to him within Age, and to another, there he who has the Right of Action *is not remitted unleſs for a Moiety*. Ibid.

8. In an Aſſiſe it was found that the *Feme infeoffed two upon Condition to re-enfeoff her when ſhe ſhould require them*; and after *ſhe took Baron*, and then *ſhe required them to re-infeoff her*, and *the one refuſed*, and the *other re-infeoffed the Baron and Feme of the Whole*; by which the Baron and Feme held them in of the Whole, and the *other ouſted them*, and the Baron and Feme brought Aſſiſe and recovered by Award; and yet it was found that the *Baron and Feme never claim'd the other Moiety by Entry, but enter'd by the Feoffment*; and yet becauſe his Entry was lawful in the other Moiety, therefore by Award they ſhall be adjudg'd in, in their beſt Right, and recover. Br. Remitter, pl. 45. cites 35 Aſſ. 11.

9. In Formedon, *Tenant in Tail made Feoffment and dy'd*, and the *Feoffee infeoff'd the Iſſue in Tail within Age*, if he is impleaded, he ſhall have his Age; for he is remitted upon this Matter pleaded; for there is no Folly in him; and he *cannot waive the Tenancy*, and *has not any Eſtate veſted to the whom to bring his Action, nor that can render to him his Demand*, and therefore is remitted. quod nota. Br. Remitter, pl. 3 cites 40 E. 3 43.

Tenant in Tail alien'd by Fine, and after he *levied a Fine with Proclamations, and died*, the Alienee brought Scire facias to execute the Fine, and the Heir in Tail ſhew'd this Matter, and pray'd his Age, and had it; for it was adjudg'd a Remitter by the Nonage. Br. Remitter, pl 38. cites 22 E 4. 7.

10. In Aſſiſe the Caſe was, That the *Baron ſeiſed in Jure Uxoris made Feoffment in Fee, and retook to him and his Feme, and to the Plaintiff in the Aſſiſe*, and after the *Baron and Feme levied a Fine to the Tenant with Warranty*; the *Baron dy'd*, the *Feme ſurvived*, and the Tenant held himſelf in, and all this Matter was found by Aſſiſe awarded at large, becauſe the *Plaintiff was an Infant*; and it was awarded that the *Feme by the Retaking was remitted to the Whole*; and therefore all paſs'd by the Fine, and ſo the Plaintiff took nothing by his Writ, quod nota; but *Miror that ſhe had not recovered a Moiety*; For per Littleton, in his Chapter of Remitters, the *Feme is not remitted but to one Moiety only*. Br. Remitter, pl 6. cites 44 E. 3. 17 & 44 Aſſ. 2.

11. If Land be *intailed by Fine to the Baron and his firſt Feme, and the Heirs of their two Bodies*, and they *have Iſſue a Son*, and the *Baron and Feme diſcontinue by Fine, and retake to them and to the Heirs of the Body of the Baron*, the *Remainder to the right Heirs of the Baron*; the *Feme dies*, and the *Baron takes another Feme* and dies, and the *ſecond Feme brings Writ of Dower* againſt the Son; But per Cur. ſhe ſhall be barr'd, for *the Heir is remitted by the firſt Tail*, of which the Feme is not Dowable, and ſo in by elder Title than the Feme can demand Dower of; For ſhe cannot demand Dower but upon the *ſecond Tail General*, which *is gone by Remitter*, and ſo the Heir in by elder Title, quod nota. Br. Remitter, pl. 7. cites 44 E. 3. 26.

12. In

Br. Waſt pl 46. cites S C.

12. In Waſt, it was ſaid that where *Feme* is *in with her Baron by Leaſe of J. for Life*, and the *Baron diſcontinues to W.* and *W. makes another Leaſe to the Baron and Feme for Life*, and the *Baron dies*, the Feme in Waſt ſhall be alleged to be in by the firſt Leaſe, and *not* by the ſecond Leaſe, by Reaſon of the Remitter. Br. Remitter, pl. 8. cites 46 E 3. 20.

13. In Formedon; *Baron was ſeiſed in Fee in Jure Uxoris*; they *had Iſſue a Daughter*; the *Baron gave in Tail to the Daughter and her Baron*; the *Donor and his Feme dy'd*, and the *Baron of the Daughter dy'd*, and the *Daughter made Feoffment in Fee and dy'd*; the *Son of the Daughter brought Formedon*. And per Culpeper, he ſhall be barred; for his Mother was remitted to the Fee-ſimple, and then the Feoffment good, Quod Thirning non Negavit, by which the Demandant pleaded other Matter. Br. Remitter, pl. 10. cites 11 H. 4. 50.

Br. Remitter pl 10 cites 12 H. 4 19 S. C.

* Orig is (de reſceite)

14. *A. was ſeiſed in Fee*, and *B. diſſeiſed him, and compelled A. to Marry his Daughter, and after* compell'd him * *to* take *a Gift from B. of the ſame Land in Tail, by Menace of Death*; and it was admitted, that becauſe his Entry is lawful, and he *did not take* the Eſtate *by Deed indented*, now he is remitted to the Fee-ſimple, quod nota bene. Br. Remitter, pl. 40. cites 12 H. 4. 17.

15. *Formedon of the Gift of one R. to W. and E. his Feme in Tail*, and *conveyed to himſelf as Heir to the Donees; the Tenant ſaid that before the Gift of W. the Donee was ſeiſed in Fee within Age, and infeoff'd the ſaid R.* and after *R. gave to the ſaid W. and E.* his Feme in Tail, and *E. died, and W. ſurviv'd, Que Eſtate the Tenant has*; the *Demandant ſaid that at the Time of the Gift W. was of full Age*; and the others econtra. Quære of this Iſſue; for if W. was within Age at the Time of the Feoffment made to R. he is remitted, notwithſtanding he was of full Age at the Time of the Gift; for his Entry was lawful; and then it ne *retook without Matter of Concluſion*, he is remitted. Br. Remitter, pl. 2. cites 3 H. 6. 19.

16. In *Formedon* the *Tenant ſaid, That before the Gift the Donee himſelf was ſeiſed, and infeoff'd the Donor, who gave to the Donee and his Feme*, the *Donee within Age*, and *they had Iſſue the Mother of the Demandant*, and the *Feme died*, and the *Baron took another Feme*, and *had Iſſue a Son now Tenant*. Judgment &c. and this is by the Remitter; for the Entry of the Infant was lawful, and by the Gift he is remitted in Fee, and is not ſeiſed in Tail, and then the Son is Heir. Br. Remitter, pl. 34. (bis) cites 5 E. 4. 5

17. Note, Per Vaviſor, It was held by the Juſtices, in the Caſe of **Watton**, That if *Tenant in Tail diſſeiſes his Diſcontinuee, and has Iſſue*, and the *Diſcontinuee dies, his Heir within Age*, the *Tenant in Tail dies*, his Heir is remitted notwithſtanding the Nonage of the Heir of the Diſcontinuee, and yet Deſcent ſhall not bind the Infant Contrary of Remitter; *But if the Iſſue in Tail was Party to the Diſſeiſor*, he ſhall not be remitted. Br. Remitter, pl. 34. (bis) cites 11 E. 4. 1.

Br Faux Recovery, pl. 30. cites S. C.

18. Where a Man *recovers upon faint Title againſt Tenant in Tail*, and he *dies, before which the Recoveror enters*, by which the Heir in Tail enters, he is remitted; per Brian and Littleton; but per Choke J. Upon Recovery Executory he is not remitted as here, for the Entry of him who recover'd is Lawful, and the Heir in Tail is put to his Formedon to falſify. Br. Remitter, pl. 35. cites 12 E. 4. 19.

19. If a Man *diſſeiſes my Father*, and *I enter in the Life of my Father*, and after my *Father dies*; now I ſhall retain the Land againſt the Diſſeiſor, and yet he ſhall have Treſpaſs for the Time of my Father; For he may have Aſſiſe in the Life of my Father. Br. Remitter, pl. 36. cites 21 E. 4. 78. per Brian and his Companion in Bluet's Caſe. — And the like Matter was agreed for Law 30 H. 6. Ibid.

S. P. Br Remitter, pl 37 cites S C. Per Choke.

20. If the *Diſſeiſor infeoffs the Heir of the Diſſeiſee*, and the *Diſſeiſee dies his Heir within Age*, he ſhall have his Age; For he is remitted. And ſo it ſeems [that he is] if he was of full Age; For the Right is de-

ſcended

ſcended to him from his Father; quod nota. Br. Remitter, pl. 48 cites 21 E. 4. 78.

21. *Tenant in Tail made Feoffment and retook an Eſtate again*, and *oblig'd himſelf in a Statute Merchant*, and *then made Feoffment in Fee upon Condition*, and after the *Recognizance was put in Execution* of the Statute Merchant; and *after he dy'd*, and the *Heir in Tail enter'd within Age for the Condition broken*. And Per Rede and others, This is a good Remitter to the Heir in Tail; Becauſe he is within Age, and therefore Folly ſhall not be adjudg'd in him, and therefore a Remitter; *But if he was of full Age, and enter'd for the Condition*, and has Title of Formedon Paramount, as above, there he ſhall not be remitted; For he ſhall be adjudg'd in of ſuch Eſtate only, as he was who made the Condition, at the Time when he made Feoffment upon Condition, which was Fee-Simple. Br. Remitter, pl. 33. cites 8 H. 7. 7. Br. Conditions, pl. 134 cites S. C. — Br. Eſtates, pl. 59. cites S. C.

22. If the *Son and a Stranger diſſeiſe the Father*, and after the *Father dies*, the Son is remitted to all, and he ſhall be adjudg'd in as if he had enter'd as Heir of the Father. Br. Remitter, pl. 53. cites 11 H. 7. 12.

23. If Land be entailed *to a Man and his Wife, and the Heirs of their Bodies*, who *have Iſſue a Daughter*, and the *Wife dies*, and the *Huſband* takes another Wife, and *his* Iſſue *another Daughter, and diſcontinues* the Tail; *and* after he *diſſeiſes the Diſcontinuee, and dies ſeiſed*, now the Land ſhall deſcend to the 2 Daughters. And in this Caſe, as to the Eldeſt Daughter, who is inheritable by Force of the Tail, this is no *Remitter but of the Moiety*; And as to the other Moiety, ſhe is put to ſue her Action of Formedon againſt her Siſter; For in this Caſe the 2 Siſters are not Tenants in Parcenary, but they are Tenants in Common, for that they are in by divers Titles; For the one Siſter is in her Remitter by Force of the Entail, as to that which to her belongs; and the other Siſter is in as to that to her belongs in Fee-Simple, by the Deſcent from her Father &c. Litt. S. 662. 2 Becauſe only a Moiety of the Land deſcended unto her, and there cannot be any Remitter for ſo much as comes to the Iſſue by Deſcent, or by any other Act without his Folly; and in this Caſe by Act in Law the Coparcenary is deſtroyed; For the Daughters are in by ſeveral Titles viz. The Eldeſt Daughter is Tenant in Tail Per Formam Doni, by the Remitter of the one Moiety, and the youngeſt ſeiſed in Fee-Simple by Deſcent of the other Moiety, againſt whom the other Siſter in Tail may have her Formedon. Co. Litt. 350. a.

24. *So* if *Tenant in Tail infeoffs his Heir apparent in Tail within Age, and another* Jointenant *in Fee*, and the *Tenant in Tail dies*; now the Heir in Tail is in his Remitter as to the one Moiety, and as to the other Moiety he is put to his Writ of Formedon &c. Litt. S. 663. And *ſo* it is *if the Diſcontinuee after the Death of the Tenant in Tail makes a* Charter of *Feoffment to the Iſſue in Tail*, being *within Age*, who has Right, *and to a Stranger* in Fee, and makes Livery to the Infant in Name of both; The Iſſue is not remitted to the Whole, but to the Half; For firſt he takes the Fee-Simple, and after the Remitter is wrought by Operation of Law, and therefore can remit him only to a Moiety. Co. Litt. 350. a.

(H) *At what Time* a Man ſhall be remitted.

1. IF Tenant in Tail makes a Feoffment in Fee to the Uſe of himſelf in Fee, and after Leaſes for Years and dies, the Iſſue is immediately remitted by the Deſcent of the Reverſion before Entry into the Land, and the Eſtate of the Leſſee immediately changed into a Tenancy at Sufferance. 39. 13 Ja. B. R. between *Bridgman* and *Charlton*. Adjudg'd upon Evidence. See (K) pl. 8 — Roll. Rep. 205. S. C. — Mo. 846. pl. 1143. Mich. 13 Jac. Anon. ſeems to be S. C. accordingly; tho' it is here ſaid, That the Iſſue accepted the Rent. And the Opinion of all the Juſtices was, That it did not confirm the Leaſe, that being utterly void, as being made by the Father at a Time when he was Tenant in Fee Simple.

2. Where the *Iſſue in Tail enters as Heir of the Anceſtor in Tail, who ſuffers a Falſe Recovery*, and the other outs him, he ſhall have Aſſiſe, and *ſhall falſify in Aſſiſe*; and ſo he is *remitted notwithſtanding the Recovery*, as it ſeems; But this is *before Execution* had. *But if the Demandant had ſued Execution* againſt the Anceſtor, there the Iſſue is *put to his Formedon*. Note the Diverſity, Where he may enter and have Aſſiſe, and where not. Br. Remitter, pl. 9. cites 7 H. 4. 17.

3. A Man can *not* be remitted *after Collateral Warranty deſcended*; For Lineal Warranty and Aſſets deſcended is only a Bar to the Tail, but Collateral Warranty is an Extinguiſhment of the Tail; ſo that tho' the Tenant in Tail or his Iſſue enter after this, and dies ſeiſed, and his Heir is in by Deſcent, yet he ſhall not be remitted for the Reaſon aforeſaid. Br. Garranties, pl. 31. cites 19 H. 6. 59.

What is here ſaid of Non-Tenure pleaded muſt not be underſtood of a Simple Plea of Non-Tenure, but of Non-Tenure pleaded with a Diſclaimer; For the Plea of Non-Tenure ſignifies, as we ſaid before, that the Tenant has not the Freehold, which may be true, yet he may have a Reverſion in Fee expectant on an Eſtate for Life; ſo that in that Caſe, the Demandant re-entering, ſhould not be remitted to the whole Fee. Hawk. Co. Litt. 456.

4. If *Tenant in Tail diſcontinues and dies*, and the *Iſſue brings a Formedon* againſt the *Diſcontinuee*, who *pleads Non Tenure, and utterly diſclaims* in the Tenancy, Judgment ſhall be, That the Tenant go without Day, and the Demandant may enter notwithſtanding the Diſcontinuance. Litt. S. 691. Hawk. Co. Litt. 456.

5. So if a *Diſſeiſee brings a Writ of Entry Sur Diſſeiſin againſt the Diſſeiſor's Heir, who diſclaims*, the Diſſeiſee may enter, and ſhall be remitted; or rather, ſhall recontinue the former Eſtate; For in theſe Caſes the Demandant has no Right to 2 Eſtates. Litt. S. 692. Hawk. Co. Litt. 456.

6. Note, in the Caſe of *Feme Covert*, ſhe *may be remitted in the Life of the Diſcontinuor*; becauſe ſhe has a preſent Right. *But* in the Caſe of Tenant in Tail, the *Iſſue cannot* be remitted in the Life of the Diſcontinuor; Becauſe the Iſſue has no Right until his Deceaſe. Co. Litt. 352. a.

(I) In what Caſes a Remitter *to one ſhall be to another*, and in what Not.

Jo. Car. pl. 15. Mich. 4 Car. B. R. Kendal v. Fox. — Cro. C. 145. pl. 22. S. C.

1. BAron and Feme Tenants for Life, Remainder in Tail to the Eldeſt Son of the Baron, the Remainder to the Youngeſt Son of the Baron in Tail, with diverſe Remainders over in Tail, &c. Remainder in Fee to the right Heirs of the Baron in Fee. The Baron makes Feoffment to the uſe of himſelf for Life, the Remainder to the Eldeſt Son in Tail with Warranty, and dies; [illegible] the Warranty deſcends upon the Eldeſt Son, and ſo the Remainders by the Statute 32 H. 8. by which he is remitted, &c. yet this Court will not remit the Eldeſt Son to his Eſtate Tail, which he had before, by the Collateral Warranty of his Father. Between [illegible] and Kendal [illegible]. Car. B. R. Adjudg'd upon a Special [illegible]; And afterwards, videlicet Mich. 5 Car. [illegible] upon Writ of Error in the Exchequer-Chamber without any Diſſent, and the firſt Judgment affirm'd. Intratur Tr. 3 Car. [illegible] 746. Hill. 10 Car. B. R. between * *Gimlet* and [illegible], [illegible] and agreed by the Counſel and Court without any Diſſent of the [illegible]. Intratur Tr. 8 Car. Rot. 1000. [illegible] See 19 H. 6. 5.

* Cro. C. 391. pl. 2. Hill. 10 Car. B. R. Gymlet v. Sands.

— Baron Tenant for Life, *Remainder to his Wife for Life*, Remainder to the firſt Son in Tail. The Son is of Age, the Baron makes Feoffment in Fee with *Warranty*, and takes back an Eſtate to [illegible] for Life. For

The Bar[illegible]. The Wife is remitted, But the Collateral Warranty binds the Son; for he is not remitted. Per Holt Ch. J. 11 Mod. 91. pl. 14. cites Bulst. 165.

2. In Assise it was found, That the Lord Say *gave in Tail*, the *Donee enfeoff'd in Fee, and retook to him and his Feme in Tail*, the *Remainder to W. in Fee*; and *had Issue and dy'd*. The *Issue of the Feme died without Issue*. W. by the Remainder enter'd, and the Donor ousted him, and his Entry lawful; Because *the Issue in Tail was remitted*. *And this is a Remitter of the Reversion* also; For *Discontinuance cannot be of Estate Tail only, unless the Reversion be discontinued also*; So the Issue in Tail cannot be remitted without Recontinuance of the Reversion to the * Donor, or his Heirs. Br. Remitter, pl. 27. cites 36 Ass. 4.

* Orig. is (Donee.)

3. *A Disseisor infeoffs 4*, upon whom the *Disseisee re-enters*, and *one of the Feoffees enters again*, and the *Disseisee brings Assise*, he cannot plead Jointenancy with the other 3; For by the Entry of the Disseisee their Interest was defeated, and therefore *Regress of the one does not remit the others*; For the *Right is determined*. Br. Remitter, pl. 16. cites 1 H. 6. 5. Per Hals. J.

But where 4 Coparceners or others are lawfully [illegible], and [illegible], the [illegible] of the one remits all the others; For the Entry is lawful, and the Right remains. And in the other Cases e contra; For the Right, Interest, and Possession is defeated by the lawful Entry. Ibid.

4. If *Land* be *given to a Woman in Tail*, the *Remainder to another in Tail*, the Remainder *to the 3d in Tail*, the Remainder *to the 4th in Fee*, and the *Woman takes Husband*, and the *Husband discontinues* the Land *in Fee*; By this Discontinuance all the Remainders are discontinued. For if the Wife dies without Issue, they in the Remainder have no Remedy but to sue a Formedon in the Remainder when it comes to them [illegible]. But if after such Discontinuance an *Estate be made to the Husband and Wife for* their two Lives, or of another Man's Life, or other Estate [illegible], this being a Remitter to the Wife, is also to all in the Remainder; [illegible] after the Wife who is in her Remitter is dead without Issue, then [illegible] Remainder may enter &c. without suing any Action &c. and so is it of those who have the Reversion after such Entails. Litt. S. 673.

For the Ʀ-quest of the [illegible] that [illegible] of the Estate [illegible] Remitter [illegible] to the Estate in Tail should be a Remitter to them in the Remainder or Reversion. Co. Litt. 354. b.

5. If 2 *Jointenants* in Fee, the *one* being *of full Age*, the *other within Age*, [illegible] and the *Disseisor dies seised*, and *his Issue enters*, the *one of the Jointenants being then within Age*, and after *comes to full Age*, and the *Heir of Disseisor leases to them for their 2 Lives*, this is a Remitter (as to the Moiety) to him that was within Age, because he is seised of the Moiety which belongs to him in Fee, for his Entry was congeable; But the other Jointenant has in the other Moiety an Estate for his Life only by Force of the Lease, because his Entry was taken away &c. Litt. S. 696.

Where Parceners or Jointenants [illegible] the Remedy, and one enters, the other shall enter also, as where the [illegible] is not [illegible], and they join [illegible], and one is summoned and severed, and the other recovers, both shall enter; but where their Remedy is several, as when 2 Parceners are disseised, and the Disseisor dies seised, and [illegible], and the *Issue of one of them recovers*, the Issue of the other shall not enter without her [illegible]. Hawk. Co. Litt. 258.

But [illegible] of Littleton, if *after the Descent the other Jointenant had died*, and the *Infant* [illegible] he should have entered into the Whole, because he is now in Judgment of Law, solely [illegible] Feoffment, and he claims not under the Descent. Co. Litt. 364. b.—— And claims nothing [illegible], where Right of Entry was bound by the Descent. Hawk. Co. Litt. 257.

If [illegible] be [illegible] the Father and [illegible] dies seised, his Son [illegible], he is remitted to the Whole, and his Companion shall take Advantage thereof, otherwise [illegible] Case of Littleton, for that the Advantage is given to the Infant, more in respect of his Person than of his Right, wherefore his Companions shall take no Advantage. Co. Litt. 364. b. —— Serjeant [illegible] says, That in [illegible] the Right of Entry which B. had in Jointure with A. shall not be [illegible] to A. in respect of the Privity between them. Hawk. Co. Litt. 257.—But if the [illegible] the Jointenants, ere the Land had descended to the Father, and from him [illegible] A. had died, [illegible] the other should be taken away by the first Descent; and therefore he would not enter with the Heir of A. Co. Litt. 364. b.

6. A

6. A Gift *in Tail* is made *to B.* the Remainder *to C. in Fee, B. diſcontinues and takes* back an *Eſtate in Tail*, the *Remainder in Fee to the King by Deed inroll'd*; *B. dies*, his Iſſue is remitted, and conſequently the Remainder. Co. Litt. 354. b.

But ſee now the Statute of 4 and 5 Annæ cap. 16.

7. *J. S. Tenant for Life*, the Remainder *to A. in Tail*, the Remainder *to B. in Fee*; *J. S. is diſſeiſed. A* collateral Anceſtor of A. releaſes with Warranty and dies*, whereby the Eſtate Tail is barred; *J. S. re-enters*, the *Diſſeiſor has an Eſtate in Fee-ſimple, determinable upon the Eſtate Tail*, and the Remainder of B. is veſted in him; and ſo note in this Caſe, *the Eſtate for Life*, and the *Remainder in Fee are* veſted, and *remitted*, and an Eſtate of Inheritance left in the Diſſeiſor. Co. Litt. 354. b.

(I. 2) Where the Iſſue ſhall be remitted *againſt one*, and *not againſt another*.

1. IF *Tenant in Tail and his Iſſue diſſeiſe the Diſcontinuee to the Uſe of the Father*, and the *Father dies*, and the *Land deſcends to the Iſſue*, he is not remitted againſt the Diſcontinuee, in Reſpect he was *Privy and Party to the Wrong*; but in Reſpect of all others he is remitted, and ſhall deraign the 1ſt Warranty; And ſo note, A Man may be remitted againſt one, and not againſt another. Co. Litt. 357. b.

S. C. Lev. 49 accordingly; For if this 2d Feoffment make a Diſcontinuance the Entry of the firſt Son was lawful; and if it was no Diſcontinuance (as they held it was not, being made to him who had the Reverſion in Fee by the firſt Feoffment) nor forfeited then the Entry of the eldeſt Son is lawful as Heir to the firſt Entail; the firſt Diſcontinuance being purged by the Remitter of the Feme, ſo Quacunque Via data, be the 2d Feoffment by the Feme a Forfeiture or not, the Entry of the firſt Son was lawful.

2. The *Husband purchaſed* Lands to [the Uſe of] *himſelf and his Wife in Tail*, they *had Iſſue two Sons*; then the *Husband made a Feoffment to the Uſe of himſelf for Life*, Remainder *to his Wife for Life*, Remainder *to his ſecond Son and his Heirs, and died*; the *Wife entered* and *made a Feoffment to the Iſſue of the ſecond Son*; and then the *eldeſt Son entered for a Forfeiture* upon the Statute of 11 H. 7. cap. 20. and adjudged without any Difficulty that his Entry was lawful, and that this Feoffment by her (tho' made to him who had the Reverſion in Fee) is a Forfeiture within the Statute; For they all agreed, That by her Entry ſhe is remitted, and that as to this there is no Difference between an Eſtate at Common Law, and this Eſtate limitted to her by the Statute of Uſes. Sid. 63. pl. 33. Mich. 13 Car. 2. B. R. Jones v. Philpot.

Fol 422.

(K) What *Charges* ſhall be *Defeated* by a Remitter. Charges of other than him who is remitted.

1. IT ſhall defeat all Charges of Strangers.

2. It ſhall defeat all Charges of his Anceſtors.

3. As if Tenant in Tail diſcontinues and retakes in Tail or Fee, and grants Rent-charge, and dies, the Iſſue ſhall avoid the Rent. 44 E. 3. 26.

See Dower D. pl. 10.

4. So if the Iſſue be remitted to a Special Tail, the Wife of his Father, who is not his Mother, ſhall not be endowed. 44 E. 3. 26. b.

5. So

5. So if Tenant in Tail diſcontinues and retakes in Tail, and dies, the Iſſue ſhall be in Ward to the firſt Donor by the Remitter. 44 E. 3. 26. Dubitatur.

6. If Baron ſeiſed in Right of the Feme diſcontinues in Fee, and retakes in Fee, and after the Feme dies, and after Baron takes 2d Wife and dies, by which the Land deſcends to the Iſſue of the firſt Wife, whereby he is remitted, the Feme ſhall not be endowed. 21 E. 3. 36 b. Land was given to A. and the Heirs of his Body, and A. died, and B. entered as Heir, and diſcontinued in Fee, and retook to him and his Feme in Special Tail, and had Iſſue: the Feme died, the Baron took another Wife and died, and ſhe brought Writ of Dower againſt the Iſſue, and he pleaded the Special Tail of his Father and Mother, Judgment if Dower, the Feme cannot plead the Elder Tail and Remitter of the Heir to ſuch General Tail, ſo that ſhe may be endow'd. Br. Remitter, pl. 11. cites 19 H. 6. 45. per Aſcue J.

7. The ſame Law if the Iſſue be remitted by Recovery. 21 E. 3. 36. b.

8. If Tenant in Tail makes Feoffment in Fee to the uſe of himſelf in Fee, and afterwards leaſes for Years rendring Rent, and dies, the Iſſue being remitted by the Deſcent of the Reverſion before Entry, the Eſtate for Years is alſo changed into a Tenancy at Sufferance, becauſe there is not any Privity between this Eſtate and the Leaſe, and therefore No Acceptance of the Rent can confirm it. M. 13 Ja. B. R. between *Bridgman and Charlton*, Adjudged upon Evidence. See (H) pl 1. S. C.—Remitter avoids a Leaſe for Years without Entry. Noy 48. cites 15 E. 4. 6. 9 H. 6. 43.

9. In Formedon, the *Tenant pleaded in Bar that the Grandmother of the Demandant was ſeiſed in Fee, and took to Baron J. N. and had Iſſue E. Mother of the Demandant*, and the ſaid *J. N. gave in Tail to the ſaid E. and her Baron, and after J. N. and his Feme died, and the Baron of E. died, and ſhe ſurvived, and enfeoffed the Tenant*, Judgment &c. and a good Plea to bar the Tail by the beſt Opinion for the ſaid E. was *remitted to the Fee-ſimple*, which voids the Tail. Br. Formedon, pl. 63. cites 11 H. 4. 50.

10. If *Diſcontinuee of the Wife's Land* by the Husband *makes an Eſtate of Freehold to the Husband and Wife by Deed indented upon Condition*, viz. *to pay* the Diſcontinuee a certain *Rent with a Clauſe of Re-entry*, and becauſe the Rent was behind the Diſcontinuee entered; She ſhall have Novel Diſſeiſin after the Death of her Husband againſt the Diſcontinuee; For the *Condition was gone by Reaſon ſhe was in her Remitter*, yet the Husband with his Wife could not have had an Aſſiſe becauſe He was eſtopped &c. Litt. S. 679. Br. Remitter pl. 51. cites Litt. tit. Remitter fol 154.—It is hereby to be obſerved that the Wife is preſently remitted, and that the Conditions and Rents, and all other Things annexed to, or reſerved upon the Eſtate (that is vaniſhed and defeated by the Remitter) are defeated alſo. Co Litt 358. a.

11. If an Abbot or *Biſhop* had *diſcontinued*, and *Diſcontinuee* had *charged the Land, and afterwards by Licence* had *infeoff'd the* Abbot or *Biſhop*, the Succeſſor ſhould have been remitted, and ſhould have holden the Land diſcharged. Litt. S. 686, 687. Hawk. Co. Litt. 454.

12. If the *Father diſſeiſes the Grandfather*, and grants a Rent-charge, *and dies*, now is the Entry of the Grandfather taken away; if after the *Grandfather dies*, the Son is remitted, and he ſhall avoid the Charge. So as where Littleton puts his Example of a Fee-tail, it holds alſo in Caſe of a Fee-ſimple. Co. Litt. 349. a. Nor can the Grant in this Caſe enure by Way of Eſtoppel, becauſe an Intereſt paſs'd from the Grantor. Hawk. Co. Litt. 458.

(L) What *Charges* ſhall be avoided upon a Remitter. [*Charges of the Perſons remitted.*]

Mo. 613. pl. 842. cites S. P. as in Littleton's Caſe, and that the Son's making the Leaſe ſhall not hinder the Remitter, but that the Law is ſatisfied in making the Leaſe to ſtand good againſt him, becauſe all that the Law expected was, that he ſhould not avoid his own Leaſe —S. C. And upon the Death of the Son his Iſſue is remitted, and conſequently the Leaſe is gone and vaniſh'd, becauſe the Reverſion to which the Leaſe was attendant, is gone. Per Coke Ch. J. Roll. Rep. 260. in Caſe of Bridgman v. Charlton.

1. IF Tenant in Tail enfeoffs his Son within Age, who at full Age leaſes the Land, and after is remitted by the Death of his Father, he ſhall not avoid his own Leaſe. 9. 13 Ja. B. R.

2. If the *Heir Apparent of the Diſſeiſee diſſeiſes the Diſſeiſor, and grants a Rent-Charge*, and then the *Diſſeiſee dies*, the Grantor ſhall hold it diſcharged; for there a *new Right of Entry* does deſcend unto him, and therefore he is remitted. Co. Litt. 349. a.

(M) *Deveſting* of a Remitter. *What* may do it.

*Mo. 8-2. pl. 1215 Hill. 10 Jac. the Caſe was, The *Baron* was *Tenant in Tail*, Remainder *to his Wife for Life*. The *Baron made a Feoffment to the Uſe of himſelf and Wife for their Lives for the Wife's Jointure*, and after *he died without Iſſue*, and this Jointure was pleaded in Bar of Dower; but adjudged no Bar, for the Wife is remitted, and in of her firſt Eſtate, and the Jointure avoided —— Fol. 71. pl. 84. S. C. accordingly

It was held in B. R. per 3 J. againſt Mountague Ch. J. That Nolens Volens ſhe is remitted, and in of her firſt Eſtate Cro. J. 488. Wood v. Sherley.——Jenk. 334. ſays John Say's Caſe has the ſame Point adjudged 41 E. 3. 15.

Baron and Feme *Tenants in Special Tail*, Remainder over, *Baron diſcontinues and dies*; After the *Feme levies a Fine* Per Cur. Here was a Diſcontinuance, and the Fine has fortified the Diſcontinuance; ſo that the Feme never can enter to be remitted.——Husband and Wife Tenants in *Special Tail, Husband levies a Fine to his own Uſe*, and after *deviſes* the Land *to his Wife for Life, Remainder over, reſerving Rent*; Husband dies, *Wife enters and pays the Rent*, now ſhe hath *waived* her Remitter. 3 Le. 212 cites D. 351. becauſe the Iſſue is bound by the Fine —2 Roll. R. 36. Per Doderidge J. in Caſe of Wood v Shirley.

1. IF Eſtate Tail be made to the Baron and Feme, Remainder to B. in Fee, and Baron aliens and retakes to him and Feme in Tail, Remainder to C. in Fee, and dies, Feme enters, This is a Remitter to the firſt Eſtate, and Remainder alſo; but if the after claims the 2d Eſtate, this deveſts her own Remitter, but not the Remainder, becauſe he is a Stranger. 41 E. 3. 19. b. adjudged. 41 Ass. 44. Litt. 35. Baſingh. Mich. 13 Ja. B. between *Sherley and Wood*, it was held by Hoard that the Feme cannot deveſt the Remainder, nor her own Remitter, becauſe then the Remainders ought to be deveſted alſo. But he agreed that ſhe might have diveſted her own Remitter, if there had not been any Remainders.

2. If an Ancient Right and Puiſne Eſtate comes to a Man without Folly in him, tho' prima Facie the Law ſays, that he is remitted to the ancient [Right] becauſe it is more worthy, yet he may claim to be in of the Puiſne Eſtate; for peradventure he has Warranty upon this and not upon the other.

* Fol 423.

3. As if Tenant in General Tail diſcontinues, and retakes in Special * Tail, and dies, the Iſſue of the Special Tail being Heir of the General Tail may claim to be in of the one or the other. 41 E. 3. 30. b. 46 E. 3. 25. 24. b.

4. If the Father diſſeiſes his Son and Heir within Age, and dies, the Heir may claim in of the one Eſtate or the other. 41 E. 3. 25.

5. If

5. If a Man conveys Land to the Uſe of himſelf in Tail, the Remainder to his Wife for Life, the Remainder to another in Tail &c. and then makes Feoffment of it to the Uſe of himſelf and his Feme for Life, without Impeachment of Waſte &c. and after dies, his Feme entering claiming the 2d Eſtate, this ſhall defeat the firſt Eſtate; for there was no Remitter during the Coverture, inaſmuch as her ancient Eſtate was not any Eſtate of Freehold, but only a Remainder; and then both Eſtates coming together after the Death of the Baron, ſhe has Election to claim either of them. 9 Ed. 2. Stanley and Wood adjudged.

Lacon was brought in B. R. and Montague Ch. J. held as here, but the other 3 Juſtices held, that the Feme was remitted, and in

of her firſt Eſtate. Cro J. 488. S. C by Name of Wood v. Shirley. —— Jenk. 334. pl. 12. ſays that in this Caſe ſhe had an Election, tho' both Eſtates were made during Coverture, and in both the Remainder after the Death of the Wife was limited to others, and cites John Say's Caſe to have been ſo adjudged 41 E. 3. 17.

6. *Gift* was made *to Baron and Feme*, the *Remainder to J. S.* the *Baron diſcontinued*, and *retook to him and his Feme, the Remainder to W. N.* and *died*, the *Feme agreed to the ſecond Eſtate, and ſurrendered Power to W. N.* The *Feme died*, J. S. entered, and W. N. outed him, and J. S. brought Aſſiſe, and recovered; for by the Remitter of the Feme upon the ſecond Eſtate, the Remainder to J. S. was veſted, and therefore ſhe could not ſurrender to W. N. but [could only] grant her Eſtate, which is determined by her Death, and therefore the Plaintiff recovered; quod nota. And ſo ſee that the *Agreement to the ſecond Eſtate* is of no Effect, unleſs it was by Matter of Record. Br. Remitter, pl. 29. cites 41 Aſſ. 1.

S. C. cited Arg. 2 Roll. R. 36 in Caſe of Wood v. Shirley, and ſays that with this agrees 41 E. 3. 15. 13. 17. 25. 15 [illegible] 3. and 22 R. 2. Remitter 12.

7. A Man made a *Feoffment to 2, to re-enfeoff him and his Feme in Tail*, the *Remainder to A. his Daughter*, and 4 Days after *one of the two Feoffees died*, by which the Feoffor enter'd, and required the Survivor to re-enfeoff him, by which he *made a Deed to him and his Feme in Tail*, the *Remainder to A. his Daughter in Fee, and delivered the Deed, and ſaid, God give you Joy* &c. and therefore it ſeems this was upon the Land; for it was admitted there that this was a good Feoffment without Livery; and *after the Baron diſcontinued to others, and retook an Eſtate to him and his Feme in Tail*, the *Remainder to R. in Fee, and died*, and the *Feme reciting by Deed that ſhe held* &c. *the Remainder to R. ſurrendered to R.* and after the *Feme died*; and by Judgment, becauſe *the retaking of the Eſtate by the Baron* after the Diſcontinuance &c. to him and his Feme, the Remainder to R. *was a Remitter to the Feme, by Reaſon that ſhe ſurrender, therefore the Remainder to A. is remitted alſo*, and therefore R. ſhall not have the Land. Br. Remitter, pl. 4. cites 41 E. 3. 17.

Brooke ſays, *And ſo ſee that where the Feme is Eſtate remitted (as the Feme was by Reaſon of the Coverture) there the Remainder was remitted; for as the Diſcontinuance of the one is the Diſcontinuance of all, ſo the*

Remitter to the one is the Remitter to all the Remainders; quod nota per Juſticium; for A. recovered by the Aſſiſe. Ibid. —— *And* ſee likewiſe, That the *claiming in by the Feme by the ſecond Eſtate by the Diſcontinuance*, is no Impediment of Remitter; for *ſhe was remitted to the Land by the firſt*, and the firſt Remainder alſo; and therefore the claiming by the ſecond Eſtate after cannot prejudice the firſt Remainder. Ibid.

8. A *Diſſeiſee is attainted* of Felony, and the *Land was holden of the Crown*. The *Diſſeiſee enters* into the Land, and afterwards *Office is found that the Diſſeiſee is ſeiſed*. The Remitter is deveſted out of the Diſſeiſee; for there was a Right of Entry. Arg. Godb. 326. in Caſe of Lord Sheffield v. Ratcliff, cites 3 E. 4. 25.

9. Tenant in Tail levies a *Fine, and diſſeiſes the Conuſee, and dies*, the Iſſue is remitted, then *Proclamations paſs*; now the Fine deveſts the Remitter: So if he fuffered a *Common Recovery*, and died before Execution, and the Iſſue entered, and then *Execution is ſued*, the Eſtate Tail is deveſted by the Execution. Arg. Godb. 325. cites 1 Rep. 47.

10. *Tenant in Tail* had Iſſue 2 Sons, and *infeoffed his younger Son*, and died; the younger Son died *without Iſſue, leaving his Wife privement enceint*

If Lands be given [illegible]

Heirs Females of his Body, and he *makes a Feoffment* in Fee, and *takes back* an Eſtate *to him and his Heirs*, and *dies*, having *Iſſue a Daughter*, leaving his Wife Groſſiment Enſeint with a Son, and dies, The Daughter is remitted; and albeit the Son be afterwards born, he ſhall not deveſt the Remitter. Co. Litt. 357. a.

ſeint with a Son; the elder Brother entered; this is a Remitter, and ſhall not be avoided by the Birth of a Son after. 3 Le. 2. 1 Pa. & M. C. B. Anon.

See (M) pl. 5

(N) *In what Caſes* a Man ſhall be Remitted *Nolens Volens*. Remitter waived.

1. *Baron and Feme Tenants in Tail* were, the *Remainder to J. S. in Fee*, the *Baron diſcontinued* and *retook an Eſtate to himſelf and his Feme*, *Remainder to J. D.* and died, the Feme is remitted Nolens Volens, and cannot waive it for the Benefit of J. S. Arg. 2 Roll. Rep. 34. in Caſe of Wood v. Sherley, cites 41 Aſſ. Jo. a. Stiles Caſe.

2. *Dower*, the *Tenant ſaid, That his Father, of whoſe Dowment* &c. *was ſeiſed, and inſeoff'd B. and re-took to him and his firſt Feme in Special Tail, between whom this Tenant is Iſſue*; and the *Feme dy'd*, and the *Baron eſpouſed this Feme, now Demandant*, Judgment &c. The *Demandant ſaid, That before the Baron any Thing had J. S. was ſeiſed in Fee, and gave to the Baron in general Tail; and* after the *Baron diſcontinued and re-took in ſpecial Tail* as in the Bar, and ſo the Deſcent to the now Tenant, Son of the Baron, a Remitter, Judgment &c. and pray'd her Dower; and ſo ſhe would have remitted the Heir againſt his Will. And the Opinion of the Court was againſt the Demandant, and that the *Heir may claim in by which Tail he pleaſes*. Br. Remitter, pl. 39. cites 46 E. 3. 24.

3. Where a Man is remitted he cannot waive it if it be *to the Prejudice of a 3d Perſon*. Admitted and agreed. Arg. Kelw. 4. b. 5. &c. Hill. 12 H. 7. in the Caſe of Lord Brooke v. Lord Latimer.

S. C. cited Arg. 2 Roll. R. 36. in the Caſe of Wood v. Shirley.

4. Where the *Diſcontinuee inſeoffs the Tenant in Tail who has Iſſue and dies ſeiſed*, the Iſſue, in this Caſe and in all other Caſes of the like Nature of Remitter, has not any other Liberty to chooſe what Eſtate he will have but the more ancient Right than is the Eſtate Tail ſhall be adjudged in him, and no other Eſtate. Per Brian Ch. J. and agreed to by ſeveral others. Kelw. 20. in the Caſe of Ld. Brook v. Ld. Latimer.

As if my *Father diſſeiſes me, and* afterwards *dies ſeiſed*; This is a Remitter to me in Spight of my Teeth. Kelw. 41. pl. 7. Anon.

5. If I have *Right of Entry* into certain Land, *and after the Poſſeſſion is caſt upon me by Courſe of Law*, I ſhall be remitted whether I will or no. Kelw. 41. pl. 7. Mich. 17 H. 7. Anon.

As if a Man *diſſeiſes me and after inſeoffs me by Deed with Warranty*, there I may be in as Feoffee, and take as Feoffee if I pleaſe, and he ſhall be bound by his Warranty; but yet I may claim by my Entry, and ſo be in my Remitter &c. Kelw. 41. pl. 7. Anon.

6. *But* where I come to the Poſſeſſion by diverſe Means *by my own Act*, there it is at my Election to be remitted or not. Kelw. 41. pl. 7. Mich. 17 H. 7. Anon.

Here it appears that the Husband againſt his own Alienation, if he

7. If Land be given *to the Husband and his Wife, and* to *the Heirs of their 2 Bodies*, and after the *Husband aliens in Fee*, and *takes back to him and his Wife for their 2 Lives*, This is a Remitter in Fact to the Husband and his Wife, maugre the Husband; For it cannot be a Remitter in this Caſe to the Wife unleſs it be a Remitter to the Husband; Becauſe the Husband

Husband and Wife are one and the ſame Perſon in Law, tho' the Huſband be eſtopped to claim it; and therefore this is a Remitter againſt his own Alienation and Repriſal. Litt. S. 672.

had taken the Eſtate to him alone, could not have been

remitted. But when the Eſtate is made to the Husband and Wife, albeit they be but one Perſon in Law, and no Moieties between them, yet becauſe the Wife cannot be remitted in this Caſe, unleſs the Husband be remitted alſo, and for that Remitters are favour'd in Law, becauſe thereby the more ancient and better Rights are reſtored again; therefore in this Caſe, in Judgment of Law, both Husband and Wife are remitted, which is worthy of great Obſervation. Co. Litt 354 a.

8. Where a Man is remitted *to a Right of Entry*, whether by Act in Law or by his own Act, he cannot waive it, but where he is remitted but to a Right *of Action* he may waive it. Arg. 2 Roll. Rep 34. and ſo held per tot. Cur. Ibid. 35, 36, 37. in the Caſe of Wood v. Shirley.

For more of Remitter in General, See **Appendant, Diſcontinuance, Entry, Preſentation, Remainder, Uſes,** and other Proper Titles.

Removal.

(A) Of Poor Perſons and others. *In what Caſes.* And *Power of* the *Juſtices as to Removals.*

1. IF a Man *hires a Houſe in A.* and being there with his Wife and Children he *afterwards binds himſelf as a Servant* with one dwelling *in B.* yet are not his *Wife and Children* to be ſent to B. or plac'd there, but *are to remain ſtill at A.* where they were once ſettled. Otherwiſe if the Husband has * hired a Houſe in B. Dalt. Juſt. † cap. 73.

* But it muſt be of the yearly Rent of 10l. Ibid. Marg. — 2 Shaw's Pract. Juſt. Pag. 169

52. cites S. C —— † In the Edition of 1742. it is

2. A Man ſettled at D. *marries a Poor Woman ſettled at E.* who has *Children by a former Huſband*; ſuch of them as are above 7 Years old ſhall not be remov'd; thoſe *under* 7 may be remov'd, but that is only for *Nurture*; For they ſhall be kept at the Charge of the other Pariſh. 2 Salk. 482. Mich. 10 W. 3. B. R. Anon.

Shaw's Pariſh Law 224. cites S. C. — Ibid. 249. cites S. C. — 2 Shaw's Pract. Juſt. 49. cites S. C. — Ibid. 52. cites S. C. —— Thoſe above 7 are ſettled Inhabitants in E. Carth. 455. Wingford v. Preſton, S. C. —— Carth. 279. Trin. 5 W. & M. B. R. Shermanbury in Suſſex v. Bolney, S. P.

* S. P. And the Pariſh of E. *ſhall take them again as ſoon above* the Age of 7 *Years*. Per Powel J. who ſaid, That it has always been ſo, That Children under 7 Years ſhall go along with the Mother; and if they become chargeable the Pariſh of E. ſhall pay for their Keeping, tho' they ſtill remain with the Mother. To which Powis and Gould agreed, Holt ab'ente. 11 Mod. 267, 268. Hill. 8 Ann. the Pariſh of St Saviour's Southwark v. the Pariſh of Cripplegate.

3. A Pariſhioner of the Pariſh of A. came to B. with a Certificate according to the late Act of Parliament, and the Juſtices reciting that Matter, and becauſe he was likely to become chargeable to B. ſent him back to A. It was moved to quaſh the Order; becauſe *a Certificate-Man*

Shaw's Pariſh Law 231. cites S. C. — S. P. Neſſ. Juſt. 18 532.

is not removable till he is *actually chargeable by the expreſs Words of the Act* 8 & 9 *W.* 3. *cap.* 30. And per tot. Cur. the Order was quath'd, Niſi. 2 Salk. 530. Trin. 2 Ann. B. R. Pariſh of Little Kire v. Wooltall.

4. The Seſſions may remove *any Man that does not Rent* 10*l. a Year, let him be worth ever ſo much*; For his having a Freehold of his own is foreign; and if he has any, it ought to come of his Side upon the Appeal. Per Cur. 6 Mod. 88. Mich. 2 Ann. B. R. Anon.

5 *A. removed* by *Certificate* from *B. to C. takes an* Apprentice, who ſerves out his Time at C. and lives there 2 Years, he cannot be remov'd with his Maſter. 11 Mod. 204. Hill. 7 Ann. B.R. the Pariſh of St. Gyles in the Fields v. the Pariſh of Weybridge.

6. If an *Eſtate falls to a Poor Man* the Juſtices *cannot ſend him to the Place where* his Eſtate is; For he may lett the Eſtate if he will. *But if he goes* to the Eſtate *and ſtays there* 40 *Days, he cannot be ſent from it.* The Foundation of theſe Proceedings is the Statute of Car. 2. and thereby a Man muſt be reſident 40 Days in a Place before he can be ſent to it. MS. Caſes. Hill. 9 Ann. B.R.

7. It was held per Cur. That *Juſtices of Peace have* not a Juriſdiction at large in Caſe of Settlements, but only a *particular Power of Removal where there is a Complaint* made *by the Churchwardens and Overſeers* of the Poor of a Pariſh of a Grievance there *of a poor Perſon likely to become chargeable* &c. whereupon the Juſtices may make an Order to remove the Grievance by ſending the Party to the Place where he was laſt legally ſettled; But if there be no Reaſon to remove him, they cannot adjudge the Pariſh complaining, or any other, to be the Place of his Settlement; the Juſtices *have no Juriſdiction but what is founded upon a Complaint*. MS. Caſes.

8. Where a Perſon is viſited with *Sickneſs by the Act of God*, he ought not to be removed from the Place where he is, further, to endanger his Health, without an Order of 2 Juſtices; and an *Information lies* againſt any that do it; And if ſuch *Order* is made by the Juſtices, knowing him to be ſick, an Information ſhall go againſt them. 8 Mod. 326. Mich. 11 Geo. 1725. The King v. Edwards.

(B) Of Poor Perſons *to what Place.*

If a *Woman* be *ſettled* in a Pariſh, and *not with Child of a Baſtard*, and *perſuaded when near her Delivery to remove into another Pariſh*, and there is delivered, it is good Reaſon for the Juſtices to *return her*, but that muſt be *to the Place of her laſt legal Settlement.* (with her Child, come ſemble) Comb 360. Hill. 8 W. 3. B R. The King v. the Inhabitants of Moreton.

1. If a *Woman unmarried, being a hired Servant, is* there *gotten with Child*, and *after her Time of Service expired ſhe goes into another Pariſh, and* is there hired in Service, or *is there* other-wiſe ſettled *by the Space of one Month, and then is diſcovered to be with Child*, ſhe is not to be *ſent* to the Place or Pariſh where ſhe was begotten with Child, but to the Place *where ſhe was laſt lawfully ſettled.* Dalt. Juſt. 228. cap. 73. cites Reſol. 12.

2 Shaw's Pract. Juſt. 54 cites S.C.

2. If a Man, with his Wife and Children, *takes a Houſe* in one Pariſh *for a Year, and before the End of the Year is put out* of Poſſeſſion, and then *goes into another Pariſh*, where *the Woman in a Barn &c. is delivered of a Child*: This thruſting out was an illegal Unſettling, and therefore ſuch a one muſt be return'd to the Town or Pariſh *where* he or ſhe was *laſt lawfully ſettled, and the Child alſo* born in the Time of this Diſturbance, muſt be ſent with them. Dalt. Juſt. 228. cap. 73. cites Reſol. 24.

3. Where

3. Where a Child is *brought from A. to B. without legal Authority*, they of B. may, by Warrant of 2 Juſtices of Peace, return the Child to A. tho' not the Place of laſt Settlement, becauſe they have done the Wrong. Where the Child is firſt known to be, that Pariſh muſt provide for it till they find another. Per Holt Ch. J. Comb. 364. Paſch. 8 W. 3. B. R. The Duke of Banbury v. Broughton Pariſh. Poor's Settlement 252. pl. 285. cites S. C. Shaw's Pariſh Law 225. cites S. C.

4. A Special Order of Seſſions was, That H. was *bound Apprentice, and ſerved 7 Years* to a Hemp-dreſſer *within the Precinct of Bridewell*, and *afterwards he lived 9 Years in Clerkenwell* Pariſh, *but gained no Settlement there.* The *Juſtices ſent him to Bridewell* as his laſt legal Settlement, by an Order, which ſet forth Bridewell to be an *Extraparochial Place.* And per Holt Ch. J. If a Place is Extraparochial, and has not the Face of a Pariſh, the Juſtices have no Authority to ſend a Man thither; and ſo it was reſolved in the Caſe of Sir John Ogburn. Poſſibly a Place Extraparochial may be tax'd in Aid of a Pariſh, but a Pariſh ſhall not, in Aid of that. This is *Caſus Omiſſus*, and the Order was quaſh'd. 2 Salk. 486. Hill. 11 W. 3. B. R. The * Precinct of Bridewell v. the Pariſh of Clerkenwell. Ibid. in Marg. the Reporter adds, viz. but Note in the Caſe of Stokelane and Dorking, Hil. 11 Ann. B. R. it was adjudg'd by Parker Ch. J. and the whole Court, that by Virtue of 13 & 14 Car. 2. cap. 12. S. 21. the Juſtices may exerciſe the Powers given by 43 Eliz. and that Act, in all Extraparochial Places, containing more Houſes than one; ſo as to come under the Denomination of a Town or Vill ——* Ld. Raym. Rep. 549. S. C.

H. lived 10 Years in the Foreſt of Dean, and then died, and left ſeveral Children. Two Juſtices made an Order to remove them to Linton in Herefordſhire. And per Holt Ch. J. If a Place be a *Reputed Pariſh, and has Churchwardens and Overſeers* of the Poor, it *is a Pariſh* as to *Levies*, that is Terms it be no Pariſh; *but if* it be *merely Extraparochial*, as the Juſtices cannot ſend to ſuch a Place, ſo they cannot ſend from it; as it is exempt from receiving, ſo it ſhall not have the Benefit of it; for they have not proper Perſons to complain. Perſons in Extraparochial Places muſt fulfil ſo much Authority, as ſuch Perſons did at Common Law before 43 Eliz. which enacts, that every Pariſh ſhall keep their own Poor, in Conſequence of which the Juriſdiction of Removals was ſet up before the Statute 14 Car. 2. For tho' the Poor were removed to their own Pariſhes, every Pariſh could not maintain their own Poor; but the Statute 43 Eliz. does not extend to Extraparochial Places. And Holt Ch. J. quaſh'd the Order, and bid them go and get an Order, (viz.) Foraſmuch as H. was ſettled in the Pariſh of Linton, and is not able to provide for him ſelf, theſe are &c. 2 Salk. 485. pl. 5. Mich. 12 W. 3. B. R. The Inhabitants of the Foreſt of Dean v. the Pariſh of Linton.

One cannot be removed to an *Extraparochial Place.* Per Cur. 12 Mod. 548. Trin. 13 W. 3. Anon.

A *Man ſettled in a Pariſh removed into an Extraparochial Place, and gained a Settlement, and then removed into another Pariſh, and there became chargeable.* And the Queſtion was, what the Pariſh can do with him? Whether by Virtue of the Act they may ſend him to the Pariſh, where he lived before he removed to the Extraparochial Place? For ſend him to the Extraparochial Place they cannot, for Want of Officers to receive him. Powel J. took this to be *Caſus Omiſſus*, and what ought to be moved in Parliament, theſe Extraparochial Places being many in Number, and of great Extent. 12 Mod. 81. Hill. 8 Ann. B. R. The Queen v. Doughton.

(C) Removal *of Servants.*

See (A) pl. 5.

1. A *Servant well ſettled*, being with a *Maſter removeable*, cannot be removed with him by 43 El. but the Maſter may *complain on the Reteiner. Comb. 478. Paſch. 10 W. B. R. Anon. Shaw's Pariſh Law 225. cites S. C.—* So the Books are

2. If one hires a *Maid* for a Year, and *before the Year's End* ſhe *is got with Child*, ſhe ſhall not for that be removed, but ſhall ſerve out her Time; there ſhall be a Year's continual Service to make a legal Settlement for the charging of a Pariſh, but till the Year be out none ſhall diſturb the Party from ſerving. And ſince ſhe is *not removeable within the Year*, if ſhe *leave her Maſter without his Conſent, ſhe may be ſent back* to her Service, but then it is *to ſerve her Time, and not a Charge to the Pariſh.* Per Cur. 12 Mod. 403. Trin. 12 W. 3. B. R. in Caſe of the King v. the Inhabitants of Marlborough. If a Woman Servant be with Child during the Time of her Service, a *Juſtice upon Complaint of the Maſter may diſcharge her*, and ſhe Pariſh where ſhe ſerv'd muſt provide for her, as in other Caſes of Caſual Impotency. Shaw's Pariſh Law. 241

3. If being

Nelf. Juſt 545. cites S. C. —— 2 Shaw's Pract. Juſt. 53. cites S. C. —— 2 Salk 527. S. C. by Nam. of the Pariſh of Farringdon v. Witty.

3. H. being ſingle, was hired for a Year, and after he had ſerved 3 Quarters of a Year he married, and the Juſtices removed him to his Place of laſt Legal Settlement. And per Cur. The Contract being good, the Juſtices have no Power to remove him from his Maſter before the End of the Year; for they cannot annull the Agreement of the Maſter, unleſs it be upon Complaint of the Maſter. 2 Salk. 529. Paſch. 2 Ann. B. R. Pariſh of Farringdon v. Walcot.

(D) *Orders* of Removal. *Good* as to the Form or Manner, *where Children are to be Removed.*

1. A Conſtable without a Warrant brought a Child from A. to B. and 2 Juſtices of B. made an Order (reciting the Fact) *to return the Child* to A. there *to be provided for according to Law.* The Court held the Order granted for returning the Child to the Wrong-doers, and therefore that Part was affirm'd; but it ought not to be ſaid to be there provided for &c. but they are to be left to take their Courſe according to Law; ſo that Part was quaſh'd. Cumb. 372. Trin. 8 W. 3. B. R. The King v. the Inhabitants of Banbury.

Lord Raym. Rep. 395. S. C. by Name of the King v. the Inhabitants of Wangford. —— 2 Salk. 482. Mich. 10 W. 3. B. R. Anon. ſeems to be. S. C. — The Order was quaſh'd, as being too general; for ſome of their Family might not be removeable; and ſuch a General Order ſweeps away all. —

2. An Order was made to remove *three Men* (naming them) *with their Families, from* the Pariſh of *Brandon to* the Pariſh of *Wangford.* It was excepted that this Order is void for the Uncertainty of the Meaning and Extent of the Word (*Family*) for Servants and Lodgers may be comprehended under that Word. But the Court was unwilling to quaſh the Order upon this Exception, until they were better inform'd of the Truth of the Fact; whereupon it was agreed on both Sides to produce Affidavits thereof, which was done, and *the Fact was* thus. *Three poor Men of Wangford came into* the Pariſh of *Brandon, and* there *married* 3 *poor Widows of that Pariſh who received Relief* &c. And *each of the* ſaid *Widows had Children by their former Husbands, ſome under* 7 *Years and ſome above* 7 Years of Age. And per Holt Ch. J. the Children are not removeable to Wangford to charge that Pariſh by ſettling them there; but as to *the Nurſe Children under the Age of* 7 Years, they *may be ſent* thither *for their Nurture, but* ſtill the Pariſh of *Brandon muſt relieve them there, and* as to *the Children above the Age of* 7 Years, they *ought not to be removed at all.* Therefore ſince the Juſtices have made an ill Uſe of this general Word Family, per Cur. the Order was quaſh'd. Carth. 449. Mich. 10 W. 3. B. R. Pariſh of Wangford v. Brandon.

Shaw's Pariſh Law 240. cites S. C. —— 2 Shaw's Pract. Juſt 53 cites S. C. —— Nelſ. Juſt. 550 cites S. C. —— An Order to remove J. and his Wife and Family from Brood to Sanhurſt, was quaſh'd, becauſe Non conſtat what is meant by his Family; and ſome of them may have a legal Settlement at Brood, tho' J. had not. 2 Salk. 485. Silvanus Johnſon's Caſe. — Shaw's Pariſh Law 229. cites S. C. —— S. P. Foley's Poor Laws 279. Trin. 10 Ann. B. R. Lenham Inhabitants v. Inhabitants of Peckham, Com. Kent, cites 2 Salk. 482. 485.

An Order by 2 Juſtices of Peace ſays, That ſuch Men (by Name) with their Wives and Children, were lately come &c. and then orders that *they and their Families ſhould be removed,* which Holt ſaid was too uncertain; for it may comprehend more than came in, and therefore he inclined to quaſh it. Cumb. 478. Paſch. 10 W. 3. B. R. Anon.

An Order to remove *a Woman, with her Family, to Hollaton, which was the Place where her Huſband was ſettled* &c. Quaſh'd; becauſe the Word (Family) was too general, and it did not appear; but ſhe might have gained a Settlement ſince her Husband's Death; and it did not appear where the Husband died. MS. Caſes. The Queen v. the Inhabitants of Hollaton.

An Order of 2 Juſtices to remove *a Man with his Wife and Family*, was quaſh'd in toto, becauſe the Family might have another Settlement. 12 Mod. 398. Paſch. 12 W. 3. The King v. the Inhabitants of Kirford.

3. An

3. An Order was made by two Juſtices, to remove H. with his Wife and Children, from Ware in the County of Eſſex, to Stinſtead in the ſame County. Exception was taken to this by Mr. Eyre. 1ſt. Becauſe it was *with Wife and * Children.* 2dly. Becauſe it was ſaid, it *appears upon Examination before us or one of us* &c. and the Examination ought to be before both, becauſe both are to make the Judgment of Removal Mr. Cowper would have diſtinguiſh'd this as to the firſt Exception from the Caſe of Mich. 10 W. 3. Of his *Wife and Family*, becauſe he might have Servants not removeable, but Children ought to ſhew their Parents. To the 2d he ſaid, That by 14 Car. 2. cap. 12. the Complaint is directed to be made to any Juſtice, and conſequently one Juſtice may examine; and it was only neceſſary that two ſhould join in Removing. But Cur. contra in both. To the firſt Holt Ch. J. ſaid, Suppoſe H. had put his Son out to Service at 10 Years old at B. and accordingly he had ſerved there a Year, and after the Father comes to live at B. himſelf, and the Son to live with him, ſuch an Order would remove the Son too, tho' he be not removeable. To the ſecond Gould J. ſaid the Statute directed, and the Practice was, to make Complaint to one Juſtice, and he grants his Warrant to bring the poor Man before two Juſtices; and then they two examine and remove. 2 Salk. 488. Trin. 12 W. 3. B. R. The Inhabitants of Ware v. Stanſtead Mount-Fitchet.

Shaw' Parim Law 249. cites S. C. —— Neſſ Juſt. 55[illegible] cites S. C. —— * An Order to remove a Man and his Children is not good. 12 Mod. 308. Mich. 12 W. 3. The King v. the Inhabitants of Kirford. —— An Order *to remove the Wife and Child of ſuch a one* held good; Otherwiſe, to remove the Children or Family of ſuch a one. MS. Caſes. Pariſh of Kingsford v. Lyonſhell.

4. An Order to remove a *Wife and Children to the Place of the Husband's laſt Settlement*, and held bad as to the Children; for they might have a Legal Settlement different from the Husband, but it might ſtand as to the Wife. But another Exception was, That there was *no Adjudication, that any of them were likely to become chargeable* to the Pariſh from whence they were removed; and tho' it was ſaid that they came to ſettle there contrary to Law, yet for the laſt Exception the Order was quaſh'd in toto. 12 Mod. 667. Hill. 13 W. 3. Pariſhes of Halſtead and Meltord.

5. A Woman and her Child were removed to the Pariſh of Great Marcum, *as being the Settlement of her Husband deceaſed.* It was objected, that they might have gained a Settlement ſince the Deceaſe of the Husband. The Court ordered to ſhew Cauſe. Poor's Settlements 109. pl. 147. Pariſh of St. John's in Lincoln v. Great Marcum.

An Order took Notice, That T. P. lately deceaſed, intruded in his Life-time into E. and that he was laſt legally ſettled in H. Theſe are to remove Frances his Wife, and her three Children to H. *as being ſettled there in Right of her Husband.* It was objected, That the Order does *not ſet forth, that ſhe has not gained a Settlement elſewhere*; for it is not a neceſſary Conſequence that ſhe is now ſettled where her Husband was, for ſhe might have gained a Settlement elſewhere, eſpecially now in Regard her Husband is dead; and it was quaſh'd per Cur. Poor's Settlements 15. pl. 22. The Queen v. the Inhabitants of Everſly.

6. Exceptions were taken to an Order for the Removal *of a Female Child about a Year old.* 1ſt. That it *ſays, the Child is likely to become chargeable, but* does *not ſay where.* 2dly. The *Order ſays that St. John Baptiſt is the Place of her laſt legal Settlement, being born there.* 3dly. This is an *Order directed to the Churchwardens and Overſeers of the Poor of the Pariſh of [illegible], and to the Churchwardens and Overſeers of the Poor of the [illegible] of St. John Baptiſt*; and it ſays, *Whereas Complaint has been made by you to us* &c. and does *not ſay which.* Parker Ch. J. ſaid, Surely that is well enough, for it is upon Complaint of the Right, if both complain. Mr. Juſt. Powys ſaid, Indeed when it has been ſaid that they do remove a Perſon there, becauſe it is the Place of his Birth, and ſay no more, it has been held ill, becauſe he might have another Settlement; but here it is ſaid, the laſt Place of her legal Settlement being the Place of her Birth; which is good till another is found out. Curia tot. would not quaſh the Order. Foley's Poor Laws 267, 268. Mich. 9 Ann. B. R. Spalding Pariſh v. St. John Baptiſt in Peterborough.

Upon an Order of Removal it was held, That if a *Child of* 8 *Years of Age* was *removed with the Father*, it *ought to be alleged in the Order, that the Place, whereto he is removed, is the Place of his laſt legal Settlement*,

7. It was moved to quaſh an Order of Juſtices, which was *for Removal* of a poor Perſon *from* the Pariſh of *A. to Middleham.* The Exception to the Order was, That the *Juſtices* have *ſet forth that Middleham was the laſt legal Settlement of the Father, therefore they ſend the Son there*; and *it appears he was* 10 *Years of Age.* Ch. J. Parker; The Juſtices have *made no Adjudication, what* Place *was the Place of the Child's legal Settlement*, they only ſay that Middleham was the Place where his Father was laſt legally ſettled, and therefore they do remove him thither; they have left us to judge where he was laſt legally ſettled; and this is in the Nature of a Judgment, and ought to be more certain. And per tot. Cur. The Judgment was quaſh'd, becauſe the Settlement of the Father is not abſolutely neceſſary to the Settlement of the Son. Foley's Poor Laws 271, 272. Mich. 9 Ann. B. R. The Queen v. the Pariſh of Middleham in Yorkſhire.

for at that Age he may gain a Settlement diſtinct from his Father; for the Age of a Nurſe Child, ſo as to be removed with the Parents, is generally eſteemed until 7 Years old; ſo the Child being 8 Years old, and no Mention made that that was his laſt legal Settlement, the Order was quaſh'd. Foley's Poor Laws 272, 273. Trin. 12 Ann B. R. Wobourn Pariſh v. Wocken Pariſh.—Poor's Settlements 17. pl. 24. S. C.

If an Order be made *to remove a Child* to the Place where the Parents were ſettled, it *muſt appear upon the* Face of the *Order that the Child has gained no new Settlement.* 2 Shaw's Pract. Juſt. 52.

Tho' it be generally true, that the *Children*, while they are under the Age of 7 Years, follow the Settlements of their Father, yet when they are *above* 7 *Years old, if they have not gained another Settlement, it muſt be ſpecified ſo in the Order.* MS. Caſes.

8. It was moved to quaſh an Order of Seſſions. There was an Order made by 2 Juſtices, *for removing an Infant from Rigmanſworth* in St. Alban's *to* the Pariſh of *St. Giles*, they appeal to the *Seſſions* at St. Alban's, who *confirm the Order* of 2 Juſtices. *Exception* was taken that they have *ſet forth that this Infant was born in St. Giles's, therefore they ſend him there; but in the Order they ſhew that his Father was laſt legally ſettled in* the Pariſh of *Rigmanſworth*, and that for this Reaſon the Order ſhould be quaſh'd; for the Place where the Child was born is not the Place of his Settlement if any other can be found out; now here is another, which is the Father's Settlement. Curia, The Birth of a Baſtard Child is its Settlement, but not of one born in Wedlock; but the Settlement of the Father ſhall always be eſteemed the Settlement of an Infant born in Wedlock, if that can be found out. Let this Order be quaſh'd. Foley's Poor Laws 269. 270. Paſch. 10 Ann. B. R. The Queen v. the Pariſh of St. Giles, Middleſex.

9. The Court was moved to quaſh an Order of Removal, which was to this Effect, viz. *Upon Complaint that Samuel Roſs hath intruded &c. We do adjudge the ſaid Samuel Roſs is likely to become chargeable to &c. and that his laſt legal Settlement was in St. Mary &c. he having ſerv'd as an Apprentice there; Therefore we do require you to convey the ſaid S. R. his Wife and Family.* Exception was taken, That the Complaint was only that *S. R. was likely to become chargeable*, and the Order was to remove him, his Wife and Family; And alſo, That the Order only ſaid that he had *ſerved as an Apprentice in &c. without ſaying that he had ſerved* 40 *Days*, which is neceſſary by the 13 & 14 Car. 2. cap. 12. S. 1. But the Court overruled theſe Exceptions; Becauſe a Man and his Wife are not to be parted, and likewiſe becauſe the Order had been good, tho' R.'s ſerving as an Apprentice had not been mentioned, the Juſtices not being obliged to give their Reaſons for their Adjudication; And therefore their Reaſons ſhall not be conſtru'd ſo ſtrictly, as where they ſtate the Facts for the Opinion of the Court. MS. Caſes Mich. 5 Geo. B. R. The King v. the Inhabitants of St. Mary Calender's in Wincheſter.

Shaw's Pariſh Law 224. cites S. C.—2 Shaw's

10. Two Juſtices made an Order to remove the Father and Mother, and John, Elizabeth, and Sarah, their Children, from the Pariſh of &c. to the Pariſh of &c. and it was moved to quaſh it becauſe it did *not ſet forth the reſpective * Ages of the Children*; For they might be Apprentices

or

or ſerve for a Year, and ſo gain a Settlement elſewhere; And for this Reaſon it was quaſh'd as to the Children, but it was good as to the Father and Mother. 8 Mod. 337. Mich. 11 Geo. 1725. The King v. Trinity Pariſh, Cheſter.

Pract. Jut. 49. cites S. C. — * S. P. 10 Mod. 26. Trin. 10 Ann. B. R. Pettworth Pariſh's Caſe, where the Court held this Exception good. —— A Motion was to quaſh an Order of 2 Juſtices, which was made for the Removal of one *Jane Smith and her 5 Children*. Exception; It's too uncertain, for it *neither tells the Names or Ages* of the Children; wherefore the Order was quaſhed as to the Children. Foley's Poor's Laws 228. Trin. 9 Ann. B. R. Flinton v. Roſſon, Com. York.

Where the Juſtices name the Children of a Perſon to be removed, their Ages need not be mention'd, becauſe the Juſtices determine of their Settlement. MS. Caſes.

11. An Order of 2 Juſtices removed *the Father and* 3 *Children* from the one Pariſh to the other; and the reſpective *Ages of the Children were ſet forth* in the ſaid Order, viz. *One of* 6, *another of* 8, *and the 3d of* 9 *Years*. Upon Appeal to the Seſſions the *Order of 2 Juſtices was revers'd as to the Children*, who were ſent back to the Pariſh from which they were ſo removed; but the Order was good as to the Father; And the ſaid Orders being now before the Court by Certiorari, it was moved to quaſh the Order of Seſſions; Becauſe the Children being of tender Years, ſhould have gone along with the Father to the Place of his Settlement. But it was anſwer'd and held by the Court, That *the Order of Seſſions does not ſet forth the Ages of the Children*; and then as the Juſtices have Juriſdiction, it *muſt be intended* they determined Right, viz. *That the Children were not of the Ages ſet forth in the original Order*, tho' that Reaſon is not given; but it would be *otherwiſe, if the Reverſal were founded upon a Reaſon not warranted in the ſame*. And a *Difference* was taken *between an Order of Reverſal and* an Order of *Confirmation*; For this muſt be taken to purſue the original Order, and to be founded upon the ſame Reaſons; and therefore muſt fall to the Ground if the original Order be erroneous. The Order of Seſſions confirm'd. Gibb. 254. Paſch. 4 Geo. 2. B. R. The Pariſh of Symſon v. Woughton.

Poor's Settlements 134. pl. 213. cites S. C.

(E) Orders of *Removal*, Good as to the Form or Manner, *in general*.

1. IN an Order to remove a poor Perſon it is *ſufficient to ſay*, That he doth *not Rent* a Houſe of 10 *l. per Ann. or is likely to become chargeable*; and either is ſufficient. Per Holt. Cumb. 339. Trin. 7 W. 3. B. R. Anon.

S. P. Per Cur. 6 Mod. 88. Mich. 2 Ann. B. R. Anon.

2. Two Juſtices ordered a Woman to be removed to Weſton in the County of Somerſet, *being the Place of her laſt Settlement as they are credibly inform'd*; *But upon an Appeal, on hearing both Sides, the Order was confirmed*. Holt Ch. J. held, That *this ſupplies the Defect*, and *(credibly inform'd)* may be that Way which the Law appoints, (viz.) By Examination of Witneſſes. But *at another Day* he ſaid, They might be informed ſo at an Alehouſe; and therefore *he held the Order ill*. But by Conſent it was referr'd to a Judge of Aſſiſe upon the Merits. Comb. 413. Hill. 8 W. 3. B. R. Anon.

Poor's Settlements 243. pl. 283. cites S. C. — S. P. 2 Salk. 473. Troloridge v. Weſton.

3. *Exception* was taken to an Order of 2 Juſtices to remove a poor Perſon, *That it is not ſaid* in the Order, *that the Man did not Rent* 10 *l. per Ann.* But Holt Ch. J. ſaid, That this Exception has been ſolemnly over-ruled. Comb. 400. Mich. 8 W. 3. B. R. Anon.

Poor's Settlements 180. pl. 232. cites S. C. — Shaw's Pariſh Law 223. cites S. C. —— To ſuch an Objection it was anſwer'd, That upon Search in the Crown Office moſt of the Orders of Settlement there fil'd are without Allegation of notorious Inhabitancy per Ann. and

yet a great Number of them were confirm'd by this Court. And after ſeveral Debates it was reſolved per Cur That it was not material, eſpecially becauſe of the Precedents mentioned above. Carth 395. Hill. 7 W. 3. B.R. The Inhabitants of Wotton Rivers v. the Inhabitants of Marlborough in Wilts. —— 3 Salk. 254. S C —— 2 Salk. 492. S.C. by Name of the Inhabitants of Weſton Rivers v. St Peter's in Marlborough ——— S. P. Poor's Settlements 10. pl 15. Paſch. 1713. The Queen v. the Inhabitants of Needham-Market.——— S P. 5 Mod. 321. Mich 8 W. 3. The Inhabitants of Chidingfold v. the Inhabitants of Penhurſt.

Poor's Settlements 271. pl. 309, 310. cites S. C — 5 Mod. 321. S. C. by Name of the Inhabitants of Chidingfold v the Inhabitants of Penhurſt

4. An Order was made to remove a poor Perſon from Chittinſton to to Penhurſt; and this was quaſh'd becauſe it was *not ſaid, That one of the Juſtices was of the Quorum.* Holt Ch. J. ſaid, That ſome indeed had been of Opinion, That an Order was good notwithſtanding this Omiſſion, and perhaps it has been ſo adjudg'd; But he was of Opinion, That this being a Special Authority to Juſtices out of Seſſions, it ought to appear that that Authority was actually purſued. 2 Salk. 475. Mich. 8 W. 3. B. R. Chittinſton Pariſh v. Penhurſt Pariſh.

—— 2 Salk 473 S. C —— S. P. Ibid. 475. Mich 8 W 3. B.R. Anon. —— 2 Shaw's Pract. Juſt 22 cites S.C. For 2 Juſtices, unleſs one be of the Quorum, have no Authority to remove a poor Man.——— Ibid. 23. cites S. C.—— S.P. Ibid 24.— Nelſ Juſt. 550. cites S.C. —— Shaw's Pariſh Law 194. cites S. C.——— For this Cauſe an Order was revers'd. Comb. 400. Mich. 8 W. 3. B. R Anon —— S P. But if it had been at *Seſſions* it need not to have been ſaid. 12 Mod 108 Mich. 8 W. 3. The King v Rainſden. — And Holt Ch. J. ſaid, The Order ſhould begin, Whereas Complaint has been made to us &c. two Juſtices, Quorum unus, by &c Comb 400. cites Pool's Caſe.

In an Order of Removal by 2 Juſtices it ſhould be *ſaid, That they were Juſtices & Quorum unus*, tho' the Quorum is often omitted; For it is a Special Authority out of Seſſions Per Holt Ch. J Comb. 285. Trin. 6 W. & M. B.R. Ann Freneley's Caſe.—— Shaw's Pariſh Law 180. cites S. C

Shaw's Pariſh Law 225. cites S. C.

5. A poor Man ought to have *Notice and to be heard* before he be removed; if it can be, it is fit it ſhould be ſo; but not abſolutely neceſſary. Comb. 478. Paſch. 10 W. 3. B. R. Anon.

2 Salk 489 pl. 51. Mich. 12 W. 3. B.R S C held accordingly.

6. If an Order be made to remove a Perſon *from A. to B. and then he comes to* C. the Juſtices *cannot graft an Order for ſending him to B.* upon the firſt Order, becauſe they are not Parties to it; But ſuch Order may be given in Evidence of a Settlement in B. Per Cur. 12 Mod. 419, 420. Mich. 12 W. 3. in the Caſe of the King v. the Inhabitants of Longcrichill.

Poor' Settlements 191. pl 256. cites S. C.—— Shaw's Pariſh Law 224. cites S C.— 2 Shaw's Pract. Juſt. 49. cites S.C.

7. Per Holt Ch. J. The *moſt regular Way* for Juſtices *to proceed upon the* 14 *Car.* 2 in removing a poor Perſon, *is to make a Record of the Complaint and Adjudication*; *and* upon that to make *a Warrant under their Hands and Seals to the Churchwardens, to convey the Perſons to the Pariſh to which* they ought to be ſent, *and deliver in the Record, Per proprias Manus, into Court next Seſſions*, to be kept there among the Records to charge the Pariſh; and that Record may be well removed by a general Certiorari to the Juſtices of Peace. And Mr. Broderick ſaid, He had adviſed the Juſtices in Surrey to do ſo. 1 Salk. 406. Hill. 4 Ann. B. R. Anon.

8. It was moved to quaſh an Order of Removal, The *Order* was *directed to the Overſeers and Churchwardens* of the Pariſh of K. and *ſets forth, That* whereas *Complaint has been made by you*, (and *does not ſay whom)* Per Cur. 'Tis well; Becauſe it refers to the Perſons beforementioned. 11 Mod. 265. pl. 5. Hill. 8 Ann. B. R. The Queen v. the Pariſh of Kiddermiſter.

9 The 2d Exception was, That there is *no Adjudication*; and upon reading the Order it appeared, That as to the Place of his laſt legal Settlement there was a good Adjudication, by ſaying, It appears to us &c. but ſaying, *He is likely to become chargeable*, is no Adjudication, *without ſaying, It appears to us* &c. And upon this laſt Exception this Order was quaſhed. 11 Mod. 265. pl. 5. The Queen v. the Pariſh of Kiddermiſter.

10. An

10. An Order of Removal was thus, viz. *We believe this Fact to be true.* Exception was taken to it; Sed non Allocatur; and it is as good as if it had been, It appears to us to be true. MS. Cafes. 10 Ann. B. R. in the Cafe of the Queen v. Bifhop's-Waltham and Floram.

An Order of Removal which was confirmed at the Quarter-Seffions was quafhed, becaufe it run

11. So where the Order was, Whereas the Perfon *in all Probability is likely to become chargeable*, it was held good. Ibid.

in theſe Words, (viz.) *Having received Information that J. S. &c. and may become chargeable, we believing it to be true, do order* &c. whereas it ought to have been (Likely to become chargeable) according to the Statute 12 & 13 Car. 2 cap. 12. For every Perſon may by Poſſibility become chargeable tho' there is not the leaſt Probability of it. MS. Cafes, Hill. 4 Geo. B. R. The King v. the Inhabitants of Teelby and Willerton in the County of Lincoln.

12. An Order for the Removal of a poor Perſon was quaſh'd becauſe there was *no Judgment* of the Juſtices concerning the laſt legal Settlement, but *only the Oath of a Woman.* 2 Shaw's Pract. Juſt. 53. cites Salk. 485. —— And Shaw's Pariſh Law 229. cites S. C. [but there is no ſuch Point there.]

13. It was moved to Quaſh an Order of 2 Juſtices; The *Order removes the Wife of J. S. late of Normanton.* It was objected, 1ſt. That it does *not appear when that was*, it may be 5 or 10 Years ago; *nor* does it appear *that the Wife was in the Pariſh at the Time of the Removal.* 2dly, That it is *ſaid, Likely to become chargeable, and not ſaid to what Pariſh or where*, may be it may to her Husband. The Court ordered them to ſhew Cauſe. Poor's Settlements. 117. pl. 158. Trin. 1724. Pariſh of Normington v. Edlington.

The Book is ſo Here.

14. Several *Orders* of Removal have been *quaſh'd*, becauſe the *County* was only in the Margin, and *not in the Body* of the Order. 8 Mod. 310 Mich. 11 Geo. in the Caſe of the King v. Auſtin.

(F) Orders of Removal. Good. In reſpect of the *Matter*.

1. JUſtices may make *one Order to remove ſeveral Families*, and upon Appeal to the Seſſions, they may reverſe it Quoad one. Comb. 478. Paſch. 10 W. 3. B. R. Anon.

Shaw's Pariſh Law. 225 cites S. C.

2. An Order made *to remove a poor Man and his Family from H. to C.* was quaſhed, becauſe *all might not be removable*; For if a *Woman has Children in a Pariſh where ſhe is ſettled and marries a Husband ſettled in another Pariſh*, if thoſe Children are above 7 Years old they are not to be removed. 3 Salk. 260. Mich. 10 W. 3. B. R. Anon.

Poor's Settlements 256 pl. 297. cites S. C.

3. An *Order of 2 Juſtices* for the Removal of a poor Perſon was *quaſh'd* at the Quarter Seſſions, and *before the poor Perſon came back to the Pariſh, to* [illegible] *Order was prayed, they make a new Order to fix him in another Place*; And per Cur it cannot be good, becauſe a new Order ought not to be made till the Party was come back; and if that Order had been confirmed here, it would not make it good, becauſe it was meerly void. 12 Mod. 633. Hill. 13 W. 3. Pariſh of Godſtone v. that of Eaſt-Grinſtone.

4. *Whereas J. S. has intruded into the Pariſh of A. and is likely to become chargeable; Theſe are to remove him with 3 Children.* Quaſh'd as to the Children, for they have *removed more than is complained of.* Poor's Settlements 29 pl. 25. The Pariſh of Newington's Caſe.

5. *A poor Perſon* with his Family was *ſettled at St. Brides, his Wife* after *he left him and married with A. B. and had ſeveral Children by him*, the *Juſtices ſent the Woman and her Children to* the Pariſh of *St. Brides* where the firſt Husband was ſettled, and the Matter was found ſpecially, and ſet forth in the Order that they had not ſeen one another for ſeveral

Years. The Court were of Opinion they *were Baſtards*, and quaſhed the Order as to the Children being ſent from St. Andrew's to St. Bride's. Poor's Settlements. 77. pl. 102. Pariſh of St. Andrew v. St. Brides.

See (F) pl. 3.

(G) Orders of Removal. Good in Reſpect of *former Orders*.

12 Mod 370 Paſch 12 W. 3. S. C. by Name of the King v. the Inhabitants of Shipping-Farringdon. — Shaw's Pariſh Law 239 cites S. C. — Dalt. Juſt. 243. cap 73. Nelſ. Juſt. 448, 449.

1 H. was *removed by Order* of 2 Juſtices from the Pariſh of A. in Warwickſhire *to Chalbury* in Oxfordſhire, and *from thence by Order of 2 Juſtices to Chipping-Farringdon* in Berkſhire. It was objected that Chalbury ought to have appealed, and got the Order upon them diſcharged, to which Holt Ch. J agreed; For *ſending the Poor Man to a 3d Place is Falſifying the firſt Order, which cannot be done but by Appeal*; For the Order of 2 Juſtices is a Determination of the Right againſt all Perſons, till it be reverſed; Chalbury ſhould have appeal'd from the Warwickſhire Order, and got that ſet aſide, and ſent the Man back thither, and the Juſtices there ſhould have ſent him to Chipping-Farringdon; therefore naught. 2 Salk. 488. Trin. 12 W. 3. B. R. The Inhabitants of Chalbury v. Chipping-Farringdon.

2. A. came to Peterborough; The Juſtices *ſent him* to Woolſton *by a Paſs ſaying he was ſettled there*; Two *other Juſtices ſent him back* to Peterborough; It was held that the 2 firſt Juſtices erred by ſending him by a Paſs, it appearing he had a Settlement; but that did not juſtify the former Error; For where a Perſon is removed, it is by an Authority in a judicial Manner, and they may ſend him forward, but not to the ſame Place again. Poor's Settlements. 84. pl. 113. Stamford Baron v. Woolſton.

3. The Pariſh of *Pottern removed J. H his Wife, and ſeven Children to* the Pariſh of *St. Giles* in the Fields. The Pariſh of *St. Giles ſent them back* to Pottern, *without ever appealing* to the Quarter Seſſions as they ought, the Order of the 2 Juſtices being a Judgment which continues of Force till ſet aſide upon the Appeal. Both the Orders were removed into the King's Bench, and the Court confirmed the Pottern Order, and quaſh'd the Middleſex Order for the Irregularity. Poor's Settlements. 126. pl. 174 Inhabitants of St. Giles in the Fields v. the Pariſh of Pottern in Wilts.

4. A *Man and his Wife and Family were removed*, and the *Children appearing to be Baſtards were ſent back* again to the former Pariſh; but the firſt Order was held final, and the Rule being granted to ſhew Cauſe, it became abſolute. Trin. 5 and 6 Geo. 2. B. R. The King v. North-Petherton.

5. A. and B. and his Wife were removed by an Order of 2 Juſtices from the Pariſh of C. to D. and the *Order for Want of an Appeal* at the next Quarter Seſſions *was confirmed*; afterwards it *appearing that B. was never married to A.* the *was removed back* again to C. *by another Order of 2 Juſtices*, which Order was likewiſe confirmed at the Seſſions; The Court were clear of Opinion that the 2 laſt Orders were bad, and that *the firſt Order* confirmed at the Seſſions whether upon Appeal, or for Want of Appeal *muſt be concluſive to the contending Pariſhes* upon the Authority of the Caſe above. Mich. 15 Geo. 2. B. R. Pariſh of Berkſwell v. Balſal.

(H) Or-

(H) Orders; *Not appealed from* to the next Seſſions. *The Effect* thereof.

1. IT was held by the Court for a *general Rule* in Caſes of Orders for Removal, That if the *Pariſh, to which the Poor Perſon is removed, does not appeal in Time*, ſuch Order is *concluſive* to the contending Parties, and indeed *to all Pariſhes, except where an after Settlement can be prov'd.* Dalt. Juſt. 246. cap. 73.

S. P. per Cur. 12 Mod. 608. Hill. 13 W. 3. B. R. The King v. the Pariſh of Mattock. — Great Saſke-Barton, and Clittow (Pariſhes)

S. P. 2 Shaw's Pract. Juſt. 26 ——— S. P. Shaw's Pariſh Law 230. cites Mich. 5 Ann.

2. A poor Perſon was moved in 1694 *from Weſt Starring to Findon; Findon does not appeal.* In 1700 the Man comes to Thackham, and *Thackham ſends him by Order of 2 Juſtices to Findon; Findon appeals*, and the Order was diſcharged. All 3 being now brought up by Certiorari, it was moved to quaſh the Order made upon Appeal, and urged, That Findon was bound by the firſt Order from Weſt-Starring to them, from which they never appealed, with Reſpect to all the World, and are concluded to ſay, That the Place of his laſt legal Settlement was not with them. But in the Reſpect of the *Diſtance of Time* the Court could not tell but he might have gained a new Settlement at Thackham, and that might appear to the Juſtices, and they might have good Ground to diſcharge the Order of the 2 Juſtices; then the Counſel offered to produce an Affidavit, That there was no new Settlement proved; but the Court held they could *not examine* that *by Affidavit*, nor enquire thereby into the Reaſon of making the Order. 2 Salk. 489. Hill. 12 W. 3. B. R. The Inhabitants of Thackham v. Findon in Suſſex.

Two Juſtices of the Peace for the County of Suſſex make an Order *dated the 1 d. of April* for removing a Man *from Bandſey to Findon.* At the next Quarter Seſſions this Order was *appealed*, and the ſaid Order was *ſet aſide.* On the 13 of *April* [illegible] *another Order by 2 Juſtices was made for the Removal* of the ſaid Man *from Bandſey to Felingtowe*, to which *there was no Appeal. In Sept. next there was an Order by 2 Juſtices to remove* the ſaid Man [illegible] to *Alderton* aforeſaid, all the Orders were removed by Certiorari, and the Court was moved to quaſh the 3d, becauſe the 2d had become abſolute, there being no Appeal from it. The Counſel on the other Side agreed that the 2d Order became abſolute, and bound all Perſons as to all precedent Settlements, but inſiſted that it ought to be intended that the Man had gained a ſubſequent Settlement in Alderton between the Time of the 2d Order and the 3d; But the Court held, That ſeeing the Man was ſued upon Felingrowe by the 2d Order, if he had gained a ſubſequent Settlement in Alderton it ought to appear, and for Want of its appearing quaſh'd by the 3d Order. MS. Caſes. Mich. 4 Geo. B. R. The Town of Alderton v. the Town of Felingtowe.

3. A poor Perſon living at St. John's Wapping, came and *lived in St. Andrews* Holbourn, and *there gained a legal Settlement*, and then *removed to St. Clement's Danes, and there gains a legal Settlement*, and *then goes* back *to* St. John's *Wapping, from whence he is removed by an Order of 2 Juſtices to St. Andrew's* Holbourn, *who let ſlip the Opportunity of appealing at the next Quarter Seſſions; but* afterwards *got the ſaid Perſon to be removed by an Order of 2 Juſtices to St. Clement's Danes; For St. Andrew's* Holbourn *did not find out after the Quarter Seſſions that he had gained a legal Settlement in St. Clement's Danes* ſince the Settlement gained in St. Andrew's Holbourn; This Matter being referred to Judge Powell, he deſired the Opinion of the Court in it, who all held that the Perſon ought to be ſettled in St. Andrew's Holbourn, for they having miſſed the Opportunity of appealing *it is concluſive* upon them, and there cannot be a ſubſequent Order of 2 Juſtices to remove the Perſon to another Pariſh, and this is for the Benefit of poor Perſons that they may know where they are to be ſettled. MS. Caſes. Hill. 3 Ann. St. Andrew's Holbourn v. St. Clement's Danes.

This was agreed to Mich. 8 Ann. The King v. Peterborough

4. If a poor Perſon be *removed from* the Pariſh of *A.* to the Pariſh of *B.* by *Order of 2 Juſtices*, and the Pariſh of *B. remove him to* the Pariſh of *C.* the Order of Juſtices removing him to the Pariſh of B. is become final, becauſe *B. did not appeal* to the Quarter Seſſions. 10 Mod. 84. Paſch. 11 Ann. B. R. Anon.

5. A

5. A poor Perſon *is ſent to the Pariſh of Stepney*, who do not appeal &c *Exception* was taken *that the Removal ought to have been to the Hamlet of Spittlefields*; For Stepney is divided into 4 Townſhips, and the Poor have been removed from one Townſhip to another in the ſame Pariſh, and the Statute takes notice of Townſhips as well as Parishes, and Spittlefields is a Hamlet of Stepney. Per Cur. *If a Perſon is removed to a wrong Place that I have ought to appeal*, and ſo Stepney ought to have done if it were a wrong Place, or elſe the Order will be concluſive upon them; but this is a Matter here out of the Record. Juſtices of the Peace are not obliged to take Notice of the Diviſions of Pariſhes into Hamlets and Townſhips, which maintain their own Poor ſeverally and diſtinctly; and *Stepney here upon an Appeal might have ſhewn that the Perſon did belong to the Hamlet of Spittlefields*, which might have been a reaſonable Cauſe to diſcharge the Order; Two Hamlets within a Pariſh are the ſame as two Pariſhes, yet Churchwardens are Overſeers of the Poor of the whole Pariſh (tho' ſo divided) and have a Super-intendancy over the whole Hamlets and Townſhips. MS. Caſes. Paſch. 11 Ann. B. R. Pariſh of Spittlefields v. Bromley.

6. Two Juſtices make an *Order on the 20th of November* to remove the Pauper and his Family from A. to B. and *at the next Seſſions, no Appeal being brought*, the Pariſh of A. gets *the Order* to be *confirmed*, and at the Eaſter Seſſions following the Pariſh of B. appeals, and then the Order of 2 Juſtices, together with the Order of Confirmation is ſet aſide. Now it was moved to ſet aſide the laſt Order of Seſſions, and that the 2 former Orders might ſtand. It was held per Cur. That it was not neceſſary on the Statute that *the Appeal* ſhould be brought at the next Seſſions after the making of the Original Order; But that it *is ſufficient* if made *at the next Seſſions after Service of the Order*; For till then the Party has no Notice to bring the Appeal, and therefore can be in no Default. Trin. 16 Geo. 2. B. R. Pariſhes of Northbrady and Rode.

(I) Orders of Removal *confirmed* on Appeal; *The Effect* thereof.

1. TWO Juſtices of Peace made an *Order to remove* J. R. his Wife and 3 Children from Rowborough *to Broad-Chalk*, which Order, *on Appeal* to the Quarter Seſſions *was confirmed*. After this R. with his Wife and 3 Children *came into the Pariſh of Downhead*, whereupon 2 *Juſtices reciting the former Order and Confirmation ordered him to Broad-chalk*: And now it was objected to this Order, That it did not appear that one of the Juſtices was of the Quorum. Mr. Northey on the other Side argued it was not neceſſary here, becauſe it was not an Original Order, but an Order made in Purſuance of an Order of Seſſions: And per Cur. a Settlement by Order on Appeal binds all Parties; *If the poor Man goes to the Pariſh from whence he is removed, the Seſſions muſt ſee their Order obeyed*; but *if he goes to another Pariſh not concerned in the Appeal*, then *it is proper for 2 Juſtices* of the Peace *to remove him to the Pariſh where he was ſettled by the Seſſions by Original Order*, *but* then *it muſt appear therein, that one* of them *was of the Quorum*. Quath'd. 2 Salk. 481. Hill. 9 W. 3. B. R. Pariſh of Downhead v. Broadchalk.

Afterwards Hill 10 W. 3. This was moved again, and then Holt and Gould held the Ad-

2. A. *came to Harrow*, and being likely to become chargeable was *removed to Ryſlip*; Ryſlip appeal'd; and *upon the Appeal A. was adjudged to be ſettled at Ryſlip*; Afterwards Ryſlip diſcovered that Hendon was the Place of his laſt legal Settlement and ſent him thither; and the Queſtion was, Whether after the Adjucation upon the Appeal, Ryſlip was not eſtopped againſt all the World, to ſay that Ryſlip was not the

Place

Place of his legal Settlement? And per Holt Ch. J. *Ryflip is eſtopp'd*, to ſay otherwiſe; For if Ryflip had not been the very Place of his laſt Settlement, the Juſtices muſt have ſent him back to Harrow, where they firſt poſſeſſed of him, for that Reaſon, becauſe they were poſſeſſed of him, and he did not belong to Ryflip; And now this is in Effect to frame the Queſtion again, viz. Whether he belongs to Ryflip? which Queſtion has been already determined on the Appeal, who have adjudged that he was ſettled at Ryflip; Now this Point being determined, the Appeal muſt be final and concluſive, otherwiſe there would be no End of Things; and the rather as to Ryflip. 1ſt, *Hendon* Ryflip was Party to the *Suit* wherein this Determination was made, and yet H. may be Eſtopp'd where it is not Party to the Suit; and ſo Holt Ch. J. remembered the Caſe of Thurſton and Pickering, where it was adjudged, that if H. be adjudged by 2 Juſtices to be the Father of a Baſtard Child, he is Eſtopp'd againſt all Mankind to ſay the contrary, and any Man may call him ſo at his Pleaſure. 2 Sal. [illegible] Mich. 10 W. 3. B. R. between the Inhabitants of the Pariſh of Harrow and Ryflip.

Juſtification final as to Ryflip againſt Perſons in Places, be- [illegible] *Suit*, as *and in the Appeal*; But as to Harrow (for he had been formerly remanded by them to Hendon, and that Order reverſed) they were at

Liberty to ſend him to any other Place, and were not Eſtopp'd; Becauſe the Juſtices on the Appeal did not adjudge him now to be ſettled at Harrow, tho' they adjudged him now to be ſettled at Ryflip, ſo that the other Point was not tried; but Turton and Rokeby contra. Adjornatur. Ibid. —— Ld. Raym Rep. 394. S. C. By Name of the King v. the Inhabitants of Ryflip, Hendon, and Harrow; But ſays, That Turton J. was of Opinion that it was very hard to conclude Ryflip againſt a 3d Pariſh, which was diſcovered after the Adjudication of the Appeal to be the Place of the laſt legal Settlement. And (by him) it is contrary to the Practices of all the Juſtices of England. Ita adjornatur. —— S. C. Ld Raym Rep. 425 where Holt Ch. J. and Gould J. were of Opinion that Ryflip was concluded; but Rokeby J. was of Opinion that the Appeal to the Seſſions was not final in that Caſe, but it may be removed into B. R. and examined there upon the Merits. Turton J. was of Opinion that Ryflip ſhould be concluded againſt Harrow but not againſt Hendon, becauſe Hendon was not Party to the Suit. The Court being divided, it was adjourned till the next Term.

Poor's Settlements 224. pl. 209. cites S. C. —— 5 Mod. 416. S. C. by Name of the Pariſh of Ryflip v. Hendon —— 3 Salk. 201. S. C. by Name of the King v. Ryflip. —— Shaw's Pariſh Law 178. cites S. C. —— S. P. for the Juſtices cannot remove him but to the Place of the laſt legal Settlement, and ſhewing any later Place of Settlement will diſcharge the Order on the Appeal. And there is a *Diverſity* between an *Order diſcharged*, and an *Order confirmed on Appeal, not appeal'd from*, for in the firſt the Matter is at large as to all Places but the Place to which the poor Man was ſent, which upon the Appeal was determined not to be the Place of his legal Settlement; but in the latter Caſes the Place to which he was ſent is bound, and the Order final and concluſive as to all the World. 2 Salk. 492. Paſch. 1 Ann. B. R. Swanſcomb Pariſh v. Sheffield Pariſh —— Dalt. Juſt. 240. cap. 73. cites S. C. —— Juſt. Caſe Law 246. cites S. C. —— 2 Shaw's Pract. Juſt. 24. cites S. C. —— S. P. Ibid. 25. —— S. P. Ibid. 28. —— Shaw's Pariſh Law 196. cites S. C. —— Ibid. 243. cites S. C. —— Neſt. Juſt. 548. cites S. C. —— S. P. For Confirmation on Appeal is an Adjudication that this is the Place of the Parties laſt legal Settlement, which cannot be avoided by the Pariſh to whom it is made. Per Holt Ch. J. 2 Salk. 527. Mich. 13 W. 3. B. R. Minton Pariſh v. Stoby Stratford. —— 12 Mod. 668. S. C. by Name of the King v. the Pariſh of Minton.

If an *Order* of Juſtices *for* the *Removal* of a poor Perſon be *confirmed on Appeal*, the Appellants are ever concluded from diſcharging themſelves of that poor Perſon as to thoſe Places; For *if another Pariſh* than that from whence he is ſent to them by the 2 Juſtices *be the Laſt* Place of his *legal Settlement*, they may ſend him thither by an Order of 2 Juſtices, to be made for that Purpoſe; or upon Appeal, another Place's being the Place of his laſt legal Settlement *may be given in Evidence* at the Seſſions *upon the Appeal*. Per Cur. 12 Mod. 548. Trin. 13 W. 3. Anon.

3. It was moved to quaſh an Order of Juſtices, for that there was a *former Order* from the Pariſh of A. to the Pariſh of Petworth, and this Order being *affirmed on Appeal* to the Seſſions, it was *final* not only between the Pariſhes that were Parties, but all others, *except a full Parent Settlement could be found out*; that therefore this Order, which was to remove one W. P. and K. his Wife, together with 3 Children from Petworth to Ringmore, ſhould be quaſh'd; and the Court held this Exception good. 10 Mod. 25. Trin. 10 Ann. B. R. Petworth Pariſh's Caſe.

If on Appeal the firſt Order be confirmed, the Parties are for ever concluded as to all Places. 12 Mod. [illegible] Paſch. 12 W. 3.

The King againſt the Inhabitants of Shipingfaringdon. —— S. P. per Cur. Poor's Settlements 224. pl. 112. The King v. the Inhabitants of Packworth.

4. *A Difference* was taken between an Order of *Reſpite* and an Order of *Confirmation*; For this muſt be taken to purſue the Original Order, and to be founded upon the ſame Reaſons; and therefore muſt fall to the

Ground if the Original Order be erroneous. Gibb. 255. Paſch. 4 Geo. 2. B. R. in the Caſe of the Pariſh of Sympſon v. Weughton

(K) Orders of Removal *Repeal'd, and the Effect* thereof.

Sett & Rem. 190. pl. 235. cites S. C.

1. IF poor a Perſon be removed *from one Place where not legally ſettled, to another where not legally ſettled*, the *Seſſions* upon Appeal may *quaſh* the Order, but cannot remove to a 3d Place. Per Holt. Cumb. 286. Trin. 6. W. & M. B. R. Wale's Caſe.

Ld Raym. Rep 515. S. C.— Poor's Settlements 275. pl. 315 cites S. C.— 2 Salk. 486 Hill. 11 W. 3. B. R. cites S. C.— Dalt. Juſt. 249. cap. 73. cites S. C. * S. P. 2 Shaw's Prac. juſt. 28

2. A poor Man by the Order of 2 Juſtices was removed *from* the Pariſh of *St. M. to* the Pariſh of *Kingſton-Bowſey* as the Place of his laſt legal Settlement, from which Order *Kingſton appeal'd* to the next Quarter Seſſions where the *Order was diſcharged*; Afterwards this poor Man *went to Bedingham*; From *whence* by another Original Order of 2 Juſtices, *he was again removed to Kingſton-Bowſey*; which laſt Order being removed by Certiorari into B. R. it was now moved that it might be quaſh'd; becauſe upon the Appeal Kingſton had been diſcharged, which could not be if that had been the laſt Place of his lawful Settlement; therefore it was inſiſted, that Kingſton was finally acquitted. But per Cur. the *Order* made *upon the Appeal is final to* all but to the * *contending Parties who were Parties* to the Appeal, and not to Strangers, as Bedingham is in this Caſe. Carth. 516. Hill. 11 W. 3. B. R. Bedingham Pariſh v. Kingſton-Bowſey Pariſh.

2 Salk 532. Hill. 2 Ann. B. R. S. C.— Poor's Settlements. 146. pl. 191. cites S. C.— 6 Mod. 213. S. C.— Shaw's Pariſh Law 222 cites S. C.—

3. A poor *Woman with Child* being *unmarried*, was by Order of 2 Juſtices *removed from Weſtbury* in Wilts *to Cottham, and brought to Bed there*; Cottham appealed at the next Seſſions, and the *Order was reverſ'd*; Afterwards *by Order of 2 Juſtices the Child was ſent back to Cottham*; they appeal'd, and the *Order was confirm'd*. At laſt all was removed into the B. R. And per Cur. *the Birth* at Cottham *did not ſettle the Child* there, *becauſe* it was *under an illegal Order* procured by Weſtbury, which Order being reverſed, the Matter is no more than this, that they unjuſtly procured the Woman to go thither. Salk. 123. Trin. 3 Ann. B. R. Pariſh of Weſtbury v. Cottham.

2 Shaw's Pract. Juſt 48. cites S. C. by Name of Corſham v. Weſtbury.

4. A poor Perſon was *removed from A. to B. The Order was quaſh'd.* Afterwards *A. ſent him to D. this* Order *was likewiſe quaſh'd.* Afterwards the Pariſh of *A. ſent him to B again*; And it was moved to quaſh it, becauſe there were 3 *Months intervening*, from Auguſt to December following. On the other Side was cited the Caſe of Barrow and Engliſby, where there were 9 *Months intervening* from the Time of the firſt Removal, and quaſh'd; the Court not intending there was any ſubſequent Settlement. Quod Curia conceſſit, and the Order was quaſh'd. Poor's Settlements. 113. pl. 152. Paſch. 1723. The King v. the Inhabi- of Carlton.

5. If an *Order* is *quaſh'd for Form at the Seſſions, which is* a *good* Order, and after they ſend the Party back; yet *the Order* being good, it *is final*, and a Bar to all ſubſequent Orders. Poor's Settlements. 119. pl. 160. Hill. 1724. Moyer Hanger v. Warden in Bedfordſhire.

(L) Or-

(L) Orders of Removal. *Directed to whom.*

1. OVerſeers of A. are to remove, and they of B. to receive; and *one Order* was directed *to both Parishes to remove and receive*, and therefore quaſh'd; For it is entire; and tho' Counſel ſaid, Here is a good Judgment, that they were laſt legally ſettled in B. yet the Court anſwered, That was but the Opinion of the Juſtices, and the Foundation of there Judgment which is, That he be removed &c. Comb. 225. Paſch. 7 W. 3. B. R. The King v. Trinity Pariſh Exeter, alias Belvin's Caſe.

2. Warrant to *remove a poor Man unto the Conſtable* &c. and ſays nothing of Ch. Warden or Ov. ſeers, Per Cur. ſince the Conſtable has executed the Order it is well enough, tho' in Strictneſs he was not bound to obey it, tho' directed to him; For if a Juſtice direct his Warrant to any Perſon by Name who is no Officer, the Perſon is not bound to obey it; but if he does, and it is a Matter within the proper Juriſdiction of a Juſtice of Peace the Warrant will bear him out, and he may *juſtify* under it. Carth. 449. Paſch. 10 W. 3. B. R. Wangford v. Brandon.

Shaw's Pract. Law 25. cites S. C. And adds, That by this it ſhould ſeem, that the Juſtices of Peace may impower a Stranger Officer to execute this Warrant.

3. Two Orders were return'd; The firſt for ſettling a poor Man, and the ſecond a Confirmation of the firſt, upon an Appeal to the Quarter-Seſſions. The firſt Order recited, That whereas Complaint has been made to us &c. That T. G. had of late intruded into the Pariſh of St. George's, we adjudge him to be laſt legally ſettled at St. Olave's, Theſe are therefore to require you to convey the ſaid T. G. to the Pariſh of St. Olave's; And the Direction upon the Order was, *To the Churchwardens and Overſeers of the Poor* of the Pariſh of St. Olave's. Quaſh'd; For they ought, and can only, order the Pariſh Officers where the Intruſion is made to make the Removal. 2 Salk. 493. St. George's (Inhabitants) v. St. Olave's, Southwark.

2 Salk. 256. S. C. by Name of the King v. St. Olave's Pariſh. — 2 Shaw's Pract. Juſt. 25. cites S. C. — Shaw's Pariſh Law 198 & 240. cites S. C. — Lut. Juſt. 248. pl. 13. cites S. C. —— Exception being taken to the Direction of an Order. The Ch. J. ſaid, It was not neceſſary; Becauſe if the Juſtices follow the Words of the Act, (viz.) *Order the poor Perſon to be removed from ſuch a Pariſh to ſuch a Pariſh*, there needs no more, neither need the Juſtices order *the Pariſh* to do it, the Perſon is ſent *to receive and provide for him*; Becauſe the Act does not make any Proviſion for it, but only ſpeaks of the Removal, and the other is of Conſequence. MS. Caſes Hil. 7 Geo. B. R.

4. An Order recited, Whereas J. S. and his Wife were laſt ſettled in Clypton; *Theſe are to order you the Churchwardens of Clypton to repair to the Pariſh of Ravyſtock*, and to relieve them, they being ſo ſick that they cannot be removed. Per Cur. The Juſtices have no Authority to ſend for Officers out of another Pariſh, but are bound to maintain the Poor as long as they continue with them. And Per Powell, No Parishioners are to be relieved till they are carried to the Pariſh. Quaſh'd. Poor's Settlements 31. pl. 49. Paſch. 1712. B. R. Clypton (St. Mary's) v. Raviſtock in Devon.

Shaw's Pariſh Law 199. cites S. C. but in the 5th Edition it is 211. —— 2 Shaw's Pract. Juſt. 29. cites S. C. —— MS. Caſes, vol. 14 Trin. 11 Ann. B. R. S. C. by Name of the Queen v. Ravelſtock (Inhabitants.)

5. Order by 2 Juſtices was *directed to the Churchwardens &c. of Banſtead, and to the Churchwardens &c. of Banſtead, and whom it may concern*, And it is not ſaid who to convey or who to receive. The Court ſeemed to incline, That it ought to be quaſh'd; Sed Adjornatur. 11 Mod. 268. Trin. 8 Ann. B. R. The Pariſh of Binfield v. Banſtead.

(M) *Ex-*

(M) *Expences* allow'd. What.

Exception was taken to an Order made for Coſts at the Seſſions, upon this Statute; 1ſt, It *orders ſo much* for Coſts, *without ſaying ſo much was expended or laid out.*

1. 9 *Geo.* 1. *cap.* 7. *Sect.* 9. ENACTS, That *if the Juſtices ſhall at their Quarter-Seſſions, upon an Appeal concerning the Settlement of any poor Perſon, determine in Favour of the Appellant, they ſhall award the Appellant ſo much Money as ſhall have been reaſonably paid by the Pariſh on whoſe Behalf ſuch Appeal was made for the Relief of ſuch poor Perſon, to be recovered in the ſame Manner as Coſts on an Appeal, by* 8 & 9 *W.* 3. *cap.* 30.

The Court ſaid, It *appears by the Oath of the Parties* that ſo much was laid out. A 2d Exception was taken, That the Order *ſays* it was *upon hearing of the Appeal*, and does *not ſay, There was any Appeal* lodged. But the Court ſaid, It was well enough; For there muſt be an Appeal, or elſe they could not hear it; and they need not be ſo nice as in ſpecial Pleading. So the Order was confirmed. Foley's Poor Laws 247. Paſch. 12 Geo. B. R. The Pariſh of Maiden-Bradley v. Wallingford Pariſh in Wilts.

For more of Removal in General, See **Baſtardy, Certificate-Man, Seſſions, Settlement of Poor,** and other Proper Titles.

Rent.

(A) Of what Thing it may be granted. [*What Eſtate Grantee ſhall have by the Words.*]

See Reſervation (B)

Br. Confirmation, pl. 15. cites S. C. — Br. Grants, pl. 73. cites S. C. — Br. Rents, pl. 14. cites S. C. but I do not obſerve thoſe Words of (Taking by the Hands of the Leſſee and his Aſſigns and of others into whoſe Hands ſoever the ſaid Manor ſhall come) in any of the ſaid Books cited out of Brook; but it is in Lib. Aſſ. pag. 126. towards the End of pl. 38. which is very long, and is there mentioned in a Nota, but is not mentioned in the State of the Caſe.

1. IF a Man leaſes a Manor for Life, and after grants a certain Rent to take out of the ſaid Manor, by the Hands of the Leſſee and his Aſſigns, and of others into whoſe Hands ſoever the ſaid Manor ſhall come. This is a good Grant in Fee, and ſhall continue after the Death of the Leſſee of the Manor. 26 Aſſ. 58 Adjudg'd.

2. If a Man *leaſes* his Land *to J. S. for Life, rendring* 2 *s. Rent per Ann. and after grants to another* 2 *s. out of the Land which J. S. holds of him for Term of Life, to the Grantee and his Heirs during the Life of the Grantor*, this ſhall be taken a Grant of the *New Rent* by him in Reverſion, and the *Grantee ſhall have the Rent tho' J. S. die.* Br. Rents, pl. 24. cites 34 Aſſ. 4. Per Shard and Fiſher.

But if a Feoffment be made, rendring 5 Marks Rent, and the Feoffor grants 2 *Marks Parcel of the* 5 *Marks*; this clearly is a good Grant, with the Attornment of the Tertenant, as it ſeems. Br. Grants, pl. 3. cites S. C.

3. Aſſiſe of a Rent out of a Rent lies not; For a Rent cannot iſſue *out of a Rent*, by the Opinion of the Court; For the Statute of Weſt. 2. 25. gives Aſſiſe in loco certo capiendo, which is not a Rent, and a *Rent cannot be put in View.* Br. Aſſiſe, pl. 2. cites 3 H. 6. 20.

4. A Rent

4. A Rent cannot be granted out of a *Piſchary*, a *Common*, an *Advowſon*, or ſuch like incorporeal Inheritances; But a Rent may be granted *out of Lands or Tenements*, whereunto the Grantee may have Recourſe, Diſtrein, or which may be put in View to the Recognizors of an Aſſiſe. Co. Lit. 144. (N)

The mutual Agreement of the Parties cannot charge a Thing with Rent which is not chargeable by Law; As out of a *Hundred* or Advowſon. 7 Rep. 28. a. b. Per Cur. cites 35 Aſſ. 10. out of a *Fair*, cites 14 E. 3. tit. Scire facias 122. The Earl of Derby's Caſe. —— * Cro. J. 669. Sanderſon v. Harriſon.

(B) Rent Seck. By what *Words* it may be granted.

1. IF Rent be granted Percipiendum apud the Manor of D. and it's Agreed that he ſhall diſtrain in other Land, in the Name of other Counties; this is Rent iſſuing out of the Manor of D. and not out of the other Lands but the Diſtreſs is but a Penalty. 41 E. 3. 15. b. 41 Aſſ. 3. Adjudged.

P. And Per Cur. Theſe Words *Apud Dom.* and made the Rent to be iſſuing out of the Manor, tho' it was Percipiendum de Maner' &c. and ſo it is *Rent-Seck out of the Manor of A. and a Rent-Charge out of the other Lands* where the Diſtreſs is limited, and Aſſiſe lies well. Br. Charge, pl. 2. cites 41 E. 3. 15.

Br. Aſſiſe, pl. 559. cites 41 Aſſ. 3. That the Grant was to diſtrain in all his Lands in D. M. & R. and the Aſſiſe was brought for Rent ariſing out of the View, and M. & R. were in another County, and yet it lies; For De, Actus, Ley, Vel, Default, Tenements, are good Words of Charge, and the Writ awarded good. —— S. P. accord. Br. Charge, pl. 20. cites 2. Aſſ. 23. Per Tot. Cur.

If a Man at the Day *grants a Rent to A. and his Heirs de Terris & Tenementis ſuis in D.* and grants *all his Lands* in D. *except his Rent-Seck*; and to the Grantee goes Seiſin, he ſhall have Aſſiſe, and Deniers et hoc a Diſtreinde. Br. Rents, pl. 21. cites 9 E. 4. 2.

2. If a Man grants a Rent Percipiendum in Manerio ſuo D. that is a good Rent-Seck iſſuing out of the Manor. 4. Leon. 5. Pl. Com. 33. Sir G. Chudleigh's Caſe. 4 Rep. 5.

3. So if a Man grants a Rent Percipiendum de Manerio de D. it is a good Rent-Seck iſſuing out of the Manor. 41 Aſſ. 3. Per Cur.

4. If a Man obliges by a Condition himſelf, his Goods and Lands, in ſuch a County, in ſuch a Sum, if the Condition be [illegible] this is a good Rent-Seck iſſuing out of the Land, tho' there are not Words of Charge, nor in what Place he will be take. 18 E. 3. 32. b. 18 Aſſ. 54. b. See (D) pl. 2. — P. pl. 1. A Man *grants a Rent to another, and by Covenant bound him and his Goods and Lands in 2 Counties*, and it was held a good Charge to diſtrain if there be a Clauſe of Diſtreſs, but not to have View; and *without Diſtreſs it ſeems a good Rent-Seck*, if he gets Seiſin. Br. Charge, pl. 21. cites 18 E. 3.

If one Died in Fee *Lands in Counties and Lands to the Amount of a yearly Rent* to A. of B. this is a good Rent-Charge with Power to diſtrain, alth. there be no expreſs Words of Charge, nor to diſtrain. Co. Litt. 147. a.

5. If a Man grants to another and his Heirs an Annual Rent of 20 s. of his Mill of C. Percipiendum Annuatim de Se & Heredibus ſuis in perpetuam. If theſe Words this ſhall be a Rent iſſuing out of the Mill; For it ſhall be intended by the laſt Words, That he will take the Rent of him and his Heirs in his Mill. 22 Aſſ. 66. Adjudged. Br. Aſſiſe, pl. 237. cites S. C. —— Br. Charge, pl. 24. cites S. C.

6. If a Man grants and confirms to another in Fee 10 s. Rent to take out of certain Land, which Rent he has of the Grant of his Father; tho' he never had any Thing of the Grant of his Father, yet this ſhall be a Rent. 26 Aſſ. 38. Per Skipwith. The Deed is that he, *during your Life, ſhall take of my Land, which Rent you had of the Grant of my Father*, tho' you had not any Thing of the Grant of my Father, this is good Title to have Aſſiſe. 26 Aſſ. 38. Per Skipwith.

Fol. 4. See (A) pl. 1.

7. If a Man leases a Manor for Life, rendring 5 l. Rent, and after grants the Rent to another for his Life, to take in the said Manor by the Hands of the Lessee, and of whosoever Hands the said Manor shall come into; and after the Lessee for Life of the Manor dies, yet the Rent of the Grantee shall continue for his Life, and the Manor shall be charged with it, tho' the Rent reserved upon the Lease be determined. 20 Eliz. 38. Per Welby.

Br. Conformation, pl. 15. cites S. C.

8. So if a Man leases a Manor for Life, rendring 5 l. Rent, and after grants his Rent to another in Fee, To have after the Death of the Tenant for Life; This is a good Grant of the Rent, tho' the Rent reserved upon the Lease for Life be determined before it commences. 20 Eliz. 38. Per Welby.

9. If I recite by Indenture, that where I have granted to G. a Rent issuing out of my Land for Life, I grant that after his Decease the same Rent shall remain to B. in Fee, albeit that there was no such Grant made to G. yet B. shall have this Rent, 21 H. 6. 11. Per Mark.

10. If *Rent* be granted *out of a Manor*, the *Demesnes* only, and *not the Services*, are charged. 5 Rep. 4. b.

Cro. E. 640. pl. 5. Hill. 41 Eliz. S. C. but not S. P.

11. A. *Lessee for Life*, in Right of M. his Wife of a Mill, *made a Lease* thereof *to B. for* 17 *Years*; B. the Year after *assigned* the Term *to C.* About a Year after *C. demised to D. for* 14 *Years, rendering* yearly 3 *Bushels of Maslin, and one Bushel of Wheat in the Name of Rent on every Saturday*; and if the same, or any Part thereof, shall be unpaid or undelivered for 3 Days next after any of the said Feasts, being lawfully demanded, then the Demise to cease; D. entered and was possess'd, and *C.* being possess'd of the Reversion, *granted all his Estate and Interest* therein to one W. R. *for the Residue of the Term* of 17 Years. D. attorn'd. One Question was, Whether the Rent pass'd to W. R. by C.'s Grant, of all his Estate and Interest. And it was resolved by all the Justices, absente Popham, That the Rent reserved *by first Lessee for Years*, upon Demise of the Land for *a less Term*, is incident to the Reversion of the *ancient Term*, and passes well enough by the Words of (*All his Estate*) and if not, yet by the Words (*Totum Interesse*) the Rent divided from the Reversion will pass, and the Reversion clearly passes by Totum Stratum. Agreed by 3 Justices, absente Popham. Mo. 526. pl. 694. Mich. 40 & 41 Eliz. B. R. Davy v. Matthew.

12. If I grant *Rent to issue out of my Manor of D. and out of my Lands and Tenements in D. and S. and out of my Lands elsewhere to the said Manor belonging.* This Middle Clause stands so in Frame divided, that it shall charge my Lands in those Towns, tho' they are no Part of the Manor; and yet that Clause is inclosed with the Manor both before and after. Hob. 175. in Case of Stukely v. Butler, cites Finch's Case.

(C) Rent Seck. *Seisin.*

Cro. Car. 520. pl. 21. Mich. 14 Car. B. R. S. C. but S. P. does not appear; for there the Rent was given by Will in Writing; and in Assise for the Rent the Jury (among other Things) found Arrearages due for 30 Years and an Half; but because it was not found when the Devisor died, the Judgment was reversed.

1. If a Rent-Seck be granted, and diverse Days of Payment are pass'd before any Seisin had of the Rent, yet if after Seisin be had he shall recover in an Assise after Demand made and Non-payment, all the Arrearages incurr'd before the Seisin had, as well as those that were after due at the Time of the Demand. Mich. 11 Car. B. R. between *Morrice and Price*, per Curiam, in Writ of Error upon a Judgment in Wales.

2. If

2. If a Rent be granted in Fee out of Land, and this [Land] before any Seisin of the Rent, defcends to two Copareceners, and after the Baron of the one gives Seisin of the Rent without the Assent of the other, yet this shall bind the other. 9. 11 Car. 25. B. between *Morrice and Price* per Curiam, upon a Writ of Error in Wales this Point was ruled. S. C. referred to 2 Lev. 240. Cro. C. 321. Jo. 413. 444. S. C.

3. If a Man *lets Land for Years rendering Rent, and dies*, the Heir shall have the Rent; for this is Parcel of the Reversion, and shall pass by Grant of the Reversion; and yet it does not appear there, if it was reserved to the Lessor and his Heirs; quod nota Br. Rents, pl. 10. cites 14 H. 6. 26.

4. A Tertenant was compelled by Decree in *Chancery* to pay a Rent-Seek, which was *devised by Will* out of the Land, notwithstanding no Seisin had of it. Mo. 626. pl. 859. Trin. 43 Eliz. And says, That Trin. 44 Eliz. a like Decree was made in the Case of Ferrars v. Tannet. S. C. cited 3 Chan. Cases 92. Arg. in Case of Bath v. Montague.

(D) Rent *Charge. By what Words* it may be granted.

1. If Rent be granted Percipiendum apud Manerium de D. and if it be Arrear he shall distrain in other Lands in the Time or other Counties; this is a Rent issuing out of the Manor of D. and not out of the other Lands, but the Distress there is but a Name. 41 E. 3. 15. b. 41 Ass. 3. See (B) pl. 1. —— Plea 4 Mar. grant Rent out of his Land, with a Grant that the Grantee may distrain, &c. 20 s. Rent, or Arrear, that he may distrain in Land of the Grantor in one or other County, and he distrains in both; A Writ, the Assise shall be brought in the first County; but if both the Lands are in one and the same County, both Lands shall be put in View. Ibid.

that *if I am not paid* 20 s. *Rent per Annum, that then I may distrain in his Land in D. for* 20 s. *Rent per Annum*; this is a good Rent out of this Land, and in Assise of it this Land shall be put in View. Br. Rent, pl. 22. cites 10 Ass. 4. —— *And if Rent be granted out of the Land in one County, and the Arrear, that he may distrain in Land of the Grantor in another County*, and he distrains in both; A Writ, the Assise shall be brought in the first County; but if both the Lands are in one and the same County, both Lands shall be put in View. Ibid.

2. If a Man by Deed obliges himself to B. in Annuo Reditu de tali summa Percipiend' in Annuation of the Manor of D. and he obliges Manerium prædictum, & omnia Catalla in the Manor to the Distress; this is a good Rent out of D. 46 E. 3. 18. b. Curia. See (B) pl. 4. 5. 6. 7. pl. 1. 2. Charge, pl. 5. cites S. C. —— Br. Grants, pl. 21. cites S. C. —— S. P. Co. Litt. 143. a.

3. If the Grantee of a Rent purchase Parcel of the Land &c. by which the Rent is extinct, yet if the Grantor grants again (rehearsing the Purchase) that the first Grant shall stand in its Force, and that he may distrain in the rest of the Land, this is a good Grant of a Rent-charge. 46 E. 3. 32. b. It amounts to a new Grant. Co. Litt. 147. b. 148. a. —— Br. Charge, pl. 48. cites S. C. Per Finch.

4. If a Man grants, that if so much of the Rent be Arrear, the Grantee shall distrain for it in such Land, this is a good Rent charge. 8 H. 4. 19. b. Br. Rents, pl. 19. cites S. C.

5. So if a Man grants to another, that he shall distrain for so much Rent in certain Land, this is a good Rent-charge. 9 H. 6. 9. Co. 7. *Butts* 24. H. 28 H. 8. 22. b. 41 Ass. 3. adjudged. 26 Ass. 39. Quære. S. P. Br. Grants, pl. 13. Per Skipwith. And says the Grantee may have an Assise. —— This by Construction of Law will amount to a Grant of a Rent out of the Land, for should it not do so, the Grant would be of little Effect, if the Grantee should have a naked Distress, and no Rent; for then he never should have Assise thereof &c. And this is the Reason that it is often ruled, and resolved that this amounts to a Grant of a Rent by Construction of Law, Ut Res magis Valeat. Rep. 24 a. Per Cur. cites 5 E. 3. 12. 3 Ass. 7. 14 Ass. 14. 16 E. 3. Tit. Grants 64.

Br. Rents, pl. 32. 26 Ass. 38. 39 Ass. 12. 46 E. 3. 18. 32. 8 H. 4. 10. 9 H. 6. 9. a. 22 H. 6. 11. Litt. S. 213. and that in this Case the Grantee shall not have Writ of Annuity.——S. P. Co. Litt 147. a. ——Br. Annuity, pl. 23. pl. 41. in Case of Cove v. the Administrators of Woodye. S. P. By Portman, And so if I make a Feoffment in Fee by Deed indented, *rendring* 10 s. *at such a Feast* for 20 Years, I shall have a good Action of Debt for this Rent, per Spilman.

Rent out of Land.

6. If a Man grants to another, That whereas he has a Rent out of certain of his Lands, that he shall distrain for it in certain other Lands; tho' he has not any * Rent issuing out of his Land, this shall create a Rent out of the Land where the Distress is limited. Fitz. Jud. 224. (C) (Qu. & Quere.)

* Rent out of Land, then this is *but a Penalty* in the other Land. 7 Rep 24. Butt's Case.

See (B) pl. 6.

7. If a Man grants and confirms to another 10 s. Rent, to take out of certain Land, which Rent he has of the Grant of his Father, tho' he never had any Thing of the Grant of his Father, yet this shall create a Rent. 26 Ass. 38. per Skipwith.

8. If a Man leases a Manor for Life, rendring 5 l. Rent, and after grants this Rent to another in Fee, To Have after the Death of the Tenant for Life, and that he may distrein after the Death of the Tenant for Life; This is a good Rent Charge tho' the Lessee be dead before the Rent commences. 26 Ass. 38. per Wilby.

9. *Grant, That if* 10 s. *Rent be not annually paid to J. N. that he might distrain in the Land*; The Grant is a good Creation of the Rent. Per Skip. Br. Rents, pl. 14. cites 26 Ass. 38.

10. If a Man *by Deed indented* at this Day *gives in Tail, or* for *Life*, the *Remainder over in Fee*; or makes a Feoffment in Fee, *and reserves to him and his Heirs a Rent, and that he and his Heirs may distrain* &c. this is a Rent-Charge; Because such Lands &c. are charged with such Distress by Force of the Writing only, and not of Common Right; And *if* one by Indenture reserves to him and to his Heirs a Rent *without such Clause of Distress* in the Deed, then such Rent is Rent-Seck, for that he cannot distrain for it; And if in this Case he was never seised of the Rent, he is without Remedy. Litt. S. 217.

11. Also if one seised of Land grants *by Deed Poll*, or by *Indenture*, *Part of Rent* out of the same in Fee, or in Tail, or for Life &c. *with a Clause of Distress* &c. this is a Rent-Charge, And if the Grant be without Clause of Distress, then it is a Rent-Seck. Litt. S. 218.

12. If a *Deed* be, *That if A. of B. be not yearly paid at Christmas for his Life 20 s. that he may distrain for it in the Manor of F.* &c. this is a good Rent-Charge, because the Manor is charged with the Rent by way of Distress; and yet the Person of the Grantor is discharged of an Action of Annuity, because he does not grant any Annuity to the said A. of B. but only, that he may distrain for such Annuity &c. Litt. S. 221.

such a yearly Sum of Money, in Judgment of Law the Manor is charged with the Rent, but the Person of the Grantor cannot be charged, because he expressly grants no Rent, for that would charge his Person; but grants only, That the Grantee should distrain &c. which only charges the Land. Co. Litt. 149 b.

13. If a Man letts Land for Term of Life, and *Tenant for Life charges the Land with a Rent in Fee*, and he in the *Reversion* confirms the same Grant, the Charge is good enough, and effectual. Litt. S. 529.

14. If a Man by Deed grants a Rent-Charge out of his Land *to one for Life, and* grants farther by the same Deed, *That he and his Heirs may distrain in the Land for the same Rent*; This amounted to a new Grant of a Rent in Fee-Simple. Co. Litt. 148. a.

Cro. E. 241. Trin 33 Eliz. B. R. accordingly. Kindler v. Leverlige.

15. A. seised of Lands, letts the same at Will at 10 l. per Ann. to B. and after by another Deed granted *eandem Redditum* to J. S. for Life, and afterwards the *Lease at Will determined*; this shall not be intended Eundem Numero, but Eundem Specie; And adjudged, That the Rent was

well

well granted for the Life of the Grantee. 1 Le. 151. pl. 229. Trin. 31 Eliz. C. B. Kirdler v. Leverſage.

16. *Clauſula Diſtrictionis* is not ſufficient in a Grant to *create* a Rent; Otherwiſe in a Deviſe. Mo. 592. pl. 798. Trin. 40 Eliz. C. B. Kingſwell v. Cawdry.

Noy 71. S.C. where the Words were *I devise a Rent of 40 s. per Ann. out of all my Lands in H. with a Clause of Diſtreſs, payable yearly at the usual Feaſts.* Per Cur. This is a good Deviſe of a Rent-Charge by the Words, *I do with a Clauſe of Diſtreſs*; becauſe of the Intent of the Deviſor in giving of a Remedy, and means to come to that Rent Charge.

17. *Leaſe for* 99 *Years*, if he and A. & B. ſo long lived, *granted a Rent* out of the Lands to W. S. his Executors &c. for the Reſidue of the Term, *to be paid at the Houſe of B. and if it ſhould be behind* 28 *Days, being lawfully demanded at the ſaid Houſe, then he ſhould forfeit* 20 *s. for every Day it ſhould be arrear; and if behind for* 6 *Months*, being lawfully demanded at the ſaid Houſe, that *then he might diſtrain for that and the Nomine Pœnæ.* Adjudg'd, That this was a Rent-Charge. Hutton 114. Mich. 8 Car. Lamb. v. Weſt.

(D. 2) Rent-Charge, *Grant thereof Good. In Reſpect of the Eſtate of the Grantor.*

1. A *Tenant for Life*, Remainder *in Tail Male to B.* his Son and Heir apparent, Remainder to A. in Tail Male, Remainder *to C. in Tail* Male, Remainder *to the Right Heirs of A.* —— *A. & B. join in a Deed, by which A. granted, and B.* the Son (being then *under Age*) *confirmed, a Rent of* 7. *S. an Annual Rent* of 10 s. per Ann. out of the Lands, payable Half-Yearly, *with a Clauſe of Diſtreſs and a Nomine Pœnæ* of 20 s. for every Month; *A. & B.* afterwards *join in a Fine to the Uſe of A. and his Heirs. A. made a Feoffment* to W. R. the Plaintiff, *B. having Iſſue living.* The Queſtion was, Whether this Debt be chargeable on W. R. the Feoffee? Becauſe it was *made by Tenant for Life, and confirmed by B. in Remainder*, being *within Age.* The Court inclined in Opinion, That the Grant was good, and ſhould bind W. R. the Feoffee; For tho' it was agreed to be void as againſt B. who was within Age, yet the Eſtate Tail being barr'd by the Fine, the Uſe whereof was limited to A and his Heirs, who granted the Rent, and W. R. coming in under all the Eſtates of A. who granted the Rent-Charge, therefore ſhall hold it charged. But without Regard to the Matter of Law, Judgment was given upon the Pleadings. Cro. C. 103 pl. 4. Hill. 3 Car. C. B. Holt v. Sambach.

S.C. Hut. 96. adjud. [illegible]. —— S.C. Winch. 142. by Name of Holbeach v. Sambeach; And ſays, That it was cited to have been adjudg'd lately upon the like Point. To which the Court ſeemed to agree; and they ſaid, If this be the Point they will give Judgment preſently. —— Het 74. Holt v. Sandbach. Hill. 3 Car. C B. but a D.P

(E) Where but a *Penalty.*

1. IF the Tenant by certain Rent grants by Indenture to his Lord, That he may diſtrain for the ſame Rent in all his Land in the *Old Mill*, and he has other Land; *This is not any New Rent created, but only a Diſtreſs for the Old Rent.* 9 H. 6. 9.

Br. Grants, pl. 131. cites S. C. —— Br. Rents, pl. 9 cites S. C. per tot. Cur.

S. P. For 3 Cauſes; 1ſt, The Law needs not to make Conſtruction

2. So if a Man grants a Rent out of the Manor of D. and grants further, That if the Rent be arrear, he ſhall diſtrain in his Manor of S. This is but a Penalty in the Manor of S. Co. 7. *Butts* 24. Contra 1 E. 3. 21. b.

that this ſhall amount to a Grant of a Rent; For here is a Rent expreſly granted to be iſſuing out of the Manor of D. and the Parties have expreſly limited out of what Land the Rent ſhall iſſue, and upon what Land the Diſtreſs ſhall be taken; and the Law will not make an Expoſition againſt the expreſs Words and Intention of the Parties, which this way ſtands with the Rule of the Law, Quoties in verbis nulla eſt ambiguitas ibi nulla Expoſitio contra Verba expreſſa fienda eſt. 2dly, If in this Caſe this ſhall amount to a Grant of a Rent out of the Manor of S. then the Grantor ſhall be twice charged; For if the Grantee brings a Writ of Annuity, this ſhall extend only to the Manor of S. For upon the Grant of a Diſtreſs in the Manor of S. no Writ of Annuity lies, becauſe the Manor of S. is only charged, and not the Perſon of the Grantor as to this; And for this Cauſe the bringing of a Writ of Annuity cannot diſcharge the Manor of S. of any Rent; And ſo the Law, by Conſtruction againſt the Words and the Intention of the Parties, ſhall do Injury to the Grantor to charge him twice. 3dly, If in ſuch Caſe the Manor of S. in which the Diſtreſs is only limited, ſhall be in another County; then it has been often adjudg'd, That the Rent ſhall not iſſue out of the ſame, but the Diſtreſs ſhall be as a mean and Remedy to compel the Tenant of the Land to pay the Rent. And it was ſaid, That there was no Diverſity in Reaſon, that the Law in Conſtruction ſhall make the Rent to be iſſuing out of this, when it lies in the ſame County; and not when it lies in ſeveral Counties: For the Words in both Caſes are all one. Co. Litt. 147. a. — 7 Rep. 24. a. Per Cur. accordingly. Trin. 42 Eliz. C. B. in Butt's Caſe.

3. If Lord and Tenant are by Fealty and Rent, and the Lord grants the Rent to another with Clauſe of Diſtreſs, and the Tenant attorns; This is a Rent-Charge iſſuing out of the Land. 1 E. 3. 21. 27, 28. Adjudg'd.

4. If a Man grants a Rent Cum Clauſula Diſtrictionis, this is not a Rent-Charge, becauſe it is not expreſly granted, if the Rent be arrear that he ſhall diſtrain. 11 H. 6. 41. b.

(F) By what *Words* a *Diſtreſs* may be *limited*.

See (E) pl. 4.—(D) pl. 2.—Br. Grants, pl. 21 cites S. C. mentions the Words of the Grant to be thus, viz. *I oblige myſelf to A. B. and E. his Wife, and the Heirs of their Bodies Iſſuing in the annual Rent of* 10 *l. which I receive of my Manor of T. and I oblige my Manor aforeſaid, and all my Goods and Chattles in my Manor aforeſaid being, ad Diſtringend. per Ballivum Domini Regis*, omnibus Appellatis revocatis & aliis Juriſdict. Renunc. &c. And ſays it was adjudged a good Grant by the Words aforeſaid, and that the Party or his Bailiff might diſtrain notwithſtanding theſe Words (*Ballivum Domini Regis*) See, that theſe Words (my Goods and Chattles in the ſaid Manor being) is a good Diſtreſs; quod Mirum; for when the Party is dead, he has no Goods, and Mirum of this Word (*Baldituin quem percipio*) for it ſeems that after his Death or Leaſe determined, the Rent is determined: but quære if it be not *intended a Rent of the Franktenement of the Manor*; for it ſeems ſo, and alſo the Clauſe of Diſtreſs ſhall not go to the Heirs by any Word above.——Br. Obligation, pl. 10. cites S. C.——Br. Charge, pl. 5. cites S. C. And ſays, Quod Mirum in ſome Points.——Br. Expoſition of Words, pl. 10. cites S. C.

1. If a Man grants Rent out of the Manor of D. and further binds the Manor aforeſaid, & omnia Bona & Catalla ſua in Manerio prædicto exiſtentia ad Diſtrictionem; this is a good Rent-charge to be levied of the Goods and Chattels of the Manor. 46 E. 3. 18. b.

2. *A.* was *ſeiſed of Lands in B.* and *granted* 5 Marks *Rent out of thoſe Lands to C. for Life*, the *Remainder to R. for Life*, and after C. died, and A. the Grantor *releaſed to R. and his Heirs all his Right in the Rent*, and that if it happen the Rent aforeſaid be behind at the Terms &c. *it ſhall be lawful for R. his Heirs and Aſſigns, to diſtrain in the ſaid Tenements* &c. And it was alledged that by the Death of C. the Rent was ended and determined by Skrene and Martin; for Rent which *had not Eſſence before* cannot remain; but Gaſcoigne and Huls awarded the Grant good, that he

he and his Heirs may diſtrain, and ſo affirm'd the firſt Judgment; for if *Rent* be granted *for Term of Life, and that the Grantee and his Heirs may diſtrain*, he has a Fee; quod nota; that the Clauſe of Diſtreſs founds in a *new Grant*. Br. Grants, pl. 26. cites 8 H. 4. 19.

3. If a Man *grants a Rent with Clauſe of Diſtreſs*, he ſhall not diſtrain without more. Br. Garranties, pl. 85. cites 11 H. 4. 41.

4. A. grants a Rent-Charge payable at ſuch a Day out of ſuch Lands, and ſays if it happen the ſaid Rent to be Arrear ſuch a Days, and *no Diſtreſs in the ſame Land then being found*, that he may enter and retain &c. theſe are implicative Words only, and Grantee can't diſtrain by Virtue of them. Ben. 19. pl. 29. Patch. 27 & 28 H. 8.

5. In Ejectment one made a *Leaſe for Years of Land, Part Fee-ſimple and Part in Leaſe for Years reſerving Rent*, and that *if it ſhould be behind* 40 Days, that *it ſhould be lawful to reſtrain*; and if there ſhould not be ſufficient thereon, then to re-enter on the ſaid demiſed Premiſes. Reſolved that this Word Reſtrain is not limited to any Thing which ſhould be Reſtrained, as in Land or Cattle &c. and therefore it ſhall not be taken for Diſtrain. Mo. 848. pl. 1151. Hill. 13 Jac. Moody v. Garnon.

Cro. J. 302. S. C. by the Name of Wood v. Garnons, and ſays that Coke Ch. J. held that (*Reſtrain*) was as much as to ſay (*Diſtrain*) and that it ſhall be accepted to be of the ſame Senſe. Sed Adjornatur ——3 Bulſt. 152. S. C. Mich. 13 Jac. Coke held accordingly, That by the Word (Reſtrain) he might diſtrain. But afterwards Paſch. 14 Jac. the Caſe being argued again, Coke held, That becauſe pounding was mentioned for him to reſtrain, it was not good.—Roll. Rep 330. S. C. and there Doderidge J. held, That had the Diſpute been only for the Rent, he would have interpreted the Word (Reſtrain) to amount to Diſtrain, but the Queſtion now is of a Condition to defeat an Eſtate.

(G) *To whom* the Diſtreſs may be *limited*.

1. IF Rent be granted to B. out of D. and bind this to the Diſtreſs by the Bailiff of the King; this is a good Limitation of the Diſtreſs, but this does not give any Benefit to the King; but the Bailiff is in this a Stranger to the Grantee. 46 E. 3. 18. b.

Br. Grants, pl. 21. cites S. C.—— Br. Charge, pl. 5. cites S. C.——

S. P. Co. Litt. 142. a.

2. If a Man grants a Rent to another out of Land, and if the Rent be behind, that a Stranger by Name ſhall diſtrain for it; this Diſtreſs is of no Value. 30 Aſſ. 26. Per Cand.

3. If the Diſtreſs be limited to a Stranger for the Benefit of the Grantee of the Rent, yet the Grantee himſelf may diſtrain for it; for the Stranger is but Servant in this, and what he may do by his Servant he may by himſelf. 46 E. 3. 18. b.

4. If a Man deviſe Land to another, to find 12 Marks for a Chaplain to Chant for his Soul in the Church of D. and that if it be Arrear, the Pariſhioners of D. may diſtrain for it; this is good by Uſage and Cuſtom of the Place, to compel him to pay it. 20 Aſſ. 26. adjudged.

5. If *A.* be *ſeiſed of certain Lands*, and *A. and B. join in a Feoffment* in Fee *reſerving* a Rent *to them both and their Heirs*, and the *Feoffee grant that it ſhall be lawful for them and their Heirs to diſtrain* for the Rent; this is a good Grant of a Rent to them both, becauſe he is Party to the Deed, and the Clauſe of Diſtreſs is a Grant of the Rent to A. and B. Co. Litt. 213.

But if B. had been a Stranger to the Feoffment, it had been void. Co. Litt. 213. b.

(H) *Out*

For 476. (H) *Out of what Land* the Rent ſhall be *ſaid to be iſſuing.*

Co. Litt. 147. a. 1. If a Man grants a Rent out of Land in one County, and that if the Rent be Arrear, he ſhall diſtrain in his Land in another County; this Rent iſſues out of the Land out of which it is granted, and not out of the Land where the Diſtreſs is limited; for the Diſtreſs is limited but for the greater Surety. 31 Aſſ. 27. adjudged. Co. 7. *Butts* 23. b. 41 Aſſ. 3. adjudged.

Co. Litt. 147. a. 2. So it is if the Diſtreſs be limited in Land in the ſame County. Co. 7. *Butts* 23. b. 17 E. 4. 6. b. 41 E. 3. 15. b. 41 Aſſ. 3. adjudged.

*Br. Charge, pl. 17. cites S. C.—— Br. Aſſiſe, pl. 105. cites S. C. where the Grant was of 20 s. Rent out of an Organge of Land, to be taken by the Hands of the Tenant of the ſame Land, and that if the Organge happen to be alien'd, ſold, or come to the Lord by Eſcheat, or that the Rent be any Way retarded, that he may diſtrain in the Manor of D. The Organge was alien'd, and the Rent Arrear, and yet the Writ abated in Aſſiſe, becauſe the Organge was not named

3. So if a Man grants a Rent out of certain Land, and if the Rent be Arrear, that he ſhall diſtrain in other Land in the ſame County, the Rent iſſues out of the Land out of which it is granted, and not where the Diſtreſs is limited. * 1 Aſſ. 10. 1 E. 3. 21.

And it is no Double Charge, neither is the Rent iſſuing out of the other Land, but only payable there; nota. Br. Charge, pl. 22. cites 22 Aſſ. 1

4. If the Tenant, who holds by certain Rent, acknowledges it by Fine to the Lord, and binds himſelf to pay it in other Place than the Land held, yet this Rent iſſues out of the Land held. 20 Aſſ. 1. adjudged.

Mo. 544. pl. 723. Paſch. 39 Eliz. by the Juſtices were divided in Opinion, Et ſic pendet, after ſeveral Arguments at Bar and Bench.

5. If a Man ſeiſed of Freehold Land, and alſo of Copyhold Land, and by Licence of the Lord makes a Leaſe of both, reſerving a Rent; this Rent ſhall iſſue out of the Copyhold Land as well as out of the other Land; for a Rent may be reſerved out of Copyhold Land, and it is ſuch a Thing to which Ward may be had for a Diſtreſs. Bulk. 40. 41 Eliz. B. R. between *Collins and Harding*, adjudged by 3 againſt 1.

—— Cro. E. 606. pl. 6. Paſch. 40 Eliz. B. R. Popham held, that the Rent ſhould be iſſuing out of the Freehold Lands, becauſe that is the moſt worthy, and of which the Common Law takes Conuſance; but all the reſt of the Juſtices ſpoke not to that Point; Sed Adjornatur. —— Ibid. 662. 663. pl. 15. Mich. 41 & 42 Eliz. B. R. the ſame Caſe came on again, and Popham held his former Opinion; but Gawdy, Fenner, and Clench held, That being made by the Lord's Licence, with one of the Reſervation, it iſſued out of both —— But by Dyer, Paſch. 5 Eliz. in ſuch Caſe (No Mention being made of any Licence granted by the Lord) the whole Rent is iſſuing out of the Land, per Common Law; for the Leſſor (by Law) not having ſuch Licence, has no Power to make ſuch Leaſe of the Copyhold, and therefore, as to that, the Leaſe is utterly void. Mo. 50. pl. 150. Anon.

6. If a Man *grants 20 s. Rent out of his Manor*, viz. 10 *s. by the Hands of A. and* 10 *s. by the Hands of B.* yet one and the ſame Aſſiſe lies, and the intire Manor is charged. Br. Aſſiſe pl. 476. cites 15 Aſſ. 11. and Fitz. Charge, 6.

7. In Aſſiſe of a Corody, it was ſaid for Law, that if a Charge be granted *to take of a Priory*; all their Poſſeſſions ſhall be charged by this Term Priory. Br. Charge, pl. 25. cites 29 Aſſ. 8.

8. If a Man *holds* 10 *Acres* of his Lord *by* 12 *d. and* 1 *Acre by* 1 *d. by ſeveral Tenures*, and he *confirms the Eſtate of the Tenant in both to hold by* 4 *d. This cannot make one and the ſame joint Tenure*, which was 2 Tenures before; and if this ſhall enure, it ſhall be to give 2 d. out of the 10 Acres, and 2 d. out of the 1 Acre, of which iſſued but 1 d. before; therefore Quære inde, and Quære, if it cannot enure to have 1 d. out of the 1 Acre, and 3 d. or the whole 4 d. out of the other 10 Acres. Br. Confirmation, pl. 1. cites 9 H. 6. 9.

9. In

9. In a Writ of Entry in Nature of Aſſiſe of Rent, it was granted, that where the *Prior and Covent of J. granted an annual Rent* of 40 s. to the Maſter and Confreres of R. from the Houſe and Monaſtry of J. to be paid at ſuch a Feaſt &c. that this ſhall charge the Houſe, and is iſſuing out of the Houſe, and the Houſe and Land upon which it ſtood were put in View. Br. Charge pl. 14. cites 9 E. 4. 20.

And if the Rent charge be granted to the Lord, the Land ſhall be charged. Br. Charge pl. 43 cites 9 E. 4. 20.

So it is where ſuch Charge is *out of a Mill*, and *after the Mill falls*, the Land upon which it ſtood ſhall be charged. Br. Charge pl. 43 cites 9 E. 4. 20.

10. A. has Land *named C.* and alſo Land adjoining, which by Continuance of Occupation has been *called C.* and he charges his Land called C. This ſhall not iſſue out of C. but out of the Land adjoining, called C. Arg. per Clerk J. and Gent was of the ſame Opinion. Mo. 230. pl. 367. Hill. 29 Eliz. in the Exchequer in Fanſhaw's Caſe.

11. A. ſeiſed of *Bl. Acre in Fee*, and poſſeſſed of *Wh. Acre for Years*, grants a Rent out of both to B. *for Life with Clauſe of Diſtreſs in both.* This Rent iſſues only out of the Land in Fee, tho' Wh. Acre is charged with the Diſtreſs; and if B. *takes Leaſe of and Part of Wh. Acre*, it is no Suſpenſion of the Diſtreſs, but that B. may diſtrain in the Reſidue; For this is *not iſſuing out of but to be taken upon* Wh. Acre. Trin. 42 Eliz. C. B. 7 Rep. 23. b. 24. b. Butt's Caſe.

The Rent iſſues out of the Freehold only; Becauſe the Rent being granted for Life is a Freehold. But if he had granted the Rent out of the Leaſehold Lands for the Life of B. then it had iſſued out of the Term, and the Land has been charged during the Term, if the Grantee had lived ſo long Co. Litt. 142. b

12. A Biſhop ſeiſed of the Manor of S. *held 20 Acres Parcel of the Manor to B. for 3 Lives rendring Rent*; and afterwards *during the Lives leaſed all the Manor to C* rendring the ancient Rent. And it was adjudged (Hobert and Winch being only preſent) that the Rent reſerved upon the Leaſe to C. iſſued out of the intire Manor; For if in Debt for the Rent the Leſſor *counts upon a Demiſe of the Manor, excepting the Reverſion of this Parcel*, the Declaration is ill, and upon Non Dimiſit pleaded, it ſhall be found againſt him. Winch. 46. 57. Mich. 20 Jac. C. B. Gloucester (Bp) v Wood.

13. Leaſe for Years of *Land in Poſſeſſion, and other Land in Reverſion*, rendring Rent, the Rent iſſues intirely out of both; and before the Reverſion falls into Poſſeſſion, a Diſtreſs may be taken upon the other Land in Poſſeſſion for all the Rent. Jenk. 254. pl. 46.

B. ſeiſed of 2 Acres, one whereof is in Leaſe to A. for Years B. makes a Leaſe of both to a Stranger to have the *one in Poſſeſſion, the other in Reverſion*, rendring 20 s. Rent yearly intirely; Now this Rent ſhall *iſſue out* of that in Poſſeſſion during the Term in A. and after it ſhall iſſue out of the Whole as one Entire Rent. Per Tanfield J. Lane 118. Hill 8 Jac. in the Caſe of Sawyer v. Eaſt.

14. If I make *Gift in Tail*, *Remainder in Tail rendring Rent*, the Rent goes out of both, but if *to A. in Tail rendring Rent Remainder to B.* then it goes only out of the Eſtate Tail of A. Arg. Litt. R. 298. Trin. 5 Car. in Beck's Caſe.

(H. 2) Nature of Rent. Where the *Rent* ſhall be *of the ſame Nature* of *the Land* out of which it iſſues.

1. RENT *reſerved upon Equality of Partition*, the Tenant may diſtrain for it of Common Right, viz. the Coparcener to whom it is reſerved. Per Newton Ch. J. and Paſton J. and yet Paſton ſaid, That it is not properly a Rent-charge. Br. Rents pl. 6. cites 21 H. 6. 11.

2. If Rent be *granted out of Land*, which is cuſtomary, as *Borough-Engliſh*, *Gavelkind*, or where Dower is of the Moiety &c. the Rent ſhall be of the Cuſtom and Nature of Land, tho' the Rent be granted out of the Land within Time of Memory, or at this Day, which was ſaid by Fitzherbert and divers Serjeants, and not much denied, and therefore in Demand of the Rent by Præcipe or Replevin, Ancient Demeſne of the Land is a good Plea; And Fitzh. vouch'd 4 E. 3. That a Feme was endow'd *of the Moiety of the Rent by Reaſon of the Cuſtom of the Land out of which* the Rent aroſe. Br. Rents, pl. 20. cites 14 H. 8. 5.

Condition. (Z. c)

(I) In what Caſes a *Demand is neceſſary* [*and if upon the Land or not.*]

1. IF a Man grants a Rent to another payable at certain Feaſts, and that if the Rent be Arrear at the ſaid Feaſts &c. being lawfully demanded it ſhall be lawful to diſtrain, tho' the Grantee does not demand the Rent at the Feaſt when it is due, yet he may demand it any Day after, and then diſtrain. Co. 7. *Mund.* 28. b. adjudged. Mich. 40, 41. Eliz. B. between *Stanley and Reed.* cites Co. Litt. 144. and in Mound's Caſe.

2. [So] if a Man grants a Rent to another, and grants further, that if the Rent be Arrear being lawfully demanded, it ſhall be lawful for him to diſtrain, he may diſtrain for the Rent before any actual Demand made of it; For the Diſtreſs is a Demand in Law, and the Words of the Grant are, That it ſhall be lawfully demanded; ſo that it is referred to the Law to judge what ſhall be a lawful Demand; For it does not appear that he intended an actual Demand. Hill. 15 Jac. B. R. between *Simmons and Allen* adjudged, this being moved in Arreſt of Judgment, tho' the Court held e contra the Term before, and in this Caſe three Precedents were ſhewn. Hill. 1 Ja. B. Rot. 818. adjudg'd upon a Demurrer between * *Inche and Langford.* 11 Ja. B. *Huddleſton and Tetnam* adjudged.

* S. C. cited as Hill. 1 Jac. C. B. accordingly. Mo 883. pl. 1238. in the Caſe of Kingſwell v. Crawley.

If the Rent is reſerved payable at a Place off the Land, *the Law requires no Demand; But if the* * Fol. 427. *Deed mentions a Demand* at a Place off the Land, then Demand muſt be according. And 125. in the Caſe of * Dennis v. Boſden. S. C. cited Hutt. 23. in the Caſe of

3. If a Man grants a Rent-charge to another to be paid at a Place out of the Land, ſcilicet in Gray's-Inn-Hall, and grants further, That if the Rent be Arrear by 30 Days next after the Feaſts &c. being lawfully demanded at Gray's-Inn-Hall aforeſaid, then it ſhould be lawful for the Grantee to diſtrain. In Replevin, if Defendant avows the the Diſtreſs in the Land, and alleges no Demand of the Rent at Gray's-Inn-Hall it is not good; For the Diſtreſs upon the Land cannot be any Demand at Gray's-Inn-Hall * where it is no Ways appointed to be demanded. Hill. 7 Car. B. R. between *Darby and Walſh* adjudged in Writ of Error, and a Judgment given in Mich. reverſed accordingly. Intratur. Mich. 6 Car. Rot. 339. Mich. 16 Car. B. R. between *Selden and Shirley.* Per Curiam in Writ of Error upon Judgment in Bank e contra and the Judgment reverſed accordingly. Intratur Hill. 15 Car. Rot. 1249. But it appears that the Judgment was not enter'd. Hobart's Reports 280. Contra Tr. 3 Car. B. Rot. 2865. Per Curiam between *Brewſter* Plaintiff, and *Bacoden* and *Brown* Defendants upon Demurrer; But after the Demurrer waived, and Plaintiff confeſſed the Grant of the Rent, and that it was Arrear according to the Avowry, and thereupon Judgment given againſt the Plaintiff and Defendants to have Re-

turn

turn. Tr. 8 Car. B. Rot. 333. Sir *J. Lamb's* Case. Per Curiam upon Demurrer; but no Judgment entered.

Kidwelly v. Brand, by the Name of

Lofden v. Downes Pl. C 70. b. Kidwelly's Case.—D. 68. pl. 23. Kidwelly v. Brand.—Cro. C 555. Smith v. Smith.—Contra Co. Litt. S 325. 202. says, That it is in Law a Rent, and the Leffor may demand it at the Place appointed by the Parties at the moft notorious Place there. —— 4 Rep. 73. according to Co. Litt. Borough's Case ——— Hob 330. accordingly. Hanfon v Norcliff.

Leafe of *Tithes* reading Rent at a Place certain out of the Parifh with Claufe that the Leafe *fhould be void on Non-payment*. Adjudged that Leffor ought to make Demand at the Place, and then on Non-payment the Leafe is void. Mo 408. Tufking v. Edmonds.—Cro. E. 415. S.C —— Adjudged in Error Cro. E. 535. S. C ——— S. C. cited Arg. 2 Jo 33. ——— Noy 145. Anon. S C Walmfley faid, The Leffor fhall not be compelled to feek the Leffee, and demand the Rent of him; but the Leffee ought to feek the Leffor, and fo it hath been ruled before that Time. Daniel agreed expreffly, and Warberton non dedixit.

4. If Lord and Tenant be by certain Rent payable at a certain Day, if the Tenant tenders the Rent upon the Land at the Day, and none comes on the Part of the Lord to receive it, yet the Lord may diftrain for it upon the Land without any Actual Demand made to the Perfon of the Tenant; For a Rent-Service is always in Demand, and the Place for the Demand is the Land out of which it iffues, and it is not any corporal Service to be done to any Perfon or by any Perfon and the Tender of the Tenant cannot alter the Place of the Payment; For the Tender of fuch Rent is not material till a Demand. Hil. 15 Ja. B. between *Cranley and Kingfwell* Adjudged upon a Demurrer in a Replevin. Hobart's Reports. 281. Same Case.

Crawley v. Kingfwel Hutt. 13. S C agreed accordingly, that the Tender by the Tenant upon the Land at the Day is fufficient; But if he had tender'd it when the Leffor was not upon the Land, it would not be fufficient.

taken, the Taking fhould be * tortious.—* S.P Noy 23. in the Case of Forteficue v Jones.—— Pafch. 15 Jac adjudged accordingly. S C by Name of Cranley v. Kingwell. —— Noy 23. S C. the Lord avow'd the Diftrefs for Fealty due from D. the Tenant faid that D. was dead at the Time of taking the Diftrefs; And this was held by the Court to be a good Plea. But by Hobart if the Land demands the Fealty of D. and he refufes and dies, yet the Lord may diftrain after his Death. —— Cranley v. Kingfwell Hob 220. pl 261 S.C adjudged accordingly; and Hobart faid, That *the Law fays in both a Demand and a Diftrefs*, and if the Tenant be there, and offer the Rent, he may not diftrain, and therefore the Rent being due, and the Lord anfwerable, he may demand it when he will at the Land: But where a *Penalty or Rent* is joined to the Thing, there you can not take Advantage of the Pain or Forfeiture, without a Demand at the very Time referv'd. And the Mifchief were Great, for by this Conceit, if the Lord did not demand his Rent at the very Day, he fhould never diftrain after, without an Actual Demand of the Perfon of his Tenant; But if the Tenant tender his Rent at the Day, or after to the Perfon of his Lord and he refufe it, I am of Opinion, That he fhall not after diftrain without a Demand of the Perfon of his Tenant; But the Cafe of a Rent-Seek Maund's Cafe, Coke lib. 7. 29 differs; for there, if Rent be not demanded at the Day, it muft after be demanded of the Perfon; for there is no Remedy for that Rent, but an Affize. Now a Man cannot be a Diffeifor, nor Damages laid upon him without a wilful Fault.

S. P. And afterwards, at another Day, the Lord demands it, and diftrains for it: and adjudged good; and recovers *Damages in the Avowry*. For the Rent was a Thing in Demand and not in Render. Noy 22. Forteficue v. Jones.

5. But if the Tenant tenders his Rent upon the Land at the Day, and after this tenders it to the Perfon of the Lord, and he refufes it, he cannot afterwards diftrain for it without a Demand from the Perfon of the Tenant. Hobart 281. Per Hobart.

6. An Action of Debt lies for a Rent referved upon a Leafe for Years without any Demand. Tr. 13 Ja. B. R. Per Coke, faid to be *Moffes Dane's* Case. Adjudg'd.

If Leffee be *bound to pay* the Rent at the Day, he muft do

tender at the Day before Demand; But otherwife it is, where Leffee is bound *to perform Covenants*. Roll Rep. 216 Trin. 15 Jac. B R. Moffes Dane's Case.

7. If I diftrain my Tenant for Rent, and he is ready upon the Land, and tenders the Rent to me, and I will not take it, but leave the Diftrefs with him, yet I may diftrain at another Day for the fame Rent. 2 Bl. 6. 31. Per Reeves.

8. If the Tenant or Leffee tenders his Rent to the Lord or Leffor [illegible] tenders it,

at the Day of Payment upon the Land, and he refufes it, yet he may after

the Lessor at the Day of Payment, he can't distrain for this Rent without Demand of the Person of the Lessee.

after Distrain for it without any Request to the Person of the Tenant or Lessee; Because it is not any Corporal Service, but issues out of the Land. 20 H. 6. 31.

Jenk. 20. pl 38 cites 30 Ass. pl. 38.

9. And in the preceding Case the Lord or Lessor may distrain for the Rent without any Demand upon the Land for the Rent; For the Distress is a Demand in it self. Contra - E. 4. 4. 20 H. 6. 31.

10. If a Man seised of a Rent-Seck, payable Annually at the Feast of Easter, and at the Feast no Demand or Tender is made of the Rent, yet he may come after the Feast to the Land and demand the Rent, tho' the Tenant be not there; yet if none be ready to pay the Rent, this is a Denier in Law, upon which an Assise lies, inasmuch as no Penalty enures upon it; but is only to recover the Rent with Damages and Costs. Co. 7. *Maund.* 28. b. Resolved.

11. But in the said Case if the Tenant be at the last Instant of the Feast ready upon the Land to pay, and he who has the Rent, nor any for him, comes to demand or receive it; In such Case he that has the Rent cannot come in the Absence of the Tertenant and demand it, and so make him a Disseisor, and render Damages and Costs, without any Default in him. Co. 7. *Maund.* 29.

Fol 428.

12. But in the said Case, he who has the Rent, because Default was in him, ought to make a Demand of it upon the Land of the Person of the Tenant. Co. 7. *Maund.* 29.

13. But in the said Case a Demand of the Person of the Tenant of the Land, out of the Land, is not sufficient to make him a Disseisor.

14. But in the said Case, at the next Feast, if he who has the Rent demands the Rent with all the Arrearages upon the Land, tho' it be in the Absence of the Tenant of the Land, yet this shall be a Disseisin in Law to have Assise for the Rent and all the Arrearages, with Costs and Damages. Co. 7. *Maund.* 29.

15. If a Man has Seisin of a Rent-Seck he ought to demand the Rent upon the Land out of which it is to be paid, to make a Disseisin upon which to maintain an Assise; For a Demand of the Person of him who ought to pay it out of the Land is not sufficient. Mich. 11 Car. B. R. between *Monroe* and *Price*. Per Curiam. In Writ of Error upon a Judgment given in Wales, where was found by Assise a Demand made, but not, where it was made and agreed per Curiam, it ought to be in Law upon the Land. But the Doubt was, Whether this shall be intended upon the Verdict. But after it was compounded.

16. Rent *assign'd for Dower, on Condition*, That the Feme on Non-Payment shall be reentr'd, need not be demanded by the Feme. D. 348. Marg. pl. 13. cites 38 Eliz. C. B. Wentworth's Case.

S. C. cited per Cur Hett. 61. as adjudg'd. — Mo. 628. pl. 868. Speckot v. Shore — But there it is stated as an Obligation for Performance of Covenants in a Deed, reciting Rent, and

17. Debt upon an Obligation. The Defendant *granted a Rent-Charge* out of his Land to the Plaintiff of 20 s. per Ann. for 10 Years, *and was bound in* 10 *l. with a Condition*, That *if he performed the Covenants* and Agreements *in the said Deed; Ita quod, The Obligee might have* and enjoy *the Annuity according to the Intent of the Deed*, that then &c. The *Annuity was arrear* at such a Feast, *but not demanded* by the Grantee, *nor tender'd* by the Obligor; And if hereby the Obligation be forfeited, was the Question; And it was holden, That it was not; For the Obligation being for the Performance of Covenants generally &c. shall not alter the Nature of an Annuity; but that it is payable, as if there had not been any Obligation. Cro. E. 828, 829. Pasch. 43 Eliz. C. B. Speccot v. Sheres.

the Breach was assign'd in Non-Payment of the Rent; But the Tenant reply'd, That the Rent was not demanded; and held good. But otherwise, had there been a Special Covenant for Payment; For then the Obligor must have pleaded the Tender specially.

If

Rent is reserved on a Leaſe for Years, in which are diverſe Covenants and a *Power for Re-entry* of all the Covenants in ſuch Leaſe, and the Rent is behind. The Bond is not forfeited, tho' the Leſſee makes a Demand for the Rent, becauſe he is to do the firſt Act, viz. To demand the Rent. Ney. Godb. 337. in the Caſe of Killigrew v. Harpur. — cites 22 H. 6. 5. — Cro. E. 332. Andrews v. Wood. Contra Sed Adjornatur.—If Leſſee gives Bond to pay the Rent, he muſt pay it without Demand, but his tendring it on the Land is ſufficient, unleſs other Place is limited. Hob. 8. in the Caſe of Baker v. Sparn

Rent payable off from the Land, and Leſſee *bound in Condition to pay* the Rent *Secundum formam & effectum Indenturæ prædict'*. Held per Cur. That the Leſſee ought to pay the Rent at his Peril without Demand. Noy 16. Anon. — Noy 53. Anon. makes a Difference, where the Leſſee is bound *to perform all Covenants in the Indenture*, and where the Bond is *expreſly to pay the Rent*. In the firſt Caſe the Leſſor need not demand the Rent; otherwiſe in the laſt. And Walmſly ſaid, That it had been ſo adjudg'd in this Court. Cites 22 H. 6. 57. — Hutt. 114. S. C. cited

18. Leaſe for Years, rendring Rent, and *in Default of Payment the Leaſe to be void*; Tho' the Rent is not paid, the Leaſe is not void without a Demand of the Rent; and upon Demand the Leaſe is void without an Entry. But otherwiſe of a Leaſe for Life. Jenk. 121. pl. 43. Mo. 291. Sir Moile Finch's Caſe.

19. In an *Avowry for a Rent-Charge* Demand is not neceſſary, tho' it was expreſs'd in the Grant, That *(it being demanded)* he may lawfully diſtrein; Agreed per Cur. and that the Diſtreſs is a Demand. Hutt. 23. Kind v. Ammery. — and cites it ſo reſolv'd in the Caſe of Beryman v. Bowyer. But if the Grant had been, That if it be Arrear at ſuch a Feaſt, and for a Month after Demand, that then he may diſtrain, it is otherwiſe; For there the Diſtreſs is *limited to a Month after Demand*. Ibid. And ſays, That it was ſo adjudg'd Trin. 3 Car. in the Caſe of Coppledike v. Langford.

20. In Replevin &c. one *granted a Rent out of* certain *Lands to be paid at a Houſe off from the Lands, and* that *if* it were *behind, and lawfully demanded at the Houſe, then the Grantee may diſtrain.* The Queſtion was, *Whether he might diſtrain* on the Land *without a Demand* of the Rent? It was inſiſted, that a Diſtreſs is a Demand in Law. Crawley J. inclined that there needed no Demand; but the other Juſtices, and Banks Ch. J. inclined that there muſt be a Demand; and Banks ſaid, That it is Part of the Contract, and like a Condition precedent; and as in that, ſo in this, he ought to make a Demand to enable him to diſtrain; for till then he is not enabled by the Manner of the Grant (which ought to be obſerved) to make a Diſtreſs. Mar. 147. pl. 218. Trin. 17 Car. C. B. Selden v. King.

(K) *What* ſhall be *ſufficient* Demand. *At what Place.* See (L)

1. If a Man demands a Rent upon the Land, he need not demand it of the Perſon of any Man. 29 Aſſ. 52.

2. If a Man demands a Rent iſſuing out of Land upon which there is a Houſe, he ought to demand it at the Houſe. 49 Aſſ. 5.

3. Leaſe of two *Barns*, rendring Rent; and for Default of Payment a Re-entry, if the Tenant be at one of the Barns to pay, and the Leſſor at the other to demand the Rent, and none there be to pay it, yet the Leſſor cannot enter for the Condition broken, becauſe there was no Default in the Tenant, he being at one; for it was not poſſible for him to be at both Places together. Poph. 58. 3 & 4 Eliz. Anon. S. P. D. 322. Marg. pl. 13. cites 30 Eliz.

4. If *Rent Seck* is granted, payable at a Place *off from the Land*, yet it may be well demanded upon the Land, and is not like a Rent reſerved on a Leaſe with a Clauſe of Re-entry. Cro. E. 324. Paſch. 36 Eliz. B. R. Biſhop v. Grant. Pl. C. 71. S. P. 173. Note in Kidwel. Caſe.

5. *Bond for Payment* of Rent reserved is not forfeited, unleſs there be a Demand of the Rent upon the Land; but if the Bond be to pay the Rent at a Collateral Place *off the Land*, it is otherwiſe. Per Popham. Ow. 111. Paſch. 38 Eliz. B. R. in Caſe of Stroud v. Willis.

6. A Demand of Rent *of the Tenant out of the Land*, is not ſufficient; but if *there is a Houſe and Land*, a Demand of Rent *on the Land*, is ſufficient; but for a Condition broken, it ought to be at the Houſe. Co. Litt. 153.

7. If *one Place* be *as notorious as another*, the Feoffor has *Election to* demand it at which he will, and albeit the Feoffee be in ſome other Part of the Wood ready to pay the Rent, yet that ſhall not avail him. Et ſic de Similibus. Co. Litt. 202. a.

See (K)

(L) *At what Place* it is to be demanded.

It ought to be demanded at the Place where it is limited to be paid; for the limiting the Payment of the Rent, out of the Land, does not alter the Nature or Quality of the Rent, nor of any Thing incident thereto, but it is to all Intents a Rent iſſuing out of the Land, and not a Sum in groſs; for it paſſes with the Reverſion as incident thereto, and ſhall be ſuſpended by Entry of the Leſſor into any Part of the Land demiſed, and ſhall be apportionable by Recovery of Part in Waſte, or Entry into Part for Forfeiture &c. and ſhall have all other Qualities of a Rent, as if it had been payable on the Land; and therefore the Opinion in Bromflip's Caſe, Pl. C. 70. that he in Reverſion might enter for Non-payment of ſuch Rent, without any Demand, was utterly denied per tot. Cur. in this Caſe; and they ſaid it had often been adjudg'd contra. 4 Rep. 73. a. Borough's Caſe.

1. If a Rent-ſervice be reſerved to be paid at a Place out of the Land, he need not demand it upon the Land, but it is ſufficient at the Place where it is to be paid. P. 5 Ja. B. R. between *Knapp and Welch*, per Curiam. P. 32 El. B. R. between *Germin and Willis*, per Curiam adjudged. Cr. 39 El. in the Exchequer Chamber, between *Edmunds and Buskin* per Curiam, in Writ of Error, and there ſaid, that this was the Point adjudg'd in B. R. that is to ſay, that the Demand ought to be at the Place appointed for Payment. Cr. 39 El. B. R.

The Dean and Chapter of Chicheſter, made a *Leaſe* to R. the Leſſee of the Defendant, of Lands in Wiccombe, *rendring Rent payable at the Cathedral Church of Chicheſter*, upon ſuch a Condition; it was agreed by the whole Court, That the *Demand ought to be made in the Cathedral Church* of Chicheſter, although it was of the Land leaſed. And the Demand ought to be made at the Setting of the Sun the laſt Inſtant of that Day, and when he made his Demand *he ought to ſtand ſtill, and not walk up and down*; for the Law did not allow of walking Demands, as Popham ſaid, and he ought to make a formal Demand. And they held the Demand ought to be made *at that Part of the Church where the greateſt and moſt going in is*. Brownl. 138. Paſch. 5 Jac. Knap v Pier Jewelch.

2. If a Man leaſes for Years rendring Rent, payable out of the Land in the Church of D. or the Church of S. upon Condition, this ought to be demanded in both Churches. P. 5 Ja. B. R. between *Knap and Welch*, per Popham and Tanfield, becauſe the Leſſee has Election to pay it in either of the Churches.

3. So if a Man leaſes for Years, rendring Rent payable out of the Land, that is to ſay, at or in the Church of C. the Demand ought to be within and without the Church; for a Demand in the Church is not ſufficient, inaſmuch as the Leſſee has Election to pay it in the Church, or out of the Church. P. 5 Ja. B. R. between *Knap and Welch*, per Curiam.

4. The Demand muſt be *upon the Land*, becauſe the Land is the Debtor, and that is the Place of Demand appointed by Law. Co. Litt. 201. b.

Mo 404 pl. 540 Trin 37 Eliz. S. P.

5. If the *King makes a Leaſe* for Years, *rendring a Rent* payable at his Receipt *at Weſtminſter*, and after the King *grants the Reverſion* to another,

ther, and his Heirs, the *Grantee ſhall demand the Rent upon the Land*, and not at the King's Receipt at Weſtminſter; for as the Law without expreſs Words, appoints the Leſſee in the King's Caſe to pay it at the King's Receipt; ſo in the Caſe of a Subject, the Law appoints the Demand to be upon the Land. Co. Litt. 201. b.

and ſeems to be S. C. and adjudged accordingly, Paſch. 38 Eliz. Burrough v.

Taylor —— Goldsb. 124. pl. 9. Hill. 43 Eliz. S. C. adjudg'd accordingly —— Cro E. 462. pl. 13. S. C. Paſch 38 Eliz B. R. adjudged accordingly. —— 4 Rep. 72 b. S. C. by the Name of Borough's Caſe adjudg'd accordingly.

6. He cannot demand it at the *Back-door* of the Houſe &c. *But* the Demand muſt be *at the Fore-door*, becauſe the Demand muſt ever be made at the *moſt notorious Place*, and it is not material, whether any Perſon be there or no. Co. Litt. 201. b.

If the Feoffor for demand it *on the Ground at a Place which is not moſt notorious*, as at the Back-door of a Houſe &c. and in Pleading the Feoffor allege a Demand generally at the Houſe, the Feoffee may traverſe the Demand, and upon Evidence it ſhall be found for him; for that it was a void Demand. Co. Litt. 202. a.

7. Albeit the Feoffee be in the Hall or other Part of the Houſe, yet the Feoffor *need not but come to the Fore-door*, for that is the Place appointed by Law, albeit the * *Door be open*. Co. Litt. 201. b.

* It was held per Cur. That if one leaſes a Houſe rendering Rent, and for Non-payment &c. it is not ſufficient to demand the Rent at the Door of the Houſe, if it be open, but the Leſſor muſt enter into the Houſe, and there demand it; So if a Leaſe be made of Land, the Leſſor muſt enter into the moſt notorious Place of the Land, and there demand it, Ex relatione Fountaine, incerti Temporis. Cro. Eliz. 15. Paſch. 25 Eliz. C. B. Anon

8. If Feoffment be made of *a Wood* only, the Demand muſt be at the *Gate of the Wood*, or at ſome *High Way* leading thro' the Wood or other moſt notorious Place. Co Litt. 202. a.

S. P. D. 329. pl. 12 Mich. 15 & 16 Eliz. The Dean and Chapter of Chriſtchurch's Caſe.

9. If the Rent be *reſerved to be paid at any Place from the Land*, yet it is in Law a Rent, and the Feoffor muſt demand it at the Place appointed by the Parties, obſerving that which has been ſaid before concerning the *moſt notorious Place*. Co. Litt. 202. a.

10. The Biſhop of Exeter *leaſed* certain *Lands in the County of Devon* for Years, *rendring Rent* payable *in Exeter* aforeſaid, *with Clauſe of Re-entry*; and the *Biſhop had a Palace in Exeter* aforeſaid; It was the Opinion of the Juſtices in this Caſe, That the Rent ought to be demanded at the ſaid Palace, and not elſewhere; and that if the Leſſee *comes to the Common Gate of the ſaid Palace, and there tenders the Rent*, it is a good Tender without more, *be the Gate ſhut or open*, notwithſtanding that the Biſhop be within the Palace, and that neither he nor any of his Servants be at the Gate to receive it; for the Leſſee is *not bad* to open the Gate of the Palace, if it be ſhut; nor *to enter* into the Palace *if it be open*. 3 Le. 4. pl. 9. Mich. 4 and 5. Phil. and Mary in C. B. Eliot v. Newcomb.

S. C. accordingly, and in almoſt the ſame Words. Bend. 59. pl. 99. —— And 27, 28. pl. 63. S. C. accordingly, and in Terſidem Verbis. S. C. cited D. 329. pl. 12. Mich. 15 & 16 Eliz. ſays,

The Precedent was view'd, and it was of Lands in Cornwal; But the Rent made payable at Exeter without limiting any Place certain, and the Demand was alleged for the Biſhop to be *in domo Archi-Palatium Epiſcopi in Civitate Ex' & quod nullus illuc venit ad ſolvend.* &c. The Leſſee alleged a Readineſs to pay the Rent *Ad magnum & communem Portum Palatii prædicti*, and Iſſue was joined upon this Point and not upon the Demand, and found for the Leſſee againſt the Biſhop, who by his Servant made the Demand *In Aula Palatii tantum*. But the Demand in this Caſe was not material by the Opinion of the Juſtices in the Time of E. 6. in Bridewell's Caſe Ideo Caſus ſigna different &c.

11. *Aſſiſe* was brought of *Rent-Seck granted by A. to B. His Son in Law, iſſuing out of one House in L.* and *payable in another*. The Rent was demanded *at the House out of which it iſſued*; And the Queſtion was, If the Demand was good, being made there, and not at the Houſe where it was payable

payable. Reſolv'd by the Ch. J. and Cooke J. at the Aſſiſe, after Advice had with the other Judges, That it was a good Demand. Cro. C. 507. pl. 12. Trin. 14 Car. B. R. Smith v. Smith.

(M) *Place of Payment.* At what Place he is bound to pay or receive it.

2 Sid. 40. Hill. 1657. B. R. S. P.

1 THE Lord is not bound to receive the Rent in other Place than upon the Land. 20 H. 6. 30.

But the Suit appearing vexatious, the Court referr'd it. Hobbs v. Eſcot.

Br. Tender &c. pl. 6. cites S. C.— Br. Condition, pl 38. cites S. C.—

2. The Lord is not bound to receive the Rent in Court upon a Tender there, after he has avow'd for the Rent; Becauſe of Common Right Rent is not payable unleſs upon the Land. 7 H. 4. 18.

Br. Touts temps Priſt, pl. 35. cites S. C.

3. If the *King makes a Leaſe for Years rendring Rent, without limiting any Place, or to whoſe Hands it ſhall be paid*, the Leſſee may by the Law pay it, either at the Receipt of the Exchequer, or to the Hands of the Bailiffs or the King's Receivers authorized by him for that Purpoſe, and therefore the ſpecial and uſual Limitation for Payment of the Rent in ſuch Caſes, at the Receipt of the Exchequer, or to the King's Bailiffs or Receivers &c. imports no more than the Law would have implied, had they not been mentioned, and therefore are only Surpluſages. And tho' the Clauſe *at the Receipt of the Exchequer &c. apud Weſtm.* yet that being Affirmative and Declaratory, it is not requiſite that the Receipt be held at Weſtminſter; for if it be held in any other Place, the Rent muſt be paid in ſuch other Place; and this the Law implies. Reſolv'd 4 Rep. 73. b. Paſch. 38 Eliz. B. R. in Borough's Caſe.

Fol. 429.

(N) *At what Place* he may pay it.

1. A Rent iſſuing out of the Land, if it be paid and accepted at a Place out of the Land, is good. Contra 49 E. 3. 6.

2. If a *Place out of the Land is limited for Payment*, and there is a Proviſo of Re-entry for Non-payment, and Rent is paid by Leſſee at the Day, but not at the Place; if Leſſor once accepts, (he being privy to the Deed) it is a good Performance of the Condition. Where the Condition is to be performed to a Stranger, perhaps it might be otherwiſe. Per Powell. 3 Chan. Caſes 68. in Caſe of Bath v. Mountague, cites Co. Litt. 212.

(O) What

(O) What shall be a good *Discharge of Rent. Eviction.*

1. IF Lease for Years be, rendring Rent, Eviction by an elder Title shall be a good Discharge of all Rent which shall incur after. 20 H. 6. 20. b.

S. C. cited by Vernon J. 2 Vent. 63. but seems there mistaken, as 2 H. 6. 22. whereas it should be as in Roll here 20 H. 6. 20. b. and is pl. 15 —— S. P. *Fogassa*. Co. Litt. 325, 232. (5) —— *But not* of Rent *due before* the Eviction. 2 Vent. 65. in the Case of Burton v. Barclay.

In Debt for Rent upon a Lease for Years, but before any Rent due the Land was evicted by an elder Title, the Defendant *pradict.* *He ousted him and his.* He cannot give the *Lessee in Evidence*, but should have pleaded the Eviction Specially and concluded with Judgment si Actio. Per Dyer, Manwood and Mounson, and they deem'd the Opinion of the Prothonotaries to the contrary. 2 Le. 11. pl. 14. Hil. 29 Eliz. C. B. Wrigsley v. Beckford.

2. If Land be given to the Baron and Feme, and to the Heirs of their Bodies begotten, the Remainder in Fee to the Baron, and after the Baron alone levies a Fine Come ceo to the King, to the Use of the King in Fee, and after the King grants it in Fee to the Baron, rendring a Fee-Farm Rent; the Feme dies, and the Fee tail entered by Force of the Statute of 32, and is seised as of Fee and Right by the Death of the Son of the Baron in Right of the Feme, yet the King shall have the Fee-Farm Rent during the Life of the Feme; because Patents of this nature are to be taken strictly, and the King may distrain by his Prerogative in any other Land of the Heir for the Rent; but if the King is pleased the Patentee after the Death of the Feme, taking a New Patent by Petition, as Knight Edmonds 31. cites 2 E. 3. City of Dublin, *Bendl.* 2. Case. Sir Anthony Dalton's Reports. 5 El.

3. If Lessee for Years rendring Rent, and after certain Days incurr'd Disseisee re-enters, yet he shall not discharge the Rents incurr'd before, for Lease is not punishable by Destress for the Rent Demanded. 20 H. 6. 20. b.

S. C. cited 2 Vent. 63. by the Case of Burton v. Barclay —— See pl. 1

4. If a Man acknowledges a Statute to B. and after makes Lease for Years to Cestuy que Rent, and after the Statute is extended, he shall pay the said Rent entire, yet this shall not discharge any Rent due before the Execution executed. Dalton's Reports 113. Mich. 41 *Eliz. Rot.* *Grekham* and *Sir Fitzherbert.*

Hob. 234. pl. 305. S. C.

5. Debt upon a Lease of a Ward, rendring 20 l. Rent per Ann. till full Age, by Deed, the *Defendant said, That the Plaintiff had no Estate of the Ward of the Gift of H. N. for his good Service*, and that *before any Rent due to the Plaintiff he ousted him of the Service of the said Ward*, by which the said N. entered, judgment si Actio, and a good Plea. Br. Dette, pl. 59. cites 45 E. 3. 8.

S. where by the Intestate's Death the Lease shall not go to the Executor. Ibid. — S. where a Man enters upon the Lessee. Ibid.

See and Lease for a Condition depending upon the Estate of the Lessee.

6. *Debt upon a Lease for Years of a Vicarage of S. for 2 Years* rendring 10 l. per Ann. and for the Arrears of the 2 Years he brought the Action; The *Defendant said, That the Ordinary sequestred for Non-Residence of the Plaintiff, before any Rent due, and called the Defendant*, and held the Church by the 2 Years, because the Plaintiff was not resident by the 2 Years, and 'twas doubted if it be a Plea; wherefore the Defendant shewed, *That the Plaintiff resigned before any Day of Payment.* Et Adjornatur. Br. Barre, pl. 77. cites 5 E. 4. 28.

7. In a *Rent* be granted *out of the Manor of D. and that the Grantee may distrain for it in the Manor of S.* if the *Manor of D.* be recovered by an Elder

der Title, all the Rent is extinct, *but if the Manor of S.* in which the Diſtrict is limited be evicted, yet all the Rent remains. Co. Litt. 147. a.

8. Rent *awarded* on a Submiſſion by Recognizance to Arbitration, ſhall not ceaſe by Eviction of the Land. 3 Le. 58. pl. 86. Mich. 17 Eliz. B. R. Treſſam v. Robins.

9. If *Debt for One Half Year's Rent* be brought, and Defendant pleads Eviction before the Half Year was out, this will not avoid the Quarter's Rent, becauſe for that the Action was attach'd. Per Cur. 2 Show. 402. Mich. pl. 374. 36 Car. 2. B. R. in Caſe of Poole v. Archer.

(P) *Rent.* What is, and what a *Sum in groſs.*

1. *Feoffment* was on Condition, that Feoffee and his Heirs ſhall *pay a Rent to a Stranger* and his Heirs, this is a good Condition, yet ſuch Payment is not properly Rent, becauſe it iſſues not out of Land, and an Aſſiſe lies not for it, yet if it be not paid the Feoffor ſhall re-enter, and the Feoffee ought to ſeek the Stranger; for the Payment is but of a *Sum in groſs.* Litt. S. 345.

A. by Indenture demiſes Land for - Years to B. and by the ſame Deed B. the *Leſſee covenants &c. with A. his Heirs and Aſſigns*, that he, his Executors &c. *will pay* to A. his Heirs and Aſſigns 75 l. per Ann. This is a good Reſervation of Rent, and not a Sum in groſs; for it is by Indenture, and their Intention was to have it as a Rent, and the Words of an Indenture ſhall be accounted to be his who may moſt properly ſpeak them. Ow. 151. Mich. 8 Jac. Alſop & Dennis v Herring, als. Jennings.——Anoe v. Hemmings. S. C. 2 Bulſt. 281. adjudged accordingly.——The Words of the Indenture were, That *in Conſideration of the Payment of the Rent herein after mentioned, he leaſes*, and after B. covenanted to pay 75 l. per Ann &c. Coke Ch. J. wondered it could be a Doubt in Pl. C. and thought it was clearly a Rent; for a Covenant is the Agreement, and Words of both; but Cæteri nil dixerunt. Roll. R. 83, 84. Mich. 12 Jac. B. R. Althow v. Heming.—— D. 275. pl. 49. S. P. Reſolved in the Court of Wards. Ld Dacres's Caſe.

2. Leſſee for Years by Indenture *covenanted and granted to pay annually for the Tenements, during the Term, a Rent at another Place, and* that *if the Rent* or Service *be Arrear, tho' it be not demanded, that the Leaſe ſhould be void, and that Leſſor might enter.* It was doubted whether this was a Rent or a Sum in groſs. See Pl. C. 131. b. 6 E. 6. in B. R. Browning v. Beſton.

It is a Contrariety. Mo. 115. pl. 260. Paſch. 20 Eliz. and ſeems to be S. C. being almoſt in the very ſame Words.—

3. A Man had a *Warren* in Fee extending into three Towns, and leaſed the ſame by Deed to another, rendring Rent; and afterwards granted by Deed the Reverſion of the whole Warren in one of the ſaid Towns to another, and the Leſſee attorned; it was holden by all the Juſtices in C. B. That neither the Grantor nor the Grantee ſhould have any Part of the Rent during the ſame Term, becauſe no ſuch Contract can be apportioned. 3 Le. 1. pl. 1. 6 E. 6. in C. B. Anon.

And 26. pl. 59. Hill. 6 & 7 E. 6. Anon. S. C. accordingly. But the Reporter ſays Quære hene of this Caſe; for it ſeems that the Sum reſerv'd is not any Rent, but due annually to be paid to the Leſſor, and in him is merely Debt, tho' the Time of Payment is mentioned to be annually; and then it is like as when one *leaſes Land for 20 Years for* 400 *l.* to be paid as follows, viz. *every Year* 20 *l.* This is merely a Debt to the Leſſor, and executed in him not enſuing the Nature of the Reverſion; and therefore if the Leſſor grants the Reverſion of Part of the Land, and the Tenant attorns, yet the intire Debt remains, but if it was Rent, then the Reverſion and the Nature thereof draws the Rent after it, which peradventure will not ſuffer an Apportionment when the Reverſion of the Acre leaſ'd is conveyed ——Noy 60. Anon. ſays, This is not a Rent but a Seigniory in groſs, due by Reaſon of the Contract.

If a Rent is *reſerved* in a Feoffment in Fee, tho' there is no Reverſion in Feoffor, yet it is a Rent, and recoverable by the Name of a Rent upon the Contract. Per Curiam Carth. 162 in Caſe of Newcomb v Harvey.

4. Baron and Feme make *Feoffment to A.* and *A. covenants to pay annually* 10 *l. Rent.* Baron dies; Feme accepts the Rent, yet this has not affirm'd the Feoffment, becauſe it is but a Sum in groſs; but otherwiſe had it been a Rent. Arg. Roll. Rep. 81. cites D. 10 Eliz. 275. pl. 49.

5. Leaſe

5. Leafe of a *Tavern*, *and Plate, and diverfe Utenfils*; Leffee *covenants to account Monthly* for every Tun of Wine he fhould fell there, and *to pay him* 30 *s. for every Tun* fold there; this is as a Rent referved, and in Nature of a Rent. Arg. But Judgment was given againft the Plaintiff on another Point. Cro. E. 62. Mich. 29 & 30 Eliz. B. R. Gallies v. Budbury.

Leafe of a Tavern, &c. Leafe not a Rent. See Ley Gilb. Ex. pl. 5.

6. *Devife that A. fhall have the Land, and that fhe fhall pay yearly* to the Wife of the Teftator 12 l. during her Life in Recompence of her Dower. Per Cur. It is a Rent, and not a Sum in groſs. Le. 157. Mich. 30 Eliz. C. B. Gollin v. Warburton.

Cro. E. 128 pl. 3. 157. 3 Le. 8. 5 Co. 68. Name of Goodridge v. Warburton. Cro. Car. 158. pl. 7. Pafch. 4 Car. B. R. Anfley v. Chapman. S. C. but not S. P.

Goodridge v. Warburton.——A. has 5 Sons, and leaves Land to each, and devifes 40 l. per Annum to his Wife out of his Lands, and provides that every one of his Sons fhall pay out of his Part *towards the Payment of the* 40 *l. per Annum to his Wife*; This is an annual Rent out of the Profits of the Land, and no Sum in groſs. Cro. Car. 158. pl. 7. Pafch. 4 Car. B. R. Anfley v. Chapman. —— Jo. 211. Anſley v. Chapman. S. C. but not S. P.

7. A Rent cannot be reſerved out of a *Common* or *Office*, or other Thing which lies not in Demand [Demeine] in which an Entry can be made, unleſs it be out of a *Meſnalty*, as 1 H. 4. and that by the Poſſibility of Eſcheat. Noy. 60. in Caſe of Lovelace v. Raynolds.

S. P. Br. Annuities, pl. 25. as to the Common, and by Walmſly as to the Meſnalty, and that a Rent charge cannot be granted out of a Meſnalty; but that tho' in the Caſe of a Common it be not a Rent, yet a Diſtreſs may be taken for it, as 20 H. 8. 1. because the Commoner hath a Benefit thereby. Cro. E. 540. pl. 19. Hill 39 Eliz. C. B. S. C.

8. *Tenant for Life* levied a *Fine to Reverſioner in Fee*, and declared the Uſes to be *on Condition* that the Conuſee and his Heirs *pay him* 40 *l. per Ann. for his Life*; this is not properly a Rent, but quaſi a Sum in groſs, and is not iſſuing out of the Land; for there is no Place appointed for Payment thereof, and therefore the Conuſee muſt ſeek out the Conuſor, and pay him. Cro. E. 688. pl. 25. Trin. 41 Eliz. C. B. Smith v. Warren.

9. A Leaſe for Years, *paying for a Fine* 20 *l.* This is a Sum in groſs, and ſhall not paſs with the Reverſion. Winch. 47. Arg. cites Ram's Caſe.

10. Leaſe for Years in Reverſion after a Leaſe for Life, rendring Pro Principium inde a certain yearly Rent, and two Days Work in Harveſt, *Reddendo inde* 3 *l. Nomine Herietti poſt mortem* of the Leſſees, or either of them, and rendring 2 Capons at Chriſtmas, Pro principio inde. Per Cur. Kering Ch. J. This is a Sum in groſs, but per 3 Juſt. contra. Vent. 91. Trin. 22 Car. 2. B. R. Lion v. Carew.

S. C. 2 Saund. 337. S. C. by the Name of Hayward v. Carew. Hard. 512. S. C. adjudged accordingly. —— Lev. 214.

Langan v. Carn S. C. adjudged accordingly.

11. Rent reſerved *out of a Portion of Tithes*, whether a Rent or a Sum in groſs? Vent. 98. Mich. 22 Car. 2. B. R. Dean and Chapter of Windſor v. Gower.

Lev. 308. S. C. —— The Court ſeemed to think it a Rent incident to the Reverſion, and that the Aſſignee is bound to pay it; but it was not adjudged, because two Exceptions were taken to the Plea, and the Reporter thinks they were not willing to determine the Matter of Law. 2 Saund. 302 to 306. Hill 22 & 23 Car. 2. S. C.

12. Rent reſerved on *Aſſignment of a Term for Years* of a Houſe; this is a Sum in groſs, and the Reſervation ought to have been by Deed. Allen 57. Paſch. 24 Car. B. R. Spathurſt v. Minns.

It is not attendant on the Reverſion, but is due by Contract only, and is diſcharged by a Releaſe of all Demands. Cro. J. 481. Witton v. Bye. —— The Plaintiff being *Leſſee* for Years, *aſſigned over his whole Term* by Indenture to the Defendant *reſerving Rent*, and an Action of Debt was now brought for the Rent in Arrear. The Defendant pleaded Non conceſſit &c. hoc &c. And upon a Demurrer to this Plea, it was objected in Behalf of the Defendant, That this Action would not lie, becauſe the Sum reſerved was not properly any Rent, but a Sum in groſs, the Plaintiff having aſſigned over his whole Term, and by Conſequence had no Reverſion, and therefore the Action ought to be for a Sum in groſs upon the Contract, (and not Debt for Rent) as it would be after the laſt Day expires. To which it was anſwered, and ſo reſolved per Cur. That [illegible] Rent, [illegible]

Plaintiff had no Reverſion, and the Plaintiff had Judgment. Carth. 161, 162. Mich. 2 W. & M. B. R. Newcomb v. Harvey.

2 Lev. 80. S. C. —— S. C. cited Carth. 162. in the Caſe of Newcomb v. Harvey.

12. *Tenant for Years ſurrendered to the Leſſor reſerving a Rent.* This was held a good Reſervation on the Contract, and that Debt lay after the firſt Day was incurred, wherein it was reſerved to be paid; For it was in the Nature of a Rent, and not of a Sum in Groſs. Vent. 272. Trin. 27 Car. 2. B. R. Cartwright v. Pinkney.

—— Such Reſervation is good, tho' without Deed. Per Hale Ch. J. Vent. 242. in the Caſe of Wilſton v. Pinkney cites Mandy's Caſe, and the Caſe of Parcas v. Owen. 23 Car.

14. A. *grants his Land for a Year* to B. *B. agrees to pay ſo much for it*, this is a Sum in Groſs, for which an Indebitatus lies. Per Holt Ch. J. Show. 36. in Caſe of Shuttleworth v. Garret

15. Rent reſerved on a Leaſe of a *Toll-Paſſage on a River*; Reſolved it is not a Rent, for it is out of an *incorporeal Thing*, and an expreſs Covenant to pay it. 2 Vent. 67. Trin. 1 W. & M. C. B. Bayntun v. Bobbet.

(Q) *Sum in Groſs. Remedy* for it.

1. TEnants have *Common, paying the Lord a Penny a Year for it*; the Lord cannot have *Debt or Diſtreſs* for it, unleſs it be Preſcription. Noy. 60. Lovelace v. Reynolds. cites 26 H. 8. cap. 3.

2. *Debt* for Rent reſerved upon the Leaſe of a *Warren of Conies*; The Defendant pleaded that the Plaintiff had plowed a Field Parcel of the Warren, by which the Conies had not ſufficient Paſture. Per Cur. (abſente Anderſon) it is no Plea; For it is not a Rent but a Sum in Groſs, due by Reaſon of the Contract, and therefore the Entry, or Uſer of that Part is not any *Suſpenſion*. Noy 60 Anon.

3. Where there is a *Rent reſerved, and a Covenant alſo for other Money in the ſame Deed*, Debt will not lie for the later; As if I demiſe 20 Acres reſerving 20 l. per Annum, and further agree with him in the ſame Deed, that *for as many Acres as he ſhall plow* up, he ſhall give 10 *s.* per Ann. for each; This laſt Sum is no Rent, and an Action of *Debt* will not lie for it. Per Holt. 12 Mod. 73. Trin. 7 W. & M. B. R. Anon.

(R) *What* ſhall be ſaid to be *Part of the Rent.*

1. WHERE a Man *recovers Rent of* 20 *d. per Annum, and the Sheriff puts him in Seiſin by* 2*d.* of the Plaintiffs, *this ſhall not be intended Parcel* of the Rent, but the *Recoveror at the Rent Day may diſtrain and make Avowry for all the* 20 *d.* Per Davers and Danby J. clearly. Brooke ſays the Reaſon ſeems to be that the Rent is not due till the Day, and therefore cannot be intended Parcel of the Rent, which then was due. Br. Avowry pl. 78. cites 37 H. 6. 39.

Maſon v. Chambers S. C. Cro. J. 34 Trin. 2 Jac. Reſolved accordingly per tot Cur.

2. Leaſe is made by A. to B. *rendring Rent* 4 *l.* and A. by the ſame Indenture, grants to B. and his Aſſigns *dare & Reddere to B. the Leſſee and his Aſſigns* 3 *s.* 4 *d. for Portage*; This 3 s. 4 d. is by Way of *Covenant*, and no Part of the principal Rent to be retained by Way of Defalcation. Yelv. 42. Hill. 1 Jac. B. R. & Trin. 2 Jac. Chambers v. Maſon.

(S) *One*

(S) *One or several.* By Grant.

1. *THREE Coparceners made Partition*, and the *one granted to the two* 100 *s. Rent* by these Words following *viz.* 50*s. to the one, and* 50 *s. to the other*, and yet this is one Rent, and not several Rents. Br. Rents pl. 18. cites 29 Aff. 23.

Br. Joinder in Action pl. 79 cites S. C. — S. C. cited Hob. 172. in the Case of Stukely v. Butler.

2. *Tenant for Life granted a Rent-Charge*, and *he in Reversion granted another* Rent-Charge, The *Tenant for Life surrendered*, he in Reversion shall hold the Lands charged with 2 Rents, and as to one he shall be Tenant in Fee-simple, and as to the other he shall be only Tenant for Life. D. 10. b. pl. 35 Trin. 28 H. 8.

3. If a Man be *seised of* 20 *Acres* of Land, and *grants a Rent of* 20 *s. percipiend' de qualibet Acra Terræ meæ*, (that is) out of every one Acre of my Land, this is a several Grant out of every several Acre, and the Grantee shall have 20 l. in all. Co. Litt 147. b.

4. Where the *intire Rent is granted* or reserved *out of* 2 *Things, one of which is not chargeable*, and afterwards a *(Viz.)* would distribute Part of the Rent to one of the Things and Part to the other, yet the Rent shall be intire, for there the (Viz.) would refer the Rent to Thing which is not answerable for the Rent, and so by Colour of Distribution would extinguish it, which is repugnant, and so the (Viz.) is void. Per Rhodes and Periam J. Mo. 201. pl. 349. Pasch. 27 Eliz. C. B. in Knight's Case.

5 Rep. 55. S. C. — And. 1[illegible]. S. C. — If A. grants a Rent of [illegible] l. out of 2 Manors, viz. 50 s. out of one, and 50 s. out of the other, it is but one Rent; Per Hobart Ch. J. Hob. 172 in the Case of Stukely v. Butler cites 20 E. [illegible] and so are Knight's Case 5 Rep. 55. and Winter's Case D. 14 Eliz. [illegible] upon a Difference where the Rents are *reserved severally at the first*, and where there are *intire at first, and taken by a (Viz.)*

5. J. S. granted a *Rent-Charge of* 14 *l. per Annum* out of Land, *Habendum* 7 *l. per Annum for* 35 *Years, if J. D. so long live* [payable at Mich. and Lady-Day] and Habend *the other* 7 *l. per Annum for* 38 *Years to commence after the Death of J. D.* payable at the said 2 Feasts, with a Clause of Distress; The Question was, Whether this was One or several Rents; For that it is but one Grant of 14 l. in the Beginning, and the Distress limited for the 14 l. So it is entire also in the Distress. But all the Court resolved that there were several Rents, because they had several Commencements and several Endings, and tho' it be mentioned to be but one in the Cause of Distress, yet that is to be intended to be taken distributively, and adjudged accordingly. Cro. Car. 154 pl. 2. Pasch. 5 Car. B. R. Bear v. Weesley.

Weesley v. Bear. [illegible] Jo 2[illegible] pl. 1. Trin. 5 Car. B. R. adjudged accordingly, because of the severance in the Habendum, and that the one is to begin presently, and the other after the Death of J. S.

6. A. granted an *Annuity of* 100 *l. a Year to B. C. D. E. and F. to be equally divided between them, to have to them and their respective Assigns* 20*l. to each* during their Lives, and the Life of the longest Liver of them, and if any one died, his Share to be equally divided among the Survivors. D. and E. survived, and for Rent Arrear distrained, and in Replevin avow'd jointly. Holt Ch. J. held that the Words *Equally to be divided* cannot make a Tenancy in Common in a Deed, tho' they may in a Will; and the Words *(to have and receive* 20*l. a-piece)* explain how the Money on Receipt is to be distributed, but do not sever the Grant; For it is but one Rent, and one Grant undivided, and so D. and E. are Jointenants, and the Avowry good, and adjudged for the Avowant. 1 Salk. 390. Hill. 10 Ann. B. R. Ward v. Everard.

The Grant was of one Annuity or yearly Rent of 100 l. to be [illegible] 2[illegible] &c. and [illegible] to [illegible] till [illegible] com[illegible] 2[illegible]

5 Mod. 25. S. C. —— Comb. 329. S. C. states the Case accordingly, and that upon [illegible]

... Comyns, it was found for the Avowant upon a Trial at Bar; But Judgment was arrested, ... moved to plead and avow De Novo; For that it was adjudged that the 5 Grantees ... Coparceners, and tho' the Heir at Law shall be first of the whole Rent, yet the (Par) distributes it. ... the Law nor why a (Viz.) should not make a Severance as well as the Husband, but ... Rent; And that it was also adjudged that the Apportionment of the Rent over- ... For this is a Rent De Novo, which the Grantor may make to rise and ... Creation from the ordinary Rules of Leases as a new Grant. — Carth. 242. ... of Carth. and in the Margin says, That those are the very Words of the Deed, ... was Counsel in the Cause. But Ibid. 342. says, that after several De- ... Opinion for the Plaintiff that these were several Rents, but Holt Ch. ... Judges in Court no Judgment was given; but that a new and the ... Rent, ... the Parties agreed, and nothing further was done. — Carthew, at the End of ... Term, cites Pich. 12 Car. 2. in C. B. that in an Avowry upon this very Grant the Defendant made ... that Rent to the said B. C. D. E and F. jointly for Rent Arrear, and upon a ... the Opinion of the Plaintiff had Judgment, because these were several Rents, and the Avowry ... Judgment was Pasch. 16 Car. 2. Carth. 334. Hamerton v. Clayton & al.

(T) *Extinguish'd or apportioned. By Conjunction of* Estates.

1. WHERE a *Lease was made for Life by Deed indented rendring Rent*, and after the *Lessor granted and confirmed, the same Tenements to the Lessee and Heirs for ever*, the best Opinion was that by this the Rent is extinguished; For the Reversion is gone, and by Repurture with the Reversion the Rent passes with it, unless it be excepted; and after the Plaintiff denied the Deed. Br. Extinguishment. pl. 28. cites 22 Ass. 18.

2. The *Father* seised in Fee of Land, *had* Issue *two Daughters*, he *grants a Rent-charge to one* of his Daughters *in Fee*, and dies; *the Land out of which* the Rent was granted, *descended to the two Daughters*; so that they had as great an Estate in the Land as the one of them had in the Rent; *Partition is made* between them; after this the Rent shall be revived, the same not being extinct by this. Per Doderidge J. 3 Bulst. 122. Mich. 13 Jac. in the Case of Gough v. Howard, cites 33 Ass.

3. If a Man *grants a Rent-charge in Fee*, and *after gives the Land in Tail to the same*, and the *Grantee purchases the Land of the Donee in Tail in Fee*, the Tenant in Tail hath Issue, and dies, the *Wife brings Formedon*, and *recovers the Land*, the *Grantee withdraws for the Rent*, the Issue shews the Purchase, the Grantee shews the Recovery. In this Case the *Charge is extinct* for ever, notwithstanding the Recovery for once extinct is for ever. Per Ashue. Br. Charge, pl. 42. cites 19 H. 6. 45.

Lessee for Life of a Manor leases Part for Years, the Lessee has a Part of the Term to the Lessor, rendring Rent; if he after surrenders to the first Lessor, the Rent reserved upon the 2d Lease is determined. Br. Extinguishment, pl. 33. cites 20 E. 4. 12. Per Brian.

Lessor grants the Rent to H. S. and after the Tenant for Years surrenders, the Rent is not extinct. Ibid.

5. If a Man *enfeoffs me upon Condition to render to him* 10 *l. the 1st of May*, and after *I lease it to him for Years rendring certain Rent*, and *at the Day I do not pay the* 10 *l.* Now he shall hold the Land, and the Rent reserved by me upon the Leafe is determined and extinct. Br. Extinguishment, pl. 34. cites 20 E. 4. 12. Per Brian.

6. A. *leases to B. for* 100 *Years*, and *B. leases to C. for* 20 *Years*, rendering Rent; A. granted the *Reversion in Fee to J. S.* and *J. S. took all the Reversion of the Term*. Adjudged that J. S. shall not have the Rent nor Re-entry; for the Reversion of the Term, to which the Rent is inci-

dent.

dent, is extinguished in the Reversion in Fee. Mo. 94. pl. 232. Pasch. 12 Eliz. [illegible] Treasurer v. Paton

7. A. [illegible] a *House and Stable* for 30 Years, and [illegible] *the Stable to B. for 6 Years*, and A. assign'd the whole to C. for all the Years, whereby C. had the Reversion of the Stable, and the rest in Possession for 30 Years; and demised to A. for 21 Years, the whole on Condition of Re-entry for Non-payment of the Rent, or of 25 l. a Sum in gross, at Days appointed. Before any Default of Payment, A. re-demiseth the Stable, wherein B. had 6 Years, to C. for 10 Years, but no Attornment; Afterwards the Rent and Fine were unpaid at the Days appointed. A. re-entered. In this Case the Question was, Whether the Rent and Condition were suspended by Acceptance of the Re-demise of the Stable? And adjudged, 1st. That by the Re-demise to C. of any Part, by the very Acceptance of the Re-demise the Rent was suspended, if it had been a Re-demise in Possession. 2dly, That in this Case there being no Attornment, nothing pass'd but the [illegible], but only a Future Interest after B.'s Lease for 10 Years; and therefore neither the Rent nor the Condition are suspended. Upon this Judgment a Writ of Error was brought, and all the same Points, from Point to Point, were adjudged as before; so that this was the Judgment of all the Judges in England. Pollexf. 144, 145. in Case of Hodgkins v. Thornborough, cites it as 4 Rep. 52 b. Rawlins's Case.

In [illegible] Case of [illegible] kins v. [illegible] & Thornborough, [illegible] C. [illegible] observed that the Resolution of that Point as to the Rent was not necessary to the Judgment in that Case, [illegible] Condition, [illegible] tire, and [illegible] to be apportion'd; but that as

to the Rent, no Book was found to warrant such an Opinion but Br. Tit. Extinguishment [illegible] where it is said, If there be Lord and Tenant by 3 Acres, and the Tenant leases one to the Lord for Years, the whole Rent is [illegible]; but [illegible] that this Case is not to be found in the [illegible] said, That a Lease for Years was stronger than a Lease for Life, where [illegible] fine, and the [illegible] Lord [illegible] out of which the Rent issues are to be [illegible] Condition, [illegible] where Part of the [illegible] to such a Rent [illegible] for if the Rent be diminish'd, the Condition [illegible] 27 & 28 Car. 2. B. R. —— 4 Le. 116. pl. 235. Mich. 32 Eliz. B. R. Rawlins's Case [illegible] —— 2 Lev. 143. [illegible] Hodgkins v. Thornborough —— Freem. Rep. 417 [illegible] Hale said [illegible] Extinguishment, was the [illegible] could not be suspended in Part, and in Esse for Part, which is a [illegible] down since the Opinion in Brooke, but no Reason at all was ever given why it [illegible] be suspended in Part, [illegible] extinguish'd in Part; for of that never any Question [illegible] surrender Part of the [illegible] Part of the Rent is thereby extinguished [illegible] on all the [illegible] Lord Coke in Ascough's Case, [illegible] Entry by W[illegible] all to suspend the whole Rent. —— [illegible] S. C. says, That P[illegible] was against the Opinion of the Court in this Case, [illegible] Reports, fol. 141.

8. If A. *devises Rent to B.* and afterwards *makes B. Executor*, there this Rent shall be extinct; but where a Man devises *the Land* [illegible], and a Rent out of it to another, and afterwards makes him [illegible] Rent was devised his Executor, he may now elect to have this as a Legatee. Per Doderidge J. 3 Bulst. 122. Mich. 13 Jac. in Case of [illegible] v. Howard.

9. If [illegible] *the Part of his Father, and a Rent out of the [illegible] Land on the [illegible]*, the Rent is extinct, and cannot be revived [illegible] the without Issue. Arg. Bridgm. 54.

10. A Copyholder made a *Lease to B. for 16 Years, rendering* 20 l. *Rent*; B. [illegible] *Part* of the Lands *for 10 Years to C. rendring no Rent*; C. afterwards [illegible] *his Term to A.* the first Lessor. The Question was, Whether the Rent shall be apportioned or suspended? And [illegible] that it should be neither, but that the Lessor should have the whole Rent of 20 l. a Year, against his Lessee. And they all agreed farther, that B. shall have nothing against C. because he reserved nothing, nor shall C. have any Thing against A. for the same Reason. 2 Lev. 143. Trin. 27 Car. 2. B. R. Hodgson v. Thornborough. Hodgkins v. Thornborough, S. C. Pollexf. 141. [illegible] —— [illegible] Hodgkins v. [illegible] & Thornborough, S. C. [illegible] ——

Ch. J. [illegible] That [illegible] the Lessee *had reserved* [illegible] *Rent* upon the Lease for 10 Years, [illegible] A. should have 2[illegible] l. of B. and B. should have [illegible] l. of C. and C. [illegible] of A. [illegible] shall have according to his Contract, and no other Ap[illegible]

to the Contract, and Agreement of the Parties, and no Extinguiſhment or Suſpenſion ſhould be of the 20 l. For this is always where the Leſſor enters injuriouſly, and contrary to the Will of the Leſſee, but all done here is by Agreement and Contract; and therefore each ſhall enjoy according to his Contract. 2 Lev. 143. in Caſe of Hodgſon v Thornborough.——If B. had leaſed any Part to A. without reſerving any Rent, there ſhould be an Apportionment; but if a Rent had been reſerved, there ſhould be no Apportionment; for then the Leſſor and Leſſee had, as it were, by Agreement, apportion'd the Rent betwixt themſelves, and the Leſſor ſhould have had his whole Rent of the Leſſee, and ſo ſhould the Leſſee of the Leſſor. Per Hale Ch. J. Freem. Rep. 118. pl. 553. in S. C.——Freem. Rep. 424. pl. 429. Trin. 1675. Advocatur.—— S. C. Ibid. 413. pl. 545. Mich. 1675. Hale ſaid, If the Rent muſt be apportioned in this Caſe, there might be a Queſtion how that ſhould be; As if A. leaſe to B. 20 Acres of 20 s. a-piece Value, and B. redemiſes one of thoſe Acres to A. for 5 l. Now whether the Apportionment ſhould be by recouring this 5 l. or whether 20 s. ſhould be abated, and the 1ſt Leſſee have the 5 l. over and above? But he ſaid, That the Book of 17 Ed. 3. 5. was to the Principal Caſe in the very Point; but if it were in Caſe of a Leaſe for Life, there it may be it might be ſuſpended, becauſe there is only a real Remedy, as by Diſtreſs or Aſſiſe, which ſhall not be apportioned; but the whole ſhall be ſuſpended, becauſe the Remedy is upon the whole Land; but here it is upon the Contract, and a Perſonal Remedy. Sed Curia adviſare vult.

(U) Extinguiſh'd or Apportion'd. By *Confirmation.*

1. IN Aſſiſe where a *Leaſe is made for Life by a Deed indented, rendring Rent*, and after the *Leſſor grants and confirms the ſame Tenements to the Leſſee and his Heirs for ever*, the beſt Opinion was, That by this the Rent is extinct; For the Reverſion is gone, and by the Departure with the Reverſion, the Rent paſſed with it, unleſs it be excepted; and after the Plaintiff denied the Deed. Br. Extinguiſhment, pl. 28. cites 22 Aſſ. 18.

2. If a Man *hath a Rent-Charge* out of certain Land, and he *confirms the Eſtate*, which the Tenant has in the Land, yet the Rent-Charge remains to the Confirmor. Litt. S. 536.

3. *Leaſe of* 20 *Acres*, rendring Rent, the *Leſſee grants all his Eſtate in one of the Acres to J. S.* the *Leſſor confirms the Eſtate of J. S.* Reſolv'd, That the entire Rent is gone in all the other Acres; For being an entire Contract, and by his own Act there cannot be an Occupation for Part, and an Extinguiſhment for the other Part; and in this Caſe there is no Difference between a Suſpenſion in Part and an Extinguiſhment. Owen 10. Mich. 33 & 34 Eliz. C. B. Goddard's Caſe.

(W) Extinguiſh'd or Apportion'd. By *Deſcent or Deviſe.*

1. IF a Man hath a *Rent-charge*, and his *Father purchaſes Parcel* of the Tenements charged in Fee, *and dies*, and this Parcel deſcends to his Son who has the Rent-charge, now this Charge ſhall be apportioned according to the Value of the Land, becauſe ſuch Portion of the Land purchaſed by the Father, comes not to Son by his own Act, but by Deſcent, and by Courſe of Law. Litt. S. 224.

So if the *Tenant gives to the Father Part* of the Land in Tail, and the *Father deſcends* to the Grantee, the Rent ſhall be apportioned; and ſo *by Act in Law* a Rent charge may be ſuſpended for one Part, and in Eſſe for another. Co. Litt. 149. b.——*So* if the *Father be Grantee of a Rent*, and the *Son has Iſſue Part of the Land charged*, and the Father dies, after whoſe Death the *Rent deſcends to the Son*, the Rent ſhall be apportioned. Co. Litt. 149. b.

2. If the *Grantee grants the Rent to the Tenant of the Land, and to a Stranger*, the Rent is extinct but for a *Moiety*. Co. Litt. 149. b.

Bendl. 226. pl. 259. S. C. adjudged——

3. A. ſeiſed of a Houſe in Fee, leaſes the ſame to J. S. for Years, and by Will *deviſes* it to C. and D. his younger Sons, *and to the Heirs of each of them*

their Bodies lawfully begotten, Remainder to the right Heirs of A. and dies; C. dies, leaving W. his Son; D. now is ſeiſed of one Moiety for Life, and the other Moiety in Tail, and takes the whole Rent, and dies, leaving a Son. Adjudged that the Rent is now apportionable, but if A. had *conveyed the Reverſion of one Acre, Parcel &c.* and the Tenant had attorned, there had been no Apportionment. And. 21. pl. 44. Hill. 16 Eliz. Huntley v. Roper. D. 326. pl. 1. S. C. — S. C. cited by Raymond J. Raym. 415 in Caſe of Holms v. Meynel.

4. A. has a *general Tail in Bl. Acre, and Special Tail in Gr. Acre, and leaſes both*, rendring Rent, and dies, having *ſeveral Iſſues inheritable to each Tail.* Now the Condition ſhall go according to the Rent. Per Manwood. 4 Le. 27. pl. 82. in the Caſe of Lee v. Arnold.

5. *A Prelate, is Lord, whereof he is ſeiſed in his own Right, and Land, of which he is ſeiſed in his Church's Right*, for Years, rendring Rent, with Clauſe of Re-entry, and dies, the Rent ſhall go according to his reſpective Capacity, and the Condition divided. Per Jeffrey's. 4 Le. 28. in Caſe of Lee v. Arnold.

6. If one makes a *Leaſe of Freehold and Copyhold* Lands, *rendring Rent*, and the *Copyhold deſcends to one and the Freehold to another*, the Rent ſhall be apportioned. Per tot. Cur. Godb. 139. pl. 169. 30 Eliz. B. R. Harding's Caſe.

7. A. was *ſeiſed in Fee of one* Acre, *and poſſeſſed of another Acre for a Term of* 21 *Years, and demiſed* theſe Acres to B. the Defendant for 10 Years, rendring Rent; *Proviſo, if the Rent be behind for* 28 *Days, and no ſufficient Diſtreſs upon the Land, that they might enter. A. died.* The Inheritance of one Acre came to his *Heir*, and the Term for Years to his *Executor*. The Rent was in Arrear 23 Days &c. and the Heir demanded a Portion of the Rent according to the Value of his Acre; which not being paid, he enter'd. The Queſtion was, Whether the Reverſion being divided, the Rent ſhall be in like Manner apportioned; And if the Condition be divided, whether the Heir may demand Part of the Rent, and enter for Non-Payment? But as to this no Opinion was deliver'd; Sed Adjornatur. Cro. J. 390. pl. 3. Hill 13 Jac. B. R. Wood v. Germans

(X) Extinguiſhed or Apportioned. By *Grant.*

1. A. *Leaſed to B. for Life, and* afterwards *to C. for* 20 *Years, rendring Rent*, the *Term to commence after the Death of B.* —— *B. granted his Eſtate for Life to A.* the Leſſor. *A. during the Life of B. enfeoffed J. S. in Fee, who ſuffered a Common Recovery. B. died*, and the Recoverors diſtrained and avowed for Rent Arrear. Fitzjames and Knightley thought the Rent was not extinguiſhed, becauſe it was not in Eſſe at that Time, it not being to be paid till after the Death of the Leſſee for Life, who was alive. D. 31. pl. 210. &c. Hill. 28 H. 8. B. R. Anon. *Leſſor enfeoffs a Stranger, the Leſſee not being upon the Land*, it was a Queſtion, If by the Feoffment the Rent reſerved upon the Leaſe be not extinct; But Baldwin Ch. J. thought it was not. Mo. 11. pl. 42. Hill. 4 E. 6. Anon. —— In the Caſe of Battey v. Trevillion. Mo. 281. pl. 434. Mich. 31 & 32 Eliz. C. B. One Point was, Whether, when the Leſſor enters upon the Leſſee for Life, and makes Feoffment, and the Leſſee re-enters, if the Rent be revived, and the Juſtices doubted thereof, and becauſe it did not make an End of the Cauſe they would not argue it.

2. It was taken not to be a good Security for the King for his Services reſerved upon a Grant before made to A. in Tail, to give the Reverſion Tenend. the Reverſion by ſuch Services, when it ſhall veſt, and to except the firſt Services during the Tail; For *when the Reverſion is gone, the Rent and Services reſerved upon the Tail are gone*, as well in the Caſe of the King as in the Caſe of a common Perſon, and therefore the

Device was, That the King by a New Patent, reciting the first Patent, should grave the Reversion, and the first Rent and Services Haleudum in Fee, To hold by such Services, and rendring such Rent, and by this the King shall have new Tenure immediately, and the Grantee shall not be charged of Double Services and Rents during the Tail. Br. Patents, pl. 97. cites 32 H. 8. The E. of Rutland's Case.

So if he has 2 Daughters and dies, and the one alienes to the King Ibid

3. If the *Tenant of the King of* 4 *Acres alienes one Acre to the King*, the Rent shall be apportioned, by some if it be severable, and this by the Common Law by some. Br. Apportionment, pl. 23. cites 32 H. 8.—— Brooke makes a Quære; For contrary in the Reading of Fitzjames.

God's 95. pl. 105. Mich. 28 29 Eliz. S. C. & per tot. Cur. the Rent shall not be apportioned, because a *Term is out of the Statute*; and a Rent reserved upon a Lease for Years shall not be apportioned by the Act of the Lessor; But otherwise by Act in Law, As where a Tenant makes a Feoffment in Fee in Part of the Lands, and the Lessor enters. And at another Day, Anderson Ch. J. said, That if the Lessor of 2 Acres grants the Reversion of one Acre, the whole Rent is extinct.——Goldsb. 44 S. C. Mich. 29 Eliz. but adjornatur.

4. A *Lease* for Years was made *of* 100 *Acres of* Land *rendring Rent* 10 l. afterwards the *Lessor granted* 50 *Acres of it*. The Grantee shall not have any Part of the Rent, but it is all destroy'd. Arg. 2 Le. 252. pl. 339. cites 32 H. 8. Wiseman v. Warringer.

Mo 114 pl. 255. Per 2 Justices.

5. If the Lessor *grants Part of the Reversion to a Stranger*, the Rent shall be apportioned; For the Rent is incident to the Reversion. Co. Litt. 148. a.

6. If a *Lease be of* 3 *Acres reserving* a *Rent upon Condition*, and the *Reversion is granted of* 2 *Acres*, the Rent shall be apportioned by the Act of the Parties, but the Condition is destroyed, because it is intire, and against Common Right. Co. Litt. 215. a.

7. If the *Grantee* of a Rent-charge *grants it to the Tenant of the Land, and a Stranger*, it shall be extinguished but for the *Moiety*; and so it is of a *Seigniory*. Co. Litt. 307. b.

And. 18 pl. 30. S. C. accordingly, only that the he states the Feoffment to be of 2 Manors, and that the Fine was levied of one only.—— S. C. cited Mo. 106. pl. 247. in Andrew's Case —— & Mo 384. pl. 506 S. C. cited in Perrot's Case. —— S. C. cited 2 Rep. 73. a. in Ld Cromwell's Case —— S. C. cited 2 And. 85. in Ld Cromwell's Case —— S. P. Mo. 298. pl. 446. Trin. 32 Eliz. C. B. in the Case of Sherrot v. Holloway. ——S. C. cited Arg. Mo. 384. in Perrot's Case

8. A. *infeoffed* B. in Fee of the Manor of S. *rendring* to A. and his Heirs a *Rent* annually, *with a Clause of Distress, and a Re-entry for Non-payment*; and *covenanted to make further Assurence*; And *by another Deed of the same Date A. covenanted* with B. *to levy a Fine* of the said Manor, which should be *to the same Uses*, Intents, and Conditions, as *expressed in the* Deed of *Feoffment*, and to no other. A. levied a Fine come ceo B. had Ex Dono A. with the usual Words of Release of all his Right, according to the Course of Fines &c. with Warranty accordingly &c. It was the Opinion of the greater Part of the Justices of both Benches, That the Rent was not extinguished by this Fine, but was preserved by the Indenture which directed the Uses. D. 157. pl. 28, 29, 30. Hill. 4 & 5 P. & M. Puttenham v. Duncomb.

S. C. and in the same Words Godb 135. pl. 161. 31. Eliz. C. B.

9. *Lessee for* 10 *Years granted a Rent-charge to his Lessor for the said Years*, the *Lessor granted* the *Remainder in Fee to the Lessee for Years*, the Justices were of Opinion that the Rent is gone, because the Lessor who had the Rent was party to the Destruction of the Lease, which is the Ground of the Rent. 4 Le. 2. pl 5. 27 Eliz. C. B. Buckhurst's Case.

Resolved, That the Reversion and Rent pa sed, being by Fine, and that it should enure as several Fines; But if one makes a Gift in Tail, rendring Rent, Remainder over in Fee; this being *by Deed* is a good Reversion to the Donor, and the Remainder may without the Rent

10. *Limiting a Remainder over* of the Land by him, to whom the Rent was first reserved upon the Render *by Fine* of the Land Entail'd was Extinguishment of the *Rent*, and cannot go to the Remainder. Mo. 575. pl. 795. Pasch. 41 Eliz. C. B. White v. Gerish.

Rent shall go to the Stranger. Cro E. 125. pl. 62. Mich. 41 & 42 Eliz. C. B. S. C. —— Ibid. 168. pl. 11. S. C. Adjornatur. —— Ibid. 192. pl. 36. S. C. by Name of White v. Weft. Adjudg'd. —— 2 And. 170. pl. 92. S. C. —— Noy 9. S. C. Adjornatur. —— Ow. 126. S. C.

11. A. Copyholder in Fee made a *Leafe rendring Rent*, and then *furrendered the Reverfion to B.* who diftrained for 2 Parts of the Rent; And this was held good without any Attornment of the Leffee or Notice to him; becaufe the Surrender is a Thing notorious of itfelf. Raym. 18. Trin. 13 Car. 2. B. R. Black v. Mole. Black v. Mole S. C. Lev. 40. that tho' there was no Notice of the Surrender, yet the Diftrefs was Notice fufficient, and that it is not like to the Cafe where Forfeiture is to be taken upon the Breach of the Condition, and here the Eftate paffes by Surrender and Admittance in Court, which are Publick Acts, whereof every Tenant may take notice, and Attornment is not neceffary in this Cafe, becaufe there is no Means to compell it; And Judgment was given Nifi &c.

(Y) Extinguifh'd or Apportion'd. By *Purchafe of Parcel.*

1. IF there be Lord and Tenant, and the *Lord purchafes Parcel of the Land*, the Rent of the Seignory fhall be apportion'd; and fo it was done by Award, Anno 18 E. 2 quod nota; and this by the Common Law, as it is faid elfewhere; But quære by the *Common Law*. But it is good Law after the Statute of *Quia emptores Terrarum*; And fo is Littleton in his Title of Rents, & concordat the Reading of Sir John Fitzjames. Br. Apportionment, pl. 16. cites 3 Aff. 18.

2. In *Affife of 10 l. Rent*, the *Tenant pleaded Hors de fon Fee*, the *Demandant made Title by Grant of one A. Tertenant to the Anceftor of the Plaintiff in Tail*, and the *Plaintiff is Iffue in Tail*. The *Defendant faid, That the Tenant in Tail purchafed Parcel of the Land charged, and that the Plaintiff recovered againft him by faint Title*, which Matter was pleaded for Extinguifhment of the Rent, and after *the Affife was charged to enquire if the Plaintiff be feifed of Parcel of the Land charged, which faid, That he was Ad annuum valorem 16 s. and were appofed of what Value the Lands are, who faid, That 5 l.* and fo fee that the Land is worth only the Moiety of the Rent; and after it was *awarded, That the Plaintiff recover Seifin of the Rent, and recoup 16 s. of Rent in the Hands of the Plaintiff, and no more*; And yet per Birton, he ought to recoup more than 16 s. by reafon that the Land is worth only the Moiety of the Rent; therefore quære if the Land had been of greater Value than the Rent, whether it had been apportioned, having Regard to the Quantity of the Rent; And fee, That by a Purchafe of Parcel of the Land by Tenant in Tail of the Rent, the entire Rent was not extinguifhed. But *it feems, That againft Tenant in Tail himfelf, who purchafed, it is a Sufpenfion of all during his Life; but as to his Heir, in whom there is no Folly, it fhall be apportioned.* And fo it feems Supra, That the Tenant in Tail purchafed Parcel of the Land charged, and fuffered his Iffue to recover this Land againft him in Affife upon feint Title; the Tenant in Tail died, the Iffue in Tail being feifed in this Form, brought Affife of the Rent granted in Tail, and yet recovered and the Rent recouped ut fupra, Miror inde, by reafon that he himfelf recovered the Land, and brought the Affife of the Rent. Br. Extinguifhment, pl. 29. cites 30 Aff. 12. Br. Apportionment, pl. 11. cites 30 Aff. 12.

3. Dum fuit infra ætatem; Per Kirton, If an *Infant feifed of a Rent purchafes the Land and aliens the Land within Age*, it is at his Election to bring Præcipe quod Reddat of the Land or of the Rent; quod nullus negavit. And fo fee, That the Rent is not extinguifhed by his Purchafe, but only fufpended. Br. Extinguifhment, pl. 7. cites 45 E. 3. 34.

4. If

4. If a Man has a *Rent-Charge* and *purchaſes Parcel of the Land*, charged, the *Rent* is *ſuſpended*, becauſe in this Caſe there is no Apportionment. Br. Apportionment, pl. 27. cites 11 H. 6. 22.

5. Where an annual Sum is granted out of Lands, ſo that it may be *Rent ordinary at the Election of the Grantee*, if the Grantee *purchaſes Parcel before Election* he cannot make Election afterwards, but the Whole is * extinguiſhed; But if before Election *Parcel deſcends* on the Grantee, if he brings Writ of Annuity the Annuity is not apportionable, but he ſhall have the Annuity intirely. 2 And. 4. in the Caſe of Fulwood v. Ward, cites 14 E. 4. and that this was granted.

* S P. Becauſe the Law prima facie ſays, That this was a Rent-Charge and not an Annuity. Per Coke Ch J. 2 Bulſt. 149. in the Caſe of Sprint v. Hicks.

The *Rent is extinct and againſt Common Right*, and iſſuing out of every Part of the Land, and therefore by Purchaſe of Part it is extinct in the Whole, and cannot be apportioned; *But by Act in Law it may*. Co. Litt. 147. b.

6. If a Man has a * *Rent-Charge* to him and to his Heirs, iſſuing out of certain Land, if he purchaſe any Parcel of this to him and to his Heirs, all the Rent-Charge is extinct and the Annuity alſo; becauſe the Rent-Charge cannot by ſuch Manner be apportioned. Litt. S. 222.

7. *But* if a Man who has a † *Rent-Service* purchaſe Parcel of the Land out of which the Rent is iſſuing, this ſhall not extinguiſh all; for a Rent-Service in ſuch Caſe may be apportioned according to the Value of the Land. Litt. S. 222.

* Say 69. pl. 143. Paſch. 25 Eliz. S. P. And ſo if he be *Conuſee in a Statute Merchant or Recognizance*, and purchaſes Parcel of the Land, all the Rent is determined. But otherwiſe it is in the Caſe of the Queen; for if ſhe purchaſes Parcel, ſhe ſhall have Execution of the other Lands, which are in the Poſſeſſion of others. Per Manwood.

S. P. Per Coke Ch. J. 3 Bulſt 69. But if the Grantor *grants, That the Grantee* and his Heirs *ſhall diſtrein for the ſame Rent*, 'twas adjudg'd, That this ſhall be conſtru'd the like Rent; and good.—And *amounts to a new Grant*. Co. Litt. 148.—— The Words were, That he ſhould diſtrain for the ſame Rent *in the reſt of the Land, and the Grant ſhall ſtand in its Force*, and Finch held that it was good. Br. Charge, pl. 48. cites 46 E. 3. 32.

† Where one has a *Rent-Service*, and *purchaſes the Remainder or Reverſion in Fee*, all the whole Seigniory is extinct; For the entire Tenancy is held. But ſuch Purchaſe does not extinguiſh a *Rent-Charge*; for this is chargeable upon the Poſſeſſion; For he ſhall avow as in Land chargeable to his Diſtreſs. Per Gawdy J. Cro E. 226. pl. 11 Garnon v. Weſton.—— Le. 254. pl. 363. S. C.

But where a *Rent Service becomes a Rent Seek by Severance* of the ſame *from the Seigniory*, the Nature of the Rent is changed; For if the Grantee purchaſe Part of the Land the whole Rent ſhall be extinct. Co. Litt 150. b.

F. N. B. 209. (B) S. P. cites 14 E. 3 Ceſt. 28. 13 E. 3. 47. 10 H. 4. 1 — Br. Ceſſavit, pl. 35. cites F. N. B. 209. Brooke ſays, It ſeems that ſuch Recovery is as a Purchaſe and not as a Recovery of the Land by Title, of the Land deſcended to the Demandant.

8. If 3 *Jointenants hold by an entire yearly Rent*, As a *Horſe*, or of a Grain of Wheat, and the Tenant *ceaſe by 2 Years*, and the *Lord recovers 2 Parts of* the Land *againſt 2 of them*, and the *3d ſaves his Part by rendring* of the Rent &c. and finding Surety; Albeit the Lord comes to the 2 Parts by lawful Recovery, grounded upon the Default and Wrong of the 2 Jointenants, yet ſhall the entire annual Rent be extinct. Co. Litt. 149. a.

Le. 254. pl. 363 Trin. 33 Eliz. B. R. S. C. by Name of Weſton and Garnon's Caſe.

9. Baron and Feme were ſeiſed of 2 Manors, and convey'd them by *Fine* to A. and A. by the ſame Fine *render'd back to them a yearly Rent of 50 l. and to the Heirs of the Feme*; and alſo render'd *the 2 Manors to them for their Lives, Remainder over in Tail.* Baron and Feme died. The Son and Heir of the Feme claimed the Rent. 'Twas objected, That the Grant of the Rent was void; Becauſe the Land was granted at the ſame Time and to the *ſame Perſon*, and that the Grantee cannot have both. But adjudged, That it was good, and the Law ſhall *marſhal them*; For firſt the Rent ſhall paſs, and then it ſhall be as a Purchaſe of the Land by the Feme, who was ſeiſed in Fee of the Rent; and the Purchaſe of the Remainder in Fee ſhall not extinguiſh the Rent, but it ſhall be in Eſſe during the particular Eſtate; For by this the Poſſeſſion is only charged.

charged. Cro. E. 226. pl. 11. Paſch. 33 Eliz. B. R. Garnon v. Weſton.

10. A. ſeiſed of *Bl. Acre in Fee*, and poſſeſſed of *Wh. Acre for Years*, grants a Rent out of both to B. *for Life, with Clauſe of Diſtreſs in both.* If B. *purchaſes Parcel* of Wh. Acre the Rent is not extinct, becauſe it iſſues only out of Bl. Acre. 7 Rep. 23. b. 24. b. Trin. 42 Eliz. C. B. Butt's Caſe.

(Z) Extinguiſh'd or Apportion'd. By *Recovery.*

1. WHere a Man *grants a Rent-Charge out of 2 Acres*, and after the *Grantee recovers the one Acre by good Title*, the Grantee ſhall have the whole Rent out of the other Acre. Brooke ſays, Quære inde; for this is his own Act; For it ſaid elſewhere, That if a *Feme has a Rent out of 3 Acres* of Land, *and after ſhe recovers Dower of it*, the Rent ſhall be apportioned as upon Deſcent. Br. Extinguiſhment, pl. 52. cites Doctor and Student, lib. 2. cap. 16. & 3 E. 3.

But if a Man grants a *Rent-Charge out of 2 Acres*, and after the *Grantee recovers one* of the Acres *by a joint Title by Covin*, then the Rent is extinct for the Whole; becauſe he claims under the Grantor. Co. Litt. 148. b.

2. If a Man *leaſes Land for Life, rendring Rent*, and the *Tenant is impleaded and loſes*, and *recovers in Value*, he ſhall not render Rent for the Land recovered in Value; For the Rent ſhall be recouped in the Extent. Br. Rents, pl. 12. cites 22 Aſſ. 52.

3. If a Man *leaſes Land and Goods* for Years, rendring Rent, and after *a Stranger recovers the Land*, the Rent ſhall be apportion'd, inaſmuch as the Goods are not recover'd. Br. Apportionment, pl. 24. cites 7 H. 7. 4, 5.

Leaſe of *Land and a Stock of Sheep*, and after upon a Recognizance made by the Leſſor the *Land is evicted.* Adjudg'd, That there ſhall be no Apportionment of the Rent, and the Leſſee ſhall hold the Sheep without any Allowance. And Wray Ch. J. ſaid, That it was ſo held before in C. B. For the Rent was in its Creation entire and incident to the Reverſion, and was Rent-Service, and by Eviction of the Land and Reverſion this ceaſes to be Rent-Service, and 'tis therefore gone. D. 212. b. Marg. pl. 38. cites Mich. 33 & 34 Eliz. B R. Emot's Caſe.

4. If a Man *recovers the Place waſted by Action* of Waſte, which Place waſted is only Parcel of the Land leaſed, there the Rent ſhall be apportioned. Per Newdigate Serjeant. Br. Apportionment, pl. 6. cites 14 H. 8. 11, 12.

Br. Waſte, pl. 95. cites S. C. —— S P. Co Litt. 148. a. — S P. Per Dyer and Manwood, Mo. 114. in pl. 255. Paſch. 20 Eliz. Anon. —— If *Part of the Land be recovered* the Rent ſhall be apportioned. Br. Apportionment, pl. 24. cites T. 12 H. 8 fol. 11.

5. *A.* is *Lord, and B. Tenant by certain Rent. B. leaſes to A. for Life*, and after *brings Waſte and recovers the Land again.* Keble held, That the Tenant B. ſhall not pay the Rent to A. during A.'s Life; Becauſe A. by his own Act had excluded himſelf once of any Rent during his own Life by taking this Leaſe; and tho' B. recovers, yet by *this Recovery* he *does not diſprove the Intereſt which A. had*; But by bringing this Action he had affirm'd his Poſſeſſion, and therefore ſhall be diſcharged of the Rent. Keilw. 113. b. pl. 47. Caſus incerti Temporis. Anon.

But this is not like a Condition in Deed; For he agreed, That *if the Leaſe had been* made to *A. upon Condition, and B. had enter'd for Condition broken*; In this Caſe B. ſhall pay the Rent, becauſe by his Entry *he has diſpriv'd the Eſtate of the Lord*; For if A. the Lord had charged the Land, and after B. the Tenant had recover'd by Action of Waſte, he ſhall hold the Land charg'd; Becauſe by the Recovery he affirm'd the Poſſeſſion; And ſo there is a *Diverſity* between a *Condition in Law* and a Condition *in Deed* &c. Per Keble. Keilw. 113. b. pl 47. Caſus incerti Temporis. Anon.

If *Leſſee for Life grant a Rent charge*, and after does *Waſte*, and the Leſſor *recovers in an* Action of *Waſte*, he ſhall hold the Land charged during the Life of the Tenant for Life; but if the Rent were *granted after the Waſte done*, the Leſſor ſhall avoid it. Co Litt. 233. b 234 a.

6. *A. leaſes to B. for Life*; *B.* by Indenture *grants his Eſtate to J. S. reſerving* to him &c. *a Rent*, *with Clauſe of Re-entry* for Non-payment; *J. S. does Waſte*, *A. brings Waſte*, *and recovers*. Keble ſaid, That A. after his Recovery ſhall pay the Rent, but the Re-entry is determined; and it being inſiſted, That if J. S. before any Waſte done, had granted a Rent to a Stranger, and after A. the firſt Leſſor had recovered, that in ſuch Caſe A. ſhould be charged with the Rent, becauſe there was no Default in the Stranger. Keble ſaid, That there is no Diverſity where J. S. the 2d Grantee had granted a Rent to a Stranger, and where to his Leſſor; for he had ſuch Intereſt in the Land, that he might charge it during the Life of his Leſſor, and then his Authority is as great againſt his Leſſor as againſt a Stranger, and the doing of the Waſte was not his Act, and ſo to his Intent the Rent remains, but the Re-entry is gone, becauſe the Land, by committing the Waſte, is given to the Leſſor by the Statute for a Puniſhment, and the ſame Law of Ceſſavit. But where the Lord recovers by Writ of Eſcheat, it is otherwiſe; for he ſhall not have his Land in other Condition than his Tenant had it; for the Land is not bound with any eſpecial Law, as in the Caſes aforeſaid; and ſo a Diverſity &c. Keilw. 132. a. b. pl. 109. Caſus incerti temporis. Anon.

So it is if A. had made a Feoffment in Fee, and B. had *entered for the Forfeiture*, the Rent is to be *apportioned*, and is not wholly extinct; and the Reaſon thereof is, for that it is a Maxim in Law, That Nullus commodum capere poteſt de injuria ſua Propria; and therefore ſeeing the Waſte and Forfeiture were committed by the Act and Wrong of the Leſſee, he ſhall not take Advantage thereof to extinguiſh the whole Rent, and the whole Rent cannot iſſue out of the other Acre, becauſe the Leſſor has the one Acre under the Eſtate of the Leſſee, and therefore it ſhall be apportioned. Co. Litt. 148. b

7. In ſome Caſe a *Rent-charge* ſhall not be wholly extinct, where the *Grantee claims from and under the Grantor*; As if B. makes a Leaſe of one Acre for Life to A. and A. is ſeiſed of another Acre in Fee, and A. grants a Rent-charge to B. out of both Acres, and *does Waſte* in the Acre which he holds for Life, and B. recovers in Waſte; the whole Rent is not extinct, but ſhall be *apportioned*, and yet B. claims the one Acre under A. Co. Litt. 148. b.

8. If the *King gives* 2 *Acres* of Land *of equal Value* to another *in Fee*, Fee Tail, For Life or Years, reſerving a Rent of 2 Shillings, and the *one* Acre *is evicted by a Title Paramount*, the Rent ſhall be apportioned. Co. Litt. 148. b.

9. If *Gift in Tail*, *Leaſe for Life or Years*, be made of both Acres, *reſerving a Rent*, the Donor or Leſſor dies, the *Iſſue in Tail avoids the Gift or Leaſe*, the Rent ſhall be apportioned; for ſeeing the Rent is reſerved out of and for the whole Lands, it is Reaſon that *when Part is evicted by an elder Title*, that the Donee or Leſſee ſhould not be charged with the whole Rent, but that it ſhould be apportioned ratably, according to the Value of the Land. Co. Litt. 148. b.

So it is if the *Son recovers Part of the Land* upon an Alienation, *Dum non fuit compos mentis*, the Rent ſhall be apportioned for the Cauſe above mentioned. Co. Litt. 150. a.

10. If the *Father within Age*, purchaſe Parcel of the Land charged, *and aliens within Age*, *and dies*, the Son recovers in a Writ of Dum fuit infra Ætatem, or enters; in this Caſe the *Act of the Law* is *mixt with the Act of the Party*, and yet the Rent ſhall be apportioned; for after the Recovery or Entry, the Son has the Land by Deſcent. Co. Litt. 150. a.

11. A Man *ſeiſed* of Lands *in Fee takes a Wife*, *and makes a Feoffment in Fee*, the *Feoffee grants* a Rent-charge of 10 l. out of the Land *to the Feoffee and his Wife*, *and to the Heirs of the Huſband*; the Huſband dies, the Wife recovers the Moiety for her *Dower* by the Cuſtom; the Rent-charge ſhall be apportioned, and ſhe may diſtrain for 5 l. which is the Moiety of the Rent; in which Caſe two notable Things are to be obſerved. 1ſt. Albeit the Dower be by Relation or Fiction of Law above the

the Rent, yet when the Wife recovers her Dower, ſhe ſhall not have her entire Rent out of the Reſidue; for a Relation or Fiction in Law ſhall never work a Wrong, or a Charge to a third Perſon, but *in fictione Juris ſemper eſt Æquitas.* 2dly. That albeit her *own Act concurs with the Act in Law*, yet the Rent ſhall be apportioned. Co. Litt. 150. a.

12. If a Man has *an Office for Life*, which requires Skill and Confidence, to which Office he has a *Houſe belonging*, and charges the Houſe with a Rent during his Life, and after *commits a Forfeiture of* his Office, the Rent-charge ſhall not be avoided during his Life; for regularly a Man that takes Advantage of a Condition in Law, ſhall take the Land with ſuch Charge as he finds it. Co. Litt. 234. a.

13. Leaſe of Lands to A. at 100 l. per Annum, *Right of Common was claimed, and recovered* in Part of the Lands; this is no Eviction of the Land at Law, becauſe the Soil was not recovered, and ſo no Apportionment can be at Law; but it appearing, that notwithſtanding the Right of Common the Lands were worth the Rent reſerved, and better, the Court of *Chancery* would not decree it, but Bill diſmiſs'd, tho' Maynard inſiſted that ſuch Apportionment had frequently been decreed here. Chan. Caſes 31. Mich. 15 Car. 3. Jew v. Thirkwell. 3 Ch. R. 11. S. C. by Name of Tew v. Thickwell. ——N. Ch. R. 69. S. C. ——So Leaſe of a Parſonage, and Common of Paſture, and the *Common was exiſted.* Le 331. in Caſe of Knightly v. Spencer, cites 5 Rep. 5. Corbet v. Cleer.

14. *Eviction of Tithes* ſhall make an Apportionment of the Rent. Arg. Show. 51. in Caſe of the King v. Meeres.

(A. a) Extinguiſhed or Apportioned. By *Re-entry.*

1. WHere a Man *re-enters for Non-payment* of his Rent, *by Condition upon a Leaſe for Years*, he *ſhall have* the Land and *the Arrears of the Rent* alſo, viz. the Arrears *then due.* Per Brian Ch. J. Quære of the Rent which incurr'd after the Time of the Re-entry, if he *does not re-enter by a Year after his Time of Re-entry.* Lr. Rents, pl. 15. cites 6 H. 7. 3.

2. Debt upon a Leaſe for 10 Years, and counted of Arrears of 8 Years, the Defendant ſaid that the Plaintiff entered into Parcel ſuch a Year, before which Entry Riens Arrear. And per Cur. * *Entry into Parcel* ſuſpends all the Rent upon Leaſe for Years, becauſe the Rent is not apportionable. Br. Apportionment, pl. 5. cites 7 H. 6. 26. Where there is *Lord and Tenant*, and the *Lord enters into Part*, he ſhall make Avowry for the reſt, becauſe the

3. So of *Rent-charge.* Br. Apportionment, pl. 3. cites 7 H. 6. 26.

4. *Contra* of *Rent-ſervice.* Br. Apportionment, pl. 5. cites 7 H. 6. 26.

Rent ſhall be apportioned; Per Needham and Choke, (Quære inde) becauſe it ſhall be apportion'd where the Lord *purchaſes Parcel* by ſome; but it ſeems that he cannot apportion this Rent for his own Tort. Br. Apportionment, pl. 7. cites 9 E. 4. 1.——*By* Entry into Part *by Title Paramount*, the *whole* Sum or *Rent remains.* Br. Contract, pl. 16. cites S. C.——* S. P. Br. Contract &c. pl. 16. cites 9 E. 4. 1.

It was agreed by all the Juſtices, That where a Man *leaſes Land for a certain Term rendering Rent*, it is no Plea in Debt for the Rent, that the Leſſor has entered into one Acre Parcel of the 4 Acres leas'd, becauſe the Rent is Rent-Service; therefore by their Reaſon the Rent remains, or ſhall be apportion'd; quod Curia, becauſe the *Tort is his own Act*; *Contra of Entry upon Title.* Br. Apportionment, pl. 14. cites 21 E. 4. 29.

If a Man leaſes Land for Life or Years, rendering Rent with Clauſe of Re-entry, if the *Leſſor enters into any Part of the Land*, he cannot re-enter for Rent Arrear after, by Reaſon that a Condition cannot be apportioned, &c. Br. Re-entry for Condition, pl. 193 cites 33 H. 8. and P. 9 E. 4. 1.

Where our Books ſpeak of an Apportionment in Caſe where the Leſſor *enters upon the Leſſee* in Part, they are to be underſtood where the Leſſor *enters lawfully*; as upon a Surrender, Forfeiture, or the like, where the Rent is lawfully extinct in Part. Co. Litt. 148 b.

5. If there are *three Parceners*, and the *one enters, and leaſes to me rendering Rent*, and I am bound to pay the Rent, and after the *two enter*, I forfeit the Obligation if I do not pay the third Part of the Rent but by the Entry two Parts of the Rent are extinct. Br. Conditions, pl. 207. cites 20 H. 6. 23.

6. If the *Tenant of the King aliens to ſeveral particularly*, and the *King diſtrains one for the whole*, as he may, becauſe the King is not bound by the Statute of Quia emptores Terrarum, there the others ſhall be contributory. Br. Apportionment, pl. 21. cites F. N. B. 234, 235.

7. If the Leſſor *enters for a Forfeiture into Part*, the Rent ſhall be apportion'd. Co. Litt. 148. a.

8. If my *Diſſeiſor grants a Rent-Charge out of the Land*, and I *reciting the Grant confirm it*, and after I enter, ſome now hold, That I ſhall not avoid the Rent-Charge againſt my own Confirmation. And there a general Rule is taken, That *ſuch a* Thing *as I may defeat by my Entry I may make good by my Confirmation.* A *Releaſe* to the Grantee in this Caſe were void. Co. Litt. 300. a.

So it is if the *Heir of the Diſſeiſor grants* a Rent-Charge, and the *Diſſeiſee confirms it*, and after recovers the Lands, he ſhall not avoid the Rent; and yet in neither of theſe Caſes his Entry was congeable at the Time of Confirmation Co. Litt. 300. a.

9. If the *Feoffee upon Condition* grants a Rent-Charge in Fee, and the *Feoffor confirms* it; and after the *Condition is broken*, and the Feoffor enters, he ſhall not avoid the Rent-Charge. Co. Litt. 300. a.

So if *Tenant for Life upon Condition grants a Rent in Fee*, the *Leſſor confirms* the Grant, and after the *Condition is broken* the Leſſor re-enters, he ſhall not avoid the Grant. Co Litt 301. a.

10. If one has a *Leaſe for Years of* 20 *Acres*, rendring Rent, upon *Condition, That if he does not do ſuch a Thing the Leaſe ſhall be void for* 10 *Acres*. If the Leſſee does not perform the Condition, and the *Leſſor enters*, the entire Rent is gone. Owen 10. Mich. 33 & 34 Eliz. C. B. in Goddard's Caſe.

11. A. made a Leaſe of a Houſe, and after commanded the *Breaking a Partition Wall* in the ſaid Houſe; This was held no ſuch Re-entry into the Houſe as will make an Extinguiſhment of the Rent; for that muſt be a Continuance of the Poſſeſſion, and putting out the Leſſee. Clayt. 34. Harriſon's Caſe.

(B. a) Extinguiſhed or Apportioned. By *Releaſe*.

If he who has a *Rent-Charge out of* 12 *Acres* of Land, *releaſes the Rent of one Acre*, this extinguiſhes all, becauſe it is the Act of the Party himſelf; Contra of the Act of God, as of Deſcent. Br Apportionment, pl. 17. cites 34 Aſſ. 15. —— S P. Arg. Goldsb. 116. in pl. 13.

If a Man has a *Rent-Charge* of 20s. he may *releaſe* to the Tenant of the Land 10s. or more or leſs, and reſerve *Part*; For the Grantee deals only with that which is his own, viz. The Rent; And deals not with the Land as in Caſe of *Purchaſe* of Part; And ſo it was held in C. B. Hill. 14 Eliz. Co. Litt 148.

1. A Siſe of Rent *reſerved upon a Leaſe for Life*, the Tenant pleaded a *Releaſe of Part* of the Rent, and another Anſwer to the Reſidue; and well; quod nota; For the Releaſe of Part does not determine the whole Rent. Br. Aſſiſe, pl. 428. cites 9 E. 3. 8.

2. If the Leſſor *grants* to the Leſſee for Life, *That he ſhall be diſcharg'd* of the Rent; This is a good Releaſe. Co. Litt. 264. b.

3. There is a *Diverſity* between *ſeveral Eſtates in ſeveral Lands and* ſeveral Eſtates in one Land; For if one be Tenant for Life of Lands, the Reverſion in Fee over to another; if they 2 join in a Grant of a Rent

out

out of the Lands, if the *Grantee releaſes either to* him in the *Reverſion or* to *Tenant for Life*, the whole Rent is extinguiſhed; For it is but one Rent, and iſſues out of both Eſtates. Co. Litt. 267. b.

4. If *2 Tenants in Common* of Land *grant a Rent-Charge of* 40 *s* out of the ſame to one *in Fee*, and the *Grantee releaſes to one of them*, this ſhall extinguiſh but 20 *s*. For that the Grant in Judgment of Law was ſeveral. So it is if 2 Men be *ſeiſed of ſeveral Acres*, and *grant a Rent*. Co. Litt. 267. b.

5. By the Releaſe of the *Seigniory* a *Rent-Charge* is extinct. Co Litt. 305. a.

6. Leſſee for Years *aſſigns the Term*, Leſſor releaſes *all Demands to the* *firſt Leſſee*; This does not determine the Rent, being after the Aſſignment of the Term; Only Rent due before the Releaſe may be extinct by the Releaſe. Mo. 544. pl. 723. Paſch. 39 Eliz. B. R. Collins v. Harding. Cro. E. 6. pl. 6. Paſch. 40 Eliz. B. R. S. C.

7. If *a Leaſe* be made *to begin at Michaelmas*, reſerving a Rent; and before the Day the Leſſor releaſes all the Right that he has in the Land; This cannot enure to enlarge the Eſtate, but to extinguiſh the Rent in reſpect of the Privity. Co. Litt. 270. a. b. cites it as reſolv'd in the Exchequer. Mich. 39 & 40 Eliz. Woodhouſe v. Paſton.

8. A. ſeiſed of 3 Acres grants a Rent-Charge out of them to B. — A. infeoffs C. of 2 of the Acres. B the *Grantee covenants and grants with* C *That he will not charge the* 2 *Acres* for the ſaid Rent with any Diſtreſſes. Afterwards D. the Tertenant of the 3d Acre, being diſtrain'd, brought Replevin. As to the Covenant and Grant being a Releaſe the Court was divided, but agreed, That if it be a Releaſe D. may plead it; For by that the Rent is extinguiſhed. Noy 5. Butler v. Mottingys.

9. The Plaintiff declared upon a *Leaſe for Years*, *reddend'* 30 *s. at Lady-Day and Michaelmas*; and aſſigns for Breach, *Non-Payment of a Year's Rent* due and ending *at Lady-Day* 1689. The *Defendant* pleaded a *Releaſe dated the* 18*th Day of November* 1688. of all Demands; And upon Demurrer Judgment was given for the Plaintiff; For the *growing Rent not* due, which is incident to the Reverſion, was not diſcharged; *tho' the next Half-Year's* Rent, which *was* a Duty demandable, was releaſed; But here the Releaſe being pleaded as a Bar to all, which it is not, the Plea is naught, and Judgment muſt be given for the Plaintiff. 2 Salk. 578. pl. 1. Hill. 2 W. & M. B. R. Stephens & Ux' v. Snow.

(C. a) Extinguiſhed or Apportioned. By *Surrender*.

1. If a Man makes a *Leaſe for Life or Years*, *reſerving a Rent*, and the *Leſſee ſurrenders Part* to the Leſſor, the Rent ſhall be apportioned. Co. Litt. 148. a. Godb. 22. Per Rhodes J. — A Rent reſerved upon a Leaſe for Years ſhall not be apportioned by the Act of the Leſſor; As where he he takes a Surrender of Part of it. Per tot. Cur. Godb. 95. pl. 107. Mich. 28 & 29 Eliz. C. B. in the Caſe of Wiſeman v. Wallinger.

2. A. leaſes 2 Acres rendring Rent with Clauſe of Re-entry *Leſſor accepts a Surrender of one Acre*, the whole Condition is gone, but the Rent ſhall be apportioned. Per Jefferies. 4 Le. 28. pl. 82. in the Caſe of Lee v. Arnold.

3. If *Leſſee for* 20 *Years leaſes for* 10 Years, and afterwards *ſurrenders his Term*, the Rent is gone, and yet the Term for 10 Years continues. Agreed. Godb. 279. pl. 396. Trin. 16 Jac. B. R. Blackſtone v. Heath.

4. *Leſſee for Life leaſes for Years*, rendring Rent, and *ſurrenders to Leſſor*; the Leſſor ſhall not have the Rent; For he is in by his Reverſion, which is above the Leaſe for Years. Arg. Bridgm. 44 Mich. 13 Jac. in the Caſe of Smalman v. Agborrow.

(D. a) Apportioned. In the *King's Caſe.*

1. IF the *King gives* 2 *Acres* of Land *of equal Value* to another *in Fee*, Fee Tail, for Life, or Years reſerving a Rent of 2 s. and the *one* Acre *is evicted by a Title Paramount*, the Rent ſhall be apportioned. Co. Litt. 148. b.

2. R. being ſeiſed in Fee, *leaſed for Years to L. rendring* Rent of 40 *l. per Annum*; then he *deviſed* 2 *Parts* of the ſaid Lands, (being held in Capite) *and died*, *his Heir being under Age*, who being entitled to the other 3d Part, and in Ward the *Queen granted the 3d Part of the Rent* to the Plaintiff *during the Minority of the Ward*, who brought Debt for 3 Years Rent. It was held, That the Rent might be apportioned or divided; For it is a Real Contract, which is well apportionable, and Judgment was ordered to be entered, but was ſtaid for an Imperfection in the Declaration. Cro. E. 851. pl. 7. Mich. 43 & 44 Eliz. B. R. Weſt v. Laſſels.

3. *Lands* of a Monaſtery were *granted to A. reſerving* 28 *l. Rent* yearly *for a Tenth* of all the ſaid Land *according to the Statute*, and *A. afterwards granted the greater Part to B.* and that he had uſed upon the *Agreement made* between A. and *him to pay* 2 *l.* yearly *for the Tenth of his Part*, and A. had uſed to pay 8 l. yearly for that which he retained. *A. was attainted*, and [illegible] Part came to the King, and now the Auditor would impoſe the Charge of all the Tenth upon B. Per Cur. tho' the Tenth was originally chargeable and leviable upon all and every Part of the Land, yet it be[illegible]rent to them that Part thereof came to the King's Hands, it was ordered that the Land of B. ſhould be *diſcharged* before that Auditor *Pro Rata*, and ſo it was, and B. to pay only 20 l. yearly. Lane 56. Sir John Littleton's Caſe.

(E. a) Apportioned. *By whom*; and *How.*

S. P. by Yelverton J. Brownl. 186. in Pallet's Caſe. —

1. RENT ſhall be apportioned *according to the Value*, and *not* according to the *Quantity*. Br. Apportionment. pl. 20. cites 18 E. 2. and Fitzh. Avowry 218.

S. P. Co. Litt 149. b. —— But it is ſufficient to make it according to the Quantity of the Land, if it be not ſhewn of the other Side, that it differs in Value. Noy 10 Arg. cites 4 Aſſ.

Br. Apportionment pl. 8. cites S. C.

2. Aſſiſe of 12 s. *of Rent Service*, and 40 *Acres of Land put in View*, th *Defendant ſaid that the Plaintiff is ſeiſed of* 16 *of the Acres*, *and he is Tenant of the reſt*, *and* that he *had tendred the Service for his Portion*, and is *yet ready*, and the Plaintiff ſaid, That the Defendant is Tenant of all the Land out of which &c. and it was *found* that the Rent was iſſuing out of the 40 Acres, and that the Plaintiff held 16, and *that the Tenant had tendred*, *having Regard to* 10 *s. but not to* 12 *s.* for the Whole wherefore the Rent was apportioned by the Court, and it was *awarded that the Plaintiff*

tiff should recover the Rent which belongs to the Portion, which the Tenant held, *and his Damages*. Br. Aſſiſe pl. 115. cites 4 Aſſ. 5.

3. A. brought Aſſiſe *of* 20 *d. of Rent againſt B. and put in View* 2 *Acres*, B. *ſaid that the Rent is iſſuing out of thoſe* 2 *Acres, and of* 3 *Acres of Meadow, of which R. is Tenant not named* in the Writ, Judgment &c. and if found &c. and it was *found that M.* was *ſeiſed of the* 2 *Acres* of Land, *and* 3 *Acres* of Meadow, and *held them of one S. by Eſſate* of the ſaid S. *the Plaintiff hath by* 20 *d. per Ann.* and *M. before the Statute of Quia Emptores* Terrarum *enfeoffed* 2 *to hold of himſelf of the* 2 *Acres* of Land, *and after the Statute he infeoffed B.* Tenant in the Aſſiſe *of the* 3 *Acres* of Meadow *to hold of the Chief Lord*. Per Stone the Writ ought to have been brought againſt B. and the others who are Tenants of the 3 Acres of Meadow as Tenants of the whole in Demeſne and in Service; but now the Queſtion is if we may apportion the Rent in the Abſence of the other Tenant; And the Plaintiff was nonſuited, becauſe the Rent cannot be apportioned in the Abſence of the other Tenant. Br Aſſiſe, pl. 116. cites 4 Aſſ. 6.— Nevertheleſs Rent was apportioned in the Abſence of ſome of the Tenants not named in the Writ; therefore Quære. Ibid. cites 18 E. 2. Br. Apportionment pl. 9 cites S. C.

4. A. holds 20 *Houſes* of B. by Fealty, and 20 *s. Rent*. A. *enfeoffs C. of* 18 of them, yet without Notice he remains always Tenant to B. the Lord between them 2, and this *Notice ought to be made of the very Certainty of the Rent*, which ſhould belong to B. pro Particula illa put in Feoffment; For otherwiſe it is no Notice, and this Notice muſt be given before any Avowry made by B. otherwiſe A. ſhall be ſtill chargeable for the whole 20 s. Rent notwithſtanding Notice after the Avowry, and therefore A. as to the 18 Houſes ſhall plead *Hors de Son Fee*, and this ſhall be entered to avoid the Eſtoppel. Per Frowicke Ch. J. Kelw. 74. pl. 18. M. 21 H. 7. Anon.

5. By the Words *(according to the Quantity of the Land)* in the Statute of 18 E. 1. cap. 2. [which ſee at (G. a) pl. 1.] If there be *Lord and Tenant of* 20 *Acres* of Land *by Fealty, and* 10 *s. Rent*, the *Lord purchaſes* 2 *Acres*, and taking the Rent to be apportioned according to the Quantity of the Land *diſtrains for* 9 *s.* the *Tenant makes Reſcous*, the *Lord brings his Aſſiſe*, the *Tenant pleads Nul Tort*; the Recognitors of the Aſſiſe ſhall extend the Land according to the *Value*, and *not* according to the *Quantity*, and the Lord ought upon the true Valuation of the ſaid 2 Acres ſo purchaſed, to have but 8 s. 6 d. 2 Inſt. 505. In this Caſe, alſo the Plaintiff miſtook the juſt Reſcous upon the Apportionment, yet ſhall he recover ſo much as is found by the Jury to be due; For it were too hard, and a Cauſe of Multiplication of Suits, and againſt the Meaning of the Makers of this Act, that the Lord ſhould be driven in his Aſſiſe or Avowry &c. to hit the juſt Sum due upon the Apportionment; but tho' he *demand more*, yet ſhall he recover but that juſt Sum, which is implied in theſe Words Secundum Quantitatem Terræ, i. e. Secundum Quantitatem Valoris Terræ; But if he *demand Leſs* in that Action, he ſhall not recover the Greater. 2 Inſt. 503, 504

6. So it is if a Man make a *Leaſe for Years*, reſerving a Rent, if he *grants away Part of the Reverſion*, the Rent ſhall be apportioned by the Common Law, and albeit the *Grantee of Part demands* or claims *more in* in his Action of Debt or Avowry *than is due*, yet ſhall he recover ſo much as the Jury ſhall find upon a juſt Apportionment to be due, againſt a ſudden Opinion reported by Serjeant Bendloes, Hill. 6 & 7 E. 6. that the Rent in that Caſe ſhould not be apportioned but loſt; but the Law has been often adjudged to the contrary, for 4 Reaſons, 1ſt. For that *it is a Rent-Service*, and *not a bare Contract*, and Rent-Services were apportionable at the Common Law. 2. It is *incident to the Reverſion*, which is ſeverable. Et Acceſſorium ſequitur Naturam ſui Principalis. 3. The Rent being a Rent-Service is ſeverable by Recovery of Part, in an Action of Waſte, or upon Surrender in Part. 4. Laſtly, it is a General Caſe, and eſpecially in Caſe of Writs, which many Times are void for a third Part. 2 Inſt. 504. Paſch 39 Eliz. Rot. 233. coram Rege inter Collins and Harding. Hill. 42 Eliz. in C. B. inter Ewer & Moile Tr. 43 El. C. B. Rot. 243

And

7. And where the Caſe has been put of a Leſſee for Years, the *ſame Law* holds *in the Caſe of a Leaſe for Life*, whereupon a Rent is reſerved, for the Apportionment of the Rent; whereby it appears, that there was an Apportionment at the Common Law Pro Particula ſecundum Quantitatem Valoris &c. For to none of theſe Caſes does our Act extend. 2 Inſt. 524.

8. Apportionment made by *Agreement en Pais* is good, if it be to the Quantity and Quality of the Land, which the one and the other has, otherwiſe not. Per Dyer and Manwood. Mo. 114. pl. 255. Paſch. 20 Eliz. Anon.

* Cro. E. 772. Ewer v. Moyl. — When there is to be an Apportionment either the *Jury* ſhall do it

9. If A. make a *Leaſe of a Manor reſerving Rent*, and afterwards the Leſſor grants the *Reverſion of* 40 *Acres thereof*, if B. bring Debt, he may *aver* the Rate of the Acre, and if Defendant plead Nil debet per Patriam the * *Jury ſhall rate* the Value, and tho' the Value be found leſs by the Jury than the Plaintiff ſurmiſeth, yet he ſhall recover after the Proportion. Brownl. 33. cites Hill. 10 Jac.

upon *Nul tiel* pleaded, or the Defendant may in his *Pleading ſet forth the Value* of the Land, and to what the Apportionment ſhall be. Vent 2-6. in the Caſe of Hodgkins v. Robſon and Thornborough. — Wild J. held, That there might have been an Apportionment in this Caſe, if it had been before a Jury; But the Reporter adds, Sed non dedit Rationem. Freem. Rep. 419. pl. 553. in the Caſe of Hodgkins v. Thornbury.

(F. a) Apportioned. *Demanded, How.* And Pleadings.

Yelv. 140. D. P.

1. A. WAS *ſeiſed* in Fee *of a Manor*, *one Moiety* whereof he held *by Knight Service*, *and the other in Socage*, and *alſo of a Parſonage appropriated*, and *demiſed the whole* to the Plaintiff for Years *rendring* 77 l. 6 s. 8 d. *per Ann.* *A. deviſed the Manor to B. his eldeſt Son for Life*, Remainder to *C. his youngeſt Son in Tail*; afterwards *B. ſurrendered his Eſtate* for Life *to C.* who diſtrained; and in Replevin avowed for the Rent of 5 Parts of the ſaid Manor into 6 to be divided, and *ſhewed that the Parſonage was worth* 20 l. *per Ann.* but did *not ſet forth of what yearly Value the Manor was.* Defendant demurr'd, becauſe the Plaintiff did not ſhew the entire Value by the Year of the whole. Upon the firſt Argument the Court much doubted upon this Matter, and moved the Parties to agree; but afterwards Hill. 43 Eliz. upon further Argument the Court all agreed, That the Rent ſhall be apportioned, in regard it was *not a Diſcontinuance by the Act of the Party*, *but by the Law*, viz. The Statute of Wills, as in 34 H. 6. where the Leſſor granted the Reverſion to the Leſſee, and a Stranger. And they alſo held, That the Bar to the Avowry was not good, becauſe only Part was valued, and not all. And therefore adjudged for the Avowant. Cro. Eliz. 771. 772. Trin. 42 Eliz. C. B. Ewer v. Moyle.

2. A. made a *Leaſe for Years of Lands to which he had a good Title, and of other Lands to which he had a defeaſible Title, rendering Rent.* In Replevin *A. avowed for the whole Rent*; *the* Plaintiff *replied, That* after the Leaſe made, the *Diſſeiſee entered upon Part of the Land, and ouſted him.* Upon Demurrer it was held by 3 Juſtices, That the Avowant ſhould have a Return for the whole Rent; for the Judges could not apportion this, becauſe the *Value* did not appear, which *ought to be ſhewn by the Leſſee in his Pleading and Notice given to the Leſſor.* But 2 Juſtices held that it ought to be apportioned, becauſe it appeared that Part was evicted; but becauſe the Value did not appear to the Judges, it could not be apportioned. Brownl. 186, 187. Paſch. 5 Jac. Pallet's Caſe.

3. If

3. If *Leſſee ſurrenders Part*, the Leſſor needs not ſhew the Value. Per Williams J. and Popham agreed thereto, becauſe the Acceptance of the Leſſor had made him privy to it. Browl. 187. in Pallet's Caſe.

4. In Replevin the Defendant avows for Rent, the Plaintiff ſhews that he was *evicted of Part*. Per Popham and Tanfield, The *Plaintiff ought to ſhew the Value* of the Land evicted, and how the Rent ought to be apportioned, and what Part remained, *and to tender the Reſidue*; for what the Value is, and how the Apportionment ſhould be, are both in his Notice, and therefore the Plea was ill. But Williams J. held, That the *Leſſor ought in his Declaration* or Avowry *to ſhew the Apportionment*, for he ought to take Knowledge of the Eviction, and of his own Title, and ſaid it was lately ſo adjudged in C. B. in a Caſe of Moyle v. Lever. Wherefore the Juſtices would adviſe, & adjornatur. Cro. J. 160. Paſch. 5 Jac. B. R. Smith v. Malines

5. A. poſſeſs'd of a Term for Years, and of Land in Fee Simple, leaſes both by one Deed, and reſerving one intire Rent, and dies, by which the Reverſion of the Term goes to the Executor, and of the other Lands to the Heir; in this Caſe the Heir ought to demand at his Peril *directly the Sum to which the Rent ought to be apportioned*; for if he demands more than he ought, the Demand is not good; Per Coke. But in the Caſe at Bar the Demand was *of a* leſs Sum than he ought to have upon the Apportionment*. Ad quod Nothing was ſaid whether it was good or no. Roll. R. 368. Paſch. 14 Jac. B. R. Moody v. Garnon.

But if a Man brings an Action of *Debt for more Rent than is due*, where an Apportionment ought to be by the Jury, it may be apportioned, and the Plaintiff ſhall recover for the Reſidue Per Coke. Roll. R. 368. in Caſe of Moody v. Garnon.——* If he demand leſs he ſhall not recover more. 2 Inſt. 504.

6. In Replevin &c. the Defendant *avowed* for Rent, and ſhewed *that his Father was ſeiſed, and leaſed* for Years rendring Rent, and *died*, and that the *Reverſion deſcended to him*, and ſo he avowed for Rent Arrear; the Plaintiff *replied, That the Father deviſed the Reverſion to another* &c. The *Defendant* maintained his Avowry, and *traverſed the Deviſe*. The Jury *found, That the Deviſe was only of two Parts*, and not of the 3d. the Lands *being held by Knight Service*; Hutton J. held that the Avowant ſhould have Return for Part; for here the Jury have found the 3d Part of the Reverſion in him, and ſo there appears a ſufficient Certainty to the Court to make an Apportionment; and then if the Court may make an Apportionment, the Avowant ſhall have Return for ſo much as is due to him; but if it be to be made by the Jury, and not by the Court, the Avowant ſhall not have Return for the 3d Part. Adjornatur. But afterwards Judgment was given for the Avowant, Hobart and Winch being only preſent. Winch. 49, 50. Mich. 20 Jac. C. B. Claworthy v. Mitchel.

7. A. made a Leaſe of *Freehold and Copyhold* Land to B. Debt was brought for the Rent; B. pleaded in Bar that he was *evicted out of all the ſaid Lands* ante &c. A. replies, that J. S. was ſeiſed of the Freehold, and *traverſes* the Seiſin alleged by B. in his Plea of Eviction. Upon Iſſue joined a *general Judgment is pro Quer.* and affirm'd per tot. Cur. For where the *Plea in Bar was intire, and Part falſified by the Verdict*, he muſt have his Judgment general, which was for the whole Rent, as Plaintiff declared. And it was argued that the Defendant ſhould have ſet forth the Value of the Particular Lands evicted, and alſo of the other Lands. 2 Show. 399. Mich. 36 Car. 2. B. R. Randal v. Breſe. 3 Lev. 39 S. C.

See Tenure (C. a)

(G. a) Apportioned. In what Cafes there ſhall be *No Apportionment*, but the whole Rent ſhall iſſue out of the Reſidue.

1. 18 *E.* 1. cap. 2. ENacts that *if he ſell any Part of ſuch Lands or Tenements to any, the* * *Feoffee ſhall immediately hold it of the Chief Lord, and ſhall be forthwith charged with the Services, for ſo much as pertains, or ought to pertain to the ſaid Chief Lord* † *for the ſame* ‡ *Parcel,* ‖ *according to the Quantity of the Land or Tenement ſo ſold.* (2.) *And ſo in this Caſe the ſame Part of the Service ſhall remain to the Lord, to be taken by the Hands of the Feoffee, for the which he ought to be attendant, and anſwerable to the ſame Chief Lord, according to the Quantity of the Land or Tenement ſold for the Parcel of the Service ſo due.*

* This Branch, by Reaſon of the Word (Feoffee) in it, is underſtood when Part of the Tenancy Paravaile is alien'd, and not when Part of the Meſnalty. 2 Inſt. 503. —— † The Words (*For the ſame Parcel*) are *underſtood* of Services diviſible and apportionable, and *not of entire Services*, be they *annual or not* annual. 2 Inſt. 503.

‡ The Word (*Parcel*) is underſtood of a *Part in Severalty*, and *not in Common*; and therefore it is holden, That if the Tenant make *a Feoffment* in Fee *of the Moiety or 3d Part* &c. of the Tenancy, that ſuch a Feoffee is not within the Purview of this Statute; for a Moiety or a 3d Part &c. Pro indiviſo, is not Particula; for that Word implies a Part in Severalty. 2 Inſt. 503. —— ‖ See (E. a)

If a Man *grants* a Rent-charge *out of 2 Acres*, and after the *Grantee recovers one* of the Acres againſt the Grantor *by a Title Paramount*, the whole Rent ſhall iſſue out of the other Acre. Co. Litt. 148. b.

2. It was ſaid, That if *Termor* be *outſed* of *Parcel by a Title Paramount*, he ſhall be charged of the whole Rent for the reſt; becauſe Rent upon a Chattle cannot be apportioned. Quære inde. Br. Apportionment, pl. 7. cites 9 E. 4. 1.

If *A* infeoffs *B* of *one Acre in Fee, upon Condition*, and *B.* being ſeiſed of *another Acre in Fee, grants a Rent out of both* Acres to the Feoffor, who *enters into the one Acre for the Condition broken*, the whole Rent ſhall iſſue out of the other Acre, becauſe his Title is *Paramount* by the Grant. Co. Litt. 148. b ——*But* if a Man make a *Leaſe for Life of Bl. Acre and Wh. Acre*, reſerving 2 s. Rent, upon *Condition* that *if the Leſſee does ſuch an Act* &c. that then *he ſhall have Fee in Bl. Acre*, the *Leſſee performs the Condition*, albeit now by Relation, he has the Fee-ſimple, Ab Initio, yet ſhall the Rent be apportioned; for that the Reverſion of one Acre whereunto the Rent was incident, is gone from the Leſſor. Co. Litt. 148. b —— *So note.* Diverſity between a *Rent in grofs*, and a Rent *incident to a Reverſion*, concerning the Apportionment thereof. Co. Litt. 148. b.

3. *Leaſe of a Warren, extending into* 3 *Pariſhes*, was made rendering Rent, and after the *Reverſion of all the Warren in one of the Pariſhes was granted to J. S.* and the Leſſee attorned. Adjudged that neither the Leſſor nor J. S. ſhould have any Rent; for the Law is, That no Contract ſhall be apportioned. Owen 10. in Goddard's Caſe, cites Bendl. 14 H. 7.

4. If the Grantee of an *Annuity* or Rent-charge of 20 l. grant 10 l. Parcel of the ſame Annuity or Rent-charge, and the *Tenant attorns*, hereby the Annuity or Rent-charge is divided. Co. Litt. 148.

Gift in Tail, Leaſe for Life, or for Years of both Acres *reſerving a Rent*, the Donor or Leſſor dies, the *Iſſue in Tail avoided the Gift or Leaſe*, the Rent ſhall be apportioned; for ſeeing the Rent is reſerved out of and for the whole Lands, it is Reaſon that *when Part is evicted by an elder Title*, that the Donee or Leſſee ſhou'd not be charged with the whole Rent; but that it ſhould be apportioned ratably according to the Value of the Land. Co. Litt. 148. b.

5. Concerning the Apportionment of Rents, there is a *Difference* between a *Grant of a Rent* and a *Reſervation* of a Rent; for if a Man be *ſeiſed of* 2 *Acres* of Land, the *one in Fee-ſimple*, and the *other in Tail*, and by his Deed *grants a Rent out of both in Fee*, in Tail, for Life &c. and dies, the Land intail'd is diſcharged, and the Land in Fee Simple remains charg'd with the whole Rent; for againſt his own Grant he ſhall not take Advantage of the Weakneſs of his own Eſtate in Part. Co. Litt. 148. b.

6. A *Leaſe* was made of Land *in Poſſeſſion, and of other Land in Reverſion*, after the Death of J. S. then Tenant for Life to have the firſt for Life, and the other from the Death of J. S. for 40 Years, if Leſſee ſhould ſo long live, *yielding for all and ſingular the Premiſes* 4 *l.* at the four uſual Terms of the Year; the whole Rent is payable preſently, and not to wait the Death of J. S. for the Reſervation is intire. 12. 256. b. 257. pl. 11 Mich. 9 Eliz. Anon.

7. Apportionment can be only *of Certain* Rents and Things and not of Accidental or *Caſual* Profits, as Heriots, Profits of Courts, which cannot be reduced to an annual Value. Reſolved 5 Rep. 6. a. Mich. 31 & 32 Eliz. B. R. in Lord Mountjoy's Caſe.

8. A. *Termor for* 20 *Years*, and *ſeiſed of other Lands in Fee*, *leaſes all for* 10 *Years*, reſerving Rent, with Clauſe of Re-entry, and *dies*; now the Heir has a Reverſion for the Land in Fee, and the Executor for the other Land, and ſo the Condition is divided according to the Reverſion. Per Manwood. 4 Le. 27. pl. 83. in Caſe of Lee v. Archdl.

9. If a Man *leaſes* 3 *Acres* of equal Annual Value, for Life or Years, rendring 3 s. Rent, and afterwards *grants the Reverſion of one* Acre, and the Tenant attorns, the Rent ſhall be apportioned; For tho' it was but One Leaſe, One Reverſion, and One Rent, yet it was incident to the Reverſion, which was ſeverable; And the Rent ſhall attend upon the Reverſion, and upon every Part thereof. 8 Rep. 79. b. in Wiatt Wield's Caſe.

10. A. *leaſed Freehold and Copyhold Lands by one Demiſe*, and afterwards A. *ſurrender'd the Copyhold to J. S. and his Heirs*, *and* at another Time *granted the Reverſion of the Freehold to J. S. in Fee*, and the Tenant attorn'd. Adjudg'd, That J. S. may have one Action of Debt for the whole Rent. 13 Rep. 57. Paſch. 39 Eliz. B. R. Collins v. Harding.

Cro. E. 6-6. pl. 6 P. 43 Eliz. S. C. — Ibid. 622. pl. 15 Mich. 43 & 44 Eliz. B. R. S. C.

11. A. leaſed Land to B. rendring *Rent* 10 *l.* and then *deviſed* 6 *l. per Ann.* Parcel of the 10 l. per Ann. to C. D. & E. ſeverally, to each of them a 3d Part, and dies. The Deviſe is good, and the Rent is well ſeverable, and Action lies for each, which the Law gives as incident to the Rent. Per 3 Juſtices. Contra Popham. And Judgment accordingly; Popham conſentiente. Cro. E. 637, 651. Mich. 40 & 41 Eliz. and Trill. 41 Eliz. E. R. Ards v. Watkins.

12. *Rent-Sick* or * *Rent-Charge* cannot be divided without the Tenant attorns, but *Rent-Service* may. Arg. 2 Jo. 120. in the Caſe of Goſborn v. Wright, cites Hob. 25. and ſays, That Rent-Seck is divisible by Deviſe by the expreſs Words of 34 *H.* 8. Ibid. Arg.

* *Rent-ſeck in Law* it may; As where Part was extended by a *Fieri facias* of the Party and delivered in Execution; and this Act of the Sheriff is an Act in Law. But by Act of the Party the Tenant ſhall not be made *liable to 2 Leſſees*. Cro. E. 742. Hill. 42 Eliz. Woman's Caſe.

13. *Leaſe of Bl. Acre to commence at a Day to come, and Wh. Acre in Preſenti, rendring Rent at Michaelmas.* Before the Commencement of the Term in the other Acre the entire Rent grows due, and clearly is but one Rent. Per Cur. 2 Roll. Rep. 407. Mich. 22 Jac. B. R. Falſtaff's Caſe.

14. A *Biſhop had* 4 *Manors*, which were *uſually leaſed at* 32 *l.* Rent a Year. *He leaſed* 3 of them *rendring the ancient Rent*, whereas *no ancient Rent had ever been reſerved for* 3 *only*; and conſequently the Reſervation not good; And it could not be help'd by Apportionment. G. Equ. R. 52. & 3 Chan. Rep. 109 & 119. cited by Trevor Ch. J. and Holt Ch. J. in the Caſe of Dilp v. Ld. Bolton, as the true State of the Caſe of Dutch v. Squires, according as it appears upon the Record; And they ſaid, That Cro. C. 94. is but an imperfect Report of that Caſe.

15. *Leaſe of Copyhold Lands for* 3 *Years*, *and of Freehold for* 31 *Years*, at an entire Rent. One of the Terms is expired, Debt is brought for the Rent Arrear. Per Holt Ch. J. The Plaintiff ought to ſhew how much of the Land is Copyhold, and how much Freehold. It was then inſiſted, That

That but one entire Rent was reserved, and shall be paid as well after the Expiration of the Lease of the Copyhold Lands as before. Roll Ch. J. ask'd then for what Term shall the Rent be reserved? For it doth not appear to us. Therefore you had best discontinue your Action; For if we give Judgment on the Exception you may lose your Rent. Sti. 381. Trin. 1653. Peck v. Ewre.

16. Sir J. W. *Warden of the Fleet, granted the same*, with some Exceptions, to the Plaintiff, *for* 1000 l. in Hand, 1000 *l. per Annum*, and 200 Ounces of Plate *Rent.* His Agent gave a Particular of the Chamber-Rents to the Plaintiff, to induce him to the Bargain. Afterwards, on Complaint of the Prisoners, *the Judges of C. B. reduced the Rents of the Chambers*, which the Prisoners were to pay, *so as they came to near a Quarter less in Value.* The Plaintiff thereupon sought to be reliev'd; For this Order is compulsary, and *in Nature of an Eviction*; For tho' the Thing remain, the Profits which answer the Rent are taken away; But in regard there was *no Covenant in the Assignment for the upholding the Values*, or that they were such, the Ld. Keeper conceiv'd it like other Cases of Purchase, where it seldom happens but Things are over-valu'd; and dismiss'd the Bill. 2 Chan. Cases 204. Mich. 26 Car. 2. Duckenfield v. Whitchcott.

S. C. cited Arg. 2 Show. 399. — *But* where there is *no Rent* reserved upon the Redemise, there shall be an Apportionment. Vent. 276. Hodgkins v. Robson. — *But* if *Lessee assigns Part to a Stranger*, and the *Stranger assigns it to the Lessor*, and the *Lessee had reserved no Rent*, in that Case there shall be no Apportionment; For the Lessor comes under the Benefit of the Stranger's Contract. Per Hale. Vent. 276. Hodgkins v. Robson.

17. If Lessee *redemise to Lessor, reserving a Rent*, there shall be no Apportionment; For the Parties by the Reservation have ascertain'd what Rent shall be allow'd for that Part. Per Hale. Vent. 276. Mich. 27 Car 2. B. R. Hodgkins v. Robson.

(H. a) Apportion'd. In respect of *Time.*

1. IF Tenant for Life leases for Years, *rendring Rent at the Feast of Easter*, and the *Lessee occupies for 3 Quarters of a Year*, and in the last Quarter before Easter the *Tenant for Life dies*, here shall be no Apportionment of the Rent for 3 Quarters of a Year; Because no Rent was due till the Feast of Easter, and no Apportionment shall be in respect of Time. Resolv'd 10 Rep. 128. a. Mich. 11 Jac. in Clun's Case.

But in the same Case *if Part* of the Land *had been* * *evicted before Easter, and Easter had incurr'd in the Life of the Lessor*, there should be Apportionment of the Rent, but not in respect of Time, which well continues, but in respect that Parcel of the Land demised is evicted. Resolv'd 10 Rep. 128. a. in Clun's Case ——— And this Diversity appears in 27 E. 3. 84. b. In Debt against Executors, counting that their Testator granted to him a *Pension of 20 l. to abide with him in the King's Wars, when reasonably warned, to take at the 4 Terms of the Year equally*; And shew'd further, That he went with him to Calais upon Warning, and was there arm'd; And demanded Judgment, and pray'd the Debt. The Defendant said, That for the first Quarter he was paid 5 l. and shew'd Acquittance, and before the 2d Quarter the Testator died; And demanded Judgment of the Action. Wilby Ch. J. by the Rule of the Court awarded, That the Plaintiff take nothing by this Writ, because it shall not be apportion'd in respect of Parcel of Time, tho' it happen'd by the Act of God. 10 Rep 128. b. in Clun's Case, cites 10 E. 4. 18. 20 H. 6. 6. 9 E. 4. 1. 30 H. 8. Apportion 8 -.

* If one *lease* Lands for Years, *reserving* 20 *l.* Rent *yearly*, and *at the End of* 2 *Quarters* the Lessee *is evicted*, Lessor shall have no Rent; for Rent shall never be apportioned in respect of Time. Salk. 65. Hill. 3 Ja. 2. B. R. the Countess of Plymouth v. Throgmorton.

2. A. was *Tenant for Life*, Remainder *to B.* his Son *in Tail.* A *Judgment Creditor extended the Land and leased to J. S. rendring* 100 *l. a Year, payable Quarterly.* A. died the 10th of March, and J. S. continued the Possession till after the Lady-Day next. B. claimed the whole Rent from Christmas to Lady-Day; For that J. S. holding over, shewed his Election

Election to continue Tenant at Will to B. Ld. C. Cowper said, This was *Casus Omissus* out of the several remedial Statutes for Rents, and that the Law does not apportion Rent in respect of Time, nor did he know that Equity ever did it; That the Creditor might have guarded against this Accident by reserving the Rent weekly, so that it is his Fault, and *becomes a Gift in Law to the Tenant*. And his Lordship held, That from Christmas to the Death of A. upon the 10th of March, the Tenant should pay nothing, but that *J. S. should account to B. for the Profits from the Death of A.* And with regard to the Notion, That J. S. by remaining in Possession shewed his Election to continue at the old Rent, this, the Court said, only shewed his Election from that Time, and not from the End of the preceding Quarter. Wms's Rep. 392. Hill. 1717. Jenner v. Morgan.

3. 11 *Geo.* 2. *cap.* 19. Recites, That *where any Lessor* or Landlord, *having only* an Estate *for Life in the Land* &c. *dies before or on the Day on which any Rent is reserved* or made payable; *such Rent* or any Part thereof *is not recoverable by the Executors &c. of such Lessor &c. nor is the Person in Reversion intitled thereto, any other than for the Use and Occupation* of such Lands &c. *from the Death of the Tenant for Life*, of which Advantage hath been often taken by the Undertenants, who thereby avoid paying any Thing for the same; For Remedy whereof it is enacted, (§ 15.) That where any Tenant for Life shall die before or on the Day on which any Rent was reserved or made payable upon any Demise or *Lease* of any Lands &c. which *determined on the Death of such Tenant for Life, the Executors or Administrators of such Tenant for Life shall and may, in an Action on the Case, recover of and from such Undertenant or Undertenants of such Lands &c. if such Tenant for Life die on the Day on which the same was made payable, the Whole; or if before the Day, then a Proportion of such Rent, according to the Time such Tenant for Life lived, of the last Year or Quarter of a Year, or other Time in which the said Rent was growing due as aforesaid, making all just Allowances, or a proportionable Part thereof respectively.*

(I. a) Suspended.

1. If *Lessee surrender'd to Lessor upon Condition*, the Rent is suspended; But if Lessor *enters for Condition broken*, the Rent is revived. Arg. Het. 71. cites 7 H. 6. 2. Gascoigne's Case.

2. Entry into Part of the Land leas'd is a Suspension of the whole *Rent reserv'd upon the Lease for Years* during the Time; by the Opinion of the Court. Br. Apportionment, pl. 7. cites 9 E. 4. 1.

S. P. For in this Case he shall not take Advantage of his own Wrong as to enforce the Lessee to pay any Thing for the Residue. Otherwise of a *Rightful Entry* into Part. Per Hale. Vent. 211. in the Case of Hodgkins v. Robson and Thornborough. —— 2 Lev. 143. S. C.

It was given in *Evidence of an Entry* &c. for the Suspension of Rent, That on the Land demis'd was a Brick-Kiln and a small Cottage, and that the Lessor enter'd and went to the Cottage and *took* some of the *Bricks, and unti'd the Cottage*. But 'twas prov'd, That the *Lessor had reserved the Bricks and Tiles*, which in Truth were there *ready made at the Time of the Lease granted*, and that he did not untile the Brick-kiln House, but that it *fell by Tempest*; and so the Plaintiff did nothing, but came upon the Land to carry away his own Goods; And also he *used the Bricks and Tiles in the Reparation of the House*. And as to the Extra-tenet which was Parcel of the Issue, the Lessor did not continue upon the Land, but went off from it, and *relinquished the Possession*. But the Court held, The Continuing the Possession or Not was not material; For if he *once does any Thing amounting to an Entry*, tho' he *departs presently*, yet the Possession is in him sufficient to suspend the Rent, and he shall be said *Extra tenere* the Demised Land, the Lessee, if he has done an Act amounting to a Re-entry. Le. 110. pl. 149. Patch. 30 Eliz. C. B. Cibel v. Hills.

To make a Suspension of Rent reserved upon a Lease for Years the Lessor must *oust* the Lessee of Part of the Land let at least, *and must hold the Lessee out till after the Day* on which the Rent is made pay-

by the Leaſe; and if the Leſſee re-enters the Rent is *revived*; Sic Dictum fuit. Sti. 446 Paſch. 1655. Tanbrell v. Bullock.

3. A. makes B. Steward of his Manor, and gives 10 l. Fee to B. with Diſtreſs Pro Officio ſuo Exequendo, and Victuals and Drink for his Life. F. leaſes the Fee and his Diet to A. for 4 Years, rendring to B. 12 l. per Ann. with Clauſe of Diſtreſs in the Manor, by Deed indented. B. neglects to keep the Courts, and afterwards diſtreins for the 12 l. and makes an Avowry upon this Limitation; But the Avowry doth not lie, becauſe it is extinct by the Non-ſeaſance of the Services &c. For when the *Rent comes by reaſon of the Land*, there a *Leaſe to the Lord* is a Suſpenſion; But contrary where it comes *Ratione Perſonæ*. Br. Leet. Stat. Limit. 77. cites 20 E. 4. 12. Per Cur.

So it is if the Lord enters upon the Leſſee for Life or Years *rent to Part, and thereof diſtreſſes* or puts out the Leſſee, the Rent is ſuſpended in the whole, and ſhall not be apportioned for any Part. Co. Litt. 148. b. ——*And yet by Act in Law* a Rent-ſervice may be ſuſpended in Part, and in Eſſe for Part; as when the *Guardian in Chivalry enters into the Land of his Ward within Age*, now is the Seigniory ſuſpended; but if the Wife of the *Tenant be endowed of a 3d Part of the Tenancy*, now ſhall ſhe pay to the Lord the 3d Part of the Rent. Co. Litt. 148. b.——And *ſo* it is if the *Tenant gives a Part* of the Tenancy *to the Father of the Lord in Tail*, the Father dies, and this deſcends to the Lord; in this Caſe, by Act of Law, the Seigniory is ſuſpended in Part, and in Eſſe for Part; and the ſame Law is of a Rent-charge. Co. Litt. 148. b

4. If there be a *Lord and Tenant* of 40 Acres of Land *by Fealty, and* 20 *s. Rent*, if the *Tenant make a Gift* in Tail, or a Leaſe for Life, or Years, of Parcel thereof *to the Lord*; in this Caſe the Rent ſhall not be apportioned for any Part, but the Rent ſhall be ſuſpended for the whole; for a Rent-ſervice (ſaith Littleton) may be extinct for Part, and apportioned for the reſt; but a *Rent-ſervice cannot be ſuſpended in Part by the Act of the Party*, and in Eſſe for other Part. Co. Litt. 148. a. b.

Grant of a Rent for Life excepts it a Leaſe for Years of Part of the ſame Land, and *ſurrender* the ſaid Leaſe, the Rent is revived. Cro Car. 101. Hill. 3 Car. C B. Peyto v. Pemberton.—Litt. R. 58. S. C.——Hutt 94 S. C And it is ſaid there, that it would be otherwiſe if the Acceptance had been of an *Eſtate for Life*.——Het 50. 51. S. C. adjornatur And Ibid. 71. S. C. argued, but no Judgment.

5. If *Rent* be granted *out of an Eſtate in Fee, and a Term for Years* to A. *for Life*, an Acceptance of a Leaſe or Grant of the Land held for the Term, is no Suſpenſion of the Rent. 7 Rep. 23. b. Per Cur. Trin. 42 Eliz. in Butt's Caſe.

6. Leſſee conſents to the doing a Thing ordered by Leſſor to be done; afterwards it appeared that it could not be done without *Cutting down an Appie-tree*. The Leſſor's Workman acquaints the Leſſee of it, who will not conſent, but forbids the cutting it down; however, the Workman cut it down. And this was adjudged no Suſpenſion of the Rent; but it was agreed, that if Leſſee had *revoked his Licence*, and made it known to his Leſſor, and the Leſſor had after that commanded the Workman to cut down the Tree, it had been a Suſpenſion. Arg. 2 Roll. R. 399. cites it as the Caſe of Dord Denny v. Parney.

Hurt. 6 S. C. but there the Entry is pleaded to be into ſeveral Parts of the Houſe.——Darrel v. Andrews, S. C. Brownl. 69. ſet forth the Entry to be into a Wool-houſe, and one Buttery at the Upper End of the Hall.

7. In Debt for Rent, the Defendant pleaded an *Entry and Expulſion* out of the *Garden-houſe*; and it was held good, tho' it was Parcel of the Tenements &c. Hob. 190. pl. 236. Mich. 14 Jac. Dorrel v. Andrews.

8. A. made a *Leaſe of an Houſe, Land, and Woods, excepting all Trees not before ſtript, rendering Rent. A. cut down the Trees* which had been *ſtript* before. The Queſtion was, Whether this was a Suſpenſion of the Rent? It ſeems that it is not, becauſe the Body of the Tree does not belong to the Leſſee; ſo that the Prejudice to him is only in Reſpect of the Boughs and Shade; beſides he not having Property in the Trees, the taking

taking the Boughs will not be a Suſpenſion; for no Rent iſſues out of them, and they are Parcel of the Inheritance; but adjornatur. 2 Roll. Rep. 398. Mich. 21 Jac. B. R. Farby v. Clarke.

9. Leaſe of a *Parſonage* for Years, Leſſee *covenants to pay* the Rent, but before any becomes due, the Ordinary *ſequeſters* the Parſonage *for Non-payment of the firſt Fruits*; this is no Plea for the Leſſee in Action of Covenant. And if he had given Bond for Payment of the Rent, it would be no Plea in Debt on the Bond; for he had bound himſelf to pay the Rent, and the Occupation is not material, where the Leaſe is for Years or Life; but otherwiſe of a Leaſe at Will. Het. 54. Mich. 3 Car. C B. Jeakill v. Linne.

10. In *Debt for Rent* upon a Leaſe for Years, the *Defendant pleaded that* Prince Rupert, *an Alien born, and an Enemy to the King, invaded the Land* with an Army, and entered upon him, and drove away his Cattle, *and kept him out that he could not enjoy the Lands* for ſo long a Time. And this he pleaded in Bar to the Action; and upon Demurrer to the Plea, Roll held the Plea not good, for he *did not plead that the Army were Aliens and unknown*, as he ſhould have done; and the pleading that it was Hoſtilis Exercitus, makes not the Plea more certain than before; and where a Tenant for Years *covenants to pay Rent*, tho' the Lands are ſurrounded with Water, yet he is chargeable with the Rent, and much more in this Caſe. Sti. 47. 48. Mich. 23 Car. Paratine v. Jaſe.

Allen 26, 27. S. C. and reſolved among other Things, That the Plea was inſufficient; for though the whole Army had been Alien Enemies, yet he ought to pay his Rent. And this Difference was taken, That *where the Law creates a Duty* or Charge, *and the Party is diſabled to perform it without any Default in him, and has no Remedy over*, there the Law will excuſe him; As in the Caſe of Waſte, if a Houſe be deſtroyed by Tempeſt or Enemies, the Leſſee is excuſed, according to Dyer 33. a. 1 H 5. b. 283. a. 12 H 4. 6. So of an Eſcape. Cro 4 S 4 b 33 H 6. 1. So in 9 E 3. 16. a Superſedeas was awarded to the Juſtices, that they do not proceed in a Ceſſavit upon a Ceſſer during the War; *But where the Party by his own Contract creates a Duty* or Charge *upon himſelf*, he is bound to make it good, if he may, notwithſtanding any Accident by inevitable Neceſſity, becauſe he might have provided againſt it by his own Contract. And therefore if the Leſſee covenant to repair a Houſe, though it be burnt by Lightning, or thrown down by Enemies, yet he ought to repair it. Dyer 33. a. 4. E. 3. 6. b. Now the Rent is a Duty created by the Reſervation, and had there been a Covenant to pay it, there had been no Queſtion but the Leſſee muſt have made it good, notwithſtanding the Interruption by Enemies; for the *Law would not protect* him *beyond his own Power*, no more than in the Caſe of Reparation; this Reſervation then being a Covenant in Law, and whereupon an Action of Covenant hath been maintained, (as Roll ſaid) it is all one as if there had been an actual Covenant. Another Reaſon was added, That *as the Leſſee is to have the Advantage of Caſual Profits, ſo he muſt run the Hazard of Casual Loſſes*, and not lay the whole Burden of them upon his Leſſor; and Dyer 56. 6. was cited for this Purpoſe, that though the Land be ſurrounded, or gained by the Sea, or made barren by Wildfire, yet the Leſſor ſhall have his whole Rent. And Judgment was given for the Plaintiff.

11. *A. leas'd a Houſe in London to B.* at a certain Rent; *B. left the Houſe and went to Oxon to K. Cha. 1. and* then *ſent his Servant with the Key* of the Houſe to A. and deſired her to re-enter, and accept the Surrender. She ſaid ſhe would adviſe with the Defendant, her Son in Law, (who then ſat in the Houſe of Commons, and acted with them) afterwards ſhe refuſed to accept of a Surrender; *the Houſe was made an Hoſpital by the Parliament for Maimed Soldiers*; the Defendant, as Executor to the Lady, brought Debt at Law againſt the Plaintiff for Rent incurr'd, whilſt the Houſe was ſo uſed, and all the Time. B. brought a Bill to be relieved againſt the Action. It was inſiſted to be but reaſonable, That if a Tenant be put out by ſuch againſt whom he can have his Remedy, that he notwithſtanding, be liable to pay his Rent to the Leſſor; but in this Caſe the Plaintiff has no Remedy over, and that it was an Act of Force in the Parliament, which is pardoned by the Act of Oblivion, and ſo no Remedy over, and the King had pardoned all Arrears of Rent. Lord Chancellor took Time to adviſe, but declared that if he could he would relieve the Plaintiff. Chan. Caſes 83. Paſch. 19 Car. 2 between Harriſon and Lord North.

12. If

12. If *A lets to B. for* 10 *Years*, and B. *demiſes* to A. for 6 *Years*, to commence *in futuro*, in the mean Time this works no Suſpenſion either of Rent or Condition. Vent. 91. Trin. 27 Car. 2. B. R. Lion v. Carew.

13. *Pulling down a Rent-houſe*, is no Suſpenſion of Rent, but is a Treſpaſs, for which Leſſee may have his Action. 2 Jo. 148. Paſch. 33 Car. 2. Roper v. Loyd.

14. A. *Leſſee for* 60 *Years made an Underleaſe to B. for* 21. at 25 l. payable Quarterly. *B. covenanted to pay the Rent* to A. her Executors &c. *during the Term, and* covenanted *to keep the demiſed Premiſſes* during the ſaid Term, [*in ſufficient Repair*] *except* the ſame ſhould happen to be demoliſhed or *damaged by Fire, and would ſo deliver them up at the End of the Term*, except as before excepted. B. enter'd and was poſſeſs'd. *The Premiſſes were burnt* down, *and remained unbuilt for* the Space of *a full Year*. In an Action for Non-Payment of the Rent it was inſiſted for the Defendant, That the Rent was payable only for the Enjoyment of the demiſed Premiſſes, ſo that ſince he was hinder'd enjoying them by their burnt down, (which he was not anſwerable for, nor obliged by his expreſs Covenants to repair, but that the Plaintiff was to rebuild them,) it would be hard to charge him with the Rent when he had no Uſe of them. But Per tot. Cur. He is bound by *expreſs Covenant* to pay the Rent during the Term; and the Plaintiff had Judgment. 2 Ld. Raym. Rep. 1477. Paſch. 13 Geo. 1. B. R. Monk v. Cooper.

(K. a) Revived.

1. IF the *Lord releaſes to his Tenant, and to the Heirs of his Body*, the Rent ſhall revive after the Tail determined by the beſt Opinion; quod *mirum*; for he releaſes to him who has Fee-ſimple, but this *goes by Way of making of Eſtate*; therefore quære if there be a Diverſity. Br. Extinguiſhment, pl. 45. cites 13 E. 3.

2. In Aſſiſe *W. M. granted* 10 *l. Rent to N. D. out of his Land for Life of A.* the *Remainder to R. for his Life*, and after *A. died*, and *W. M. after the Death of A. releaſed by another Deed to the ſaid R. all his Right in the Rent, and granted that whenſoever the Rent ſhall be Arrear that the ſaid R. and his Heirs may diſtrain*; It is a good Title to R. for the Rent in Fee, by all the Juſtices, and yet by the Death of A. the Rent was extinct; For the Remainder was void, by Reaſon that the *Rent was not commenced by this Grant could not remain*, and ſo the Releaſe of the Rent to R. was void, inaſmuch as the Rent was extinct before the Death of A. but becauſe the laſt Deed has this Clauſe of Grant to R. that he and his Heirs may diſtrain when the Rent is Arrear, therefore *this is a New Grant*; Quod nota. Br. Rents pl. 19. cites 8 H. 4. 19.

3. If the *Grantee of a Rent-charge, and a Stranger diſſeiſe the Tenant of the Land*, and the *Grantee confirms the Eſtate of his Companion*, and the *Tenant* of the Land *re-enters*, the Rent is revived; for the Confirmation extended not to the Rent ſuſpended; otherwiſe of a *Releaſe*. Co. Litt. 298. b.

4. Rent and Services ſuſpended by *Union with the Crown* by Attainder of the Tenant are revived by Grant of the Land to a Subject. Ley 1. Trin. or Paſch. 1619. Long's Caſe.

Agreed per Richardſon Ch. J. ibid 84.

5. *Grantee* of Rent *diſſeiſes the Grantor, and makes Feoffment*, and the Diſſeiſee re-enters, or *recovers* &c. or if it be *rendered by Concluſion*, ſo that there is no Remitter, the Rent ſhall not be revived, becauſe he grants the Rent ſuſpended. Arg. Litt. R. 83. in the Caſe of Peyto v. Pemberton.

(L. a) Re-

(L. a) Revived. By Re-entry.

1. IN *Debt* the Opinion of 2 Juſtices was, That if the *Leſſor enters upon his Leſſee for Term of Years, and makes Feoffment in Fee*, and the *Leſſee re-enters*, that the *Rent* reſerved upon the Leaſe *is revived*; *for* by the Entry of the Termor, the *Reverſion is revived*, and the Rent is incident to it. But Quære inde; For he made Feoffment of the Land diſcharged of any Rent, and therefore it is hard that the Rent ſhall revive. Br. Revivings pl. 1. cites 9 H. 6. 16.

2. *Lord and Tenant by* 10 *s. Rent. Tenant leaſes to the Lord* for Life, and after brings *Waſte*, and recovers all the Land. Per Keble the Rent ſhall not be revived during the Lord's Life; But otherwiſe, if the Leaſe had been on Condition, and the Tenant had *entered for Condition broken*, and ſo note a Diſtetence between *Condition in Deed and* Condition *in Law*. Kelw. 113. b. pl. 47. Caſus incerti Temporis. Anon.

3. Leſſor enters on Part of the Land let, and *pulls down Part of the Houſe*. Per Popham and Gawdy the Rent is not revived by the *Leſſee's Re-entry* into that Part of the Land where the Houſe ſtood; For the Houſe was Part of the Cauſe for which the Rent was reſerved. Fenner and Clench doubted. Adjornatur. Cro. E. 341. Mich. 36 & 37 Eliz. B. R. Cherborn v. Rye.

Per Popham and Gawdy, the Leſſee ſhall hold the Land diſcharged of any Rent. Gold. 125. pl. 15 How v. Broom. & al.

(M. a) Avoided.

1. IF a *Rent-charge* be *granted for a Way*, and *the Way is ſtopped*, the Rent-charge ſhall be ſtopp'd alſo. Dav. Rep. 1. b. in the Caſe of Proxies cites 9 E. 4. 19. 15 E. 4. 2. 21 E. 3. 7. 45 E. 3. 8.

2. If the *Diſſeiſor grants a Rent-charge*, and the *Diſſeiſee enters, and caſts him who granted the Rent-charge*, then is the Rent-charge taken away and avoided. Litt. S 477.

3. If one *holds* Land *by 5 s. a Year Rent for Caſtle-Guard*, tho' the *Caſtle* be *pulled down or deſtroyed*, the Rent remains; For when the Tenant held of the Lord to keep or repair his Caſtle, and afterwards ſuch Service was in antient Times changed by the mutual Conſent of Lord and Tenant into an annual Rent, yet it is ſaid that ſuch Rent is paid Pro Wardo Caſtri, that is, in Satisfaction of Ward of the Caſtle; But if he holds to keep the Lord's Caſtle, and the Caſtle falls the Service is ſuſpended till it be re-built; but then the Tenure ſhall not be alleged to be for the Rent but for the Caſtle-guard, and ſo ſhall the Avowry be. 4 Rep. 88. in Luttrell's Caſe cites Bendl. Mich. 3 H. 8. C. B. Capel v. Apprice.

Mo. 1. pl. 2. S. C.— S. C. Bendl. 9, 10. pl. 5 —— S. C. cited Arg. Litt. Rep. 48. in the Caſe of Stevens v. Holmes.— S. C. cited Dav. Rep. 3. a. b in the Caſe of Proxies.

(N. a) Of the *ſeveral Sorts* of Rents, as Rent-Service, Rent-Charge, and Rent-Seck.

1. WHERE a Man *holds a Manor of his Lord by Service of* 40 *s. and by* 20 *s. for grinding at his Mill*, and *grants the* 20 *s. to W. S.* and the Tenant attorns. Some held this 20 s. was Rent-Seck, and Per Cur. if Lord of the Manor re-

and by ſome it was Rent-Service in the Hands of the Grantor. Br. Tenures pl. 26. cites 9 Aſſ. 24.

f. Tenant of Certain Tenements of Manor, moving Suit to the Mill, this Suit is Service, for which the Lord may diſtrain. Br. Tenures pl. 26. cites 9 Aſſ. 24. ——— *And if he after grants the Manor to J. N. rendring to him 40 s. for the Manor, and 10 s. for the Grinding*, the 10 s. is Rent-Service, iſſuing out of the whole Manor. Per Pernenk; quod non negatur. Br. Tenures, pl. 26. cites 9 Aſſ. 24.

2. Where the *Rent and Service go together*, this is Rent-Service; *but* if the *Rent-Service* be *ſevered from the Services in Fact or in Law*, this is Rent-Seck. Br. Rents pl. 14. cites 26 Aſſ. 38.

*It is called Rent-Service because it has ſome corporal Service incident to it, which at leaſt is Fealty. Co. Litt. 142. a. —— S. P. Co. Litt. 96. b. —— A Rent *reſerved upon a Leaſe for Years* is more than a Contract; For it is a Rent-Service. 13 Rep. 58. a Note by the Reporter in Caſe of Collins v. Harding.

3. * Rent-*Service is* where the Tenant holds his Land of the Lord by *Fealty and certain Rent*. Litt. S. 213.

4. † Rent-*Charge is* where one ſeiſed of certain Land grants *by Deed Poll*, or Indenture, a yearly Rent to be iſſuing out of the ſame Land in Fee, Fee-Tail &c. *with a Clauſe of Diſtreſs*. Litt. S. 218.

5. Rent-*Seck* is where ſuch Grant is made *without Clauſe of Diſtreſs*, & Idem eſt quod Redditus Siccus; Becauſe no Diſtreſs is incident to it. Co. Litt. S. 218.

† It is called a Rent-Charge, becauſe the Land is charged with a Diſtreſs for Payment thereof. Co. Litt. 143. b. —— And if it be to the whole Value of the Land or to the 4th Part of the Value it is called a *Fee-Farm Rent*. Co. Litt. 143. b.

To theſe may be added Redditus Aſſiſus, or *Redditus Aſſiſæ*, vulgarly Perry *Caſtle* which are the certain Rents of the Freeholders, and ancient Copyholders, becauſe they be alſo deſcribed certain, and doe diſtinguiſh the ſame from Redditus Mobiles, *Farm Rents* for Life, or Years, which are variable and uncertain. 2dly, Redditus Albi *White-Rents*, Blanch Farms, or Rents Reſerved, and commonly called *Spur-Rents*; They are called White Rents, becauſe they were paid in Silver, to diſtinguiſh them from Work-Days, Rent Cummin, Rent-Corn &c. And again, theſe are called 3dly, Redditus Nigri, Black Maile, or to *black-Rents*, to diſtinguiſh them from White-Rents. See 1 Co. Chanſ. 12 H. 3. M. 12 Rex concedat Hered. Eus de Ardevor Maneria de M. & A. &c. Reddendo per Annum ad Scacc. Regis &c. 5 Eliz. de Antiqua Firma 4thly, Redditus Reſoluti be Rents charged out of the Manors &c to other Lord &c. Feodi Firma, Fee-Farm, for this Kind of Rent Vide 18 Eliz. cap. 8. 2 Inſt. 19.

6. Rent *reſerved between Parceners* out of the Land which the other has in Partition *for Equality of Partition* is Rent-charge, and he may diſtrain in the Land of Common Right. Br. Rents, pl. 4. cites Littleton, Tit. Parceners.

7. If a Man grants a Rent out *of* 3 *Acres*, and grants further, that if the Rent be behind, that he ſhall diſtrain for the Rent in one Acres; this Rent is entire, and cannot be a Rent-ſeck out of 2 Acres, and a Rent-charge out of the 3d Acre; and therefore *it is a Rent-Seck for the whole, and yet he ſhall diſtrain for this in the 3d Acre*. Co. Litt. 144. b.

8. *So* if a Rent be granted *to* 2, *and to their Heirs out of an Acre of Land*, and that it ſhall be lawful *for one* of them *and his Heirs, to diſtrain for this in the ſame Acre*, this is a Rent-ſeck; for inaſmuch as they ſtand jointly ſeiſed of one intire Rent, it cannot be as to the one a Rent-ſeck, and as to the other a Rent-charge; and this Diſtreſs is as an Appurtenant to the Rent; and therefore if he which has the Rent dies, the Survivor ſhall diſtrain; and if *both grant over the* Term to another, he ſhall diſtrain for this. Co. Litt. 147. b.

9. *But* if a Man grants Rent *out of Bl. Acre to one and to his Heirs*, and grants to him that he may *diſtrain* for this *in the ſame Acre* for Term of his *Life*, this is a Rent-Charge for his Life and a Rent-Seck after, diverſis Temporibus. Otherwiſe it is if the Diſtreſs be limited for certain Years in the ſame Land, there it remains a Rent-Seck entirely; For that the Fee and the Freehold is Seck in ſuch Caſe. Co. Litt. 147. b.

10 Since the Statute of *Quia emptores Terrarum* if a Man gives Lands in Fee, reſerving a Rent, *it is a Rent-Seck* in a Subject; Becauſe a Tenure

Cro. E. 576. pl. 2. Hill.

- Rep. 24. b. Per Cur. accordingly, in Butt's Caſe.

- Rep. 24. b. Per Cur. accordingly, in Butt's Caſe.

- Rep. 24. b. Per Cur. accordingly, in Butt's Caſe.

nure cannot be created at this Day; and every Fee-Farm Rent, when granted by the King, becomes Rent-Seek, and therefore *not to be extended*. Arg. 9 Mod. 72. cites Cro. E. 656. 41 Eliz. B.R. Wastil v. Heath.

(O. a) Where *Rent-Service or Charge becomes* Rent-Seek in the Hands of the Grantee.

1. THE *Lord grants his Rent-Service, saving to himself his Signiory*, the Grantee cannot distrain, for this is Rent-Seek; And so see, That by express Words Fealty may be severed from Rent-Service. Br. Tenures, pl. 79. cites 7 E. 3. and Fitzh. Avowry 142. If there be Lord and Tenant, and the *Tenant holds of his Lord by Fealty and certain Rent*, and the *Lord grants the Rent* by his Deed to another, * *reserving the Fealty* to himself, and the *Tenant attorns* to the Grantee of the Rent; now this Rent is Rent-Seek to the Grantee, because the Tenements are not holden of the Grantee of the Rent, but are holden of the Lord who reserv'd to him the Fealty. Litt. S. 225. —— * So if it be saving to him the other Services. Litt. S. 225.

If there be *Lord and Tenant by Fealty and* certain *Rent*, and the *Lord by Deed grants the Rent in Fee, saving the Fealty, and* grants further by the same Deed, *That the Grantee may distrain* for the same Rent *in the Tenements*, it a Distress were incident to the Rent by the Grant; and that a Tenant attorns to the Grant, yet can not the Grantee distrain; For the Distress is an Incident inseparable to the Seignory, if not then the Tenant should be *subject to two Services*. Co. Litt. 150. b.

So it is if the Lord *grants the Rent in Tail or for Life*, saving the Fealty, and further grants, That the Grantee may distrain for it, albeit the Reversion of the Rent be a Rent Service, yet the Donee or Grantee shall have it but as a Rent-Seek, and shall not distrain for it. Co. Litt. 150. b.

2. If *Lord and Tenant* are, and the *Tenant holds the Manor of his Lord by* 40 *s. Rent* per Ann. *and* 10 *s. per Ann. for grinding at his Mill*, and the *Lord grants the* 10 *s.* which comes for Grinding *to* W. S. and the *Tenant attorns*, W. S. shall have it as Rent-Seek by some, and by some it was Rent-Service in the Hands of the Grantor; To which Parn. agreed. Br. Rents, pl. 11. cites 9 Ass. 24.

3. If a Man holds by *Fealty and* 10 *s. Rent*, and *grants the Rent*; this is Rent-Service to the Grantee, for the Fealty shall pass. Contra if the Tenure is by *Homage, Fealty, and Escuage and Rent*, and he *grants the Rent only*, for there the Services remain with the Homage. Per Willby J. *But* per Skipwith clearly where the *Rent is joined with a Reversion*, As upon Lease for Life, or upon a Gift in Tail, reserving Rent; there, if the Rent be granted and the Tenant attorns, the Grantee shall have only Rent-Seek; For the Services are incident to the Reversion, and do not pass by Grant of the Rent. Per Willby, It may be severed; For *if the Donor grant the Services* the Grantee shall have the Rent as Rent-Service by Grant of the Services, which none denied. But see Littleton contrary in his 2d Book, the 12th Chapter of Rents, fo. 49 & 50. Br. Grants, pl. 73. cites 20 Ass. 38.

4. It was agreed for Law, That if there be *Lord and Tenant*, and the *Tenant holds of his Lord as of his Manor*, and the *Lord retains the Signiory to the Tenant, saving the Reversion*, yet this is Parcel of the Manor, and yet is now Rent-Seek, which was Rent-Service before. Br. Rents, pl. 23. cites 31 Ass. 23.

5. *Or if a Tenant holds of his Mesne as of his Manor*, and the *Lord Paramount purchases the Tenancy where the Mesne has the Surplusage of the Service*, yet the Mesne who is Lord of the Manor shall have the Surplusage of the Rent as Rent-Seek, and this Rent remains Parcel of the Manor; quod nota; And a Man *shall make Title* to those Rents *in Assize by Continuance of Seisin of them, of which he, and those whose Estate he has in the Manor time out of Mind, have been seised*, and so prescribe; And so

see

ſee that the Rent, which is not now Rent-Service, may be Parcel of the Manor; but a Man ſhall not preſcribe in Rent-Service. Br. Rent, pl. 23. cites 31 Aſſ. 23. & 36 H. 6. 13.

6. If a Man *holds* certain *Land by Rent-Service* and *pays* the Rent *continually to the Lord in another County than where the Land is*, this ſhall * change the Nature of the Rent, and therefore where the Plaintiff would have intitled himſelf to it as to an Annuity he was not ſuffer'd. Br. Rents, pl. 26. cites 36 H. 6. 13.

* Orig is (Charge)'— For if held in Fee ſimple by Rent-Service, and he covenants by Deed with the Lord *to go for him into another County, or to do other Foreign Services in another County*, yet this is good, and ſhall be Rent-Service as before; For otherwiſe the Tenant may be doubly charged, as it ſeems, Scil. With Annuity and with Rent-Service. Ibid.

If a Man *leaſes Lands to A. to hold of him by Rent*, if he *grants the Rent* to another by this Deed, *ſaving* to him *the Reverſion*; ſuch Rent is but a Rent-Seek, becauſe that the Grantee had nothing in the Reverſion of the Land &c. Litt. S. 228.

It was conceived, The Grantee of a Rent *ſever'd from the Reverſion* could not have Action of *Debt for it*, becauſe he is not Party nor Privy to the Contract, nor has the Reverſion. Le. 315. Paſch. 30 Eliz. B. R. Audley v. Smith.— The Attornment makes Privity. 2 Jo. 2. cites 8 C.

7. *Tenant for* 20 *Years leaſes* the Land to W. P. *for* 10 *Years*, *rendring Rent*, and *after he granted the ſame Rent* to W. P. There he cannot diſtrain becauſe it is Rent-Seek; For he has not the Reverſion of the Term, which gives the Cauſe of the Diſtreſs. Br. Rents, pl. 17. cites 2 E. 4. 11.

If he grants the Reverſion of the Lord to another for Term of Life, and the Tenant attorns &c. then the *Grantee has the Rent as a Rent-Service*, for that he hath the Reverſion for Term of Life. Litt. S. 228.

8. *Contra if he had granted the Reverſion* and Rent to W. N. there he might diſtrain. Note the Diverſity. Br. Rents, pl. 17. cites 2 E. 4. 11.

9. If the *Donee holds* of the Donor *by Fealty and certain Rent*, and the *Donor grants the Services to another*, and the Tenant attorns, ſome have ſaid the Rent ſhall not paſs; Becauſe the Rent cannot paſs but as a Rent-Service, being granted by the Name of Services, and the Fealty cannot paſs, becauſe it is an Incident inſeparable to the Reverſion; But it ſeems the Rent ſhall paſs as a Rent-Seek; becauſe at the Time of the Grant it was a Rent-Service in the Grantor, and therefore there are Words ſufficient to paſs it to the Grantee, and it is not of Neceſſity that it ſhall be a Rent-Service in the Hands of the Grantee. Co. Litt. 150. b.

(P. a) *Demand* of Rent. At what *Time*. And what is a ſufficient *Attendance*.

1. IN Aſſiſe a Man *leaſed* Land *for* 12 *Years*, *rendring Rent*, *with Clauſe of Re-entry*, if it be arrear at the Day &c. and at a Day of Payment the Rent was arrear, and the Leſſor *came the next Day*, *and enter'd without demanding the Rent*; and therefore per Cur. his Entry is not lawful, becauſe he did not demand the Rent; nevertheleſs it is not expreſs'd when he ſhall demand the Rent, but it ſeems this ſhall be the Day of Payment, and at the laſt Inſtant of the Day. Br. Entre Cong. pl. 81. cites 40 Aſſ. 11.

* Upon a Leaſe for Years with

2. In *Quare ejecit* infra Terminum, the Defendant *juſtified by* reaſon of a *Leaſe* made by the Defendant to the Plaintiff for Term of Years *rendring Rent*, *and a Re-entry for Default of Payment*, and for the Rent Arrear; Such

Such a Day he re-entered. Fulthorp, at the fame Day that he fuppofes the Rent to be Arrear, the Plaintiff was *at the Day ready upon the Land* to have paid him if he would have demanded it, Abfque hoc, that any Day after this Day he demanded the Rent &c. Newton, after this Day of Payment &c. we came to the Land, and there demanded the Rent, and he did not pay it, Abfque hoc, that he tender'd the Rent to us at any Day after the faid Day, and before the Re-entry, and upon this they demurred on both Sides, & Adjornatur; and it feems here, that the *Tenant ought to attend all the Day upon the Land to tender the Rent*; *But* it feems that the *Leffor may come any Time of the Day* to demand the Rent. Br. Entre Cong. pl. 39. cites 4 H. 6. 9.

Refolved, the Leffee muft be upon the Land, and the Leffor come, and demand the Rent before the Sun-fet of the Day; for he knows not when the one and the other fhall intend the Re-entry, and therefore he muft be there all the Day; but Quere, if the Leffee be upon the Land at Sun-rifing, and the Leffor come after, and demand the Rent, whether that be a fufficient Demand, or not? Br. Conditions, pl. 192. cites 39 H. 8.

3. If a Man *leafes* Land *rendring Rent, and for Default of Payment at the Day, and a Mean after* to re-enter, the Demand at the Feaft-Day is not good for a Re-entry; and if he comes the laft Day of the *Month*, and departs, yet if the Tenant comes the laft Inftant of the Day, and tenders the Rent, the other cannot re-enter. Per Fairfax and Brian. Br. Entre Cong. pl. 90. cites 6 H. 7. 3.

If the Re-ceiver of the Rent be at certain Houfes, and it is there that the Rent is to be paid, it is fufficient for the Tenant to be ready in the Houfe at any Time of the Day, and need not ftay there all the Day; but if he goes out of the Houfe before Sun-fet, and comes not again before Sun-fet, it is a Forfeiture. Br. Conditions, pl. 192. cites 39 H. 8.

be Void in the Space of a Week after any Day of Payment, &c. In this Cafe the Feoffee muft tender and pay the Rent on the Feaft-Day; *but he has a reafonable Time for the Tender*, viz. from Sun-rifing to the laft Inftant of the Week, *unleffe he goes from the Feoffee* out of the Feoffee upon the Land, and *tenders* the Rent. Co. Litt. 202. a.

4. 'Tis not neceffary that the Grantee of the Rent fhall demand it *at the very Time* when it becomes due; but at any Time after is fufficient; For this is not like a Demand of a Rent-Seck, or Rent-Charge, becaufe that is fpecial, and overthrows the whole Eftate, and therefore the Time of Demand muft be certain, to the End the Leffee, &c. may have Notice thereto pay the Rent; But a Demand of a Rent-Service, or Rent-Charge is but only a formal Mean to recover that which is due; and therefore it may be demanded after it is behind at any Time, Whether the Tenant be prefent or no; For Remedies for Rights are ever favourably extended. Co. Litt. 153. a. b.

Cro. E. 514. Arg. cites S. P.

5. The Rent upon a Leafe was made payable at 4 ufual Feafts, upon Condition that if the Rent be behind by the Space of 3 Months after any of the Feafts, on which &c. then a Re-entry. The Rent was Arrear; Demand was made by J. S. by virtue of a Special Letter of Attorney at the Capital Meffuage an Hour before Sun-fet the laft Day of the 3 Months after the Feaft &c. according to the Condition, in Order for a Re-entry) of the Rent due at Midfummer laft; but none was there on the Part of the Leffee to pay. J. S. *ent his Servant in the Name of* the faid Meffuage, commanding him to ftay there, *and if any came to pay* the faid Rent *to give him Notice* thereof; then *J. S. went out upon the Land*, the Land lying on both Sides, *and did not return into the Houfe until Sun-fet.* This is a good Continuance of the Demand, and the 3 *Months* fhall be computed by 28 *Days*. 4 Le. 179. pl. 273. Mich. 15 Eliz. B. R. Wood v. Chivers.

D. 336. pl. 15. Eliz. S. P. Bridg. Sed quære if the Entry was not lawful, as it was pending the Demand of the Rent, and if the Leffee was not then upon the Land, and ready to pay the Rent, and if the Leffor was not then off the Land, and not ready to receive the Rent, and if upon the Matter, there was not a fufficient Demand. 4 Le. 181. pl. 276.

6. Leffor comes to the Land before the laft Hour, viz. in the Morning or in the Afternoon, and demands the Rent, and then *goes off the Land*, and *is not there the laft Inftant of the Day*, it is not a fufficient Demand, tho' he return preſently after Sun-fet. Agreed by all the Juſtices. 4 Le. 180. in the Cafe of Wood v. Chivers.

7. *Demand in the Morning*, and Continuance on the Land till Sun-fet without any other Demand after is good; For his Preſence there is

Continuance of the Demand. Per Gerrard Attorney-General; Quod fuit conceſſum per tot. Cur. 4 Le. 180. in the Caſe of Wood v. Chivers.

Tenant demands, and ſtays on the Land till Sun-ſet; 'Tis a Continuance of the Demand. Per Cur. J. Quod Wray Ch. J. conceſſit. 4 Le. 180. in the Caſe of Wood v Chivers.

8. Where a Leaſe is made *rendring Rent at Michaelmas, between the Hours of 1 and 5 in the Afternoon*, and a Re-entry &c. the Leſſor *comes at the Day at* 2 o'Clock, *and continues demanding till* 5, and the Rent is not paid; he may re-enter, altho' he was not at 1 o'Clock, when peradventure the Leſſee was there, and tendered it. Cro. E. 15. pl. 5. Paſch. 25 Eliz. C. B. The Ld Cromwell v. Andrews.

God's Gift of St. Anton. but ſeems to be S. C. by Name of Stone cited, that if a Diſtreſs be put upon the Land only for an Hour, or by Night, it was not a ſufficient Diſtreſs.

9. A. leaſed to B. for Years, rendring Rent upon Condition, That *if the Rent be behind* at the Day, *and* 10 *Days after (being in the mean Time demanded)* and *no Diſtreſs to be found* upon the Land, that then the Plaintiff might re-enter. The Rent was behind at the Day, and 10 Days after, and a ſufficient Diſtreſs was upon the Land till 3 o'Clock in the Afternoon of the 10th Day, at which Time B. drove out the Cattle, and at the laſt Hour of the Day A. came and demanded the Rent, and it was not paid, nor any Diſtreſs on the Land. It was held by Wray and Shute that the Condition is not broken, and that if a Diſtreſs be found there any Time within the 10 Days it is ſufficient; but Clench doubted; but adjudged, That a Demand made at the End of the 10 Days is not ſufficient, tho' no Diſtreſs be then there; but a Demand muſt be made in the mean Time. Cro. E. 63. pl. 6. Mich. 29 & 30 Eliz. B. R. Worceſter v. Stone.

Cro. E. 209. S. C. by Name of Fabian v. Winſlow. Sav. 121. S. C.—— Le. 305. S.C by Name of Fabian v. Windſor

10. If Rent be demanded ſo much Time *before Sun-ſet*, as is ſufficient for the Rent to be paid in, it is enough. Per Cur. And. 253. pl. 232. Mich. 31 & 32 Eliz. Fabian v. Rewmiton.

Cro. E. 73. S. C if Rent be reſerved at the Feaſts of the Annunciation and Nativity of St. John, and it is in Arrear at Lady Day, and not demanded at that Day, he cannot *demand all at Michaelmas*, and a Demand in that Manner is void for all.

11. Leaſe for Years, rendring Rent *to be paid at* 2 *Days in the Year*, Proviſo, That *if Leſſee do not pay the ſaid yearly Rent*, that then a Re-entry; That Rent is not demandable on Pain of Forfeiture, but on the laſt Day of every Year only, and not every Year according to the Reſervation. 3 Le. 226. Dr. Molin's Caſe, cited in the Caſe of Scot v. Scot.

Bowl. 135. ſtyles of v. Cuth. reported in much the ſame Words. S. C. & S. P. Cro. J. v. Swetman v. Cuſh. S. C. & S. P. where the Words are, *If the Rent be not paid or Demand ... any Time within the Year*, the Leaſe to be void.

12. Leaſe of Land rendring Rent per Ann. *Quandocunque the Leſſor ſhall demand it.* If Leſſor comes to demand it before the End of the Year, his Demand on the Land is not good, unleſs the Leſſee be there alſo; for the Time being uncertain when the Leſſor will demand it, he ought to give *Notice to the Leſſee* of the Time; and if he comes to the Leſſee and demands it, this is not ſufficient; For tho' Notice ought to be given to Leſſee in Perſon, yet the Land is the Debtor; And for this the Law binds the Leſſor to come to the Land, as to the Place in which it ſhall be paid; But if Leſſor ſtay till the *End of the Year*, then Leſſee at his Peril ought to attend upon the Land to pay; For the End of the Year is the Time of Payment preſcribed by the Law. Per Popham; quod fuit conceſſum. Yelv. 37. Paſch. 1 Jac. B. R. Sweton v. Cuthe.

13. Tho' *Sun-ſet* is the Time to demand, yet it is *not due till Midnight*. Per Hale Ch. J. 1 Saund. 287. Trin. 21 Car. 2. B. R. in the Caſe of Duppa Executor of Baskerville v. Mayo.

(Q. a' De-

(Q. a) Demand. *Good. In Reſpect of* the *Sum.*

1. IF in Demand of Rent the *Leſſor*, or any on his Part *demands one Penny more or leſs than is due*, the Demand is not good, and no Re-entry in ſuch Caſe ſhall be given unleſs the Demand be preciſely and ſtrictly followed. Agreed per tot. Cur. Le. 305. pl. 425. Mich. 31 & 32 Eliz. C. B. in the Caſe of Fabian v. Windſor. And 252 pl. 232 S. C. by Name of Fabian v. Rewnſton. — Saval. 121. Fabian v.

Wilſon. S. P. —— Cro. E. 259. S. C. — * S. P. Per Periam and Windham J. Mo. 2[illegible]. in Knight's Caſe.

2. Rent was payable Half-yearly, Demand of a Year and a half in one intire Sum, *by the Name of Rent and Arrearages*, or of 10 *l.* (being the half Year's Rent due at the laſt Feaſt *day at* the laſt Feaſt before the Demand, and of 20 *l. more* [illegible] *due before*, is a good Demand. And ſo was the Opinion of the Court. And. 256. pl. 263. Trin. 32 Eliz. Dennis v. Belden. Cro. E. 259. Fabian v. Wiſt n. S. P. — but if Rent is 5 l. per Ann. and 5 l. is behind, and

at the next Day Leſſor demands 10 l. it is not good, but he muſt demand 5 l. which then becomes due, but may demand the Arrears alſo. Allen. 94. Anon.

(R. a) Demand. Good. In Reſpect of the *Words*, or *Manner*.

1. HE who is to demand Rent ought to *bring Witneſſes with him, and in their Preſence make expreſs Demand* of the Rent on the Land, tho' no Perſon be there preſent to pay it. Per Hales. Quære hoc. D. 68. b. pl. 25. Paſch. 5 E. 6. in the Caſe of Kidwelley v. Brande.

2. If the *Leſſor* comes *upon the Land* to demand the Rent, and there *meets* with J. S. *a Stranger*, *and ſays* to J. S. *Pay me my Rent*; this is not a good Demand, for he has miſtaken the Perſon; for J. S. is not chargeable therewith, but in ſuch Caſe a general Demand of the Rent, without Reference thereof to any Perſon who is not chargeable, had been good. Yelv. 27. Paſch. 1 Jac. B. R. Sweton v. Cuſhe.

3. Dean and Chapter of Chicheſter leaſed Land to B. rendering Rent, *payable at the Cathedral Church of Chicheſter*, he ought to make a *formal Demand*, and his ſaying, *Bear Witneſs I am come here to demand and receive ſuch Rent*, is not a good Demand. Brownl. 138. Paſch. 5 Jac. Knap v. Pier Jewelch.

4. *And* in this Caſe a *General Letter of Attorney* by the Dean and Chapter, to demand their Rent on any Part of the Land leas'd, was not good, but it ought to be ſpecial only for that Land; and it ought alſo to be particular, and not general of any Perſon to whom they had made a Leaſe. Brownl. 138. Knap v. Pier Jewelch.

5. *I demand my Half Year's Rent*; this is a ſufficient Demand; by two Juſtices againſt one. Het. 109. Trin. 4 Car. C. B. Hunlock's Caſe. S. P. Dal. [illegible] pl. 35. 3 El. Anon.

(S. a) Demand *to have Re-entry. Neceſſary* in what Caſes.

Br. Conditions, pl. 216. cites 40 Aſſ. 11 ——S. P. Becauſe the Land is the principal Debtor, for the Rent iſſues out of the Land. Co. Litt. 201. b. ——It was reſolv'd that when a *Leaſe* for Years is made, *reſerving a Rent, and for Non-payment* that the Leaſe *ſhall be void*, the Leaſe is not void by Non-payment, without an actual Demand, becauſe a Rent is not properly due till it is demanded; But otherwiſe it is if it be to be void for Non-payment of a Sum in groſs. Freem. Rep. 242. pl. 255. Hill. 1677. Sir John Marſham v. Goodere.

1. THE Leſſor cannot enter upon the Leſſee for Years, by *Clauſe of Re-entry for Non-payment of Rent*, unleſs he firſt demands the Rent; quod nota, by Award. Br. Demand, pl. 19. cites 40 Aſſ. 21.

2. In Covenant the Defendant juſtified for a Re-entry upon the Plaintiff, who was his Leſſee for Years, for the Rent Arrear by *Clauſe of Re-entry*, and the Iſſue was taken whether the Defendant *demanded the Rent before his Re-entry*, or not; quod nota. Br. Entre Cong. pl. 14. cites 47 E. 3. 12.

Br. Conditions, pl. 125. cites S. C.

3. Where the *King* leaſes for Years, with Clauſe of Re-entry for Non-payment of the Rent, the King need not demand the Rent before he re-enters. Per Huſſey and Brian; and it is ſaid there, that if the King *grants the Rent and Re-entry to another*, he cannot enter without demanding of the Rent, and the King may grant his Action, and a Chaſe en Action, contrary of a common Perſon; quod nota. Per Huſſey, And the *King cannot enter till the Non-payment be found by Office.* Br. Entre Cong. pl. 88. cites 2 H. 7. 8.

Het. 59. Mich. 3 Car. C. B. in Caſe of Merriman & Wolverton, Yelverton J. cited a Caſe where a Leaſe was made, rendering a Rent payable at ſuch a Day upon Condition that *if the Rent be not paid at ſuch a Day without Demand*, that the Leſſor may re-enter, it was adjudged that no Demand was requiſite; for Modus & Conventio vincunt Legem.

4. A. made a *Leaſe* for Years, *rendering Rent at* the Feaſt of *St. Michael*; and for Default of Payment at the ſaid Day, *and by the Space of* 40 *Days after*, the *Leſſor to re-enter without any Demand* of the Rent. The Rent is in Arrear by 40 Days after the Feaſt, and no Demand made by the Leſſor; the Leſſor entered. The Queſtion was if the Entry was lawful? Per Hutton, It is not; for a Demand of the Rent is given by the Common Law between Leſſor and Leſſee; and notwithſtanding the Words (without any Demand) it remains as it was before, and is not altered by them; but if the Rent had been reſerved payable at another Place than upon the Land, there the Leſſor may enter without any Demand. But where no Place is limited but upon the Land, otherwiſe it is. Richardſon to the contrary, for which he had covenanted that he might enter without any Demand, the Leſſee had *diſpenſed with the Common Law* by his own Covenant. And Harvey was of the ſame Opinion. Het. 77. Hill. 3 Car. C. B. Challoner v. Ware.

(T. a) *Payment of* Rent. *At what Time. By* the Words of *Limitation.*

1. IF one *makes a Leaſe, October* 1. for Years, or Life, or Gift in Tail, *rendering* per Annum, a Pair of Gold *Spurs at Eaſter, or* 20 *s. at Michaelmas.* If Leſſee do not pay the Spurs at Eaſter, nothing is due till Mich. 10 Rep. 128. a. in Clunn's Caſe. cites 43 E. 3. Tit. Barr 194. 44 E. 3. 32. 15 E. 3. Execution 63. 5 E. 2. 2.

2. A

2. A Grant of a Reverſion depending on a Term for Years was Habend. & Tenend. *Reverſionem* illam ad Terminum Vitæ &c. *cum poſt Mortem &c. aut aliter accideret*, rendering annually 20 s &c. when the Reverſion ſhall happen as is aforeſaid, the Words (Cum Reverſio accideret) ſhall be conſtrued Cum *Poſſeſſio* accideret *ad Reverſionem*, till when no Rent is payable. D. 376. b. 377. a. pl. 27. Trin. 23 Eliz. Anon.

3. If Rent be reſerved *Annuatim durante Termino* prædicto, *the firſt Payment to begin two Years after*; this controls the Words of Reſervation. Per Jones J. 3 Bulſt. 329. Hill. 1 Car. B. R. in Caſe of Shury v. Brown.

4. Rent *generally reſerved*, is payable at the End of the Year. Arg. Lat. 264 Mich. 2 Car. in Caſe of Cole v. Sury.

5. Leaſe rendering Rent, and 100 *Couple of Conies*, to be paid between ſuch and ſuch a Time *weekly, as Plaintiff ſhould appoint*, ſuch Reſervation ſeems to differ from Rent which may be demanded all at once in the laſt Week, becauſe it may be kept without Damage, but the other not. Lat. 271. Mich. 3 Car. Per Jones J. Baily v. Buggs.

6. A Leaſe was made to hold from Mich. 1661 to Mich. 1668. paying *Rent Half-yearly*. It was demurr'd, ſuppoſing that the Words being to Michaelmas 1668, there was not an entire Half-year, the Day being to be excluded, and that it was ſo held in Caſe of **Humble** v. **Fiſher**, in 1 Cro. 702. Per Cur, It is true in Pleading, *Uſque tale Feſtum*, will exclude that Day; but in Caſe of a Reſervation the Conſtruction is to be governed by the Intent. Vent. 292. Hill. 27 & 28 Car. 2. B R. Pigot v. Bridge.

7. In Debt for Rent, the Plaintiff declared upon a Demiſe made 25 Auguſt, 11 W. 3. of a Meſſuage &c. *Habendum for 7 Years*, to commence *from the 24th Day of January*, *Reddendum* quarterly, *at the 4 moſt uſual Feaſts, viz. Michaelmas, St Thomas, Lady-day and Midſummer*, 31 10 s. per Ann. the *firſt Payment to be made at Michaelmas* next, and aſſigns for *Breach, that* 14 *l.* of the ſaid Rent *was in Arrear for one Year, ended 24th December*, Anno 13 W. 3. Defendant demurr'd, and it was *objected that the Year did not end the 24th of December, but at St. Thomas's Day*, according to the Reddendum, which is 21 December, Quod Curia conceſſit, becauſe where ſpecial Days of Payment are limited by the Reddendum, the Rent muſt be computed according to the Reddendum, and not according to the Habendum, and the Computation of the Rent, according to the Habendum, is only where the Reddendum is general, (viz.) Yielding and paying quarterly ſo much Rent; whereupon the Plaintiff had Leave to diſcontinue. 1 Salk. 141. pl. 7. Mich. 1 Ann. B. R. Tomkins v. Pincent.

S. C. - Mod. ſays, That ſo much as the Rent declared on, and the Rent reſerved by the Deed, were quite different, the Court told the Plaintiff that he could not diſcontinue, becauſe this Judgment could be no Bar againſt the right Rent. —2 Ld Raym. Rep. 819. 820 S. C. ſtates it that the Rent was reſerved payable at the 4 moſt uſual Feaſts, but the (viz.) contained but 3, namely, St. Thomas Day, Lady-day, and Midſummer, and Exception being taken thereto, that it was ill, the Court held that the (viz.) being repugnant, it ſhall be rejected as void; and as to the other Point of the Year not ending the 24th December, that the Rent ought to have been demanded in the Action, as of the 21 Holt, Powell and Gould were of that Opinion, but Powis J. contra. And Judgment for the Defendant for the Pleaſer given in 1 Salk. ſupra.

So where the *Demiſe was* 25 *March*, *Habend. a Die Datus*, the Half-year ends 25th September. See Skin. 309. Hill. 3 W & M. B. R. Parker v. Harris.

(U. a) Payment. At what Time. By Words Disjunctive, or Dubious.

1. LEaſe rendering Rent, payable at *Michaelmas*, *or* 14 *Days after*, *Et ſi contingat*, the ſaid Rent to be behind *Poſt aliquod Terminorum* vel Feſtorum *prædictorum in quo ſolvi debet*, by the Space of 14 Days, *Poſt aliquod Feſtum prædictum*, that then &c. Adjudged that the Leſſee

1 Le 141 S. P. Smith v. Billiard — 2 Rep 129. S. C. cited 11 Clun's Caſe

Leſſee has 14 Days after the ſaid 14 Days mentioned in the Reſervation, without Danger of the Penalty of the Condition, and the laſt Words Poſt aliquod Feſtorum prædict. for the Contrariety ſhall be rejected. 4 Le. 91. Paſch. 25 Eliz. C. B. Clark v. Kempton.

Het. 74 Anon. S. P. —So in Caſe of Leſſee for Life. Per Fleming Ch. J. Cro. J. 228. in Caſe of Barwick v. Foſter.

2. *Bond for Payment of* 40 *l. annually, during the Life of* B. at the Feaſt of St Michael, and the Annunciation, *or within* 30 *Days after* every of the ſaid Feaſts; B. dies within the 30 Days. It was held that this is a Diſcharge of the Payment due at the Feaſt before his Death. Cro. E. 380. Hill. 37 Eliz. Price v. Williams.

2 And. 54. Paſch. 38 Eliz. S. C. but ſomewhat differently reported as to the Payment of the Rent; for it ſays the whole Rent is payable October 1 for the whole Year, and the next Half Year's Rent is payable March 30. and ſo all the Rent reſerved will be payable within the Term, and that this muſt be the Intent of the Leſſor. —Noy 1. Martin v Wentworth, ſeems to be S. C. but not ſo clearly reported.

3. Leaſe made 26th June 26 Eliz. Habend. a Feſto Annunc. ult. præterit. for 35 Years, *rendering the firſt* 10 *Years* 40 *l. annually, on the* 1*ſt of October and the laſt of March, by equal Portions*; and *after the* 10 *Years* 46 *l. on the ſame Days, the firſt Payment to begin* October 1. next following. Reſolved, that tho' the Leaſe began not in Intereſt till the 26th June 26 Eliz. yet in the Account of the Number of Years, it began the Ladyday before; ſo that the 10 Years expired at Lady-day 36 Eliz. and then the firſt Reſervation ended, and every Day after there is to be paid 23 l. And now tho' the Leſſor cannot have 10 Years together 40 l. but ſhall *fail in one of the Payments*, yet that is not material; for it is impoſſible that he ſhould have it 10 Years and 10 Times, as this Reſervation is, ſo Judgment for the Plaintiff. Cro. E. 515. Mich. 38 & 39 Eliz. B. R. Main v. Beak.

4. *Leaſe of Bl. Acre, to commence at a Day to come, and of Wh. Acre in Præſenti*, rendering Rent at Michaelmas before the Commencement of the Term in the other Acre, the entire Rent is then payable. And per Cur. It is but one Rent. 2 Roll. R. 467. Mich. 22 Jac. B. R. Falſtaff's Caſe.

5. A Rent was granted by Indenture to J. S. and J N. for a Term of Years, if they ſhould ſo long live, *payable at Michaelmas and Lady-day*, the *firſt Payment to be in Manner* and Form *as afterwards expreſs'd in the Grant, and no otherwiſe*, but *omits mentioning the Time when* it ſhould commence. Jones and Berkley J. held, That for this Uncertainty the Rent ſhould commence preſently. Croke J. compared it to a Grant of a Rent, the Payment whereof is to be limited by another Deed, in which Caſe, for Want of a Limitation, the Grant is void. Jones ſaid he did not remember that Richardſon Ch. J. delivered any Opinion [as to this] but all 4 agreed that when the Limitation and Expreſſion is made, then the Rent ſhall *commence* well enough. Jo. 343. Trin. 10 Car. B. R. Dickinſon v. Waterman.

6. Covenant upon a *Leaſe for Years*, yielding and *paying* 10 *l. at Michaelmas, if it be demanded, or within* 10 *Days after*. The Breach aſſigned was for Non-payment of the Rent. It was objected, that it is not ſaid the Rent was demanded at the Day, and then it is not due. But per Cur. If it be not demanded, it is due at the Day, tho' not payable; but however, it is due 10 Days after. Freem. Rep. 463. pl. 633. Trin. 1678. Norris v. Elſworth.

7. Covenant for Payment of Rent at St. John and Chriſtmas, or *within* 14 *Days after, the firſt Payment to be at Chriſtmas next after the Date* Per Cur. The Defendant had 14 Days after the firſt Chriſtmas, as well as any other, to pay his Rent in, and Judgment accordingly. 2 Show. 77. Trin. 31 Car. 2. Anon.

(W. a) Pay-

(W. a) Payment, When. By *General Words.*

1. THE Words of a Will were, I give to A. 40 s. of yearly Rent going out of all my Lands in M. with a Clauſe of Diſtreſs for Non-payment thereof *at the uſual Feaſts*, during all his Life; the uſual Feaſts for Payment of Rents in the Vill where the Lands were, were St. Michael and the Annunciation; adjudged a good Deviſe, and that the uſual Days ſhall be taken to be the *uſual Days in the Town where the Lands are, for the Payment of Rents.* 2 And. 122. pl. 67. Mich. 40 & 41 Eliz. Cowdrey's Caſe.

2. The Dean and Chapter of W. leaſed Land for 21 Years, rendering 4 l. Rent quarterly, Leſſee aſſigns the *Moiety* for Years to J. S. *paying the Half of all ſuch Rents as are payable to the Dean and Chapter*; J. S. muſt pay the Rent to B. quarterly; for (*Such*) ſhall intend the Quality, as well as the Quantity. Noy 18. Sir Hugh Wrot's Caſe.

3. If a Rent be reſerved to be paid *before Michaelmas*, this may be paid at any Time before Michaelmas, at the Election of the Leſſee, and this Payment ſhall be a Bar in Debt brought for this after Michaelmas. Per Coke Ch. J. Roll. R. 390. Trin. 14 Jac. B. R. in Caſe of Whitchcoke v. Fox.

4. Rent was made, payable *yearly during the Time Leſſee ſhould enjoy.* The Leſſor cannot demand it half yearly. Per tot. Cur. againſt Hutton J. Het. 53. Mich. 3 Car. C. B. Wentworth v. Abraham. Litt. Rep. 61. S. C. reported in the ſame Words.

5. *Pro quolibet Anno*, is all one as if it had been annually, and then it is to be paid at the End of every Year. Lutw. 231. Mich. 3 Jac. 2. Coningsby v. Rodd.

(X. a) Payment. When. *By* Words (*Months* &c.) *How* to be *computed.*

1. RENT was reſerved payable at the 4 uſual Feaſts, upon Condition to re-enter, unleſs it be paid within 3 Months after any of the ſaid Feaſts; It was reſolved by all the Juſtices, That in the Computation of theſe 3 Months there ought to be allowed 28 Days to every Month. 4 Le. 179. pl. 288. Mich. 15 Eliz. B. R. Wood v. Chivers.

2. A Month &c. ſhall be accounted to conſiſt of Days, and therefore the Demand ſhall be made at the laſt Inſtant of the Day, *without accounting Nights*, but the Night is Parcel of the Year, yet it cannot be demanded in the Night. Per Bromely. Dal. 114. pl. 5. 16 Eliz. in Caſe of Butle v. Willord.

3. Condition of Re-entry was on Non-payment of the Rent *by the Space of a Month* after every Quarter, and the Demand of the Rent was the *28th Day* after Chriſtmas; And well, as is reſolved in the Caſe of the Biſhop of Peterborough v. Catesby. 2 Lutw. 1139. in the Caſe of Kirby v. Green, cites 2 Cro. 166, 167. Cro. E. 73. pl. 3. Mich. 29 & 30 Eliz. B. R. Allen v. Andrews. And if Leſſee comes on the Land to make a Tender within the Month, and Leſſor is not there, it is no good Tender

(Y. a) Payment. When. *By transposing the Feast-Days* mentioned in the Grant.

1. LEase of 2 Acres, dated the 2d of November, *Habend' one of the 2 Acres from Michaelmas last past, and the other from March after,* rendring 10 l. Rent at the Feasts of *St. John Baptist and St. Thomas* the Apostle.—Tho' the Rent is reserved payable at St. Thomas and St. John Baptist, yet being one entire Rent the Payment is not to *commence* till St. John; For he had not all the Land at the Feast of St. Thomas, and then he cannot pay his Rent for the Entirety till he has the entire Land, and the *Law shall marshal the Payments.* 2 Roll. Rep. 213. Mich. 18 Jac. B. R. St. John v. Child.

3 Bulst 328. S. P. Per Whitlock J in the Case of Shury v. Brown.——5 Rep. 112. in the Case of Mallory v. Pain S P. ——— 2 Jo. 109. S P. Obiter.

2. If Lease be to one in *November, rendring Rent at Michaelmas and the Annunciation,* yet the first Payment shall be at the Annunciation, because it is the *first Day of Payment in Time* tho' it be not the first in *Nomination.* 2 Roll. Rep. 213. in the Case of St. John v. Child.

Lease was made in *August, rendring Rent at Lady-Day and Michaelmas*; yet adjudg'd, That the first Rent was payable at Michaelmas. Pl C. 172. Hill v. Grange ——— S C. cited Arg. Hard 91 ——— S C. cited Cro E. 832. in the Case of Pain v. Malory.

(Z. a) Payment on the Rent-Day. Good. And to whom. *Lessor dying on the same Day.*

See (H. a) pl. [illegible]

Br. Presentation, pl. 4. cites S. C.

1. THORP said in a Quare Impedit, That it is not doubted but if the *King's Tenant receives his Rent due from his Tenants at Christmas on Christmas-Day,* and after he dies the same Day, that the Tenants shall pay it again, and the Lands shall be thereof charged in the Exchequer; which none deny'd or affirm'd. Therefore *quære Legem*; For if the Bishop presents to his Advowson, and his Clerk is instituted and inducted, and the Bishop after dies the same Day, by which the Temporalties come to the Hands of the King the same Day, the King shall not have the Presentation. Contra, If no Induction was. Quære of the Diversity of the Payment of the Rent, and this Case of the Advowson; For all is one in Reason. Br. Rents, pl. 2. cites 44 E. 3. 3.

But it is otherwise in the Case of the *King.* Ibid.——

* Goldsb. 98 pl. 17. Trin. 30 Eliz.

2. If the Rent be payable at Easter, and the Tenant *pays the Rent in the Morning* * about 10 o' Clock of the same Day, and the *Lessor dies before* 11 in the same Morning, this Payment was voluntary, and yet it is good Satisfaction against the Heir. 10 Rep. 127. b. Clun's Case. Mich. 11 Jac. cites 44 E. 3. 3. b.

3. If one seised of Land in Fee Oct. 1. makes Lease of the said Land for 10 Years *from Michaelmas*-Day then *last past, rendring to him and his Heirs* 20 *l.* a Year *at the Feast of St. Michael* the Archangel, *or within a Month after*; In this Case, if the *Lessor dies between Michaelmas and the End of the Month* the Heir shall have the Rent as incident to the Reversion, and not the Executors as Rent arrear; Because it is not due till the End of the Month. Cited by Coke Ch. J. Mich. 11 Jac. in Clun's Case, as a Case whereof he had seen a Report Mich. 34 H 8. in the Time of Baldwin Ch. J. where it was so held by all the Justices.

4. The

4. Tho' *Sun-set* is the Time appointed by Law to demand Rent to take Advantage of a Condition of Re-entry, and to tender it to save a Forfeiture, yet it is *not due till Midnight*; For if one seised in Fee leases for Years, rendring Rent at Midsummer on Condition of Re-entry for Non-Payment; now if he will take Advantage of the Condition he must demand it at Sun-set, but if he *dies after Sun-set and before Midnight* his Heir shall have this Rent, and not his Executors, which proves that the Rent is not due till the last Minute of the Natural Day. Per Hale Ch. J. Saund. 287. Trin. 21 Car. 2. in the Case of Beppa Executor of Barkerville v. Mayo.

5. A. granted a *Rent-Charge to B. for Life, payable at Lady-Day and Michaelmas*, and *B. died on Michaelmas-Day after Sun-set*; It was held by Judge Tracy, That since B. lived after Sun-set, which was the legal Time for demanding the Rent, tho' he died before 12 at Night, it should go to the Executors. Wms's Rep. 178, 179. Arg. cites it as a Case at Durham Assizes between Bellasis and Cole. The Reporter gives a Note of a State of this Case under the Hands of the Counsel on both Sides, and the Opinion of Tracy J. which he said was communicated to him by Mr. Justice Tracy, and that the Justice told him he had advised with Holt Ch. J. at his Chambers, and that upon View of the several Authorities relating to this Case his Lordship was of the same Opinion. Ibid 178, 179. and says it was the 19th of April, 13 W. 3. by the Name of Southern v. Bellasis.

S. C. cited per Ld. C. Macclesfield (who was the Counsel that had sign'd the Case for the Defendant as mentioned above) at the Sitt. of the Lady Celt in the Northern Circuit in the late King William's Time, in which he did desire Justice Tracy to take the Advice of the Judges, and give his Opinion accordingly, That where the *Tenant for Life can make a Reparation* did about 6 in the Evening the Rent was become completely due, and belong'd to the Executor; otherwise he thinks he could not give a proper Discharge for it 'till the last Instant, which must certainly be may at any Time of the Day wherein it is payable; and this does not at all contradict Paskerfill v. Sparrow in Saund. 287. Ch. Prec. 556 in the Case of Lord Strafford v. Lady Wentworth.

6. If *Lessor dies on the Rent-Day* between 3 and 4 in the Afternoon *before Sun-set*, the Rent shall go to the Heir or Jointress; Because at the Time of the Lessor's Death there was no Remedy or Means to compel the Payment thereof. Decreed per Trevor Master of the Rolls, 1711. 2 Salk. 578. Rockingham v. Oxenden. Wms's Rep. 177. Mich. 1711. S. C. by the Name of Ld. Rockingh m v. Dr. Penrice & al ——— S. C. cited. Arg. 9 Mod. 21. —— Per Cur. The Rent is not due from the Tenants till the last Minute of the Day on which it is payable, neither can they be compell'd to pay it till after that Day, but they *Can pay the Rent* they ought to it was due from them, and the next in Remainder if is plain has no Right to receive it; therefore being paid it to a wrong Hand, who received it without any Title, it ought to be paid over to the Plaintiff, who had a colourable Title to receive it as Administrator to the Intestate. 9 Mod. 21. Patch. 9 Georgii in Case Lord Strafford v. Lady Wentworth. — Ch. Prec. 555. S. C. Hill. 1720. —— S. C. cited Wms's Rep. 180.

7. The *Distinction is* between *Leases determined and* Leases *continuing*; In the first Case, if a Tenant for Life makes a Lease for Years, and reserves Rent at Lady-Day and Michaelmas, and *dies on Michaelmas-Day at 12 at Noon*, or any other Time before the last Instant, the Rent shall go *to his Executor* or Administrator; For the Rent was due on the Beginning of the Day, tho' the Lessees, if the Lease had continued, might have deferr'd the Payment till the last Instant of the Day, which Election was now taken away by his Death, upon which the Lease determined. But if such Tenant for Life *grants Leases by Virtue of a Power*, so that such Leases do not determine by his Death, but run on, there the Election of the Tenants is not taken from them to defer Payment to the last Instant of the Day, and so the Lessor dying before such last Instant the Rent goes with the Reversion. Per Ld. Macclesfield. Ch. Prec. 555 Hill. 1720. E. of Strafford v. Lady Wentworth.

(A. b) Payment. *Good.* And *what Amounts* to a Payment.

Br. Brief, pl. 303. cites S.C.

1. PAyment of Rent by the Tenant to *one Coparcener*, where there are two or more, is good, and a Payment to both. Br. Tender, pl. 19. cites 36 Aſſ. 1.

2. A *Payment made in Name of Seiſin of Rent* being given *before the Day on which the Rent is due*, ſhall not be abated out of the Rent. Co. Litt. 315. a.

S. P. 4 Le. 4. pl. 16. Paſch. 25 Eliz. Fuller's Caſe —But if

3. *Money paid for Rent before the Day* of Reſervation is no good Payment of the Rent; For it is a Payment only of a Sum in Groſs. Cro. E. 15. Paſch. 25 Eliz. C. B. Ld. Cromwell v. Andrews.

the Reverſion be a Sum in Groſs, Payment before the Day is good. Le. 136. in the Caſe of Littleton v. Perns —— So Acceptance of Rent before Commencement of the Leaſe is no Acceptance at all. Fin Law. 8vo 68.

If the Leſſee covenants, to pay his Rent to the Leſſor, his Payment of the Rent *before the Day* is no Performance of the Covenant, Cauſa patet. Le. 136. pl. 186. Mich. 30 Eliz. C. B. in the Caſe of Littleton v Pernes.

S.C. Le. 237. pl. 320. Mich. 32 & 33 Eliz. B. R.

4. In Debt for Rent the Defendant gave in *Evidence*, That the Leſſor was bound by Covenant to repair the Houſe, but did not; and therefore he *expended Part of the Rent in the Repair of the Houſe*. Per 2 Juſt. Contra Fenner J. The Leſſee might expend the Rent in the Reparations and ſtop ſo much. But it ſhould be *pleaded* and not given in Evidence. Cro. E. 222. pl. 2. Paſch. 33 Eliz. B. R. Tailour v. Beale.

Le. 237. pl. 320. adds a Quære, If

5. Paying *Rent-Charge* &c. *by the Leſſor's Order* or Appointment is Payment to himſelf. Cro. E. 223. Tailour v. Beale.

the Leſſor covenants to diſcharge the Land leaſed and the Leſſee of all Rent-Charges iſſuing out of it, and a Rent-Charge be due, if the Leſſee may pay it out of his own Rent to the Leſſor; Ad quod non fuit reſponſum.

Covenant to ſave the Leſſee harmleſs from a *Rent-Charge*. If Leſſee pay it *without Compulſion* he pays it in his own Wrong, and muſt *pay it again* to the Leſſor. But if he is diſtrain'd for the Rent-Charge, and his Goods taken; This is a Breach of the Covenant, and not before. 3 Salk. 169. pl. 9. Mich. 9 W. 3. B. R. Hannam v. Redman.

6. There is a Diverſity where the *Acquittance* for the laſt Quarter is under the Plaintiff's *Hand and Seal*, and where it is under his *Hand only*; For in the firſt Caſe it is an Eſtoppel, in the laſt it is but Evidence. Comb. 59. Trin. 3 Jac. B. R. Fountain v. Gnales.

(B. b) *Determined* or Not; where the Eſtate, on which it was reſerved, is determined.

1. A MAN ſeiſed of a Foreſt *granted the Office of Foreſter* to one *rendering Rent*, and after gave the Foreſt to J. S. The Foreſter *forfeited the Office*, and the *Lord of the Foreſt ſeiſed*, yet the Foreſter ſhall render the Rent to the Grantor; quod nota bene. Br. Charge, pl. 52. cites 26 Aſſ. 60.

Br. Extinguiſhment, pl. 35. cites S.C.

2. If an *Abbot has a Rent*, and *all the Monks die*, the Rent-charge is extinct: And *ſo of an Annuity*; for the Corporation is determined, and the *Creation De Novo is another Body*. Br. Mortmaine, pl. 1. cites 20 H. 6. 7.

3. If

3. If a Man grants a *Rent out of a Mill*, and the *Mill is taken*, yet the Soil is charged. Br. Acceptance, pl. 5 cites 9 E. 4. 21. Per Danby.

4. A *Parſonage Appropriated to a Prior Alien, was charged with an Annuity*, and after was *ſeiſed into the King's Hands*; and it was *enacted by Parliament*, in Time of *H. 5. That the Poſſeſſions of Priors Aliens ſhould remain to the King and his Heirs for ever*; and the *King granted the Parſonage to another and his Succeſſors, as it was in the King's Hands*; and the Chargee brought a Writ of Annuity againſt the Grantee of the Parſonage &c. And the beſt Opinion was, That the Annuity is determined, for the *Corporation is diſſolved*. Br. Charge, pl. 54. cites 21 H. 7. 1.

5. King Ed. 6. purſuant to the Will of H. 8. *granted the Manor* of D. to his Siſter Mary, *ſo long as ſhe ſhould have unmarried. She granted a Rent-charge* out of it. The King died, and the *Reverſion* by that Means *deſcended to her*, and then *ſhe married* King Philip. The Queſtion was, Whether ſhe might not avoid the Rent-charge? But the Book leaves it a Quære. Dyer 141. pl. 44. Patch. 3 & 4 P. & M.

S. C. cited Mo. 319. Per Egerton Solicitor General Arg. That after Marriage ſhe may avoid her own Grant, as it is in Bendloe's Reports, and as it is put at large in D. 141. But Mo. 324. Coke, who argued of the other Side, denied the Expoſition of Egerton, and inſiſted that ſhe ſhould not avoid her own Charges made by her before the Deſcent of the Reverſion.

6. A. *Tenant for Life made a Leaſe for* 21 *Years, rendering Rent at Michaelmas and Lady-day, or within* 13 *Weeks* of any of the ſaid Feaſts. *After Michaelmas, and before the* 13 *Weeks paſt, A. died.* The Plaintiff his Executor brought Debt for the Rent. Adjudged that the Action did not lie for the Rent; for being to be paid at Michaelmas, or within 13 Weeks after, the Leſſee has Election to pay it at any of the Days, and before the laſt Day it is not due; and when the Leſſor dies before that Day, his Executors have not any Right to the Rent; but after the Death of the Leſſor, having but an Eſtate for Life, *the Rent is gone: But if the Leſſor had had a Fee-ſimple* in the Land, *and had died before the laſt Day*, the Heir ſhould have had the Rent, as incident to the Reverſion; *but the Leſſor had ſurvived both Days*, the Rent had been a Thing veſted in him, and his Executors ſhould have had it. *But if the* Rent had been *reſerved at Michaelmas, and if it be behind by* 13 *Weeks*, that then it ſhould be lawful for the Leſſor to enter; if the *Leſſor ſurvives Michaelmas*, his Executors ſhall have Debt for the Rent; for then the Rent is due, and *the* 13 *Weeks are but a Diſpenſation of the Law* of the Leſſor *until that Time*; And in this Caſe, as well as where the Rent is reſerved at two Days in the Diſjunctive, it is ſufficient that the Rent be demanded at the latter Day, without demanding of it at the firſt Day. 4 Le. 247. pl. 403. Mich. 12 Jac. B. R. Glover v. Archer.

10 Rep. 127. a Mich. 11 Jac. B. R. Chan's Caſe.—— Cro. J. 330. pl. 5. Mich. 20 Jac. B. R. Chan v. Fiſher. By Fleming Ch. J. and Williams J. but Croke J. contra. Et adjornatur; but ſays Note, afterwards it was adjudged for the Defendant.—And there Fleming and Williams cited the Caſe of

* Barwick v. Foſter, where a Leaſe was made for 21 Years, rendering annually at Michaelmas, or within 40 Days ſuch Rent, the Leaſe beginning at Michaelmas, and end there; and the Rent was due for the laſt Year, alth' the Year expired before the 40 Days, for the Reſervation being annually during the Term at the ſaid Feaſts, or within 40 Days, it ſhall be expounded according to their Contract, at the End of every 40 Days during the Term; But the Term ending at Michaelmas, ſo as there cannot be 40 Days after, during the Term, the Law rejects that 40 Days at the laſt Feaſt, for that cannot be, and then it is due at the Feaſt, according to the Contract of the Parties. But here, the Term being uncertain, depending upon the Life of the Leſſor, the Law reſpects the 13 Weeks as the Feaſts; and as if ſhe dies before the Feaſts, it is not due; ſo if ſhe dies after the Feaſts, and before the 13 Weeks ended, it is not due by the Contract. And if there be an Eviction by elder Title, betwixt Michaelmas and the 13 Weeks, there is not any Rent due; for the Reſervation is at ſuch Days during the Term. Wherefore &c. Croke Juſt to the contrary; for the Rent is reſerved payable annually, and is a Duty at the ſaid Feaſt, otherwiſe it is not annually reſerved, nor payable, and the Addition, (Or within 13 Weeks) is but an Enlargement of the Day of Payment, for the Eaſe of the Leſſee, at his Election; and he denied the Law to be ſo in the Caſes put of the Death of the Aſſignor after Michaelmas, where the Eviction is after Michaelmas; for he held that the Rent is due to the Executor, and not to the Heir, and is due, notwithſtanding the Eviction, after Michaelmas; for otherwiſe the Intent of the Parties to have an annual Reſervation, is deſtroyed, if the Rent be not due until a Year and a Quarter after. Et adjornatur. Cites 5 & 4 Phil. & Mar. Dy. 142. and 32 Eliz. Smith and Ballard's Caſe —— * S. C. Cro. J. 225. pl. 3. Mich. 5 Jac. B. R. Adjornatur. And Phil. 233. S. C. adjornatur. And ſo this Precedent was here ſo was. Trin. 34 Eliz. Rot. 649. between Archer and Dodwell, Debt for Rent, and declares upon a Leaſe made, rendering Rent at Michaelmas and the Annunciation, or

or within 12 Days after every of the ſaid Feaſts; and demands the Rent due at Michaelmas laſt paſt, and mentions not the 12th Day after; and the Plaintiff had Judgment. And it was then ſaid, That the Reſervation being Durante Termino at Michaelmas, or within 10 Days, this Election is determined at the laſt Feaſt, becauſe the Term is expired.

Ibid. 205. pl. 188. Hill. 1690. S. C. but no Decree, but re commended a Compromiſe, ſo quære.—

7. *Leaſe for* 3 *Years* of Tithes and Glebe, 2 Years and a Half expired in the Leſſor's Life, and the *Leſſee had taken the Profits of the whole Year in the Leſſor's Life, who died before the laſt Rent-day*; the Succeſſor files a Bill to have that Half Year's Rent. See Statute 28 H. 8. cap. 11. The Plaintiff had not made the Executor of the Leſſor a Party. Per Lords Commiſſioners, Diſmiſs the Bill. 2 Vern. 136. pl. 134. Paſch. 1690. Benthan v. Alſton.

No Relief for the Rent. Chan Caſes 239. Mich 26 Car. 2 Negus v. Fettiplace.——So for Rent reſerved at Michaelmas, or *within* 30 *Days after*, and the Parſon dies after Michaelmas, and within the 30 Days the Executor has no Remedy for this Rent. Cro. E. 575. Pilkington v. Dalton.——S C. cited 10 Rep. 29. b. in Clunn's Caſe.

(C. b) Relation. Who ſhall have the Rent by Relation.

1. A. Seiſed of Freehold and Copyhold Land, makes a Leaſe for Years of both, with Licence, rendering Rent, and after grants the Reverſion of the Freehold, and makes a *Surrender of the Copyhold* to one and the ſame Perſon; and an Attornment was had for the Freehold, and the Surrender of the Copyhold was *not preſented till a Year after*, yet he in Reverſion ſhall have an Action of Debt for all the Rent; for the Preſentment of the Surrender is but a Perfection of the Surrender before made. Arg. Lane 33. cites it as adjudged 41 Eliz. B. R. in Caſe of Collins v. Harding.

2. A. ſeiſed of a Manor bargains it to B. *Rent incurs before the Inrolment*; B. ſhall not have the Rent, tho' the Deed be inroll'd within ſix Months after. The ſame of a Condition; and if a Reverſion be granted, and before Attornment of the Tenant the Rent incurreth, the *Grantee* ſhall not have the Rent, notwithſtanding any Relation. Per Snig Baron. Lane 63. in Sir Edward Dimock's Caſe.

(D. b) *Nomine Pœnæ. What* is, and How recovered.

1. A Rent-charge was *granted for Years* with a Nomine Pœnæ, and a Clauſe of Diſtreſs, if it was not paid on the Day. The Rent was behind; *the Years expired.* It was moved, That tho' the Years are incurr'd, he might *diſtrain* for the Nomine Pœnæ; but the Court was of a contrary Opinion, becauſe the Nomine Pœnæ depended on the Rent, and the Diſtreſs was gone as to both of them. Winch. 7. Paſch. 19 Jac. Tatter v. Fry.

2. A Nomine Pœnæ is *an uncertain Thing*, and comes not within the Statute 21 *H.* 8. 19. of *Avowries*, as a Rent-charge does, which is certain. Arg. Sty. 4. in Caſe of Remington v. Kingerby.

3. A *Grant* was made of a Rent-charge *of* 20 *l. per Annum to the Husband, and a Covenant to pay to the Children* 300 *l. a-piece*; if Sons, *at the Age of* 21, and if Daughters, at the Age of 18 Years; *and in Default of Payment of the ſaid* 300 *l.* then *the Grantor further granted to the Husband and Wife*, an *Annuity of* 4 *l. over and above the Annuity of* 20 *l. as a Forfeiture*

ture or Penalty, with a Clauſe of Diſtreſs. One Queſtion was, Whether this 4 l. per Annum was a new diſtinct Rent from the 20 l. a Year, or a Nomine Pœnæ annexed to the Rent of 20 l. per Annum. But the Court was not agreed; for the Ch. Juſtice held it a Nomine Pœnæ, but two other Juſtices held otherwiſe, becauſe the ſaid annual Sum of 4 l. was not to ariſe upon the Non-payment of the Rent-charge of 20 l. a Year, but for Non-payment of the Collateral Sum to the eldeſt Son, upon his coming to the Age of 21. And that a Nomine Pœnæ is always given and created, upon Non-payment of Rent granted before; and tho' it is mentioned in the Indenture, that the 4 l. ſhall be paid as a Forfeiture or Penalty, yet this is to be intended as a Forfeiture or Penalty for not paying the Collateral Sum to the eldeſt Son when he came to the Age of 21. But no Judgment was given. 2 Lutw. 1151. Trin. 3 Jac. 2. C. B. Egerton v. Sheafe.

(E. b) Nomine Pœnæ. *Charged or Benefited* by it, *Who*, and *How far*.

1. A By Deed, in which B. his Son and Heir Apparent joined, (but B. did not ſeal it) granted *an Annuity to J. S. for Life out of all his Lands in D. and if it* ſhould happen the ſaid Annuity to be in *Arrear*, it ſhould be lawful for the Grantee *to enter for the ſame, as well as for* 6 *s.* 8 *d. Nomine Pœnæ, & toties quoties to diſtrain* &c. In the Deed were no other Words of Grant. A. died; Debt was brought againſt A's Executors, as well for the Arrears of the Annuity as for the Nomine Pœnæ. And upon Demurrer, all the Juſtices doubted whether the Action would lie againſt the Executors for the Penalty, becauſe the Perſon of the Grantor was never charged with it; for the Words, *If it ſhould happen* &c. are not Words of Grant. Dy. 227. a. b. pl. 43. Hill. 6 Eliz. Sir Geo. Capell's Caſe.

6. Rent was granted to A. iſſuing out of the Manor of D. *for* 60 *Years, with a Nomine Pœnæ*; A. deviſed the Rent to B. Deviſee ſhall take Benefit of a Nomine Pœnæ annex'd to an Annuity or Rent granted to a Teſtator: The Nomine Pœnæ ſhall *paſs as incident* to the Rent; Per Yelverton and Fenner J. And in this Caſe Yelverton J. held, That an Action of Debt well lay for this Rent; but as to this Point Fenner J. doubted: Wherefore Cæteris Juſticiariis abſentibus adjornatur. Cro. E. 895. pl. 13. Trin. 44 Eliz. B. R. Brendloſs v. Philips.

3. A. leas'd for Years to B. rendering Rent at Michaelmas and Lady-day, with a Nomine Pœnæ of 3 s. 4 d. for every Day it ſhould be Arrear after the Feaſt. B. aſſigned the Term. It was adjudged that the *Aſſignee* is chargeable with the Nomine Pœnæ incurr'd after the Aſſignment, but not before. Mo. 357. pl. 486. Trin. 36 Eliz. Thyn v. Cholmley.

S. C. agreed Goldsb 129. pl. 25. —— Ibid 186. pl. 120 in almoſt the ſame Words.

—— S. C. Cro. E. 383. pl. 3 Paſch. 37 Eliz. B. R. ſays the Penalty amounted to 300 l. and more, and that Gawdy and Clench held that the Action lay againſt the Aſſignee; for the Land is charged therewith, and the Aſſignee for his own Time ſhall be chargeable. But Fenner held contra, for the Penalty is quaſi Collateral. Fenner alſo moved, that the Declaration was not good; for he is not intitled to the Penalty, unleſs the Rent be demanded, no more than he ſhou'd be to the Forfeiture of a Lease for Non-payment. Gawdy, It is not alike; for the Condition which goes in Defeaſance of an Eſtate, ſhall be taken ſtrictly, but the Penalty is in Nature of the Rent; and as he ſhall have the Rent itſelf without Demand, ſo he ſhall have the Penalty. And to that Opinion Clench agreed, Popham abſente; wherefore it was adjourned.

4. *And if the Rent be Arrear by* 2 *Feaſts*, the Penalty is 6 s. 8 s. a Day, viz. for the one Rent 3 s. 4 d. and for the other Rent 3 s. and 4 d. more. Adjudged. Mo. 357, 358. Thyn v. Cholmley.

(F. b) Nomine Pœnæ. *Demand thereof*, or of the Rent for which it is given. *Neceſſary* in what Caſes.

But where A. made a *Leaſe for Years* to B. rendring

1. DEBT lies for Nomine Pœnæ *without a Demand of the Rent.* Mo. 358. pl. 486. cites it to be adjudged in the C. B. Paſch. 31 Eliz. in the Caſe of Mommidge v. Inkham.

Rent by Indenture, and the *Leſſee covenants*, That *if the Rent be behind* at any Time of Payment according to the Form of the Indenture, that the *Leſſor ſhall have Nomine Pœnæ* for ſuch Default, and the Rent being behind A. brought Debt for the Nomine Pœnæ; The Queſtion was, Whether *without a Demand of the Rent, Debt lay for the Nomine Pœnæ*; And the better Opinion of the Court was, That the Action of Debt did not lie. Godb 154. pl. 203. Trin. 5 Jac. in B. R. Sir John Spencer v. Poyntz. — S. C. cited Arg. 2 Jo. 33. Hill 19 Car. 2. C. B. in the Caſe of Tuſtian v. Roper. — S. P. Style 4. Hill. 21 Car Remmington v. Kingerby. Adjornatur.

So where the Defendant made Avowry, and conveyed himſelf to 5 l. Rent due ſuch a Day, and for Non-Payment thereof 80 l. Nomine Pœnæ and avow'd for the 85 l. but *laid no Actual Demand of Rent*; It was reſolved by the Court, That this Avowry was inſufficient for the Pain, which could not be forfeited without Actual Demand of the Rent, and yet the Return was adjudged unto him, becauſe he had juſt Cauſe to diſtrain for the Rent, and they appeared to the Court to be ſeveral. Hob. 133. pl. 177. Mich. 13 Jac. Howell v. Sambach. — Brownl. 179. Howell v. Sambay S. C. the Avowry was held ill for the Nomine Pœnæ, but good for the Rent; and ſaid it had been ſo adjudged in one Mildmay's Caſe.

S. C. cited Arg. 2 Jo. 33. Hill 19 Car. 2. C. B. in the Caſe of Tuſtian v Roper.

2. A. was *Leſſee for* 99 *Years*, if *B. and C. ſo long lived.* A. *granted a Rent* out of the Land, payable at Michaelmas and Lady-Day, *and if* it were *behind* 28 *Days*, *being demanded at the Houſe* of C. *then to pay* 20 *s. Nomine Pœnæ for every Day*; Adjudged, That for the Nomine Pœnæ there muſt be an Actual Demand. Hutt. 114. Trin. 8 Car. Lamb v. Weſt.

(G. b) Nomine Pœnæ. Demand thereof, *when.*

Brownl. 75. S. C. but the Word (Name) ſeems miſprinted for the Word (Demand) —— S. C. cited Arg. 2 Jo. 33. Hill. 19 Car 2. C. B. in the Caſe of Tuſtian v. Roper.

1. A Leaſe for Years was made rendring Rent, with a Nomine Pœnæ of 8 s. per Day for Non-payment &c. In Debt brought for the Rent, and the Nomine Pœnæ; It was adjudged againſt the Plaintiff, becauſe he did not ſet forth that the *Rent* was *actually demanded at the Day*, without which a Pain is not forfeited. Hob. 82. pl. 108. Hill. 10 Jac. Grobham v. Thornborough.

Brownl 171. S. C. adjudged. — S. C. cited Arg. 2 Jo. 33. Hill. 19 Car. 2. C. B. in the Caſe of Tuſtian v. Roper.

2. A *Nomine Pœnæ* was, That if the Rent was not paid at the End of 10 Days, being lawfully demanded, that then &c. Per Hobart If he would diſtrain for the Pain, he muſt actually demand the Rent at the 10 Day's End, and muſt make *another Demand of the Pain itſelf*, (unleſs perhaps the Diſtreſs will be a Demand) which muſt be after it is grown due, ſo that it is not *till the 11th Day*, in the End of which he muſt demand it; For the whole Day is given to the Payer without Fraction. And tho' the whole Clauſe of Diſtreſs be not ſeveral, one for the Rent, and another for the Pain, but as it were joint for Both, ſo as there could be no Diſtreſs for the Rent, unleſs there was alſo for the Pain forfeited, and Diſtreſs for Both, yet the Law will divide them, and diſtinguiſh the Demands according to their Natures. Hob. 208. pl. 262. Trin. 15 Jac. Browne v. Dunnery.

3. Nomine

3. Nomine Pœnæ ought to be *demanded ſtrictly at the Day*; and when it is to be demanded on the Land, it may be at any Time. Per Richardſon. Het. 87. Paſch. 4 Car. C. B. Fox v. Vaughan and Hall. 7 Rep 28. Manra's Caſe.

(H. b) Nomine Pœnæ. Demand thereof; What is *ſufficient.*

1. WHere a *Leaſe* is *by Indenture, rendring* 10 *l. Rent, and for Default* at any Payment 40 *s. Nomine Pœnæ*, the *Tender, Payment, and Requeſt ſhall be upon the Land*, and there it ſuffices. Br. Tender, pl. 23. cites 20 E. 4. 18. *Contra upon collateral Obligation*, as it ſeems. Br. Tender pl. 23. —— pl. 23. ——

But when it is all in the Indenture, the Penalty is of the Nature of the Rent. Br. Tender pl. 23. —— And it was ſaid per Brian, Where the *Leſſee ſays* that he has been *always ready to pay his Rent*, the Leſſor may *reply*, That *he made Requeſt upon the Land*, and otherwiſe the Requeſt is not good; Quod Curia conceſſit. Br. Tender pl. 23. cites 20 E. 4 18. —— Br. Conditions pl. 169. cites S. C.

2. One *avowed* for a Rent granted, and a Nomine Pœnæ, and ſhews not any *Demand* of the Nomine Pœnæ; But the Iſſue was tried, and found upon other Matter, viz. *Non conceſſit*. It was moved in Arreſt of Judgment, That he alleged no Demand; yet the Avowant had Judgment; For it is Matter confeſs'd, and the *Action is a Requeſt*, viz. the Avowry; For he is there the Actor. And it is but a Circumſtance collateral to the Right. Hutt. 42. Mich. 18 Jac. Sir Tho. Wentworth's Caſe.

3. M. a Feme ſole *Leſſee for Life made a Leaſe for Years rendring Rent* at Michaelmas and Lady-Day &c. with a *Nomine Pœnæ of* 40 *s. for every Day it ſhall be in Arrear after* 30 *Days next after the ſaid Feaſts. A. married* A. but went from him and lived with her Son, who was the Leſſee. The Rent-Day incurred, and the *next Day after the Feaſt ſhe demanded it*, and the *Leſſee paid it* to her without any Diſagreement of the Husband (nor was it found that he had any Notice of the Marriage, tho' it appeared upon the Evidence that he had) *Afterwards the Husband demanded the Rent, and* 40 *s. for every Day incurred after it became due*, which amounted to 333 l. and one Queſtion was, Whether one Demand was ſufficient, or *whether there ſhould have been a new Demand every Day for every* 40 *s.* As to this Point the Court differed; But Ley Ch. J. ſaid, That the Rent ought to be demanded every Feaſt, and yet the Words (every Day next after) ſhall be referred to the Day next enſuing the Rent Day. But Chamberlayne J. as to the Nomine Pœnæ was againſt the Plaintiff, whereupon the Plaintiff releaſed the Penalty and Damages, and had Judgment for the Rent. Palm. 206, Mich. 19 Jac. B. R. Tracy v. Dutton. Cro. J. 621. pl. 7. S. C. and that the Court would not reſolve this Point, but give Judgment upon another.

(I. b) *Re-entry.* In what Caſes. *By what Words.*

1. IF one makes a Leaſe for Years, *rendring for the firſt* 2 *Years* 10 *l. and afterwards* 30 *l.* per Annum, with Condition, That if the Rent of 30 l. or *any Part of it be behind*, that the Leſſor may enter; it was ſaid that the Leſſor may enter for the Non-payment of the 10 l. For the 10 l. was Parcel of the Rent; for it was but one Rent. 4 Le. 8. pl. 35. Hill. 27 Eliz. in the Caſe of Holland v. Hopkins.

2. Leaſe

2. Leaſe on Condition that if the Rent be behind, and *no ſufficient Diſtreſs upon the Land*, that then the Leſſor may re-enter; If the Rent be behind, and there be a Piece of Lead or other Thing *hidden in the Land*, and no other Thing there to be diſtrained, the Leſſee may re-enter; For the Diſtreſs ought to be open, and to be come by. Godb. 110. pl. 130. Mich. 28 & 29 Eliz. C. B. Hoodie v. Wintcomb.

(K. b) Re-entry in what Caſes. *Want of Diſtreſs*, and *deſerting* the *Premiſes*. Power of Juſtices of Peace.

1. 11 *Geo.* 2. 19. *S.* 16. ENacts, That *if any Tenant, holding any Lands, Tenements, or Hereditaments at a Rack-Rent, or where the Rent reſerved ſhall be full 3 Fourths of the yearly Value of the Demiſed Premiſes, who ſhall be in Arrear for one Year's Rent, ſhall deſert the Premiſes, and ſhall leave the ſame uncultivated or unoccupied, ſo as no ſufficient Diſtreſs can be had to countervail the Arrears of Rent, it ſhall and may be lawful to and for 2 or more* Juſtices of the Peace *of the County, Riding, Diviſion, or Place (having no Intereſt in the demiſed Premiſes) at the Requeſt of the Leſſor or Landlord, or his Bailiff, or Receiver to go* upon and *view the ſame, and to affix, or cauſe to be affixed on the moſt notorious Part of the Premiſes* Notice in Writing, *what Day, (at the Diſtance of* 14 *Days at leaſt) they will return to take a* ſecond View *thereof; 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, then the ſaid Juſtices may put the ſaid Landlord or Leſſor into the Poſſeſſion of the ſaid demiſed Premiſes, and the Leaſe thereof to ſuch Tenant as to any Demiſe therein contained only, ſhall from thenceforth become void.*

S. 17. *Provided always, That ſuch Proceedings of the ſaid Juſtices ſhall be examinable into in a ſummary Way by the next Juſtice, or* Juſtices of Aſſiſe *of the reſpective Counties in which ſuch Lands or Premiſes lie; and if they lie in the City of* London, *or County of* Middleſex, then *by the Judges of the Courts of King's-Bench or Common-Pleas, and if in the Counties Palatine of* Cheſter, Lancaſter, *or* Durham, *then before the Judges thereof, and if in Wales then before the Courts of Grand Seſſions reſpectively, who are hereby reſpectively* impowered to order Reſtitution *to be made to ſuch Tenant, together with his Expences and* Coſts *to be paid by the Leſſor or Landlord, if they ſhall ſee Cauſe for the ſame, and in caſe they ſhall affirm the Act of the ſaid Juſtices to award Coſts,* not exceeding 5 *l. for the frivolous Appeal.*

(L. b) Re-entry. *Waiv'd.* By what Act.

But if *Leſſor accepts next Quarter's Rent*, then he has loſt the Benefit

1. RENT due at Michaelmas was behind being demanded at the Day, which Rent *Leſſor afterwards accepted*, and after entered for Condition broken, and good; for the Rent was due before the Condition broken. Le. 262. pl. 368. 18 Eliz. Green's Caſe.

of the Re-entry; For thereby he admits the Leſſee to be his Tenant. Le. 262. pl. 368 Green's Caſe. —— *And* if Leſſor *diſtrains for Rent due* at Lady-Day *after the Forfeiture*, he cannot after re enter for the ſaid Forfeiture; For by this Diſtreſs he hath affirmed the Poſſeſſion of the Leſſee. Le. 262. pl 368. Green's Caſe —— *So* if he make *Acquittance* for the Rent, *as a Rent*. Secus if the Acquittance be but *for a Sum of Money*, and not expreſly for the Rent. Per tot. Cur. Le. 262. pl. 368. Green's Caſe. —— Cro. E. 3. pl. 6. Hill. 24 Eliz. S. C.

(M. b) *Re-*

(M. b) *Remedy for Rent-Charge, Rent-Seck &c.*

1. IF a Man who has a Rent-Seek be once feifed of any Parcel of the Rent, and after the Tenant will not pay the Rent behind, this is his Remedy, *He ought to go* by himſelf or by ſome of the Lands, or Tenements out of which the Rent is iſſuing, *and there demand the Arrearages* of the Rent, *and if* the *Tenant denies* to pay it, *this* Denial *is a Diſſeiſin* of the Rent. Litt. S. 233.

2. *Alſo if* the *Tenant be not* then *ready* to pay it; this is a Denial, which is a Diſſeiſin of the Rent. Litt. S. 233.

3. *Alſo if* the *Tenant, nor any other* Man *be remaining upon the Lands* or Tenements, to pay the Rent when he demands the Arrearages; this is a Denial in Law, and a Diſſeiſin in Deed, and of ſuch Diſſeiſin he may have an *Aſſiſe of Novel Diſſeiſin* againſt the Tenant, and ſhall recover the Seiſin of the Rent, and his Arrearages, and his Damages, and the Coſts of his Writ and of his Plea &c. Litt. S. 233.

4. *And* if, *after ſuch Recovery and Execution had*, the *Rent be again denied* unto him, then he ſhall have a *Rediſſeiſin*, and ſhall recover his double Damages &c. Litt. S. 233.

Tenant, or any for him be there, yet muſt the Grantee demand it, becauſe without a Demand there can be no Denier in Law or in Deed. Co. Litt. 153. b.

5. Of Rent-Seck a Man may have an *Aſſiſe of Mortdauncestor*, or a Writ of *Cuſtyel* or *Cojnage*, *and all* other *Manner of Actions Reals*, as the Caſe lies, as he may have of any other Rent. Litt. S. 2[illegible].

dant blood *after Seiſin had* by ſome of the Anceſtors of the Defendant; for without an actual Seiſin, or Seiſin in Deed, none of theſe are maintainable. Co. Litt. [illegible].

6. If *Rent-charge* be *granted before Time of Memory*, and *no Diſtreſs or Seiſin* had *within Time of Memory*, the Heir of the Grantee is without Remedy. Br. Rents, pl. 7. cites 14 H. 7. 1.

7. A Man may *diſtrain for Rent-Seck* in 3 Caſes. 1ſt. As if a Man holds of B. by Homage, Fealty, and 10 s. Rent, who takes Wife and dies, now the Wife ſhall have the 3d Part of the Rent as a Rent-Seck, and for this Rent ſhe ſhall diſtrain, and this is *by reaſon of Dos*. 2dly. If there be Lord Meſne and Tenant, and the Tenant holds of the Meſne by 10 s. and the Meſne over by 1 d. now if the Lord Paramount *purchaſe the Tenancy, the Meſne* ſhall have the Overplus of the Rent as a Rent-Seck, and may diſtrain for it, becauſe the Rent was Rent-Service before, and the Nature of the Rent is not changed by the Act of the Meſne. 3dly. If the *King* has a Rent-Seck, he may well diſtrain. Keilw. 104. pl. 11. Caſus Incerti Temporis.

8. Aſſiſe was for a *Rent-Charge deviſed* unto him for Life, whereof he had *Seiſin by* the Hands of a *Farmer for Years*; and whether this Seiſin was ſufficient to maintain an Aſſiſe, was the Queſtion? And held by all the Juſtices that it was *not* a *ſufficient* Seiſin. Cro. J. 142. pl. 20. Mich. 4 Jac. in B. R. Bredeman v. Bromley. 6 Rep. 59. b. S. C.

9. 4 *Geo.* 2. 28. *S.* 5. Enacts that *all Perſons ſhall have the like Remedy by Diſtreſs, and by Impounding and Selling the ſame in Caſes of Rent-Seck, Rents of Aſſiſe and Chief Rents, which have been collected or paid for* 3 *Years, within the Space of* 20 *Years before the firſt Day of this Seſſion of Parliament, or ſhall be hereafter created, as in Caſe of Rent reſerved upon Leaſe.*

(N. b) Remedy for Rent. Where the *Goods* are *taken in Execution.*

1. 8 *Ann.* 14. *S.* 1. ENacts, That *no Goods or Chattels whatſoever, lying or being in, or upon any Meſſuage, Lands, or Tenements, which are or ſhall be leaſed for Life or Lives, Term of Years, or Will, or otherwiſe, ſhall be liable to be taken by Virtue of any Execution, on any Pretence whatſoever, unleſs the Party at whoſe Suit the ſaid Execution is ſued out, ſhall before the Removal of ſuch Goods from off the ſaid Premiſſes, by Virtue of ſuch Execution or Extent, pay to the Landlord of the ſaid Premiſſes, or his Bailiff, all ſuch Sum or Sums of Money as are, or ſhall be due for Rent for the ſaid Premiſſes at the Time of the taking ſuch Goods or Chattels, by Virtue of ſuch Executions, provided the ſaid Arrears of Rent do not amount to more than one Year's Rent; and in caſe the ſaid Arrears ſhall exceed one Year's Rent, then the ſaid Party, at whoſe Suit the Execution is ſued out, paying the ſaid Landlord or his Bailiff one Year's Rent, may proceed to execute his Judgment, as he might have done before the making of this Act; and the Sheriff or other Officer is hereby impowered and required to levy and pay to the Plaintiff as well the Money ſo paid for Rent, as the Execution Money.*

S. 8. *Provided, That this Act ſhall not prejudice the Crown, to recover and ſeiſe Debts, Fines and Forfeitures due and anſwerable to the Crown.*

(N b. 2) Remedy. By *Ejectment.* Where there is *No Diſtreſs, or Tenant in Poſſeſſion.*

1. 4 *Geo.* 2. *S.* 28. *S.* 2. ENacts that *as often as Half a Year's* Rent *is due, and the Leſſor has Right by Law to re-enter for Non-payment, he may, without any formal Demand or Re-entry, ſerve a Declaration in Ejectment for Recovery of the demiſed Premiſſes; or if the ſame cannot be legally ſerved, or there is no Tenant in actual Poſſeſſion, then to fix the ſame on the Door; or if no Meſſuage, then on ſome notorious Place of the Lands &c. and it ſhall be deem'd legal Service, and ſhall be as a Demand or Re-entry. And in Caſe of Judgment againſt the Caſual Ejector, for not confeſſing Leaſe, Entry, and Ouſter, it ſhall appear to the Court by Affidavit, or be proved upon the Trial, in caſe the Defendant appears, that Half a Year's Rent was due before the Declaration was ſerved, and that* no ſufficient Diſtreſs *was to be found on the demiſed Premiſſes countervailing the Arrears then due, and that the Leſſor had* Power to re-enter, *he ſhall have Judgment and Execution; and if* Leſſee &c. ſuffer Judgment and Execution, *without paying Rent and Arrears, and full Coſts, and without filing any Bill in Equity within ſix Kalendar Months after Execution executed, ſuch Leſſee &c. ſhall be* barr'd of all Relief *in Law or Equity,* other than by Writ of Error, *to reverſe ſuch Judgment, and the Leſſor ſhall hold diſcharged of ſuch Leaſe; but if* Verdict be for Defendant or Plaintiff be Nonſuit, *except for Defendant's not confeſſing Leaſe, Entry, and Ouſter, Defendant ſhall have* full Coſts, *but not to bar the Right of any* Mortgagee, *he paying the Arrears, Coſts and Damages, and performing the Covenants &c. as Leſſee ought to have done.*

S. 3. No Injunction *againſt Proceedings at Law in ſuch Ejectment, unleſs within* 40 *Days after a perfect Anſwer filed by Leſſor or Leſſors &c. ſuch Leſſee &c.* bringing into Court ſo much Money *as Leſſor or the Plaintiff ſhall ſwear to be due, (over and above all juſt Allowances) and Coſts taxed in the ſaid Suit, to remain till hearing the Cauſe, or to be paid to the Leſſor on Security,*

curity, ſubject to Decree of the Court. And if ſuch Bill be filed within 40 Days, and after Execution is executed, *the Leſſor ſhall* account for ſo much only as *he made, Bona Fide, without Fraud, Deceit, or wilful Neglect, from his actual Entry; and if it be leſs than the Rent, the Leſſee before he is reſtored to Poſſeſſion, ſhall pay what is ſhort. Provided if* Leſſee &c. before Trial, tender &c. the Arrears and Coſts *to the Leſſor, his Executors &c. or to the Attorney in the Cauſe, then the Proceedings to ceaſe.*

(N. b. 3) Remedy for Rent. Tho' *No Agreement* can be proved.

1. 11 *Geo.* 2. 19. *S.* 14. ENacts that *where the* Demiſe is not by Deed, *the Landlord ſhall recover a reaſonable Satisfaction for the Tenements occupied by the Defendant in an* Action on the Caſe for the Uſe and Occupation *of what was ſo held or enjoyed; and if in Evidence on the Trial of ſuch Action, any Parol-Demiſe, or any Agreement (not being by Deed) whereon a certain Rent was reſerved, ſhall appear, the Plaintiff in ſuch Action ſhall not be nonſuited, but may make Uſe thereof as an Evidence of the Quantum of the Damages to be recovered.*

(O. b) Remedy for Rent Arrear, *after Alteration of* the *Eſtate* by him to whom the Arrears are due.

1. IF A. be ſeiſed of a Rent-ſervice or Rent-charge in Fee, *and grants it over by Deed* to B. and his Heirs, and the *Tenant attorns*, A. is without Remedy for the *Rent Arrear before the Grant*; for diſtrain he cannot, and he has no other Remedy; becauſe all Privity between him and the Tenant is deſtroyed by Attornment to B. And A. has no more Right than any Stranger to come on the Land after ſuch transferring over the Rent. Agreed; and ſaid to be agreed in Andrew Ognell's Caſe 4 Rep. 49. Vaugh. 40. Hill. 21 & 22 Car. 2. C. B. in Caſe of Dixon v. Harriſon. Where a Rent-charge is granted to A. in Fee, and the Rent is Arrear, and the *Grantee levies a Fine to the Uſe of himſelf and his Wife in Tail*, Per Vaughan Ch. J he may *diſtrain* for the Rent Arrear before the Fine levied. 2 Jo. 2. Witherhead v. Harriſon.

2. If Grantee of Rent-charge (as above) regrants the ſame Rent to A. either in Fee, in Tail, or for Life, and the Tenant attorns, as he muſt to this *Re-grant*, yet A. ſhall never be enabled to diſtrain for Arrears due to him before he granted over the Rent; for now the Privity between him and the Tenant begins but from the Attornment to the Re-grant, the former being abſolutely deſtroyed. Per Vaughan. Vaugh. 40. in Caſe of Dixon v. Harriſon. 12 Mod. 46. in Caſe of Midgley v. Lovelace.

3. Two *Tenants in Common by a Deviſe* of the Leſſor *granted the Reverſion by Fine after Arrears due*, and afterwards bring *Covenant* againſt the Aſſignee of the Leſſee. Reſolv'd, That the very Privity of the Contract was transferr'd by the Statute of H. 8. which gives the Action for and againſt the Aſſignees; and the Contract ſtill remains, tho' the Privity of the Eſtate is gone. And per Cur. *Debt* lies in this Caſe for Arrears of Rent, a Fortiori *Covenant* &c. And Judgment accordingly. Carth. 269. Mich. 5 W. & M. Midgley and Gilbert v. Lovelace. 12 Mod. 45. S. C.

(P. b) *Arrears recover'd.* At and from what *Time.*

1. LORD and *Tenant*, and the *Rent was Arrear*, and the *Tenant recovered by Aſſiſe*, and the Lord *brought Aſſiſe of the Rent, and recover'd as well the Arrearages due before the Diſſeiſin as the Rent due after the Diſſeiſin, but no Rent during the Diſſeiſin*, And the Poſſeſſion by Diſſeiſin does not determine the Arrearages due before; but the Rent for the Time of the Diſſeiſin was recouped in the Recovery in the Aſſiſe by the Tenant againſt the Lord. Br. Arrearages, pl. 17. cites 8 Aſſ. 37.

Br. Entre Congeable, pl. 90. S. C.

2. He who *re-enters for Condition for Non-Payment of Rent* upon a Leaſe ſhall have the Land and the Rent alſo, ſcil. the Arrearages. But Quære if he *does not enter within a Year or Half a Year after the Time of Forfeiture* what Remedy for the Rent incurr'd after the Time of the Re-entry? Br. Arrearages, pl. 11. cites 6 H. 7. 3.

3. Where a *Rent* is *extinguiſhed* during the Term by the Act of the Leſſor; As where Leſſee for 20 Acres, rendring Rent, grants all his Eſtate in one of the Acres to J. S. and the Leſſor confirms the Eſtate of J. S. which extinguiſhes the Rent in all the Acres, the Leſſor ſhall not avow for the Arrearages of Rent *before the Time of Confirmation* and Extinguiſhment. Ow. 10. Goddard's Caſe.

4. Rent is *tender'd* to a Biſhop, who *refuſed* it, and afterwards was *tranſlated to another See.* Upon a Bill brought by the Biſhop the Lord Chancellor was clear of Opinion, That by Law the Plaintiff could not recover the ſaid Arrears, but how far the Plaintiff was relievable in Equity was the Queſtion; And his Lordſhip ordered Precedents to be produced, where there hath been a juſt Duty, but no legal Remedy; And ordered a Caſe to be ſtated. But it appearing, That the Plaintiff, before he was tranſlated to the other See, would not accept the ſaid Rent; his Lordſhip, with Judges aſſiſting him, were clear of Opinion, That there was no Ground in Equity to give the Plaintiff any Relief, and diſmiſs'd the Bill. 2 Ch. R. 60, 61. 25 Car. 2. The Biſhop of Sarum v. Noſworthy.

See this more at large at (N. b) pl. 1.

5. 8 *Annæ* 14. *S.* 1. Enacts, That *No Goods &c. ſhall be taken in Execution, unleſs the Party before Removal of them ſhall pay to the Landlord One Year's Rent. And the Sheriff &c. ſhall levy the Money ſo paid for Rent, as well as the Execution-Money.*

(Q. b.) Chargeable with Arrears, Who. Alienees.

1. IN *Aſſiſe in Writ of Entry in Nature of Aſſiſe of Rent*, the *Demandant ſhall recover againſt the Tenant all the Arrearages as to the Time of the Diſſeiſin, tho'* they are arrear *for* 20 *Years, and the Tenant has not been Tertenant nor Tenor but for a Month* only. In ſuch Action of Land the Statute is, That every Tertenant ſhall anſwer for his Time if the Diſſeiſor be not ſufficient to render Damages; But of Rent, he who is Tenant at the Judgment ſhall anſwer all the Arrearages. Br. Arrearages, pl. 13. cites 33 H. 6. 46.

S. P. Co. Litt 269. b.

2. If there is *Lord and Tenant*, and *Rent is Arrear*, *Tenant infeoffs B.* If the *Lord accepts Rent or Service of B.* he ſhall loſe the Arrears in Time of the Feoffor, tho' he made no Acquittance; For after ſuch Acceptance he ſhall not avow on the Feoffee at all, nor on B. for what was due before;

But

Put if the *Leſſor dies* it is otherwiſe. 3 Rep. 66. b. in Pennant's Caſe.— And ſays, That all this appears in 4 E. 3. 22. 7 E. 3. 4. 7 E. 4. 27. 29 H. 8. tit. Avowry 111.

3. *A. grants a Rent-Charge to B.*— B. dies. *A. infeoffs C.*— C. infeoffs D. ſeveral Years afterwards; and *ſeveral Years afterwards D. infeoffs E.* Per 3 Juſtices againſt Anderſon Ch. J. E. ſhall be chargeable with the Arrears to the Executors; But all agreed, That the *Lord by Eſchеat*, Tenant in Dower or by the Courteſy, ſhould not be chargeable; For they did not claim by the Party only, but by the Law alſo. 3 Le. 263. pl. 355. Mich. 32 Eliz. C. B. Anon.

4. If J. S. *grants a Rent*-Charge out of his Land for Life, and the Rent is arrear, *and* afterwards *makes a Feoffment* in Fee *to A.* and *the Rent is arrear* again in A.'s Time, and then *A. infeoffs B.* and the *Rent is arrear again* in B.'s Time, and then the *Grantee dies*, his Executor may have an Action of Debt againſt every of them for the Rent arrear in their ſeveral Times reſpectively; For Qui ſentit Commodum, ſentire debet & Onus. 7 Rep. 38. b. The laſt Reſolution, Mich. 5 Jac. C. B. in Lillingſtone's Caſe.

(R. b) Remedy for Rent by Diſtreſs. By *Recoverors.*

1. 7 *H.* 8. 4. ENACTS, That *Recoverors of Manors, Lands, Tenements, and Advowſons, their Heirs and Aſſigns, may diſtrain for Rents, Services, and Cuſtoms, due and unpaid, and in the Avowries, and ſelling the ſame; and have like Remedy for recovering them as the Recoverors might have done or had, albeit the ſaid Recoverors were never ſeiſed thereof.*

If a Man had made a Leaſe for Years, reſerving a Rent, and *before Recovery had ſuffered a Common Recovery*, the Recoveror ſhould diſtrain for that Rent which the Leſſor before the Recovery could not; But if the Recovery had not been had, then he might have diſtrained, and ſo it is within the Statute. *But* if a *Fine* had been levied of a Manor, *and before Attornment the Conuſee had ſuffered a Common Recovery*, the Recoveror ſhould not diſtrain &c. becauſe the Conuſee, againſt whom the Recovery was had, could not. But this Act *extended* only to Diſtreſſes and Avowries for Rents, Services, and Cuſtoms, and gave alſo a Form of a Quare Impedit. But upon this Statute it was holden, That the Recoveror could not *have an Action of Debt* againſt the Leſſee for Years, nor an Action *of Waſte* againſt Tenant for Life or Years; and therefore Remedy was provided in theſe Caſes by the Statute of 21 H. 8. 15. Co Litt. 104. b.

2. *A. made a Leaſe for Life to B. and* afterwards a *Leaſe for Years to C. reſerving Rent. B. ſurrender'd to A. who ſuffer'd a Common Recovery to the Uſe of J. S.* One Queſtion was, Whether this Caſe was out of the Statute of 7 H. 8. cap. 4. or that J. S. could diſtrain and avow for the Rent within this Statute; For A. himſelf, who ſuffered the Recovery, could not make Avowry. Knightly bid them demur if they would; But the Counſel pray'd Day to another Term, and had it. D. 31. pl. 210, 214. Hill. 28 H. 8.

Ibid Marg. ſays, It ſeems that the Avowry is good by the Words of the Statute, and that Co. Litt. 104. b. agrees, That it is good.

(S b) Remedy for Rent Arrear. By *Statute.*

The Preamble of the Statute concerning Executors or Administrators of Tenants for Life is to be intended of Tenant for term of Life, so long as Cestuy que Vie lives, who are also holpen by the double Remedy; but after the Estate for Life determined his Executors and Administrators might have had an Action of Debt by the Common Law, but they could not have distrained, which now they may do by Force of this Statute; For in that Point it adds another Remedy than the Common Law gave. Co. Litt. 162. a. b.

1. 32 *H.* 8. *cap.* 37. *N.* 1. FOrasmuch as by the Order of the Common Law the Executors or Administrators of Tenants in Fee-Simple, Tenants in Fee-Tail, and Tenants for Term of Life of Rent-Services, Rent-Charges, Rent-Sucks, and Fee-Farms, have no Remedy to recover such Arrearages of the said Rents or Fee-Farms as were due unto their Testators in their Lives; Nor yet the Heirs of such Testator, nor any Person having the Reversion of his Estate after his Decease, may distrain or have any Lawful Action to levy any such Arrearages of Rents or Fee-Farms due unto him in his Life, as is aforesaid; By reason whereof the Tenants of the Demaines of such Lands, Tenements, or Hereditaments, out of which such Rents were and are payable, who of Right ought to pay their Rents and Farms at such Days and Terms as they were due, do many Times keep, hold, and retain such Arrearages in their own Hands, so that the Executors and Administrators of the Persons, to whom such Rents or Fee-Farms were due, cannot have or come by the said Arrearages of the same, towards the Payment of the Debts and Performance of the Will of the said Testators.

A *Rent-Charge* was *granted* to J. S. *for 99 Years, if he so long lived.* The Rent being arrear, J. S. died. The Executor distrain'd and avow'd. The Court resolv'd, That this is not within the Statute; For that provides Remedy where the Testator died seised of a Rent to him and his Heirs, or for Life, and by his Death there was not any Remedy for the Executor, as it appears by the Preamble of that Statute; But where he has Remedy by the Common Law by Action of Debt, as in this Case the Executor has, he cannot distrain. Cro C. 471. pl. 4. Patch. 13 Car. B. R. Turner v Lee.

A. an Executor brought Debt for the Arrears of several Rents, as well Copyhold as Free Rent, held of the Manor of D. *whereof Testator died seised.* Per Cur. The Action lies not for Arrears of Copyhold Rents; For the Statute extends not to them, but *only to* Rents out of *Freehold*; neither does it lie for the Free Rents unless the Lord or his Executor conveys a *Privity between the Tenant and the Land*, As by attornment. Yelv. 125 Mich. 6 Jac. B. R. Appleton v. Dolly.— Brownl. 102 S. C. by the Name of Appleton v. Lady, reported in almost the very same Words.

For Remedy whereof be it enacted by the Authority of this present Parliament, That the Executors and Administrators of every such Person or Persons unto whom any such Rent or Fee-Farm is or shall be due and not paid at the Time of his Death, shall and may have an Action of Debt for all such Arrearages against the Tenant or Tenants that ought to have paid the said Rent or Fee-Farms so long behind in the Life of their Testator, or against the Executors and Administrators of the said Tenants.

The Distress is the more plain and certain Remedy than the Action of Debt; For the Action of *Debt must* be brought *against them that took the Profits when the Rent was behind*, or against their Executors or Administrators, but the *Distress may be* taken *upon the Land*, be it either in the Tenant's own Hands or *in the Hands of any other that claims by or from him.* Co. Litt. 162. b.

And to the end that Executors and Administrators of every such Person or Persons, unto whom such Rent or Fee-Farm ought to be due and not paid at the Time of his Death, as is aforesaid, to distrain for the Arrearages of all such Rents and Fee-Farms, upon the Lands, Tenements, and other Hereditaments which were charged with the Payment of such Rents or Fee-Farms, and chargeable to the Distress of the said Testator,

A. by Indenture demised the Demesnes whereof was lawfully seised for 3 Lives by Copy, according to the Custom &c. *granted a Rent-Charge to T. S. for Life*, Pro Consilio Impendendo, *and afterwards conveyed the said Manor to B. in Tail.* The *Rent was arrear. T. S. died. B. and*

And forasmuch as the said Lands, Tenements, or Hereditaments, continue, remain, and be in the Seisin or Possession of the said Tenant in Demesne, who ought immediately to have paid the said Rent or Fee-Farm, so being behind, to the said Testator in his Life,

and

and the *Manor descended to C* his Son, *&c. granted a Copyhold to D.* The *Executors of J. S. assigned D. for the Rent.* Fenner conceiv'd, That they could not; Becaufe this Land did not continue in the Seifin and Poffeffion of the Tenant, and that here C was Iffue in Tail, and fo claims not by E. his Father only but per Formam Doni. But Periam and Windham contra; For the Statute extends not to an Action of Debt only, but alfo to Diftrefs and Avowry. And Windham and Rhodes held, That the Copyholder claims not by the Lord only, but alfo by the Cuftom; but that is not any Part of his Title, but only appoints the Manner how he fhall hold. That the Poffeffion continues here in C. For the Poffeffion of the Copyholder is his Poffeffion; fo as if D. be outed, C. fhall have an Affife. And fo the firft Words of the Statute are obferved; *But the Seifin and Poffeffion continue in C.* who claims only by E. who was the Tenant in Demefne, that ought to pay the Rent. But Fenner anfwer'd, That the Seifin and Poffeffion mentioned by the Statute is the very actual Poffeffion, viz. Such in which the Diftrefs may be taken; which, he faid, could not be in a Freehold without an actual Poffeffion. But it was agreed per tot. Cur. That the Copyholder fhould hold the Land charg'd. 2 Le. 152. pl. 185. Hill. 18 El. C.B. The Executors of Sir William Cordell v. Clifton. —— 3 Le. 59. pl. 87. S.C. by the Name of the Earl of Weftmoreland's Cafe, reported almoft in the fame Words.

It was infifted by Littleton, That none are *Tenants in Demefne* but he who is in Poffeffion, and therefore if one *grants a Rent Charge for Life, and then makes a Leafe for Years*, that during thefe Years he fhall not be charg'd for Arrears then incurred; For by the Statute none is chargeable but the Tenant in Demefne, who ought to pay the fame, and the Tenant for Years ought not to pay it; and the Law lays the Charge upon him, and not upon the other Tenant, during the Term. But Wray of a contrary Opinion held, That the Leffor might diftrain for all the Arrears charg'd; Becaufe he is the Perfon that ought to pay it, and the Tenant is not charg'd, but only there is a Neceffity for him to pay it to prevent a Diftrefs. But this was not ruled, it being a Trial by Order of the Exchequer Chamber, to try if fuch Rent was granted or not. Lat. Rep. 93. Trin. 4 Car. in the Exchequer. Bingham v. Parkhurft.

Or in the Seifin or Poffeffion of any other Perfon or Perfons claiming the faid Lands, Tenements, and Hereditaments only by and from the fame Tenant by Purchafe, Gift, or Defcent,

It was mov'd to the Court, If *A. grants a Rent-Charge out of B. Acre for Life, and then B. makes a Leafe for Years of the Acre, and dies, A. diftrains upon the Leffee for Years for Arrears incurred in the Life of B. and avows for the whole Arrears incurred in the Life of B. and in the Life of the Leffee for Years, and the Leffee for Years brings Trefpafs for the Diftrefs, whether he fhall recover Damages for the whole Diftrefs, or only for the Diftrefs taken for the Arrears incurred in the Life of the Leffee for Years?* Refolved, That he fhall recover Damages for the whole Diftrefs; For the Leffee for Years is not within the Statute, becaufe he claims not by or from the Tenant for Life; and fo it is of a Reverfion, for the Caufe aforefaid. Co. Litt. 162. b.

the *Rent is behind, B. dies, A. inter alia* C. of the Lands *in Fee*, and divers Years after *intrufs* for divers Years after *inter alia* &c. And it was holden by Wray, Periam, and Windham J. [illegible] Ld. Ch. J. That *E. fhould be chargeable* with the faid Arrearages to the Executors of A. [illegible] pl. 418. Mich. 20 Eliz. in B. R. Anon. —— *But* they all agreed, That the *Leaf by Leffee, Tenant in Dower*, or by the *Feoffee*, fhould not be charged; *For they do not claim* it by the Party's gift, but alfo *by the Law.* 1 Le. 302, 303. pl. 418. Anon. —— 3 Le. 263. pl. 355. S.C. reported in almoft the fame Words.

A. feifed of a Rent-Seck in Fee after the Determination of a Leafe of 30 *Years*, then *by Deed, grants the Rent* Charge out of the Land *to J. S. for the Term* for 30 Years *referved*; then *A. in Fee, B. in Fee, J. S.* made his Executors and *died. B. made a Leafe at Will.* The *Executors of J. S. diftrained for Arrears due* in the Life of J. S. *before the Expiration of the Term* of 30 Years. It was objected, That this Cafe was out of the Statute, which extends only to Tenants in Demefne, who immediately ought to have paid it, who in this Cafe was the Grantor, and thofe who claim only by and from him; whereas the Leffee at Will did not claim from him but from the Feoffee. It was refolved, That the Arrears due in the Life of J. S. were look'd at the Common Law. But adjudg'd, That *the Leffee at Will* claims not immediately from the Grantor, yet he *is tenant in the Act*; For where Things are due in Right and Verity, and become remediles by the *Act of God*, viz. By the Death of him to whom they are due, Statutes giving Remedy in fuch Cafes fhall be conftrued bountifully, and to extend the Remedy proportionably to the Mifchief intended to be cured by it, agreeable to the Intent of the Makers; and therefore the *Leffee, Feoffee, and fo on* in Inheritance, *fhall be charged* by Virtue of this Act. And fome thought the *Leffee* was within the very Words; For tho' he is not in (*by*) the Grantor, he is in (*poffeffion of*) it coming from him) is tantamount to (*under him*) and that the Word (*and*) fhall be taken for (*Or*) and that the Word (*claim*) meant, That he muft claim only Under the Tenant in Demefne, and *not Paramount*; *As if Tenant in Tail makes Feoffment in Fee, and dies*, and the *Difcontinuee charges the Land* with a Rent *in Fee, and then infeoffs the Iffue* in Tail *within Age*, fo that he is remitted; Now in this Cafe this Word (*Only*) ftands Oppofite. *For now the Iffue claims by Title Paramount.* But if the Tenant makes Feoffment in Fee to the Ufe of another; in this Cafe, *Ceftuy que Ufe* does not claim only by the Feoffor, but by the Statute alfo; and he *is not in Eo le Per*, and yet he claims under the Feoffor; and this was the Intent of the Act. 4 Rep. 48. b. 50. b. Andrew Ognel's Cafe.

So if Tenant makes a *Gift in Tail*, and the *Donee dies*, the *Iffue in Tail is within this Statute*; For he claims (only) under the Title and Eftate of the Tenant in Demefne, tho' he does not claim only by Defcent, but alfo per Formam Doni. Ibid.

So if *Tenant in Tail* [illegible] the *Remainder over in Fee*, the Iffue in Tail is within the Statute, contrary to the Opinion in Pl. C. in Barrill's Cafe, 4. b. 4 Rep. 50. b. Hill. 29 Eliz. C.B. Andrew Ognel's Cafe —— Co. Litt. 102. b. cites S. C. —— 4 Le. 115. pl. 214. S. C. by the Name of Ognel v. Underhill. Adjudg'd.

If the *Tenant makes a Leafe for Life*, the *Remainder for Life*, the *Remainder in Fee*, the *Tenant for Life pays not the Rent due* to the Lord, the *Lord dies*, the *Tenant for Life dies*; the Executors cannot diftrain upon him in *Remainder*, becaufe he *claims not by or from the Tenant for Life*; and fo it is of a Reverfion, for the Caufe aforefaid. Co. Litt. 162. b.

In

10 A. [illegible] *In like Form as their said Teſtator might or ought to have done* Page [illegible] *the ſaid Executors and Adminiſtrators ſhall, for the* [illegible] *Death, &c. make Avowry upon their Matter aforeſaid.*

[illegible] Reſt reſerved, and after A. *grants over the Rent to J. S.* and the Tenant attorns, and A. [illegible] *Grantee* [illegible] *Death*; For by the Granting it over the Arrears were loſt, and [illegible] *Death*, as the Statute ſpeaks; And the Concluſion of the ſaid Branch is, *In like Form as their Teſtator might and ought to have* [illegible] where after the ſaid Grant A. *by Deed grants the Arrears to the Grantee*, for any other, could diſtrain or have any Remedy for the ſaid Arrears; and in the [illegible] next preceding touching the Action of Debt, the Words are (*Unto whom any ſuch Rent or Fee-Farm ſhall be due and not paid at the Time of his Death*) ſo that the Act gives *no Remedy when the Rent is by his own Act loſt dispenſed with the Arrears*, but when they were due to him at the Time of his Death, and *by the Act of God* became remedileſs. Agreed per tot Cur. 4 Rep. 50. b. 51. a. Hill. 29 Eliz. C. B. in Andrew Ognel's Caſe. —— Vaugh. 40. in the Caſe of Diron v. Gar- [illegible] this Caſe having been cited, Vaughan ſaid, He agreed this Caſe; For after the Tenant attorns [illegible] Grantor is without Remedy for the Rent Arrear before his Grant; for diſtrain he cannot, and other Remedy he has not; Becauſe all Privity between him and the Tenant is deſtroy'd by the Attornment to the Grantee, and he has no more Right than any Stranger to come upon the Land, after [illegible] from power of the Rent. And he ſaid he ſhould likewiſe agree another Caſe, That if ſuch Grantee ſhould re-grant the ſame Rent back to the Grantor, either in Fee, in Tail, or for Life, and the Tenant attorns, as he muſt to this Re-grant, yet the firſt Grantor ſhall never be enabled to diſtrain for Arrears due to him before he granted over the Rent; For now the Privity between him and the Tenant begins but from the Attornment to the Re-grant, the former being abſolutely deſtroy'd, and the Tenant no more diſtrainable for the ancient Arrears than he was upon the Creation of the Rent, for Arrears ſo curr'd before, till firſt attorn'd.

So if there be *Lord and Tenant*, and the *Rent is behind*, and the *Lord grants away his Seigniory*, and dies, the *Executors ſhall have no Remedy* for theſe Arrearages for the Reaſon before-mentioned. Co. Litt. 162. b.

S. 2. Provided always, That this Act, nor any Thing therein contained, ſhall not extend to any ſuch Manor, Lordſhip, or Dominion in Wales, or in the Marches of the ſame, whereof the Inhabitants have uſed Time out of Mind of Man, to pay unto every Lord, or Owner of ſuch Lordſhip, Manor, or Dominion, at his or their firſt Entry into the ſame, any Sum or Sums of Money for the Redemption and Diſcharge of all Duties, Forfeitures, or Penalties wherewith the ſaid Inhabitants were chargeable to any of their ſaid Lords Anceſtors or Predeceſſors before his ſaid Entry.

Rent-Charge was granted by Deed to a Feme Sole for Life. The Rent was arrear. She took Baron. The Rent was again arrear. She died. The Baron brought Debt againſt the Heir of the Grantor, who was the Tenant of the Land charg'd, for all the Arrears. The Writ was awarded good, and he had his Judgment by reaſon of this Statute. Fitzh. 268. pl. 2[illegible] 1. Eliz. Sharp v. Poole. —— Kelw. 214. b. pl. 28. S. C. —— And. 47. pl. 120. S. C. —— Co. Litt. 162. b. cites S. C. —— 4 Rep. 51. a. in Dyer's Caſe, cites S. C. and adds, That 2 Objections were made againſt the Baron's having the Arrearages before the Coventure; 1ſt, Becauſe by the Common Law the Executors &c. of the Feme might have had Debt for the Arrears before the Coverture, and that the Statute, as appears by the Preamble, provides Remedy, when the Executors &c. of him to whom the Rent was due cannot have or come by the ſaid Arrears &c. ſo that the Makers of the Act did not intend to give Remedy where Remedy was at Common Law, nor change the Remedy at Common Law for another. 2dly, That this Branch touching Baron and Feme gives him Remedy for the Arrears due in the Wife's Life, ſo that the Arrears ought to incur while ſhe was a Wife, and not before. But reſolv'd unanimouſly, That by the ſaid Branch he ſhall have the Arrears incurr'd in the Life of his Wife. And this cannot extend to Arrearages during the Coverture; For the Common Law gave him ſuch Arrearages, and therefore when the Statute gave Debt to him for the Arrears, this muſt mean ſomething further, and ſhall be conſtru'd of Arrears due before; And the Statute by naming her (Wife) intended only to deſcribe the Condition of the Feme, and not to imply, That the Arrears ſhould incur after the Coverture.

S. 3. And further be it enacted by the Authority aforeſaid, That if any Man who now has, or hereafter ſhall have in the Right of his Wife, any Eſtate in Fee-Simple, Fee-Tail, or for Term of Life, of or in any Rents or Fee-Farms, and the ſame Rents or Fee-Farms now be, or hereafter ſhall be due, behind, and unpaid in the ſaid Wife's Life, then the ſaid Husband, after the Death of his ſaid Wife, his Executors and Adminiſtrators, ſhall have an Action of Debt for the ſaid Arrearages againſt the Tenant of the Demeſne that ought to have paid the ſame, his Executors or Adminiſtrators.

And alſo the ſaid Husband, after the Death of his ſaid Wife, may diſtrain for the ſaid Arrearages in like Manner and Form as he might have done if his Wife had been then living, and make Avowry upon this Matter, as is aforeſaid.

S. 4. And be it further enacted by the Authority aforesaid, That if any Perſon or Perſons who now has, or hereafter ſhall have any Rents or Fee-Farms for Term of Life or Lives of any other Perſon or Perſons, and the ſaid Rent or Fee-Farm ſhall be due and behind, and unpaid in the Life or Lives of ſuch Perſon or Perſons, for whoſe Life or Lives the Eſtate of the ſaid Rent or Fee-Farm did depend or continue, and after the ſaid Perſon or Perſons do die, then he unto whom the ſaid Rent and Fee-Farm was due in Form aforeſaid, his Executors and Adminiſtrators, ſhall and may have an Action of Debt againſt the Tenant in Demeſne, that ought to have paid the ſame when it was firſt due, his Executors and Adminiſtrators; And alſo diſtrain for the ſame Arrearages upon ſuch Lands and Tenements, out of which the ſaid Rent or Fee-Farms were iſſuing and payable; In ſuch like Manner and Form as he ought or might have done, if ſuch Perſon or Perſons, by whoſe Death the aforeſaid Eſtate in the ſame Rents and Fee-Farms was determined and expired, had been ſtill Living and not dead; and the Remedy for the Taking of the ſame Diſtreſs to be in the ſame Manner and Form aforeſaid.

A Grant and Rent granted to B. for the Life of A, the Life of A. Remainder to B. in Fee. The Rent was in Arrear for ſeveral Years in the Life-time of A. who died, then B. and afterwards B.

diſtrained E. for all the Arrears incurr'd in the Life-time of D. The Queſtion was, If E. ſhall be charged for all the Arrears by this Act. Reſolv'd and adjudg'd, That the Remainder-Man is charg'd by the laſt Part of the Caſtle of the Statute, according to the expreſs Letter thereof; And the ſeveral Inſtances and Penning of the former Part concerning Diſtreſs given to the Executors, and of this Branch, ſhews the Intent of the Makers to make a Diverſity of Rent-ſecks and Fee-farms, or otherwiſe they would have uſed the ſame Words. And in this Caſe all the Land was charged with the Rent, and their held it ſo charged, and when he made the Leaſe for Life, Remainder over in Fee; the Remainder-Man was charged, and might have been diſtrain'd by the Common Law for the Arrears, and too' by the Act of Gloc. (viz.) by the Perſon of C the Tenant for Life, D was diſabled to diſtrain upon him, but that is ſupply'd by the 1ſt Part of the 2d Branch, which gives the Grantee Power to diſtrain as if the Caſty que Vie had been alive. And Judgment accordingly. 5 Rep. 118. a. b. Paſch. 1 Jac. C. B. Eddiſh's Caſe. —— Co Litt. 162. b. cites S. C.

Judgment againſt Tenant for Life of a Rent Charge, and a Liberty of the Rent was extended by Elegit, and mere Retaining in Arrear, *ſi dicit*; And the Queſtion was, *If Leſſor the Tenant by Elegit may diſtrain after the Death of A. for the Rent due in A's Life Time* by this Branch of the Statute. It was argu'd, That Tenant by Elegit was ſuch a one as was in for the Life of another within this Statute, and therefore might. Newdigate J. thought he was in by Act of the Parties, and ſo within the Statute. But Glyn Ch. J. and Warburton held the Diſtreſs not good, but that he might have Debt. And Glyn ſaid, That this Diſtreſs is founded upon an Act of Parliament, and that all Perſons who are in by an Act of Parliament are in Privity, and if ſo he cannot diſtrain. And adjudg'd accordingly. 2 Sid. 28, 29. Mich. 1657. and pag. 62. Hill. 1657. Poole v. Neel.

A. ſeiſed in Fee granted a Rent-Charge of 60 l. per Annum to J. S. for his Life out of the Manor of T. with a Clauſe of Diſtreſs for Non-payment within 20 Days, if demanded. J. S. made W. R. his Executor, and died. The ſaid W. R. diſtrain'd for 120 l. being for 2 Years Rent in Arrear, in the Life-time of his Teſtator. It was ſuggeſted, That the *Executor of a Perſon ſeiſed of a Rent Charge ceaſes granted for his own Life* was not within this Act, which is to be in Deſtruction of Executors of Tenants per autre Vie during the Life of Ceſty que Vie. But it was reſolv'd, That this Caſe is within the Statute 2 Lutw. 1227. Paſch. 8 W. 3. Poole v. Bell.

2. If a Man makes a *Leaſe for Life* or Lives, or a *Gift in Tail, reſerving a Rent*, this is a Rent-Service within this Statute. Co. Litt. 162. b.

3. For the Arrearages of a *Nomine Pœnæ*, and for Reliefs as for Aid Pur faire Fits Chivaler, or Pur File marier; This Statute gives no Remedy, For, for the Arrearages of the Nomine Pœnæ, the *Grantee ſhall not* only *have* an Action of *Debt*, *and conſequently his Executors* or Adminiſtrators; and yet the Nomine Pœnæ, as an incident to the Rent, ſhall deſcend to the Heir. For *Relief* the Lord *cannot have* an Action of *Debt but Diſtrain*; but his *Executors by the Common Law ſhall have* an Action of *Debt*; For it is no Rent, but caſual Improvement of Services for the ſaid Aids. If the Lord does levy them, the Son and Daughter reſpectively ſhall have an Action of Debt againſt the Executors or Adminiſtrators of the Lord; and if they have nothing, then againſt the Heir; but this is by the Statute of W. 1. Note, That *all Manner of Arrearages of Rents* iſſuing out of a Freehold or Inheritance, whether they be in *Money*, or *Corn*, or *Cattle*, *Fowl*, *Pepper*, *Comin*, *Victual*, *Spurs*, *Gloves*, or any *other Profit* to be delivered or yielded, and *whether* they be *annual or every* 2, 3, *or* 4 *Years*, or the like, *or within* this Statute.

But *Work-Days*, or any *corporal Service*, or the like, are *not* within this Statute. Co. Litt. 162. b.

4 Rep. 49. b. in Ognel's Case, That at Common Law the Executors during the Life of the Tenant for Life could not have Debt, but that after the Estate for Life determined the Action was maintainable. cites 9 H. 6. 43. 14 H. 6. 26. 19 H. 6. 43. 32 Eliz. 3. tit. Debt F. N. B. 121. (C) accordingly.

4. A. made a *Lease for Life rendring Rent. The Rent was Arrear. A. died.* It was a Question, Whether the *Executors* might distrain, or have Debt, inasmuch as the Words of the Statute seem to mean only Rents in Gross &c. in Fee, Fee-Tail, and for Life and not to extend to Rents incident to Reversions; and says, That it seems by 10 H. 6. and 37 H. 6. fol. 39. The Action of Debt by the Common Law lay for Rent reserved upon Lease for Life, after the Death of the Lessor, for the Executors or Administrators; And several thought that this Case shall be intended within the Purview of this Statute. D. 375. b. pl. 20. Pasch. 23 Eliz. Anon.

Ow. 117. Trin. 35 Eliz. B. R. Lambert v. Austen S. C. the Court was divided, viz. Gawdy and Fenner that the Distress was well taken upon the Statute of 37 H. 8. cap. 37. for the Reason here mentioned; but by Popham and Clench contra; For the Termor ought to pay it, because he takes the Profits of the Land —— Cro. E. 332 pl. 12. Trin. 36 Eliz. B. R. S. C. and the Court divided, and Gawdy and Fenner held, That the Tenant of the Freehold is only to be charged; for an Assise lies only against him, and he is the Party that is to attorn; and the Lessee for Years is only chargeable for his Cattle being upon the Land, as a Stranger shall be in that Case; and the Intent of the Statute was only to give Remedy against him who was chargeable in the Life of the Testator; And Fenner said, If Lessee for Life grants a Rent-charge, and then makes a Lease for Years and dies, Debt lies for this Rent against the Executors of the Tenant for Life, and not against the Tenant for Years, for he is not the Party chargeable, and in this Case, if no Seisin was had, there is no Remedy; For Tenant for Years cannot give Seisin, and a Release of this Rent must be to the Tenant for Life, and not to the Tenant for Years. Clench and Popham contra, That the Tenant for Years is only chargeable in Debt for the Rent incurred during the Years, and not the Tenant of the Freehold, and both are chargeable, one with an Assise, and the other with a Distress during the Estate; Then it is to be considered in this Case who is chargeable by the Intent of the Statute; If *Tenant per auter Vie grants a Rent, and Cestuy que Vie dies*, the *Grantee* of the Rent *dies*, the Executors of the Grantee have no Remedy by the Statute; for the Statute giving the Distress intends the Party that properly and usually is to be distrained, which is the Termor in Possession, and those that come in Privity under him; but so is not he in the Reversion; And therefore in this Case the Executors cannot distrain, but only have an Action of Debt, and the Statute gives the Distress upon the Tenant in Demesne which is chargeable immediately, and not on him in the Reversion, except his Cattle come upon the Land by Escape. Fenner, if Tenant in Tail grant a Rent-charge, and then makes a Lease for Years according to the Statute, and dies, the Issue shall hold it discharged, and the Grantee shall not distrain during the Term. Quod Gawdy concessit, et adjornatur.

5. A *Grant* of [a Rent] Charge to *G. B. for Life*, with a Clause of Distress, then the *Grantor made a Lease* of the Lands *to W. S. for Years, and* afterwards *granted the Reversion to R. L. for Life*; the *Rent was in Arrear, G. B. died*, the *Term for Years expired*, and the *Executors of G. B. distrained for* the Rent, Arrears of Rent due in his Life-time; and adjudged, That the Distress was well taken upon the Statute 23 H. 8. cap. 37. because the Rent did not issue out of the Term but out of the Freehold. 3 Nelf. a. 113. pl. 9. cites Owen 117. Lambert v. Austen.

6. A Reversioner in Fee on an Estate for Life *devised a Rent of 4 l. per Annum to J. S. for Life.* J. S. made his Executors and died; The *Executors distrained*, and avowed for that Rent: He ought to *aver* that the Land remains in the Seisin of the Tenant that ought to pay it, or in the Hands of some other that claims by him by Purchase or Descent according to the Statute of 32 *H.* 8. 37. Cro. E. 547. Hill. 39 Eliz. C. B. Myles v. Willoughby.

Gawen v. Ramtes. Cro. E. 804, 805. pl. 5. Hill. 43 Eliz. that all the Justices agreed that a Distress by C. was main-

7. A. seised in Fee granted a *Rent to B. and his Heirs for the Life of J. S.*—B. by Will *devised it to C.* The Rent is Arrear. *J. S. dies.* C. distrained. The Court inclined, that by this Statute, one that has a Rent Pur auter Vie may after the Death of Cestuy que Vie distrain for the Rent incurred in the Life of Cestuy que Vie, if the Land be in the Possession of any Person that was chargeable with the Rent in the Life of Cestuy que Vie; But whether C. was well intitled to the Rent was a Doubt which depended upon 2 Points. 1st, If by the Common Law such Rent was devisable,

viſable, and the Court agreed, That it was not. 2dly, If it be deviſable by the Statute 32 & 34 H. 8. and Gawdy and Fenner held it was, tho' it be only a Franktenement deſcendible; But Popham econtra. All agreed that no General Occupant could be of it; and if it was deviſable by the Cuſtom, that the Deviſe would prevent the Occupancy. Mo. 625. pl. 858. Mich. 42 & 43 Eliz. Gawen v. Rautes.

tainable by this Statute; becauſe the Eſtate in the Rent is determined, and the Rent was due before; and it is within the Intent of the Statute, altho' it was not for his own or another's Life, but Quaſi a Fee.

8. A Rent-charge was *granted* to the Defendant's Teſtator *for 40 Years with a Clauſe* of Diſtreſs in the Deed, *That the Grantee and his Heirs might diſtrain* for the Rent *during the Term*. In Replevin the Defendant, as Executor, avowed for this Rent. It was held that the Executor ſhall have the Rent, and diſtrain for it, and not the Heir. Cro. 644. pl. 50. Mich. 40 & 41 Eliz. B. R. Darrel v. Willon.

9. The *Lord of a Copyhold Manor*, where Copyholders are for Life, *grants Rent-charge out of all the Manor*; one *Copyhold eſcheats*, the *Lord grants that again by Copy*; the Queſtion was, If the *Grantee of the Copyhold* ſhall hold it charged or not; and by the whole Court but Fenner he ſhall not hold it charged, becauſe he *comes in Paramount the Grant*, that is, *by the Cuſtom*; The ſame Law of Statutes, Recognizances, or Dowers; but the 10th of Eliz. Dyer 270. by the whole Court, that he ſhall hold it charged; but this hath been denied for Law in a Caſe in C. B. between **Swaine and Becket**, which ſee Trin. 5 Jac. *But* to Coke J. it ſeemed that *if a Copyholder be of* 20 *Acres*, and the *Lord grants Rent out of thoſe* 20 *Acres in the Tenure* and Occupation *of the ſaid Copyholder (and names him)* there if this *Copyhold eſcheat, and be granted again*, the Copyholder ſhall hold it charged, for this is now charged by expreſs Words. Brownl 208. Sammer v. Force.

But Holt ſaid, That *Debt would not lie for a Quit-Rent* iſſuing out of a Copyhold; but Powis J. doubted of that Matter, and cited Bligh Heir's Caſe, and Yelv. 155 that a Quit-Rent is not within the Statute of 32 H. 8. cap. 37. and therefore an Executor cannot bring an Action of Debt for the Arrears. Carth. 91, 92. Mich. 1 W. & M. B. R. in the Caſe of Shuttleworth v. Garnett.

10. In *Debt* by an Executor for the Arrears of a Rent-charge upon the Statute of 32 H. 8. the *Plaintiff declares, That the Defendant* in the Life of the Teſtator *did enter into the Land*, out of which the Rent was iſſuing, and occupied it, *and took the Profits* thereof *by* the Space of *5 Years*, and demands the Arrears of the Rent for that Time; And after a Verdict for the Plaintiff, *it was moved that the Action will not lie for the Arrears againſt the Occupiers*, for the Statute gives it againſt the Tenant of the Land; To which Hale anſwered, That at the Common Law the Action lay againſt him that took the Profits of the Land, and againſt the Huſband that was ſeiſed in Right of his Wife. C. 4. fol. 49. 2dly. That this Action is given in Lieu of a Diſtreſs, and the Beaſts of the Occupiers were chargeable to the Diſtreſs. 3dly, That it would be convenient [inconvenient] that the Plaintiff ſhould be compelled to inquire out in whom the Eſtate was of Right; But Judgment was ſtayed, and Roll doubted of the Caſe; but inclined againſt the Plaintiff. All. 62. Paſch. 24 Car. B. R. Dunſh v. Smith.

11. *Leaſe* to the Plaintiff for Years, Habendum *De Anno in Annum quamdiu ambabus Partibus placuerit, to begin the 25th of March, paying* for the ſame 20 *l. yearly*, by equal Portions *at Michaelmas and Lady-Day*; The *Rent was behind at Michaelmas, and A. died in January following*, having made the Plaintiff his Wife, his *Executrix*, and the *diſtrained for* the 10 l. *Rent due at Michaelmas* to the Teſtator, the Cattle of the Defendant *the 17th of April following*, Et ſi &c. Upon this ſpecial dict, Whether it was for 2 Years certain, according to 3 Cro. 775. (which they agreed to be good Law) or not, the Court did not determine; but they agreed, that if the Parties in ſuch a Leaſe do begin the Year,

Year, the Will cannot be determined till the End of the Year, as 3. Cro. 775. and Q. Br. Leafe 53. and in this Cafe, tho' A. died in January, and the Death of one of the Parties determines the Will, yet here the Defendant was to hold the Land till the 25th of March, and the half Year's Rent at Michaelmas belonged to the Plaintiff as Executrix, and the half Year's Rent, which became due the 25th Day of March following, did belong to the Heir, with the Reverfion; but in this Cafe the Plaintiff had Judgment; for tho' the Defendant had a Right to the Rent due at Michaelmas, yet he *could not diſtrain* for it *after the 25th of March*, becauſe the former Leaſe at Will made by the Teſtator was then determined. Holt's Rep. 417. Mich. 5 Annæ. Crockerell v. Owerell.

12. A. was Tenant in Tail ſubject to a Rent-Charge for Life of B. who died, the Rent being Arrear; The Queſtion was, How far the Iſſue in Tail ſhould be liable for the Arrears incurred in the Life of his Anceſtor. Ld. C. Cowper was of Opinion, That the Statute 32 *H.* 8. 37. only provided what was juſt and equitable, that he who ſhould have paid ſhould ſtill be liable to an Action of Debt, or Diſtreſs of the Executor or Adminiſtrator of the Grantee of the Rent-charge; And ſo againſt any *claiming under* him, by Purchaſe, Gift, or Deſcent; but extends *not to the Iſſue in Tail* who claims not under, but *Paramount*. That the Tenant ought to have paid the Rent; That it is true, whilſt the Rent-charge was continuing, the Iſſue in Tail was liable to be diſtrained for the whole Arrear, which was incurred in the Life-time of his Anceſtor; but that was Summum jus, and the new Remedy given by the Statute does not carry it ſo far; had this Caſe been within the Statute, yet the Plaintiff's Remedy was at Law, and not to be aided in Equity, or the Remedy altered or changed from a Diſtreſs to a Receiver or Poſſeſſion. 2 Vern. 612, 613. pl. 550. Trin. 1708. Ld. Fairfax v. Ld. Derby.

13. 8 *Ann. cap.* 14. *S.* 4. Enacts, That *it ſhall be lawful for any Perſon, having Rent due upon any Leaſe for Life, to bring an Action of Debt for ſuch Arrears, as upon a Leaſe for Years.*

(T. b) *Diſtreſs.* By whom.

A. ſeiſed in Fee of certain Lands, *leaſed them to B. for 99 Years in Conſideration of* 300 *l.* and *B. re demiſes the whole Term to A. rendring* 20 *l. Rent per Ann.* (the Intent of the Bargain being to ſecure an Annuity of 20 *l.* to B. which he purchaſed with the 300 *l.*) then *A. died*, and the *Defendant entered* upon thoſe re-demiſed Lands as *Guardian to her Son*. In this Caſe it was agreed, 1ſt. That when a Termor aſſigns his whole Term, rendring Rent, altho' he cannot diſtrain, becauſe he has no Reverſion in him, yet he may maintain an Action of Debt againſt the Leſſee upon this Contract. Freem Rep. 218. pl. 226. Mich. 1674. Floyd v. Langfield. cites S. C. and 2 Cro 487 and Moor 126.

1. IF a Man *has Land for Years*, and *grants all the Term rendring Rent* he cannot diſtrain. Br. Dette pl. 39. cites 45 E. 3. 8.

2. If a Rent be granted *to* 2 *and to their Heirs out of an Acre of Land*, and that it ſhall be lawful *for one* of them *and his Heirs to diſtrain for this in the ſame Acre*; this is a Rent-Seek; for inaſmuch as they ſtand jointly ſeiſed of one intire Rent, it cannot be as to the one Rent-Seek, and as to the other a Rent-charge; and this Diſtreſs is as an Appurtenant to the Rent, and therefore, if he which has the Rent dies, the *Survivor* ſhall diſtrain, and if *both grant over the* Term to another, he ſhall diſtrain for this. Co. Litt. 147.

Burwell v. Harwell. S. C. Cro. C. 597. pl. 19.

3. *A. bound in a Statute-Merchant, grants a Rent-charge to B.* out of his Lands; The *Conuſee extends* the Lands, and levies his Debt, Coſts and Damages, and *Grantee diſtrained* for his Rent, & per tot. Cur. held good,

good; For he cannot have Scire Facias, but the Conuſor or his Aſſignee of the Land only may; and in Replevin or other Action for taking the Diſtreſs, this ſhall be put in Iſſue, if the Conuſee had levied the Debt &c. and if found ſo, then the Diſtreſs ſhall be held lawful, otherwiſe econtra. Jo. 456. pl. 1. Trin. 16 Car. B. R. Harwell v. Burwell.

Mich. 16 Car. Judgment, Nifi &c. ——— Mar. 124. pl. 203. Mich. 1- and Judgment for the Avowant.

Car. Adjornatur. Ibid. 159. pl. 230. Hill 17 Car. S C. argued. Ibid 207. pl 247 S C.

(U. b) Diſtreſs. In *what Land.*

1. OF Common Right a Man cannot diſtrain for Rent, but *in the Land out of which the Rent is iſſuing*; but if the Tenant grants to me that I am not paid the Rent, that if I may diſtrain in other Land, this is good; per tot. Cur. and there is it no New Rent. Rent pl. 1. cites 9 H. 6. 9.

2. If a Man grants a Rent out *of* 3 *Acres*, and grants further that if the Rent be behind, that he ſhall diſtrain for the Rent in one of the Acres; This is *a Rent-Seck for the Whole, and yet* he *ſhall diſtrain for this in the* 3*d Acre*. Co. Litt. 147. b.

3. If a Man be ſeiſed of 2 Acres of Land in 2 ſeveral Counties, and makes a *Leaſe* of both of them, reſerving 2 s. Rent, In this Caſe, tho' ſeveral Liveries be made at ſeveral Times, yet it is but an intire Rent, in Reſpect of the Neceſſity of the Caſe, and he ſhall *diſtrain in one County for the whole*, and make one Avowry for the whole; *but* he ſhall have *ſeveral Aſſizes* in Confinio Comitatus, and in either County ſhall make his Plaint of the whole Rent, but there ſhall be but one Patent to the Juſtices. Co. Litt. 153. b.

4. Leaſe for Years of *Land in Poſſeſſion, and other Land in Reverſion* rendering Rent; the Rent iſſues intirely out of both, and before the Reverſion falls into Poſſeſſion, a Diſtreſs may be taken upon the other Land in Poſſeſſion for all the Rent. Jenk. 254. pl. 46.

3. *A. was ſeiſed of* 3 *Parts of a Manor, and B. of the* 4*th Part. A. granted a Rent-charge* to J. S. and then A. ſold his 3 Parts, and B. his 4th Part to C. Then C. demiſed a 4th Part to W. R. but whether it was the very 4th Part which was B.'s, or a 4th Part generally, was not agreed; but if it was the very 4th Part of B. then W. R. was not liable to a Diſtreſs for it; otherwiſe if it was a 4th Part generally. But afterwards it being alleged by W. R. that it was Eandem quartam Partem, which was demiſed to him, it was held by all, That it ſhall be diſcharged, becauſe it was never charged, tho' once he might have diſtrained in all the Manor, for then there was no 4th Part, for all was alike in the Hands of C. but now when the 4th Part is in the Hands of a Stranger, it is no Reaſon that it ſhall be charged. Goldsb. 62. pl. 2. Trin. 29 Eliz. Goveritone v. - - - - -.

Le. 86. pl. 103. Paſch. 24 Eliz. C. B. S. C. by Name of Gunterſon v. Latcher; and ſays, that the Manor was not ſo conſolidated nor united by this Unity of Poſſeſſion, but that the Owner might well enough ſingle out Eandem quartem Partem, and grant it, and the Grantee ſhall hold the ſame diſcharged as the ſaid C. held it, and the Beaſts of the ſaid W. R. ſhall not be diſtrained; and ſo Judgment was given againſt the Avowant.

(W. b) Diſtreſs. At what *Time.*

1. IF one makes a *Leaſe for* 21 *Years*, and a Year after *grants the Reverſion reſerving Rent*, he cannot diſtrain for ſuch Rent *till after the Term ended.* Per Moile; but Danby and Needham ſaid, That if the Beaſts of the Grantor come upon the Land, he may after diſtrain them, but Moil ſaid No, He has nothing to do in the Land during the Term, but perhaps if the Grantor had payed him the Rent once, then if it be behind after, he ſhall have Aſſiſe &c. but if the Term continues 20 Years after my Grant &c. after the Term determined, he may diſtrain for all the Arrearages. 10 E. 4. 4. pl. 6.

2. *Grantee for Life of a Rent takes a Leaſe for* 5 *Years* of the Land; the 5 Years *expire*; He cannot afterwards diſtrain for the Rent incurr'd during the 5 Years. Cro. E. 861. Mich. 43 & 44 Eliz. C. B. Johnſon v. Barly.

Holt's Rep 41. S. C.— 11 Mod. 202. S. C. accordingly.

3. *Leaſe* to hold *from Year to Year*, and ſo on *ſo long as* both Parties pleaſe; Leſſee entered upon a third Year, the Rent of the 2d Year not paid. Held that the 3d Year is not in Nature of a diſtinct Intereſt, becauſe it ariſes from the ſame Executory Contract; and therefore the Leſſor may *diſtrain the 3d Year for the Rent of the 2d.* 2 Salk. 414. Hill. 7 Ann. B. R. Legg v. Strudwick.

The 5 *Days* mentioned in this are by an Act of 11 *Geo.* 2. 19. enlarged to 30 *Days.*

4. 8 *Ann.* 14. [or 17, Quære] *S.* 2. Enacts, That *in Caſe any Leſſee for Life or Lives, Term of Years at Will, or otherwiſe, of any Meſſuages, Lands, or Tenements, upon the Demiſe whereof any Rents are or ſhall be reſerved or made payable, ſhall fraudulently or clandeſtinely convey or carry off or from ſuch demiſed Premiſſes*, his Goods or Chattels, *with Intent to prevent the Landlord or Leſſor from diſtraining the ſame for Arrears of ſuch Rent ſo reſerved as aforeſaid, it ſhall and may be lawful to, and for ſuch Leſſor or Landlord, or any Perſon or Perſons by him for that Purpoſe lawfully impowered, within the Space of* 5 Days *next enſuing ſuch Conveying away or Carrying off ſuch Goods or Chattels as aforeſaid, to take and ſeize ſuch Goods and Chattels wherever the ſame ſhall be found, as a Diſtreſs for the ſaid Arrears of ſuch Rent, and the ſame to ſell, or otherwiſe diſpoſe of in ſuch Manner as if the ſaid Goods and Chattels had actually been diſtrained by ſuch Leſſor or Landlord, in and upon ſuch demiſed Premiſſes for ſuch Arrears of Rent.*

S. 3. *Provided nevertheleſs, That nothing in this Act contained ſhall extend, or be conſtrued to extend, to impower ſuch Leſſor or Landlord to take or ſeize any Goods or Chattels, as a Diſtreſs for Arrears of Rent, which ſhall be ſold* Bona Fide, *and for a valuable Conſideration, before ſuch Seizure made, any Thing herein contained to the contrary notwithſtanding.*

S. 5. *And it is further enacted, That all Diſtreſſes hereby impowered to be made, as aforeſaid, ſhall be liable to ſuch Sales, and in ſuch Manner, and the Monies ariſing by ſuch Sales to be diſtributed in like Manner, as by an Act made in the* 2d *Year of the Reign of their late Majeſties King* William *and Queen* Mary, *intitled*, An Act for enabling the Sale of Goods diſtrained for Rent, in caſe the Rent be not paid in reaſonable Time, *is in that Behalf directed and appointed.*

S. 8. *Provided that this Act ſhall not prejudice the Crown, to recover and ſeize Debts, Fines, and Forfeitures, due and anſwerable to the Crown*

(X. b) Diſtreſs. *How* to be *made, and* * *what* to be *done.*

* See (W. b) pl. 4. S. 5.

1. IF a Landlord comes into a Houſe, and ſeizes on *ſome Goods* as a Diſtreſs, *in Nature of all* the Goods in the Houſe, that will be a good Seiſure of all; but he muſt *remove them* in convenient Time at Common Law; and now ſince the Statute of W. & M. *immediately*, except it be Hay or Corn. And becauſe in the Principal Caſe the Seiſure was of *Barrels of Beer*, tho' not eaſily removeable, if at all, without Damage, and on a Monday, and no Removal till Wedneſday, when another took them by Replevin, in which the Leſſee and not the Diſtrainant was made Defendant; and beſides, the Landlord *quitted Poſſeſſion* the two intervening Nights, and had not the Poſſeſſion at the Time of the taking by Virtue of the Replevin, without which there could be no Reſcous, the Plaintiff was Nonſuited. In this Caſe it appeared that the *Diſtrainant drew Beer out of one of the Barrels*, which made him a * *Treſpaſſor ab Initio*, as to that Barrel only. Per Holt Ch. J. 6 Mod. 215. Trin. 3 Ann. B. R. Dod v. Monger.

* This is altered by the Statute 11 Geo. 2. 19. S. 19. which ſee at (Y. b)

2. 11 *Geo.* 2. *cap.* 19. *S.* 10. Enacts that *it ſhall be lawful for any Perſon lawfully taking any Diſtreſs for Rent, to impound or ſecure the Diſtreſs on ſuch Part of the Premiſſes chargeable with the Rent, as ſhall be moſt convenient, and to appraiſe, ſell, and diſpoſe of the ſame upon the Premiſſes, as any Perſon may now do off the Premiſſes by Virtue of 2 Will. & Mar. Sſt.* 1. *cap.* 5. *or of* 4 *Geo.* 2. *cap.* 28. *And it ſhall be lawful for any Perſon to come, and go to and from ſuch Part of the Premiſſes, to view, appraiſe, and buy, and alſo to carry off the ſame, on Account of the Purchaſer; and if any Pound-Breach or Reſcous be made of Goods diſtrained for Rent ſecured by Virtue of this Act, the Perſon aggrieved ſhall have like Remedy, as in Caſes of Pound-Breach, or Reſcous, by the ſaid ſtatute.*

(Y. b) Diſtreſs. *Difficulties*, in making Diſtreſſes, *removed.*

1. 11 *Geo.* 2. 19. *S.* 19. ENacts that *where any Diſtreſs ſhall be made for any Kind of Rent juſtly due, and any* Irregularity or Unlawful Act *ſhall be afterwards done by the Party diſtraining, or by his Agent, the Diſtreſs it ſelf ſhall not be deemed unlawful, nor the Party making it be deemed a Treſpaſſor* Ab initio; *but the Party aggrieved by ſuch Unlawful Act or Irregularity, ſhall or may recover full Satisfaction for the* Special Damage *he ſhall have* ſuſtained thereby, and no more, *in an Action of Treſpaſs, or on the Caſe, at the Election of the Plaintiff. Provided always, That where the Plaintiff ſhall recover in ſuch Action, he ſhall be paid his* full Coſts of Suit, *and have all the like Remedies for the ſame, as in other Caſes of Coſts.*

S. 20. *Provided nevertheleſs, That no Tenant or Leſſee ſhall recover in any Action for any ſuch Unlawful Act or Irregularity, as aforeſaid, if* Tender of Amends *hath been made by the Party diſtraining, or his Agent, before ſuch Action brought.*

S. 21. *In Actions againſt Perſons intitled to Rents or Services of any Kind, or their Bailiffs or Receivers, or other Perſon or Perſons relating to any Entry, by Virtue of this Act, or otherwiſe, upon the Premiſſes charged with ſuch Rents or Services, or to any Diſtreſs or Seiſure, Sale, or Diſpoſition*

(as)

Goods or Chattels thereupon, it ſhall and may be lawful to and for the Defendant in ſuch Actions, to plead the General Iſſue, and give the Special Matter in Evidence, any Law or Uſage to the contrary notwithſtanding; and in Caſe the Plaintiff in ſuch Action ſhall become Nonſuit, diſcontinue his Action, or have Judgment againſt him, the Defendant ſhall recover double Coſts of Suit.

(Z. b) *Frauds* to prevent Diſtreſſes for Rent *remedied*, and *Aiders puniſhed.*

1. 11 *Geo.* 2. 19. *S.* 3. ENacts that *Tenants fraudulently conveying away their Goods and Chattels off the Premiſſes, to prevent the Landlord's diſtraining, and all and every Perſon aſſiſting therein, or in concealing the ſame, ſhall forfeit to the Landlord double the Value of ſuch Goods, to be recovered by Action of Debt, in which no Eſſoign, Protection, Wager of Law ſhall be allowed, nor more than one Imparlance.*

S. 4. *Provided if ſuch Goods exceed not the Value of* 50 *l. ſuch Landlord, his Bailiff, Servant, or Agent, may make Complaint in Writing to* 2 *Juſtices of Peace.*

S. 5, 6. *But* Appeal *may be to the Quarter-Seſſions. And Appellant entering into a* Recognizance with 2 Sureties, in double the Sum *ordered by the two Juſtices of Peace to be paid, the Order of the* 2 *Juſtices of Peace ſhall not be executed in the mean Time.*

S. 7. *And where any Goods ſo conveyed away by any Tenant, his, her, or their Servant, or Agent, or other Aider or Aſſiſter, ſhall be Put, Placed, or Kept in any Houſe, Barn, Stable, Out-houſe, Yard, Cloſe or Place, locked up, faſtened, or otherwiſe ſecured, ſo as to prevent ſuch Goods or Chattels from being taken and ſeized as a Diſtreſs for Arrears of Rent, it ſhall and may be lawful for the Landlord or Landlords, Leſſor or Leſſors, his, her, or their Steward, Bailiff, Receiver, or other Perſon or Perſons impower'd, to take and ſeiſe as a Diſtreſs for Rent ſuch Goods and Chattels (firſt calling to his, her, or their Aſſiſtance, the Conſtable, Headborough, Borſholder, or other Peace-Officer of the Hundred, Borough, Pariſh, Diſtrict, or Place where the ſame ſhall be ſuſpected to be concealed, who are hereby required to aid and aſſiſt therein; and in Caſe of a Dwelling-Houſe) Oath being alſo firſt made before ſome Juſtice of the Peace, of a reaſonable Ground to ſuſpect that ſuch Goods and Chattels are therein) in the Day-time to break open, and enter into ſuch Houſe, Barn, Stable, Outhouſe, Yard, Cloſe, and Place, and to take and ſeiſe ſuch Goods and Chattels for the ſaid Arrears of Rent, as he, ſhe, or they might have done, by Virtue of this or any former Act, if ſuch Goods and Chattels had been put in any open Field or Place.*

(A. c) Remedy by Diſtreſs. *For what Rent.*

S. P. Br. Rents, pl. 5. cites Littleton, Tit. Parceners.

1. WHere a Rent is *reſerved upon Equality of Partition*, the Tenant may diſtrain for it of Common Right, viz. The Coparcener to whom it is reſerved. Per Newton Ch. J. and Paſton J. and yet Paſton ſaid that it is not properly Rent-charge. Br. Rents, pl. 6. cites 21 H. 6. 11.

2. *Tenant for* 20 *Years leas'd* the Land to W. P. *for* 10 *Years rendering Rent*, and *after he granted the ſame Rent* to W. N. there he cannot diſtrain,

ſtrain, becauſe it is Rent Seck; for he has not the Reverſion of the Term which gives the Cauſe of the Diſtreſs. Contra if he had granted the Reverſion and Rent to W. N. there he may diſtrain; Note the Diverſity. Br. Rents, pl. 17. cites 2 E. 4. 11.

(B. c) Diſtreſs of *whoſe Cattle &c.*

1. IT was admitted that if 2 *Jointenants* are, and *one of them grants a Rent-charge*, the Grantee may diſtrain the *Beaſts of the Grantor* upon the Land, but not the Beaſts of the other Jointenant. *Quære if he* may diſtrain the *Beaſts* which comes there *Damage feaſant*, it ſeems that he may. Br. Charge, pl. 39. cites 11 H. 6. 33.

2. *A. and B. ſeverally ſeiſed of* 2 *Cloſes adjoining*, and the *Fence belonging wholly to A.* by Preſcription, and the Beaſts of B. for *Default of Fence* eſcape out of his Cloſe into the Cloſe of A. and immediately before B. could re-chaſe them into his proper Cloſe, the Lord diſtrained them for Services; and if he may ſo do was demurr'd in Law. And it was adjudged Pro Quer. and againſt the Avowant; for no Default can be aſſign'd in B. for this Eſcape, nor any Law oblige him to keep the Beaſts in his own Cloſe. D. 317. b. pl. 9. Mich 14 & 15 Eliz. Anon.

3. *A. Leſſee* for 60 Years *of* 3 *Cloſes*, *grants* 2 *to B.* who put *his Beaſts* there, and they *ſtrayed into the other Cloſe that was not ſufficiently hedged or incloſed*; the Leſſor, who had the Reſidue of the Land finding them levant and couchant diſtrained them for his Rent; and it was held per Croke, Dodderidge, and Haughton, abſente Mountague, that the Diſtreſs is well taken; and they ſaid, That there is no Diverſity between this Caſe and that of Lord and Tenant; otherwiſe if he makes *Freſh Suit*, ſo that they are not levant and couchant. And Dodderidge gave the Reaſon, becauſe the *Cloſe is a* * *Debtor*, and he came to his Debtor, and diſtrain'd Beaſts found there, and he cannot examine how they came there, or if the Cloſe be hedged or not; and Opinio Curiæ, that that Leſſor ſhall have a Return. Palm. 43. Mich. 17 Jac. B. R. Lacie's Caſe.

* Where the *Land is Debtor*, the Cattle of a Stranger, that are *Levant and Couchant*, are as liable as the Cattle of the Owner, and ſo it is in the Caſe of a *Rent Service*; Nay if one ſeiſed in Fee grant a *Rent-charge*, tho' this be a Charge on the Land by his own Act, yet if his Neighbour's Cattle eſcape thereinto, and happen to be there Levant and Couchant they are diſtrainable, becauſe the Land is Debtor; This Caſe was adjudged in Point in the Exchequer. 12 Mod. 178. Hill 9 W. 3. B. R. in Caſe of Britton v. Cole. Holt Ch. J. cited it as adjudged Paſch. 18 Car. 2. Hodgſon and Toobigle.

4. A. ſeiſed in Fee makes a *Leaſe for Life*, *and after grants a Rent-charge* to B. If A's Cattle come on the Ground, B. may diſtrain them, tho' he cannot diſtrain the Cattle of the Tenant in Poſſeſſion. Brownl. 32. Anon.

5. A. ſeiſed in Fee of a Cloſe leaſed it to B. The Cloſe adjoining belonged to C. The *Fence between the* 2 *Grounds had always been made by A. and thoſe whoſe Eſtate* &c. he had Time out of Mind. B the *Leſſee's Rent was Arrear*, and for Want of Fences between the 2 Cloſes, the *Beaſts of C. eſcaped into the Cloſe leaſed by A. to B. and A. diſtrained them for his Rent* before C. had any Notice of their being there; and in Replevin by C. Judgment was given for A. in C. B. and affirmed on Error in B. R. Nisi &c. 2 Saund. 289. Hill. 22 & 23 Car. 2. Poole v. Longville.

A *Rent-charge* was Arrear for 20 Years, and *Cattle eſcaped out of the next Ground*, and were diſtrained; Ld. Nottingham relieved againſt it. Cited 2 Vern. 131. pl 128. as the Caſe of Brodon v. Pierce.

6. *And* the Court relied much upon the Caſe in 19 H. 7. 21. b. where it is ſaid, That if the Beaſts *eſcape* into any Land, and the *Lord diſtrain* them,

But the Reporter takes a *Difference*

between a *Perſon by a Leſſee in Reverſion*, and *by a Leſſor upon his own Land* for Rent reſerved; For the Lord has nothing to do with the Fences or the Land, and ſo the Fences being in Repair or not, are Nothing to him; But it is not ſo as to the Leſſor, who ought to repair either by himſelf or his Tenant, or otherwiſe he ſhall *take Advantage of his own Wrong*; and to warrant this he cites D. 31 [illegible] b 318 pl. 9. 20 E. 4. 49. b [illegible] H. [illegible]. 1. 15 H. 7. 21. 15 H. [illegible]. 1. But if the Beaſts eſcape into the Land *without any Default in the Fences, or the Tenant of the Land where Fences not bound to repair* the Fences, for Default whereof the Beaſts eſcape and are diſtrained, it is not material to the Lord or Leſſor, Whether they were Levant or Couchant or not. 2 Saund. 292. and ſays he thinks the Caſe hard to be maintained

them, that the Diſtreſs is good, and that *Levancy and Couchancy* is not material. 2 Saund. 289. Poole v Longville.

Holt Ch. J. ſaid, He thought it hard to maintain the Judgment in the Caſe of Poole v. Longville 2 Saund. 289. that when the Plaintiff's Inheritance is charged with the Repairs, he ſhould take Advantage of his own Wrong in not repairing, by making the eſcaping Cattle a Diſtreſs for his Rent, and it is not like the Caſe of Lord and Tenant there quoted; for the Lord has nothing to do with the Land, but the Charge of Repairs belongs to the Tenant. And per Cur. That Judgment is fit to be conſidered. 6 Mod. 198. in the Caſe of Elmore v. Tucker. ——— This Caſe of Elmore and Tucker was the ſame Point with that of Poole and Longville. And upon Demurrer was relied upon as a Caſe in Point; But after the Court had declared their Opinion as before, it was adjourned.

7. A. is ſeiſed of a 3d Part in Common, and B. of the other 2 Parts in Common with A.—— A. *lets his 3d Part*, reſerving a Rent. B. puts in his Cattle, or a Stranger by his Licence, ſuch Cattle are not diſtrainable for the Rent. 2 Vent. 283. Hill. 2 & 3 W. & M. B. R. Kemp v. Cory.

(C. c) Diſtreſs. In what Caſes *ſeveral Diſtreſſes* may be *for the ſame Rent.*

1. IF the *Lord* comes to diſtrain and *takes an Ox, which is* [*not*] *ſufficient* for the Rent Arrear, and there are then no more Beaſts there, *he may* come at another Time, and *take a Cow*, and *at another Time*, and take another Cow, till he has ſufficient Diſtreſs. Br. Diſtreſs pl. 96. cites the printed Abridgment of Aſſiſe tit. Bar.

2 Lutw. 1536. cites 5 C. And the Reporter adds a Quære, If the 2d Diſtreſs had been juſtifiable admitting that it had been *pleaded* that at the Time of the Caption of the firſt Diſtreſs, there was *Not ſufficient Diſtreſs* upon the Land demiſed, and that the firſt Diſtreſs was not but of ſuch a Value &c

2. If one take Trop Petit Diſtreſs for Rent, and after takes another Diſtreſs for the ſame Rent, it is not good; For he cannot avow 2 Diſtreſſes for the ſame Rent; For it was his Folly that he took not a better Diſtreſs at firſt; But note in the Abridgment of the Aſſiſes it is ſaid that if there be *not ſufficient* Diſtreſs when he diſtrained, he may diſtrain again. Cro. E. 13. pl. 8. Hill. 25 Eliz. C. B. Anon.

Made to extend to Wales and Counties Palatine. 19 Car. 2. *cap.* 5. It was a

3. 17 *Car.* 2. *cap.* 7. *S.* 4. Enacts, That *where the Value of the Cattle diſtrained ſhall not be found to the full Value of the Arrears diſtrain'd for, the Party to whom ſuch Arrears were due, his Executors or Adminiſtrators may from Time to Time diſtrain again for the Reſidue of the Arrears.*

Miſchief before this Statute, That in Caſe a Diſtreſs was too little one could not diſtrain again, be the Demand never ſo great, but the other might plead Levied by Diſtreſs which ſhews that Diſtreſſes could not be ſplit. Per Holt. Cumb. 346. Mich. 7 W. 3. B. R. Johnſon v. Bane.

4. If one diſtrain *again* for the *ſame Rent*, the Remedy is *Reception*, and if the Sheriff refuſe a Replevin, an Action lies againſt him. Farr. 118. Mich. 1 Ann. B. R. Anon.

(D. c) Di-

(D. c) Diſtreſs. Pleadings in Avowry; Good.

1. IT was ſaid for Law in a Note, That in Replevin, if the Defendant avows *for Rent*, and the *Plaintiff alleges Tender upon the Land*, this ſuffices *without Tender in Court*; For he is not bound to tender but only upon the Land; Quod Nota. Br. Avowry pl. 40. cites 7 H. 4. 14.

2. In Trelpais, the *Defendant ſaid that the Plaintiff held of J. S. by Fealty, Homage, and Suit of Court, and* 10 *s. Rent* payable &c. and for the Homage, Fealty, Suit, and Rent Arrear, *he as Bailiff diſtrained*, The *Plaintiff ſaid, That he held by Fealty, Suit of Court, and* 9 *s. Rent*, *Abſque hoc* that he held in the Manner as the Defendant alleged, and the other contra, *as to the* 9 *s. Rent and Fealty, he ſaid, That non fuerunt infecta*, and it was *found that the Plaintiff held by Fealty, and* 9 *s.* and *not by Homage or Suit*, and the Plaintiff recovered, and the Defendant brought Writ of Error, and it was held by Conisby, That to ſay that the Fealty was *ſuit* (*Nota bene*) *is not good*; For he *ought to ſay in the Affirmative that it was ſuit*. *Dyer per Cur.* becauſe the *Avowry is in the Affirmative that it was infecta*, therefore it is a good Anſwer that the Fealty *was Suit* quod nota. Per Cur. And it ſeems there that the Verdict ought to have found that he did not hold by Homage, Fealty, Suit, and 10 *s.* Rent, Prout &c. For this is the Rule. Br. Barre, pl. 73. cites 9 H. 7. 12.

3. In Avowry for Rent-charge *the Plaintiff ſaid, That his Beaſts eſcaped for Default of Inclofure of the Tertenant, and he firſt purſued them, and the Defendant took them*; the *Defendant ſaid that they were there damage feaſant*, and no Plea without Traverſing *the Eſcape or the firſt Suit*, and he may traverſe either of them. Br. Traverſe per &c. pl. 298. cites 15 H. 7. 17.

4. A. diſtrains, and being asked for what Cauſe he diſtrained aſſigns a Cauſe which is not ſufficient, and after an Action is brought againſt A. he may *avow* the Diſtreſs *for another Cauſe*. 2 Le. 196. pl. 244. Mich. 29 Eliz. C. B. in an anonymous Caſe.

5. Reſolved that an Avowry may be *for Part of a Rent*. 4 Le. 4. pl. 13. Paſch. 31 Eliz. C. B. Anon.

6. In Repievin &c. the Defendant avowed for a *Rent-charge deviſed to him*, but did *not allege the Land to be holden in Socage*, and therefore adjudged to be ill. Cro. E. 667. pl. 23. Paſch. 41 Eliz. C. B. Merryweather v. Stanton.

7. A avow'd a Diſtreſs for Rent, *alleging a Poſſeſſion for a certain Term of Yea s.* It was moved, That tho' in Debt for Rent it was good, yet that it was not good in Avowry; But it was anſwered, That ſo it might be in a Formedon or Real Action, but this was only between Leſſor and Leſſee. And the Court held it all one, and Judgment for the Avowant. 2 Show. 484. Mich. 2 Jac. 2. B. R. Seymor v. Pathley.

The Commencement of Particular Eſtates ought generally to be ſet forth, but not to where

he can claim by Statute. Cro. C. 571. Hill. 15 Car. B. R. in the Caſe of Savage v. Hawkins. Jo. 433. S. C.

*. 11 *Geo.* 2. 19. *S.* 21. *Whereas great Difficulties often ariſe in making Avowries* [illegible] *upon Diſtreſſes for Rent, Quit-Rents, Reliefs, Heriots* [illegible] *Services, it ſhall and may be lawful to and for all Defendants in* [illegible] *to avow or make Conuſance* generally, *That the Plaintiff in Replevin, or other Tenant of the Lands and Tenements whereon ſuch Diſtreſs was made*, enjoy'd the ſame under a Grant *or Demiſe* at ſuch a certain Rent, *during the Time wherein the Rent diſtrained for incurr'd, which Rent was then and ſtill remains due, or that the Place where the Diſtreſs was taken was Part of ſuch certain Tenements, held of ſuch Honour, Lordſhip, or Manor*; *for which Tenements the Rent, Relief, Heriot, or other Service diſtrained for was, at the Time of ſuch Diſtreſs, and ſtill remains due*; *without farther ſetting*

forth the Grant, Tenure, Demiſe, or Title of ſuch Landlord, Leſſor, or Owner of ſuch Manor, any Law or Uſage to the contrary notwithſtanding. And if the Plaintiff in ſuch Action ſhall become Nonſuit, diſcontinue his Action, or have Judgment given againſt him, the Defendant in ſuch Replevin ſhall recover double Coſts of Suit.

(E. c) Avowry. Good; after the *Eſtate determined.*

1. A Man *leaſed for Life, rendring Rent*, the *Rent was arrear*, and the *Tenant ſurrender'd to him in Reverſion*; yet it is agreed, That he ſhall have the Rent due before the Surrender; but there he diſtrained, and after the Tenant ſurrender'd. And it was agreed per tot Cur. except Alcue, That he may make *Avowry after the Surrender*; and it is not mentioned there whether there was any Exception in ſaving the Rent upon the Acceptance of the Surrender. Br. Rents, pl. 5. cites 19 H. 6. 41

2. If one diſtrains for a Rent, and * *before the Avowry the Eſtate determines*, on which the Rent was reſerved, the Avowry ſhall be as if the Eſtate had continued; For the Avowant is to have the Rent notwithſtanding. But if the Diſtreſs was *for a Perſonal Service*, then the Defendant muſt have a ſpecial Juſtification; For he cannot have the Service in Specie when the Eſtate is determined. Vent. 250. Mich. 25 Car. 2. B. R. in the Caſe of Wildman v. Norton, ſays; Note that it was ſo ſaid.

* Per Twiſden J. He ought not to make Avowry or Conuſance, but to juſtify; Becauſe the Taking was lawful. Raym. 64 Hill. 14 Car. 2. B. R. in the Caſe of Palmer v. Richards.

3. 8 *Annæ* 14 [or 17.] *S.* 6. *Whereas Tenants* Pur auter Vie *and Leſſees for Years, or at Will, frequently hold over the Tenements to them demiſed, after the Determination of ſuch Leaſes. And whereas after the Determination of ſuch, or any other Leaſes, no Diſtreſs can by Law be made for any Arrears of Rent that grew due on ſuch reſpective Leaſes before the Determination thereof, it is hereby enacted, That it ſhall and may be lawful for any Perſon or Perſons, having any Rent in Arrear, or due upon any Leaſe for Life or Lives, or for Years, or at Will, ended or determined, to diſtrain for ſuch Arrears after the Determination of the ſaid reſpective Leaſes, in the ſame Manner as they might have done if ſuch Leaſe or Leaſes had not been ended or determined.*

S. 7. *Provided, That ſuch Diſtreſs be made within the Space of* 6 *Calendar Months after the Determination of ſuch Leaſe, and during the Continuance of ſuch Landlord's Title or Intereſt, and during the Poſſeſſion of the Tenant from whom ſuch Arrears became due.*

S. 8. *Provided, That this Act ſhall not prejudice the Crown, to recover and ſeiſe Debts, Fines, and Forfeitures, due and anſwerable to the Crown.*

(F. c) Eſtopple.

1. A Man avows for a Rent *due ſuch a Day, and is Nonſuit*, now he may avow for the *ſame Rent*, and ſuppoſe the ſame due at *another Day*; For he ſhall not be *eſtopped* by the Record on which he was Nonſuit. Arg. 2 Le. 3. pl. 3. cites 20 H. 7.

2. *After*

2. *After an* * *Avowry* for Rent due at a *later Day* an Avowry may be for Rent due at a *former Day*; and the ſame *after a Recovery in* an Action of Debt. But an † *Acquittance* for Rent due at a later Day is a bar. Lev. 43. Mich. 13 Car. 2. B. R. Palmer v. Stanage.

Sid. 40 S. C. by Name of Palmer v. Stavick. — Raym. 21. S. C. by Name of Palmer v. Stavick —— Keb. 95. S. C —— * Show. 9. in the Caſe of Piltarſe v. Darby. —— † 8 P. D. 2-1. pl 26. Hill. 10 Eliz. Morton v. Hopkins. —— Bendl. 186 pl. 228. S. C. —— Mo. 8- pl. 219. S. C —— And. 14 S. C. —— The Acquittance ought to be under *Hand and Seal*. Per Powel J. Comb. 60.

3. J. S. *held* Froſter-Court *Farm* of A. *by Leaſe at* 263 *l. a Year* and alſo *a Farm* called Pikes of A. *at Will at* 22 *l.* J. S. paid 157 l. 10 s. to A.'s Steward, who gave J. S. a Receipt thus (viz.) *Receiv'd* then *of J. S. the Sum of* 137 *l.* 10 *s. in full for Half a Year's Rent due at Lady-Day* laſt paſt. A Bill was brought by A. to be relieved, but the Maſter of the Rolls diſmiſs'd it, in regard J. S. might have his Action at Law for the Rent of Pikes, notwithſtanding the Generality of the Words of the Releaſe. But on Appeal the Ld Chancellor ſaid, He was not ſatisfied that A had Remedy at Law, as Both theſe Lands might formerly have been held together, and the general Words in the Leaſe might poſſibly extend to Pikes, contrary to the Intent of the Parties; And that if A. ſhould not recover at Law, his Lordſhip muſt relieve here; and ſo it would be ſending it to Law in order to have a new Bill. And therefore *decreed an Account*. Sel. Caſes in Chan. in Ld. King's Time 1, 2. Mich. 1724. Ld. Lucy v. Watts.

4. A Tenant got a *Receipt in full to the Date*; Bill was brought for Account. The Tenant inſiſted he was not obliged to any Account previous to the Receipt; Becauſe his Voucher might be loſt, and not preſerved on account of the Receipt; ſo that he might be made to ſuffer, not thro' any Default of his own, but by relying on the Receipt. But there being great Reaſon to believe the Receipt inſiſted on was *obtained either thro' Fraud or by Miſtake*, and that the Tenant had not paid all that was due to the Time of the Receipt, *Account was ordered* to be taken previous to the Receipt; *and to pay Coſts*. Sel. Caſes in Chan. in Ld. King's Time 2. Mich. 1724. cited in the Caſe of Lord Lucy v. Watts, by Mr. Talbot, as decreed about 2 or 3 Terms before, in the Caſe of Bacon v. Harris.

(G. c) Rent *doubled.* By Holding over.

1. 4 *Geo.* 2. *c.* 28. *S.* 1. ENacts, That *if Tenant or Tenants for Life or Years, or others in Poſſeſſion of Lands &c. by, or under, or by Colluſion with ſuch Tenant or Tenants, ſhall wilfully* hold over, *after Determination of ſuch Term, and after Demand made, and* Notice in Writing *for delivering Poſſeſſion by the Landlord, his, her, or their Agent, lawfully authorized, ſuch Perſon, ſo holding over, ſhall pay at the Rate of double the Value, to be recovered by Action of Debt in any of his Majeſty's Courts of Record, and Defendant ſhall give Bail, and againſt which there ſhall be no Relief in Equity.*

2. 11 *Geo.* 2. *cap.* 19. *S.* 18. Enacts, That *in Caſe any Tenant ſhall give Notice of his Intention to quit the Premiſſes, and ſhall not accordingly deliver up the Poſſeſſion at the Time in ſuch Notice contain'd, the ſaid Tenant, his Executors or Adminiſtrators, ſhall pay to the Landlord double the Rent which he ſhould otherwiſe have paid.*

(H. c) *Pleadings in Debt* for Rent.

1. A Man *leas'd for Years*, rendring Rent, and made *Indenture with divers Covenants Ad quas* quidem Conventiones *perimplendas* &c. *obligavit se et Hered' suos* per Præsentes *but it did not appear in what Sum*, and in Action declared for Rent Arrear; and the *Defendant said, That such a Day the Plaintiff enter'd upon him*, Judgment if for any Rent due after &c. And as to the Rent before, he said, That he has made gree; And it was held a good Answer by Naked Averment, notwithstanding that he declared upon Indenture; So of Levy'd by Distress upon the Land &c. Br. Dette, pl. 38. cites * 45 E. 3. 4. & 46 E. 3. 1.

But Brooke says, See 9 E. 4. 36. That this amounts only to the general Issue Ibid. —— In Debt against Lessee for Years upon Arrears of Rent, the Defendant *pleaded Entry of the Plaintiff before the Rent Arrear*, and were at Issue, and pass'd for the Plaintiff; and therefore he recover'd, notwithstanding that the Defendant alleg'd Jeofail that the Plea is no Plea; For it is a good Plea. Br. Dette, pl. 28. cites 34 H. 6. 21. —— * Br. Dette, pl. 176. cites S. C. and Fitzh. Barre 209.

2. Debt upon *a Lease by Indenture*, which *will'd, That the Lessee repair the House at the Costs of the Lessor*; it is a good Plea in Debt for the Rent, That he has bestow'd it upon the Reparations. Br. Debt, pl. 235. cites 2 R. 2.

But in Debt upon a Lease rendring Rent, and 20 Marks Arrear &c. The Defendant *said, That he expended it in Reparations* of the Tenements leas'd *by Command of the Lessor*, Judgment; and held no Plea per tot. Cur. For he is not bound to obey such Command, and also the Lessee himself is bound to the Reparation if no Matter be shewn to the contrary. But per Brudenell Ch. J. If Lessor be bound to the Reparation by Covenant, it is a good Plea, as above. Br. Dette, pl. 27. cites 34 H. 6. 17.

3. *So*, that the *Plaintiff distrain'd* the Defendant, *and sold* the Distress for the Rent *by Assent of the Defendant*. Br. Dette, pl. 235. cites 2 R. 2.

If a Man has Rent due to him he has his *Election to bring Debt or to distrain*, and if he brings Debt after distraining, the Defendant may plead Levied per Distress; For by *distraining* he *has determined his Election for that Time*; For otherwise he might have 2 Judgments, viz. Return irrepleviable, and Judgment in Debt; to avoid which he may, in that Case, plead Levied by Distress Per Holt Ch. J. 12 Mod 330. Mich. 11 W. 3. B. R. in the Case of the King v. Speed. —— The Reporter makes a Quære, How it would have been if Lessor had *distrain'd, and the Cattle had died in the Pound*. Ibid.

4. In Debt upon *a Lease of Tithes*, *Levied by Distress* is no Plea; Per Skrene; Because there is no Land in which he can distrain, and he cannot distrain by the Tithes sever'd; For this is the Thing leased. But Till contra. Br. Dette, pl. 234. cites 11 H. 4. 40.

5. In Debt upon a Lease for Years, the *Defendant said that where the Plaintiff has counted upon a Lease rendering* 4 *Marks per Ann.* that *the Lease was rendering* 1 *Mark per Annum, and as to the 1st Term, he has been always ready, and yet is, and brought the Money into Court; and as to the other nothing Arrear*, which seems to be no Plea, but that *He owes him nothing, in Debt* &c. and *Nothing Arrear, in Avowry* &c. and *to the rest the Plaintiff entered into the Land before the Day of Payment*. And per Rolf, The first Plea goes to all; but it seems that the *Defendant ought to traverse that the Lease was not made rendering* 4 *Marks* &c. Br. Deux Plees, pl. 1. cites 3 H. 6. 19.

6. In Debt upon a Lease for Years of Land, or upon Arrears of Account before Auditors, he may say *Non Demisit*, or Nul tiel Account; for there he cannot wage his Law. Br. Dette, pl. 88. cites 8 H. 6. 5.

7. Debt upon a Lease for Years in London, the Defendant said that the Custom of London is, that the Lessor shall repair the Tenements sufficiently, and that before the Day &c. the House became *so ruinous by Tempest*,

Tempeſt, that he could not abide in it, and he requeſted the Plaintiff to repair it, and he would not, by which before the Day he left the Houſe. Judgment if Actio; and the Opinion of the Court was, that it is no Plea. Br. Dette, pl. 18. cites 27 H. 6. 10.

8. Debt upon Arrears of a *Leaſe for Years in the County of Middleſex of Land in the County of Kent*, the Defendant *pleaded Payment in the County of K. where the Land is.* And per Moile J. This is a good Plea to plead it in the County of K. where the Land is; for it may be that he paid it by Diſtreſs, or upon the Land without Diſtreſs, *but it is no* Plea *in any other County without anſwering to the Debt.* But per Aſhton, It is no Plea, but *ſhall ſay that Levied by Diſtreſs, and then* a *good Plea*; and it is no Replication that he did not diſtrain, for this is not traverſable. And per Aſhton, The Payment is a good Plea in a Foreign Country, which does not ſeem to be Law; and Priſot and Danby were abſent. Br. Dette, pl. 118. cites 37 H. 6. 10.

Br. Traverſe per &c. pl. 138. cites 37 H. 6. 10. 11. S. C. That the *Defendant pleaded Levied by Diſtreſs upon the Land*, and that it is no Plea That he did not diſtrain; for if he levied it or had Payment any Way, it is ſufficient.——In *Debt upon a Leaſe for Years*, the *Defendant ſaid that the Plaintiff levied the Rent aforeſaid by Diſtreſs* &c. and the *Plaintiff ſaid that he did not levy the Money aforeſaid prout* &c. and a good Iſſue. Br. Iſſues Joines, pl. 33. cites 1 E. 4. 5 ——Br. Negativa &c. pl. 46. cites S. C.

9. In Debt upon *Leaſe for Years, Tender upon the Land, and Refuſal of the Plaintiff* is no Plea; for he ſhall anſwer to the Debt. Contra in Avowry; for there he is to have Return, and ought not to diſtrain, if Tender was made. Br. Dette, pl. 216. cites 14 E. 4. 4.

10. In Debt the *Plaintiff counted upon a Leaſe for Years by Indenture*, yet the *Defendant may plead that Nihil debet per Patriam.* Br. Faits, pl. 110. cites 10 H. 7. 24.

11. Debt upon *a Leaſe of a Manor.* Keble ſaid that 40 s. Rent, and 100 Acres of Land make the Manor, and the Leſſor has nothing in the Manor at the Time of the Demiſe, and a good Plea; for then the Service ſhall not paſs. Br. Dette, pl. 240. cites 16 H. 7. 3.

12. Note by Award, that if a Man *counts in Debt that he leaſed*, and does *not* ſay *that he was ſeiſed and leaſed*, it is well by Way of Writ or Count, and *the ſame in Formedon, Cui in Vita* &c. *Quod Dedit* or *Quod Demiſit*, without ſpeaking of Seiſin; *but in* Bars and *all Pleadings*, he *ſhall ſay that he was ſeiſed and leaſed* &c. *or gave* &c. quod nota. Br. Pleadings, pl. 47. cites 21 H. 7. 26.

13. In Debt for Rent, the Defendant *pleaded an Extent of the Land by a Stranger upon a Statute acknowleged before the Demiſe*, but ſhewed that the *Liberate* was *executed after the Rent* was *due.* The Plaintiff demurr'd, and had Judgment, becauſe the Extent was before the Liberate executed. Heb. 82. pl. 108. Hill. 10 Jac. Grobham v. Thornborough.

14. In Debt for Rent *by Executor for Rent due after Death of Teſtator*, the Declaration did not *ſet forth that Teſtator was poſſeſs'd for Years*, ſo that it might be intended that he was ſeiſed in Fee, eſpecially as in the Leaſe there was an Exception of Trees, with Liberty to cut them and if he was ſeiſed in Fee, then this Rent would belong to the Heir; but this being *after Verdict*, the Court held it good, for that had the Teſtator been ſeiſed in Fee, the Jury upon Nil Debet pleaded would have found for the Defendant; but they all agreed the Declaration had been ill upon *Demurrer.* Sid. 218. Mich. 16 Car. 2. B. R. Bickerſtaff v. Purdue.

15. Error of a Judgment in B. R. in Ireland, in *Debt* for Rent *on a Leaſe, paying on 1ſt September yearly 74 l. by equal Portions*: and *demanded* 100 *l.* for Rent for 1 *Year and an Half.* The Errors aſſigned were, 1ſt. That the Rent is a Duty payable yearly on the 1ſt of September, and the Words (By equal Portions) are Idle and Surpluſage, and *no Half Year's Rent can be due.* 2dly. *The Rent for a Year and a Half amounts to* 111 *l.* and the Plaintiff demands but 100 l. which is leſs than is due, and

does

does not ſhew how the Rent is ſatisfied. The Court held that the Judgment ought to be revers'd for both Cauſes, but this being the firſt Time of arguing it, and none ready for the Defendant. Adjornatur. 2 Lev. 4. Paſch 23 Car. 2. B. R. Hulme v. Sanders.

16. *Debt* for Rent, Defendant pleaded Actio non &c. quia Die &c. that it became due, *Paratus fuit & adhuc* paratus exiſtit ſolvere & profert hic in Cur. the Money on Demurrer; the Plea was adjudged ill, becauſe he *did not plead Obtulit.* 2dly. The Plea goes not to the Action, but in Excuſe of Damages only. Quære of the firſt Reaſon; for Rent is demandable, otherwiſe of a Sum in groſs, which is payable without Demand. 2 Lev. 209. Mich. 29 Car. 2. B. R. Beverſham v. Osborne.

17. Debt for Rent, Defendant pleaded That *he was at the Houſe on the Day &c. an Hour before Sun-riſe, and ſtaid there till Sun-ſet ready to pay the Rent*, and that no Body was there to receive it, and that ſince that Day he always was, and yet is ready &c. Per Cur. The Plea is good without a Tender; but it had not been ſo in an Action of Debt on a Bond, for there Tender muſt be ſet forth to ſave the Breach of the Condition. Raym. 418. Mich. 32 Car. 2. B. R. Crouch v. Faſtolfe.

18. If an *Eviction* be pleaded in Bar to Rent, it muſt be to *Rent grown due after the Eviction.* 2 Vent. 68. Trin. 1 W. & M. C. B. in Caſe of Baynton v. Bobbet.

19. A Leaſe for a Year, Rent *payable Quarteriatim*, and not ſaid to be at the moſt uſual Feaſts or Days of Payment, and *Avowry* was made *for Rent due ad Feſtum Michael.* whereas it ought to have been the 23d September, according to Calculation. Eyres J. ſaid, If he had declared of a Rent *aretro at Mich.* it would have been well; but here it is for a Rent due at Michaelmas; Ergo not good. 12 Mod. 5. Paſch. 3 W. & M. B. R. Smith v. Bromley.

Demurrer on Replication, becauſe the *Avowry was only for Part* of the Rent,

20. If you bring *Debt or Annuity*, and *Part of the Quarter is paid*, you muſt *acknowledge Satisfaction* for that, and *declare for the Reſidue.* 12 Mod. 72. Paſch. 7 W. & M. B. R. Anon.

without ſhewing how the reſt was ſatisfied. And per Holt, If the Rent of a Quarter be 20 l. and you avow only for 10 l. you muſt ſhew how the reſt was ſatisfied, juſt as in Declaration for Part of a Debt due upon a Bond; and for this Hoff and Sambath's Caſe is clear. 12 Mod. 84. Mich. 7 W. 3. B. R. Johnſon v. Baynes, cites 1 Cro. 103, 104.

(I. c) Pleadings. In what Caſes he ſhall *conclude* his Plea with (*And ſo Nil Debet.*)

1. DEBT upon a Leaſe for Years rendering Rent, the Defendant *pleaded that the Plaintiff diſſeiſed J. S. and leaſed to the Defendant*, as in the Declaration, *who entered ſuch a Day after the Day of Payment, before which Entry Riens Arrear*; and this Riens Arrear is no Plea in Debt, but *ſhall ſay Nihil Debet*; and after he, by Advice, *took the Entry and Diſſeiſin by Proteſtation*, and for Plea Nihil Debet; quod nota. Br. Dette, pl. 13. cites 20 H. 6. 20.

* S. P. Br. Dette, pl. 20. cites 28 H. 6. 6. That it is a good Plea without more. But in Debt *in the ſame County* where the Land is, it is no Plea, *if he does not ſay over, and ſo Nil Debet*; for where the Land is, there the Debt may well be tried. Contra where the Land is not. Br. Dette, [illegible] cites 28 H. 6. 6.

2. Debt in Middleſex upon a Leaſe of Land in Eſſex,* *Levied by Diſtreſs* priſt, is a good Plea, without ſaying Nihil Debet, becauſe the Land is *in another County*, and this Iſſue is to be tried where the Land is; the Plea was accepted without anſwering over to the Debt; quod nota. Br. Dette, pl. 95. cites 22 H. 6. 13.

3. *So, tho'* it be brought *in the County where the Land is.* Per Cur. Br Dette, pl. 95. cites 4 H. 6. 5.

If

If *Payment in another County*, or * *levied by Diſtreſs*, be pleaded, he ſhall conclude, *And ſo Nihil Debet.* Br. Dette, pl. 27. cites 34 H. 6. 17. —— * S. P. Br. Dette, pl. 38

4. Debt in Middleſex upon a Leaſe for Years of Land in Eſſex rendering Rent, the Defendant *pleaded Payment at D. in the County of E. where the Land is.* And the Opinion was, That it is no Plea without ſaying, And ſo Nihil Debet. Br. Dette, pl. 96. cites 22 H. 6. 36 —— And Newton accordingly, in Debt the ſame Year, fol. 35. for Payment is no Plea, but where the *Defendant cannot Wage his Law*, as here. Ibid. S. P. Per Priſot, and there admitted, that in Debt upon a Leaſe for Years, Payment is a good Plea Quod Mirum, that he ought not to anſwer to the Debt, therefore Quere inde; for if it be Law, the Plea ſeems to be inſtruch as the Defendant cannot wage his Law. Br. Dette, pl. 24. cites 33 H. 6. 3. —— *But* in Debt upon a Leaſe for Years, the Defendant pleaded *Payment in another County, and without ſaying, And ſo Nihil Debet*, and yet *awarded a good* Plea. Br. Dette, pl. 77. cites 9 H. 7. 2. —— Payment in a Foreign County, is a good Plea *without Acquittance, but* if he pleads it *in the ſame County*, he *ſhall conclude, And ſo Nihil Debet.* Br. Dette, pl. 238. cites 11 H. 7. 4. Per Perſe. Contra where the Action is brought *where the Leaſe was made*, Per Quod Mirum, &c.

(K. c) Pleadings in *Caſes of Re-entry.*

1. IN *Reſpaſs*, the *Defendant pleaded a Leaſe of the Plaintiff*, and the *Plaintiff replied by Re-entry for Non-payment, by Condition upon the Leaſe*, and the *Defendant rejoined by Agreement between them by Parol, that the Defendant ſhall retain the Rent for Boarding the Plaintiff at his Table by* 10 *Weeks*; and well Br. Replication, pl. 60. cites 47 E. 3. 24.

2. In *Treſpaſs*, the *Defendant juſtified by Leaſe for Years by Deed*, and the *Plaintiff ſaid that it was reſerving Rent, with Clauſe of Re-entry for Default of Payment, and that the Rent was Arrear by* 6 *Weeks, by which he re-entered.* And per Cur. He ought to ſhew a Demand. Br. Entre Cong. pl. 2. cites 20 H. 6. 30. 31.

3. In *Writ of Entry* by an Abbot *of* 5*l. Rent*, the *Defendant pleaded as to ſome of the Rent iſſuing out of ſo much of the Land out of which* &c. *a Plea to the Writ*, and *as to ſome Rent iſſuing out of the Tenement, Hors de ſon Fee*, and *as to ſome Rent iſſuing out of the reſt Non Diſſeiſivit.* And it was held ill Pleading; for he ſhall anſwer as Tenant of the Land or Pernor of the Rent, and then ſhall plead; and alſo he ought to divide the Parcels of the Rent, and ſhew how much is iſſuing out of one Parcel, and how much out of the other, and plead in Bar; and ſo he did. Brooke ſays, And ſo ſee that *where it is ſuppoſed by the Writ that it is one entire Rent*, the *Defendant* ſhall be compelled to *plead to it as to ſeveral Rents.* Br. Rent, pl. 16. cites 5 E. 4. 80. Br. Enter en le per &c. pl. 29. cites S. C.

4. A. made a Leaſe for Years rendring Rent, and a Re-entry for Non-payment; and at the Day a *Stranger demanded* the Rent; Leſſee ask'd what Authority he had of the Leſſor to demand the Rent, and becauſe he was a *Cozening Fellow*, and one that was *notoriouſly infamous*, and would not ſhew any Authority, the Leſſee would not pay the Rent; and thereupon A. entered, and his Entry adjudged lawful; for a Command to receive Rent may be by Parol. Cro. E. 22. Mich. 25 Eliz. C. B. Sir John Souch's Caſe. Mo. 141. pl. 282. Anon. S. C. That he was a Man of ill Fame, and was outlawed in 40 Actions. And the Juſtices ſaid, That if any Man would ſwear that this was true, that the Leſſor ought not to enter. And one was immediately ſworn that he was of ill Fame, and the Notes of the Records of the Outlawries were ſhewn, and then the Juſtices diſmiſs'd the Leſſee.

5. If the Rent and Reverſion are *extended upon a Statute*, or ſeiſed into the King's Hands for Debt, if the Leſſee pays the Rent according to the Extent, the ſame is not in any Danger of the Condition; for that now the Leſſee is compellable to pay it according to the Extent. 3 Le. 113. pl. 150. Trin. 26 Eliz. in the Exchequer. Biſhop of Briſtol's Caſe.

6. If the Condition was, that *if the Rent be behind by the Space of a Year &c. and no Diſtreſs &c. per totum tempus præclict.* then to re-enter. If there be a Diſtreſs there at any Time of the Year, tho' none be there the laſt Day, yet the Condition is not broken. Cro. E. 764. pl. 2. Trin. 42 Eliz. B. R. Grigg v. Moyſes.

7. Leſſor *enters*, by Reaſon of a Condition upon Non-payment of Rent, and *afterwards brings Debt for a ſubſequent Rent*, he muſt *ſhew a Re-entry by the Leſſee* to revive the Rent, or elſe the Action is barr'd by the Leſſee's pleading the Entry of Leſſor for the Prior Rent. Per 2 Juſt. againſt 1. Bulſt. 205. Paſch. 10 Jac. Collins v. Goldſmith.

8. Where an Entry is *to avoid a Freehold*, there the ſame ought to be pleaded by Indenture for the *Condition*; but otherwiſe where to avoid a *Leaſe for Years*, being but a Chattel. 3 Bulſt. 296. Mich. 1 Car. B. R. Potter v. Foſter.

9. Plea that he ſtaid on the Land demanding the Rent *Uſque ad Occaſum ſolis*, without ſaying *Poſt* Occaſum Solis, is good. 3 Bulſt. 296. Potter v. Foſter.

10. Leaſe with a Clauſe of Re-entry, if *Leſſor before the Day of Payment enters into Part* of the Lands let, and at the Day he makes a Demand of the Rent; in this Caſe Non-payment and a Re-entry ſhall not make the Leaſe void; for the Rent was *ſuſpended* at the Time of the Demand; Sic Dictum fuit. Sti. 446. Paſch. 1655. in Caſe of Timbrell v. Bullock.

(L. c) Pleadings in *Aſſiſe* &c. for Rent. In what Caſes there muſt be Profert, or *Monſtrans* of Deeds.

1. In *Aſſiſe of Rent*, the Defendant *pleaded Hors de Son Fee* &c. the Plaintiff *ſaid*, That *he is Lord of the Manor* of B. *and thoſe whoſe* [illegible] hath in the ſaid Manor *have been ſeiſed of the ſame Rent* where- [illegible] and it was held that he ought to ſhew Deed of the Purchaſe; for he cannot claim it by *Que Eſtate* without ſhewing Deed thereof where it is a *Rent in Groſs* as it appears to be here, and not Parcel of the Manor, nor appendant to it. Br. Monſtrans pl. 91. cites 22 Aſſ. 53.

Before the Statute of Tenures, to hold of the Chief Lords, and rendring Rent to the Donor and his Heirs Lord of the Manor, ſuch Rent *may be preſcribed for* without ſhewing Specialty *as Parcel of the Manor*. Per Thorp. Br. Monſtrans. pl. 91. cites 22 Aſſ. 53. *So* of a *Rent reſerved for Equality of Partition*, which has gone with the Manor Time out of Mind, it may be preſcribed for without ſhewing Specialty. Per Thorp. Br. Monſtrans pl. 91. cites 22 Aſſ. 53.—— *And* it was agreed that if a *Man purchaſes Rent-Service, and gets Seiſin*, he ſhall have Aſſiſe without ſhewing Deed thereof, and yet it cannot be purchaſed but by Deed, and this by *Reaſon that it is of Common Right*, therefore ſhall not ſhew Specialty after Seiſin. *Contra of a Rent-Charge and Rent-Seck*, and the Reaſon is becauſe the Rent *may be claimed by a Que Eſtate* without ſhewing Deed, where it is claimed as Parcel or Appendant to the Manor where the Land is, Becauſe the *Manor or Land may paſs by Livery without Deed, and then the Rent goes with it*. Br. Monſtrans pl. 91. cites 22 Aſſ. 53.

2. *Aſſiſe of Rent*, the Plaintiff *preſcribed* in him and his Anceſtors, and thoſe whoſe Eſtate his Anceſtors had in the ſame Rent, to hold &c. and the Title adjudged good without a ſhewing Specialty of *Que Eſtate*, and Error thereof brought, and the Judgment was affirmed. Br. Monſtrans pl. 91. cites 23 Aſſ. 6.

Ibid. pl. 62. cites 24 E. 3. 32. Contra That he ought to ſhew Deed. — In Treſpaſs the Defendent conveyed by Que Eſtate of B. and the Plaintiff intitles himſelf by a Stranger &c. and there it was ſaid he who *intitles to himſelf to a Rent by Que Eſtate* ſhall ſhew Deed thereof. Per Littleton. Br. Monſtrans pl. 122. cites 18 E. 4. 10.

3. In Aſſiſe, the *Plaintiff preſcribed* in J. S. and his Anceſtors *in the Rent* Time out of Mind who *granted* it *to T. who deviſed it to the Plaintiff*

tiff by Cuſtom; and per Cur. he ſhall ſhew the Deed to T. quod nota. Br. Monſtrans pl. 101. cites 38 Aſſ. 28.

4. A. *granted all his Eſtate reſerving a Rent*, he ſhall not have an Action thereof without ſhewing Deed of Reſervation, for he has not any Reverſion in him. Br. Monſtrans pl. 133. cites 43 Aſſ. 46. and 12 H. 4. 17.

5. *Aſſiſe* was brought by W. P. of 26 s. 8 d. *of Rent* granted to him *for Life* by J. S. *out of 5 Marks* of Rent, which he had in T. *in Fee with Diſtreſs* in all his Lands and Rents in T. But it was not adjudged whether he ſhould ſhew the 1ſt Deed of 5 Marks Rent; For the Court held Contra querentem, inaſmuch as a Rent cannot iſſue out of a Rent as it ſeems. Nevertheleſs per Paſton, Weſtbury, and Rolfe, he may maintain the Aſſiſe without ſhewing the *firſt Deed*, becauſe he *has no more than a particular Eſtate*; but it was not denied but that if he had had the intire Fee-ſimple he ought to ſhew the 1ſt Deed notwithſtanding Parcel only of the Rent be granted, and not the Whole. Br. Monſtrans pl. 5. cites 3 H. 6. 20.

6. If *Rent Parcel of a Manor, or appendant to an Office, or* Rent *recovered in Value for Land tailed loſt* ſhall be in Demand, the Demandant ſhall not ſhew Deed, for by a Grant of the Manor or Office the Rent paſſes, and where it is recovered in Value the Record ſhall ſerve. Per Keble. Br. Monſtrans pl. 112. cites 12 H. 7. 11.

(M. c) *Equity.* Caſes in Equity relating to Rent.

1. LORD Zouch deceaſed, late Father to the Plaintiff, did *give the Manor* of W. with the Appurtenances in the County of Dorſet, *intailed to the Father of the Defendant, reſerving* 40 *l. a Year* rent to him and his Heirs; and after, about 3 Years laſt paſt, granted 25 l. Parcel of the ſaid Rent, to the Plaintiffs for their Lives; and the Defendant's Father *attorned, and paid* the Rent to the Plaintiffs, *until about* 2 or 3 *Years before his Death*, which was about 6 Years ſince, ſince which Time the Defendant, being Iſſue in Tail and ſeiſed, refuſed to pay the ſaid Rent, but was ordered by this Court to pay it, if he ſhew not good Cauſe to the contrary. Cary's Rep. 131, 132. cites 22 Eliz. Zouch v. Siddenham.

2. The Plaintiff ſeeks Relief by way of Contribution, for that one of the Defendants has *a Rent-charge out of his, the Plaintiff's, Lands*, and *one other of the Defendant's Lands*, and yet ſeeks to lay the whole Burden of the Rent-charge upon his the Plaintiff's Lands; and becauſe the Defendant would not anſwer, therefore an Injunction is granted for ſtaying of the Suits for the Rent Cary's Rep. 132. cites 22 Eliz. Dolman v. Vavaſor.

3. Where a Man made Title to a *Rent-Seck*, of which there was *no Seiſin*, nor for which he had any Action at the Common Law, and prayed Help here, it was denied upon Conference had by the Lord-Keeper with the Judges. Cary's Rep. 7. cites Mich. 1596. Anon.

4. The Court is of Opinion, That the Plaintiff having *ſuſpended his Rent*, there is no Reaſon but that the Defendant ſhould detain it, by Reaſon of the *Plaintiff's Act*. Toth. 267. cites 31 Eliz. fol. 312. Warren v. Towler.

5. *Leſſee for* 40 *Years* from Q. Eliz. *made a Leaſe for* 21 Years *rendring Rent*. The *Patentee granted Totum Statum ſuum* to J. S. the Plaintiff, to whom the *Under-leſſee refuſed to* attorn, or *pay the Rent*; But Lord C. Elleſmere decreed him to attorn, and pay the Rent and Arrears, unleſs Cauſe &c. For J. S. could not compel the Tenant to attorn, yet without

Attorn-

Attornment the Reverſion, to which the Rent was incident, was in J. S. Mo. 805. pl. 1092. Mich. 5 Jac. in Canc. Shute v. Malory.

S.C. cited Abr. Equ Caſes 364. pl. 1. and adds a Reaſon, viz. becauſe by Intendment the Tenant of the Land was Inops Conſilii at the Time of the Deviſe. But Lat. 147. cited there is a D. P. and I ſuppoſe miſprinted.

6. A *Rent* was *deviſed without Diſtreſs*, yet the Tenant has been *decreed to pay it*; becauſe without Seiſin he has no Remedy, and yet the Rent is in the Deviſee by the Deviſe. Said by Ld. C. Elleſmere to have been ſo decreed. Mo. 805. pl. 1092. in the Caſe of Shute v. Malory.

7. If the *Leſſor enters, and ſuſpends* his Rent he ſhall not have his Remedy in Equity for it; For it is contrary to the Law. Per Doderidge and not denied by any. Noy 82. in the Caſe of Vincent v. Beverly.

8. If a *Man grants a Rent-charge* out of all his Lands, and *afterwards ſells the Lands by Parcels to divers* Perſons, and the *Grantee* of the Rent *will* from Time to Time *levy the Whole* Rent *upon one* of the Purchaſors *only*, *he* ſhall be eaſed in Chancery by Contribution from the reſt of the Purchaſors, and the Grantee *ſhall be reſtrained* by Order to *charge* the ſame upon *him only*. Cary's Rep. 3. Anon.

9. One was relieved againſt an *Extinguiſhment* of Rent. Toth 270. cites Mich. 2 Car. Halliley v. Skarret, and Sheedon v. Gibbs.

10. Judges were of Opinion, that a Rent *paid for a long Time (although no Aſſurance could be produced)* ſhould be *decreed* to be paid. Toth. 270.

11. A Rent-charge *decreed, though no Evidence.* Toth. 270. cites Hill. 10 Car. Churchil v. Brewer.

12. Concerning Rents which have been paid, by Reaſon of a *long conſtant Payment.* Decreed. Toth. 270. cites 12 Car. Caſar v. Gater.

S. C. cited N. Chan. R. 124. in Caſe of Darcy v Darcy, S. C. —Toth. 269. cites 5 Eliz. Lib B fol 736. Ferrers v Newby & al That the Court allows Seiſin to a Rent Seck —4 Le 184. pl. 282. Mich. 30 Eliz. C. B in Eaſton's Caſe, it was agreed by all the Juſtices, That where an Annuity or Rent is granted to one for Life or in Fee, and the Deed is Executed, Sealed, and Delivered, but no Seiſin is given to the Party of the Rent or Annuity, the Court of Chancery may decree a Seiſin of the Rent to be given, and the Rent to be paid to the Grantee, and that was ſaid to have been *oftentimes decreed* in the ſaid Court of Chancery —S. P. Arg. And admitted by the Counſel of the other Side. Chan. Caſes. 79. in Caſe of Thorndike v. Allington.

13. An Annuity was *deviſed by Will, and* by the ſame Will *the ſame Lands deviſed to an Half-brother of the Deviſee* of the Annuity; this being *a* Rent-Seck without Seiſin, and no Power of Diſtreſs, and the *Deviſee of the Lands* having *promiſed to pay it*, the Court *decreed* the Deviſee of the Lands *to give Seiſin* of the Rent to the Deviſee of the Annuity. Chan. Caſes 147. Mich. 21 Car. 2. in Caſe of Davy v. Davy, cites 22 June 1644. Ferris v. Newby.

14. A *Deviſe* was to the Plaintiff by the Defendant's Father (whoſe Son and Heir the Defendant was) of 20*l. per Annum out of a Rectory, with a Clauſe of Diſtreſs* for Non-payment. *The Glebe* belonging to the Rectory *was but of* 40 *s. per Ann.* And the Tithe not being ſubject at Law to a Diſtreſs, and ſo no ſufficient Remedy at Law for the Rent, the Plaintiff thereupon brought his Bill to have the whole Rectory liable to the Rent, and the Defendant decreed to pay it. On the Defendant's Part it was inſiſted, That this Court ought not to extend a Remedy beyond what the Deviſor appointed, and the Plaintiff muſt take ſuch Remedy as by Law he might. The Plaintiff's Counſel replied, That the Deviſor gave the Annuity out of the whole Rectory, and intended the Tithe as well as the Glebe ſhould be liable to it. The Court *decreed*, That *the whole Rectory be liable* to pay the Annuity, and that the Defendant do pay the Arrears and Coſts. Chan. Caſes 79. 80. Hill. 18 & 19 Car. 2. Dr. Thorndike v. Allington.

15. A Rent or Penſion of 1 l. 14 s. per Annum, was granted by King H. 6. to Eaton College, iſſuing out of certain Lands; The College brought a *Bill againſt the Executor of the Tertenant* for Relief as to the Arrears due in his Teſtator's Life-time, ſuggeſting that the College did *not know the Lands charg'd*, and ſo could not diſtrain, and that tho' the

Perſon

Perſon of the Defendant was not chargeable with the Rent at Law, but only the Land by way of Diſtreſs; yet ſince the *Teſtatrix had both the Lands, and kept* the Rent, it was inſiſted, That the Perſonal Eſtate of the Teſtatrix was augmented thereby. And ſo the Maſter of the Rolls *decreed the Executor to pay the Arrears as far as he had Aſſets* of the Teſtatrix's Eſtate. Chan. Caſes 121. Hill. 20 & 21 Car. 2. Eaton Colledge v. Beauchamp and Riggs.

10. The Bill was for 3 l. due for a Rent of 5 s. per Annum, Arrear for 12 Years. The Plaintiff ſuggeſted, That the *Deeds* by which it was created were *loſt*; and there was *Proof of a conſtant Payment till the Deeds loſt Days*. The Maſter of the Rolls decreed Payment of the Arrears and growing Rent, becauſe he ſaid it was uncertain what Kind of Rent it was, and ſo no Remedy at Law. Chan. Caſes 120. Hill. 20 & 21 Car. 2. Collet v. Jaques.

A Bill [illegible] to be relieved [illegible] the Plaintiff [illegible] of 5 s. [illegible] Rent, [illegible]

of Lands, the Bill ſuggeſting the Rents had been *conſtantly paid Time out of Mind, but that they could not recover at Law, by reaſon the Nature of the Rent, whether Rent-charge, or Rent-ſeck, and the Limitations of the Deed being uncertain*, ſo that they could not at Law declare with ſuch Certainty as was required in an Avowry, and ſeveral Precedents being produced, where the Court had proceeded in theſe Caſes, and amongſt others Sir William Beverſham's Caſe, who had a Decree for a Rent of 1 s. 3 d. per Annum, the Court declared they would decree the Rent, if it had been conſtantly paid; but the Defendant denying the Matter ought be tried at Law, an *Iſſue* was directed *to try whether any and what Rent was iſſuing out of all or any the Lands in the Bill mentioned*. Vern. 359. pl. 354. Hill. 10 & 11. Cox v. Foley.

17. A. entitled to a Rent-charge of 200 l. a Year, whereof ſome Rent was due, ſuggeſted by Bill that the *Deed was kept in Secret on the Land, by* [illegible] *all but Trifles; ſo that there was not a ſufficient Diſtreſs*, and had no Remedy but in Equity, and prayed Relief. Lord Chancellor directed a Trial at Law, Whether there was any Fraud to hinder the Plaintiff of his Diſtreſs? and declared that *unleſs* ſuch *Fraud* did appear, the Plaintiff *ſhould not have Relief here*; and that all he could do was to refer it to a Trial on that Point. Chan. Caſes 144. Mich. 21 Car. 2. Davy v. Davy.

N. Chan. Rep. [illegible] & Clarke Name of [illegible] Davy.

her Jointure, with *Powers of Diſtreſs*, and there being a *great Arrear, and no Diſtreſs* [illegible] Land, Bill was that Defendant, the Deviſee of the Inheritance, might ſet out [illegible] the Plaintiff might have a Diſtreſs [illegible]. Per Lord Wright. The Law never gives [illegible] than what the Party has a Right for himſelf, and that is here only by Diſtreſs, [illegible] unleſs *from Fraud*, as being the Law Side thereof, or Purchaſing in the Night [illegible] pl. 240. Mich. 1701. Chamberlayne v. Lewis ——— S. C. Chan. Prec. 120. pl. 112. [illegible] was to be heard the 12th of July, and the Lord Keeper continued his former Opinion [illegible] and affirmed the Decree —— [illegible] *Epiſtle* [illegible] *Church the Land here*, to be [illegible] payable half-yearly, [illegible] *ſuit to enter a Diſtreſs*, and the Diſtreſs [illegible] the Father [illegible] by his Will and Executor for Six Months [illegible] of the Rent [illegible] Coſts and Charges, and Power to enter and enjoy till [illegible] the Lord Keeper [illegible] the Bill in the like Caſe between Chamberlayne and [illegible] 386. pl. 344. Mich. 1711. Nota. Fodder v. Fodder —— S. C. Chanc. Prec. 120. pl. 106. ſays that *the* Deviſe was [illegible] Life, to be rent free Life, to be rent free [illegible] of the Rents and Profits of Eſtate, and to be [illegible] which [illegible] Lands were not ſufficient to anſwer the Rent, [illegible] and made her Executor, ſhe brought her Bill; and it was decreed [illegible] *that the Father ſhould retain for his Arrears, and that the Deviſee, the Heirs of the Deviſee, ſhould pay the Rent for the future*, and the Deviſee of the Rent Charge with the ſaid Annuity, charged it in his Hands by the ſame Words; for it could not be charged before.

18. A. was *ſeiſed in Fee of Rent* of 7 l. per Annum, which was *paid him* by the Owner of the Lands out of which &c. *during his Life, and* by his Death this Rent *deſcended on the Plaintiff* as Heir, and *the Owners of the Land paid the Rent* to the Plaintiff *till* 1641. Several *Conveyances were made of the Land* in the late Troubles, *and no Rent paid ſince* 1641. The Lands were now come to the Defendant; Plaintiff prayed that Defendant might be decreed to pay the Rent and Arrears. The *Defendant ſaid he did not know any ſuch Rent* was iſſuing out of the ſaid Lands, *and that he* and thoſe under whom he claims, *had enjoyed* thoſe Lands 20 Years under diverſe Purchaſes, *without any Demand* of the Rent that [illegible]

knew of till the Bill, and demurred, becauſe the Bill ought to ſubject His Perſon (which was not to be liable at Law) to pay the Rent and Arrears, and it having been ſo long unpaid, it was to be *preſumed the Rent was extinguiſhed*, and however, it appearing by the Bill that the Plaintiff had Seiſin, he might bring his Action at Law; and if there had not been a Seiſin, it was ſaid that all the Relief this Court would have given, would be but to give Seiſin. And on Debate the Demurrer was allowed. Chan. Caſes 194. Trin. 22 Car. 2. Palmer v. Whettenhal.

19. A Leaſe is made rendering Rent, and *if a Meadow be plow'd to pay 5 l. per Acre.* North K. ask'd if this was relievable? 2 Chan. Caſes 199. Trin. 26 Car. 2.

20. Chancery will not decree a *Rent* to be *abated* on the Account of Loſs, Eviction, or *leſſening the Profits*, unleſs there be a Covenant. 2 Chan. Caſes 204. Mich. 26 Car. 2. Duckenfield v. Whitchcot.

21. Forty Marks yearly *Rent* was reſerved on a Sale of Lands in the 9th of H. 8. payable to the Vendor and his Heirs. This *Deed was inroll'd at Cheſter*, and the Rent paid till the Year 1652, but the *Counterpart being loſt*, it was now denied to be paid. The Defendants pleaded that they were Purchaſors for a valuable Conſideration without Notice &c. and that ſome of them had enjoyed the Lands 30 Years, and more, in all which Time no Demand was made of theſe 40 Marks, or of any Part thereof. Maſter of the Rolls decreed it to be paid with Intereſt; but Finch K. revers'd that Decree as to the Intereſt, becauſe the Deed being inroll'd, it was a Neglect in the Plaintiff that he did not recover the Rent ſooner. Fin. R. 241. Mich. 27 Car. 2. Botelerv. Maſſey.

22. Lands were *charged with a Rent*; *A. purchaſes Part with Notice*, and afterwards *ſells Part of that Part to B.* and deſires the Grantee of the Rent to *join in a Fine to B.* aſſuring the Grantee that it would be no Prejudice to his Rent. It was inſiſted that No Relief ought to be in Equity, becauſe the Extinguiſhment of the Rent being a Rent-charge was by the Plaintiff's own Act by a Fine; But Ld. Chancellor held, There was no Conſideration for the Rent, nor any Agreement to extinguiſh it, and that the Grantee was *circumvented*, and decreed Relief againſt A. Chan. Caſes 273. Hill. 27 & 28 Car. 2. ..... v. Hawkes.

23. *Rent* in Lieu of Tithes payable before the Diſſolution of Abbeys &c. tho' not paid for 14 Years paſt were decreed to be paid, and all the Arrears. Fin. R. 256. Trin. 28 Car. 2. Dr. Busby v. the Earl of Saliſbury.

24. A. upon his Marriage *charges* his *Lands with a Rent-charge for the Joynture of his Wife*, and *afterwards* by his Will *deviſes Part of theſe Lands to his Wife.* The Plaintiff's *Bill was, That the Lands deviſed* to the Wife *might bear their Proportion of the Rent-charge*, otherwiſe *the reſt* of the Lands, that *were not ſufficient to pay the Rent*, would be clogg'd with the Arrears, which in Time would ſwallow up the Inheritance. Ld Chancellor, The Grantee of the Rent-charge may diſtrain in all or any Part of the Lands for her Rent, and there is no Reaſon to abridge her Remedy in Equity, and the Husband certainly intended her ſome Benefit by this Deviſe, and he has not declared it ſhould be accepted in Part of the Rent-charge; and therefore diſmiſs'd the Bill. Vern. 347. pl. 342. Mich. 1685. Knight v. Calthrope.

25. A. *Leſſee* for Years *under a certain Rent, and Covenants to repair, makes* 100 *Under-leaſes*; The Premiſes were not repaired, nor the Rent paid; A *Re-entry is made*, and the Original Leaſe avoided. Six of the *Under Leſſees brought a Bill* againſt the Head Landlord and firſt Leſſee &c al. The *Court* ſaid, They *could not* make any Decree to *apportion the Head Landlord's Rents*, *nor relieve* the Plaintiffs, *but on* their *Payment of the whole Rent in Arrear, and repairing all the Premiſes*; But when they have ſo done, they might compel the reſt of the Under-Tenants to contribute. 2 Vern. 103. pl. 99. Trin. 1689. Webber v. Smith.

26. *A. ſeiſed in Fee* of a Meſſuage of 8 l. per Ann. *and poſſeſſed of a Perſonal Eſtate* of about 250 l. Value, deviſed ſeveral Legacies, and *gave to B. his Eldeſt Son, the Plaintiff, 5 l. yearly for 40 Years, if he ſhould ſo long live, and made C. his 2d Son Executor and Reſiduary Legatee, and deviſed to him the ſaid Meſſuage in Tail. C. died*, and during his Life paid the Annuity. His *Executrix reſolved*, That *ſhe had no Aſſets, and that the Will had not ſubjected the Real Eſtate to the Payment* thereof, and *that C. docked the Eſtail, and borrow'd 50 l. of B. the Plaintiff; and for ſecuring thereof, and* alſo of *the 5 l. a Year for 3 Years, convey'd the Meſſuage in Fee to J. S. in Truſt for the Plaintiff, redeemable* at 3 Years End on Payment of the 50 l. and Intereſt, and the 3 Five Pounds; *and that* the Money was repaid, and *the Plaintiff had re-conveyed, and ſo had extinguiſh'd his Right*, if any he had, as to the Real Eſtate. But the Court thought that C. being both Deviſee of the Land and Executor alſo, the Lands ſhould be liable to the 5 l. a Year, as in Clowdeſley and Pelham's Caſe, eſpecially as it was all the Proviſion made for the diſinherited Heir, and C. had above 20 Years duly paid the ſame. And as to *the pretended Extinguiſhment* by accepting the Mortgage, it was *not to be regarded in Equity*. And ſo decreed the Arrears and growing Annuity for the future, and an Account of the Rents and Profits of the Real Eſtate for that Purpoſe. 2 Vern. 143, 144. pl. 140. Trin. 1690. Elliot v. Hancock & al.

For more of Rent in General, See Arrears, Debt, Diſtreſs, Diſtreſs, Replevin, Reſervation, Seiſin, and other Proper Titles.

Repleader.

(A) *In what Caſes* it ſhall be [and *at what Time.*]

1. IF the Parties are at Iſſue upon an immaterial Iſſue they may repleat. 3 D. 6. 39. In *Debt* againſt Leſſee for Years of which the Plaintiff had Notice, a Verdict for the Defendant. It was inſiſted, That Judgment ought not to be given, but a Repleader, the Iſſue being upon a *Matter immaterial*, the Notice being to Plaintiff with his Aſſent or Acceptance by the firſt Leſſor. And Twiſden J. ſaid, That if an *Iſſue* be taken, and Verdict given, Judgment ſhall thereupon be given whether for the Plaintiff or Defendant, and cited Cro. J. 515. But an *immaterial Iſſue* is where upon the Verdict the Court cannot know for whom to give the Judgment, whether for Plaintiff or Defendant. And to this the Chief Juſtice and Windham J. agreed, and awarded a Repleader. Lev. 32. Paſch. 13 Car. 2. B. R. Serjeant v. Fairfax.

Debt upon Bond againſt the Defendant, as *Executor*; The *Iſſue was joined*, *Whether* he had *Aſſets or not on the 21ſt of September*, which was *the Day when he had Notice firſt of the Plaintiff's Original*; and it was *found*, *That he had Aſſets after ſuch Notice*. It was moved for a Repleader, becauſe (as was ſaid) this was an *immaterial Iſſue*; For tho' he had not Aſſets then, yet if he had any afterwards he is liable to the Plaintiff's Action; But it was inſiſted to have Judgment upon the Statute of 32 H. 8. c. 5. becauſe here the Parties only doubt whether there were Aſſets at the Time of the Notice. And it was found, That there were none, and that therefore Judgment is to be given accordingly. And of that Opinion was the whole Court. 2 Mod. 129, 130. Paſch. 28 Car. 2. C. B. Read v. Dawſon.

Atkins J. was of Opinion, That if the Parties join in an *immaterial Iſſue* there ſhall be no Repleader, becauſe it is helped after Verdict by theſe Words in the Statute, viz. *Such Iſſue*. It is no fault,

[illegible] Point, and the Intent of the Statute was to prevent Repleaders, and that [illegible] of that Act, he was of Opinion, That the Judges sat there [illegible]. For by such an Interpretation much of the Benefit intended by the [illegible] Verdict, would be restrained. But the other Justices were all of Opinion, [illegible] Statute it had been always allow'd, and taken as a *Difference*, That when [illegible] there should be no Repleader; but that it was otherwise where the [illegible] in the Case of [illegible] v. Dawson.

[illegible] *Property, and says, That the Goods are his, absque hoc that they are the Plaintiff's* [illegible] *That they are his, absque hoc that they are the Defendant's*, & hoc petit [illegible]. This was taken to be an *immaterial Issue*, and a Repleader or a new Trial [illegible] the Property cannot be try'd; for the Plaintiff ought to prove them [illegible] to be his; For if they be a Stranger's, and not the Plaintiff's, the Plaintiff [illegible] Right to take them. Skin 65. pl. 11. Mich. 34 Car. 2. B. R. Hubleton's Case.

[illegible] *That per quoddam Scriptum* &c. being a Deed Poll, [illegible] *the Plaintiff, such Lands, pro uno Anno, si [illegible] tam diu vixerit*, [illegible] [illegible] duo Festa maxime usualia &c. *and counts also upon a Lease Parol* [illegible] *for one Year &c. and avers, That J. M. was the Life intended, and that he was* [illegible] *at the Time* that the Money was due &c. [illegible] *Issue was taken, That J. M. was not living*; and a Verdict for the Plaintiff. And it was moved in Arrest of Judgment, That the Issue was an immaterial Issue; It was answer'd, That the Verdict being found for the Plaintiff, and he having a good Declaration, he shall have Judgment according to the Case of Solvit ad Diem pleaded to a single Bill, and found for the Plaintiff, he shall have Judgment, tho' if in such Case the Verdict had been for the Defendant, there shall be a Repleader. But per Holt Ch. J. the *Issue* here *is quite throughout immaterial*, and there ought to be a Repleader; And it seemed to him, That the Words in this Case Si vita tam diu vixerit [illegible] and insensible, and that he might have declared upon a Demise for a Year certain. Skin. 560, 571. pl. 14. Mich. 6 W. & M. B. R. Netherton v. Jessop.—— See pl. 52. Staple v. Haydon.

As in Action of Debt brought upon an Obligation, to which the Defendant *pleads, That an Stranger was imprison'd by another Stranger*, and kept *in Prison until the Defendant, as Surety* of the Stranger, [illegible]. And it was held a naughty Plea, and a Repleader awarded. Brownl 64. [illegible] Mantel v. Gibbs.

2. So upon an insufficient Plea. 20 H. 6. 32.

3. After Issue if the Tenant makes Default, and at the Petit Cape [illegible] the Demandant releases the Default he shall not [illegible] [illegible]. 12 H. 6. 7.

Fol. [illegible]

4. If the Inquest be taken by Default the [illegible] shall not re[illegible] after; Because by the Default he was out of Court. 20 H. 6. 32.

See pl. 52 the Resolution, [illegible] Case of Staple v. Haydon.

5. If Tenant for Life makes Default after Default, and he in Reversion is received, and joins Issue upon an ill Plea, and [illegible] Nisi Prius makes Default; now at the Day in Bank there shall not be any Repleader [illegible] by his Default, after the Receipt, [illegible] the Land upon the Default of [illegible] [illegible]; and so the Plea cannot be put in such Degree [illegible] the [illegible], as it ought upon the Repleader. [illegible] H. 6. 57.

6. If an Inquest be taken before the Justices of Nisi Prius, and this returned in Bank, if the Parties were not well at Issue, they shall be received to replead. 30 E. 3. 17. But quære.

As [illegible] upon [illegible] ture [illegible] for 20 Years, rendring 10 l. *per Ann.* at Easter, and other Covenants Ex utraque parte Perimplendas *et ad omnes* [illegible] *plendas* [illegible] *alter by the same Indenture in 20 l.* And for Non-Payment of [illegible] last, the Lessor brought Action of 20 l. and the *Defendant said, That* [illegible] *the Land all* [illegible] *ready to pay, and none came of the Part of the Plaintiff to receive*; [illegible] *That such a Day after the said Feast he demanded the 10 l. and the Defendant refused* [illegible] the *Defendant* [illegible] *That he paid the 10 l. the same Day; and so to Issue*; And found [illegible] the Nisi Prius. And per Cur. This is Jeofail; For the *Penalty refers to the Feast of* [illegible] is excused by the Tender upon the Land all Easter-Day, and the Plaintiff intitles him [illegible] after the Penalty is saved; by which it was awarded, That they *replead*, notwithstanding [illegible] *Prius*, when the Defendant is not demandable; For yet *he has Day in Court* [illegible]. And in several such like Cases the Parties have repleaded; quod nota, by Award. Br. Repleader [illegible] 22 H. 6. 57.

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So in *Replevin* the *Defendant made Conuſance as Bailiff to S* for Damage feaſant, *&c. as that he* [illegible] *leaſed* the Land *to A. B. for Years, who granted Part of his Term to the ſaid S.* The Plaintiff [illegible], *That long before K. 6. had any Thing* in the Lands, *one T. late Abbot of K. was ſeiſed* thereof in Fee in Right of his Church, *who demiſed to him for Life.* The *Defendant traverſ'd the Deſcent of the Abbot.* The *Jury found the Leaſe, but that there was no Livery made.* Upon this Verdict the *Court awarded a Repleader*; Becauſe a Verdict at large cannot be given upon a ſpecial Iſſue joined. And they award the Repleader *to commence at the Attorney.* D. 111. b. 118 pl. 76, 77. Paſch. 2 P. & M. Jones v. Weaver.

So *in Debt upon an Obligation*, the Defendant *pleaded the Statute of Ufury, made the 6th of Feb.* 13 *Eliz.* (whereas the Parliament did begin the 2d of Feb. 13 *Eliz.*) and that the Obligation was taken by Uſury. The *Plaintiff replied, It was not made for Uſury &c. contra formam Statuti modo, &c. forma pracdict.* and upon this they were at Iſſue, and found for the Plaintiff; and for that the Statute was miſ-recited, and it was a general Law of which the Court is to take Conuſance: altho' both the Parties do agree there is ſuch a Statute, yet the Court well knowing *there is no ſuch Statute*, and ſo cannot be contra Formam Statuti, the Court held, No Judgment could be given for the Plaintiff, it being in the Ear of the Defendant, the Court held it clearly ill; and that a *Repleader* ought to be, altho' it was *after Verdict.* And it was adjudged, That there ſhould be a Repleader. Cro. E. 245 pl. 4. Mich. 33 & 34 Eliz. B. R. Love v. Wotton. —— cites 1 Mar. Dy. 119.

So where Error was brought of a Judgment in *Trover againſt Huſband and Wife, upon the Converſion of the Wife to her own Uſe*; wherein they *pleaded, Quod ipſi non fuit culpabiles.* This was miſ'd to be ill, becauſe no Tort is ſuppoſed in the Baron; and ſo the *Plea ſhould be Quod ipſa non eſt culpabilis*; Wherefore *after Verdict* for the Plaintiff a Repleader was awarded. Cro. J. 5 pl. 6. Paſch. 1 Jac. in the Exchequer-Chamber. Cox v. Crepwell.—— Cox v. Cropnel and his Wife, S. C. in B. R. Cro. E. 883. Adjudg'd.

So *in Aſſumpſit upon a Promiſe of the Wife Dum Sola*, the *Plea was* entered *Et predict. the Huſband and Wife defendunt Vim* &c. *et ipſa the Wife ſays, Quod ipſa non aſſumpſit.* And this being tried and found for the Plaintiff, it was moved in Arreſt of Judgment, That a Plea of the Feme without the Baron is no Plea at all; and an Iſſue joined and tried thereupon is idle, and not aided by any of the Statutes of Jeofails. And of that Opinion was all the Court. A Repleader was awarded. Cro. J. 208. pl. 4. Mich. 9 Jac. B. R. Tampion v. Newſon.—— Yelv. 210. S. C. And ſays, The S. P. was adjudg'd in an Action againſt the Huſband and Wife for Words ſpoke by the Wife, where the Wife only pleaded Not Guilty. Chomley v. Arſley.

So in a *Replevin* the Defendant *pleads*, That it is *his Freehold.* The Plaintiff *replies*, That *the Beaſts eſcaped* thence *by Default of the Incloſure* &c. The Defendant *reioins*, That *tempore Capcionis the Hedge was well repaired*; And Iſſue upon that is found againſt the Plaintiff, who now moves in Arreſt of Judgment, That it is not a good Iſſue; For it ought to have been *Tempore Eſcapii*, or *Intrationis.* But by the Court that was now diſallow'd, being mov'd *after a Verdict*; but becauſe, upon View of the Return of the Venire facias, nothing was indorſed but the Jurors Names, the Court awarded a Repleader. Noy 115. Baſford v. Ventres, cites 5 Rep. 41. —— [But ſee now the Statute of 21 Jac. 13. at Fit. Amendment.]

So in Debt on a *Bond, with Condition to pay* 10*l.* 10 *s.* the Defendant *pleaded Payment of* 10*l. Secundum Formam Conditionis*; upon which they were at Iſſue, and a *Verdict* was given for the Plaintiff; and yet a Repleader was awarded. Hob. 112. Kent v. Hill.

But in Treſpaſs for beating and impriſoning *his Wife* &c. the Defendant *juſtifies by Warrant of the Sheriff.* The Plaintiff *replies, De injuria ſua propria abſque tali Cauſa*, and Iſſue upon it; And Verdict for the Plaintiff. And it was moved for a Repleader; becauſe *De injuria ſua Propria is not a Plea to Matter of Record*, but the Plaintiff ought to have travers'd the Warrant. But Judgment was given for the Plaintiff; becauſe it is *good enough after Verdict.* Paym. 50. Mich. 13 Car. 2. B. R. Collins v. Walker.—— And ſays, That it was ſo reſolved between Osborn, and Deſmond, and Peter v. Stafford. Hob. Rep. 244.—— See 2 Leon. 81. Moor v. Sir John Savage.

See pl. 32. the 8th Reſolution, in the Caſe of Staple v. Haydon.

7. *Debt againſt Executors*, who *pleaded Riens enter mains*; and it was *found, That they had enter mains*, and did not ſay Aſſets, nor how much they had; and ſo Jeofail; And they repleaded. Br. Repleader, pl. 55. cites 40 E. 3. 15.

8. In *Treſpaſs Day was given* at the Commencement *to Octab. Mich.* and the *Roll ſeem'd to be read in the ſame Hour and made Octab. Termin. but it could not well be perceiv'd*, ſo that the Juſtices were in Doubt how the Truth ſhould be tried, if ſuch Deceit had been; and at laſt an *Inqueſt was taken* of the Clerks, *and nothing was found*; and after the Parties had Day in Court, and Proceſs continued without Interruption, tho' it was not continued by Courſe of Law, and the *Juſtices* would not amend the Original, but *awarded them to replead* de novo &c. 46 E. 3. 19. a. b. pl. 2. Br. Repleader, pl. 8. cites S. C.

9. *Detinue of a Deed*, by which the *Land was given to R.* his Anceſtor, *whoſe Heir he is, and J. his Feme, and the Heirs of R.* which *R. died, and J. married to Defendant*, and detained the Deed. The *Defendant ſaid, That the Land was given to R. and J. in Tail*; and ſo to Iſſue thereupon; Where the *Plaintiff ought to have maintained Quod ſibi in Fee*

as above, therefore they repleaded; quod nota. But it seems, That the Defendant in his Bar ought to have alleg'd the Tail, absque hoc that it was given to them and the Heirs of R. prout &c. Br. Repleader, pl. 10. cites 7 H. 4. 14.

10. *Account* of *Receipt of* 100*l. for Merchandize for* 7 *Years.* The *Defendant said, That he fully accounted the* 5*th Year for the Whole*; And found for the Plaintiff. And they repleaded; For he cannot account the 5th Year for the Profits which arose the 2 last of the 7 Years. Br. Repleader, pl. 46. cites 7 H. 6. 5.

A Repleader may be *after Demurrer.* D. 118. a. Marg. pl. — says, That it was argued by Fenner, and so adjudg'd according to 35 H. 6. 19. a. Pasch. 35 Eliz. in Hart's Case.— But at the End of Ridgway's Case, 3 Rep. 52. b. it is said, That the Record of this Case of 9 H. 6. 35. had been search'd, and that it does not warrant the Report of the Book.— And. Mo 867. pl. 1198. Mich. 14 Jac. in the Case of Master v. Salter. It was agreed, That after a Demurrer no Repleader shall be; but otherwise after a Verdict.

11. In Recordare the Defendant *avow'd for Damage feasant*, and the *Plaintiff made Title to a Common by way of Bar* to the Avowry; and the *Defendant replied by a Deed of Release of the Common, which was not a perfect Deed*, by which the *Plaintiff demurr'd upon the Replication of the Defendant*; And by the Opinion of the Court, the Replication is not good; but because there was a Default in the Replication of the Defendant, who made his Title to the Common, therefore by Award of the Court the Parties were awarded to replead. And so see that *they shall not replead for the Default which is in this Plea upon which the Demurrer is, but* because a Plea before was not good; As where they *demur upon the Rejoinder*, there *if the Replication be not good, they shall replead*; and if they *demur upon the Replication, and* afterwards *it appears that the Bar is vicious*, they shall replead, and all those shall be by Defaults in Matter apparent, And so see that Repleader shall be as well *after a Demurrer in Law as after Issue joined*; quod nota. Br. Repleader, pl. 39. cites 9 H. 6. 35.

It was held strongly by Dyer, Dal. 76. pl. 2. 14 Eliz. in the Case of Fitzwilliams v. Corley, That Repleader *never shall be but on Tender or Issue misjoined*, and *never upon a Demurrer* in Law; For if there be a *sufficient Declaration* and a *Fault in the Bar* and a *Fault in the Replication*; the Judgment shall be, That the Plaintiff takes nothing by his Writ, and not that he shall replead; For tho' the Bar be ill, yet the Parties have let it pass. So if the *Count* be *good*, and the *Bar ill*, and the *Replication ill*, and the *Rejoinder ill*, and a *Demurrer be upon the Rejoinder*, the Plaintiff shall recover, and they shall never replead, tho' the Replication be not good.

After a Demurrer in Law there shall be no Repleader, Per Periam. Which Anderson Ch. J. denied; For it seemed to him, That tho' the *Demurrer was upon the Replication*, yet if the Matter of the *Bar is ill*, they shall replead; And as to this he put the Case of Browning v. Beston, in Trespass, where the Demurrer was upon the Replication, which was adjudg'd good, and that the Plaintiff should be barr'd; but because there was a Default of Pleading in the Bar, they shall replead. But the Reporter says, Quere if this was by Aid of the Court or Consent of the Parties; For the Pleading was alter'd in divers Points in the Assignment of the Day of the Trespass, which seems to be by Assent of the Parties, as he apprehends; But he says, Periam cited the Case of Danby v. Southwell, in *Debt upon Obligation*, where the *Demurrer was upon the Replication*, and the Plaintiff was barr'd, because the Replication was ill; And there it was said, That if the Plaintiff had demurred upon the Bar, which was ill, he would have recovered; So that there it appears, that upon Demurrer upon the Replication *there is no Relief to the Default of the Bar.* Therefore Quere Legem, and the Course of the Court of C. B. For, he says, as he remembers, the Ld. Dyer, in his Time, always took it, that no Repleader should ever be after Demurrer, which seems against the Opinion of 9 H. 6. Sav. 89. pl. 165 Pasch. 28 Eliz. in Beffel's Case.

After *Demurrer* there never shall be any Repleader; For the Parties have, by their mutual Assent, put themselves upon the Judgment of the Court, and therefore without their Assent they cannot replead. 3 Rep. 52. b. Pasch. 36 Eliz. B. R. the 3d Resolution in Ridgway's Case.

But Gawdy said, It is without Question, that a Repleader may well be *after Demurrer*, but that is *when the Pleading is insufficient of both Parties.* But Per Popham, If it be *insufficient in Matter, so that by it the Action is confessed, and the Plaintiff replies*, and a Demurrer upon it, yet Judgment shall be given against the Defendant; *but where the Bar is insufficient* not in Matter, but *in Form*; (as for want of a Traverse) *and a Replication* is to it, which is *ill*, and a Demurrer upon it, there shall be a Repleader; and afterwards the Justices mov'd the Parties to discontinue the Action, and to commence again; and so they did. Cro. E. 518. pl. 4. Pasch. 36 Eliz. B. R. Grills v. Ridgway.

The Court was moved to have a Repleader *after a Demurrer*, and this *without the Assent of the Parties.* To this it was answer'd, That the same cannot be without the Assent of the Parties, according to the Resolution in Point, Coke 3 Rep. fol. 52. (5) in Ridgway's Case, against the Opinion in 9 H. 6. fol. 35. But by the Opinion of the whole Court here, in this principal Case, no Repleader can be granted here, being after a Demurrer, without the Assent of the Parties hereto. 2 Brownl. 35. Mich. 10 Jac. Succomb v. Wardner.

The

Tho' generally upon a *Demurrer* there ſhall be no Repleader, yet this is to be underſtood upon the true Plea, upon which the Demurrer was; But upon other preceſſary Pleas it is [illegible] Arg. Bar. 142. 144. the Caſe of Climſon v. Pool.—— And ibid. 148 ſays, That in the Book of Entries are Precedents of Repleader after Demurrer; But they are not Entries by Rule of Court, and cites Cr. Eliz. 155.

In a *Quantum meruit* by a Surgeon *for curing a Hand*. The Defendant *pleaded a Tender of 2 Guineas, value 45 s. wch was ſufficient, abſque hoc that he deſerved more*. The Plaintiff *demurred*, becauſe the Traverſe made the Plea double, and was impertinent, and that no ſuch Value can be put on Guineas. The Plea was adjudg'd ill, and a Repleader was awarded, and to omit the Traverſe, and the Plea to be of a Tender of 45 s. and Iſſue to be taken of the Sufficiency thereof. 3 Lev. 423. Trin. 8 W. 3. C. B. Stephens v. Cooper—— Ibid. The Reporter adds, Et ſic dictum, That a Repleader was awarded by the Court *after Demurrer and Argument*; which, he ſays, He had heard denied ſeveral Times of late, and that no Repleader ſhall be after Demurrer, but after Iſſue join'd; but that heretofore Repleader had been after Demurrer.

Powell poſitively ſaid, That Repleader could *never* be *upon Demurrer, but* is *always after Iſſue*; tho' the old Books ſeem'd to make a Queſtion of it, yet there were 20 Authorities in the new Books of it; And yet Brotherick ſeem'd as earneſt of a contrary Opinion at the Bar, tacente Holt Ch. J. & Cur. reliqua. 6 Mod. 102. Hill. 2 Ann. B. R. in the Caſe of Croſſe v. Billſon.

12. *Debt againſt Cuſtomer upon Tally ſhewn* to him ſuch a Day, Year, Place, and County, at which Time he had Aſſets, and would not pay. To which the *Defendant ſaid, That ſuch a Day after he ſhew'd the Tally to him, at which Day he had nothing in his Hands, nor ever after, abſque hoc that that he ſhew'd the Tally to him before this Day*; and ſo to Iſſue, and *found for the Plaintiff*. And the *Defendant would have repleaded; becauſe no Place nor County was alleg'd where the 2d Tender was*, & non Allocatur; For it ſhall be *intended* in the Place and County where the firſt Tender was; quod nota. Per Cur. But *Contra where he juſtifies in another County, and traverſes in the firſt County*; For there Place and County ought of Neceſſity to be ſhewn, for the County there is Parcel of the Iſſue. Br. Pleadings, pl. 9. cites 27 H. 6. 9.

13. *Treſpaſs againſt Baron and Feme of Goods taken in D. in the County of C.* and the *Baron pleaded Not Guilty; and* the *Feme, as to all the Goods, except certain, Not Guilty; and as to thoſe that ſhe was poſſeſſed ut de Propris at B. in the County of H. and bailed the Goods to E. to keep, who delivered the Goods to the Plaintiff, and the Baron and Feme took them at the Vill in the Declaration.* The *Plaintiff ſaid, That he was poſſeſſed* of the Goods *ut de Propris at the Time of the Treſpaſs till the Defendant took them at the Vill in the Declaration, abſque hoc that thoſe were the Goods of the Feme at the Time of the Treſpaſs*; and the others e contra; and the Iſſue *tried by View of D. in the County of C.* And it ſeemed to the Court, That the Pleading is not good, and it *ought to have been tried by the County of H. and not by the County of C.* And it was agreed, That after the Iſſue found the Parties ſhall not have Day in Court if the Verdict be good; But if it be not good, then the Parties ſhall replead. Br. Repleader, pl. 34. cites 5 E. 4. 108.

14. In *Waſt* they were at Iſſue, and the *Jury ready to paſs*; there if there be *Jeofail apparent in the Record*, the Inqueſt ſhall be diſcharged. Br. Repleader pl. 54. cites 7 E. 4. 1.—— And ſo it was uſed in B. R. 35 H. 8. and the Parties repleaded; Quod Nota. Ibid.

All Matters apparent in the Record, which are Defects, are Cauſes for Repleader *at the Common Law*, unleſs in Special Caſe; but ſeveral of thoſe are remedied by the Statute of Jeofails 32 H. 8. cap. 30. Br. Repleader pl. 62.

15. It was adjudged by good Advice in B. R. That if an *Office* be *traverſed in Chancery*, and Iſſue being joined, the *Tranſcript is ſent into B. R. to try the Iſſue*, which is *found againſt the Queen*, but becauſe *all the Points of the Office were not traverſed*, he who tendered the Traverſe was put to replead, he *ſhall replead in B. R. and not in Chancery*, tho' nothing was certified in B. R. but the Traverſe, and the very Record is in Chancery, inaſmuch as the Court is once ſeiſed of the Record; And this Repleader is only to fortify the Record, and to make the Iſſue there the better, and the more eaſy to be tried, ſo that Right be done to the Party.

Party. Dal. 15. pl. 6. 1 Mar. Anon. and says it was so done in Clayton's Case.

16. In *Replevin* the *Plaintiff claimed Common appendant to a Manor or Messuage* called Curfal, whereupon Issue was joined, and the Jury came; Exception was taken, because it was *not certainly pleaded*, to what Thing the Common belonged as it ought viz. to the Manor or to the Messuage, for which Reason the Court adjudged them to replead. And. 31. pl. 73. Mich. 4 & 5 P. & M. Lee v. Mayer.

D. 264. pl. 39. Trin. 9 Eliz. S. P. and seems to be S. C. the Defendant Quoad prædict. Transgress de Novo Assignat in prædict. Acra Terræ pleaded Not Guilty; and for this Uncertainty of the Land, and being *without any Buttals or Name to the Acre*, and the Answer being to the Acre of Land only, the Jury at the Bar was discharged by the Opinion of the Court; For the Assignment ought to have been without any Sive &c. And the Plaintiff might have averred the 2 Acres, the one of Land the other of Meadow &c. and no Buttal is made, and also the Answer is not full.—— S. C. Bendl. 107. pl. 222. Trin. 9 Eliz. Anon.

17. In *Trespass* in C. B. the Plaintiff made a *New Assignment in una Acra Terræ sive Prati.* The *Defendant pleaded Not Guilty*; for which Reason the Court adjudged all the Pleading void, saving that the Writ abated for this Uncertainty; So note, That this New Assignment is as Parcel of the Declaration, otherwise it could not be that the Writ should abate, but there ought rather to be a Repleader, and then to commence at the New Assignment, the which is not done for the Reason aforesaid. And. 31. pl. 73. in the Case of Lee v. Mayer.

18. In *Avowry for Rent*, the Defendant *made Title* to it, *as Cousin and Heir to Ro. Chamberlaine*, that is to say, *Son of Ann Daughter of Ro.* and *avowed for Rent Arrear for* 16 *Years after the Death of Ann*; and because he made Title to it immediately as Heir of Ro. and after avowed for Rent after the Death of Ann, which cannot be; for so it shall be intended that she died in the Life of Ro. and Issue being joined upon another Matter, they were awarded to replead. Cro. E. 24. pl. 1. Hill. 26 Eliz. C. B. Chamberlaine's Case.

Goldsb. 67. pl. 11. S. C. accordingly, tho' objected by Radford Prothonotary.—— S. C. cited Cro. 53 Mich. 29 & 30 Eliz. in the Case of Knight and Elkin v. Gresham, and a Repleader was awarded accordingly.

19. *Debt upon a Sheriff's Bond* conditioned *to appear in B. R.* where the Process is returnable, then &c. The *Defendant said* in Fact, *That he had appeared Secundum Formam* & effectum *Conditionis* &c. and upon this they were at Issue. The Court were clear of Opinion, that a Repleader should be awarded, and so it was, because *the Appearance was* not triable by a Jury, but *by the Record.* Le. 90. pl. 114. Mich. 29 & 30 Eliz. C. B. Brett v. Shepperd.

20. In *Debt* the Plaintiff *declared, That he let certain Lands for Years to the Defendant, rendring Rent payable at* the Feasts of *the Annunciation and St. Michael, or within* 40 *Days after* every of the said Feasts, *and that the Rent was behind at the Feast of St Michael* last past, Unde Actio accrevit. The Defendant *pleaded Nihil debet*, upon which they were at Issue; It was shewed to the Court, That here upon the Pleading is a Jeofail, for the Rent is reserved payable at the said Feasts, or within 40 Days after; and he declares, That the said Rent, upon which the Action was brought was behind at St. Michael, without Respect to the 40 Days after which cannot be; for *before the* 40 *Day after* each Feast *no Action did lie*; whereupon the Court awarded a Repleader. 4 Le. 19. pl. 64. Mich. 32 Eliz. C. B. Josselin v. Josselin.

21. *Trover of* divers *Trees apud D. in the County of Surry*; The Defendant pleads, *That Queen Mary was seised in Fee of the Manor of D. in the County of Sussex, where those Trees were growing, and granted it to the Defendant* in Tail, whereby he was seised thereof; *and that J. S. cut the said Trees, and granted them to the Plaintiff, who lost them, and the Defendant found and converted them* &c. The Plaintiff *replies De Injuria sua Propria* &c. And thereupon Issue was joined. Coke moved, That the *Replication was Ill*; For De Injuria sua Propria is not any Plea, where the Defendant makes Justification by claiming an Interest

Intereſt in the Freehold to himſelf, as 16 E. 4. 4. 44 E. 3. 18. and 14 H. 4. 32. is, upon the ſame Reaſon; But where one claims not any Intereſt, but juſtifies by Command, or Authority derived from another, it is otherwiſe; and of that Opinion was the whole Court, wherefore a Repleader was awarded. Cro. E. 539, 540. pl. 2. Hill. 39 Eliz. B. R. The Archbiſhop of Canterbury v. Kemp.

22. In *Replevin* &c. the Defendant made *Conuſance as Bailiff* to F. G. for 10 s. for an Amercement &c. and *for 20 s. for Rent.* The Plaintiff as to the 20s. for Rent, *replied Quod paratus fuit & obtulit to J. S. Bailiff to F. G. who refuſed it, and that he is yet ready*; The Defendant *traverſed the Refuſal*, and ſo to Iſſue. It was reſolved per tot. Cur. That this *Iſſue* joined upon the Refuſal was ill; For it *ought to have been joined upon the Tenure*, and therefore a Repleader was awarded as to that Point. Cro. E. 885. pl. 26. Paſch. 44 Eliz. C. B. Parham v. Norton.

Where the Plea of the Defendant *confeſſes & avoids* the Matter for which the Plaintiff declared, *but does not ſufficiently avoid it*, and thereupon *Iſſue* is *joined on an immaterial Point*, if it is found for the Plaintiff, he ſhall have Judgment, tho' the Iſſue was immaterial; *but* where the *Defendant's Plea avoids the Plaintiff's Title*, or *confeſſes and traverſes a Matter not material*, and Iſſue is taken upon ſuch immaterial Traverſe, and it is found for him, the Statute of Jeof. ails will not help in ſuch Caſe; but *there muſt be a Repleader*. Per Holt Ch. Juſt. 3 Salk. 305 Mich. 10 W. 3. B. R. in the Caſe of Witts v Polehampton. — Ld Raym. Rep. 390. Pitts v Polehampton S. C.

23. In *Replevin* the Defendant *avowed upon the Statute infra Feodum & Dominium upon a Stranger*, the Plaintiff *replied Non-tenure Generally*, without alleging Tenure of any particular Perſon, *and traverſed the Tenure alledged.* It was ruled to be ill, and therefore Repleader was awarded; for he might traverſe the Tenure or plead Hors de Son Fee, but cannot reply Non-tenure generally at the Common Law. Cro. J. 127. pl. 16. Trin. 4 Jac. B. R. Paramour v. Chapman.

24. In *Battery* the Defendant *juſtified that he was a Copyholder, and that the Lord had a Way for himſelf and Copyholders over the Plaintiff's Lands, which is a Copyhold* alſo of the Manor, and that the Defendant reſted the Plaintiff as he was going there, and the Defendant Molliter Manus &c. upon him. The *Defendant traverſed that the Lord could not have a Way over his own Land*; And this was agreed per Cur. Then tho' the Verdict paſſed upon a *void Iſſue*, this is not remedied by 32 H. 8. 30. And this was alſo agreed per Cur. Otherwiſe it is where an Iſſue is miſjoined, which has the Colour and Countenance of an Iſſue; whereupon the Court awarded a Repleader. Mo. 867. pl. 1198. Mich. 14 Jac. Tasker v. Salter.

S. C. Hob. 132, 133. pl. 183. Says, That the better Opinion was, that this was not helped by the Statute, becauſe indeed it was no Iſſue at all, nor Trial poſſible nor iſſuable, and therefore the Verdict muſt alſo be utterly void; For a Verdict cannot make that good which the Court ſees cannot be in Law; And Hobart ſaid, That if they had found a Special Verdict, that the Cuſtom had been for the Way, as it ſhould have been pleaded, *Et ſic* &c. the Court would not have given Judgment as if the Iſſue had been found for the Plaintiff; For the Special Matter of the Cuſtom did not bear the Iſſue, as it is taken upon a Preſcription void in Law; And that ſo upon the Matter it is a Verdict without an Iſſue, and out of the Compaſs of the Statute. — 2 Mod. 130. Arg. in the Caſe of Beadle v. Dawſon cites Mo. 869. and ſtates the Difference there taken, viz. If the Plea on which the Iſſue is joined, *was no colourable Pretence* in it to bar the Plaintiff, *or it be againſt an expreſs Rule in the Law*, there *the Iſſue is immaterial*, and ſo as if there was no Iſſue; and therefore is not aided by the Statute; *But if it has the Countenance of a legal Plea, tho' it wants ſome Matter to make it ſufficient*, there ſhall be no Repleader, becauſe it is helped after Verdict. — See pl. 32. the 9th Reſolution in the Caſe of Staple v. Haydon.

25. T. brought an Action of *Debt upon a Recognizance* in the Petty-Bagg; The *Defendant prayed Oyer of the Condition there and had it*; afterwards he ſhews this Matter to this Court, and prays, in Regard he *had miſtaken his Plea*, that he may replead. Roll Ch. Juſt. This cannot be granted upon Motion here; for if the *Iſſue* be *joined in the Petty-Bag* you muſt try it, we can make no Rule but by Conſent. Sti. 412. Hill. 1654. Turner v. Trapes.

26. In *Debt* the Defendant *pleaded an Accord* with the Plaintiff, *but did not* plead any *Satisfaction*. Iſſue was taken, if there was any ſuch Accord, and found that there was not. Jones held that the Plaintiff ſhould have Judgment; but if it had been found for the Defendant there

there ſhould be a Repleader. Quære inde now by the Statute, the Plaintiff ſhall not be barred. Lat. 54. Plumley's Caſe.

This Caſe differs from the Caſe of a Diſcontinuance cited 11. Rep in Heydon's Caſe; For the Plea there was pleaded but Part, and a Diſcontinuance is aided by the Statute after Verdict.

27. In *Caſe* upon ſeveral Promiſes *for curing the Defendant of a Sore, and applying ſeveral Medicines* to him, *and for the Medicines* themſelves, the Defendant *pleaded that he had paid the Plaintiff 60 l. for the Medicines, and the Application of them*; whereupon Iſſue was taken, and Verdict for the Plaintiff. The Court was moved for a Repleader, becauſe *the Cure was not anſwered to*, and the Plaintiff declared upon that as well as upon the Price and Applications of his Medicines. Per Cur. there ought to be a Repleader; For here the Plea is to the Whole, and therefore ill. Hard. 331. pl. 6. Trin. 15 Car. in the Exchequer. Workman v. Chappel.

And for a Diverſity. Per Cur. Hard. 331. in S. C.

Ld Raym. Rep. 133. Mich. 8 W. 3. Walker v. Brook.

28. In Aſſumpſit againſt *Adminiſtrator* Defendant pleaded, That *ipſe non Aſſumpſit* inſtead of the Inteſtate; after Verdict a Repleader was awarded, and no Coſts to either Party on a Repleader. 2 Vent. 196. Trin. 2 W. & M. C. B. Anon.

29. *Treſpaſs* of his Cloſe broken called B. in D. and *for taking and impounding* 3 *Cows* &c. To all, beſides the Taking and Impounding, the Defendant *pleads* Not Guilty; and as to that he ſays, *That he was poſſeſs'd for a long Term of Years of the Place where* &c. *That he demiſed to W. for Part of the Term rendring Rent, and for Rent Arrear he took the Cattle in the Place where* &c. *as a Diſtreſs* &c. The Plaintiff *replies*, That the *Cattle were not Levant and Couchant*; upon which Iſſue is taken, and Verdict for the Plaintiff. It was argued that this was an immaterial Iſſue, and therefore moved for a Repleader. But per Treby Ch. J. Where the Cattle *eſcape accidentally*, there they are not diſtrainable until they have been Levant and Couchant; *but if* they eſcape *by Default* of their Owner, they are diſtrainable the firſt Minute; but here it does not appear how they came into the Plaintiff's Land; therefore ſince the Defendant has taken Iſſue upon the Levancy and Couchancy, it muſt be intended after Verdict againſt him, as much as if he had ſaid that he will admit that they came in by ſuch Means, whereby the Levancy and Couchancy ſhould be material to intitle him to the Diſtreſs; but if the Defendant had demurr'd upon the Replication, then it muſt have been taken more ſtrongly againſt the Plaintiff, and then it would have been ill; or otherwiſe the Defendant might have rejoined, that the Cattle came in by the Plaintiff's Default; but now after this Iſſue, it ſhall be taken nil it ſtrongly againſt the Plaintiff. And (by him) if a Repleader is to be awarded, the Replication ſhall not be ſet aſide, but only the firſt Jeofail, which was the taking of Iſſue upon it by the Defendant. But (per Powel J.) the Replication is Part of the Iſſue, and ought to be ſet aſide if a Repleader is granted; for *when a Repleader is awarded*, * *no Error ought to be left upon the Record*; and therefore if the *Declaration* be *good*, and the *Bar*, *Replication and Rejoinder ill*, if a Repleader be awarded, *all ought to be ſet aſide but the Declaration*; and Judgment Niſi &c. was given for the Plaintiff, and afterwards upon further Argument it was *adjudged* by the whole Court, That *no Repleader* ſhould be awarded; *for it is not totally an immaterial Iſſue*; *for perhaps the Defendant chaſed the Cattle upon the Land liable to his Diſtreſs*, and then Levancy and Couchancy is material; and the Court will intend that it was ſo after a Verdict. And therefore Judgment was given for the Plaintiff. Lord Raym. Rep. 167. 169, 170. Hill. 7 W. 3. C. B. Kempe v. Crewes.

* See pl. 32. the 3d and 6th Reſolution in Caſe of Staple v. Haydon.

30. A Repleader cannot be *after a Diſcontinuance*. Per Holt Ch. J. Comb. 323. Paſch. 7 W. 3. B.R. St. John v. Campbell.

31. A Repleader cannot be where there is a *Treſpaſs confeſs'd*. Per Holt. 1 Salk. 173. pl. 1. Trin. 8 W. 3. B. R. in Caſe of Jones v. Bodingham.

32. *Treſ-*

32. *Treſpaſs* againſt W. R. and W. S. *for* breaking his Cloſe called the Wharf 31ſt May, and *throwing down his Rails*, and doing the like Treſpaſs 7th July following; W. S. pleads Not Guilty as to all &c. but W. R. as to the Treſpaſs 31ſt May, *pleads Not Guilty as to the Force, but juſtifies* the Entry, and *throwing down* the Rails, by Virtue of a Leaſe of the ſaid Wharf, and *for a Way* over the ſame *to certain Stairs on the Thames*, and that being intitled to the ſaid Way, the Plaintiff obſtructed it with Rails, which the Defendant deſired him (the Plaintiff) to open, but he refuſed, ſo he juſtified the throwing them down, and pleads the like Plea as to the Treſpaſs 7th July, and *avers that he had no other Way to the ſaid Stairs and River Thames* than by and through the ſaid Wharf. The Plaintiff, as to the Plea of the 1ſt Treſpaſs *replies*, That *the Defendant had another more convenient Way to the River Thames*, and thereupon they are at Iſſue; And as to the Plea to the Treſpaſs on 7th July, he demurs. Both Defendants made Default at the Niſi Prius, which being recorded, the Inqueſt was awarded by Default, and both were found Guilty, viz. W. S. as to the Treſpaſs 31ſt May, and acquitted of that of 7th July, and W. R. was acquitted as to the Force 31ſt May, as to the Force; but as to the reſt the Jury found, That he had no other Way to the ſaid Stairs and River Thames than thro' the ſaid Wharf, and aſſeſs Damages on the Demurrer, and acquit him of the Treſpaſs 7th July. It was held clearly, That this was an immaterial Iſſue; and the Court held *as to Repleaders generally*, 1ſt. That a Repleader is to be awarded *when ſuch an Iſſue is joined, as the Court after Trial thereof cannot give a Judgment*, as being *impertinent*, and *not determining the Right*. —2dly. That *before the Statute of Jeofails*, if *ſuch* an *Iſſue were joined*, the Court *before Trial* might award a Repleader.—3dly. * When a Repleader is awarded, the *Amendment muſt begin where the Plea* which makes the Iſſue bad, *begins to be faulty*; and therefore if one makes himſelf a *bad Title in his Declaration*, to which there is a *bad Bar*, and thereupon a *bad Replication* on which there is Iſſue, there the *Repleader muſt be awarded and entered on Record*; and Plaintiff ſhall *declare de Novo* &c. *But* if the *Bar* be † *good*, or *Plea* be *good*, and the ‡ *Replication bad*, and Iſſue thereupon, there a *Repleader will be only as to the Replication*; but if Bar and Replication be bad, and a Repleader awarded, it muſt be as to both.—4thly. ‖ If the Court *award* a Repleader *where it ought not* to have been, *or deny it when it ought to be*, it is Error.—5thly. ¶ That upon Award of Repleader, there muſt be *no Coſts*, becauſe it is a Judgment of the Court upon the Pleading; *but upon Amendment* of a Plea in Paper, there muſt be *Coſts*—6thly. That *upon a general Rule* for Repleader, *without* any *Direction* from the Court *from what they ſhould begin* the Repleader, it muſt begin from the firſt Fault which occaſioned the bad Pleading commenced; for the Judgment is Quod partes replacitent. —7thly. That the Pleadings in this Caſe were ſuch as a Repleader would be awarded upon at the Common Law; for the *Defendant having inſiſted upon* a Title to a *Way by Grant*, his *Averment, that he had no other Way*, was ** *immaterial*, and by Conſequence the *Iſſue thereupon Impertinent*; beſides, there was *no Iſſue* at all *joined*, for the Plaintiff's Affirmative does not meet with the Defendant's Negative.—8thly. †† That tho' a Repleader ſhould have been at Common Law in this Caſe, this Motion having been made before Trial, and it being doubtful whether a Verdict would not help it by the Statute of Jeofails, the Court ſaid it would be juſt in them *not to grant a Repleader till* ‡‡ *after Verdict*; for they ſaid they might indeed grant a Repleader before Verdict at Common Law, but they were not bound to do it. So note the *Diverſity* ſince the Statute; for tho' it were reaſonable to award a Repleader before Verdict at *Common Law*, where the Pleading appeared ſuch on which no Judgment could be after Verdict, yet *ſince the Statute, when Verdict may cure immaterial* or inf rmal *Iſſues*, it may not be proper to do it.—9thly. After the Trial

1 Salk. 216. Trin. 2 Ann. B. R. S. C. —Ld. Raym. Rep. 708. Hilh. 13 W. 3. B. R. S. C. That a Repleader cannot be granted before Verdict after Iſſue join'd.—2 Ld Raym. 922. Trin. 2 Ann. S. C.

* S. P. 2 Salk. 579. S. C.—And ſee pl. 29.

† Where the *Bar is good, and the Iſſue ill* by which they replead, the Bar ſhall ſtand; but where the *Bar is ill*, they ſhall plead *all de Novo*; for they ſhall commence where the Default was. Br. Repleader, pl. 18. cites 22 H. 6. 14.—*If the Bar be ill, and the Title good*, there they ſhall commence at the Bar, and there the other ſhall make a new Re-

plication or Title; quod nota bene. Br. Repleader, pl. 21. cites 22 H. 6. 15.—S. P. Br. Repleader, pl. 31. cites 7 H. 7. 3.

Trial the Court held, That this Iſſue was ſuch on which no Judgment could be; for *Defendant pleaded, That he had no other Way to the Stairs and River Thames. Plaintiff replies, That he had another Way to the Thames*; and *Jury found no other Way to the ſaid Stairs and River Thames*; ſo in Truth there was ||| no Iſſue join'd.——10thly. That in this Caſe there could be no ¶¶ Repleader; for the *Parties were quite out of Court by the Default*. 6 Mod. 1, 2, 3. Mich. 2 Ann. B. R. Staple v. Haydon.

‡ S. P. Br Repleader, pl. 21. cites 22 H. 6. 15.——|| S. P. 2 Salk. 579. S. C.——¶ S. P. 2 Salk. 579. S. C.——** See pl. 1. and the Notes there.——†† S. P. 2 Salk. 579. S. C.——‡‡ See pl 6. and the Notes there.——||| See pl. 24.——¶¶ See pl. 4.

For more of Repleader in general, ſee **Amendment**, **Trial**, and other Proper Titles.

* Replevin.

(A) Replevin. *Of what* Things a Replevin lies.

* A Replegiare lies, as Littleton teaches us, where Goods are diſtrained and impounded, the Owner of the Goods may have a Writ De *Replegiare facias*, whereby the Sheriff is commanded, taking Sureties in that Behalf, to re-deliver the Goods diſtrained to the Owner; or upon Complaint made to the Sheriff, he ought to make a Replevy in the County. Replegiare is compounded of Re and Plegiare, as much as to ſay, To re-deliver upon Pledges or Sureties; and in the Statute of Marlbridge, Deliberare is uſed for Replegiare. Co. Litt. 145. b.

1. A Replevin lies of ſuch Things in which a Man has a qualified Property, tho' he has not therein an abſolute Property, as of Things Feræ Naturæ, which are made tame ſo long as they continue ſo.

Replevin does not lie of *Hounds*, *Hawks*, *Apes*, *Parrots*, *Peacocks* &c. which are Feræ Naturæ. Per Brudnell; for the Property is not properly known, and yet Treſpaſs lies thereof; and ſo of a Maſtiff. Br. Property, pl. 44 cites 12 H. 8. 4.——S. P. Per Brudnel. Br. Replevin, pl. 64. cites 12 H. 8. 3. S. C.

2. As a Replevin lies of a Leverer (For it has Animum Revertendi, and is tamed) 2 E. 2. Fitzh. Diſtreſs 20.

3. So a Replevin lies of a Ferret (for the Cauſe aforeſaid) 2 E. 2. Fitzh. Avowry 182.

4. A Replevin lies of a Swarm of his Bees. Fitzh. Nat. 68. b.

5. Replevin does not lie of *Conies*. Arg. Godb. 124. pl. 144. in Coney's Caſe, cites 19 E. 3.

6. *Treſpaſs of the Taking and Impriſonment of the Plaintiff, and yet detaining him*; by which the Plaintiff prayed Writ to deliver him. Et non Allocatur in this Action, but ſhall be put to a Homine Replegiando. Br. Replevin, pl. 57. cites 40 E. 3. 36.

S. P. Br. Damages, pl. 126. cites 12 E. 4. 5. and 18 E. 3. 48.——Br.

7. Replevin was brought *of a Sow and 6 Pigs*; and *as to the Sow the Defendant avowed for Damage-feaſant*, and as to *the Pigs Ne priſt pas*; and for the Sow the *Jury found* for the Defendant, and to the Pigs ſaid, *That the Sow was with Pig at the Time of the taking, and in the Poſſeſſion of the Defendant farrow'd the Pigs*, by which the Plaintiff recovered Damages for the

the Pigs; for *this was a taking of the Pigs.* Per Littleton, Quære if the Sow had not been with Pig at the Time of the taking. Br. Replevin, pl. 41. cites 12 E. 4. 5. and 18 E. 3. Verdict, 11 92. cites S. C. and Fitzh. Replevin 34

—S. P. Arg. 2 Brownl. 169. in Case of Cross v. Westwood.—So per Fairfax, Where *Swans are taken, and after they put to Shewettes*, or a Mare a Fole, or a * Cow a Calf &c. Br. Replevin, pl. 41. cites 12 E. 4, 5. and 18 E. 3.—* S. P. And Ov of Sheep which after have Lambs. F. N. B. 69 (D)

8. Replevin lies of *Beasts in Custodia.* Br. Replication, pl. 54. cites 22 E. 4. 60.

9. It lies not of *Charters.* Br. Grant, pl. 84. cites 4 H. 7. 10. Per Fairfax and Hussey. S. P. For they are Inheritances,

and belong to the Heir, if they concern the Land, and do not belong to the Executors; Per Fairfax, quod Hussey Ch. J. concessit. Br. Replevin, pl. 34. cites 4 H. 7. 10.—Br. Charters de Terre, pl. 53. cites S. C.—Br. Chattels, pl. 9. cites S. C.

10. It lies of *certain Iron of his Mill.* F. N. B. 68. (E)

11. In a Special Case a Man may have a Replevin *of Goods not distrained*; As if the *Mesne put in his Cattle in Lieu of the Cattle of the Tenant Paravail*, whom he is bound to acquit, he shall have a Replevin of those Cattle that never were distrained. Co. Litt. 145. b.

12. It lies not of *Money.* Mo. 394. pl. 510. Hill. 37 Eliz. B. R. Banks v. Whetstone.

13. It lies not of *Leather made into Shoes.* Arg. 2 Brownl. 139. in the Case of Cross v. Westwood.

14. It lies of a *Ship.* Per Just. Crawley. Mar. 110. pl. 188. Trin. 17 Car. in the Case of a French Ship taken by a Dunkirker, and sold at Weymouth

15. Upon Evidence at Guildhall in a Replevin for Goods taken by Order of the East-India Company from Interlopers in the Indies, Pollexfen Ch. J. held, That no Replevin lies for *Goods taken beyond the Seas*, tho' *brought hither* by the Defendant afterwards. 1 Show. 91. Hill. 1 W. & M. Nightingale v. Adams.

(B) For what Causes it may be brought. *Of what Taking.*

1. If a Man takes the Beasts of my Tenant, and I take out of the Pound his Beasts, and put in my Beasts in Pledge for them, I may maintain a Replevin for my Beasts, and the other shall not avoid it by saying that he took the Beasts of my Tenant. 7 H. 4. 18. Br. Replevin pl. 14. cites S. C.—So of Mesne and Tenant, where the

Lord distrains the Tenant. Ibid.—S. C. cited 9 Rep. 22. b. in the Case of Avowry—Lord, *Mesne, and Tenant*, the *Lord distrains the Tenant for the Services of the Mesne*, there, upon Notice thereof, the Mesne put his Beasts into the Pound for the Beasts of the Tenant, and shall have Replevin, and so shall discharge the Tenant in Part of Writ of Mesne; and so the Replevin of the Beasts which were not taken. Br. Replevin pl. 54. cites 34 H. 6. 47.—S. P. And this the Mesne may do in Spite of the Lord's Teeth; and if he will not permit him so to do, then is the first Taking tortious; For he misuses the Matter, as much as if he had put the Beasts in his Plough. Ibid. pl. 42. cites 13 E. 4. 6. and 7 H. 4.

2. If Trespassor takes Beasts, Replevin lies of this taking at Election. 7 H. 4. 28. b. * 6 H. 7. 9. 19 H. 6. 60. By some, Replevin lies not of

the Taking of Beasts *contra Pacem*; But per Gascoigne, he may have Replevin or Trespass. Br. Replevin pl. 15. cites 7 H. 4. 27.—Lessee of Beasts to feed his Land has a Special Property for the Time and therefore if they are taken from him by another it seems that Trespass lies; For Possession suffices for the bringing Trespass, but Replevin is for him, that has Property, and otherwise not. Br. Replevin pl. 29. cites 21 H. 7. 14

* S. P. Tho' he that takes them as Trespassor has a Property by Tort; For the Replevin is of the Property which the Owner had at the Time of the Taking; But he cannot have Detinue, for this is of Property, which the Owner had at the Time of the Action brought. Br. Replevin pl. 37. cites S. C.

by Brian. —— S. P. Br. Replevin pl. 39. cites 2 E. 4. 16. For the Owner may affirm Property in himſelf by bringing Replevin, or bring Treſpaſs and diſaffirm it. And as to the Replevin lying in this Caſe Brooke holds it to be good Law for the Reaſon above.

3. An *Abbot* ſhall have a Replevin of the Taking *in the Time of his Predeceſſor*. Br. Replevin pl. 62. cites 17 E. 3. & Fitzh. Exec. 106.

4. If the *Lord diſtrains his Tenants Cattle wrongfully*, and afterwards the *Cattle Return back* unto the Tenant; yet the Tenant ſhall have a Replevin againſt the Lord for thoſe Cattle, and ſhall recover Damages for the wrongfull diſtraining of them, becauſe he cannot have an Action of Treſpaſs againſt his Lord for that Diſtreſs; But againſt a Bailiff or Servant he may. F. N. B. 69. (H) cites 1 H. 6. 7.

5. Goods *diſtrained on a Conviction* for keeping Dogs and Nets not being qualified were replevy'd. The Court would not *ſet aſide* the Replevin, but made a Rule to ſhew Cauſe why an *Attachment* ſhould not go. 8 Mod. 208. Mich. 10 Geo. 1724. The King v. the Town-Clerk of Guildford.

(C) *What Perſons* ſhall have it.

S. P. and by the beſt Opinion the Replevin lies well by the Manner

1. IF the Beaſts another Man are manuring of and agiſting my Land, and were Levant and Couchant, and are taken by Strangers, I ſhall have Replevin. 42 E. 3. 18. b.

without other Special Writ upon this Caſe of Beaſts in Cuſtodia ſua exiſtentibus; Quod nota. Br. Replevin pl. 8. cites S. C.

S. P. Br. Replevin pl. 29. cites S. C. and per Fineux clearly where a

2. If a Man has Beaſts of another Man to compoſt his Land, and a Stranger takes them he may have Replevin; For he has Special Property for the Time (This it ſeems is the Intent of 42 E. 3. before.) * 21 H. 7. 14 b. † 11 H. 4. 17. 2 E. 3. 44.

Man leaſes his Beaſts for Years to compoſt the Land Replevin lies for the Termor. And ſo if a Man *bails Goods to re-bail*, the *Bailee* may have Replevin. —— † Br. Replevin pl. 20. cites S. C.

*S P. Sid. 82. pl. 8. Trin. 14 Car. 2. B. R in the Caſe of Arundel v. Trevil.

3. *Executors* ſhall have Replevin *of a Taking of Beaſts in the Life of their Teſtator*; and this by the Common Law as it ſeems; *For this affirms Property* to remain. But *Contra of Treſpaſs*; For *this diſaffirms Property*. But Action of Treſpaſs De Bonis Teſtatoris Aſporatis in Vita Teſtatoris is remedied by the Statute of 4 E. 3. Br. Replevin pl. 59. cites 17 E. 3. and 33 E. 3.

In ſuch Caſe of the Goods of the Feme taken Dum ſola, they

4. If the *Cattle of a Feme Sole* be *taken*, and afterwards *ſhe marries*, the *Husband alone* may have a Replevin. F. N. B. 69. (K) cites Trin. 33 E. 3.

ſhall join in Replevin. Br. Baron and Feme pl. 85. cites 33 E. 3. and Fitzh. tit. Recaption 31. And Brooke ſays Quære of *Goods which ſhe has as Executrix*; For there he thinks they ſhall join. But [in other Caſes] they ſhall not join in Replevin, becauſe the Feme cannot have Property in Goods during the Coverture. Ibid cites Fitzh. Replegiare 43.

S. P. And yet he had not Property in

5. The *Lord* who is *in Poſſeſſion of a Villein* ſhall have Replevin *of the Beaſts of the Villein*. Br. Replevin pl. 8. cites 42 E. 3. 18.

them at the Time of the Taking, but now by his Claim he has &c. But it ſeems he ſhall not have Damages for the Taking of the Cattle, but only for the detaining of them if the ſame be found for him F. N. B. 69. (F) cites 9 H. 6. 26. 42 Ed. 3. 28 or 8. —— The bringing of the Replevin amounts to a Claim in Law, and veſts the Property in the Plaintiff; *But* in that Caſe *of* the Goods of a Villain are *taken*

taken for a Treſpaſs, the Lord ſhall have no Replevin, becauſe the Villein had only a Right. Co. Litt. 145. b.

6. It is a general Rule, That the *Plaintiff muſt have the Property* of the Goods in him *at the Time of the Taking*. There be 2 *Kinds of Properties*, a *general* Property which every abſolute Owner has; *and* a *Special* Property, as Goods pledged or taken to manure his Lands, or the like; and of both theſe a Replegiare does lie. Co. Litt. 145. b.

(D) *Againſt what Perſons* it lies.

Fol 431.

1. IF A. takes Beaſts by Command of B. the Replevin may be brought againſt Both. M. 8 Ja. B. per Curiam.

2. And in this Caſe the Replevin may be brought againſt the Commander only, as well as Treſpaſs. M. 8 Ja. B. Per Curiam.

3. A Man may have Replevin *againſt him who diſtrains for a Duty to the King*. Br. Replevin, pl. 25. cites 21 E. 3. 42. and Fitzh. Avowry 130.

Br. Quinzime, pl 6. cites S. C.—F. N. B. 68. (G) in the new Notes there, (a) cites S. C. and 19 E. 2. Avowry 223.——Where the *Bailiff of the King diſtrains*, he *ſhall be compelled to wage Deliverance*; and from hence it follows, that Replevin lies of a Diſtreſs taken by the Bailiff of the King for the King. Br. Replevin, pl. 51. cites 1 H. 7. 11.——But per Keble and others, Replevin does *not* lie *againſt the King, nor where the King is Party, nor where the Taking is* made *in Right of the King*; and yet there it is lawful for the Sheriff to grant Replevin Prima facie; and when the other ſhews that the King is Party, or that he took in Right of the King, there the Sheriff ſhall ceaſe to make Replevin. Br. Replevin, pl. 3. cites 3 H. 7. 1.——Br. Riot, pl 2. cites S. C

(E) *How* it ſhall be *brought*. [Writ and Declaration.]

1. IF I have Beaſts of another to manure my Land, and a Stranger takes them, I may have a General Writ without ſhewing the Specialty of the Caſe. 42 E. 3. 18. b. 11 H. 4. 17. 23. b.

I may have a General Writ, and if the other *ſays that the Property is in J. N.* the Plaintiff may ſhew the Special Matter, and good. Br. General Brief &c. pl. 19. cites 11 H. 4. 17. But Brooke adds a Quære; for he ſays that by Tremaile the Replevin * ſhall be *De Averiis in Cuſtodia ſua exiſtentibus*.—— S. P. Br. Replevin, pl. 8 where the Plaintiff ſaid that the Beaſts were manuring his Land, and agiſted, and were *Levant and Couchant every Night in his Fold*, and ſo prayed Deliverance; and the beſt Opinion was, that the Replevin well lay by the Manner; quod nota, cites 42 E. 3. 18.——* S. P. Per Tremaile; but per Skrene, The one and the other is good enough. Br. Replevin, pl. 20. cites S. C.

2 But I may have a Special Writ. 11 H. 4. 17.

3. *Where a dead* Chattel, *or a live Chattel ſhall be replevied*, the *Writ ſhall be Quendam equum & Catalla quæ B. cepit.* Br. Replevin, pl. 65. cites the Regiſter.

And if a dead Thing only be taken, then it ſhall be thus, *Quandam ellam æream* &c. Ibid

4. A Man may count *of ſeveral Takings, Part at one Day and Place*, and *Part at another Day and Place*. F. N. B. 68. (D) in the new Notes there (a) cites 29 E. 3. 23. adjudged.

5. Replevin *de Averiis captis*, the Plaintiff *counted de Bonis & Catallis*, and he amended his Count after Challenge, notwithſtanding that Averia are Catalla,

Catalla; ſed prima Facie non poteſt ſic intelligi. Br. Replevin, pl. 11. cites 2 H. 4. 25.

S. P. Fitz. pl. 65. cites the Regiſter. 6. *And* in Replevin, *if the Taking exceeds one Beaſt*, it *ſhall be Averia*; and ſo note that *Averia ſunt* Beſtiæ, viz. *Catalla erunt*, and not Omnia Catalla. Br. Replevin, pl. 11. cites the Regiſter.

7. In Replevin, the Plaintiff *counted of* 4 *Oxen* taken at diverſe Times and Places, *and that Delivery was made of* 2, *and of* 2 *not*, but he yet detains *them to the Damage of* 10 *s. and did not ſever the Damages*; and yet well. Br. Damages, pl. 42. cites 7 H. 4. 11.

Pl. Replevin, pl. 28. cites 2 H. 5. 28. but it ſhould be 2 H. 6. 28. 8. Replevin *in T.* and declared *of taking of* 20 *Beaſts in A. and B.* And per Cur. He *need not ſhew how many he took in one Vill, and how many in the other*, by which he *pleaded to the Writ, becauſe A. and B. are in D. and F.* and *not in T.* and he was compell'd to *ſhew in which of the Vills A. is, and in which B. is*; quod nota. Br. Brief, pl. 19. cites 20 H. 6. 28.

Goob. 186. pl. 269. Trin. 15 Jac. C. B. S. C. argued, but adjournatur —— Read v. Haws, S. C. Brownl. 176. ſays, the Cauſe of Demurrer was held good. The Plaintiff is bound to take Notice where the Cattle were diſtrained —— S. P. For Taking apud O. but did not ſay apud O. in quodam loco vocato &c. and adjudged an inſufficient Count upon Demurrer. Mo. 678. pl. 925. Mich. 43 & 44 Eliz. Ward v. Lakin. —— Cro. E. 896. pl. 18. Trin. 44 Eliz. C. B. Ward v. Laville, S. C. accordingly; for the Place is put in the Count, to give Notice what the Defendant ſhould make his Title, and anſwer to, the Vill being too general and uncertain; and therefore the Count being againſt the General Form, it was adjudged to be ill.

9. In Replevin, the Plaintiff *declared of taking* his Cattle *apud O.* The Defendant demurr'd, becauſe he *did not ſay in quodam loco* &c. And upon Demurrer it was adjudged, That the Declaration was naught for the Cauſe aforeſaid; for the general Precedents of Declarations in Replevins are to aſſign a Place as well as a Town; and it is an Action of more Certainty than Treſpaſs, and muſt neceſſarily contain a Place in the Count, as is ſaid by Starkie and Brian 22 E. 4. 51. and cited a Precedent of 35 H. 6. Rot. 406. But afterward ſays, That yet it is true that ſome Declarations in Replevins are found without any other Place and Avowries, and other Pleas made upon them, without Demurrer or Exception to that Point, and then they are well enough. Hob. 16, 17. pl. 28. Read v. Haws.

Sty. 71. S. C. accordingly. —Replevin of 80 *Oves*, and ſays not *how many Verveces and Matrices*, and becauſe it is not certain, and the Return ought to be certain, it was adjudged in B. R. that it was not good. Cited per Baldwin Serjeant, as a Caſe in which he was Counſel, and Ellis J. ſaid he remember'd it. Cart. 218. in Caſe of Whately v. Conqueſt. 10. In Replevin &c. The Plaintiff *declared that* the *Defendant took Centum oves Matrices & Verveces* of the Plaintiff's; after a Verdict for the Plaintiff, Exception was taken (inter alia) to the Declaration, becauſe *it did not appear* in the Declaration *how many Ewes, and how many Wethers*; and the Sheriff is bound to make Deliverance of either Sort, according to the Writ; and tho' he may be informed by the Party, ſo that it is a good Return to ſay that none came on the Behalf of the Party to ſhew the Beaſts, yet he is not bound to require it, but ought to have ſufficient Certainty within the Record. And therefore Judgment was given for the Plaintiff. And therefore it was agreed, that *Oves without Addition* had been good enough. All. 32 33. Mich. 23 Car. B. R. Mere v. Clypſam.

11. In Replevin you ought always to ſay *what Cattle*, as Oves, Boves & *Pretia*. Per Ellis J. Cart. 218. Paſch. 23 Car. 2. C. B. in Caſe of Whateley v. Conqueſt.

12. All *Plaints* in Replevin *in* any *Inferior Court*, which hold Plea therein by Preſcription, *muſt be in the Detinet* only, becauſe the Goods &c. are not replevied but by Proceſs ſubſequent to, and grounded on the Plaint. Carth. 328. Trin. 8 Will. 3. B. R. in a Note at the End of the Caſe of Hallett v. Byrt.

13. In a Declaration in Replevin, if the *Plaintiff ſays, That the Defendant ſummonitus fuit ad Reſpondendum to him de Placito quod cum cepit Averia of the Plaintiff*; This Declaration with a *Quod cum* is ſtark naught, either upon a Demurrer, or after a Verdict; *But* it ſhall be De Placito

Placito *Quare*, or de Placito *quod*, *only*; Because quod cum is but a Recital, and no direct Affirmation; So that the Plaintiff has not, by his Declaration, made any Charge against the Defendant. 2 L. P. R. 456.

(E. 2) In what Cases there shall be *one or more Replevins.*

1. REplevin *of a Taking in D.* and they are at *Issue upon Avowry made in the same Place*, which is *found against the Plaintiff* by Verdict, he shall not have other Replevin. Br. Replevin, pl. 10. cites 49 E. 3. 24. S. P. Br. Second Deliverance, pl. 5. cites S. C.

2. *But* where in Replevin *of a Taking in S.* the *Defendant avowed the Taking in D. and it was found for him*; and the Defendant had Return upon Avowry made &c. the Plaintiff shall not have 2d Deliverance, because it is passed against him by Verdict; but he may have * other Replevin. Contra where the Avowry is made in the same Place. Note a Diversity Br. Replevin, pl. 10. cites 49 E. 3. 24. S. P. Br. Second Deliverance, pl. 5. cites S. C. —— *And also he cannot count in another Place than where he did in the Replevin.* Per Persly; quod non negatur. Ibid. —— * S. P. That he may have a new Replevin, *out of a Taking in S.* For the *Statute is, That in Replevin after Judgment upon a Nonsuit, there shall be Writs made that the Sheriff shall not make Deliverance per Replevin*, &c. *unless he cause the Defendant to appear*; and the Plaintiff in the 2d Replevin cannot vary from the 1st Surety; Per curiam and Valetor. And Per Brian, The Plaintiff may vary from the Place, because the Defendant pleads his Replevin avowed in another Place; but it may stand against him in the Place at first they counted in the 2d Deliverance. Br. Second Deliverance, pl. 5. cites 12 E. 3. 4. —— S. P. Per Wood. Br. Replevin, pl. 53. cites S. C. —— † All the Lattor (the pl.) cases, but the (Ne) seem to do such

3. If the *Beasts of divers several Men* be *taken*, they cannot join in a Replevin, but every one must have a several Replevin. Co. Litt. 145. b.

4. Upon Evidence in an Action upon the Statute 1 & 2 *P. & M.* although that the Districts be put into *several Pounds*, yet one Replevin shall serve; there that is not within the Statute. *Otherwise* if it be *in diverse Counties*, or several *Franchises*, where there ought to be several Replevins. Noy 52. Patridge v. Naylor. Mo. 453. pl. 625. Pasch. 38 Eliz. S. C. but not S. P. — Cro. E. 33. pl. 4. S. C. but not S. P. — Gold. b. 145. pl. 62. S. C. but not S. P.

(E. 3) Replevin by the *Statute of Marlebridge.*

1. BY 52 *H.* 3. *cap.* 21. *it is provided, That if the Beasts of any Man be taken, and wrongfully withholden, the Sheriff, * after Complaint made to him thereof, may deliver them, without Lett or gainsaying of him that took the Beasts, if they were taken out of Liberties.* The Statute is one thing where; 1st, When a Man's Beasts or other Goods were distrained and impounded, the Owner of the Goods had no Remedy but a Writ of Replevin, by which Delay the Beasts or other Goods were long detained from the Owner, to his great Loss and Damage. 2dly, When the Beasts or other Goods were distrained and impounded without any Liberty that had Return of Writs, the Sheriff was driven to make a Warrant to the Bailiff of the Liberty to make Deliverance, and that brought a longer Delay; For a Court in Law hereof cannot go into the Liberty to the Court. Arg. Mich. 3 Jac. B. R. Where the Effect was taken out of the Liberty and in open Market. Note this Statute does apply Cures to all these 3 Mischiefs. 2 Inst. —— * The Sheriff, &c. shall not do this, without Complaint made to him, *without Delay*, either *by Bill* or *Petition*, and his Precept to the Bailiff of the Liberty, that is, To make Replevin of them. And by the Statute of Quo Warranto, 18 E. 1. the Sheriff may take a Plaint out of the County Court, &c. and make Deliverance

[illegible] he *will to answer to the Court*) For it should be inconvenient, and against the Scope of this Statute, that the Party, for whose Benefit the Statute was made, should tarry for his Beasts till the next County Court, which is holden from Month to Month. 2 Inst. 139.

[illegible] by Plaint the Sheriff *may hold Plea in his County Court, tho' the Value be of* 20*l.* or more, by force of this Statute; but in other Actions he shall hold Plea under 40 *s.* 2 Inst. 139.

The *Usage* of the County of Northampton is, That in the Absence of the Sheriff's Bailiff the *Plaint shall be entered in the Sheriff's Court*; Note this. 2 Inst. 139.

If J. S. be Sheriff, and the *Distress was taken by* him, the Writ or Plaint shall be in Common Form, [illegible] by his Christian Name and Surname, Quæ J. S. cepit, and not Quæ vicecomes cepit; for the Sheriff in that Case ought to make Deliverance. 2 Inst. 139.

Hereby it [illegible] *And if the Beasts were taken within any Liberties, and the Bailiffs of the Liberty will not deliver them, then the Sheriff, for Default of those Bailiffs, shall cause them to be delivered.*

[illegible] That when the [illegible] to the Sheriff [illegible] a Replevin within a Liberty, that has Return of Writs, whether the Matter be before the Sheriff by Writ or by Plaint, the Sheriff ought to make a Warrant to the Bailiff of the Liberty to make Deliverance; which if he make no Answer, or if he returns that he will make no Deliverance, or the like, the Sheriff may, by force of this Statute and the Statute of W. 1 enter into the Liberty, and make Deliverance. Acc. herewith agrees Fleta. 2 Inst. 140. —— S. P. F. N. B. 68. (F)

And if the *Beasts* be *taken without the Franchise and impounded within*, the Sheriff may, upon Plaint made, presently enter and make Deliverance, (without any Precept to the Bailiff of the Liberty) for the Statute provides, That he shall replevy, Si extra Libertates capta fuer', & si infra Libertates ea ita fuerint impounded et averia &c. So as there is *no Precept to be directed to the Bailiff of the Liberty, but where the Distress was taken within the Liberty*; And where the Distress was taken out of the Liberty, there by the express Words of the Statute the Sheriff may enter and make Deliverance presently. 2 Inst. 140.

(F) *Proprietate Probanda.* Who shall have it.

F. N. B. 71. Proprietate Probanda, pl. 2. cites S. C.

1. HE who is not Party to the Writ of Replevin shall not have Proprietate Probanda. 14 H. 4. 25.

2. As if upon a Replevin the Beasts of a Stranger were delivered to the Plaintiff, yet the Stranger shall not have Proprietate Probanda, because he is not Party to the Writ. 14 H. 4. 25.

Br. Return de Biens, pl. 16. S. C. cites S. C. —— S. P. For Nemo punitur pro alieno Delicto. Co. Litt. 145. b —— In Replevin one as Bailiff made Conusance, and pleaded Property in a Stranger; and upon Demurrer it was objected, That he could not; and cited 1 Inst. 145. b. 11 H. 4. 4. But per Cur. This is intended of the County Court, not of this Court; and cited 2 H. 6. 14. and gave Judgment for the Conusant. Lev. 90. Hill. 14 & 15 Car. 2. B. R. Oldham v. Hanfield.

3. In Replevin the *Servant of the Defendant justify'd, and claim'd Property.* Tirwit said, A Servant cannot claim Property. Huls said, If the Property be found against the Defendant in Writ De Proprietate Probanda he shall make Fine, and so shall he not do when it is claimed by a Servant. And yet at last Writ of Proprietate Probanda was granted. Br. Property, pl. 14. cites 11 H. 4. 4.

4. In Replevin the *Defendant claimed Property*, upon which they were *at Issue*, and after the *Plaintiff was nonsuited*; And so note that it is permitted without Argument, That the Defendant in Replevin may claim Property. Per Brian. Br. Property, pl. 1. cites 26 H. 8. 6.

5. If the *Defendant claims Property* in Replevin the Plaintiff may have Writ De Proprietate Probanda without Continuance of the Replevin, tho' it be 2 *or* 3 *Years after*; Because by claim of Property the first Suit is determined. Mo. 403. pl. 537. Pasch. 37 Eliz. Gawen v. Ludlow.

(F. 2) *Pro-*

(F. 2) *Property claim'd.* In what Cafes; and the *Effect* thereof.

1. IF the Defendant *claims Property in Replevin before the Sheriff*, the * Power of the Sheriff is determined; and there the Plaintiff fhall have Writ De Proprietate Probanda to the Sheriff, to enquire of the Property. Per Hank. Br. Property, pl. 40. cites 14 H. 4. 25.

* F. N. B. 77. (C) S. P. — S. P. albeit it be provided by the Statute of Marlbridge, cap 22. Quod Vicecomes poſt querimoniam inde ſibi factam, ea fine Impedimento vel Contradictione ejus, qui dicta averia ceperit, deliberare poſſit &c. For it is a Rule in Law, That Property ought to be tried by Writ; and therefore in that Cafe, where the Trial is by Plaint, the Plaintiff may have a Writ de Proprietate Probanda directed to the Sheriff to try the Property; and if thereupon it be found for the Plaintiff, then the Sheriff to make Deliverance, (for ſo be the Words of the Writ) and if for the Defendant, he can no further proceed; but that is but an Inqueſt of Office; And therefore if thereby it be found againſt the Plaintiff, yet he may have a Writ of Replevy to the Sheriff; and if he return the Claim of Property &c. yet ſhall he proceed in the Court of C. B. where the Property ſhall be put in Iſſue and finally tried. And the Sheriff may take a Plaint upon the ſaid Writ out of the County, and make Replevin preſently; For it ſhould be inconvenient for the Owner to forbear his Cattle till the County Day. Co. Litt 145. b.

* S. P. Whether the Property be claimed where the Plea is *by Plaint or by Writ*, yet the Sheriff's Power is determined; but if the Plaint be before him by Writ, and the Defendant claims Property, the Plaintiff may ſue a Sicut alias, vel Cauſam nobis ſignifices; and thereupon the Sheriff may return, That the Plaintiff claims Property; and upon this ſhall iſſue a Writ De Proprietate Probanda returnable in Chancery or B. R. or C. B. and tho' the Sheriff finds the Property with the Defendant, yet the Plaintiff is not hereby concluded, but he may bring Treſpaſs; For this is only an Inqueſt of Office. But if he brings a new Replevin the Sheriff ſhall not make Deliverance, Cauſi patet; but when the Defendant claims Property in Bank, and a Writ de Proprietate Probanda iſſues thereupon, and it is found for the Defendant, the Plaintiff ſhall never have a Writ of Treſpaſs. Fitzh tit Proprietate Probanda, pl. 4. cites Hill. 31 E. 3. Per Stone & Schard; and 2 E. 3. Hill. North. But Fitzherbert ſays, It ſeems that Writ of Proprietate &c. ſhall not iſſue in this Caſe, (viz.) When the Parties appear in Bank, and the Defendant claims Property without Cauſe to intitle him to the Beaſts, to which the Plaintiff might have Anſwer; and this ſhall be tried here; For (he ſays) he apprehends that a Man ſhall not have Writ of Proprietate Probanda but only upon Return of the Sheriff &c.

2. If the Defendant *claims Property before the Sheriff* it ſhall be tried by Writ de Proprietate Probanda, and if it be claimed *in Bank* it ſhall be *tried by* 12. Per Brian Ch. J. quod non negatur per aliquem. Br. Property, pl. 32. cites 21 E. 4. 64. Br. Property, pl. 1. cites S. C.

3. If *Property be claimed* in Replevin, and notwithſtanding the *Party replevies*, an Action of *Treſpaſs will lie*, and the Claim or Notice of Property ſhall be the ſole Iſſue. Per Holt Ch J. at Guildhall. Mod. Caſes 69. Mich. 2 Annæ. Leonard v. Stacy.

(F. 3) Proprietate Probanda. The *Effect of* the *Finding thereon*; *and Judgment* How.

1. THE *Trial* of the Property *in the County by Writ de Proprietate Probanda* is only an Inqueſt of Office, and *may be traverſed and try'd again* upon Iſſue joined; *But* where it is try'd *in Bank*, it ſhall be upon Iſſue joined, and ſhall bind the Parties Br. Property, pl. 49. cites Fitzh. tit Replevin 35. and H. 31 E. 3. & concordat Ibidem 30. and that by the Verdict certified out of Court the Plaint ſhall abate. And cites the Regiſter, fol. 109.

2. It

2. It was ſaid, That if the Sheriff returns in Replevin, that the Defendant claims Property, by which Writ of Proprietate Probanda iſſues, which is found for the Defendant, the *Plaintiff ſhall take nothing by his Writ.* Br. Property, pl. 12. cites 17 H. 4. 28.

3. If the Defendant claims Property in Court, *and it is found that he has no Property*, the *Plaintiff ſhall recover all in Damages.* Br. Property, pl. 12. cites 7 H. 4. 28.

If Replevin is brought, and the Sheriff cannot execute it, but he may have a Writ of Treſpaſs, and cites 31 H. 6. [illegible]. Contra 31 H. 3. Ibid. 3. or elſe he *may remove the Plaint in the County by Recordari*, (tho' it ſeems that it is removed there by the Claim of Property &c.) *and ſo try the Property de Novo*, and the Plaintiff ſhall not be eſtopped by the Trial in the Propr. Proband. which is only an Inqueſt of Office.

In Replevin B. R. *at the Plaries Capias, the Sheriff returned that the Defendant claimed Property*, by which *Writ for the Property of the Property*, which was returned ſerved, and the Property *found for the Defendant*; and by ſome this determines the Matter; for when Property is found, the Power of the Sheriff is paſt from Replevin, and the Party is put to his Writ of Proprietate Probanda to the Sheriff, to inquire of the Property; and *if* it be *found for the Plaintiff*, the *Sheriff ſhall make Replevin immediately, and ſhall attach the Defendant to anſwer to the Court of the King for the Contempt, and to the Party for his Damages*, but *if* the Matter be *found for the Defendant, all the Matter is determined*; for it lies by the Writ that the Plaintiff ſhall not recover for the taking of the Beaſts, but for the Claim of the Property. Br. Replevin, pl. 58. cites 1 E. 4. 6. —— *But* per Markham Ch. J. Notwithſtanding that the Property be found for *the Defendant, yet the Plaintiff may proceed in the Replevin againſt the Defendant, to make him anſwer to the Taking*; *and if the Defendant juſtifies by Property, the Plaintiff ſhall anſwer to it, and they ſhall go to Iſſue Prevenges*, and this ſhall make an End of all; for *the Writ* of Proprietate Probanda *is only Inqueſt of Office*; but 3 Yelverton conceſſit. And it was ſaid that the Property may be to the Defendant, and yet the Plaintiff may have Cauſe of Replevin; As if he has let Beaſts to the Plaintiff to compaſture his Land for certain Time, and after the Court took Day of Adviſement. Ibid.——F. N. B. in the new Notes there (c) cites S. C.

S. P. That he was compelled to claim it again in Court. Br. Replevin, pl. 16. cites S. C.

4. It was ſaid, that Hill. 31 E. 3. the Defendant *in Replevin in the County* claimed Property, and the Property *found for him*; and becauſe it was not of Record, and alſo this was only an Inqueſt of Office, he was forc'd to take an *Averment* that the Property was His. Br. Property, pl. 13. cites 7 H. 4. 46.

5. If the *Property* be *found for the Plaintiff*, and at the Day of Return the *Sheriff returns an Eloignment*, and the *Defendant makes Default*, a Withernam ſhall be granted, and ſo a Capias, Plaries & Exigent. F. N. B. 77. (C) in the new Notes there (a) cites 39 Ed. 3. 30. But Fyne held that the *Plaintiff* in that Caſe *ſhall recover the Whole in Damages.* And cites 7 H. 4. 28. Per Hull, When the *Defendant comes in by Withernam* after Property found for the Plaintiff, the *Plaintiff may have two Counts againſt him, one on the Propr. Proband. and another on the Replevin.* 7 H. 4. 36. If the Replevin be returnable in Chancery, Sicut alias vel Cauſam &c. and the Claim of Property returned upon, then the Propr. Probanda ſhall iſſue out of the Chancery; but if on the Plaries the Claim is returned in B. R. or C. B. the Proprietate Probanda ſhall iſſue from thoſe Courts, and cites Dy.

(G) *Gager Deliverance.* Upon what Plea.

Br. Replevin, pl. 23. cites 21 E. 3. — That it was agreed that where the Defendant traverſes the Place the Defendant ought to make Avowry to have Return, and that it was ſaid that Ancient Demeſne is a good Plea in Avowry.——S. P. As to the Iſſue taken upon the Place where Defendant found Pledges for the Deliverance. Br. Gage Deliverance, pl. 5. cites 21 E. 3. 7. 51.

1. IN Replevin upon taking in D. if Defendant ſays that he took in another Place, and that it is Ancient Demeſne, and avows the taking there, the Defendant ſhall gage Deliverance, becauſe if the taking be where the Plaintiff has counted, the Court has Plea of it. 21 E. 3. 7. 51.

3. ——Upon which Plea as to the Place, the Defendant made Avowry to have been [illegible] and the Plaintiff maintained his Writ, and had Deliverance. Quod nota. Ibid. pl. 13. cites 21 H. 7. 22.

It was agreed that if Peter avers that the Place where &c. is Ancient Demesne, the Defendant cannot avow to have Return. Br. Gage Deliverance, pl. 14. cites 1 H. 7. 11. where it is Prayer that the Plaintiff can pray to have Gager of Deliverance, as is said there. Ibid. —— Belcher out sir W. not be compelled to gage Deliverance upon his Pleading, that the Place where &c. is Ancient Demesne, and shewed Nota hereby, but he may take it to another Place in the first Writ for Damage Feasant, and for the other Beasts in the Avowry, Writ issued to deliver the Beasts, notwithstanding that the Parties were not at Issue. Br. Gage Deliverance, pl. 15. cites 1 H. 7. 21.

2. In a Replevin, if Defendant claims Property in Pais, the Sheriff ought not to take Deliverance. 30 E. 3. 9. b.

3. In Replevin, Defendant pleads a Recovery in an Inferior Court, and that those Goods were delivered to him in Execution, he shall not gage Deliverance, because he has Interest and Property thereby. 38 E. 3. 33. Br. Replevin, pl. 22. cites S. C. — Br. Gage Deliverance, pl. 1. cites S. C. —— Where 1 Mayne sues Levi Level Damages in diffe in ebarrat Demaine, and the Bailiff by One ipe takes Pledges to Levi ubi de the Damages, and gets them and delivers the Money to the Plaintiff in the Assise, and after Recovery the Beasts, &c. Levi ubi cannot be returned, and the Pledges of the Defendant delivered to the Plaintiff as aforesaid, by R. it appears in Pleading thereupon, that the Land recovered was made Frank-fee by Fine levied before the Recovery at Common Law, that in truth the Plaintiff shall not be compelled to make Deliverance, but Writ issued to deliver the Distresses to the Defendant without giving Deliverance, for it appears that the Defendant cannot have Return at the first Default, for they are all, for ought the Plaintiff knows, for no Blame is in the Officer as to the Pledges, and all Good for the Execution; for he was not bound to take Conusance of the Fine levied at Common Law. Br. Gage Deliverance, pl. 3. cites 7 H. 4. 28. —— S. P. Br. Withernam, pl. 4. cites 7 H. 4. 27. S. C.

4. A Man *granted* to another *to distrain for Rent, and to retain* the Distress *against Gages and Pledges until it be paid*, and yet Replevin lies; and he was compelled to gage Deliverance. Br. Replevin pl. 60. cites 31 E. 3. and Fitzh. Gage Deliverance 5. S. P. For it being with the Nature of such a Distress to be irreplevisable, and by such an Invention the Current of the Replevins should be overthrown, to the Hindrance of the Commonwealth; and therefore it was disallowed by the whole Court, and said that the Defendant should gage Deliverance, or go to Prison. Co. Litt. 145. b. —2 Inst. 140. S. P. cites 31 E. 3. Gager Deliverance 15.

5. In Replevin the Plaintiff *counted of* 4 *Oxen taken, whereof he had Deliverance of* 2, *and that he yet detains the other two.* Per Skrene, We pray that the Defendant gage Deliverance of the two which he yet detains. Per Thirn, He *need not gage Deliverance before Recovery made* &c. Br. Gage Deliverance, pl. 2. cites 7 H. 4. 11.

6. Where a Man *avows as Under-Sheriff, for levying Expences of the Knights of the County for the Parliament by their Writs*, and by Sale of that which he so took, he shall not gage Deliverance. Br. Gage Deliverance, pl. 4. cites 11 H. 4. 2.

7. In Replevin the Defendant *avowed for a Rent-charge*, the *Plaintiff said that the Place* &c. *was not Parcel of the Land charged*, and the others econtra; *and the Plaintiff said that the Defendant is yet seised of the Beasts, and prayed that he might have Gager thereof Deliverance*, and the *Defendant said that the Plaintiff ought not, because he had gage Deliverance* &c. And by the Opinion of the Court, the Sense of the Deeds cannot make Issue, but the Defendant shall gage Deliverance, and this Matter shall come in after; Per Bell. upon the Pluries, and *the Defendant said that they were dead in Pound overt in Default of the Plaintiff* &c. Et adjornatur. Br. Gage Deliverance, pl. 1. cites 5 H. 6. 15. —— Brooke says, See 5 H. 7. 9. That the Issue was taken upon the Default of the Dead Beasts. Ibid.

9. In Replevin the *Defendant made Conusance as Bailiff for a Rent-charge where the Plaintiff counted Quod alibi detinet* &c. by which the *Plaintiff prayed that he may gage Deliverance.* And by the Opinion of the Court *he shall sue an Oyer to the Conusance.* Br. Gage Deliverance, pl. 11. cites 22 H. 6. 41.

9. Replevin of Beasts taken in D. the Defendant said that [illegible] in S. and not in D. [illegible] ment of the Court, and made Avowry as to the Taking, the Plaintiff prayed that he may gage Deliverance. Per Prisot, Where a Man pleads in Abatement of the Writ, or of the Court, as if he says the Property is in a Stranger, and not in the Plaintiff, he shall not gage Deliverance. Catesby agreed where the Property is alleged in another by which he does not take, or that he took as a Herriot, or for Rent arrear, Beasts &c. where he may sell them, he shall not gage Deliverance in the principal Case here. Br. Execution, pl. 21. cites 21 E. 4. 13.

10. Replevin of a taking in D. in a Place called C. The Defendant said, That he took in another Place in the same Vill, absque hoc, that he took in C. modo &c. and made Avowry to have Return, as he ought, and yet he did not go upon this, but upon the Place only. Per Fairf. It seems that the Defendant shall not gage Deliverance upon an ill Plea, as here, for it may be tried against the Plaintiff. Brook says Miror of this Reason; for it may be as well found for the Plaintiff. Per Pigot, The Defendant has * confess'd that the Property is in the Plaintiff, in which Case the Nature of the Writ is that he shall gage Deliverance; but if the Property was in Debate, neither the Sheriff nor the Justices can compel him to gage Deliverance; for he did not confess Property in the Plaintiff; nor where he said that he Ne prist pas, shall be gage Deliverance; which Cases were agreed per Chocke and Catesby Justices. Br. Gage Deliverance, pl. 22. cites 21 E. 4. 64.

* It seems to be a Mistake of the Reporter, that the Defendant confess'd the Property, but admits Property to be in the Plaintiff in the Replevin, and there is Reason that the Plaintiff shall have the Custody of his own Beasts, and the Defendant is at no Mischief; for the Plaintiff has found Surety to have Return if &c. Quod Catesby concessit. Ibid

11. In Replevin *at the Pluries*, the Sheriff return'd *Averia elongata sunt*, and thereupon *Withernam*, and the Sheriff returned *Nihil Datur*, and the *Defendant appeared*, the *Plaintiff* declared of a Place called S. in B. & quod ademit detinet &c. the *Defendant* said that his Father was seised of 100 Acres of Land in D. called L. and died seised, and the Land descended &c. and he as Heir took the Beasts Damage feasant, absque hoc, that he took them in the Place called S. and demanded Judgment of the Writ, and prayed the Return, and the Plaintiff prayed that he gage Deliverance; and the Court was in Doubt whether he should maintain his Writ before that the Defendant should gage Deliverance, by which the Plaintiff to avoid his own Delay said, that the 100 Acres of Land are as well by the Name of S. as by Name of L. and that the Place called S. and the 100 Acres of Land called L. are one and the same Place, and not diverse, as he &c. and to the Plea pleaded by the Manner &c. no Law ought to put him to Answer &c. and prayed that the Defendant gage Deliverance, and because the Defendant appeared by Attorney, the Court awarded Writ to the Sheriff to make Deliverance &c. without finding Pledges, but if the Party had appeared in Person, he should find Pledges, or should be committed to Prison: But per Newton and Eaton, Tho' they shall gage Deliverance; and if he does not find Surety he shall go to the Fleet. Br. Gager Deliverance, pl. 14. cites 1 H. 7. 11.

12. In Replevin, if the *Writ* be *vitious by Matter apparent*, the Defendant shall not be compelled to gage Deliverance upon his Avowry, for tho' it is *quasi nullum Originale*. Br. Gage Deliverance, pl. 15 cites 1 H. 7. 21.

23. Upon *Non Cepi* there shall be no Gager of Deliverence in Replevin for Cattle. Per Holt Ch. J. 12 Mod. 429. Mich. 12 W. 3. in the Case of More v. Wats.

(G. 2) Gager

(G. 2) Gager Deliverance; *In what Cases*, and *by what Persons*; And how Compell'd.

1. IN Replevin where it *appears by the Declaration, That the Deliverance is not made*, and the *Defendant says nothing*, the Court shall award that the Defendant make Deliverance. Br. Gage Deliverance pl. 10. cites 22 H. 6. 21. Per Newton.

2. *Ad quod damnum* to inquire *in 2 Acres Parcel of 1000 Acres, of which the Defendant was seised in Fee Tempore* &c. and the *Plaintiff said that he himself was seised of 100 Acres, wherein the Place where &c. was Parcel Tempore* &c. *Absque hoc That the Place where &c. was Parcel of the 1000 Acres*, and the Plaintiff prayed that the Defendant gage Deliverance; Defendant said, That Plaintiff had *had the Deliverance already*, Et non allocatur; For it it be so, it may appear by the Return of the Sheriff; and so if he *says that the Beasts are dead in Pound Overt in Default of the Plaintiff*, yet he shall gage the Deliverance; For *if it appears by the Return of the Sheriff, that the Distraint is excused*; and by such Surmise of the Defendant the Plaintiff shall not be delayed, and the Defendant is not at any Mischief for the Cause aforesaid; For the *Surety and the Writ to make Deliverance in these Cases may be conditionally*, viz. If it be so &c. and after he was awarded per Cur. to make Deliverance, and the Name of the Pledge put in Court, and the Surety made conditionally; Quod nota. Br. Gage Deliverance pl. 17. cites 5 E. 4. 117.

3. In *Homine Replegiando*, the *Defendant avowed the Taking as his Villein Regardant*, the *other said, That Frank, and of Frank Estate*, and so to Issue; and after he found Surety to sue with Effect, and then the *Plaintiff surmised that the Defendant had taken his Goods, and prayed* that he may *gage Deliverance of the Goods*, to which the *Defendant said nothing*, by which *Writ issued to the Defendant to deliver the Goods returnable immediately*. Yonge said this Writ is awarded without a Count. Per Cur. this is not Cou[nt] but *Surmise of the Plaintiff depending upon the Matter precedent*, and therefore the Writ well awarded; And per Cur. the *Defendant's* * *Attorney shall gage Deliverance*; For he has Power of all Things depending upon the Matter, and he shall have his Goods without Surety. Br. Gage Deliverance pl. 18. cites 6 E. 4. 8. Br. Retorne de Avers 30. cites S. C.—Br. Surety pl. 18. cites S. C.

* Br. Surmise pl. 12. cites S. C

4. In *Homine Replegiando*, Vavisor J said, That the Opinion of the Justices Anno 6. was that the *Defendant shall gage the Deliverance conditionally*, viz. if he has him; For it may be that he has not taken him, and then Nulla sequitur Pœna. Br. Retorne de Avers pl. 31. cites 12 E. 4. 4. Br. Gage Deliverance pl. 22. S. P.

5. In *Replevin* the Sheriff *returned Averia Elongata*, upon which *issued Withernam*, and the *Sheriff returned Quod nulla Bona sint Catalla infra* &c. *Nec est inventus in eadem*, whereupon *issued Capias*, and the *Sheriff returned Capi Corpus, and That Languidus in Prisona*, by which *issued Duces tecum*, and the *Sheriff brought him in*, and the *Plaintiff counted of an Adhuc Detinet*, and the Defendant avowed, and the Plaintiff prayed that he might Gage Deliverance; And the Defendant said that the Beasts are dead in Pound Overt. Per Littleton, If the Defendant after Avowry cannot Gage Deliverance he shall be imprisoned for the Contempt, and so shall you, if your Plea be not sufficient against the Gager Deliverance. Br. Retorn de Briefs pl. 100. cites 20 E. 4. 11.

6. Note

6. Note; Per Read and Fineux Ch. J. That if the *Bailiff of the King distrains &c. for a Duty to the King*, he shall gage Deliverance, as well as a Common Person &c. Frowick said that the Books are contra, and they said so. Br. Gage Deliverance pl. 12. cites 15 H. 7. 11.

7. No Gager of Deliverance *is in no Case but where the Defendant admits the Taking &c. and controverts the Property.* Per Holt Ch. J. Carth. 287. in the Case of Delabaitide v. Reynell.

(H) *In what Cases* it shall be *upon Withernam.*

1. IF it appears that the first Taking was lawful, and the Plaintiff cannot have the Beasts again; Because they were sold upon an Execution; The Plaintiff shall gage Deliverance of the Beasts which he had in Withernam of the Defendant, without any Gager of the Deliverance of the first Beasts. 7 H. 4. 28. Adjudged.

S. P. Pr. Gage Deliverance pl. 5. cites S. C. — In Replevin a Withernam was awarded against the Defendant, after which the Defendant claims Property, and thereon Issue taken, the Plaintiff gages Deliverance, and a Writ issues to make Deliverance; the Sheriff returns elongatus, and so a Withernam was awarded against the Plaintiff, and on Nihil returned, a Capias issued; then the Issue is found for the Plaintiff, on which he has Judgment; and then on a Pluries returned, the Defendant prayed, and had an Exigent against the Plaintiff; and by Tyrwhit, the Defendant shall recover Damages against the Plaintiff for his Detainer. F. N. B. 74 (A) in the new Notes there (a) cites 11 H. 4. 10 and adds Quære * 1 Co. 75. — * [the Pleadings in Bredon's Case.]

2. In Replevin, if Defendant claims Property the Plaintiff shall gage Deliverance of the Beasts of the Defendant, which he had in Withernam before at the Plea pleaded, upon Return de Averiis elongatis. 11 H. 4. 10.

Fol. 423. Fitz. tit. Gage Deliverance pl. 6 cites S. C.

3. In a Replevin if the Sheriff cannot have the View of the Chattels taken, upon which he returns a Withernam against him, and after the Parties are at Issue upon the Title in Bank, if the Defendant claims Property in the Chattles taken upon the Replevin, the Plaintiff shall gage Deliverance of the Beasts taken in Withernam before the Chattles taken upon the Replevin are delivered to the Plaintiff: Because the Defendant claims Property in them, and if he had then also Property in them on his part he might Replevy those Withernam, For this would not be any Withernam, but otherwise there would be Withernam. 30 E. 3. 9. b. Adjudged.

F. N. B. 75 (A) in the New Notes there (b) cites S. C.

4. In Replevin if the Plaintiff avows the taking the Beasts of the Defendant as of the Chattels of the Defendant, he ought to make Deliverance of the Beasts, which he has in Withernam before Deliverance made by the Defendant of the Beasts first taken; For those are taken to be the Beasts of the Defendant. 30 E. 3. 9. 9. b.

F. N. B. 75 (A) in the New Notes there (b) cites S. C. Per Horton.

5. Where the Bailiff makes Conusance for the Lord who joins in Aid of him, now because the Conusance is in Right of the Lord he shall make Deliverance of the Beasts, and the Bailiff shall have his Beasts taken in Withernam. 7 H. 4. 28.

6. As to Gaging Deliverance, it was held, That was to be done by the Plaintiff, *only where the Thing is replevied.* Per Holt 12 Mod. 36. in the Case of De la Baitile v. Reignald & Ux.

(I) Cage Deliverance. *At what Time.* Upon Withernam.

1. [illegible] Plaintiff be nonsuited for the Plaintiff of the [illegible] Pledges, that the Defendant in Withernam, but none came from the Plaintiff to have them, and the Plaintiff prays a Writ to the Sheriff to deliver the Withernam to him, and the Defendant prays that the Plaintiff may be Delivered, and the first Part of the Beasts which he took are dead by Default of the Plaintiff, and the rest he is ready to deliver. [illegible] Withernam, but the Plaintiff [illegible] Withernam, and the Plaintiff [illegible] Beasts are dead, and the Plaintiff [illegible] 44 Ass. pl. 15. Cited [illegible] Cage Deliverance, and the Plaintiff [illegible] Defendant [illegible] Plaintiff [illegible] pl. 11. Mich [illegible]

2. [So] [illegible] Withernam [illegible] Withernam [illegible] Withernam [illegible] Withernam [illegible] pl. 15.

3. [illegible] 20 s. in Withernam upon not finding of the Pledges, [illegible] Deliverance of 20 s. before the [illegible] 20 s. [illegible] 25 Ed. 3. 47. b.

5. [illegible] before Avowry. 7 H. 4. 11.

Delivered [illegible] E. 3. For it may be that he will claim Property by the Avowant [illegible] Withernam before they are at Iffue or demur in Law.

6. In [illegible] the Sheriff, the *Plaintiff* [illegible] upon which the *Defendant* [illegible] *and gaged*, [illegible] which the Replevin was *laid were his proper Goods*, and [illegible] were *at Iffue*, and the Defendant prayed Deliverance [illegible] Withernam. Hill. faid, This you cannot have till Iffue be try'd. The faid contrary that the *Property* of Beafts of which Replevin is made *is in Defendant till the contrary is found*, wherefore [he bid the] Defendant the Deliverance of the Withernam. Fitzh. tit. Cage Deliverance pl. 20. cites Mich. 31 E. 3.

7. If Defendant in Replevin *comes in on the Replevin* he need not [illegible] Deliverance, but if he comes not in upon the Replevin, but upon [illegible] ther Proceſs he muſt [illegible] Deliverance in ſome Caſes, and [illegible] demned the Caſe in Raymond. Per Holt Ch. J. 12 Mod. [illegible] Caſe of More v. Watts.

(K) *What* ſhall be *good Counterplea* to the Gager. Counterplea.

Fitzh. Ch. Deliverance pl. 11. cites S. C

1. IT is no good Counterplea that the Plaintiff himſelf, who prays the Gager, is ſeiſed of the Beaſts; *For this cannot make Iſſue.* 3 H. 6. Fitz. Counterplea.

2. It is no good Counterplea that Deliverance was made in Pay to the Plaintiff. 25 E. 3. 47. b. *For this may make Iſſue.*

* Br. Gage Deliverance pl. 23. cites S. C. ſo that Iſſue ſhall be taken whether the Beaſts are dead or live. Quod Nota. And it ſeems that if the Beaſts died in Default of the Defendant, the Plaintiff ſhall have Action thereof. —— In Replevin the Defendant *avowed for Rent*, and *Return* was awarded for the Rent; It was agreed, That if after he has Return the Beaſts die in the Pound in Default of the Plaintiff, the Defendant has no Remedy but to diſtrain de Novo. And ſo ſee that the Return is not Execution for the Rent but only a Gage for it, in which the Defendant has no Property. Br. Retorne de Avers pl. 17. cites 21 E. 3. 22. —— Ser. (X) pl. 5. S. P.

3. It is a good Counterplea that he put them into Pound Overt, and that they are dead for Want of Suſtenance; *For if this be true, I ſee ſhall not be any Gager.* * 4 H. 6. 13. b. † 5 H. 7. 9. 21 E. 3. —— 25 E. 3. 47. b. 13 H. 7. 28. b. 30 H. 6. 2. 3 H. 6. 15.

† Br. Replevin pl. 35. cites S. C. —— Iſſue was taken whether they died in Default of the Plaintiff, or of the Defendant. Quod Nota. Br. Gage Deliverance pl. 16. cites S. C.

(K. 2) Counterplea. *Iſſue Good.* And *how Tried.*

But note that 21 E. 3. 25. ſuch Plea is ſometimes, and by ſome, eſteemed to make Delay, which is the beſt Law, by the Reporter; and there (as it ſeems) the Plaintiff may return the Things. —— Ibid. pl. 11. cites 22 H. 6. 41. accordingly, That Iſſue ſhall be taken whether the Deliverance is made or not.

1. IN Replevin the Parties were at Iſſue, the *Plaintiff ſaid that he had not yet delivered his Beaſts, and prayed that the Defendant ſhould make Deliverance*; Hulz ſaid that the Deliverance is made already; and Prowſe ſuffered the Iſſue. Br. Gage Deliverance pl. 6. cites 11 H. 6. 16.

2. If the *Plaintiff prays*, That the *Defendant gage Deliverance*, and the *Defendant ſays*, *That the Beaſts were in Pound overt, and there diſtrained for* [illegible] *Damage*, and the *Plaintiff ſays*, *That they are alive, Writ ſhall iſſue to the Sheriff to try it*; and *if it is found that they are alive, Deliverance ſhall be made immediately*; But this ſhall not be tried by 12 in C. B. becauſe the Plaintiff ought not to be delay'd to have his Beaſts when the Property is known to be in him. And the ſame Term after Avowry the Plaintiff pray'd, That the Defendant gage Deliverance; who ſaid, Ut ſupra, that they were dead in Pound overt for want of Suſtenance; and the Plaintiff ſaid, That they are alive, and pray'd *a Writ to the Sheriff to make Deliverance Si conſtare poterit that they are alive*, and it was granted; quod nota. Br. Gage Deliverance, pl. 22. cites 21 E. 3. 63. & 77.

S. P. The Court ſaid, That Dead or Alive will not make a Good Iſſue; But the Plaintiff

3. In Replevin the *Defendant avowed*, and the *Plaintiff prayed* that he be compelled to *to gage Deliverance*, the *Defendant ſaid as to [illegible] of them, that they were delivered by Replevin, and to the reſt that they were dead for Want of Suſtenance*, the *Plaintiff ſaid* that they were alive; *and it was compelled to ſay Alive and Not dead*; and ſo he did, and prayed Writ to the Sheriff,

Sheriff, quod si constare poterit, that they are alive to make Deliverance. Br. Gage Deliverance, pl. 25. cites 22 E. 4. 65.

shall have Writ to make Deliverance, and after Writ was awarded to deliver those which were acknowledged to be alive Et sibi constare &c. that the Allegation of the Defendant be false as to those which are alleged to be dead, viz. That they are alive, then to take in Withernam 2 other Beasts of the Defendants &c. Fitzh. Gage Deliverance pl. 22. cites T. 22 E. 4.

4. In Replevin if the *Beasts of the Defendant* are *taken in Withernam, for Non-delivery of the Beasts of the Plaintiff*, there at the Day *each of them shall give Deliverance to the other, and shall find Pledges severally of the Deliverance*, and *each shall have several Writ of Deliverance*, and it shall not be in one and the same Writ; quod nota; and it is no Plea for the Defendant *to say that the Plaintiff after the Taking, and before the Replevin, struck Part of the Beasts*, for this shall come in by Return of the Sheriff; and to say that the Beasts died in Pound, in Default of the one or the other, this was not Law, but shall come by Return of the Sheriff. Br. Gage Deliverance, pl. 27. cites 13 H. 7. 28. and 16 H. 7. 16. accordingly.

Br. Withernam, pl. 17. cites S. C.

(L) *Return* of Beasts.

1. If a Replevin abates for *False Latin*, or other Cause, which is not the Default of the Party, but of the Clerk, the Defendant shall not have a Return. 3 H. 6. 3.

In Avowry, where the Writ of Replevin abates, the Avowant shall have a Return; for it appears that the Plaintiff has the Cattle Jenk. 124. in pl. 81 —— Replevin was *abated for Variance between that and the Plea*; For the *Replevin was for Cattle* C. and the *Plea was for Cattle* H. and the Defendant prayed Return, and could not have it. Br. Return de Avers pl. 14. cites 41 E. 3.

2. If a Recaption abates by Death of the Plaintiff, the Defendant shall not have a Return. 11 H. 6. 24. b.

But in Recaption, if the *Plea* stays for the Defendant, he shall have Return; quod nota bene. Br. Return de Avers, pl. 34. cites Fitzh. Recaption 5 & 7.

3. In a Replevin, if the Defendant makes a Justification, and does not avow, he shall not have any Return of the Cattle.

S. P. Tho' his Plea is found for him. Br. Return de Avers pl. 22. cites 15 E. 4. 20. ——— S. P. 9 E. 3. 33. b. Per Littleton. ——— *Contra if he makes Conveyance for Justification*; quod nota bene. Br. Return de Avers, pl. 26. cites S. C. — [Quære, And it is so in the Year-book.]

In Replevin the Defendant cannot avow or justify, at his Election, but if he justifies he cannot have a Return as he could, if he had avowed. 3 Lev. 224, 225. Mich. 39 Car. 2. C. B. Amesbury v. Harvey.

4. If a Bailiff in Fee justifies, makes a Justification, and not any Conusance in the Right of his Master, he shall not have any Return. 9 E. 4. 33. b.

5. In a Replevin against Master and Servant, and the Servant comes and avows the Taking in the Right of the Master, and after the Master comes and justifies the Taking, *In this Case the Avowry of the Servant is not to stay Judgment*; for it appears by the Plea of the Master, that he will not have a Return, but that he only makes a Justification to excuse him of Damages. 35 H. 6. Avowry 47. *Per Curiam.*

In Replevin against the Master and Servant, the one avows for the Taking, and the Plaintiff prays Process against the other, and Process issues, and the other makes Default, and the Court denies it; for he is out of Court by Reason that the other has justified for him; quod nota per Cur. Br. Avowry, pl. 33. cites 21 E. 3. 5.

6 L

[illegible] Master and Servant make Avowry together, the Master [illegible] and is taken only as a Continuance. 35 H. 6.

S. C. cited [illegible] Replevin against the Master and Bailiff, or Servant, if by Ex[illegible] takes Conuſance as Bailiff, and the Matter pleads that he did [illegible] he ſhall not have any Return upon his Conuſance, 2 [illegible] the Matter, his Conuſance is void, [illegible] 15 E. 3. Mayory 107.

Br. Retorne de Avers, pl. 21 S. P. cites 22 H. 6. 53.

2. Replevin of a Taking in L. in T. the Defendant ſaid that L. is in [illegible] in T. Judgment of the Writ, and to have Return made known, and the Plaintiff was compell'd to maintain that L. is in T. and the other contra. Br. Replevin, pl. 7. cites 41 E. 3. 4.

Br. Retorne, pl. 8. cites S. C.

9. Where the *Tenant offers the Rent or Amerciament at the Time of the Diſtreſs made, or after the Diſtreſs taken*, and the *Lord refuſes it*, there he ſhall have Return; quod nota. Br. Retorne de Avers, pl. 11. cites 45 E. 3. 5.

Br. Surety, pl. 24. cites S. C.

10. Homine Replegiando was brought by 3, Et per Cur. *they ought not to join*; by which they were not ſuffered to count, and were [illegible] and the Defendant prayed to have Deliverance or Return of them, and could not have it, becauſe they ſhould have found Mainprize to ſue with Effect, and therefore may have Execution againſt the Mainpernors, if &c. Br. Retorne de Avers, pl. 14. cites 8 H. 4. 24.

11. W. ſues a Replevin, H. removes it by a *Recordare* into the King's Bench; the *Plaintiff does not declare*, and upon that a Return awarded to H. The Sheriff thereupon returns *Nichil cepit*, and then a *Withernam* was awarded and executed, and now comes the Plaintiff and *prays to declare*, and prays a Deliverance of the *Withernam*. And it was tendred to the Court by the Clerks, That upon *Submiſſion of the Party* [illegible] *declaring*, and that impoſed upon him by the Judges, he ſhall have Deliverance of the *Withernam*, and ſhall declare. And now a Fine of 3 s. 4 d. was impoſed upon the Plaintiff, and then he declared and had Deliverance. Note, The Courſe of the King's Bench is contrary to that of the Common Bench. Noy 50. Webb v. Hind.

12. The Defendant can have no Return where the *Writ is ill*, tho' the *Return is ill*; and therefore the Replevin was quaſhed without Judgment for a Return. Show. 99. Trin. 2 W. & M. Allen v. Darby.

13. In Replevin for *Beaſt*, if *Money be brought into Court* by Plaintiff, and *accepted by Defendant*, yet a Return ought to be awarded, and the Plaintiff may take Advantage of the Money's being taken out, as he can. 12 Mod. 354. Paſch. 12 W. 3. B. R. Hern v. Laines.

14. If Cattle be *taken in Withernam by Way of Execution* in Replevin, the Plaintiff thereby gains an abſolute Property in them, [illegible] of his own, *Quære* where the Withernam *is a Diſtreſs*. Per Holt, Ch. J. 12 Mod. 428. Mich. 12 W. 3. B. R. in Caſe of More v. Watts.

As if the Defendant *claims Property*: For ſince the Taking or Property is in Queſtion the Law deems it reaſonable, that the Defendant ſhould [illegible] again during the Diſpute. 2 Salk. 581. in the Caſe of Moor v. Watts.

15. *Alias Pluries Withernam* if the Defendant [illegible] he ſhall have his Cattle again, and even a *Capias in Withernam* [illegible] in the Caſe of Moor v. Watts.

(M) Return of Deaths. *In what Cases without Avowry made, and what Not.* [*or upon a Bad Avowry.*]

1. IN Replevin or Deceipt if the Plaintiff be nonfuited the Defendant ſhall have a Return generally, without making Avowry. * 9 H. 6. 4. b. Cited. 11 H. 6. 5. b. 14. b.

S. P. Per Brown; *Ibi* it ſeems *that* [illegible] *Avowry* [illegible] *and Pledges found to have Return, &c.* Br. Retorne de Avers, pl. 20. cites 22 H. 6. 45. [illegible] Retorne de Avers, pl. 5. cites S. C. —— but Br. Ibid. pl. 5. is, That a Plea removed was by Certiorari nus Cantarine Beate Marie de Dale cui [illegible] de averſis eorundem for Default of Surname the Plaint was abated, and Return awarded. Avowry [illegible] Contr. upon Nonſuit in Replevin; Quod nota Diverſity where the Plaintiff and the Writ is [illegible] and where the Plaintiff is nonſuited; cites 22 H. 6. 30. —— [But Quere as to this Word (Nonſuit) and a Difference founded thereupon For in the Year-Book there is no ſuch Word, but Diſſeiſance [illegible] between the Plaintiff's being named in the Plaint and not in the Writ; for if the [illegible] and named in the Plaint, tho' not in the Writ, a Return would not have been awarded without making Avowry. See 22 H. 6. 3. b. pl. 22. and ſee if Brooke is not miſtaken in a Correction of (Nolunt) in his MS. the Word (Nonſuit) being in all the Editions.]

If the *Plaintiff in Replevin be nonſuited before the Court*, the *Defendant ſhall have Return with the Avowry*; and if before the Court, he ought to make Avowry; Per Brian Ch. J. Ad quod non fuit reſpondum. Br. Retorne de Avers, pl. 33. cites 21 E. 4. 64.

2. [But] if in Replevin the Defendant abates the Writ by Plea he ſhall not have Return without Avowry made. 9 H. 6. 4. b. Cited.

S. P. Br. Retorne de Avers, pl. 22. Cites 22 H. 6. 24. —— Br. Replevin, pl. 3. S. P. —— Br. Retorne de Avers, pl. 3. cites S. C. —— S. P. But if the Avowry made by the Defendant in ſuch Caſe be inſufficient, tho' the Writ be abated, yet he ſhall not have Return. Per Cur. Cro. b. 333. Trin. 7 W. 3. B. R. Long v. Kelſall.

In Replevin the *Writ was abated for Exception pleaded to the Count*, becauſe *no Place* [illegible] was put; and yet the Defendant was [illegible] to make Avowry *for he cannot be nonſuited* [illegible] per Priot, always where the Writ abates by Plea, the Defendant ſhall have Avowry for Return; and ſo he did here. Br. Retorne de Avers, pl. 6. cites 25 Ed. 3. 42. —— Br. Avowry, pl. 120. cites S. C.

But if the [illegible] *Words in Interment of the Count after Replevin made*, as it is *from the Goods of A*, the *Writ ſhall abate*, and the *Defendant ſhall have Return with the Avowry*; For when the Writ is abated there remains no Original upon which Return may be awarded. Per Pigot; quod Fairfax concedit. Br. Retorne de Avers, pl. 33. Cites 21 E. 4. 64.

In Replevin the Writ abated and the Defendant did not avow to have Return; yet it was held, That Return ſhould be awarded in ſuch Caſe and *in every Caſe where it appears that the Defendant is in Poſſeſſion of the Goods* &c. ſo they be delivered by Replevin. Cro. J. 519. Sallead v. Stocton. cites 39 H. 6. 35.

In an Avowry if the Defendant ſays, That the *Property is in a Stranger*, abſque hoc that ever was the Plaintiff's, this is good Iſſue in Bar or Abatement; and the Defendant ſhall not have Return of the Goods; tho' it be found for the Plaintiff's the Avowant is to have a Return. 2 Lev. 201. Mich. 25 Car. 2. B. R. Wildman v. North. —— Vent. 2. 30. Wildman v. North. —— 3 Keb. 220, 221.

The *Reaſon* [illegible] *matter Matter is pleaded in Abatement* that the Defendant ſhall not have a Return without making Avowry; is it the Plea be *Right in antre bon*, becauſe the Plea in it ſelf does not contain any Matter for a Return; for tho' it may be true, yet the Taking may be tortious. But where the *Plea in Abate* [illegible] *Return*; As *Property* of his [illegible] Plea in Abatement he need not make Avowry, for [illegible] good Cauſe for a Return, becauſe he had no Right or Property. Cro. Eliz. 444. Trin. 4 W. & M. B. R. [illegible] —— S. C. —— 1 Salk. 94. S. C. —— 5 Ch. cited Ld. Raym. Rep. 207. Pl. 8. 9 Mod. 3. in the Caſe of Parker v. Mellor; and Holt Ch. J. ſaid, He remember'd it, and that Return was granted there becauſe the Plaintiff had not any Right to the Cattle; and he cited 39 H. 6. 35. where, tho' the Avowry was ill, yet the Plaintiff having no Right a Return was granted. — Cath. 398. Parker v. Mellor. S. P.

3. In Replevin if the Defendant ſays, That he took in other Place, and that it is ancient Demeſne, and avows in this Place, and it is found for him, yet he ſhall not have a Return; Becauſe of this Taking the Court cannot take Conuſance. 21 E. 3. 7. 51. b.

S. P. (G) pl. 1. S. C. —— The Plea of taking them in a ſeveral Liberty

goes to the Juriſdiction of this Court. Br. Retorne de Avers, pl. 16. cites 21 E. 3. [illegible]

4. If Avowry be for diverse Causes, and some are found against him, yet if any are found for him, he shall have Return. 5 H. 7. 13.

He shall have Return of the Whole, and yet shall render Damages for the same Taking. Br. Damages, pl. 4. cites 2 H. 6. 2. — S. P. Br. Avowry, pl. 6. cites 2 H. 6. 1. & 2 H. 6. 24.

L. P. R. 167. S. P. cites 21 Car. B. R. For thereby it appears that he has good Cause to distrain — If Avowry be for Rent, and one is found for the Defendant and the other against him, he shall have Return; but where for more and for the Plaintiff, he shall recover Damages; otherwise Lut. Br. Avowry, pl. 25. cites 44 E. 3. 15. by Curiam.

S. P. Br. Avowry, pl. 6. cites 2 H. 6. 44.

5. [So] if a Man avows the Distress of one Horse for a Rent-Service and Rent-Charge, if it be found that the Rent-Service is arrear and not the Rent-Charge, yet he shall have a Return, for the Avowry was intire. 2 H. 6. 4.

S. P. Br. Avowry, pl. 6. cites 2 H. 6. 1. — Br. Return de Avers, pl. 1. cites 8. C. — Br. Avowry, pl. 6. cites 2 H. 6. 1. — Br. Return de Avers, pl. 1. cites 8. C.

6. So if Avowry be for Rent-Service due at several Days; that is to say, So much at such a Day &c. if some be found for him and some not, he shall have Return. 2 H. 6. 3. 11 H. 6. 5.

Br. Avowry, pl. 6. cites 2 H. 6. 1. — Br. Return de Avers, pl. 1. cites 8. C. — Quære where the Lord distrains 2 Horses, one better than the other, and avows the one for the one Rent-Day and the other for the other Rent-Day, not mentioning which is for the first and which for the second Day; if the one is found against him and the other for him; Quære of which Horse he shall have Return. Br. Avowry, pl. 6. cites 2 H. 6. 1. — Br. Return de Avers, pl. 1. cites 8. C.

If Diversity between Horses, and I have Cause for the one of them and not for the other; if I distrain for any one of them I shall have Return for but 1, cites Hob 133. Fitz. If I distrain 2 Horses, one for Trespass and the other for Rent; the Justifying for one shall have Return for one only, and the Plaintiff shall recover Damages for the other. 12 Mod. 552 in the Case of Horn v. Lunes.

7. In Avowry for a Beast for Damage feasant, if diverse Pleas are pleaded, and several Issues taken, if one Issue be found for the Plaintiff and another for the Defendant, the Defendant shall have a Return. Dubitatur. 27 E. 3. 86.

Hob 133. pl. 177. Howel v. Sambach.

8. In Replevin if the Defendant avows for Rent & Nomine Pœnæ, and it appears that he has no Cause of Avowry for the one, by much the Avowry is to abate as to that, yet it shall not abate at all, but he shall have a Return. B. 10 J. B. Per Curiam.

Br. Avowry, pl. 118. cites S. C. that Defendant shall have Return —

9. If Avowry be made for Rent-Service due at 2 several Days, and it appears that one of the Days is not yet come, all the Avowry shall abate; because he is an Actor, and all this appears by his own Pleading. Contra 11 H. 6. 5.

So, Br. Return de Avers, pl. 1. cites S. C. accordingly, Per Danby, Newton, Paston, and Strange; But Cur. Fitz. Trin. 5 Jac. where a Man brought Debt of a Sum due at 2 Days, and the one is not come, this shall abate. For false in Parcel goes to all there; quod nota. But per Martin, Cottesmore, Jay & Jellet, the Plaintiff shall have Return in the Case supra; therefore Quære.

All the Matter of Fact in Bar to Part, or Justification to Part, shall serve for this Part; For the Defendant is to make Avowry to all Intents to be as a mere Plaintiff. Br. Barre, pl. 68. cites 11 H. 6. 5. — S. P. Saund. 63. in the Case of Duppa Executor of Batherville v. Mayo, cites 1 Rep. Godb. 301.

It was held in Error, on Judgment in C. B. in such Case that the Avowant before Justices of Nisi prius should have abated his Avowry, Quod the Michaelmas Rent not then due, and taken Judgment for the rest. But the Defendant getting his Avowry amended in C. B. the Roll was remanded. Error cont'd. 2 Salk. 580. Richards v. Cornforth — 5 Mod. 305.

10. But if the Avowry be for some Beasts for Rent due at one Day, and for other Beasts for Rent due at another Day; if it appears by the Avowry that one of the Days is not yet come, yet the Avowry shall not abate, but he shall have Return of the Rent due. 11 H. 6. 5. B.

11. Avowry [Replevin] against 3; one comes, and this one only makes the Avowry, and the other 2 say nothing, nor was any Proceis made or continued against them; and he avow'd for himself only, and avow'd the Taking

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in D. where the Plaintiff counted in S. He ſhall not have a Return in this Caſe without Avowry. Br. Avowry, pl. 33. cites 49 E. 3. 24. Per Perle and Kirton.

12. *Plaint is removed* out of the County into Bank *by Pone by the Defendant*, and *at the Day the Plaintiff is demanded*, and does not come. *Nonſuit* ſhall be awarded, and the Defendant ſhall ſue Return if he will. Br. Retorne de Avers, pl. 19. cites 21 H. 6. 50.

In ſuch Caſe if the Plaintiff is Nonſuit *without Default*, the Defendant ſhall ſuggeſt what Cattle he took, and ſhall have Return. Paym. 55. 15 Car. 2. B R. Mich. Anon.

13. In Replevin the Plaintiff declared &c. the *Defendant ſaid, That the Property is* in *W. N. and not in the Plaintiff, and made Avowry to have Return*, and the *Iſſue paſſed for him the Property, and* it appears that *the Avowry is not good*, yet per Priſot, the Defendant ſhall have Return without Avowry in this Caſe, becauſe the *Plaintiff has no Property, and* the *Defendant had the firſt Poſſeſſion of the Beaſts*. Br. Replevin pl. 31. cites 39 H. 6. 35.

Contra if the Iſſue had been upon the Plaint and found for the Defendant, that the Plaintiff ſhall recover, and the Defendant ſhall not have Return; For the Defendant *has not denied the Property in the Plaintiff*, of which Beaſts he ought not to have Return but upon good Avowry; and ſo ſee *always where the Defendant pleads in Bar*, the Defendant *ſhall make Avowry to have Return*. Ibid. —— Br. Retorn de Avers, pl. 28 cites S. C. but adds a Quere.

14. A Man was *diſtrained for* 20 *Sheep*, and the *Party ſued Replevin*, and *he who diſtrained alleged Plaint in Court of a Freehold to have the ſame Sheep attached by Cattle, to the Replevin ſhould not be thereof made*, and the *Sheriff returned it*, and the *Plaintiff prayed Superſedeas for him and his Chattles by Reaſon that this Court had the Ancient Seiſin*; and the Opinion was, That he ſhould not have Superſedeas for his Goods but for his Perſon only; but per Laicon, He ſhall have Superſedeas for both; And by ſeveral, He ſhall have Certiorari of them. Br. Replevin, pl. 50. cites 16 E. 4. 8.

15. In Replevin, the *Plaintiff was nonſuited*, by which the *Defendant had Return*, and after the *Plaintiff replevied them again by Plaint, where he ought to have had Second Deliverance*, and the *laſt Plaint was removed by Recordare*, and the *Defendant prayed the Writ* to the Court, *and* becauſe the Deliverance was made againſt the Law he *prayed Return, and had it without making Avowry*, inaſmuch as the Deliverance was without Authority, and he *ſhall return to the Plaintiff for Second Deliverance, and there he ſhall make Avowry*. Br. Retorne de Avers pl. 32. cites 21 E. 4. 6.

Br. Replevin, pl. 44. cites S. C.

16. And where a *Man diſtrains* 2 *Oxen*, the *Plaintiff removes the Plaint, and declares but of one Ox*, the *Defendant ſhall ſue the Matter that he took* 2, *and avow for both*, and ſhall have Return of both. Quod nota. Ibid.

S. P. For otherwiſe the Plaintiff by his Plaint ſhall deceive the Defendant. Br. Replevin, pl. 44. cites S. C. —— S. P. Ibid. pl. 55. cites S. C. and 22 E. 3. Fitzh. Retorne des Avers, pl. 22.

17. In Replevin, the Plaintiff *counted of a Taking of* 10 *Beaſts*, and the *Defendant avowed for* 20 *for Damage feaſant*; and becauſe the Plaintiff had Replevin of them, he prayed Writ to the Sheriff to make Deliverance of them, of which he has not declared Si conſtare poterit that Replevin of them was made and had it in C. B. Br. Replevin. pl. 32. cites cites 1 H. 7. 12.

The Defendant may avow for all, or for the 10 complained in his Plaint only at his Pleaſure; quod nota. Ibid. pl. 27. cites 14 H. 7. 1. ——* S. P. Br. Retorne de Avers, pl. 9 cites 55 H. 6. 40.

18. The Lord avows the taking of *one Mare*, as *for Rent* behind, ſo [*and a Writ*] *for the 4th Part of a Relief*, and does *not expreſs the Sum* nor

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the Relief, and *for the Rent* the *Plaintiff pleads Tender*, and *demurs for the Relief*, because he had not expreſs'd the Sum, and because he had diſtrained one Thing for the Rent and Relief, pretending that if one Cauſe paſs againſt him, and another for the Avowant, that he could not have a Returno Habendo; but the Court were of a contrary Opinion. Brownl. 174. Hill. 12 Jac. Rot. 3400. Pain v. Maſcal.

19. But if *two Men diſtrain one and the ſame Mare for two ſeveral Cauſes*, and *one has Judgment for himſelf, and the other for himſelf*, in this Caſe no Returno Habendo can be made of the Mare. Brownl. 175. Pain v. Maſcal.

Lat. 12. S. C. in totidem Verbis —— * D. 41. b. pl. 6. That the Writ of Second Deliverance is to no other Purpoſe but to revive the firſt Plaint, and is a Superſedeas of the Writ of Returno Habendo; Cited by Keilway as 22 H. 7. and that he had the Report of the Caſe. —— Keilw. 92 b. pl. 7. —— S. P. 1 Salk 95. pl. 6. Trin. 13 W. 3. B. R. Pratt v. Rutlidge. —— 12 Mod 547. S. C. and S. P.

20. In a Replevin, the *Plaintiff was Nonſuited*, and the *Defendant had a Returno Habendo*, and a Writ of Inquiry of Damages; and the *Plaintiff brought* a Writ of *Second Deliverance*. Per Cur. This is a * Superſedeas to the Return. Palm. 403. Paſch. 1 Car. B. R. Anon.

(N) Returno Habendo.

1. THE Writ of Returno Habendo is not Returnable.

2. *Withernam is delivered to the Plaintiff of the Goods of the Defendant*, and the *Defendant has not Day in Court*, nor would the *Plaintiff make Plea*, the Defendant *ſhall have Audita Querela; for he cannot have Returno Habendo*, becauſe he has not Day in Court. Per Holt J. Quære Br. Withernam, pl. 12. cites 44 Aſſ. 14.

(N. 2) Return. The *Effect* thereof *as to* the *Thing ſued for*.

1. IN *Replevin*, the *Defendant avowed for Rent*, and Return [illegible] *he cannot have Scire facias upon this* [illegible] *the Rent*; for the Judgment is no more than [illegible]; and if he takes the Return of the Beaſts, and they after die in Pound in Default of the Plaintiff, the Defendant has no Remedy but to diſtrain again. And ſo ſee that the Return is not Execution of the Rent, *but only a Pledge for the Rent, in which he has no Property*; for if it was an Execution for the Rent, he ſhould have Property. Br. Executions, pl. 46. cites 21 E. 3. 21, 22.

(O) * Return

(O) * Return *Irreplegiable. In what Cases* it ſhall be *againſt Plaintiff* in Replevin. At the Common Law.

* Note per Derby Arguendo in Debt, and not denied, That if a Man has *Return* adjudg'd for him *irrepleviable*, it *is not Satisfaction for the Time for which it is awarded*, but he *ſhall hold it till he be ſatisfied*; and from hence it ſeems that he has no Property in them. Br. Retorne de Avers, pl. 6. cites 33 H. 6. 48.——*And if the Plaintiff after this tenders ſufficient Amends, and the Defendant refuſes it*, the Plaintiff ſhall have Writ of Deliverance. Ibid.

1. If the Plaintiff makes Default after Iſſue, and the Array tried, the Return ſhall be † repleviſable. 2 H. 4. 23. 24 E. 3. 33. Ad judged.

† The Defendant could not have Return irreplevisable, becauſe it was the firſt Nonſuit, but had ſecond Deliverance. Nota. Br. Retorne de Avers, pl. 24. cites 24 E. 3. 34.——[All the Editions of Brook are 24 E. 3. 34) but it ſhould be (33) as in Roll, and is 24 E. 3. 33. a. pl. 22.

2. When the Jury comes to give their Verdict, if the Plaintiff in the Replevin be Nonſuited, the Return ſhall be repleviſable. 2 H. 4. 23. Br. Retorne de Avers, pl. 12. cites S. C. and the Plaintiff was put to his Suit in Second Deliverance.——It was agreed by the Court, That if a Man in a Replevin pleads, and they *are at Iſſue*, and the *Jury is charg'd*, and gone from the Bar, and returns to give their Verdict, and the *Plaintiff is Nonſuit*, there Return irrepleviſable ſhall not be awarded, as in Caſe if a Verdict had been given, but the Party may have a Writ of ſecond Deliverance, as well as if he had been Nonſuit before Declaration or Appearance. 3 Le. 49. pl. 70. Mich. 15 Eliz. C. B. Anon.——S. P. *But of Nonſuit after Verdict, or upon Judgment given upon Demurrer in Law, there Return ſhall be awarded irreplevisable*; quod nota. Brook ſays the Reaſon ſeems to be inaſmuch as upon Nonſuit given after Verdict Judgment ſhall be given, as if no Verdict had been. And ſo ſee that he ſhall have Return, but not irreplevisable. Br. Retorne de Avers, pl. 23. cites 14 H. 6.

In Replevin, if the Plaintiff be *Nonſuited after Avowry*, or after *Iſſue joined*, or *before*, all is one, and the Defendant *ſhall not have Return irreplevisable, but only Return*; quod nota per Cur. Br. Retorne de Avers pl. 7. cites 34 H. 6. 5.

3. If after Iſſue the Plaintiff makes Default at the Day of Niſi Prius, the Return ſhall be repleviſable. 4 H. 6. 8. b.

4. If the Plaintiff in a Replevin be Nonſuited, and the Avowant has a Return awarded, but before Execution the King dies, and in the Time of the next King the Avowant ſues a Writ to warn the Pledges to ſhew Cauſe why he ſhall not have Return, and the Sheriff returns that he was warned, and did not come, by which a Return is awarded, yet it ſhall be repleviſable. 1 E. 3. 9. b. Br. Retorne de Avers, pl. 12. cites 2 H. 4. 25. That it was ſaid by the Clerks of the C. B. that a Man ſhall not have Return irrepleviſable, but in Caſe of the Statute upon Nonſuit in the Second Deliverance, or upon Return awarded for ſome Cauſe in Second Deliverance &c. [As in the Pleas following.]

5. If an Inqueſt paſſes againſt the Plaintiff, the Return ſhall be * Irrepleviſable at the Common Law. 2 H. 4. 23. 4 H. 6. 28. *At the Common Law* Return irrepleviſable *was not granted but where the Iſſue was tried againſt the Plaintiff*, and the *Statute does not give Return irrepleviable, but where Return was once awarded before*, that then he ſhall have only Writ of Second Deliverance, upon which, if he made Default at another Time, viz. upon the *Second Nonſuit*, the Defendant ſhall have Retorne irrepleviable. Per Bab. quod Curia conceſſit. Br. Retorne de Avers, pl. 25. cites 4 H. 6. 8.——* i. e. That he ſhall have the Diſtreſs as a Pledge till all the Rent &c. avowed for be paid &c. 2 Salk. 580. Per Cur. Mich. 9 W. 3. B. R. in Caſe of Richards v. Cornforth.—See (K) pl. 3. S. P.

6. So if it be adjudged againſt the Plaintiff upon Demurrer. 2 H. 4. 23. If the Plea be to the Writ, or any other Plea, be *tried by Verdict, or judg'd upon Demurrer*, Return irrepleviſable ſhall be awarded, and no new Replevin ſhall be granted, nor any ſecond Deliverance by the Act of Weſtm. 2. but only upon a Nonſuit. 2 Inſt. 342.

7. [illegible] per Cur. unless in Case of the Statute of W. 2. [illegible] Judgment [illegible] 2. 2 D. 4. 23.

8. Second Deliverance *against an Abbot and Monk*, the *Plaintiff did not come*, and they prayed Return irrepleviable. Per Cur. this *cannot be granted to Commonalty*; Quod nota. Br. Retorne de Avers pl. 18. cites 21 E. 3. 32.

9. In *Second Deliverance*, the *Sheriff returned no Writ*, and the *Defendant averred and proved that the Plaintiff Count* against him, which *Plaintiff made Default*, and therefore the *Defendant prayed Return irrepleviable*, and could not have it, but Sicut alias, notwithstanding they have Day by the Roll. Br. Jours pl. 18. cites 49 E. 3. 2.

Br. Retorne de Avers pl. 18. cites S. C. ——— In a Replevin the Defendant *makes the Avowry*, &c. for a Return *Habendo*, *says, That the Queen* was *seised* of the Manor, *and leased to him*; the Plaintiff demurred, because he ought to have shewn what Title the Queen had. Curia the Plea is in Abatement of the Writ, and the Avowry Pro Retorn' Habend' is not traverfable, and it is good *without title shewn*; and afterwards the Court gave Judgment, That the Writ and Count should abate, and that the Avowant should have a Return irrepleviable. 2 L. P. R. 458. cites Pasch. 5 W. 3. B. R. Long v. Gelder.

10. In Replevin the *Defendant pleaded in Abatement of the Writ* that the Property is in the Plaintiff and another &c. and the *Plaintiff confessed it*, by which the *Writ abated by Award*, *and Return awarded* to the Defendant, yet there the *Plaintiff shall have New Replevin*, and the Return shall not be irrepleviable; For the *Statute of Weſt. 2. cap. 2. does not remedy false Writs, nor Abatement of the Writs in Replevin*; But that the Plaintiff may have new from Time to Time; but it remedies Nonsuit in Replevin, ſo that if the Plaintiff be nonsuited, he ſhall never have New Replevin, but Writ De Judicio viz. Second Deliverance; *but upon Plea to the Writ* if it be *tried againſt the Plaintiff by Verdict*, the Defendant ſhall have Return irrepleviable as well as upon a Bar. Contrary it ſeems of a *Demurrer upon Plea to the Writ*; Quod nota Diverſity. Br. Replevin pl. 6. cites 34 H. 6. 37.

Br. Second Deliverance pl. 15. cites S. C. ——— By the Nonſuit in the 2d Deliverance, the Defendant ſhall have Return irrepleviable, which is a Bar in the Law. Br. Second Deliverance, pl. 1. cites 19 H. 6. 11.

11. If a Man be *nonſuited* in Replevin, *and Return is awarded*, and the *Plaintiff ſueth Writ of 2d Deliverance, and ſuffers it to be diſcontinued*, Return irrepleviable ſhall be awarded as well as if the Plaintiff had been nonſuited in the Writ of 2d Deliverance. Br. Retorne de Avers pl. 37. cites 17 H. 8.

12. *At the Common Law* if the *Plaintiff* in the Replevin had been *Nonſuit either before or after Verdict*, the Defendant, who diſtrained, ſhould have had Return but not irrepleviable; ſo as the Plaintiff after Nonſuit *might have had as many Replevins as he would* which was vexatious and miſchievous, for Remedy whereof the Act of Weſt. 2. cap. 2. reſtrains the Plaintiff from any more Replevins after Nonſuit, but gives a Writ of Second Deliverance. 2 Inſt. 340.

13. If the Writ of *Replevin abates for Want of Form in Default of the Clerk*, the Defendant ſhall not have Return at all. *But* if it abate *for Matter appearing by Miſ-information, or other Default of the Plaintiff*, the Defendant ſhall have Return but not repleviable [irrepleviable] 2 Inſt. 340.

14. *But* if the Defendant pleads a *Plea to the Writ*, and the *Plaintiff confeſſes it*, then the Plaintiff ſhall have Return, but not irrepleviable: For the Plaintiff *may have a New Writ of Replevin*; For the Act of Weſt. 2. only gives Remedy in Caſe of Nonſuit. 2 Inſt. 340.

15. If the Plaintiff, in the Second Deliverance be *nonſuited*, *or* if the *Plea* be *diſcontinued*, *or* the *Writ abates*, *or* if he *prevails not in his Suit*, Return irrepleviable ſhall be granted. 2 Inſt. 341.

(O. 2) Re-

(O. 2) *Return by Sheriff*, good or not.

1. THree brought Writ of *Homine Replegiando by their Friends*, and the *Sheriff returned that the Defendant claimed them as his Villeins regardant to his Manor of Dale, by which he cannot make Replevin*; and a good Return; quod nota, Claim of Property. Hull bid them find Surety to have them here at a certain Day, and you shall have Writ to the Sheriff to deliver them. Skrene prayed Writ that the Sheriff may take Surety in Pais, and could not have it. Br. Replevin, pl. 49. cites 8 H. 4. 2. Br. Retorne de Avers, pl. 13. cites S. C.

2. *But* T. 32 E. 3. the *Sheriff returned* in such Writ, *Quod mandavi Ballivo Abbatis de B. who returned that he who was taken was a Villein to the Abbot, Et ideo non potuit deliberare eum.* And it was held no Answer, and *Non Omittas was awarded*; quod nota. Ibid. Br. Retorne de Avers, pl. 13. cites S. C.

3. In Replevin at the Pluries, the Sheriff *returned that the Beasts were lockt up in a Park among Savages; so that he could not replevy them*, and therefore was *amerced*, and other Writ awarded to the Sheriff to make Deliverance; for he *ought to have taken the Posse Comitatus* to make Deliverance, as well as if it had been in a Castle or strong Place. Br. Replevin, pl. 17. cites 8 H. 4. 19. F. N. B. 68 (G) in the new Notes there (a) cites S. C. For it was a Denial.

4. In *Replevin* the Sheriff return'd *Quod nullus Venit ex Parte Querentis ad Demonstranda sibi Averia, by which he did nothing*; and it was doubted if this be a good Return or not. Br. Retorn de Briefs, pl. 5. cites 28 H. 6. 7. And such a Return was made [illegible]

the Pluries, and he return'd further, *Quod nulla alia brevia inde ad manus suas devenerunt* [illegible] fore ill, and he was amerc'd. Ibid. —— *For it is a Contempt if one Writ comes, and he returns Quod nulla alia brevia* &c. and it was said that the rest is no good Return, but it is [illegible] this by the Reporter, as it seems, for it is only a Note. Ibid. —— S. P. D. 188. pl. 12. [illegible] Eliz. Anon.

5. In Replevin *at the Pluries*, the *Sheriff return'd Quod averia Mortua fuit*; and the Opinion of the Court was, That it is a good Return. Br. Retorn de Briefs, pl. 125. cites 32 H. 6. 27.

6. *And if he who has lost his Beasts, and sues Replevin*, the Sheriff may *return the special Matter*. Ibid.

7. In Replevin it is no Return, *That he has no such Beasts*, but may return Quod *averia sunt Elongata*, or Quod *nullus Venit ex parte Querentis ad Demonstranda averia*. Br. Retorn de Briefs, pl. 89. cites 5 H. 7. 27. Where the Sheriff returns Quod *Averia elongata ad loca incognita*,

this is a good Return; *But* if he returns *Ad loca incognita infra Comitatum meum*, he shall be amerc'd; For the Law intends that he may have Notice in his County. Per Jenney. Br. Retorn de Briefs, pl. 100. cites 22 E. 4. 11.

8. It appears by the Register, That if the Sheriff returns upon the Replevin, Sicut alias or Pluries, *that he has sent unto the Bailiff of the Franchise* &c. who has given him no Answer, or that he will not make Deliverance &c. then the Plaintiff shall have a *Non Omittas* unto the Sheriff, that he enter into the Franchise, and make Return; and if the Sheriff does not do so, he shall have an Alias non Omittas directed unto the Sheriff, and afterwards a Pluries non Omittas &c. But it seems that that Return, Quod mandavi Ballivo Libertatis &c. qui Nullum mihi dedit Responsum, or the Return, *That the Bailiff will not make Deliverance* of the Cattle, are not good Returns; for by the Statute of Westm. 1. cap. 17. in the End of the Statute, it appears, that the *Sheriff*, upon such a Return made to him by his Bailiff, *ought pre-*

ſently to enter into the Franchiſe, and to make Deliverance of the Cattle taken; and ſo it appears the Sheriff may do by the Statute of Marlbridge, cap. 21. If a Plea of Withernam be in the County by Plaint before the Sheriff, and the Sheriff ſends unto the Bailiff of the Liberty to make Deliverance, and the *Bailiff does nothing*, that then the Sheriff Ex Officio may enter into the Liberty without any Writ directed unto him in that Caſe. F. N. B. 68. (F)

9. On a Pluries to the *Sheriffs of London*, they *return the Cuſtom of the City*, that Replevin ought to be made in the Sheriff's Court there, and not by the King's Writ; Et non allocatur, and an Attachment was granted. F. N. B. 68. (G) in the new Notes there (a) cites * Dy. 254.

* This is miſprinted and ſhould be D. 245. pl 67. the Caſe of Hurſt, for Goods taken by Mallory the Lord Mayor of London; who pleaded, That the Cuſtoms of London were ratified by Parliament; but by the Opinion of the Juſtices of both Benches, the Return was held inſufficient; and that another Writ of Pluries Replegiare was awarded to the New Sheriff and Proceſs of Attachment againſt the Old Sheriff, and after the Matter was compounded.