
W. Lee.
W. Fortescue.
J. Willes.
E. Probyn.
F. Page.
Law. Carter.
J. Fortescue A.
W. Chapple.
T. Parker.
M. Wright.
Ja. Reynolds.
Tho. Abney.
T. Burnett.
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.
### TABLE OF THE

#### Several TITLES, with their Divisions and Subdivisions.

- **Commissions.**
  - Who may be. And how to qualify themselves.
  - Their Fees and Allowances.
  - Power of them, and Affignees; as to discovering.
  - As to feizing the Effects.
  - In selling, disposing, and assigning.
  - Bound. By what Act or Agreements of Bankrupt.
  - Liable. What, Settlements or Securities on, or Claims by, Wife or Children.
  - Mortgages or Purchasers. How far affected.
  - Distribution. To Whom; How; and Which.
  - In Case of Partnership.
    - When Debts are due to the Crown.
    - Partners Where one is Bankrupt.
    - How the other shall be charged &c.
    - Creditors. Inter &c.
    - Affignees
      - Suits and Actions by them; and Pleadings &c.
      - Power. As to making Dividends
      - To what Time their Interest reates.
      - Cheek When; How; and by Whom, and How to make the Affignment.
      - Bound by what Agreement &c, by Bankrupt.
    - Punishable or Relieved. In what Cases.
    - Frauds between Bankrupt and Creditors after Commission issued.
    - Purchasers affected. In what Cases.
    - Reward to Discoverers of bankrupts Effete.
    - Concalements of Bankrupt's Effete.
    - Of setting off where there are mutual Debts, and submitting to Arbitration.
    - Demeanor and Crime in bankrupt's not appearing and discovering; and How the Commissioners are to proceed.
    - Bankrupts protected In what Cases.
    - False Claims of Debts, Punishment.
    - Surplus and Allowance.
    - Certificate and Discharge.
    - Discharge. How it affects a Joint Debtor who is not a Bankrupt.
    - Gaoler &c. Punishment.
    - Precedings &c of Commissioners to be recorded.
    - Compositions between Creditors and Bankrupt.
    - And Pleadings thereof.
    - Pleadings and Evidence.
    - Equity.
  - **Cul in Vida.**
    - Who shall have it, and in what Cases.
    - Write and Pleadings.
    - Recovered. What shall be.
  - **Curett.**
    - Tenant by the Curett.
    - Of what Seisin. Actual or not.
    - In what Cases.
    - In Respect of the Issue.
    - Limitation of the Estate.
  - Nature

---

**Table:**

<table>
<thead>
<tr>
<th>Division</th>
<th>Subdivision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court</td>
<td>Customary. Who are Judges.</td>
</tr>
<tr>
<td>County</td>
<td>Court.</td>
</tr>
<tr>
<td>Hundred</td>
<td>Court.</td>
</tr>
<tr>
<td>Jurisdiction.</td>
<td></td>
</tr>
<tr>
<td>Sheriff's Tourn.</td>
<td>Who bound to come to it.</td>
</tr>
<tr>
<td>Jurisdiction.</td>
<td>In Respect of the Thing.</td>
</tr>
<tr>
<td>Place.</td>
<td></td>
</tr>
<tr>
<td>Borough.</td>
<td>What Things it may do.</td>
</tr>
<tr>
<td>Pleadings and Proceedings.</td>
<td></td>
</tr>
<tr>
<td>Inferior Courts.</td>
<td></td>
</tr>
<tr>
<td>Process and Proceedings therein.</td>
<td></td>
</tr>
<tr>
<td>How they must demesn to the Superior.</td>
<td></td>
</tr>
<tr>
<td>Prouit'd or refrained by the Superior,</td>
<td></td>
</tr>
<tr>
<td>and what shall be an admitting their</td>
<td></td>
</tr>
<tr>
<td>Jurisdiction.</td>
<td></td>
</tr>
<tr>
<td>Count. Pleadings and Proceedings.</td>
<td></td>
</tr>
<tr>
<td>The Offence and Punishment of bring-</td>
<td></td>
</tr>
<tr>
<td>ing Actions there where they have</td>
<td></td>
</tr>
<tr>
<td>no Jurisdiction.</td>
<td></td>
</tr>
<tr>
<td>Of removing Causes thence.</td>
<td></td>
</tr>
<tr>
<td>Jumprings therein. When void.</td>
<td></td>
</tr>
<tr>
<td>'s Record remained. In what Cases.</td>
<td></td>
</tr>
<tr>
<td>Creditors Inter &amp;c.</td>
<td></td>
</tr>
<tr>
<td>Creditors and Bankrupt.</td>
<td></td>
</tr>
<tr>
<td>Bankrupt.</td>
<td>Who may be.</td>
</tr>
<tr>
<td>By what Act</td>
<td></td>
</tr>
<tr>
<td>Proof. How.</td>
<td></td>
</tr>
<tr>
<td>Relation of Bankruptcy.</td>
<td>To what Time.</td>
</tr>
<tr>
<td>Commission.</td>
<td>How and when granted.</td>
</tr>
<tr>
<td>What Creditors may obtain it, and</td>
<td></td>
</tr>
<tr>
<td>how, and when.</td>
<td></td>
</tr>
<tr>
<td>Superceded or abated.</td>
<td></td>
</tr>
<tr>
<td>What Creditors, and How, and When,</td>
<td></td>
</tr>
<tr>
<td>to prove their Debts.</td>
<td></td>
</tr>
<tr>
<td>Contingent and future Debts.</td>
<td></td>
</tr>
<tr>
<td>Who must come in as Creditors.</td>
<td></td>
</tr>
<tr>
<td>Creditors. At what Time to come in.</td>
<td></td>
</tr>
<tr>
<td>Of Joint or Separate Commitments in respect of Partners Bankrupts.</td>
<td></td>
</tr>
<tr>
<td>and how to proceed therein.</td>
<td></td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Nature of the Estate.</th>
<th>Of what.</th>
<th>Favour'd. In what Cafes; and of what the Tenant may take Advantage.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Bound by, or liable to what Charges, Prevented or disabled by Act or Default. In what Cæs.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Pleadings in Actions by, or against him.</td>
<td></td>
</tr>
</tbody>
</table>

**Custom.**

In the Negative.
Commencement, and How it differs from Precedent.
What it is; and How established.
Uncertain.
Custom against Custom.
To what Things it shall be said to extend.
Bound thereby, who
The King.
Infants, Idiots &c. by a General Custom.
Who may do Things by Custom, that could not be done by Law. Infants &c. Destroyed, How; and in what Cases Purulence thereof, what Act shall be said to be. Gavelkind.
Pleadings.
Trial of Custom.

**Customs.**

Good.
In Respect of the Estate to be bound.
Gavelkind.
In General.
In Destruction of a Precedent. What shall be.
What are against the Law of Reason. The Land.
Done by Custom. What may be.
Proceedings in Inferior Court. In what Cæs not good.

**Customs of London.**

In General.
What Persons shall be within the Custom. As to Things.
Actions brought there by the Custom. Trialible How; and Pleadings.
Foreign Attachments. Who bound by it; and in the Hands of what Person a Debt may be attach'd. What Debt or Goods. When.
In what Actions.
How the Proceedings may be. Who shall have it, and against whom. Pleadings.
Pleading, a Judgment in Foreign Attachments, in Bar of Action in other Courts.
Defendant arrested. In what Cæs; and when he may be. What Persons shall be within the Custom of London in general.

**Orphans.**

Touching the Custom.
Protected; Favour'd and Relieved.
What Persons are intitled to the Benefit of the Custom, or excluded from it. Initiated to what; and How; notwithstanding any Thing done in Fraud of Custon.

As to the Widow's Part.
Bar thereof, what is. By Settlements &c. &c. And what shall be said an Advancement.

As to the Children's Part, in Case of Sur-
| Debt. | Names. By what Names Things must be
demanded, the Nature of them being charged from what they formerly were, to 
be brought into Issues &c.
Knt. Who shall have Action, and against whom
Pleadings.
The Gift of the Action.
In what cases Debt lies, or Covenant.
Executor.
In what the Action, by Matters Subsequent.
Appointment.
For other Matters
Upon what Judgment or other Record.
For what Thing the Judgment being, it lies upon it And in what Court.
At what Time before Performance of the Consideration.
Where brought.
In what the Deed and Deed. By whom against whom.
In the Deed and Deedins.
In respect of the Thing; and where in the Deed only.
What will be a good Consideration to raise it.
Tho there is not Quidd pro Quo.
Part Where Debt, Covenant, Cafe or Account
lies, without a Contract
Extinguishment thereof. By Acceptance
Or a Higher Thing.
Of equal Altritude
Of a Lower Thing.
In what Cases a Collateral Thing may be given in Satisfaction
What will be a good Bar, by Eviction, Diffiicu 
On Penal Statutes, tho' not expressed in the Statutes
Pleading.
Declaration
In bar of Debt on Judgments.
Nil Debt, or Nil Deed &c.
| Deeds.

Let us what Act or Thing. What shall be said a Takings
Pleadings and Proceedings
Punishment
| Declaration.

Want of Form. And what is Form, and what is Matter.
Good
Certain in what Cases it must be, and what shall be said to be so.
Purposum to a Defective Deed
Without settling forth what will make a valid hemp
Repugnancy or Surplusage
Amended At what Time
Abatement
Necessary. In what Cases
Though Defendant makes Default
De Novo
In what Case the Plaintiff may declare.
Where the second Declaration may vary
from a former.
Double.
Aided by Intendment
As to the Place where the Thing is supposed to be done, there being two several Counties &c to which it may refer.
| Derr. | A | A |

Abridgment of what Parties or not Parties.
What
In what Cases.
Avoided or saved By what and how.
Involvement. And of Caveats to prevent it.
Reversal. Error.
Open or amended.
Performance inferred.

The different Operations of the Several Sorts of Conveyances.
How to be taken where they may operate several Ways; or can't take Effect as the Parties intended.
Operation; whether by Involvement, 
In what Cases and when.
And Pleadings there.
By Demise and Re-demise.
Good Though it cannot take Effect as the Parties intended.
Bargain and sale.
Good of what Estate &c And the Effect thereof.
In respect of the manner, and to whom
What amounts to, or shall be said such.
Involvement
By Statute. And by whom
In what Cases the Deed must be involv'd
At what Time, and where.
How the Estate is, and what Sargency may do before it.
Relation.

Pleadings &c.

Derr. Staining.
Proceedings and Exceptions to Conveyances.
Execution. How.
Aiders and Allieds. Who are.

Debtor.

Appearance
What shall be said to be so.
In Cumberland Marshall.
Notice. How. Good
Demandsable.
Who.
At what Time Parties.
In what Cases.
To what Appearance.
Aided by it; What. Defects in Mefne
Proceed &c.
At what Time, in what Cases a Man may appear where the Proceeds is not served. Where an Inheritance is to be left to other Thing.
Compelled, the Proceeds be not served.
Necessary to what Purposes.
Baron for the Fees. Compellable in what Cases.
Against Return of the Sheriff.
Where upon coming into Court for another Purposes one shall be obliged to Answer in the Cause in Court.
Departure in Delict of the Court.

What
### A TABLE of the several TITLES, &c.

<table>
<thead>
<tr>
<th>K</th>
<th>Pleadings.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Demurrer.</td>
</tr>
<tr>
<td></td>
<td>How.</td>
</tr>
<tr>
<td></td>
<td>What may be done upon or after it.</td>
</tr>
<tr>
<td></td>
<td>Set aside.</td>
</tr>
<tr>
<td></td>
<td>What is a good Case of Demurrer.</td>
</tr>
<tr>
<td></td>
<td>To what.</td>
</tr>
<tr>
<td></td>
<td>Bills.</td>
</tr>
<tr>
<td></td>
<td>In General.</td>
</tr>
<tr>
<td></td>
<td>What of Parties.</td>
</tr>
<tr>
<td></td>
<td>Matter of Law and Want of Equity.</td>
</tr>
<tr>
<td></td>
<td>After Suits elsewhere.</td>
</tr>
<tr>
<td></td>
<td>Length of Time.</td>
</tr>
<tr>
<td></td>
<td>Where it is subject to a Penalty, &amp;c.</td>
</tr>
<tr>
<td></td>
<td>For not setting forth any Title.</td>
</tr>
<tr>
<td></td>
<td>Of Revivor or Review.</td>
</tr>
<tr>
<td></td>
<td>To Answers and Replications, Suppens &amp;c.</td>
</tr>
<tr>
<td></td>
<td>What shall be said in an over-ruling one's own Demurrer.</td>
</tr>
<tr>
<td></td>
<td>At Law.</td>
</tr>
<tr>
<td></td>
<td>In what Cases; And How considered.</td>
</tr>
<tr>
<td></td>
<td>Confessions of Matters of Fact.</td>
</tr>
<tr>
<td></td>
<td>In what Cases it is.</td>
</tr>
<tr>
<td></td>
<td>What is aided by it.</td>
</tr>
<tr>
<td></td>
<td>Duplicity.</td>
</tr>
<tr>
<td></td>
<td>Peremptory.</td>
</tr>
<tr>
<td></td>
<td>In what Cases</td>
</tr>
<tr>
<td></td>
<td>To Write or Declaration. Good.</td>
</tr>
<tr>
<td></td>
<td>To Pleas good.</td>
</tr>
<tr>
<td></td>
<td>Where it makes a Discontinuance.</td>
</tr>
<tr>
<td></td>
<td>Stay of Proceedings.</td>
</tr>
<tr>
<td></td>
<td>To Part and Plea to Part.</td>
</tr>
<tr>
<td></td>
<td>Judgment upon Demurrer upon Plea to the Writ or in maintenance of the Writ.</td>
</tr>
</tbody>
</table>

| G    | Desi.e.                                                                 |
|      | Departure.                                                               |
|      | In Pleading.                                                             |
|      | What is.                                                                 |

| Q    | Dispositions.                                                            |
|      | Read in what Cases.                                                     |
|      | At Law.                                                                  |
|      | Suppressed.                                                              |
|      | Supplied or amended.                                                    |

| R    | Deput.                                                                  |
|      | Made by whom.                                                           |

| S    | Defect.                                                                 |
|      | By Claim of Gavelkind, or Borough English.                              |
|      | To whom.                                                                |
|      | Ancient Manor.                                                          |
|      | To the Heir or Executor.                                                |
|      | By Relation.                                                            |
|      | Who may be and to whom.                                                |
|      | By Way of Preference.                                                  |
|      | By Matter subsequeent.                                                  |

| T    | Bailard and Muiller.                                                    |
|      | By what dying Ei'd the Muller shall be bound.                           |
|      | Who bound by Defect from the Baift rd.                                  |
|      | What shall be an Interruption of the Polifion of Bailard-Eigner.         |
|      | By Relation.                                                            |
|      | To take away an Entry.                                                 |
|      | In what Cases it shall defend, and what shall be Sei'm to take away the Defent. |
|      | Impediment, What                                                        |
|      | In by Defect or Purchafe.                                               |
|      | To take away an Entry.                                                 |
|      | Where the Entry is given by Record.                                    |
|      | Of what Things                                                          |
|      | Ei'ate.                                                                 |
|      | To toll an Entry. Bound thereby Who; and where they claim by the same Title. |

| U    | Defence.                                                                |
|      | In Pleadings.                                                           |
|      | Necessary in what Cases                                                |
|      | The Manner.                                                             |
|      | In what Actions.                                                       |
|      | What may be pleaded after Defence made.                                |

| V    | De Injuria tua Propria.                                                 |
|      | In what Cases it is a good Plea.                                        |

| W    | Demand.                                                                 |
|      | Sufficient, what is                                                    |
|      | Necessary or not.                                                       |
|      | In what Cases. And where.                                              |
|      | Of Things in Real Actions.                                              |
|      | Pleadings.                                                              |
|      | Count, or Declaration.                                                 |
|      | In what Order the several Things may be demanded.                      |
|      | To the Disjunctive.                                                    |
|      | Of divers several Things.                                              |
|      | Of Things of different Natures in one Demand.                          |
(Z) Court Customary. Who are Judges.

1. There is a Customary Court, consisting of Copyholders, or Customaryholders, for without them it cannot be, and this Court may be held without any free Tenant, or other Suitors, besides the Copyholders or Customaryholders, and of this Court the Lord or Steward is Judge. Co. Lit. 38.

(A. a) The Tourn of the Sheriff.

1. The Sheriff's Tourn is incident to the Office of Sheriff. Co. The Tourn is the King's Court, and of Record. 2 Inst. 143.

2. By Magna Charta 9 H. 3. cap. 35. The Sheriff shall keep his Tourn at the usual Place, and that only twice a Year in the Due and Customed Place, viz. once after Easter, and once after Michaelmas.

3. Westm. 2. 13 E. 1. cap. 13. The Sheriffs in their Towns, and elsewhere, when they have to inquire of Malefactors, by the Precept of the King, or of their Office, shall make their Inquests by lawful Men, at least 12, who shall set their Seals to their Inquisitions, and the Sheriffs shall take and imprison those whom by such Inquisitions they shall find Guilty, as they have used to do; and if they shall imprison others, such Persons imprisoned shall have their Action by Writ of Imprisonment against the Sheriff, as against any other Person. And so it shall be observed of every Bailiff of Liberty.

4. 1 E. 3. cap. 17. Sheriffs and Bailiffs of Frankishes, and all others who take Indictments in their Towns, or elsewhere, shall take such Indictments by Roll indented, whereof one Part shall abide with the Indictors, so that one of the Inquests may serve one Part of the Indenture to the Justice, when he shall come to make Deliverance.

5. Indictment was in the Sheriff's Tourn four Days after the Month of Note, that Easter, and it was very much debated, whether the Indictment was void or not, because the Statute says, that he shall lose his Tourn. Br. Indictment, pl. 27. cites 6 H. 7. 2.

After the Month of St. Michael is void; because the Statute is, that it shall be held within a Month after Easter, and after Michaelmas, otherwise he shall lose his Tourn, and consequently, if there is no Tourn, then the Indictment taken after before the Sheriff in no Tourn is void. Br. Indictment, pl. 9. cites 38 H. 6. 7.

6. The Sheriff's Tourn wherein the Sheriff had the Directory, was in the Meeting of the Freemen in several Parts of the County; and this was anciently, and now is called by that Name, which, simply considered, is but a Hundred Court, or the Sheriff's Tourn to keep the Hundred Court. It was ordered to be kept twice every Year, viz. at Ladyday and Michaelmas, or soon after; unto this Court all the Freeholders of the
Court [of Sheriff's Tourn.]

Hundred repaired, and there they, the Bishop and Sheriff, executed the same Power and Work for kind as they did in the County Court. In this Court all the Suits in the Hundred Court depending had their Determination, and others had their Commencement and Proceedings, as well the Pleas of the Crown as others. Some have conceived it to be a County Court, or superior thereto, but there being no Ground thereof, I conceive it to be no other than a Visititation of the County by Parcels or in Circuit. Bacon of Government 66, 67. cap. 24.

(B. a) [Tourn.] Who shall be bound to come to it.

Fifth Leet. 1. If a Man hath a Leet of all the Refiants within the Precinct of his Manor which is within the Hundred, yet these Tenants shall be bound to come to the Sheriff's Tourn. 18 H. 6. 15.

Before the making of this Statute, the Sheriff and the Lords of Leets, did use to amerce Archbishops, Bishops, Priors, Earls, Barons, Religious Men and Women, if they came not to the Tourns, or to the Leets of others, because for Suit Real no Distress can be taken, but for the Amercements for Default of Suit, which this Act doth remedy; for now, seeing it is hereby provided, that the Persons above-named shall not need to come to Tourns &c. therefore for their not coming they cannot be amerced. 2 Inft. 120, 121.

And it is worthy of the King's noble Progenitors, that by the Common Law, Parfons of Churches, that had Curam Animarum, the better to perform their Function, were not compellable to come to Tourns or Leets, and if they were disfrained to come thither, they might have a Writ, Cum fecundum Confessidinem Regni notifi Perfunca Ecclesiasticae ratione Terrarum & Tenementorum eiusmodi Ecclesiae suis annexorum ad veniendum ad Viaum Franc' Preg' in Cur. nostra, vel aliorum quorumcunque &c. whereby it appeareth that this Writ is grounded upon the Common Law, being the general Custom of the Realm; but other Clerks (that be no Parfons of Churches with Cure) under which Name all Ecclesiastical Persons, regular and secular, are contained, if they be disfrained to come to Tourn or Leet, they shall have a Writ respectiing this Statute to be dicharged thereof, which Writ beginneth, Cum de Communi Consilio proviso pro quod Viti Religionis non habeant necesse venire ad Tournum Viccom' &c. 2 Inft. 121.

This Tourn of the Sheriff is Curia Viccom' Franci Preglit, (as it hath been said) and therefore this Act extendeth to all Leets and Views of Frank-pledge of all other Lords and Persons. 2 Inft. 121.

Here Hundred is taken pro Vinu Franci Preglit, so as the Sense is, that he which hath Tenements in the Tourn, and in some other View of Frank-pledge of some other Lord, or in diverse Views of Frank-pledge, he shall not need to come to any other but where he is conversant, and Hundred here are named, because Sheriffs (as hath been said) kept their Tourns in every Hundred. 2 Inft. 122.

Here Bailiff is taken for the Tourn or Leet where he is conversant. 2 Inft. 122.

6. Tenants
(C. a) The Jurisdiction of the Tourn. In respect of the Thing.


2. As an Assault made upon a Man, is not inquirable there, because it is but a Tort to a particular Person, of which Trepass lies. 4 D. 6. 10. cites S. C. & S. P. by Martin. Br. Leet pl. 15. cites S. C. & S. P. by Martin, and yet he agrees to the contrary of Affrays, and therefore Brooke says, Quære of Assaults; for the Law seems the fame of the one as of the other. Fitzh. Tourn de &c. pl. 1. cites S. C. Br. Prefentment in Courts, pl. 17. cites S. E. 4, 5. that the Sheriff cannot inquire of Assault in his Tourn, and if he may inquire of it, the Defendant shall not have Answer, but shall make Fine &c.

3. The Stoppage of a Water which is to the Nuisance of all the People of the Country, may be inquirable there, for this is popular. 4 D. 6. 10. inquirable in the Tourn. Br. Leet, pl. 15. cites S. C. Br. Prefentments in Courts, pl. 7. cites S. C. & S. P. by Martin. Fitzh. Tourn de &c. pl. 1. cites S. C.

4. So of a Bridge, over which the People ought to pass. 4 D. 6. 10. of a Bridge, over which the People ought to pass. Fitzh. Tourn de &c. pl. 1. cites S. C.

5. He may enquire of the Death of a Man before him and the Coroner. Statute of Marlbridge, cap. 24. 4 D. 6. 13. B. He hath not Conuince of Bread and Drink in a Tourn. 4 D. 6. 13. B. cites S. C. accordingly. 4 D. 6. 13. B. It shall be presented in a Leet, but not in a Tourn; Per Cur, for the Sheriff's Tourn is no Leet, and such Things as are omitted in a Leet shall be presented in the Tourn. F. N. B. 166. (A) in the new Notes there, (d) cites 18 H. 6. 12, 13. —Br. Leet, pl. 25. cites 4 E. 4. 31. Contra, and that the Sheriff may enquire in his Tourn of bread and Drink, and cites Prefentments in Courts, pl. 16. which is S. C. but S. P. does not appear there; but S. P. is in the Year Book accordingly. Mich. 4 E. 4. 31. b. pl. 12. by Choke.—2 Inft. 72 cites S. C. and says, that for want of the Knowledge of Antiquity, it was obiter there denied, that the Tourn and the Leet was of one Jurisdiction, and as so an Influence given, that the Leet has Conuince of Bread and Ale, viz. of the Affile thereof, and that the Tourn has not, it is clear that the Breach of the Affile of Bread and Ale is inquirable in the Tourn as a common Nuisance, and therewith agrees constant and continual Experience, and Reason proves, that the Derivative cannot have Conuince of that which the Primitive had not, unless given by some Act of Parliament; herewith agrees the Stile of the Tourn, and the Authority of later Books, and cites 4 E. 4. 31. 22. E. 4. 22. 12 H. 7. 18. 20 H. 8. 13. Dier 13. B.

7. But vide Statutum Wallis, in Magna Charta, fol. 6. That the Sheriff may enquire de Affile Panis & Cervile non observavit, & be cam infringitibus. 4 D. 6. 13. B.
Br. For the •' is E. Charta, of the Statute certain, facts, terms, and penalty shall be inquired in the Tourn or Leet; for otherwise those Courts have not the judgment of it. Br. Judgment, pl. 146. cites 1 R. 3. 1.

9. No inquiry shall be made in those Courts but of Offences inquirable by the Common Law, unless the Statute makes express mention, that it shall be inquired in the Tourn or Leet; for otherwise those Courts have not the judgment of it. Br. Judgment, pl. 98. cites S. C.

10. Of Nuisances &c. which are by the Common Law, the Sheriff may inquire in his Tourn. Br. Jurisdiction, pl. 98. cites 1 R. 3. 1.

11. In Writ of Trespass &c. the Defendant pleads, that he fraudulently, or the like, where fraudulently shall come in Debate in County, there the matter shall proceed. Br. Jurisdiction, pl. 98. cites the Register.

12. But contra if it come in Issue there upon Plaintiff without Writ, there it suffices to remove the Plea. Ibid.

13. The Authority of the Sheriff to hear and determine Theft or other Felonies by the Common Law, (except the Death of a Man) in the Tourn, is wholly taken away by this Statute of Magna Charta, cap. 17, howbeit, his Power to take Indictments of Felonies and other Misdeeds within his Jurisdiction is not taken away by this Act. 2 Inft. 32.

14. The Tourn and Leet are of one and the same Jurisdiction; For Derivative Potestas est ejusdem Jurisdictionis cum Primitiva. 2 Inft. 71.

15. Both Ecclesiastical and Civil Causes were decided in the Hundred, County, and Sheriff’s Court, before the Conquest; But William the Conquer ordered, that no Ecclesiastical Plea should be held before a secular Judge. 2 Inft. 488.

16. Tithes were anciently determined in the Sheriff’s Tourn. 2 Inft. 661. cites many Books &c. to prove it.

17. The Sheriff in the Tourn may take Recognizances for keeping the Peace. 4 Inft. 253, 264. cap. 54.

18. Any Matters done at the Sheriff’s Tourn which is within the Leets Jurisdiction is not void, and coram non Judge, but only an infringement of the Franchise. 12 Mod. 180. Per Holt Ch. J. Hill.


(D. a) [The Jurisdiction of the Tourn.]

In respect of the Place.

1. If a thing be to be done within a Franchise, where there is View of Franklodge, in which Default of not repairing a Caufey, or other Matter, and all other Things within Franchise, are presentable, the not repairing the Caufey, or other Matter, is not presentable in the Tourn of the Sheriff, because it is out of his Jurisdiction, be-
ting it is out of his Jurisdiction, being in the Franchise. 29 C. 3.

21. a. b. adjudged. 28 C. 3. 95. b.

2. But if there be a Default in the Lord of the Franchise, in not *Fitch. Lee, causing the Cauley to be amended, this may be presented in the Sheriffs Tourn without any Warrant by Writ, for that the Franchise was deputed originally out of the Tourn. *to B. 4. 4. + 28 C. 3. 95. Co. Litt.

b. b. 17 Id. R. b. between & Leader and Samuel, per totoem Cultu, 165. b.—

3. But this may be presented in the Sheriff's Tourn by Prescription, *Fitch. Avowry, pl. 247. cites S. C.

For more of the Tourn of the Sheriff, see 4 Inf. 259. 260. cap. 53.—Pryn's Animad. on 4 Inf. 189. 190.—Preface to 9 Rep. 2. b.—And see 2 Hawk. Pl. C. 55. to 72. as to the following Points; 1st. The original Institution of the Court. 2dly. At what Time, and in what Place it must be holden. 3dly. What Peytonsoe Suit thereto. 4thly. What Authority the Sheriff (or his Steward) hath as Judge of it. 5thly. What Kind ofOffences are inquirable in it. 6thly. Within what Place such Offences must arise. 7thly. By what Jurors, and in what Manner Indictments in it ought to be found. 8thly. In what Manner they are to be proceeded upon. 9thly. In what Manner they are to be traverse and determined.

(D. a. 2) County Court.

See Tit. Court (1) pl. 3.

1. 6 E. 1. cap. 8. *Nafts, that Sheriff's shall plead in their Counties Hereby it Stat. Gloucester Pleas of Trespass, as they have been accustomed; appears, that the Court has no Jurisdiction to hold Pleas of Wounds and Malings, but those Pleas must be determined in the King's higher Courts, but of Battery (without Wounding or Malming) this Act proves, that the County Court has Jurisdiction. 2 Inf. 312. ad finem.

If the Plaintiff counts in Trespass &c. to the Damages of 40 s. and the Jury find the Damages under 40 s. yet the Plaintiff shall have no Judgment, though in Truth the Caule de Jure did belong to the Inferior Court. 2 Inf. 312.

2. Plaintiff of Replevin by the Sheriff shall be before the Sheriff in full County, and not out of the Court; for the Suitors are Judges, and the Sheriff is Minifter, and the Processe shall be awarded by the Suitors, per Cauesby, but Pigot contra; for if the taking be the Day after the County the Sheriff may take Plaint, and make Replevin immediately, and C
otherwise it shall be Mischief to stay till the County Court; and by him and Brian this has been used throughout England for ever; and per Brian, Plaintiff cannot be made in Court Baron, but sedes Curia; and per Pigot, Withernam cannot be but in full County. Br. Plaintiff, pl. 21. cites 21 E. 4. 66.

3. The Government of the County in Times of Peace consisted much in the Administration of Justice, which was done in the publick Meetings of the Freeholders, and their Meetings were in one Place, or in several Parts of the County, in each of which the Sheriff had the managing of the Acts done there. The Meeting of the Freemen in one Place was called Folkmeet by the Saxons, (faying the Judgment of the Honourable Reporter) Coke Init. 2. p. 69. and of later Times the County Court, the Work wherein was partly for Confutation and Direction concerning the Ordering of the County for the Safety and Peace thereof, such as were Redress of Grievances, Election of Officers, Prevention of Dangers, &c. and partly it was judicial, in hearing and determining the Common Pleas of the County, the Church Affairs, and some Trepassses done therein, but not Matters Criminal, for the Bishop was Judge therein together with the Sheriff, and by the Canon he was not to intermeddle in Matters of Blood; yet neither was the Bishop's nor Sheriff's Work in that Court, other than Directory or Declaration, for the Free men were Judges of the Fait, and the other did but edocere Jura Populo; yet in special Cases, upon Petition, a Commission issued forth from the King to certain Judges of Oyer to join with the others in the hearing and determining of such particular Cases; but in Cause of Injustice, or Error, the Party grieved had Liberty of Appeal to the King's Justice. Nor did the Common Pleas originally commence in the County Court, unless the Parties dwelt in several Liberties or Hundreds in the same County, and Cause any Miftake were in the commencing of Suits in that Court, which ought not to be, upon Complaint the King's Writ reduced it to its proper Place, and in this also the King's own Court had no Pre-eminence. In those ancient Times this County was to be holden but twice a Year by the Constitution of King Edgar, but upon urgent Emergencies otter, and that either by the King's epecial Writ, or if the emergent Occasions were sudden and important, by extraordinary Summons of ringing the Moot-bells. Unto this Court all the Freeemen of the County assembled to learn the Law, to administer Justice, to provide Remedy for publick Inconvenience, and to do their Fealty to the King before the Bishop and Sheriff upon Oath, and in the Work of administering Justice, Causes concerning the Church must have the Precedency, so as yet the Canon Law had not got any Footing in England. Bacon of Government, 66, 67. cap. 25.

2 Inl. 139. S. P.

4. The Sheriff may hold Plea by Replevin by Plaint of any Value. 2 Inl. 312.

5. So if the Replevin be by Writ, but this is in Nature of a Commission. 2 Inl. 312.

The Jurisdictions of the Sheriff by a Writ, the Sheriff may hold Plea of a Debt of 100l. or of a Trespass at Arnis, and the Proceeds is an Attachment, &c. not a Capias, but is but in Nature of a Commission, and doth not enlarge the Judicature of his Court, for the Words of the Writ do not, nor cannot make the Sheriff a Judge of that Court in that Particular Cause, but the Suits must be the Judges as at Common Law, which cannot be altered but by Act of Parliament. The Plaintiff may remove this Plea without Caufe hewed, but the Defendant cannot without hewing of Caufe. 2 Inl. 312.

by his ordinary Jurisdiction he can do; Asp. and therefore the Action being brought in the County Court for Tithes, it was infinius, that this is not Debitum ex Contradictio, but ex Delibe founded upon a Statute, whereas the Sheriff has no Power to hold Plea, and therefore prayed a Prohibition; but
Court [County.]

but the Court said, that this was a very considerable Case, and therefore directed a Suggestion and Declaration upon it, that the Defendant might plead or demur, and so the Case might come judicially before the Court. Lev. 213. Mich. 26 Car. 2. B. R. Bishop v. Corbet.

7. If in the County Court, or other Inferior Court, the Plaintiff shall For more as divide a Debt of 20l. into several Plaints under 40s. the Defendant may plead the fame to the Jurisdiction of the Court, or may have a Prohibition to stay such indirect Suit. 2 Inst. 312. in Principio.

8. In County Courts the Suits are the Judges. 2 Inst. 225. Nor will a Jurisdiction

where the Sheriff a Judge of that Court, by Virtue of the Words in the Statue of Gloucefter, cap. 8. for that were to alter the Jurisdiction and Judicature of the Court, whereof by Common Law the Suits are Judges, which cannot be altered but by Act of Parliament. 2 Inst. 312. 4 Inst. 266. cap. 55. S. P.

9. Trefoys quare Vi et Armis; the Defendant Infulum fects upon the Plaintiff was brought in the County Court, and Judgment there given for the Plaintiff; But it was reversed here upon a Writ of Falfe Judgment, because the County Court, not being a Court of Record, cannot fince the Defendant, as he ought to be, if the Caufe go against him, because of the Vi et Armis in the Declaration, but an Action of Trefoys without those Words will lie in the County Court well enough. Mod. 215. pl. 2. Trin. 25 Car. 2. C. B. Wing v. Jackfon.

10. On a Motion for an Attachment against F. & Al' for a Rior &c. at a Meeting of the County of Exef, for the Election of a Coroner, the Dispute arose on the Sheriffs offering to adjourn it from C. to D. The Gentlemen apprehended, as they were Judges of the Court, i. e. Suits, they might adjourn only, and that the Sheriff could not. Ch. J. and two Judges held that the Power of adjournning on the Occasion, on Election of Verderors, Knights of the Shire &c. was in the Sheriff, it was his Court, and so called in Acts of Parliament, &c. But Eyre doubted, but admitted that the Sheriff had Power to appoint the Meeting, yet when the Court was assembled (it being no more than an Assembly of People to exercise a Jurisdiction) they made a neceffary Part, and the Sheriff alone could not adjourn. Trin. 5 Geo. B. R. 'The King v. Fitz. But Eyre afterwards mutavit Opinionem.

11. Besides the Tenants of the King, which held per Baroniam, and did Suit and Service at his own Court, and the Burghers, and Tenants in Ancient Demefne, that did Suit and Service in their own Court in Perfon, (and in the Kings Court by Proxy,) there was also a certain Set of Freeholders, that did Suit and Service at the County-Court; these were such as anciently held of the Lord of the County, and by the Efcheats of Earldoms fell to the King or such as were granted out to hold of the King, but with particular Refervation, to do Suit and Service before the King's Bailiff, because it was neceffary the Sheriff or Bailiff of the King should have Suitors at the County Court, that the Business there might be dispatched; thefe Suitors are the Pares of County Court, and indeed the Judges of it, as the Pares were the Judges in every Court Baron, and therefore the Sheriff or King's Bailiff having a Court before him, there must be Pares or Judges, and the Sheriff himself is not a Judge, and yet the Stile of the Court is, Curia Prima Comitat' E. C. Milis' Vic' Com' praed' tent' apud B. &c. So it appears by that, that the Court was the Sheriff's by the old Feudal Conftitutions, and yet the Lord was not the Judge, but the Pares only; fo that even in a Jurifdiction, which was a Commiffion to the Sheriff to hold Plea of more than was allowed by the natural Jurifdiction of a County Court, the Pares only were Judges, and not the Sheriff, because it was to hold Plea in the fame Manner as they used to do in that Court. According to the Constitutions of Alfred, there were to be 12 at leaft of the Pares Curia of the County Court,
Court [Baron.]

1. The Court Baron is the Court of the Lord of the Manor.
2. The Suitors are Judges, and the Steward but as a Registrar.
3. County Courts are to be held from Month to Month, or longer, if formerly so used.

(D. a. 3) Held. At what Time, and Place.

This is altered by the Statute 1 E. 6.

1. 9 H. 3. cap. 35. County Courts are to be held from Month to Month, or longer, if formerly so used.
2. 11 H. 7. cap. 15. Direct's bow Plants are to be entered, and the Sheriff &c. shall make a sufficient Precept to the Bailiff of the Hundred to attend, summon, or warn the Defendant to appear and answer the said Plaints. Bailiff not doing his Duty to forfeit 40 s. Justice of Peace may convite the Sheriff of fraudulent Practice.
3. 3 E. 6. cap. 25. They are to be held every Month, and no otherwise.

4. 7 and 8 W. 3. cap. 25. They are to be held at the usual Place, and on a Wednesday.

S. P. and Sheriff may grant Replevins out of it by the Statute W. 2. per Holt Ch. J. 12 Mod. 320. Mich. 12 W. 3. in a Note there.

For more of the County Court, See Crompt. Jurisdiction of Courts, 231. to the End. — 4 Inf. 266. cap. 55. — Prynn's Animad. on 4 Inf. 169. 190.

(E. a) Court Baron.

1. The Court Baron is the Court of the Lord of the Manor.
2. The Suitors are Judges, and the Steward but as a Registrar.
3. Although the Plea be holden by Force of a Writ of Right. — The Suitors are Judges in County and Court Barons, as well in Writ of Right and Felonies, as in Suits by Plaint, and not the Sheriff nor Steward. Bre. Judges, pl. 15. cites 59 H. 6. 5. Per Car.
4. In Court Baron the Suitors are Judges, and in the Leet the Steward is Judge; Per Fineaux and Keble. Br. Court Baron, pl. 9. cites 12 H. 7. 16.
5. A Woman may be a Free-Suitor to the Lord's Courts, but that's generally said, that the Free-Suitors are Judges in those Courts, it is intended of Men only. — 2 Inf. 119.
6. A Court Baron cannot be holden but before the Suitors, and sometimes before the Bailiff and Suitors, as by Writ. But by Plaint it shall be before the Suitors only, but in no Case without the Suitors; Resolved per tot. Carr. E. 792. pl. 55. Mich. 42. & 43 Eliz. C. B. in Case of Pell v. Towers. — Nov. 20. S. C. & S. P.
7. A Prescription to have a Court Baron before his Steward is not good; For it ought to be Comm. Sextataribus; Per tot. Carr. But perhaps adventure he might have profected to have a Court to be holden before his Steward, but not a Court Baron. Cro. J. 583. pl. 2. Mich. 18 Jac. B. R. Arnyn v. Appletoft.

The
3. In a Court Baron they cannot hold Plea of Debt or Trespass, where the Debt or Damage amounts to 40s. Co. Lit. 118, Vide for this the Statute of Gloucester, cap. 8. ending of Debts and Damages under 40s. at Home, as it were at their own Doors. 4 Inst. 268, cap. 57.

4. In a Court Baron they cannot hold Plea of Trespass Vi & Arnis, Co. Lit. 118, because this Court cannot impose a Fine. Vide Heugam Magna, cap. 3. de Jurisdictione Curiarum, fol. 9.

6. Every Manor has a Court Baron incident to it, and every Man, as Butler, Brook well of the Manor, as a Stranger, may be implicated there in Debt or Damage in Trespass if they come within the Manor, and Process shall be as at Common Law, that is to say, Summons, Attachment, and Dispossess, and H. 6. is the such Returns as are good at Common Law, are good there, and Good at-contrary of tach'd there shall be forfeited to the Lord; and the same of Issues returned the Attachment, Per Baron, Dovers and Choke, but this is not reported in 37 H. 6.

7. In Admeasurement of Pasture, and in every Vicounted, as in Justices Br. Court &c. to the Sheriff, the Suits are Judges, and not the Sheriff; Per Baron, pl. 12. cites 3 E. 4.

8. Court Baron shall be held in one Place certain; Per Baron, pl. 8. cites 8 H. 7. 3.

9. Precept by Parol in a Court Baron to disfrain for Amercement, or Precept, the like, is good without Writing; Per Cur. quod nota. Br. Court Baron, pl. 25. cites 16 H. 7. 14.

Court Baron is good without Writing.——In a Court Baron the Plaintiff must allege a Prescript to disfrain. Brownl. 36. Anon.

10. A Court Baron is incident to a Manor; And was said, Arg. that Br. N. C. pl. therefore the Lord of the Manor cannot grant over the Court Baron, nei- ther if he grants the Manor can he reserve the Court Baron, because it is incident. Br. Incidents, pl. 34. cites 19 H. 8.


11. Action was removed out of Court Baron, inasmuch as there were A Court only four Suits. Br. Suit. pl. 17. cites the Register.——Brooke says, Quære inde, for it seems that the plural Number, viz. two, suffices, and fo;
Court Baron.

Court Baron may be held in any Place within the Manor, but not without, and to of a Lest in any Place within the Liberty or Franchise, and though no Court has been holden in the Manor Time out of Mind, yet by this it is not lost; For it is the incident to the Manor of Common Right. Dal. 61. pl. 15.

Ov. 35.
Anon. S. P. but seems only a Translation of Dal. — It may be held sometimes in one Place, and sometimes in another; Per Windham J. Cro E. 39. Patch. 29 Eliz. C. B. —— A Court for admitting Copyholders, and where no Places are held, may be held out of the Precedent of the Manor. Arg. to 39. out of a Record. Trin. 299. Trin. 26 Eliz. B. R. in Lt. Dacre's Cale.

4 Inf. 268
13. The Court Baron is not a Court of Record. 2 Inf. 143. and cap. 57. S. P. Ibid. 311. ——But
See pl. 19. in the Note there.

14. The Sile of the Court is, Caria Baronis E. C. Militis Manerii sui prædicit (having the Manor's Name written in the Margin) tent' tali Die &c. coram A. B. Senechallo ibidem. 4 Inf. 268. cap. 57.

15. Court Barons were ordained to determine Injures, Trespasses, Debts, and other Actions, where the Debt or the Damages are under 40s. and also, because the Lords of the Manors, and Court Barons, have given their Tenants their Lands and Tenements before the Statute of Wem. 3. to hold of them, and also because Homagers of Court ought to inquire in this Court, that their Lords shall not lose their Services, Customs, or Duties. And also it was ordained to make their Suits there, and so flew themselves obedient to their Lords, and that nothing be done within the Manor to be any Annoyance, or hurtful to the Inheritances of the Lords of the Manors, which should not there be inquired of, and presented for the Lords of the Manors. Kitch. of Courts, 6, 7.

16. A Court Baron by Prescription may be pleaded to be held before the Steward, Arg. cites 6 E. 4. but if there be no Custom or Prescription to warrant it, then it must be Coram Senechallo &c. Selatoribus, according to H. 6. and Gawdy said, that every Court Baron is to be held before the Suitors, if there be no Prescription to the contrary. Godb. 68. 69. pl. 93. Mich. 28 & 29 Eliz. B. R. in Cale of Lovel v. Goliton.

It was said in this Cafe at the Bar, that the Form of Pleading in the Book of Entries is, That the Court was helden before the Steward if the Action be for Debt or Trespass for Amencements, or such personal Things; But if the Action be brought for Things Real, then it is Coram Selatoribus. Ibid. 60. ——The Suitors are Judges in Real Causes, but not in Personal, Per Suit J. Godb. 49. in pl 60. Mich. 28 & 29 Eliz. B. R. Anon.
17. It is the common Course throughout the Realms, that the Answer-
ments in a Court Baron are ass'd by the Steward. Cro. E. 748. pl. 1.
18. A Man cannot have a Court Baron by Prescription, it being inci-
dent to the Manor; but he may by Prescription enlarge the Authority of
thereof, as to hold Pleas above 40 s. &c. Per tot. Cur. Cro. E. 792. pl. that where
the Court Baron by
Prescription may hold Pleas to the Value of more than 40 s. it is then a Court of Record; and if
there be Error it shall be redressed by a Writ of Error, and not by a Writ of False Judgment.

19. The Court by Custos may be held before the Steward, as the Court
of Westminster; Per Cur. And per Vaughan it is held before the Steward, though the Suitors are Judges. 2 Jo. 22, 23. C. B. Eure v. Wells.
20. Debt was brought for a Fine set upon the Defendant by the Homage at the Court Baron, grounded upon a Custos to make Laws for
regulating their Common, and inflicting a Penalty on such as did indi-
close at inconvenient Times; and a Wager of Law was offer'd there, and
Judgment is there for the Defendant; For of common Right the Homage has no Right to impose a Penalty for such private Offences, but it is only by Custos that they can do it; cites 5 Co. Chamberlain of London's Case. Mo. 276 Leon. 203. The Case indeed is not well
reported, but upon comparing the Books together, it appears the Wager of Law was not admitted in that Case. Per Holt Ch. J. 12.
Mod. 614. Hill. 13 W. 3. in Case of the City of London v. Wood, cites Co. Ent. 118.
21. A Court Baron consists of the Lord, Tenants, Steward and Bailiff,
within the Manor, and is sometimes called the Copyholder's Court, espe-
cially when it is for Trial of Titles of their Lands, for taking and par-
ing Estates, Surrenders, Admittances and Grants; and herein the Lord or his Steward is Judge, (as the Custos of the Place is) yet the Court is
sometimes called the Freeholder's Court, when the Actions and Proceedings are for Trial under 40 s. and is something like a County Court, and
the Proceeding much the same, and was without doubt granted to the
Lord originally by the King; but now most are by Prescription, and
are commonly held once in three Weeks, and may be as often as the
Lord or Steward thinks fit, who is supreme Judge in Law and Equity,
and is obliged to register all Records of the Court, and other Proceed-
ings between Lord and Tenant, and between Tenant and Tenant, and
to be indifferent between them; and when such Court is to be kept the
Lord or Steward lends his Warrant at six or more Days Notice, according
to Custos. Scroggs of Courts 39.
22. When a Court Baron shall be held. See Court (G) pl. 5.

(F. a) [Court Baron.]
What Things it may do.

1. If a Man recovers in a Court Baron, they have not Power to * Be Court
make Execution to the Plaintiff of the Goods of the Defendant,
but they may distrain him, and retain the Deters till Satisfaction.
* 4 H. 6. 17. § 6, 22 Att. 72.

But Brooke says, Quere of this Matter; for it is usual to tax the Sum by the Suitors of the Court
assigned by the Steward, and then to award a Levant Facias, which is in Nature of a Fieri Facias;
but
but Brooke adds, Quære if by Custom, or by the Common Law? — Br. Court Baron, pl. 7. cites S. C. but Brooke says, where the Ute is to make Lascari Faci this is good by Custom, as it seems to him, but then it ought to be pleaded accordingly, as it seems.

‡ Br. Execution, pl. 80. cites S. C. accordingly, but Brooke says it seems, that where it is otherwise used it is well, as by Levari Facias — Fitch. Execution, pl. 110. cites S. C. by Thirne, and also cites 4 H. 6. accordingly. — Adjudged, that a Bailiff of a Court Baron, upon Judgment there given, and a Levari Facias awarded, cannot sell the Goods, and to levy the Monies, without special Custom. Nov 17. Hill. 3 Jac. B. R. Tryst & Burgh — Ibid. cites 4 H. 6. 17. and 38 E. 2. 3. 5. that he may deliver the Goods to the Recoveror, and that the Lord may fell a Dilref taken for a Fine.

You may add any thing to a Court Baron by Prefcription, as to sell Goods taken in Execution upon a Judgment; Per Walmley. Nov 20. in Case of Pell v. Towers.

2. Upon a Recovery of Damages in a Court of Ancient Demesne, upon a Writ of Right, if Execution be granted, the Bailiff of the Court may take and sell the Cattle of the Defendant. 7 H. 4. 27.

3. P. 6 E. 1. B. R. Rot. 8. per Judicium Curtis, Curia Baro-

niis non habet potestatem placitandi de aliqua Transfugione in parvo vel in Chacea de levis Bestis, nisi quis inventiarum cum Manuopere.


fuit Uxor Adae post Portem Aud in semem fecit cum T. W. de quo praed. Ada tenet sua (§) Tenementa, per 22 s. pro dose sua habenda, & poten, quia praed. Alicia dixit, quod predic. T. W. iniquit praed. Pecuniam ab ea extortit, amercavit ipsam in Curia sua primo ad dimi-
dam Marcam, et postmodum ad 10s. pro Delegatione illa; upon

which Verdict Judgment is given. Et quia predic. T. W. non potuit nec debuit de Jurie in Curia sua de Aliqua Delegatione placitare, nec aliquem pro ea amerciare, consideratum est, quod pradicta Alicia recuperer Pecuniam pradict' sic extortam verius pradict' T. W. & T. W. in Milercordia.

5. It was admitted in a Replevin, that upon Recovery of 38 s. in a Court Baron, the Officer may deliver to the Plaintiff the Beasts of the De-
fendant in Execution. Br. Court Baron, pl. 5. cites 38 E. 3 3.

6 Wherea Man makes Fine in Court of Record, there in Court Baron, the Party for such Offence shall be amerced. Br. Court Baron, pl. 20. cites F. N. B. 73.

7. Parl was removed out of Court Baron because there was only four Suitors. Br. Court Baron, pl. 20. cites the Register, fol. 11. and F. N. B. fol. 239.

8. Trespass VI & Arnis does not lie in Court Baron, but there the Party may have Superfedeas. Ibid.

9. If a Man divides a Debt of 20l. or the like, in a Court Baron, into several petit Sums under 40s. of this the Party may have Superfedeas; and it seems, that of this the Defendant may wage his Law by Con-

science, for there is no such Contract, and Action of Damages above 40s. does not lie in a Court Baron. Br. Court Baron, pl. 20. cites F. N. B. 239.

10. In Trespass in County, or Court Baron, if the Defendant pleads his Franktenement, or the like, or claims the Plaintiff to be his Villein, or the like, the Court shall cease, and if they proceed Writ of Falsa Judgment lies. Br. Court Baron, pl. 21.

11. In a Court Baron no Goods can be forfeited for Default of Appearance upon the Distrefs; for Distrefs is only in nature of a Pledge to be fately kept; And in Court Baron the Process is Distrefs infinite only, and not an Attachment; Per Cur. and cited 33 and 34 H. 6. And Judgment ac-

S. P. and seems to be S. C. and though this being the King's Manor, it was urged, that this was not merely a Court Baron, but a Court of Record, and that it is Curia Domini Regis Manerii Hil de Dunstable, yet all the Judges contra Williams held the Goods not forfeited, and the Sale not good, and Judgment was entered for the Plaintiff. — 2 Rolle Rep. 483; Hill, 22 Jac. B. R. in Case of Turbeville v. Tipper, it was agreed, that the Process in Court Baron is Summons, Attachment, and Diffrents.

(F. a. 2) Original of Hundreds, and Hundred Courts.

1. Counties were too great to meet upon every Occasion, and every Occasion too mean to put the whole Country to that Charge and Trouble, and this induced Subdivisions; the first whereof is that of the Hundred, now, and also anciently so called, but as ancient (if not more) is the Name Pagus; For the Historian tells us, that the Germans, in the executing their Laws, a Hundred of the Freemen joined with the Chief Lord per Pagos Vicofque, and in raising of Forces a Hundred were selected ex lingulis Pagis, which first were called Centenarii, or Hundredors, from their Number, but used for a Title of Honour like the Triarii. And as a 2d hereunto I shall add that Testimony of the Council at Berkshiremead, which speaking of the Reduction of Suits from the King's Court ad Pagis vel Locis Præpositum, in other Places it's rendred to the Governors of the Hundred or Borough; And at this Day in Germany their Country is divided into Circuits Centen or Canton, and Centengriche, and the Hundredere, they call Centgrave or Hundred-Chiefs, whether for Government in Time of Peace, or for Command in Time of War, the latter whereof the Word Wapentake doth not a little favour; amongst these one was, Per Eminentiam, called the Centgrave or Lord of the Hundred, and thereunto elected by the Freemen of that Hundred, and unto whom they granted a Stipend in the Nature of a Rent, called Hundred-Setzena, together with the Government of the same. The Division of the County in this Manner was done by the Freemen of the County, who are the sole Judges thereof, if Polydore's Testimony may be admitted, and it may seem most likely, that they ruled their Division at the first according to the Multitude of the Inhabitants, which did occasion the great Inequality of the Hundreds at this Day. The Government of the Hundred revolved at the first upon the Lord and the Hundredors; but afterwards, by Alfred, they were found inconvenient, because of the Multitude, and were reduced to the Lord or his Bailiff, and of the Hundred, and these were to be sworn, neither to condemn the Innocent, nor acquit the Guilty. This was the Hundred Court which by the Law was to be holden once every Month, and it was a mixt Court of Common Pleas, and Great Pleas, for the Saxon Laws order, that in it there should be done Justice to Thieves, and the Trial in divers Cales in that Court is by Ordeal. Their Common Pleas were Cafes of a Middle Nature, as well concerning Ecclesiastical Persons and Things, as secular, for the greater Matters were by Commonion, or the Kings Writ removed. All Precholders were bound to present themselves hereat, and no sooner did the Defendant appear, but he answered the Matter charged against him, and Judgment passed before the Court adjourned, except in Cales where immediate Proof was not to be had, albeit it was held unreasonable in those Days to hold such hasty Process, and therefore the Archbishop of York prefers the Ecclesiastical, or Canonical way before this. Lastly, in their Meeting, as well at the Hundred County Court, they retained their ancient Way of coming armed. Bacon of Government, 65, 69, cap. 25.

E 2.14
2. In King Alfred's Time the Kingdom was in Grofs, and then divided into Counties and Hundreds; and all Persons then came within one Hundred or other, and then the King's Relations had the Government of them, and therefore they were called Confanguinei, and so are the Earls, Lord Lieutenants &c. at this Day; and then, when the Office became troublesome, there were ordained Vicecomites, which Name remains to this Day, and the others continue to be called Confanguinei, but have no Power in the County, having only the Honorary Name of Earls, or Comites of such or such a County &c. And for the better Government of these Counties, the Vicecomites had two Courts, but out of those the King granted petty Leets, and Court Barons, but the Tourn of the Sheriff had the superintendent Power, they being derived out of the Sheriff's Tourn, as in Dy. 13. And then, afterwards, the King granted away some Hundreds in Fee-simple, and some Franchises, and the last excluded the King utterly, but the Hundreds granted in Fee were not wholly exempt. On this arose some Confusion, and the Parliament hereon took Notice, that the Execution of Justice was by this much interrupted, and therefore came the Statute of 9 E. 2, that Sheriffs should be sufficient Persons, and have Lands in the County, and so be able to answer both the King and Country, and that Bailiffs and Farmers of Hundreds should be sufficient Men. And at this Time Hundreds were grantable for Years. Then came the Statute of 2 E. 3, cap. 4 and 5, that Sheriffs should continue but for one Year, but this took not away the whole Inconvenience, for the Crown still granted away Bailiwicks and Hundreds for Lives at Rents on such excessive dear Rates, that made them endeavour to make up their Money by unlawful Means, and thereon came the Statute of 2 E. 3, cap. 12. and 14 E. 3, cap. 9. By the first it was enacted, that all Hundreds and Wapentakes granted by the King, shall be again annexed to the County, and not severed; and by the other Statue, that all should be annexed, and the Sheriff should have Power to put in Bailiffs, for which he will answer, and no more shall be granted for the future; And one Reason of this was, because the King granted away Hundreds, and abated not the Sheriff's Farm; Arg. 2 Show. 98, 99. pl. 98. Patch. 32 Car. 2. B. R. in Case of Cade v. Ireland.

(G. a) The Hundred Court Jurisdiction.

1. In an Hundred Court they may swear 12 Freemen to present a Thing. 39 E. 3. 35. 6.
2. In an Hundred Court they cannot hold Plea of Debt or Trespass where the Debt or Damages amount to 40s. Co. Lit. 118.
3. In an Hundred Court they cannot hold Plea of a Trespass Vi & Armis. Co. Lit. 118.
4. By Usage a Man may be amerced for not bringing a Porpoise, or other Royal Fisli, that he finds in the Parish, to the Manor of the Hundred, where he should have 12d. for his Labour, though the Lord of the Hundred hath a Property in the Thing for which the Amercemenit is. 39 E. 3. 35. 6.

5. Note,
Court [of Hundred.]

5. Note, that for Amendment in the Hundred the Lord may disa
the Beasts of the Offender throughout all the Hundred, tho' they are not in the Land of the Party. Br. Court Baron, pl. 13. cites 2 Hil. 4. 24.
6. Hundred cannot try Issue by Inquest; For the Lord cannot compel his Franks to swear. Br. Court Baron, pl. 23.
7. This is no Court of Record, and the Suits are hereof Judges; Of the 2 Inf. 147. Antiquity and Jurisdiction hereof, vide Magna Charta, and as the Lord and the same was derived out of the Town for the Safe of the People, to this Court of the Hundred, for the same Cause, was derived out of the Court of the County, and is a Court Baron in his Nature. 4 Inf. 267. cap. 56.
8. The Sile of this Court is Curia E. C. Maltis Hundredi sui de B. in Com. Buck. ten?. Er. Caram A. B. Susecshallo ibidem. 4 Inf. 267. cap. 56.
9. By the Statute of 14 E. 3. Hundreeds (except such as then were of Fitates in Fee) are rejoined (as to the Bailiwick of the same) to the Counties, and all Grants made to the Bailiwick of Hundreeds, since that Statute, are void, and the making of the Bailiffs thereof belong to the Sheriff, for the better Execution of Justice, and of his Office; and so it was resolved by the Lord Treasurer Lea, and all the Barons of the Exchequer, and so decreed in the Exchequer Chamber between Fortescue of Buckinghamshire, and the Sheriff of the same Township, 2 Car. the Plaintiff having of late divers Hundreds granted to him for Life in the County of Bucks, retiring a Rent, which the Sheriff disallowed, and put in Bailiffs of his own; And a Commination was given to the Court by the Attorney General, to avoid the like in other Counties, for that they were against Law, and belonging to the Office of the Sheriff, and were Occasions of Delays and Hindrances of Justice. See the Statute of W. 2. cap. 36. against Procurement of Suits in this Court. 4 Inf. 267. cap. 56.
10. In the Hundred Court the Suits are the Judges, and not the Lord, tho' the Writs (when the Proceedings are by Writ) are directed to him, which is, because the Court is his, and the Profits belong to him, and he is to see Justice done. 6 Rep. 11. Pauch. 25 Eliz. Gentleman's Cafe.
11. One sued in B. R. for Costs given in the Hundred Court which was under 40s. and declared, that the Court was held before the Steward Secundum Consequendum Maneriæ prædicti. Exception was taken, that the Steward is not Judge in such Court, but the Suits; But per Cur. a Steward by a Cautum may be Judge in a Hundred Court, and that for it had been held; And here the Plaintiff has declared upon the Cust-

b Hundred Court, but a Dilfringes; but Levari may be by Cautum; Per Holt Ch. 1. 7 Mod. 44. Trin. 1 Ann. B. R. Anon — S. P. and generally all the Hundred Courts in England have such.

c Cautum; but the true Common-Law-Procures is a Dilfringes. 7 Mod. 1. Pauch 1 Ann. B. R. Anon. — 1 Salk. 201. pl 5. S. P. and seems to be in S. C.

d Hundred Court, but a Dilfringes; but Levari Factis is not the proper Procurs of

13. In Trefpa the Defendant justified by Levari Factis awarded by the Steward, and feated by him in a Hundred Court held before the Steward and Suits; Per Cur. The Sealing of Procures by the Steward is
sufficient, but the Court being said to be Coram Seneschalle & Seillatoribus, it is ill, and judgment for the Plaintiff on Demurrer; But Coram Sellatoribus per B. Seneschallum [had been well enough] 3 Barb. 117, pl. 29. Hill. 2. Car. 2. B. R. Doe v. Parmiter.

14. Trespaßs for taking his Horses; The Defendant justifies by Virtue of a Recovery in a Hundred Court before J. S. Seneschallum Dominii Regis, and that a Lector Facias issued out, and by Virtue thereof he prout Minifter preview did seize the Horses upon that Execution. The Plaintiff replies, and sets forth the Statute of 14 E. 3. 9. and avers, that this Hundred was not granted in Fee at the Time of making of that Statute; and the Question intended was, How far that Statute should extend, and what Hundreds should be annexed to the Sheriffwick by that Statute? Baldwin pro Quer' agreed, that the King might have Hundreds, and foe might a Subject, but then they must be such as were in the Hands of a Subject in Fee at the Time of the making of that Statute. Atkins said, Lord Ch. J. Hale's Opinion was, in this Case, that it extends to such only as had been granted out since the Statute 10 E. 1. But per tot. Cur. that cannot come in Question here; for here being a Court de facto, the Plaintiff shall not in this Action try the Title of the Owner, and it is all one as it there be a Dilettor of a Manor, and a Recovery in that Court Baron, the Officer may well justify executing the Proceeds; for he that is in Possession is Dominus pro Tempore, and if they would try the Title it might be by Suo Warranto, or Action on the Case; and for that Reason they all gave Judgment for the Defendant. Freem. Rep. 204. pl. 207. Mich. 1675. Ward v. Bent.

For more of the Hundred Court, See Crompt. Jurisdiction of Courts, 231. to the End.—4 Inft. 267. cap. 56.—And See tit. Hundred.

(H. a) Piepowders.

1. TO every Fair a Court of Piepowders belongs of Right. 17 E. 4. cap. 2.

2. Dower de Jusees. Fol. 3. cap. 1. Sect. 3. That from Day to Day the Right of Strangers, Plaintiffs, in Fairs and Markets be halden, as of Duift, according to the Law of Merchants.

3. 17 Ed. 4. cap. 2. Reeting, That divers Perions coming to Fairs be grievously vexed and troubled in the Court of Piepowders by leigned Actions, and also by Actions of Debts, Trespasse, Fees, and Conträets, made and committed out of the Time of the said Fair, or the Jurisdiction of the same, contrary to Equity and good Conscience shall be enated, That no Minifter of any such Court of Piepowders shall hold any Plea, without Oath made by Plaintiff or his Attorney, that the Conträet, or other Feats contained in the Declaration were made within the Fair, and within the Time of the Fair, and within the Jurisdiction and Bounds of the said Fair. 1 R. 3. cap. 6.

6 Rep. 12. 4. The Steward is Judge of this Court; For it is a Court of Record. a City's C. Br. Jurisdiction. pl. 111. cites 6 E. 4. 3. accordingly, 7 E. 4. 21. 3. — Br. Error, pl. 162 cites 6 E. 4. 7. and 7 E. 4. 23, that of Error in Court of Pie- powders lies Writ of Error, and not of False Judgment, which proves that it is a Court of Record, and this per Littleton, good and regular. — 4 Inft. 272. cap. 60.

5. This
Court of Piepowders.

5. This Court is a Court of Record if it may hold Plea of any Sum over S. C. cited 45 adjudged and affirmed in Error. Jenk. 132. pl. 70. cites 13 E. 4.*
   2 Bul. 237.

6. In the Court of Piepowders the Plaintiff or his Attorney shall be examined by Oath if the Matter arises within the Fair, and the Defendant may plead that it arises in a Foreign Place. Br. Jurisdiction. pl. 119, cites 1 R. 3. cap. 6.

7. This Court is incident to every Fair and Market, as a Court Baron. * It is incident, to a Manor, and is derived of two Latin Words, as is apparent, and so called, because that for Contracts and Injuries done concerning the Fair or Market there shall be as speedy Justice done for Advancement of Trade and Traffick, as the Duit can fall from the Foot, the Proceeding their being de Hora in Horam; And therefore Braeton faith Item propter cui colorum debet habere Judicia, ficta sunt Mercatorum quibus exhibetur Justitia Peperdronis &c. 4 Inft. 272. cap. 60.
   † Jenk. 132 pl. 70. says it is called Curia Pedis Pulverizati, because of the Confluence of People, who, by their Motion, raise Pulverum vel Latum.

8. And there may be a Court of Piepowders by Custom without Fair or Market, and a Market without an Owner. 4 Inft. 272.

(I. a) Piepowders. What Action lies there; And for what.

1. If one flanders another, who trades in the Market, in any Thing * Cro. E. which concerns his Trade, the Action lies in the Court of 731. pl. 2. Howell v. Piepowders, but the Words ought to be Spoke * in the Market, and not before; But if the Words do not concern any Thing touch- ing the Market, the Court hath not Jurisdiction. Co. 10. 73. Mo. 624.
   &c. 624.
   Hall v. Jones.
   accordingly. — S. C. cited Mo. 871. lit pl. 1116. — 4 Inft. 272. cap. 60. cites S. C. & S. P. adjudged — S C. cited 2 Bulft. 81. — An Action upon the Case for flanderous Words, brought in a Court of Piepowders, for Words spoken long before the Court was held, adjudged there for the Plaintiff, and affirmed here in a Writ of Error, because the Court was laid to be holden by Precepture. 2 Bulft. 25. cites 8 Jac. White v. Snow.

2. No Action lies upon a Contract made at a Fair before. D. 3.
   133. S. 80. adjudged.

3. An Action of Trelpafs for an Assault and Battery, was brought in a Court of Piepowders for an Assault done long before, and well maintainable. 2 Bulft. 23. cites Hill. 33 Eliz. Chambers v. Peru.

4. Though it be the King’s Court, yet Debt on a Penal Law shall not be brought there. But because they have Power to hold Pleas in Actions of Debt, and so had Colour to hold Plea, in such Action a Judgment given therein is not void, but voidable by Error. Cro. E. 530. pl. 59 Mich. 38 & 39 Eliz. C. B. Wilkinson v. Netherfol.

5. A Piepowder Court may be as well to a Market as a Fair, it has no Mo. 623. Jurisdiction of any Matter but what happens in the Market the same Day. 623. pl. 832. Hill Cro. E. 773, 774. pl. 2. Mich. 42 & 43 Eliz. B. R. Howel v. Johns. 832. Jones, S. C. & S. P. and also it may be by Custom of a City or Place, where there is no Fair or Market at that Time, and cites 13 E. 4. 8.

E.

6. The
A Court of Piepowders, though it be incident to a Fair, yet, by Custom, it may be in a Market; and likewise may be by the Custom of a City or Place where there is no Fair or Market at the Time, and therefore, though in pleading the Court was intituled, Curia Pedis pulverizata ratione Merc. &c., an Exception thereto was disallowed, because the Record said further, Secundum Constatdem Civitatis, No. 612, 624, pl. § 34.

6. The Jurisdiction thereof consisteth in four Conclusions.

1st. The Contract or Cause of Action must be in the same Time of the same Fair or Market, and not before or after a former.

2dly. It must be for some Matter concerning the same Fair or Market, done, complained on, heard and determined.

3dly. It must be within the Precincts of that Fair or Market.

4thly. The Plaintiff must take an Oath according to the Statute of 17 E. 4. 2, but that concludeth not the Defendant. 4 Inf. 272.

7. And all this was resolved and adjudged in a Writ of Error, brought by Hall v. Jones, and the Case was this; Jones being Regifter of the Bishop of Gloucester, brought an Action upon the Cafe in the Court of Piepowders, belonging to the Market in Gloucester, against Hall for these Words, Master Jones and his Clerks having by Colours of his Office extorted and gotten 300 l. per Annum by unlawful Means, for many Years together, above their ordinary Fees, for proving Testaments, and granting Administrations; And Not Guilty being pleaded &c. it was tried and adjudged for the Plaintiff; and divers Errors were assigned, but the Judgment was reversed for these Errors following;

1st. That this Court of Piepowders being incident to the Market, hath no Jurisdiction but of such Things as concern the Market, and these slanderous Words did in no sort concern the Market, but if one slander the Wares of any in the Market, whereby he cannot make Sale of them, an Action doth lie in that Court.

2dly. It appeared in the Record that the Words were spoken the Day before the Market, and no Action lieth in that Court but for an Injury within the Jurisdiction of the Court done, complained on, heard and determined on the same Market Day, the Proceedings being de Hora in Honam, and within the Precinct of the Market. And herewith agreeeth 3. Mar. Dier 132. And it was resolved, that this Court was incident as well to a Market as to a Fair. 4 Inf. 272.

Patch 42 Eliz. B. R. Hall v. Jones, cites 13 E. 4. 8. — Cro. E. 773, pl. 2. Howell v. Johns, S. C. but says nothing of the Secundum Constatdem Civitatis, and Judgment was reversed. Mo. 514. pl. 1116. cites S. C. by the Name of Powell v. Jones, as adjudged, that the Action does not lie, unless the Words were spoken in the Market or Fair. — S. C. cited Arg. 2 Bull. 21. that the Judgment was reversed for the Errors mention'd as above in 4 Inf. 272. — S. C. cited D. 152. b. Marg. pl. 80. that Judgment was reversed.

It's only for Matters of Contrasts, Batteries, and Assaults are determinable in a Court of Piepowders, but not Actions of the Cafe for Words; For that these do not disturb the Market; Per Fleming Ch. J. 2 Bull. 24. Mich. 10. Jac. in Cafe of Goodson v. Duffil.

8. Contrasts, Batteries, and Assaults are determinable in a Court of Piepowders, but not Actions of the Cafe for Words; For that these do not disturb the Market; Per Fleming Ch. J. 2 Bull. 24. Mich. 10. Jac. in Cafe of Goodson v. Duffil.

K. a) [A Court of Piepowders.] Of what Things and Actions it may hold Plea.


Where the Court is as an Incident only to the Fair, it can-
Court of Piepowders.

1. There may be a Court of Piepowders by Prescription without not hold 
Fair or Market, that may hold Plea of Obligation by Prescription. Plea of Ob-
ligations, or

Mich. 10. Jac. B. R. between Goodson and Duffield, resolved per

Cittain.

Fair; but where it is by Prescription it may hold Plea of an Obligation &c. though it appears that the Obligation was made in the May before the Fair. Mo. 82. pl. 1116. S. C. — Cro. J. 215. pl. 14. S. C. & S. P. resolved, that they may be by Custum in Villas and Boroughs for any Caules, as Debits upon Bonds, or otherwise, or any Causes done at any Time, being transitory and Personall, and so they are in divers Cities, as Bristol and Gloucester, and a Record was cited Mich. S. Jac. Rot. 146 in Case of White v. Hunt, where such a Judgment in Gloucester was affirmed to be good; and Hill. 23 Eliz. in Case of Dard v. Chambers, where such Custum was alleged to be in Canterbury, and held good. — 2 Bull. 21. S. C. & S. P. held accordingly; and Hill 23. Arg. cites the Ca-

res of Chambers v. Petr. and White v. Cow. * S. C. cited D. 133. b. Marg. pl. 82. as ad-

judged accordingly. — Ibid. cites Mich. 35. & 34. Eliz. Parker v. Dunly, where Error was 
brought on the Recovery had by Oneley against Parker, in Debt for Performance of Covenants in the Court of Piepowders in Canterbury, and the Stile of the Court, was, "Platins tenta in Curia Pedis " Pulveris" in Civitate Cant." without saying, "in Pleno Mercato tenta" and Bray, Fenner, and Clineck held this to be Error, and Judgment reversed against the Opinion of Gawdy, because the Plea was concluded, "Juxta Conaccentuam Venus praedicta"; But says Nota. 13. E. 4. 8. Piepowders without a Market, and this Book was not remembered by any, which is Verbatim contrary to this Resolution.


4. If 2 Men make a Contreheid for Land in a Fair that cannot be within S. P. and it their Jurisdiction, and they are not to hold Plea of such a Contra, but ought to be held be-

fore the Mayor, unless by Custum. Skin. 33. pl. 10. Anon.

(K. a. 2) [Court of Piepowders.]

Pleadings and Proceedings.

1. It was aliciou'd for Error upon Record given in the Court of Pie.S. C. cited 
powders Secundum Consequentiun Civitates, because it did not say in pleno Mercato vel Feria, and it was adjudged no Error by reason of the Words, Secundum Consequentiun Civitates, so that it appears that the Court of Piepowders may be by Custum without Fair or Mar-

ket. Br. Error. pl. 171. cites 13. E. 4. 8. 2. Error was aliciou'd upon a Judgment in a Court of Piepowders in 
Gloucester, because the Adjournment was ented Idem Dias datus est, whereas it should be Eadem Hora, but held good. Mo. 459. pl. 637. 

3. If Judgment be given upon a Contreheid made at a Fair precedent, and no Plaint was then entred, it is erroneous. Jenk. 211. pl. 48. 


4. If Judgment be against Defendant he must be amerced, or else the 

Judgment is erroneous. Jenk. 211. pl. 48.

5. Such a Court laid to be held by Prescription and Charter is well 

Such Court may be held, though not in Pleno 

Mercatus &c.

(L. a) Courts of Boroughs, and other Inferior Courts. 
Of what Things they may hold Plea, [and in respect of the Declaration.] and try by Jury there.

1. If an Obligation be made out of the Jurisdiction of the Court, though the Action brought upon it is transitory as the other Courts, as the Courts at Westminster, that have a general Jurisdiction, yet such Inferior Courts have not any Jurisdiction of any Thing that arises out of the Jurisdiction, and therefore they have not Power to hold Plea thereof. Patch. 15 Car. 2. R. between Richardson and Bernard adjudged per Curiam, in an Action brought by him that recovered upon such Obligation in an Inferior Court for an Escap of him that was taken in Execution upon the Judgment against the Officer that suffered him to escape; and adjudged, that this was certain non Judicium, and mery bon; and that the Officer shall take Advantage thereof, and Judgment given against him that brought the Action for the Excape after a Verdict for him. Intracut. Term 4 Car. 2. R. Rot. 1590. for there it appears by the Declaration, that the Obligation was made at a Place in the Body of the County out of their Jurisdiction.

Argument in the Exchequer, in the Case of Gwinn v. Poole, and said, that true it is, if it appears by the Declaration of the Plaintiff, that the Cause of Action arose out of the Jurisdiction of the Court, all the Proceedings after shall be void, & coram non Judice, and this was the reason of the Judgment in the Case of Richardson v. Barnard, in Rolle's Abr. 545. 879. March's Rep. 8. because it appeared in the Body of the Declaration, that the Place, where the Obligation was made, was in the Body of the County out of their Jurisdiction; But where nothing of this appears by the Plaintiff's Declaration, it ought to be notified to the Court by the Defendant's Plea to the Jurisdiction of the Court.

2. In an Action upon the Case in an Inferior Court, if the Plaintiff declares, That at a Place within the Jurisdiction of the Court the Defendant assumed, That in Consideration that such a Ship should go from Yarmouth, which was out of the Jurisdiction, to Amsterdam, he would give to the Plaintiff's; and ascertained, That the Ship went from Yarmouth to Amsterdam, and thereupon the Defendant pleas Not Guilty; This is not triable in this Inferior Court, because they cannot enquire of those Things which are out of their Jurisdiction, and without it the Action does not lie, though the Agreement was within the Jurisdiction. Patch. 15 Car. 2. R. between Brian and Langborn adjudged in a Writ of Error upon such a Judgment in Newcastle, and the Judgment reversed for this Error. Intracut 15 Car. R. Rot. 495.
In an Action upon the Case in Windfor Court, upon a Pro. S. C. cited
milk that the Plaintiff declares, That at Windfor aforefaid, within
judgment in consideration that the Plaintiff af
tured to draw with four Horses 1500 Tires from an House in Hedley
in Comitatus Bucks, in the Top of Hedley Hill ibidem, the Defendant
assumed to pay 51. Though the Defendant pleads Non Assumpsit,
per the Court cannot proceed to try it upon this Declaration, for
that it appears in the Declaration, that Hedley Hill and the House
a quo &c. are in Comitatus Bucks, of which the Jury cannot take Con-
te:
and if they proceed to try it, the Jury ought to inquire of
it for Damages. P. 15. 2. R. between (* For and
Stone adjourned, and the first Judgment reversed. Intracoe Nill.
15. 14 Car. 1. Rot. 444.

In an Action upon the Case in the Court of Bath in Comitatu
Somerset, if the Plaintiff declares, That he was a Taylor, and that
he used the said Art for several Persons inhabiting tam infratm Civitaten
pract., quam aliis infra Regnum Angliae, and the Defendant, to fear-
dalize him in his said Art, said these Words of him; Thou hast ro
as much Cloth out of my Suit and Cloak which thou madest for me, as
did make thy Wife a Waistcoat, by which he lost his said Customers;
Though the Defendant pleads Not Guilty, yet the Court cannot
proceed to try it upon this Declaration, for that the Jury upon the
Trial ought [not] to give Damages for the Loss of Customers out
of the Jurisdiction of the Court. P. 15. 2. R. between
Stoweland Ireland, per Curiam in a Wilt of Error upon a Judg-
ment in Bath, and it was reversed accordingly, but after a Day
was given over to the next Term. Intracoe Trin. P. 15 Car. 1. Rot.
1587, and after, Hill. 15 Car. the Judgment was affirmed, be-
cause it was so alleged only for Damages.

three Judges, contra Barkley, for he might lose Customers who dwelt out of the Jurisdiction, and
yet the Customers may be within the Jurisdiction.—Cafe et, in the Marcus for these Words,
You are a Whore; and the Plaintiff declared, that by reason of speaking the Words, the loth her
Marrige; After Verdict and Judgment for the Plaintiff, Error was alleged, that the Loss of Marriage,
which was the Cause of Action, doth not appear to be within the Jurisdiction of the Court, and the
other Words are not seelible, and the Judgment was reversed. Raym. 65. 2. R. 14 Car.
Wright. S. C. but no Judgment.—Keb. 228, pl. 65. S. C. adjournate.—It was agreed
clearly, that it that which is the Gift of the Action, and the compleat Cause of it be laid within the
Jurisdiction, and the Declaration shews further Matter, which is only Aggravation or consequential
Damage, without which the Action would have lain, such Matter need not be alleged to be within
the Jurisdiction; As in Case for calling a Woman Whore, whereby the loth her Marriage, there not
only the Words, but the Loss of Marriage must be alleged to be within the Jurisdiction, be-
cause the one without the other would not maintain the Action, and there one may confute the
Words, and traverse the Damage. So in Trefpas by a Matter for the Buttery of his Servant, where-
by he lost his Service; the Loss of Service, as well as the Buttery must be laid within the Juridic-
tion. 6 Mod. 324. Mich. 5 Anom. B. R. and cited and allow'd the principal Case in Roll.—
Salk. 40. pl. 1. S. P. and that in Case for calling the Plaintiff Whore, Per quod Mariaginam
amists, the Loss of Marriage must be laid infratm Jurisdictionem; For that is the Gift of the Action;
but otherwise for calling her Thief &c. Per Cur. Obiter.

In an Action upon the Case in the Mayor's Court of Oxon. if in Affirmatm
the Plaintiff declares, That in Consideration the Plaintiff would buy
 or procure to be bought, Wines in London, and would convey them to
declared, Oxford to the Defendant, to be sold by him, the Defendant assumed at this in Com.
Oxford to pay to the Plaintiff the Money laid out by him for the Wines
and Carriage of them, and the Mooter of the clear Profts arising by
Sale thereof, and the Defendant pleads Non Assumpsit to this; In
this Case Oxford cannot try it, because they cannot
inquire of the Performance of the Consideration for Damages which is performed out of their Jurisdiction, solicitor, the buying of Wines in London, and the Carriage of them to Oxford from London.


6. In an Action upon the Case in the Court of Launcelton in Cornwall, if the Plaintiff declares, That whereas he was an Attorney of the Hundred Court of Stratton in Cornwall, the Defendant having Communication with J. of the said Office of the Plaintiff, said these scandalous Words of him, within the Jurisdiction of the said Court of Launcelton, Thou art a Cheater etc. After Devise for the Plaintiff, and Damages given, and Judgment, this is Error, for that the Jury could not inquire whether the Plaintiff was an Attorney of the Hundred Court, this being out of their Jurisdiction, and this being the principal Cause of the Action and Damages. Palsch. 1651, between Fawe and Heddon, adjudged per Curiam, and the Judgment in Launcelton reversed accordingly.

7. If an Interior Court hath Jurisdiction to hold Plea of any Sum under 40l. [and] an Action upon the Case [is brought there] upon a Promiss, in which the Defendant affirmed to perform an Award made by J. S. or otherwise to pay to the Plaintiff 40l. this Action does not lie in this Inferior Court, though the Plaintiff acknowledges himself satisfied [of part of the Damages] to draw it within the Jurisdiction of the Court, because it consists in Damages to be assessed by the Jury, and the Jury may give more or less Damages than 40l. and therefore before the Damages are made certain by Assentment of the Jury, the Plaintiff cannot acknowledge Satisfaction of any Part thereof. Palsch. 15 Car. B. R. between Giltiers and Wilkins adjudged per Curiam, in a Writ of Error upon a Judgment in Banbury, and (§*) Judgment thereto given reversed for this Cause among others. Intratius Trin. 14 Car. Rot. 215.

8. An Inferior Court cannot hold Plea of an Obligation, Contract, Battery, or other tranitory Actions, if it was not made within the Jurisdiction of the Court, inasmuch as the Jurisdiction of the Court is limited to Things arising within the Jurisdiction. Mich. 15 Car. B. R. per Curiam, prater Barkly, who inclined the contra for the common Practice of such Courts.

9. In Writ of Error by W. against B. upon a Judgment given in the Court of the City of Bristol, the Case was, that B. was Plaintiff in the said Court against W. in an Action of Covenant, and declared of a Covenant made by Word by the Testator of W. with B. and declared also, that within the said City there is a Custom, That Covenant or tenures flesh shall bind the Covenantor as strongly as if it were made by Writing; And it was held by the Court, that that Custom does not warrant this Action, for the Covenant binds by the Custom the Covenantor, but does not extend to his Executors, and a Custom shall be taken strictly, and therefore the Judgment
Judgment was reversed. Le. 2. pl. 3. Hill. 25 Eliz. B. R. Wade v. Kenno.

10. A Man recovered Debt and Damages in B. R. and afterwards brought Action of Debt against the Bail in the Court in the Tower of London. Upon this Judgment, and after a Summons and Nihil returned, the Defendant was taken by a Capias and released, and thenceupon the Plaintiff brought an Action on the Cafe in the same Court against the Registrar for the Registry, and upon a Motion a Prohibition was granted, for that the Original Foundation of this Action commenced in this Court. Roll Rep. 54. pl. 28. Trin. 12 Jac. B. R. Anon.

11. In Trapsas Vi & Armis at Douce the Plaintiff declared that the Defendant took certain Cows of his out of the Jurisdiction of the Court, and brought them within the Jurisdiction, and there disposed of them to his own Use. After Judgment for the Plaintiff it was alligned for Error, that in regard the taking, which is the Ground of the Action, was without the Jurisdiction of the Court, altho' the Disposing of them was within, yet the Court had no Jurisdiction of the Cause, which Roll Ch. J. agreed, and said, that if the Action had been a Trover and Conversion it had been good, but being a Trapsas Vi & Armis it is naught, and reversed the Judgment Nih. Syl. 313. Hill. 1651. B. R. Keightley v. Notes.

12. A Quantum Meruit for Work done in London will not lie in an Inferior Court, tho' the Premise were made good within the Jurisdiction, for the Jury must enquire of the Worth. Freem. Rep. 214. Mich. 1676. in Oldenburgh's Cafe.

13. An Attempt for Rent, tho' there were a Special Premise, ought not to be brought for Kent in an Inferior Court, because it concerns the Reality, Held. Freem. Rep. 214. pl. 221. Mich. 1676. in Oldenburgh's Cafe.

14. 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 toto. Cur. And Holt said, there have been Cases to the contrary, but the Law is now settled otherwise; and if a Person 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.

(L. a. 2) Inferior Courts.
Proces and Proceedings therein.

1. In Trapsas, the Defendant justify by Warrant directed to him in the Court of R. by the Steward there, to attach the Plaintiff by his Goods within the Hundred, to answer one A. by Virtue whereof he entered the Houle, and took the Goods, as Bailiff. Jones for the Plaintiff demurred, because it is not showed what was the Caufe, or that the Court had Jurisdiction thereof, which the Court agreed, and that such Court cannot direct a Warrant to a Bailiff of a Hundred. Keb. 838. pl. 22. Hill. 16 and 17 Car 2. B. R. Watkins v. Cad.

2. A Summons must be returned before a Capias shall issue out of an Inferior Court, or else the Bailiff, who executes the Capias, is guilty of False Imprisonment. Vent. 220. Trin. 24 Car 2. B. R. Read v. Willmot.

3. If where this Cafe is de-

4. In a Caufe commenced in an Inferior Court, if issue be not joined within six Months after Appearance, the Caufe ought not to be removed by Habeas Corpus, a Special Return being made thereof by Virtue of the Statute; and this was agreed by the Court on Debate in this Caufe, a Complaint being made against Mr. Staples, the Steward of Windor. 2 Show. 394. pl. 362. Mich. 36 Car. 2: B. R. Halter v. Whitfield & al.

5. The regular Proces in Inferior Courts is a Poke in Cafe, and a Simmuns in Debt, but however, the miswarding of Proces is cured by the Defendant's Appearance; per Holt. Comb. 260. Pafs. 6 W. & M. in B. R. Anon.

6. Holt Ch. J. said, that Twifden was once strongly of Opinion, that a Capias does not lie in an Action on the Cafe in an Inferior Court, but that upon Consideration of the Book H. 6. Twifden said, he was convinced that a Capias well lay. Comb. 260. Pafs. 6 W. & M. B. R. Rogers v. Marshhall.

7. In Inferior Courts the Court is, to inform an Appearance by Dittrefs, and that ought to be reasonable, and if a Recons be made to a reasonable Dittrefs, the Steward may impose a Fine for it; and it would be too much to disfrain Goods to the Value of the Debt demanded; And the Officer can't justify the breaking an Hons to take such Dittrefs. And tho' Inferior Courts may grant other Proces out of Court, yet can't they grant an Attachment on Contempt but in Court; per Holt Ch. J. 12 Mod. 610. Hill. 13 W. 3. Anon.

8. Judgment was given in the Town Court of Brefiol, and Costs taxed, and a Svec Fadic taken out against the Bail, and a Year afterwards the Court granted a new Trial, and set aside the firt Judgment, and an At- traction was granted against the Judge for this Caufe. 1 Salk. 201. pl. 4. Trin. 1 B. R. The Queen v. Hill.

9. An Attachment was pray'd against W. the Town Clerk of an Inferior Court, for refusing an Appearance on an Attachment which was tender'd without putting in Bail, but upon restoring of the Goods the Matter cease'd. Powel J. said, it is the Course of Inferior Courts to take special Bail even in Caufe of an Executore, but upon an Habeas Corpus we will discharge him. There is Proces of Capias in an Inferior Court, and upon this there may be special Bail, because their Jurisdiction is limited, but this is never upon Proces by Attachment, because this Proces is against the Goods. Hill. to Ann. B. R. The Queen v. Wakefield, and the Bailiffs of Litchfield.

10. A Motion was made for an Attachment against Mr. Street, Steward of the Borough Court in Southwark, alleging, that there had been a Verdict there pro Quer' and Judgment and Execution executed, and that he had granted a new Trial, which he ought not to have done, and fat aside all the Proceedings on the Verdict and afterwards; But it appearing, that after Illie was joined there was a Reference and an Agreement, that Plaintiff should not go on to Trial, yet Plaintiff brought on his Caufe, and had a Verdict for all his Damages, viz. 20 l. whereas his real Demand was not above 7 l. and this being made appear to the Steward that the Defendant was surprized, he fat aside all the Proceedings, and having offer'd the Plaintiff, that if he would try the Right in a feign'd Illie the Money should remain in Court for Security, but this being refused, he granted a new Trial, and the Complainant appearing to be vexatious, the Court ordered the Plaintiff to pay 13 s. 4 d. Costs, for it was agreed, that the an Inferior Court cannot grant a new Trial after a Caufe hath been fully heard, yet where a Verdict is ob- tained by Surprize, or through any Irregularity, it may there be set aside. The
The Judge may and ought to enquire into it, and the Defendant here made no defence, nor knew any Thing of the Matter, till Execution executed. Hill. 8 Geo. B. R. Street's Cafe.

(L. a. 3) How they must demean to the Superior Courts.

1. If Records are, or Writ of False Judgment, or Certiorari, or Writ of Error comes, the Power of the Court suceses, and it is Error if they proceed after it. Br. Judges pl. 17. cites 6. H. 7. 16.

2. If a Writ of Error be directed to an Inferior Court; they ought to execute it in all Things thro' their Fee be not paid nor tender'd to them; and the Secondary said, that the Fee which is demanded by them ought to be endorsed upon the return of the Writ of Error, so that the Judges may Judge if it be reasonable, and that divers Precedents Warrant that Accordingly. Lane 16. Hill. 4 Jac. in the Excedequer, Mayor of Lincoln's Cafe.

3. In all particular and private Jurisdictions, if they come to be certi. fed in B. R. in a Writ of Error you must set out their Power; But if they have their power by a Statute, as Wales, then it need not be set forth S. C. accord- per Hyde Ch. J. Godb. 381. pl. 496. Pach. 5 Car. B. R. in Cafe of ingley, and Gunter v. Gunter.


(L. a. 4) Favour'd or restrain'd by the Superior Courts. And what shall be admitting the Juris- diction.

1. THOUGH Execution of a Judgment had in an Inferior Court of Record having Power to hold Plea above 40s. As in London, Oxford &c. cannot be had of any other Goods than such as are within the Jurisdiction of that Court, yet if the Record of a Judge- ment be removed into Chancery by Certiorari, and thence by Mitimus into B. R. or C. B. Execution may be had upon any Goods in any County of England. Went. Off. Ex. 138.

2. B. R. never gives judgment upon a Conviction in another Court; But if, after Issue joined in another Court, the Indictment be removed, the Party is always admitted to wave the Issue below, and plead de novo, and go to Trial upon Issue joined in this Court. Carth. 6. Trin. 3 Jac. 2 B. R. The King v. Baker.

3. In Debt on a Bond given in the Court of the Sheriffs of London, upon 2 Mes. 195 not Guilty, it appeared, that the Bond was made out of the Jurisdiction &c. Hill. of the Court, and therefore it was objected, that the Proceedings were co- ram non judice, and void, and that the Serjeant, by executing the Pro- ceds, was a Trespafor; but adjudged for the Plaintiff, and by Holt, v. Martin, Ch. J. to which the rest agreed, 11, Where an Inferior Jurisdiction is in the confined to Perions, as the Marthalewa was to thofe of the King's Court di- Houlhold, if it appears by the Declaration, that the Person who sues, is qua- Ifed. - Vide frem Eep.
Court [Inferior.]

Ch. 7. Mod. 3. S. P. per Cur. and Diceus to be S. C.

26

4. They held 2dly, That where it is confined to some particular Things, and the Suit there is for something else, of which they have no Jurisdiction, all is void, and by no Admission can be made good.

5. And they held 3dly, That where they are confined to Place (viz.) to all Contracts arising within such a District, though the Contract arises out of it, yet the Court may award Proceeds, and the Officer may execute it, unless it appears to him, that it arose out of the Jurisdiction; As if this Bond had been dated at York; but he is not bound to enquire either whether there is a Caufe of Action, or where it did arise.

6. But where a Defendant pleads to the Merits of the Caufe, and not to the Jurisdiction of the Court, he can never then take Advantage of the Want of Jurisdiction; for by the Averment of the Court, and his own Admission, he is estopped to say, that it was a Matter that arose out of the Jurisdiction; and 'tis impossible the Court should know where a transitory Matter arises, unless the Defendant acquaints them with it.

7. Upon a Motion for an Attachment against a Steward of an Inferior Court, for discharging a Jury before they gave their Verdict, it was held, that if a Jury in such Court will not agree on the Verdict, the Way is, as in other Courts, to keep them without Meat, Drink, Fire, or Candle, till they agree.

8. All Misdemeanors in Judicial Officers of Inferior Courts are Contempst to the Courts of King's Bench, and therefore Attachments go daily against Stewards of those Courts, for granting an Attachment against all the Party's Goods. But for Error in Judgment, a Judge is not punishable.

(L. a. 5)
Court [Inferior.]

(L a. 5) Count and Pleadings, and Proceedings in Inferior Courts.

1. If an Inferior Court holds Plea, and in the Stile of the Court it's Rep. 133: does not appear how it holds it, viz. by Charter, or by Pre-3. Patch. s C. B. scription, the Proceedings in this Plea are erroneous, and all which 3 P. in Tur- follows upon it. For all Jurisdiction to hold Plea refts in the Crown's Café, and therefore it ought to be ascertained to the King's Court, how this — Cro. Power is derived from the Crown. Yelv. 46. Hill. 2 Jac. Mouse's J. 322. pl. 14. Patch. 17 Jac. 3 C. B. in Cafe of Pendarvis v. Kingston, S. P. —— Cro. C. 46. pl. 5. Mich. 2 Car. C. B. in Cafe of Hodes v. Moyse, S. P.

2. In Inferior Courts it is not necessary to set forth in their Records by Cro. C. 46. what Title and Authority they hold Pleas ; But otherwise when they certify; Per the Chief Jurifrice and Jones. Lat. 182. Mich. 2 Car. in 7 of Gun- ton v. Gunton.

3. A. brought Action against B in the Court of the Verge, and recovered; and upon Error brought the Error assign'd was, that the Plaintiff decla- presented in St. Martin's within the Jurisdiction, and upon Not Guilty a Ven. fac. was from St. Martin's presence, and says not Intra Jurisdictionem. And this being a Court which varies and alters the Limits of the Jurisdiction according to the Restauration and Removal of the King, it may be that St. Martin's was Intra Jurisdictionem at the Time of the Contract and the Declaration, and yet was not at the Time of the Ven. fac. being several Months after; and therefore he ought to have paid Intra Jurisdictionem, as in the Declaration. And Doderidge and Jones, being only prentet, for this Cause held it was Error. Lat. 214. Patch. 3 Car. Thair v. Fosset.

4. In Cafe for bringing an Action in the Court of Bristol, at the Suit of Jo. 445. pl. H, without his Privy, whereby the Plaintiff was imprisoned, and so all, his Creditors came upon him, and he lost his Credit &c. after Verdict for s. C. and the Plaintiff, Error was brought and assign'd, becaufe it was not shew'd the Court that the Causes of Actions which the other Creditors had against him did arife within the Jurisdiction of the Court of Bristol. Berkley held the Damages ill ailefled, becaufe they were given as well for the Actions brought by the other Creditors. But Brampton J. contra; becaufe the Actions brought by the other Creditors, were added for Aggravation only, and the Cafue of the Action was the Arrest and Imprisonment, like the Cafe were a Man speaks Words which are in part actionable, and others only put in for Aggravation, and Damages ailef'd for the Whole, it is good. Mar. 47, 48. pl. 76. Trin. 15 Car. Thurston v. Ummons.

5. In Error to reverse a Judgment in the Marthaly a the Court affirm'd, that all Matters tranfitory, as well as other Matters, ought to be alledge to be within the Jurisdiction; But if one lends a Horse at Hall to ride to Beverley, and to re-deliver the Horse at Hall at a certain Time, an Action lies for this in the Court of Hall; because it is founded upon the Loan and Failure of the Redelivery. Sid. 180. pl. 17. Hill. 15 and 16. Car. 2. B. R. Inman v. Batten.

6. Error
6. Error of Judgment given in the Court of York, where the Plaintiff declared, that the Defendant being indebted to him at York Infra Jurisdictionem for Goods to him sold and delivered, addicted & bidem promised to pay; and the Judgment was reversed, because it is not shown at what Place the Goods were sold, and it might be out of the Jurisdiction. Lev. 156. Hill. 16 and 17. Car. 2. B. R. Stone v. Waddington.

7. Where an Officer of an Inferior Court justifies by Force of the Proceedings, there ought to shew the Jurisdiction whether by Prescription, or by Charter; and if by Charter, he ought to make a Proffer hie in Cur. of the Letters Patents. But if the Plea be pleaded by a Stranger, he need not shew such Certainty; for this would be to lay him under an Impoollibility. Sid. 311. pl. 23. Mich. 18. Car. 2. B. R. Chute v. New ton.

8. The Plaintiff in the Inferior Court complains that B. such a Day and Place, being indebted to him infra Jur. &c. for Money lent, did die & kco predicate assume to pay, and doth not say, that the Money was lent infra Jurisdictionem Curiae. Per Vaughan, If he had declared upon the Promiss in Law, that did arise upon the lending of the Money, he ought to allege, that the Money was lent infra Jur. &c. But if Money be lent out of the Jurisdiction and express Promise within to pay it, the Court may hold Plea of this Promise. Sed Alii alteri ienferant, because he cannot plead non assumptum infra Jurisdictionem, sed quere rationem. Frem. Rep. 317. pl. 392. Mich. 1673. C. B. Baker v. Holman.

9. Trepass for taking his Goods. The Defendant pleads, that Pro cess issued out of an Hundred Court to seize the Goods for not appearing, the Plaintiff demurred, because it was not alleged that the Caese of Alien did arise within the Jurisdiction of the Court; and the Demurrer held good. Frem. Rep. 260. pl. 279. Trin. 1679. Stainton v. Randall.

10. Debt upon a Bond against an Executor, who pleaded that in Curia Domini Regis de Recordo tent’ 4 die Novemb. Anno Regni Domini Regis nunc 34. apud Guildhall Croitat. Norwic’ coram A. & B. Vicecom’ ejudem Civitatis, one Lily brought Debt against him in a Bond for 500l. and recovered, and so pleaded Plene administravit praterquam &c. quæ non sufficient &c. Defendant demurred generally, and adjudged per tot. Cur. for the Plaintiff, because the Defendant did not shew by what Authority this Court was held, viz. by Prescription, Grant, or otherwise, according to Turner’s Cæse, 8 Rep. [133. a.] 3 Lev. 141. Mich. 35 Cur. 2 E. Jones v. Moldrin.

Show. 320. 11. The Statutes of Jeofails extend to Inferior Courts after Verdict; Mich. 3 W. Allowed per Cur. Comb. 260. Pasch. 6 W. and M. in B. R. Anon. & M. in

Cafe of Phyle v. Bofon, cites 8 Saund. 257. S. P. allowed by the Judges in the House of Lords, that they are helped by the 21 Jac. cap. 13. and says, that of this Opinion was all the Court, and Judgment in the principal Cæse, for which this was an express Authority; for that the Discontinuance of Proces is helped by the Common Law, and a Discontinuance of Court is helped after Verdict by the Statute of Jeofails, and says, that so they held in another Cæse this Term, in the Cæse of Wal vin v. Smith.

Ld. Raym. Rep. 211. Pasch. 9 W. 3. S. P. in Lee’s Cæse,

12. False Judgment from a County Court, where Debt was by Jurisdictions, the Declaration was, that the Defendant was indebted to the Plaintiff within the Jurisdiction of the Court, for Goods sold and delivered, and because it was not alleged that the Contrat was within the Jurisdiction
Jurisdiction, judgment was reversed, for if one be indebted to the other, he is to wherever he goes. 12 Mod. 593. Mich. 13 W. 3. point there was an action for.

Money lent, and because it was not said that it was lent Infra Jurisdictionem Curiae, judgment was reversed; for per Car. though the Debt is transitory, and is a Debt in every Part of England, yet it ought to be laid to arise within the Jurisdiction of the Inferior Court; but if the Plaintiff had shewn, that the Money had been lent Infra Jurisdictionem Curiae, or if it had been for Goods there sold, the Plaintiff would have had no need to say, that the Defendant assumed to pay Infra Jurisdictionem Curiae, because the Law creates the Promise upon the Creation of the Debt, which Debt being within the Jurisdiction, the Promise shall be intended there also.

13. Let a Debt be contracted where it will, if Bond is given for it, within the Jurisdiction of an Inferior Court, that gives them Jurisdiction. 6 Mod. 323. Mich. 3. Ann. B. R. Villars v. Cary.

14. In Actions in Inferior Courts, every Part of that which is the but it was Gift of the Acton, must appear to be within the Jurisdiction, otherwise of his own accord, such Matters as are inferred only for Aggravation of Damages, and might be omitted, and yet the Action remain; Per Car. 1 Salk. 404. Matters so inferred are effectually necessary to maintain the Action, they must be averred to be within the Jurisdiction, i. e. where the one without the other will not maintain the Action. 6 Mod. 223. S. C. — 11 Mod. 7. Stann. mer v. Dauers, S. C. accordingly.

15. Nothing shall be intended within the Jurisdiction of an Inferior Court, but what is expressly alleged so; that where an Action is brought on a Promise in a Court below, not only the Promise, but the Consideration of the Promise, must be alleged to arise within an Inferior Jurisdiction; because such Inferior Courts are bound in their original S. P. debates. Bid. Creation to Causes arising within the Limits of such new erected Jurisdiction; and therefore if a Debtor, that has contracted a Debt out of such limited Jurisdiction, comes within it, yet they cannot sue Saund. 74. there for such a Debt; because the Cause of Action did not arise within the Jurisdiction; and therefore it is not within the Limits of their S. P. Commiission to try and determine; and therefore the Consideration of the Promise which is the Cause of the Action, must be alleged to be within the Jurisdiction of the Court; and not only so, but it must be proved upon it; in S. C. the Trial; and if the Plaintiff prove a Consideration out of the Jurisdiction, that cannot be given in Evidence; and if it be, the Defendant's Counsel may propose a Bill of Exceptions, and the Bill will appear to be erroneous; and therefore Saund. 74. in Case of Deacock v. Belt, makes a true Distinction between Counties Palatine, and other Inferior Courts. Gilb. Hist. of C. B. 152, 153.

(L. a. 6) The Offence and Punishment of bringing Actions there, in Cases where they have no Jurisdiction.

1. If one is arrested by Process in an Inferior Court, for a Cause arising out of their Jurisdiction, the Party may maintain an Action against the Plaintiff, who lev'd the Plaintiff; for he is supposed to know where the Cause of Action arose, but not against the Judge or Officer, Latn. 1776.
Court [Inferior.]

Bur. Gwyn who had executed it; for they can't tell, whether it arises within their Jurisdiction or not. 2. Jones 214, 215. Trin. 34 Car. 2. B. R. Ollier v. Beffy.

2. Some Jurisdictions are limited; 1st. As to the subject Matter, as the Commissioners of Excise touching Impositions for strong Wines, and they adjudged low Wines to be strong Waters, which was an Excess of their Jurisdiction, and therefore an Action lay against them. So Marshal's Café, Co. 10, they have Jurisdiction in Debt and Covenant, where both Parties are of the Houthold, and in Trespasses where one of them was of the Houthold, but this did not extend to Trespasses upon the Café, and their holding Plea in Affimpiit, was Coram non Jusdice. So in Café where there is a Founder of an Eleemunatory Foundation, and a Viator is appointed, and his Jurisdiction is limited by Rules and Statutes, if the Viator in any cause exceeds these Rules, an Action lies against him, as was agreed in the Café of Exeter College; But contra where he is mittaken in a Thing within his Power, though there is no Appeal over. 2dly, In respect of the Persons, as in the Café of the Marshal's, where the Parties ought to be of the Houthold &c. Ut supra, or all is Coram non Jusdice. 3dly, In respect of the Place, as Judices of Peace in relation to the Poor, for their Relief within their several Parishes, but if they tax S. to the Relief of the Poor of D. this is an apparent excess of Jurisdiction, and the Judges and Officer are liable to an Action. Of this Sort are Inferior Courts in Corporations. But where the Inferior Court has Cognizance of the Action, and is only restrainable in it at the Pleasure of the Party, by pleading to the Jurisdiction, especially where the Action will lie as well within as without the Jurisdiction, as all transitory Matters, where it can't appear whether they arise within or without the Jurisdiction, and therefore if the Person can be come at by Processe, over whose Person they had Jurisdiction, and he omits to plead to the Jurisdiction, by pleading over to the Merits he is concluded for ever. The reason of a Prohibition is the fame, which is to hinder the Party from being wronged, yet if the Party plead to the Merits no Prohibition lies, for he has offer'd himself by Pleading, but if all the Proceedings were void & coram non Jusdice, if the Party has pleaded, yet a Prohibition ought to go. Where it appears in the Declaration, that the Cause arose out of the Jurisdiction, all the Proceedings will be Coram non Jusdice, but where nothing of this appears thereby, it must be notified to the Court by the Plea of the Defendant to the Jurisdiction, which Plea, if the Court refuses or accepts it and proceeds afterwards, if it be offer'd before Impar lance and upon Oath as it ought to be, all Proceedings are void, and the Judge and Officer liable to Actions. See W. 1. cap. 35. By pleading to the Action the Defendant cannot have an Action upon this Statute, and therefore the Superior Courts refuse to grant Prohibitions upon Suggestions that the Cause arose out of the Jurisdiction, until the Defendant has pleaded this Matter to the Jurisdiction of the Inferior Court. 2 Lutw. 1565, 1566, 1567, in the Appendix 4 W. & M. in the Argument of Baron (John) Powell in Scacc. in the Café of Gwyn v. Pool.

3. If Suits be in Inferior Courts without Cause an Action lies, but not for a cautelefs Suit in the Courts at Westminster; and false Imprisonment.
(L. a. 7) Of removing Causes out of Inferior Courts.

1. 43 Eliz. cap. 5. No Writ of Habeas Corpus, or other Writ sued for to remove an Action, shall be allowed, unless it be delivered unto the Judge or Officer of the Court before the Jury appear, and one of them be sworn.

2. 21 Jac. 1. cap. 25. S. 2. No Writ to remove a Suit in an Inferior Court On a Habeas Corpus be delivered to the Stewards &c. of the same Court, before Issue or Demurrer joined, so as such Issue or Demurrer be not joined within six Weeks after the Arrest or Appearance of the Defendant.

Writ came to him, but did not say, that Habeas was not joined within six Weeks &c. as it ought to be by the Statute, and therefore held. There was likewise another Fault, because it being in an Inferior Court, it is not returned, that the Cause of Action arose within the Jurisdiction. Comb. 127.

3. 21 Jac. 1. cap. 23. S. 3. If any such Cause shall be removed or laid by any such Writ or Process, and afterwards the same Cause shall be remanded, the same Cause shall never afterwards be removed or laid before Judgment by any Writs whatsoever.

4. S. 4. If in any Cause not concerning Freehold, Leases or Rent, it shall be laid in the Declaration, that the Debt, Damages or Things demanded do not amount to 51. such Cause shall not be played, nor removed in any other Courts by any Writs other than Writs of Error or Aaint.

In stat. 21 Jac. 1. cap. 25. Par. 3 may proceed in Causes therein specified, which appear or are laid, not to exceed 51. though there may be other Actions against such Defendants, wherein the Plaintiff's demands may exceed 51. This was a temporary Act, and continued by 5 Geo. 2. cap. 27. from the End of that Session for seven Years &c.

5. S. 5. If any Writ shall be sued for contrary to the Intent of this Act, it shall be lawful for the Judge or Officer, to whom such Writ shall be directed, to disallow the same, and to proceed as if no such Writs had been granted.

6. S. 6. Provided that this Act shall extend only to such Courts of Record, and for so long Time only, as there shall be an utter Barrister of three Years standing, that shall be Steward, Town-Clerk, Judge or Recorder of the same Court, or that shall be Assistant to such Judge, and there present, and not of Counsel in any such Case then depending in the same Court.

Court of which an utter Barrister is Steward, and in fact the Habeas of the Plaintiff was not joined more than six Months after the Appearance of the Defendants there; so that by the Statute 21 Jac. the Steward had Liberty to proceed now without the Writ, and without the allowance of the Writ; yet in this Case the Steward is bound to return the Writ with the special Matter, otherwise he shall be in Contempt; and so it was constantly ruled in B. R. when Hale was Ch. J. Comb. 69. Mich. 1 W. & M. in B. R. Warln v. Clerke——Habeas was joined in an Inferior Court, and the Steward refused to allow the Habeas Corpus, and the Cause was tried but not before an utter Barrister, as is directed.
7. S. 7. This Act shall not extend to any Cause wherein any such Plea
shall be pleaded, as could not be tried within the Jurisdiction of such Inferior
Court.

8. By 21 Jac. after a Proceedendo awarded, no Supersedes ought
to be granted, unless it unduly vel imprudere emancipat, in which Cases
it usually to grant one. Cro. C. 487, pl. 11. Mich. 13 Car. B. R.
Bower v. Cooper.

9. No Court can be exempt from the Superintendence of the King in his
Court of B. R. It is a Consequence of every Inferior Jurisdiction of
Record, that their Proceedings be removable into this Court, to
have their Record inspected, and to see whether they keep themselves within
the Limits of their Jurisdiction. 1 Salk. 144, pl. 3. Trin. 12

(L. a. 8) Judgments in Inferior Courts. When void.

1. W H E R E Judgment is given in a Base Court, or Peculiar, of
Contraâ£, Covenant, or Land which lies out of the Jurisdiction of
the Court, it is void, and the Party of the Execution shall have Affidavit
or Trepsfa. Br. Judgment, pl. 64. cites 22 Aff. 64.

2. But where it is given there of Franktenement upon Plaintiff, where
ought to be sued by Writ, this is not void, but Error, and there it is
agreed in Effet, that Franktenement shall not be recovered in Court
Baron but by Writ, and not by Plain, and if it be it is Error, and
False Judgment lies. Br. Judgment, pl. 64. cites 22 Aff. 64.

3. Error upon a Judgment in Cambridge, because the Cause of
Action is laid to be in a Lease called Bl. Acres, and it is not averred that it
was in Jurisdiction, cites Kelw. 33. a. 89. a. The Judgment was
entered,ideo videtur; And per Car. Judgment shall not be by a Vide-
tur. And Judgment for those Causes was reversed. Noy 129. Ventres
v. Carter.

4. In Assumpsit &c. the Defendant pleaded two several Attach-
ments of Money in London, viz. of one Part of it due to himself, and
the rest to a Stranger, and both due on Bond. The Plaintiff replied,
that both the Bonds on which the Attachments were made, were exe-

Yelw. 170.
Trin 6
Jac. B. R.
the S. C.
and the
Ideo vide-
tur was
adjuged
Error; For it ought to be Ideo consideratum &e.

5. Assumpsit in London for depauperating of an Horfe in Effet; The De-
fendant pleaded in Bar a former Action brought in the Sheriff's Court
in London for the same depauperating, and Judgment there for the De-
fendant. The Plaintiff replied, that the Cause of Action did arise in
Effet, out of the Jurisdiction of the Sheriff's Court. Upon Demurrer
it was adjudged that the Plea was ill; for if they hold Plea of a Matter

125
out of the Jurisdiction, the Judgment is void, and cannot be executed.

6. It was held in this Case, per Holt Ch. J. that wherever a new Jus-
risdiction is created by Act of Parliament, and the Court or Judge that ex-
cercisethisJurisdiction, acts as a Court or Judge of Record according to
the Courts of the Common Law, a Writ of Error lies on their Judgments,
but where they act in a summary Method, or in a new Course different
from the Common Law, there a Writ of Error lies not, but a Certio-

(L. a. 9) Plea or Record remanded into the Inferior
Court. In what Cases.

1. Officers for in Chester the Tenant vouched Foreigner to Warranty,
by which the Record is remov'd into Bank, and there the
Tenant was examin'd, and this Erron was quaff'd, by which the Plea
was remand'd into Chester, to take the Affize. Br. Parol ou Plea re-
maund pl. 5. cites 8. Aff. 22.

2. If Foreigner be vouched in Plea of Land in the Huyings in London,
the Plea shall be sent into Bank, and when the Warranty is determin'd,
it shall be remand'd into London, and in this Case Bank has no Power
in award Sell'n of the Land, but only to try the Warranty, and to
remand it. Br. Parol ou Plea remand pl. 2. cites 43 E. 3. 1.

3. Formedon in London, the Tenant vouched Foreigner to Warranty,
by which the Plea was sent into Bank, and Process made against the Vouchée,
and at the Day the Tenant said that pending the Process against the
Vouchée, it was found before the Ejsbeater, that if N. held of the King,
and d'd without Heir, by which the King seiz'd it, and gave to the
Tenant by Patent, and pray'd Aid of the King, and because the Tenant
vouched his Vouchée, and this Court has no other Power here but to deter-
mine the Warranty, therefore they recorded the Aid Praver, and rem-
manded the Parol into London. Br. Parol ou Plea remand pl. 9. cites
44 E. 3. 2. 3.

4. Fine came out of Franchife into B. R. by Writ of Error, and no
Error found, by which the Party su'd Execution there, and the Bench of
the Franchife where &c. seiclet of Oxon demanded Coutance of it,
and were ou'd; for when the Plea comes into B. R. it shall not be

5. But if Record be remov'd into C. B. out of Ancient Demofne by Pre-
tence of Frank Fee, and it is found no Frank Fee, it shall be remand'd.
Ibid.

6. If Aid of the King be granted in Affize for insufficient Conté, yet
when it is in the Chancery, it shall not be remand'd till the Title of the
King be examin'd for the King, otherwise upon a Vouchée, as it was

7. When Record comes out of County Palatine or Franchife, to try a Br. Traverf
Foreign Vouchée or Foreign Relief, the Record shall be remand'd after de Office pl.
Trial of it. Br. Parol ou Plea remand pl. 4. cites 21. H.

8. Contrary where both Courts are at Common Law, as the Chancery and Br. Traverf
B. R. in Case of a Traverf &c. or other Jilæ join'd in Chancery; de Office pl.
for this shall be try'd in B. R. and there shall remain, and there Judge
ment shall be given. Ibid.
9. So or a Record remov'd from C. B. into B. R. by Writ of Error, or otherwise, quod nota. Ibid.

10. A Man was arrest'd by Plaintiff in London, and after the Defendant brought Writ of Debt in Bank, and had Writ of Privilege, and because it appeared that the Plaintiff was older than the Writ, the Defendant was remanded into London, and the Plaintiff in London had Procedendo, quod nota. Br. Procedendo. pl. 6. cites 8. E. 4. 13.

11. If a Man is arrest'd in London, and after another brings Action in Bank against the same Defendant by Covin, and has Capias against him to bring him remov'd out of London, and the Plaintiff in London prays Procedendo for the Covin, he shall not have it till the Day of the Return of the Capias, that the Parties may be examin'd of the Covin, quod nota. But if the Defendant does not come at the Day &c. and is let to Main-prize, the Plaintiff may have a new Bill against him &c. and the Cause why they furcarse in London is, because the Capias is a Superedes in itself; for by the Arrest upon it, he is Prisoner at the Bank, and not at London, and then they cannot proceed, and cannot have the Prisoner, quod nota. Br. Procedendo. pl. 11. cites 10. E. 4. 16.

12. Where Pleas of Trepass, which is in a Court Baron, of Damages under 40 s. is removed into Bank by Recordare erewince, where it ought not to be removed, there the bafe Court cannot proceed, because the Plea is removed, and therefore Procedendo ought to be awarded to them to proceed, per divers Serjeants, quod nemo negavit. Br. Procedendo. pl. 6. cites 14. H. 8. 15. 17.

13. If a Man arrested in a Franchize sues Writ of Privilege, and removes the Body and the Cause, and after does not come to prove his Cause of Privilege, the Plaintiff in the Franchize cannot have Procedendo, and therefore it seems that the first Sureties remain, contra if he had been dismiss'd by Allowance of the Privilege, for then his Sureties are discharged. But it seems that when they remove the Body and the Cause, they do not remove any Sureties, but then there is not any Record against them, and then it seems that the Privilege being allow'd, the Sureties are discharged, contra where the Privilege is not allow'd; for then the Prisoner and the Cause was always remaining in the Custody of those of the Franchise. Br. Procedendo. pl. 13. cites 31. H. 8.

14. A Procedendo is a Writ to the Judge of an Inferior Court, requiring him to proceed in a Cause formerly remov'd hither by Ceriter-rari, or other Writ, or remov'd for some Time by Superedes. P. R. C. 294.

15. A Procedendo was deny'd to be granted to the Court of Canterbury in Ejection; for per. Cur. it was never known to have been granted in such Action. Sid. 66. pl. 40. Mich. 13 Car. 2 B. R. Anon.

16. A Procedendo was deny'd to be granted to the Court of Canterbury in Ejection; for per. Cur. it was never known to have been granted in such Action. Sid. 66. pl. 40. Mich. 13 Car. 2 B. R. Anon.

Because it appeared to the Court, that the Filing it was by Practice, and the Offence very great, a Procedendo was awarded, against the Opinion of Twifden J. and contrary to the Cause of the Court. Sid. 108. The King v. Upton. S. C. — It was file'd the same Day that the Ceriter-rari was return'd, which the Court conceived an irregular Surprice, notwithstanding the Bar, and the Clerks affirm'd that none could iluce. Kebr. 475. The King and Justices ofSomersetshire v. Upham. S. C.

19. Proce.
Court [of Stannaries.]


20. It was mov’d, that if the Plaintiff in Error of a Judgment in the County Palantine of Chelten, does not return the Record in a short Time, there might be a Procedendo; But per Holt, we cannot grant a Procedendo, because there is nothing before us; but upon a Certificate that the Record is not come in, you must have a Writ De Executione judiciei out of Chancery. Comb. 422 Hill. 9 W. 3. B. R. Anon.

21. Upon a Return of a Hab. Corp. from London, a By-Law was set forth, laying a certain Penalty upon a Freeman, for selling Goods not weight’d at the City Beam, according to the Custom; and it was moved to file the Return, for otherwise the Defendant could have no Remedy, if the Return were false, and so they might return what Custom they pleased fals & impune. Holt Ch. J. held, that the Practice had always been in B. R. to award a Procedendo, without filing the Return; But the Question (he said) was, Whether the filing would hinder the granting a Procedendo? That it was true, that the Habees Corpus suspends all Proceedings below, till the Court has de. 1 Sulk. 352. termin’d the Right of the Cape of Detainer upon the Return, and if they proceed in the mean Time, it is void, & Contum non judicet; so that a Procedendo was necessary, to unty their Hands below. And said, he could see no Reason, why they might not grant a he Procedendo after the Return filed. 6 Mod. 177. Trin. 3 Ann. B. R. Pazerkerly, 1 Balo.

22. When a Cause is removed by Habeas Corpus into B. R. a Procedendo may be granted, though the Return be filed, because the Record is not removed, but only a Transcript of it. Pach. 6 Geo. B. R.

For more as to Inferior Courts and Proceedings there, See Certiorarii Customs. (1. 2) Habeas Corpus. And other proper Titles.

(M. a) Court of Stannaries.

1. 33 E. 1. Rotulorum Chartarum, membrana 8. parte 40, 41. pro Stannatoribus nostris in Comitatu Devoine & Cornubiz, grant to them &c. of their Privileges, &c. all one except of the Places of the Prison, viz. l’Oliwhithiel for Cowin, & Liddford for Devon, & of the Coinage, viz. l’Oliwhithiel, Bodmyn, Liskerret, Truro, & Helston, in Cornubia.

2. 33 E. 1. Libro Parliamentorum 155. ad petitionem Stannatorum Cornubiæ, conceditur Charta Libertatem, juxta formam Confirmationis Regis Henrici, per se, non conjunctim cum Stannatoribus Devoine &c.

3. 1 E. 2. Rotulo Patentium, prima parte, membrana 13. Concellio Mineralibus Regis in Comitatu Devonie commorantibus, quod ipso a die contentionis praedentem per quadrimmem proximo sequens completem, liberi fin & quieti in Civitatis, Burgis Villis, Mercatoribus & aliis locis quibuscumque in Comitatu Devonie praedicto & aliis Comitatuibus vicinis de Theoloneo & omnibus aliis Conueniuntibus praedantis de quibusdamque necessarios pro vieta & velitum eorum Mineralibus ibidem emendis. Et quod de transgressionibus occasionibus perturbationibus, feu plactis aliquis, aliubi in Coris Comitum Baroni, vel aliorum Dominorium quorumcumque, tota Tempore praedicto, non
Court [of Stannaries]

non placient, nec placientur, contra voluntatem suam, sed coram Custodiis nostris Minerarum predictis, & Vicecomites nostris judicibus Co- mitarum, qui pro Tempore iurient. Vobis omnibus & linguis finanter inhistentes, ne Minerarios nostris predictos contra hanc Concessioneam nostram moleletis in alius, seu gravetes quo minus ipi Quicquidci & Libertatis predictis ut possint, justa formam Concessiones ejusdem.

4. 4 H. 8. cap. 9. Richard Strocke imprisoned in Liddard, till he was delivered by a Writ of Privilege out of the King's Exchequer at Westminster, for that he was one of the Collectors in the said County for the rent of the two Stannaries grante in this Parliament.

5. 23. H. 8. cap. 8. If any Person shall be such, accused, indicted, imprisoned, arrested, condemned, or otherwise vexed or troubled in his Person, Lands, Chattels, Goods or Chattels, by any of the Speakers or Officers of the King's Courts of Stannary, &c.

6. 23. H. 8. cap. 8. Walter Wallings, a Tinner, was indicted at Exeter before the Justices Itinerant, for killing Walter Wallings, the Son of his Brother in Decenna de Holme, and after it is there laid, Nomen Locutis in quo interdictus est, nunt intra Libertatem Stannarum, and after the Defendant rendered himself to the Sheriff of the County of Devon, and after Thomas de Swin- nery, Cunctos Stannarie, came to the Sheriff, and required him to deliver the said Defendant to him, upon which the Sheriff delivered him to the said Thomas, by which the Defendant was bound to Grah- am de Liddard in Libertate eisdem Stannarib, and after it is laid, Nomen defensores adhibe off in Liddbard, ina Libertate predicta Stannarie, and after it is demanded of the Sheriff, wherefore he delivered the Defendant to the said Cunctos of the Stannary, &c. who said, that he demanded him by force of the said Charter, 33 E. 1. upon which they were adjourned to Westminster coram Rege, and Day given to the said Cunctos, and to the Defendant to answer it; but the Cunctos did not come, but retired himself by Stealness, and for the Damage that might arise in the Stannaries by his Absence; but the Defendant appeared there, and pleaded Not Guilty, and was found Not guilty.

7. 2 Ed. 3. Rotuli Patentium parte 1. Dibrana 27. No- mero 130. upon the Supplication of the Tinner, the King granted, That no Tin shall be weighed at Tavistock, so quad multum dis- tat a Mari, and so with great Charge transported after Cornage and Weighting, and for this Expenditure it should hereafter be weighed at Ashburton, Chaglord, and Plympton, and not at Tavistock. And Westmonasterum in Scaccario among the Cities de Cornubia, 5 Ed. 2. Rot. 6. quod Laundecon, William B. and G. T. are sued by Writ of Conspiration by J. T. for appealing him of a Robbery 3 Ed. 2. ec. upon which comes P. W. and shews the Letters Patents of 33 Ed. 1. which are entered in hæc verba, and thereupon P. W. demands Conducence of this Plea, for that the De- fendant are Stannaros, to which the Plaintiff J. T. said, Nunc predicti Stannaros Curiam Mian habere non debent, quia dicit, quod uta equeula jam per 3 Dies versibus predictos ieiunantes & alios continuata est, abhine hoc quod predictus P. W. bel aliquus alius corum Ballivus, Curiam Mian non petisset, bel Curiam predictam offendere. Dicit eranm, quod cum continuantur in dicta Charta, quod predicti Stannaros operantes in Dominis Regis, dum operantur in eisdem Stannarib, hic est debeat, & quiet de omnibus Patentiis & Quotidianis Curias Regis tangeribus. Et cum predictus P. W. alieno predictis Stannaros Curiam
Courts of Stannaries.

8. The Court of Trematon in Cornwall is not any Stannary Court, for the Stile of the Court is, Manerium de Trematon Curia Domini Regis ibidem tenta coram J. S. et, and a Writ of Error lies in B. R. upon a Judgment there, and they may hold Plea there of Replevins. Co. Book of Entries, fol. 293. between Walter Skelton, and John Starkey, and Nicholas Asford, 15 Cl. Rot. 78.

9. If a Suit be in the Duchy Court at Callock in Cornwall, touching a Copyhold, and after a Verdict, Mr. Coryton, the Vice-warden, grants a Mandate to the Steward of the Court not to give Judgment, for that the Defendant had petitioned him in point of Equity, and a Prohibition is granted, upon a Swornise that the Vice-warden had nothing to do as Vice-warden in the Dutchy Courts; but there hath been a Usage there to appeal to the Lord Warden as chief Steward of the Duchy for Matters of Equity, and Mr. Coryton was only Vice-warden of the Stannaries by his Patent, and not Deputy Steward of the Duchy. Tr. 10 Car. B. R. between a Prohibition granted, upon the Motion of Master Attorney General. Bich. 10 Car. B. R. between Adams and Hann, per Curiam, a Prohibition granted.

10. The Charter of the Stannery is, that the King grants to the Tinners to dig Tin in the Waste Lands and Moors of the King and others wherefoever in the County of Cornwall. Br. Prerogative, pl. 134.

11. By ancient Charters, the whole Company and Body of Tinners, in every of the said Counties of Devon and Cornwall, are cast and divided in several Stanneries or Jurisdicitions: In every of which Stannaries, there is a Court to minifter Justice in all Causes Personal arising between Tinner and Tinner, and between Tinner and Foreigner; and also for and concerning the Right and Ownership of Tinn Mines, and the Disposition thereof, except in Causes of Land, Life, and Member; and if any suit or Judgment be given in any of the said Courts, the Party grieved may make his Appeal unto the Lord Warden of the Stannaries, who is their superior Judge, both for Law and Equity; and from him, unto the Body of the Council of the Lord Prince, Duke of Cornwall, to which Duke the Stannaries were given, as by the former Charters have appeared, and from them the Appeal hath to the King's most Royal Person. Dodderidge's Hist. of the Duchy of Cornwall, 93, 94.

12. When Matters of Moment concerning the State of those Mines or Stannaries, shall come to be question'd or debated; there are in every of the said Counties, by the Direction of the Lord Warden, several Parliaments or general Assemblies of the Tinners summon'd,whereunto every Stannery within that County sendeth Jurates or Burgess, by whose Advice and Consent, Constitutions, Orders and Laws are made and ordained, touching Tin-Causes, which being promulged, the same do bind the whole Body of Tinners of that County, as firmly as if the same had been established in the general Parliaments of the Realm. Dodderidge's Hist. of the Duchy of Cornwall. 94.
13 As well Blowers as all other Labourers and Workers (without Fraud or Covine) in or about the Stanneries in Cornwall and Devon, are to have the Privilege of the Stanneries, during the Time that they do Work there. Resolv'd by all the Judges. Mich. 4 Jac. 4 Init. 231.

14. 2dly, That all Matters and Things concerning the Stanneries, or depending upon the same, are to be heard and determin'd in those Courts according to the Custom of the same. Time out of Mind of Man used. Resolv'd by all the Judges. Mich. 4 Jac. 4 Init. 231.

15. 3dly, That all tranfitory Actions between Tinner and Tinner, or Worker and Worker, (who the Cause be Collateral, and not pertaining to the Stannery) may be heard and determin'd within the Courts of the Stanneries according to the Custom of the said Courts, albeit the Cause of Action did rise in any Place out of the Stanneries, if the Defendant be found within the Stannery; or may be determin'd at the Common Law at the Election of the Plaintiff. Resolvable by all the Judges. Mich. 4 Jac. 4 Init. 231.

16. But if the one Party only be a Tinner, or Worker, and the Cause of Action being tranfitory and collateral to the Stannery, do rise out of the said Stanneries, then the Defendant may by the Custom and Usage of those Courts plead to the Jurisdiction of the Court, that the Cause of Action did rise out of the Stanneries, and the Jurisdiction of those Courts, which by the Custom of the Court be ought to plead in proper Person upon Oath. And if such Plea to the Jurisdiction be not allow'd, then a Prohibition in that Case is to be granted. And if in that Case the Defendant do come to plead to the Jurisdiction of the Court upon his Oath, he ought not to be arrested Emundo, Redundando, vel Morando, at the Suit of any Subject in any Corporation, or other Place where the said Courts of the Stannery shall be then holden. Resolv'd by all the Judges. Mich. 4 Jac. 4 Init. 231.

17. 4thly, If the Defendant may plead to the Jurisdiction of the Court in the Case before mentioned; and will not, but pleads and admits the Jurisdiction of the Court, and Judgment is given, and the Body of the Defendant taken in Execution, the Party cannot by Law have any Action of false Imprisonment, but the Execution is good by the Custom of the said Court. But if in that Case it doth appear by the Plaintiff's own showing, that the Contract or Cause of Action was made or did arise out of the Stanneries, and the Jurisdiction of those Courts, or if it appear by the Condition of the Bond whereupon the Action is grounded, that the Condition was to perform'd in any Place out of the Jurisdiction of those Courts, then all the Proceedings in such Cases upon such Matter apparent, are coram non juro. Resolv'd by all the Judges. Mich. 4 Jac. 4 Init. 231.

18. 5thly, We are of Opinion, that no Man ought to Deny in that Court, for, for want of Form but only for Subtance of Matter. Resolv'd by all the Judges. Mich. 4 Jac. 4 Init. 231.

19. 6thly, That the Courts of the Stanneries have not any Jurisdiction for any Cause of Action that is local, rising out of the Stanneries. Resolv'd by all the Judges. Mich. 4 Jac. 4 Init. 231.

20. 7thly, That the Privilege of the Workers in the Stanneries do not extend to any Cause of Action that is local, rising out of the Stanneries, (for Matters of Life, Member, and plea of Land, are by express Words excepted in their Charters) and no Man can be exempt from Justice. Resolv'd by all the Justices. Mich. 4 Jac. 4 Init. 231.

21. Upon Judgment given in the Stannery Court, the Cause is, 1st. To appeal to the Vice-Warden. 2dly, From him to the Warden, and after to the Duke himself, (of Cornwall) when he hath had his Livery, Per Doderidge J. and Coke Ch. J. agreed with him herein, but before this, that he hath his Liberty to appeal to the Warden, and afterwards to the Council; But no Writ of Error lieth upon a Judgment there given for any Matter touching the Stanneries; but upon a Judgment there given upon collateral Matters a Writ
a Writ of Error well lieth, and this hath been so before resolv'd, as
the same is to be feen recorded in the Chancery, in the Petty Bag Of-
lice, by all the Judges, upon a Conference had. 3 Bulst. 193. Pach.
14 Jac. in Case of Langworthy v. Scott.
22. S. gave Bond to deliver so much Tin, made in the Tin-work in
Devonshire, at such a Place within the Jurisdiction of the Stannery. In
Debt upon the Bond [brought in B. R.] the Defendant pleaded to the
Jurisdiction of the Court, because it was a Tin Caufe. Montague Ch.
J. said, it is alleg'd in the Plea, that the Defendant is a Tinner, and
this is not travers'd, and puts the Case, that if the Condition was to
deliver the Tin at Bristol, whether the Stannery Court should have Ju-
risdiction there? implying, that it should not. But Doderidge said,
the Case is not so here, for it is to be delivered within the Jurisdiction.
The Defendant shew'd certain Articles under the Great Seal, appoint-
ing and limiting the Jurisdiction, wherein the Article goes only to the
Caufe, and not to the Perfon. Doderidge J. said, the Jurisdiction of
the Stannaries had been debated before all the Judges of England, and
their Charter of E. 1. and the Statute of 50 E. 3. was shewn to them,
and that both Statute and Charter were general, viz. as to the Caufe, and
not restrained to the Persons; yet, Montague Ch. J. at length ruled,
that because the Caufe and the Perfon are both Privileg'd, the Juridi-
cion be allow'd. 2 Roll Rep. 44. 45. Trin. 16 Jac. B. R. Pin-
fon v. Smale.
23. C. a Minifter in London came into the Stannery Court at the Suit
of L. and put in Surety and then came again; it was shewn, that nei-
ther the Plaintiff nor Defendant were Tinters, nor the Caufe a Stannery
Caufe; whereupon C. was discharged, and then C. was immediately
arrest'd again by L. and Proces awarded. An Attachment was grant-
ed against L. and a Prohibition to the Court, for the Defendant ought
to not to be arrested in coming to make his Law. And Ley Ch. J. said,
that it was usual there after the Oath made, for 3 d. to enter the Plain-
24. The Jurisdiction of the Stannaries is only for Tin Matters, and
where the Persons which sue, or one of them, be a Tinner; and all their
Proceedings there summarily and de Plano, without any formal Course,
airegulur, and the King's Courts shall take Notice where they proceed
irregularly, and shall controul them, and preserve the Jurisdiction of
the Court; per Noy; and approv'd by the Court. Cro. C. 333. pl. 19.
25. The Custom in the Stannaries to try Causes there by six Jurors is a
void Custom; though in Wales, where it is confirm'd by Act of Parli-
ament it is good. So a Custom of the Stannary Court to take out Exe-
cution both against Body and Goods is void. Sid. 233. pl. 36. Mich.

(N. a) Court. Jurisdiction of Court. Pleadings how.

1. IN Trespa's at the Distrefs the Defendant was permitted to say,
that the Place is within the Franchise of N. E. where the King's
Writ runs not, Judgment of the Writ, and was suffer'd to have the
Plea at the Distref{s}, and the Writ abated by Nient desire of the Plaintiff.
Br. Jurisdiction. pl. 9. cites 45. E. 3. 17.
2. He

3. Debt in London upon an Obligation, the Defendant pleaded, that it was made by Dawes in another County, by which it was awarded quod defendens eat fine die, & quod querens nihil capiat per Querelam, and by all, this Judgment does not go in Bar, but to the Jurisdiction, and such Plea cannot be sent into Bank to be tried and remanded as Foreign Voucher in London, for this is by Statute which does not extend to personal Actions. Br. Jurisdiction. pl. 83. cites 3 H. 4. 18.

4. Formedon of a Seigniory, Castle, and Manor. Newton said as to the Seigniory and Manor, they are in the County of Carmarthen, and that the King and his Progenitors, and all those whose Estate &c. have had Time out of Mind, Jurisdiction Royal, Exchequer and Justice in the same County, and Writs sealed with the Seal of the Prince, and that those lands and all others in the same County have been pleaded within the same County, and not out, Judgment of the Writ, and admitted there that he may plead Matter which goes to the Jurisdiction as here, and conclude to the Writ. Br. Brief. pl. 165. cites 7 H. 6. 36.

5. Trespafs against T. C. Rolfe said he is Chancellor of Oxford, and King Henry granted to J. D. Chancellor of Oxford, and his Successors, that they should not be impleaded by Writ of Trespass, nor of Contract of Things which they do by their Officer, and that it was disallowed the Plaintiff by his Officer, Judgment if the Court will take Conmaince, per Babb. Ch. J. you ought to have demanded Judgment of the Writ. Br. Brief. pl. 169. cites 8 H. 6. 18. 19.

6. For those of London have Privilege that they shall not be impleaded out of the City of his Lands, and if Writ be brought here of Land in London, he shall plead this Matter, and demand Judgment of the Writ, and not to the Jurisdiction. Br. Ibid.

7. If the Plaintiff Counts in Debt or Trespass, and the Defendant pleads to the Jurisdiction, the Court shall not be entered before the Jurisdiction be affirmed, and if Continuance be taken till the next Term, it shall be upon the Writ as if no Count had been, and at the next Term the Plaintiff shall count anew. Br. Count. pl. 36. cites 8 H. 6. 18.

8. In Detinue of a Charter, the Defendant defended Tort & Force, and no more, and pleaded to the Jurisdiction, because the Land in the Charter is within the Cinque Ports, and it was admitted a good Defence, and therefore it seems that he shall not make full Defence, if he will plead to the Jurisdiction, but it was not adjudged if the Plea be good to the Jurisdiction in this Case. Br. Jurisdiction. pl. 36. cites 8 H. 6. 22.

9. Mortmaincler, the Tenant pleaded to the Jurisdiction, because the Land lies in another County, and the Action is brought in C. B. and demanded Judgment if the Court would take Conmaince; and per Moyle the Plea is good, and shall not conclude to the Writ, but to the Jurisdiction, for another Court ought to hold this Plea, and not this Court, and therefore well ; contra where his Plea proves that he ought to have other Action in this Court, but this Plea proves that this Court shall not hold Pleas of this Action, but another Court. Br. Jurisdiction. pl. 59. cites 38 H. 6. 18.

10. Pleadings to the Jurisdiction are, 1st. Ancient Demise. 2dly, County Palatine. 3dly, Cinque Ports. 4thly, Foreign Plea in personal Actions. Brown's Anal. 3.

* Discouled. Br. Jurisdiction, pl. 38. cites 8. C.
† Br. Ju.
Li. Io. Salvis sibi omnibus &c. 3dly, Upon the View Ancient Demesne right, may be pleaded to the Jurisdiction. 4thly, A Foreign Plea may be pleaded to the Jurisdiction in a Personal Action, but not in a Real. S. P. 5thly, If one pleads to the Jurisdiction, and concludes to the Action, the It was said Jurisdiction is admitted, except in some special Cases. 6thly, Every by Coke Castle in the Cinque Ports is intended Guildable, and not any Member of the Ports (49. E. 3. 34.) 7thly, The Tower of London is accounted in one cannot Law to stand in the County of Middlesex. 8thly, The Plea to the Jurisdiction ought to be pleaded at the first, except in some special Cases Jurisdiction (as before.) 9thly, The Judgment in these Cases is, as in other Pleas, at all after That the Writ shall abate. Brown's Anal. 3. 4.

For the Entry is Salvis Exceptionibus &c. tam ad Breve, quam ad Narrationem &c. (not said ad Jurisdictionem Curiae,) Comb. 213. Patch. 6 W. & M. in C. Br. Denham v. Plumptre, and cites 3 H. 6. 30. a 11 H. 6. 38. and 20 H. 6. 32. This shows the Power to try the Case in the Court of King's Bench, and the question of the Jurisdiction of the Court of Common Law. 22dly, a Plea to the Jurisdiction must always be pleaded Primo Die. Carth. 26. Patch. 1 W. & M. in B. R. in Case of Andrews v. Clerke.

Court. Jurisdiction.

(O. a) Affirm'd. By what.

1. In Formedon, the Tenant paid after the View that the Land is in Wales, where the King's Writ does not run, Judgment of the Writ, for he cannot have it to the Jurisdiction, for he affirmed the Jurisdiction by the View, by which the Demandant replied. Br. Jurisdiction. pl. 37. cites 7 H. 6. 36.

2. And if the Tenant pleads to the Jurisdiction, and the Demandant Imparles, and the Plea to the Jurisdiction is not entered, the Jurisdiction is affirmed; contra if it appears of Record, by Plea entered, that he has pleaded to the Jurisdiction. Br. Ibid.

3. The Plaintiff declared in the Marshal's Court, upon an Insuffl Compania vta infra Jurisdictionem &c. and had Judgment. It was objected, that the Account doth not alter the Duty; for that may arise in York, and that no other Consideration being laid to intitle the Court to any Jurisdiction, the Judgment ought not to stand; but it was adjudged, that the Account was sufficient to give the Court Jurisdiction. 8 Med. 77. Patch. 8. Geo. 1723. Spackman v. Hussey.

For more of Court in General, See Ancient Demesne, Chancery, Ecclesiastical, Prohibition, University, and other Proper Titles.
Creditor and Debtor.

(A) Creditor. Favoured in Equity against the Debtor, and others claiming from him.

1. Conveyance by Covin does not devest the Estate out of the Debtor, Feoffor &c. but he stands still seised as to the Creditors, notwithstanding the Feoffment. Hob. 72. pl. 86. Humberton v. Howgill.

2. A Judgment of a Debt, and Fine to a Purchasor acknowledged all in one Day, the Judgment to be preferred. Toth. 180. cites 4 or 5 Car. Owen v. Lady Deancourt.

3. A Debtor employed a Creditor to purchase Lands for him, and to take up Money to pay for it, which he did, and took the Purchase in his own Name. The Debtor sued in Chancery to have the Lands on Payment of the Money, but the Creditor having on other Occasions mortgaged his own Lands, and engaged for the Debtor, Bridgman K. decreed, that in order to have a Conveyance, the Debtor should pay the Debts as well as the Purchase Money. 2 Chan. Cases 87. cited per Finch Chancellor, as the Case of Bradburn v. Amand.

4. A Settlement after Marriage in Prenance of a Bond or Agreement before, is good against Creditors, as if made before, and is not a voluntary Conveyance, nor fraudulent; Agreed per Cur. 2 Key. 700. pl. 52. Mich. 22 Car. 2. B. R. Lloyd v. Fox.

5. Trustees by a Settlement for Payment of Debts pretend, that they have not sufficient Power to sell, and the Heir pretends that he hath some Statutes and Securities which charge the Lands, and to obstruct the Sale, and the Wife pretends that she has a Jointure, but is willing to accept 2000 l. in lieu of it. Decreed, that all Parties join, that the Creditors may be satisfied, (excepting the Jointure, which was prior to all the Incumbrances, or to pay her 2000 l. in lieu of it) and the Debts to be satisfied in equal Proportion, the Trustees to be indemnified, and have their Charges and Allowances, and such Securities, as the Creditors respectively have, to be delivered up to the Purchasors. Fin. R. 262. Trin. 28 Car. 2. Bennet v. Ingoldsby and Hampson.

6. Creditors, not Parties to a Suit, allow'd six Months Time to come in and prove their Debts before the Master, paying their Proportion of the Charge of the Suit to be ascertain'd by the Master, and if they come not in as aforesaid, to be excluded. Fin. R. 358. Paffch. 30. Car. 2. Foot v. Clerk and Venner.

But the Reporter says Quere; for it seems he was but To-
Creditor and Debtor.

It was decreed, that the Lands are liable to the Payment of the next in Tail Tenant's Debts in general. Vern. 99, 100. Mich. 1682. Turner v. Gwynn.

gwils, unless it be intended he had still a Power of doing it, lodged in him, by reason of the Fine, notwithstanding he had declared, that after Payment of the 1600£. it should go to the former Uses. Ibid.

Tenant in Tail suffers a Recovery to let in a Mortgage of 500 Years, and then limits the Land to the old Uses, and makes his Will, and devises all his Lands for Payment of his Debts. The Court thought the Equity of Redemption should be Affected to satisfy Creditors, or a subsequent Grantee of an Annuity. Note, the Redemption was limited to him, his Heirs or Assigns. Chan. Prec. 39. Hill. 1691. Foster v. Auffin.

3. Creditor shall be relieved against a Legatee, sayd to be settled in the * Chan. Ca-
in Case of Noel v. Robinson; and Lord Chancellor said, it is certain that a Creditor shall compel a Legatee to refund.


9. A Deed of Trust was made for Payment of such Creditors as come in
within a Year; yet a Creditor not coming in within the Year, will not be excluded, but it is a continuing Trust; but A Bill may be ex-
hibited after the Year, to compel the Creditors who stand out to come in, or renounce the Benefit of the Trust. Vern. 260. pl. 253. Mich.

10. Creditors on Judgments and Bonds decreed to redeem Mortgages
towards Satisfaction of their Debts. 2 Chan. Rep. 396. 2 Jac. 2. Anon.
11. Action of Debt brought against an Heir upon the Bond of his Au-
csefor, who pledges a false Plea, and the Plaintiff has Vertiff; the De-
fendant dies before the Day in Bank, and devises his Lands to his Heirs. The
Obiige brings a Bill against the Devisee to be paid his Debt. Lord
Chancellor said, there is no Colour of Equity in the Case, unless you
will have it that the Defendant died maliciously before the Day in
Bank, on purpose to defeat the Plaintiff of his Debt, and dismis'd the
12. A Tenant for Life was outlawd, and absconded; B. purcbases bis
Estate. Jeffries C. set aside the Purchase in Favour of Creditors, the
Purchase being made at an under Value, and pending the Prosecution at
13. Executor makes a Voluntary Affirmation of Part of the Affect; Arg. Vern.
it was strongly insifted for the Plaintiff, that he being a Creditor to the
first Teftator, might * follow the Estate, in whose Hands ever it came,
and ought not to be put to the Charge and Trouble of controversing the
Account directed by the Court to be taken. Sed non allocatur. Where

November, 1793. who said, that he had examined the Register Book, and that the Decree was
found upon particular Proof of Fraud, which Mr. Vernon's Report does not plainly and fully set
forth in Case of Nagents v. Gifford, and decreed accordingly, notwithstanding it was insifted that
Notice was not expressly given to the Purchasor.

14. The Son is Surety for the Father to several Persons by Bond,
and the Father enters into Statute to indemnify the Surety, and pay the
Debts. Afterwards, at the Indenture of the Father, one of the Creditors
exchanges his Bond for a Mortgage from the Father. The Son ex-
tended the Lands mortgaged, pretending he was dammified. Several
of
of the Debts to be paid were the Debts of the Son. Decreed, that
the Mortgage be redeem’d, or foreclosed, and a perpetual Injunction
against the Statute. 2 Vern. 39. 1 Hill. 1688. Legriel and Morilco v.
Barker.

15. Lands were settled by the Parliament for the Payment of C’s Debts.
The Trustees brought a Bill against the Administrators of C. to di-
cover the Personal Estate &c. And the Administrators (who were Ad-
mnistrators as Creditors to C) with three or four of the Creditors, bring a
Bill against the Trustees; and it was decreed, that they shall sell &c. and
that all Creditors may come in by a Time, contributing to the Charges &c.
and now the Plaintiff’s (as other Creditors) exhibit their Bill against the
Administrators, and against the Trustees, to discover the Personal Estate,
and to have the Lands sold &c. The Defendants objected, That the
Plaintiff’s ought not to have exhibited a new Bill, but should, by Mo-
tion to the Court, come in as Creditors upon the former Bill exhibited
by the Administrators. But the Court over-ruled it, and said this Bill
was well brought, because it calls the Administrators themselves to an
Account, which could not be upon the former Bills. 3 Chan. Rep. 216.
Pach. 1693. Gwevers v. Danby (Earl of) & al.’

16. Where a Judgment Creditor levy’d his Debt out of the Peronal
Estate, the Court inclin’d to relieve a Bond-Creditor, and to place him
in the Stead of the Judgment-Creditor, and charge the Land with his

17. Lands on Marriage were settled on Daughters, and their Heirs, till
3000 l. be paid by the next Remainder-Man. Decreed at the Rolls and
affirm’d on Appeal by Cowper K. that Judgment-Creditors should redeem
the Daughters who had entred on the Estate, but that on the Daughters
Account of Profits, the Surplus should not annually go to sink the
Principal, but only as an entire Sum of 1000 l. was raised, and so on,
not till another 1000 l. was raised. 2 Vern. 523. Mich. 1705, and 578.

17. Marriage Covenant to purchase and settle Lands of 400 l. per Ann.
to Baron for Life, then to the Feme for Life, Remainder to the Heirs
of their two Bodies, and if he dy’d no Settlement made, the Wife may elect
to have either 400 l. per Ann. or 3000 l. in Money, in Lieu of Dower
and Thirds. Baron dies before a Settlement made; the Court, in Fa-
vour of Creditors, will not allow the Wife to elect the 3000 l. in
Money, and the Children have 400 l. per Ann. settled on them after
her Decease, and so to exhaust the Affairs, but decreed a Settlement of
400 l. per Ann. on the Wife for Life, Remainder to the Children.

18. 4000 l. was put into Trustees Hands upon the Marriage of Dr. Ful-
ham with Mrs. Evelin, to be laid out in Lands to be settled upon the Hus-
band for Life, Remainder to the Wife for Life, for her Jointure, Re-
mainder to the first and every other Son of the Marriage in Tail Male, Re-
mainder to the Heirs of the Body of Dr. Fulham, Remainder to his Right
Heirs in Fee; The Wife dies, leaving Issue a Son, and after the Husband
dies, before the Money was laid out in Land, and devises all his Estates,
both Real and Personal to Trustees during the Minority of his Son,
for the Benefit of his Son, and in Case he dies before the Age of 21, then he
gives several Legacies, and the Rejudie of his Personal Estate to Charitable
Uses &c. The Son died before the Age of 21. Creditors bring a Bill
against Dr. Fulham’s Executor and his Brother, who claims the 4000 l.
as Real Estate, and not subject to Debts by simple Contrat; suggesting,
that there are not Personal Affairs enough to pay Dr. Fulham’s Debts,
without the 4000 l. be taken as Money, there being no Issue Ict of the
Marriage, and the Whole would have vested in Dr. Fulham, if he had
out lived his Son &c. and the Consideration of the Marriage Agree-
ment.
Creditor and Debtor.

45

ment extends no further than the Issue of the Marriage, and not to the General Heir of the Husband &c.

Mr. Vernon for Defendant, who was Uncle and Heir at Law to the Son of Dr. Fulham, and claims the 4000 l. as Real Estate defecnded to him cited the Case of Whittick v. Jermin, Tempore Hale Ch. B. which was the first Case where Trust Money to be laid out in Lands was held to be Real Estate. Atkins v. Atkins, Tempore Jeffery's C. such Trust Money shall be taken as Real Estate, and shall go to the Heir, and not to the Executor, though the Articles be silent as to the Remainder in Fee, and the Limitation of the Articles went no further than to the Issue of the Marriage. So a Wife shall have Dower of such Trust Money, and a Husband shall be Tenant by the Curtesy &c.

Per Harcourt C. I shall not give my Opinion now if the 4000 l. agreed to be laid in Land by the Marriage Articles, shall be taken in Equity to be Real Eater against the Creditors by simple Contract for the Benefit of a Collateral Heir at Law, but refer the Account of the Personal Estate of Dr. Fulham to the Master, to see if that be sufficient to pay the Debts by simple Contract; For if so, then this Point cannot come in Question. I don't think the Cases cited come up to this Case; the first Case was in Favour of the Issue of the Marriage, and not for a Collateral Heir; and in the second Case, the Dispute was between the Heir and the Executors, but not of Creditors; So in Dower, and by the Curtesy, it has only been carried against Executors, and that does not come up to the Case of Creditors. Mif. Rep. 13 July, 13 Ann. Fulham v. Jones & al'.

20. Bill by a Judgment Creditor to open a Decree of Foreclosure, to which Suit he was not a Party, suggesting Fraud and Contrivance between the Mortgagor and Mortgagee thereby to cheat him of his Debt. The Mortgagee pleaded the Decree of Foreclosure and Purchase of the Equity of Redemption, and by Answer denies the Fraud, but admits he had Notice of the Judgment when he brought his Bill to foreclose, but did not know the Person who had got the Judgment, nor where to find him, and for that Reason did not make him a Party to the Suit. The Mortgagee, by his Answer, admits the Mortgagee, but says, he was in Prison at the Time of the Foreclosure; but owns he employs a Solicitor to appear for him &c. He says, that being very poor and necessitous, and in Prison, he was prevail'd on to assign his Equity of Redemption for 20 Guineas, though the Estate is worth a great deal more. Per Cowper C. since the Mortgagee had Notice of the Judgment before the Foreclosure and Purchase of the Equity of Redemption, the Plaintiff may go before the Master, and be at Liberty to surcharge or falsify the Mortgagee's Account; but the Mortgagee is not to account for the Profits since the Decree of Foreclosure, and the Plaintiff being a Judgment-Creditor, and not a Party to the Bill of Foreclosure, may redeem. Note, in this Case, the Plaintiff being an obscure Person, was ordered to give Security to answer Costs, in Case he did not redeem. Mif. Rep. Mich. 2 Geo. in Canc. Bird v. Gandy & al'.

21. A Jointure was made after Marriage in Bar of Dower, by the Husband, of Lands which were then his Father's, and the Father joint'd therein; But it was not to take Effect till after his Father's Death, as the Statute requires. Afterwards the Husband devised his Lands for Payment of Debts, and died, living the Father, and then the Creditors bring a Bill, and the Wife would waive the Jointure, and claim Dower, and after such her Answer put in, the Father died. But Parker C. seeing that by waving the Settlement, the Lands would go to the Heir at Law not subjected to the Payment of Debts, since it never was part of the Father's Estate, the Father out living him, and so the Affets would fall short, and that what the Wife did was in Favour of the Heir at Law, to the
Prejudice of the Creditors, he decreed, that she should take the Estate for her Life, but that she should assign it over in Trust for the Creditors, who should convey to her a third Part of her Husband's Lands for her Dower, free from Incumbrances. 10 Mod. 487. Pach. 8 Geo. 1. Mills v. Eden.

22. A seized in Fee and indented to several by Bonds, in which his Heirs were bound, devised his Lands to A. for Life, Remainder to his first &c. Sons in Tail, Remainder over. Lord C. Macclesfield decreed a Sale, though there was no Devise of the Land for Payment of Debts. 2 Wins's. Rep. 234. Trin. 1724. Manaton v. Manaton.

23. Where Debts by Specialty, and which are a Lien at Law on the Real Estate, are paid out of the Personal Estate by Executors in each of the Lands, the Creditors by simple Contract shall stand in the Places of the Creditors by Specialty to have their Debts satisfied out of the Lands, and decreed the Lands to be sold for that Purpose, and the Heir, who was an Infant, to join in a Conveyance within six Months after he comes of Age. 9 Mod. 151. Trin. 11 Geo. 1. in Canc. Charles & al' v. Andrews.


24. A Legacy of 1000 l. was bequeathed to a Feme sole Infant, charged upon Lands, and payable at 25. She took Husband, who assigned the same, during her Infancy, to W. in Consideration of 750 l. and afterwards she attained her Age of 25. It was intitled against this Assignment, that it was made for less Money than was really due, viz. 750 l. instead of 1000 l. But it was answered, that the Intrest of the 750 l. from the Time it was paid to the attaining 25, and the Hazard of her dying before that Age, made it a dear Bargain, and that with regard to any Judgment or other Creditors of the Husband, as they claimed under him, and had no specific Lien on the Legacy, they could not be in a better Condition than he himself was; And Ld. Chancellor decreed the Assignment good, and that W. was intitled thereto with Intrest from the Wife's attaining the Age of 25. 2 Wms's Rep. (603.) (609.) Trin. 1734. Duke of Chandos v. Talbot.

25. Where there are proper Persons to get in the Estate of another, Chancery will not suffer the Creditors of the Testator to bring a Bill in Equity in order to get in that Estate; But if the Executors will collate with a Debtor, there is no Doubt but a Debtor may bring his Bill, in order to take Care of the Estate, and charge the Executors with such Collections; Per Parker J. who fate for the Lord Chancellor. Barnard. Rep. in Canc. 32. Pach 1740. Franklin v. Fern.

(B) Agreements between Debtor and Creditor.

How far good and binding.

I. D E B T O R agreed with his Creditors to assign all his Estate on Oath, to Persons in Trust, for Payment of his Debts, and such Allowance to himself; most of the Creditors signed. Debtor imbered some of the Goods, on which some of those that signed took out a Statute
Creditor and Debtor.


9. All the Creditors of A. except I. S agreed to accept 5 s. in the Pound, and to take A’s Bond for the same, and I. S promised to do so too, but instead thereof, brought an Action for the whole Debts. On a Bill by A. suggesting as afo said I. S insisted that the Plaintiff is able to pay the whole, denies the Agreement as yet forth, and that if he did promise to come into any Composition, it was to be paid 5 s. in the Pound ready Money, and 15 s. more in Seven Years, and the Court disnified the Bill as not proper for Relief. Fin. R. 332. Mich. 29. Car. 2. Davis v. Legelder.

3. A Creditor agrees to take his than his Debt, so as the Money is paid at a certain Day; if Debtor fails at the Day, the Creditor is not bound by the Agreement. Vern. R. 210. pl. 208. Mich. 1683. Sewell v. Muffon.

4. Creditors, fearing Want of Assets, made a Composition with the Executor of Debtor; afterwards Assets came in; though the Executor was willing to pay the whole, yet on a Bill by the Refiduary Legatee for an Account, and to have the Benefit of the Surplus Lord Chancellor said he could not set aside the Composition the Creditors had made. They have no Bill for the Purpose and only come in before the Master, and therefore they must abide by the Composition. Chan. Prec. 99. 100. pl. 68. Mich. 1699. Lord Caflerton v. Lord Fanthaw.

5. A. An Executor and Devisee, being decreed a Trustee, was ordered to account, and, on Account, was reported to be indebted to B. the Coffy que Trust, in 4000 l. The Decree was affirmed in the House of Lords. Afterwards A. went beyond Sea, and being there, a Composition was made, by which A. was to pay a small Sum to B. and B. was to indemnify A. from the Creditors of the Testator. A. being threatened with Suits by some of Testator’s Creditors brought a Bill against B. to indemnify him. And Ld. C. Macclesfield decreed accordingly, and said, that all that Equity ought to guard against, is that no Fraud be used in obtaining the Composition, and took Notice, that there had been a fair Representation on the Part of A. and a just Compliance by B. the Defendant, and in a great Measure executed by A. and therefore ordered B. to execute his Part of the Agreement, and indemnify the Plaintiff against the Debts of the Testator. Williams Rep. 751. Mich. 1721. Pollen v. Sir John Hubard.

6. The Court of Chancery with Consent of the Wife and her Truftees, who had about 5 or 6000 l. Portion of hers in their Hands, in Order to compound with the Husband’s Creditors, ordered Part of the Trust Money to be paid to the Creditors in Discharge of the Husband’s Debts, some of the Creditors at executing the Deed of Composition took private Securities postulated &c. The Master of the Rolls thought this under hand Dealing a Fraud on the Wife, on the Trustees, and the Court, and therefore directed all such Securities to be set aside and delivered up to the Husband. Wms’s Rep. 768. Mich. 1721. Middleton v. Lord Onslow. & al'.

(C) Where
Creditor and Debtor.

(C) Where a Debtor may prefer one Creditor to another, or what Creditors shall have the Preference.

1. A Statute first acknowledged shall be preferred before a Judgment obtained afterwards. Brownl. 37. and to Vice versa. If nothing be done by the Sheriff on the Extent, and if the Land be first executed on the Statute, and afterwards an Eligit upon a Judgment obtained, before the acknowledging of the Statute come also to the Sheriff, the Moiety of the Land extended shall be delivered to the Plaintiff on the Judgment. Brownl. 38.

2. A Mortgage was made by Feoffment without Livery, yet this Defeotive Mortgage is a Charge on the Lands in Equity, and the Mortgagor and his Heirs are but Trustees for the Mortgagee and Judgments confused by the Heir on Bonds of his Ancestor (the Mortgagor) shall not take Place of the Mortgage. Fin. R. 28 Mich. 25. Car 2. Burgh. v. Francis.

3. A is indebted by Bond (in which I. S. is bound as Surety) and also by simple Contract to B. A. states an Account of both Debts with B. and makes a Bill of Sale for the securing the Balance which proves deficient. On a Bill by the Surety decreed, the Money arising by the Bill of Sale should be applied towards of both Debts in Proportion. Vern. 34. Hill 1681. Perris v. Robert.

4. Recognizance was enrolled by Special Order of the Court after lapse of Time for the doing it, by which the Recognizance is effectual from the Date. A. between the Date and the Involuntary lenth Money to the Cognizor and took a Judgment, which now was overreached by the Recognizance; the Estate was in Mortgage, and neither the Judgment or Recognizance could reach it without Aid in Equity, the Cognizor having only an Equity of Redemption in him. The Court inclined to prefer the Judgment Creditor that he might not complain of wrong done him by the order for inrolling the Recognizance. 2 Vern. R. 234. Trin. 1691. Pothevill v. Kendric.

5. A is Tenant for Life, subjett to a Mortgage of 1500l. to B. Remainder to J. S. in Fee. A. acknowledges a Statute to C. for 500l. and afterwards A. sells his Estate for Life to I. S. for 3000l. who had no Notice of the Statute to C. The 3000l. was borrowed by I. S. of D. who likewise paid off the 1500l. and took an Assignment of the Mortgage for the 1500l. and also charged with the 3000l. and I. S. covenanted to pay the Money, and the Equity of Redemption is limited to him; and D. covenanted on Payment to aifign to I. S. or as he would direct. I. S. acknowledged a Statute to E. who had no Notice of the 500l. Statute to C. and after devises the Lands to A. and charged with Debts and Legacies. Decreed that B. must come in last of all, even after Debts and Legacies, and affirmed by Lord Wright affilied by two Judges, and said it was like the Cafe of a Third Mortgagor buying in a first. Ch. Prec. 158. Pl. 131. Pach. 1701. Blake v. Hungerford.

6. A Seized in Fee, in 1679, mortgaged for 500 Years, and in 1687, the Term being kept on foot and affigned to B. C. and D. B. lends 1000l. to A. on a Judgment, and in 1698, A. borrows 1500l. of E. for
for securing whereof A and C one of the Trustees assign the Term of 500 Years to E. B. having Notice of this Allignment, B. D and A. assign to I. S. in Trust for B. Per Wright K. ther' is a Term attendant on the Inheritance, yet a Judgment is an equitable Lien on the Inheritance and consequently affects the Term; and therefore B. having got the legal Estate as to Two Thirds of the Term in I. S. in Trust tor herself, shall have the Benefit of it, though she had Notice of the Mortgage and Allignment by A. and C. And all mife Incumbrances from 79 were postponed to the Debt to B. and E. 2 Vern. 524. pl. 474. Mich. 1795. Bristol (Earl) & al'. Creditors of Sir William Balfet v. Hungerford & al.

7. Decreed at the Rolls that Mortgages were to be paid first, and then Judgments, and then Recognizances &c. But upon Appeal to the Lords, it was adjudged, that Mortgages were not to be preferred before other Real Incumbrances; But Mortgages, Judgments, Statutes, and Recognizances, should take Place according to Priority, and as they stood in Order of Time. 2 Vern. 525. pl. 474. Mich. 1795. E. of Bristol. & al' Creditors of Sir William Balfet v. Hungerford.


9. A. a Freeman of London by Will gives his own Third Part of Gilb. Equ. his Personal Estate to M. his Wife, and the other Two Thirds to his Res. 32. Children, and dies, leaving Two Daughters B. and C. Afterwards M. possessed herself of the whole Stock and carried on the Trade, and some time after married J. S. who employed the whole Stock in Trade likewise, and made no Distribution to the Children. C. dies; On a Treaty of Marriage between W. R. and B. a Computation was made of what B's Fortune might amount to, but it falling short of what W. R. expected, and the Match thereupon falling off, J. S. agreed by Parch to make her Fortune 4000l. and paid 2500l. of it. J. S. afterwards died indebted to several other Persons, but made a Will and entered into a Bond to W. R. for Payment of the 1500l. but kept the Bond himself, though in his Sicknes he sealed it to W. R. The Agreement by J. S. to pay the Portion, and the Execution of the Bond was proved. But Lord Hardcourt thought the Bond made so long after the Marriage as four Years, could not be rank'd to the Agreement, so as to make it any Evidence in Writing of that Agreement; especially on the Circumstances that the Bond was then made without any Application of W. R. and B. and was not delivered into his or her Custody, and that it being made at the Time the Will was, and shown to them with his Will, and after his Death found with his Will, he looked on it only in Nature of a Legacy, and voluntary, as against his own Creditors, and to be postponed to them Ch. Prec. 372. pl. 259. Trin. 1715. Leofes v. Lewen.

10. Private Act of Parliament for Sale of Lord Stowell's Estate and directed that the Money arising by Sale should first go to pay off Mortgages, and then Statutes, Judgments, and Recognizances, with a falling to all but the Family of Lord Stowell; decreed in Pariuance of this Act, that subsequent Mortgages should be paid before Judgments precedent but fem'd to admit that by Virtue of the general falling in the Act, they might make Use of their Incumbrances as they could at Law; Per Cowper C. 2 Vern. 711. pl. 633. Hill 1715. Ward & al'. v. Cecil & al'.
Creditor and Debtor.


Wms’s Rep. 274 to 343. S. C.

12. Though the Court may permit the Inrollment of a Recognizance after the Time is elapse’d; Yet it is always to be done with Caution that it may not prejudice any intervening Purchasor, and the Statute of Frauds and Perjuries provides that judgments shant’, by having Relation to the first Day of the Term, bind Purchasors nor allfect the Land, but from the Time of signing them in the Margin; But says nothing as to Recognizances and Pocket Securities, which are more dangerous to Purchasors, and it may fairly be presumed that the Debt was otherwise satisfied or secured when the Recognizance was not enrolled. 2 Vern. 750. Hill. 1716. Bothomly v. Fairfax.

(D) In what Cases, where the Creditor is supplant of his Security, a Court of Equity will substitute other Security in its Room.

1. A Indebted to B. in 260 l. assigns over to B. the Benefit of a Decree against C. afterwards A. agreed with C. to release to him all Benefit of the Decree, and all Suits and Demands, B. brought his Bill to set aside the Release, C. pleads the Release for a Valuable Consideration, and that he had no Notice. The Court allowed the Plea, and there being several Securities mentioned in the Release, as made over by C. to A. in Consideration of such Release, decreed those Securities to be made good to the Plaintiff B. to enable him to receive Satisfaction for the 260 l. and A. and C. to Covenant not to release such Securities till B. is satisfied. Fin. R. 218. Trin. 27 Car. 2. Hookes v. Simball.

2. A Debt owing to the King, was ordered to be satisfied out of the real Estate, that the other Creditors might be let in to have a Satisfaction of their Debts out of the Personal Assets. Vern. 455, pl. 427. Pauch. 1687. Sagitary v. Hide.

3. A. was indebted 1000 l. by Mortgage, and 500 l. by Bond; A before his Death makes a Lease of Lands to Trustees, for Payment of his Debts, worth about 1200. The Heir of A. after his Death sells as much Land as pays 1400 l. whereas the Mortgage was Part, (which was more than the Value of the Truft Estate). The Creditor for the other 1001. brought his Bill against the Heir, and the Trustees, to have his Debt satisfied out of this Truft Estate. It was infifted for the Heir, that having paid as far as the Value of the Truft Estate did extend, he ought not to have his Lands charged any farther. But it was ruled, that since the Truft Lands were not sufficient to satisfy the whole Debt, the Heir, and the Trustees, and the Mortgagee should not juggle together to cheat other Creditors, by paying the Mortgage first off; but on the contrary, the Trust Lands should be applied in the first Place for the other Debts, because the Mortgagee could be at no Damage, being secured by this Mortgage; but on the contrary, if the Mortgage should be first satisfied, the other Creditors should be satisfied, the other Creditors
Creditor and Debtor.

51

drawn might lose their Debts; and so the Plaintiff in this Case had Re- iected his Debt. 2 Freem. Rep. 51, pl. 56. Patch. 1690. Poyse's Cafe. 4. T. S. entered in a Bond, wherein he bound himself and his Heirs to pay 100l. within six Months after his Death to A. and became indebted to B. in 45l. by simple Contract, and died Intestate, not leaving Personal Assets sufficient to pay his Debts; The Defendant was his Son and Heir, and had real Assets from him by descent of the Value of 100l. and he took out Administration to his Father; and six Days before the 100l. became due, by the Condition of the Bond, agrees with the Obligee to convey the Freehold Lands descended to him in satisfaction of the Bond, and the Conveyances were drawn and ingrossed accordingly; but before the Execution of them, he gives the Obligee 30s. to have the Consideration of the Deed raze'd out, and made to be for so much Money paid instead of delivery up of the Bond; but no Money was paid, but only the Bond delivered up. B. demanding his Debt, he inflicted he had paid the Bond out of the personal Assets, and had none left to pay him; whereupon he brought this Bill, and the Defendant inferred, that he being both Heir and Administrator, had the Liberty to pay the Debt out of what Assets he pleased; that he had not paid the Bond out of the Real Assets, nor ever intended so to do, but upon the whole Matter the Court declared the Bond to be well paid out of the Real Assets, and decreed the Debt and Costs out of the Personal Assets. Abr. Equ. Cases, 144; pl. 21. Hill. 1695. Neave v. Alderton.

5. The Plaintiff lent a Sum of Money on the Mortgage of some Horses, and had a Bond for Payment of the Money, as usual in such Cases; afterwards he lent a further Sum of 200l. on the Equity of Redemption, and had a Bond for that likewise; afterwards the Mortgagor becomes a Bankrupt, and by some Accident the Value of the Horses sunk so much, that they were not sufficient to raise the Mortgage Money first lent; and on a Bill brought to have them sold, and that as so much as they fell short to answer the first Mortgage Money, the Mortgagee might come in upon his Bond as a Creditor; it was so decreed, and as to the 200l. lent upon the Equity, which was worth nothing, it must stand singly upon the Bond. Abr. Equ. Cases 312, pl. 9. Patch. 1695. Wiseman v. Carbonell.

6. A Man borrows a Sum of Money on the Mortgage of a Ship, and Gilb. Equ. Covenants, that whatever Money the Mortgagee should advance for In- insuranc of the Ship in a Voyage she was then about to make, that he would repay it, but there was no Covenant for re-payment of the principal Money itself; the Mortgagee insures the Ship, and the Mortgagor re- paid him that Money; then the Ship proceeds on her Voyage, and re- turns Home; and being afterwards to go out on another Voyage, the Mortgagee treated with another Perfon concerning the Insurance, but could not agree for the Rate, and thereupon the Ship went out and was lost in the Voyage, and now between the Mortgagee and the Execu- tors of the Mortgagor, the Question was, whether the Mortgagee should come in for his principal Money as a Creditor, by simple Contract, and it was argued that he ought not, because there was no Covenant for Pay- ment of the Mortgage Money, so that he must be supposed to rest him- self on the Ship only for his Security, and that being lost, so is his Money too; but on the other Side it was argued, that if he had taken no Security at all for his Money, he had then, without Question, been a Creditor by Simple Contract; and surely the taking Security ought not to put him in a worse Condition, especially now, that the Security being lost and gone, his Debt rests wholly on the Simple Contract; and of the same Opinion was my Lord Chancellor Harcourt, and pro-
nounced this Decree accordingly. Abr. Equ. Cafes, 139. pl 5. 1713.
Thomas v. Terry.

7. S. having several young Children, and being much in Debt con-
veyed Part of his Lands in Trust for the Payment of his Debts, and by an-
other Deed conveyed other Part to Trustees for the Maintenance of his
Children. This last Conveyance being voluntary, was declared void
as to Creditors, and still liable to their Demands as before, but it was
good against S. himself, and should bind him, and therefore if his
Creditors should fall upon those Lands for a Satisfaction of their Debts,
and thereby strip the Children of their Maintenance, the Children
should have a Recompence out of the Residue of the Estate, which S.
had referred to himself for his own Maintenance, and compared it to
the Cafe where Creditors that have a Lien upon the Land take their
Satisfaction out of the personal Estate, which was liable to other Cre-
ditors of an inferior Nature, who have no Lien upon the Land, thes
Creditors in Equity shall stand in the Place of the other Creditors
who had a Lien upon the Land, and have a Satisfaction out of that in
their Stead; This Cafe is the same, for though the Conveyance was vo-
luntary in the Father, yet he is bound by Nature to provide for his
Contra.

8. Where a Person indicted by Specialties and Simple Contract dies, and
leaves both a personal and Real Estate, this Court will not fuller
the Debts by Specialty to be hung upon the Personal Estate, and that being
exhausted leave the Debts by Simple Contract unsatisfied, the Land not
being liable to pay them, but will decree the Debts by Specialty to be sat-
fisfied out of the Land, and the Debts by Simple Contract out of the per-
in Cafe of Blundell v. Barker.

(E) Creditors. Disputes inter se.

1. CREDITORS having recovered at Law and received the Money,
and given Release, Chancery will not afterwards compel
them to take their proportionable Shares, but dismissed a Cross Bill
brought for that Purpose. 2 Ch. Rep. 178. 31 Car. 2. Tucker v. Scarle.
2. Bill by a Conveyee of a Statute of the Mortgagor to redeem, after a De-
eree of Foreclosure &c. The Defendant pleads the Decree of Foreclosure,
and that the Statute was acknowledged after the Mortgagee's Bill filed, that
the Mortgagee had no Notice, and made proper Parties at the filing of
the Bill, and that the present Plaintiff took the Security pendente litem.
Mr. Vernon said, that if an Incumbrancer lies by, and suffers the
Mortgagee to obtain a Decree of Foreclosure, though he is not bound
by the Decree, because not made a Party, yet, if he afterwards brings
a Bill to redeem, he shall not be at Liberty to except to the Accounts
stated by the Mather, but shall pay the Whole upon his Redemption.
Per Harcourt C. This is a Recent Foreclosure, let the Plaintiff redeem upon
Payment of what is due, with Costs. MS. Rep. 9 July, 13 Ann. in

3. A. mortgages to B. for a Term of Years, to secure the Sum of
already lent to the Mortgagor, as also such other Sums as should hereafter be
lent or advanced to him. Afterwards A. makes a second Mortgage to C.
for a certain Sum, with Notice of the first Mortgage, and then the first
Mortgagee
Creditor and Debtor.

Mortgages having Notice of the second Mortgage, lends a further Sum &c. The Quetion was, upon what Terms the second Mortgagee shall redeem the first Mortgage. Per Cowper C. the second Mortgagee shall not redeem the first Mortgage, without paying all that is due, as well the Money lent after, as that lent before the second Mortgage was made; For it was the Folly of the second Mortgagee with Notice to take such a Security. But upon the Importunity of the Counsel, it was order'd, that the Master should report what Money was lent by the first Mortgagee, after he had Notice of the second Mortgage. MS. Rep. Pach. 2 Geo. in Canc. Gordon v. Graham.

4. A Bill was brought for a Seal of Defendant Fletcher's Estate, for satisfaction of Creditors by Mortgages and Judgments. One Mr. Curwin, a Papist profess'd, had a Mortgage for 2400 l. upon the Estate Prior to the Plaintiff's Mortgage, and he had also a Judgment, but that was subsequent to the Plaintiff's Mortgage, and to several other Judgments, and to other Creditors, and the Quetion was among the Creditors, who should have the Priority in Payment &c. the Estate not being sufficient to pay off all the Mortgages and Judgments.

Per Parker C. The Mortgage to Curwin being a Papist profess'd is void by the Statute of W. 3. for that is an Intelet in Lands, but as to the Judgment, though a Papist can't take out an Eliget, for that gives an Intelet in the Motery of the Debtor's Lands; Tel, if Lands are decreed to be sold for Payment of Debts, a Court of Equity ought to affi's a fair Creditor (though a Papist profess'd) in obtaining a Satisfaction for his Debt, and when the Land is sold and turn'd into Money, Why should he not be paid his Debts out of that Money, as well as another Perfon?

But Quere, if his Judgment shall have the Preference of other Judgments subsequent to Protestants, out of the Money rais'd by Sale, since if the Lands were not sold, they would be liable to the other Judgments, but not to the Judgment given to a Papist, who can't sue out an Eliget.

Another Point was started, that one of the Judgments Creditors had sued out a Ca. Sa. and taken the Defendant Fletcher's Body in Execution.

Quere, if this Creditor shall be let in, in a Court of Equity to have a Satisfaction out of the Money rais'd by Sale, unless he will discharge the Execution at Law, and deliver the Defendant out of Prison; for by the Ca. Sa. this Creditor has conduced himself from taking out any other Execution as long as the Defendant lives, but indeed, if the Defendant dies in Prison, after his Death the Creditor may sue out an Eliget or Fi. Fac. but as long as the Body of the Defendant remains in Execution, no other Execution can be sued out against him.

Order'd, that all the Lands be sold, and an Account stated of the Debets, and their Priority, and if there be sufficient to pay all the Creditors, then the Money to be apply'd, but if there be a Deficiency, then, upon the Master's Report, the Court to determine as to the Preference of the Creditors; Per Parker C. MS. Rep. Hill. 6 Geo. in Canc. Lowther v. Fletcher, & al.

5. Bill to have a Satisfaction of a Judgment, against a Purchasor of the Equity of Redemption of the Land, or to redeem Incumbrances &c. The Defendants ininit on Stat. 4 & 5 W. & M. cap. 20. that no Judgment shall affect a Purchasor or Mortgagee unless Docketted, this Judgment was not Docketted till 1721, and the Purchasor was made in 1718.

Counsel for Plaintiff ininit, that the Defendant, the Purchasor, had Notice of this Judgment, and an Allowance for it in the Purchase, and that ratifies an Equity for the Plaintiff against him.

Macclesfield C. It is plain the Defendant had Notice of the Judgment, and did not pay the Value of the Estate, and that is a strong Pre-

sumption
Creditor and Bankrupt.

4. A Judgment was sign’d in June 1725. A Mortgage was made to the Plaintiff in 1728. In January 1729, the Judgment was Docketted, as appears by Entry in the Margin of the Docket. Matter of the Rolls held, that the Docket was not good, being made after the Time limited by 4 & 5 W. & M. cap. 20, and that the Officer had no Authority for it; and said, he would complain to the Judges of the Attorney's keeping back the Rolls. That the Mortgage had got the preference of the Judgment by defect of the Docket. And as to the Notice that the Statute being express, that Judgment's not Docketted, should lose their Preference as to Purchasers and Mortgagees, Notice or not Notice was not material, though urg’d, that the Doggett was purely to give Notice, and to make the finding of Judgments more easy. Decree for the Plaintiff; But the Cause turn’d upon the Foot of an Agreement between Plaintiff and Defendant, touching the Defendant's delivering upon the Bond and Judgment. MS. Rep. Mich. 1733. For shall v. Coles.

7. Where by the Statute of Frauds it is said, that Judgments shall not bind Lands, but from the Signing, this relates only to Purchases, and therefore, as between Creditors, a Judgment entered in the Vacation relates to the first Day of the preceding Term; Per Ld. C. 3 Wms's Rep. 399. Mich. 1735, in Case of Robinson & al' v. Tonge & al'.

For more of Creditor and Debtor, See Charge, Payment, and other Proper Titles.

Creditor and Bankrupt.

(A) Bankrupt. Who may be.

1. 21 Jac. 1. cap. 19. All Ass against Bankrupts shall extend to S. 15. All Aliens, as well Aliens as Denizens, as effectually as to Natural-born Subjects, both to make them subject to the Laws as Bankrupts, as also to make them capable of the Benefit as Creditors.


4. One
4. One who had a Stock in the East India Company, and who sat in their Committee as a Merchant in the Management of their Trade, and did receive the Profits of his Stock upon the Return of the Ships, though he had a great Estate in Lands, and did not get the most Part of his Living by Buying and Selling, yet he may be a Bankrupt, for it is not the Quality of his Peron, or the Greatness of his Estate, which protects him from thofe Laws, but his buying, selling, and trading in the Mercantile Trade, makes him liable to be a Bankrupt; and this was the Case of Sir John amble to Wolffenholme. Nelf. Ab. 336. pl. 8. cites Patch. 1653.

5. 13 & 14 Car. 2. cap. 24. relating to Bankrupts. — Dealers in Stocks are not thereby made liable to Bankruptcy; Per Ed C. King. 2 Wms's Rep. 508. Mich. 1752 in Case of Cott. v. Nettewill, cites Wolffenholme's Cafe


6. In Trover &c. upon Not Guilty pleaded, the Question of Fact. Sid. 411. pl. was, whether the Defendant was a Bankrupt, he being the Owner of the Goods; The Plaintiff proved, that he bad Silk and other Goods, to a great Value in his Warehouse, and that upon the Credit of them he took Up Money; but could not prove that the Goods were brought in after the Defendant had contrived Debts, or that he had exported any at all Time after, or for a long Time before; But after 15 Years, after he had exported his Goods, if they were the Effects of his former Trading, which he Trade that could not put off immediately, when he ceased to trade, could not this Action be brought, and the Court held accordingly, and cited the Cases of Bryant and F artery to be so adjudged, unless the Debts were contracted during the Trade; But if such Person trades again, and then becomes indebted, he may be a Bankrupt for this Debt, but not for the Debts contracted between. — But afterwards it was held otherwise, As where one had formerly been a Turkey Merchant, and traded in 1656. (but had not of late Years imported or exported any thing) but had Goods which were the Effects of his former Trading, to a very great Value, which he forbad to several Persons, and borrowed Money upon the Credit of them; The Court held, that this brought him within the Statute, for such Debts, as he contracted after 1656. Vent. 451. Mich. 25 Car. 2. B. R. Sir Anthony Barham's Cafe, &c.

7. The Defendant, with others, covenanted with the King to provide Victualls for the Seamen in the Dutch War, at 6 d. per Man; and afterwards these Victuallers agreed with the Purfers of the Ships to provide for thofe Men at other Rates; afterwards the Victuallers being C. and discharged from that Employment, and having a great Sum due to them from the King, refused to pay the Purfers, supposing themselves not to be Debtors, but Debitors, until such time as their Accompats with the King were allowed, and so it was said was the custom of the Navy Board, where-upon a Commission of Bankrupt issued out against them, and Debt was at all the brought.
brought by the Plaintiff, who entitled himself by Affiignment under the
Commission. The Court were clear of Opinioi, that the Employment
in buying Stores and Provisions for the Navy, did not make them
Traders; nor was it a buying and selling intended by the Statute. And
Hale said, every Purveyor might as well be made a Trader, or every
Schoolmaster who keeps Boarders. 1 Vent. 270. Paclf. 27. Car. 2. B. R.
Sir Thomas Lillington's Cafe.

8. Upon an Issue directed out of Chancery, whether Bankrupt or not,
within the Statutes of England at the Time of making a Conveyance of
Land by him to the Plaintiff. The Jury found the Defendant was born
England, and after dwelt in Ireland, and there fought his Living by buy-
ning and selling; that he came frequently into England, and bought
Goods there, and sold them in Ireland, and was indebted to diverse Persons
in England, to the Value of 100l. and more, yet unpaid. That one be
sold in England a Parcel of Nuts Tongues, and after sold in Ireland a Par-
cel of Tallow to be delivered in England, and which was delivered accordingly.
And afterwards he left his House in Ireland, and his Trade also there, and
abated and ascended from his Creditors, and came and journeys in
England, and ordered himself to be denied to Persons inquiring for him,
and all this before the Conveyance made; But that the said Conve-
nyance was made bona Fide, and for a Valuable Consideration. And
if &c. It was inquired among other Things, that the Jury make no Con-
duction upon the Evidence that he is Bankrupt, and that the Court can-
not. But per not. Court Judgment was given for the Plaintiff, for it was
said, that though the Jury found the Matter Specially, the Court may
conclude upon the Evidence, that be is Bankrupt, and this by the Statutes
here; for if this Case shall not be taken to be within the Statutes, all
the Intercourse between the Kingdoms will be much interrupted, if not
utterly destroy'd. 2 Jo. 141, 142. Paclf. 33 Car. 2. B. R. Dodsworth
v. Anderson.

9. A Taylor cannot be a Bankrupt, because he gets not his Living by
Buying and Selling, but by working up the Materials of his Cusromers
in Cleaths, and to differ from a Shoemaker. R. S. L. 185. cites


Says, that a Taylor that makes Garments only as a Servant to his Customers shall not be a Bank-
rupt; (and this seems to be true, but no Book there cited mentions a Taylor.)—— Dav. of Bank-
rupts 25. accordingly, but cites no Book.

10. A Feme Sole Merchant in London, is held to be within the Statutes
of Bankrupts. R. S. L. 156. cites Stone's Readings 43.


11. No Handicraft Man is within the Statutes of Bankrupts, but a
Vintner is. R. S. L. 186. cites Stone's Read. 121. Queue.

12. There is no material Difference between an Inn-keeper and the
Master of a Boarding School, who buys and dries Provisions for young
Scholars, and obtains Credit by his Way of Living, but it was never
yet thought that he was within any of those Statutes. 3 Mod. 330. per

13. An Inn-Keeper was Part Owner of a Ship, and having 50l. Stock
therein, absconded. It was held by Holt Ch. J. and Eyre J. that the
Share of the Ship was only Stock to trade in Potentia, that there must
be an actual Trading to make him a Bankrupt; that an Inn-Keeper is
not a Trader, for he buys Provisions, not for Trading, but to accom-
modate his Guests, and not to sell again at large. And Holt Ch. J.
held
held, that where a Man buys and sells under a particular Restraint, he contras as a Seller is not Seller within the Statute. 1 Salk. 109. Trin. 3 W. & M. in B. R. Newton v. Trigg.

(as himself told the Reporter) that an Innkeeper cannot be a Bankrupt, and as to his having Part in a Ship freighted, and a Stock in it, no regard was had thereto, the same being found imperfectly -- Show. 96. S. C Holt Ch. J. and Eyre J. thought him not liable, but Dolben contra, fed adjournatur. -- Ibid. 268. S. C. and the three Judges delivered their Opinions scrutini that he was not liable, and Holt Ch. J. declared Dolben to be of the same Opinion. -- 3 Mod. 537. S. C. adjudged accordingly. -- Carr. 149. S. C. adjudged accordingly per tot. Car. and it was revolved by all, that Buildings, and having a Share in a Ship, is no more than if a Man has a Short in a Barge or Coach which are to Hire 6cc. and that his having some Stock in a Ship does not make him a Merchant, because it is frequent for Persons to advende some particular Things in such a Ship for such a Voyage, but that will not make them Traders within the Statutes, for by those Statutes professed Merchants are only meant, who are in constant Trading. -- Skinner. 275. and 291. Luton v. Biggs. S. C. and same Points adjudged accordingly.

14. Steward of an Inn of Court cannot be Bankrupt; Per Holt Ch J. Skinner. 392. Trin. 3 W. & M. obiter.

15. In Troyer the Jury find a special Verticle, that an Innkeeper An Innkeeper bought Goods for the Ufe of his Guests and sold them to his Guests, Bankrupt; per Holt Ch J. and the Quétion was, Whether the Innkeeper by this was a Bankrupt? and adjudged by the whole Court that he was not ; because the Trade was not at large, but confined hospitantibus, and is properly the Accolommodation of his Guests and it was agreed in that Cafe, that Farmers are not within the Statutes of Bankrupts; it was also found in that Cafe that the Innkeeper had a Share in a Stage Coach, but that was not regarded. Hill. 9 W. 3. Cited per Holt Ch. J. Raym. Rep. 252. As the Cafe of Newton v. in Cafe of Trigg adjudged Trin 3 W. & Mil in B. R.

An Innkeeper as such is not within the Statutes of Bankrupts, because he does not live by Buying and Selling, but by uttering his Goods without any Contract, and if he utters them at an unreason-

5able Rate he is indefatigable for Extortion, which a Seller is not. Rejolved by all the Justices. Mar. 54. pl. 67. Trin. 15 Car. Crisp v. Pract. -- Jo. 447. pl. 5. S. C. adjudged. -- Cro C. 493. S. C. adjudged accordingly. -- But where an Innkeeper is a Chapman also, and Buys and Sells, he may on that Account be a Bankrupt, though not barely as an Innkeeper, and this has been fre-
nently seen.

16. A Gunfounder is not within the Statutes of Bankrupts, because S.C. cited this was for the Service of the King and delivered to his Ufe. Cited by Holt Chr. J. Show. 272. as held not within the Statutes, because it was a Particular Undertaking.

17. A Gentleman of the Temple went to Lisbon and turned Factor, and traded to England, and broke. And it was argued, that the Statute of Bankrupts did not extend to Persons out of the Realm. But the Court held him to be a Bankrupt by Raflon of his trading hither and back again, which gained him a Credit here; per Cur. on a Trial at Bar. 1 Salk. 110. Pl. 5. Pash. 5 W. W. & M. Sedgwick v. Bird.

18. If a Man, whilst a Trader, owes a Debt of 100 l. to £. and leaving off his Trade, borrows another 100 l. of the same Person, then pays him one of the 100 l. not mentioning whether it be in Satisfaction of the former Debt, or the latter, yet it shall be applied to the former, so that the Creditors shall never charge him with a Commiilion of Bankruptcy for that which remains; Per Holt Ch. J. Comb. 463. Mich 3. 9. 3. B. R. Anon.

19. If A. leaves off Trade, he shall be a Bankrupt for Debts contract-
ed before, but not for Debts contracted after. Resolved by Holt. Ch. 17. Hill. 12 & 15 Car. 2. B. R. Bresemann v. Harvey, the Court inclined accordingly as to both Points, fed adjournatur -- Vent. 5 Mich. 20 & 21 Car. 2. B. R. Anon. S. P. accordingly, and says it was so ruled in Sir J. Harvey's Case. Q. 20. A

21. The Defendant was indicted, for that he being a Bankrupt, and brought before Lords Commissioners, he refused to give them an Account of his Effects, and his Defence at Trial, upon Not guilty pleaded, was, that he was an Infant at the Time of the Debts contracted, and therefore could not be a Bankrupt; and of that Opinion was Holt; for tho' the Debts of an Infant are only voidable at his Election; yet no one can be a Bankrupt for a Debt he his not obliged to pay; wherefore the Defendent was acquitted. 12 Mod. 243. at Guild-hall, Mich. 10 W. 3. the King v. Cole.

22. It was ruled by Holt Ch. J. at Lent Assizes at Thetford, 16 Mar. 12 W. 3. upon Evidence at a Trial at nisi prius, that a Ship Carpenter is within the Statute of Bankrupts. But a Cafe was made of it for his further Consideration. Lord Raym. Rep. 741. Kinne v. Smith & al.

23. Upon an Issue directed in Chancery, to be tried before the Lord Ch. J. Holt for his Opinion, the Cafe upon the Trial before him at Guildhall the sitting after this Term, appeared to be thus. A Scrivener, who was not liable to be a Bankrupt before the Statute of 21 Jac. 1. cap. 19. committed an Act, which was made an Act of Bankruptcy by the Statute of 1 Jac. 1. cap. 15. viz. abounding &c. and he had also a Share in the Stationer's Company. And the Question was, Whether he was not a Bankrupt by that? And Holt Ch. J. held that since the 21 Jac. 1. Cap. 19. had made a Scrivener liable to be a Bankrupt, it had subjected him to all the Old Acts, which by the former Statutes made a Man a Bankrupt, as well as to the Acts mentioned in the Statute 21 Jac. 1. Cap. 19. But as to the Share in the Stationer's Company, he seemed to incline that that could not make him a Bankrupt. But the Ld. Keeper held the Scrivener to be a Bankrupt by both the Points. Upon the Importunity of the Council it was referred as a Cafe, as to both Points, for the further Consideration of the Ld. Ch. J. 2 Ld. Raym. Rep. 851, 852. Hill 1 Anna. Bird v. Major.

24. The Jury found that R. B. rented a Farm, for which he paid 300 l. per Ann. and that he planted Potatoes on Part of the Lands which he farmed, and that he bought great Quantities of Potatoes to plant there, and that for several Years he dealt with several Persons in Potatoes, at several Times and Places, and had employed Ware-houses, where he put in Potatoes, and had stored several Markets therewith, and had sold great Quantities thereof for Profit, and for his living &c. The Court being divided, no Judgment was given, but two of the Judges seemed to be of Opinion, that if a Man bought great Quantities of Wool or Hops, though he kept a Farm, and kept of his own, and several Hop-Gardens, he shall be accounted a Trader in those Commodities; and to hold an Innkeeper, if he turn Corn-Chandler. Tis true, the Jury have not found that B. got the cheieft Part of his Livelihood by buying and selling Potatoes; but its not the Quantity which is material, it lies in Proportion to other Goods which he buys and sells; for if a Man hath an Orchard, and buys several Quantities of Fruit of other People, though not so many as be
Creditor and Bankrupt.

be hath in his own Orchard; yet this shall make him a Trader and consequently subject him to the Statute of Bankruptcy. The two other Judges were of a contrary Opinion, viz. that here was not enough found by this Verdict to make B. a Bankrupt; for a Farmer is no Trader within any of the Acts beforementioned, quatenus a Farmer; and though he uses another Trade, yet if that is not the principal Means of his Livelihood, he is not a Trader within those Statutes; 'tis true if buying and selling in any Trade is the chiefest Means of his Livelihood, then he is a Trader within the Acts of Bankruptcy; but that is Matter to be given in Evidence, and found by the Jury which was not done in this Case. 8 Mod. 45. 48. 49. 7. Geo. Mayhoo v. Archer.

A Person, being under the Age of Twenty-one, bought Goods, and after the Age of Twenty-one committed an Act of Bankruptcy in Respect of those Goods on which a Commission issued. Ld. Chan. Macclesfield doubted whether he might not be a Bankrupt; but the Chan. [Ld. King] was clear of Opinion he could not, and said, if Commissioners find a Man a Bankrupt who is not so, Action will lie against them. Select Cases in Chan. in Ld. King's Time 46, 47. 11. Geo. 1. Whitlock's Cafe.

25. 5 Geo. 2. cap. 30. 5. 39. Bankers, Brokers, and Factors, are declared liable to the Statutes of Bankrupts.

26. S. 40. Provided always, and it is hereby further declared and enacted by the Authority aforesaid, that no Farmer, Grazier, or Drover of Cattle, or any Person, or Persons, who is, or are, or shall be, Receiver General of the Taxes granted by Act of Parliament shall be entitled as such to any of the Benefits given by this Act, or be deemed a Bankrupt within the same, or within any of the Statutes now in force concerning Bankrupts, any Law, Custom, or Usage, to the contrary notwithstanding.

27. A Pawn-broker, is not within the Statutes of Bankrupts, barely as such, but if he trades other ways, a Statute may be taken out against him by the Addition of Dealer and Chapman. Day. of Bankrupts 24, 25, cites Highmore's Cafe in 1737, and Read's Cafe in 1742. And that several Commissions have been taken out accordingly.


29. So of the South Sea Company. See the several Statutes as to that Company.


31. So of Persons circulating Exchequer Bills. See the several Statutes relating thereto.

\[ \text{(B) Bankrupt. By what Act.} \]

1. 13 Eliz. 7. If any Person using the Trade of Merchant, or seek-\[\text{ing his Living by Buying and Selling, in Grofs, or by Retail, shall depart the Realm, or begin to keep his House, or otherwise depart the absent himself, or take Sanctuary, or suffer himself willingly to be arrested Real to for Debt not grown due, or suffer himself to be outlaw'd, or yield himself to Merchandize, Prison, or depart from his House with Intent to defraud his Creditors, he shall be deemed and taken as a Bankrupt.} \]

Arrests, defers his Return, this is tantamount to his departing the Realm to defraud his Creditors, and he shall be adjudged a Bankrupt. R. S. L. 186. Cites Stone's Read. 125.
Creditor and Bankrupt.

One against whom a Capias de escommodo capiendi is awarded, departs the Realm to avoid being taken, this is not an Act of Bankruptcy, any more than the departing the Realm or keeping his House for fear of an Attachment out of Chancery. R. S. L. 186. cites ibid.

An Apothecary being Church Warden, and in Debt kept in Church, this was deemed a keeping his House. So where one has no House of his own, but keeps in another Man's House, or in a Chamber to hire, this will be adjudged keeping his House. R. S. L. 186. cites ibid.

If the Lieutenant of the Tower of London, be a Merchant indebted, and keeps in the Tower, it is an Act of Bankruptcy. R. S. L. 186. cites ibid.

2. A Process issued against J. S. to arrest him, he keeps his House to save himself from Arrest, and afterwards goes out to the Market, and to other Places; and when he hears again of a new Process out against him, he keeps his House again, and afterwards goes at large; the Question was, if he were within the Statute of Bankrupts? And all the Court held he was not, because he used to go at large; and it might be, that his Policy would not prevent the serving of the Process; for he might be met withal unwittingly. Cro. E. 13, pl. 6. Hill. 25 Eliz. C. B. Anon.

3. 1 Jac cap. 15. §. 2. Every Person using Merchandize &c. who shall willingly or fraudulently procure himself to be arrested, or his Goods, Money, or Chattels, to be attached, or sequestr'd, or depart from his Dwelling House, or make any fraudulent Grant or Conveyance of his Lands or Chattels, whereby his Creditors may be defeated or delayed for the Recovery of their Debts; or being arrested, shall, after his Arrest, lie in Prison six Months upon that Arrest, or any other Arrest or Detention for Debt, shall be adjudged a Bankrupt.

4. A Merchant had made a Fraudulent Deed to the Defendant of the Goods contained in the Court, but afterwards he went abroad to Church, to the Exchange, and did trade and commerce; and yet afterwards it is contained in the Indenture of Sale by the Commissioners to the Plaintiff that he had made this fraudulent Deed, and that afterwards he had traded and served the Exchange until a Day after, at which Day he wholly absented himself. And upon this Special Verdict the Defendant had Judgment; For every Deed to defraud other Creditors (but those to whom such Deed is made) is not sufficient to make one to be a Bankrupt; But if he make any Deed after he begins to be a Bankrupt, it shall not bind; But upon the Stat. of 1 Jac. which makes him a Bankrupt which makes fraudulent Deeds, it ought not to be as this Case was, viz. so long before he became a Bankrupt. Hutt. 42. Paclh.


5. It one exercises a Trade, and then becomes indebted, and afterwards quits his Trade, and lives in the Country without following any Trade, but lives on his Land only, and conceals himself from his Creditors, yet he is a Bankrupt; for he liv'd by his Trade when the Debt grew. Agreed. Palm. 325. Mich. 20 Jac. B. R. Heylor v. Hall.

6. If one for a Time deals in a Trade, and afterwards quits it, but leaves his Stock in the Hands of another, and goes shares with the other, both in Profit and Loss, and after such quitting, becomes indebted and conceals himself from his Creditors, he is a Bankrupt within the Statute. Agreed. Palm. 325. Mich. 20 Jac. B. R. Heylor v. Hall.

7. If one conceals himself within his House for a long Time, this does not make him a Bankrupt immediately; But if he conceals himself for a Day or an Hour, to delay or defraud his Creditors, this makes him a Bankrupt within the Statute. Palm. 325. Mich. 20 Jac. B. R. Heylor v. Hall.

8. If one is Surety for another, and conceals himself, he is a Bankrupt within the Statute. Agreed. Ibid.

9. 21 Jac. 1. cap. 19. §. 2. Every Person using the Trade of Merchandize, by Way of Bargaining, Exchange, Bartering, Cheviance, or otherwise in
Creditor and Bankrupt.

Grofs, or by Retail, or seeking his Living by Buying and Selling, or
that shall ife the Trade or Profession of a Scrivener, receiving other Men's
Moneys or Estates into his Trust or Custody, who shall obtain any Protection
(other than such Persons as shall be lawfully praftified by Privilege of Par-
liament) or shall prefer unto his Majesty, or unto any of the King's Courts,
any Petition or Bill against his Creditors, or any of them, thereby deflecting
or endeavouring to compel them, to accept less than their just and prin-
cipal Debts, or to procure Time, or longer Days of Payment, than was
given at the Time of their Original Contrails; or being arrested for Debt,
shall after his Arrest lie in Prifon two Months upon that, or any other
Arrest or Detention for Debt; or being arrested for 100 l. or more, of just
Debt, shall after such Arrest escape out of Prifon, shall be adjudged a
Bankrupt; and in the Case of Arrest, or lying in Prifon for Debt from the
Time of his first Arrest.

10. A Tradefman being outlawed, becomes a Bankrupt; but if the
Outlawry be reverfed lor want of Proclamations, all that is done in the
mean Time by the Commissioner is void; Contra, if it was reverfed

11. If a Trader, hearing that a Writ of Fieri Facias was iffled
against him, to the Intent to preserve his Goods from being levied in Exe-
ception, clandestinely conveys them out of his House, and conceals them pri-
vatelv, that does not amount to an Act of Bankruptcy. Ruled by

12. If a Banker or Goldsmith, who has many Peoples Money, will
refufe Payment, yet keeps his Shop open, and as oaten as he is arrested gives
Bail, he may by that Means give Preference of Payment to his Friends,
and when he has done, he runs away, yet such Payment shall stand
good against a Commiffion of Bankruptcy. And this was practifed in the
Case of Shipman the Banker, who was arrested almost every Hour in the
Day for several Days before he went off, and yet gave a Bail as often,
and paid his Friends, and then went and rendered himself in Discharge
of his Bail; Per Holt Ch. J. 7 Mod. 139. Hill. 1 Ann. B. R. Hop-
kins v. Gery.

13. A Banker, being called upon for Money in his Hands, does not, or
cannot, pay it; Lord Chancellor King held, that this does not amount to
an Act of Bankruptcy. Select Cases in Chancery in Ld. King's Time,
42, 43. Trin. 11 Geo. 1. in Case of Pakenham v. Bland and Hoskins.

14. L. having two Promiffory Notes signed by A. payable to L. or
Order four Months after Date. L. when about three Months was to run,
endered them to M. for Goods then delivered, and A acceding about one
Month after, L. on M's going to him, procures himself to be denied, and
then M. issues a Commiffion of Bankruptcy against L. who petitioned
to supersede the Commiffion. It, Objection was, that L. had committed
no Act of Bankruptcy. adly, That M. was not a proper Creditor.

Ld. Chancellor, By late Statute a Creditor by Note payable at a fu-
ture Day, may sue out a Commiffion, as well as come in as a Creditor;
But the Debtor's denying himself to such a Creditor, is not an Act of
Bankruptcy; it must be a keeping House &c. in order to defeat or delay
Creditors of their Debts, which could not be in the present Case, be-
cauise M. had then no Debt due to demand, and for a Commiffion super-
ceded. It was objected, that L. was Debtor to M. immediately upon the
Goods delivered; sed non allocatur; for by Ld. Chancellor, it was
Part of the Contract that M. would stay for the Money, till the Notes be-

15. B. was arrested for 28l. and though he had Money sufficient to pay
the Debt, yet chafed not to go to Prifon, in Order, as he declared, to
force his Creditors to come to a Compofition. And per Ld. Chancellor, this
is an Act of Bankruptcy within 1 Jac. 1. though, without such Intent,
Creditor and Bankrupt.

yielding himself to Prison, was no Act of Bankruptcy, unless he lay there two Months. Otherwife, where the Party procures himself to be arrefted upon a Summ Debt, and that, by the Statute of Elizabeth, is immediately an Act of Bankruptcy. Mil. Rep. Trin. Vuc. 1734. Ex Parte Barton.

(C) Proving him a Bankrupt. How?

1. If the Commissioners, without pursuing the Statutes of Bankrupts, affirm a Person to be a Bankrupt, he may traverse that he was not Bankrupt, cited by Coke Ch. J. 8. Rep. 121. a. as adjudge'd Mich. 6. Jac. B. K. Cat v. Delabatre.

2. In the Cafe of Bankruptcy, although the Commissioners have sole Authority to adjudge a Man Bankrupt, yet in an Action the Jury must find whether he was a Bankrupt or no, and not barely by the adjudication of the Commissioners. Raym. 337. Hill. 31 & 32. Cat. 2. Banbridge v. Bates & al'.

3. It was ruled by Treby Ch. J. of C. B. at Nifi Prius at Guildhall, the Sitting after Michaelmas Term, 10 Will. 3. upon Evidence in Trover brought by the Plaintiff against the Defendant, after Argument of the Council on both Sides. 1. That it is not necessary to prove, that the Person, upon whose Petition the Commission of Bankruptcy was granted, was a Creditor of the Bankrupt; because upon View of the Statutes they do not require that. 2. That it is not necessary to prove, that the Bankrupt was indebted in 100l. though the Practice has been to do so; because though the Chancellor frequently, before he grants a Commission of Bankruptcy, requires such Proof, yet it is only Matter of Discretion in him. Ld. Raym. Rep. 724. Smith v. Sir Richard Blackam.

And if they commit her, and the Warrant of Commitment mentions it to be as well for refusing to discover the Goods &c. of a Bankrupt, as the Time and Manner of his Bankruptcy; yet, Ld. C. held the Commitment illegal, and ordered, that she be Wms's Rep. 611. S. C.

4. The Wife of a Bankrupt cannot be examined against her Husband touching his Bankruptcy. By the Common Law, the cannot be a Witness for or against her Husband; and though the former Statute of 21 Jac. authorizes the Commissioners to examine the Wife touching any Concealment of his Goods &c. yet neither that, or the late Statute of 5 Geo. 1. 24. extends to examine the Wife touching the Bankruptcy, or whether he had committed any Act of Bankruptcy, and How, and when he became a Bankrupt; Per Ld. C. Parker. Hill. 1719. Wms's Rep. 610. 611. Ex parte James.


(D) From
Creditor and Bankrupt. 63

(D) From what Time. To what Time the Bankruptcy shall relate.

1. A Grazier Copy-holder in Fee, to May 1643, became a Bankrupt, and Goodw. of Bankrupts. But but A and Crs., continued arg. on a Commission in 1651 (which was Ten Years after the first Cause of Bankruptcy) after Argument at Bar and Bench it was adjudged for the Creditors, that they had a good Title against the Purchasers; but Cur- rian, the Provifo is express, that the Commission must be sued within Five Years after some time when he became a Bankrupt; and his being so after the Sale, that will not hinder, that if the Commission be not sued within the Five Years of his becoming a Bankrupt, and then they can only defeat all Sales made within the 5 Years, but not afterwards it was con- fi ded he was a Bankrupt in 1641. Point was, whether if a Man continued Bankrupt Twenty Years, he is always liable or no, which was adjudged for the Plaintiff by all the but it was said, he became a Bankrupt again in the Year 1649. And Hale made this Difference, that if one becomes a Bankrupt by a transient Act, as in Case of Suit &c. he may again become Bankrupt; but if it be a continued Act, as Imprisonment, withdrawing himself &c. he may not become a Bankrupt again; so with this Difficult you may understand how it is fald, Once a Bankrupt and always a Bankrupt. 2. A did an Act of Bankruptcy in 1651, and in 1657 did another Act, and Keb. 522. whereupon he was found a Bankrupt, and the Lands sold. It was re- solved that the Commission was well sued out within Five Years af- ter the last Act, though not within the Five Years before the Com. S. C. and misfion, [of the first Act of Bankruptcy] and also before the Leafe and [and] the Vendee of the Commissioners shall avoid the Leafe. Lev. 14. Car. 2. the Reporter says, that he heard and observed this Cafe. Patch. 16. the Commissioners, it was mov'd, that the Commission shall relate to the first Act 1651, which was the most Notorious, being by Impris- onment, though had the first Act been by Concealment or Outlawry, he agreed, the Party-Credi- tor need not take Notice of it by the 21 Jac. which he did, should not be taken favourably against the Purchaser, but only against the Bankrupt himself, and cited the Case of Bradford B. Edin- burghly, but Carla contra; For the Words of the Act are not, "After he shall first be a Bankrupt." For then the earlier being a Bankrupt, would, after five Years, be a perpetual Superfedeas to all Trademen; but if one hath fold, and then five Years pass without any Act of Bankruptcy, the Pur- chaser is safe, and then no Act can hurt him; But where the Bankrupt continues in Possession, any after Act is sufficient to bind the Term; and Judgment clearly for the Plaintiff.

3. One Stanly was arrested by an Executor of his Creditor, before Pro- bate of the Will, and put in Jail, and with two or three Days after he paid S. C., Raym. 479. 1000 l. to the Defendant to whom he fhold indebted in such Sum, and then S. C. in yielded himself to Prison in Discharge of his Bail. The Quelion was, B. R. adjur- whether Stanly should be fald to be a Bankrupt from the Time of his Under- firft Arrest (and so the Defendant be liable to refund the Money paid to him) or from the Time he yielded himself to Prison. Judgment S. C. in was given in C. B. for the Defendant; and upon Error brought in in B. the S. C. B. R. the Judgment was affirmed una voce, for that the Relation to and adjurd made a Man a Bankrupt ought to be upon an actual lying in Prison, and not upon putting in Bail only. Vent. 370. Patch. 56 Car. 2. B. R. 87. Duncomb v. Walter. S. C. and Judgment affirm'd in B. R. — 2 Show. 253, pl. 261. S. C. and Judgment affirm'd.

4. If
Creditor and Bankrupt.

4. It one is arrested and put in Bail, and after does not pay the Money within Six Months, he shall be adjudged a Bankrupt after the Six Months only, and it shall not relate to the Time of the Arrest. And so is the Statute of 21 Jac. cap. 19, to be understood, for it may be that he had Caufe to content the Debt, and the Suit might depend above Six Months; and also it would be mischievous to all Persons who deal with them, to make them refund their Money, when the Bankrupt appeared to be a Man creditable and solvent, and Judgment accordingly; Per tot. Cur. Skin. 270. Tin. 3. Jac. 2. Hinton’s Cafe.

5. Indebitatus; in a special Verdict, the Cafe was, that H. being a Tradefman owed 100 l. to B. and 50 l. to C. B. arrested him for this 100 l. and put in Bail, and about a Month afterwards H. paid off C. and then rendered himself in Discharge of the Bail in B’s Action. Note, the Statute of 21 Jac. cap. 19, says, he shall be a Bankrupt from the firft Arreft; but per Cur. that must be taken from the firft Arreft upon which he lies in Prifon, and not where he puts in fufficient Bail, otherwife no one could fafely pay or receive from a Tradefman adjudged in B. R. and afcertained in Error in Cam, Sacc. 1 Salk. 109. Trin. 2 W. & M. Camp. v. Coleman.

6. In Trover the Cafe was, J. S. was arrested at the Suit of H. and put in Bail. Afterwards upon a Scire Facias at another’s Suit, his Goods were fold to the Plaintiff; after this J. S. renders himself in Discharge of his Bail and goes to Prifon. And Holt C. J. inclined (contrary to the Cafe of Duncomb and Walter in 3 Lev. 57, wherein he was of Counfel, but not firffifhed with the Judgment) That J. S. was a Bankrupt from the Time of the Arreft, not from the Render only; for if H. is arrefted at the Suit of A. and puts in Bail, and, that pending, is after arrefted at the Suit of B. and goes to Prifon and lies two Months, he is, by the Act of Parliament, Bankrupt from the Time of the firft Arreft by A. But it appearing in this Cafe, that the Commiffion was taken out before the Two Months were expired from the Render, it was held to be ill taken out; J. S not being then a Bankrupt. And thereupon the Plaintiff had a Verdict. 1 Salk. 110. pl. 7. Trin. 2 Ann Ceram Holt Cn. J. at Nif- fius prius at Guildhall. Smith v. Stracey.

The Commiffion was taken out before the Bankruptcy, fo that there was no Determination on that Point. And the Words in the Act viz. “Or shall procure his Enlaiement by putting in common or hired Bail,” are by 10 Ann. cap. 14, repealed; fo that the putting in hired Bail is no Act of Bankruptcy; by which it is plain, that bare Arreft, and putting in Bail, are not confider’d as Acts that hurt a Man’s Credit. The Act of Parliament muft mean, that where there is a lying in Prifon for two Months, the Bankruptcy shall not be from the End, but the Beginning of the two Months, viz. from the Arreft: for in the principal Cafe, where the Debtor on the 25 June, 1729, was arrefted upon a Writ returnable in three Weeks after Trinity, at the Suit of the Plaintiff Tribe, and at the Return thereof put in Special Bail, and being indebted to the Defendant Webber in 261 l. 18 s. on the 7th of January following paid him 447 l. and on the 15th of August, 1741, paid him the further Sum of 181 l. 18 s. the Court were of Opinion, that as to such Payments as were made between the Arreft, and the Debtor’s surrendering himself to Prifon, which was after the Payment of the 447 l. were good Payments to the Defendant Webber, but that the Plaintiff shall take a Verdict for the 181 l. 18 s. which was paid after the Bankrupt’s surrendering himself to Prifon.

7. Upon an Issue directed out of Chancery, whether Bankrupt or not at such a Time, it was held per Holt C. J. that if H. commits a plain Act of Bankruptcy, as keeping House &c. though he after goes abroad and
and is a great Dealer, yet that will not purge the first Act of Bankruptcy, but he will still remain a Bankrupt; But if the Act was not plain but doubtful, then going abroad and dealing &c. will be an Evidence to explain the Intent of the first Act; for it was not done to defraud Creditors and keep out of the Way, it will not be an Act of Bankruptcy within the Statute. Salk. 110. pl. 6. Trin. 3 Ann. coram Holt Ch. J. at Guildhall, Hopkins v. Ellis.

(E) Commissions. How and when to be granted &c.

1. 13 Eliz. cap. 7. S. 2. Chancellor is to appoint Commissioners to seize his Person, Estate, and Effects, and to distribute the proceed ratably among the Creditors.

2. There ought to be a Petition in writing to my Ld. Chancellor, or else he has no Warrant to grant a Commision, and then whatever the Commissioners do will be void. Refolv'd. Freem. Rep. 270. pl. 298. Pach. 1680. C. B. Hinton's Cafe.

3. If the Examinations are left by Fire, &c. if there ought in such Cafe of Fire to be a New Commision, Quere. 2 Show. 102. Pach. 32 Car. 2. B. R. The King v. Ballar.

4. Commision of Bankruptcy superseded by the Content of the Petitioning Creditors, North K. refused to revive it, or to grant a Proceedendo on the Application of the other Creditors that had not come in, but defired so to do. Vern. R. 208. Mich. 1683. Backwell's Creditors Cafe.

concerning Creditors to contribute, Ld. Jeffries Ch. seem'd to think it might be renewed. Cafe 192. S. C.

5. The granting a Commision is not a Matter discretionery in the Ld. Chancellor &c. but he is bound to do it; Per North K. Vern. 153. Pach. 1683. Backwell's Cafe.

6. Commision of Bankrupt cannot be granted but by Petition of a But such Pe-Creditor; Per North K. 2 Ch. Cafes 191. Mich. 3 Jac. 2. Backwell's Cafe.

(F) Commision. What Creditors may obtain it, and how, and when.

1. If a Man quits his Trade, and after becomes indebted to F. S. In this Cafe J. S. cannot sue a Commision of Bankruptcy for such Debt contracted alter, though it the old Creditors sue a Commision, this new Creditor shall be admitted to have his Share of the Bankrupt's Estate. Per Holt Ch. J. Ld. Raym. Rep. 287. Hill. 9 W. 3.; in Cafe of Meggot v. Mills.

2. If A. being a Trader, becomes indebted to B. in 100 l. and then he quits his Trade, and afterwards becomes indebted to B. in 100 l. more; A

after
afterwards pays to B. 100 l. without laying upon what Account. Holt Ch. j. said, that since so much in Quantity is paid to B. as was due to him from A. when A. was capable of being a Bankrupt, it would be too rigorous to admit B. to sue a Commission of Bankruptcy for the old Debt of 100 l. But to this Point he said, he would not give an absolute Opinion: and none of the other Judges contradicted it. Ld. Raym. Rep. 287. Hill. 9 W. 3. B. R. in the Case of Neggott v. Mills.

3. It was laid by Holt, and not denied by the Court, that if a Man contrains Debts while he is a Dealer, and after leaves off his Trade, and then commits an Act of Bankruptcy; there none of his Creditors becoming so, since the leaving off of his Trade, can sue out a Commission of Bankruptcy; but if those, who were his Creditors before his leaving off his Trade, sue out such a Commission, the other Creditors may come in and join. 12 Mod. 159. Hill. 9 W. 3. Meggott v. Mills, & al.

4. B. gave A. two Notes, the one for 50 l. and the other for 51 l. payable at different Times. Afterwards B. before the Day of Payment of the second Note, sued out a Commission of Bankruptcy; but Ld. C. Harcourt superseded the Commission; but the Court denied to affirm the Bond, the Commission not appearing to be taken out maliciously or fraudulently, which are the Words of the Act. Wm's Rep. 260. Trin. 1714. Ex Parte Mackernels.

5. Indorse of Notes of one, who afterwards becomes Bankrupt, purchased in at an under Value, as at 128. in the Pound, petitioned for a Commission against the Drawer. And Ld. C. Macclesfield held, that he was plainly a Creditor, just as if the Drawees had paid the Bankrupt an under Rate for them. Wm's Rep. 782. Hill. 1721. Ex Parte Lee.

6. 5 Geo. 2. cap. 30. S. 22. Enacts, That it shall be lawful for Persons taking Bills, Notes, or other Security for Money payable at a future Day, to petition for a Commission, or join in petitioning.

7. S. 23. No Commission of Bankruptcy shall be awarded, unless the single Debt of the Creditor, or of more Persons being Partners petitioning for the same amounts to 100 l. or unless the Debt of two Creditors petitioning amounts to 150 l. or unless the Debt of more Creditors petitioning amount to 200 l. And the Creditors petitioning shall, before the same be granted, make Affidavit, or solemn Affirmation, before one of the Masters of Chancery, of the Truth of their Debts, and give Bond to the Lord Chancellor, in the Penalty of 200 l. to be conditioned for proving their Debts, as well before the Commissioners, as upon a Trial at Law, in case the due discharging of the same shall be contested, and also for proving the Party a Bankrupt, and to proceed on such Commission as herein is mention'd.

8. S. 25. The Creditors who shall petition for a Commission of Bankruptcy, shall be obliged at their own Costs to prosecute the same, until Affirmes shall be chosen; and the Commissioners shall, at the Meeting appointed for the Choice of Affirmes, ascertain such Costs, and by Writing shall order the Affirmes to reimburse such Petitioning Creditors out of the first Effects of the Bankrupt that shall be gotten; and every Creditor shall be at Liberty to prove his Debt without paying Contribution.

9. The Defendant W. being indebted to the Plaintiff in 1730, afterwards committed an Act of Bankruptcy; upon which the Plaintiff being the petitioning Creditor, took out a Commission of Bankruptcy against the Defendant, in order to over-reach and make void as many of his Conveyances and
Creditor and Bankrupt. 67

and Settlements &c. as possible, the Creditors on a Bill filed endeavoured to prove him a Bankrupt, as far backward as they could; and did actually prove, to the Satisfaction of the Court, that he was committed an Act of Bankruptcy in the Year 1726. Then it became a Question, whether the Commission of Bankruptcy, and all that was done under it, was not Wrong, in regard that the Debt of the petitioning Creditor on which it was grounded, was contracted subsequent in Time to the first Act of Bankruptcy? After this Matter had been argued, and Time taken to consider of it. The Lord Chancellor dismissed the Plaintiff's Bill without Prejudice. Note, this Decree was reversed in the House of Lords, by the Opinion of all the Judges, February the 17th, 1737. Cafes in Canc. in Lord Talbot's Time 243, 244. Mich. 1734. De Gols v. Ward.


(G) Commission superseded or abated.

1 Fac. 1. cap. 15. S. 17. If after any Commission of Bankrupts sued forth, and dealt in by the Commissioners, the Offender happens to die, before the Commissioners shall distribute the Goods, or any of them; the Commissioners shall in that Case proceed in Execution, upon the Commission for the Offenders Goods, Lands, as they might have done done if the Party were living.

2 If there be once a Petition in writing, my Lord Chancellor may grant and repeal Commissions tofies quotes, and need not a new Petition for a new Commission, but may supersede the old Commission, either for the Miscarriage of the Commissioners, or in Case of Death, or for any other Reason, and may grant a new Commission; and the granting a new Commission is a Superseding to the old one; Resolved. Freem. Rep. 270, 271. Pach. 1650 C. B. Hinton's Case.

3 If a Commission of Bankruptcy be sued out against one A. and the Commissioners do, pursuant thereto, declare him to be a Bankrupt, and then be dies, and then the King dies, and then a Commission is renewed against him, whereupon the Commissioners met and assigned his Estate to one David Robinson and Charles Challos (being two of the Creditors;) Held per Justice Powell, Judge of Affize, at Somerset Affizes in the Summer, 3 Ann. that the Commissioners might proceed after the Death of the Bankrupt. Arthur's Case.

4. If a Creditor by Bond, before the Day of Payment sues out a Commission of Bankruptcy against the Obligor, it is irregular, and is such Irregularity, for which the Commission ought to be superseded; For though it be debitrin in praenter, yet as it cannot be so much as put in Suit, or an Action commenced upon it, much less can there be a Commission of Bankruptcy taken out upon it, by which all the Real and Personal Estate of the Bankrupt is (as it were) seised in Execution. Wmsb. Rep. 610. Hill 1719. by Ld. C. Parker. Ex parte James.

5. A Commission was taken out and not sat on till Three Months after. Ld. Chancellor said it plainly thaws it was done to protect the Estate; the Commission shall be superseded for Example-Sake, that such Things should not be practised. Select Cafes in Canc. in Ld. King's Time. 46. Trin. 11 Geo. Comb's Case.

6. A.
6. A. sued out a Commission of Bankruptcy against B. and kept it for 6 Months, without doing any thing upon it; and afterwards executed it. Lord C. King on a Petition superseded it for this very Reason; and it being urged, that the Expense of another Commission would be a fresh Charge upon the Bankrupt's Estate, his Lordship replied, he would take Care that the former Commission should not be at the Charge of the Bankrupt's Estate. 2 Wms's. Rep. 545. Trin. 1729. Ex parte Palmer.

7. A. being Assignee under a Commission of Bankruptcy, dying indelit by Bond, &c., the Creditors of the Bankrupt petitioned that the Administrator of the Assignee might account before the Commissioners, suggesting that the Administrator had confided, that he believed her intehtate, the Assignee, kept the Bankrupt's Money in a separate Bag, with a Note in it, shewing it to be such. But the Administrator denying this upon Oath, and that he did not believe the Factual to be so, and likewise l'vearing that Tellor died indebted by Specialty several 1000 Pounds, besides his Affidavit, whereupon Lord C. King ordered the Petition of the new Assignee to be dismissed, and directed them to bring their Bill. 2 Wms's Rep. 546. Trin. 1729. Ex parte Markland.

8. 5 Geo. 2. cap. 39. S. 23. If Debts sworn to (and by reason thereof a Commission is awarded) shall not be really due, or, if after such Commision taken out, it cannot be proved that the Party was a Bankrupt, then the Lord Chancellor shall, upon Petition of the Party grieved, order Satisfaction to be made for the Damages sustained; and, in Case there be Occasion, assign such Bond to the Party, who may sue for the same in his own Name.

9. S. 24. Commissions fraudulently obtained to be superseded, and another granted.

10. S. 45. No Commission of Bankrupt shall abate by the Death of his Majesty, his Heirs or Successors, but shall continue in force; and if it shall be necessary to renew any Commission by reason of the Death of the Commissioner, or any other Cause, such Commission shall be renewed, and but half the Fees usually paid, shall be paid for such renewed Commission.

11. A Commission of Bankruptcy sits against H. at 11 of the Clock in the Morning; At 3 in the Afternoon the Commissioners declare him a Bankrupt, and execute an Assignment at 6, and then have Notice that he died at 10 of a Clock the same Day, this is a Dealing within the Act of Parliament, and the Proceedings shall stand. Lord Chancellor said, he knew no particular Act as distinct from another which can be called a Dealing. It has been said, that the declaring him a Bankrupt was the Act meant, but that Declaration of the Commissioners being only Directioinary and for Caution, and not at all binding to any Body, it is not probable that the Act should intend that only a Dealing, which it has not any where given the Commissioners Power to do; whatever is done in Pursuance of the Commission is a dealing in it, it never being mentioned, and the rather for these being remedial Laws, are to be beneficially construed in Favour of the Creditors, I cannot therefore put a narrow constraining Construction upon the Words dealt in, in Order to overthrow this Commission, and all the just Right of the Creditors claiming under it. Cafes in Eqd. in Ld. Talbot's Time, 184. Hill. 1735. Warringdon v. Morton.

(H) Who
Creditor and Bankrupt.

(H) Who are Creditors; and How, and When, to prove their Debts.

1. And B. were Sureties for one C. for the Payment of Money, and to have Counter-Bonds to save them harmless; the Money was not paid at the Day, and the Sureties paid it; and afterwards C. became Bankrupt, and whether they were Creditors within the Statutes, was the Question. And it was resolved, that they were. Cro. J. 127. Trin.

2. A Creditor offered Proof of his Debt, which the Commissioners disallowed; whereupon Application was made to the Court, who at first declined to meddle with it, but at length consented to hear the Proof. Chan. Ctes. 275. Patch. 29. Car. 2. Anon.

3. A lent Money to a Bankrupt, after a Commission of Bankruptcy was set out against him. Trevor and Hutchins, Lords Commissioners, held, that he could not come in as Creditor, but was excluded. But Lord Rawlinson doubted, and took it to be a new Point, not yet settled, and that there were no Words in the Act to exclude him. But Ld. Trevor and Hutchins held, that when the Commission was set out, he was bound to take Notice. 2 Vern. 157. 161. Trin. 1690. Hitchcox v. Sedgewick.

4. If there be an Act of Bankruptcy committed, and a Creditor obtains a Judgment subsequent to it, then a Commission is taken out; now the Judgment is thereby avoided. At Nisi Prius coram Holt. 12 Mod. 446. Patch. 13 W. 3. B. R. Anon.

5. A lends Money to B. and C. on their Bond; B. becomes Bankrupt. The Commissioners assign the Estate in Trust for the Creditors. A sues the Bond against C. and gets Judgment, and takes him in Execution by a Ca. Sa. and thereupon C. paid A. 24l., but being old and poor, A. consented to discharge him out of Custody. Ld. C. Harcourt decreed A. to come in as a Creditor for a Moiety of what remained due on the Bond; for the Execution being subsequent to the Assignment of the Bankrupt's Estate, shall not (at least in Equity) discharge A.'s Demand out of the Bankrupt's Estate. But because, in Equity, was liable but to Half the Debt, and C. was not the original Debtor for the Whole, A. shall have Relief only for a Moiety of his remaining Debt against the Assignees; But had the Bankrupt been the original Debtor, and had borrowed all the Money, then A. should come in before the Assignees, as a Creditor, for all his Debt. Wm's Rep. 237. Trin. 1713. Ex Parce Smith.

6. If a Man trade with a Bankrupt between the Act of Bankruptcy and the Commission, whether by Delivery of Goods, or Payment of Money, without Notice of the Act of Bankruptcy, the Bankrupt keeping open Trade, such Person shall come in as a Creditor for such Goods or Money. Trin. 1716. Crofley's Cafe.

7. On a Petition to Ld. Chancellor Parker, praying to be admitted a by 7 Geo. Creditor on a Note, payable at a future Day, given for Goods sold and delivered, the Commissioners having refused to admit him as such, in regard to the Bankruptcy was between the Date of the Note, and Time of Payment, Objection, That there was a Difference between a Bond and a Note, for interest, upon a Note did not import any Debt till the Day of Payment came. But per Ld. Chancellor, this comes improperly before me for my Determination, on a Petition, I having nothing to do in such Cases, but to Creditor is
direct and see that the Commissioners do their Duty, and can't order them to admit any one Creditor; But I may say so much Money in their Hands as will answer the Proportion of the Debt, in Case it should be allowed of, and a Bill may be brought for that Purpofe, in order to determine if the Cafe be of great Consequence. For by this Means a Trader may disappoint which of his Creditors he pleafeth, and poftpone them, by giving of some Notes payable at a future Day, and then becoming a Bankrupt. I do incline to relieve such Creditors, efppecially where the Note is given for Goods sold, and thefe Notes are a Sort of Specialty. Objection, That he might plead Certificate and Diffcharge at Law, if an Action were brought upon such a Note. But per Cur. That is not fo because the Caufe says, CauſaACTIONIS accrued before the Bankruptcy, which can't be in this Cafe till the Money is payable; and why may not such a Note for a Precedent Debt be aid Debtum in present & Solvendum in futuro? As to the Honesty of the Note, that may be enquired into, and will be no Objection, because the Honesty of a Judgment Bond &c. are liable to the fame Enquiry. And though this Note were given to one S. who is now abroad, yet it being now aligned to another, there is no Occafion or Neceflity for an Inquiry on what Terms it was given him, and to call him to be examined to it, because prima facie it carries the Face of Truth. It is ufual not to grant a Commiffion on the Petition of Creditors on fuch Notes, till the Day of Payment comes. Trin. 6. Geo. Canc. Burdocks Cafe.

8. A Creditor on a Bond with Condition to pay Money at a future Day, subsequent to an Act of Bankruptcy, could not before 7 Geo. 1. cap. 31. be admitted to prove fuch Debt, or to have any Dividend before fuch Security became payable; and that Act recites it to have been a Quefition, lor Remedy whereof that Act was made; and fo was the Opinion of all the Judges. 2 Ld. Raym. Rep. 1549. Mich. 2 Geo. 2 b. R. in Cafe of Tully v. Sparkes.

9. 5 Geo. 2. cap. 30. §. 26. At fuch Meeting as fhall be appointed, the Commissioners fhall admit the Proof of any Creditor's Debt, that fhall be remote from the Place of fuch Meeting, by Affidavit, or solemn Affirmation, and permit any Person duly authorized by Letter of Attorney (Oath or Affirmation being made of the Execution thereof, either by an Affidavit sworn, or Affirmation made, before a Mafter in Chancery, Ordinary or Extraordinary, or before the Commissioners in open voice; and in Cafe of Creditors residing in Foreign Parts, fuch Affidavits or Affirmations to be made before a Magiftrate, where the Party fhall be residing, and fhall, together with fuch Creditor's Letters of Attorney, be attested by a Notary Publick) to vote in the Choice of Assignees in the Place of fuch Creditor.

(I) Contingent and future Debts.

1. In an Action of Debt upon a Bond dated before the Act of Bankruptcy committed by the Defendant, it appeared the Money in the Condition was not payable till after the Act of Bankruptcy; the Defendant infifted he ought to be discharged upon Common Bail, by Virtue of the Statutes about Bankrupts, but it was ruled he should be held to Special Bail.

2. 7 Geo. 1. cap. 31. S. 1. Enacts, that every Person who shall give A Trader Credit or Securities payable at future Days, to Persons who are, or shall contracted become Bankrupts, upon good Confertation bona fide, for Money or other Thing not due before the Time of such Persons becoming Bankrupts, shall be admitted to prove their Securities or Agreements, as if they were payable at one of the pfent, and shall have a Dividend in proportion to the other Creditors, their Sales, discounting 5 per Cent. per Ann. from the actual Payment to the Time such Money would have become due.

3. And by S. 2. the Bankrupt shall be discharged from such Securities, as if such Money had been due before the Time of his becoming Bankrupt.

4. Upon a Treaty of Marriage between the Plaintiff's Nephew and the Defendant's Daughter, a Settlement was agreed upon, and Articles entered into between Plaintiff and Defendant, and also before the Marriage, the Plaintiff by a separate Writing, reciting, that a Marriage was intended, and in Consideration thereof, the Plaintiff promised and agreed to pay the Defendant 40 l. a Year by Quarterly Payments, during the Plaintiff's Life; but if the intended Husband and Wife, or either of them should die during the Defendant's Life, then the Annuity to cease. This Agreement was Signed and Sealed by the Plaintiff; The Marriage was bad, and Settlement made according to the Articles. The Plaintiff soon after became a Bankrupt, and in all Things conformed to the Acts relating to Bankrupts, and had a Certificate confirmed; the Defendant did not come in under the Commiission, but for two Years and half Annuiy, accrued since his Bankruptcy, brought Action of Covenant; it was tried per Ch. J. King. The now Plaintiff pleased the Bankruptcy and Certificate, and it was strongly inquired, that it was within the Statute of 7th of the present King, whereby Persons intituled to Notes payable at future Days, should come in under the Statute, and a Value set on the Debts, with rebate of Interest, but Ch. J. was of Opinion this Agreement was not within that Statute. The rather, because of the Impossible of setting a Value on this Annuity, being on three Contingencies, and Verdict for the now Defendant, but upon the now Plaintiff's importunity, the the Point was referred to be argued in the Court of C. B. which was done accordingly, and all the Judges were of the same Opinion. Plaintiff brought a Bill for Injunction.

18. On Suggestion that this Agreement was a Fraud being private and not in the Articles.

2dly, For that the Verdict was against Conscience, for that the now Defendant ought to have come in under the Statute, being within the late Act; But on Motion for continuing the Injunction the Master of the Rolls said, had it been Res Integra he knew not what he might have done, but now the Point was determined at Law, so disfavored the Cause, for that there was no Fraud. MS. Rep. Trin. 9 Geo. 1723. Fletcher v. Bathurst.
5. A Contingent Creditor, as where Obligor in a Bottomree-Bond becomes a Bankrupt, shall not be bari'd by the Allowance of the Bankrupt's Certificate, the Right of Action not being then accru'd. 2 Wms's Rep. 499, pl. 159. Mich. 1728, per Ld. C. King. Ex Parte Calwell.

6. It J. S. gives a Bond to certain Persons condition'd for Payment of sommes in Case he shall marry such a Woman, and that he shall forgive them, but in Trust for the said Woman her Executors &c. and afterwards J. S. marries her, and becomes Bankrupt, and has his Certificate of Discharge and dies living his said Wife. The Court held, that this was not barred; For that it was not within the 7 Geo. 1. cap. 31. it being uncertain whether this Bond should ever become payable or not, by reason of its depending on two Contingencies, which had not both happen'd at the Time of the Act of Bankruptcy committed, and so was impossible to make Abatement of 5 l. per Cent. as the Act directs. 2 Ld. Raym. Rep. 1549. Mich. 2 Geo. 2. R. Tully v. Sparks.

7. Edward Cork on Marriage, by Articles in 1716, Covenant'd to pay Trustees 4000 l. in Case he should die leaving a Son and other Children who would arrive to 21 equally &c. E. becomes a Bankrupt and has a Son, and four other Children all Infants who prefer Petition, praying that sufficient Part of the Estate might be set apart in order to be divided, when &c. Lord Chancellor, it is uncertain whether ever any Thing will become due, and before 7 Geo. 1. cap. 31. it was a Question whether Bonds or Promissory Notes payable at a future Day, though certain in all Events could be let in, and the Difference now in such Cases is to be adjusted by rebate of Interest, but here how is it possible to adjust the Difference upon a Contingency which may never happen? He allows the Case upon Bottomree-Bonds, where Contingency had happen'd before a Distribution actually made. Obj. that this Demand will be discharg'd by Certificate by Statute 5 Geo. 2. cap. But per Lord Chancellor that Clausule only relates to inrolling Proceedings, and this is not a Debt due or arising at the Time of the Bankruptcy. Petition in a Petition. MS. Rep. Trin. 1734. Ex Parte Jefferies.

8. Statute 19 Geo. 2. Enacts, That from and after the 29th Day of October, the Oblige in any Bottomree-Bond, or Respondentia Bond, and the aforesaid in any Policy of Insurance made and entered into upon a just and valuable Consideration Bona Fide, shall be admitted to claim; and after the Loss or Contingency had happen'd, to prove his, her, or their Debt and Demands, in respect of such Bond or Policy of Insurance, in like Manner as if the Loss or Contingency had happen'd before the Time of issuing of the Commission of Bankruptcy against such Obligor or Insurer; and shall be intituled unto, and shall have and receive a proportionable Part, Share, and Dividend of such Bankrupt's Estate, in Proportion to the other Creditors of such Bankrupt, in like Manner as if such Loss or Contingency had happen'd before such Commission issued.

9. And that all and every Person or Persons against whom, from and after the said 29th Day of October, any Commission of Bankruptcy shall be awarded, shall be discharged of, and from the Debt or Debts owing by him, her, or them, on every Bottomree or Respondentia Bond, and shall have the Benefit of the several Statutes now in Force against Bankrupts, in like Manner to all Intents and Purposes, as if such Loss or Contingency had happen'd, and the Money due in respect thereof, had become payable before the Time of the issuing such Commission.

(K) Who
(K) Who must come in as Creditor.

1. **Sells Land to B. who afterwards becomes a Bankrupt, Part of the Purchase Money not being paid; A. shall not be bound to come in as Creditor under the Statute, but the Land shall stand charged with the Money unpaid, though no Agreement for that Purpofe.** Vern. 268 Pl. 262. Mich. 1684. Chapman v. Tanner.

2. A. makes a Mortgage and afterwards a Commiffion of Bankruptcy is taken out against him, and Commiffioners make an Affignment of his Eftate, and then B. lends 2000 l. to the Bankrupt on a Second Mortgage, having no Notice of the Bankruptcy, and afterwards he gets in the fift Mortgage. This Prior Mortgage shall not protect the Mortgage subsequent to the Bankruptcy. 2 Vern. 157. Trin. 1690. Hitchcox & al v. Sedgwick & al.

3. Creditor becomes Bankrupt, the Question was, Whether his Factor, having Cloaths in his Hands of the Bankrupts, might thereout retain his Title to his Factories, and Debts, or must come in as a Creditor under the Statute, and accept of a Compifation in Proportion with other Creditors, and account for the Cloaths he had in his Hands. 2 Vern. 254. Hill 1691. Woodlford v. Month after Swaine

4. A. by Articles was to build certain Houses, B. furnishes him with Materials, and takes an Affignment of the Articles for his Security, but before the Affignment A. was a Bankrupt.

5. A. by Articles was to build certain Houses, B. furnishes him with Materials, and takes an Affignment of the Articles for his Security, but before the Affignment A. was a Bankrupt.

6. P.
Creditor and Bankrupt.

6. P. had a current Account with B. a Banker, and had 3000l. in B’s Hands; B. paid P. 1000l. and P. instead of a Receipt gave B. a Promissory Note. B. assigned the Note to H. and afterwards B. became a Bankrupt. H. sued the Note, and P. not being able to prove on the Trial, that B. was Bankrupt at the Time of the Assignment, H. recovered. P. brought a Bill for an Injunction, and for a Discovery, whether the Assignment was not made after the Time it bore Date. It was insisted that though this was a Promissory Note it should be considered only as a Receipt, he having at that Time Money in his Hands, and could not be imagined he intended to be liable on the Note at the same Time that so much Money was due to him; and if so, the 1000l. should be taken as so much Money paid and deducted out of the 3000l. so should come in for his distributive Share of 2000l. of the Bankrupt’s Estate, and not be a Creditor for 3000l. and pay the 1000l. Note; No Proof was made of Bankruptcy at the Time of the Assignment, only that he could not pay it, but never kept out of the Way; Ld. Chancellor, That does not amount to an Act of Bankruptcy; and if People are so careless to give Notes instead of Receipts, it is more fit they should suffer than innocent People who know nothing of their Transactions; Bill dismissed. Select Cafes in Chan. in Ld. King’s Time. 42, 43. Trin. 11 Geo. 1. Pakenham v. Bland and Hoskins.

7. On a Divifion for Rent, Goods were fold and 771. 3s. remain’d in the Contable’s Hands, who became a Bankrupt. The Tenant dies, and his Executor prays to be paid this Money by Assignees in Preference to other Creditors.

Obj. This comes to the Hands of the Contable by due Course of Law, and cited Mar. 9. 1721. Ld. Macclesfield ex Parte Peirfon, where was cited Wright v. Dixon, Mich. 6 Geo. 1. C. B. Goods taken in Execution by Wilcox Bailiff of of Weftminster and he died; Judgment and Execution yet afdie, and ruled by B. R. that the Widow and Executrix of W should refund the Money though she alleged she had not Assets to pay Specialties.

But per Ld. Chancellor both the Cafes cited are against Executors, and though the Law makes a Difference between one Creditor and another; yet in Cafe of Bankruptcy all Creditors are upon an equal Foot, if any Thing remain’d in Specie, it might be otherwise, but here the Money is embezzled by the Contable; so ordered the Petitioner to come in as a Creditor with the refl. MS. Rep. Mich. Vac. 1733. Ex Parte Dobson.

8. An Attorney had been employed by one who became Bankrupt; Assignees petition to have up Papers, and that the Attorney might come in for his Demands Pari passu with other Creditors.

Ld Chancellor, the Attorney hath a Lien upon the Papers in the fame Manner against Assignees as against the Bankrupt, and though it doth not arife by any express Contract or Agreement, yet it is as effectual, being an implied Contract by Law; But as to Papers received after the Bankruptcy they cannot be retained, and therefore if the Assignees desire it let the Bill be taxed, and upon Payment, Papers delivered up; and although the Attorney had come in and proved his Debt, yet a Creditor, who hath a Security, may properly come in and prove his Debt, because possibly his Security may prove deficient. MS. Rep. Mich. 1734. Ex Parte Bath.

9. A. being Collector of Land-Tax, and in Arrear becomes Bankrupt. His Goods are seiz’d by Warrant from Commissioners of the Land-Tax; Then an Assignment is made, but it was before Sale by the Commissioners of the Land-Tax.

Per Cur. this is to be considered as a Prerogative Cafe, and the Collector is an Officer and Debtor to the Crown, and as in Cafe of an Ex-
Creditor and Bankrupt.

1. 1 Jac. 1. cap. 15. § 4. A Creditor may come in within four Months after the Commission must have been taken out, and until Distribution be made, so that the assignment to the Charges of the Commission, and if the Creditors come in within four Months, the Commissioners may proceed to Distribution.

2. A Commission of Bankruptcy was taken out against T. F. the 17th of November 1676, but prosecuted only by R. the other Creditors confessing, that Execution of the Commission be forborn a Month, but R. did not confent thereto, nor knew thereof, but R. prosecuted and sued M. who had been admissible as a Debtor by Assignment of the Bankrupt. It was inferred at the Trial, that F. (the supposed Bankrupt) was not so. R. had a Verdict, and the four Months were out; three Weeks after, the petitions to be admitted into the Distribution, and now would contribute to the Charges, the Suspension of executing the Commission having been so ordered by the Chancellor; and now his Lordship directed her to come in to the charges, but the Distribution, &c. was a separation of the separate Commissioners in respect of Partners in Trade Bankrupts. And how to proceed therein.

1. A Joint Commission was taken out against two Joint Traders Bankrupts. The Commissioners assign the Real and Personal Estate of them, or either of them. Afterwards the separate Creditors take out separate Commissions against them, and the separate Commissioners assign the separate Estates and Estate to other Assignees. Upon Petition by the separate Assignees for Liberty to sue at Law for the separate Estate, Ld. C. King thought the first Assignment passed as well the separate as joint Estate, and that the second Assignees could do nothing at Law, and so denied the Petition, but would not hinder their joining in a Bill for an Account in Equity. 2 Wms's Rep. 500. Mich. 1728. Ex parte Cook.

2. A Petition came on before the Ld. Chancellor on the Behalf of D. There was a separate Commission taken out against one P. only; and a
Creditor and Bankrupt.

Petition by a Creditor on the Partnership Estate. The Order pronounced was, that the Partnership Estate should be divided amongst the Partnership Creditors in the first Place; and if there should be any Surplus of this Estate due to the Bankrupt, that the Surplus, together with his separate Estate, should be divided amongst his separate Creditors; that on the other Hand, the separate Estate should in the first Place be divided amongst the separate Creditors; and if there should be any Surplus from that, that the Surplus, together with the Partnership Estate, should be divided among the Partnership Creditors. Barnard. Rep. in B. R. 470. Arg. cites 23 December 1728, the Cafe of Mackenfon v. Parker.

3. If A. and B. Joint Traders, become Bankrupts, and there are joint and separate Commissions taken out against them, and A. and B. before the Bankruptcy, become jointly and severally bound to J. S. — J. S. may Chiefs under which Commission he will come, but shall not come under both. 3 Wms's Rep. 425. Hill. 1735. Ex Parte Rowlandfon.

4. But if two Joint Traders owe a Partnership Debt, and one of the Partners gives a Bond as a Collateral Security for Payment of this Debt; here the Joint Debts may be sued for by the Partnership Creditor, who may likewife sue the Bond given by one of the Traders. 3 Wms's Rep. 408. Hill. 1735. Ex Parte Rowlandfon.

(N) Commissioners. Who may be. And how to qualify themselves.

1. Johnson was both Clerk and Commissioner to a Commission of Bankruptcy, by which Means he had Fees for both, and thereby four Commissioners were always present, including the Clerk, whereas three are sufficient. On Petition he was removed. Select Cafes in Canc. in Ld. King's Time 45. Trin. 11 Geo. Wood's Cafe.

2. 5 Geo. 2. cap. 30. S. 43. The Commissioners shall not be capable of acting until they respectively shall have taken an Oath to the Effect following, viz. I A. B. do swear, that I will faithfully, impartially, and honestly, according to the best of my Skill and Knowledge, execute the several Powers and Trusts reposed in me as a Commissioner in a Commission of Bankruptcy against and that without Favour or Affection, Prejudice or Malice. So help me God.

3. S. 44. Which Oath any two of the Commissioners are empowered to administer to each other, and they are required to keep a Memorial thereof, signed by them among the Proceedings on each Commission.

(O) Commissioners. Their Fees and Allowances.

1. 5 Geo. 2. There shall not be paid out of the Estate of the Bankrupt any Money for Expenditures in Eating and Drinking, or of the Commissioners or of any other Person, at the Times of their meeting of the Commissioners or Creditors; and if any Commissioner shall order such Expenditure to be made, or eat or drink at the Charge of the Creditors, out of the Estate of such Bankrupt, or receive above 20s. each Commissioner for
Creditor and Bankrupt.

Each Meeting, every such Commissioner shall be disabled to act in any Commission of Bankrupts.

2. § 46. All Bills of Fees or Disbursements demanded by any Solicitor employed under any Commission of Bankrupts shall be settled by one of the Masters in Chancery, and the Master who shall settle such Bill, shall have for his Care in setting the same, as also for his Certificate thereof, 20s.

3. On a Petition to the Ld. Chancellor in Feb. 1739, in the Case of Edward Holiday a Bankrupt, against several of the Commissioners for taking more than 20s. apiece at each Meeting, and likewise ordering great Sums of Money to be charged for their Eating and Drinking, his Lordship declared them incapable by Virtue of this Act to be any longer as Commissioners in the Execution of the said Commission, and that no further Proceedings ought to be had thereupon, and also that all further Proceedings on the present Commission be absolutely Stayed, and that the Petitioners be at Liberty to apply to his Lordship by Petition, to have the said Commission renewed, and directed to such new Commissioners to be named therein as he shall think fit, and for that Purpose did order, that the Solicitor for the Petitioners, and the Solicitor for the Assignees, do respectively leave with his Secretary to the Commissioners of Bankruptcy, the Names of five Persons whom they shall propose for his Lordship's Consideration, in order that proper Persons may be appointed Commissioners in such renewed Commission; and did also further order, that the present Assignees, under the said Commission, be removed from being Assignees of the said Bankrupt's Estate and Effects, and that the said Bankrupt's Creditors do proceed to a Choice of new Assignees in their room, and for that Purpose, after the said Commission shall be renewed, an Advertisement is to be published in the London Gazette, appointing a meeting of the Creditors of the said Bankrupt for choice of such new Assignees, and after such choice shall be made, his Lordship did order, that the surviving Commissioners in the present Commission, or any three of them, and the said Assignees so hereby removed, do join with the major Part of the Commissioners to be named in the renewed Commission, in making an assignment of the said Bankrupt's Estate and Effects, to the new Assignees to be chosen; and did further order, that forthwith after the Execution of such Assignment, the said old Assignees do respective deliver over to the new Assignees, all the Effects of the said Bankrupt, remaining in Specie in the Hands, Custody, or Power of them, or any of them upon Oath, and also all Books, Papers, and Writings in their respective Hands, Custody, or Power, relating to the said Bankrupt's Estate or Effects upon Oath, and that the said old Assignees do deliver Possession of the said Bankrupt's Real Estate to the new Assignees, and did further order, that the said old Assignees petitioned against (naming them) do, out of their own Pockets, pay to Mr. Skurry, Solicitor for the Petitioners in this Matter, the Costs of the Petitioners present Application, and the Costs of renewing the said Commission, to be Taxed by Mr. Burroughs, one of the Masters of this Court, in Case the Parties shall differ about the same.

X (P) Com-
(P) Commissioners and Assignees Power as to discovering.

1. 13 Eliz. cap. 7. S. 2. 

IVE'S Power to the Commissioners, or the most Part of them, to take by their Directions Order with the Body of the Bankrupt by Imprisonment.

2. S. 5. If after such Act committed, and Complaint thereof made to the Commissioners, or the Major Part of them, by any Party griev'd, suspecting any of the Goods or Debts of such Offender to be in the Possession of any Person, or any Persons so to be inducted to such Offender, do make Relation thereof to the Commissioners, they shall have Power to call before them by such Proceeds, or Means, as they shall think convenient, all such Persons so supposed to have any such Goods or Debts in their Custody, or supposed to be indebted to such Offender, and upon their Appearance to examine them, as will by their Oathes, as by such Means as the Commissioners shall think meet, for the Knowledge of all such Goods and Debts.

3. S. 6. If such Persons upon Examination do not disclose the whole Truth of such Things as they shall be examined of, or deny to swear, then such Persons upon Proof made before the Commissioners by Examination, or otherwise, shall forfeit double the Value of all such Goods and Debts by them concealed; which Forfeiture shall be levied by the Commissioners of the Lands, Goods, and Chattels, of such Perfon so denying to swear, or not disclosing the whole Truth, in such Manner as is before appointed for the principal Offenders, the same Forfeitures to be distributed for Satisfaction of the Debts of the Creditors in such Rate as before declared.

4. S. 7. And every Person fraudulently claiming or detaining any Debt, Goods, or Chattels of the Bankrupts, which are not really due, or belonging to him, shall forfeit double the Value be shall so claim, or detain, to be levied and employed as aforesaid.

5. 1 Jac. cap. 15. S. 6. The Commissioners may call before them the Bankrupt; and if upon Warning left in Writing Three Times at the Dwelling-Place, where the Bankrupt, his Wife, or Family, for the most Part of his Abode, did remain, within One Year next before he became Bankrupt, the said Bankrupt shall not appear before the Commissioners, it shall be lawful for the Commissioners to appoint to proclaim the said Party a Bankrupt, at such Publick Places where the Commissioners shall think meet, warning him to appear before them upon the Commission, at some Time appointed; and if upon Five Proclamations, the Party offending appears not before the Commissioners, and yield his Body; the Commissioners may award a Warrant, to such Persons as they think meet, to apprehend the Body of the Offender, and to bring him before the Commissioners, wherever the Party may be found, in Place privileged or not, to be examined.

6. S. 7. It shall be lawful for the Commissioners to examine the said Offender upon Interrogatories touching the Lands, Goods, Debts, Books of Account and such other Things as may tend to disclose his Estate, or Secret Grants, and elusign of his Lands, Goods, Money and Debts, as they shall think meet.

7. S. 10. If any Persons known or suspected to detain any of the Lands, Hereditaments, Goods, or Debts of the Bankrupt, or to be indebted to, or for the Benefit of the Bankrupt, shall, after lawful Warning to the said Persons given to come before the Commissioners to be examined, refuse to come, or shall not come at the Time appointed, having no lawful Impediment,
Creditor and Bankrupt.

(juch as shall be allowed off by the Commissioners, and which shall be then made known to the Commissioners) or having Knowledge of any other Meeting of the Commissioners shall not appear before them at such Time as they may, or being come shall refuse to be sworn, and make Answer to such Interrogatories as shall be ministr'd; it shall be lawful for the Commissioners to commit such Person as to them shall be thought meet, all such Persons as shall refuse to be sworn and make Answer, and also to direct their Warrants to such Persons as to them shall be thought meet, to apprehend such Person as shall refuse to appear, and to bring them before the Commissioners to be examined, and upon their Refusal to come, or to be examined, to commit the Party, so refusing, to such Prison as the Commissioners shall think meet, until the said Person shall submit himself to the Commissioners, and be by them examined according to the Statute 13 Eliz. and this present Act.

8. S. 11. Provided that such Witnesses as shall be sent for, shall have such Costs as the Commissioners shall think fit, to be rateably born by the Creditors. And if any Person, other than the Bankrupt, either by Slander or by his own Act, shall wilfully and corruptly commit wilful Perjury by his Deposition to be taken before the Commissioners; the Party so offending, and all Persons that shall maliciously and corruptly procure any such unlawful, wilful and corrupt Perjury, may therefore be indicted in any of the King's Courts of Record and shall suffer such Pains as are limited by the Statute concerning Perjury 5 Eliz. cap. 9.

9. E. was found to be a Bankrupt by 13 Eliz. cap. 7, and was committed to the Fleet, the Warrant to the Warden of the Fleet was, to retain and keep in Prison, to answer and to satisfy all such Matters as shall be objected against him. The Question was now, if the Commissioners may licenc't him to go at large to treat about his Debts. By the Court, if the Warrant had been, that the Party should have been in Execution, then he could not be enlarged; but the Court advised them to take Security, let he should withdraw himself; But if one had judgment against a Bankrupt, and, upon a Habeas Corpus brought, he is committed in Execution without a Capias Utlagat'] then the Commissioners cannot deal with him any more for to enlarge him. Noy 143. Mich. 4 Jac. C. B. Edwards's Cafe.

10. 21 Jac. 19. S. 6. The Commissioners shall have Power to examine the Wife of the Bankrupt upon Oath for the Discovery of his Estate, Goods, and Chattels, and such Wife refusing to appear, or to answer Interrogatories, shall incure the same Penalties as are provided against such Persons in the like Cases.

11. I. brings his Habeas Corpus; the Return was, That he was com-mitted by J. S. J. N. J. T. (to whom, and others, a Commission of Bankrupt was awarded) for refusing to answer a Quittance put to him, concerning the Bankrupt's Estate &c. and so commiss'd, fut in Custody by S. C. and Warrant to the Officer, Virtue Commissioners pr'd & hac eft Causa because it captions usu detentionis &c. Three Exceptions were taken to the Return. 1st. For that there did not appear a sufficient Authority; for those that the Commission is laid to be granted to them and others, and then they could not act without the rest; for the Return does not express any him were a Quorum &c. in the Commission. 2dly. Instead of Commilfions in Captain, Majority, &c. it ought to be Capus, for that is the usual Form; For this is, as for a Quo. if the Commitment were by the Officer that makes the Return. 3dly. ford and Hac eft Causa captions usu detentionis is uncertain; for it ought to be held be detentionis. And upon the first and last Exception, the Prisoner was discharged by the Court, but told him, that he must answer directly to such Questions as were put to him, in Order to the Discovery other Jufti- of the Bankrupt's Estate, or else he was liable to be committed. Vent. c. being 323. 324. Mich. 29 Car. 2. B. R. J's Cafe. did not refuse to swear, but had sworn, that he had none of the Bankrupt's Estate in his Hands, but would
would not answer whether any of the Bankrupt's Effects came to his Hands before the Commission fixed out &c. having received his own Debt before, nor per Car. is he compellable to answer upon 1 Jac. cap. 15. S. 70.

12. A Person once examined by Commissioners of Bankrupts, cannot be examined again without a new Commiission. 2 Show. 152. Patch. 2 Car. 2. B. R. The King v. Ballet.

13. The Defendant bought of P. Jewels, Plate &c. for valuable Consideration paid; P. became a Bankrupt, and a Commission was taken out against him, and the Commissioners examined B. the Defendant touching the Goods what they were, and the Value on them, but on Protest that he did not answer, the Commissioners committed him; but on an Habeas Corpus in B. R. he was delivered. The Answer before the Commissioners being as to the Time &c. to his Remembrance, and that he could not positively answer farther, and by Consent he was again to attend and be re-examined, which he did. And now the Plaintiff's Bill is to have the Defendant's Answer in Chancery, where he pleaded, that he had no Goods of P.'s, but such as he really paid for before the Commission issued against P. and that he had no Notice of any Act or Thing by P. whereby he was a Bankrupt, but truly paid for what he bought &c. It was objected, he ought to answer the Time of Bankruptcy, else the Statute against Bankrupts will be of little Effect. E contra, It is no Equity in such Case to make a Man pay twice. Lord Chancellor ruled the Plea good, saying it is an Infallible Rule, that a Purchaser for a valuable Consideration shall never, without Notice, discover any Thing to hurt himself. But as to the Point of Bankruptcy, whether that the Defendant being formerly examined by the Commissioners on Oath, should be examined, or put to answer to the Time Matter here, the Chancellor seemed to be of Opinion that he should; But the other Point being clear, there was no Debate on this Point. 2 Ch. Chanc. 72, 73. Mich. 33 Car. 2. Perrat v. Ballard.

14. Equity will not compel a Man to discover what Goods he really bought of a Bankrupt after the Bankruptcy, and before the Commission fixed out, where the Party has no Notice of the Bankruptcy. Vern. 27. pl. 23. Hill. 33 and 34. Car. 2. Abey & al v. Williams.

15. B. was committed by Commissioners of Bankruptcy, and the Conclusion of the Commitment was, until he confirm himself to our Authority, and be hence delivered by due Course of Law. By Cowper it was objected, that the Conclusion of the Commitment ought to have been, until he shall submit himself to be examined upon Interrogatories, according to the Intent and Meaning of the Act; for being a Special Authority to commit, the Words must be pursued. Here the Commissioners required B. to tell all that he knew touching the Estate of the Bankrupt and (that being too general) when and in what Manner did you aid and assist in embezazzling the Estate of the Bankrupt (not whether he did aid or assist) and for not answering, they committed him. Holt C. J. said, The General Questions may be well, if he cannot recollect any Thing, it is a fair Answer; Now, if any of the Questions were fair, there was just Cause to commit for not answering them. He is not to answer any thing criminal; it is criminal to embezzle any Goods after the Bankruptcy, but not before. But held, if a Man has intermeddled honestly and fairly without Craft, he may and ought to discover it to avoid the Penalty; it may be the Word Embezzlement may be too hard, but there is Latitude enough for other Questions tantamount? But here the Prisoner must be discharged; for the Conclusion of the Commitment is ill. Here the Conclusion should have been, till he shall submit, and be (or to be) examined touching the Premisses, or (as Mr. Cowper said) upon Interrogatories. Note, Something was laid at the Bar of an Action of falle
Creditor and Bankrupt.

81

false Imprisonment. Per Holt Ch. J. There is no Colour for an Action of false Imprisonment, where an Officer commits such a Mistake or Slip. Comb 392, 391. Mich. 8 W. 3. B. R. Bracy's Cafe.

16. The Defendant was committed by the Commissioners of Bankrupts for not answering and making aDiscovery of his Estate; and being in Court upon an Habeas Corpus, he produced Affidavits that he had made a Discovery, and moved to be discharged, but it was denied; for if the Commitment was illegal, he might have an Action of false Imprisonment, and per Curiam, the Statute impowers the Commissioners to examine the Party upon Interrogatories, which they must prepare and tender to him ready drawn; and this not being returned on the Habeas Corpus, the Warrant for Commitment was held void. 5 Mod. 368. Mich. 9 W. 3. B. R. Gregory's Cafe.

17. H. was brought into B. R. upon a Habeas Corpus; and the Return was, that she was committed by Commissioners of Bankrupts, for refusing to be examined by them; and the Conclusion of the Warrant of Commitment was, that she should remain in Custody, until she should be otherwise discharged by due Course of Law; and by Reason of this Conclusion, the Court held the Commitment to be ill, and discharged the Defendant; because the Power given by the Statute 1 Jac. 1. cap. 15. is to commit the Party, until he submit himself to the Commissioners, and shall be by them examined. And there is no Mention made of being discharged by due Course of Law. And for this Exception Bracy committed for such Account was discharged. 2 Ld. Raym. Rep. 851. Hill. 1 Anne, Hollinghead's Cafe.

18. Though the Affignees under the Statute of Bankruptcy were disabled from recovering the Effects belonging to the Bankrupt's Estate by a Fraud in the Defendant's viz. their having altered the Bills of Lading and Invoices, and even the Ship's Name, that the Affignees might not know or discover the Goods, that were affigned to B. the Bankrupt; yet there the Ld. Keeper refused to direct an Issue, saying, it was a Matter triable at Law, and refused to direct that the Statute of Limitations should not be given in Evidence. 2 Vern. 504. pl. 452. Trin. 1705. cites the Cafe of Peeres v. Bellamy.

19. § Geo. 2. cap. 30. § 4. Every Bankrupt, after Affignees shall be appointed, is to deliver upon Oath, or Affirmation, before one of the Masters of Chancery, or Justice of Peace, unto such Affignees, all his Books of Accounts and Writings not seized by theMessenger of the Commission, nor before delivered up to the Commissioners, and then in his Power, and discover such as are in the Power of any other Person that any Ways concern his Estate; and every such Bankrupt, not in Prison, shall after such Surrender, be at Liberty, and is required to attend such Affignees upon Notice in Writing, in order to assist in making out the Accounts of the Estate.

20. § 5. Every Bankrupt having surrendered shall at all Seasonable Times, before the Expiration of Forty-Two Days or such further Time as shall be allowed to finish his Examination, be at Liberty to inspect his Books and Writings, in the Presence of some Person to be appointed by the Affignees, and to bring with him for his Assistance, such Persons as he shall think fit, not exceeding Two at One Time, and to make Extracts and Copies to enable him to make a full Discovery of his Effects, and the said Bankrupt shall be free from Arrests in coming to surrender, and from Actual Surrender for the said Forty-Two Days, or such further Time as shall be allowed for finishing his Examination, provided such Bankrupt was not in Custody, was not in Custody at the Time of Surrender; and in Case such Bankrupt shall be arrested for Debt, or on any Ejectment Warrant, coming to surrender, or after his Surrender, within the Time before mentioned, then on producing such Summons or Notice under the Hands of the Commissioners, or Affignees, and giving the Officer a Copy thereof, he shall be dis-charged.
Creditor and Bankrupt.

charged, and in Case any Officer shall detaint any such Bankrupt, such Officer shall forfeit to such Bankrupt, for his own Use, 5 l. for every Day be shall

detain him.

21. S. 6. In Case any Bankrupt be in Custody at the Time of issuing of the Commission, and is willing to submit to be examined, and can be brought before the Commissioners and Creditors, the Expenoe thereof shall be paid out of the Bankrupt's Estate; but in Case such Bankrupt is in Execution, or cannot be brought before the Commissioners, then the Commissioners shall attend the Bankrupt in Custody, and take his Discovery; and the Affiges shall be required to appoint Persons to attend such Bankrupt in Prison, and to produce his Books and Writings, in order to prepare his Discovery; a Copy whereof the Affiges shall apply for, and the Bankrupt shall deliver to their Order ten Days before such last Examination.

22. S. 12. Upon Certificate under the Hands and Seals of the Commissioners that such Commission is issued, and such Person proved before them to become Bankrupt, it shall be lawful for any of the Justices of his Majesty's Courts of B. R. or C. B. or Barons of the Exchequer, and the Justices of the Peace within England, and Wales, and of Berwick upon Tweed, and they are required upon Application made, to grant their Warrants for apprehending such Perfon, and him to commit to the Common Gaol of the County where he shall be apprehended, there to remain, until be be removed by the Order of the Commissioners; and the Gaoler, to whose Custody such Perfon is committed, is required to give Notice to one of the Commissioners.

23. S. 16. It shall be lawful for the Commissioners to examine every Perfon, against whom any Commission shall be awarded, touching all Matters relating to the Trade and Effects of such Bankrupt, and also to examine every other Perfon duly summoned, or present, at any Meeting of the Commissioners, touching all Matters relating to the Perfon and Effects of such Bankrupt, and any Act of Bankruptcy committed by him; and also to reduce into Writing the Answers of such Bankrupt, or other Per-

son, which Examination the Party examined is required to subscribe; and in Case such Bankrupt, or other Person, shall refuse to answer, and shall not fully answer to the Satisfaction of the Commissioners, all lawful Questions put by the Commissioners, or shall refuse to subscribe his Examination (not having a reasonable Objection to the wording thereof, or otherwise to be allowed by the Commissioners) it shall be lawful for the Commissioners by Warrant to commit him to such Prison as the Commissioners shall think fit, there to remain without Bail, until such Perfon shall submit himself to the Commissioners, and full Answer make to the Satisfaction of the Commissioners to all such Questions as shall be put to him, and subscribe such Examination as aforesaid.

24. S. 17. In Case any Person shall be committed by the Commissioners for refusing to answer, or not fully answering any Question, the Commission-

ers shall in their Warrant of Commitment specify such Question.

25. S. 18. In Case any Person committed by the Commissioners Warrant shall bring a Habeas Corpus, in order to be discharged, and there shall appear any Insufficiency in the Form of the Warrant, it shall be lawful for the Court, or Judge, before whom such Party shall be brought by Habeas Corpus, by Rule, or Warrant, to commit such Person to the same Prison, there to remain, until he shall conform as aforesaid, unless it shall be made appear, that he has fully answered all lawful Questions put by the Commissioners; or (in Case such Person was committed for not signing his Examination) unless it shall appear that the Party had good Reason for refusing to sign the same. And in Case any Gaoler, to whom such Person shall be committed, shall wilfully fuller such Perfon to escape, or to go without the Walls or Doors of the Prison, such Gaoler shall for such Offence, being concurred by Indictment, or Information, forfeit 50 l. for the Use of the Creditors.

(Q.) Power
(Q) Power of Commissioners in seising the Effects of the Bankrupt.

1. 21 Jac. 1. It shall be lawful for the Commissioners or any other Per- 
cap. 19. S. 8. sons, or Officers, by then to be appointed by their War-
rant, under their Hands and Seals, to break open the Houl'es, Chambers, 
Shops, Warehouses, Doors, Trunks or Chells of the Bankrupt, where 
the said Bankrupt, or any of his Goods or Estate shall be reputed to be, and 
to seize upon, and order the Body, Goods, Money, and other Estate of 
Bankrupt, as by the said former Laws are appointed, by Imprisonment 
or otherwise, as to the Commissioners shall be thought meet.

Bankrupt's Goods, unless it be the Bankrupt's Goods in the Houle of the Bankrupt. 2 Show. 247.

2. A Merchant seised of Lands, being indebted to several Persons, a Sid. 69.
committed an act of Bankruptcy, and was outlawed in 1645, and in 1648 
fold his Lands to the Lessee of the Plaintiff, and in 1649 was outlawed 
again; in 1653 a Commission of Bankruptcy was taken out against him, 
and in 1657 he was declared a Bankrupt; and the Commissioners sold the 
Opinion of Lands to the Defendant, who entered and got Possession; The principal the Court. 
Question was, Whether the Commission taken out in 1653, whereupon — Iïbid. 
he was found a Bankrupt, should relate to the first acts of Bankruptcy 
in the Year 1643, so as to avoid the Sale made by the Bankrupt in the 
Year 1648? It was resolved per rot. Cur. that the Sale should not be 
Glyn Ch. J. 
defeated by an act of Bankruptcy done before, if it was not done with- 
in five Years before the suing out of the Commission. Lev. 13, Hill, 

Bankrupt, and he thought that a new Act of Bankruptcy did not make him a new Bankrupt, and or- 
dered it to be argued again. —Iïbid. 176. S. C. argued again, and Newdigate Ch. J. said, that 
they were divided in Ch. J. Glyn's Time, and that perhaps they would not now adjourn it into the Ex- 
chequer Chamber, and therefore perwaded the Creditors to agree, and so they referred it to cer- 
tain Persons to end it that Vacation; and if not then ended, they ordered that it should be argued a- 
gain the first Saturday of the next Term. — Keb. 11. pl. 24. Patch. 13 Car. 5. S. C. argued by 
Newdigate as Council for the Defendants. But per Cur the Provisto is express, that the Commilion 
must be fixed within 5 Years after some time when he became a Bankrupt, and his being so after the 
Sale will not hinder, that if the Commission be not fixed out within 5 Years of his becoming a Bank- 
rupt, and then they only can defeat all Sales made within the 5 Years, but not afterwards.

Warrants to commit the Bankrupt to Goal, and the Goaler is to give Notice 
of such Person being in Custody, and the Commissioners are empowered to seize 
the Effects of such Bankrupt (the necessary wearing Apparel of such Bank-
rupt, or of his Wife or Children excepted,) and his Books or Writings, which 
shall be then in the Custody of such Bankrupt, or of any other Person in 
Prison.

(R) Allignees
(R) Affidavits bound. By what Acts or Agreements of Bankrupt.

Such Contract, after an Act of Bankruptcy, is not merely void, but is good between the Parties. 5 Salk. 59. pl. 2. Hill. 11 W. 5. B. R. Hulsey v. Fidel.


2. A. was indebted to B. a Bankrupt, and A. and B. became bound for this Money to M. L. in Trust for the Bankrupt, a Commission issued, and this Debt was assigned to a Creditor; M. L. died, and his Executors released his Debt. The Creditor brought Debt, and adjudged that it lies; because the Interest of this Debt was transferred to the Creditor, by the Statute 21 Jac. cap. 19, the Bond being made to the Uie of the Bankrupt, and therefore the Release afterwards was no Bar; and so the Bankrupt's being bound was not Material, the Bond being in Trust for him. Palm. 505. Hill. 3 Car. B. R. Gerrard v. Ayler.

3. C. possessed of a Lease for Years, contracted with the Committee of the Company for a new Lease, and paid part of the Fine, and by C's Consent a new Lease was made to M. by the Company, and to him executed, C. was at the Time of the Treaty, a Bankrupt. The Question was, whether the Commissioners could assign the Lease to the prejudice of M. and Drake's Café was cited. The Lord Keeper ordered, that the Plea and Demurrer be ousted, and the Benefit thereof saved till the Hearing; he doubted of the Lease; there were other Matters for the Benefit of M. also in the Plea. 2 Chan. Cafes 196. Pach. 26 Car. 2. Street v. Mercer's Company, and Moffe.


5. Two Joint Traders, one of them became a Bankrupt; Per Holt. Ch. J. the Commissioners cannot meddle with the Interest of the other, for it is not affected by the Bankruptcy of his Companion. 3 Salk. 61. Pach. 7 W. 3. Anon.

6. A. becomes Bankrupt, and then sells Goods to B. B. sells them to C. which is a Conversion; then a Commission of Bankruptcy is sued, and an Assignment made by the Commissioners to E. who brings Trover against C. Per Holt; the Action well lies; but that Point was also referred for his Consideration. Ld. Raym. Rep. 741, at Lent Affairs at Deptford, 16 Mar. 12 W. 3. Kirke v. Smith, & al.

7. D. the Receiver of the New River Rent assigned to the Plaintiff by a Bond, wherein the Defendant S. and G. were bound to him in 700l. for Payment of 350l. and this Assignment was to indemnify him against two Debts, for which P. stood bound as Surety for D. and in Satisfaction of 30l. he owed the Plaintiff; D. became a Bankrupt, so P. could not sue in the Name of D. at Law, and brought his Bill to have the Money decreed to him in Equity. Defendant S. insisted, that D. is indebted to him for four New River Shares, and insisted to retain it out of the Bond; and the Affidavits insisted to have the Bond, they being just Creditors as well as the Plaintiff, and had the Law as well as Equity, on their Side.
Creditor and Bankrupt.

Side. Per Ld. Keeper, the Assignees can have no better Right than the Bankrupt himself; and as the Bankrupt is bound by the Allignment, the Assignees under the Statute must be bound likewise, and stand in his Place; but they inquiring D. was a Bankrupt before he assigned the Bond, he directed that it be tried to Law; but said, he was in doubt whether S. might not retain for his Debt, and that Stoppage seemed to be a good Equity in such Case. 2 Vern. 482, 492. pl. 390. Hill. 1761. Peters & al* v. Soame, & al.

8. C. about two Months before Bankruptcy, having trust Money, 2 Wms. Tallies &c. in her Hands belonging to her Children, makes a Deed, de claring the Trust of what belonged to her Children respectively &c. The Creditors would have set this aside. Ld. Chancellor said, it is a fair Small v. and honest Proceeding, there can be no Bankrupt in Equity, but at Odley, the Law only. 10 Mod. 489. 498. Patch. 8 Geo. Canc. Cock's Canc.

9. Appeal was from a Decree of Dismission at the Rolls upon this Case. The Defendant Warner made a Leafe of an Inn to A. for Years, with a Provifo in the Leafe, that the Leefe, his Executors or Administrators, should not assign the Term to any Person or Persons, without the Consent of the Leffer, under his Hand in Writing, first had and obtained with a Power of re-entry in such Case to the Leffer, and that the Leafe should be void. Leffe dies, and his Executor enters and enjoys the Premisses, and afterwards becomes a Bankrupt. The Commissioners assign this Leafe inter alia to the Assignees chosen by the Creditors, and afterwards in Consideration of 50l. they assign to the Plaintiff Goring, who brought this Bill to be reliev'd against this Provifo, and to stay Proceedings in an Ejectment brought by the Leffer against him upon this Provifo &c. The Defendant Warner by his Answer inuits upon the Forfeiture at Law, and that the Provifo was reasonable and ought not to be set aside in Equity. Per Macclesfield C. I don't think this is a breach of the Provifo or Condition at Law, but whether it be fo or not, I think this is a proper Case for Relief in a Court of Equity. I think the Allignment by the Commissioners is clearly no breach of the Provifo, for that is done by Authority of a Statute, which will supercede any private Agreement between the Parties, inconsistent with it, and I am inclin'd to think the Allignment over by the Assignees is not a breach of Condition; For the first Allignment by the Commissioners, is not a perfect and compleat Allignment within the Meaning of the Statute, and pulls only the legal Interest subject to a Trust to be sold and disposed of for the Benefit of the rest of the Creditors, and the Disposition is not compleat, till sold by them for the Benefit of the Creditors. The first Allignment is only formal, and in case of the Commissioners, and in order only to make a Sale thereof for the Benefit of the Creditors, and their Assignees stand in the Place of the Bankrupt, and is in effect his Alligne, and it is unjust and unreasonable that such a Provifo should frustrate and overthrow the Intent of a Statute, made in favour of honest Creditors, and deprive them of the Advantage they may make of a beneficial Leafe. And though it was inquired, that the Commissioners nor their Assignees can be in no better a Condition than the Bankrupt himself, and consequently cannot allign over without Licence, I think tho' that Rule holds true generally, yet there may be some Exceptions to it, and that the present Case is an Exception out of that Rule, and decreed the Plaintiff to hold and enjoy, and an Injunction, to stay Proceedings at Law. MS. Rep. Mich. 11 Geo. in Canc. Goring v. Warner.

10. The Law is very clear, that the Assignees are exactly in the same Place as the Bankrupt, and stand in his Place to every Particular,
and any Agreement entered into shall bind them; and though there may not
be the same Remedy against them, that is not from the Nature, but
the Necessity, of the Thing; for he shall have an adequate and com-
plete Satisfaction, as far as his Fortune in the Hands of the Assignees will
2 Geo. 2. in Case of— v. Du Rhone.
11. A Bankrupt, whose Estate is in Mortgage, conveys the Equity of
Redemption to a third Person after an Act of Bankruptcy, but before the
Commission and Allignment, this shall not defeat the Assignees. But
where a bona Fide Purchaser for a valuable Consideration, and without
notice, has a Contest with the Assignees, this Court will not take any
Advantage from him, therefore not compel a Discovery. A Commission
issued is Notice of the Bankruptcy. Cases in Equ. in Ld. Talbot's

(S) Commissioners Power in selling, disposing, affuring, and allying Estates &c.

1. 13 Eliz. cap. 7. s. 7. T H E Lord Chancellor, upon Complaint in
Writing, against Persons being Bankrupt,
shall have Power, by Commission under the Great Seal, to appoint such Per-
sons as to him shall seem good; who, or the most Part of them, shall have
Power to take by their Discretion such Order, with all his Lands, as well
Copyhold as Freethold, which be shall have in his own Right before he
became Bankrupt, and also with all such Lands as such Person shall have
purchased for Money, or other Recompence, jointly with his Wife, or
Child, to the only Use of such Offender, or for such Use, or Title, as such
Offender then shall have in the same, which he may depart withal, or
with any Person of Trust, to any secret Use of such Offender, and
also with his Money, Goods, Merchandizes and Debts; and cause the
said Lands &c. to be appraised to the best Value, and by Deed indented,
inrolled to make Sale of the said Lands &c. and of all Deeds touching
only the same, belonging to such Offender, and also of all Fees, Offices,
Goods, and Chattels; or otherwise to order the same for Satisfaction of
the Creditors; to every of the Creditors a Portion, rate like, according to their
Debts; and every Direction, and other thing done by the Persons so au-
thorized, shall be good in Law against the said Offender, his Wife, Heirs,
Children, and such Persons, as by joint Purchase with the Offenders shall
have any Estate or Interest in the Premises, and against all other Persons
claiming by, from, or under such Offender, by any Acts done after such
Person shall become Bankrupt, and also against the Lords of the Manors, where-
of the said Copyhold Lands be held.

2. S. 3. Provided that every Person, to whom any such Sale of Copyhold
Lands shall be made, shall before they take any Profit of the same, agree
with the Lords of the Manors for Inch Fines as have been accustomed to
be paid; and upon such Agreement, the Lords at the next Court, shall not
only grant unto the Vendors, upon Request, the same Customary Lands, by
Copy of Court-Roll for such Estate as to them shall be sold, referring the an-
cient Rents, Customs, and Services, but also admit them Tenants, and re-
their Fealty.

3. S. 11. If any Person declared a Bankrupt by Virtue of this Act, shall
at any Time after purchase Lands or Chattles, or any Lands or Chattles
shall descend or come to such Bankrupts before their Debts shall be fully sa-
ished
Creditor and Bankrupt.

It is agreed that the said Lands and Chattels shall by the Commissioners be bargained, sold, extended, delivered and used for Payment of the said Creditor, in like Manner as other the Lands and Chattels of the said Bankrupts.

4. S. 12. This shall not extend to any Lands which shall be alienated by any Bankrupt before he became Bankrupt, so that such Alienation be made bona fide, and not the Use of the Bankrupt himself only, or of his Heirs, and that the Parties to whose Use such Alienation shall be made, be not privy to the fraudulent Purpose of such Bankrupt to deceive his Creditors.

5. A Debtor became a Bankrupt, and after a Commission awarded he sold Part of his Goods to one of his Creditors in Satisfaction of Part of his Debts, pl. 505.

and afterwards the Commissioners by Indenture sold those Goods jointly to the Plaintiffs, who were the other Creditors. It was resolved that the Sale by the said Commissioners was good, for the Intent of the Statutes is to be S.C. to relieve the Creditors equally in Distriution of the Bankrupt’s Estate, adjudged, and that he himself cannot dispoze of his Goods after the Commission awarded; and if a Debtor refuses to come into the Commission, and the Goods are sold to others, it is likewise good. 2 Rep. 23. Trin. 41 Eliz. B. R. Cafe of Bankrupts.

6. 21 Jac. 1. cap. 19. S. 10. If any Lands, Goods, or other Estate, of any Bankrupt, shall be extended, after such Time as he is become Bankrupt, under Colour of being an Accountant, or indebted unto the King; it shall be lawful for the Commissioners to examine upon Oaths, whether the said Debt were due to such Debtor or Accountant, upon any Bargain or Contract originally made, betwixt such Accountant and the said Bankrupt; and if such Bargain or Contract was originally made with any other Persons than the said Debtor or Accountant, or for the Use and Trust of any other Person, it shall be lawful for the Commissioners to dispose of all such Lands, Goods and Debts so extended, for the Use of the Creditors.

7. A Indebted to B. prevailed on C. to be bound with him, and for 2 Vern. R. his Indemnification; A. assigned several Debts and covenanted not to reallie the same to any Part thereof; A. became Bankrupt; decreed the S. P. Letter of Attorney, by which the Debts were so assigned, should be confirmed to C. against A. and all claiming under him. N. Ch. R. 22. 9 Car. 1. Meech v. Bradshaw.

8. It has been ruled in Canc. that they may affign an Equity or Redemption of a Mortgage, but Quare; for it seems to be against the Statute, which enables them to the Benefit of a Condition that is per hazard formed and not forfeited. Chan. Cafes 71. Hill 17 & 18 Car. 2. cited in pl. 59. Newdigate Serj. in Cafe of Drake v. Mayor of Exon. and says, that it was for some time doubted. — Held per Hutchins Commissioner, that the Commissioners should have the Equity of Redemption. 2 Vern 101. Trin. 1690. in Cafe of Hitchcock v. Sedgwick. — 2 Vern. 286. pl. 274. Hill. 1692. S. P. seems admitted.

9. A Leffor and Leesee for Years, the Leffor covenants with the Leesee Nol. Chan: and his Affigs to renew, then the Leesee becomes Bankrupt, and Commissioners of Bankrupts allign this Covenant. The Affignee brought this In dem Ver. Bill to have the Defendant, the Leffor, renew to him. The Cafe was referred to Wyndham J. and Baron Turner, and they certified the S. C cited Plaintiff ought not to be relieved; and fo be wasssembled. Chan. Cafe 71. Hill 17 & 18 Car. 2. in Canc. Drake v. the Mayor of Exon. in pl. 59. — S. C. cited per Cur. 2 Vern. 194. in pl. 176. as adjudged.

10. The Commissioners of Bankrupts have only a Power to sell, and no Vent 360. Estate, and to pass the Estate there mult not only be a Deed indented, but S. C. & S. F., the same must be involed also, and in this Cafe there is no Relation; for no Time is mentioned within which it is to be done, fo that it might extend
extend to Seven or Twenty Years, which would be dangerous. 2 Jo. 197. Palsch 34 Car. 2, B. R. in Case of Perry v. Bowers.

11. Sale of Goods by a Bankrupt, after an Act of Bankruptcy, is not merely void; the Contract is good between the Parties, but it may be avoided, or not avoided, by the Commissioners or Assignees at Pleasure; therefore they may either bring a Suit for the Goods as fappoing the Contract to be void, or may bring Debt or Allumpst for the Value, which affirms the Contract. 3 Salk. 39, pl. 2. Hill 11 W. 3, B. R. Hulvey v. Fidel.

12. When the Commissioners have assigned the Bankrupt's Estate and given the Bankrupt his Certificate and Discharge, they have executed their Power, and the Debts, which the Bankrupt owed to the Creditors before the Bankruptcy, are now extint by Act of Parliament, and a Legacy given to the Feme on a Contingency and which happened after the Bankruptcy, but was not aligned over before the Certificate and Discharge, is as a new acquired Estate by the Husband in Right of his Wife. Wms's Rep. 385, 386. per Ld. C. Parker. Mich. 1718. Jacobson v. Williams.

(T) Liable. What.

1. 13 Eliz, cap. 7. If any Person, declared a Bankrupt by Virtue of this Act, shall at any Time after purchase Lands or Chattles; or any Lands or Chattles shall descend or come to such Bankrupts, before their Debts shall be fully satisfied or agreed for, the said Lands and Chattles shall, by the Commissioners, be bargained, sold, extended, delivered and used for Payment of the said Creditors, in like Manner as other the Lands and Chattles of the said Bankrupts.

2. By the Statute 13 Eliz, cap. 7, it is expressly provided, that the Copyhold Land, as well as the Freehold Land, of a Bankrupt, shall be held for the satisifying of the Creditor. Co. Comp. Cop. 61. S. 52. The Statutes of Bankrupts, because the Stat. 13 Eliz. expressly mentions them, and though the other Statutes do not, yet they being made for further Remedy in the Matter aforefaid, are not to be expounded by the former, especially since that has taken Care that no Prejudice shall happen to the Lord.

3. 1 Jac. 1, cap. 15. S. 12. All Money which shall be forfeited by this Act, shall be recovered by the Creditors only, or any of them that will sue for the same by Action of Debt &c. in any of the King's Courts of Record; and the Money so recovered, the Charges of Suit being deducted, shall be distributed towards Payment of the Creditors.

4. If an Obligation be taken in the Name of another to the Use of a Bankrupt, the Commissioners may well affign that, unleas the other Party hath of his own Money paid and satisfied Debts due by the Bankrupt. In Consideration of that also, Creditors within 13 Eliz. are intended, for Merchantizes &c. and not Creditors upon Counter Bonds. And the Commissioners shall judge of that; for if they make an Affignment to such Creditors, such Allegations afterwards come Tarde; for the Statuure veits the Thing assigned in the Party to whom &c. Per Cur. Noy 142. Calchman's Case.

5. 21 Jac.
Creditor and Bankrupt. 89

§ 21 Jac. cap. 19, S. 11. Enacts that, if at any Time hereafter any A delivered
Perfon or Persons shall become Bankrupt, and at such Time as they shall so
become Bankrupt, shall, by the Consent of the true Owner or Proprietary
have in their Possession, Order and Disposition, any Goods or Chattels
whereof they shall be reputed Owners, and take upon themselves the Sale, repri-
se, upon Alteration and Disposition as Owners, in every such Cafe, such Goods shall
be liable to the Bankrupt's Debts, as if they had been the proper Goods of
the Bankrupt.

It was argued, that if a Factor becomes a Bankrupt, the Goods bought by him as Factor shall not be
subject to his Debts. Lt. Chancellor asked if there is any Cafe of that kind, and said, that if a Factor con-
tinues a long Possession, by which they are taken as his own, and Credit given to him on that Account, it
would alter the Cafe; for if Possession and Disposition be given to a Person that becomes a Bankrupt,
though no Intent of Fraud appear, yet if it gives a false Credit, there is the same Inconvenience as
if Fraud was intended; for if the Bankrupt appear the visible Owner so as to gain a false Credit,
there is the same Inconvenience, and it matters not whether it was by Fraud, or only by Neglect,

6. S. 12. The Commissioners shall have Power by Deed indubed and
enrolled within six Months after the making, in some of his Majesty's Courts
of Record at Westminster, to bargain, sell and convey any Manors, or
Hereditaments, wherein any Bankrupt shall be seised of any Estate in
Tail, in Possession, Reversion or Remainder, and whereof no Reversion or
Remainder shall be in the King of the Gift or Provision of his Majesty,
his Progenitors, or Successors, for the Benefit of the Creditors, and
all such Bargains, Sales and Conveyances shall be good against all Persons
whom the Bankrupt by common Recovery, or other Means, might debar from
any Remainder, Reversion, Rent Title, or Possibility, of the said Manors or
Hereditaments.

7. Two Merchants became bound in a Statute 21 Jac. 1 for a true Jo 204. pl.
Debt, which being forfeited, the Cognizee sued for forth an Extent 30 Octo-
ber 3 Car. and extended the Goods 31 October following, and the 3 No-
ember the Coginors became Bankrupts, and upon the 6 November the De-
fendats brought a Liberare upon the Extent, and the Goods were delivered
to him according to the Appraifement; 8 November a Commission of Bank-
ruptcy was awarded against the Cognizors, and the 23 November the Com-
missions sold the Goods to the Plaintiff, who brought Trover against the
Cognizee, and the Question was, if this Sale was good? It was par.
Cur. resolved, that as the Goods were extended before the Cognizors be-
came Bankrupt, though delivered by the Liberare afterwards, they could
not be sold by the Commissioners, because after the Extent they were
in Custodia Legis, so as the Cognizors had no Power to give, sell, or
dispose of them; besides, the Extent was returned before they became
Bankrupts, and the Goods were delivered to the Cognizee are the Libe-
rate, before the Commission fixed out, and when the Liberare is brought,
it shall have Relation to the Extent, and they be null but one Extent.

A a 8 Upon
Creditor and Bankrupt.

8. Upon a Fieri Facias Money was levied by the Sheriff on an Execution for Damages and Coits in an Action on the Cafe for Words, and before the Return of the Writ, the Plaintiff, at whose Suit the Execution was taken out, became a Bankrupt, and his Creditors having filed out a Commission of Bankruptcy, the Commissioners assigned this Money in the Sheriff's Hand to them; adjudged, that the Affignement was void, because it was made after the Execution executed, and that was before the Party became a Bankrupt, and it can't be said to be the Bankrupt's Money, till it is paid to him, so that the Money was in Cuffodia Legis, and no Body could give a Legal Discharge for it, but he who was a Party to the Record. Cro. C. 166, 176. pl. 24. Mich. 5 Car. B. R. Benson v. Flower.

9. If a Gentleman buys and sells Land, he is not within the Statute; for it ought to be taken of those who buy and sell Personal Things; Per Crooke J. Mar. 35, 36. pl. 67. Trin. 15 Car.

10. A Bailiff took Goods in Execution by Virtue of a Fi. Fa. which bore Tefe 4 Junii, but not taken out before 11 Junii following, and between those two Days (viz.) 6 Junii, the Owner of the Goods became a Bankrupt, and in an Action of Trover brought by the Assignee of the Commissioners of Bankruptcy against the Bailiff, in whose Possession the Goods were, it was the Opinion of the Court, that they were liable to the Judgment from the Time of the Tefe of the Fieri Facias, for that is properly the Emanatio Brevis, though in Fact it be at another Time. Sid. 271. Trin. 17 Car. 2. B. R. Baily v. Bunning.

11. On Motion for Money out of Court brought in by the Sheriff on a Vend. expanas Tefe before, but after Commission of Bankrupts taken out, the Court said, that unless the Goods were sold before the Party became a Bankrupt, though they were sold before the Tefe of the Commission, yet the Goods are bound by the Bankruptcy. 3. Keb. 480. Trin. 27. Car. 2. B. R. Bingley v. Warcop.

12. In a Special Verdict in Alliunct brought by an Assignee of the Commissioners of Bankrupts, the Cafe was, T. obtained a Judgment against W. for 400 l. and on the 19 June brought a Fi. Fa. which was delivered to the Sheriff 30 June in the Morning, and as Night W. left his House, and became a Bankrupt. On the 19 of October following, the Sheriff levied the Goods of W. to the Value of 400 l. and paid the same to T. and afterwards the Commissioners assigned this Money to the Plaintiff, who brought this Action against T. It was held by all the Justices, that the Assignment by the Commissioners was good; for the New Statute makes no Difference in this Cafe; because before that Statute was made, the Goods were bound from the Tefe of the Writ, but now they are bound from the Delivery of the to the Sheriff; that is, they are bound that the Bankrupt himself cannot dispose them, but the Commissioners may, by the express Words of the Statute 21 Jac. 1. c. 19. no Execution thereof having been forced and executed. But then all the Judges (except Levinz, who at last attended) held clearly, that the Commissioners could not assign the Money, for their Power is only over the Bankrupt's Goods, but the Money for which they were sold was never the Bank.
Creditor and Bankrupt. 91

Bankrupt's Money, and no Action would lie for it. 3 Lev. 69, 191.

Mich. 36 Car. 2. C. B. Phillips v. Thompson

13. When a Judgment is once executed, the Goods are in Custodia Legis, and shall not be taken away by an Exchequer Process, or Assignment of Commissioners of Bankrupts. 3 Mod. 236. Trin. 4 Jac. 2. in B. R. Letchmere v. Thorowgood, & al.

as for the Defendant. —— Show. 146. Letchmore v. Toplady, S. C. adjudged for the Defendant. —— 2 Vent. 169, 170. S. C. the Court was of the same Opinion, but upon Importunity Leave was given to speak further to the Cafe the next Term.

14. A puts out 1000 l. at Interest to the East India Company, and takes Bond for it in the Name of J. S. his Wife's Relation, and afterwards A. is Bankrupt; J. S. is summoned before the Commissioners, but before his Examination, tells the Company that the Money was not his, but that they should pay it to the Person as should bring the Bond. Accordingly A's Wife brought the Bond, and receiv'd the Money. The Court will not enforce J. S. to pay the Money. Ch. Prec. 18. pl. 17. Hill. 1690. Hill v. Moor.

15. Two Foreigners beyond Sea config Goods to B. then in good Circumstances in London, but before the Goods arrive B. becomes a Bankrupt; If they can by any Means prevent the coming of the Goods to B. or the Assignees, they may; and B. or the Assignees shall have no Relief in Equity. 2 Vern. 203. pl. 187. Hill. 1690. Wifeman v. Vandeputt.


17. The Father on his Son's Marriage settles Lands on himself for Life, Remainder to his Son for Life &c. and covenants during his own Life, to pay the Son 15 l. a Year. The Son becomes a Bankrupt; The Plaintiff as Assignee, brings a Bill against the Father, to have the Benefit of this Agreement, and to compel the Payment of the Annuity. But per Cur. an Assignment under a Statute is not intituled to have the Performance of an Agreement made with the Bankrupt. 2 Vern. 194, pl. 176. Mich. 1690. Moyies v. Little.

18. If a Bankrupt be outlawed after he has committed an act of Bankruptcy, and upon the Outlawry the K. leases the Profits of his Lands, and grants his Chattels, and after a Commiffion of Bankrupts is taken out, this will not defeat the Interfess which the Creditors have by the Bankruptcy in his Estate. 1 Salk. 108. pl. 2. Hill. 2 W. & M. in C. B. Pain & al v. Teap. & al.

19. An Award is made in an Adversary Suit between A. and B. Part-Ibid 220 at not known to be fa, a Commiffion is afterwards taken out; Assignee took, it was confirm'd by the Court. A. was then a Bankrupt but a Quere, if then a Bankrupt but a Quere, if there appearing no Fraud in obtaining the Award, but it being in an not known to be so, a Commiffion is afterwards taken out; Assignee on a Re-

20. A Man had devised Lands, which were in Mortgage, to be sold, and the Surplus of the Money to be paid to his Daughter; the Daughter married a Man, who soon after became a Bankrupt, and the Commissioners assigned this Interest of the Wife's; the Husband died, and the Assignees brought this Bill against the Wife and Trustees, to have the Land folded, and the Surplus of the Money paid to them; but the Court would not affift in stripping the Wife (who was wholly unprovided for) of this Interest,
Creditor and Bankrupt.


21. It was ruled by Holt Ch. J. upon Tuesday January 31. Hill. 10 W. 3. at Nili Prius at Guild Hall, upon Evidence in a Trial, 11.

That if the Goods of A. be seized upon a Fieri Patias on a Judgment against A. and after the Seizure A. becomes Bankrupt; this Act of Bankruptcy cannot affect the Goods leived in Execution as aforesaid. But if A. was a Bankrupt before the Seizure, and after the Bankruptcy, the Sheriff upon a Writ of Fieri Patias to him directed upon a Judgment obtained against A. seizes the Goods and sells them, and a Comitition of Bankruptcy is granted, and the said Goods assigned by the Commissioners, the Assignee of the Commissioners may maintain Trover against the Vendees of the Goods; but no Action will lie against the Sheriff, because he obey'd the Writ. Ld. Raym. Rep. 725. Cole v. Davis.

22. It was resolv'd in this Case, that if Goods of A. are seised upon a Fieri Patias, and sold to B. Bono Fide upon valuable Consideration; though B. swears A. to have the Goods in his Possession, upon Condition that A. shall pay to B. the Money, as he shall raise it by the Sale of the Goods, this will not make the Execution fraudulent. And in such Case a subsequent Act of Bankruptcy by A. will not defeat the Sale. But though the original Debt was just, yet, if the Execution was fraudulent, viz. upon any Draft, a subsequent Act of Bankruptcy will defeat it. Ruled by Holt Ch. J. Ld. Raym. Rep. 725. Cole v. Davies, & al. Assignees of Maul a Bankrupt.

A Legacy was given to A. before he became a Bankrupt, for which he had a Decree. Assignee shall have the Benefit of the Decree. 2 Vern. R. 452. Hill. 1701. Toulson v. Grout.

23. A Legacy was given to A. before he became a Bankrupt, for which he had a Decree. Assignee shall have the Benefit of the Decree. 2 Vern. R. 452. Hill. 1701. Toulson v. Grout.

24. In a special Verdict in Ejectment the Case was, the Custum of a Manor was, that a Copyholder might surrender for three Lives (successive), and that an Heriot was due on the Death of every Tenant. A Copyholder surrendered to W. R. for his own Life, and for the Lives of A. B. and C. D. and the Question was, Whether this was warranted by the Custom? and adjudged that it was, for there could be no Occupancy; but Powell Justice doubted, because of the Statute of Bankrupts; sed per Holt Ch. J. that Statute makes no Difference, for if the Copyholder becomes Bankrupt, and his Estate is assigned by the Commissioners, the Assignee would have it determinable upon the Life of the Copyholder Bankrupt, and that the Heriot would be then due, but not upon the Death of the Assignee, because it was so originally, and cannot be altered by the Act of the Copyholder himself. 3 Salk. 181. pl. 1. Hill. 1701, in Case of Smartle v. Penhallow.

6 Mod. 66. S. P. in S. C. by Holt Ch. J. that if the Assignee dies during the Life of the Copyholder Bankrupt, there will be a Case out of the Custum by the Transmission of the Grant by the Act of Partitia, and yet the Lord shall have his Heriot, for it never was the Intent of the Statute. to put the Assignee in a better Condition than the Principal, whose Estate he has, would have been in, nor to work an Alteration of Tenement to the Prejudice of the Lord; thus supposing the Copyholder surviving should not have it back again, and if he shall have it again upon the Death of the Assignee, during his Life, then the Lord by original Custum ought to have a Heriot, and a subsequent Act of Bankruptcy shall not defeat him of it; and if the Copyholder had died, living the Assignee, and thereby his Interest determined, as some thought it would, Quere, who shall pay the Heriot? but upon this Point they seemed cautious of delivering any Opinion, but reserved themselves till that Matter would come to be a Question; for they said it was worth Consideration.

25. If
25. If there be several Joint-Traders, Payment to one of them is Pay-See(Y)
ment to all. So if they all, except him to whom the Payment was made,
were Bankrupts, the Payment is only unavoidable as to his Proportion.
At Niti Prius coron Holt. 12 Mod. 447. Patch. 13 W. 3. Anon.
26. And if there be four Partners, whose three are Bankrupts, and See(Y)
their Shares aligned, and a Payment was made to him that was no
Bankrupt, it is a Payment to all the Affignees, for now they are all
Partners. Ibid.
27. Tho’ a Surrender of a Copyhold be void in Law for want of a 2 Verm. 364
Preferment, and that might be the Laches of the Mortgage in not pro-
ducing it, yet the Surrender was a Lien and bound the Land in Equity; cordingly,
and the Surrender, or if he become Bankrupt, the Affignee, who though
ought not to be in better Case than the Bankrupt; is plainly bound in Neglect was
Equity by this defective Conveyance. (Et come moy femble, says the
Reporter; He became a Trustee for the Purchafor.) 2 Salk. 449. pl. 2

in the first Hearing to dismiss the Bill. —— S. C. cited by Mr. Vernon. Wm’s Rep. 280. —— S. C.

28. Commissioners of Bankrupt of one S. assign a Bond of 80l. which
was made to one W. who was former Husband to the Wife of S. and to
whom he was Executrix, and held per Cur. that they could not assign
anything but what the Bankrupt had in his own Right. The Power
the Husband had of dissipating it, does not make it his till he has dis-
persed of it. Per Holt Ch. J. and Powell J. dedit juris. 17

29. A. was Affignee of a Commission of Bankruptcy issued out against
one Bovill, who had contracted with the Defendant for Goods to the Va-
lue of 244l. but not having ready Money to pay for them, offered to
Mortgage to him an Estate he had in Possession, as a Security for the
Money; and for that Purpose left with Defendant the Title Deeds to get
the Assignment drawn; Defendant carried the Deeds to an Attorney to add
that, draw the Assignment, who died without doing it; after that, he car-
ried them to a Scrivener, but before the Assignment was perfected, Bovill
became a Bankrupt. A. now brought his Bill to have the Deeds del-
ivered up for the selling of the Estate to satisfy the Creditors. De-
fendant’s Counsel urged, that this was more than a Pledge of the Deeds,
for that an Assignment was intended to be made; that if it had
been made, the Court would not have taken it from him without Pay-
ment of the Money; that it’s not being made, was owing to the Death
of the Attorney, which was an Accident, and this Court often relieves
Accidents; and therefore the Deeds ought not to be delivered up with-
out Payment of the Money. The Court decreed the Deeds to be
brought before the Master, and to be deliver’d by Schedule to the Plain-
tiff. But, note, no Reaso’ was given for this Decree. Ch. Proc. 375.

30. Feme before Marriage veils her Estate in Trustees for her separate
Maintenance; her Debts will not be discharged by the Bankruptcy, nor Ch. J. Par-
er Estate out of the Reach of the Creditors; But such Settlement or
Conveyance made to the Creditors shall be deemed void and fraudulent.
Wm’s Rep. 628. in Case of Parker Ch. J. in Delivering the Opinion of the Court. 10 Mod.

31. M. a Feme sole curred into a Bond, and married A. who after became
Bankrupt. It was resolved by the Court of B. R. that the Bank-
ruptcy of the Husband, the Bond-Debt of the Wife is discharged, and
Bb
also that Debts due to the Wife, though unrecovered, are within the Act of
4 Anne, cap. 17, to be assigned by the Commissioners of the Bank-

32. A Feme sole Legatee of 1000 l. payable after the Death of the Tilga-
tor's Wife, and at her Age of twenty Years, if she should live so long, at
about eighteen Years of Age married J. S. who after became a Bank-
rupt. Then the Widow died, and the Legatee became of twenty Years of Age. The Assignees of the Bankrupt's Estate brought a Bill, claiming the 1000 l. which was decreed by Baron Price in the Absence of Ld. C. Cowper. But upon an Appeal to Ld. Chancellor, his Lord-
ship declared, that the Assignees were in no better Condition than the Bankrupt himself, and that, had he fixed for the Legacy, the Court would oblige him to make a Provision for the Wife and Children, and that fo must the Assignees, if they come here for Equity. Wms's Rep. 382. Mich. 1717. Jacobson v. Williams.

33. But as to the Interest of the 1000 l. that having been commonly
allow'd to be received by the Bankrupt, fo ought the Assignees to re-
ceive the same during his Life. Ibid. 383.

34. And if the Bankrupt's Wife should die without Issue, then the
Bankrupt would have been allow'd to receive the whole Money, and
therefore in such Case the Assignees should be allowed to receive it also.
Ibid. 384.

35. Feme sole takes a Mortgage for 500 l. and marries B. a Tradesman,
who becomes Bankrupt. The Commissioners assign all his Estate Real
and Personal. B. dies. The Wife claim'd the Benefit of the Mort-
gage, and brought her Bill for that Purpose, and to have the Writings
from the Assignees. The Matter of the Rolls delivered his Opinion
folemly, first for the Wife, and afterwards for the Assignees; But
said, that if there had been any Articles before the Marriage, purporting
that this Money should continue in the Wife as her Provision, or should
be assigned in Trust for her, this would have been a specific Lie upon
the Mortgage, and have preferred it from the Bankruptcy. Wms's

36. And his Honour held, that if the Assignees had in this Case
brought their Bill against the Widow, Equity would hardly have lent
any Affidavit against her; because they claiming under the Husband,
could be in no better Plight than the Husband would have been, and
had he fixed for the Money, or prayed a Foreclosure, Equity would
(probably) not have compelled the Payment to him, without his
making some Provision for his Wife, or at least upon her Application
the Court might have prevented Payment to him, unless he make some

37. A living in a remote Part of England from B. and having Dealt-
ings with him, lends him a Quantity of Goods; B. apprehensive he should
soon be a Bankrupt, and not thinking it reasonable, that these Goods
should go to the Payment of other Creditors, delivers a Quantity of
Goods, which were mostly the very same that were sent him, to C. for the
Use of A. After that, but before A's Acceptance of them; B. breaks. The Que-
tion was, whether the Delivery of these Goods to C. for the Use of A.
did not vest the Property of them in A. fo absolutely, as to put them out of the Dilpofal of the Commissioners of Bankruptcy; and upon this appearing by Evidence, at the Trial, to be the Case, it was slated by the Direction of Parker Ch. J. who try'd the Cause, for the Opinion of the Court, who all delivered their Opinion Seriatim this Term, that the Property of the Goods was so vested in A. by the Delivery of the Goods to C. for his Use, that they were not subject to the Dilpofal of the Commissioners. 10 Mod. 432. Patch. 5 Geo. 1. B. R. Atkins v. Berwick.

38. A
Creditor and Bankrupt.

38. A Trader in London having Money of J. S. (who resided in Holland) in his Hands bought S. S. Stock as Factor for J. S. and took the Stock in his own Name, but entered it in his own Name, but enter'd it in his Account Book as bought for J. S. after which the Trader became Bankrupt. Determined by the Lord Parker, that the Trust Stock was not liable to the Bankruptcy, and said, it would lessen the Credit of the Nation to make such a Construction. 3 Wms's Rep. 187 in a Note of the Reporter cites Trin. 1721. Ex parte Chion.

39. Affignee is the same Condition (as to the Right) with the Bankrupt himself, and consequently if he was barred by the Statute of Limitations, so shall the Affignee. 8 Mod. 171. Trin. 9 Geo. Grey v. Ben-dith.

comes a Bankrupt, and the other receives 100 l. of a Joint Debt. Affignee brought a Suit for the whole Money received ; but relieved he could only maintain Action for a Moiety, for he can only have such Action as the Bankrupt could. 2 Show. 105. Patch. 52 Car. 2. B. R. Ruthward v. Hodton.

40. In an Action of Trover for certain S. S. Bonds, this Question fell out upon the Trial, Whether if a Bankrupt's Wife employs another to buy Bonds with the Bankrupt's Money, and he accordingly does so, and delivers them to the Wife, the Affignees under the Commissary may come upon the Buyer. Upon which Question, the Ld. Ch. J. whom the Caufe was tried before, ordered the Poitca to be stayed. And now the Court seem'd to be of Opinion, that the Commissaries could not come upon the Buyer; for they said, if they could, it would be of dangerous Consequence; because he only acts as an Agent or Servant to the other. However it stood over. Barnard. Rep. 77. Trin. 2 Geo. 2. Willon v. Polton.

41. An Estate was devolved to be sold, and the Monies arising by S. C. cited such Sale to be divided among such of the Children of A. as should be living at A's Death. B. One of A's Children became Bankrupt, and the Commissary's assigned over his Estate; After which B. got his Certificate allowed, and then A died. Decreed that this Share of the Money which belonged on A's Death belonged to B. should be paid to the Commissaries; because not only the later Statutes, relating to Bankrupts, mention the Word (Possibility) but also because 13 Eliz. cap. 7. 8. 2. impowers the Commissaries to assign all which the Bankrupt might depart with; And here B. in the Life-time of A. might have released this contingent Interest. Besides the 21 Jac. 1. cap. 19. enacts that the Statutes relating to Bankrupts shall be construed in the most beneficial Manner for Creditors. Wms's Rep. 389. in a Note there, cites it as decreed at the Rolls. Mich. 1731. and affirmed by Ld. Ch. King Mich. 1732. Hidgen v. Williamson.

or may expect any Profit, Possibility of Profit, Benefit, or Advantage whatsoever.

42. 5. Geo. 2. cap. 30. S. 9. In Case any Commission of Bankruptcy shall arise against any Person, who after the 24th of June 1732 shall have been discharged by Virtue of the Act, or shall have compounded with his Creditors, or delivered to them his Effects and been released by them, or been discharged by any Act for Relief of Insolvent Debtors, then the Body only of such Person conforming shall be free from Arrest and Imprisonment; but the future Estate of such Person shall remain liable to his Creditors (the Tools of Trade, necessary Household Goods, and necessary Wearing Apparel of such Bankrupt and his Wife and Children excepted) unless the Estate of such Person shall produce clear 15 s. in the Pound.

43. J. S. by Will gives to his Daughter A. then Wife of One Beavis, his Gold-Watch, Jewels, China and Household Goods to be at her Disposal, and
and to do therewith as the Testator shall think fit. 

Creditor and Bankrupt.

This is a Devise to the separate Use of the Time and not assignable by the Commissioners of the Bankrupt &c.

A Case was cited as before Lt. Chancellor Cowper, viz. Devise to Feme Covert for her Use and Benefit, and held that because it was not for her separate Use, but only for her Use and Benefit, the Husbands's Goods were not liable to the Debts of such Bankrupt, and both of them, as Goods for his separate Use and Benefit, it was the Husbands's Goods, and the Matter of the Rolls said he was very much dissatisfied with that Determination, and here the Intent appears to give it to the separate Use of the Wife; and a Married Woman could not have &c. to her own Use, for for the separate Use of the Wife, and the Things were proper for her separate Use and devised for the Wife. MS. Rep. 1733 at the Rolls, Kirk v. Paulin.

44. If J. sells Goods to B. from beyond sea to the Use of B. and before these Goods are paid for, B. dies insolvent, I cannot have my Goods again; but if I sell Goods to a Father to dispose of to my Use, and be becomes a Bankrupt, these Goods are not liable to the Debt of such Bankrupt. 3 Wms's Rep. 185. Trin. 1733. Godfrey v. Furzo.

45. Stat. 19. Geo. 2. No Person who is or shall be bona fide a Creditor of any Bankrupt, for or in Respect of Goods really and bona fide sold to such Bankrupt, or for, or in Respect of any Bill, or Bills of Exchange really and bona fide drawn, negotiated, or accepted by such Bankrupt, in the usual and ordinary Course of Trade and dealing, shall be liable to refund or repay to the Assignees or Assignees of such Bankrupt's Estate, any Money which before the arising forth of such Commissio was really and bona fide, and in the usual and ordinary Course of Trade and Dealing, received by such Person of such Bankrupt, before such Time as the Person receiving the same shall know, understand, or have Notice, that he is become a Bankrupt, or that he is in insolvency Circumstances.

(U) Liable. What. Settlements or Securities on, or Claims by Wife or Children.


1. In Trespass, upon Not Guilty pleaded, it was found, that the Land was Copyhold of Inheritance, held of the Manor of C, and that there was a Custum in that Manor, that if a copyholder in Fee, died seised, living his Wife, she should have the Copyhold during her Life, and Twelve Years after; then they found the Statute 13 Eliz. and 1 Jac. 1. of Bankrupts, and that upon a Commissio of Bankruptcy, the Husband was adjudged a Bankrupt, and that he being seised in Fee of the said Copyhold, the Commissioners made a Bargain and Sale thereof to the Plaintiff for the Use of the Creditors &c. They find, that the Widow, at the Court held &c. was admitted Tenant feuemundum constructuendo Manerei before the Plaintiff was admitted; It was held by Berkley and Croke Justices, that the Bargain and Sale binds the Copyholder, and bars his Estate, and that he is no longer a Copyholder after the Bargain and Sale inrolled; and that when the Bargaine is admitted by the Lord, the Estate shall vest in the Bargaine, and the Admittance shall have Relation to the Bargain and Sale and devest the Estate, which the Feme claimed by the Custum; and Judgment accordingly. Cro. C. 568. Hill 13 Car. B. R. Parker v. Bleek.

2. A
2. A. purchased a Copyhold to him and his Son for their Lives, Re- 

mained to his Wife in Fee, and about Two Years after turned Impec- 

tant, and about Twelve Years afterwards became a Bankrupt, and his Copyhold 

was sold by the Commissioners to the Defendant; A. the Bankrupt died, 

[The Wife died.] B. his Son entered and made a Lease &c. to the 

Plaintiff, who brought Ejectment; it was resolved, that tho' a Copyhold 

Estate is liable to the Statutes, yet this Copyhold is not, because it 

was bought two Years before the Purchaser was an Impec- 

tant; so that foones 

for the Defendant [the Son] by all the Justices, but Berkley con- 

tra; For they held, that the Pur- 

chase being before A. the Father became a Trader, and so long before he 

became a Debtor is not 

within the Statute; For the Statute intends such Persons only as get their Living by 

buying and selling, and 

by Fraud had paffed away their Lands to Friends in Truft, and became indebted, 

and committed 

such Acts of a Bankrupt; that for such Acts done by them after, it should be within the Com- 

missioners Power to fell such their Lands. But here, many Years, before, when he was a clear Man, he 

procured this Land to be settled upon his Son. (No Fraud or Purpose of being a Bankrupt being 

found.) It would therefore be a malicious Cafe, and false to Inconveniences, if it should be within the 

Statute; For none might know with whom to deal by way of Marriage or otherwise, when he 

is not a Traderman, and settles Land upon his Wife and Children Bona fide, and without Cause of 

being suspected to be a Bankrupt, and afterwards becomes a Traderman, and then a Bankrupt, if this 

Act should overturn a Conveyance duly settled. 

Jo. 457. pl. 3. S. C. states it, that the Eject- 

ment was brought by the Son, and that judgment was given for all the Plaintiff, payer Barkley, 

who held for the Defendant in Omnibus. 

But it was resolve'd, that Copyhold Lands otherwise were within the Statutes, and might be sold, 


and says, that the Reason why Copyhold Lands were adjudg'd in that Cafe to be included in the ge- 

neral Words of all Lands, Tenements, and Hereditaments in the Statute 21 Jac. touching Bank- 

rupts was, because Copyholds are expressly mentioned in the Statute 15 Eliz. concerning Bankrupts, 

and the Statute 21 Jac being fubfient and explanatory, and a very beneficil Law, therefore Copyholds 

have been adjudg'd to be within those fubfient Laws; besides, the Lord of the Manor, in the 

Cafe of a Bankrupt Copyholder, can be at no Prejudice, because the Allegiance of the Commissioners is 

to be admitted, and to pay his Fine to him. 

3. A Tradesman in Confitution of Marriage made a Conveyance of his 

Lands to himself and his Wife, and afterwards became a Bankrupt; It was 

held per Cur. that the Wife was within the Statute 1 Jac. 1. and the pro- 

viding for his Wife and Children to be a providing for himself. 


4. It is a Common Cafe, that if a Man voluntarily pays Money to a 

Bankrupt after he becomes So, it is in his own Wrong and he may be 

forced to pay it again. But otherwise it is, if the Bankrupt recover it a- 


1682. in the Cafe of Noel v. Robion. 

5. Devise of 500 l. to be invested in Land for the Benefit of the Wife of 

J. S. for her Life, and afterwards to her Children, and the Interes 

of the Money to go in the mean Time to Perfon as would be intitled to receive the Profits. J. S. the Husband becomes Bankrupt; Per 

Cur. this not being a Truitt created by the Husband, nor any thing 

carved out of his Estate, but given by a Relation of the Wife's and 

intended for her Maintenance, it is not liable to the Creditors of the 

Husband, and decreed the Interest to be paid to the Trustee to be laid out 

in Land and settled according to the Will. 2 Vern. 95. Patch. 1689. 

Vandenanker v. Deebrough. 

6. A. a Trader on Marriage gives Bond to a Trustee to leave his Wife 

worth 500 l. or a Third Part of his Personal Estate, at her Election. A. 

becomes Bankrupt; Decreed that the Wife come in as a Creditor on the 

amounted of 500 l. Bond, and what should be paid in Respect thereof to be put 

out at Interest and received by the Creditors during the Life of the Wms.'s 

Creditor and Bankrupt.

7. Laws devised to his Daughter being a Female Covert for her separate Use, without appointing any Trustees, and it being expressly declared to be exclusive of the Husband, shall not be subject to the Bankruptcy of the Husband, and decreed at the Rolls accordingly. 2 Wms's Rep. 316 to 319. Mich. 1725. Bennet v. Davis.

8. One not in Debt, nor then a Trader makes a voluntary Settlement on a Child, and afterwards becomes a Trader and a Bankrupt; this Settlement is not liable to the Bankruptcy. 3 Wms's Rep. 293. pl. 75. Trin. 1734. Lilly v. Osborn.

(W) How far any Mortgagees or Purchasers of Lands or Goods from a Bankrupt shall be affected by the Bankruptcy.

1. 21 Jac. 1. cap. 19. If any Bankrupt shall convey, or assure any Lands, Goods, or Estates, unto any Persons, upon Condition, or Power of Redemption at a Day to come, by Payment of Money, or otherwise, it shall be lawful for the Commissioners, before the Time of the Performance of such Condition to appoint, under their Hands and Seals, Persons to make Tender of the Money, or other Performance, according to the Nature of such Condition, as fully as the Bankrupt might have done; and the Commissioners shall, after such Tender or Performance, have Power to fell such Lands, Goods and Estates for the Benefit of the Creditors, as fully as they may fell any of the Estates of the Bankrupt.

2. S. 14. No Purchaser, for a Valuable Consideration, shall be impeached by any of the Acts against Bankrupts, unless the Commission be fixed out within five Years after the Person became a Bankrupt.

3. If the Copyhold Lands of a Bankrupt be sold according to the Statute of the 13 Eliz. cap. 7, the Vendee shall be admitted and pay a Fine. Co. Comp. Cap. 62. S. 56.

2 Chan. Rep. 41.
S. C. says, the Defendants demanded
they brought their Ejeicement. Now, though the Deed under which the Judgment was obtained, was as they shall have discovered whether the Defendant did not know at the Time of executing his Deed, that the Bankrupt, yet the Plaintiffs were not entitled. Then they brought a Bill to discover whether the Defendant did not know at the Time of executing his Deed, that S. had committed an Act of Bankruptcy, and if so to set forth the Fraud of obtaining the Deed, and to have a new Trial. The Defendant pleaded his Deed, and that S. was really indebted to him at the Time it was executed, and demanded Judgment, whether the Plaintiffs should discover any Thing to weaken his Title? And upon long Debate, the Plea was allowed. Nelf. Chan. Rep. 141, 142. 22 Car. 2. Gladwin & al v. Savill.

that upon long Debate it was allowed, that the Plaintiffs may at any time bring any new Action.

5. The Assignee of a Bankrupt exhibits his Bill against the Defendant, to discover Goods of the Bankrupt, that came to his Hands after the Bankruptcy. The Defendant, by way of Plea, sets forth, that he had no Goods of the Bankrupt's, or that ever were his, but what he bought for full and valuable Consideration, and bona fide; and that at the Time of the Sale and Payment of his Money, he had no Notice either of the Commission, or of any Act of Bankruptcy committed by the Bankrupt. On long Debate, the Plea was allowed by the Ld. North, and to take what Remedy they could before the Commissioners, or at Law. Hutchins, Counsel for the Defendant, cited a former President, but was not produced. 2 Chan. Cafe 135. Hill. 34 and 35. Car. 2. Brown v. Williams.

6. Assignee of the Commissioners of Bankruptcy against P. exhibited his Bill against the Defendant, to discover Goods &c. which were the Bankrupt's at the Time of his Breaking; the Defendant pleaded, that he was Purchaser for full and valuable Consideration, and at the Time of his Purchase, until the now Bill, had no Notice that P. was a Bankrupt, nor of any Commission, and pleads this Matter against any Discovery. After long Debate, Ld. K. North seemed to incline that the Defendant, being a Purchaser without Notice, should not be prejudiced by this Court; but that if the Sale were at an extreme Under-Value, as for 5s. or the like, then such a General Plea shall not stand. And after long Debate, whether the Defendant should set forth what the Goods were, or what the Defendant paid for them, it was concluded that he should, so as the Plaintiff should consent to take no Advantage of the Discovery, but here in this Court only, and not at Law, which the Plaintiff consented to by his Counsel, and to subscribe his Consent with the Registrar, and then the Defendant was to answer. 2 Chan. Cafe 156, 157. Mich. 35 Car. 2. Wagitaff v. Read.

7. A. purchaser of a Man, who had committed an Act of Bankruptcy, but without Notice thereof; afterwards a Commission is taken out, and there being a Term standing out in Trustees, the Assignee brings a Bill against them and the Purchaser, to have the Term allotted to him. Bill dismissed. 2 Vern. 599. pl. 537. Mich. 1707. Wilker v. Bodington.
1. Upon View of the Statute of 17 Eliz. and 1 Jac. it was resolved by the Court, that it certain Creditors sue a Commission, and others within four Months after or more, being Creditors, come before Distribution, and will join in the Charge of the Commission, and all that belongs to it, and tender their Parts, that they shall not be relived, but have their equal Parts as Creditors. But if any Distribution be made of any Part of the Estate, no Creditors are to be admitted after, that came not in before. Hob. 287. Pl. 375. Ragle's Cafe.

2. 21 Jac. cap. 19. S. 9. The Creditors are impeached to examine upon Oath any Person, for the Discovery of the Certainty of the several Debts due to the Creditors; and Creditors having their Debts secured by Judgments, Statutes, or other Specialties, with or without Penalty, or having made Attachments in London &c. where there is no Execution or Extent served or executed before the Person became Bankrupt, shall not be relieved for more than a ratable Part of their just Debts, without Respect to any Penalty contained in such Judgment, Statute, or other Penalty.

One Seized
of Lands
in Fec 
asses
a Debt by
Statutes, and
afterwards
becomes a
Bankrupt,
and the 
Creditors by
Statute extends
the Lands, then a Commission of Bankruptcy is sued out; Upon a Reference by the Lord Chancellor to the Judges of C. B they held that the Clause of the Statute was full and plain, that all the Creditors of the Bankrupt, unless where there was a Mortgage, should be equally paid. Wm's Rep. 92, 93. Patch. 1706. Sir Geo. Newland and Beckley v.

3. Bill against the Commissioners and Assignees of a Statute of Bankruptcy to be let into the Statute, paying Contribution-Money, and decreed accordingly, the Plaintifflikewise accounting for what Estate of the Bankrupt came to the Hands of the Plaintiff's Father, and repaying Money, which himself had recovered at Law. Pin. Rep. 60. Hill 25 Car. 2. Vanaker v. Nath, & al'.

4. Creditors excluded were let in for their Shares according to a prior Agreement, though an Assignment and Dividend had been made of the Estate. Pin. R. 326. Mich. 29 Car. 2. Elbworth and Maffett v. Kent, & al'.

5. A mortgaged Lands, and afterwards becomes a Bankrupt. The Title of the Mortgage is not to be impeached by the Statute, and the Mortgagee being a Creditor likewise by Bond, was decreed to come in, b

6. Where there are Lands undivid, and the Commissioners make a Di-
assignment on a supposed Value thereof, without having any Money to di-
tribute, this was held by the Court to be a good and regular Distribu-
tion, and the Words of the Act are, that the Commissioners shall have
the ordering of the Bankrupt's Estate, so that there is no Necessity to sell
and distribute the Money, but if they also a Proportion of the Land to
each Creditor, it is well enough. 2 Vern. 158. Trin. 1690. Hitchcox
v. Sedgwick.

7. Ld. Hutchins said, that fraudulent Distribution may be set aside by
the Ld. Chancellor, even upon a Petition, and that it had been so done
in the Ld. Clarendon's Time. And in the principal Case a new Distribu-
tion was ordered, and Land, sold before fraudulently, was ordered to
be sold again, and other Creditors not taken in before to have their Pro-

8. If one quits his Trade, and a Commission of Bankruptcy is after-
wards sued out against him by his old Creditors, yet an after Credito-
shall be admitted to have his Share in the Bankrupt's Estate. Ld. Raym.

9. A. being indebted to a Feme Couer becomes a Bankrupt, the Husband
pays the Contribution Money, and dies before Distribution, and then the
Wife died. The Executors of the Wife are intituled to the Dividend;
for the Husband paying the Contribution Money does not alter the

10. A. drew a Bill of Exchange for 100 l. on B. in Holland, payable
to C which B. accepted, and afterwards A. and B. become Bankrupts, and
C received 40 l. of the 100 l. out of B's Effects. Ld. C. Macclesfield
directed, that the Creditors of A. come in for the 40 l. Refidue of the
100 l. and that if the 40 l. paid to C. shall appear to have been paid out
of B's own Effects, then the Creditors of A. should come in for the
whole 100 l. out of which they must answer the other 40 l. to the
Creditors of B. that being to be taken by A's Creditors in such Case
only as Trustees for B's Creditors. 2 Wms's Rep. 89. Hill. 1722.
Ex Parte Ryiwicke.

11. A. gives a Promissory Note for 200 l. payable to B. or Order, B.
deposits it to C. who endorses it to D. A. B. and C. become Bankrupts,
and D. receives 5 s. in the Pound on a Dividend made by the Affignees
against A.—D. shall come in as a Creditor for 150 l. only out of B's Effects,
and it D. paid Contribution Money for more than 150 l. it shall be re-
turned. 2 Wms's Rep. 407. pl. 129. Pash. 1727. Ex Parte Le-
febure.

12. Upon Petition to Ld. Chancellor, the Case was, Hugh Payne
and Deborah Bullock May 1716 gave Bond to Mary Trelfel for payment of
120 l. In 1727, Mary Trelfel assign'd a Bond to Rachel her Daughter the
Petitioner; Hugh Payne and Deborah Bullock both died. Hugh Payne
died insolvent. Deborah Bullock left a considerable Real Estate, which
devolved to Hugh Payne her Grandson. Hugh Payne the Grandson entered
d and sold Part of the Lands, and after became a Bankrupt; his Affignees
were in Possession of the Lands that were Deborah Bullock's, withheld
by Hugh Payne the Grandson. Petitioner therefore prayed that these Lands
in the Hands of the Affignees might be liable to the Bond Debt of Deborah,
preferable to the general Creditors of Hugh Payne the Grandson. It was
instituted for the Petitioner, that since the Stat. 3 & 4 W. & M. cap. 14.
of fraudulent Devises, Lands in Hands of Devisees are made liable to Bond
Debts, as in the Hands of the Heirs, and here the Affignees stand in the
Place of the Bankrupt, and subject to the same Equity, and the Bank-
ruptcy and Affignment is no Alienation bona fide within the Exception

D d
1. **JOINT DEBTS** are to be out of the **Joint Stock** first, and if there be an Overplus, then that ought to be applied to pay particular Debts of each Partner; But if there be not enough to pay all the Joint Debts, and if either of the Partners shall pay more than a Moiety of the Joint Debts, then such Partner is to come in before the Commissioners of the Bankrupts, and be admitted as a Creditor for what he shall so pay over and above his Moiety. 2 Chan. Rep. 226. 34 Car. 2. E. of Craven & al v. Knight & al'.

On a joint Commission of Bankrupts against two Traders, separate Creditors are allowed to come in, for the joint Effects are to be applied, first to pay the Partnership Debts, and then the separate Debts; and the separate Effects to pay first the separate Creditors, and afterwards the Partnership Creditors; Per Cowper Chancellor. 2 Vern. 766. Mich. 1715. Crowder's Case. Wms's Rep. 326. S. P. per Ld. Cowper. S. P. 2 Wms's Rep. 500. by Ld. C. King, Mich 1725. Ex Parte Cook.

Sec (T) pl. 23, 26.

(Y) Distribution to whom; and how. In Cafe of Partnership.
4. Two Partners in Trade pay in each an equal Stock, and agreed A Quare is by Covenant, that the Stock should pay the Debts of the Stock, and every one of their separate Debts should charge the Stock, but only his own Estate, or to that Effect. They both become Bankrupts, and a could have Commission against them both; one of them owed more than the other. The Question was between the separate Creditors of each Bank-

5. If One or more of the Joint Traders becomes Bankrupt, his or their Proportions only are assignable by the Commissioners to be held in Common with the rest, who were not Bankrupts; At Nisi Prius before Holt. 12 Mod. 446. Pach. 13 W. 3 B. R. Anon.

6. Separate Creditors allowed to come in under a Joint Commission against Two Partners; but the Joint Effets are to be applied, first to pay the Partnership Debts, and then the separate Debts; and as to the separate Effets, first, the separate Creditors, and after the Partnership Creditors, are to be paid out of the same. 2 Vern. 706. Mich. 1716.

7. If a Joint Commission of Bankruptcy is taken out against Two Joint Traders, it was questioned, if separate Creditors may come in under it? And that they may, it was argued, That if there are Two Joint Traders, and one becomes Bankrupt one Day, and the other the next Day, and a Joint Commission is taken out, different Relations must be had under the Joint Commission with regard to the different Times of the Bankruptcy, and the Distribution under it must be the same, as if separate Commissions had been taken out. For in both Cases the Joint Fund

Creditor and Bankrupt. 103

3. R. S. and G. where Partners together in the Trade of a Dry-
Salter; G. embezzles and waftes the Joint-Stock, contrails private Debts, and becomes a Bankrupt. The Commissioners alin the Goods in Partnership. Bill by R. the Plaintiff for an Account, and to have the Goods sold to the best Advantage; and inflicted that out of the Produce of the Goods, the Debts owing by the Joint-Trade ought to be paid in the first Place, and that out of G's Share Satisfaction must be made for what G. had wafted or embezzled; that the Affignees could be in no better a Cafe than the Bankrupt himself, and were intitled only to what his Third Part would amount unto clear after Debts paid and Deductions for his Embellissement; and the Court seemed to be of that Opinion; but sent it to a Maller to take the Account and State the Cafe. 2 Vern. 293. pl. 283. Trin. 1693. Richardson v. Goodwin &c.


5. Trover for Three Bank Notes, which were payable to A and Co. and upon the Trial it was objected that the sole Interest of these Notes was not in A. alone &c. and that A. had once a Partner, one J. who died before the drawing of these Notes, and so his Executors having not renounced the Partnership were still interested in all Things relating to their Trade. And J. Powell held that this was true enough, for Prima Facie the Executors of J. shall be taken to continue in the Partnership till they renounce it, and no Renunciation being made out in this Cafe, but some of the Executors having proved the Will, they were interested in these Notes too, though they never acted in the Trade. Per Powell J. Somerlet Allizes, 5 Ann. in Arthur's Cafe.

4. Two Partners in Trade pay in each an equal Stock, and agreed, How the separate Creditors

Fund is primarily applied to the Joint Debts, and the separate Fund to the separate Debts, and then in an Average to the Joint Debts & vice versa. So are the Orders in the Court of Chancery in the following Instances, viz.

A. and B. were Partners, but the Partnership being dissolved, and A. setting up for himself became Bankrupt, and a Commission issued out against him, and then B. failed, and a Commission issued against him, the Joint Creditors were admitted to prove their Joint Debts under the separate Commissions, and cites 22 Jan. 1738, the Case of Stephens v. Brown and Adlam. — And that 22d April 1729, it was ordered, that the Joint Eftate should go to the Joint Creditors, and the remaining Part of the Joint Eftate, which respectively belonged to each, should go to their separate Creditors upon a Joint Commission sued out against the then Defendants, and cited Harley v. Heyham and Heyham. — And that 2 Geo. 2. in C. B. two being Joint Obligors, and after Bankrupts, separate Commissions were taken out against them, and the separate Commissioners refusing to let in the Obligee, he brought an Action against one of the Obligors, but the Defendant having got a Certificate under the separate Commision was discharged, Matthews v. Alland. Which proves that Joint Creditors may come in under separate Commissions, and by the same Reason, separate Creditors may come in under a Joint Commision, and the Law being so, every Assignee may recover by setting forth the special Matter; and besides, if the Assignee of the other Part will not join, he may be summoned and fevered. And the Court thought the last Case cited came fully to the Point of the principal Case, and therefore inclined to give Judgment accordingly; Sed adjournatur. Gibb. 282. Patich. 4 Geo. 2. B. R. Grace v. Heyham.

(Z) Distribution, where Debts are due to the Crown.

I. On a Scire Facias on an Extent, the Case was this. Dixon, a Receiver General, as Principal, and George Newell and Joseph Newell (as his Securities) became bound to the Queen in 3000 l. Upon this Bond an Extent Issued against the Body Lands and Goods of G. Newell and J. Newell, dated 5 December, and upon the 8 December an Inquisition was taken upon the said Extent, whereby it was found that the Defendant Arnold was indebted to George Newell in 109 l. 12s. Upon the Return of this Inquisition, a Scire Facias is sued out against Arnold, and he comes in and pleads, that upon the 24 of the same December G. Newell became a Bankrupt, and that thereupon a Commission of Bankruptcy issued, and that Proceedings were had thereupon according to the several Statutes made concerning Bankrupts, and that 6 December G. N. was found a Bankrupt, and that thereupon the Commissioners assigned over his Estate and Effects to one Taylor, so that he be the Defendant was not indebted to the said G. N. but to the Assignees of the Commission of Bankruptcy. Upon this Plea, the Attorney General demurred, and threw for Cause two Things, 1st, That it was not fit forth what Act of Bankruptcy the said G. Newell had committed; and, 2dly, That he had not set forth the Commission, and that the Commissioners had adjudged and declared G. N. to be a Bankrupt, and that the Plea amounted to the General Issue. The Barons deliver'd their Opinions Seriatim.

And Baron Lovell said, that the Plea in this Case was naught, 1st, Because the Defendant had not set out what Act of Bankruptcy George Newell
Newell had committed; for this being in the Case of the Crown, it is not sufficient to say only, that such a Day G. N. manif estly became a Bankrupt, though this Sort of Pleading to bar a Subject may be good enough, a Plea to a Common Intent being good, but in Case of the Crown it must be certain; and, edly, Because he had not set forth that the Commissioners had found him a Bankrupt, for the Commissioners are to proceed upon the Statutes, and they ought to bring the Party within the Extent of the Acts; and of this Opinion was Ward Ch. Baron.

But Baron Lovell observed, that there was another Fault in the Plea, because in setting out the Allegation it was not pleaded with a Profert in Cov.

Baron Price held, that the Pleading was sufficient. As to the first Cause alligned, he said, that the old Precedents in the Case of Bankrupts, did set forth all the Proceedings, as the Petition, the Giving of the Commission &c. and what was done thereupon, but the Precedents of late were otherwise, and they do not set forth any Particulars, but only in General, that such a Day he became a Bankrupt. Liv. 104.

In an Allignment by Alligners of Commissioners of Bankrupts, the short Way is now only used, when a Person is declared a Bankrupt by Commissioners, it is not any way material; For on an Issue whether a Man be a Bankrupt or not, whether a Particular Act of Bankruptcy is alligned in the Plea, yet any other Act of Bankruptcy may be given in Evidence.

The Judgment or Declarations of the Commissioners is no Evidence in a Trial, and consequently it cannot be material. But now as to the Matter, whether this Matter ought to be more particularly set out in the Case of the Crown, he did not think it necessary, for by the same Reason that one Act of Bankruptcy ought to be set forth, all the Acts of Bankruptcy ought to be set forth, and the Act of Bankruptcy, or the Declaration of the Commissioners, is not anywise material, neither is it any Evidence. As to the 2d Exception, that this Sort of Pleading amounted to the General Issue, and that, though this Sort of Pleading might be good in the Declaration, yet it is not good in a Plea; he said, that a Declaration required more Certainty than a Plea. Co. Lit. 303.

In a Declaration every Thing must be affirmed particularly. Now as to the saying that he was indebted to Taylor, and not to the Crown, whether or no this amounted to the General Issue; he said, that to make a General Issue, they should have gone into a Particularity, but here this is done not tall enough. By 21 Jac. cap. 4. it is enacted, that whenever the King, and such from under whom the King claims &c. hath been, or shall be, out of Possession for twenty Years, and shall not &c. have taken the Profits of any Lands &c. within twenty Years before the Information or Intrusion to be brought, to recover the fame; the Defendant &c. may plead the General Issue, if he &c. think it, and shall not be pressed to plead specially; and where any Information of Intrusion may fitly and aptly be brought on the King’s Behalf, no Scire Facias shall be brought whereunto the Subject shall be forced to a Special Pleading, but the Party was before obliged to set forth his Title. Where a Man would take Advantage of a Matter pleaded that amounts to the General Issue, upon a Demurrer, he must allign it for Caufe. 1 Cro. 116. Ward v. Blur. Baron Bury was of the same Opinion, that the Pleading was good.

The Question of Law in this Case was, What Operation this Extent had, and whether or no the Goods and Chattels of G. Newell were not bound from the Telle of the Writ of Extent? As to this Point it was resolved per rot. Cur. that Judgment should be given for the Queen.

Baron Price argued, that it is agreed of all Hands, that in Case of an Execution for a Subject, whether it be an Elegr, or Plei Facias, or
an Extent, the Goods and Chattles of the Party were bound from the Tettle of the Writ, before the Statute of Frauds and Perjuries, by Virtue of which Statue, the Property of the Goods of the Party against whom a Writ of Execution is sued out, is not bound, but from the Time that such Writ is delivered to the Sheriff &c. to be executed. But this Statue does not extend to the Cafe of the Crown. On an Extent on a Statute acknowledged according to 23 H. 8. when a Liberate is sued out, and the Goods are delivered by the Sheriff, according to the Appraifment in the Extent, the Goods of the Party are fo bound hereby, that he cannot either give, fell, or difpofe of them, neither can he forfeit them, nor can they be diftrained for Rent. The Liberate here has Relation to the Tettle of the Extent, though the Extende had no Right in the Goods until the Liberate, 1 Cro. 148. Jones 202. Audley v. Halley. The Writ to feife does not give a Property, but it is only a Protezione from the Crown to have the Goods delivered over to the Party, the Liberate is but a finifhing of the Execution. There is such a Lien upon the Goods from the Tettle of the Execution, that if the Party die, or affign away his Goods, the Sheriff may execute the Writ against the Executor, or against the Affignee, Rolls Ab. 896. The Interreit of the Goods is bound though the Property be not transferred. See Keb. 930. 932. Bailey against Bunning. Sid. 271. 1 Lev. 173.

Now it will be hard to vary this in the Cafe of the Crown, or to make a Construction to letfen the Prerogative of the Crown.

Of Extents there be severall Sorts, for some are general to feife Body Body, Land and Goods, some have a Composition them to find Debts by Inquisition, or otherwife, some are to feife into the Queen's Hands until the Debts are satisfied, and some of thefe Extents are to fell the Goods of the Party, and others are that the Goods should not be fold but by Order from the Court. But this is only as a Check upon the Officers, not but that the Crown hath the Property.

In Cafe of a Statute Staple, according to 27 E. 3. cap. 8. the Goods of the Party are to be feised and delivered to the Party; now this gives an immediate Property. But in Cafe of a Statute Merchant this is not fo, for there goes firft, Proces against the Body, and then upon a Return of a Non eft inventus, or a Mortuus, there goes an Extent against the Lands and Goods. This muft be much stronger in the Cafe of the Crown.

Executions for the Crown have Relation to the Time of the Execution awarded, and the Goods and Chattles of the Party are bound from that time into whose Hands forever they come; 2 R. Ab. 157. 171. Sir George Fleetwood's Cafe.

In Dyer 67. Stringfellow's Cafe. Stringfellow sued a Writ of Extendi Facias, out of the Chancery, to have Execution of a Statute Staple against one Brownefope, and takes the Goods accordingly, and feifes them into the Kings Hands, but there is no Liberate. Then there comes a Prerogative Writ out of the Exchequer, rehearing the King's Prerogative, that he ought to be satisfied his Debts, and commanding the Sheriff to levy upon Brownefope a Debt of 500l. which he owed the King, and if he had not sufficient to extend his Land, and this Writ was delivered to the Sheriff after the Day of the Return of the firft Writ, but the firft Writ was not returned at the Day. And the Sheriff hereupon returned the Special Matter, and it was held in the Exchequer, that the Sheriff should be amerced if he would not amend his return (i. e.) Return that he had saved the King's Debts; for the Property of the Goods was not in Stringfellow, before that the Goods were delivered to him by Virtue of the Liberate.

There is a very ancient Statue, 25 E. 3. 19. reciting that forasmuch as the King had made Protections to diverse Persons which were
Debt.

So for Felon this now, the Money fully and plead Right fues Chatties Handing wards. This makes at Time Extents Debtors be the no It made Information, the Letter to a.

As to the Objection that this Case differs from the common Case of Extents for the Crown, for that here is a Debt bound which is in a third Perfon's Hands, the Extent has bound the Money, Goods, and Chattles of the Party himself, but not the Debt in the Hands of Arnold.

Now, this Debt in Arnold's Hands is a Chattle, though it be but a Chofe in Action, which in the Case of a Subject is not affignable nor liable to any Execution; but in the Case of the Crown it is affignable and liable to Execution. But it is faid, that this is not the Chattle of George Newell. Vid. Staml. Prerog. 45. 17 E. 2. cap. 16. under the Word Catalla are only comprehended Leafes for Years, the Ifues and Profits of the Lands of thofe that fly for Felony, until fuch Time as they shall be attainted, and acquitted, and of Clerks convici, until he has made his Purgation, Emblems growing upon the Ground at the Time the Forfeiture of the Goods firft began to take Place, a Right of Action to Goods, as where Goods are taken away wrongfully from a Felon, or where one is indebted to a Felon by Oblication, or is accountable to the Felon for any Receipts or otherwife. This Statute of E. 2. does not give any Thing, but only fhews what shall be forfeited. Under the Word Catalla are sometimes taken, Goods which the Felon has no Property in; as if a Man delivers Money out of a Bag or Corn out of a Sack to one to keep, who is afterwards attainted of Felony, the Money or Corn in such Case is forfeit-ed. Staml. Pr. 45. 6. 6 H. 7. 9. a. 19 H. 7. 47.

It was objected, that it was not the Extent, but the Inquisition that bound the Goods. But it was anfwered, that the Inquisition was only an Act in purfiance of the Extent, and imply'd within the Extent itfelf. It is an Inquisition of Information and Inftruction only, and not of Intitling. It has fuch a Relation to the Extent, that the whole together makes but one Execution. Suppofe that there fhould be an Extent and no Inquisition at all fhould be taken upon it, but the Sheriff fhould return that he had feiz'd the Debt; this would have been good, though the Debt were in the Hands of a third Perfon; now, if this be fufficient Grounds for you to bring an Action for the Crown, the Inquisition is not material. It is but an Inquiry to find the Debt, but when there is an Inquisition it is fuller and more entire. And there is a Mistake in the Conclufion of the Plea Absque hoc, that the Defendant was indebted to the Queen tempore Inquisitionia; For it fhould be that he was not indebted to the Queen at the Time of the Tefte of the Extent.

If there be a Difficulty in making this Relation, the Inquisition finds every Thing that was before the Extent, but not any Thing since the Extent, but in purfiance of the Power of the Extent. It is but a bare Information, and it doth relate to the Extent. An Inquisition upon an Elegit relates to the Elegit; So a Bargain and Sale inroll'd, relates to the Date of the Bargain and Sale. So if a Feoffment be made with a Letter of Attorney to deliver Seifin, and after an Allignment is made by Commissioners of Bankruptcy, and then Livery is made, this shall relate
relate to the Feoffment; for all is but one Conveyance. It’s Goods are bail’d or fold upon Condition, and the Bailee or Vendee becomes Bankrupt, and the Commissioners assign his Estate and Effects, and then the Condition is perform’d, this over-reaches the Bankruptcy.

It was further objected, that it would be of dangerous Consequence that Extents should over-reach the Debits which are to be distributed among the Creditors. But it was answer’d, that an Extent was a Matter of Record, whereof every Person ought to take Notice. When an Inquisition is taken, though it be 100 Miles off, it is no more than the Extent itself. But it was said, that without this Proceeding it might be of great Damage to the Crown; for Tradesmen may commit an Act of Bankruptcy in a coveneous Manner, and fo as it cannot be known, as it was done in this Case; for here the Creditors were very quick, and a Commiion of Bankruptcy was taken out before the Inquisition was taken, and it was their Interest to defeat the Extent, so that the Danger attends the Crown more than the Subject. The Person indebted is not any way prejudiced; for it is the same Thing to him, whether he pays the Money to the one or to the other.

The Act of Bankruptcy itself does not bind the Property, but that continues in the Bankrupt until the Affignment is made. 3 Keble 616. In Debt on an Obligation the Defendant pleaded, that before the Action brought, the Plaintiff became a Bankrupt; to which the Plaintiff demurred; and per Cur. the Plea is ill, and until an Affignment, the Debtor is defenceless. Payment of a Debt to a Bankrupt before the Commiion is void, is good enough, and fo it is before his Debt be affign’d. Andrews v. Spicer. By 1 Jac. cap. 15 S. 14. No Debtor or the Bankrupt shall be endanger’d for the Payment of his or their Debts truly and bona fide to any such Bankrupt, before such time as he shall understand, and know that he is become a Bankrupt.

Now in this Case Arnold could not be damaged; for he did not know that Newell had committed an Act of Bankruptcy, but after he had Notice of the Bankruptcy, it was equal to him whether he paid it to the Queen, or to the Assignees of the Commissioners.

Besides the Crown is taken Notice of in 21 Jac. cap. 19. 3. 10. It is thereby enacted, that if it shall happen, any of the Lands, Tenements, Goods, Chattles, Debts, or other Estate of any Bankrupt, to be extended, after such Time, as he, or she, is become Bankrupt, by any Person or Persons, under Colour or Pretence of his or their becoming an Accompant, or any way indebted to the King, his Heirs, or Successors, it shall be lawful to and for the Commissioners to examine upon Oath, whether the said Debt was due to each Debtor, or Accompant, upon any Bargain or Contract originally made between such Accompant and the said Bankrupt, the said Debtor and Accompant, and his or their Servants, and if such Bargain or Contract was originally made to and with any other Person or Persons, then the said Debtor or Accompant, and for the Use and Trust of any other Person or Persons. The Commissioners, or the greater Part of them, may order and dispose of all such Lands &c. Goods, Chattles and Debts, so extended as aforesaid, to and for the Use of the Creditors &c. And this is now, as if it had said, that where a Man shall be a Bankrupt before such Time, as that there is an Extent fused out for a just and true Debt, the Creditors shall not intermeddle with, nor sell the Goods, there being such a Lien upon the Extent, so that upon the whole, the Mitchell and Inconvenience will be on the Part of the Crown. Judgment for the Queen. Per Cur.
(A. a) Partners. Where one is Bankrupt. How the other shall be charged &c.

1. B. And S. were two joint Obligees; S. became a Bankrupt, and the 
Commis- 
(being himself a Creditor) for the Benefit of himself and the 
other Creditors; the Question was, whether this was a good Assign- 
ment? Per Windham J. if there be two Obligees, the one cannot re-

 tract the other, because a Thing in Action; And per Twifden J. the 
that this was 
Statute faith, that the Assignee shall have the same Action; but here the only 
the Bankrupt cannot have an Action without the other; Adjournatur. Method to 
recover the 
Debt; for 
if it had been assigned to another, he alone could not bring Action for the Moiety, and the Action 
must be brought by the Assignee, in the Statue, in his own Name, as before the Bankruptcy it ought 
to be brought in the Name of the Obligee, and now all the Interest is in B. the Obligee, one Moiety 
in his own Right, and the other Moiety for the Advantage of the Creditors, and therefore he alone 
shall maintain the Action in his own Name, he being Obligee as to one Moiety, and Assignee as to 
the other, and all one and the same Person, and therefore to be sued by him alone; For after the Al-

signment it cannot be sued by him and S and to this Windham J. inclined; but no one being ready 
on the Part of the Defendant, Adjournatur.

2. Jones moved, that one who was Partner with his Brother a Bank-
rupt, being arrested, might be ordered to put in Bail for the Bankrupt 
as well as for himself. Twifden said, that if there are two Partners, and 
and one breaks, you shall not charge the other with the Whole, because it is 
ex maleficito; But if there are two Partners, and one of them dies, the 
Survivor shall be charged for the Whole. In this Case you have admis-
ted him as a Partner, by swearing him before the Commissioners of Bankrupts; 

3. Action of Treaver well lies by the Assignee of one Partner a Bankrupt 
against the other; and so ruled on a Trial, and agreed now. 2. Kobe. 765. 

4. If there are Accounts between two Merchants, and one of them be-
comes Bankrupt, the Courfe is not to make the other, who perhaps upon 
flaring the Accounts, is found indebted to the Bankrupt, to pay the 
Whole of which originally was intimated to him, and to put him in the Rec-
covery of what the Bankrupt owes him, into the same Condition with 
the rest of the Creditors; but to make him pay that only which appears 
due to the Bankrupt on the Foot of the Account, otherwise it will be for 
Accounts betwixt them after the Time of the other's becoming Bankrupt, if 
any such were. Per North Ch. J. Mod. 215. pl. 1. Trin. 28. Car. 2. 
C. B. Anon.

5. Joint Debts are to be paid out of the Joint Stock first, and if there 
be an Overplus, then that ought to be apply'd to pay particular Debts 
of each Partner; But if there be not enough to pay all the Joint Debts 
and if either of the Partners shall pay more than a Moiety of the Joint-
Debts, then such Partner is to come in before the Commissioners of Joint 
Bankrupts, and be admitted as a Creditor for what he shall pay over and others are 
allowed to come in, but the joint 
Effects are 
to be applied, first to pay the Partnership-Debts, and then the separate Debts; and the separate Ef-

fects to pay, first the separate Creditors, and afterwards the 
Partnership Creditors; Per Cowper C. 

6. If
Creditor and Bankrupt.

6. If one or more of the Joint Traders become Bankrupt, his or their Proportions only are assignable by the Commissioner, to be held in common with the rest who were not Bankrupts. At Nisi Prius Coram. Holt Ch. J. 12 Mod. 446. Patch. 13. W. 3. B. R. Anon.

7. If there be several Joint Traders, Payment to one of them is Payment to all; so if they all, except him to whom the Payment was made, were Bankrupts, the Payment is only unavoidable as to his Proportion. At Nisi Prius Coram. Holt Ch. J. 12 Mod. 447. Patch. 13. W. 3. B. R. Anon.

(B. a) Creditors. Inter sc.

1. If a Trader, being indebted on Simple Contract, pledges Goods for the Payment, and promises to pay the same, the Creditor is to have Interest even between the Act of Bankruptcy and the Commision; and for Debts on Specialty, the Creditor shall have Interest as well between the Act of Bankruptcy as before. Trin. 1716. Crolly's Case.

2. Clerk of a Commission in the Presence of the Person at whose Instance he was instructed to pay, opened a Sceritude, and took out several Papers, and made a pretended Sale; ordered to be examined on Interrogatories, and pay the Real Value of the Goods, and to be removed from the Clerkship. Select Cafes in Chancery in Lord King's Time. 45. Trin. 11 Geo. Mozene &c. Creditors of Abraham.

3. A Mortgage shall have his Interest run on upon a Bankrupt's Estate, because he hath a Right in Rem, but as to other Interest, it ceaseth on the Bankruptcy. Per Ld. Chan. King, 18 July 1729.

(C. a) Suits and Actions by. Assignees; and Pleadings, &c.

1 Jac. 1. cap. 15. S. 13. The Commissioners of Bankrupts shall have Power to align, or dispose all the Debts due to, and for the Benefit of the Bankrupt, to the Use of the Creditors, and the same Disposition of the Debts shall vest the Property in the Persons to whom it shall be assigned by the Commissioners, as fully as if the Bond, Judgment, or Contract, whereupon the Debt shall arise, had been made to the Persons to whom the same shall be assigned; and after such Assignment, neither the Bankrupt, nor any other, to whom such Debt shall be due, shall have Power to recover the same, nor to make a Discharge thereof; neither shall the same be attached as the Debt of the Bankrupt, or such other Person; but the Party to whom the same shall be assigned shall have Remedy to recover the same in the Name of the Person, to whom the same shall be assigned, or ordered, as the Party himself might have had.

2. Assignees may sue Actions in their own Names for the Debts due to the Bankrupt; for they are transferred by Act of Parliament, but yet it is a Debt upon Record; but as in Debt upon a Contract, Defendant might have joined his Laws against the Bankrupt, so he may against the Assignees. Cro. J. 105. Mich. 3. Jac. B. B. Bradshaw v. ---.

3. A
Creditor and Bankrupt.

3. A Bankrupt indebted to A. in 20l, and to B. in 10l, hath a Debt due to him on a Bond of 20l. The Court was of Opinion that this Bond-Debt may be assigned by the Commissioners respectively to the Creditors in Proportion to their Debts, and per Warburton J. when it is so assigned, they may severally sue for the same, because the Act of Parliament operates upon the Assignment. Trin 10 Jac. C. B. Godsb. 195. pl. 282. Anon.

4. Debt against Administrator and declared that the Intestate was indebted to J. S. 120l. for Wares sold, and that J. S. became Bankrupt, and was so adjudged by the Commissioners, and this Debt was assigned to the Plaintiff Being a Creditor; it was inferred that by the Assignment this is now quasi a Debt on Record, and the Plaintiff enabled to this Suit by Act of Parliament, and that Ley-ganger lies not; but resolved the Action did not lie; for that Debt upon a single Contract lies not against an Executor or Administrator; and that the Assignment, by the Commissioners of Bankrupts did not alter the Law, but that against an Assignee, Wager of Law did lie; adjudged for the Defendant. Cro. C. 187. pl. 6. Palch. 5 Car. R. Morgan v. Green.

in the Life of the Debtor, and after his Death by Action on the Cafe against his Executor; for the Statute which gives Power of Assignment, does not alter the Course of the Law for Recovery thereof in other Nature than the Law before allowed, and gives no greater Advantage to the Assignee than the principal Creditor himself had.

5. Though in Case of Bankruptcy it was once held that no Trever lay but on specially dwelling the Bailment before and Conversion meane, yet it has been since held to lie generally; Per Cur. 3 Kebl. 294. in pl. 22. Palch. 26 Car. 2. B. R.

6. Assignees brought a Bill to have an Account against the Defendant of the Bankrupt's Estate; the Defendant pleaded that he was but a Servant to the Bankrupt, and likewise he had been examined by the Commissioners upon the whole Matter, but the Plea was over-ruled and ordered to answer. 2 Vent. 358. Mich. 33 Car. 2. in Canc. Anon.

7. Case of the Assignee of the Commissioners of Bankrupts; The Defendant pleaded Non assigniis infra for Annuas. Holt mov'd, that the Assignment and Promiss, which give a New Caufe of Action, are within the Six Years, and the Assignee shall have a new Six Years. Cur. contra. The Six Years shall be accounted from the original Action, and the new Power of Promiss is but a Fiction in Law. The Court inclined to give Judgment for the Defendant but a Discontinuance was granted &c. Conti. 76. Mich. 3 and 4 Jac. 2. in B. R. Althbrooke v. Manby.

of Bankruptcy transfers the Right to the Assignee, but it is no more than the old Right with which the Bankrupt had before he had committed any Act of Bankruptcy, and therefore the Assignee must take it in the same Plight and Condition as the Bankrupt himself had it, and so it hath been adjudged in the Case of Salton and Plunkitt, that the Assignee was in the same (as to the Right) with the Bankrupt himself, and consequently, if he was barred by the Statute of Limitations, so shall the Assignee. 8 Mod. 171, 172. Trin 9 Geo. Grey v. Bendith.

Though the Assignee of the Effects of a Bankrupt claims under the Act of Parliament, yet as the Statute of Limitations might be pleaded against the Bankrupt, by the same reason it is pleadable against such Assignee; Per Ed. Chancellor. 3 Cwms's Rep. 144. Mich. 1732. South Sea Company v. Wymondell.


9. In a special Action on the Cafe brought by the Plaintiff as Assignee Show. 7, of the Commissioners of Bankrupts, he need not prove to be the Person be- S. C but came Bankrupt. Carth. 29. Palch. 1 V. & M. in B. R. Pepys v. Low. n Judio,
11. Action upon the Case by Assignees of Commissioners of Bankrupt, for setting forth, that the Bankrupt had recovered such a Sum against Defendant's Tiltor, and that Execution remained to be done, and the Debt was assigned to Plaintiff; and that Goods to such a Value of Tiltor came to Defendant's Hands, which he converted to his own Ufe. After Verdict it was moved in Arreil of Judgment, because the Bankrupt before the Act committed; but per Cur faying that Execution remained to be made, supplies that and Plaintiff had Judgment. 12 Mod. 306. Mich. 11 W. 3. Turner v. Main.

12. Indebitatus Assumpsit by the Assignees of Commissioners of Bankrupt for Goods sold after Bankruptcy committed, lies, or may bring Trover, but not both. 12 Mod. 324. Mich. 11 W. 3. Hulsey v. Fieldall.

13. 5 Geo. 2. cap. 30. S. 38. Enactts, that no Suit in Equity shall be commenced, by the Assignees, without the Consent of the major Part in Value of the Creditors present, at a Meeting, pursuant to Notice in the Gazette.

14. When

15. Where a Person makes Payment of a Debt to a Creditor, soon after he becomes a Bankrupt, and the Creditor had no Notice of the Bankruptcy at the Time he received the Money, the Assignees under the Commission shall not be allowed to recover the Money back again in an Indebitatus Assumpsit, but only in an Action of Tresor. And the Reason is, that they cannot insist upon having the Money by Way of Contract, but as a Tort. Barnard. Chan. Rep. 202. Mich. 1740. Bourne v. Dodson.

(D. a) Power of Assignees. As to making Dividends.

1. 5 Geo. 2. cap. 30. Persons chosen Assignees shall, after the Expiration of 4 Months, and within 12 Months from the Time of issuing such Commission, cause 21 Days Notice, to be given in the Gazette, of the Time and Place the Commissioners and Assignees intend to meet and make a Dividend, at which Time the Creditors, who have not before proved their Debts, shall be at Liberty to prove the same; which Meeting for the City of London, and all Places within its Bills of Mortality, shall be at Guildhall; and upon every such Meeting the Assignees shall produce Account of their Receipts and Payments, and of what shall remain outstanding, and shall (if the Creditors present require the same) be examined upon Oath or Affirmation, touching the Truth of such Accounts; and the Assignees shall be allowed all just Allowances, and the Commissioners shall order such Part of the nett Produce of the said Bankrupt's Estate, in the Hands of the Assignees, as they shall think fit, to be divided amongst the Creditors, and shall make such Order for a Dividend in Writing, and shall cause one Part of such Order to be filed amongst the Proceedings under the Commission, and shall deliver into each of the Assignees a Duplicate of such Order, which Order shall contain an Account of the Time and Place of making such Order, and the Sum Total of the Debts proved, and the Sum Total of the Money remaining in the Hands of the Assignees, and how much in the Pound is then ordered to be paid; and the Assignees in pursuance of such Order, and without any Deed of Distribution, shall forthwith make such Dividend, and take Receipts in a Book from each Creditor.

2. S. 37. Within 18 Months after the issuing forth of any such Commission, the Assignees shall make a second Dividend, in case the Estate was not wholly divided upon the first, and shall cause Notice to be inserted in the Gazette, of the Time and Place the said Commissioners intend to meet to make a second Dividend, and for the Creditors, who shall not before have proved their Debts, to come and prove the same; and at such Meeting every Assignee shall produce upon Oath or Affirmation his Account, and what, upon the Balance shall appear to be in his Hands, shall by like Order of the Commissioners be forthwith divided, which second Dividend shall be final, unless any Suit shall be depending, or any Part of the Estate standing out, or unless some future Estate of the Bankrupt shall afterwards come to the Assignees, in which Case the Assignees shall, as soon as may be, convert such future Estate into Money, and shall within two Months after, by the like Order of the Commissioners, divide the same.
3. Commissiouers of Bankruptcy appoint a Dividend to be made of the Bankrupt’s Estate; a Creditor under the Commission neglects to receive of the Affignees his Proportion of that Dividend; the Affignees afterwards break, and run away with the Dividend that was in their Hands; the Creditor shall not be allowed to come upon the Bankrupt’s Estate for that Money, but must take this Remedy against the Affignees as well as he can. Cited by Ld. Chancellor as a Case that had been put; But his Lordship said, That Case wholly depends upon the Deed of Distribution made by the Commissioners after taking the Dividend; for if no such Deed of Distribution had been made, the Creditor would have been allowed to have come upon the Bankrupt’s Estate, and would not have been confined to have taken his Remedy against the Affignees. Barnard. Chan. Rep. 419, 420. Hill. 1749, in Cafe of Smith v. Duke of Chandois.

(E. a) Affignees. Relation. To what Time their Interest relates.

Vent. 360. S. C. and the Court said, that he is in en le Pot, and by that it might extend to Seven or Twenty Years, which would be dangerous, and Judgment accordingly. 2 Jo. 196, 197. Perry v. Bowers. would be very inconvenient to admit of Relation, because no Time prefixed for the Involment. Sed Adjecta tur. Skinn. 30. pl. 6 S. C. argued—2 Show. 156. pl. 142. Berris v. Bowyer. S. C. adjudg’d, per tot. Cur. that Involment is necessary before any Thing can pass by such Deed of Affignement, or Bargain and Sale from the Commissiouers.

J. H. by Special Verdict appeared to be a Bankrupt, and was committed Two Months in 1651, and recommitted for another Act in 1657, and then the Term for Years, whereof he was possess’d, was sold to the Defendant by the Bankrupt, and in 1660, the Commissiouers sold to the Plaintiff. The Words of the Act are not alter after he shall flit a Bankrupt, for then the earlier being a Bankrupt, would after Five Years be a perpetual Superfedeas to all Tradeleins; but if one has sold, and then Five Years pass, without any Act of Bankruptcy, the Purchaeor is safe, and no after Act can hurt him; But where the Bankrupt continues in Possession, any after Act is sufficient to bind the Term; Judgment clearly for the Plaintiff. Keb. 722. pl. 54. Patch. 16 Car. 2. B. R. Spencer v. Vanacre.

3. The Plaintiff obtained a Judgment in Debt, and afterwards became Bankrupt; the Defendant brought Error in the Exchequer Chamber, and there the Judgment was affirmed, and the Record lent back into B. R. Then a Commissiouer of Bankruptcy was taken out, and the Commissiouers alignd this Judgment; but the Plaintiff sued out Execution and the Money was levied by the Sheriff, and brought into Court, and then the Affignee moved, that it might not be delivered to the Plaintiff, forming that the Judgment was alignd to him as before; the Court thought it would be hard to stay the Money on a bare Surname, and for aught appeared it was the Plaintiff’s Due. But, however, because it might be hazardous to deliver it to him, they confented to detain it, so as the Affignee would forthwith take out a Scire Facias in Order to try the Bank.
Creditor and Bankrupt.


4. Payment by Debtor of a Bankrupt either to the Bankrupt himself, or to his Creditor before Notice of the Bankruptcy and before the Commis-

sion sued, is a Discharge against the Commissioners, or the Asig-

nee; Per Hale Ch. J. and Cur. 3. Keb. 190. pl. 38. Trin. 25. Car. 2. void, but if no Notice, or if the


Party be compelled to pay by Suit, as here, before any Commis-

sion sued out, it is a good Discharge. And Judgment for the Plaintiff, and anciently, till the Commis-

sion sued out, the Debtor ought not to re-pay, though he had Notice of Bankruptcy. 3 Keb. 230. Mich. 25. Car. 2. B. R. Prin v.

Bankruptcy

5. If a Man pays Money due to a Bankrupt before Notice, he shall not be charged for it again; but if he have Notice, and it be recovered from

him by Law he shall not be charged neither; for perhaps Nobody will take any Commis-


6. In a special Verdict in Trover for 120l. the Cafe was, P, a Trader committed an Aff of Bankruptcy in 1673, and kept on his Trade till 1677, and then bound his Son Apprentice to F, the Defendant, and paid him 120l. being the usual Sum given in such Cases; and in 1679 the Trader, a Commission of Bankruptcy issued against P, and he was found a Bank-

rupt, and this 120l. was assigned by the Commissioners as the Mo-

ney of the Bankrupt in the Hands of F. to the Plaintiff. All the Court

held, that the Affirmation was ill, it being so long before the Commis-

sion, that the Money was paid, and when there was no Sufpicion of his being a Bankrupt, and no manner of Fraud or fraudulent Intention found, or to be imagined. 3 Lev. 58, 59. Trin. 34. Car. 2. C. B.

Rider v. Fowle.

from an Arrest, and that he suffered himself to be outlawed, having Notice of the Exigent. Then he bound his Son Apprentice to F, the Defendant, giving 120l. with him, which the Commissioners assigned to the Plaintiff. North and Windham J. held the Payment of the 120l. not to be a Provi-

sion, but Charlton and Levins doubted; & adjourned. But afterwards adjudged for Defendant.

7. Affirmation of a Term by Commissioners of Bankruptcy was made to

a Creditor, who before Involvement of the Deed of Affirmation made a Lease to the Defendant, and then the Deed was involved. Per Cur. such a Leas-

fee cannot maintain an Ejection, because the Lease could not have been before the Involvement; The Words of the Statute are, that Com-

missioners may fell by Deed involved; So without Involvement no Sale.

12 Mod. 3. Mich. 2 W. & M. Elliot v. Danby.

8. By Bankruptcy the Property is in the Creditors, and Asignee has a

Barnard. 2d Barnard. 2d in Cafe

the fame Remedy as Bankrupt would have had. 12 Mod. 324. Mich. Rep. in


of Bracey v. Dawson, the Ch. J. said, He could not agree, that the Bankrupt ceased to have the Pro-

perty of his Goods at the Time of the Act of Bankruptcy committed; the Property does continue in him even till the Affirmation. The Property is never in the Commissioners, they have only the Pow-

er given them of affinging the Effects.

9. If there be an Aff of Bankruptcy committed, and a Creditor obtains a

Judgment subsequent to it, and then a Commis-

sion is taken out; now the Judgment is thereby avoided. At Niti Prius coram Holt Ch. J.

12 Mod. 446. Anon.

10. Trover the Plaintiff's Title was under a Bill of Sale from the Sher-

iff; the Defendant's under an Affirmation from Commissioners of

Bankrupt, the Cafe was, A. was arrested at the Suit of J. S. and put in Bail; then surrendered himself in discharge of the Bail, and continued in

Prison
116 Creditor and Bankrupt.

Prison two Months: So that by 21 Jac. cap. 19. by relation he became a Bankrupt from the Time of the Arrest, which being prior to the Bill of Sale, the Plaintiff had no Property, and of that Opinion was Holt Ch. J. but in this Case the Commission of Bankruptcy being taken out before the two Months were expired, he directed the Jury to find for the Plaintiff. Trin. 2 Ann. apud Guildhall.

11. One Mills the 14th of Oct. became a Bankrupt; afterwards a Judgment &c. and a Fi. Fa. was had against his Goods, &c. which were sealed and sold. In December following a Commission is taken out, and in March an Assignment is made of the Goods; And the Assignees bring the Trover generally. Held, that if a Man becomes a Bankrupt, the Property of his Goods continues in him until Assignment, but the Property from the Act of Bankruptcy is so bound, that it cannot be altered until Assignment. The Assignee shall have all the Goods the Bankrupt had at the Time of the Bankruptcy being committed. The Assignee doth come in the Place of a Bankrupt, but doth not represent him as an Administrator doth his Intestate. And if there had been a Demand proved in this Case, the Trover would have lain, but without proving an actual Demand by the Assignee; It was held, that the Action will not lie, Per Holt, but Powell J. contra. No Judgment. Patch. 7 Ann. Higdell v. Clare.

12. An Assignment from the Commissioners has to many Respect a Relation to the Time when the Act of Bankruptcy was committed. And therefore if after such Act the Bankrupt disposes of his Effects, the Assignment shall certainly over-reach it. Agreed by the Ch. J. 2 Barnard. Rep. in B. R. 343. Mich. 7 Geo. 2. in Case of Bracey v. Dawfion.

13. And he agreed the same too, where a Sheriff takes Goods in Execution of a Bankrupt, and does not deliver them over to the Party before the Assignment made, the Assignment shall not have a Relation to defeat that Execution; because there the Execution was completed. 2 Barnard. Rep. in B. R. 343. Mich. 7 Geo. 2. in Case of Bracey v. Dawfion.

(F. a) Assignees Chosen. When; How; and by Whom; and How the Assignment is to be made.

1. 5 Geo. 2. cap. 30. The Commissioners shall forthwith, after they have declared the Person a Bankrupt, cause Notice thereof to be given in the Gazette, and shall appoint Time and Place for the Creditors to meet (which Meeting for the City of London, and all Places within the Bills of Mortality, shall be at Guildhall) in order to choose Assignees.

2. 3. 27. No Creditor, or other Person on the Behalf of any Creditor, shall be permitted to vote in such Choice of Assignees whose Debt shall not amount to 10 l.

3. S. 30
(G. a) Assignees. Bound by what Agreement &c. made or done by Bankrupt.

1. SIR Stephen Evans had Diamonds consigned to him by Governor Pitt to sell for his Use; he charged them fraudulently at a less Value than he sold them for, and after became a Bankrupt; upon which a Question arose, whether the Assignees under the Commission of Bankruptcy should pay Costs? And resolved they should out of the Estate; for if he had been here himself, he must have paid Costs, and the Assignees stand in his Place, as to his Estate. But it appearing that the Paper, in which he charged them at a less Value than what he sold them for, was not delivered to Mr. Pitt, it was look'd upon not as actual Fraud, but only a Preparation to it, of which he might have repented, so no Costs against the Assignees. Select Cases in C. in Lord King's Time, 16, 17. Trin. 1725. Child v. Pitt.

2. A Person that files out a Commission may be discharged by the Assignees, for they are Trustees for the Creditors, and may employ whom they please, and therefore the former one to deliver up all Papers &c. on being paid his Bill. 23 December 1725. Ld. Chan. King.
(H. a) Commissioners or Assignees. Punishable or Relieved. In what Cases.

1. H. And other the Plaintiffs are Creditors of a Bankrupt, but H. the Plaintiff was the Principal Creditor, and they all complain against the Defendants, who were Assignees of the Commissioners, for that they have recovered Judgment for 331 l. of the Bankrupt’s Estate in the said H’s Hands; whereas the said Bankrupt was indebted to him in 700 l. and that H. and some other of the Creditors, are willing to take their Proportion of the said 331 l. whose Debts are now in Danger of being lost, if the Whole should be received by the Defendant K. and others Assignees &c. who had obtained the said Judgment; and therefore they exhibited a Bill for Relief. The Defendants demurred, for that there is no Equity in the Bill to change the Law, by which the Assignees are enabled to recover the Bankrupt’s Estate, and there is no particular Charge in the Bill that makes the Demands of the Assignees unreasonable. The Court decreed, that H. should prove his Debt before the Commissioners, and pay to the Defendants their Proportion of the said 331 l. and Costs to be distributed to them respectively. Fin. Chan. Rep. 264, 265. Thn. 28. Car. 2. Hawkins v. King.

2. W. a Villanler, was greatly indebted to M. his Brewer, and quittd that Trade, and turn’d Innkeeper, and borrow’d Money of N. his Landlord to buy Goods to furnish his House, and for Security thereof, made a Bill of Sale to N. but kept the Possession of them. Afterwards W. became further indebted to M. for Drink deliver’d after his becoming Innkeeper; but not being able to go on with his Trade, he agrees with N. to give him Security by a New Bill of Sale of the same and other Goods, but before the Execution W. by Controversey with M. commits an All Åff of Bankruptcy; and N. not knowing of the Trick, accepts a New Bill of Sale. M. owes out a Comission, and gets an Assignment, and then brought Trover for these Goods. Holt Ch. J. held, Quod nullus deditit, that if these Goods of W. had been assign’d to any other Creditor, the keeping Possession of them had made the Bill of Sale fraudulent as to the other Creditors; but since the Original Agreement was as here, and so honestly and really made for securing the Defendant’s Money lent to W. for the said Purpoze, the Agreement was good and honest. Ld. Raym. Rep. 286. Hill. 9 W. 3. B. R. Meggot v. Mills.

3. 5 Geo. 2. cap. 30. § 26. The Assignees shall be obliged to keep Books of Account, wherein they shall enter all Sums of Money, or other Effects, which they shall have received out of the said Bankrupt’s Estate, to which Books every Creditor shall have free Right.

4. § 42. If any Commissioner shall order Expenses of Eating and Drinking to be made, or shall eat or drink at the Charge of the Creditors, or out of the Estate of such Bankrupt, or receive above 20% each Commissioner for each Meeting, every such Commissioner shall be disabled to act in any Commission of Bankrupts.
(I. a) Frauds between Bankrupt and Creditor after Commission issued.

1. S Geo. 2. cap. 39. Every Security to be given to the Use of any Creditor, as a Consideration to persuade him to sign such Certificate, shall be void; and the Party sued on such Contract may plead the general Issue.

2. S. 24. If any Bankrupt, after a Commission issued against him, shall pay any Money to the Person who sued out the same, or deliver him Goods, or other Satisfaction, for his Debt, whereby he shall privately receive more in the Pound than the other Creditors, such Payment or Satisfaction given shall supersede the Commission, and the Lord Chancellor shall award to any Creditor petitioning another Commission, and the Person taking such Goods, or Satisfaction, shall forfeit all he has received, or the Value thereof, to be divided amongst the Bankrupt's other Creditors.

(K. a) Purchasors affected. In what Cases.

1. O R D Chancellor said, There are Frauds which Equity can only relieve against; and there are other Frauds where particular Acts or Parliament make the Legal Act void &c. but that does not take away the Jurisdiction of this Court, which can give fuller and more particular Relief. And a pretended Sale of Lands by Ward, shortly before his Bankruptcy, to his Brother, on 1 Jac. 1. cap. 15. was set aside, on Bill by Alienees, whereby voluntary Conveyances, by Persons who after become Bankrupts, are void.

Objection. That such a Conveyance would be void at Law, and need not come into this Court to set it aside; sed non Allocatur. Mil. Rep. Hill. 1733. De Golls v. Ward.

2. Upon further hearing of this Cause, Issue being directed to try the Bankruptcy of John Ward, upon Trial at Bar in B. R. in Easter Term last, he was found to become Bankrupt, 26 August 1725. And now upon the Equity referred, Plaintiffs (Truelers for the S. S Company) prayed an Account, and to set aside Conveyances that J. W. had made since his becoming Bankrupt.

For Defendant Knox Ward and Wife it was insinced, that previous to their Marriage by Settlement, in June 1729, in Consideration of 400l. Portion and the Marriage, J. W. agreed to purchase Lands of 1000l. per Ann. out of the Sale of particular Lands mentioned in that Settlement, which Lands were subject to several Trusts precedent to the Use of the Marriage; and that they, being Purchasors, were protected by the Stat. 21 Jac. 1. whereby it is provided, that no Purchase made from a Bankrupt shall be impeached, where the Commission does not issue within five Years after the Bankruptcy committed, and in this Case it did not, for the finding him to become Bankrupt is in August 1725, and the Commission did not issue till November 1730.

Mr. Attorney General for Knox Ward and Wife argued, that though their Settlement is not by actual Conveyance, yet it is a Covenant which
which binds Specifick Lands, and a Purchasor in Equity and by Ad is within the Intent of the Statute, for the Assignees are bound by the same Equity as the Bankrupt himself was, and cited the Case of \\
Taylor and Wheeler per Lord Cowper. Besides, here Defendants had no Notice of the Bankruptcy, which includes Notice of all the Acts which constitute the Bankrupt. As being indebted and trading &c. and of this Opinion was J. Talbot in the Case of Mr. Taylor's Bankruptcy, where Issue was directed as to the Notice of his being a Trader; But the Statute Jac. 1. does not mention or regard the Case of Notice or not. Mr. Floyd cited Lev. 13, 14. Radford v. . . . . . as in Point on the Statute Jac. 1. And in Equity the Settlement covenanted to be made, is to be considered as made. The Consideration is unquestionable, viz. Marriage and a Portion.

Mr. Brown for the Plaintiffs argued, that Defendants have shown no Conveyance to Defendant Knox Ward; so the Question is, whether Plaintiffs are intituled to any Relief against Knox Ward and Wife? He agrees, that if they had been antecedent Purchasers by Conveyance, and for valuable Consideration, they would be protected. As to the Objection, that the Articles in Equity are to be considered as a Purchase; he said, that in the Articles John Ward does not covenant to settle &c. but only as far as in himself lies he would readily and confirm the Articles; and the Covenant &c. to settle is by Knox Ward, who under former Deeds was intituled to the Surplus of the Estate, which former Deeds were all subsequent to J. W. his Father's Bankruptcy. As to the Stat. 21. Jac. it extends to actual Conveyances, and that are fairly and honestly made; and by Stat. 13 Eliz. cap. 7, as to Conveyances before Acts of Bankruptcy, they are void, if the Purchasers have Notice of the Fraud &c. And it is strange to say, that a Purchaser, after the Bankruptcy, should be protected, though with Notice of the Fraud &c.

As to the Covenant by Knox W. on the Marriage Articles, it only relates to the General Surplus—So that this is in Nature only of a Security to raise &c. to purchase &c. All the Declarations of the former Trusts for the Benefit of Knox Ward are void by the Bankruptcy, and he was privy and Party to all those Deeds which were fraudulent (and it was said was the Iole Foundation of the Jury finding J. W. a Bankrupt.) As to Knox W. not having Notice of the Bankruptcy, it is without Doubt he had, and knew his Father to be a Trader; Besides, the Statute, which makes the Acts done amount to a Bankruptcy, is Notice to him and every Body. As to the Wife and her Father, the several Deeds &c. and pretended Transafions between J. W. and K. W. are all recited in the Marriage Articles &c. But per Ld. Chancellor, the Notice of the Deeds are not sufficient, but that they were made with fraudulent Purpofe. Whereupon Mr. Brown said further, that the Purpofe of the Deeds appear particularly from the very Deeds themselves, and the Wife and her Father should have made Inquiry as to the Nature and Intent of those Deeds &c. And that there is no Proof of Payment of the 4000 l. Portion, or of any Part.

Lord Chancellor said, The great Difficulty of this Case is with Respect to Mrs. Ward, the Wife, and the Issue of the Marriage; for as to Knox Ward, he appears to have been Party and Privy to the fraudulent Transafions of his Father. It is very rare that Attempts in Equity are made to fet aside a Marriage Agreement. He remembers Shrypton v. Wych Turly as the only one. As to the Objection, that this is only a legal Conveyance, he agrees it is not, but by the Articles the Surplus is subjected to make good the intended Purchase and Settlement &c. and J. W. is Party to the Articles There was no Notice to the Wife, or Father, of the Acts of Bankruptcy. As to
Notice of the Deeds whence the Bankruptcy arose, that is not sufficient—And you can't come to impeach a Purchaser in Equity without Notice, any more than you can a legal Conveyance &c.—It is not sufficient to say that Knox W. was intitled to the Surplus only as a Volunteer; for if such fell for a valuable Consideration, the Purchaser shall protect himself &c.—And he thought a Purchaser by Articles is a Purchaser within the Saving of the Statute of 21 Jac. 1. fo as to defend himself in Equity &c.—Knox W. is not within the Statute, and he takes less by the Articles than he had before &c. Adjournatur.

Afterwards Lord Chancellor declared that he had spoke with the Ch. J. of B. R. who had told him that the Jury found J. W. Bankrupt from executing the Deed of 25 August, 1725, and that no Act of Bankruptcy was proved before or after, but the Execution of that Deed.—And no other Act of Bankruptcy till 1726. The Parties then by Direction of his Lordship went on into the Cause.—The Marriage Articles of Knox W. were read, and Mr. Attorney-General of Counsel for Knox W. & Ux. said, that the Statute secures Purchasers generally, whether directly or indirectly from Bankrupts &c.—And in Equity it is not material, whether the Purchaser be by Actual Conveyance, or by Articles &c. and the Covenant binds, &c. and defends &c. and cited the Case of Guth v. Clith Prceed. Ch. 223.—As to the Objection, that Knox W. and his Wife &c. are to be considered as having Notice &c. there was no Evidence as to that, except what is collected from the Articles but that is not sufficient—Nor any Thing but Notice of the Deeds which made the Bankrupt in 1725; But then there should be Notice that the Creditors, for whom those Deeds were made, were fictitious &c. which was what made the Bankrupt.—But suppose there was Notice that there had been an Act of Bankruptcy by Mr. J. W. in 1725, they nevertheles were protected by the Statute, because the Statute is general, that no Purchaser should be impeached where the Commission does not sitte in Five Years &c. and asked, if that is saying, a Purchaser without Notice?—And the Statute which mentions Purchasers, as the Statute of Eliz. for making void Voluntary Settlements, don't regard whether there is Notice or not of the preceding Settlement.—And the Reason of the Statute is, that if a Man continues to deal for so many Years &c. without a Commission of Bankruptcy taken out, his Acts shall be valid where they were for a Consideration.—An Equitable Purchaser is within the Statute, as in the other Case on the Statute of Eliz. As suppose A. pays a Consideration for an Equity of Redemption, he shall be preferred in Equity to a Voluntary Conveyance of the Equity of Redemption preceding, upon the Equity of the Statute.—It was also objected, that this Purchaser by the Marriage Articles is subject to the Power by J. W. in the Deed of September 7, 1725, where the Power is to charge the Premises with any further Sum for Payment of his Debts.—And objected that the Marriage Articles is subject to this &c.—Then as to these Two Questions, 1st. Whether the Marriage Settlement is subject to this Power?—And 2dly, Whether, if it be, this Power is transferred to the Plaintiffs or the Assignees?—1st. The Power is not referred in the Marriage Articles, all that is there is, that after the Trusts performed in this former Deed &c. Mr. J. W. ratifies and confirms &c. the Power and Trust; And J. W. agrees that the Settlement (as made of 1725) a Year out of a Surplus arising after the Trusts &c. as in the former Deed.—The Power therefore is extinguished by the Marriage Agreement inconsistent with it as much as if it had been released.—Suppose J. W. had sold the Estate, could he alter execute the Power &c?—Besides, here J. W. in 1725 did appoint several Debts to be paid &c.—The next Question will be, whether the Assignees (if the Power did still exist) could have the Benefit of it? for the Plaintiffs was cited Jacob U. Salvage.
Creditor and Bankrupt.

Savage heard before Ed. King.—But the Execution of this Power would charge the Estate he had sold &c. i.e. contracted for; which is a Sale in Equity.—If the Statute had not transferred Estates in Tail, the Court would not have compelled the Bankrupt to have suffered a Recovery, or levied a Fine &c. and yet this is a Power in the Bankrupt.—If the Conveyance in 1725 by the Bankrupt was void, then it remained in J. W. to convey for a valuable Consideration.—So if considered as voluntary only, he would have it still in his Power to convey to a Purchaser.

Lord Chancellor said, this is an extraordinary Case, and he believed none like it before, and hopes never will again, and therefore it is incumbent on the Court to do all they can to prevent the like. Here appears a Scheme of Fraud, through many Years, to defraud just Creditors.—The Nature of the Case is of a Gentleman having a very great Estate, and not greatly indebted, except the Demand by the S. S. Company.—The Deeds begin with the Conveyance of 25th and 26th August, 1725. And by subsequent Deeds all the Real and Personal Estate, even to Household Goods, are vested in Trustees to pay pretended Creditors, the Son joining with the Father, but not one of the pretended Creditors.—And no Distress from any Creditor &c.—Amongst other Trusts is the extraordinary Power in the Deed of 7 Sept. 1725 for J. W. to charge any other Debts. And last of all the whole Surplus of all the Estates is vested in the Son Knox W.—Then comes the Marriage Articles in June 1729, and therein every one of the former Deeds are required to be in Consideration of the Marriage of K. W. with Mrs. . . . . . ., and 1000 l. Portion (but not proved paid.) The Surplus agreed to be subject to a Term of 200 Years to pay 400 l. a Year to Mr. J. W. for Life; it he shall particularly demand it, and then for K. W. and his Wife; then to purchase Lands of 1000 l. per Ann in Tail General to K. W. Remainder to his Right Heir, with Power, as to Portions for Children, and Power for Trustees to provide Coach and Horses for Mr. J. W.—Then there is another Deed of Deed of Deed of Deed of the same Manor of K. W. to some Uses.—A Bill was brought by the Assignees to set aside these Deeds &c. an Issue was directed and the Jury find J. W. Bankrupt 26th August 1725, being the Date of the first Deed of Release, by which that Deed is overreached.—And the Judges certify, that this Deed was the Act of Bankruptcy, as being made to defraud his Creditors.—The Question is, What is the Consequence of this Verdict is?—At Law this Deed and all subsequent ones are void. But it was objected from the Statute 21 Jac. 1. that the Commission of Bankruptcy was not taken out till 20th November, 1730, above Five Years after the Act of Bankruptcy, and by a Charge in that Statute, Purchasers in such Case are not to be impeached, &c. But he holds that this Charge only protects Purchasers bona fide, without Notice of the Fraud and Act of Bankruptcy.—And here Knox W. must have had Notice of the Act of Bankruptcy, because Party to the very Deed that made the Bankruptcy, so that K. W. is not protected by this Deed.—Next here in Equity.—And here must take Notice, that there are Circumstances of Actual Fraud, and here appears a long Series from 1725.—The Power in the Deed of September 1725 to charge the Estate with any other Debts, is Fraud apparent, because it refers in Effect the whole Estate in the Bankrupt himself &c.—The next Consideration is, how far the several Defendants are to be affected. This is to be considered in two Respects; 1st. Under the Deeds from 1725, prior to the Articles; 2dly, How upon the Marriage Articles?—As to the Deeds prior to the Articles they concern the Trustees for the pretended Creditors, and those Creditors; but no Proof.
Proof of any Real Deeds; and the first Deed for that Reason found void, and therefore this is out of the Case. Then the Quifition is under those Deeds, how it stands with Mr. K. W. and he holds that he is affected with the Act of Bankruptcy and Fraud, being Party to the first Deed &c. and at best, it is all voluntary as to him, and the Surplus in all the subsequent Deeds is referred to him.—Next as to the Marriage, and here is the only Appearance of Difficulty;—So as to the Persons provided for; and as to J. W. himfelf he cannot partake of the Confideration. — All the Parties to be considered are, Knox Ward and Mrs. Nettleton the intended Wife, and the Ifile. —

As to Knox Ward, his Case is not immediately the Marriage Articles, he had Notice of the Bankruptcy of his Father before. It was objected that K. W. is to be considered as a Purchafor by the Articles, and the Statute not mentioning Notice, and where the Commission is not sued out within Five Years &c.—He holds that Articles in Equity are the fame as Actual Conveyance at Law, and no more to be impeached in Equity; but holds, that K. W. takes nothing under the Articles but what he had before. — And it is strange for him to take more and better Interest than before; but suppose it be, he holds the Clause in the Statute 21 Jac. 1. not to be considered in the large Sense intended for &c. to extend to all Purchafes, but holds that this Clause is to be compared to the Clause in the Statute 13 Eliz. cap. 7. which provides against Purchafors having Notice of the Fraud &c. The Statute 21 Jac. takes Notice of the former Acts against Bankrupts, and is for further Provision for Creditors &c.—Therefore holds this like the Case, and warranted by the Construction made on the several Statutes about Leafe by Ecclefaical Perfons, 1 Vent. 244. Enry v. Fitton, the late Receiver in that Case.— And to holds that all the Statutes against Bankrupts are to be construed together and to be considered all as one Statute &c.—And no Pretence but Mr. Knox W. had Notice &c. and therefore holds that Mr. Knox W. cannot protect himfelf under the Statute.

—Next as to the Wife and Ifile. Mrs. N. for what appears, is an Innocent Person,—No Evidence to shew her Father had any other Notice than what appears from the Deeds;—But thinks Notice of the Deeds is not Notice of the Fraudulent Intent of thee Deeds, other than as to Mr. K. W. who was Party &c.—And if Mrs. N. had not Notice of the Bankruptcy, he cannot be affected in Equity by the Bankruptcy. —

Next as to the Ifile of the Marriage. First, as to the Heirs of the Body of Mr. K. W. that is an Elate Tail in him.—Agrees that in Marriage Articles where the Limitation is to the Heirs of the Body by the Wife, there it shall be carried into strict Settlement, but otherwise where the Limitation is general to all the Ifile, and that this was the real Intent appears by the Provision of 6000 l. which is expressly for the Ifile of the Marriage, and extends to the Elder Son, as well as to the rest of the Children. — This 6000 l. is secured by a Power and Trust. He holds that the Ifile are to be affected with the Notice to the Father, and Mother, and Trustees. — As to the Objection by Plaintiffs, that the Provision is of the Surplus only after the fictitious Debts &c. — but this would be strange, and their Provision ought to be after what was really due. — As to Mr. J. W.'s Power to charge other Debts, he holds his joining in the Marriage was an Extinguishment of that Power, and amounted to a Revocation therefore held and decreed the Marriage Articles to be set aside, as to all the Ules, except as to the Jointure of the Wife, and the 6000 l. for the Ifile. MS. Rep. Mich. 1739. Read v. Ward.

(L. a)
(L. a) Reward to Discoverers of Bankrupt's Estate.

1. 5 Geo. 2. cap 30. Every person who shall (after the time allowed to such Bankrupt) voluntarily make Discovery of any Part of such Bankrupt's Estate, not before come to the Knowledge of the Assignees, shall be allowed Five per Cent, and such further Reward as the Assignees, and the major Part of the Creditors, in Value, present at any Meeting of the Creditors, shall think fit.

(M. a) Concealments of Bankrupt's Estate punished.

1. 13 Eliz. cap. 7. If the Creditors of any Bankrupt be satisfied their Debts with the proper Lands, Goods, and Debts of the Bankrupts, or with the same and some Part of the Forfeitures, and there shall remain an Overplus of the said Forfeitures of the double Values; the one Moiety of the Overplus of the Forfeitures, shall be by the Commissioners paid unto the Queen, and the other Moiety shall be distributed amongst the Poor within the Hospitals in every City, Town, or County where such Bankrupt shall be.

2. A Commission being set out by the Bankrupt's Father-in-Law, to whom the Bankrupt, before suing out the Commission, had made over all his Effects except a few Shillings, and some delicate Debts was held by Ld. C. Parker, to have been plainly sued out fraudulently to discharge the Bankrupt. Wms's Rep. 1560. 563. Trin. 1719. Ex Parte Salkeld.

3. A Goldsmith being much indebted, put up his Shop, and having a Stock likewise in Partnership in the Wine Trade, assigned two thirds thereof to J. S. a Creditor, (who had been particularly residing to him) without his Knowledge, being worth about 900L. and never after opened his Shop again, but the next Day went of, and was after found to have become Bankrupt a Day after the Day of the Assignment. O a Bill by J. S. against the Assignee, and the Partner in the Wine Trade, the Master of the Rolls held the Assignment good. And held, that there might be just reason for one becoming Bankrupt to prefer one Creditor to another, as where he was a faithful Friend, or Money lent in Extremity without Profit, and all that such Creditor has to sublitt upon, whereas Dealers in Trade may have been Gainers. And that the Time of the Assignment, it made before the Bankruptcy, is not Material, but the Justice of the Debt. And its being made without Notice of the Creditor is no Objection; for this shews that there was no Fraud or Improavity. And if such Assignment to a Single Creditor be a Chafe eu Action, he may apply for Relief here, for he can go no where else. Otherwise if a Legal Estate had been conveyed. His Honour cited some Precedents, and said, that though preferring some Creditors, in hopes of other Favour, may be of inchievous Consequence, yet by reason of the Precedents, he must Decree in favour of the Assignment. Wms's Rep. 427. Mich. 1727. Small v. Oudley.

* But the Council inflected, that the Assignment was of all his Stock in his Trade.

If the Assignment had been, of all his Goods and Effects, or of all his Estate, or all his Stock in Trade, as Goldsmith &c. this had been too general, and would hardly have stood; But here it was not of the Trader's own Trade, but a small Branch of a different Trade, of a Stock in
Creditor and Bankrupt.

Wine, in all not above 300 l. and but two thirds of that. Ibid. 431. in a Note added by the Reporter, (as it seems) at the End of the Case, says it was so said by the Master of the Rolls.

4. A a Trader was just on the Brink of Bankruptcy, a Deed ready
in the intituled was brought to him, which he executed a little before his Bank-
ruptcy, and in Contemplation thereof, to give a Preference to some of his
Creditors. Cited by the Master of the Rolls, as the Case of SAUCO P. Wm's Rep.
Shepherd, and said, that he doubted thereof; but that on Appeal, 431. to have
been decreed in Sir Ste-
then Evans's

5. 5 Geo. 2. cap. 39. 8. 21. Every Person who shall have accepted of any
Trust, and shall wilfully conceal any Estate of any Bankrupt, and shall not,
within 42 Days after such Commission shall issue, and Notice given in the
Gazette, discover such Trust and Estate in Writing to one of the Commission-
ners or Affignees, and submit it to be examined (if required) shall forfeit
100 l. and double the Value of the Estate concealed to the Creditors.

(N. a) Of setting off where there are mutual Debts
between Bankrupt and Creditor, and of submitting to
Arbitration, and compounding Debts due to
Bankrupts.

1. W H E R E there is mutual Credit between a Bankrupt and a Cred-
itor, the Balance shall only be paid, and the Clause in the
Statute is not to be construed of Dealings in Trade only, or in Case of
mutual running Accounts, but also where one Credit is upon Mortgage,
and the other upon Note, Per Ld. Cowper, and he said, that in all
Cases of mutual Credit it is natural Justice and Equity, that only the
Balance should be paid. Wm's Rep. 325, 326. Trin. 1716. Ld.
Laneshorough v. Jones.

2. Sir Stephen Evans in the Year 1711 had 5000 l. Stock in the Hud-
son's Bay Company, and was their Banker or Callier, and upon that Ac-
count was indebted to the Company in 800 l. and soon after became a
Bankrupt; the Affignees bring a Bill against the Company to transfer
the 5000 l. Stock to them with all Dividends due thereon; the Compa-
ny by their Answer inlit, that by Virtue of a By-Law in these Words
(viz.) "That the Stock and Dividend of each Adventurer shall be
obliged for such Debts and Engagements as such Adventurer shall
be
become engaged in to the Company, and that the Committee of the
Company for the Time being, shall and may Distain the same until
such Debts and Engagements are fully satisfied," the Company is
not obliged to transfer the Stock to the Complainants, until they pay
the 800 l. due to the Company, and they likewise inlit upon the
Clause in the Statute of Bankrupts, 5 Geo. that, "where it shall ap-
pear to the Commissioners, that there has been mutual Credit by the
Bankrupt, and any other Person, at any Time before the Perfon,
against whom such Commission is or shall be awarded, became Bank-
rupt, the said Commissioners shall state the Account between them,
and what shall appear to be due upon the Balance of such Account,
and no more shall be claimed or paid on either Side." And that Sir

Stephen MS Rep.
Mich. 12
Geo. 1st
of Sir Step-

Bankrupt,

Halton's

K. k
Stephen Evans having Credit in their Books for 500l. Stock, and the Company on the other Side having Credit in Sir Stephen Evans's Book for 800l. they ought to 
dd and have an Allowance of the 800l. of the 500l. Stock.

It was argued for the Plaintiffs, that the By-Law to dislaim the Adventurer's Stock for a Debt due to the Company, was contrary to Law, and a void By-Law, That it gave the Preference to a Simple Contract before a Debt by Specialty or Judgment. That it subverted the legal Course of Administration. That if an Adventurer died indebted by Simple Contract to the Company, that Debt by Simple Contract would be satisfied before Debts by Specialty or Record to other Persons, That this By-Law was contrary to the Statute of Bankrupts, which makes all Debts equal, and to be paid Pari Passu, which is most agreeable to natural Justice and Equity, and supposing it might bind the Adventurer himself as an Agreement, yet it would not bind the Assignees, who are Trustees for the Creditors, and the Stock and Effects of the Bankrupt vested in them, by Act in Law, and not by the Party; That this Cafe was out of the Clause of the Statute 5 Geo. cap. 24. of listing Accounts where mutual Credit had been given, that Clause extends only to mutual Debts, here the Company is not Debtors to the Proprietors of the Stock, nor can they demand the Value of the Stock from the Company, the Company is only a Trustee for the Proprietor, and not their Debtor &c.

It was argued for the Defendant, that this was a good By-Law to bind the Members of the Company, That such an Agreement among Partners in Trade would be good, That if any of the Partners borrow'd or took any Money out of the Joint Stock, that his Share and Interest in the Joint Stock should be liable to make Satisfaction for such Debt, that the Company having the Control and Power over the Proprietors Stock, might reasonably detain the Stock, till they were satisfied, for a Debt due to them from such Proprietor, That the Assignees were in the same Condition with the Bankrupt himself, they stand in his Place, and must take his Estate and Effects, subject to the Engagements and Charges they were liable to in the Hands of the Bankrupt. 2dly, That this Cafe was within the Clause of the Statute 5 Geo. cap. 24. of mutual Credit &c. and that Sir Stephen Evans was a Creditor of the Company for his 500l. Stock, and the Company a Creditor of Sir Stephen Evans for the 800l. due to them, that the Stock is called Credit in the Books of the Company, and he has a Demand against the Company for the Interest and Produce of the Stock, and though there was nothing due to Sir Steven Evans for Dividends at the Time of his Bankruptcy, yet, the Stock itself was a Debt from the Company, and so within the Clause of the Act of setting one Debt against another, and only the Balance due to Sir Stephen's Assignees, That it would be very unreasonable where there were mutual Dealings and Credit, that the Debtor to the Bankrupt should be bound to pay the Whole due from him to the Bankrupt's Estate, and e contra should only come in as a Creditor, under the Commission for all due to him, and receive perhaps only two or three Shillings in the Pound for his whole Debt &c.

King C. was of Opinion that the By-Law was not good. It was assuming a Legislative Power, and altering the Law, it was different from an Agreement between private Partners in Trade; these Sorts of Companies were of a publick Nature, all People were admitted into them, and great Part of the Personal Estates of the Kingdom were invested in them; That it did not only make Debts by Simple Contract equal to Specialty and Judgments, but gave them the Preference. It gave
Creditor and Bankrupt.

127

gave them a Power to attach their Creditors Effects, and to be their own Carvers; it subverted the legal Course of Administration, and was inconsistent with the Statute of Bankrupts, which makes all Debts equal &c.

But Raymond Ch. J. and Mr. Baron Price, who assisted his Lordship, thought it a good By-Law, it extends only to their own Members, and tends to the Benefit and Advantage of the Corporation. All By-Laws for the Benefit and Advantage of Trade are good, unless such By-Laws be unreasonable or unjust. That this, in their Opinion, was neither; not unreasonable, because it extends only to their own Members, whose Consent is implied in all By-Laws, and every Man that buys Stock must take it subject to the Engagements laid upon such Stock by the Company; it is not unjust, because the Stock is only to be retained as a Pledge till the Debt be satisfied, which every Debtor in Bankruptcy is bound to do; That the Assignees stand in the Place of the Bankrupt, and can be in no better Condition than the Bankrupt himself.

King C. said, I think this Case is within the Clause of the Statute 5 Geo. of setting off Debt against Debt, so need not give any direct Opinion as to the By-Law, here is mutual Credit given, and therefore I think the Company may retain the Stock due to them, out of the Dividends due to the Bankrupts Estate, subsequent to the Bankruptcy; and shall not be obliged to come in as a Creditor under the Commission, and be decided accordingly. MS. Rep. Mich. 12. Geo. Gibbon, & al. Assignees of Sir Steven Evans Bankrupt v. Hudson's Bay Company.

3. 5 Geo. 2. cap. 30. S. 29. Where it shall appear that there has been mutual Credit given, or mutual Debts between the Bankrupt and any other Person, the Commissioners or Assignees shall state the Account, and one Debt may be set against another, and the Balance of such Account shall be claimed or paid.

4. S. 34. It shall be lawful for the Assignees, with the Consent of the major Part, in value of the Creditors present, at any Meeting purporting to Notice in the Gazette, to submit any Difference between such Assignee, and any Person whatsoever, or by reason of any Matter relating to such Bankrupt, to the determination of Arbitrators, or otherwise to compound the Matters in difference, as the Assignees with such Consent can agree.

5. S. 35. The Assignees are empowered with consent of Creditors, to make Composition with any Debtors to such Bankrupts, where the same shall appear necessary.

(O. a) Demeanor and Crime in Bankrupt's not appearing and discovering his Effects; and How the Commissioners are to proceed for that Purpose.

1. 13 Eliz. cap. 7. If any such Persons, which shall be indebted, do shut & 9. I of Purposo withdraw themselves from their usual Mansion Houses, upon Complaint, the Commissioners shall have Power to award five Proclamations, to be made in the Queen's Name, upon five Market-Days, in such Places near the Place where such Bankrupt has most commonly made his Abode, commanding him to return with all convenient
Creditor and Bankrupt.

...
not exceeding 50 Days from the End of the said 42 Days; so as such Order for enlarging the Time be made five Days before the Time on which such Person was to surrender himself.

8. S. 36. After such Bankrupt shall have obtained his Certificate, and the same shall be confirmed, such Bankrupt shall be obliged to give his Attendance, upon Notice in Writing to attend the Assignees, in order to settle any Account of such Bankrupt's Estate, or to attend any Court of Record, to be examined touching the same, or for such other Business, which such Assignees shall judge necessary for getting in the Bankrupt's Estate, for which Attendance the Bankrupt shall be allowed 2 l. 6 d. per diem; and in case such Bankrupt shall neglect to attend, or refuse to assist in such Discovery, without good Cause to be shown to the Commissioners to be by them allowed (such Assignees making Proof thereof upon Oath, or solemn Affirmation, before the Commissioners) the Commissioners are required to issue a Warrant, to such Persons as they shall think proper, for apprehending such Bankrupt, and him to commit to the County Gaol, there to remain in close Custody, until he shall conform to the Satisfaction of the Commissioners, and be by the Commissioners, or the Order of the Lord Chancellor, or by due Course of Law discharged; and such Gaoler is required to keep such Person in close Custody, within the Walls of the Prison, under the Penalties before mentioned, for suffering such Prisoners to escape.

(P. a) The Bankrupt's Person protected. In what Cases.

1. In Debt on Obligation, the Defendant pleaded, that before the Action brought, the Plaintiff became a Bankrupt, to which the Plaintiff demurred, and per Curiam, it is an ill Plea; and until an Assignment be made, the Debtor is defenceless; and [cited] therefore [the Case of] Nanton and Dale [that] Payment, before a Commission fixed out, is well enough, and so it is before this Debt be assigned. And Judgment for the Plaintiff. 3 Keb. 616. pl. 78. Hill. 27 and 28 Car. 2. B. R. Andrews v. Spicer.

2. A Man rents an House for Years, by Lease, at C. and becomes a Bankrupt, and surrenders all his Goods and Effects to the Commissioners, according to the 4 and 5 Ann. Reg. and with the rest, this Lease. And his Certificate was allowed; but being taken into Custody for Non-Payment of the Rent since, he moved by Counsel to be discharged; but the Court would not grant it, and forced him to put in Bail; for they said, the Act of Parliament did not make void the Contract between him and his Landlord. Pach. 6. Ann. Reg.

3. Two Persons having Authority to seize the Effects of a Bankrupt, broke open a Closet, where the Bankrupt was, to search for them; two Officers came soon after them, and took him in an Action, and threw him into the Counter, where he was served with several other Actions in Custody. It was ordered that they, at their own Costs, should procure him to be discharged out of Custody, or to stand committed, being an Abuse of the Proclamation of the Court. Sel. Case in Chan. in Ld. King's Time. 64. Mich. 12 Geo. Anon.
(Q. a) False Claims of Debts. Punishment thereof.

1. 5 Geo. 2. cap. 30. If any Person shall before the Commissioners, or by Affidavit or Affirmation exhibited to them, swear or affirm, that any sum of Money is due to him from any Bankrupt which is not really due, knowing the same to be not due, and being convicted by Indictment or Information, such Person shall suffer the Penalties inflicted by the Statutes against willful Perjury, and shall be liable to pay double the Sum so sworn or affirmed to be due.

(R. a) Surplus and Allowance.

1. 13 Eliz. cap. 7. Such of the Commissioners as shall put the
Commission in Execution, shall, upon Request made by the Bankrupt, not only make Declaration to the Bankrupt of the employing and behoving of their Lands, Goods and Debts, but also make Payment of the Overplus, if any be, to the Bankrupt.

2. 5 Geo. 2. cap. 30. S. 7. All Bankrupts who shall surrender and conform, as by this Act is directed, shall be allowed 5 per Cent. out of the near Produce of the Estate that shall be receiv'd, in case the near Produce of the Estate, after such Allowance made, shall be sufficient to pay 10s. in the Pound, and if the said 5 per Cent. shall not amount to above 200l. and in case the near Produce of the Estate shall be sufficient to pay 12s. 6d. in the Pound, then all Persons so conforming, shall be allowed 7l. 10s. per Cent. so as such Allowance shall not amount to above 250l. and in case the near Produce shall, over and above the Allowance, be sufficient to pay 15s. in the Pound, then Persons so conforming, shall be allowed 10 per Cent. so as such 10 per Cent. shall not amount to above 300l. and every such Bankrupt shall be discharged from all Debts owing at the Time that he did become Bankrupt.

3. S. 8. If the near Proceed of such Bankrupt's Estate shall not amount to 108. in the Pound, such Bankrupt shall not be allowed the 5 per Cent., but shall be allowed so much as the Assignees and Commissioners shall think fit, not exceeding 3 per Cent.

4. S. 12. Nothing in this Act shall give any Advantage to any Bankrupt who shall, upon Marriage of any of his Children, have given above the Value of 100l. (unles he shall prove by his Books, or otherwise upon his Oath or Affirmation before the Commissioners, that he had remaining other Estate sufficient to pay every Person, to whom he was indebted, their full Debts) or who shall have lost in one Day the Value of 5l. or in the Whole the Value of 100l. within 12 Months next preceding his becoming Bankrupt, at Cards, Dice, Tables, Tennis, Bowls, Billiards, Shovel-Board, or Cock-Fighting, Horfe-Races, Dog-Matches, or Foot-Races, or other Game, or by bearing a Share in the Stakes, or Betting, or that within one Year before he became a Bankrupt, he shall have lost 100l. by Contracts for Stock, or Shares of any publick Funds, where such Contract was not to be performed within one Week from the making, or where the Stock was not actually transferred.

(S. a)
(S. a) Certificate and Discharge.

1. 13 Eliz. cap. 7. S. 10. If the Creditors, of any Bankrupts which depart the Realm, keep their Houses, or otherwise withdraw into Places unknown, or suffer themselves to be arrested, or outlawed, or yield their Bodies into Prison Purposely to defraud the Creditors, be not fully satisfied for their Debts by the Means before specified, they shall have their Remedy for Levying the Reddue against the Offenders, as they might have had before the making of this Act. And the said Creditors shall be only barred for such Part of the said Debts as shall be paid unto them, as aforesaid.

2. 4 & 5 Anne 17. All Bankrupts surrendering and conforming themselves, as in this Act, shall be discharged from all Debts owing at the Time of the Bankruptcy, and if they be prosecuted for any Debt due before, they shall be discharged on Common Bail, and plead that the Cause of Accusation accurred before they became Bankrupts, and give the Special Matter in Evidence, and if Judgment be given against the Plaintiff, the Defendant shall recover his Costs.

3. If a Bankrupt has a Certificate, and an Action be brought against him afterwards for a Debt precedent to the Statue, he may plead his Certificate upon the Roll, and so prevent a Judgment from being entered up afterwards, but having neglected so to do, it was his own Fault, and a Court of Equity is not to relieve either his Pleading, or his Want of Plea, or no proper Plea put in in Time, nor could he be relieved on an Audita Querela, because he had an Opportunity and might have pleaded his Certificate before the Judgment was entered, and upon producing some Precedents where Bankrupts had been relieved against Judgments obtained against them, they did not come up to the Case in Queltion, and the Petition was dismissed. 2 Vern. 695, 697. Trin. 1715. Goodwin's Case.


5. Gore brought an Action, for Rent, against Bagshaw, a Bankrupt, and obtained Judgment before Bankrupt's Certificate was allowed by Ld. Chancellor, and the Certificate nor being allowed till after the Rules of Pleading were out, the Bankrupt had no Opportunity to plead his Certificate, and take the Benefit of the Act 4 Ann. but in the Scire Facias against the Bail the Certificate was pleaded, and the Plea over-ruled, so that the Bankrupt has no Relief but in Equity, or by Audita Querela, which is an Equitable Remedy at Law. A Motion was made by Sir Joseph Jekyll, for an Injunction; But Cowper C. denied the Motion, (though Sir Joseph Jekyll said, there were several Precedents of Injunctions of this Sort, but had none ready to produce) because this was a mer-

6. A creditor of B. brought an Action at Law, and having got Judgment, took him in Execution, on a Ca. Sa. Afterwards the Act of 5 Geo. was made, where by cap. 24. a Bankrupt, if he surrenders, is examined, and 4 Fifths in Value and Number of his Creditors sign his Certificate and testify their Content &c. is to be discharged. After which Statute a Commission is taken out against B. by C. B's Father-in-law, and A. is peremptorily to come in and be an Assizee to prevent the linking the Estate, and getting him discharged. The Estate of B. (besides what he had, before the Statute, made over to C.) was only some few Skilings and some desperate Debts. It was inferred that Fraud appearing, Equity would not interpose in Prejudice of an honest Creditor, and Favour of the Bankrupt, which Ld. C. Parker admitted. And as to A's coming in and proving the Debt, it was argued, that it might be thought necessary in order to prevent B's Discharge, and this his Lordship held reasonable. And that as to not retaining the Body, where all the Bankrupt's Estate was to be seised, here was no Estate left to seise, all that being made away to C. And that in this Case A's coming in, cannot be construed an Election to be paid out of B's Estate, and to a Waiver of his former Execution of the Body; for here being no Estate, there could be no Election, and A. proposing to waive any Benefit under the Commission, his Lordship said it ought to be accepted; and refused to discharge B. Wms's Rep. 360. Trin. 1719. Ex Parte Salkeld.

7. Such Creditors of a Bankrupt as come in under the Commision, by which all the Bankrupt's Estate, both Real and Personal (by Means whereof he should pay his Debts) was seised, shall not be allowed to impress the Bankrupt for not paying those Debts. Per Ld. C. Parker, who said he would Order his Discharge out of Custody, as to any Action brought by those, who had come into the Commission of Bankruptcy, and had sought Relief thereby. And though it was objected that he ought not to be discharged, till he had perfected his Examination, yet the Court held the contrary; for it did not appear that he had been in Contempt or relufed: But if he had, yet when the Commission was irregularly sued out, there ought not to be any Proceedings upon it by Way of Examining the Bankrupt or otherwise. Wms's Rep. 612. Hill 1719. Ex Parte James.

8. A Creditor petitioned the Ld. C. Parker against the Allowance of the Bankrupt's Certificate, who in Consideration of the Plaintiff's withdrawing his Petition gave him a Bond for the whole Debt. The Certificate was afterwards allowed, and the Creditor sued the Bankrupt, who pleaded the Act of 5 Geo. 2. and that the Bond was obtained in Order to procure his Discharge; But Ld. C. Parker refused to relieve the Bankrupt, and dismissed his Bill with Costs. Wms's Rep. 629. Pech. 1726. Lewis v. Chafe.

9. A Question was, concerning the Form of Certificates on the late Act. But per Ld. C. Parker, the Commissioners are to certify One Day, that the Bankrupt has in all Things conformed &c. And then the next Day, the Creditors certify on the fame Parchment their Consent, at the Foot of which the Commissioners are to certify, that the Creditors had consented according to the Terms of the Act. Trin. 6 Geo. Burdock's Cafe.

10. A Bankrupt in Bond, was sued for a Debt on Bond, before his Certificate allowed, but he had surrendered his Effects and submitted to be examined, and his Certificate not being allowed, he pleaded Non factum, and Judgment was given against him. He had afterwards a Certi-
Creditor and Bankrupt.

Certificate allowed and confirmed. The Obligee Three or Four Years afterwards brought a Scire Facias upon the Judgment, and the Defendant pleaded the Stat. 5 Anne; and that the Cause of Action accrued before his Bankruptcy, and upon Issue joined, it was found against the Bankrupt, he (as was alleged) not being able to get the Commission, or a Copy thereof, to produce at the Trial, and the Plaintiff after had Judgment. The Plaintiff got an Injunction, but the Matter of the Rolls, upon Hearing, didmit it, as a Matter wholly at Law; But upon Appeal, Ld. C. Macclesfield reversed the Decree, but seemed to admit that were the Cafe only Matter of Mispleading Equity should not relieve, but upon the several Circumstances of the Cafe a perpetua Injunction was granted. 2 Wms's Rep. 70. Trin. 1722. Blackhall v. Combs.

11. A Creditor came in under the Commission and proved his Debt, and afterwards arrested the Bankrupt, who now prayed to be discharged. Ld. C. King said, it has been the Construction of Equity upon Statute of 1 Anne cap. 12. which discharges the Bankrupt of his Debts on a Certificate by 4 ths of his Creditors, and allowed by the Chancellor, that where a Trader becomes a Bankrupt and any one of his Creditors comes in before [under] the Commission to prove his Debt, that the Design only to oppose the Bankrupt's Certificate, yet this is an Election to take his Remedy for his Debt under the Commission, and if pending that, the Creditor sues and arrests the Bankrupt, it is taken to be an Oppreftion; and ordered the Creditor, at his own Expenfe, to discharge the Bankrupt out of Custody. 2 Wms's Rep. 394. Mich. 1726. Anon.

12. But if such Creditor will waive any Benefit under the Statute, and stay a reasonable Time, and there is an Improbability of the Bankrupt's being able to gain his Certificate signed by 4 ths in Number and Value of the Creditors, or allowed by the Court; in such Cafe if the Creditor applies to the Court, declaring his Content to waive any Right, or Share of the Bankrupt's Eftate under the Commission, and praying that he may sue the Bankrupt; Ld. C. King thought it reasonable for the Court to give Leave to such Creditor to proceed at Law against the Bankrupt for his Debt. 2 Wms's Rep. 395. Mich. 1726. in an Anon. Cafe.

13. On a Joint Commission against Two Partners, the separate Creditors though they have taken out separate Commissions, shall yet be at Liberty to come in to oppose the allowing of the Certificate. 3 Wms's Rep. 23. Hill. 1729. Horfey's Cafe.

14. Where Two Partners are Bankrupts, and a Joint Commission is on the thing taken out against them, if they obtain an Allowance of their Certificate, other Hand, this will bar as well their separate as their Joint Creditors. 3 Wms's Rep. 24. Hill. 1729. Horfey's.

A Bankrupt, and on a separate Commission being sued out against him, his Certificate is allowed, this does not only discharge the Bankrupt, of what he owed separately, but also of what he owed jointly, and on the Partnership Account, because by the Act of Parliament the Bankrupt, upon making a full Discovery, and obtaining his Certificate, is to be discharged of all Debts. Now as the Debts he owes jointly with another, are equally his Debts as what he owes on his separate Account, consequently he is to be discharged of both his joint and separate Debts; And it is has been determined by the Judges of B. R. by the Lord Chancellor Parker. 3 Wms's Rep. 24, in a Note cites 3 July 1721. Ex Parte Yale.

15. 5 Geo. 2 cap. 30. S. 10. No Discovery shall intitute such Bankrupt to the Benefits allowed by this Act, unless the Commissioners, or the Major Part of them, shall under their Hands and Seals certify to the Lord Chancellor, that such Bankrupt has made a full discovery of his Eftate, and in all Things conformed himself according to the Directions of this Act, and that there does not appear to them any Reason to doubt of the Truth
Truth of such Discovery, and unless Four Parts in Five in Number and Value of the Creditors, who shall be Creditors for not less than 20l. respectively, or some other Person by them duly authorized, shall sign such Certificate, but the Commissioners shall not certify till they shall have Proof by Affidavit, or Affirmation in Writing, of such Creditors, or of the Person by them authorized, signing the Certificate, and of the Power by which any Person shall be authorized to sign for any Creditor, (which Affidavit or Affirmation, together with such Authority to sign, shall be laid before the Lord Chancellor, with the said Certificate) and unless such Bankrupt make Oath, or solemnly affirm in Writing, that such Certificate was obtained without Fraud; and unless such Certificate shall, after such Affidavit or Affirmation, be allowed by the Lord Chancellor, or by such Two of the Justices of B. R. C. B. or Barons of the Exchequer, to whom the Consideration of such Certificate shall be referred by the Lord Chancellor, and any of the Creditors of such Bankrupts are to be heard, if they think fit, against the making such Certificate, and against the Confirmation thereof.

16. 8. 13. If any Bankrupt, who shall have obtained his Certificate, shall be taken in Execution, or detained in Prison, on Account of any Debts owing before he became Bankrupt, by Reason that Judgment was obtained before such Certificate was allowed, it shall be lawful for any one of the Judges of the Court, wherein Judgment has been so obtained, on such Bankrupt’s producing his Certificate allowed, to Order any Sheriff or Gaoler, who shall have such Bankrupt in his Custody, to discharge such Bankrupt without Fee.

17. Where a Bankrupt is in Execution before the Commissioners, and the Creditor comes in and receives a Dividend out of the Estate, the Court will put him to his Election either to discharge the Bankrupt, or renounce the Dividend, and this in Conformity to the Law, where if the Credit- tor will take the Debtor in Execution, he cannot afterwards take Execution by Fi. Fa. because the Body is deemed a Satisfactory; But otherwife, if Creditor takes a Fi. Fa. first and leaves short &c. there, he may take a Ca. Sa. afterwards and sue both. And here A. sued out a Commission of Bankruptcy against B. 1726, and after in 1727, received a Dividend of 2 s. 6 d. in the Pound, and now lately took B. in Execution for the Reft of his Debt, and now B. petitioned to be discharged, but was denied; Per Ld. Chancellor. MS. Rep. Mich. Vact. 1733. Ex Parte Blewin.

18. Per Ld. Chancellor. Though a Creditor of Bankrupt under 20l. is by the last Act excluded from Affent or Diftinent to the Certificate, yet as he is affected by the Consequence of allowing the Certificates, he hath Right to Petition, and show any Fraud against allowing the Certificate. MS. Rep. Mich. 1734. Ex Parte Allen.

19. Bankrupts in Prison on a false Process at Suit of A. pray’d that A. might make Election, whether he would come in under Commission, or take his Remedy at Law. Per Ld. Chancellor, A. may take a special Election, to take his Remedy at Law, and to come in under the Commission, so far as to prove his Debt and affent or dissent to Certificate, because that will affect his Remedy at Law, but he is to waive any Dividend or further Benefit under the Commission, and accordingly A. made his Election in this Case. MS. Rep. Mich. 1734. Ex Parte Hofey.

20. F. having proved a Debtf 2000l. under Commission of Bankruptcy against one L.—and paid Contribution, and yet had L. in Execution for his Debt.—An Order was made by the late Lord Chancellor, that F. should either discharge L. or lose his Dividend.—And Creditors having certified, that 4 5ths in Number and Value of Creditors had consented to L’s Discharge exclusive of F. he now petitioned against allowing of Certificate, and that he might be admitted to come in, so far under Commission as to have Liberty to affent or dissent. Lord Chancellor said,
Credit and Bankrupt.

said, that it was settled on great Debate, that a Creditor might be at Liberty to elect to proceed at Law, and notwithstanding have Liberty to elect or dissent to Certicate. The Cae of putting Creditor to Election is but modern in Favour of Bankrupt. But if that Election is made in general Terms, and in Consequence the Creditor is to be excluded from a Liberty of dissenting to the Certificate, the rest of the Creditors are not only to take all the rest of the Effects, but have it in their Power by allowing the Certificate to bar the other’s Debt &c. So that permitting such Creditor to dissent or dissent to the Certificate is not to give him a Benefit but to prevent his being hurt, and the Iaff Statute about Bankrupt’s mentions 4 5ths of Creditors who shall have proved their Debts, and not who proved &c. and fought Relief, and it would be hard to put it in the Power of a few small Creditors, by consenting to the Certificate, to preclude the other of his Debt, and therefore as the Court by equitable Construction puts a Creditor to his Election of abiding by his Remedy at Law on coming in to have his Dividend under the Commission, fo by the same Rule of Equity, such Creditor renouncing any Benefit under the Commission should not be hurt, therefore let F. be at Liberty to make a Special Election. MS. Rep. Trin. Vac. 1734. Ex Parte Fenwick.

(T. a) Discharge. How it affects a Joint Debtor who is not a Bankrupt.

1. 10 Anne, cap. 15. The Discharge of a Bankrupt by Virtue of the Act 4 Anne, or by any other Act relating to Bankrupts, from the Debts by him owing at the Time he became a Bankrupt, shall not be intended to discharge or release any other Person, who was Partner in Trade with the Bankrupt at the Time he became a Bankrupt, or who stood jointly bound, or had made any joint Contract with him for the same Debt from which he was discharged; but notwithstanding such Discharge, such Partner shall stand chargeable.

(U. a) Gaoler &c. Punishment.


2. 5 Geo. 2. cap. 39. 8. 19. The Gaoler shall upon request of any Creditor, having proved his Debt, and producing a Certificate thereof under the Hands of the Commissioners, (which the Commissioners are to give Gratis) produce such Person so committed; and in Case such Gaoler shall refuse to
Creditor and Bankrupt.

flow such Person so committed, and being in his actual Custody at the time of such Request, to such Creditor requesting to see such Person, such Gaoler shall forfeit 100l. for the Use of the Creditors, to be recovered by Action of Debt, in the Name of the Creditor requesting such Sight.

(W. a) Proceedings &c. of Commissioners to be recorded.

1. 5 Geo. 2. cap. 30. UPON Petition of any Person, the Lord Chancellor may Order such Commissions, Depositions, Proceedings and Certificates, to be entered of Record; and in Case of the Death of the Witnesses proving such Bankruptcy, or in Case the said Commissions, or other Things shall be lost, a Copy of the Record of such Commissions or other Things signed and attested as herein is mentioned, may be given in Evidence to prove such Commissions, and Bankruptcy or other Things; and all Certificates which have been allowed, or to be allowed and entered of Record, or a true Copy of every Certificate, signed and attested as herein is mentioned, shall and may be given in Evidence in any Courts of Record, and, without further Proof, taken to be a Bar and Discharge against any Action for any Debt contracted before the signing of such Commission; unless any Creditor of the Person that has such Certificate, shall prove that such Certificate was fraudulently obtained.

2. And the Lord Chancellor shall appoint a Place near the Inns of Court, where the Matters aforesaid shall be entered of Record, where all Persons shall be at Liberty to search, and the Lord Chancellor shall by Writing appoint a proper Person, who shall (by himself or Deputy to be approved by the Lord Chancellor by Writing) enter of Record such Commission and other Things, and have the Custody of the Entries thereof; and also appoint such Fee for his Labour therein as the Lord Chancellor shall think reasonable, not exceeding what is usually paid in like Cases; and the Person so to be appointed, and his Deputy, shall continue to enter of Record all the Matters aforesaid, and to have the Custody of the same, so long as they shall behave themselves well; and shall not be removed but by Order in Writing under the Hand of the Lord Chancellor, on good Cause therein specified.

(X. a) Compositions between Creditors and Bankrupt; and Pleadings thereof.

1. F. Being a Goldsmith in London, and being disabled, agreed with most of his Creditors to affray over all his Estate upon Oath to several Persons in Trust for the Payment of his Debts, as far as his Estate would pay, be having such Allowance for himself and Family as was agreed upon; and most of the Creditors signed the said Agreement. But some of the Persons that signed, finding that F. had done some Act of Violation of the Agreement, took out a Commission of Bankruptcy against the said F., and seized all the Estate they could come by, and pretended that some
Creditor and Bankrupt.

In one of the Creditors aforesaid, that signed the Agreement, and that were not privy to the suing out the Commission, had Notice in due Time, though they had neglected the same, and that it was seven Months from the Date of the Commission before the Commissioners aigned. And F. and other the Persons concerned in the first Agreement, and excluded by the Commission of Bankruptcy, being not comprized, as aforesaid, preferred their Bill against the Allegiance of the Commission of Bankruptcy, to have the Agreement performed, or at least to be admitted to an equal Dividend with them. But this Court would give no Relief therein; and the rather, for that it was made appear that F. had made a Sale of some of the Goods he aigned to the Creditors; but dismissed the Bill.


2. Scire Facias on a Judgment, the Defendant pleaded a Composition for 2 s. in the Pound; ita quod it be paid within five Years after the major Part of his Creditors in Number and Value shall subscribe the same Composition, and after the Defendants should be discharged from Imprisonment; and upon a Demurrer to this Plea, Holt Ch. J. was of Opinion, that a Composition by Virtue of the Statute must be final, and such as will bind the Defendant, and from which he cannot vary, that those Words ita quod, in Things Executory (as in this Case) make a Condition precedent, but in Estates Executed, they make a Condition subsequent, and so is Littleton to be understood. That the Payment of 2 s. per Pound, being a Condition precedent to this Agreement, and wholly the Power and Will of the Defendant till it is paid, it is therefore no Debatable Agreement, and consequent not within the Statute; and this Agrees with the Plaintiff.

3. An Objection was made to a Composition, for that this Agreement appeared to be only to, for, and with those Creditors who were Parties, and had signed the Composition; but this Objection was disallowed, because the Statute makes this an Agreement for the Ref. 3 Salk. 59. pl. 1. Paich. 12 W. 3. in B. R. Feltham v. Cudworth.

4. The Statute of Two Thirds in Number and Value was pleaded in Bar, and the Defendant, to bring himself within the Benefit of the Statute, shews, that he abscended at the Time mentioned by the Statute, but did not prove for what he abscended; and for this the Plaintiff had Judgment on Demurrer. 7 Mod. 83. Mich. 1 Anne B. R. Greenway v. Freeman.

5. When one pleads the Statue of Two Thirds, if he would take Advantage of the Clause of being in Custody, he must shew it to have been on the 17th November; if of the Clause of abscending, he must shew he abscended for Debt at the Time of the Statue made. And Holt said, he took the Statue to be a private Law; for though it concerned a great many, yet it concerned a particular Sort of People; and here the Plaintiff had Judgment, because the Defendant did not shew in his Plea, that he had abscended at the Time the Act made, but only said it was on the 17th of November. 7 Mod. 96. Mich. 1 Anne B. R. Nicholl's Cafe.
(Y. a) Pleadings and Evidence.

1. 1 Jac. 1. cap. 15. If any Action shall be brought against any Com-
millioner, or other Person, having Authority under the Commission for any Matter, by force of the said Statute [13 Eliz.] or this Statute, the Defendants may plead Not Guilty, or Jullity, that the Aff whereof the Plaintiff complained, was done by Authority of the said Afs 13 Eliz. cap. 7. or this Afs, without expressing any other Matter of Circumstance contained in either of the said Afs, whereasunto the Plaintiff shall be admitted to reply, that the Defendant did the Act supposed of his own Wrong, without any such Cause alleged by the said Defendant, whereasupon Issue shall be joined.

2. In Debt on the Statute of Bankrupts Plaintiff counts on the Debt due unto him, Et quod vigore Statuti praeeditum accipiet, it was urged, That there being two Statutes of Bankrupts, the Statute of 13 Eliz. cap. 7. and 1 Jac. cap. 15. and other Statutes before, and the Statute 1 Jac. cap. 15. gives the Action, and so the Declaration is uncertain; and for this Cause is bad and insufficient. Fleming Ch. J. held the Declaration is clearly good, notwithstanding the Exception taken; for it is plain that these Words in the Declaration, (vigore Statuti praeeditum accipiet) shall be referred unto the Statute, which gives the Action unto the Creditor upon the Assignment by the Commissioners, and this is only the Statute of 1 Jac. cap. 15. There are general Statutes, and so Notice is to be taken of them; and in this the whole Court agreed; and Judgment for the Plaintiff. 2 Bulst. 26. Mich. 10 Jac. Powell v. Stuff and Timewell.

3. Debt upon an Obligation assigned by the Commissioners of Bank-
rupes, and does not follow the Obligation; wherefore it was demurred. And because he comes in by Aff in Law, and has no Means to obtain the Obligation, it was adjudged to be good enough, without shewing it in Court; As Tenant by the Statute Merchant, or Tenant in Dower, shall have Advantage of a Rent Charge, without shewing the Deed. Cro. C. 209. pl. 5. Hill. 6 Car. B. R. Gray v. Fielder.

4. In Audita Querela, the Plaintiff counted that Sir H. B. to whom he was Indebted, became a Bankrupt, and that certain Creditors had his Debt assigned to them, and that one of them accepted part of his Debt in satisfac-
tion of the Whole; but because he did not shew what were the Debts of the Creditors, that so his Payment might appear proportionable to the Debts, the Defendant demurred; Sed per Cur. it is well enough, especially being an Action by one that is a Debtor, and the very Assignment is a Sufficient Bar against the Parties; and if there were Surplusage, the Defendant hath Remedy in Chancery. Judgment for the Plaintiff. Keb. 491. pl. 49. Patch. 15 Car. 2 B. R. Fitzwilliam v. Lewis.

5. Scire Facias against the Executors of B. upon a Judgment against their TEsator, they plead, that he was a Trader, and indebted to several Persons, and that upon their Petition to the Ld. Chancellor, a Commis-
sion of Bankruptcy issued against him, and that by reason of the Death of King Charles II. a new Commission issued in time of King James II. and aver'd the said last Commission to be still depending; and upon De-
murrer it was held that this Plea is ill; because the Defendants did not allege, that their TEsator was a Bankrupt at the Time of the Petition exhib-
ted, or at the Time when the Commission issued against him. The Court held
held this Exception incurable, because by the Statute 13 Eliz. cap. 7.
the Bankrupt is described in the first Place; and then the next Para-
graph gives the Lord Chancellor Power to grant Commissions against
Perfons therein described, being Bankrupts; and that all the Precedents
are with Averments of the Bankruptcy. 2 Lutw. 1273. Hill. 3 & 4.
Jac. 2. Gubbs v. Backwell.

6. It was ruled in this Case, that, in pleading a Man to be a Bank-
rupt, it is sufficient to say, that he became a Bankrupt ad annum intentions
separata Statuta, without setting forth any particular Act of Bankruptcy, as
departure out of the Kingdom, taking Sanctuary, or keeping his House,
and abconding there. Comb. 108. Patch. 1 W. & M. in B. R., Betts
v. Lowe.

7. In an Indebtitatus Assumpsit the Defendant pleaded, that the Plain-
tiff became a Bankrupt, and Commission was taken out, and so all his Goods
&c. belonged to the Commissioners &c. The Plaintiff demurred and had
Judgment; for till an Alignment the Property of the Goods is not
transferred out of the Bankrupt. 1 Salck. 108. Patch. 1 W. & M. in
B. R. Cary v. Crip.

8. In a special Assumpsit brought by Assignee of Commissioners of Show. 7;
Bankrupt, he need not prove how the Person became Bankrupt; adjudged.

But the Reporter adds Quere, if good.

9. Through Commissioners upon the Statute of Bankrupts have an Au-
thority under the Great Seal established by Act of Parliament, yet, if
they declare a Man Bankrupt that is not so, he may recover the Bank-
ruptcy, and try it in B. R. Arg. 4. Mod. 116. Trin. 4 W. & M. in

10. In Prover by Assignee of Commissioners of Bankrupt against De-
fendant who pretends to have satisfied the Goods for Rent, Note. The 159. Meggot
Commission must be proved, and the Assignee must prove an Act of Bank-
ruptcy, as well as the Alignment by the Commissioners, and Prima
Facie it shall be intended, that the Assignment was executed at the
Time it bears Date, (which is but two Days before the Action brought)
by the Witnese not remembering the precise Day, but it appearing that
the Date was erased, Holt said, he expected better Proof, and then
do not appeal.
B. R. Meggot v. Watton.

11. If the Petition to the Ld. Chancellor, mention'd in the Declara-
tion, recites, that the Bankrupt was indebted in 305. and the Petition pro-
duced at the Trial recites, that he was indebted in 150. yet, that is no
Holt Ch. J. at Thetford Assizes, Kirne v. Smith.

12. There is no need to produce at the Trial the Petition to the Ld.
Chancellor; because it may have been by Parol, though the Practice
has been otherwise; Ld. Raym. Rep. 741. Ruled by Holt Ch. J. at

13. In an Action by Assignees of Commissioners of Bankrupts, they
As to the need not set out the Proceedings of the Commission and Commissioners at
large, Arg. 2 Ld. Raym. Rep. 1543. cites Lutw. 274. [Hill. 12
W. 3.] Lawton v. Lamlb, and that in Lutw. 451. [Slaugh-
ter v. Pierrepont.] It was held, that it need not appear in a Plea of
Alignment by Commissioners of Bankrupts, that the Bankrupt was in-
deuted in 100.

declaring hath been allowed upon the Authority of a great Number of Precedents; But as to the other
Case in Lutw. 451. of a Plea that was long before the Statue of 5 Geo. 1. Cap. 24. Par. 22. which
14. In Debt the Defendant pleaded in Bar that the Plaintiff was a Grocer and Indebted, and became a Bankrupt; and that upon a Commission taken out he was declared a Bankrupt, and that the Debt for which the Action was brought against the Defendant, was assigned to his Creditors &c. The Plaintiff took Issue that he did not become Bankrupt. Lutw. 701. Trin. 1 Ann. Hepworth v. Haigh.

15. An Action brought against a Bankrupt, the Defendant pleads the Statute of Bankrupts, (in which it is said, That the Person, who does as the Affidavit, may plead the general Issue,) and that he manifestly became a Bankrupt before the Day &c. Holt Ch. J. said, this Plea will not do; for when a Statute gives a Plea, it must be pleaded in the Words of the Statute. 11 Mod. 207. pl. 9. Hill. 7 Ann. B. R. Hull v. Holiday.

16. In Action upon several Promises brought by Assignees of a Commission of Bankrupt, the Declaration was, That in Consideration the Defendant was indebted to the Bankrupt for Goods sold and delivered &c. he promised to pay the Assignees. After Verdict on Non Assumpsit &c. it was moved in arrest of Judgment, that the Promise ought to have been made to Bankrupt, sed non allocat', per Cur. for the Debt being assigned to the Assignees, that is a good Consideration. There are two Ways of declaring. 1st. As here upon express Promise to the Assignees. 2dly, Assignees may bring such Action as the Bankrupt; As he may have an Indebitatus Assumpsit, so may they. Et Judic. pro Quer. Pach. 12 Ann. B. R. Fahion v. Dornett.

17. In an Action brought by Assignees under a Commission of Bankruptcy, against the Executive of S. J. R. the Plaintiff declared, that the Defendant promised to pay them, but did not, by Means of which they brought this Action; the Defendant pleaded, that he never made such Promise to the Bankrupt, and upon that the Plaintiff demurred. But the Court said, that if the Defendant had by his Plea denied the very Words of the Declaration in this Point, the Plaintiff would have been bound at the Trial to have proved a Promise actually made to themselves. They took this to be exactly like the Case of an Executor, and accordingly gave Judgment for the Plaintiff. 2 Barnard. Rep. in B. R. Mich. 3 Geo. 2. Skinner v. Rebow.

18. Debt for Rent by G. against B. a Bankrupt, and Judgment before the Certificate was allowed, so that he had no Opportunity to plead it, and take the Benefit of 4 Ann. But in the Sci. Eec. against the Bail, the Certificate was pleaded, and the Plea over-ruled, so that the Bankrupt had no Relief but in Equity, or by Audita Querela, which is an equitable Remedy at Law. But Cowper Chancellor denied an Injunction, because this was a merciful Law made in favour of the Bankrupt, and in prejudice of Creditor, and therefore not to be extended in Equity further than at Law. Mich. 3 Geo. Canc. Bagthall v. Gore.

(Z. a)
(Z. a) Equity.

1. PROOF of a Debt disallowed by Commissioners of Bankrupt, the Court will hear the Proof. Chan. Cases 275. Pash. 28. Car. 2. Anon.

2. Bill for Relief against Bonds &c. given to the Bankrupt, but suggested to be paid, and therefore prays to have them deliver'd up and cancel'd; a Creditor of the Bankrupt's, to whom the Bonds &c. are assigned by the Commissioners, must be made a Party. Fin. Rep. 265. Mich. 28 Car. 2. Ford v. Lear and Key.

3. Bill by Creditors against the Assignees of a Bankrupt to have a Debt recovered by the Assignees distributed among the Creditors, without being paid into the Hands of the Assignees, as fearing, by Payment to the Assignees, their Parts may be lost; decreed, to be distributed among the Creditors and Assignees, according to their several Proportions, by the Person against whom the Recovery was, who was one of the Plaintiffs in this Cause, and a principal Creditor. Fin. Rep. 264. Trin. 28 Car. 2. Hawkins & al. v. King & al.

4. Bill for Account and Discovery of Money receiv'd by Defendant for one that became Bankrupt; Defendant pleaded, he receiv'd it only as Mensual Servant to the Bankrupt, and had accounted for it to him already, and that the Commissioners had already examin'd him on Interrogatories, the Plea was over-ruled. Vern. 95. pl. St. Mich. 1682. Wagstaff v. Bedford.

5. Bill for Discovery of a Bankrupt's Estate; the Defendant demurred, 3 Wms's because the Bankrupt was not made a Party, and the Demurrer was allow'd. 2 Vern. 32. pl. 23. Hill. 1688. Sharpe v. Gamon.

6. Bankrupt is taken in Execution pending the Reference of his Certificate to the Judges, though it appears that the Debt was discharged by the Statute, yet the Court would not discharge him, but put him to his Audita Querela. 2 Vern. R. 697. in Cafe of Goodwin; cites it as the Cafe of Baily v. Robinson. Trin. 6. Ana in B. R.

7. A Bankrupt having flipt his Time of pleading his Certificate to a Debt precedent to the Bankruptcy, is not to be relieved in Equity; and per Harcourt C, the Statute is binding in Equity, as well as at Law. 2 Vern. 696. Trin. 1715. Goodwin's Cafe.

8. 5 Geo. 2. Cap. 30. 3. 38. No Suit in Equity shall be commenced by Assignees, without the Consent of the major Part in Value of the Creditors present at a Meeting purfuant to Notice in the Gazette.

For more of Creditor and Bankrupt in General, See other Proper Titles.
Cui in Vita.

(A) Who shall have it, and in what Cases.

1. Westm. 2. 13 E. 1. cap. 15. GIVES a Cui in Vita to the Wife for Recovery of her Land left by the Husband's Default in his Life Time.

2. Recovery by Sufferance is Alienation, and therefore the Feme shall have Cui in Vita, after the Death of her Husband, of a Recovery so suffered. Br. Cui in Vita Pl. 19. cites 4 E. 3.

3. If Judgment of Forejudging be given against Baron and Feme, this is not Void but Error, and the Feme shall not have Cui in Vita. Per Cui in Vita. Pl. 14. cites 9 E. 3. 2.

4. In Affise if a Man leaves to Baron and Feme for Life, and the Baron aliens in Fee, the Lessee may enter and recover by Affise if he be ousted, notwithstanding that, the Feme may have Cui in Vita, after the Death of her Husband. And fo see that the may have Cui in Vita notwithstanding the Alienation and the Entry; for the Title of Entry is not given but by the Law, for the Alienation and the Title of the Feme is by the Demise before Notice. Br. Cui in Vita. pl. 9. cites 11 Aff. 11.


6. The Heir of the Feme shall have Cui in Vita and not Affise, Br. Entre Cong. pl. 23. cites 21 E. 3. 6.

7. In Affise the Baron and Feme were seized in Feme, and the Baron intestating E. in Fee, but the Feme held her in, claiming her first Estate, and the Baron by Licence and Will of E. the Feodarie, re-enter'd and took the Profits, and after E. died, his Daughter and Heir being in the Ventry of his Feme Mother to the Daughter, and after the Baron died, and the Feme claimed by her First Interest, and continued Post Mortem Vivi by Ten Years, and the Plaintiff in Affise entered because the Feme was his Niece, and the Daughter of E. the Feodarie, was born and entered, and well, by warrant, and the Lord of the Niece brought Affise against the Daughter and Heir of E. the Feodarie, and was barred, quod nota; for the Feodiment of the Baron was a Discontinuance, so that the Entry of the Feme was not lawful; but the suit to her Cui in Vita. Br. Entre Cong. pl. 56. cites 21 Aff. 25.

8. It appears by Judgment in Affise, that where Baron and Feme are Tenants for Life, the Remainder to A. in Tail, and the Baron aliens in Tail, and A. has issue and dies, the Issue may enter for the Alienation to his descenditence notwithstanding that the Feme covert be alive; for the shall have Cui in Vita after the Death of her Baron. Br. Cui in Vita. pl. 10. cites 43 Aff. 17.

Br. Cui in Vita, pl. 23. cites S. C.
Cui in Vita.

143

the Writ awarded good, upon the Alienation made by the Tenant himself; for if he makes Discontinuance, and after divers Degrees, repurchases the Land again, the Writ is well brought as above, and the Writ awarded good, notwithstanding that it appeared that was one and the same Person. Br. Entre in le per. pl. 3. cites 44 E. 3. 45.

10. Baron and Feme and a Third are sued in Fee, the Baron alienated and died; Cui in Vita does not lie for the Feme; For the and the Third may join in Writ of Right. Br. Extinguishment, pl. 43. cites 35 Aff. 15. and Fitzh. Cui in Vita 20.

a Cui in Vita of a Motely, being the third Jointenant, but that such Alienation seems to be a Severance of the Jointure, and refers to Pech. 16 E. 3. Cui in Vita in the Abridgment.

11. But if the Third dies, the may have Cui in Vita of all, and so Action suspended is now revived; but it seems it was never suspended; For it was not given to her till after the Death of the Third. Ibid.

12. If a Man is sued in Jure Uxoris, and W. recovers against him by F. N. B. Default, and the Baron dies, the Feme shall have Cui in Vita, and S. P. but not Quod ei deforceat; Per Moyle J. quod non negatur. Br. Cui in Vita. pl. 12. cites 2 E. 4. 13.

were a Demise made by the Husband; for otherwise the should be without Remedy; for she cannot have a Quod ei deforceat.

13 If the Husband discontinues the Land of the Wife, and she brings a By Accept-Writ of Dower, she is concluded to have a Cui in Vita; Per Walmiley J. Ow. 154. cites 10 E. 4.

shall be bard'd in Cui in Vita in the Residue. F. N. B. 194. (B)

14. If Baron and Feme are implored by him, who has good Title, and the Baron confesses the Action, the Feme has no Remedy. But by the Statue of Welfm. 2. cap. 3. upon the Render of the Baron the Feme may be received; but where the Baron and Feme are received in Default of the Tenant for Life by Reversion in Jure Uxoris, there the Baron cannot confess the Action; for he is received to defend the Right of his Wife. Br. Cui in Vita. pl. 23. cites 7 E. 4. 17.

15. If Recovery is had by Default in a Writ of Waft, the Feme after the Death of her Husband shall not have Cui in Vita. Quere Whether because it is not merely by Default, or because no Land is in Demand by the Writ of Waft, or if the shall have Quod ei deforceat upon such Recovery? Br. Cui in Vita: pl. 22. cites 9 E. 4. 16.

16. The Writ of Cui in Vita lies, where the Husband aliens in Fee the Right of Inheritance of his Wife, or the Freehold of his Wife by Feeolment, or grant for Life, or in Tail; then after the Death of the Husband, the Wife shall have Cui in Vita contradicere non potuit; and the Writ lies where the Wife has an Estate for Life or in Tail, and the Husband aliens that Estate and Title of the Wife's, then the Wife after his Death shall have that Writ. F. N. B. 193. (A)

17. And if the Wife does not bring the Writ during her Life, then if she had an Estate in Fee Simple, her Heir shall have a Writ, which is called Sur Cui in Vita after her Death. And if the Wife have an Estate in Tail, and her Husband aliens, and makes a Feeolment of that Estate; then if the Wife dies, her Heir shall have a Writ of Formedon in the Descender to recover that Estate, and not a Writ of Sur Cui in Vita; for those Writs of Cui in Vita, and Sur Cui in Vita, are Writs founded upon the Common Law, of an Estate in Fee Simple; for there was
no other Estate at the Common Law, which would deicide, but a Fee
18. If the Husband and Wife exchange the Land of the Wife for
other Lands, if the Wife agreed unto the Exchange after the Husband's Death,
the shall not have a Cui in Vita. F. N. B. 194. (A).
19. The Husband gave the Land of the Wife to f, who gave other
Land to the Husband and Wife, and to her Son of the Husband, and to
the Heirs of him who survived, and that was pleaded by Exchange in Bar,
in a Cui Fita and holden in Bar. F. N. B. 194. (B) in the Notes in the
Vita 10.
20. So if she accepts a Rent where she and her Husband makes a Fe-
21. The Aunt and the Niece may join in a Writ of Sur Cui in Vita,
upon an Alienation made by the Husband, their Common Ancestor;
or upon a Recovery had against the Husband and Wife, who was the
Common Ancestor to them, if the Second Husband aliens the Lands
of the Wife, and he and his Wife die, and the Issue of the Wife and
the first Husband shall have a Sur Cui in Vita against the Alience,
although the Second Husband be living, if he were not intitled to be
Tenant by the Curtel of; but if the Second Husband be intitled to be
Tenant by the Curtel, then the Issue of the First Husband shall not
have a Sur Cui in Vita during the Life of the Second Husband. F. N.
B. 194. (D.)
22. Two Barons of Femes Juntentains alien jointly and die, their
Femes Survivors shall have several Cui in Vita; because the Coverture
is the Cause of the Action, the which is several; for the Coverture of
the one, is not the Coverture of the other. Keilw. 105 b. pl. 18. Cui
incerti temporis. Anon.
23. If Baron seised of a Copyhold in Right of his Wife surrender this
to the Use of a Stranger, the Wife cannot enter after the Death of the
Baron; For Copyhold is out of 32 H. 8. For this is intended of Free-
hold, but he ought to make his Plaint in Nature of a Cui in Vita.
24. Husband aliened the Lands of the Wife and afterwards they are
divorced and the Husband dies; the Wife shall not enter by the 32 H. 8.
but is put to her Cui in Vita ante Divortium. Le. 7, in pl. 10. Mich.
25 and 26 Eliz. B. R. Egerton Sol' Gen' cites it as Haddon's Cafe.
25. If Lands, during the Coverture, are given to the Husband and
Wife and their Heirs, this is Jus Uxoris within the Statute Wefhm.
2 cap. 3. 2 Int. 343.

(B) Writ and Pleadings.

1. N Cui in Vita of Land Quam clamat esse jus &c. de Dono Will &
Georgii &c. The Tenant said, that the Demantant had never any
Thing of the Gift of Will &c. And held a good Plea to the Writ. Thel.
Dig. 170. Lib. 11. cap. 52. S. 5. cites Trin. 4 E. 2. Briet 795.
2. In Cui in Vita of Land Quam clamat &c. de Dono Will' qui Hug.
quondam vivam suam & Islam inde jeffavit &c. The Tenant said, that
the Baron never had any Thing but as Baron of the Feme &c. And it was
held no Plea. Thel. Dig. 170. Lib. 11. cap. 52. S. 6. cites Pach. 5 E.
2 Br 799.
3. Cui in Vita supposing that the Tenant had not Entry unless by S. to whom her Baron leased; The Tenant said, that the Baron leased to S. and to Ages his Feme, Judgment of the Writ. And held no Plea. Thel. Dig. 170. Lib. 11. cap. 52. S. 4. cites Mich. 19 E. 2. Brief 813.

4. In Cui in Vita the Tenant pleaded Maintaincy by Feme with one A. and the Demandant said, that the Tenant had released all his Right to A. and so the Tenant is sole Tenant, and yet the Writ was abated. Thel. Dig. 226. Lib. 16. cap. 7. S. 7. cites 3 E. 3. It. North. Maint' de Br.' 13.

5. In Cui in Vita of a Manor given in Tail, if the Tenant pleads Nontenure of Parcel, it is sufficient for the Demandant to maintain, that the Tenant was Tenant of the Manor as intirely as the Manor was at the Tune of the Gift in Tail. Thel. Dig. 226. Lib. 16. cap. 7. S. 10. cites Trin. 4 E. 3. 163, and says, lce 4 E. 3. 122. 9 E. 3. 489. and 20 E. 3. Maint' de Br.' 10 in Formedon.

6. In Cui in Vita of a Manor, the Tenant pleaded Nontenure of Parcel, and the Demandant said, that the Tenant is Tenant intirely of the Manor in Demise as in Demise, in Service as in Service &c. and was not received, by which she said fully Tenant of the Manor according as the demands it, and the others e contra. Thel. Dig. 226. Lib. 16. cap. 7. S. 14. cites Mich. 5 E. 3. 207.

7. In Cui in Vita ifine may be taken upon the Demise supposed to be made by the Baron. Thel. Dig. 171. Lib. 11. cap. 52. S. 13. cites Paisch. 8 E. 3. 392.


9. In Cui in Vita the Writ was in good non habet Ingres, nisi potf di- Note, if the Writ be in missiouem quam A. quond. Vir &c. inde fect W. D. cui ipsa in Vita sua &c., which writ was abated; for it ought to be quam A. quondam vir &c. The Words cui ipsa in Vita sua &c. inde fect W. D. &c. Thel. Dig. 104. Lib. 10. Cui in Vita &c. are put.

10. In Cui in Vita, it is a good Plea to say, that the Demandant had accepted Part of the same Land for her Dower. Br. Execution, pl. 57. cites E. 3. 39.

11. Cui in Vita against Tho. and Will. & A. his Feme, who had not Entry unless by the Baron of the Demandant. Tho. disclaimed, and the Baron and Feme took the entire Tenancy, and said, that they entered by Tho. and not by her Baron, but they were compelled to answer to the Lease supposed by the Writ, by which they said as above Ages he, that the Baron leased to them 3 man & forma &c. and ifine thereupon, and held, that it went to the Action. Thel. Dig. 176. Lib. 11. cap. 54. S. 38. cites Mich. 29 E. 3. 60.

12. In Cui in Vita the Cale was, that the Baron seised in purse Xeris, Br. Bar. pl. gave the Land to Baron and Feme in Special Tail, the Remainder to T. in lcs cites Tail, seeing the Receiver to him and his Heirs. the Baron had lffe by S C

13. his Feme, the Baron and Feme died, and the lffe brought Cui in Vita against the Tenant, and they pleaded this Matter in Bar by this Git. having the Receiver to the Baron and his Heirs, and shewed Deed of it without Warranty, and sover'd, that Ages is defended in Fee to the Heir, who is Demandant, by the same Father, and so pleaded the Receiver for his Warranty and the Ages in Bar, and the Demandant demur'd, and because the Demandant by this Suit is to defeat the same Reversion and Warranty, therefore by Award the Demandant recover'd; For a Man P P.
shall not be bound by this Thing which he is to defeat by his Suit, quod nota. Br. Cui in Vita. Pl. 6. cites 38 E. 3. 32.

13. In Cui in Vita a Man seized in Jurc Usoris discontinued, and after several Alienations, he re-purchased; the Feme died, and the Heir brought for Cui in Vita against him by Name of W. B. quod reddat &c. &c in quod non habeat ingregium nisi post dimissionem, quam idem W. B. fecit &c. cui ipsa, the Feme, contradiceret non potuit, and Exception was taken to the Writ, inasmuch as it should be by a strange Name, & non allocatur, but the Writ awarded good. Quod nota. Br. Cui in Vita. pl. 24. cites 44 E. 3. 4. 5.

14. Cui in Vita against B. in que idem B. non habeat ingregium nisi post dimissionem quam predicitis B. cui ipsa &c. inde fictit so. D. &c. adjudged a good Writ, notwithstanding that it appears by the Writ, that the Tenant is the same Person who made the Lease, without giving diverse Names; For divers Meffe Eosumments may be made between the Demise and the Re-purchase. Thel. Dig. 177. Lib. 11. cap. 54. S. 41. cites Hill. 44 E. 3. 4. And says, it seems that the Writ was a Sur Cui in Vita.

15. Cui in Vita which he claims to hold to her and the Heirs of her Body ethicis, and did not shew of whose Gift, and therefore the Tenant pleaded it to the Writ, and it was abated by Award, quod non contradictur ibidem, that in Quod ei deforcerat, he need not shew of whole Gift. Note the Diversity. - Br. Cui in Vita. Pl. 2. cites 43 E. 3. 8.

16. Cui in Vita which he claims to hold to her and the Heirs of her Body of the Gift of W. N. The Tenant said, that she never had any Thing of the Gift of W. N. Prif. And per Belknap, clearly this is no Answer; For if she has of the Gift of one, or another if the Baron Aliens, they shall have Action, and the Writ shall say Quam clamauit efe jus &c &c. &c. &c. &c. therefore, that it be of a Purchase, and therefore every Word in a Writ is not traversable. Br. Cui in Vita. Pl. 3. cites 49 E. 3. 29.

17. In Cui in Vita which he claims to hold to her and the Heirs of her Body of the Gift of J. N. the Gift is not traversable, but the Alienation. Br. Traverfe per &c. pl. 43. cites 49 E. 3. 32.

18. So it be which he claims to be her Right and Inheritance, where it is of a Purchase, this is not traversable. Br. Traverfe per &c. pl. 43. cites 49 E. 3. 32.


20. In Cui in Vita of the Demise of the Baron of Land, which she held for Term of Life of the Demise of J. N. and the Tenant said, that she had nothing of the Demise of J. N. and admitted a good Answer. Per Cur. upon Argument of it; For where she makes Title, this Title ought to be a true Title, and there Fine upon Release made to Baron and Feme, and to the Heirs of the Baron by J. N. was taken no Demise; for it is suppos'd by it, that the Baron and Feme were in Possession at the Time of the Fine. Br. Cui in Vita. pl. 4. cites 50 E. 3. 6.

21. In Cui in Vita, where four are impleaded, three confess or make Default, and the fourth demands the View, the Demandant shall have Judgment of three Parts immediately, contra where the fourth takes upon him the entire Tenancy. Br. Judgment, pl. 22. cites 12 H. 4. 19.

22. And if the fourth is Tenant of the Whole, and does not take upon him the entire Tenancy, but demands the View, and he is ou'ted of three Parts by Execution upon a judgment against the other three, he shall have Abiun. Br. Judgment, pl. 22. cites 12 H. 4. 19.

23. In Cases Special, the Writ shall make Mention of whose Gift, Leafe, or Demise, he holds, contra of Fee Simple, For of Estate for Term
Cui in Vita.

Term of Life. The Writ shall say, Quam clamat tenere ad terminum Vita. ex diminutionem f. N. And of Ejacule Tail, Quam clamat tenere sibi & Hereditibus de corpore suo exunctibus de domo f. N. And of Fee Simple, Quod clamat esse suam furs, or jus & Hereditatem suam, without saying of whose Gift or Poffement, per Prior; and fo was the beat Opinion, which is not much deny'd. Br. Cui in Vita, pl. 7. cites 39 H. 6. 38.

24. If the Baron alienates the Land of his Feme with Warranty, and leaves Affets defended in Fee, and he and the Feme die, and the Heir alienates the Affets, and dies, his Heir shall be bar'd in Cui in Vita, by Reason that Allots was defended to his Father, because it was of Fee Simple; contra the Heir in Tail, who alienates such Affets and dies, his Ilfeu shall not be bar'd. Br. Cui in Vita, pl. 18. cites Vet. N. B. Formedon in Defender.

25. The Writ of Cui in Vita may be in the Per, Cui, and Post. F. N. B. 193. (E).

26. In a Cui in Vita the Grant, or Gift, alleged in the Writ, is not recoverable. F. N. B. 194 (G).

27. If a Man gives Lands to a Woman to marry her, and they marry, and afterwards the Husband aliens and dies, the Wife shall have Cui in Vita. F. N. B. 194. (H).

(C) Recover'd. What...

1. E N T R Y fur Diffellin per Cur. Where the Baron and Feme pur- S. P. the Echoes Land, and the Baron aliens and dies, the Feme may have Purchase being during the Cover- the Baron and the Feme during the Coverture, and therefore it is not Cure. F. N. good for any Moiety. Br. Cui in Vita, pl. 8. cites 19 H. 6. 45. B. 194. (B)

2. But if they purchase before the Coverture, and after inter-marry, and F. N. B. 194. the Baron aliens all and dies, the Feme shall have Cui in Vita of the (B) S. P. ac- Moiety and recover it, and the Alienation is good of the other Moiety; Note the Diversity; for it appears. Br. Cui in Vita, pl. 8. cites 19 H. 6. 45.

2. An Husband seised in Right of his Wife, and having in his own Cro. E. 234. Right, Lands contiguous to his Wife's Land, builds an House which ex- Pl. 7. Patel. teds 20 Feet Northward, and 12 Feet Eastward upon his Wife's Land. B. Hayes v. the rest of the House standing upon the Husband's Ground; The Wife Allen, S. C. dies without any Ilfeu had by her Husband; The Heir of the Wife, adjoind, brings a [Sur] Cui in Vita against the Husband, and demands the same; and Judges by the Name of his Wife, and had Judgment Pro tanto, as afore- said; Affirmed in Error. Tenk. 268. pl. 83.


For more as to Cui in Vita, See the Statue of Weftm. 2. 13 E. 1. cap. 40. at tit. Age. (I) pl. 9. &c. and other proper Titles.

Curtesy.
(A) Tenant by the Curtesy. Of what Seisin. Actual or not.


1. QUARE Impedit by the King against diverse, the Defendant made Title that the Advowson descended to three Coparceners, who made Partition to present by Turn, and that the Eldest had her Turn, and after the Second her Turn, and be married the Youngest and had Issue by her, and she died, the Church voided, so it belonged to him to Present, and did not allude that his Feme ever presented, so as the had Possession in Fact, and yet admitted that he may be Tenant by the Curtesy by the Seisin of Law, yet he the others. Br. Tenant per le Curtesy, pl. 2. cites 21 E. 3. 31.

Tenant by the Curtesy, because he could by no Industry attain to any other Seisin, Et Impotentia excusat Legem.—A Man shall be Tenant by the Curtesy of an Advowson, of which the Wife had the Inheritance, though it not avoided in her Time. Dod. of Advowson. 21—F. N. B. 149. (D) S. P.—1 Rep. 97 b. Arg. S. P. and says, the Rule of Law is so, and cites 9 E. 3. 66. a. b. and 3 H. 7. 5. a. The Baron shall be Tenant by the Curtesy of an Advowson, though the Feme never presented. Br. Tenant, per le Curtesy, pl. 9. cites 7 E. 3. 66 and Fifth Tit. Barre 293.—And notwithstanding the Advowson becomes void during the Coverture, and the Wife dies after the six Months palf, and before any Presentment made by the Husband &c. so as the Ordinary presents for Lapse to this Avoidance, yet the Husband shall present to the next Avoidance, as Tenant by the Curtesy &c. Perk. cap. 6. S. 463.

2. Affise by N. against A. it was found by Verdict at large, that S. was seized of the Land and had Issue R. before Es 큰 fals, and A. within the Esquire by her Baron and died feised, R. and A. entered and made Purparty of this Land and others, so that this Land was alloted to R. who took to Baron the Plaintiff in the Affise and had Issue, and R. died, and the Baron held him in as Tenant by the Curtesy, and A. ousted him, and he brought Affise and Judgment given for the Plaintiff; For this Entry and Purparty, and Dying seized, made the Battard to be Heir; quod nota. Br. Entre Cong. pl. 31. cites 21 E. 3. 34.

3. Land is given to W. and A. his Feme in Special Tail, the Remainder to J. N. in Tail, the Remainder to the right Heirs of J. N. The Baron died without Issue, and A. the Feme survived, and is Tenant in Tail after possibility of Issue extinct, and took another Baron and had Issue, and after J. N. died without Issue, to whom A. the Feme is Heir, and after A. died. The second Baron shall be Tenant by the Curtesy, for when the Remainder in Fee came to the Feme Tenant in Tail after possibility seized in Fee. Br. Estates pl. 25. cites 9 E. 4. 17, 18.

of Issue &c. the Frank-tentamen was extint in the Fee, and so A. was.

Co. Lit. 29 a.

S. P.—1 Rep. 97 b. Arg. S. P. and says, it is a Rule in Law, and cites 7 E. 5 66. a. b. and 3 H. 7. 5.

Cafe, Arg.

5. A
5. A man shall not be tenant by the curtesy, unless upon seisin in feme shall fall. Br. Tenant per le Curtesy, pl. 7. cites F. N. B.

6. If father and daughter be, and the daughter takes baron and has issue by him, and after the issue dies, and the father of the feme dies, the baron and feme enter, and after the feme dies the baron shall be tenant by the curtesy, querre; for the issue died before the land was descanted to his mother. Br. Tenant per le Curtesy, pl. 12. cites lib. Patkins tit. Tenant per le Curtesy.

7. If father and daughter be, the father dies, the daughter enters and takes baron and has issue, and after a son is born, who enters upon the baron and feme, and after the issue of the daughter dies, and the son, who was brother to the daughter, dies without issue, the baron shall not be tenant by the curtesy, if he does not enter again in the life of the feme. But querre if he shall be tenant by the curtesy, if he had entered in the life of the feme? Br. Tenant per le Curtesy, pl. 13.

8. If a man seised of lands in fee has issue a daughter, who takes husband and has issue, and the father dies, and the husband enters; he shall be tenant by the curtesy, albeit the issue was bad before the wife was seised. And so it is albeit the issue had died in the life time of her father before any descent of the land, yet shall he be tenant by the curtesy. Co. Litt. 29. a.

9. If after issue land descends to the wife, (be the issue dead or alive at the time of the descent) he shall be tenant by the curtesy. S. P. obiter.

10. Custom of a manor, that if a man marries a customary tenant of S. C. died the said manor, and has issue, and shall over live his wife, he shall be Arg. 2. 29. in pl. tenant by the curtesy. During the coverture, a customary tenement follows, he has issue, yet he shall not be tenant by the curtesy, because the wife was not customary tenant at the time of marriage. This 2 Le 109. pl 140. Trin. 29 Eliz. B. R. Sir J. Savage's Cafe. Cafe denied per cur.

11. A died, leaving a wife, a son, and a daughter; the widow encumbered the same cafe as the lordship. And as tenant in common with her son of another part, and of a third part as guardian in socage to her son. The son went beyond the sea, and died under age, whereby the daughter became intitled; where one enters, claiming the whole estate, he applied to the mother to be let into possession of the son's part for himself, which the mother refused, imagining the son was still alive, and in execution therupon to hold the land for him. Upon this they brought a bill in

Curtesy.
Curtefy.

of the Compahion, this
may not serve as the
Entry of his
Compahion, being made
directly against him;
but that is not this
Cafe; for
it appears, that the Mother's keeping Possession of the
whole against the Daughter and her Husband,
was inteirly owing to a Mistake in imagining her Son was still living,
and not with an Intent to ex-
clude the Daughter from her Right, and therefore no
Inference can be drawn from it.

(B) In what Cases. In Respect of the Issue.

1. A female inheritable took Baron and had Issue, the Baron died, and
she took another Baron and had Issue, which died, and the female
died, the Second Baron shall be Tenant by the Curtefy; Br. Tenant
per le Curtefy. pl. 8. cites 21 H. 3. and Fitzh. Dower 123.
2. A Man may be Tenant by Curtefy, though the Child never be heard
to cry, if it move and be alive; because it may be born dumb; Per

3. If the Baron has Issue by the female, and the female dies, the Baron
shall be Tenant by the Curtefy, be the Issue dead or alive. Br. Tenant
by the Curtefy. pl. 11. cites Old Tenures tit. Tenant per le Curtefy.
4. The Wife died big with Child and was rip'd alive out of her Belly,
the Husband shan't be Tenant by the Curtefy; for it ought to commence
by the Issue and be consummate by the Death of the Wife, and the
Estate of Tenant by the Curtefy ought to take away the immediate De-
cent. 8 Rep. 35. a. cited per Cur. as Reppes's Cafe.
5. If the Issue be born Dead or Dumb, or both, or be born an Idiot, yet
it is a lawful Issue to make the Husband Tenant by the Curtefy and to
inherit the Land. Co. Lit. 29, a.

(C) Tenant by the Curtefy. In what Cases. In Re-
spect of the Limitation of the Estate.

1. If a Daughter be Heir and endeavours her Mother, and takes a Baron
and has Issue, and dies, and the Mother dies, the Baron of the
Daughter after his Issue, if the Issue in the Life of the Mother, shall not
be Tenant by the Curtefy; for the Possession of his Issue was defeated and
turned into Recoveries; Br. Tenant per le Curtefy. pl. 19. cites 8 Aff. 6.
2. *A Man sold of Land took Feme, and he and his Feme devised a Fine*, Br. Lib. 2. 35. a. cited 151.

and took an Estate to them, and to the Heirs of their Two Bodies begotten. S. C. cited 35. a. cited 151.

and had issue a Daughter E. and died. E. took Baron, and the and her. S. C. cited 35. a. cited 151.

Baron devised a Fine of the same Land, and retook to them and to the Heirs by Anderson of

there two Bodies, the Remainder over in Fee, and had issue within Feme of B. in Cace Baron, and the second Baron of F. entered pretending to be Tenant by the on 192. v.

Curtefy, because, by his Pretense, his Feme was remitted to the first Tail, and

by the Feme levied by the Father and Mother of his Feme, which is general to his Feme, and so every Issue inheretible, and so be Tenant by the Curtefy, But the best Opinion was, because his Feme and the first Baron levied the Feme, and retook but an Estate to them in special Tail, therefore the second Baron cannot be Tenant by the Curtefy, because as his Feme shall be etopped by the Feme, so shall her Baron be who claimed by her &c. in Ejcetione Culde'. Br. Tenant per le Curtefy; pl. 1. cites 46 E. 35. a. cited 35. a. cited 151.

3. 5. 3. *Husband makes Discontinuance of his Wife's Land, and takes back Title*. 25. E&tate to him and his Wife by which his Wife is remitted; they have S. P. Arg. 35. a. cited 151.

31. &c. The Wife dies; Husband shall not be Tenant by the Curtefy 35. a. cited 151.

For he has extinguished his future Right by the Livery. Arg. 4 Le. 221. 155. Arg. 35. a. cited 151.

cites 9 H. 7. 1. 35. a. cited 151.

21. 22. in pl. 105. Trin. 3 Eliz. Arg. S. P.—*If he makes a Precedent on Condition, and re-enters for Condition broken, and the Wife dies, he shall not be Tenant by the Curtefy, for his Title to be Tenant by the Curtefy is extinct by the Ecodment, Co. Litt. 30. b.—* S. P. by way of Quere Per Holt Ch. J. Certb. 67.

4. The Baron of Feme Tenant in Tail shall be Tenant by the Curtefy, Co. Litt. 35. a. cited 151.


5. A. had Issue a Daughter, and devised his Lands to his Executors for Payment of his Debts, and till his Debts paid, and made his Executors, and died; and after the Debts were paid. Resolv'd, in the Beginning of Q. Elizabeth, that the Daughter having married, and had Issue, and the Debts being afterwards paid, that the Baron shall be Tenant by the Curtefy; cited in Matthew Manning's Cafe, 8 Rep. 96. as Guavarra's Cafe.

6. In all Cases where a Man takes a Wife seised of such ESTATE of Tenement, so that the Issue which he has by his Wife may by Possibility inherit the same estate as the Wife had, as Heir to the Wife, in such Cafe, after the Death of the Feme, he shall have the same Lands by the Curtefy of England, otherwise not, and Issue born dead, can't by Possibility inherit. 8 Rep. 34. b. Trin. 29 Eliz. C. B. Paine's Cafe.

7. A *Munster* is not an Issue, but Human Shape is sufficient, though Co. Litt. 29 there be some Deformity. 8 Rep. 35. a. cites Briston. b. S. P. 35. a. cited 151.

8. A. has a Son and two Daughters, and devised Black Acre, White 2 Le. 192. Acre, and Green Acre, whereof he is seised in Fee to his Wife for Life; pl. 215. Hill. Remainder of Black Acre to his Son and his Heirs; Remainder of 29 Eliz. B. R. Periman.

White Acre to his eldest Daughter and her Heirs; Remainder of White Acre to his youngest Daughter and her Heirs, and if any of his three; C. in rot. Children die without Issue of his or her Bodies, then the other surviving them shall have Tenem illam Partem, equally to be divided. A. dies; The 5 Le. 180. Wife dies; The eldest Daughter dies, leaving Issue. The Son dies; The 5 Le. 232. White Acre without Issue; The eldest Daughter enters into Black Acre. But Cook. 35. a. cited 151.

adjudg'd that the Words Tenem illam Partem extend only to the Land, in rotundum and not to the Estate therein, and gives only an Estate for Life, and to the

Verbis. —

the 5 Le. 52. 35. a. cited 151.
of the Husband shall not be Tenant by the Curtesy, and there are not

two Survivors, so nothing to be divided, and therefore the Law says,

that Black Acre is descended viz. the Fee of it to the Daughters of

the two Sisters. 2 Le. 129. pl. 171. Mich. 29 Eliz. B. R. Hawkins's

Cafe.

Curtesy.

Le. 167 pl. 233. Samms v. Payne S. C. held accordingly. For the Ef-
rate of E. is spent and determined by the dying without If-
and estate, and does not cease, or is cut off by any Limita-
tion; and Judgment given for the Tenant by the Curte-
sfe. —

And. 134. pl. 225. S. C. and S. P adjut'd ac-
 frighteningly —

8 Rep. 34 a. S. C. but states nothing as to the Condition of Payment, but upon the Limitation only, and held, that though the Effate Tail is determined, yet the Effate of the Tenant by the Curtesy continues; for this is not derived merely out of the Effate of the Peme, but is created by the Law, by Privilege and Benefit of the Law, tacitly annex'd to the Gift. Ibid. 36. a. ad easem.

10. Devise to A. his Daughter for Life, and if she marry after my
Death and have Issue &c. then I will, that her Heir after my Daughter's
Death shall have the Land, and to the Heirs of their Bodies begotten, Re-

148. 53 Eliz. Lilly v. Taylor, as to their Mother's Effate in the Land; therefore where Little-
ton faith, Issue by her Wife Male or Female, it is to be understood, which by Possibility may inherit, as Heir to her Mother of such Effate. Co. Lit. 29. b.

11. If Lands be given to a Woman and to the Heirs Male of her Body,
the takes a Husband and has Issue a Daughter and dies; he shall not
be Tenant by the Curtesy, because the Daughter by no Possibility
could inherit the Mother's Effate in the Land; therefore where Little-
ton faith, Issue by his Wife Male or Female, it is to be understood, which by Possibility may inherit, as Heir to her Mother of such Effate. Co. Lit. 29. b.

12. If a Woman Tenant in Tail general makes a Feoffment in Fee, and
takes back an Effate in Fee; and takes a Husband and has Issue, and the

wife dies, the Issue may in a Formedon recover the Land against
his Father, because he is to recover by Force of the Effate Tail, as

Heir to his Mother, and is not inheritable to his Father. Co. Lit. 29. 6.
A. bars Issue a Daughter, and devises his Lands to Executors for Payment of his Debts, and till his Debts are paid, and makes his Executors, and dies. The Daughter marries, and dies; the Debts are paid by Executors; the Husband shall be Tenant by the Curtesy. 8 Rep. 96. Trin. 7 Jac. in Mannoningham's Case.

B. Re-B. band and the adjudged and the per

C. Claims to and and his

D. In the Section entered, Share to and to and to his


16. Upon a Special Verdict the Case was; P. was seised of two Mefuages in Fee after the Death of his Brother, and had Issue two Sons, R. his eldest Son, and N. his younger Son, and four Daughters, E. M. O. and A. and made his Will in Writing, and devised his two Mefuages to N. his younger Son, and to have 301 for Annuity for his Maintenance for ten Years after the Death of his Grandfather, and the Rent of the Profits to be applied for raising Portions for his Daughters; and if N. die, then he gives the Estate, that N. had, to his four Daughters, Share and Share alike; and then further says, and if it shall please God all my Sons and Daughters die without Issue, then he devises it to his Sister and her Heirs &c. The Devise for; the Grandfather dies; and after, N. enters, and dies without Issue; the four Daughters enter, and are seised, and the one takes Husband, and has Issue, and dies, and the Husband claims to be Tenant by the Curtesy; adjudged per tot. Car. that here was no Tenancy by the Curtesy. Skim. 266. pl. 3. Hill. 2 and 3 Jac. 2. B. R. Price v. Warren.

17. Where the Estate is to determine by express Limitation, or Condition, on the Death of the Wife, there the Husband shall be Tenant by the Curtesy; as where an Estate for Life is limited to a Woman; Remainder to her first Son, and every other Son in Tail Male, Remainder to the Heirs of her Body, Remainder to her right Heirs; here it is plain she is seised of the Inheritance; yet if she has a Son, the Husband shall be Tenant by the Curtesy, because the contingent Estate, which is to arise on her Death, intervenes between her Estate for Life and the Inheritance. 9 Mod. 155. Trin. 11 Geo. in Canc. Boothby v. Vernon.

(D) The Nature of the Estate.

1. If a Niece purchaser Land, and takes Baron, and the Lord enters before that the Baron has Issue, there it seems that the Baron by Co Litt. 39. Issue bad, shall not be Tenant by the Curtesy. Br. Tenant per le Curtesy; S.P. pl. 14 cites Dext. & Stud. Libro secundo.

2. But if the Baron and Feme have Issue before the Lord enters, then he shall be Tenant by the Curtesy; For by the Issue had, Atowry shall be made upon the Baron alone, and not before, and there if the Feme dies, the Possession is vested in the Baron by the Law, and not in the Heir, if no other Person enters, and he who is to use Precipe quod reddat, shall have it against the Baron, and not against the Heir, which is clear Law. Ibid.

3. If Lands held of the King, by Knight's Service in Capite, descend to a Woman, and after Office found for intruder, and takes Husband...
Curtefy.

band, and has illue. In this Case, the Husband shall be Tenant by the Curtefy. Co. Litt. 30. b.

4. If a Man marries the Niece of the King by Licence, and has illue by her, and after Lands descend to the Niece, and the Husband enters, the Niece dies, he shall be Tenant by the Curtefy of this Land, and the King upon any Office found, shall not evict it from him, because, by the Marriage, the Niece was infranchised during the Coverture. Co. Litt. 30. b.

Co. Litt. 30. a. in princ. pio. S. P.

5. In Gavelskind, Baron shall be Tenant by Curtefy, without illue; Arg. and feems admitted. 2 Sid. 153. Patch. 1659. B. R.


(E) Tenant by the Curtefy. Of what.

Perk. S. 459. 1. T H E Wife is seised of a Reversion with certain Rent and has illue; the Wife dies, the Baron shall be Tenant by the Curtefy of the said Rent, and the Heir shall have the Reversion, and so the Rent shall be severed from the Reversion by the Means of the Law; But in this Case the Baron cannot distrain for the said Rent, and yet it was Rent Service in the Feme; But because he comes to this Rent by his own Act he cannot distrain; For it was his own act to take the Feme to Wife. Kelw. 104. b. pl. 13. Cafus inc. Temp. Anon.

2. Though the Rule in Law is, that one shall not be Tenant by the Curtefy without actual Seisin; yet in some Cases a Man shall, as where the wife was never seised, as if Rent descended to the Wife during Marriage, and before the Day of Payment the Wife dies, yet the Baron shall be Tenant by the Curtefy, because no Default can be in the Baron; for he cannot have the Rent before the Day comes. Kelw. 104. b. pl. 13. Cafus incerti Temporis. Anon.

3. Where an Office of Inheritance descends to the Wife, and he has illue by her, the Husband shall be Tenant by the Curtefy, and in the like Case a Feme may be endowed; Arg. Pl. C. 379. b. Sir H. Neville's Cafe.


5. If an Estate of Freehold in Seigniories, Rents, Commons, or such like be suspended a Man shall not be Tenant by the Curtefy; but if the Suspension be but for Years, he shall be Tenant by the Curtefy. Co. Litt. 29. b.

6. If a Tenant makes a Lease for Life of the Tenancy to the Seigniories, who takes a Husband and has illue, and the Wife dies, he shall not be Tenant by the Curtefy. Co. Lit. 29. b.

7. But if the Lease had been made but for Years, he shall be Tenant by the Curtefy. Ibid.

8. If
8. A Woman Tenant in Tail general takes a Husband, and has Issue, which Issue dies, and the Wife dies without any other Issue, yet the Husband shall be Tenant by the Certificate, albeit the Estate in Tail be determined; because he was intituled to be Tenant per Legem Angliae, before the Estate in Tail was spent, and for that the Land remains. Co. Lit. 30 a.

9. But if a Woman makes a Gift in Tail, and reserves a Rent to her and to her Heirs, and the Donor takes Husband and has Issue, and the Donee dies without Issue, and the Wife dies; the Husband shall not be Tenant by the Certificate of the Rent, for that the Rent newly reserved is by the Act of God determined and no State thereof remains. Co. Lit. 30 a.

10. But if a Man be seised in Fee of Rent and makes a Gift in Tail general to a Woman, the takes Husband and has Issue, the Immue dies, he shall be Tenant by the Certificate of the Rent, because the Rent remains. Co. Lit. 30 a.

11. A Man shall be Tenant by the Certificate of a Common sans Nombres. Co. Lit. 30 b.

12. So he shall be of a Houfe, that is Caput Baronie or Comitatus. Co. Lit. 30 b.

13. And so he shall be of a Cafle, which serves for the Publick Defence of the Realm. Co. Lit. 30 b.

14. Custom that if any Wife seised of Copyhold Land has Baron and Mo. 271 pl. they have Issue between them &c. and the Wife dies, that the Baron seised. Co. Lit. 30 a. they shall have the Copyhold for Life, as Tenant by the Certificate. The Husband, the Husband, the Husband, the Husband, who takes to Wife one, to whom Copyhold devolves, he enters into the Land before any Admittance claiming it in Right of his Wife; they S. C. adorns have Issue; but before Admittance Wife dies. It seems the better Opinion natur, the of the Court was, that such Entry was sufficient to intitle him to be Tenant by the Certificate, but without a Custom a Man cannot be Tenant by the Certificate of a Copyhold Estate. And 192. pl. 227. in Case of Ewer v. Eastwick.

15. The Defendant conveyed Lands to the Use of his Daughters; the Plaintiff married one and had Children by her, who are dead; the Plaintiff prefers his Bill to be Tenant by the Certificate, but held not so, because the Daughters had Joint Estates, and so goes to the Survivor. Torh. 83. cites 20 Jac. Cowley v. Anderdon.

16. If one take a Wife that is seised of Gavelkind Lands, and she dies without Issue by her Husband; her Husband shall be Tenant by the Certificate of half of the Lands, so long as she shall live unmarried; but if she shall marry again he shall forfeit the Estate in the Land, Mich. 22 Car. 2. B. R. This is by the Custom of Kent; but by the same Custom, if he had Issue by his Wife, then he shall be Tenant by the Certificate of all the Lands his Wife was seised of, and although he do marry again, he shall not forfeit his Estate. Mich. 22 Car. Quere, whether in the former Case he shall forfeit his Tenancy by the Certificate, if he do live incontinently, as the Wife shall her Dower by a like Custom. L. P. R. 627.

17. One cannot have a Right Title Use, Reversion, or Remainder extant on a Freehold as Tenant by Certificate, or Dower. R. S. L. 201. cites C. L. 29.

18. A
18. *A Term to attend the Inheritance which was in Trustees was decreed not to be made Use of against the Baron, Tenant by the Curtefy, by the Heirs at Law.* 2 Vern. 324. pl. 313. Mich. 1695. Snell v. Clay.


20. Though the Inheritance was in Trustees for Payment of Debts; yet decreed that the Baron should be Tenant by the Curtefy. 2 Vern. 631. pl. 605. Hill. 1711. in the Case of Williams v. Wray, cites it as Ball’s Case.

21. Husband may be Tenant by the Curtefy of a Trust though the Wife cannot have Dower thereof, laid by the Lord Chancellor to be a settled Rule. 3 Wms’s Rep. 234. Hill. 1733. in Case of Chaplin v. Chaplin.

23. The Resolution of the Court by Lord Chancellor. The principal Question in this Case, on which I am now to give my Opinion, is, whether the Defendant Inglis ih can Tenant by the Curtefy of an Equity of Redemption. The Mortgagee came into Possession in 1731.

Thomas Cathborn, Father of the Plaintiff, and of the Wife of the Defendant Inglis, by Virtue of a Marriage Settlement, being feiled of some Lands in Title, and of other Lands in Fee Simple, had little three Daughters.

Part of the Land, of which he was feiled in Fee, he settled on himself for Life, with Remainder to Anne his Elder Daughter in Fee, and the other Part of such Lands he devised by his Will to the said Anne his Daughter, and her Heirs, subject to the Payment unto her two Sisters of 200 l. a piece.

Anne,
Curtefy.

Anne, after the Death of her Father, borrow'd 900l. of the Defendant Scarf, and by Lease and Release of 24th and 25th June 1728, mortgaged part of the Fee Simple Lands to the said Scarf and his Heirs, under a Proviso to be void on payment of 900l. and Interest.

6th August 1729, the said Anne Intermarried with the Defendant Inglis, and in 1731 died, leaving Inglis by him a Son, who died without Issue, and on his Death his two Aunts, the Plaintiffs, became his Heirs at Law, and entitled to that Inheritance, and, as such, brought their Bill, Trin. 1733 in this Court, against Mortgagee Defendant Scarf, and the Defendant Inglis, among other Things for a Redemption of the mortgaged Premises, and to have an Account of the Rents and Profits of the Real Estate, which belonged to the Plaintiff's Wife, that descended to his Son, from the Time of the Death of such Son, as Heir at Law to both of them.

The Defendant Inglis intituled to be intitled to the mortgaged Premises for his Life, as Tenant by the Curtefy, and the Cause, being at Issue, was heard on the 8th of May 1735 before his Honour the Master of the Rolls, when it was decreed, that the Defendant Inglis was not intituled to be Tenant by the Curtefy of the mortgaged Estates, and so was decreed to Account for the Rents and Profits thereof from the Death of his Son.

From this Decree the Defendant Inglis thought fit to appeal, and the general Question now is, whether the Husband can be Tenant by the Curtefy of the Equity of Redemption, upon a Mortgage in Fee? This Question depends on two Considerations.

1st. What kind of Interest an Equity of Redemption is considered to be in the Eye of this Court? 2dly, What is requisite to intitle the Husband to be Tenant by the Curtefy?

1st. What kind of Interest in the Eyes of this Court, an Equity of Redemption is? An Equity of Redemption has always been considered in this Court as an Estate in the Land, it is such an Interest in the Land as will descend from Ancestor to Heir, and may be Granted, Intailed, Devised or Mortgaged, and that equitable Interest may be barred by a common Recovery; which proves, that an Equity of Redemption is not considered barely as a mere Right, but such an Estate, whereof, in the consideration of this Court, there may be a Seifin, or a Devise of it could not be good. The Person who is intituled to the Equity of Redemption, is, in this Court, consider'd as Owner of the Land, and the Mortgagee to retain the Land as a Pledge or Deposit.

And for this Reason it is, that a Mortgage in Fee is consider'd as a Personal Estate, notwithstanding the Legal Estate vests in the Heir in Point of Law.

The Husband of a Mortgage in Fee shall never be Tenant by the Curtefy of the mortgaged Estate, unless there be a Foreclosure, or that such Mortgage has subsisted for so great a length of Time as the Court thinks sufficient to induce them to grant a Redemption.

A Mortgage in Fee will not pass under a Devise of all my Lands, Tenements, and Hereditaments, decreed in the Case of Litton v. Saffall, 2 Vern. 625. There said, if it was a Release of an Equity of Redemption or Foreclosure, it is now Part of the Real Estate in the Land.

1 Vern. 401. Barnet and Linaston. A Mortgage in Fee in Right of the Wife on the Husband's dying and not disposing thereof, was decreed to be a Chose in Action, and survived to the Wife; From whence it follows, that the Person that is intituled to the Equity of Redemption, is Owner of the Land; For if a Mortgage in Fee, in Right of the Wife,
is, on the Death of the Husband, decreed to be but a Choie in Action, if the Ownership of the Land is not in the Mortgagor, it is in no body; and if this Matter of Mortgages is not an Interest in Equity only, but properly a Real Estate, then the Real Property will be funk and vested no where, if not in the Mortgagor.

If a Man by his Will deviles Lands, and afterwards mortgages in Fee those Lands; At Law it is consider'd as a Revocation of the total Devilight, but in Equity only a Revocation pro tanto, amounting to the same Thing as letting in a Charge upon the Land, and when the Mortgage is paid, the Devile takes Place.

The Ownership of the Land doth always vest in the Mortgagor or Mortgaggeo.

It is objected by the Plaintiffs, that an Equity of Redemption is only a Right of Action, and not to be consider'd as such an Estate whereof there can be a Tenancy by the Curtesy, but this is by no Means well founded; For this is no otherwise a Right of Action than every Title, and as there can be no Benefit had of an Equity of Redemption, but by suiting a Subpna out of the Court, fo is the Case of every mere Title in Land, which is consider'd as a Real Estate in this Court, but cannot be come at without a Subpna. To say that is a mere Right of Action, is by Consequence to say, that the Estate in the Land is in no Body, and this determines the Question; For if a Mortgage is but a Choie in Action, this affirms that the Equity of Redemption is the real Ownership of the Estate, and this will determine the Point between them.

It is objected, that the Mortgagee is not barely a Trustee for the Mortgagor; It is true, not barely a Trustee, but it is sufficient for the present Purpose, if he is in Part a Trustee for the Mortgagor, and it is most certain, that as to the Real Estate in the Land, the Mortgagee is only a Trustee for the Mortgagor till Foreclofure. Mortgagee is only Owner as a Charge or Incumbrance, and intituled to hold as a Pledge, and but as to the Inheritance descended, and Real Estate in the Land, the Mortgagee is a Trustee for the Mortgagor till the Equity of Redemption is foreclofure.

2dly. The next Consideration is what is requisite to intitle the Husband to be Tenant by the Curtesy. At Law four Things are necessary to make a Tenancy by the Curtesy, (to wit) Marriage, having Issue that may Inherit, Death of the Wife, and Seisin of the Wife. Co. Litt. 30. a. Here it is admitted, that the three first did concur, but the Objection that is rely'd on is, that there was no actual Seisin of the Wife during the Coverture, which is contended to be as Necessary in respect to an Equitable Estate, as of a Legal Estate, and it is admitted that the Wife had no actual Seisin of the Legal Estate, either in Fact or in Law. Here is no Dispute whether actual Seisin in Consideration of Law, but all that is beside the present Question; For the Proceedings are upon a Supposition, as no such Thing as a Tenant by the Curtesy; But the true Question is upon this Point, Whether there was not such a Seisin or Possession in the Wife of the Equitable Estate in the Land, as in Consideration of Equity is equivalent to an actual Seisin of a Legal Estate at Common Law.

In Consideration of this Court, I am of Opinion there was such a Seisin of the Wife in the present Case of the Equity of Redemption.

I have shewn, that a Perfom, intituled to the Equity of Redemption, is Owner of the Land of the Legal Estate; and if fo there must be a Seisin of the Legal Estate; And what other Seisin could there be than what Inglish and his Wife had in the present Case?

For here is a Mortgage in 1728 by Ann Caiborn, who in 1729 married with the Defendant Inglish, and in 1731 died, leaving Issue a Son, and the Wife was all along in Possession till her Death, and Mortgagee did
Curtsey.

159
did not come into Possession till after her Death, and there is not any Foreclosure, and though the Possession of the Wife was but as Tenant at Will to the Mortgages, yet it was, in Equity, a Possession of the real Owner of the Land, subject only to a pecuniary Charge on it, and from thence I think it clearly follows, that there cannot be a higher Seisin of an Equitable Estate.

Next, whether there can be a Tenant by the Curtsey? I am of Opinion there may be a Tenant by the Curtsey of the equitable Estate of the Wife; Equity follows the Law because made a Rule of Property.

Williams and Wray, 2 Vern. 680, Wall’s Case cited, where it was determined, that the Husband be Tenant by the Curtsey of a Trust Estate of the Wife, and so clearly there admitted, and yet the Case was of a Trust for the Payment of Debts.

Sweetapple and Binthon, 2 Vern. 536, Mrs. Binthon gave Money to be laid out in Land to be tsettled on her Daughter and her Illue, and afterwards the Mother dies, and the Daughter marries with Sweetapple, by whom she had Illue, and dies before the Money was laid out in Lands, and upon the Death of the Wife Sweetapple brought his Bill, praying that the Money might be laid out in Lands, and that he might be decreed to hold the same for his Life as Tenant by the Curtsey, which my Lord Cowper decreed accordingly; Which is a much stronger Case than the present; for in that Case there was neither Seisin nor Lands, but it was determined according to the common received Rule of this Court in considering Money directed to be laid out in Land, the same as Land.

There has been two Objections made by the Plaintiff.

1st. That the Husband had it in his Power to have had Seisin in his Wife’s Life-time; for he might have paid off the Mortgage, and therefore it was his own Laches that he did not.

2d. That a Wife shall not be endowed with an Equity of Redemption here.

As to the Laches in the Defendant Inglis it was compared to the Husband’s not making an Entry at Law. The Comparison will not hold; for it is not so easy to pay off the Principal and Interest due on a Mortgage, as it is to make an Entry at Law, nor is it to be done so speedily, for a Mortgage in most Cases is allowed Six Months Notice to be paid off.

And in the Case of Sweetapple, which I have just mentioned, the Husband might have brought his Bill, in his Wife’s Life-time, to compel the laying out the Money in the Purchase of Land, but though he omitted so to do till after the Wife’s Death, yet that was not objected to him as Laches.

But it was further said, that it would encourage the Defendant Inglis to let the Interest run on the mortgaged Premisses, which would perhaps swallow up the whole Estate; for that at the said Defendant’s there might be as much due on the Mortgage for Principal and Interest, as the Estate would then be worth; But I cannot find the Force of this Ground; For if he is Owner of the Estate, she was Owner of the Fee.

If by this is meant the Interest that became due in the Life of the Wife, the Husband has nothing to do with it, because the Interest that he claims does not arise till the Death of the Wife, and he therefore is not to pay Interest that was due before his Title accrued.

But by this is only meant the Interest from the Death of the Wife; During the Tenancy by the Curtsey, the Heir will have the same Remedy as in the Common Case of a Tenancy for Life of an incumber’d Estate; for in all such Cases the Tenant for Life keeps down the Interest.
And as to the next Objection of the Wife's not being endowed of an Equity of Redemption on a Mortgage in Fee, and that therefore a Husband ought not to be Tenant by the Curtesy of an Equity of Redemption, this proves too much; for it has been determined that a Wife shall not be endowed of a Trust Estate, yet that Husband shall be Tenant by the Curtesy of a Trust Estate. The Argument from Dower to the Cafe of a Tenant by the Curtesy fails in this Cafe. Perhaps it may be hard to find out a sufficient Reason, how it came to be so determined in the one Cafe, and not in the other, but it is easy to follow former Precedents, and what are settled and established, and if such Precedents should be departed, I hold it far rather, that the Wife should be allowed her Dower of a Trust Estate, and not that a Tenancy by Curtesy of a Trust Estate should be taken away.

It may be refusing to allow the Wife Dower of a Trust Estate was because she could not have it at Law, and that it was founded on the Maxim of Equitas sequitur Legem; but whatever the Reason of such Refusal was, the Husband is allowed to have a Tenancy by the Curtesy of a Trust Estate, may even of Money directed to be laid out in Land though not actually laid out, as in the Cafe of Sweetapple before cited.

Upon a Mortgage for Years, Wife shall have Aid of Equity of Redemption, which she could not have of a Trust Estate. If Tenant by the Curtesy of Money to be laid out in Land, by Analogy it ought to be so of an Equity of Redemption, especially where the Wife continues in Possession of the Mortgaged Lands all her Life-time.

As to Penvill and Lulston's Cafe heard at the Rolls, Feb. 4, 1729; that was a Pauper Cause, and a Question was made in it, whether there would be a Possession Fratris of an Equity of Redemption; his Honour made no Determination in it; but it appears by the Minutes in the Register's Book, which I have seen, that his Honour said, he would take Time to consider of it, and I do not find that it ever came on afterwards.

There was a Cafe put on the Part of the Plaintiffs by way of Illustration; which was this, suppose that a Female conveys Lands to J. S. in Fee, upon Condition, that if at such a Day she paid such a Sum of Money to him, or his Heirs, that then she might re-enter; she afterwards marries and has Issue, but before the Day on which the Condition was to be performed she dies, and after her Death her Heir pays the Money; whether the Husband would be Tenant by the Curtesy? If this is meant as a Mortgage to make a Security, then it is the same as the present Cafe, but if it is meant of a mere Purchase subject to a Re-Entry at Common Law on Payment, undoubtedly the Husband would not be Tenant by the Curtesy; for that were to make him Tenant by the Curtesy of a Condition; for taking it as a Purchase, the Wife had, in that Cafe, no Estate or Settis in Re, nor Right ad Rerum, till the Performance of the Condition. As to a Condition or Power of Revocation, these stand upon different Reasons.

For these Reasons, upon the best Consideration, (although I form my Judgment with great Delicence, when I differ in Opinion from other great Persons that have gone before me) I am of Opinion, that the Defendant Inglis is intitled to be Tenant by the Curtesy of the mortgaged Premisses in Question, and the Consequence of that is, that that Part of the Decree of his Honour the Muter of the Rolls, whereby it is adjudged that the said Defendant is not Tenant by the Curtesy, must be reverted. MS. Rep. Hill Vac. 11 Geo. 2. Calhoun v. Inglis and Scarff.

(F) Favour'd.
(F) Favour’d. In what Cases; and of What the Tenant may take Advantage.

1. A *Fine levied by Feme Covert alone, without her Husband, of her own LAnds, wherein she has Fee Simple, is an Eftoppel against her and her Heirs, if her Husband avoid it not by Entry, or otherwise, as he may during his Wife’s Life, and after her Death, during his own Life, as if he be Tenant by the Curtely. * Wett. symb. S. 8. cites 17 Ed. 3. 52 and 75. 17 Alf. 17. P. 4 23. 
2. Tenant by Curtely shal have Benefit of Warranty; for though he is in the PofT, yet he continues the Eftate; per Wray Co. J. 2 Le. 218.
3. Tenant by the Curtely of a Coparcener of an Adverseſon shall have the same Advantage as his Wife should have had; agreed by Anderson. 157 S. C. Cro. E. 18. pl. 6. Pafch. 25 Eliz. C. B. in the Case of Harris v. Nichols, does not appear.

Co Litt. 186. S. P.

(G) Bound by, or liable to what Charges &c.

1. *F E M E Tenant in Tail acknowledged a Statute, and took Baron, and had Life, and died. The Lands may be extended in the Hands of Tenant by the Curtely, and also in the Hands of Tenant by the Curtely, and also in the Hands of the Ifue in Tail, if Tenant by the Curtely surrender during the Life of Tenant by the Curtely. * D. 31. pl. 17. Marg. cited by Noy in his Reading to have been adjudged. Mich 6 Eliz.
2. Tenant by the Curtely shall be Attentive to the Lord Paramount.
3. Tenant by the Curtely is not to be prejudiced by Term for Years to attend the Inheritance, and decreed accordingly, that the Term should not be made use of against him by the Heirs at Law. 2 Vern. 324. pl. 313.

(H) Prevented or disabled by what Act, or Default. In what Cases.

1. A Man took a Feme Inheritrix, and had Ifue by her, and did Br. Forfeit Felony, and was attained, and by some the Baron shall be Tenant by the Curtely; for it is veited by the Law, and he is in the PofT, by the Law, and not by the Feme, or by the Ifue, and some e con. & c.; for all is forfeited; Quære? For by several ellicwhere he is Tenant Co. Litt. by the Curtely, and that after Ifue had, the Lord may avoK upon him 42 a S. P. only for Homage without the Feme. Br. Tenant per le Curtelie; pl. 3. 26. 
b. 3. 49.

[And so it seems it should be here] so as the Ifue cannot inherit to her, yet he shall be Tenant by
The Curtefy in respect of the Issue which he had before the Felony, and which by possibility might then have inherited, but if the Wife had been attainted of Felony before the Issue, albeit the had Issue afterwards, he shall not be Tenant by the Curtefy. — The Year Book of 21 E 3; 49. b. 40, a pl. S. is of Felony done by the Wife. — Pollesf. 51. in Cafe of Parbons v. Pearce, Arg. S P.

2. A Man discontinued the Land of his Feme, and retook an Estate to him and his Feme, by which the Feme is remitted, and after he has Issue by this Feme, and the Feme dies; per Kingstmill, the Baron shall be Tenant by the Curtefy, because the Feme was remitted; But Fairfax, Tremail, and Hulley contra; For the Baron was not remitted, and by the Peofment he gave his Right which he had, or might have. And 30 E. 3. the Question be the Issue of the Feme and the Father, and there it is adjudged, that he shall not be Tenant by the Curtefy. Br. Tenant per le Curtefy; pl. 6. cites 9 H. 7. 1.

3. If a Feme takes Baron, and has Issue, and Land descends to the Feme, and the Baron enters, so that he is intitled to be Tenant by the Curtefy, and after the Feme is found an Idiot, and his Estate in the Land is also found, the King shall have the Land; and if the Feme dies, the Baron never shall have the Land by the Curtefy; and when the Office is found, the Title of the King shall have Relation to the first Possession of the Feme also, and so both the Titles commence at one and the same Time, but the King shall have the Pre-eminence; and because the King's Title is to the Frankenement of the Land seeing he shall have the Custody of it during the Wife's Life, this wholly takes away the Baron's Title; Per Welton. Pl. C. 263. b. Mich. 4 & 5 Eliz. in Cafe of Dame Hales v. Pettite.

4. A Woman Inheritrix takes Husband, who after is attaint of Felony; the King pardons him; they have Issue; the Husband shall be Tenant by the Curtefy, which proves the King has not the Freehold by that Attainder; per Coke Counsel, Arg. 2 Le. 126. Mich. 28 and 29 Eliz. in Cafe of Veneables v. Harris. Noy 159. cites 12 H. 7. — If a Feme takes Baron who have Issue, and after he is attaint of Felony, and then the King pardons him, per Coke he shall not be Tenant by the Curtefy by the Issue had before; Contra if he had Issue after. Br. Tenant per le Curtefy, pl. 15. cites 13 H. 7. 17.

5. Baron and Feme feisd of Land in Right of the Wife (whereof the Baron was intitled to be Tenant by the Curtefy) levied a Fine, which, upon Error brought, was revers'd, because the was within Age, and the Reversal was for both, and the Baron adjudged to re-have, so as the Fine was utterly avoided. Cro. J. 432. cites Charnock v. Worlsey. Cro. E. 129. pl. 1. Patch. 51 Eliz. B. R. S. C. adjudged, that the Fine should be revers'd in toto. — Le. 114. pl. 157. S. C. and the Fine revers'd accordingly. — S. C. cited Ow. 31. as resolved accordingly. — S. P. by Holt Ch J. who said, it is to be considered, whether his Title to be Tenant by the Curtefy is not extingushed if the Fine be revers'd after her Death; but indeed, if the Fine be revers'd in her Life-time he may have a new Title. 5 Mod. 67. Mich. 7 W. 3. Br. R.

6. By Stat. 3. Jac. 1. cap. 5. A Popish Recusant Conviēt, who is mar- by'd otherwise than in open Church, and by a lawful Minister, according to the Orders of the Church of England, shall be Tenant by the Curtefy.

7. A Man married his Father's Sister's Daughter. This is no Cause of Divorce; but it was adjudged, that though that Marriage [might be said to] be within the Levitical Degrees, yet it is a Marriage de facti, and only avoidable by Divorce, which, after the Death of the Husband, cannot be done, because thereby the Issue will be bastardized; and if the Wife had been Inheritrix &c. the Husband should have been
Curtsey.

Tenant by the Curtsey; and vouched 7 H. 4. Nov. 29. Hill. 15 Jac.

9. Four Things do belong to an Estate of Tenancy by the Curtsey, viz. Marriage; Seisin of the Wife; Illis and Death of the Wife. But it is not requisite that these should concur together at one Time; and therefore if a Man takes a Woman seised of Lands in Fee, and is dispossessed, and then have Illis, and the Wife dies, he shall enter, and hold by the Curtsey. So if he has Illis which dies before the Descent, as is aforesaid. Co. Litt. 30. a.

10. A Man is intituled to be Tenant by the Curtsey, and makes a Feoffment in Fee upon Condition, and enters for the Condition broken, and then his Wife dies, he shall not be Tenant by the Curtsey, because albeit the Estate given by the Feoffment be conditional, yet his Title to be Tenant by the Curtsey was inclusively absolutely extinct by the Feoffment, for the Condition was not annexed to it. Co. Litt. 30. b.

11. The Reason of the Difference why a Wife, in Case of an Elopement with an Adulterer, forfeits her Dowry, and yet the Husband leaving his Wife, and living with another Woman, does not forfeit his Tenancy by the Curtsey, is, because the Statute Westminster 2. cap. 34, does by express Words, under these Circumstances, create a Forfeiture of Dower; but there is no Act inflicting, in the other Case, the Forfeiture of a Tenancy by the Curtsey. 3 Wms's Rep. 276, 277. Pach. 1734. in Case of Sidney v. Sidney.

(I) Pleadings in Actions by or against Tenant by the Curtsey.

1. In Procipe quod reddat the Tenant pleaded, that A. his Feme, was seised &c. and marry'd him, and had Illis T. and died, so he is Tenant by the Curtsey, the Reverlon to T. and pray'd Aid of him, and a good Plea, without expressing the Surname of his Feme. Br. Pleadings, pl. 16. cites 40 L. 3. 37.

2. The Baron of the eldest Parceller, who is Tenant by the Curtsey, shall have Querre Impedit in his Turn. Thel. Dig. 24. Lib. 2. cap. 1. S. 44. cites Hill. 5 H. 5. 10.

3. In Wast against Tenant by the Curtsey, he said, that his Feme never had any Thing after the Coverture &c. and held, that the Pleading was not good; because it was only Argumentative, by which he pleaded, that one Alice infeoff'd him, Abesse boc, that he had ever any Thing by the Curtsey. Thel. Dig. 173. Lib. 11. cap. 53. S. 9. cites M.ch. 20 H. 6. 2.

4. Tenant by the Curtsey, though not expressly named in the Writs mentioned in Stat. 13 E. 1. 4, yet he is within the Mitchief and Purview of that Statute, for he is Tenant for Term of Life. 2 Inf. 353.

For more of Tenancy by the Curtsey in General, See other Proper Titles.

Custom.
(A) [In what Cases a Custom shall be] void for Uncertainty.

This in Roll 1. 

A Custom ought to be certain.

2. Such Custom shall be void for want of Certainty, which in Case of such Grant would be void for want of Certainty. D. 1.

Fitzh. Barr. 1. Custom, that when an Infant is of such an Age that he can count 12d. or measure an Ell of Cloth, that he may make a Peculium, is void for the Uncertainty. 13 Ed. 3. Fitz. Dunm. butt infra 31 dom. * S. C. cited to the Notes there. — Dav. Rep. Tanistry, 55. a. cites S. C. that such Custom is void for Uncertainty; but Ibid. 55. a. b. cites S. C. [only it is misprinted, 177; instead of 277] that the Custom is good, because the Time of the first coming may well be tried.


7. A Custom alleged and found by Verdict to pay 10d. to the Vicar at the usual Time of Churching Women, was held to be void; 1st. Because it was not alleged, what was the usual Time the Women were to be Churched, and therefore uncertain; 2dly, Because it was unreasonable, because it obliged the Husband to pay if the Woman was not Churched at all, or if she went out of the Parish, or died before the Time of Churching; Judgment was arrested. 2 Ld. Raym. Rep. 1558. Pasch. 2 Geo. 2. Naylor v. Scott.

(A. 2)
(A. 2) What it is; and How established.

1. A Custom, in the Intendment of Law, is such a Usage as hath obtained the force of a Law, and is in Truth a binding Law to such particular Places, Persons, and Things which it concerns, and such Custom cannot be established by Grant of the King, according to 49 E. 3. 3. a. or by Act of Parliament. But it is not non scriptum, and made by the People only of such Place where the Custom is. Dav. Rep. 31. b. 32. a. Hill. 5 Jac. B. R. in the Calf of Taniftry.

(B) In the Negative.

1. A Custom may be in the Negative, mix'd with an Affirmative. Custom does not lie in the Negative, but may be in the Negative with an Affirmative Precedent, As to prescribe to buy and sell without paying Toll; but it is no good Custom to say, that he has not paid Toll; and the Law seems to be the same of being quit of Tithes. Per Patron. Br. Customs, pl. 22. cites 7 H. 6. 31, 32. and 8 H. 6. 3. But he may prescribe in the Affirmative; As to say, that he and his Ancestors have been quit of Toll Time out of Mind. Br. Prescription, pl. 76. cites 18 E. 4. 3. by Littleton.

(B. 2) Commencement. And how it differs from Prescription.

1. Custom may be alleged, where there is no Person who can prescribe. Br. Prescription, pl. 100. cites 2 M. 1.

2. As Inhabitants cannot prescribe, but they may allege Custom, that the Inhabitants may common in D. and the one goes with the Place, and the other with the Person, which Person ought to be able to prescribe; for otherwise it is not good. Ibid.

3. Where a Man prescribes to go quit of Tithes for his Lands in D. where all others of D. pay Tithes, this is void; for Custom cannot be particular, but ought to be throughout a Country or Vill. Br. Prescription, pl. 93. cites Doct. & Stud. Lib. 2. cap 55.

4. Prescription goes to one Man, and a Custom to many. Brownl. 133. And 6 of Hill. 6 jac. in Calf of Kelles v. Mason.

rence between Freehold and Copyhold Land, that in the last Case a Prescription in a particular Place,
5. Prescriptions are either personal, and in this Inhabitants may prescribe, as for a Way, or Matter of Estate; or real, and this is inherent in the Estate, as where he prescribes by a Que Estate; or Local, where a man prescribes to have a Thing appendant, or appurtenant, to his Manor, that whithersoever the Land goes, the Prescription is concomitant to it. Arg. 2 Brownl. 210. Hill, 7 Jac. B. R. in Case of Marham v. Hunter.

6. Naturally a Prescription, or Thing prescribable, is so to be laid, where by Law it may, and not by Way of Custom, and where it cannot be by Law, and is therefore pleased by Way of Custom, the Nature of it is not chang’d, but remains still a Prescription in its Kind, though it be allowed to be pleased by Way of Custom for Necessity’s sake; and it appears in Gaterow’s Case, 6 Rep. 39 b. that a Thing lying properly in Prescription, as Common did in that Case, being an Interest which must inherit in somebody, can’t be pleased by Way of Custom, nor stand by Custom, where it can’t stand by Prescription, as there they would have made it for Inhabitants that are not permanent to prescribe. But yet for Common for Copyholders in the Lord’s Soil, it is allowed to be pleased by Custom for Necessity’s sake; whereas, in the Soil of another, it must be laid by Prescription in the Lord, and yet the Nature of both is a Prescription; per Hobart Ch. J. Hob 56. pl. 114. Trin. 12 Jac. in Case of Day v. Savage.

7. A Matter of Discharge may be laid by Way of Custom, for that it is no Interest, but an Exemption, not Positive, but Privative, of the general Possession; per Hobart Ch. J. Hob. 56. Trin. 12 Jac. in Case of Day v. Savage, cites Gaterow’s Case.

8. As to Prescription and Custom, this Difference ought to be observed, A Prescription ought to stand upon Reason; but a Custom can’t have Commencement but by Parliament, and not by Grant, as Borough Engliish and Gavelkind, no Reason being to maintain these but only by Act of Parliament; per Coke Ch. J. 2 Bullit. 206. Paish. 12 Jac.


10. A Custom can’t extend to a particular Place; Arg. Poph. 201. speaking of the Claim cites D. 35 Eliz. and this was agreed per rot. Cur. Mich. 2 Car. B. R. of the Freemen of London to be discharged of Wharfage, which was adjudged not a Custom, but a Prescription, calls it a local Prescription to privilege Persons in a certain Place and Condition, which he says is, in its Nature, neither a Prescription nor a Custom, and not a Custom, because it concerns the Discharge of Persons, and it is merely local; nor a Prescription, because it is not annexed to any Estate, nor to any Person, but in relation to a certain Place and Condition; and yet it is rather termed a Prescription; for it is laid, that Inhabitants may prescribe for an Edesement, or a Discharge, but a strict Prescription to make Title to a real Interest is so nice, that it cannot be pleased by way of Custom, nor confounded with it. Inhabitants, or Freemen, or Citizens, cannot prescribe in that kind.

(C) Custom
Custom against Custom.

See Tit. Prescription (X)

1. If in an Action upon the Case a Man prescribes, that he, and all those whole Estate he hath in the Manor of D, hath used Time out of Memory &c. to have a Fold-Courte, select, Common of Pasture for Sheep, not exceeding 200 in certain Land, as appurte-
nant to his Manor, and that the Defendant hath inclosed Part of the Land, in which he ought to have the Common of Pasture for the said Sheep &c. and the Defendant pleads, that there is a Custom Time of Mind out of Mind, &c. that the Owner of the Land, in which the Common of Pasture for the said Sheep is to be taken, had used Time out of Mind to enclose any of the said Land in which the Common of Pasture is to be had; This is not good within a Traverse of the Pres-
scription, for this is a Custom against a Custom, which cannot stand together, select, that one should have the Fold-Courte Time of Mind, and the other might enclose it, and exclude the Fold-
Courte. Trin. 11 Car. B. R. and Ch. 11 Car. between Day and Spooner, per Curiam, overruled without Argument, in a Writ of Error upon a *Judgment, to the same Intent at Linco. Inter-
tellar Dict. 6 Car. Rot. 153. Hill, 11 Car. it was adjudged per Curiam accordingly.

2. In an Action upon the Case for stopping ancient Lights, if the Plaintiff declares, That he was leas'd of an ancient House in the City of York, and that he, and all those whole Estate &c. have had Time &c. seven ancient Windows, and that the Defendant had erected a new House upon his own Land, next adjoining thereto, by which he stop-
ped the said Windows, and the Defendant pleads in Bar, that there is a Custom within the said City Time of Mind of an ancient House against the Land of his Neighbour, that he may stop the said Windows and Lights upon his own Land, at his Will and Pleasure, by Force of which Custom he stopped the said Windows; This is no good Plea, for a Custom against a Custom is not good, for both are of equal Antiquity, and the one cannot have a Pre-
scription to have the Lights, and the other to stop them, Time out of Mind. Cr. 29 Ch. 3. B. R. between Bland and Mofly, adjudged upon a Demurrer; Cited Co. 9. Aldred's Case, 58.

3. If one prescribes to have a Way over the Land of B. to his Freehold, B. cannot prescribe to stop it. Co. 9. Aldred's Case, 58. b.

Hickman v. Thorney, which see at Prescription (X) pl. 4. and the Notes there.

4. In Replevin the Defendant alleged a Custom of the Manor, that Quelibet Femia viro cooperta joining with her Baron in a Surrender of Copyhold lying in the Manor, and being privately examined by the Steward, makes it a good Surrender. Plaintiff replied, that there is a Custom in the Manor, that Quelibet &c. who is of full Age, may surrender, but that the Feme in this Case was within Age, but did not traverse the Custom of Qnelibet &c. and therefore the Court held it ill; for the Plaintiff confounding a parti-
cular Custom, ought to traverse the general Custom alleged by the De-
Custom.

(D) *Who shall be bound by a Custom.*

The King.

Ravm. 77. 1. A Custom that carveth itself upon the King's Prerogative, is void against the King. Da. 1. [Dav.] Casuistry 33.

2. It is no good Custom, that when any Distress be taken for the King's Debt within the Precinct of such a Manor, that it shall be brought to the Pound of the Lord, there to continue for three Days, within which Time, if the Owner of the Distress pays it, he shall have back the Thing distrained, because this is not any manner of Profit to the Lord, but of Service; and Wages shall not bind the King without his Special Grant. 21 E. 3. 3. 4. 6. Bridged.

3. The Custom of London to retain Goods put in Mortgage till Satisfaction be made of the Damage upon the lett, extends to the King's Jewels. 35. P. 6. 25. Da. 1. [Dav.] Casuistry 33. b.

It was argued by several, that a Custom which arises upon the Person or Goods shall not bind the King; *Custum of Custom which arises up in the Land, as Gavelkind, or Borough English, this shall bind him.* Br. Prerogative, pl. 5, cites 35 H. 6. 25. — And it was said there, that the King *shall not pay, Postage, nor Passages,* ibid. — *Nor Liases of Acknowledgment,* nor Attestation of Vellum before Sefesere shall not grieve him,* ibid. — *So 20 Defenses shall not toll his Entry,* ibid. — *And his Goods shall not be forfeited, as Woot, stone, nor as Wreck,* for Default of proving the Property within the Year; nor by Sale in Market Ores, nor where Custom of the Land to pay Fine at the Attestation, the King shall not pay Fine for it if he purchases it.* Br. Prerogative, pl. 5, cites 35 H. 6. 25. — Jenk. 83 pl. 62. S. P. cites 35 H. 6. 55. [but is misprinted, and should be fol

4. *If a Man hath Toll or Wreck, or Strays, by Prescription, this extends not to the King's Goods.* Da. 1. [Dav.] Casuistry 33. b.

5. It is a good Custom of the County of Chester, that if the King's Tenant in Capite by Knight's Service dies, his Heir being within in Age, that the King shall not have the Lands held of other Lords by Knight's Service: and this is there said to be Secundum Consuetudinem, ad antiquum tempus per quan tum Prerogavitnam haec in Comitat prad'. obtriptam s titratam. 23 C. 1. Rotuli Claun duin Henbrig, 9 The Custom allowed. The like in Membrana, 10 & 24 C. 1. Membrana, 3.

6. There is a Custom in Cheshire, that if a Debtor comes before the Chamberlain of Chester, and there takes his Oath that he is not able to pay the Debts, but that he will as fast as he can, that he shall have a Protection; and it is ordained by the Statute of [34] P. 8. [cap,
Custom.

[cap. 13.] That such Protection shall not be allowed without the King's Warrant; and if an Action of Debt be brought here in R. and the Plaintiff have Judgment, and sies an Elegit, directed to the Chamberlain of Chester, to extend certain Lands within the County-Palatine of Chester, * he ought to execute it notwithstanding the said Custom, for the Custom cannot extend out of the County-Palatine to bind the King's Courts, for the Chamberlain is but a Minster in this to execute the Process of the Court. P. 414. Psal. 41.4.

1 Car. between Bormy and Plaintiff, against Sir Urin and Crew, Boreo; Borough returned. Belke day, and Judge, adjudged, and a new Elegit awarded after the said Matter returned.

7. Custom that go with the Land bind the King, as Gavelkind, Borouo, Borough English &c. Jenk. 83. pl. 62. cites 35 H. 6. 25.—See pl. 4 in the Notes.

8. But no Custom shall bind the King for his Persor or Goods; As Portage, Murage, Wait, Edrays, Toll, Lapse, Alienation of a Vileine before Seilure. Jenk. 83. pl. 62. 

9. By the Custom of Kent, if a Man be hanged for Felony the King shall not have Annum Dom. &c Vainia, nor the Lord any Eschez of these Lands in Kent, the Custom there hinders it. 3 Built. 213. Mich. 14 Jac. B. R. in a Nota on the Cafe of Rolofwell v. Welsh.

(K) What Persons may do Things by Custom, which they cannot do at Common Law.

[Infants.]  

1. B Custom an Infant may make a Feoffment at the Age of 15. * Firth. To. 9. Combe 76. b. * 5 H. 7. 41. Doctor and Student. 21. shall be taken frieckly; for it has been adjudged, that a Release made by him at such Age is void; Per Belke and Vavilor

2. By the Custom of a Town an Infant may bind himself Ap- By such apprentice. 9 H. 6. 7, 8. per Dayby. Custom he may bind himself by Deed, but not by the Common Law, per Danby; and therefore in Action brought of the Departure the Court ought to be upon the Custom, as it seems. Br. Custom, pl. 63. cites S. C.

3. It was admitted a good Custom, that Infant within Age may de- Br. Depart- cure, pl. 9. cipis his Land. Quod Nota bene. Br. Customs, pl. 29. cites 37 cites S. C.
(L) What Persons shall be said to be bound by a general Custom.

[Infants, Idiots &c.]

1. If a Custom be, that a Devise made of Lands, and a Proclamation made thereof, and Nonclaim within a Year, shall bind all Men, yet an Infant shall not be comprehended within this Custom, for he is exempt by reasonable Construction of Law, because he hath not Discretion to make his Claim. 37 Ill. 5.

2. If a Custom be, that when a Copyhold descends to any Man, a Proclamation shall be made at Three several Courts, that he shall come to be admitted, and if he does not come at any of the several Courts, and pray to be admitted, it shall be forfeited to the Lord, yet an Infant is not comprehended within this Custom, because by Intendment of Law he cannot make Claim. Co. 8. Lechford 100. adjudged.

3. So for the Cause aforesaid, Men of unbound Memory in Prison, and out of the Realm, are not within such Custom. Co. 8. See Richard Lechford 100. b.

4. So if the Custom of London be, that the Mayor may take Recognizances of any Person, being of full Age, or of Women unmarried; this Custom shall not bind Idiots, Men of unbound Memory, or in Prison, for they are excepted by the reasonable Construction of Law. Trin. 32 Eliz. B.R. between Chamberlain and Thorp, Dibitatur.

(M) To what Things it shall be said to extend.

1. If a Custom be, that every Tenant of such an Honour hath used Time out of Mind &c. to pay a Fine upon every Alienation; this Custom shall not extend to the Demesne-Lands in the Hands of the Lord, but only to Tenements in the Hands of the Tenant. 14 H. 4. 8. 9.

2. If a Custom be, that the Lord ought to have the best Beast of him that dies his Tenant, and the Parson of the Parish the second-best Beast, as a Mortuary; if the Tenants hold two several Tenements of the Lord, subject to the Custom, within the Parish, it seems the Lord shall have the two best Beasts within the Intent of the Custom, and the Parson the Third. Dibitatur, 7 H. 6. 26. b.

3. If the Inhabitants upon a Common have used Time out of Mind &c. to dig Clay in the said Common of their Lord, for the Reparation of their Houses standing upon the said Common, and a Stranger
Custom.

Stranger digs Clay in the Common, the Inhabitants cannot take this Clay * from him, for this is not within their Custom. Rich. 37. 38 Eliz. B. R. between Stile and Batt, adjudged.

the Stranger dug it lawfully by the Lord's Licence.—Mo. 411. pl. 561. S. C adjudg'd.

See tit. Common and Commemor. (B) pl. 13.

[3.] If the Custum of a Manor be, That when any Tenant sells his Tenements, three Proclamations shall be made in the next Court-Day of the Manor, and that if any of the Blood of the Vendor will give so much Money for the Tenement as the Vendee will, that he shall have it; and a Tenant, in Consideration of 100l. in Money, and that the Vendee, being his Physician, hath cured him of a great Malady, sells the Tenement to him, and the next of the Blood comes to the next Court, and proffers 100l. for the Tenement, yet he shall not have it, for this was given partly for the other Consideration, which is not valuable, and to it is not within the Custum, for by the Custum it is to be intended where the Vendee comes in only for Money. D. 37. El. B. R. by two Justices; but by this Means every one may evade the Custum.

4. So if he had sold the Tenement in Consideration of a Lease for Years of other Land, and it be the next of Blood should not have the Tenement upon the Broth' of the i'd. D. 37 El. B. R. held.

5. If the Custum of the Manor be, That if any Copyholder in Fee Cro. E. 8. 7c. surrenders out of Court, and he, to whose Use it is surrender'd, does not come in at the Court to take his Copyhold, after three Proclamations made, that then the Lord may seize the Copyhold as forfeited, and a Copyholder in Fee surrenders to the Use of another for Life, the Remainder over in Fee, and the Tenant for Life does not come into Court to take his Copyhold after three Proclamations made according to Custum, upon which the Lord seizes the Copyhold as forfeited, and after Cessay que Use for Life dies; he in the Remainder shall not be bound by the not coming in of the Leefee, for the Custum being in all cases of Deprivation of an Estate, shall be taken strictly, and so it shall be intended only of Tenant in Fee in Possession, and not in Remainder, as this Case is, and so this is out of the Custum. 13. 44 El. B. R. between Jack and Long, adjudged.

6. Custum of London, that if any Goods are pawn'd there, the Pawnee may demand them till the Money be paid; this Custum does not intitle him to detain the Goods of a Stranger. 2 And. 152. per Cur. cites 35 H. 6. 26

7. A Custum is in London, that none ought to intermeddle with the Art of a Weaver there, but only those who are free of the Guild. If a Stranger receives a Silk in London, and carries it to H. and weaves it there, and then brings it back again to London, and receives his Pay for it; Resolved, that this is not any intermeddling with their Trade in London against the Custum, though the Contract was made in London; adjudged for the Defendant. Cro. E. 803. Hill. 43 Eliz. London Weavers v. Brown.

8. Custum that the eldest Daughter shall solely inherit; this is only to let the eldest Sister inherit by Force of this Custum. So if the Custum be that the eldest Daughter and eldest Sister shall inherit, the eldest Aunt shall not inherit by that Custum, and so if the Custum be that the youngest Son shall inherit, the youngest Brother shall not inherit by the Custum. Godb. 166. pl. 232. Patty. 8 Jac. C. B. Rapley v. Chaplain. And Foster J. said it was so adjudg'd in one Denton's Cafe.
172

Custom.

9. A Custom is always infra Manerium, and a Matter extra Manerium can never be by the Custom, as a Custom to have Common out of the Manor is void. Arg. 2 Show. 131. pl. 109. Nich. 32. Car. 2. B. R. in the Case of Zinzen v. Talmage.

Bridg. 52. Arg. —

10. Customs are stricti juris. 2 Jo. 142. Pach. 33 Car. 2. B. R. See p. 15.


11. General Customs may be extended to new Things which are within the Reason of those Customs; and 5 Co. 82 * Snelling's Case is an Authority in Point, where, by the Custom of London, Executors may pay Debts, viz. Simple Contracts in equal Degree with Bonds; and adjudged, that Administrators were within the Custom, though created by 31 Ed. 3. within Time of Memory, because within the same Reason.

12 Mod. 271. per Holt Ch. J. in delivering the Opinion of the Court. Hill. 11 W. 3. in Case of the City of London v. Vanacre.


13. All Customs which are against the Common Law of England, ought to be taken strictly, may very strictly, even stricter than any Act of Parliament that alters the Common Law; per Trevor Ch. J. in delivering the Opinion of the Court. 11 Mod. 160. Hill. 6 Ann. C. B. in Case of Archer v. Bokenham.

14. It is a general Rule, that Customs are not to be enlarged beyond the Usage, because it is the Usage and Practice that makes the Law in such Cases, and not the Reason of the Thing; for it can't be said that a Custom is founded on Reason, though an unreasonable Custom is void; for no Reason, even the highest whatsoever, would make a Custom or Law; so it is no particular Reason that makes any Custom Law, but the Usage and Practice itself, without Regard had to any Reason of such Usage; and therefore you can't enlarge such Custom by any Parity of Reason, since Reason has no Part in the making of such Custom; per Trevor Ch. J. 11 Mod. 160, 161. Hill. 6 Ann. C. B. in Case of Archer v. Bokenham.

(N) What Act shall be said a good Pursuance of the Custom.

Gavelkind [&c.]

Br. Customs. 1. WHEREx the Custom of Gavelkind Land is, That an Infant of the Age of 15 may make a Feoffment, this ought to be taken strictly; for if he is disposed, and releaseth to the Dispositor, this is not within the Custom, for it is not a Feoffment. 11 P. 4. 33. cites S. C. —

Firzh. Custom, pl. 11. See tit. Gavelkind. (C) pl. 1. and the Notes there.

Br. Customs. 2. So if he releaseth to the Discontinuee, this is not within the Custom. 11 P. 4. 33.

Pl. 15 cites S. C. and per Hank. a Release to Discontinue is no Feoffment. ——Firzh. Custom, pl. 11 cites S. C.
3. So if he grants a Reversion dependant upon an Estate for Life, it is not good. 11 H. 4. 33. 6.

4. But if he leaves for Years, and releases to him, it is a Feevoment within the Custom, because the Freehold passes by the Release. 11 H. 4. 33.

5. [But] If an Infant after 15 makes a Feevoment with Warranty, the Warranty is not warranted by the Custom. 11 H. 4. 33.

6. If there be a Custom within a Town to have a d. for every Hide of every Sheep, Cow, or Ox, that is killed, or sold, within the said Town, and for Nonpayment thereof, to seize the Hides & the Party that is to have the d. cannot by this Custom justify the tanning the Hides, and converting them into Leather, which he took for the Nonpayment of the d. though he did it for Necessity, felicity, because they would * be patented, for this is only a Damage to the Owner, and he might have Deed for the d. 43 El. B. R. between Dunno and Recess, adjudged. 7. A Custom was found in a Manor, that where an Estate was granted to A. for Life, Remainder to B. for Life, Remainder to C. for Life, that A. had Power to destroy the Reminders by surrendering the Estate in Court &c. And it was found that A. granted it away by Fine. And it was held per Cur. that the Remainders were not destroyed, nor granted by the Fine; for this being a Custom against common Right, that one Man should destroy the Right of another, it ought to be pursued strictly; and the Custom being found to do it by Surrender, a Fine shall not have that Operation within the Custom. Freem. Rep. 283. pl. 284. Mich. 1679. Talmarth v. Zinzay.

(O) Destroyed. How; and in what Cases.

1. Seized in Fee of Land in Borough English, [after the Stat. 27 H. 8.] makes a Feevoment to the Use of himself, and the Heirs Males of his Body, according to the Course of the Common Law; these Words, according to the Course of the Common Law, are void; for Customs which go with the Land, as this is and Gaselkind, and such like Customs which fix and order the Defeants of Inheritance, can be altered only by Parliament. By Catlin, Dyer, Sanders, Widdam, Browne, Bendlowes. Jenk. 220. pl. 70. cites D. 179. 6. 19. [p. 42. Patch. 2 Eliz. Anon.] 2. A Custom once reasonable and tolerable, if after it become grievous, and not answerable to the Reason whereupon it was groundid, yet is to be taken away by Act of Parliament; for an Inheritance once fixed, cannot be taken away but by Parliament. 2 Inst. 664.

3. The Question was whether the Statute 14 Car. 2. cap. 2. being an Act to take away a Custom in a Manor, in ejectorship? And it was held by North, Atkins, and Windham, that if it had destroyed the Custom; the Authorities cited were Affirmative.

y y

2 Mod 39.

The Act to be argued again.
Acts should not destroy Custums, were Dy. 19. 50. 3 Cro. 125. 2 Le. 74. 1 Inf. 115. 23 H. 8. 5. 11 Rep. 59. 64. Mo. 113. Hob. 173. And they seemed to take a Difference, that where a Statute is introductory of a new Law, there it shall take away all contrary Custums, though there be only Affirmative Words; but if there were a Law before, that shall not be destroyed by Affirmative Words. And though an Opinion has prevailed, that, notwithstanding the Statute of Magna Charta, where there is a Custom for holding Leets at other times than are mentioned in the Statute, it shall be well enough, and so the Law is taken, but North said, if that Statute were to be continued now, it would hardly be so taken. Freem. Rep. 203. pl. 206. Mich. 1673. Anon.

(P) Pleadings.

Br. Destine de Siens pl. 30. cites C. 1. Detine, by the Heir of Heir Loomes, or Principals of his Ancestor, viz. the best of every Sort of Goods, and counted upon the Custom of the County, and it was held a good Custom, and the Defendant durst not demur, and it was admitted that the Heir might have Action, though he never had Property before, or Possession; for the Law and Custom adjudges Property and Possession. Br. Custums, pl. 27 cites 39 E. 3. 6.

2. In an Action brought by Co-heirs in Gavelkind, or by the Younger Brother in Borough English, or by a Feene in Nottingham of Dower of a Moiety &c. the Plaintiff ought to declare upon the Custom and prescribe in it, and shew it in his Count, and otherwise ill, quod Nota; Per Cur. Br. Count. pl. 91. cites 5 E. 4. 8.

3. If a Custom be that the Feene shall have the Third Part of the Goods of her Husband, if he has Issue, and if he has not Issue, then the Moiety, there if she brings Rationahlim Parte Bonorum de Mediate, she ought to count of the Custum, and that the Baron had no Issue. Br. Custuns pl. 70. cites 7 E. 4. 20, 21.

4. Trespases of breaking his Close, subverting his Land, and spoiling his Grasfs, the Defendant said, that the Land is one Acre, called F. and that the Custum of this Land is, and Time out of Mind was, that every one who has Land in the said F. viz. Head-land, in plowing his Land may turn his Plow upon the said Head-land, and that the Defendant had half an Acre abutting upon the said Land, and in Plowing the said Acre he turned the Plow upon the said Land, and in turning the Point of his Culler, vazed a little Parcel of his Land, and one of the Oxen took his Mouthful of Grasfs, which is the same Trespase. Per Townsend the Custum is not alleged to be throughout the Country, but only in one Close, which cannot be a Custum, but Brian contra, and that this Use is throughout the Realm, where one has Land adjoining to another's Land in the Field, but in such an Action of Trespases, Patch 22 E. 4. 8. the Defendant said that the Custum of the County of Middleton is, where this Land lies, that where a Man goes to plow in the same County, it his lawful for him to turn his Plow upon the Land next adjoining if it be not joined with Grain, and per Cur. he shall say it has been used there Time out of Mind &c. and not that it is lawful &c. by which he said accordingly, and that this Land was the Land adjoining, by which he turned his Plow upon it, that because he could not well govern his Horses they turned up a Foot of Land, which is the same Subversion of Soil &c. and as to the Grasfs said, that one of his Horses in turning took a Mouthful of Grass against his Will, which is the same Despofuring &c. Per Catesby, where a Man drives a Drove of Cattle and they do so against his Will, this is a good
good Jutification; contra, if he suffers them to continue there, and the plea awarded good, and the Custom admitted good. Br. Custom pl. 51. cites 21 b. 4 29.

5. Information in the Exchequer against a Merchant for selling Wine in a Strange Suit, the Defendant pleaded Licence of the King made to J. S. to do it, which J. S. had granted his Authority to thereof the Defendant, and that there is a Custom among Merchants throughout England, that one may assign such Licence to another, and that the Assignee shall enjoy it &c. which was demurred in Law, and it was agreed for Law, that a Man cannot preferre Custom throughout England; For if it be the agitation England it is a Common Law and not a Custom, contra if the Custom had been pleaded to be in such a City, or County as Gavelkind, Borough English, Gloucester Fee &c. Note the Diversity. Br. Customs pl. 59. cites 34 H. 8.

6. In Tryals the Custom of a Manor was, Quod qualibet Tenens per Capum patent dimittere [devisare] terras suas, for Life, or Years in Fee, or after, and that a married Woman might devise her Copyhold Lands to any other, or to her Husband, by the Act of the Husband, a Feme covert devised her Land to her Baron (the Defendant) accordingly. The Court held that the Custom was not unreasonable, but it is alleged, Quod Poterit devisare, which Word (poterit) is a Word of Jutification, and that should be quid sane devistare; It was adjudged against the Plaintiff. Mo. 123. pl. 206. Pach. 24 Eliz. Anon.

Perfons, and that a Surrender was made accordingly. Anderson Ch. J. said, that Infeft of the Word Poecoris it should be, that Feme covertis pollutant, and that by the Custom have used to devise to the Husband, and therefore the Precipitation is not good Adjudicator—Ib L. 142; pl. 178. Trin. 25; Eliz. Skipwith v. Sheffield. S. C. Anderson said, it shall be intended that the Wife being sub Poecoris Virt, did it by Coercion of her Husband. It was then urged, that the Custom might be good, because the Wife was to be examined by the Steward of the Court, as the Manner it upon a Fine to be examined by a Judge; but to this the Court said nothing.—3 Le. St. pl. 122. Pach. 28 Eliz. S. C. Andersen cited to Godb. 14. et adjonatur.—2 Brown. 218. Arg. cites it to be adjudged 24 Eliz. in the Serjeants Cases, [which seems to be S. C.] that inasmuch as this was annexed to her Estate, which beg. by Custom, the Custom was good.—S. C. cited, that the Custom was good, but the assigning it by the Word (poterit) was Is. Supp. to Co Camp Cop 84.—A Custom found within a Manor, that every Tenan of the said Manor pointt & potissimo faro redde &c. was adjudged naught. Raym. 4. Arg. cites Pach. 57. Eliz. Bishop's Case.

7. A Custom was set forth, that Liset & licit for the Lord of the Manor to offers a Pain for the Breach of a Bye-Law. Arg. Raym. 4 cites it as adjudged void, Pach. 37 Eliz. Sir William Hatton's Case.

8. In pleading Uxige and Custom, it must pleaded, that it was put in Ux. Cre L. 322. pl. 13. Pach. 37 Eliz. C. B. Arg. cites it as held in C. B. in Hatton's Case.

9. Partener by Custom in his Declaration must make Mention of the Custom, as to Lay the Land is of the Custom of Gavelkind; but he shall not subscribe in it. And fo it is of Burgi-English; and these Two vary in that Point from other Customs; for the Law when they are generally alleged take Knowledge of these Two, Lit. S. 265. and Co. Lit. in his Comment thereon 175. b.

10. It appears by the Register, and many of our Books, that there must be a Custom alleged in some County &c. to enable the Wife or Children to the Wit De Ratione Parte Bonorum, and fo it has been reolved in Parliament. Co. Lit. 176 b. verius finem.

11. In Treffys the Defendant justified by a Custom in the Manor of T. the Plaintiff required de Injuria sua propria abique tali Causa &c. Though the Plaintiff should not have traversed the Cause generally, but the Custom, yet that was adjudged hoopen by the Statute of Jeufails, as Matter of Form; because abique tali Causa contained the Custom and more. Hob. 76. pl. 97. Banks v. Parker.

12. In
12. In Covenant the Plaintiff declared upon the Custom of London, that every Freeman may take Apprentices, and that Infants may bind themselves &c. After a Verdict for the Plaintiff, it was moved in Arreit of Judgment, that this Custom was pleaded in Fieri, when it ought to be in Fact; because Customs and Precedents consist in reiterated Acts, and therefore there must be an Usage to support them; but Judgment was given for the Plaintiff. Raym. 4 Hill. 12 Car. 2. B. R. Windm. v. Gibbs.

13. In Trespass, Quare Claustrum sicut in C. the Defendant pleaded the Manor of C. is an ancient Manor, and that within the said Manor is a Custom, that every Tenant haberd a Way over the Place where &c. Upon which the Defendant demurred, and Judgment was given for the Plaintiff that the Plea is ill. Sid. 237. Hill. 16 & 17 Car. B. R. Cornelius v. Taylor.

14. In Trespass for taking Three Tuns of Hay, the Defendant justifies, for that he was Meadow-Roeve, chosen at a Last Secession Constituens Manoris, and that Time out of Mind the Meadow-Roeve had used to collect the Bishops Rent's, and had used to have for his Pains out of the Meadow in Quo &c. as much Hay as he could draw out of an ordinary Cart; and so justifies for his Load of Hay, and doth not aver that it was upon an ordinary Cart; and the Court seem to incline that the Plea was not good, because he had not applied his Case to the Custom; Sad adjournat. Freem. Rep. 101. pl. 114. Pach. 1673. Lincoln (Bishop) at Wood. 3. Keb. 257.

15. In a Trespass against an Officer of an Inferior Court if a Custom be alleged in a Court after a Plaintiff levied, to take out Proceedings, and he alleges he that Proceeds was taken out (but alleges no Plain levied) he is a Trespasser. Freem. Rep. 356. pl. 449. Mich. 1673. Bennet v. Thorne.

16. Trespass for breaking his Clofe, called the Market-Place, and erefting a Stall there, the Defendant justified by Virtue of a Custom of the Manor for all Tenants to set up Stalls there to sell their Goods, and that he being a Tenant &c. and a Butcher, set up a Stall there to sell Flefh; Plaintiff demurred because Defendant did not say expressly, that the Market-Place is within the Manor; but the Court held that there is a sufficient Averment that the Locus in quo is within the Manor; It was also objected, that the Custom is to set up Stalls for selling their Goods, and the Plea is that he set up a Stall to sell Flefh, without saying (his) Flefh, and so it may be the Flefh of a Stranger, and for that Reason, Judgment was for the Plaintiff; but it being a hard Cafe, the Court moved the Parties to agree to amend the Plea and go to Trial on the Merits, and so they did. 3 Lev. 190. Mich. 36 Car. 2. C. B. Chatin v. Bentworth.


18. In an Action brought upon a Custom, it ought to be shown what the Custom is, otherwise it is not maintainable 2 Ld. Raym. Rep. 1134, 1135. Pach. 4 Ann. B. R. in the of Cafe Winchester (Mayor) v. Wilks.

(Q) Trial
(Q) Trial of Custom.

1. Where a Custom is pleaded in the Vill, Court, or Country, where the Custom is used, there it shall be try'd by the Justices, and by the Court, and not by the Country. Br. Trials, pl. 104. cites 11 E. 4. 2.

2. Contra, where it is pleaded in another Court, as the Custom of N. is pleaded in C. B. &c. there it shall be try'd per Pais. Ibid.

3. Contra, where it is pleaded in N. where the Custom is known. Ibid.

For more of Custom in General, See Common, Copyhold, Customs, Prescription, Coll. And other proper Titles.

* Customs.

(A) What Customs are good.

What Customs are good in respect of the Estates that shall be bound by them.

1. D. 19 El. 357. [v. pl.] 46. adjudged, That the Custom of a Town that a Tenant in Fee of Socage-Land shall not decease, or grant Leases for more than six Years, and if he does, that the Leases shall be void, is a Custom against common Reason, and the Liberty of [one that has] a Fee-Simple. (Seemle, Book intends a Devise by the Statute.)

Word (Devise) here should be (Dehise) and the one is frequently misprinted for the other.

(B) Gavelkind.

(C) What Customs are good, What not.


2. Trefpafs for digging Land the Defendant said that it is Four Acres adjoining to the Sea, and that all the Men of Kent have used Time out of Mind, when they fift in the Sea, to dig in the Land adjoining, and pitch Stakes to hang their Nets to dry; Nelle said he ought to have what Men. And per Choke and Littleton this is no Custom; for it is contrary to common Right and Reason. And per Dunby, Fifters may justify the going upon the Land to Fift; for it is for the Common Wealth, and for the Sufferance of several &c. and is the Common-Law, Quod fuit conceduum. Per Fairtax, the digging is Destruction of the Inheritance, and therefore is no Custom. Br. Customs, pl. 46. cites 8 E. 4. 18.

3. Trefpafs of cutting of Grafs, the Defendant said that there is such a Custom in the County of Kent, that when any Enemies come to the Sea...
Sea Coast, that it is lawful for all of Kent to come upon the Land adjoining to the same Coast, in Defence and Safe-Guard of the Country, and there to make their Trenches and Bulwarks for the Defence of the same Country, and said, that at the Time of the same Trepsas Enemies came &c. by which they dug to make Trenches and Bulwarks &c. And per Jenny it is the Common-Law to do so in Deience of the Realm. But Careful by contra inde &c. quere. Br. Customs, pl. 45, cites 5 E. 4. 23.

4. In the Law-Book are many Cases of Customs allowed for particular Reasons in particular Places, which it there were general would be contrary to Law and Common-Equity, and this in Lands, Goods, and Liberties, and as well in Castles Spiritual, as Temporal; and therefore the Custom of Borough English, Curvulund, and for an Infant to sell Land, if they were general, would be against Common Right; but yet they are allowable upon particular Reasons, which are not now disputable, in certain particular Places. Arg. Mo. 583. As Tenant of the Church of Hereford, that holds in Socage, shall be in Ward to the Dean and Chapter, which is contrary to Common-Law and Equity, cites 8 H. 3. Fitzh. Prescription.5.

5. So the Custom of Tenant-Right, in the North Parts, that one S. P. Arg. who takes Easte by Deed and Livery of Saun or his Life shall Sid. 267 pl. have Inheritance Custumary defendable to his Heir, and the Lord is compellible to make to every Heir and Purchaser such Easte for ever; which is contrary to Common Equity; but allowable for the Policy of strengthening the Borders against Scotland with such Persons, as shall not be removable, and shall increase in Unity of Alliance and Confinquity, whereby they will join with much greater Courage in the Service against the Scots. Arg. Mo. 583. in pl 796. Trin. 41 Eliz.

6. So the Custom that the Executors of a Copyholder for Life shall have the Land for a Year after. Arg. Mo. 583.

7. And the Custom of Cheltenham in the County of Gloucester, that if a Tenant in close Tenure of Inheritance takes Feme, and has Issue by her, and dies; And the Feme takes Second Baron and he has Issue by him; He shall gain the Land to him, and if he has no Issue he shall have the Land for his Life and Twelue Years after. Arg. Mo. 583.

8. So the Custom of Linne is, that if any Vill takes Toll of a Freeman of Linne, he shall take as much in Withernam, when any of such Place comes with Goods to Linne; and this allowed a good Custom, or grantable by Charter, and thofe of Newcastle, who have taken Toll of one of Linne, have made Recompence upon Withernam there taken, which is contrary to Common Equity, that the Goods of One Man shall be taken for the Fault of another. Arg. Mo. 583.

9. So the Custom of the Cinque Ports, and of the Tower of London, Mo 603. pl. to take Withernam of Londoners, if any Londoner has arrested a Freeman 834. Hill. of the Cinque Ports, or of the Liberty of the Tower is against Com- 41 Eliz. C B. in Common Equity, but the Custom is good, by Reason that those Places are to be tell of People for Safety. Arg. Mo. 583.

Cafe was vouch'd Anno 18 Eliz. between a Freeman of Dieppe in France, and a Freeman of Sandwich, which was upon the same Custom of Sandwich put in Use, the Consideration of which was committed by the Queen, upon the Letters of the King of France, to Wray and Dyer, and to two Cavilians, who certified the Custom good; but Anderdon, Waldcly, Owen, and Beacont, held the Prefcription nor. 2458., but Milleney doubted much, because the 4 Ports are Places defensive of the Realm, whereby there may be a special Reason that they shall not attend elsewhere for their Justice than within the Cinque Ports. — 2 And. 151. pl 85. S C adjudged by Aience of all the Justices, that the Custom shall not be allowed; and that Judgment shall be given for the Plaintiff.

10. So in Trepsas the Defendant justified by a Custom, that if Hogs come into the Street they should be taken and killed and carried to the Hospital for Sustenance of the Poor there, and allowed good, though con-
Cuftoms.


11. So the Custom of York, that Goods there, Foreign bought and For-
gain fold shall be iorfeised, is a good Cuftom, but againft Common-
Equity; and if it was universal through the Realme, it certainly
would not be allowable. Mo. 589. Arg. cites D. 270. 10 & 11
Eliz.

12. So in London, a Villain inhabiting there for a Year shall be infran-

(D) What Customs are good.
What Customs shall be good in Destruction of a
Prescription.

Custom (C) p. 2. S. C.

(C) Tit. Stop.

pl. 48 per iot.

CD. 9 William Alfred 58. b. is cited, that the 29 Cl. Bland
brought an Action upon the Case against Holyd, and
counted, That whereas Time out of Memory &c. there had been seven
Lights to his Houfe, the Defendant in York City had erected an Houfe
upon his Land, and stopped them, to which the Defendant said, That
the Custom of the City is &c. that such Obitration upon Junior
58. of was lawful, and adjudge not good, because the
Custom cannot take away the Prescription, and it may be, that
the Preriptan began by Grant. Quere, for there is such Custom
in London.

(E) What shall be against the Law of Reason.

1. It is not a good Cuftom in London, that if any Stranger
comes into any Parith in London, and dies there, and his Body
is carried and buried out of the Parith, that so much shall be paid
for his Burial, and other Things belonging thereunto, as for the
Sermon &c. to the Parith where he dies, as is paid in the Place where
he is buried; for this is against Reason to bind Strangers by such
a Cuftom for Burial, who are not compele to come to the
Church to receive the Sacraments there. P. 15 Il. B. Sir 7.
Ferris's Case, resolved per Curiam, and a Prohibition granted
accordingly, upon a Suit in the Spiritual Court, by the Parith
of St. Botolph, London, where the Party died, for these Duties.

2. It is a good Cuftom, that whereas J. S. is feied in Fee of the
Manor of T. and all the Tenements in the said Town are held of the
said Manor; that he and all thefe &c. have had Time out of Mind &c.
A Bakehouse, Parcel of the said Manor, maintained at their Charge,
and that this Bakehouse was sufficient to bake Bread for all the Inha-
bitants, and for all Passengers through the said Town, and the
Bread there baked and used, &c. to be sold at reasonable Prices,
and that no other Person, within the said Town, had need to bake
any Bread to sell to any Person. This is a good Cuftom, though
it restrains other Men to exercise their Trades within a certain
Place.
Customs.

3. If there be a Custom within a Parish, That the Parson of the Mano 333, cited 3 Rep. 135. b pitched, 3d. B. R. between the said Parish, for the Incroce of Cattle for the Maintenance of Hospitable Custom, and that in Consideration thereof, the Parson shall have the Tenth of the Incroce for. This is a good Custom, for it is grounded upon a good Consideration, as much as the Parson shall have the Tythe and Tenth of the Incroce. Cr. 39. B. R. Yielding v. per Curiam.

—— See Actions (N. c) pl. 35. and the Notes there.

4. It is a good Custom, that where he and all he, have Time gained, cited 2 Bull. 195. out of Land been settled of a Mill in the Parish of D. that all the tithe, cited 160. pl. 9. Inhabitants within the said Parish, ought to grind all the Grain that are adjudged for they expend in their Meetings, or Tenements, at the said Mill, the Plaintiff. This is a good Custom, though all the Inhabitants are not his Tenants. 11. 11. B. R. between Higgs and Gardiner adjudged, for this Custom may have a reasonable Beginning, as by Composition upon building the Mill.


6. [As] a Custom, which is injurious and prejudicial to a Multi- reafonable tude, and beneficial only to some particular Person, is repugnant to the Law of Reason. Davies 1. Common 32. b.

7. A Custom in a Town for a Lord to enter into the Lands of his First Cus- of his Inheritance. 43 E. 3. 32. Curia.

Man of his Inheritance. 43 E. 3. 32. Curia.

is not good to call a Man of his Inheritance without Answer; besides, the Usage was alleged to be in this Vill only, and not in the Neighbourhood. —— S. C. cited Arg. Bull. 115.

8. But if this Custom had extended itself into many Towns, it had been good. 43 E. 3. 32.

seems to be admitted. —— See supra, pl. 7. in the Note.

9. It is a good Custom, that the Tenants of the Manor ought to pitch- themselves to choose a Beadle to collect the Rent and Amencements of Avowry, pl. the Manor, and that if the Beadle be not sufficient, that the Tenants shall answer them to the Lord. 44 E. 3. 13. 11 H. 4. 2. 11 H. 6. 61. cit. per Cur. 32. b.

But 11. H. 4. 2 has no such Point, and therefore Roll seems to be misprinted for 14 H. 4. 2.

10. Also the Custom is good, if it be besides what is before, that if the Beadle elected by the Tenants refutes to do it, that he shall be attacked,
amerced, and that the Lord may distrain him, till he hath found Sureties to perform his Office, though the Tenants are to answer for him. 11 H. 6. 32. B.

12. It is a good Custom, that the Lord of the Town shall have to his Fold the Sheep of Strangers, which come upon the Land of his Tenants, and not the Tenants. 46 C. 3. 13.

Fitzh. Brief, 12. It is a good Custom, that when a Man hath agiiled his Cattle in my Park, in the Time of a great Snow, for Necessity to cut the Branches of the Oaks for them. 46 E. 3. 12. B. admitted; but such Usage is not sufficient, unless it hath been Time out of Mind &c.

13. It is not a good Custom in a Leet, that if the Petit 12 make any false Pretention, and it is found false by the Grand Inquest, that the Petit 12 shall be amerced; for this is against common Right, and Extortion. 9 H. 6. 44. B. Curia.

for the Verdict of the one 12 is intended in the Law to be as good as the Verdict of the other 12.

Br. Customs, pl. 3. cites S. C. — Fitzh. Tit. Customs, pl. 1. cites S. C.

Br. Customs, pl. 3. cites S. C. 14. But it is a good Custom, that if they conceal any Thing that ought to be presented, that they shall be amerced. 9 H. 6. 44. B.

Fitzh. Customs, pl. 1. cites S. C.

Br. Prescriptions, pl. 98. cites S. C. 15. It is a good Custom, that every Man of the Town that hath an House next adjoining and abutting to the High-Street, may sell all Merchandizes in his Shop within the said House, in the Time of the Market which is held in the High-Street. 11 H. 6. 19. B. 25.

The Prior of Dunstable's Cafe the Prescription was held ill. Afterwards the Defendant precluded the Custom of the Vill to be, that every Burgess, neither of any House adjoining to the High Street, may sell in his own House, and that he is a Burgess, and was precluded of a House adjoining to the High Street, and sold &c.

S Rep. 127. a. cites S. C. and held, that the Defendant pleading himself to be a Householder within the said Vill, and prescribed as such, was not good &c.

4 Le. 339. pl. 82. Glascok's Cafe, S. C. & S. P. adjudged. 16. It is a good Custom, that a Copyholder in Fee may cut down Trees, and fell them at his Plesure. 9 H. 6. 1a. B. between Glascok andPecke.

* Cro. Car. 220. 221. pl. 7. Rockey v. Huggins, S. C. adjudged. 9 H. 6. 243. pl. 2. S. C. resolved per tot. Cur. 17. But otherwise it is of a Copyholder for Life. 9 H. 6. 1a. B. between * Rokey and Huggins, adjudged, upon a Special Verdict per totam Curiam, where the Cutting of Elms by a Copyholder for Life, by such Custom was adjudged a Forfeiture, and cited Powell and Peacock, adjudged. Dobert's Reports 16. laid by Darbyton to have been lately adjudged.


Brownl. 172. 18. [But] It is a good Custom, that a Copyholder for Life, who 153 Rolls v. by Custom may name his Successor, may cut Timber Trees, and convert them at his Plesure; for he is qual to a Copyholder in Fee. 9 H. 6. 1a. between Roll. and Majen, per Curiam.

Brownl. 172. cites Brownl. 5 to 91. S. C. argued by Counsel, and Ibid. 192. to 203. S. C. debated by the Court, and Judgment for the Defendant that the Custom was good. — S. C. cited Cro. C. 221. In pl. 7. by Croke J.
19. Where a Custom is, that every Tenant of the Manor, who disreems for Damage ensuing in his Manor shall impound in the Park of the Lord, or shall be answer'd, this is no good Custom; for the Lord is not damnified. Br. Customs, pl. 31. cites 21 H. 7. 20. per Fither and Kingfinill.

20. So where Tenants make a Law that each Parishes shall pay annually to the Church such a Sum, and if not that he shall forfeit to the Lord 20 d. this is no good Custom or Reasonable Law; for the Lord is not damnified by this Non-payment, nor is he to take Profit by it. Ibid.

21. Contra if he was to forfeit 20 d. to the Church Wardens &c. and per Pollard it is a good Precaution, or Custom, that the Tenants of the Manor near shall not sine, unless in the Lord's Boat; for the Lord is at Charges in Reparation of the Boat, and so he is by Reparation of the Park or Pound, which Kingfinill denied. Ibid.

22. A Custom was to have so much per Tuns every Ship which came in to W. &c. It was objected, that a Tuns of some Merchandizes was not worth so much as they claimed to have for the Custom, yet it was adjudged good. Arg. Sid. 18. cites Mich. 23 Jac. Rot. 3009. Napper v. Manfield

23. A Custom to elect a Canon to succeed in the next vacant Place, there being no Vacancy at the Time, was held to be ridiculous, and a Manda- mus was denied. 2 Jo. 199. Palfch. 34 Car. 2. B. R. Dr. Owen v. Dr. Stainhow.

(F) What Things may be done by Custom.

1. It is a Custom, That when one goes to Plough, that he may turn his Plough upon the Land next adjoining, be it Goods or not. 22 E. 4. 8. v. adjudged; but 21 E. 4. 28. v. dubitatur. 4. S. and 21 E. 4. 28. that it is a good Jusification in Trefpass for subverting the Soil, and feeding the Grazes by a Custom, that he may turn his Plow upon the Land next adjoining, by which he is to do, and his Horses in the Turning subverted a Foot of Land, and took a mouthful of Grases contra voluntatem, and well. — S. P. Dav. 50. v. Arg. in the Case of Tarifality, and Ibid. 52. v. cites 21 E. 4. 28.

2. It is a good Custom to dry Nets upon the Land of another Man, in favour of Fishing and Navigation. Dabies 1. General 32. b.

3. It is no good Custom, That none shall put his Cattle into his Land before the Lord, for it is not reasonable, that if the Lord will not put in his Cattle, that the Tenants shall lose the Profit of their Soil; but if a Day is limited it is otherwise. * 21 E. 4. b. Littleron. 2 b. 4. 24. v. Dabies 1. General 32. b.

4. It is a good Custom, That none shall put in any Cattle in certain Lands after the Corn cut, and Dines till Michaelmas following. 46 E. 3. 23. v. cites Br. Customs, pl. 9. cites 46 E. 3. 23. but that two Men shall have their great Cattle there, to take the first Seflin of the Pature; and this Custom is good against the Lord also. Custom is, that none shall put in his Beats after the Corn cut and carried away, till Mich. and because the Plaintiff put his Beats in
5. It is no good Custom, That the Lord of the Manor shall detain a Distress taken upon the Demesnes, till a Fine at his Will paid for the Damage. Lit. 46. Davies. 1. Tanistry 33.

6. A Custom, That the Lord may take for his Heriot the Beast of a Stranger, levant and conchate upon the Land of the Tenant, is not good. D. 3. El. 199. Davies. 1. Tanistry 33.

7. A Custom, That the Lord of the Manor shall have 3 d. (31.) for a Pound Breach of every Stranger, is not good * 21 H. 7. 40.


8. Where by a Custom the Homage of the Manor hath used Time out of Mind to make By-Laws for the better ordering the Tenants of the Manor, touching touching their Common, under a Pain, it is a good Custom, that the Lord of the Manor hath used Time out of Mind &c. to detain the Cattle of him that broke the By-Laws, for the Penalty in any Place within the Manor, though it be within the proper Soil of the Lord, or others, and not in the Lands of the Tenant, for this is not sitting out of the Land. D. 15 El. 322. 23. adjudged; but there 24 moved again in another Case.

9. It was said, for Law, that by no Custom can Battiff or Steward leave Frank Tenement; Per Cur. contra of Copyhold, as it seems, if it be taken in Court according to the Custom of the Manor. Br. Customs. pl. 33. cites 19. Aff. 9.

10. The Custom of York is, that a Feme Covent may take Land purchas'd by her Baron, of the Gift of the Baron, and that if the Baron discontinue and dies, and the Feoff does not claim within the Year and Day, the same shall be barred. Br. Customs. pl. 56. cites 12 H. 3. and Fitzh. Prescription, 61.

11. Of every Custom there are Two Essential Parts, viz. Time and Usage; that is, Time out of Mind and continual and peaceable Usage without lawful Interruption. Co. Litt. 110. b.

12. That may be good by Custom without Consideration, which will not be good by Prescription without Consideration, As Custom to turn his Flow upon the Head-Land, and so for Fishermen to dry their Nets upon the Land of another, and so to dig the Land of others to make Bulkwarks in Time of Danger &c. because those Things are pro Bono Publico. 3 Lev. 307, 308. Trin. 3 W. & M. in C. B. in the Case of Simpson v. Bithwood.
(G) What shall be against the Law of Reason.

1. It is a good Custom, That the Corporation of Litchfield have Mo. 851. had a Marker there, Time out of Mind &c. and that the Corpo- ration ought to repair the Way to it, and to appoint a Bellman that, &c. Hill v. Hau- man; to Beflman S. &c. from thosc that brought their Grain to the said Beflman, and united their Sacks, there to sell it, had good, tho' used to take a Pint of Grain, if it was but one Bushel or under, but if it was above a Bushel, then a Quart, to the Ule of the said Corporation: but brought on; This is a good Custom, for the Pen that are charged by it, have a reasonable Benefit thereby. P. 11. B. R. between Hill But without and Hawkes, &c. Tr. 12. B. R. adjudged.


3. It is a good Custom, That where the Bishop of Sarum was Hob. 189. pl. feised in Fee, in the Right of his Bishoprick, of certain Mills within 258. Trien. the City of Sarum, that all the Inhabitants resident within the City S. C. in any ancient Mefluage held of the said Bishop, have used a Tempore S. C. cited &c. all their Grain by such Inhabitants in their said Houses, at 27. in the said Mills, and not elsewhere, without Licence &c. to grind, and Cafe of pay for the said Grinding; and in Consideration thereof, the Bishop's Good, a Tempore &c. have used to keep Servants &c. to grind, and Loaders Had. 67. to carry &c. for here are mutual Considerations, and mutual &c. 68. Trien. tions &c. for one is to grind there, and the other to maintain his Mills, and all Provision for Grinding. Hobert's Reports 250. quer. between Harum and Graven, per Curiam; though this extends as well to Graven bought, as to Sarum that grows upon their Tenements. Manfel. S. P. and cites S. C. but the Ch Baron, and Parker held, that such Customs must have a reasonable Intention viz. that all such Corn as is ground, must be ground there. ——2 Sane. 117. Paeh. 22 Car. 2. B. R. Per Twiden in Cafe of Coryton and Litheby, that according to such Allegation, the Defendant cannot spend any Corn in his Horse, unless it be first ground, and to he cannot feed any Chick- en, or give any Corn to his Horses, or he is Fornment, (as he said) with it, unless it be ground; and therefore it was unreasonable; and Judgment accordingly —— Vent. 167. Mich. 27 Car. 2. B. R. the S. C. adjug'd —— 2 Lev. 27. Litheby v Coryton S. C. and Twiden J. said, that the Declaration should have been, that they ought to grind all the Corn which is ground and spent within their Houses, and not all Corn spent there; For Corn may be spent without being ground at all, as for Horses, Swine, Poultry &c. and Judgment accordingly. —— Lev. 13. ches S. P. held accordingly, Mich. 1654. Alien v. James.
4. But such Custom is not good, if it extends to Grain sold in his House, to restrain such Inhabitant from selling Grain in his House *, without grinding thereof. *Hoberts Reports, 259. between Harbin and Green, adjudged.


7. Custom for those that govern the Common to incline to their proper Use, Sid. 162. Mich. 15 Car. 2. B. R. in Case of Smith v. Barret; Per Windham J. who said it was the Custom in Kingsnore in Somerset.

8. The Mayor and Commonalty of London declared on a Custom, that they and their Underwriters, have had of every Matter of a Ship 8 d. per Ton, for every Ton of Cheese brought from any Place in England to the Port of London, from the End of London-Bridge in the Name of Windeby, and that the Defendant being Matter of a Ship brought thither to many Ton &c. Adjudged, that the Liberty of bringing Goods into a Port for Safety, imports a Consideration in itself; And to a Judgment in B. R. was affirmed in Cam. Seacc. 3 Lev. 37. Mich 33 Car. 2. London (Mayor and Commonalty) v. Hunt.

(H) What shall be good Customs.

1. It is a good Custom, That a Copyholder for Life may nominate him that is to succeed him. *Trin. 10 Ja. between Rawles and Mysen, per Curiam.


3. It is a good Custom, That an Estate of Feehold and Inheritance hath used to pass by Surrender, without the Assent of the Lord in his Court, by Delivery over by the Bailiff to the Feodist, according to the Form of the Charter, to be made in Court, or such like. *Co. Lit. 59. b.

4. If the Lord of a Copyhold by Custom claims to have a Fine of the Copyholder, upon every Alteration of the Lord, be it by Alienation, or otherwise, this is a void Custom as to the Alteration, or Change of the Lord, by the Act of the Lord himself, for by such
8. A Saux may prescribe or allege a Custom, to have solum Veilu- See Tit. ram Terras from such a Day to such a Day, and by this the Owner of the Soil shall be excluded from feeding there. Co. Lit. 122.

9. So a Saux may prescribe to have Cublic Pathum of such See Tit. Land, and exclude the Owner from feeding there. Co. Lit. 122. 

10. In the Isle of Man is a Custom, that if one steals a Horse he shall be a Custum, not be hanged, but shall be fined and go quit, because the Owner may not, cites have his Horse again, for he cannot be eaten; But if one steals a Horse or a Capon &c. he shall be hanged; For it shall be intended that it cap. 69. cites was taken to eat, and so the Owner could never have it again. This 46 S. 5. a. is a good Custom. Mich. 35 H. 6. 37. b. 28. a. per Needham. that if a Man steals a Horse or an Ox, it is no Felony; for the Offender cannot hide them, it is said in the Margin, that they have no Woods there; but if he steals a Capon, or a Pig, he shall be hanged &c. There are several Customs that are good Rationes Last which are not allowed throughout England: As the Case of Female Merchant in London; and the Custoal of the Isle of Man to hang for stealing a Capon, but not an Ox. Sid. 267. pl. 18. Arg. cites 12 H. 8. 5.

11. A Custom that a Lefsee for Years shall hold for Half a Year beyond his Term is not good; agreed by all the Justices. So a Custom that a Lefsee for Life may leave per Anser Vie is not good; Per Hales & Mountague, Mo. 3. pl. 27. Hill. 3 E. 6. Anon.

12. Custom to have an Heret of the Purchaser of Lands within the Manor, if the Copyholder, the Vendor, has no live Beast, was adjudged a Void Custom. Bendl. 322. pl. 295. Trin. 13 Eliz. Lyne v. Ben- net.

13. A Custom was found by Verdict, that Copyholders may let for a Year ad Paffurandum, not ad Colendum. Le 16. pl. 19. Parch. 26 Eliz. B. R. in the Case of Cham v. Dover.

14. Where Common-Law and Custom meet, and so that of Necessity one must have the Preference and stand; the Common-Law shall be preferred, and take Place before the Custom; as Rent Charge granted out of Land at Common-Law and Borough-English &c. this Rent descends according to the Common-Law. And 191. pl. 226. Mich. 27 & 28 Eliz. in Case of Smith v. Lane.


16. In Kent there is a Custom, that if the Free-Tenants of a Castle do not pay their Rent they shall lose the Lands helden of it; And the Custom of Litford.
17. Every Custom ought to have four inseparable Qualities. First, it ought to have a Reasonable Commencement. (For quoad ab initio non vadit tracé Temporis non convalefet, & Confuséudo ex certa Caufa rationali Uritata privat communem Legem. Secondly, it ought to be certain and not ambiguous; For Incerta pro nullis habentur. Thirdly, it ought to have Continuance, Time out of Mind without Interruption; For Confuséudo femel repromota non poefit amplius induc. Fourthly, It ought not to exalt itself upon the Prerogative of the King; For Nullum Tempus occurrit regi.) Dav. 32. a. to 34. a. Hill. 5 Jac. B. R. The Cae of Tanitry.

18. Customs ought to be reasonable, and if they are generally Inconvenient they cannot be reasonable, and if they are generally inconvenient, though not mischiefous, yet they are not good. Arg. and agreed per Council of both Sides, 2 Brownl. 87. Patch. 9 Jac. C. B. in Cae of Rowles v. Mason.

19. A Custom was allledged in the Town of J. to elect every Year two Burgess, who used to make a Feast such a Day, and the Defendant being elected Burgifs refused to make that Feast, for which he was fined 20l. and imprisoned till he paid it. It was held by the Court to be a good Custom, and well returned, and the Prisoner remand. Cro. J. 555. pl. 17. Mich. 17 Jac. B. R. Wallis’s Cafe.

20. Custom, that if a Copyholder leaves for a Year, without Licence, and dies within the Year, it shall be void against the Heir, is a good Custom. Hert. 126. Mic. 4 Car. C. B. Turner v. Hodges.

21. A Custom in the Dutchy of Cornwall, that in the same Lands, an Eftate in Fee should descend to the Younger Son, according to the Nature of Borough-English; But an Eftate in Tail to the Heir at Common-Law, and held good per tot. Cur. (Abbeuf Crooke.) Mar. 54. 55. pl. 82. Mich. 13 Car. Anon.


23. Custom, that if a Man comes upon my Land that I may best him, or if he puts my Goods into his Houfe, that I shall burn his Houfe, are not lawful Customs. Br. Customs, pl. 5. cit. 33 H. 6. 25.

24. That cannot be called a Custom, which is grounded upon Fraud.

25. Custom of the Manor of Taunton, that the Wife of Copyholder shall have the Inheritance of the Baron, and if the marry a second Husband and die, second Baron shall have all the Inheritance. Cited by windham J. Sid. 267. pl. 18. Trin. 17. Car. 2. B. R. in Newton’s Cafe.

26. Every Custom supposes a Law, and if it be no irrational, and entertain no Contraditions it is good; Per Vaughan Ch. J. Freem. Rep. 64. pl. 76. Mich. 1672 in Cafe of Colliford v. Jackfon.
Customs. 189

veny, and any other Person be Bail, that if the Principal do not pay the Damages that are recovered against him &c. that the Bailiffs have used to take the Bodies of such Bail &c. And shews, that an Action of Covenant was brought against J. S. and that a Recovery of 29 l. in Damages was had against him, and that the Plaintiff was Bail, and thereupon a Capias was sued out against the Principal, and returned Non est inventus; and thereupon a Capias was sued out against the Bail, by Virtue whereof he arrested him; Vaughan said, if an Act of Parliament were made, that if the Principal do not pay the Money the Bail should be taken without any Capias sued forth against the Principal, no Man would doubt but it was good. From Rep. 85, 64. pl. 76. Mich. 1672. Colshd v. Jackson.

27. All Customs are to be taken strictly, when they go to the De- S. P. Yelv. 

vation of an Estate. 3 Mod. 224. Trin. 4 Jac. 2. B. R. by Eyre J. in Cafe of King v. Dillon. 

t 1. in Bif. pole's Cafe. 

--- S. P. 

Le. 1. in 


28. Holt Ch. J. cited a Cafe of Malden in Effect. The Corporation there prehible to repair the Port, in Consideration whereof, they have used Time whereof &c. to receive for all Lands, sold within the Precinct of the Borough, a certain Rate of 10 l. in the Pound, out of the Purchase Money; and it was adjudged a good Custom; and this is what they call (Land-cheep;) for the Landholder reaps a Benefit by the Trade coming to the Town, by Reason of the Port. Ld. Raym. Kep. 386. Mich. 10 W. 3. Vinkenforne v. Ebden.

29. The Reasons by which a Custom is supported, are generally these. Yet if no

First, because the Party that is bound by it, has Beneficy by it. Secondly, that the Party that claims the Advantage of it, is at Charge for the Begin. Reason of it. Thirdly, that it may have a Reasonable Commencement, or ring of a suppress Fraud, and the Two Firit of these Reasons hold in the Cafe Custom, of Toll Travers and Toll-thorough. Arg. 6. Mod. 124. Hill. 2 Ann. 


is unreasonable, and was against Reason in the Beginning, for there are some Things for which no

Reason can be given, as Borough English and Gavelkind; Per Coke Ch. J. 2 Bish. 196. Hill. 17 Jac. 

B. R. in Cafe of His v. Gardiner.

30. A Custom which may be general, and extend to all the Subjects in England, and is not warranted by, but contrary to the Common Law, is void. Gibb. 51. Pasch. 2 Geo. 2. B. R. Sherborn v. Boltrock.

(1) Against the Law of the Land.

1. Ever a Custom against the Maxims of the Common Law is not void. Davies 1. Tenchery 32.

2. For it is a good Custom, That a Feoffment of Tenant in Tail Br. Cuf-

with Warranty, shall not be a Discontinuance. 30 Atr. pl. 47.

3. It is a good Custom, That a Woman shall not have Dower, where the received, during the Coverture, part of the Money for the Sale of the Land. 20 C. 3. Brook Customs 53.

4. It is a good Custom, That if a Man marries a Widow, she shall not have Dower. Kitchin 149. Da. 1. 30. b.
5. But a Custom, That the Wife of Tenant in Fee shall not be curfewed, is not good. Da. 1. 2. S. C. 49. b.

6. A Custom, That the Wives of Irish Lords, or Captains, ought to have the sole Property in certain Parts of the Goods during the Coverture, with Power to dispose of them without the Assent of the Husband, is not good, because it is against the Common Law. Da. 1. 2. S. C.

Br. Customs, p. 21. cites S. C. — ibid. Week's, though without Title, he shall not be ousted by Entry without Action. 21 C. 3. 46. b. adjudged.

Jenk. 21. p. 40. cites S. C. and says, that this is a good Custom.

* Br. Customs, p. 19. cites 14 H. 4. 2. S. C. Says, it is admitted, that such a Custom to have a Fine for Alienation is a good Custom, but that he ought to allege Scisin &c. and ought to shew what Fine certain he shall have, per optimam Opinionem, and that such Custom ought to be shown to be allowed in Eyre, per Cur. because it is against Common Right. — Fitz. Customs, pl. 12. cites S. C.

|| Br. Customs, pl. 17. Hank J. said, that in several Places there is a Custom, that Frank-tenant who is feized in Fee, when he will alien shall come into Court and surrender the Land, and the Altence shall make Fine, and if he does not, the Lord may seize for the Alienation.

7. It is a good Custom, That if a Man be seised of Land for 40 Weeks, though without Title, he shall not be ousted by Entry without Action. 21 C. 3. 46. b. adjudged.

8. A Custom, That the Tenants of an Honour shall pay for every Alienation a Fine to the Lord, is not good, because it is against the Law, that any should make Fine for an Alienation but the King's Tenants. * 14 H. 4. 3. But where thereof, for it there were against Reason, the Law would not allow it the King. Cat. 14 H. 4. 4. 1.

9. A Custom against common Right, is not good. 7 H. 4. 32.

10. A Custom is not good, that trenches in Prejudice of the whole Realm. 7 H. 4. 32.


* See Tit. Proc. (D) pl. 1. 2. S. C. and the Notes there.
† See Tit. Error (L. b) pl. 6. and (G c) pl. 4. S. C.

11. It is not a good Custom of a Court to award a Capias in an Action of Debt, or other such Writ, before any Summons awarded, for this is against the Court of the Common Law, and all Courts. Palsh. 3 Jac. B. R. between Banks and Pemberton, in a Petition. Palsh. 5 Jac. B. R. between Ballard and Cooke, the which interlocut Trin. 4 Jac. Rot. 681. Hill 4 Jac. B. R. between Myole and Catcmet, adjudged, which interlocut, Trin. 4 Jac. Rot. 1569.

See Tit. Error (L. b) pl. 6. and (G c) pl. 4. S. C.

12. It is a good Custom in London, That the Mayor, Recorder, or any Alderman, being a Justice of Peace, may take Depositions of any Person produced before them, in perpetuum rei memoriam ex parte aliquus Personem, and that such Depositions shall be recorded there in perpetuum rei memoriam, and that these Depositions fo taken, for any Persons there given in Evidence, shall be good Evidence to a Jury, to induce the Consciences of any, and to enforce the Truth. This is a good Custom, though these Depositions may be taken in perpetuum rei memoriam, without any Suit depending contra. Hill. 32 El. B. R. between Kimmerly and Cooper.

Cro E. 168. pl. 4. Kimberley v. Cooper. S. C. but because it was not alleged, that London is an ancient City, the Declaration was not good; For it is a thing traversable, the Action being grounded upon it, and therefore adjudged for the Defendant — 3 Le. 98. pl. 120. Rymerly v. Cooper. S. C. and adjudged against the Plaintiff for the Said Default in the Declaration.
13. It is not a good Custom in London. That if a Man becomes in a Bail for another in an Action there, and the Plaintiff recovers against the Custom, the Principal, and sues out a Capias against him, and the Sheriff returns non est inventus, that presently upon this Return, without any reasonable Seize Facias against the Bail, the Bail may be taken in Execution upon — 2 Le. his Recognizance; for this is against the Law and Reason, that much as if he had sued his Seize Facias against the Bail, they might have pleaded the Release of the Plaintiff, or Death of the Principal at. Trin, 32 El. B. R. between Divorce and Rateliff, adjudged.

B. R. Anon. S. P. 29 to the City of Westminster — 5 Mod. 95. S. P. per Car. obiter, but said, that this Custom cannot be supported by Reason, and though the Customs in London are confirmed by Act of Parliament, yet such Customs which are contradictory to Reason, and to the Principles of the Common Law, shall not be allowed in B. R. 5 Mod. 95. Trin. 7 W. 3. — Jenk. 85. pl. 62. S. P.

14. So it is not a good Custom in an inferior Court upon a Judgment in the same Present. In Nature of a Capias ad Satisfacienti to give a Warrant to the Bailiff to take the Principal in Execution, if he may be found, and in his Default to take the Bail; for this is against the Law to take the Bail before a Capias returned against the Principal, and Seize Facias against the Bail, Hill, 10 Car. B. R. between Seburne and Swaker, per Custum, upon Demurrer. Infratur, Trin, 10 Car. Rot. 372.

15. It is not a good Custom in an inferior Court (which is not with- * See Tit. in the Statute of 32 [35.] H. 8. to grant a Talesde Circumstantial, Trial (B. c) because this was against the Law. Patch, 16 Car. B. R. between * Goddyear and Even, obiter. Mich. 11 Car. B. R. between Coxpland and Burnet, adjudged in a Writ of Error, upon a Judgment given in the Liberty of the Dean and Chapter of York, and the Judgment reversed accordingly. Inf, Trin. 10 Car. Rot. 1195.

16. It is a good Custom in an inferior Court, That when any Man comes to the grand Ditrefs in any Plea, and it is returned that he is distraint by his Goods, & quod nihil habet ulterius per quod di- stringi potest, that his Goods shall be delivered to the Plaintiff, finding Security, that if the Suit fails for the Defendant, that he shall have again his Goods, and that, if it fails for the Plaintiff, that he shall have them. Mich. 13 E. 3 B. R. Rot. 160. in Hardstone in Kent, in the Court of the Archdeacon.

17. A Custom in an inferior Court, to try Issues by Six Jurors, is not good, though many Courts have used it, and many Judgment depends thereupon. Trin, 8 Car. B. R. between Tredwineck and Perreyman, adjudged in a Writ of Error upon a Judgment in Bodnyn in Cornwall, and the Judgment reversed accordingly; though it then appeared to the Court, by many Certificates, that more than Twenty Courts in Cornwall have the same Customs, and infinite Trials there accordingly.

though in some Parts of Wales there are such Trials by six only, that is by reason of the Nature of 33 H. 8. which appoints, that such Trials may be by six only, where the Custom hath been so — Custom to try by six Jurors, unless it be in Wales, where it is confirmed by Act of Parliament, or to take Execution of Body and Goods, is a void Custom. Sid. 233. pl. 56. Mich. 16 Car. 2. B. R. Aike v. Hankin.

18. It is a good Custom in the County-Palatine of Chester, That if Judgment be there given in a Bate Court, and thereupon a Writ of Error is brought before the Chief Justice there, and he reverses the First Judgment, to give Certs to him at whose Suit it is reversed. Trin, 9. Car. B. R. between Foden and Maddock, Infratur. Patch, 8 Car.
8 Car. Rot. 397. admitted in a Writ of Error, where it was certified as a Custom, and agreed per Curiam, to be a good Custom.

19. It is a good Custom in an inferior Court, that in an Action of Debt, if the Defendant does not deny the Debt, but petit quit inquiratur de vero Debito secundum Consequentiam, that a Jury may be returned, that shall try it, and if they had it to be a true Debt, that the Plaintiff shall have Judgment thereupon Math. 11 Car. B. R. between Smith and Watson, adjudged in a Writ of Error upon such Judgment in Norwich, and the First Judgment affirmed accordingly. Intratur, 10 Car. Rot. 679.

20. If there be a Custom in an inferior Court, that if a Man brings an Action against another there, and the Defendant appears, and pleads to Iliae, and at the Day of Trial, the Defendant being solemnly called, does not appear, nor find Pledges, qui eum mancipare voluerint, to have his Body from Court to Court, at every Court thereafter to be held, till the Plea be determined as he ought by the Custom, but in Contempt of the Court, receivit & delabrat facultatem, and Judgment is thereupon given; yet this is not a good Custom, but utterly unreasonable, but they ought, according to Law, to take the Inquest by Default; for if he had appeared and paid in Prisun without finding Pledges, they ought not to have given Judgment against him, if he would have pleaded to Iliae. Trin. 11 Car. B. R. between Burges and Sparke, per Curiam adjudged, and such Judgment given in Plymouth reversed accordingly. Intratur, 12 Car. Rot. 376.

21. It is a good Custom in Bristol, in the Court of Tolsy there, held before the Sheriff and Bailiffs of the City, to maintain an Action upon the Case, upon a conceiving Solvere, is such, that the Defendant conceiving Solvere to the Plaintiff 601. pro diversis denariis Quantum eidem Querenti per Defendentem prius debitis solvere; though this is not good at Common Law, and though a Man cannot beforehand know upon what Contract this is brought till it comes to Trial. Math. 15 Car. B. R. between Orchard and Jenkens, per Curiam, in a Writ of Error out of Bristol, where this was assigned for Error, that it was against the Law, as to this Matter, but reversed for another Cause, and the Judgment affirmed accordingly. Intratur, Mich. 14 Car. Rot. 194. and adjudged in a Writ of Error upon a Judgment in Bristol. Dill. 11 Car. B. R. Rot. 1238. 1239, in Two Actions between Lawford and Cooke, and the Judgments affirmed accordingly.

22. Trespass
23. Trespass by J. against B. because the Plaintiff is Lord of the Hundred and ought to afford for the King's Duties throughout the Hundred, that he dilated such a Day for the King's Duties, and the Defendant made Returne, the Defendant preferred in Custom in his Manor, where &c. that when any Distress is taken there for Debt of the King, or other Cause, that he shall take it and put it into his Park for Three days, and if the Offender in this Time, tender Amends, that he shall re-boys his Goods, and said, that the Plaintiff's Bailiff dilated for Debe to the King, and his Bailiff took it and put it into the Park for Three days, and demanded judgment if Action, and because it is only a Bondage to the Defendant to keep the Action, and no Profit, and that such Custom cannot bind the King without special Grant of it, therefore by Award the Plaintiff recovered his Damages, and the Custom condemned. Br. Customs pl. 20. cites 21 E. 3. 4.

24. A Custom was alleged in the Town of C. that if the Tenant cease by Two Years, the Lord should enter into the Freehold of the Tenant, and hold the same until he be satisfied of the Arrearages, and it was adjudged a Custom against the Dow of the Land, to enter into a Man's Freehold in that Case without Action or Answer. 2 Inst. 46, 47. cites 43 E. 3. 32.

25. Præcipe quod reddat, where the Custom is, that the Heir shall have his Land at the Age of Fifteen Years, or may alien when he can raise a Ward of Clauses; yet in Præcipe quod reddat, such Heir shall have his Age, and so it seems, that Custom shall be taken freely, and not extend to be outlaid of his Age in those Points. Br. Customs pl. 14. cites 11 H. 4. 29, 30.

26. A Custom of a Manor was found, that a Feme Covent might devise Goods. 13 Eliz. C. B. Shipworth v. Sheffield. S. P. of a Gift to the Husband; but the Court held the Custom unreasonable, and it shall be intended, that the being sub Potestate viri, did it by Coercion. Fleetwood urged, that the Custom might be good, because the Wife was to be examin'd by the Steward of the Court, as the manner is upon a Fine, to be examin'd by a Judge; but to this the Court said nothing. 3 Le. St. pl. 122. Pauch. 26 Eliz. C. B. Shipworth's Cafe. S. C. saecularis. Anon. 2 And. 152. per Car. cites 3 E. 3. It, North, where it was agreed, that such Custom was not allowable by Law.

27. In a Writ of Error by W. v. B. upon a Judgment given in the Court of the City of Bristol; the Case was, that B. was Plaintiff in the said Court, against W. in an Action of Covenant, and declared a Covenant made by Word by the Tenant of W. with B. and declared also, that within the said City there is a Custom, that every Tenor that Covenant, as strongly as if it were made by Writing; and it was held by the Court, that that Covenant doth not warrant this Action, for the Covenant binds by the Custom the Covenantor, but does not extend to his Executors, and a Custom shall be taken stricly, and therefore the Judgment was reversed. 2 Le. pl. 3. Hill. Eliz. B. R. Wade v. Remoe.
28. A Lord cannot prescribe to have a Fine of every Tenant that marries his Daughter without his Licence, for it is against the Freedom of a Freeman, that is not bound thereto by a particular Tenure. Hawk. Co. Litt. 211.

No Custom can help that which is against Common Law. As where in Cafe, the Court of S. the S. the Defendant made Default, & habuit Diem per Confuetudinem Villae predicti, this is against Law, it being an apparent Discontinuance, and Judgment there given was reversed. Cro. J. 357. pl. 15. Mich. 12 Jac. B. R. Peplo v. Rowley.

30. A Custom was alleged in the Spiritual Court, that all those that dwell in such a House had use to find Meat and Drink for the Churchwardens and the Persons, going in Procession in Rotation Week, at the said House; but the Custom was held to be against Law. Mo. 916. pl. 1301. Mich. 13 Jac. Reynolds’s Cafe.

31. Custom alleged, that he and all the Occupiers of the said Meadow-Clofe have used fugare & refugare asseria, from the Meadow-Clofe to the Moor-Clofe, and from thence to the Court-Clofe; This is a Custom only to do a Wrong and to do good, and Judgment accordingly. Bull. 326. Hill. 1 Car. B. R. Turner v. Denning.

32. In the Borough Court of Southwark, a Capias was awarded against the Defendant, who was sued there as Administrator, and Desertion returned upon him, and Fieri Facias was awarded against the Bail, secundum Confuetudinem: it seems admitted, that this Custom is void; but the Writ of Error was abated, because the Principal and Bail joined in it. Palm. 507. Trin. 4 Car. B. R. Plaw v. Richards.

33. Trefpafs for taking Beef; The Defendant pleads a Custom to chafe Superiors of Villains at a Court-Leet; that he was there chosen, and having reviewed the Plaintiff’s Goods, found the Beef to be corrupt, which he took and burned. The Plaintiff demurs, for that the Custom is unreasonable, and when Meat is corrupt and sold, there are proper Remedies at Law, by Action on the Cafe, or Precentum at a Leet; and cited 9 H. 6. 52. 11 Eliz. 1. 3. 4. 6. and Stat. 18 Eliz. cap. 3. But the Court held it good Custom, and Judgment was given for the Defendant; the Chief Justice being not clear in it. 2. Mod. 36. Trin. 27 Car. 2. C. B. Vaughan v. Wood.

34. Trefpafs for taking his Goods; The Defendant justifies by Virtue of four several Attachments out of Bloomsbury Court and sets forth that the Custom there is, upon such Attachment to detain the Goods till the Owner give Security ad Satisfaciendum the Plaintiff de debito. Resolved the Custom was unreasonable. Freem. Rep. 321. pl. 400. Mich. 1674. B. R. Watfon v. Parfons.

35. It is a General Rule that Customs are not to be enlarged beyond the Ufage, because it is the Ufage and Practice that makes the Law in such Cafes, and not the Reafon of the Thing. Per Trevor Ch. J. Gibb. 243.

For more of Customs in General, See Custom, and other Proper Titles.
Customs of London.

(A) An Action brought there by the Custom.

1. An Action by the Custom lies in London for these Words: Cro. C. 13 Car. B. R. between Bower & his Wife, against Cooper, per Curtian, after an Indictment Corpus and Procedendo granted, to 846. pl. 11. 1 Sy. 229. Bower & Ux. v. Cooper, S. C. accordingly: Denton v. Curtian. But the Opinion of Berkeley was the contra; and for that Co. 4. Exford's Case, is contra; And in this these Precedents were cited, feliciter, between Bond and Watson, S. C. accord. Trin. 8 Car. B. R. a Procedendo for such Words, and accordingly— Cro. C. 553. 9 pl. 14. Hill. That if a Judgment be given in London in this Action, a Writ of Error lies, in which the Law may be decided, and therefore it is not reasonable to grant a Supercedas to hinder the Suit there. Trin. 1659, between Peston and Harrison, adjudged per total Curtian, and a Procedendo granted accordingly, where the Words were, Thou art a Whore, and my Husband's Whore, that she should sue for Defamation in the Spiritual Court only. —— Mar. 107. pl. 182. T. R. 17 Car. 2. R. Anon, a Procedendo was granted, and laid by the Counsel, and agreed by the Court, that of late Years many Procedendo's had been granted in the like Cases in B. R. —— Syr. 69. 26. Mich. 25 Car. Isaac v Green, S. P. adjourn. — S. P. and Procedendo granted by three Justices, Hide Ch. J difting. Raym. St. Mich. 15 Car. 2. R. Hayes v. Wheeler. — Lee 116. Mich. 15 Car. 2. R. Wheeler v. Welch, S. P. fees admitted, and fees to be S. C. —— Keb. 478. pl. 40. S. C. adjourn. Hales v. Wheeler. —— A Procedendo was granted, Carth. 75. 76. Mich. 1 W. 25 M. in B. R. Watson v. Clerk.

2. Debt, because the Defendant was with him at Table by seven Weeks for 12 d. the Week, the Defendant tender'd to wight his Law. Laiicon laid to the Law, he shall not be receiv'd; for he was at Table in London, where by Custom he cannot wight his Law for Boarding. Per Littleton, this is no Matter here. Per Billing, the Action lies here, if he counts upon the Custom. Br. Customs; pl. 43. cites E. 49. 5.

3. As in Rationabili parte Bonorum here. Ibid.

4. Contra upon the Custom of such a Country. Ibid.

5. For where the Custom is arising upon the Land, this is allowable in every Court, as Greavekind, Borough-English, and Feue to have Dower of the Moietie, but for an Infant to have Portions of Goods, this shall not be maintain'd in the Court only where the Custom is. Br. Customs; pl. 43. cites E. 49. 5.

6. The same, that in Debt a Man shall not wight his Law, where an Attorney of London witnesses the Contrat; tho'le Customs shall be allowed in the Places where they arise, but not in this Court, or in another Court, and therefore the Law does not lie here. Br. Customs, pl. 43. cites E. 49. 5.

7. All such Customs pleaded in Bar here are good Bars here; But when Action shall be brought upon a private Custom, this shall not be brought in Bank, as Debt in London against Executors upon a Simple Contrat.
trait, does not lie here, but it lies well in London; for there the Custom is known, and yet such Recovery had there, and pledged here, is a good Bar, quare; For the best Opinion was, that the Law lies well. Br. Customs, pl. 43. cites 1 E. 4, 5.

8. O. and j. were bound as Sureties with one A. to B. who recovered against j. in London, and had Execution against him; and now j. finds O. to have been of him Contribution to the said Execution, ut Utterque oneretur pro rata, according to the Custom of London; O removed the Cause by Privilege into B. R. whereupon came J. and prayed a Proceedendo; and because, upon this Matter, no Action lies by the Courte of the Common Law, but only by Custom in such Cities, the Cause was remanded; for otherwise, the Plaintiff should be without Remedy. 2 Le. 166, 167. pl. 202. Parch. 26 Eliz. B. R. Ofley v. Johnson.


10. By the Custom of London, the Debtor may be arrested before the Money is due, to make him find Sureties. Vent. 29. Parch. 21 Car. 2. B. R. in a Note there.

11. A Woman declared, by Bill original, in Nature of Debt pro Rationabiliter partes Bonorum, in the Court of the Mayor and Aldermen of London, and alleges the Custom, that when Citizens and Freemen of London die, their Goods and Chattles, above Debts and necessary Funerall Expenses, ought to be divided into three Parts, and that the Wife of the Teitators ought to have one Part, the Executors another, to discharge Legacies, and dispose of their Discretion, and the Children of the Teitator, Male or Female, which are not sufficiently provided for in the Life of the Father, to have (notwithstanding the Legacies in the Will) the other third Part, and that the Suit for the same ought to be in that Court &c. But the Court agreed, that it may be remanded here, and that being removed in B. R. it may be proceeded upon here, and that it is an Original Writ by the Common Law; and said, there were several Precedents to this Purpoze. And Richardson Ch. J. said, that the Plaintiff might have declared, without alleging the Custom, because it was well known there; but other wise, where an Action upon the Custom is brought in a Place where the Custom extends not. Herl. 158. Hill. 5 Car. C. B. Calon’s Cafe.

12. A Cause was removed out of London by Habeas Corpus, wherein the Plaintiff had declared against the Defendant as a Feme Sole Merchant; and Barre moved for a Proceedendo, because (he said) they could not declare against her here as a Feme Sole, for that she had a Husband. Jones contra. The Husband may then be joined with her, for he is not beyond Sea. Twifden said, I think a Proceedendo must be granted for the Cause alleged. It was resolved in the Cafe of Langhin and Breuin, in Cro. (though not reported by him) That if the Wife use the same Trade that her Husband, she is not within the Custom. And they are to determine there, whether this Cafe be within their Custom; perhaps a Victualler (as this Trade is) is not such a Trade as their Custom will warrant; and whether it will warrant it or not, is in their Judgment. A Proceedendo was granted. Mod. 26. pl. 70. Mich. 21 Car. 2. B. R. Anon

13. Warfe was brought in the Hultings upon a Leaf for Years of a Brewhoue. Lev. 309. Hill. 22 and 23 Car. 2. B. R. Cole v. Green.


13. Hole
Customs of London. 197

13. Holt moved for a Procedendo in an Action against a Feme Sole, Merchant in London, removed hiset, and alleged, That by the Custom of London, it should be tried there; and it was granted per Cur. Comb. 42. Hill. 2 and 3 Jac. 2. B. R. Scoan v. Mace.

(B) The Custom touching Orphans.

1. A Woman before the contract's Marriage with J. S. agrees with him, that the shall have Power to devise the Sum of £201 S. C. & S. P. to any Person, and after the Marriage, the, by her Will, gives it to the Children of the first Husband, and dies. The Husband, after her death, acknowledges a Judgment at the Common Law for the Security of it, yet, by the Custom of Orphans of London, he may be compelled by the Court of Orphans of London, to give new Security for it at the Chamber of London. Pach. 17 Jac. B. Andrew's Case per Curiam.

2. If a Man for Orphans' Money gives a Security in the Prerogative Court, yet he may be compelled to give other Security to the Chamber of London. P. 3. 17 Ja. 2. said by Hutton to be the Case of one Lloy, of late Time, resolved.

3. In London there hath been a Court of Orphans Time out of Hob. 347. Mind, and there hath been a Custom, That if any Free-man, or Lich's Cafe, Free-woman, dies, leaving Orphans under Age unmarried, that they S. C. and Administrators have not to exhibit true Inventories before them; Lich's Cafe, and if there appeared to be any Debt, to be bound to the Chamber-Cafe, S. C. to hold the Seal of the Orphans, in a reasonablc Sum, to make a Good Account, and to appear upon Oath, after they have received them, and if they refused, to commit them till they were bound. This is a good and reasonable Custom; and if the Ecclesiastical Court will compel them to make an Account there against this Custom, a Prohibition lies. Dabart's Reports, Cafe 313. Locke's Cafe.

4. Adjudged that if an Orphan, who by the Custom of London is but under the Government of the Lord Mayor and Aldermen, lies in the Spiritual Court for any Goods, Money &c. due to him, either by the Vizage to Custom of London or by any Legacy &c. or to have an Account, that a Prohibition shali be granted, because the Government of Orphans of Lon- yet if he don both by Custom belong to the Lord Mayor and Aldermen, and conceives it E c c they more secure
Cuftoms of London.

they have Jurisdiction of them. 5 Rep. 73. b. Patch. 35 Eliz. B. R. Orphans of London's Cafe.

For that and have. 10. Nature, contra. It was fild per Coke. Att. Gen. to have been fo adjudged in the Cafe of Sharrington v. Fulwood. — 4 Rep. 64. b S. C.

It was fild per Coke. Att. Gen. to have been fo adjudged in the Cafe of Sharrington v. Fulwood. — 4 Rep. 64. b S. C.

S. C. adjudged per Cur for the Defendant. 6. In Treffpa and falfe Imprefonment, the Defendant juftified by the Defendant juftified by the Custom of London, that the Mayor and Aldermen had the Cuftody of Orphans (viz. of the Males till Twenty one, and of the Females till Twenty one or Marriage; and that the Plaintiff took a City Orphan out of the Guardianship of A. and at the next Court was committed Prisoner to the Defendant; On Demurrer to the Plaintiff, Exception was taken, that the Plea was not good, to take a Perfon without Notice of his Crime and to carry him to the Court to be immediately committed; that he ought to have Notice of what he was brought to the Court for, fo that he might prepare to Answer. But the Court held it good, and gave Judgment for the Defendant. Lev. 162, 163. Patch 17 Car. 2. B. R. Wilkinson v. Boulton.


Y. C. and Ld. Keeper Bridge, and Bridgers Twidale and Wyldes. 8. The Portion of an Orphan in the Chamber of London is of such a Nature, that if the Husband dies without altering the Property, his Widow and not the Executors shall have it. Chan. Cafes 182. Trin. 22 Car. 2. Pheafant v. Pheafant. hold clearly that this was a Chofen Action, and not deifiable. — S. C. cited Vern. 89.

Mod. 7. pl. 75. and 76. pl. 43. S. C. and H. not knowing that she was an Orphan is not material. 2 Lev. 72. The King v. Harwood, S. C. resolved. — S. C. cited 3 Wm's Rep 118. in a Note by the Reporter.

It was fild contra. Ch. Prec. 537. Mich. 1723. Anon. 9. H. was committed to Newgate by the Court of Orphans, for that he married an Orphan without License first obtained; and was fined 40 L. and refted to pay it; H. brought a Habeas Corpus, to which several Exceptions were taken, and among the rest, one was, that it was not returned, that H. was a Freeman, but that and all the others were over-ruled, and he was remanded. Vent. 179. Hill. 23 & 24 Car. 2. B. R. Harwood's Cafe.

V. H. who dies under Twenty-one, her Orphanage Part shall not be difeize to the other Children, but shall go to the Husband. Vern. 88. Mich. 1692. Fowke v. Lewen.

11. One P. was committed by the Mayor and Aldermen of London for marrying an Orphan without their Consent; and was brought into B. R. by Habeas Corpus; P. was also fined 50 L. and this Conviction of his was removed by Certiorari. Exception was taken to this Conviction, because the Ciyton, as it was, that they had Power to commit the Party offending where he took away an Orphan, and such Orphan to taken away did marry; But here the Fine is let for marrying without their Consent, and it pays nothing as to the taking away. But Per Holt Ch. J every marrying is a taking away out of their Cuiiedy. Hill. 4 Ann. Reg. B. R. 'The Queen v. Pullen.

12. A
12. A Child, entitled to an Orphanage Part, dying before Twenty-one, and unmarried, cannot devise it by her Will; for by the Custom it 1724. Jelfon
  serves to the other Children; but the may devise what Share comes to her, out of her Father's Personal Estate by the Statute of Distributions. 2 Vern. 1758. Trin. 1766. Wilcocks v. Wilcox.

deeded over Foremore C. and Cowper C. successively, in the Cases of Ambrofe v. Ambrofe, and of Rawlinson v. Rawlinson.

† The Orphanage Part shall survive even after a Division, and Partition made between the Children, but what was devised to them out of the Father's Part the Mother will come in for a Share of, according to the Statute of Distributions; Per Ld. Harcourt. Ch. Prec. 372. Trin. 1715. Leciles v. Lecen.

13. An Orphan cannot release her Custody Share it being a meer futurity Right, nor can the Husband do it, per Ld. Macclesfield, that it is a but whether such Release will not amount to a Composition, or Agreement Ld. Mac- in Bar of her futurity Right, or be as they call it, a compounding for Maccles- her customary Share was not determined. Ch. Prec. 544, 546. Mich. Trin. 1722. Kemp. Kelley.


14. The Husband of the Daughter of Freeman (who had another Daughter and a Son) upon receiving a suitable Portion released all Right and Interest, which he had, or might have by the Custom or otherwise, except what the Father should give by Will or otherwise, and by the same Deed covenanted that at any Time after the Death of the Father-in-Law he would do any further Act for releasing of any Right, which he might have by the Custom, to the Executors &c. of the said Father. The Court seemed inclined that the Release being for a Valuable Consideration, purporting an Agreement to quit the Right, to be binding in Equity; but however the Covenant for a Valuable Consideration to release the future Right is good, and the Executor having, before the Bill brought, tendered a Release, which the Husband refused to execute, the Court decreed an Execution. 2 Wms's Rep. 272. Pasch. 1725. Cox v. Belitha.

15. And where the same Freeman had left to his other Daughter (a very Weak Woman) 3500 l. by his Will, and the being Forty Years old, and not likely to marry; and the Father, after making the Will (as was positively sworn by the Son the Defendant) desired the Son to secure to his said Sister an Annuity of 250 l. a Year, in Satisfaction of her Legacy, which he accordingly did; and the, in a Publick Manner, with the Consent of her Relations, and Friends, and the Brother-in-Law and Sister, as also the Tenant in the Father's Will, were Witnesses to the Deed, released all her Right to her Father's Personal Estate by the Custom of London to her Brother; And the Brother-in-Law and his Wife, after the Death of the said Sister, bringing a Bill for her Orphanage Part, the same was dissatisfied with Costs, and decreed the Brother-in-Law in the Cross Caufe to release his Right to the Custumary Part in Purificance of the Covenant, and to pay Costs there also. Per Jekyll and Gilbert Commissioners. 2 Wms's Rep. 272. 274. Pasch. 1725. Cox v. Be- litha.

16. The Custom of London is, where there are several Children, the Father may appoint a Right of Survivorship amongst them: If there be a Male Child only, the Father may devise over his Orphanage Part, if such Male Child die before the Age of Twenty-one Years, and if there be a Female Child only, then the Father may also devise over in Case such Female Child die before the Age of Twenty-one, or her Marriage. MS. Rep. Pasch. 13. Geo. in Canc. Piddington v. Mayne.

17. Bill
17. Bull against the City of London by Plaintiff, in Behalf of himself and the Rest of the Proprietors of Orphan Stock, to have an Account of the Produce of that Fund, and to have the Surplus of that Fund for some Years last past to be applied to make good the Deficiencies of former Years, for that by Stat. of 5 & 6 W. & M. cap. 10. Sect. 13. the Produce of that Fund is applied for the Payment of the Annual Sum of 4l. per Cent. to the Proprietors, or so much thereof only, as the Money, by this Act appointed to be raised and paid as aforesaid, shall Yearly amount unto, to satisfy and pay towards the said Interest to the said Orphans equally in Proportion &c. and that there is no Provision by the said Act, for making good the Deficiency of any former Year by the Surplus of any subsequent Year &c. King C. affiled with Raymond Ch. J. and Jekyl Master of the Rolls held that the general Intent and Scope of this Act was, to secure 4l. per Cent. to the City Orphans for ever, for the respective Sums due to them from the City, and the several Funds thereby raised, are appropriated for that Purpose, and the City is made Trustee for them, and are to have no Benefit by those Funds, until the 4l. per Cent. be paid to the Orphans; and though Sect. 13 of the Act says, that the Fund shall be Yearly applied only to the Payment of the Annual Interest of 4l. per Cent. yet the Word (only) in that Place shall be null and overthrown the general Tenor and Scope of the whole Act, and that Claus seems chiefly calculated for the Benefit of the Orphans to prevent any Misapplications, or to apply any Part of the Annual Fund to make good former Deficiencies before the 4l. per Cent. for the current Year be fully paid and satisfied, and not give the Benefit and Advantage of any Yearly Surplus to the City, till all former Deficiencies be made good to the Orphans.

Decree, That the City shall account for the several Years Surplusses received by them, and pay over such Surplusses to the Orphans pro Rata, until the former Deficiencies be made good to them &c. Per Cur. MS. Rep. Hill. 2 Geo. 2 Canc. Ladda v. London City.

12. Where the Husband was attained of Felony, and pardoned on Condition of Transportation; and afterwards the Wife became intituled to some personal Estate, as Orphan to a Freeman of London; this Personal Estate was decreed to belong to the Wife, as to a Feme Sole. 3 Wms Rep. 32. Trin. 1729. Newfome v. Bowyer.

[B. 2] As to the Widow’s Part.

S. C. cited 10 Mod. 455. Mich. 6 Geo. 1. in Canc. as held accordingly, and that in that Case it was held, that there the Father was to be considered as dying without Children, and the Estate was to be divided into Moieties, the one Moiety to go to the Wife, the other Moiety to be the Testamentary Share of the Father, and not at all considered what the Nature of the Estate was, whether Real or Personal, out of which the Children were advanced.

2. The Widow is intituled to the Furniture of her Chamber, or in Case the Estate exceeds 2000l. then to 50l. instead thereof. In a Case before Lord Parker, 18 Mar. 1718. Biddle v. Biddle.
(B. 3) Custom as to the Wife's Part. Bar thereof by Settlement &c.

1. T HE Father, a Freeman of London, possessed of a Term, assign'd it to his Son for a Provision, and died; the Widow sued in Chancery for her Custumary Part; and upon Issue tried before Hale, whether by this Assignment, the full be bar'd of her Custumary Part; it was proved, and found by the Jury, that she is not bound by it, as being voluntary, but that she shall be intituled to her Custumary Part of it, and so the like as of Goods. 2 Lev. 150. Hill. 25 and 27 Car. 2. B.R.

2. If a Woman, before Marriage, agrees to a Jointure in Bar of her Custumary Part, this Agreement shall bind her, and the full never after sue for her Custumary Part. Held by Lord Chancellor. 2 Freem. Rep. 67. pl. 78. Trin. 1681, in Cafe of Bravell v. Pocock.

3. A Freeman of London leaves the City, and lives in the Country 20 Years together, and marries, and makes his Wife a Jointure, and dies, she shall have her Share by the Custom; per North K. Vern. 190. pl. 174. Trin. 1683. Rutter v. Rutter.

4. Marriage Agreement provided, that if the Wife claims any of the Personal Estate by the Custom of the Province of York, then the Estate settled in Jointure should be to other Uses. Decreed, she is bound by the said Settlement, and ought not to claim any Part of the Personal Estate; decreed by Lord C. Nottingham. But Lord K. North decreed one Third of the Personal Estate to belong to her as Administratrix, and that it was an accruing Right, not barred by the Marriage Agreement. But Lord C. Jeffries let aside the Order of Lord K. North, and confirmed that of Lord C. Nottingham, and decreed accordingly. 2 Chan. Rep. 252. 34 Car. 2. Benfon v. Bellais.

5. A Freeman of London left London, and lived many Years in the Country, and by his Will devised a Leasehold to B. and all his Books to C. and as to all the rest of his Estate, confiuting of Money, Goods, Mortgages, and Credits, he gave the Use thereof to his Wife for Life, and made B. and C. and others, Executors; and directed his Executors, out of his Estate, to pay the Wife's Funeral Charges after her Death, and gave her the Use of his Plate for her Life, and directed, that his Stock and Estate, then in D's Hands, should there remain during her Life, and the Product be paid to her for her Maintenance, and gave several particular Legacies, and devolved over the Surplus of his Estate after his Wife's Death. It was decreed at the Rolls, and affirmed by the Lords Commissioners, that the Wife should have a Moity of the Books and Goods, though specifically devolved to others; and there being no Ghold, the Widow by the Custom was intituled to a Moity, so that the Testator could devolve no more than a Moity, and therefore nothing more paffed by the Will, and that the specific Legates should not have any Satisfaction out of the Surplus for the Moity evinced by the Widow by Reason of the Custom. 2 Vern. 110. Mich. 1689. Webb v. Webb.

6. A
6. A voluntary Judgment given by a Freeman of London, payable three Months after his Death, is to be postponed to Debts by Simple Contract, and to the Widow's Customary Part, but will bind the Freeman's Lega-

7. Any Jointure binds and bars the Wife; per Dee, City Serjeant, and said, that it is called a Compellation. 2 Vern. 660. in pl. 592.

8. Where a Freeman of London's Wife is compounded with before Mar-
riage, by settling a Jointure, though of Land, the Wife is taken as
advan'd, and the Children, by the Custom of London, shall have a
Moiety, as if the Wife was dead, and so certify'd in the Cafe of Hall

9. The Wife of a Freeman of London shall not take by her Husband's Will, and likewise by the Custom, unless it be so declared in the Will.

10. A Widower and Widow being about to inter-marry, and having only Personal Estate, by Articles made before Marriage, agreed, that in case the Husband survived, he should have 2000 l. only out of his Wife's Personal Estate, and the rest to be at her Disposal &c. and in case the Wife survived, then she was to have 2000 l. out of the Husband's Personal Estate, without saying only, or no more; the Husband, being a Freeman of London, died, and his Wife brought her Bill for an Account of his Personal Estate, over and above the 2000 l. and to be let into her Customary Share thereof; but it was decreed, that the equal Con-
struction of those Articles must be to exclude the Wife from any further Share out of the Estate; and though the Words were not so full to ex-
clude her, yet the Intent of the Articles appearing to be a mutual recip-
rocal Agreement between them for settling each other's Claim, ought not to be extended larger on one Side than the other; and decreed, that the Wife must have only the 2000 l. Gilb. Equ. Rep. 95, 96. Trin. 1 Geo. cited in the Cafe of Pitt v. Lee.

11. Bill by a Widow of a Freeman of London, for her Customary Share of her late Husband's Estate.

The Cafe was. The Husband made his Will, and devised to his Wife sev-
eral Shares in the New River Water, with Remainder over &c. and gave her several Legacies; the Will was sealed up in a Sheef of Paper and, included in the same Paper, was a Bond found, executed by the Tsettator some Time before the Date of the Will, which Bond was conditioned to pay the De-

daunt, being his Nephew, the Sum of 1000 l. or to transfer to him 1000 l. Stock in the Million Bank; but this Bond appeared to be voluntary, and not given upon a valuable Consideration &c.

If Quere; If this voluntary Bond shall be taken as a Debt due from the Tsettator, and consequently to be paid out of the Tsettator’s Per-

conal Estate, before the Widow’s Customary Share.

2edly, If the Widow must renounce and disclaim all Benefit and Advantage by the Will, as well the Devise of the Shares in the New River for her Life, being Real Estate, as the Devise of Personal Chat-
tels to her.
Trevor, Master of the Rolls said, the Plaintiff must disclaim all Benefits and Advantage by the Will, if she will have a Decree for her Custumary Share, contrary to the Will, and this is the constant Course of this Court. 26ly, This Bond being in Nature of a voluntary Gift, is fraudulent against the Wife's Custumary Share, and shall not stand in her Way, and such Sort of Contrivances to evade the Custom, are always for Aide in this Court. Decreed accordingly. MS. Rep. Trin. 2 Geo. Canc. Edmundson v. Cox.

12. A. a Freeman of London purchased Land in the Name of B. and This Decree C. but no Trust was declared. The Consideration Money (being 940s.) was paid to B. who was an Attorney at Law kept the Writings, and received the Rents of so much, as was left, of the Estate, and A. by a Paper, all his late. own Hand Writing, purporting an Estimate of his Estate, and what he was worth, had charged B. as Debtor for Money lent him to buy the said Estate, and also for Interest thereof. A. died; B. afterwards executed a Declaration of Trust. Decreed, That this Declaration after A's Death, is sufficient to bar the Widow's Custumary Part. But the Court, upon the Circumstances, recommended it to the Heirs or Devisees of A. to let the Wife come in for Dower of this Trust Estate. Wms's Rep. 321. Trin. 1716. Ambrose v. Ambrose.

13. A Freeman bequeathed a Legacy to his Wife, which, with the other Wms's Rep. Legacies, did not exceed the Husband's Testamentary Part, the shall take both the Legacy and her Custumary Part; per Lord C. Parker, Wms's Rep. 333. Hill 1718. Babington v. Greenwood.

Publisher, Whether such Legacy must not be given out of the Testamentary Part, as (he says) appears from the Reporter's Notes to have been determined about this Time, in the Case of Baddle v. Baddie? 14. Money of the Husband's and Wife's, by Marriage Articles, lodged in Trustees Hands, to be laid out in Lands, and fertilized, and to be in bar of Dower and Jointure is no Bar of the Custumary Part; per Lord Macclesfield. For the Money in this Case, as soon as the Articles are executed, is to be looked upon as Land too. Ch. Prec. 505, 508. Mich. 1718. Babington v. Greenwood.

15. A Citizen of London joines his Wife before Marriage with Gibb. Equ. Land, to which the Custom did not extend. Lord Chancellor sent to S. C. arg'd, the City to certify, whether this Jointure did not bar her of her and Ld. Custumary Right? It was certified that it did not, because not made Chancellor in Bar of her Custumary Part; but that had it been made in Bar, it though it would have bound her. 10 Mod. 457. Mich. 6 Geo. 1. in Canc. Arg. cites it as the Case of Atkins v. Waterton.

designed to have the Custum certified. —— Equ. Abr. 157. &c. pl. 4. S. C. says, that the Certificate was, that had it been made in Bar of her Share of the Personal Estate it had been a Bar, but if expressed only in Bar of Dower, or Thirds of Lands, the same had never been in Controversy in this Court, nor had they any Custum concerning it. It was afterwards decreed, Patch. 2 Geo. 1. to be no Bar of the Custumary Share. —— Chan. Prec. 508. S. C. cited as clearly decreed to be no Bar.

Both the same Points held accordingly by Ld. C. Parker, and said, that Land, or a Real Estate, is of a quite different Nature from Personal Estate, and a Matter wholly out of the Custom. Wms's Rep. 551, 552. Hill 1718. In Case of Babington v. Greenwood.

16. Acceptance of a Settlement before Marriage out of the Personal Estate, without any Notice taken of the Custum, bars the Widow's Cu. in Canc. in Slommary Part of the Personal Estate, if she survives, as by Virtue of the Time, 14 May 4. 1725. Ld. King's band thinks it fit to make her. Abr. Equ. Case 159. Trin. 1727. Lewen's C. but not decreed. —— 3 Wms's Rep. 11. pl. 5. S. C. Ld. Chancellor declared, that the Wife in this Case was bar'd of her Custumary Part. (B. 4)
(B. 4) Orphans Protected, Favour’d, and Reliev’d.

1. 4 & 5 P., & M. cap. 8. D E S not to take away any Custum touching any Orphan within the City of London.

2. The Defendant was bound by Recognizance to the Chamberlain of London for payment of divers Sums of Money for Orphans Portions; and departed out of this City, and dwelt in Oxfordshire, leaving no Estate behind him in the City; so as the Proces of the City cannot take hold; therefore a Subpena is granted against him upon Pain of 100l. to appear before the Mayor and Aldermen, and to stand to their Order. Cary’s Rep. 60, cites 2 Eliz. fol. 5. Mayor &c. of London v. Dormer.—Afterwards fol. 67. Order’d, if he do not appear, an Attachment is granted.

3. An Orphan under Age whose Father left him 1000l. which was in the Chamber of London, married a Wife with a good Portion, she was allow’d 240l. out of the 1000l. and so relieved against the Custum of London. Chan. R. 26. 4 Car. 1. Havers v. Burton.

4. Defendant, for what Money he has put out belonging to the Plaintiff, as her Orphanage Money, shall account and pay Interest after such Rate as is allow’d for Orphanage Money by the Court of Orphans, and no more. Chan. R. 106. 12 Car. 1. Hayne v. Nelson.

5. Upon the Marriage of Orphans, the Custum is to appoint the Common Serjeant to treat and take Security for the Orphan. Arg. 2 Vent. 341. Mich. 22 Car. 2. in Case of Pheasant v. Pheasant.

6. On a Bill to bring in a Foreigner to give Security to the City for the Orphan’s Portion according to the Custum of the City, Bridgman K. decreed the Plaintiffs to try the Custum. Chan. Cases. 203. 23 Car. 2. Mayor &c. of London, and Byfield v. Slaughter, & al. the Executors of the Plaintiffs Father.

7. Orphanage Part, according to the Custum of the City of London, was decreed with Costs. Fin. R. 248. Hill. 28 Car. 2. Hill v. Blacket and Rodes.

8. Plea of an Account of an Orphans Estate, before the Aldermen of London, was disallow’d, and a Surcharge allow’d to be made thereon by Lord Chancellor. 2 Chan. Case. 170. Hill. 1 Jac. 2. Newdigate v. Johnfon.

9. The Plea for an Account before the Aldermen was disallow’d, and a Surcharge allow’d by the Ld. Chan. to be made, and decreed the Executor to pay Interest at 6l. per Cent for the Money not paid into the Chamber, till he paid it in, though the Chamber usually took but 5l. per Cent. 2 Ch. Cases, 170. Hill. 1 Jac. 2. Newdigate v. Johnfon.

10. This Custum of the City of London is the Remains of the old Common Law, that a Man could not give away any Part of his Estate without the Consent of his Children, and is so taken Notice of in Bracton, but being found extremely inconvenient and hard, it was by the tacit Consent of the whole Nation, abrogated and grown into disuse. (For what Law has ever been made to repeal it?) and kept up only in the City of London; Per Ld. Macclesfield. Ch. Prec. 596. Tr. 1722, in Case of Kemp v. Kelley.

11. By the Custum of London, a Freeman cannot devise either the Orphanage Part, or the Contingency of the Benefit of Survivorship among Orphans. Neither can an Orphan devise his Orphanage Part, or the Part which accrued by Survivorship. But such Freeman may give by Will to
Customs of London.

205

to his Children, Legacies inconsistent with the Distribution under the
Custum; and then such Children must make their Election, whether
they will abide by the Will, or by the Custum? But they cannot abide
by the Will in Part only, and take the Benefit of the Custum also.

(B. 5) Orphans. What Persons are intitled to the
Benefit of the Custum, or excluded from it.

1. TH ERE is no such Custum, as that a Child marrying under
Eighteen Years, without the Father's Consent, shall lose her Or-
Rhodes.

2. A Freeman of the City of London dies leaving a Wife and Child,
the Wife dies, her Third shall go to the Executor, or Administrator; so
if the Child dies, and leave an Executor, the Child's Part shall go to
the Executor, but not to the administrator of such Child; for if there
be no Executor, it shall go to make up and increase the Orphanage Mo-
ney of the other Children. Arg. 2. Show. 409. Mich. 36 Car. 2. B. R.
in Case of Palmer v. Allicock.

3. A Daughter of a Freeman, marrying without her Father's Consent,
loses her Orphanage's Part, unless he is reconciled to her before his Death.

4. The Custum of London doth not extend to Grand-Children; As
it A. the Grand-father dies, leaving the Father with several Daughters,
these Daughters are not within the Custum. Per Ld. Keeper Cowper
Hill. Vac. 5 Ann.

5. A Grandchild is not within the Custum of London to come in Gilb. Equ.
for his Father's or Mother's Share, together with the other Children of
a Freeman; and this has been settled by the Ld. Chancellor, where
a Deed, by Way of Provision for a Grandchild, being made by the
Grandfather, after the Father's Death, in Order to introduce him into
his Father's Place, was set aside, as made in Fraud of the Custums
Northey v. Burbage.

S. C. admitted by Counsel, and said to have been so determined and

(B. 6) Bar. What is a Bar of the Children's Part,
or otherwise, and what shall be said an Advancement.

1. RESOLVED that where a Citizen of London devises a Legacy
to one of his Children, that notwithstanding that Child shall have
his Share out of the Custumary Part, unless it doth appear, that by the
Intent of the Teftator, that Legacy was to go in Satisfaction of his

G g g
2. A Man devised 3000 l. to his Daughter, and the Residue of his Personal Estate he devised to his Brother. The Quetion was: Whether this Daughter should have her Cuthomary Part besides this Legacy, by Reason that he gave the Residue to his Brother, which is a kind of an Implication, that the Daughter should have the 3000 l. and no more; and if she should have her Cuthomary Part too, there would be nothing left for the Brother. But the Ld. Chancellor held clearly, that she should have her Legacy and her Cuthomary Share too; there being no Words in the Will to exclude her, the shall not be barred by Implication; and if there were nothing for the Brother, he could not help that, it must go as far as it would. 2 Freem. Rep. 67, pl. 73. Trin. 1681. Bravell v. Pocock.

The Reporter Queris, and says, it seems only such a Provision as is made on Marriage, or in Pursuance of a Marriage Agreement. Ibid. 89, 90.

3. Per Cur. any Provision made by the Father in his Life-time for his Children, is an Advancement within the Cuthom unlesa it be declared by Writing, that they are not sufficiently advanced, and for sometime it was held that in such Writing there must be mention made what Summe they received from their Father because of bringing it into Hotch-pot. Vern. 89. pl. 78. Mich. 1682. Fouke v. Lewen.

4. The Father by a Prior Will declares a Child not fully advanced, and after revokes that Will, and by a latter declares that Child fully advanced, such former Will is a sufficient Declaration to let the Child into Hotch-pot. 2 Chan. Cases 117. Trin. 34 Car. 2. Anaud v. Honeywood.

5. A Portion of Money given by a Freeman of London to his Son, has ever been taken for, and towards the Advancement of such Son out of his Father's Personal Estate, within the Custom of the City of London. 2 Chan. Cases 118. Trin. 34 Car. 2. Anaud v. Honeywood.

6. Father on his Son's Marriage, pursuance to Articles for purchasing Lands to be settled on his Son and his Wife &c. advances 4000 l. Queare, If this be Advancement to bar him? The Chancellor decreed, the Son to have a Share of his Father's Personal Estate, without bringing the 4000 l. into Hotch-pot. 2 Chan. Cases 119. Trin. 34 Car. 2. Anaud v. Honeywood.

7. Where a Citizen has several Children, some advanced, some not. The advanced die. The Father dies. There shall be no Consideration had of the Dead Children, who were advanced; but it is all one as if they had never been. Decreed. 2 Chan. Cases 119. Trin. 34 Car. 2. Beckford v. Beckford.

8. A Freeman of London having several Chymical Receipts of a ve- of a very great Value, as he imagined, gave them a little before his Death to J. S. who had married one of his Daughters. It was alleged in order to bring the same into Hotch-pot, that they brought J. S. the Defendant 500 l. a Year, and Plaintiff offered to give the Defendant 500 l. for his Interest therein, and so intitled that they ought to be looked upon as Part of the Freeman's Personal Estate, and that Defendant account for them to the Plaintiff, who had married the other Daughter.
Costums of London.

10. The Question was, whether the Children, who are declared not Vern. 345: fully advanced, are to bring what they had received into Hotch-Pot pl. 339. with the Orphanage Thirds after the Estate is divided into Thirds, S C. and not into Hotch-Pot with the whole Estate; and decreed accordingly, not to be with the whole Estate; and what hath been received by any one more than their Share, and Legacies, is to be repaid, as the Master shall appoint, 2 Chan. Rep. 359, 360. 1 Jac. 2. Beckford v. Beck- ford. 

11. A Freeman gave a Portion with bis only Child on her Marriage. Whether she was excluded thereby of her Orphanage Part, the Tuteator not having declared by Will, or otherwise, that she was not fully advanced? 2 Vern. 234. pl. 215. Trin. 1691. Fane v. Bence.

12. With Regard to the Advancement of a Child, it has been determined, that small inconsiderable Sums occasionally given to a Child, cannot be deemed an Advancement, or Part thereof. Thus Maintenance Money, or an Advancement made by a Freeman to his Son at the University, or in travelling &c. is not to be taken as any Part of his Advancement, this being only his Education, and it would create Charge and Uncertainty to inquire minutely into such Matters. So putting out a Child Apprentice, is no Part of his Advancement, for it is only procuring the Master to keep him for Seven Years, instead of the Parent. Trin. 1718. at the Rolls. Hender v. Rofe. But the Father's buying an Office for his Son to bat at Will, as a Gentleman Pensioner's Place, or a Commission in the Army, there are Advancements Pro tanto. 3 Wms's Rep. 317. in the Note. cites Norton v. Norton. Mich. 1692. by the Lords Commissioners Rawlinson and Hutchins.

13. Where it appears, any how, under the Father's Hand, how The very much a Child has received, though it is therein said, that the said Portion, or was, in full of his Child's Part by the Custom, yet the Child shall come in for the Culinary Part of the rest of the Father's Perfor- mance, bringing the Portion already received into Hotch-Pot; or, otherwise it is, if it does not appear under the Father's Hand what the Advancement was. 2 Salk. 426, 427. Anon.

Part; and though the Child afterwards received further greater Sums from his Father, and the Certainty thereof appeared by his own Answer, yet those Sums, which were additional Gifts to his Advancement, being with the Sum mentioned by the Father, brought into Hotch pot, will not bar his Orphanage Part. Wms's Rep. 242. Hill 1716, decreed by the Master of the Rolls. Northey v. Strange. Chan. Prec. 4to. pl. 295. Patch. 1717. Northey v. Burbage, S C. —— Gilb, Eq. Rep. 136, 137. S C. in totidem Verba.

14. By the Custom of London, if a Freeman hath advanced a Child in his Life-time, and it appears by his Will, or by any Writing, what the Sum advanced is, and that the Sum advanced is less than the Cuftomary Share doth amount unto, such Child, so advanced, may come in for a Cul- timentary Share, bringing the Sum so advanced in Hotch-pot; But if it doth not appear what the Advancement is, then the Advancement is a Bar of the Culfomary Share. The Case here was, that the Father of the Plaintiff
Plaintiff and Deendent in his Will takes Notice, that he had advanced the Plaintiff in his Life-time, by giving her 300 l. and upwards, and thereupon gave her 5 l. only by his Will. And the Question was, whether this shall be taken to be such a certain Sum appearing in Writing, that the may put it in Hotch-pot, and come in for her Customary Share, by Reason of the Word (upwards) which, as it was said, made it very uncertain; but decreed that this was a certain Sum appearing in Writing, and he would take it to be 300 l only; and although it was said, that by the Word (upwards) it might be taken to be 300 l. or 1000 l. the Matter of the Rolls said, it could not be so intended here, but that it might be intended a little more, and so little, that the Teetator did well know, & De minimis non curat Lex. Note, it was supposed that the Word (upwards) was inferred purposely to make it uncertain, which made it look like a Trick; but if he had taken Notice that he had taken Notice that he had advanced his Daughter, and not said what, she had been barred; but here it was decreed, that she should come in for her Share, bringing the 300 l. into Hotch-pot. 2 Freem. 279, 280. pl. 351. Hill. 1704. Bright v. Smith.

St. C. cited per Ed. C. Parker. Wm's Rep. 642, 643; and that through the same be written by the Free-man's Book keeper or Servant, it is as sufficient as if written by the Free-man himself, and such Advancement may be brought into Hotch-pot, — — — But Ibid. 643; in a Note added at the Bottom of the Page, is a Quære, If this is warranted by the Certificate of the Cafe, which was as follows, [and which I will add here to shew the Form of such Certificate.] 6 Dean & Ux v. Ld. Delaware. May 9. 1710. In Parolence of an Order of 16th of December last, it is certified, that a Free-man of the City dies, leaving a Wife and one Daughter married in his Life-time, and it appears by the Books of such Free-man, that he had paid several Sums of Money in Part of such Daughter's Portion unto her Husband, and afterwards several other Sums, which ought to be taken as paid on Account of the Portion, but not expressly entered in such Freeman's Books as paid in Part of Advancement, or in Part of the Portion, (all which Entries are of the Teetator's own Hand Writing) and such Sums taken altogether do not amount to a third Part of such Freeman's Estate, put together with what he left at his Death, such Daughter ought not to be taken as fully advanced, but in Part advanced only; and in such Cafe, by the Custody of the City, such Child and her Husband are to have a Third of what the Teetator left at his Death, without regard of what was received in the Father's Life-time, and without putting what had been so received to the Estate left at his Death."

16. A Freeman of London, who was a Widower, and had several Children, being possessed of a considerable Leasehold Estate, on a Second Marriage conveys these Leaves in Consideration of 2000 l. Part, in Trust for himself for Life, Remaining to his Wife for Life, in Lieu and Bar of all Dower, Customary Estate &c. Remaining to the first Son of that Marriage, and to every other Son; and in the Settlement there was an Agreement, that Trustees should sell these Leaves and invest the Money in the Purchase of Lands of Inheritance, to be settled to the Uses aforesaid; but the Husband dying before any Purchase made, it was held first, that the Wife was barred from claiming any other Part of the Personal Estate. Secondly, that the Children by the first Venter could have no Right to those Leaves; neither would this Settlement prevent the Children of the Second Marriage from coming in for a Share of the Rest of the Personal Estate; for by the Agreement these Leaves are now to be considered in Equity, as if a Purchase had been actually made, and the Freeman had paid the Money out of his Pocket. Eeq. Abr. 153. pl. 8. cites 2 Vern 655. Mich 1700. [1710] Hancock v. Hancock; [but that is only a short Note of the Case.]

Any Land of Inheritance settled by the Freeman upon his Children, is not to be called an Advance- ment, either in Part, or in all, with the Custody of the Freeman, in regard they are not within the Custody, which affects only the Personal Estate of the Freeman, otherwise of a Lease for Years — But if Lands of Inheritance are given to a Child by Bar of the Orphanage Part, and received as such, it will be binding, or at least the Child cannot have both; Per Jekyl and Gilbert Commissioners. 2 Wm's Rep. 274. Park. 1725 Cox v. Bessaha.

17. A
A Freeman of London married a Widow of a considerable Fortune, but she had several Children, and it was agreed, that he was to have 600 l. only of her Fortune, and the rest to be settled upon her Children, and in Case she survived him she was to have 600 l. to be paid her by her Executors; accordingly a Deed was executed and the Parties were mentioned to be Citizens of London. This was decreed by Ld. Harcourt as a Satisfaction of her Customary Part, and took Notice that the Deed was expressly worded in Consideration of the Marriage and Marriage Portion, so that he was absolute Master of that 600 l. and therefore this 600 l. must be looked upon to come out of his Personal Estate. But as to the Morte of the other Morte (no Issue being of the Marriage) there was no Question made, but the Widow would be intitled to it, and an Account was decreed accordingly. And the Master of the Rolls took Notice of the Deed mentioned to be made between the Parties, Citizens of London, so that the Custom might be well supposed to be in their View. Ch. Prec. 355. pl. 248. Hill. 1711. Whithill v. Phelps.

Smith was a Freeman of London and had Issue one Child only, a MS. Rep. Daughter, and gives her 3000 l. Portion, and marries her to the Plain-tiff Maggot, and is a Party to the Marriage-Articles, wherein this Sum of 3000 l. is declared to be given to her for her Portion by her Father, the said Smith. Afterwards the said Smith makes his Will, and thereby devolves the Sum of 1000 l. to his said Daughter, and likewise gives several Legacies to her Children; he also gives to his Daughter certain Lands for her Life &c. and then follows this Proviso (viz.) Provided if my said Daughter shall not within two Months after my Decease, upon Request to her made by my Executrix, give a good and sufficient Release to my Executrix of all her Right and Interest to her Customary Share of my Estate &c. Then my Will is, that the Legacy to her of 1000 l. and the several Legacies aforesaid to her Children, shall be void, and makes his Wife (now Defendant) his sole Executrix and Refiduary Legatee. The Bill was brought by the Husband and Wife, in Right of the Wife, for her Customary Share of the Tettator's Estate.

It was agreed, where the Portion of the Child appears in certain under the Father's Hand, such Portion shall not be taken for a full Advancement in the Life-time of the Father, to exclude and bar such Child of her Customary Share.

Where a Freeman dies, leaving only one Child, who has had a Portion from her Father in his Life-time, such Child shall not put her Portion in Fitch-pet, but is intitled to her Customary Share, besides what she had for her Portion, because where there are more Children than
one, such Portion shall be put in Hotch-pot, only with the Customary Share belonging to the Children, that all the Children may be equal. See Lord Delawar's Case.

3dly, It was resolved in this Case, that the Plaintiff's Wife need only release her Chattel Legacy, and not the Devise of the Lands to her for Life, because the express Condition in the Will doth controul the implied Condition by the Custom, that she must renounce all Benefit by the Will, if the will take Advantage of the Custom in Subversion of the Will.

4thly, If the Children, being Infants, shall forfeit their Legacies according to the Provifo, or not by the Act of the Mother. This Point Lord Chancellor would not now determine upon this Bill, but said, it would be time enough to do that, when they should bring a Bill for their Legacies; but as to the other Matters decreed ut supra. Per Cowper C. MS. Rep. Trin. 2 Geo. Maggot v. Smith.

20. A Provifo for a Child on her Marriage by a Freeman is no Bar to any future Share she might be intituled to by the Custom, any more than it would be to her taking by Defcent or Devise. Cited by Mr. Vernon. Ch. Prec. 508. as decreed by Ld. C. Cowper Mich. 1717. Platt v. Stanton.

21. S. brings a Bill for one Third of his Wife's Father's Personal Estate; a Settlement by Agreement &c. was made on the Marriage, and the Father gave with his Daughter an Estate, as for her Marriage Portion &c. By Will, the Father gave a 1000l. to his Wife, and five Tenements (which were his on Leases) to Trustees in Trust for the Daughter's separate Use, and made the Wife Executive. S. being beyond Sea, left the Wife and Children upon the Mother, who maintained them. Per Cowper C. 1st, An Advancement of a Daughter by a Real Estate as her Portion &c. was not an Advancement within the Custom; but if it were in Land, the Certainty doth appear, and the Land must be valued, and brought into Hotch-pot; the Custom has no Relation to an Estate of Inheritance; If a Freeman lays out his Money, the Custom is defeated; But if there was any Provifo made by Agreement &c. that instead of Money as a Portion &c. the Father should diminishing his Personal Estate by making a Purchase, it might be a Question how far this would be within the Custom? But Lands defended, or purchased, are not. 2dly, That S. must have one Third of the clear Personal Estate, deducting the Widow's Chamber, * Parapliernalia, &c. 3dly, That the five Tenements given to the separate Ufe of the Wife, should not go in part of this one Third to which the Husband was intituled, for that the Daughter had no Election in this Case. She could not choose the one Third, because that was in the Power of the Husband, and to his Account; And as the five Tenements are here given to the Trustees, it is of a different Kind from the Husband's one Third; nor is it to the same Person; so it can't go in part of Satisfiction within the Meaning of the Teitator. In Cases of the Custom, the Legatee has an Election, whether he will renounce his Legacy, or his one Third Part. Here the Father has under all Events, Ex abundanti, made a Provifo for the separate Ufe of his Daughter out of the Part which the Father had Power to dispose of. 4thly, If the Legacies fall short, every one must abate in Proportion; but if the Daughter's separate Provifo fall short, which the Father intended her, the Court ought to lay hold on that which the Husband ought to recover when the Account is taken, and it ought to be brought before the Master, especially if the Husband's going away were without the Wife's Default. 5thly, This Specific Legacy of the five Tenements must be valued, and every one must abate in Proportion. 6thly, The Wife and Executors must have her 1000l. besides her one Third Part. Mich. 4 Geo. Stanton v. Plat.
22. Sir W. W. in 1718. made his Will, giving to his Daughter 7000 l., and to his Son and Executor, all the rest of his Estate. He declared that this Legacy to the Daughter was in Satisfaction of all she could claim &c., under the Customs, and she was to declare within one Month after his Death whether she would abide by that or not, and she was to release &c. The Tsettator lived Two Years after this Will, and after his Death, the Daughter marrying within a Fortnight, they were both made acquainted with the Will, and the Executor and Son came one Morning, and made a Delivery of some Plate &c. specifically devised, and also assigned an Annuity in the Exchequer, which was given to the Daughter &c., and being asked to execute a Release some time was desired for Consideration &c. In Mich. Vac. the Question was, on a Plea to the Discovery and Account prayed by a Bill, whether what the Daughter and her Husband had done, did amount to such an Acceptance as did determine their Election, and to exclude them from a Share by the Customs; and per Ld. Chancellor the Plea was allowed, because they had not made any Election by the Bill to waive the Will, but with a saving to any further Claim, or Right they might make, i.e. by amending their Bill, and running the Hazard of the Account of the Personal Estate; for whether it be more or les, they must abide by the Event of it. He declared that it was the Tsettator's Intention, that if she accepted of the Legacy, she was to take that in Satisfaction of the whole, under the Customs, and that he never intended she should have an Account of the Personal Estate, to see whether it was her best way to abide by the one or the other, she was to have no such Liberty and therefore he confined her to a Month's Time to declare herself, so that all Objections made from her, being under any Surprise, or having any thing misrepresented unto her, is out of the Case. It is likely Sir W. W. thought the Custom very hard, and he had a Mind to tie her down; but yet this must be a complete Acceptance by her of all that he had imposed, but in this Case it doth not appear that all was finnished and completed, some Things she did accept of, but the executing of the Release was put off, and other Matters, for further Consideration, so that this was not a full and entire Acceptance, though he thought that if all had been done and accepted of without the Release, that was not so necessary to be done within the Month, but might be executed at any Time. Per Ld. Chancellor. Mich. Vac. 1721. Smith v. Withers.

23. Where a Daughter, who married without the Father's Consent, was afterwards advanced in Part, and the Freeman, the Father, had forfeited some Leafybold Estate to the Separate Use of the Daughter, the Peme Cover, this ought to be brought into Hotch-Pot, it being, in the strictest Sense, an Advancement of the Child pro rante; 2 Wms's Rep. 273, 274. Pach. 1725. per Jekyll and Gilbert Commissioners. Cox v. Belitha.

24. A Settlement was on the Wife of a Citizen of Part of the Personal Estate of the Husband, in Bar and Satisfaction of all her Claim, and demand out of his Personal Estate by the Customs or otherwise. The Husband died intestate. The Wife is barred of her Distributive Share of her Husband's Estate by the Statute of Distributions by Force of the Words (or otherwise) for they can extend to nothing else; and it was said to be twice so adjudged by Cowper C. in the Case of Pit. v. Lee, and Davila v. Davila; and decreed accordingly by King C. MS. Rep. Mich. 14 Geo. in Canc. Badcock v. Stanhope.

25. Though a Declaration by a Freeman's Will only, that a Child was fully advanced, is not of itself sufficient, yet where the Advancement was Forty Years before the Free-man's Death, so that it was difficult to prove an Advancement made at that Distance of Time, yet a Proof was read that the Daughter's Husband had assigned he had received above 1000 l.
1000 l. Porition with his Wife from the Free-man at his Marriage, this was satisfactory. 2 Wms's Rep. 527, 529. Trin. 1729. at the Rolls. Cleeaver v. Sparling.

Where a Daughter of a Freeman of London accepts of a Legacy of 10,000 l. left her by her Father, who recommended it to her to release her Right to her Orphanage Part, which she does release accordingly; if the Orphanage Part be much more than her Legacy, though she was told she might elect which she pleased; yet if she did not know, she had a Right, first, to enquire into the Value of the Personal Estate, and the Quantum of her Orphanage Part, before she made her Election; this is so material that it may avoid her Release. 3 Wms's Rep. 316. Trin. 1734. Pufey v. Desbouvrie.

27. A. a Freeman of London had Issue two Sons, B. C. and four Daughters, D. E. F. and G. He in his Life-time gave to B. and C. and to D. and E. 1500 l. a piece, and took several Receipts in the following Words, viz. Received of my Father A. 1500 l. which I hereby acknowledge to be on Account, and in Part of what he has given, or shall give unto me his Son [or Daughter] in, or by his last Will. Afterwards A. made his Will thus, viz. And whereas I have heretofore paid to, given, or advanced with my Children B. D. and E. [omitting C.] the Sum of 1500 l. a piece, now I do hereby in like Manner give and bequeath unto my three other Children, C. F. and G. the several Sums of 1500 l. a piece; and then gives the Residue equally among his Children. The Custom of London being waved on all Sides, the Question was, whether C. should have another 1500 l. upon the latter Words of the Will, or should be in the same Case with B. D. and E. they being equally advanced by the Father and this seeming to be only a Mistake in the Testator, it was infilited that the Receipt could not controul the express subsequent Gift of the Father, and that the omitting C. should be plainly intended a Difference between them. But Ld. C. Talbot decreed the 1500 l. received by C. in A's Life-time to be a Satisfaction for what A. gave him by his Will, and that he should not have another 1500 l. upon the latter Words. Caules in Equ. in Ld. Talbot's Time 71. Patch. 3 Geo. II. Upton v. Prince.

(B. 7) As to the Children's Part in Cause of Survivorship. To whom it shall go.

S. C. cited

1 Wms's Rep. 318. in a Nota of the Reporter.

2. If there be a Widow and two Daughters, and one of the Daughters dies, her Orphanage Part shall wholly survive to her Sister, and that even after a Division and Partition made between them; but if the Father's Legatory Part was devised to the Daughters, that is under the Direction of the Statute as a Legacy, and must be distributed between the Mother and the surviving Daughter accordingly; This Difference was taken and agreed by the Court. Chan. Prec. 372. Trin. 1713. in Case of Lovelies v. Lowen.

3. A Freeman left at his Death a Wife and several Children, one of the Children died seven Years old. It was agreed, that Share should survive, and that it was not subject to the Statute of Distributions, but Quere, whether it survived to the Mother, as well as Brothers and Sisters? The Orphanage Part is not due till 21, so that an Orphan cannot dispose of it sooner. Mich. 7 Geo. Canc. Matter of the Rolls Knipe v. Wale.

3. 4. devise of Lands to Trustees in Fee, in Trust within six Years after the Testator's Death, to raise and pay 1500 l. to his Daughter A. A. dies within the six Years; the 15 l. shall go to her Administrator, here being no certain Time limited when, but only the ultimate Time, within which it shall be raised. 3 Wms's Rep. 119. pl. 27. Hill. 1731. Cowper v. Scoet, &c. &c.

(B. 8) Of Bringing into Hotch-pot.

1. AN Orphan who was advanced with 200 l. being the only Child, is not to bring it into Hotch-pot. 2 Vern. 629. cites 17 Jac. 1. Wood v. Fetterplace.

2. Sum of Money given by a Freeman of London to a Daughter, if not given as a Marriage-Portion, or in pursuance of a Marriage-Agreement is no Advancement, As Money given at Christenings and Lying-in; but however must be cast into Hotch-pot. Vern. R. 61. Mich. 34 Car. 2. Jenks v. Hollford.

3. Heirs of Lands given her in Frank-marriage; Those must be cast into Hotch-pot; Otherwise of Lands convey'd or given to her by her Father, or other Ancestor after the Marriage. Per Council. Ibid.

4. Where an Heir or Co-heir had a Real Estate settled on him by the Father, it is out of the Custom of the City of London, and though the 599. S. C. Father should after declare the same to be a full Advancement for such but S. P. Child, yet, it is no Bar to his Orphanage Part, neither is it to be brought into Hotch-pot. Vern. R. 216. Hill. 1683. Civil v. Rich. 2 Chan. Rep. 141. S. C. but S. P. does not appear.

5. Where a Child is marry'd with the Father's Consent, and there is a Portion given in Marriage, such Child is debar'd from claiming any Benefice of the Orphanage Part, unless the Father shall by Writing under his Hand and Seal, not only declare that such Child was not fully advanced, but likewise mention in certain, how much the Portion given in Marriage did amount unto, that so it may appear what Sum is to be brought into Hotch-pot. Vern. 216. Hill. 1683. Civil v. Rich.

her into her Share by the Custom. 2 Vern. R. 619. Hill. 1708. cites Turner v. Langland. — For otherwise
Customs of London.


2 Chan. Coles. 117. S. C.


See Equt. Abr. 115. In the Note to pl. 4. of the S. C. the Certificate recited Verbatim, viz. We the Ld. Mayor and Aldermen of the City of London, having heard the said Parties and their Counsel. Learned in the Law, do humbly certify your Lordship, that by the Laws and Customs of the City, if any Freeman's Child, Male or Female be married in the Life-time of his or her Father, by his Consent, and not fully advanced to his or her full Part or Portion of his or her Father's Peronal or Custumary Estate, as he shall be worth at the Time of his Decease, then every such Freeman's Child so Married is debarred from having any other Part or Portion of his or her said Father's Peronal or Custumary Estate, to be had at the Time of his Decease, except such Father by his last Will and Testament, or some other Writing by him written, and signed with his Name and Mark, shall declare or express the Value of such Advancement; and then every such Child, after the Decease of his or her said Father, producing such Will or other Writing, and bringing such Portions so laid of his or her Father's or the Value thereof into Hotch-potch, shall have as much as will make up the same a full Child's Part or Portion of the Custumary Estate, his or her said Father had at the Time of his Decease; notwithstanding such Father shall, by any Writing under his Hand and Seal, declare such Child was by him fully advanced.

2 Vern. 234. 9. If a Free-man has one Child only, which has received some Portion from his Father, and the Father dies, leaving this Child and a Wile, the Child shall have his full Orphan's Part, without any regard to what he has already received, for that Advancement in Part is only agreed. S. P. —— to be brought into Hotch-potch with Children, and not with others; Ibd. 629. Per Sir Edward Northey. 2 Salk. 426.


10. If any Child has any Thing by the Will more than the rest, which is declared as a Satisfaction for her Advancement, if the will claim the Benefit of the Custum, the must wave this; Per Ld. Cowper. Hill. Vac. 5 Ann. 11. A
11. A Free-man of London willing to prefer two Daughters beyond others, bequeathed to them a Bond of 500 l. Afterwards by Advice the Clause was rased out, and the Will re-published, and a new Bond given in the Name of J. B. in Trust for the two Daughters. Ld. Cowper held, that this Bond must be brought into Hotch-potx to intitle them to a further Share. Ch. Prec. 269. Mich. 1708. Hedges v. Hedges.

Notes thereof. — Though in this Case some of the other Children had given Receipts, but knew nothing of their Equitable Right; Ld. K. Cowper declared, that this was but Evidence, and that he would, notwithstanding, let them into their Right, though otherwise, if there had been a Receipt under Seal. MS. Rep.

12. A. on his Son B's Marriage with C. covenanted in Case of a second Marriage to pay the first Shd by the first Wife 500 l. There was a Son and several Children besides, of the first Marriage; Per Cur. the Heir must bring in the 500 l. into a Hotch-potch, though in Nature of a Purchaser under a Marriage Settlement. 2 Vern. 638. Hill. 1708. Phiney v. Phiney.

13. Bill by the Plaintiff as only Child of her Father, a Free-man of London, for her Share of her Father's Estate, according to the Custome of the City of London. The Case was, the Plaintiff at several Times had received several Sum s of her Father in his Life-time, and her Father transferred in 1705. Bank-Stock in Trust for himself, in order to dispose of it by his Will to the Defendants &c.

Quere, if the Plaintiff shall put the Money given her by her Father in his Lifetime into Hotch-potch, with the Residue of the Testator's Estate, or whether she shall retain the Money so given to her by her Father, and have a Moneys of the Residue of her Father's Personal Estate, (being an only Child, and the Testator having no Wife) according to the Custome.

Mr. Vernon for the Plaintiff, insisted, that the Plaintiff is intitled to a Moneys of her Father's Personal Estate by the Custome, without putting in Hotch-potch, what was given her by her Father in his Life-time, the being an only child, and not fully advanced by her Father in his Life-time.

He cited the Case of Turner v. Jennings, lately in this Court, where it was resolved, that a Child of a Free-man of London shall not put in Hotch-potch what was given to her by her Father in his Life-time, and unless there be other Children, and so it was resolved in Chancery, in the Case of Dean v. Lord Delaware, that an only Child shall not put in Hotch-potch where there is a Widow, but shall have her Custumary Share besides what her Father gave her in his Lifetime. If the Child be fully advanced in the Father's Life-time, the Father may dispose of all his Estate by Will; so if the Father marries his Daughter in his Life-time, and declares her fully advanced, without expressing what Sum he gave with her in Marriage, this is a full Advancement by the Custome, though not so in reality, and will bar her of her Custumary Share, but if the certainty of the Sum appears so given in advancement of the Child, and it falls short of her Proportion of her Father's Estate, then it shall be put into Hotch-potch, and she shall have her Custumary Share. Declaration of a full Advancement by the Father, is not a Bar of the Custumary Share in no Case but that of Marriage.

If a Free-man of London has ten Children, and fully advances nine of them in his Life-time, the tenth Child shall have the whole Custumary Share belonging to the Children.

It appears that an only Child has received from his Father in his Life-time, as much as his Custumary Share amounts to, this shall be taken as a full Satisfaction of his Custumary Share.
Shall, but if it fall never to little short thereof, then it shall be taken as a Gift from the Father, and the Child shall have his whole Custumary Share, without any Regard to it.

Note, Tracy J. who sat for Ld. Chancellor, order'd an Account to be taken what Money the Plaintiff had receiv'd from her Father in his Life-time, and on what Account, and refer'd the Consideration, whether Money given to her by her Father in his Lifetime, should be taken in Part of her Custumary Share, or whether she should have a Moiety of her Father's Estate over and besides what he had given her in his Lifetime, there being no other Child. Curia Auferire vall. MS. Rep. Trin. 3 Geo. in Canc. Stanley v. Smith and Norcliff.

14. A having seven Children makes an Executor in Trust, and devises to each Child one seventh of his Personal Estate; one of the Children dies in his Life-time, and one of the six surviving Children has been advanced by the Father in his Life-time, yet this Child shall take his full Share of the seventh Part, without bringing what he had before received, into Hotch-potch. 3 Wms's Rep. 124. Hill. 1731. Cowper v. Sco, & al.

(B. 9) As to the Legatory Part, or Dead-Man's Share, whereof he may dispose as he pleases.

That the Custumary Part, belonging to the Administrator of a Citizen of London dying Intestate, is not within the Act of Distribution of Intestate's Estates; because the Custom of London being faved by the Act, the Custumary Part should go wholly to the Administrator, as it did before; and so it hath been resolved at Common Law, and in Chancery. 2 Freem. Rep. 85. pl. 94 cites it as resolved by Lord Keeper North. Hill. 1692. Anon.

2. An Inhabitant of the Province of York made a Will, and devised a Moiety of his Estate to his Wife; adjudged, that the Widow should have three Fourths. 2 Vern. 111. Mich. 1689. cites the Cafe of North v. North.

3. Where a Citizen of London, by Will, had devised 700 l. for Mourning, the Question was, whether this 700 l. should come out of the whole Estate, or only out of the Legatory Part? For it was inferred, if there had been no Direction to the Will, or if the Will had only directed, that the Expenses of the Funeral should not exceed such a Sum, there the Deduction must have been out of the whole Estate. Per Cur. Mourning devised by the Will, must come out of the Legatory Part, and not to Jeffer the Orphanage and Custumary Share. 2 Vern. 240. Mich. 1691. Deakins v. Buckley.

4. Upon hearing this Caufe, the Lord Chancellor ordered one of the Masters to fitate a Cafe, and fend it to the Recorder of the City of London, to certify to the Court the Custom of the City. The Master stated a Cafe as follows (viz.) Thomas Anderfon, a Freeman of London, by his Will directed, that an Inventory should be taken of his Personal Estate by his Executors, and that Barbara, his Wife, should have her Widow's Chamber, and after his Debts and Funeral Charges paid, gave her a Third Part of his Personal Estate, another Third Part he gave equally among his Children Jofeph, Hannah, and Jofeph and William, and Jane, who died in the Testator's Life-time, and remaining Third Part he gave as follows (viz.) 740 l. to say Hannah, 40 l. in small Legacies, 200 l. a Piece to the said Jofeph, William and Jane, and the Overplus (if any) to be

\[ \text{MS. Rep.} \\
\text{Trin. 1 Geo. in Canc.} \\
\text{Readevshaw v. Duck, & al.} \]
be equally divided amongst four of his Children, and to be paid them by his Executors (viz.) to his Sons at the Age of 21 Years, and to his Daughters at the Age of 21 Years, or Marriage. And if the Third Part of his Personal Estate in his Dispose should, by bad Debts or Accidents, fall short, and not be sufficient to pay all his said Legacies, he will'd each of the said Legates should bear such Loss (whatever it amounted to) in Proportion according to their Legacies, and made Duck, Chandler, Samuel Greenhill, and Thomas Greenhill, Executors; Duck, Chandler, and Thomas Greenhill, only proved the Will, and exhibited an Inventory of their Testator's Personal Estate into the Chamber of London, and entered into the usual Recognizance, and paid Barbara, the Widow, and the Plaintiff Readhaw (who married Juliana) several Sums on Account of their Custody Shares. Thomas Greenhill died, and Duck having taken out Administration to him, a Bill was exhibited against Duck and Chandler, the two surviving acting Executors, for an Account of the Testator's Personal Estate, and to have a Distribution thereof, according to the Custom and the Will. The Defendant Duck (who was become insolvent) was indebted 163l. 1s. 10d. as the Balance of his own Account, and 279l. 19s. received by his Intestate Thomas Greenhill, out of the Testator's Estate, making together 443l. 0s. 10d.

Quere, Whether, by the said Custom, the Loss of the said Freeman's Estate, by the Involvency of his Executors, ought to be born out of the Testamentary Part of his Estate only, or out of the whole Personal Estate only, as well Customary as Testamentary.

The same was certified as follows, viz.

"We the Lord Mayor and Aldermen of the City of London, whose Names are subscibed, do, in Obedience to the said Order by William Thompson, Esq., Recorder of the said City, and humbly certify unto your Lordship, That it a Freeman of London dies, leaving a Widow and Children his Personal Estate (after his Debts paid, and the Custumary Allowances for his Funerall, and for the Widow's Wardrobe, being first deducted thereout) is, by the Custom of the Lid City, to be divided into three Equal Parts, and disposed of as follows (viz.) one Third Part thereof belongs to his Widow; another Third Part belongs to his Children unadvisedly in his Lifetime, and the other Third Part, such Freeman, by his Last Will, may devise as he pleaseth. But where a Loss of a Freeman's Estate doth happen by the Involvency of his Executors, there is not any Custom of the City of London which directs whether such Loss ought to be born out of the Testamentary Part of his Estate only, or out of his whole Personal Estate, as well Customary as Testamentary. Dated the 26th Day of April 1715." This Certificate of the Lord Mayor and Aldermen, being sent to the Lord Chancellor Cowper, he, upon hearing Counsel, was of Opinion, that the Widows and Orphans of a Freeman of London, are in the Nature of Creditors for two Thirds of the Personal Estate he shall die possessed of; and that if any Losses happen by the Involvency of his Executors, such Losses ought to be born by the Legates of a Freeman out of his Testamentary Part, and the same be decreed. MS. Rep. Trim. 1 Geo. in Canc. Readhaw v. Duck & al.

5. A Man made his Will, and by it gave all his Estate, according to the Custom, having a Wife and Children, viz. two Thirds to his Wife, and one Third to his Children, with a Devise over. Held per Maller of the Rolls, that though this was not exactly conformable to the Custom, yet his Opinion was, that the Devise of one Third to the Children was void.
void, being what the Custom gave, and to the Devise over not good; that as the Wile was to have two Thirds, the shall take one Third by the Custom, and the other shall be the Dead-Man's Part; these Proportions are to arise after a Deduction of the Widow's Chamber, and her Para-
phernalia, i.e. such Ornaments as the usually wore about her Body; for though this is not by the Custom, and was at first only allowed to Citizens of the better Sort, yet it is fit to give the same Privilege to all Citizens Widows. Matter of the Rolls. Trin. Vac. 1718.

6. If a Freeman gives a Legacy to his Child, and disposes of his whole Personal Estate, the Child shall not have both the Legacy and the Or-
phanage Part, even though the Legacy does not exceed the Dead-Man's Part; SUCS if the Legacy be given expressly out of the Testamentary Part. But in no Case shall the Child be obliged to make his Election, till after the Account taken. 3 Wms's Rep. 124. in the Note; cites 4 July 1718, at the Rolls, Heuder v. Role.

7. In this Case it was held, that where a Freeman of London made his Will, and devised Legacies to his Children more than their Orphanage Part would amount unto, without taking any Notice whatsoever of the Custom, that these Legacies shall be a Satisfaction of their Orphanage Shares, to which they were intituled by the Custom in the Nature of a Debt, and that the Legacies shall not come out of the Testamentary or Dead-Man's Part, because it is held in this Court, that they shall not both by the Will and the Custom too; but where such Legacies are lefts than their Orphanage Shares, whether they shall be Pro tanto in Satisfaction he was in great Doubt, and lent it to the City to certify, though he seem'd rather to think they should in this Case take both, if none of the Devisees in the Will were thereby disappointed. Equ. Ab. 160. pl. 5. cites Trin. 1729, at the Rolls, between Nichols and Nicholls.

8. A Freeman of London, by his Will, charges 1500 l. on his Real Estate for his Daughter, and also gives her 1500 l. out of his Personal Estate. The Daughter would take the 1500 l. out of the Real Estate (as that is not within the Custom) and also claim her Orphanage Part; But the Court, in regard the Testator had disposed of all his Real and Personal Estate among his Children, and intended an equal Division, would not suffer the Child to disappoint her Father's Will, but com-
pelled her to abide entirely by the Will, or by the Custom. 3 Wms's Rep. 123. Hill. 1731. Cowper v. Scot, & al'.

(B. 10) Orphan intitled to What; and How; not-
withstanding any Thing done in Fraud of the Custom.

1. A Deed of Gift made to defraud the Plaintiff of her Customary Part by the Custom of the City of London was adjudged void. Toth. 113. cites 40. Eliz. Topp v. Topp.

2. A Mortgage made to a Citizen and forfeited to him shall be ac-
counted Part of the Freeman's Estate to be distributed, and shall not go to the Heir. Toth. 131, 132. cites 7 Car. Aii v. Wood. and May-
nard v. Middleton.

3. A Citizen made a Deed of Trust of a Lease to the Use of his Will, and he having Two Sons and a Daughter, directed by his Will his Exe-
cutor to convey the same to the Two Sons. Decreed that the Deed is
is contrary to, and against the Custom of London, and that the Daughter ought, according to the Custom, to have her Part of the said Leaf and Proits thereof. Chan. R. 84. to Car. 1. Not v. Smithies.

4. A Freeman of London desired, that his Third Part should make the Lev. 238 Customary Part of his Children 500 l. A Piece, if their Customary Parts adds, Quere did not amount to so much; and that if any of them died before Twenty-one, his Part should be divided amongst the Survivors; all of them died — It has before Twenty-one, except the Plaintiff’s Wife, her Brother John being the much left that died, and the Plaintiff had received out of the Father’s Part, whether a as much as made his Wife’s Part 500 l. and the Question was, if the Freeman’s should be intitled by the Will if she should have John’s Part; it was Wil伦n objected that she should not, for it is not due by the Will, but by any way Custom, and the ought to administer to John to make a Title, for the operate on the Orphans. Father had no Power to appoint a Survivor; But per Keeling Ch. J age Part? though the Father has no Power to dispose the Custumary Part from formerly it his Children, yet he may appoint a Survivor thereof out of the Children whose to have been himselfs by his Will; and Sir Sergeant Wild, Recorder of London, held, that said, it was lately so resolved in Chancery, in a Cafe where he was a Freeman Counsel; and so Keeling now directed the Jury, who gave the Verdict that a Power accordingly for the Plaintiff for the whole. 1 Lev. 227. Mich. 19 appoint by Will, that if any of his Children should die within Age, then such Child’s Part should go to the surviving Child or Children. 3 Wms’s Rep. 318. In a Note by the Reporter, cites 1 Lev. 227. Hammond v. Jones, ruled by Kelyng Ch. J. at Nih Prius, and said by Wylye, Recorder of London, to have been so adjudged in Chancery. But laterly it has been admitted to be otherwise.


ed in himself, Per Maynard Arg. 2 Vent. 341. Mich. 22 Car. 2. said, that it was so resolved in Cave of Dr. Ent v. Adrian.

6. A Citizen of London being Executor and Residuary Legatee dying, whether this being but a Legacy, which till Election refted primi tacie in the Legatee, not as Legatee, but as Executor, and the first Tettor’s Elate, which remains in the Executor, as Executor shall not be subject to the Custom as the Executor’s own Elate? The Ld. Chancellor decreed the contrary, and said, I will make Election for him. Chan. Cales. 310. Hill. 30 and 31 Car. 2. Civil v. Rich.

7. If a Citizen of London has a Trust of a Term attending his Inheritance, and dies, the Trust of the Term shall not be subject to the Custom of London to be divided between the Wife and Children &c. as other Perfonal Elate and Chattles shall; Per Ld. Chancellor. 2 Freem. Rep. 66. pl. 77. Trin. 1681. In Cale of Tiffin v. Tiffin.

8. Where a Citizen of London dies Intestate, the Third Part of his Skin, Goods belonging by the Custom to his Administrator is not subject to Distribution by the Stat. 22 Car. 2. cap. 10. for Settlement of Intestates Elates. adjudged at

And it was granted by all, that by the Custom of London the Heir shall cordingly, have his Share in the Distribution; and Judgment accordingly. 2 Jo. and says, it 204. Patch. 34 Car. 2. B. R. Percival v. Crip. was afterwards decreed in Chancery, that the Administrator’s Part was within the Custom, and not liable to a Distribution upon the Statute, and they relied upon this Opinion in B R. and that Trin. 53 Car. 2. where in a like Cafe a Suit was in the Spiritual Court for a Distribution, a Prohibition was granted. ———

9. If Goods are absolutely given away by a Free-man of London in his Life. This will stand good against the Custom. But if he has it in his Power, as by the keeping of the Deed &c. or if he retains the Poffeffion of the Goods, or any Part of them, this will be a Fraud upon the Custom.


10. A on Marriage of M. his Daughter to B a Freeman of London, settles a Term for Years in Trust, that B. the Husband should receive the Revenz till such Time as W. R. and W. S. should otherwise appoint, and then to such Person as they should appoint, and for Want of such Appointment, then for such as B. should by Will appoint, and for Want of such Appointment then in Trust for the Executors and Administrators of B. The Trustees made no Appointment, or the Question was, whether this Term should go according to that Appointment, or be looked upon as Part of B's Personal Estate, and so go according to the Custom, he being a Freeman of London. And Lt. Keeper was of Opinion, that it was not to be looked upon as Part of B's Personal Estate, because it never was in him; but was settled by the Wife's Father, and therefore not subject to the Custom. Abr. Equ. Cates 151. Hill. 1702. Grice v. Gooding.

11. A Freeman of London grants the greatest Part of his Personal Estate in Trust for himself for Life, and then for his Grand-Children by his Son, who was deaf. A. has no Wife, but has a Daughter Living. Decreed the Deed to be set aside (A not being entirely disfurnished himself of the Estate in his Life-time, and being made a little before his Death, is a Donatio Caufa Morris) as the moiety belonging to the Children, in this Case, there being no Wife, but as to the other moiety of which he had Power to dispose (as having no Will) the Deed will stand good; Per Cowper C. 2 Vern. R. 612 Trin. 1708. Turner v. Jennings.

9. A Freeman of London had Issue a Son and a Daughter. The Son died, leaving Three Children. The Freeman assigns Leafe in Trust to sell and pay any Sum not exceeding 1000L. as he should appoint, and he by Deed and Will appointed 500L. to his Daughter, and the Residue to his Grand-Children. Decreed to be set aside, as to a moiety, which the Daughter by the Custom, as only Surviving Child, was intituled to, as being in Fraud of the Custom. 2 Vern. R. 685. Trin 1712. Turner and Ux v. Jenning and Longland.

13. The Children of a Freeman of London, where there is no Wife, are intituled to a moiety, the other moiety being the Dead-man's Part; admitted by Counsel on both Sides; and decreed, per Maiter of the Rolls. Wms's Rep. 321. Hill. 1716. Northev v. Strange.

14. A. a Free-man of London purchased an Estate in the Names of B. and C. and the Consideration Money was mentioned in the Conveyance to be paid by B. but no Trust declared. A. dies, and some time after B. gave a Declaration, that the Purchase was made in Trust for A. This is a good Bar against the Widow of A. who claimed a Share of the Money paid for the Purchase, infifting that it ought to be looked upon as Part of the Personal Estate of A. and consequently that a Right vested in her by the Custom to a Share of this Money in the Hands of B which could not be altered by fuch subsequent Declaration of Trust; But decreed against her; However considering all Circumstances, the Court recommended it to the Heirs or Devifes of A. to agree to let the Wife in for her Dower of this Trust Eftate. Wms's Rep. 321. pl. 82. Trin. 1716. Per Ld. C. Cowper. Ambrofe v. Ambrofe.

15. A Leasehold Estate devised by a Freeman of London to a Trustee for the separate Use of his Daughter shall not be taken as Part of her Orphanage Part, but out of the Legatory Part; but if Legatory Part be
not sufficient, the Legatees must abate in Proportion. 2 Vern. R. 753.

16. A Freeman having a Wife and one Child (inter al') devis'd the Orphanage Part to the Child, and in Case of the Child's Death before Twenty one, then to go over to the Tafier's Father; and it was held that this Devise over was void, for that the Father had nothing to do with the Child's Orphanage Part, which came to him by the Custom, not from the Father; and were such Devise over to be good, it would be a Prejudice to the Child (who in Case there were but one Child) might devise over such Part at Fourteen, which would take Effect, the Child to die before Twenty-one, or if he should die infantile and unmarried, it would go all to the Mother as his next of Kin, and not according to the Father's Will; or if the Child marry and die within Age, leaving Issue, the Widow and Issue would be defirute, were such Will to be good. 3 Wms's Rep. 319. in a Note at the Bottom cites Hill. 1718. Biddle v. Biddle.

17. Covenanting on Marriage by a Freeman to add 1500 l. of his own Money to 1500 l. of his Wife's to be laid out in Land, and settled on the Husband and Wife for Life &c. is not to be looked upon as breaking into the Custom. For the Freeman might at any Time during his Life, even in his last Sickness, have inveis'd his Personal Estate in a Purchase of Land, which would defeat the Custom, and stand good, though the Pree-man should at the same Time have said, that he did this on Purpoze to defeat the Custom. And this, if the Purchase was real, would have held good to bar the Custom. Per Ld. C. Parker. Wms's Rep. 532. Hill. 1718. Babbage v. Greenwood.

18. A Freeman having no Wife and only one Daughter, devis'd all his Personal Estate to his Daughter, who was married, for her own separate Ufe, and was enjoyed accordingly. The Husband died. The Representatives of the Husband are not intitled to such Part as was the Daughter's Customary Share, but the whole belongs to the Wife. Trin 5 Geo. Merriweather v. Heiter.

19. A Freeman of London, before Marriage, compouded with his Wife for her Customary Part. The Free-man dies, leaving Children and the Widow; The Question was, whether the Husband or the Children should have the Benefit, fo as that the Husband might by this Means dispose of Two Third Parts, selle's his own Third Testamentary Share and his Wife's, or that his Children would be entitle'd to a full Half Part, as if the Wife were actually dead? Ld. C. Parker declared his Opinion in Favour of the Husband's Right, but with a Salvo as to the Certificate, which might be made (if Occasion should be) by the Lord Mayor and Aldermen by Mouch of their Recorder. See Wms's Rep. 634 to 647. Pach. 1723. Blunden v. Barker.

N. B. There is a Note at the End of the Cafe that the Parties came to an Agreement, so that these Points were never certified.

Had been both way's, though the most solemn ones had been against the Children's having the Benefit of the Composition, to which the Court inclined without then determining it. But, says, that afterwards, in the Ice of Philip v. Sir Edward D outliers, heard July 1734. Ld. C. Talbot taking Notice of the contrary Determinations made by the Court in this Point, said it had of late been settled, that it should in such Case be taken * as if there was no Wife, and consequently that the Husband should have one Moiety, and the Children the other. And says, that the like was held by Ld. C. Hardwick, June 18. and February 5 1737; in the Cases of Philip v. Jane, and Morris v. Butter to.

S. C. cited accordingly: 1o Mod. 455.

This Point was adjudged at the Rolls after solemn Debate. 2 Wms's Rep. 527. Trin. 1729.

Cleaver v. Sparling.

L 11 20. A
Customs of London.

29. A Mortgage shall be paid out of the Personal Estate in Preference to the Cufromary. or Orphanage Part by the Custom of London; Arg. said to have been so determined; and the same was admitted by Ld. C. King, because the Cufrom of London cannot take Place till after the Debts paid. 2 Wms's Rep. 335. Hill. 1725. in the Case of Rider v. Wager.

21. 11. Geo. 1. cap. 18. Sel. 17. It shall be lawful for all Persons, who after the 1st of June 1725, shall become Free of the City, and for all who at that Day shall be unmarried, and not have Issue by any former Marriage, to dispose of their Personal Estate.

22. Sel. 18. If any Person who shall be free of the City hath agreed, or shall agree, by Writing, in Consideration of his Marriage or otherwise, that his Personal Estate shall be distributed according to the Custom of the City; or in Case any Person so free shall die intestate, his Personal Estate shall be subject to the Custom of the City.

(C) Foreign Attachment.

1. This is not a good Custom. 21 Ed. 4. 67.

2. A Creditor of W. A. attaches his Debt in the Hands of W. S. who was indebted to the said W. A. and this being removed into B. R. by Cerroirari, a Procedendo was pray'd; but Coke Ch. J. say'd, that where the Party cannot have the like Remedy in B. R. as he may in London, upon this Cufrom of Foreign Attachment it ought to be remanded; And Doderidge say'd, that by way of Barr we often allow such Customs of London, as when a Debt is recover'd there by Force of Foreign Attachment, and afterwards the Debtor of him in whole Hands it was attached, brings Action for it, and the Foreign Attachment is pleaded in B. R. we ought to allow it; but upon such Custom by way of Original Suit, we cannot do Right to the Party, and therefore the Procedendo ought to be granted, and this Cufrom has very often been pleaded in our Books; and this Diversity was agreed by Coke Ch. J. and a Procedendo granted. Roll Rep. 263. pl. 42. 13. Jac. B. R. Croffe's Cafe.


4. It was agreed by all, that a Foreign Attachment in London, is to no other Purpoe but to compel an Appearance of the Defendant in the Action; For if it appears within a Year and a Day, and puts in Bail to the Action, the Garnisher is discharged, but without Bail they will not accept an Appearance. Carth. 26 Pach. 1 W. & M. in B. R. in Cafe of Andrews v. Clerke.

(D) What
(D) What Persons shall be bound by this Custom, and
in the Hands of what Person a Debt may be attacked.

1. D. 8 Eliz. 247. 73. This was indebted to Foxcroft, and A. Cro. E. 410.
indected to the said Toft; Toft died in the Cafe of Snelling
infare. The Ordinary committed Administration, and after For-
croft died the Ordinary, and upon his Default the Debt of A. was
attached by the Custom, and after the Administrator brought Debt
against A. who pleaded the Attachment, and yet the Plaintiff
covered, for that no Action of Debt lay as above against the Ordi-
nary, nor by the Ordinary against A. Deetea of the Intestate, after
the Administration committed by any Law; And some were of
Opinion, that at the Common Law no Action lay against the Ordi-
nary, but by the Statute of Westminister 2, cap. 19, which is with
in the Time of Memory, and therefore the Custom cannot extend
to it.

2. Co. 5. Smelling s.. b. This last Opinion is resolved not to be
Law, and resolved, That the Administration is within another
Custom, to be charged for a Contrate, because he was chargeable
et Common Law as an Executor by his Administration; and the
Name of the Charge, seller, Administrator is only charged by the
Statute, and per in Substance is all one; And it seems by the
Book, this Custom is all one with a Foreign Attachment.

3. By this Custom a Debt be attached in the Hands of W. B.
may pleat it in Bar against his Debtee. 21 Eliz. 4. 67.

4. But when an Attachment is pleaded, the Plaintiff may traverse
the Cause thereof, feite to, that the Defendant was not indebted to him of.
hour v. who attached it. Bich. 12 Jac. B. R. by Coke, and by him there
 cited P. 40 El. B. R. Pain's Case adjudged. Old Entries, and though
Debt in Attachment. 1, Fol. 157. b. But Note, This is upon
the Custom of London, within the Year and Day.

The Debt is not now traversable because it is recovered in London, Ex non diffusionatur within the Year and
Day, as it mbe by the Custom, yet it was reld good per tot. Car. For whether he was indebted or not is well statute; For if he was not indebted, then they in London could not attach the Plaintiff's Debt by a Foreign Attachment for nothing; And Fenner said, that it was so ruled 22 & 23 Eliz. C. B. in one Bray's Cafe. 24. 702. pl 99. S. C. but S. P. does not appear. S. C. cited by

5. A Foreign Attachment lies in London against Foreigners, if the
Debtor be within the Jurisdiction. Jenk. 139. pl. 84.

6. A Creditor of W. R. attaches Money in the Hands of the Ordina-
ry. Adjudged that it could not be, for a Foreign Attachment cannot
charge any other Person than the Debtor himself, which the Ordinary
is not, before Goods of the Intestate come to his Hands, nor Creditor of the Intestate can sue him till he has actual Seisin, and before such Seisin he has no little Interest in the Matter, that he can neither release or bring the Action; but Goods in the Hands of an Executor or Administrator, may be attached by a Foreign Attachment, because they are Debtors; and yet by this Means a Debt upon Simple Contract may be paid before a Debt upon Specialty. 3 Salk. 49. Trin. 7 W. 3. B. R. Masters v. Lewis.

(E) What Debt, or Goods, may be attached by the Custom.

Br. Debt, pl. 1. Such Goods cannot be attached, of which he had no Property at the Time of the Attachment. 17 Eliz. 4. 7. b. per Curiam.

2. If A. be indebted to B. and J. S. a Stranger, takes by Tort certain Goods of A. as a Trespasser, B. cannot, by the Custom, attach those Goods in the Hands of J. S. for the Debt of A. because the Property is out of A. at the Time, and only a Right in him. Trin. 4 Ja. B. R. between Staunton and Amory, adjudged.


4. If A. be indebted to B. by Obligation, and B. is indebted by Contract to H. and B. dies, and his Administrator demands the Debt upon the Obligation of A. who promises him, that if he will forbear him for a Month, that he will pay him then, but he does not pay him accordingly; and after H. brings Debt in London against the Administrator upon the Contract (as he may there by the Custom) the Debt of A. due by the Obligation, may be attached in the Hands of the Administrator; for notwithstanding the Promise is broken, yet the Debt continued due by the Obligation, and a Recovery upon the Obligation, will be a Bar of the Action upon the Promise, in which all should be recovered in Damages. B. 12 Ja. B. R. between Spinke and Tenant, per Curiam.
5. If A. lends to B. 100 l. to be repaid by B. upon the Death of his S. C. cited Father, and after the Death of the Father of B. this 100 l. is attached by Force of a Foreign Attachment, and after A. brings an Action upon the Cafe against B. for this Money; this Foreign Attachment will be a good Bar thereof, though the Cusan be to attach Debts, and this is an Action upon the Cafe, in which Damages only are to be given, because this is a Debt, and he might have had an Action of Debt thereupon, and therefore maifhuch as this was well attached, he shall not defeat it by bringing an Action upon the Cafe for it. C. 11 Car. 3. B. R. between Sir Nicholas Hills and Walker, per Cusan, upon a Demurrer upon a Foreign Attachment in Exeter, which is of the Nature of an Attachment in London.

6. If A. sells certain Stockings to B. upon a Contract, for which B. is to give 10l. to A. and if it sells the Stockings again before August after, that he shall give 2d. more for every Pair of Said Stockings; the 12l. is attachable by Foreign Attachment, because an Action of Debt lies for it, but the 2d. for every Pair of Stockings is not attachable, because this refutes only in Damages to be recovered by an Action upon the Cafe, and not by Action of Debt, because it is made payable upon a Possibility only. 2d. 11 Car. 3. B. R. between Read and Hawkins, per Cusan, upon a Demurrer, where an Action upon the Cafe was brought for the 12l. only, and the Foreign Attachment pleaded in Bar; but the Judgment was given against the Defendant for the impudling the Foreign Attachment. Instructur, B. 11 Car. Rot. 78. but per Cusan, it had been a good Bar, if it had been well pleaded.


8. A Man may have Money in his Hands which is attachable, though it be no Debt; As if he has Money to keep, or if he finds the Money of the Debtor. Admitted. Cro. E. 172. pl. 13. Hill. 32 Eliz. 3. B. R.

9. A Debt of Record as upon a Judgment &c. cannot be attached by the Custom of London, and says, that so it was held in the Cafe of Sir John Parrot, in C. B. And was it said by Cook, that such a Debt could not be attached upon the Statute of Bankrupts. Lc. 240. pl. 333. Trin. 32 Eliz. in the Exchequer. Sir Walter Waller’s Cafe.

10. A Man indebted in Arrearages upon an Influx comptz.vv., in a Sum certain, and promised to pay it at a certain Day, but did not, and afterwards it was attach’d in London by the Custom &c. In a new Action brought for the Arrearages in B. R. it was adjudg’d a good Bar. Arg. Roll Rep. 105. cites Mich. 37 & 38 Eliz. 3. B. R. Vandiflone v. Humphrey.

11. Whether a Debt upon a Recognizance may be attach’d in London. 38. b. don. Toth. 115. cites 38 Eliz. Skegg v. Smith. Marg. pl. 72. cites Mich. 13 & 14 Eliz. Rot. 1649. Sir Roger Manwood’s Cafe, wherein it was agreed, that Debt upon a Recognizance might be attach’d; but cites 31 Eliz. Gurtle’s Cafe, wherein it was held, that Debt upon a Statute Merchant cannot be attached.

12. Part of a Debt may be attach’d by the Custom of London ; Per Ow 2. cites Warburton J. Godb. 196. pl. 282. Trin. 10 Jac. 3. B. S. P. 22 H. 6 47.

14. An Executor submitted to an Award, and the Arbitrators awarded, that the Plaintiff should deliver to the Defendant certain Goods, and that the Defendant should pay to the Executor 50l. This Money is not attachable in his Hands by any Creditor of his Teftator, it being not a Debt due to the Teftator tempore moris sui, and so not attachable as the Teftator's Debt. Vent. 111. Hill. 22 & 23 Car. 2. Horfam v. Turgis.

And Ibid. 741 pl. 42. adjudged — S. C. cited Arg. 2 Lutw. 985.

15. A. is indebted to B. B is indebted to C. and D. A at B's Request gives a Note to C. for the Money due from A. to B. afterwards A. let D. attach the Money as due to D. from B. and on that Attachment D. got a Verdict, and Judgment. Decreed the Money to C. and that D. might take his Remedy at Law, and should assign his Judgment to the Six Clerk &c. in Truth for A. to reimburse him the Money. Fin. R. 235. Mich. 27 Car. 2. Corderoy v. Carpenter, &c.

16. On Debt brought in London against the Hambrough Company and they not appearing upon Summons, and a Nihil returned, an Attachment was granted of Debts owing to the Company in the Hands of 14 several Persons. Per Cur. We are not Judges of the Customs of London; nor do we take upon us to determine, whether a Debt owing to a Corporation be within the Custom of Foreign Attachment or not. This we judge and agree in, that it is not unreasonable that a Corporation's Debt should be attached. If we had judged the Custom unreasonable, we could and would have retained the Caufe; For we can over-rule a Custom, though it be one of the Customs of London, that are confirmed by Act of Parliament, it be against natural Reason, but because in this Custom we find no such Thing, we will retain the Caufe. Let them proceed according to the Custom at their Peril. If there be no such Custom, they that are aggrieved may take their Remedy at Common Law. We do not dread the Consequences of it. It does but tend to the advancement of Justice; and accordingly a Procedendo was granted per North Ch. J. Windham and Ellis. (abente Atkins, Mod.) 212. pl. 45. Pach. 28 Car. 2. C. B. Hambrough Company's Cafe.

17. A. ow'd B. 200l. A. borrow'd 200l. of P. to pay B. which Sum A. was to receive of C. being the Purchase Money of Lands in Somersetshire fold to D. but before A. receiv'd any of the Money, he paid the 200l. Debt to B. Afterwards upon executing the Conveyance by A. to D. he could not pay down ready Money, but gave A. two Bonds of 100l. each, to be paid in half a Year. A. delivered these Bonds to P. which A. by P's Direction, assigned to M. to the Use of D. Afterwards Ld. H. attach'd this Money in the Hands of D. for so much due by A. to him. M. having an Interest in the Bonds by the Allignment, refused to transfer that Interest to P. the Plaintiff, whereupon P. by Bill pray'd Relief against this Attachment, and to have the Money, and for M. to transfer his Interest in the Trust of the said Bonds &c. Decreed, that D. pay the Money to P. and P. upon Payment, to deliver up the Bonds to D. to be cancelled, and a perpetual Injunctin against Ld. H. and B. to stay Proceedings on the Attachment, or other Proceedings at Law for the Money on the Bonds, and M. to transfer his Interest to the Plaintiff. Fin. Rep. 299. Pach. 29 Car. 2. Perrier v. Ld. Haliliux, &c.

18. If A. is indebted to B. who is indebted to C. and B. affirms the Debt of A. to C. in Satisfaction of his Debt; now the Debt due from A. is become the Right and Property of C. and B. hath nothing but in Truth
227

[Foreign Attachment]

At what Time.
In what Cases it may be.

1. If a Bail recovers Debt or Damages in B. R. this Debt cannot attach a Debt in a Superior Court. P. 32. Cl. 3 B. R. between Kery and Bowyer, per Curiam; and Tr. 32 Cl. after adjudged, and there is cited Sir John Parret's Cate to be adjudged accordingly.

Customs of London.
Customs of London.

2 2 8

crues by master of Record, cannot be attach'd by the Custum of London.—Cro. E. 29. pl. 9. cites S. C. adjug'd. — 3 Le. 240. pl. 553. cites S. C. as so held. — Cro. E. 236. pl. 9. cites S. C. adjug'd.!

2. After an issue in an Action of Debt in B. R. the Debt for which the Action is brought, cannot be attach'd in London for the Cauf aforementioned. §§. 31. 32 El. B. R. the Case of Fenner and Samuel is cited to be adjug'd.

Cro. E. 147, pl. 21. S. C. the Defendant pleaded a Foreign Attachment in London after Appearance, and pending the Action; but after Admission it was ruled to be no good Plea, but no Cause was flown, and the Defendant had a Day to plead peremptory, or a Nihil dict to be entered.—5 Le. 222 pl. 316. S. C. adjug'd no Plea after Impairance. — The Garnifher cannot plead to the Jurisdiction after Impairance; For it is an Admission of the Jurisdiction; Per Holt Ch. J. Comb. 109. Pitch. 1 W. & M. in B. R. Andrews and Clerk. — Show 9. Clarke v. Andrews. S. C. & S. P. and Prohibition denied. — Garrth 25. S. C. & S. P. and Prohibition denied.

Debt upon a Bill obligatory. The Defendant pleaded a Foreign Attachment in London, which was made whilst the Suit was depending in C. B. and before he had any Notice of the Suit, it was the Opinion of the Court, that whilst the Suit is depending, it cannot be meddled with by any other, for it is quasi in Cutholdia legis, and the Queen's Court is interested therein, and therefore the Attachment is not good. — Cro. E. 691. pl. 28. Trin. 41 Eliz. C. B. Humfrey v. Barnes.

4. If a Writ of Debt returnable in Banco be purchased before the Attachment, it cannot, by the Custum, be attach'd. §§. 5 Sa. between Action and Proffer.


there by three Juflices, (abente Gawdy) but it being also moved for Error, that the Custum alleged was, that the Plaintiff should swear his Debt, whereas the Record is, that it is sworn by another, who was the Plaintiff's Attorney, it was held incurable, and the Judgment was reversed. — S. C. cited by Crooke. Roll Rep. 105. pl. 21. Mich. 12 Jac. B. R.

7. W. was arrested by Latitat for 1000 l. on a Bond. The Money was brought into Court; but before the Return of the Writ, an Attachment issued in London against W. for divers Sums; it was moved, that the Money might be taken out of the Court to satisfy the Plaintiff, because B. R. had the Priority of Suit, but the Court made a Rule to have it examined, and that if it appear'd he was a Debtor to those in London, before he became indebted to the Plaintiff, that the Money shall remain in Court subject to the Payment of their Debts, and that the Court should not be made a Means to strip others of their just Debts; And by Williams J. In Case of Priority of Suit B. R. has always had the Privilege and Jurisdiction, and so it has been oftentimes adjudged. Bullit. 217. Trin. 10 Jac. Ingram v. Sir Ed. Waterhouse.

8. There cannot be a Custum for a Foreign Attachment, before there is some Defaunt in the Defendant. Vent. 236. Hill. 24 & 25 Car. 2. B. R. Anon.

9. If
9. If a Suit be begun in B. R. or C. B. &c. &c. no Foreign Attachment for a Debt &c. shall prevent the Judgment of that Court, nor shall it prevent the Judgment of this Court, and therefore I confirm the Decree made, and set aside the Proceedings and Judgment on the Foreign Attachment; Per Ed. Chancellor. 2 Chan. Cases 233, 234. Mich. 29 Car. 2 Anom.

10. Bill of Middlesex presents an Attachment as much as an Original, because it is in Lieu of one, and it is the Foundation of the Suit, and if laid to be secundum Confusurudinem Curiae, it will be a Bar. 2 Show. 374, pl. 359. Trin. 36 Car. 2. B. R. Anon.

11. A Judgment was set aside as irregular, and the Money paid into the Hands of the Defendant's Attorney; before he could carry it away, it was attached at the Suit of A. on an Action entered in the Counter. Per Holt Ch. J. let the Plaintiff in the Action in the Counter attend; Tis a Trick. Camb. 427. Trin. 9. W. 3. B. R. Hayes v. Barnaby.

(G) [Foreign Attachment]

At what Time it may be.

1. A R. Obligee before the Debt is due by Obligation, cannot, by the Custom, attach a Debt for it, because he cannot attach a Plaintiff for the first Debt before it is due. Tr. 32 El. B. R. between Dalton and Selby, agreed.

2. But if B. is indebted to A. and C. is bound to B. but the Day of C. before it is due to B. Tr. 32 El. B. R. between Dalton and Selby, agreed. held accord.-

3. If in such Case, if it be pleaded, that such Debt was attached before the Day of Payment by the Condition of the Obligation, it ought to be specially pleaded, that, by the Custom, such Debt may be attached before the Day of Payment by the Condition of the Obligation. Rich. 10 Car. B. R. between Adler and Clapper, the, S. P. per Curiam, upon a Demurrer where the Custom was alleged generally, as the like is in other Cases for Debts then due, and therefore the Court inclined it was not good. Int. Tact. 10 Rot. 328. Hill. 10 Car. this being moved again, the Court was of the same Opinion.

4. If A lends Money to B. to be repaid upon the Death of the Father of B. and after, an Action is brought by C. against A. and after, the Father of B. dies; the Money due by B. to A. may after be attached in the Hands of B. though it was not due at the Time of the Suit commenced against A. much as it became due before the Time that, by the Custom, Process is to be granted against him to whom he is indebted, [or as Mr. Danvers has alter'd it] "in whole Hands it is attached." Trin. 11 Car. B. R. between Sir Nicholas Hale and Walker, per Curiam, upon a Demurrer upon a Foreign Attachment in Exchequer, which is all one with an Attachment in London.
5. A Debt may be attached, by the Custom, before it is due, but before it is due Judgment cannot be given upon this Attachment, that he shall have or retain it in Satisfaction of his Demand demanded before it is due; for thereby there should be an Execution of this Debt attached before it becomes due, which cannot be, for by the Judgment it is put in Execution presently. Tr. 14 Car. B. R. between Pierse and Calcott, adjudged upon a Demurrer. Innauit, Mich. 13 Car. Rot. 473. But note, it was objected on the other Side, that this was a good Custom, because the Judgment is not that the Debt attached shall be paid presently, but only that he that is Plaintiff, shall have it in Satisfaction of his Debt presently, but to be paid when it becomes due.


(H). [Foreign Attachment] In what Actions it may be.

1. In an Action of Debt for Tobacco in the Detinett, a Debt cannot be attached within the Custom in Satisfaction thereof, because it does not appear of what Value this Tobacco was, so that it might appear that the Debt is but a Satisfaction to the Value, which cannot be supplied by a Plea in Bar made in another Action against him in whose Hands the Debt was attached. Tr. 14 Car. B. R. between Pierse and Calcott, per Curiam, adjudged upon Demurrer, Innauit, Mich. 13 Car. Rot. 473.

2. But if the Value of the Tobacco had been averred in the Record of the Attachment, the Debt might have been well attached in this Action. In the said Case of Pierse and Calcott not denied.

(I) How the Proceedings may be in the Foreign Attachment.

1. Where the Custom is to swear the Debt, it is no good Custom if it be alleged, that the Plaintiff swore his Debt to be true, by himself, or by his Attorney, for his Attorney cannot swear it to be a true Debt. Tr. 14 Car. B. R. between Pierse and Calcott, per Curiam, adjudged upon a Demurrer, Innauit, Mich. 13 Car. Rot. 473.

2. The Custom of London is, that where the Goods of the Defendant are attach'd in other Hands, because the Defendant is returned Nihil in plaint of Debt, whereby the Plaintiff, upon the Circumstance of the Attachment recovers the Goods attach'd, and has Execution, that there,
if the Defendant would disjolve the Attachment, he ought to come within a 
Year, and put in Surtety to answer the Action, or, if he cannot find Surtety, 
then to render his Body to Prison. Quod Nata, Br. London, pl. 1. cites 
20 H. 6. 3.

3. A Suit was in Exeter by M against H. and the said H. was returned Le: 321. pl. 
Nobil: and it was sworn that T. the Plaintiff had certain Money in his 452 Michil 
Hands due to H. whereupon this Money was attacked in T's Hands, T v. Hore, 
pleaded Nibil Debt to H. upon which M. demurr'd, and adjudged for Judge, and 
him, because he ought to have pleaded, that he owed nothing to H. nor had the Judg-
any Money in his Hands due to H upon which T. brought Error, be-

cause it is a good Plea, and the Plaintiff was to be barred and not to 
recover, and that fo is the common Pleading in London; and the 
Judgment was reversed. Cro. E. 172. pl. 13. Hill. 32 Eliz. B. R. 
Trols v. Mitchel.

4. L. brought Debt against H. who pleaded, that J. in London af-
firmed a Plaintiff against A. and by the CustoI there attacked the Debt 
demanded, in the Hands of H. and alleged the CustoI, that the Plain-
tiff should swear the Debt, but the Record is, that the Debt was sworn 
by a Stranger; This was held incurable; and so a Judgment in C. B. 
was reversed. Cro. E. 712. pl. 36. Mich. 41 & 42 Eliz. B. R. 
Leuknor v. Huntley.

5. The CustoI is, that if any one is indebted to another, if he will 1bbl. 402.
enter his Suit or Plaint in the Counter of the Sheriff of London, that a 
Debt ought 
Precept shall be awarded to a Sergeant at Mace, to Summon the Defendant, to be affirm-
and if he return Nibil, viz. that he has nothing within the City by 
which he may be Summoned & non eft inventus, and if he be solemnly 
called at the next Court, and makes default, that then, if he can show 
the Defendant has Goods in the Hands of one within the Liberty Arg. cites it 
of the City, that the said Goods shall be attached, and if the Defendant as to fet 
makes Default at four Court Days, being solemnly called, then if the Plaintiff 
swear his Debt, and put in Bail for the Goods, that if the Debt 156. b. pl. 
be disproved within a Year and a Day, or the Judgment be reversed, 
3 Eliz. in Case 
that he shall have Judgment for the said Goods. Godb. 400, 401. of Harwood 

The 
Defendant pleaded an Attachment in London, and that he had found Pledges to return the Money if 
it should be deraigned within a Year, and because the Pledges were not put in at the Day of the last De-
fault, but at another Day after, it was helden no Pisa, and Judgment was for the Plaintiff. Mo. 572. 

6. It was ruled, That if A. brings Debt in London against B. and att-
aches Goods of B. in the Hands of C. from whose Possession the Goods are 
not removed; and B. by Certiorari brings the Cause into B. R. and puts in 
Bail, the Attachment is at an End, and C. ought to deliver the Goods 
B to which, if he does not, B. may have Trover or Replication: but B. 
R. will not compel him to deliver them, because he is no Party in 
Court, and all Things are as if there never had been an Attachment.

(K)
Cuftoms of London.

(K) [Foreign Attachment.]

Who shall have it, and against Whom.

1. If A. recovers Debt against B. in London, B. may attach this Debt in his own Hands for so much due to him. Path. 32 El. B. R. between *Kerry and Brayner, admitted. Ten. 32 El. B. R. is his Case admitted. Dredg. 11 Jac. B. between Lepas and Holman.

2. A Debt due to an Administrator may be attached within the Custom, for an Administrator is within the Custom. Rich. 12 Jac. B. R. between Spinke and Tenant, per Curiam.

3. If in Bar of an Action a Foreign Attachment is pleaded, that the Custom is, that if any Man brings his Action against another for any Debt, and upon a Return made, that he Non est inventus, &c. and upon furnishes, that any other is indebted to the Defendant in such a Sum, and thereupon to pray Proces to attach the Sum in his Hands, and to defend, ita quo the Defendant appears to answer the Plaintiff, and the Servant returns that he hath attached him to defend the Sum in his Hands, and the Defendant does not appear at Four Courts after &c. that Judgment shall be to recover it in his Hands &c. this is no good Custom, without a Surense that the Stranger who is indebted to the Plaintiff is within the Jurisdiction of the Court, and the Return of the Servant is not sufficient that he hath attached him to defend it in his Hands, for perhaps the Servant intends that he may attach the Debt in his Hands, though he be not within the Jurisdiction of the Court, and his Return shall not bind the Party, without an actual Surense thereof by the Party himself. Ten. 11 Car. B. R. between Sir Nicholas Halle and Walker, adjudged upon a Denouncer, where a Foreign Attachment in Exeter was pleaded, which was all one with the Custom of London, and all Customs there confirmed by Parliament in the Time of Queen Elizabeth.

4. The Custom of London is, that if any Plaintiff be affirmed in London, before &c. against any such, and it is returned Nihil, if the Plaintiff will furnish, that any Man within the City is Debtor to the Defendant in any Sum, he shall have Garnishment against him for him to come in to answer, if he be indebted in the Form as the other hath alleged, and if he comes, and does not deny it, then this Debt shall be attached in his Hands &c. So note, that the Plaintiff ought to furnish, that the other Man who is indebted to the Defendant is within the City. 32 E. 4. 30 per Staceley, the Recorder of London, the Custom is certified.

5. Whether the Custom of Foreign Attachment holds between a Citizen and Foringer. Manc. D. 3 El. 196. 42.

6. A Citizen of London was indebted to a Foreigner upon Bond, and the Foreigner was indebted to the Citizen upon a Simple Contant; the Foreigner died, and upon Oath made by the Citizen, that his Debt was a just Debt, he lodged a Plaintiff in London against the Exicute of the Foreigner; and
Customs of London.

and upon four Defaults recorded, he had Judgment, and then he at- bound to C.
tacked the Debt in his own Hands, finding Sureties, that if the Debt was
not discharged by the Executor within a Year and a Day, or the Judgment
reverted, then he should be discharged of so much of the Debt which
be exist on the Bond; the Question was, whether this Custom did extend and the said
C. in London made
Attachment of the Debt
of 100l. in his own Hands for the said Debt of C. and had Judgment thereupon accordingly, and
afterwards assigned this Obligation to the Queen &c. D. 156. b. Marg. cites Titn. 18 Eliz. Chamber-
lain v. Greatham. — Ibid. cites 45 Eliz. in C. B. that it was paid for Law per Cur. that a Man
by the Custom of London cannot attach a Debt in his own Hands; for that which is in his own
Hands cannot be held attach'd; and it was said also, that the Custum is good only between Citizens,
and not to extend to Strangers.

7. Goods were attach'd in the Hands of the Exeter Carrier, who is then
priviledged in the Common Pleas, by Reason of an Action there depending;
per tot. Cur. The Attachment ought to be dissolv'd, and the Privilege
to all Goods for which he is answerable to others. Le. 189. pl. 268.

(K. 2) Foreign Attachments. Pleadings in General.

1. CUSTOM of London was in Issue, and the Trial thereof there,
and Exception was taken, that Allowance thereof ought to be
sween of Record; and the Opinion of the Justices was, that he is not
bound to flow Allowance thereof another time by Record; quod nota,
that of Custom there needs no Allowance. Br. Customs, pl. 42. cites
3 E. 4. 30.

2. In Debt the Defendant pleaded a Foreign Attachment; the Plaintiff Mo. 703;
replied, that he was not indebted to the Defendant in any Sum; and this pl. 979. & C.
was held a good Replication, because its illueable, whether he was
indebted or not; for if he was not indebted, then he could not be at-

3. In Delinc for Goods Plaintiff declar'd, that he deliver'd them to Godh. 400.
re-deliver quando requitus &c. but that Defendant had not delivered pl. 438.
them Lices iepius requitus &c. Defendant pleaded the Cuslom of Fo-
reign Attachment in London; whereupon they were recovered there against
the. Plaintiff demurred; it, Because the Cauze of the Debt, on which adjournatur.
the Attachment was, is not flowen; nor is it averred expressly, that there
was any Debt; to which Stone, for the Defendant, replied, that the
Cauze of the Debt shall not be flowen, because it is only Inducement,
and not traverable. 2dly, Exception was, that the Cuslom is, if he
swears his Debt to be true &c. but here it is alleged, that he swore his
Debt, but did not say, that he swore it a true Debt. Stone replied, that
this shall be intendted. 3dly, That it is not flowen that the Debtor was
within the City at the Time. 4thly, The Cuslom is, that if the Sheriff
returns that the Debtor Nebit habet, by which to be summoned, and that he
cannot be found within the City, and be demanded at the next Court, that
then, if he does not come, Foreign Attachment shall be awarded; but in
this Case, none of these Points were aver'd, viz. that the Sheriff re-
turn'd &c. Stone anfwer'd, that this was true, and therefore the Judg-
ment is Erroneous, but that we cannot take Advantage of it, being
Strangers &c. At length the Court feend of Opinion against Stone in

O o o
all

4. A Foreign Attachment, in an Inferior Court, was pleaded in this Manner; (That by Custom Time out of Mind) whoever levied a Plaintiff pro aliquo debito against another upon Surmise; That a Stranger was indebted to the Defendant, that Process issued forth to attach &c. The Court said, That they need not express that the Debt did arise infra Jurisdictionem; for perhaps it did not. And yet if an Action be brought in such Case, and the Debt be laid to be contr'd infra Jurisdictionem Curiae, if the Defendant will plead to it be may; but he shall never be admitted to align for Error in Fact, that the Debt did arise extra Jurisdictionem Curiae. But if he had tendered such a Plea in the Inferior Court upon Oath; then, if they had refused it, it would have been Error. Wherefore it is enough in this Case to say, that a Plaintiff were levied pro aliquo debito infra Jurisdictionem, without averring, that the Debt did arise within the Jurisdiction. Vent. 236. Hill. 24 and 25 Car. 2 B. R. Anon.

5. Debt on a Bond; the Defendant pleads, that the Plaintiff being indebted unto J. S. he made an Attachment of the said Money in his Hands; the Plaintiff demurs; two Exceptions were taken, because, 1st, It does not appear that the Debt arose within the Jurisdiction. 2dly, That the Attachment pleaded was made before the Money was payable by the Bond. It was answered as to the first, that there is a great Difference where a Man is Plaintiff in an Action, and the Defendant here, who was a third Person, who is no ways privy, and could not allege, that he that is Plaintiff here, was a Defendant below; and the Precedents are all without it, as may be seen in Coke's Entries, Tit. Debt. And as to the other Matter, it is Debittus in Presenti, tho' Solvend. in futuro; and it may be attached before it is payable, though it cannot be condemned till after. 2 Show. 506. pl. 468. Hill. 2 and 3 Jac. 2. B. R. Self v. Kennicott.

Show. 9. Carth. 25.


6. In Case of a Foreign Attachment, the Garnishee cannot plead to the Jurisdiction after an Imparlance; For an Imparlance is an Admission of the Jurisdiction; per Holt Ch. J. Comb. 109. Pafch. 1 W. and M. in B. R. Andrews v. Clarke.

Show. 9. Carth. 25.


7. Upon a Foreign Attachment the Garnishee pleaded to the Jurisdiction of the Sheriff's Court; but it was over-ruled. Carth. 25. Pafch.


by the Reporter for a Prohibition, but says, that Dolben was angry, and said, that no Man would have made such a Motion but the Reporter himself, and wondered that he who had been concerned in the City should have made such a Motion; But that Holt said, there was Reason in it, but the Pleading of it was after Imparlance, and so they came too late, it not being pleaded in Time; And a Prohibition was denied.

(L)
(L) Pleader of a Judgment in a Foreign Attachment, in Bar of an Action in other Courts.

1. By the Custom of a Foreign Attachment of London, if A. owes B. in London &c. and C. is indebted to B. in the same Sum, and the said C. is condemned there to A. according to the Custom, and Judgment given against him accordingly; yet if no Execution be sued against C. A. may retort to have Judgment and Execution against B. his principal Debtor, and B. may sue C. for his Debt, notwithstanding the unexecuted Judgment. D. 7 E. 6. 82. 72. by Brook, Recorder of London, this certifies to be the Custom of London.

2. In Bar of an Action brought in B. R. if the Defendant pleads a Judgment in a Foreign Attachment in Bar, and alleges the Custom to be, that if the Plaintiff in the Court hath Proces. against the Defendant, and upon a nihil returned, makes a Sumnifie that B. is indebted in so much to the Defendant, and upon his Prayer to attach it in his Hands by Proces. and he does it accordingly, and if the Defendant makes Default at Four Courts after that, by the Custom, at the left of the said Four Courts, the Plaintiff may pray Proces. against B. to come in and shew Caule wherefore the Judgment should not be against him at the next Court after; and when he comes to apply this Custom to his Case, he shews that there were four Defaults, and that at the fourth Default the Plea was continued for several Courts, and then Proces. went against B. and then after Judgment against him; this is not warrantable by the Custom, insomuch as he shews, by the Custom, it ought to be at the next Court after the four Defaults. Trin. 11. Car. B. R. between Sir Nicholas Hall and Walker, per Curtiam upon Denmu rer adjudged.

3. Debt by T. C. and R. C. upon an Obligation against R. D. of 32l. Br. London; and as to 18l. Parcel &c. he pleaded that M. brought Debt in London pl. 9. cites against the said R. C. of 18l. who was returned Nihil, by which 18l. S. C. Parcel of the 32l. was attach'd in the Hands of the Defendant, as the Debt of the said R. C. by the Custom, which is where the Defendant has divers Debtors &c. and is returned Nihil, that he shall attach it, and have Execution &c. See the Pleading of this Foreign Attachment, by the Custom of London, Libro Intrat. For it is illy pleaded here, and because he alleges the Custom to be divers Debtors, and in the subsequent places but one Debtor, therefore per Judicium, the Plaintiff recover'd, quod Nota, but it was held by the Jusitices, Serjeants, and Apprentices, that if the Custom had been well pleaded, that this had been a good Barr, though the Action be brought by R. and T. and the Attachment was made as of Debt due to R. only; For in Debt to two, the one of them may discharge it intirely by his Release, Acquittance, or Comiance in Court of Record &c. For Bar against the one, of all, or of Parcel, is good against both; For such Record against the one, is as strong as if the one had releasted, quod nota. Br. Dette. pl. 190. cites 22 H. 6. 47.

4. In Debt by A. against B. the Defendant said, that f. S. brought Writ. Cap. Writ of Debt in London against A. the now Plaintiff, of 108l. which was som, pl. 5. returned Nihil, and be made Default, whereas after four Defaults record. cites S. C. ed, f. S. sumnifie, that B. the now Defendant was indebted to A. the now Plaintiff,
5. After Debt brought, the Plaintiff attached in London a Debt due by another Man to the Defendant, and had Judgment to recover; adjudged a good Bar to the Action for so much. Mo. 598. pl. 820. Palf. 36 Eliz. May v. Middleton.

6. Whether an Attachment made of a Debt in London may be pleaded in Bar of a Scire Facias upon a Recognizance in this Court, it hath been over-ruled in Law it cannot. Toth. 115. cites 38 Eliz. Skeggs v. Smith.

7. Debt by an Administrator upon a Bond of 26 l. made to the Intestate. The Defendant pleaded, that he brought Debt of 30 l. against the Plaintiff by the Name of Administrator to her Husband in London, and that upon Nilbl returned the Debt was attacked in his own Hands. It was adjudged no Plea, because Non est factum by the Bar that the Debt recovered in London was the Intestate's Debt, but only that he was sued by the Name of Administrator, which she might be for her own Debt, and then the Intestate's Debt cannot be attacked for her proper Debt, and it is not pleaded that the Debt in London was by Specialty, otherwise it is not demandable against an Administrator; besides, the Judgment in London was, De bona propria, which cannot extend to Goods of the Intestate's. Adjudged for the Plaintiff. Cro. E. 843. pl. 25. Trin. 43 Eliz. C. E. Hodges v. Cox.

8. Debt upon an Obligation; The Defendant pleads a Foreign Attachment in London, and the Plaintiff demurs, and the Exceptions were, first, that the Defendant had attacked the Monies in his own Hands by way of Retainer, and so the Custom unwarrantable. 2dly, It appeared
Customs of London.

appeared that Judgment was given in the Mayor's Court, by the Default of him in whose Hands the Money was attached; and it appeared that the Defendant, which brought the Action in London, and be in whose Hands the Attachment was made, and that made Default, was the same Person; and it is a Contrariety, that the same Person should appear and not appear, and a Peculation for that is naught; and the Custom is in London, that the Recoveror in London ought to find Surtcies, that if the Debt be discharged within a Year and a Day, then to pay the Money, and it did not appear by the Record that he found Surtcies, which was an incurable Fault and so adjudged by the Court. Brownl. 60. Mich. 10.

8. Debt upon Bond conditioned to pay 50 l. before such a Day; the 2 Keb. 132. Defendant pleaded the Custom of London of Foreign Attachment, (viz.) pl. 91. S. C. adinator, that where a Man is indebted to another, and that Debtor hath Money due to him from one in London, that the Creditor may attach it before it 59. S. C. is due to him, and that such a Creditor of the now Plaintiff did attach it as mov'd 501. in the Defendant's Hands before it was due to the Plaintiff, and gave Security, according to the Custom, to repay the Debt, if it should be disproved within the Year and a Day &c. and that on such a Day Custom of (which was atter the Day in the Bond) he paid the 50 l. to the Credit- tor upon a Scire Factas brought against him according to the Custom &c. and upon a Demurrer it was inferred that it is not a good Custom to attach Money before it was due; but adjudged, that it was; for Debt due to the &c. and his Custom was laid, Sid. 327. pl. 7. Pach. 19. Car. 2. B. R. Robbins v. Standard.

not payable till after, to which the Court inclined; fed adinator. — Ibid. 202. pl. 36. S. C. all the Court conceived the Custom sufficient, and well alleged; and Judgment for the Defendant, Nili.

9. Affinmpt by Administrator upon Indebitatus for 30 l. for Wares, sold by the Intestate, the Defendant pleaded that after Intestate's Death, and before Administration granted, be affirmed a Plaintiff in London against the Archbishop of Canterbury (to whom the granting the Administration belong'd) in Trepanis on the Cafe, on Affinmpt of the Intestate to the Defendant for 30 l. within day' by the Defendant to the Intestate, and upon Pro- cese against the Archbishop the Return was, that Nihil habet nec eft inventus &c. and then shewed the Custom of London of Foreign Attachment, and that himself owed the Intestate 30 l. which he had in his Hands, and prayed Attachment of the said Monies in his Hands according to the said Custom, and alleged the Condition, Proceedings, and Judgment in good Form, as usual in such Cafe, and then concluded Judgment Si Att. But it being shewn, that the Custom is alledged, that if the Debtor dies intestate, and a Plaintiff be affirmed against the Administrator, and if Proceeds against him be returned, that Nihil habet Nec eft inventus &c. that this Custom is not pursu'd in the Plaintiff affirmed against the Archbishop, and then the Judgment founded upon this Custom is void; Quod sux conceitium Per to. Cur. Raymond Abente. And resolved that the Defendant's Plea was insufficient, and that the Judgment upon the Foreign Attachment was not any Eftoppel to the Plaintiff here, be not being a Party libere. And Judgment for the Plaintiff. 2 Jo. 166. Mich. 33 Car. 2. B. R. Smith v. Ridges.

10. If Money be attack'd and paid thereon, and afterwards the Original Creditors sue for the fame, if the Attachment happens to be ill plead- ed, or otherwise avoided, the Party must pay the Money over again, and has no Remedy neither in Law, or Equity. 2 Show. 374. Trin. 36 Car. 2. B. R. Anon.
II. In Assumpsit, Evidence was given that the Leet was attached by the Custum of London before the Action brought, and Condemnation had there before Plea pleaded. It was urged that this should relate to defeat the Action; but it was ruled that if an Attachment and Condemnation be before the Writ purchased, it may be given in Evidence on the general Issue, because that is an Alteration of the Property before the Action brought; but if the Attachment only be before the Writ purchased, it ought to be pleaded in Abatement of the Writ, and if the Condemnation be after the Action commenced and before the Plea pleaded, then it may be pleaded in Bar, but shall not be given in Evidence on Non assumpsit; for the Property is not altered by the Condemnation. Coram Holt Ch. J. in Middlesex, 1 Salk. 250; Patch. 5 W. 3. Brook v. Smith.

12. In pleading a foreign Attachment, it must be that the Defendant (in the Action in London) was attached by the Money in the Garnisher's Hands, and not that the Garnisher was attached by the said Money. Carth. 282. Trin. 5 W. & M. in B. R. Lawrence v. Atherton.

13. We cannot take Notice of a Judgment upon the Custum of Foreign Attachment in London, without the Custum be specially shown; Per Holt Ch. J. 12 Mod. 407. Trin. 12 W. 3. Anon.

(L. 2) Defendant arrested. In what Cases; and when He may be.

[1.] 3. C. 9. Machally 63. b. resolved by all the Justices and Barons, that after the Plaintiff entered in the Book of the Porter of London, and before the Entry thereof in the Court before the Sheriff, the Defendant may be arrested by the Custum of London.

[2.] 4. By the Custum of London, after the Plaintiff entered as in the said Case before, or before the Plaintiff entered, it is afterwards entered, any (Serjeant ex Officio, at the Request of the Plaintiff, may arrest the Defendant aulio, aliquo precepto Decennis vel altero, and this Custum was allowed to be good by all the Justices and Barons. Co. 9. Machally 67, 69. b.

[3.] 5. By the Custum of London, after a Plaintiff entered as before, the Defendant may be arrested by his Body, by a Precept in Noscena Capias ut supra, before any Summons, and yet it is allowed to be a good Custum by all the Justices and Barons, nisasmuch as it is established and confirmed by Parliament. Co. 9. Machally 68.

[4.] 6. Co. 9. Machally 69. b. it was objected, that the Custum of London is not good, in that the Entry of the Plaintiff, upon which the Party was arrested ut supra, was without Form, and so obscure, that Opus ex Interpret; but by all the Justices and Barons the Custum is allowed, for that this was but a Short Remembrance to draw the Declaration at large afterwards in the Court of Pleas, which, by the Custum, is sufficient to arrest him.

(M) What
(M) What Persons shall be within the Custom
[Of London in General.]

1. C. D. 5. Snelling 82. b. adjudged, that when the Custom is Cro. E. 409.
that if two Citizens of London makes a Contract, and that he pl. 21. Trin.
that ought to pay the Money dies, his Administrator shall be bound to
pay it as well * as if it were by Obligation, that this is a good Cu-
stom, because the Administrator was chargeable at common Law;
and by the Statute the Name of Charge is only changed, but
the Substance remains all one; and resolved also, that the Stra-
ger, which is no Citizen, after such Debt recovered against the Ad-
imistrator by a Citizen, shall be bound by this Custom.

judged accordingly S. C. cited by Coke Ch. J. as adjudged, that an Administrator may be within
in a Custom, Quod sui ciium per Dodridge that he shall be, but Haughton J. doubted. Roll

coercer, certificated, that by the Custom of London, a Foreigner, as pl. 31. cites
well as a Citizen and Freeman of London, may devise his Lands or Tenements in Fee. 5 H. 7. + 10. and + 19. per Brian.

Land —— Fitzh. Custom, pl. 7. cites S. C. 4 S. P. so that it be to Laymen, as appears
in the Case of John Crully of Grays Inn; for it seems that the Custom is annexed to the Land,
and not to the Person of the Owner. Br. Custom, pl. 41. cites 5 H. 7. 10. —— Fitzh. Custom, pl.
J. cited 5 H. 7. 10. and 19.

3. Doctor and Student 21. there is a Custom in London, that Br. Devile,
Freemen there may, by their Testament enroll’d, devise the Lands
of which they are leaved to any, except in Mortmain; but 30 D. 8. 19.
S. 132. in London a Man may by Testament devise to a common
Person, though the Testament be not enroll’d.

4. * 5 H. 7. 10. and + 19. b. per Brian, none may devise to Guilds * Br. Cuf-
and Corporations in London, unless he be a Citizen and Freeman,
and then he may, D. 8. 9 Eliz. 255. 3. intended, that this devise
is to be made to a Corporation within the City only, and not out
and made a Niseare.

wife, pl. 22. cites S. C. —— Fitzh Custom, pl. 8. cites S. C.

5. Dib. D. 8. 9 Eliz. 255. 7. Devise of Lands in London to Trinity
College in Cambridge, and by all the Justices tis good by the Sta-
tute of 1 and 21 H. and nothing is land of the Custom.

6. Doctor and Student 21. Citizen and Freeman may devise in Br. Custom’s
Mortmain. 30 D. 8. S. 132. And he that makes such Devise,
ought to be a Citizen and Freeman, and ought to be reliant.

London to devise in Mortmain was by Grant of 1 E. 5. —— But though they may devise in Mort-

7. 45 Ed.
Customs of London.

Br. Customs, 7. 45 Ed. 3. 26. b. adjudged, that a Citizen not relish, taxable, or inheritable, cannot devise to St. Mary-Quevy in Mortmain; and there it is said, that to it had been adjudged before this Time. * 38. Mf. 18. adjudged.

Br. Customs, pl. 56. cites 38 Ed. 17. a Man impeached for Mortmain in London said, that the Citizen of London is, that every Citizen may devise his Land in London as well in Mortmain as otherwise, and that every one who has Land in Fee in the same City is a Citizen, and C. was tried in Fee, and was a Citizen, and devised it: but because he did not deny that he was not resiant in the City, or taxable to Scot or Lot, or inherited there by Succession of Deceased, and is not in the same City, and is no Citizen, and then out of the City of the Custom, therefore it was awarded that the King have the Land for Mortmain.

8. But there it is agreed by Finchley, that Citizens born and inheriting in London, by way of Heritage or Relish, and taxable to Scot and Lot, may devise in Mortmain Lands of which they are seised in Fee. But D. 8, 9 Ed. 255. 3. cited the 45 Ed. 3. to be that such Devise cannot be made in Mortmain, unless by a Citizen or Freeman; but the Book is contrary. 38 Ed. 18. agreed.

Br. London, 9. 30 Ed. 8. 3. 132. Such Testament ought to be enrol'd ad proximam Hugings.

Flint. Customs, pl. 30. cites S. C. and 29 Ed. 31. that such Testaments are enrolled in London within the Year; but Brooks makes a Quere, if it be of Necessity or not. — Br. Office devine &c. pl. 19. cites S. C. — Br. London, pl. 51. cites F. N. B. 199. that such Testaments shall be enrolled before the Mayor in the Hallings; but Brooks makes a Quere, if it be of Necessity, unless where the Devise is in Mortmain; for by several it need not otherwise to be enrolled.

10. Doctor and Student 21. puts the Devise in Mortmain by Testament enrolld, but none of the other Books makes any Deletion thereof.

Flint. Customs, pl. 3. cites S. C.

The Custom of London is, that a Freeman may devise Land to a Corporation in London; and that a Citizen may devise to any Man; and that a Citizen and Freeman may devise in Mortmain; Per Flewwood Recorder of London. Mo. 156. in pl. 230. Trin. 25 Edw.

12. Ca. 8. 129. Cases of the City of London, it is laid, that in London, Citizens and Freeman, by their Customs, may devise in Mortmain, notwithstanding the Statute of Mortmain be to the contrary, for the Customs are confirmed by Act of Parliament.

13. D. 28. 29 Ed. 8. 33. 12. The Custom of London is, that a Man may devise his purchased Lands in Mortmain.

Customs of London.

15. The Wife of a Merchant in London may sue and be sued by Customs, because London being the chief Place of Trade and Merchandise, it is intended, that Merchants cannot be always resident there, but sometimes beyond Sea, and in other Places, about their Affairs; and therefore it is reasonable, that the Wife should sue and be sued in the absence of her Husband; Arg. 2 Brownl. 218. cites 39 H. 6.

16. A Feme Covert shall sue an Action alone, without her Husband, for she is a Sole Merchant; also they do certify Recognizances Oec Tenus; Per Wray and per Gawdy, a Feme Covert may have an Action within the City, but not here. Le 131. pl. 175. Pash. 31 Eliz. B. R. Chamberlain v. Thorp.

17. Citizens, who are to be discharged of Prisage of Wines, ought to be Citizens, Freemen, and Commonor, not in a Chamber, but to keep a settled House there; Per Doderidge J. 3 Bullit. 16. Hill. 12 Jac. and Ibid. 23. per Coke Ch. J. S. P.

18. A Free-Woman of London is with the Charter as to Prisage; Per Doderidge J. and Coke Ch. J. said, that so it is for Apprentice in London. And that Homo includes both Sexes. And therefore the Custom of London being, that if a Freeman devise a Legacy to an Orphan, the Executor must find Surety to pay it, or be imprisoned; a Legacy left by a Free-Woman is within the Custom. Roll. Rep. 316. Hill. 13 Jac. B. R. Spencer’s Cafe.

(N) Customs of Things.

1. Od. 5. Snelling 82. admitted by Judgment a good Custom, that if a Contract be made by two Citizens, and he that ought to pay the Money dies intestate, the Administrator shall be bound to pay it, as well as if it were by Obligation.

2. Feme Covert in London, sole Merchant, shall have Action here within in her Baron. Br. Customs, pl. 43. cites 1 E. 4. 5.

3. And Debt against Pledges lies in London without Specialty. Ibid.

4. So where a Man counts upon a Conscient Solvent by Customs of London. Ibid.

(O) Customs of London.

1. There is a Custom in London, that when a Chaplain keeps any Woman in his Chamber suspiciously, a Man may come to his Chamber with the Beadle of the Ward, and enter the Chamber and search. 2 P. 4. 12. b.

2. It
Custums of London.

2. It is no good Custom in London, that if any Person dies within any Parish in London, and is carried out of the Parish to be buried in any other Parish, if he is buried in the Chancel or otherwise, he shall pay to much to the Parson of the Parish where he died, as he should have paid if he had been buried there in the Chancel or otherwise, as where he was buried for this Custom is against Reason, that he that is not any Parishioner, but passing through the Parish lies at an Inn for a Night, should be forced to be buried there, or to pay as if he had been buried there. Holbrooke's Reports. 233. between Topsal and Ferrers.

3. The Custom of London is good, that if a Villein abides in London for a Year and a Day, that he shall not be taken nor put out by Writ de nativo habendo, nor by any Process thereupon filing. 7 H. 3. 6. 32. dabitatur. 8 H. 6. 3. b. for this is not more than is ancient Custom.

4. By the Custom of London, no Attaint lies for a false Verdict given in London. 7 H. 3. 6. 32. b.

5. It is a good Custom in London, that the Mayor of London may take Recognizances of any Person being of full Age, or Woman unmarried, for he is a Judge of Record, and though perhaps the Debt grew due out of London. Dabitatur, 32. Cl. S. R. between Chamberlain and Tror.

6. It is a good Custom of London, that they, Time out of Mind, have used to have a measuring of Coals infra Portum London, which extends from Staines-Bridge to London Bridge, and from thence to Gravesend, and from thence to Peenyland, or Pendale, and all this is the Port of London. Mich. 11. M. 2. between the City of London and Manly. Per Curiam.

7. London prescribed, that their Guilds and Fraternities might make other Guilds and Fraternities by Utage; but Judgment was given against them, for none can do it but by Charter of the King, making express mention thereof; and where they prescribed to make Laws and Statutes, Belk said, they cannot alter the Estate and Inheritance, as to make Land descendentable to the eldest Son, to be deparable between the Males.
Males; For the King cannot do this by Grant without an Act of Parliament, nor make Tenements devisable by his Charter, Quod Candiish concedit. Br. London, pl. 22. cites 49 Aff. 8.

8. Custom of London to examine Causes by the Mayor, at the Suggestion of the Plaintiff or Defendant, pending a Plaintiff before the Sheriff of London and upon Examination and Satisfaction found to bar the Plaintiff, it is a good Custom; Contra if it be prescribed after Judgment given; For it is not reasonable to avoid a Judgment by Examination. Br. Customs, pl. 60. cites 10. H. 6. 14.

9. By the Custom of London, Lands and Houses there might be bought and sold by Word only, without any Deed or Enrollament; and this is a good Custom notwithstanding the Statute 27. H. 8. of Inrollaments; By the Opinion of the Jutices of both Benches. D. 229. a. pl. 50. Patch. 6 Eliz. Chibborn's Cafe.

10. There is a Custom in London, that Apothecaries who sell unwholsome Drugs, shall forfeit a certain Penalty; Debt was brought in London by the Chamberlain against W. for this Penalty. Upon a Habeas Corpus & Caflam brought by W. to the Court awarded a Proceeding, because the Plea in London is maintainable by the By Laws and Customs there. Mo. 493. pl. 538. Pauch. 37 Eliz. Wiltford v. Malham.

11. Error of a Judgment in C. B. by Confeffion in an Action of Debt, brought by the Successor of the late Chamberlain of London; S. P. as the Error aligned was, That the Action was brought by the Defendant in Error, as Successor of B. Chamberlain of London, upon a Bond, made to him solvendum to him and his Successors, and alleged the Custom of London, that the Chamberlain there had used Time out of Mind &c. to take Bonds payable to him and his Successors, that their Successors shall have the Bonds in any Court, and that all their Customs were confirmed by Parliament 7. R. 2. and that the Plaintiff had Judgment upon this Bond; whereas by Law a Bond, being but a Chatlet, cannot go to a Successor, but in regard it is alleged to be a Corporation for that Pur- ror's Cafe, pole, the Court held the Custom to be lawful and reasonable, and shall go to the Successor and not to the Executor, and affirm'd the Judgment. Cro. E. 464. (bis) pl. 16. Pauch. 38 Eliz. B. R. Bird v. Wilton.

12. Other special Commissioners for this Purfice, the Judgment was affirmed — And in a Note ibid. at the End of the Case, cites 43 & 44 Eliz. B. R. Wiltford v. Cutton, where Debt was brought on such a Recognizance made to B his Predecessor alleging the Custom of London, for the Chamber- lain to take Obligations or Recognizances to them and their Successors for Orphans Portions; and after Judgment for the Plaintiff, Error was brought there to the Exchequer Chamber, where the Judgment was affirmed.

13. Custom, that if any Free-man devis'd any Legacy to an Orphan, that the Executor should be contrain'd to find Sureties to pay the Legacy according to the Law; in this Case the Court ought to be had to Alls, and Conditions, and the Will of the Party; Per Cur. Roll R. 316. pl. 27. Hill. 13 Jac. B. R. Spencer's Cafe.

14. A Custom for the Mayor of London to appoint a Place for Taverns &c. and to Imprison for erecting one in a Place against their Wills, is good. Mar. 15. pl. 34 Pauch. 15 Car. Anom.

15. By the Custom of London, a Tenant at Will under 40s. Rent, shall not be turn'd out without a Quarter's Warning, and if the Rent be above 40s. he must have half a Year's Warning. 2 Sid. 20. Mich. 1657. B. R. Dethick v. Sanders.

16. On a Cettitorari, the Return was of a Custom for the Company of Merchant-Taylors to ebofe Livery-Men, and to commit the Refifirs, and that was elected, without reasonable Caufe, refufed, and therefore they Keeper of committed him; it was objected, that the Custom to commit, is not Newgate, he good, because it does not concern the Government of the City, but the State of a Company only, edly, it does not appear, that he was Habilia & Idio- nicus, and therefore not eligible; Sed non allocatur; For as to the fit, all parties, some
all the Customs are confirm'd by Statute; and as to the 2d, the Re- 
fulfual without reasonable Cause, implies Habils & Idoneus. 2 Lev. 202. 
Trin. 29 Car. 2. B. R. The King v. Merchant-Taylors.

Freemen of 
which Com-
panies are 
Libery-men, 
and that 
there is a Court of Aldermen, and that if any Person daily chaffers does not take upon him the Office of a Li-

terry-man, he may, by Customs, be committed by the Court of Aldermen to any Officer of the City; and that 
Clerke being before that Court, and relating, the Court committed him by Warrant, in Writing to the 
Keeper of the Newgate, until he should declare his Consent to take upon him that Office. Reloved, that 
B. R. takes Notice of a Liberry-man, and of the Nature of his Office, and that he who comes into a 
Company agrees to Incident Charges and Duties; and it was admitted, that a Corporation might have 
Power to commit by Custom, though not by a Charter or By-Law, and that the Sheriff is the pro-
per Officer to whom they should commit him. 1 Salk. 349. pl. 5. Hill. S. W. 1. d. R. King v. 
Clerke. 

16. Upon a Habeas Corpus and Certiorari the Return was a Custom 
&c. that of any Freeman of the City speaks contemptuous Words of an Al-
dermen, that in such Cafe, the Common Serjeant has usually exhibited 
a Motion against him before the Mayor and Court of Aldermen, and 
that if the Offender be convicted by Verdict or Confinement, they 
used to punish him by Fine or Disfranchisement; that Clerke spoke scat-
dalous Words of Alderman Lawrence, when he was surveying the 
Mesures of Coals, (viz.) that he would undo the City, and that he was a 
Knave; it was objected, that a Custom to try a Man for Words 
spoken of an Alderman &c. in the Court of Aldermen, is unreason-
able, because he is both Judge and Party, besides it does not appear, 
that Clerke is a Freeman; though in the Information, which is return-
ed in his Verbal he is said to be a Free-man; but that is not sufficient. 
For it ought to be returned in Fact, that he is a Free-man. The Court 
would not grant a Procedendo without further Argument, for they said 
it might be dangerous to put it in the Power of the Aldermen to dis-
franchize a Free-man for speaking Words of an Alderman. 2 Lev. 209, 

City of London v. Clerk, S. C. the Court held, a Custom to disfranchishe for Words is void, and a Proce-
dendo was denied. — — S. C. cited 2 Salk. 426. Trin. 1 Ann. B. R. per Cur. and they held accord-
ingly. — — S. C. cited 2 Id. Raym. Rep. 777. and agreed by Court and Counsel of both Sides, that a 
Custom to disfranchishe for such Words would be void. But Mr. Dee said, that notwithstanding the 
Report in Levinz, he had seen a Rule for a Procedendo in the said Cafe. 

17. By the Custom of London any Person above Fourteen and under 
Twenty-one unmarried may bind him self Apprentice &c. according to the 
Custom, and the Master thereupon shall have Tale Remedium against him, 
if he were Twenty one. In Covenant brought on an Indenture of such 
am Apprentice, the Court held the Custom sufficiently alleged to give 
a Motion and an Action of Covenant, that Tale Remedium im-
plies it, and well as other Things; and though by Common Law or 
the Statute his Covenant shall not bind him, yet by Custom it shall 
be void. Mod. 271. pl. 22. Trin. 29 Car. 2. B. R. Horn v. Chandler. 

2 Roll Rep. 
305. Pach. 
21 fasci B. R. 
such Custom 
was certified 
by the Re-
corder Ori-
tenus, and 
that the Ca-

nents in 
the Inden-
ture bind 
the Infant 
though the Indenture is not enrolled within the Year before the Chamberlain; But that 
is with this Difference, that the Apprentice may come in before the Mayor and Aldermen, and then show 

his Matter in Petition in French, that the Deed is not enrolled within the Year, and thenceupon 
a Scire Facias shall issue to the Master, to know why the Deed was not enrolled, and if upon his De-
fault the Deed was not enrolled, the Apprentice may sue out his Indenture, and shall be discharged; 
But if the not doing it was by the Default of the Apprentice, as if he will not come before the Cham-
berlain, but absents himself, he shall not be discharged; for the Deed cannot be enrolled unless the 
Infant is present in Court and acknowledges it. 

3 Keb. 564. 
18. Upon a Habeas Corpus to the Mayor &c. of London, a Cafu-
pl. 58. The 
tom was returned to disfranchishe, and commit a Free-man for speaking Op-
probrious Words of an Alderman. The Court said they might Fine in such 
Cafe, but the other Custom would not hold notwithstanding the Act of 
Con-
Confirmation of their Customs, which does not extend to unreasonable. Ibid. 799. pl. able Customs. Vent. 327. Hill. 29 & 30 Car. 2. B. R. Clark's 59. S. C. a Cafe.

Record, to which the Counsel for the Defendant agreed; But per Car. this is an unreasonable Cut- tom to disfranchise for speaking Words, being against Magna Charta; and by Wild. J. such an Act of Parliament would be unreasonable, and a Procedendo was denied by the Court. Ibid. 81t. pl. 27. S. C. and on a further Motion the Court held a Custom to disfranchise for Words to be void, and a Procedendo was denied

19. In Trespass for taking and breaking so many dozen of Spectacles &c. the Defendant pleads that the City of London is an Ancient City, that therein is and hath been an Ancient Custom, That if any make and expose to Sale ill and unserviceable Goods, the Chief Officers of the Company have used to seize them, and carry them to the Guildhall, and impanel a Jury, and if they find them ill and unserviceable, to break them, and shew that the Plaintiff is one of the Company of Spectacle-Makers, and that the Defendants are Master Traders, and chief Officers of the Company, and that the Goods made by the Plaintiff, and taken ut supra, were unserviceable; The Court took the Custom to be good and reasonable, and the Judgment was for the Defendant Nilii. Skin 55, 56. pl. 8. Trin. 34 Car. 2. B. R. Bolton v. Throgmorton.

20. By Custom in the City of London the Lord-Mayor is Chancellor, and may call Caufes before him out of the Sheriff's Court, and rule them according to Equity. Skin. 67. pl. 13. Mich. 34 Car. 2. B. R. in Cafe of Barns v. Barns.

21. Custom of the City of London shall be preferred to the Custom of 2 Vern. 47. the Province of York, and notwithstanding the Custom of the Province S. C. Re- ferred to a Matter to of York, the Heir by the Custom of London shall come in for a Share of the Personal Estate, for the Custom of the Province of York is only the local, and circumcised to a certain Place, but that of London follows Matter spe- cific Person though never so remote from the City. 2 Vern. R. 82. pl. 78. daily. Mich. 1688. Cholmly v. Cholmly.

22. Upon a Certiorari the Custom of London was returned, to punish by Mol. 28. by Information in the Court of Aldermen, either for an Assault or Contem- nuous Words spoken of an Alderman in the Execution of his Office, and to aft the fine him; and that at a Wardmore held by Sir Robert Jeffries, the Court a- wardsed a Proceden- do; for they may been by Words only, because no Indictment lay at Common-Law, but have a Cui- he is to be bound to Good Behaviour; yet for Assault he is punishable, tor and that may be by Information there by the Customs, as well as in B. R. by the Courie of the Court, though the Regular Courie by the Com- mon Law is Indictment. Secondly, The Court held, that the Inform- as assault mation lay in the Court of Aldermen, though an Alderman was griev- ed; otherwife of the Mayor for he is an Integral Part, without which the Court cannot be held, but the other may be severed and he must not sit. 2 Salk. 426. pl. 2. Trin. 1 Ann. B. R. the Queen v. Rogers. S. C. re- solved ac- cordingly, and a Procedendo was granted.
(P) Pleadings of the Custom of London.

1. NOTA, that it was agreed for Law, that in Debt in London, upon a Certifici Solvors, by the Cultom, the County shall be, quod pro Mercandies fictis prinis venditis Certifici Solvors 10 l. So that the Merchandize ought to be reheard, and yet the Merchandize is not traversable, as it feemes. Br. London pl. 15. cites 35 H. 6. 29.

2. Where the Cultom of London is in Issie at Westminister, or elsewhere, if the Party will have it to be try’d by Certificate of the City, he ought to furnish, that the City is an ancient City, and that there has been a Cultom Time out of Mind, that where their Cultom is in Trial in any Courts of the King, that it shall be certified by the Mayor and Aldermen, by the Mouth of their Recorder now held; For if he does not make such Surniffe, it shall be try’d by the Country, as other Matters in Fact are. Br. Trials; pl. 96. cites 5 E. 4. 39.

3. In a Writ of Entry for Difference brought in C. B. the Defendant pleaded, that the House in Demand is within the City of London; and that the said City is Antiqua Civitas; and that King Hen. 3. Certifici e writs Civitatis prædict. quod non implicaentur de Terris & Tenementis suis &c. extra marvis Civitatis prædict. and further said, That he himself is Cross London &c. and demanded Judgment of the Writ; (Note, in the Pleading before, the Tenant said) Et illis rectum teneatur intra Civitatem praedictam secundum Confcuittudinem Civitatis praedict. And to this Plea, Exception was taken, because that the Tenant doth not shew before whom, by their Customs, they ought to be pleaded. It was the Opinion of the whole Court, that the Tenant ought to have shewed, that the Citizens for their Lands ought to be pleaded in the Hullings &c. And the general Words in the Plea, viz. Sed illis Rectum teneatur intra Civitatem praedictam secundum Confcuittudinem Civitatis praedict. did not supply the Defect aforesaid. After, it was awarded by the Court, that the Tenant answer further &c. 3 Le. 148. pl. 197. Hill. 28 Eliz. C. B. Anon.

4. The Customs of London are only triable by the Mayor and Aldermen, by the Mouth of the Recorder, if it be not a Matter in which the Corporation of London is a Party. The Customs of other Corporations are triable by the Country, if they be denied. Jenk. 21, 22. in pl. 49.

5. The Judges of every Place are supped to have Knowledge of the Laws of the Place whereby they do judge, and to have Cultomaries among them; And therefore, in Suits of their own Courts, do determine them, as the Judges of the Common Law do in the King’s Courts judge the general Customs of the whole Kingdom being the Common Law; and so in London, by Special Privilege, they certify also its Customs of this Nature into B. R. which other Towns do not. And their Customs, even those that are their local Laws, are triable by Jury, if they come to Issue in the King’s Courts. And agreeing with this was found and shewed a Precedent, Mich. 37. 38 Eliz. Rot. 418. in C. B. London, William H. Lose, in an Action upon the Safe for certain Parcels of Plate, and the Issue was, whether the Cultom of London was, that there was a Common Market in London, for all Goods in all open Shops, all Days, except Sundays and Holy Days, from the Sun Rising to the Sun Set; and concluded, Et hoc parasit furti verificare, ubi & quando ac prout Curia consideraverit. And then the Defendants made their Surniffe for the Trial of their Custom by the Mouth of their Recorder, and prayed a
Damages.

Writ accordingly; and it was granted returnable in Trinity Term, and continued per Non misit Breve till Oetabis Mich. and then it is entered, that the Conclusion of the Defendant's Plea, ought to have been, Et de hoc ponit se super patriam; whereupon the Plea was so made, and issue taken, and upon Venire Facias to the Sheriff of London, found for the Plaintiff, and had Judgment; per Hobart Ch. J. Hob. 87, in Case of Day v. Savidge. 6. In laying the Custom of London as to taking Apprentices, he must declare, that he is Civil, as well as Liber Homo. 2 Bolf. 193. Hill. 11 Jac. Burton v. Palmer.

For more of Customs of London in General, See other Proper Titles.

Damages.

(A) Whoso shall recover Damages.

1. The Heir in a Plea of Land, shall not recover Damages for Damages in the Time of his Ancestors. 17 C. 3. 45 b. S. C. & S. P. per Stone.—Entry for Diffeiz made to the Father of the Demandant, and paid for the Plaintiff, and it was awarded, that he should not recover Damages for the Statute of Gloucester, which will, that the Demandant recover Damages, against any who is found Tenant after the Death of the Tenant in the Life of the Father of the Demandant, and well per to Cur, the Reason seems to be inasmuch as the Demandant is Heir immediate to the Grandfather now deceased. Br. Damages, pl. 20. cites 45 E. 2.

In a Hurd of Aeth, A. was accorded to the Sheriff to inquire of Damages, and he inquired of the Damages in the Life of the Father of the Demandant, and well per to Cur; the Reason seems to be inasmuch as the Demandant is Heir immediate to the Grandfather now deceased. Br. Damages, pl. 37. cites 2 H. 4. 15.

2. The Executor shall not recover Damages in Debt, for Damages in the Time of the Testator. 17 C. 3. 45 b. S. C. & S. P. but for Damages after the Testator's Death he shall.

3. The Successor shall recover Damages in Debt, upon an Obit. S. C. that the Successor shall recover Damages for the whole Time, [which seems to intend the Time of the Predecessor and Successor]

4. The Master of Saint-Croix, who is Prebendary as a Parson, shall not recover Damages in a Writ of Annuity for the Time of his Predecessor. 26 Art. 4.

This in Roll begins with Letter (O)

Fol. 509.

Cites S. C. and to the Damages were severer.

5. But
Damages.

5. But otherwise it would have been, if he had been elective, for there he should have recovered Damages for the Time of his Predecessor. 26 Al. 4.

6. In Debt upon an Obligation by the King, he recover'd, and the Servants of the King dared not take Judgment of Damages, but of the Principal only; and yet the Prothonotaries shew'd diverse Presidents that the King had recover'd Damages. Br. Damages; pl. 15. cites 34 H. 6. 3.

7. And it was agreed there, that the King shall not recover Damages in Square Impedite for Lapse nor Disturbance. Ibid.

8. Prefentee of the King to a Corodry, made his Plaint, that the Abbot would not admit him to the Corodry according to the Prayer of the King; and the Abbot return'd Cause; and by all the Juities the King shall not recover Damages in this Case, but the Prefentee; for the Damage is to him; for the King has only the Presentation. Br. Damages, pl. 93. cites 39 H. 6. 49.


1. WHE'RE a Man would recover Damages, he ought to take new Original; and 'tis not a Writ Judicial. Br. Damages, pl. 36. cites 50 E. 3. 23.


This in Rolls 248-250. 

(B) Who shall recover Damages in an Action, in respect of his Estate.

1. If Lessee for Years be ousted, and he in the Reversion disputed, and he in the Reversion recovers in an Affise, yet he shall not recover Damages. D. 19 Eliz. 354. * pl. 15. + 15 H. 7. 4. b. 5 H. 7. / 10 B. Co. 9. 105. b. 3 H. 6. 33. Contra, 12 H. 6. 4. 

2. So if after the Ouster, he in the Reversion enters upon the Distillation (as he may by the Law to take a Distillation) and after the Distillator re-enters upon him, and he recovers in an Affis; yet he shall not have any Damages, for the Re-entry of him in Reversion reduces the Estate to the Lessee, and then the Damages, instead of the Profits, belong to him, and then he shall not be twice charged, Quere, D. 19 Eliz. 355. 15 H. 7. 5.
(C) Damages against the Defendant. How to be given. In what Cases they shall be joint.

[In respect of several Matters contained in the Declaration against the same Defendant.]

1. In an Action of Waste, if Waste be assigned in Domibus, seilicer, Co. C. 414. in three Methues, still in Gardens seilicer, in cutting down five Apple-Trees, and ten Pear-Trees in one Garden, and ten Pear-Trees, and seven Apple-Trees in another Garden, Sparim crecent, having the View of every Particular, and upon the Default of the Defendant, a Writ of Enquiry of Waste is awarded, and the Jury finds the Waste in the three Methues, and in some of the Apples and Pear-Trees to his Damage 50l. This is a good Verdict, though the Damages are alleged entirely, though it was objected, that the Damage of the Apple and Pear-Trees might be so small, that the Place wasted should not be recovered; but they being alleged also to have been Sparim crecent throughout the Garden, shall be recovered. But if it was so small, yet, all being upon one Demise, if all the Waste be of a given considerable Value, though the Particulars are but small, yet the Place wasted shall be recovered. Mich. 11 Car. S. R. between Fitch and it shall not King, adjudged per Curiam, as to this Point, upon a Writ of Error, upon a Judgment in Banco. Idem, &c. 9 Car. 213. Peti Dama-
ges in any j

and the usual Course is, in all Cases, to find Intire Damages.

2. Trespafs of a Close broken, and Embellishments taken, it was found by matter in Law, that the Plaintiff ought to recover for the Close broken, but not for the Corn, to the Damage of 45s. and they were compelled to fever the Damages, and so they did, 20s. for the one, and 20s. for the other. For, for Part the Plaintiff ought to recover, and for the reit not. Br. Damages, pl. 160. cites 42 E. 3. 25.

3. Where Tenant for Life to the Aunt, and the Niece does waste in their Time, and had done waste before, in Time of the two Sisters, the Aunt and the Niece shall join in Waite, and the Damages shall be severd, quod nota. Br. Damages, pl. 31. cites 45 E. 3. 3.

4. Quare Imp. against Baron and Feoff in seure Usuari, the Plaintiff recovered, and levied the Damages upon the Bacon, and the Baron died, the Feoff brought Attaint, and assigned the false Oath in the Principal, and good by Judgment, and Attaint was brought against him who first recovered, and against another who pleaded Nonnulla, and it was found against him, and the false Oath found in the other Points also, and the Plaintiff was restored to her first Damages lost. And the Judgment was of this against him who first recovered only, and not against both the Defendants. But the Judgment of Damages in the Attaint was against both, so the Damages severd in Judgment. Br. Damages, pl. 162. cites 46 Ass. 8.

S 88

5 Præmunire
5. Praemunire against two, one was found Guilty as Principal, and the other as Accessory, and Damages severed, and the Plaintiff pray'd judgment against them in common, and had it, notwithstanding that Hales said, there may be Principal and Accessory in Praemunire, and this, because it was found, that the two were Coadjutors, Procurers, and Abettors to the Third, to sue the Ball. Br. Damages, pl. 46. cites 8 H. 4. 6.


7. In Appeal against several who are acquitted, every one of them shall recover Damages against the Plaintiff severally, and not jointly; contrary of the Plaintiffs. Br. Judgment, pl. 93. cites 11 H. 4. 16.

8. Where a Man has two Daughters and dies seized, and N. abates, and the one Daughter has Issue and dies, the Issue and the other shall have Mortdancerof, and the other shall recover Damages for her own Time, and the, and the Issue shall recover Damages in Common for the Time after the Death of the Mother. Br. Damages, pl. 51. cites 11 H. 4. 16.

9. So in Waifs, where the Daughter has Issue and dies, the other and the Niece shall join and recover Damages as above, quod Hanc concedit; For they cannot do otherwise than to join, and cannot otherwise recover their Damages; For an Entry upon the Abater determines the Damages, but in distraint of Land, and taking of Goods, Trespa^s lies of the Goods. Ibid.

10. If two do to me a Trespa^s, and I after have several Actions against them, and recover the entire Damages against each, and have Execution, the one cannot plead that the Plaintiff has recover'd against the other for the same Trespa^s, his Damages, and had Execution; for it is no Plea. Br. Judgment, pl. 98. cites 14 H. 4. 22.

11. Contr. where the Plaintiff joins them in Action, there he shall have only Damages against both, and if they join themselves in Action, he cannot recover them in Action after, As after Nonuit, Discontinuance &c. Per Hank, quod fuit concellium arguendo. Br. Judgment, pl. 98. cites 14 H. 4. 22.

12. Deutine of divers Goods, and counted the Value and Price of every Thing certain by itself, and the Inquest gave a Verdict quod detinet at Damnum 10 l. in Grofs; and by the Opinion of the Court they ought to recover the Damages of every Thing by itself; for the Plaintiff shall recover the Thing, and if the Thing be lost then the Value thereof, which cannot appear if the Damages are not fever'd, quod nota. Br. Deutinum de biens pl. 4. cites 3 H. 6. 43.

13. Forcible Entry was found for the Plaintiff to the Damage of 10 l. and Costs 5 l. Per Strange, if the Damages be not sever'd in every Action where a Man shall recover Damages, the Julicis ought not to give Judgment, and if they do, it is an Error, which was denied, per tot. Cur. Brook says it seems that his Intent is, that the Damages shall be sever'd from the Costs. Br. Damages pl. 88. cites 14 H. 6. 13.


15. Damages may well be sever'd, but Costs are intire, and cannot be sever'd; Per Prief. Br. Damages pl. 59. cites 36 H. 6. 13.

Damages.

17. Trespasses of Goods taken they were at Issue upon the Property, and found for the Plaintiff to the Damage and Costs of 6 l. and the Defendant prayed that the Damages should be sever'd from the Costs, and per Brian, Coke, and Littleton, it is at the Election of the Plaintiff if he will have them sever'd, or in Gross; by which they were not sever'd. Br. Damages. pl. 128. cites 18 E. 4. 23.

18. Trespasses against Four, the one pleaded that De non assautit Demetue &c. and the others pleaded Not Guilty; there per Cur. if the Plea of the first be found against him he shall render the entire Damages; for the Trespasses is confided by his Plea, unless he says that the Plaintiff made the Assault, but of the other, it shall be inquired, if they did the Trespass, and how they did it, and if it be found that the Three made the Assault, but did not main the Plaintiff, then the Judgment of the Damages shall be for the Assault against all in Common; and of the Main, against him who justified. Br. Damages. pl. 163. cites 6 H. 7. 19.

19. Refcous; the Plaintiff counted, that the Defendant held of him by Homage, Fealty, and 105. Rent due at Easter and Michaelmas, and for the Rent be disvain'd, and the Defendant made Reasons where it appeared in the Declaration, that the one Rent was past and the other not, and the Defendant pleaded Not Guilty, and the Jury found that there was no such Tenure, but that the Plaintiff leas'd to the Defendant at Will, rendering 105. at these Fefts, and that this was Arrear and the Plaintiff disvain'd, and the Defendant made Reasons, and per Brian the Plaintiff shall not recover; for the Damages ought to have been sever'd here, and they are allof'd in Common for the Day past and the Day to come. Br. Verdict pl. 36. cites 9. H. 7. 20.

20. Trespasses against Two of Trees cut, the one justified for himself of Common there, and the other for Common there for himself, and they are found Guilty and Damages taxed intirely, and by the best Opinion it is well, for it is only one and the same Trespasses, though the Answers are sever'd. Br. Damages, pl. 202. cites 11 H. 7. 19. 20.

21. Contra in Trespasses against Two, of Two Horses taken; for this is a sever'd Trespasses. Ibid.

22. If Trespasses be brought against Two, the Damages ought not to be sever'd, if they be not found Guilty at several Times. But if 20. sever'd Damages and entire Costs shall be given. Jenk. 269. pl. 86.

23. Trespasses against Three, they plead several Pleas, and several Issues are joind, and all tried by One Jury; and entire Damages and not sever'd given, judged good, and affirmed in Error, for they are all found Guilty, as the Plaintiff has declared, and that was jointly against them, and of a joint Trespasses. Jenk. 317. pl. 10.

24. Trespasses of Battery and Wounding against Two; one pleads to all, except the Wounding, that it was in his own Defence, and to the Wounding, Not Guilty. The other justifies all in his own Defence. Issue was upon both Pleas. The Jury found the First Guilty of the wounding, and also of the Battery, and aijled Damages 20l. and finds the Issue against the other, and Damages 100. and gave entire Costs against both, and Judgment was accordingly. Error was brought and aijled, that there ought to have been but one Judgment for Damages, and he ought to have made his Election against whom he would take his Judgment; And the Court was of the same Opinion; for this Action is for one joint Trespasses, and therefore one joint Damage ought to have been given against both, though they sev'ed in pleading, they being both found Guilty of the same Battery; And therefore the Judgment was reverfed. Cro. J. 118. pl. 7. Pach. 4. Jac. in B. R. Crane v. Humberitone.

25. Battery brought against Three, Two of them pleaded Not Guilty, and Judgment by Non jum informat against the Third, and the Two were found
Damages.

found Guilty for all; and the Jury gave Damages severally, against one 100 l. and against the other 100 s. It was resolved that the Damages that were given by the first Jury, to wit, 100 l. shall be recovered against all the Defendants in that Writ named; and that in Trepasses the first Jury assesses the Damages for the whole Trepasses, that shall bind all the Defendants, and therefore Execution was given against all the Defendants for the 100 l. Brownl. 233. Mich. 8 Jac. Heydon v. Styles.

This in Roll is Letter (R)

(D) How to be given. In what Cases they may be joint.

Roll Rep. 222. pl. 14. & C. adjudget, and so is the Course of the Court, to give joint Damages at the Election of the Jury, Quod fuit concessum per Cur. and the Clerks; And Doderidge said, that so it is where the Action is brought for two Trepasses, or the like, where both Causes of Action are of the same Nature. — 3 Bulst. 238. S. C. says, that Judgment was given for the Plaintiff upon a Demurrer, and upon a Writ of Inquiry the Jury gave Intire Damages; Dod. J. I. said, that the Things joined are of one and the same Nature, and therefore Damages ought to be given Jointly; But in a Declaration for several Things, there to let down several Sums; and the whole Court agreed thereto, and Judgment for the Plaintiff.

2. The Law is the same in a Treower and Conversion for several Matters, and llace taken severally, pet the Damages may be joint.

3. In an Action of Assault and Battery against four for two Trepasses, supposed to be done at two several Days, if one Defendant pleads Not Guilty to both Trepasses, and another Defendant pleads Not Guilty to the first Trepass, and justifies the second Trepass of the Plaintiff's own Assault, and the other two Defendants plead Not Guilty to the first Trepass, and Judgment is given against them by Non suin informatus for the second Trepass, and upon these several Pleas, several Issues being joined, all are found for the Plaintiff; Though there are two several Trepasses, and divers several Pleas, pet the Jury may assizes one intire Damage against all, and for both Trepasses; and it is at the Peril of the Plaintiff, if he have no Cause of Action for any Part of his Damages being intire, Mich. 9 Car. B. R. between Eajlct & alios against Edwards, adjudged in a Writ of Error, and the Judgment in Bacon affirmed accordingly, Inratur. Patch. 9 Car. Rot. ultimo.

4. In a Decies tantum against several, if they are attainted, the Damages shall be given against them severally, and not jointly, for there were several Takings. 44 E. 3. 36. b.

Br Decies tantum, pl. 8 [7] cites S. C. and it was against one for taking 10 s. and against another for taking 6 s. 8 d. and the third a Coat, Price 5 l. 4 d. ad Damnum 10 Marks, and they were therefore attainted, but because the Plaintiff had not severed the Damages, the Court were of Opinion to take the Largell De Nova, whereupon the Plaintiff released the Damages. — Br. Damages, pl. 30. cites S. C. —— Ibid. pl. 91. cites 53 H. 5 (2) 28. B. F.
5. In Debt upon one Obligation against two by several Precipes, Br. Damages, pl. 2. cites S. C. the Plaintiff shall have several.

6. In Trespass for a Battery, and carrying away his Goods, upon Not Guilty pleaded, if one be found guilty only of the Batter, and the other of carrying away the Goods, the Damages shall be given severally, and not in common. Contrad, 22 C. 3. 20. b. adjudged.

7. Affio against several; one alleging Jointenancy by Deed with a Stranger, who upon Process did not come, by which the Affio was awarded, where the other had pleaded Miynomon of the Plaintiff, and all found for the Plaintiff; and against him, who pleaded Jointenancy, Double Damages were awarded, and single Damages against the other; and the Double Damages shall be levied of him who pleaded Jointenancy only, and the other Damages shall be levied of him and the other in Common. Br. Damages pl. 104. cites 22. All. 1.

8. In Appeal against Two they shall recover Damages severally; Per. it should Hank; And per Weitberry if Three Joint-tenants are, and one releases to be 1st. a pl. one of the [other] Two, and they are divided, there the Damages recovered shall be severable for the Third Part. Br. Damages pl. 51. cites 11 H. 4. * 16.

9. Debt against Two upon an Obligation by several Precipes, who pleaded Non est Fel orium, and the Damages were sepa rated, and the Plaintiff had Judgment against every one of them of the several Damages; for the Judgment ought to accord with the Write, and so did it, but there shall be only one Execution, and shall not have Execution against both. Br. several Precipe pl. 8. cites 14 H. 4. 19. and 5 E. 4. 4.

10. Trespass of trampling his Grafs in the Park of C. and in Seven Acres adjoining, and found for the Plaintiff to the Damage of 40 d. and Cotts 20s. there it is good to sever the Damages, and so they did, viz. 20 d. for the one and 20 d. for the other, where the Defendant had justified for Default of Fence and Hedge of the Plaintiff Br. Damages, pl. 72. cites 21 H. 6. 33. and 22 H. 6. 7.

11. Trespass of a Villein taken into his Service from another &c. the Defendant said that the Villein was Frank, and of Frank Eflate, and the other e contra, and to the being in his Service said, that he was not retained, and to the Frank e contra, and found that he was Villein to the Plaintiff but was retained, and gave Damages to 30 l. and at the Prayer of the Plaintiff they severed them, and gave 28 l. for the Price of the Villein, and 40 l. for the Los of the Service, and after the Plaintiff released the Demands of the Service, and had Judgment for the Rentdue. Br. Damages pl. 76. cites 22 H. 6. 30.

12. Maintenance against Two; the on justified as Attorney for certain Counsel, and gave 40d. and the Plaintiff said, that he gave 6 s. of his proper Money to a juror in this Action, and the other pleaded Not Guilty, and all found for the Plaintiff to the Damage of 10 l. This is no good Verdict, for they ought to have severed the Damages; for it appears several Torts. Br. Damages pl. 91. cites 36 H. 5. [6.] 29.
13. So in Trespafs against Two the one is found guilty ofPART and acquitted of the rest, and the other found Guilty of the rest and acquitted of the First Part, the Damages shall be severed. Br. Damages pl. 91. cites 36 H. 5. [6.] 28.

Br. Verdift, pl 97. cites S. C.

14. Detinue of certain Rings of Gold with Precious Stones, viz a Ruby and a Diamond, and of twelve Pieces of Violet coloured Cloths, and 101. in Money, in a Bag sealed, and counted of several Damages for each Thing by itself, except the Money, and the Jury found Damages of 30 l. for all, except the Money, and if the Stuff cannot be rendered, then 20 l. for the Stuff, and 10 l. for the Money, and the said Opinion was that the Damages shall be severed for each Ring and Piece of Cloth by itself. But see in Mich. 1 R. 3. 10. 1. that it is admitted that [where] the Declaration was to a Sum in Gros. and the Plea Non Detenu, and the Jury gave Damages in Gros in like Manner, and therefore Judgment was given for the Plaintiff against the Opinion of several, Quare if it shall not be Error. Br. Damages pl. 141. cites 1 H. 5. 5.

Br. Verdift, pl 97. cites S. C.

15. And, by the said Opinion, In Quare Imp. and Writ of Durein Prentent, the Jury shall say, whether the Church be full for Six Months or not, by Reason of the Damages of Half a Year in the One Cafe, and of Damages to the Value of the Church for Two Years in the other Cafe.

Br. Verdift, by the Statute. Ibid.

16. And in Writ of Ravifhment o Ward, the Jury shall give Damages to 100 l. if the House be married, and if not 20 l. or such like. Ibid.

17. In Reconcus, the Plaintiff counted that the Defendant held of him by Fealty and 10 s. payable at Michaelmas and Easter, and for the Rent Arrear the Plaintiff distrained, and the Defendant made Reconcus ad Damnum &c. and the Defendant pleaded Not Guilty. It appeared by the Declaration, that the one Day of Payment was past and the other not, and the Damages are not severed, and to the Plaintiff cannot recover, by the said Opinion; But per Brian the Action lies for Part, and for Part not, Quare inde for nothing shall be recovered in this Action but Damages which are intire, as here. Br. Reconcus pl. 28. cites 9 H. 7 3.

Br. Damages, pl. 101.

cites 1 H. 7.

23. S. P. and to are all the Edi-
tions, but no such Point appearing there, they all seem misprinted, and that it should be to H. 7. 23. a. b. pl. 27.

19. In Debt on a Leafe for a Year, made in London, of Lands in Wandsworth in Surry, the Defendant pleaded four Pieces of Trouble in Surry; one Issue was found for the Plaintiff to the Damage of 12 d. and another for him, to the Value of 10 d. and a third for him to the Damage of 6 s. 8 d. and the fourth Issue against the Plaintiff, and would have alledged the Cods of every Issue found for the Plaintiff by itself, as they had found the Damages; but the Court ordered them to tax the Costs intire, and so they did, viz. to 18 d. &c. Keilw. 48. a pl. 1. Hill. 18 H. 7. Collet v. Hall.

20. Trespafs brought for breaking of his Cloths, and beating of his Servants, and in his Declaration he did not lay per quod foritum Fuum amufff: Damages intire were given, and for this Omission in the Declaration the Judgment was arrested. 2 Bollit. 102. cites to Rep. 139. a. Mich. 14 and 15 Eliz. B. R. Pooley v. Osborn.

21. In a Replevin the Parties were at Issue upon the Property, and it was found for the Plaintiff, and Damages intire were alledged; and not for the taking by it felt, and for the Value of the Cattle by themselves; for the Judgment upon that is absolute, and not conditional; and also, it the Plaintiff had the Cattle, the Defendant might have given the fame in Evidence to the Jury, and then they would have alledged Da-

mages
22. Error: the Plaintiff counts in Replevin Quod adhibi detinet; and Le. 42. pl. the Jury ass'ted the Value of the Benefic, and Damages intirely; whereas S. Wood they ought to fever them; for he may have the one, and not the other; and the Judgment for this Cause was reversed. Cro. E. 59. pl. 4. Trin. 29 Eliz. B. R. Ath v. Wood. S. C. Upon this Write of Error was brought, and the Plaintiff was of 1000 Cattle, but the Proof extended but to 869, and notwithsanding the Number set down in the Plaintiff be by Plea of the Defendant, quantum modo admitted, and the latter Number formed, and the contrary not proved shall go in Mitigation of the Damages, and the Jury shall conforn their Verdict in the Right of Damages according to the Proof of their Number, notwithstanding that Number set forth in the Plaintiff be not denied by the Defendant's Plea, and so it was put in Ure in this Cause. — Godb. 112 pl. 153. Wood v. Ath, S. C. but S. P. does not appear. —— Ow 159 S. C. but S. P. does not appear.

23. The Defendant promised to do several Things, and the Plaintiff Le. 170. pl. alleged two Breaches, one whereof was insufficient, and the Defendant pleaded Non Affirmata; Reolvd, that it shall be intended that they gave Damages for both; and 2dly, That inasmuch as the Plaintiff had Judgment in no Cause of Damage for the one, therefore Judgment given for the Plaintiff in B. R. was reversed in the Exchequer Chamber. 5 Rep. 108. a. b. cites it as adjudged Mich. 30 & 31 Eliz. Moor v. Bedel.

24. In Trespass for breaking his Close and spoiling his Graz's, the Jury gave Damages intire as well for breaking the Close as spoiling the Graz's whereas the Plaintiff had only the Lin-Graz's, in which Case Tresp's Queare Christen freris would not lie for him, and therefore could not recover the Damages. 3 Le. 213. pl. 252. Mich. 30 & 31 Eliz. B. R. Hitchcock v. Harvey.

25. Error was brought of a Judgment, and aigned, First, because the Action is an Action upon the Close for disturbing him to exercise the 65. Berkeley Office of the Keeper of a Walk in the Forest of E, and supposing that he was a. b. Penned in the Manor of S. to which Manor the Office of the Caedyd of the said Forest appertained; and that he be and all these, whose &c. Time whereof &c. by Reason of the said Office, had had &c. Omnia bona & Catala jurisfeed. in the said Forest, except bona & Catala forisfeed. aliqui. whereas there cannot be a Prescription to have Omnia Catala forisfeed &c. and then there be Damages demanded, and given for a Profit, which he could not have A Third Error aigned was, because the Disturbance is alleged 23 December Per quod a Predicta 23 Decem. 35 ulq; 10 Feb. next following, he lost the Profits of the Office; and he fews not any Cause whereby he lost the Profits from the 23d of Decem. And yet Damages are given for that Time allso, where Damages are not to be given. For it is not alleged, that he was kept out from the exercising of the Office, nor any Disturbance after the 23d of Decem. nor with a Continuando. Wherefore for these Errors and Imperfections in the Declaration, and divers others, without regarding any any Matter in Law, it was awarded, that the first Judgment should be reversed. Cro. E. 360. pl. 17. Patch. 39 Eliz. B. R. Pembroke (Earl of) v. Sir Henry Barkley.

26. Trespass of Battery. Two of the Defendants pleaded de som Affirmata. The Third pleaded Non-Guilty. Both Ilues were found for 11 Rep. 7. a. the Plaintiff, and several Damages found against them who pleaded fervally, and ruled to be ill; For it is one joint and entire Offence by the Plaintiff's Action; and when all are found equally guilty, the Damages...
Damages:

Damages ought to have been entire. But if in Trespass against divers, the one be found Guilty in Part, and the others in all, there the Damages shall be several. Cro. E. 860. pl. 32. Mich. 43 & 44. Eliz. C. B. Aulten v. Willward.

27. In Battery the Baron justifies, for that the Plaintiff assaulted his Feme, in Aid of whom &c. The Feme by herself pleads and justifies de fon Assault Demenis; The Plaintiff says, de Injuria sua Propris aliquo tali Casus, and both Issues found for the Plaintiff, and Damages entirely given, and now alleged in arrest of Judgment, that the Trial was ill; For the Feme by herself cannot plead, and the Damages being entirely affixed, all was ill; and of that Opinion was the Court; and awarded that they should replead. Cro. J. 239. pl. 3. Pach. 8. Jac. B. Watfon v. Thorpe.

28. Error of Judgment in Assualt, Battery, and Wounding. Error was, that the Defendant Quoad the Battery and Wounding was not Guilty; & Quoad the Assualt, justifies. The Issue was joined, De non torto Dehmi. Both Issues were found against the Defendant, and for the First Battery and Wounding 6. Damages, and for the Assault 1. Damages. Per Cur. The Jury ought not to have given Damages for the Assualt, for it was included in the First Issue, and that being tried, this Issue needed not, and they having found Damages severall, it is double Damages for one and the same Thing, which ought not to be, and therefore the Judgment was reversed. Cro. J. 251. pl. 5. Mich. 8. Jac. in B. R. Candish's Cafe.

29. In an Action of Trespass against Three Defendants, the first pleads generally Non Culp. to the whole; the Second pleads as to Part, Non Culp. and the Third, as to another Part, pleads Non Culp. Issues joined against them all. The Jury found the first Defendant guilty of the whole, and the other Defendants guilty of the several Parcels, and did affirms Intire Damages for the Plaintiff, and Judgment given accordingly in C. B. for the Plaintiff, and a Writ of Error brought to reverse the Judgment, and this only adjusted for Error, Quia Juratores fe male getierunt in vere dicto dando Curiae, this is a clear Error, and for this Error Judgment was reversed per Curiam, and a new Trial to be had. Bullit. 50. Mich. 8 Jac. Mills v.

[Note: The text continues with legal citations and analysis.]
Damages.

257

32. Where an Action of Battery is brought against several, and the 11 Rep. 5
Defendants are all charged with one Battery, though the Declaratory
Statement of the Plaintiff is several; yet they being with a joint
conviction &c. shew that they are jointly liable, the Cts. S. C.
Trespassers there, though Damages are severally given and very dif-
ferent, as 200 l. against one, and 25 l. against another &c. yet what
Corr. and found at the same time, and may be taken against the
other; And if the Damages are too great, any of the Defendants may
be discharged, though he be not the same Party against whom the
private Plaintiff is found, and so a Judgment in C. B. was affirmed in B. R. Charge, and

33. In Trespass for breaking his House and beating him, if it be Brown.
 against Joint Trespassers, there can be but one Satisfaction, and therefore
if they are sued in one Action, though they may swear in Pleas and Je-
sues, yet one Jury shall affix Damages for all; and as to the Damages
Plaintiff
he is not a Party to the suit, and shall have an Attaint, as well as his
he cannot have Fellows, and it they are sued in several Actions, though the Plaintiff,
makes choice of the best Damage, yet, when he hath taken one Sat-
faction, he can take no more, and if he requires Two, an Audita Que-

34. In Case for not grinding at Plaintiff’s Mill, a Fault was, that he
Mo. 857. pl. 1247. 3. C.
disposed, the Breach Anno 12. & diversif Vicius between that and Anno
2, which was long before the Plaintiff’s bad Interest and the Damages were
given entire upon Not Guilty to the whole, which Damages shall be un-
derstood to be given not according to the Law, but according to the
Allegation of the Plaintiff, who lays his Damages for all, and the
Verdict of Laymen, who find him Guilty de Praemillos to the Damage
of &c. and makes no Difference that the Special Breach is Right An-
Grinding from the
2 Jac. to
no. 12. and the rest comes by diversif Diebus, like a Trespass with a
Continuando, for which Damage is also given. Hob. 189. pl. 233. L.
Trin. 14 Jac. Harbin & Ux v. Green,

but in the 11 Jac. the Judgment was arrested. —— Brownl. 13. S. C. and upon Motion in Arreft
of Judgment it was adjudged maught.

35. In Assumpsit the Plaintiff counted of two several Assumpsits, where-
of one was an express Assumpsit for 137 l. and the other was an implied
Assumpsit for 48 l. the Defendant pleaded Non Assumpsit generally; This ex-
tends to both the Assumpsits, and entire Damages being given was held

35. Action upon the Case. The Plaintiff declared that he at L. such
a Day &c. lent to the Defendant a Gelding to ride from L. to the City of E.
and safely to redeem it back to the Plaintiff; and that the Defendant dis-
claimed the Plaintiff’s Gelding from L. to E. and from E. to L. and so abused
him thereby, that he became of little WorB, and notwithstanding at L.
he required him to redeem him such a Day, he refused to redeem him. In-
tire Damages being given for all these Torris, all the Court delivered their
Opinions feriatim, that the Trial was good and the Damages well
attained.
'alleged, First, because the principal Tort was, the not delivering up
on Requêt at Exon, according to the Contracț. And then when he
denied the Re-delivery, and after converted him to his own Use,
the Plaintiff may well have an Action for both, and together. And
although perhaps the Defendant might have demurred (as the Lord
Herbert conceived) for the Doublets of the Declaration; yet when he
demurred not to it, but pleaded Not Guilty of the Premisses, and it
found Guilty, that makes the Declaration good, and there is not any
C. B. Whyte v. Ryden.
37. Trever and Conversion of 200 Loads of Coals; upon Non Guilty,
the Defendants were found severally guilty for several Loads, and were
found severally Not Guilty for the Refuls, and intire Coals; Reolved,
by all the Justices and Barons on Error brought in the Exchequer
Chamber, that the Plaintiff should have several Damages; for being
found severally Guilty of several Parcels converted, he shall have
Warn and Dewes.
38. Trefpafs. Plaintiff declares, that the Defendant did break his
Cloths, and eat his Grafs &c. cam avtiris suis, viz. Oxen, Sheep, Hogs,
avlains Angilce Turckes; and the Judge in this Case did hold, that
Turckes are not comprised within the general Word Avertis, which is an
old Law Word, and these Pows came but lately into England, and
upon this it was directed to sever the Damages; for otherwise, if the
Damages shall be jointly given, and it be ill for this of the Turckes,
for the Reason abovefaid, it will overthrow all the Veridict. Chff. 1s,
51. pl. 55. August 13 Car. before Barkley, Judge of Allifie. Ulley's
Cafe.
39. W. brought an Action of Trefpafs, for assaulting, beating, and
wounding him, against four severall Persons; three of them plead Not
Guilty, and are found Guilty; and the fourth pleads Not Guilty to part,
and justifies for the rest; viz. the Wounding only; yet the Veridict was
found generally for the Plaintiff, and intire Damages affléd; and Judg-
ment given, and a Writ of Error was brought, and the Error aligned
was, that the Damages ought not to be intire against all, because that
the fourth Perfon was only found Guilty of part of the Trefpafs, viz.
the wounding, and therefore, as to him, the Damages ought to have
been severfed, in relation only to the wounding, and not as it is; for so
Damages should be given twice for the same Thing; first against the
three, and then against the fourth, which the Court granted, and re-
verfed the Judgment. St. 5. Hill. 21 Car. Whitwell v. Short.
40. B. brought an Action of Trefpafs against D. in C. B. for taking
away three Cows, and had Judgment against him upon a Nil dict. The
Defendant brought a Writ of Error in this Court to referre the Judg-
ment. The Error aligned was, that for two of the Cows there was no
Value declared, and yet intire Damages were given for them all, which
was not good. Roll Ch. J. said, this is a Judgment upon a Nil dict, and
so there is no Veridict to help it. St. 174, 175. Mich. 1049. B. R.
41. In an Action of Trefpafs for fishing, and cutting down two Acres
of Oziers, the Damages ought to be severall, as the Trefpafs is; Per Car.
Keb. 18. pl. 51. Balch. 13 Car. 2. B. R. in Evidence to a Jury in Cafe
of Rich v. Hall.
42. If any Part of the Declaration be uncertaint, and intire Damages
are given, the Plaintiff can have no Judgment; but in the Certaintie of
the Allegation, the Court requires no more than the Nature of the
Thing required. Gilb. Hist. of C. B. 98. cites 1 Saund 319. Palch. 23
Car. 2. Bennet v. Holcomb.
43. Treff
Damages.

43. Trespafs for entring his Clofe, and moving and carrying away his Corn and Græfs there &c. with a Continuando of the fame cutting and carrying away from the 16 August 21 of the King now to 30 Sept. 22 of the King. It was moved in Arrest of Judgment, that it was im-
possible that when he had cut the Corn there growing the 16th August 21. that he should continue cutting till 30 September 22. But per Vaughan Ch. I there is a Difference between Things legally impossible, as in the Case of Alliumpitis, there, though one be bad, yet it shall be pre-
sumed that the Jury gave Damages for it, because it is only legally im-
possible; and non contat to the Jurors, whether by Law it were good or not; but where a Thing is naturally impossible, as it is here, it cannot be presumed that the Jurors gave any Damages for that which they

44. In the Declaration there was an Indubitatus Attiumpitis, and entire Damages were given; and it was not said for what he was indebted; so that it might be for a Bond, or Rent &c. And it being bad for that Part, quod Confilium non negavit, it was bad for the whole; and so Judgment arrested. Freem. Rep. 162. pl. 177. Trin. 1674. Gadbury v. Day.

45. Trespafs against A. B. and C. for an Affault and Battery and Im-
priifonment, and taking two Silver Buttons &c. B. and C. plead Not Guilty to the Whole, upon which they were at Issue, and A. as to the Force and Arms, pleads Not Guilty; and as to the Right of the Trespafs, A. being non &c. for that the Plaintiff assaulted them, and so to Issue (but say nothing of the Imprifonment, and taking the Buttons.) The Plaintiff had a Verdict, and intire Damages; adjudged, that the Plaintiff, having charged them all jointly with the whole Matter, though one of them had committed the Battery, another had been guilty of the Imprifonment, and the third of taking of the Butrons, yet being all done at one time, they were all guilty of the Whole, and shall be charged all of them with the whole Damages. 3 Lev. 324. Hill. 3 W. and M. in C. B. Smithfon v. Garth.

46. An Action was for Words spoken at several times, viz. He got a Witness to forswear himself in such a Cause, you or he (inmundo the Plaintiff) hired one B. to forswear himself. And for these following Words spoken at another time; Two Dyers are gone off (inmundo become Bankrupt) and, for ought I know, H. will be so too within this Time Twelve-month; Verdict for the Plaintiff, and Joint-damages given. Judgment for the Plaintiff. 10 Mod. 196. Hill. 12 Ann. B. R. Harilton v. Thornborough.

(E) How to be given.
In what Cases jointly to the Plaintiffs.
To Baron and Feme.

1. If an Affife by Baron and Feme, if it be found they were dif-
feised, they shall recover Damages of the Illues in common.
11 H. 4. 16. b. 17. adjudged.

2. But This in Roll
is Letter (S)
See tit. Bar-
ron and
Feme (E. b)

11 D. 4. 16. b. 17. adjudged.

2. But

S. C. &
S. P. ac
ram Reg. Burchefter’s Cafe.
2. But if it be found that certain Goods of the Baron were taken upon the Land, the Baron only shall have Judgment for the Damages for them. 11 H. 4. 17. adjudged.

Br. Dama-

ges, pl. 51.

Fitzh. Judgment, pl. 70. cites S. C.——2 Inst. 236. Ed. Coke cites S. C. and 7 H. 6. 50. b. and says, that in Affile brought by the Baron and Feme, he and his Feme shall receive Seisin of the Land, and he alone, that in Original brought by him and her, shall have Damages, which is worthy of Observation. (But it seems, this is to be understood only of Damages, as to the Goods.)—- Ibid. cites Trin. 4 H. 4 Rot. 24. Burchetts's Cafe, where Damages for the Goods were to both, and for that Reason the Judgment was reversed, because the Wife had nothing in them.

3. In Trespasses by Baron and Feme, for imprisoning the Feme till a Fine paid; for all the Trespasses but the Fine they shall recover Damages in common. 11 H. 4. 16. b.

Br. Dama-
ges, pl. 51.
cites S. C.—Fitz: Judgment, pl 70. cites S. C.

4. But for the Fine the Baron shall recover Damages only. 11 H. 4. 16. b. because it was his Chattel.

Br. Dama-
ges, pl. 57.
cites S. C.—Fitzh. Judgment, pl. 70, cites S. C.

5. If Baron and Feme recover in Writ of Ward, and the Baron dies, the Execution of Damages shall survive to the Feme, and not to the Executors of the Baron. Br. Jointenants, pl. 61. cites 19 E. 3. and Fitzh. Scire Facias, 119.

6. In Square Impedit against Baron and Feme, the Plaintiff recover'd by sale Oaths; the Baron died; and the Feme brought Attaint for the Damages levied of the Goods of the Baron, and yet the Feme by the Attaint was refer'd to the Damages loot, and to the Advowson, and recovered other Damages by the Attaint, because if the first Damages had not been levied of the Goods of the Baron, they should be levied of the Goods of the Feme, who was Party to the Judgment, and therefore the Attaint suauio'd as well for Damages as for the Principal. Br. Jointen-

nants, pl. 46. cites 46 Aff. 8.

7. In Trespasses of the Battery of the Baron and Feme, the Jury shall sever the Damages; but for the one Part the Writ was abated; For the Baron and Feme shall not Join in Battery of the Baron. Br. Damages, pl. 85. cites 9 E. 4. 51.

8. In Debt on a Bond made to K. a Feme dama sola, who afterwards married, and the Action was brought by K. and her Husband, and the Jury aslielled the Damages to the Baron and Feme Ratione Detentionis Debiti, and held good; for the Damages shall be to both. Cro. E. 259. pl. 42. Mich. 33 and 34 Eliz. B. R. Gurney v. Cleere.

(F) To Joint-Tenants. [Given jointly in what Cases.]

If Two Joint-Tenants bring an Affile, and the one is severed, if it be found that the other had Goods taken upon the Land, he shall recover for Damages for them. 11 H. 4. 17.

Br. Damages, pl. 51, cites S. C. that if three Jointenants are, and one of them releases to one of the others, and they are distilled, the Damages shall be sever'd for the third Part; Per Welbury = 2 Inst. 236. S. P. ——.
2. If two bring Action of Mortdalester, and recover, and one dies before Execution, the Damages shall not survive; contrary after Execution of the Land: But in Debt and Trepass, the Damages shall survive, and here-with agrees Fitzh. Execution 255. The Reason seems to be, because before Execution of the Land, the Damages shall be of the Nature of the Land; contrary after Execution. Br. Jointenants, pl. 56. cites 14 E. 3, and Fitzh. Execution 75.

3. In Action by several, if one is nonsuitet, this is not [* the Non suit of the others] but only for the Quantity of Damages [for himself] and he shall be summoned and sever'd, and the others shall proceed and recover their Parts of the Land and of the Damages, and so Damages sever'd, Quod Nota. Br. Damages pl. 100. cites 16 All. 14.

(F. 2) Recover'd. By Parceners; and How. Jointly, or not.

1. Tenants for Life, the Reversion to two Coparceners, did waft, the one Parcener had Issue and died, the Tenant did Waft again, the other and the Niece joined in Waft, and this Matter was found, and they recovered the Place wafted and treble Damages, viz. each recovered for the last Waft, and the other Damages only for the first Waft, and so see that Damages survived. Br. Jointenants pl. 48. cites 45 E. 3. 3.

2. If Abatement, or Waft, be done against two Coparceners, and the Br. Judge one has Issue, and dies; and the Issue and the other join and recover the Land; yet the Damages shall be sever'd. Br. Joiner in Action, pl. 98. cites 11 H. 4. 16.

3. If three Coparceners recover Land and Damages in an Action of Mortdalester, albeit the Judgment be joint, that they shall recover the Land and Damages, yet the Damages being necessary, though they be personal, do in Judgment of Law, depend upon the Frehold, being the Principal which is several. And though the Words of the Judgment be joint, yet shall it be taken for Distributive. And therefore if two of them die, the whole Damages do not survive, but the third shall have Execution according to her Portion; and this is another Exception out of our Author's Rule. But if all three had sued Execution by Force of an Eject, and two of them had died, the third should have had the whole by Survivor, till the whole Damages be paid. Co. Litt. 198. a.

4. If the Aunt and Niece join in an Action of Waft, for Waft done in the Life of the other Sister, the Aunt shall recover the Damages only, because the same belongs not by Law to the Niece. And some hold the Damages in that Case to be the Principal. Co. Litt. 198. a.

As to giving Damages Jointly, See Judgment (E).
Against Whom they shall be given.

1. If the Lord join himself to his Bailiff in an Avowry, the Plaintiff shall not recover DAMAGES against the Lord, but only against the Bailiff; for the Bailiff only continued Party to the Issue. 8 H. 6. 5. Curin. Brook Damages 68.

2. In Detinue for a Writing against Executors, supposing it come into their Hands after the Death of the Testator, if the Executors have been at all Times ready to render it after it came into their Hands &c. 22 E. 3. 9. b.

3. Stat. Gluc. 6. E. 1. cap. 1. Whereas beforefore Damages were not awarded in Affises of Novel Diffefs, but only against the Diffessors, Damages were not given in Affise, against any but against the Diffessor, Per Littleton, Pool, and Stilman quod versum etc. Br. Damages, pl. 155. cites 3 H. 6. 35. — Before this Statute the Diffessor had no Damages against any but the Diffessor himself, by reason whereof the Statute gave Damages against the Moze Occupiers for the Non-sufficiency of the Diffessor, and this Remedy is given to the Diffessor by Affise only, and not in Trespass; For it is against the same Person that did the Diffessor, and he shall answer for all the Damages; For if one diffesses me, and infesso B. who cuts Wood on the Land, and C. diffesses B. and doe Trespass on the Land, or J. S. cuts the Trees, the Possession of the Fee of B being in B my Diffessor, yet, when I re-enter, B. is chargeable to me in Trespass, for the whole Trespass done by any Person in the mean Time, and he has Remedy over against any Person that was Trespassor to him; — See (O) pl. 5. infra S. C.

* The Letter 4. (2) * It is provided, that if the Diffessors do alien the Lands, Law extends only to them that came in by Title, As by Feoffment or Fine after the Diffessor; but by Equity it extends to them that came in by Wrong, and to them also, whose Estate was before the Diffessor; For Example, if the Diffessor were diffessed, the second Diffessor was within this Statute; for he that comes in by Title, shall be within the Remedy of this Law, a Forfei, he that comes in by Wrong, and so it is of all others, that come in under the Diffessor, though it be not by Alienation. 2 Inf. 284.

No Leafe for Years, or Tenant by Statute, Staple, or Merchant, or the like, that have but a Chattel, shall be accounted a mean Occupier within this Statute, but he that has the Inheritance, or Forehold at the least; otherwise he is not said to be a Tenant of the Land; and so much is implied in this Word (alien) which cannot be intended of a Leafe for Years &c. where he that brings the Affise, has right to the Inheritance or Forehold; but where Tenant by Statute Merchant, or Staple &c. bring an Affise, there Lease for Years, or Tenant by Statute, Merchant, or Staple &c. may be a mean Occupier, because the Plaintiff in the Affise has right but to a Chattel. 2 Inf. 284.

‡ Hereupon do follow such Tenements shall come, shall be charged with the Damages; three Conclu- sions in Law; That if the Diffessor be sufficient to yield the whole Damages, he is solely to be charged therewith; for then this Statute extends not to the Tenant; And as it appears by the Preamble, he was not inconsiderable by the Common Law. The second Conclusion is, that the Diffessor be able to yield Part, and not the whole Damages, he shall be charged, and therefore Judgment is even given as well against the Diffessor (though he be found insufficient) as against the Tenant. 2 Inf. 284.

|| The Ground hereof is, Quod Bone Fidei Poffessor in id tamnum, quod ad fe pervenerit, tenetur. Hereupon seven Conclusions are Grounded; 1st. Albeit the mean Occupiers are neither Diffessors nor Tenants, yet if they are not named in the Affise, no Judgment can be given against them, neither can they be charged for the Time they take the Profit. 2 Inf. 285.

2dly,
263

Damages.

duly, though they be named, yet as hath been said, the Diffieror must be found by the Affiffe to be insufficient, and the mean Occupiers must be found to take the Preffes; for if they be omitted, and none but the Diflltor and Tenant named, and the Diflltor is found insufficient, and no further inquired of, the Traftor shall be charg'd for the Whole. 2 Inft. 285.

duly, if the Affiffe be brought againft the Diflltor and the Tenant, and it is found by the Affiffe, that the Diflltor is sufficient, and that the Diflltor infirfed A. who infirfed B. who infirfed the Tenant, and that A. had it one Year, and B. half a Year, and the Tenant two Years; Upon this special Finding, the Tenant shall answer Damages but for his Time, for 'Every one shall answer for his Time.' And the Plaintiff has lost his Damages against A. and B. for that they were not named in the Writ. 2 Inft. 285.

4thly, if the Diflltor A. and B. and the Tenant in the Cafe before, be all named, and the Diflltor A. and B. are all found insufficient, the Tenant shall answer for the Whole; for although the Letter of this Law is, where the Diflltors have nothing &c. yet these Words, 'Every one shall answer &c.' do imply, (If they have sufficient,) for otherwise they cannot answer, that is, they cannot satisfy; for in that Sense (Answer) is here taken. 2 Inft. 285.

5thly, it shall never be inquired of the Tenants Insufficiency, for against the Diflltor and him, null the Affiffe of Nofetify be brought. 2 Inft. 285.

6thly, Upon their Words, 'Every one shall answer for his Time,' several Judgments shall not be given, but one Judgment is to be given entirely against all, and so was it ever used since this Statute; but the Sheriff upon the Execution may use such Insufficiency as Justice requires. 2 Inft. 285.

And it is said, if the Affiffe be brought against the Diflltor and the Tenant, and Judgment given for the Plaintiff, and a Writ sues to the Sheriff, and he returns, that the Diflltor is insufficient, the Plaintiff shall have Process to levy it of the Tenant. 2 Inft. 285.

7thly, This gives no Damages, where none was recoverable in the Affiffe at Common Law, but gives Damages against the Tenant for the Insufficiency of the Diflltor, as hath been said. 2 Inft. 285.

As if he in the Recension upon a Term for Years, or Tenant by Statute Staple be disfii, he shall have an Affiffe to recover the State of the Land, but shall recover no Damages for the Profits of the Lands, because they belonged not to him. 2 Inft. 285.

In Affiffe the Cena, that the Tenant was arrear of his Rent for seven Years, and the Ed. disfrain'd, and a Stranger made Rejions; The Ld. brought Affiffe against both, and all this was found, and the Arrears 17 Mark, and that the Diflltor is not sufficient, and yet it was agreed, that he shall recover Generally against the one and the other, without shewing what; And yet per Finch, the Arreages shall be against the Tenenatt, as in Cafe of Recovery of Land, but as to the Damages it shall be against the Diflltor; and per Conthis, the Statute, that every one shall answer for his own Time, is understood, where the Diflltor aliens after the Diflltor, and yet Judgment as above. Br. Affiffe, pl. 16 cites 40 E. 5. 24.—2 Inft. 284. S. P. cites 20 Aff. pl. 3. and 10 E. 5. 24. [but it seems mifprinted, and that it should be according to Br. vix. 40 E. 5. 24. &q; 40 Aff. pl. 31.]

But in a like Cafe the Plaintiff suemied, that the Diflltor is not sufficient, and pray'd it might be inquired by Affiffe, and so it was, and he was found not sufficient; and that the other was not Tenant but for half a Year, and yet Judgment ut supra, and that the Diflltor shall be taken, and that the Plaintiff recover the Arreages of a Term, pending the Writ. Br. Affiffe, pl. 16. cites 40 Aff. p. 3. Quod Nota.—Fitch. Affiffe, pl. 339. cites S. C.

If the Committed confined the Diflltor with Force, and infirfed A. who infirfed B. who infirfed C. an Affiffe is brought against them all, and treble Damages for the Insufficiency of the Diflltor shall be levied upon all, according to this Act. "Every one shall answer for his Time," that is, what Damages should be recovered against the Diflltor, if he were sufficient, shall be recovered for his Insufficiency against the mean Occupiers and the Tenant only. 2 Inft. 285.

5. (3) It is provided also, that the Diflltor shall recoverDamages in a The Diflltor Entry upon Novus Difllsion against him that is found Tenant after Diflltor shall recover Damages by this Act in a Writ of Entry su Diflltor in the Poft; As if the Tenant comes to the Land by Diflltor, Infrusion, or Abatement, or when by Ailientation, it is out of the Degrees; for the Words be, "Against him who is found Tenant after the Diflltor," within which Words, he that comes in the Post is included. Note, the Writ of Entry in the Post is given by the Statute of Marlebridge, cap. ultimo; for the Diflltor was driven to his Writ of Right at the Common Law. 2 Inft. 286.

If the Diflltor makes a Peonfion in Fee, and the Diflltor dies, the Heir of the Diflltor shall not recover Damages by this Act against the Aliens; For this Branch of the Act provides for the Diflltor, and not for the Heirs. 2 Inft. 286.

If the Diflltor makes a Leafe of Freehold, by the which he infirfed A. and B. and makes livery of Seignior to A., in the Name of both, B. never agreeing to the Peonfion, nor taking any Profit of the Land, A. dies, in this Case by the Law, the Freehold and Inheritance is vested in B, by Survivor; and in a Writ of Entry in the Per, brought by the Diflltor against B. he may, as is afoeid, plead the Special Matter, and that he never agreed nor took any Profits, and discharge himfelf of the Damages for the Caufe afoeid. 2 Inft. 286.

The Statute says, "Every one shall answer for his Time, and yet if a Writ of Entry be brought against two Defendants, and the one disclaims and the other takes the whole Tenancy upon him, and pleads in Bar, as it is found against him, the Demandant shall recover Damages for the whole against him, because he took upon him the whole Tenancy." 2 Inft. 287.
A Diffeilus inquisitor. A caco inquisitor. The Diffeilus brings a Writ of Entry in the Per & Cai against B, who vouches A. who pleads and looses; Judgment for the Damages shall be given against the Vouches, for he is found Tenant in Law. 2 Inf. 287.

In this second Branch the Tenant only is charged with the whole Damages. Neithere there were divers mean Tenants, for the Words, "Every one shall answer for his Time," is only in the Case of an Affidavit upon the 1st Branch; neither ought the Writ of Entry to be brought against any, but against him that is the Tenant of the Land; but in some Case, another than the Diffeilus shall recover Damages by this Branch; as the Successor of an Alien, but otherwise of Bishops, or other feeble secular Bodies politic.

If the Tenant comes to the Land by Affidavit, which he cannot withstand, and where there is no Act or Default in him, in that Case he shall not be charged; As if the Diffeilus alius to A. and his Heirs, and A. dies without Heir, the Law (that there may be a Tenant to a Stranger's Precipe) does call the Land upon the Lord; in this Case, if the Lord do not take any Profit of the Lands in a Writ of Entry in the Post brought against him for the Land, the Lord may plead the Special Matter, and how that he never took any Profit of the Lands, and so discharge himself of the Damages; or albeit he be a Tenant of the Land, yet he is no Tenant against his Will within the meaning of this Law, because there is no Wrong nor Default in him. 2 Inf. 286.

But if the Lord by Escheat does enter, and take the Profit of the Land, then shall he be charged as a Tenant within this Act, for albeit he could not withstand the Escheat, which made him Tenant in Law, yet might he have refrained to take the Profit, which in right belonging to the Diffeilus, but his Rent or valuable Services shall be recovered [recomptu] in Damages. 2 Inf. 286.

And if it is in all respects where the Attention of the Diffeilus does signify, and the Land defends to his Heir, he may refrain from the taking of the Profits and plead the like Plea, and discharge himself of the Damages. 2 Inf. 286.

6. (4) It is provided also, that where before this Time Damages were not awarded in a Plea of Mortmain, &c. (but in Case where the Land was recover'd against the Chief Lord) that from henceforth Damages shall be awarded in all Cases where a Man recovers by Affidavit of Mortmain as, before is said in Affidavit of Novel Diffeilus.

In contradiction of general References in Acts of Parliament, such Reference must be made only as may stand with Reason and Right. 2 Inf. 287. — In a Mortmainor, if the Tenant omits, and the Vouches pleads and looses, in this Case the Plaintiff shall recover against the Tenant the Land, and the Tenant in Value against the Vouches, and the Plaintiff shall recover his Damages against the Vouches, and by this Act Damages shall be recovered in a Nuper dicit. 2 Inf. 287, 288.

7. (5) And likewise Damages shall be recovered in Writs of Cofinage, Aiel, and Befaiel.

8. In Affidavit, it was inquired if the Diffeilus was sufficient to render Damages, and of the Tortenants for the Time, and found the Diffeilus insufficient, and that an Infant was a Tortenant, but was in Ward, and therefore he was not charged, but the Diffeilus only. Br. Damages pl. 105. cites 22 Aff. 28.

9. It was found that the Diffeilus was not sufficient to render Damages in Affidavit of Rent, and the Tenant had not been Tenant but Half a Year, where the Arrearages were Arrear by Seventeen Years, and yet Judgment of Arrears and Damages were given against the one and the other, and this in Affidavit of Rent. Br. Damages pl. 17. cites 40 E. 3. 24. and the like Case, 40 Aff. 3.

10. In false Imprisonment against two, the one came and pleaded, and it is found to the Damage &c. and after the other came and would have pleaded, and could not by Reason of such like Issue founded against him at the Suit of the same Plaintiff in Trepass, by which the Plaintiff had Judgment to recover Damages against the one and the other, and yet the lait who pleaded was not Party to the first Issue, but he was Party to the Original, and therefore charged of Damages by Award; For he may have attain thereof, Quod Nota. Br. Damages pl. 29. cites 44 E. 3. 7.

11. Scire Facias against the Heir of Acquittal acknowledged by his Father, he was returned warned, and did not come, by which Diffirings dissuaded, and no Judgment to recover the Acquittal and Damages, as it should have been against his Father, if he had appeared and pleaded, and
and it had been found against him. Br. Damages pl. 175. cites 46 E. 3. 31.

12. In Writ it was agreed, that if a Man leaves for Term of Life the Remainder over in Tail, the Remainder in Fee to the Tenant for Term of Life; the Tenant for Life did Waft, and he in Remainder in Tail brought Action of Waft, and recovered, and died without Issue before Execution: his Executors shall have Execution of the Damages, and yet now the Fee is vested in the first Tenant; for the Damages were vested by the Judgment. Br. Damages pl. 177. cites 50 E. 3. 3.

13. Where the Tenant vouches in Precipu quid reddat, where Damages are to be recovered, and the Vouchee enters into the Warranty and loses, the the Damages shall be recovered against the Vouchee, therefore he shall have Writ of Error. Br. Damages pl. 45. cites 8 H. 4. 5.

14. Where two bring several Writs of Debinne against one and the same Person, so that that the Plaintiffs interplead, there the Plaintiff, if he recovers, shall have his Damages against the other who enterpleaded with him, and not against the Defendant; Therefore beware of Covin to make one enterplead, for it is nothing worth. Br. Damages, pl. 9. cites 9 H. 18.

15. It was said that the Heir in Writ of Error, upon erroneous Judgment [of Laws] entailed by his Ancestor, shall not render Damages unless he has Assists per Defeci &c. Br. Damages pl. 10. cites 9 H. 6. 49.

16. Upon Re-entit upon which Damages shall be recovered, the Damages shall be taxed against the Tenant by Re-entit. Br. Re-entit. pl. 65. cites 22 H. 6. 52.

17. Trespa against two, the one appears and is convicted, and the other makes Default, he shall be charged of the Damages found against his Companion. Br. Damages, pl. 131. cites 26 H. 6. and Fitzh. Enquit 16.

18. If Defenfor makes Feoffment, and the Defenfor re-enters, he shall recover his Damages by several Writs of Trespass as well against the Feoffee, as against the Defenfor. Br. Damages, pl. 13. cites 33. H. 6. 46.

19. And in Affise of Rent the Plaintiff shall recover all his Damages against the Tenant for Twenty Years, though he has not been Tenant but for one Month. Ibid.

(H) Damages Double [or Treble. In what Cases. And] by Whom the Damage shall be taxed, by the Jury or Court.

1. In a Redifsein double Damages are given by the Statute of Weltminister 2. cap. 26. the Jury shall give single Damages, and the Court shall encrease them to double. Co. Slangh Charta 116. the Words of the Statute are, Adjudicentur de extra damnum in duplo.

2. In Affise the Defendant sued Certificate upon Deed of the Ancestor of the Plaintiff, and the Plaintiff deny'd the Deed which was found for the Tenant by Niti Prius, by which Damages were awarded to the Tenant to double upon the Statute, and that the Plaintiff Captur. Br. Certificative de Ewique; pl. 33. cites 23 E. 3.

Y y y
Damages.

3. If a Man cuts Trees, and after suffers the Groomers to be defroy'd, this is double Wilt, and shall render double Damages. 2 Roll. Wait (E) pl. 27, cites 9 H. 6. 67. 22 H. 6.

4. If 

5. B. Bailiff of the Sheriff of W. was indifluted before Justice of the Peace in their Sessions, upon two several Indictions; it, That be, as Bailiff, had received 20s. from J. S. Extorropic colori Officci; and in the other, that he took 6s. 8d. and Judgment against him, and treble Damages given upon each. Resolved, that the affussing of treble Damages to the Party was Erroneous; for although, by Colour of the Stat. of 23 H. 6. where treble Damages are given to the Party, they might affess them, yet in this Case it is Erroneous; for they ought first to have enquired of the Damages; for perhaps they may be more or lesss, according to the Circumstances; and they cannot affess them themselves, without Inquiry by the Jury; whereore the Judgment was revered.

6. Cro. C. 438. pl. 9. 448. pl. 20. Mich. 11 Car. in B. R. Brunilden's Cafe, alias, Bumpstead's Cafe. it is to be considered, whether Damages are to be recovered upon an Indictment but that the Party shall have Action to recover them; besides that it is not clear whether this is an Offence by the said Statute whereupon treble Damages are at all to be recovered.

(H. 2) Recover'd. From what Time.

1. In Affife, it was found that the Plaintiff within Age was sais'd and diffeied, and came to the Land, and put in his Foot, but did not take the Profits, and the other appled him, and yet he shall recover Damages from the first Diffeiun, and therefore it seems that he was not remitted by his Entry, or then he ought to recover his first Damages in Trefpafs. Br. Damages, pl. 159. cites 26 Aff. 42.

2. If a Man has two Sons, and dies sais'd, and a Stranger abates, the Elder Son dies, the Youngest shall not recover Damages in Mortdanceftor, but from the Time of his Brother's Death. Br. Damages, pl. 160. cites 34 Aff. 10.

3. And if the Father has two Daughters, and dies sais'd, the one dies without Issue, the other shall not recover Damage for the one Money, but from the Time of her Sifer's Death; and, it seems, the Reason is, because all the Matter appears in the Verdict, or in Pleading; for otherwise it may be, that there were no more Sons than the Younger, who brought the Mortdanceftor, and in the other Cafe, that the Father had but one Daughter in all; But in Writ of Aiel, e contra; For there the Son can't make himself Heir to the Grandfather, without making Mention of the Father, quam vide diverfitatem libro Dr. & Stud. lib. 2. tol. 81. Br. Damages, pl. 160. cites 34 Aff. 10.

4. A Man was restored as Heir, by Suit, by Petition to Land, of which the King was intituled, and the King brought Writ of Error, and the first Judgment of the Issue between the King and him, upon the Petition, was reversed, and other Issue tried for the King ad Damnum for Wofe in the Time of the Defendant's Father, and in his own Time to 40l. and the King recovered the Damages against the Defendant, as well for Wofe in his Father's Time, as in his own Time, and yet the Heir had nothing by Defendant from his Father, and the Reason was because Seis Facias Issued against...
Damages.

against him generally as Heir, and he was return'd wary'd, and made Def-


5. If a Man be diffeifed, and the Diffeifee dies, his Heir shall recover Damages against the Diffeifeor, but in his Writ of Entry against the Diffeifeor, he shall recover Damages but from the Death of his Ancestor. 2 Inf. 286.

6. It is a Rule upon the Statute of Gloucester, that in none of these Writs the Demandant shall recover Damages but from the Death of his next immediate Ancestor whose Heir he is ; as if there be Grandfather, Fa-
ther and Son, the Grandfather dies failed, an Eltanger abates, the Father dies, the Son, in a Writ of Aiel, must make his Refort as Son and Heir of the Father, Son and Heir of the Grandfather, therefore he shall in that Case recover Damages but from the Death of his Father, because he is his next immediate Ancestor, and from him the Right descended; and so in the Writ of Befaiel and Cofinage; but in the Case before, if the Grandfather had survived the Father, the Son shall re-
cover Damages from the Death of his Grandfather, because he is his immediate Ancestor, and the Right immediately descended to him; Et sic de cæteris. 2 Inf. 288.

7. If a Man has two Daughters, and dies selfed of Lands, an Els-

crange abates, one of the Daughters, has Issue, and dies; the Aunt and the 

Niece shall join in an Affife of Mordaunc, and the Aunt only shall re-
cover Damages till the Death of the Sifer, and both of them from her 

Death, which stands upon the Reason aforesaid. 2 Inf. 288.

8. If there be Grandfather, Father, and Daughter, the Grandfather 

dies selfed, an Elsrange abates, the Father dies, his Wife being Pri-
enseit with a Son, the Son is born, he shall recover Damages in a Writ of 

Aiel from the Death of the Father, for now he is immediate Heir to the 

Father. 2 Inf. 288.

9. A Man sies in the Spiritual Court for a Matter which, upon 

the Face of the Label, appears to be of Temporal Conunance, and obtains 

a Sentence. The Defendant appeals first, and then sies out a Prohibition. 

In the Declaration upon that Prohibition and Proceeds thereupon there 

is Judgment against the Defendant by Nil dicit; and Writ of Inquiry 

to Damages awarded. Parker Ch. J. of Opinion, that Damages were 

do be given only for the Proceedings in the Spiritual Court, since the Pro-


(H. 3) Damages recovered, or taxed. To what Time.

1. In Affife the Plaintiff recovered Damages for a Year, which was But Trin.

incurred after Verdict, Quod Nota. Br. Damages, pl. 97. cites 13 

Aff. 2.

was of Damages after Verdict. Ibid. — S. C. cited to Rep. 117. 2.

2. In Affife the Plaintiff recovered the Land and the Damages taxed S. P. Br.


cites 18 Aff. 3.

incurred pending the Writ. — In Affise a Man shall recover Damages to the Value of the Issues of 

she Lands, pending the Writ till Judgment. Br. Damages, pl 45, cites 7 H. 4. 16.

3. An-
3. Damages. 

2. 268

3. Damages. the Plaintiff shall recover the Damages in Warf, as well for the Warf done pending the Writ as before. Br. Damages pl. 43. cites 7 H. 4. 16.


5. In Action of Warf, the Plaintiff shall recover Damages pending the Writ, and the Arrears pending the Writ of Annsity. Br. Damages pl. 188. cites 7 H. 4. 16.

6. In Writ of Entry for Difficulties, or in Nature of Annsity, Writ is awarded to inquire of the Damages, the Demandant shall recover Damages till the Award of the Writ of Inquiry of Damages, and not further, nor for Time after, notwithstanding that the Writ of Inquiry of Damages is pending Seven Years. Br. Damages pl. 14. cites 33 H. 6. 47.

7. Verdift, he shall recover Damages but from the Time of the Difficult to the Time of the Verdift.

8. And in Precipe quod reddat, the Demandant shall recover Damages till the Time of the Judgment given. Ibid.

9. But if the Court will be advis'd of their Judgment, the Demandant shall not recover any Damages for this Time, nor but till the Verdift given. For he shall not recover till the Time of the Judgment, but where the Judgment is given immediately upon the Verdift. Ibid.

10. 8. But in Precipe quod reddat of Rent of the: Sefia of the Demandant himself, he shall recover Damages and Arrears all the Time pending the Writ till the Day of the Judgment given. Ibid.

11. And the same Law in Annsity of Rent. Ibid.

12. But where a Man recovers by Default in Writ of Entry, he shall not recover Damages but till the Day of Judgment, and if Writ of Inquiry of Damages pends for Seven Years he shall not recover Damages for this Time. Ibid.

13. Annsity of Rent, the Plaintiff prayed his Damages of the Rent and Damages of the Arrears pending the Writ, and could not have but Damages of the Arrears of the Rent before the Writ brought, Quod Nota. Br. Damages pl. 154. cites 37 H. 6. 38.

14. But in Annsity, a Man shall recover the Annsity and the Arrears pending the Writ, and his Damages over and above, Quod Vide in a Note. Ibid.

15. Trefpafs by Tenant by Statute Staple, the Jury assailed Damages as well for the Time after the Tefe of the Writ till the Verdift, as for the Trefpafs before the Writ, and yet well, and the Plaintiff shall recover, and upon the Extent of the Statute Staple the Sheriff return the Extent of the Land, and not of the Goods. Br. Trefpafs, pl. 43. cites 16 H. 7. 6.

16. In Annsity it was found for the Plaintiff and they were adjourned to Welfminder for Difficulty of the Verdift, and there it was adjudged for the Plaintiff, and he recovered Seifin of the Land and Damages, and Damages for the Adjournment, Quod Nota for the one and for the other. Br. Damages pl. 112. cites 35 Aif. 13. And another Annsity which was adjourn'd Anno 36 Aif. 2. it was awarded that the Plaintiff should recover Seifin &c. and his Damages taxed, &c. the Plaintiff prayed his Damages pending the Adjournment, Chelr. said, this you cannot have; for it was not at another Time enquired of the Value of the Land per Ann. which is necessary in all Cases of Adjournment, Quod Nota. Br. Damages pl. 112.

17. Patria Laboris & Expensis non debet fatigari, 33 H. 6. 47. in an Annsity for Land, the Plaintiff recovers Damages till the Time of the Verdift, in an Annsity for Rent, till the Time of the Judgment, Pittold's Cafe, 10 Rep. 115. in Trefpafs or Eftment till the Writ purchased. The Reafon
Damages.

269

The second Diversit is, an Affife complaining of a Wrong which continues, and the other Incidents of a Wrong done before the Plaintiff, and not of a Wrong which continues; for in an Affife of Rent it appears by the Plaintiff to the Judges, how much it is arrear at the Time of the Judgment; in an Affife of Land it appears to the Judges only. Jenk. 6, pl. 9.

16. In Real Actions, as Affise for Land where Damages are recoverable, as appears by the Principal Cafe, Damages till the Verdict is recoverable, and for Rent as it is said before, till the Judgment in Personal Actions, for the Wrong done before the Action brought; The Reason is, Damages are the Principal in Personal Actions, and the Plaintiff till has Possession, and knows his Damage, and the Damage is the Cause of his Suit. In Wafe the Plaintiff may easily see it, and fix of the Jurors ought to see it before the Wafe be found. In real Actions, the Principal is the Freehold, which is deforced from him, and he cannot know his Damages, but the Jurors have the View of the Land, and may take Knowledge of it; and for Rent the Judges may discern, by Computation of the Time, how much Rent is incurred upon Consideration of the Writ, and Count and Deed, as aforesaid, and therefore in this Cafe he shall have Judgment of the Rent incurred after Verdict, till the Judgment; Sententia non fortur de non liquidis. Jenk. 7, pl. 9.


Ibid. 692. Trin. 13 W. 3. S C, moved again, but the Plaintiff could not obtain Judgment, the Court inclining strongly against him.

18. In Covenant for not repairing good Damages ought to be given; Per Holt Ch. J. who said that it had been always practifed so before him, and every Body else that he ever knew, and that they always confider in these Cafes, what it will cost to put the Premises in Repair, and give so much Damages, and the Plaintiff ought in Justice to apply the Damages to the Repair of the Premises; to which &c. the Court agreed. 2 Ld. Raym. Rep. 1125, 1126. Patch. 4 Ann. B. R. Vivian v. Champion.

19. An Action was brought by the Husband for taking his Wife away, and ravishing her, Per quod Conformit &c. per magnum Tempus, viz. Per Spatium unius Annii ac tis &c. Verdict pro Quer. and general Damages given. Moxed in Arreft of Judgment, That a Year had not expired from the First of October, the Time of the Office, to the Time of the Verdict, and much left at the Time of the Action commended; and therefore general Damages being given, it was erroneous. On the other Side it was faid, that coming under a Per Quod, it was only confidential, and laid by Way of Aggravation of Damages, and was not the Caufe of Action; that the Per Magnum Tempus was enough, and the viz. Spatium &c. should be rejected as Supplufage, becaufe imposable. Parker Ch. J. said this Cafe was widely different from the Common Cafes of viz. a Time that is altogether impossible, as the 30th of February &c. for here the whole Time is not imposable; and it cannot be known for how much of it the Jury gave the Damages; most probably to the Time of the Verdict. Adornatur. 10 Mod. 273, 274 Hill. 1 Geo. 1. B. R. Walter v. Warren.
(1) In what Cases the Court may ass the Damages. 
[Without awarding a Writ of Inquiry.]

Br Damages, 1. In a Recordari for taking his Cattle, if upon Demurrer it is ad-
judged for the Plaintiff, the Court may award Damages without a Writ of Enquiry of Damages. 14 H. 4. 9. b.
2. So for other Things. 3 H. 6. 29. b.
Br Damages, 3. When a Ban shall be condemned by Judgment, the Justices may tax the Damages, without awarding a Writ of Enquiry of Damages. 8 H. 6. 5.

Though the Justices use to award Inqueft of Damages when they give Judgment by Default, yet they themselves may tax the Damages if they will.

In an Audita Querela, if the Matter be found for the Plaintiff by Verdict, and they do not inquire of the Damages, the Court may re-
6. The Defendant pleaded Release of Acquittal, which was not sufficient, and therefore the Plaintiff recovered his Acquittal by Award of the Court, and his Damages taxed by the Court to 100 s. And so fee that in some Cattle the Court may tax Damages without awarding Writ of Inquiry of Damages. Br. Damages pl. 59. cites 38 E. 3. 10.
7. Trespers of Battery by which the Party is maimed, the Justices may tax the Damages themselves by their Discretion it they will, Quod Nota; Per Cur. But yet they awarded Writ of Inquiry of Damages. Br. Damages, pl. 54. cites 11 H. 4. 65.
8. In Replevin, the Defendant justified, the Plaintiff pleaded Joint-ency in the Land, and had Day in the same Term, and at the Day the Defendant made Default and the Plaintiff recovered Damages to 4l. taxed by the Court, and not Damages as he counted, Quod Nota, that the Court itself taxed the Damages. Br. Damages, pl. 55. cites 14 H. 4. 2.
9. Upon Demurrer in Law the Justices may award Damages for the Party by their Discretion, or award Writ to inquire of the Damages at their Election. Br. Damages, pl. 194. cites 14 H. 4. 39, 40.
10. In a Replevin against O, who avoided for Rent; the Plaintiff was Nonfuit; the Question was, Whether the Court might ass the Damages, without a Writ of Inquiry of Damages? It was the Opinion that they might; for they are not in respect of any local Matter, but they ac-
crue to the Avowant for the Delay in the Non-payment of the Rent; Contrary where Judgment is given for the Plaintiff; there the Court shall not ass the Damages; for he ought to recover for the taking of his Cattle, of which the Judges cannot take Notice; and the Damages may be greater or les, according to the Value of the Cattle, and the Circumstances of the taking and delaying of them. 3 Le. 213. pl. 291.

11. The
11. The Constant Course and Practice of both Courts is, on a Judgment in Debt upon Default or Confession, to tax the Costs Occasion and detention of debiti, as well as Costs of Suit; and this being the Assent of the Party Plaintiff, which is always entered on the Record, as it is in this very Case, will conclude the Defendant, as appears by all the Precedent in the Books of Entries; But if the Plaintiff will not assent to it, then be shall have a Writ of Inquiry of Damages Occasion and detention of debiti if he will; but it is in the Election of the Plaintiff, and not of the Defendant; And if the Court by the Assent of the Plaintiff may tax 20s. or any other small Sum for Damages Occasion and detention of debiti illius, by the fame Reason they may tax 20l. or any greater Sum for such Damages, if they see Cause. 2 Saund. 107. Trin. 21 Car. 2. Holdipp v. Otway.

12. In Debt upon an Obligation, the Plaintiff had Judgment, and afterwards brought Debt on the Judgment, and had Judgment upon it. The Ch. Justice at first opposed the taxing Damages (viz. Interest) without Writ of Inquiry; but afterwards it was refer'd to the Secondary to tax the Damages without Writ of Inquiry. Sid. 442. pl. 15. Hill. 21 and 22 Car. 2. B. R. Row v. Apsey.

(K) In what Cases the Court may mitigate or encrease Damages.

1. Damages are given at the Nisi Prius in an Action where Damages are the Principal, and the Court cannot have any certain Conulance of the Cause, * neither by the Record, nor other Matter apparent, they cannot mitigate nor encrease.

2. [As] In Case for Slander, the Defendant justified in the Manner, D. 105. a, and at the Nisi Prius Damages were given, the Court cannot mitigate them. D. 2. 2a. 105. 15. M. Botham v. Ed. Stur. pl. 29. that the Court can neither increase nor abridge them.

3. But in Battery pro Amputatione manus dextrae, the Court may Encrease the Damages, for 'tis apparent to the Court by the Record and View of the Person. D. 2. 2a. 105. 15. Tripetey, 22 E. 3. S. C. 11. b. adjudged.


50 Eliz. C. B. in Case of Mallet v. Ferrers, where in Trespass of Battery the Parties were at Issue upon Not Guilty, and at the Nisi Prius it appeared that the Thumb of the Right Hand of the Plaintiff was clear cut off, and so mutilated; and it was found for the Plaintiff, and Damages taxed to 40l. and now the Party came in Perfon into Court, and prayed in respect of the H'interfERENCE of the Mann, that the Court would increase the Damages; which Damages, upon great Consideration had, were made 100l. and Judgment given accordingly.

5. So in Battery upon View of the Wound in Court. 3 D. 4. 4. Br. Cofts, pl. 7. cites S. C.—Br. Damages, pl. 40. cites S. C.—Br. N. C. pl. 466. cites S. C.—First. Damages, pl. 53. cites S. C.—S. C. cited Lac. 225. Mich. 2. Car in Case of Hooper v. Pope, which was Trespass of Assault, Battery and Wounding, and upon Not Guilty, Verdict was for the Plaintiff, and small Damages given; and because the Plaintiff had a Mayhem in his Hand by the Wounding, it was moved to increase the Damages on view of the Mayhem; but the Court order'd, that the Wound be viewed by a Chirurgeon, and he to make Oath that it is a Mayhem, and also to have a Certificate of
Damages.

of the Justice of Appeal, before the Court was tried that it is the same Wound, upon which the Action was brought, which was done, whereupon it was moved, that Damages should not be increased, because the Action is more generally than for Assault, Battery and Wounding, and a particular Mayhem does not appear on the Declaration, nor is it indulged on the Pleading, nor is it according to D. 105 [See pl. 2. supra.] 22 E. 3 11 [See pl. 3. supra.] 5 H. 4 22. [See pl. 6. Infra.] But notwithstanding, the Court increased the Damages upon the Matter above.

* Fitzh. Damages, pl. 57. cites S. C.-Br. Damages, pl. 47. cites S. C.-Br. Damages, pl. 37. cites S. C.-Fitzh. Damages, pl. 97. cites S. C.-Br. Damages, pl. 47. cites S. C.-Fitzh. Damages, pl. 57. cites S. C.-Br. Damages, pl. 97. cites S. C.-Br. Damages, pl. 47. cites S. C.-Fitzh. Damages, pl. 57. cites S. C.-Br. Abridgment, pl. 6. cites S. C.-Br. Damages, pl. 44. cites S. C. & S. P. and says, it is said there, that they may increase Damages 160. — But P. 27. H. 8. 2. Per Englefield, Fisherbert, and Shelly, In Trespass locall they cannot abridge nor increase Damages contra Offs, and therefore, it seems, that they cannot abridge nor increase, but in such Cases where they may have Notice as aforesaid, or in Case of Mayhem apparent and the like 180. — Br. Abridgment, pl. 11. cites S. C. & S. P.-Br. Abridgment, pl. 53. cites S. C.-Jenk. 68. pl. 29. cites S. C.-Jenk. 68. pl. 29. cites S. C. —Jenk. 68. pl. 29. cites S. C.-2 Inst. 300. Ld. Coke says, that the Words in the Stat. Westm. 1. cap. 20. that "Great and large Amends shall be awarded according to the Trespass against Trespassors in Parks attained at the Suit of the Party," if the Damages are too small, the Court has Power to increase them; For the Word (Award) properly belongs to the Court.


7. Ditch. 14 Jac. B. R. In an Appeal of Mayhem, by Freeman against Trevors, the Jury gave twenty Marks Damages, and upon View in Court, and Information of the Surgeons there present, the Court increased the Damages to 1001. because he left the Ufe of his Hand.

8. But if in an Appeal of Mayhem, the Judges of Nifi Prius, upon View thereof, certify, That he had sustained Damages to such greater Sum, yet the Judges of the Court out of which it issues, cannot encrease Damages without their View. 8 H. 4. 23.

9. But upon a View in Pais by any of the Judges of the Court into which the Nifi Prius is returned, they may encrease Damages. 8 H. 4. 23.

10. In Conspiracy for inditing for a Trespass, Damages may be mitigated by the Court. 7 H. 4. 31. b. Curia.

11. In Debt upon an Obligation, the Defendant denies the Deed, and it is found against him, the Court may encrease the Damages assessed. 14 H. 4. 19. b.

12. In Trespass for entering into his Park, and taking a Doe, the Court may mitigate the Damages given by the Jury. 5 H. 6. 2. b.

13. In Trespass for cutting his Trees, upon Not Guilty pleaded, the Court cannot encrease the Damages given by the Jury, because it lies not in their Conunance. 3 H. 4. 4.
15. In an Appeal of Robbery, if the Defendant be acquitted, and the Court cannot increase the Damages, because they know (or by Reason of their knowing that) the Appellee was long in Prison, when the Inquest had taxed the Damages before 42 H. 19.

Br. Damages, pl. 115 cites S. C. —— S. C & S. P. per Knivet, and also because it was taxed by the Inquest. Br. Abridgment, pl. 30. cites S. C.

16. In such Action where the principal Demand is certain, the Court may increase Damages. 10 H. 6. 24. b. Curta.

Br. Costs, pl. 28. cites S. C.

Firth. Damages, pl. 31. cites S. C.

17. As in Debt upon the Arrearages of an Account, if the Jury finds it Arrear, and gives Damages, yet the Court may increase it, because the Demand is certain. 10 H. 6. 24. b. adjudged.

In several Precipices upon an Obligation, the Plaintiff had several Judgments, and Damages severally, viz. against each the Sum which the Jury found, and the Court increased the Damages over and above the Verdict to a Mark; Quod Nona; But it is said elsewhere, that he shall have but one Execution. Br. Damage, pl. 57. cites 14 H. 4. 19.


42. b. 43.


19. Appeal of Maien, the Inquest taxed Damages to 100s, and Chevington increased them to 10 Marks; and Wilby said, that it was too little, by which Sbard awarded the Damages to 10L notwithstanding the first Judgment. Br. Damages, pl. 111. cites 30 Aff. 30.

20. Trefpas for that the Defendant beat and mayhem'd him; the Defendant plead'd Not Guilty, and is found Guilty at the Nisi Prius, where the Plaintiff gave in Evidence, that he was mayhem'd at the same Time, and the Inquest found accordingly, and Damages 18L, and at the Day in Bank be judg'd the Mayor to the Court, and prayed Increafe of Damages, and the Court awarded, that he recover the 18L. taxed by the Jury, and 22L. over, viz. 40 in all. Br. Damages, pl. 86. cites 39 E. 3. 20.

21. Trefpas of Trees cut; Ifieue was join'd, and pass'd for the Plaintiff, to the Damage of 5L. The Plaintiff prays'd, that they would increase Damages. Thinn said, we will not increase Damages of Trees cut; for it does not lie in our Conscience, by which they increased Costs, and not Damages, quod nota * This is intended of such Matter which lies not in • See pl. 32. their Conscience, but of such Matters which lies in their Conscience, they infra. may increase after Verdict upon Ifieue, and so it was agreed by the Pruthnotaries of C. B. Hill. 3 M. 1. in Trefpas of Bateory. Br. tit. Abridgment, pl. 36. cites 3 H. 4. 4.

22. In Attaint, the Costs were increased by the Court. See Br. Attaint. pl. 26. cites 8 H. 4. 23.

23. The Court cannot increase Damages after Ifieue tried between the Parties. Br. Abridgment, pl. 25. cites 8 H. 4. 23.

24. The Court adjudg'd Damages by the View of the Person, who was beaten, to 200 Marks, which was adjudg'd by Inspection. Br. Damages, pl. 49. cites 9 H. 4. 1.

25. In Replevin the Ifieue was found for the Plaintiff to the Damage of 20L. The Plaintiff prays'd his Judgment, and the Court would not give Judgment, unless the Plaintiff would release Part of his Damages, and it was said, that by the same Law that they may increase Damages, they may abridge. Quod nota. Br. Judges pl. 22. cites 11 H. 4. 10.

15 Damages.

4 A
26. Debt against A., upon an Obligation, the Defendant pleaded Non est factum, and it was found against him to the Damage of three Marks. The Plaintiff demanded Judgment as the Inquest had found, and Increase of Damages at their Discretion, by which it was awarded, that he recover accordingly, and one Mark over of Increase. Br. tit. Abridgment, pl. 35. cites 14 H. 4. 19.

27. Upon Inquest of Office to inquire of Damages, the Court may abridge or increase the Damages. Br. Damages, pl. 144. cites * 9 H. 6. 10.

* It should be 19 H. 6. 10.

28. But contra, upon Issue tried upon the Principal between Party and Party, quod nota Diversity. Ibid. and cites 7 H. 4. 31. 3 H. 4. 4. and 34 H. 8.

29. Note per Cur. that where the Demand is certain, as in Action ofDebt &c. the Court may increase as well the Damages as the Costs, quod nota. Br. Damages, pl. 137. cites 10 H. 6. 42. 25.

30. And if the Jury in Debt finds 20s. for Costs and Damages in one and the same Sum, the Court may increase it to 20s. more, quod nota. Ibid.

31. Forcible Entry found for the Plaintiff to the Damage of 20l. and it was awarded, that he should recover 20l. taxed by the Inquest, and 40l. over by the Statute, viz. 60l. in all, and to see that the Court trodled the Damages. Br. Damages, pl. 70. cites 19 H. 6. 6.

32. In Trespass, the Defendant imputed till another Term, and at the Day made Default, by which Writ was awarded to enquire of Damages, which found 20l. Damages, and 4l. Costs, and therefore the Court abridged the Damages to 20 Marks, and the Costs to four Marks; for where it is upon Writ of Inquiry of Damages, the Justices may increase or diminish at their Pleasure; for it is only an Inquest of Office to instruct them, and they may assize the Damages themselves, without awarding any Inquest of Office, or Writ to inquire of the Damages, if they will. Br. tit. Abridgment, pl. 7. cites 19 H. 6. 10.

33. But where the Inquest passes upon the Principal, viz. upon the Issue between Party and Party, there the Court may increase Costs, but not increase nor diminish Damages; for there the Party is at his Attaint, but upon Inquest of Office, he cannot have Attaint, quod nota Differentiam, but where they give Execrable Damages upon the Issue, there the Court may make Judgment, till the Plaintiff will release his Damages to a reasonable Sum, quod nota. Br. tit. Abridgment, pl. 7. cites 19 H. 6. 10.

34. In Trespass by Two against Three the one appeared and pleaded to Issue and the others made Default, and at the Day of Nisi Prius it was found for the Plaintiff to the Damage of 100l. which they sever'd, i.e., 40l. for the Value of the Goods, and 60l. for the Costs of the Suit; the Plaintiff prayed Judgment and the Court thought the Costs too high; and per Cur. if it was not for the Two who made Default the Costs should be abridged; for they may as well abridge as increase Costs, but by Reason of the Two in the Sumul the Court was in Doubt; For in Trespass against Two, if the one appears, the Plaintiff shall count, that he together with the other, did the Trespass, and though against the one the Proces is determined, yet against the other Proces shall be awarded, and they could not know to what Costs this may come. And after all was discontinued. Br. tit. Abridgment pl. 9. cites 21 H. 6. 10.

35. In Debt, the Jury found the Debt and Damages to 26s. 8d. and the Court increased the Damages to 13s. 4d. beyond the first Sum. Br. Damages pl. 139. cites 32 H. 6. 1.

36. Damages were increased in Costs by Reason that the Defendant delayed the Plaintiff by Injunction. Br. Damages pl. 165. cites 21 E. 4. 78.
In Trespass Local they cannot abridge nor increase the Damages; contrary of the Colts; Per Fitzherbert, Englefield, and Shelley. And therefore after Demurrer when the Inquest and Damages were awarded and returned, the Justices at the Prayer of the Defendant and his Counsel would not abridge Damages, Quod Noto. Br. tit. Abridgment pl. 1. cites 27 H. 8:2.

38. Note, it was holden for Law, that the Justices may increase but not decrease Damages, because the Party may have an Attaint. But note, contrary by Anderson and Periam. J. Godb. 135. pl. 157. Hill. 29 Eliz. C. B. Anon.

39. In an Assault, Battery, and Wounding, the Plaintiff after Verdict moved the Court for an increase of Damages; the Court said they could not do it, if the Word Matiemavat was not in the Declaration. Vent. 327. Hill. 29 & 30 Eliz. B. R. Anon.

40. The Plaintiff declares in Debt upon Obligation of 16 l. to his Damages to 10 l. and upon Non est factum pleaded, the Jury found the Damages to 7 l. and 40 l. Colts; and the Court increased the Colts 4 l. So he had Judgment to recover his Debt, and Damages, and Colts to 13 l. which is more, than in his Count, and this was allowed for Error. Sed non allocatur. For although the Jury cannot give more Damages than the Plaintiff counts, yet the Court may increase them as they please; Wherefore the Judgment was affirmed. Cro. E. 544. pl. 13. Hill. 39 Eliz. B. R. Wolf v. Meggs.

41. Trespafs of Battery: One of the Defendants pleaded Not Guilty; The other justified. The Issue against him was, De fort Fort Demumse, and one Pen. Fac. was awarded to try these Issues; and it was found for the Plaintiff, and Judgment accordingly, and Error thereof brought, because the Plaintiff declared to his Damage of 40 l. and the Damages asessed by the Jury were 33 l. and the Colts increased by the Court were 4 l. So the Plaintiff had Judgment to recover 4 l. which is more than whereof he declares; Sed non allocatur. For the Damages found by the Jury being less than he counts, although the Colts amount to more it is not material. Cro. E. 866. pl. 47. Mich. 43 & 44 Eliz. in Cam. Scacc. Comb v. Carey.

42. Trespafs for breaking his Close, and cropping 200 Pear-Trees, and 100 Apple-Trees, upon Not Guilty pleaded, the Plaintiff had a Verdict and Damages to 30 l. The Defendant moved the Court to mitigate the Damages, it appearing upon Affidavit that the Plaintiff would have accepted 5 l. before the Action brought; but the Court said that they could not diminish the Damages in Trespafs, which is local, and therefore it could not appear to them, and Judgment accordingly. Brownl. 204. Mich. 3 Jac. Delves v. Wyer.

43. In Trespafs for an Assault and Battery A. and B. A. appeared &c, and a Verdict was given against him; the other was in the Simul cum; and Damages taxed against A. to 30 l. but the Court upon View of the Mayhem increased the Damages to 40 l. and afterwards a Verdict was given against B. and Damages taxed; and then it was moved, that the Court upon another View of the Wound would increase Damages against B. for that A. had murdered the Officer that came to serve the Execution upon him for the 40 l. so that possibly the Plaintiff might recover nothing against A. But it was denied by the Court, for that they could have the View but once in the same Action, but if he had brought several Actions, it would have been otherwise. But the Court directed the Plaintiff to stay till A. was hanged, and then they might make the View and increase the Damages. Litt. Rep. 51, 52. Mich. 3 Car. C. B. Anon.

44. In Battery, Judgment was given upon Non sum informat sis, and afterwards there was a Writ of Inquiry of Damages; on a Motion to miti- gate the Damages the Court said, that in such Cases they never wouldingly alter the Damages, where the Party had also given Evidence at the Inquiry of Damages. Litt. Rep. 150. Patch. 3 Car. C. B. Stanlie's Cafe.
Damages.

45. In Trespass the Plaintiff declared generally, that the Defendant maihemavit &c. And upon his gave in Evidence that the Defendant discharged a Great Gun in a Ship without giving Notice according to Custom &c. whereby the Plaintiff lost an Eye and a Leg. It appeared upon the Evidence, that it was done without any Design or Intention of the Defendant, and therefore the Jury gave but 10/. Damages; Whereupon the Court was moved to increase the Damages upon View of the Maihem, (as they might) and a Day was given him to produce his Witness's, but their Evidence being the fame in Effect as at the Trial, the Court would not encrease them; besides the Particulars of the Maihem being not set forth in this Declaration, but generally Quod Maihemavit, the Court said that they cannot increase the Damages upon View of the Maihem unless the Judges of the Nii Prins &c. before whom it was tried, certify the Particulars of the Maihem to the Court, and that these were the Maihems, which the Plaintiff offered to prove upon the Evidence at the Trial; for otherwise it cannot appear to them, that they are the same Maihems for which the Plaintiff had declared. Sid. 198. pl. 22. Hill. 14 & 15 Car. 2. B. R. Angel v. Shutterton.

46. In Trespass for Assault, Battery and Maihem, the Jury gave only 10/. Damages; but the Court upon View of the Maihem, (which was a Broken Leg) and upon Affidavit of the Charges to the Surgeon, increas'd the Damages to 20/. Nii Caefa &c. and now Caefa was shewn (viz.) that the Plaintiff did not set forth in what Part of his Body he was maimed. But per Hale Ch. B. if the Plaintiff alleges that he was maimed, that is ground enough; and afterwards it was held by Hale &c. Cur. the Damages may be increas'd where the Word maimimony is in the Declaration; but the usual and better Way had been to express the Manner of the Maihem and that in an Action of Battery the Court might increase the Damages upon the View, if the Manner of the Battery was alleged in the Count. Hardr. 408. Patch. 17 Car. 2. in the Exchequer. Austin v. Hilliar.

47. The Plaintiff in an Action of Battery declared that that the Defendant struck the Horse whom the Wife rode, so that the Horse ran away with her, whereby she was thrown down, and another Horse ran over her, whereby she lost the Use of Two of her Fingers. The Jury had given them 48/. Damages, and they moved the Court, upon View of the Maihem, to increase them; whereupon the Declaration was read; but the Court thought the Damages given by the Jury sufficient. Mod. 24. pl. 65. Mich. 21 Car. 2. B. R. Dodwell and Ux v. Burford.

48. The Plaintiffs in an Action of Battery declared that that the Defendant struck the Horse whom the Wife rode, so that the Horse ran away with her, whereby she was thrown down, and another Horse ran over her, whereby she lost the Use of Two of her Fingers. The Jury had given them 48/. Damages, and they moved the Court, upon View of the Maihem, to increase them; whereupon the Declaration was read; but the Court thought the Damages given by the Jury sufficient. Mod. 24. pl. 65. Mich. 21 Car. 2. B. R. Dodwell and Ux v. Burford.

49. Collateral Damages shall be considered in Equity on Penalty of a Bond to save Harmless. Sid. 442. Hill. 21 & 22 Car. 2. B. R. King v. Atkins.

50. M. brought an Action of Assault and Battery, against J. S. who pleaded, De for Assault Demesne; and a Verdict being for the Plaintiff, they gave him 6f. Damages at the Affes; but upon view of the Mayhem, it appearing that he had lost two of his Fingers, and was thereby disabled to follow his Trade of Cloth-Shearing, the Court increased the Damages to 100/. Freem. Rep. 173. pl. 185. Mich. 1674. C. B. More's Cafe.

51. Adjudged
Damages.

51. Adjudged in Action of Assault &c. that where the Plaintiff declares of a Wounding by the Word Mayhemavit, it is clear the Damages may be increased, though Damages are given by the Jury. 3 Salk. 115. pl. 6. Cook v. Beale. 

52. So it is where the Plaintiff sets forth a Wound so particular in its Declaration, that by the Description it appears to be a Mayhem, and so it is the Wound is visible and apparent; and this may be done, whether W. 3. S. C. Damages are given by the Jury upon an Issue joined, or upon a Writ of &c. S. P. resolved accordingly, though the Word Mayhemavit is not in the Declaration, and cites Raff. Appeal 46. and 5 H. 4. 21. b.

53. But this Increase of Damages must be given by the Courts a Writ in form upon the View of the Wounding, or upon Affidavits made thereof; and it cannot be done by the fficers of Nisi Prius, who, if the Wound is very great, must enforce the Evidence on the Paper, and upon such Evidence &c. the Damages will be increased, though the Wound was not set forth in the Mayhemavit in the Declaration. 3 Salk. 115. S. C.

54. And so it is without such Indorsement, where the Cause was tried before a Judge of that Court, where the Motion is made for increase of Damages. 3 Salk. 115. pl. 8. Cook v. Beale.

55. Trespass, Assault and Battery. The Plaintiff declares, that the Defendant on many a free 15th Jan. Thosmam Cook, slit, &c. the Plaintiff, Philip Johnson, killed &c. And as a Result, the Plaintiff was tried before Powell himself.

56. &c. (Per Powell, J.) though the left of a Noise is not a Mayhem to bring an Action Felonius for the Loss of it, yet the Court may in such Cause increase the Damages. Ibid.

57. And he said, that the Court might increase the Damages upon a Writ of Inquiry, because that was but a bare Inquest of Office. And St. 345. 1 Le. 139. Bnd. 138. Litt. Rep. 51. Hurt. 121. 53. 1 Sid. 425. 1 Mod. 24. were cited, and a Case between Sallat and Saxby, where in a general Action of Assault, Battery, and Wounding, upon the Motion of Sergeant Lovell. 3 Salk. 17. on a Writ of Inquiry, the Damages were increased about four Years ago, upon the Motion of Sergeant Lovell. 3 Salk. 115. pl. 8. Cook v. Beale.

58. The Plaintiff was arrested at the Suit of the now Defendant, in a fictitious Action, without any Colour of Reaon; and afterwards he brought an Action of false Imprisonment against the Defendant, and the
Damages.

Fury gave him 80l. Damages; and upon a Motion in arrest of Judgment, because the Damages were excessive, it was opposed by the Plaintiff's Counsel, and inferred, that he might have the Benefit of the Verdict, which was granted, and accordingly the Plaintiff had Judgment. 8 Mod. 296. Tin. 10 Geo. 1725 Herbert v. Morgan.

(L) [Mitigated, or Increased]
In Respect of the Plea;
[And Circumstances.]

* See (R) pl. 4

1. In Trespass for taking his Goods, to the Damage of 20l. if the Defendant pleads an Arbitrament made in another Country, and this is tried against the Defendant, and Damages alluded for the Trespass, yet inasmuch as this Foreign Jury could not have full Connoisseur of the Trespass, and the Defendant hath * not denied the Damage to be according to the Count, the Court, with the Advice of the Plaintiff, may encrease the Damages, and to such as much as the Plaintiff hath counted. 14 H. 4 7. b.

2. In an Action for taking his Goods, if the Defendant avows, upon which it is demurred and adjudged for the Plaintiff, or upon Default and Damage found upon the Writ of Inquiry of Damages, the Court may encrease them; for the Court (this being upon De-\n\n\n\nmurder) might have awarded Damages without Inquiry, therefore the Inquisite is but for their Information. 14 H. 4 9. b. 3 H. 6. 29. b.

3. So in this Case the Court may mitigate the Damages for the same Reason. 3 H. 6. 29. b.

4. So in Trespass, if Judgment be given upon Nil dicit, and a Writ of Inquiry of Damages served, the Court may encrease or diminish the Damages found by the Inquisite, for that they might have awarded Damages according to their Discretion, without such Writ, * 19 H. 6. 10. b. adjudged. Nid. 1651. between + Lyn and Lord Foliot, in an Action of Assault, Battery, and Wounding, the Manner of the doing thereof being specially laid in the Declaration, though the Inquisite gave 200l. Damages, yet upon Examination of Surgeons, and upon View of the Wound in Court, and for the Heinoufnes of the Fact, being done in the High Street, in the Day-time, with a Stiletto, with an Intent to kill him, and the Surgeon, by Agreement, being to have 150l. for the Cure, the Plaintiff being in great Danger of Death, and having lost a Portion of Blood, as the Surgeons said, the Court increased the Damages to 400 l. in toto, and Judgment given accordingly.

5. In Trespass for breaking his Close by Rawlins with a Continuando, it was moved by Coke, that the Plaintiff needed not to shew a Regres to have Damages for the Continuance of the first Entry, viz. for the mean Profits "Gawdy J. without an Entry, he shall not have Damages for the Continuance, unless in the Case where the Term, or Estate, of the Plaintiff in the Land is determined; and to such Opinion of Gawdy, the whole Court did incline, but they did not resolve the Point, be-
caused a Regret was proved. Le. 302. pl. 416. Trin. 31 Eliz. B. R.
Rawlins's Cafe. Cites 20 H. 6. 15. 38 H. 6. 27.

6. In such a Precipe where the Demandant is to recover Damages, if Lev. 302.
the Tenant pleads Non-Tenure, or disclaims, there the Demandant may
over him to be Tenant of his Land, as his Writ suppose the Benefit of
his Damages, which otherwise he should lose, or pray Judgment and en-

Cur. that Littleton and Coke are not to be understood of a simple Plea of Non-tenure, but of Non-
tenure with Disclaimer, as the Pleadings usually were in Littleton's Time.

7. In Trespass of Assault and Wounding, where the Truth was, that the
Plaintiff's Arm was broke, and he was in great Danger still of losing
the Use of it, and the Jury gave but 12d. Damages; the Court would
not increase them, because the Manner of Wounding was not set forth in
the Declaration; and, per Roll Ch. J. it might be, that his Arm was

(M) Damages Increased, or Decreased.

By what Court it may be.

1. The Justices of Nisi Prius have no Power to encrease Dam-
ages, but only to inquire of that which is affirmed by the
Inquest. 8 H. 4. 23.

2. In Trespass and Battery in an Inferior Court, the Judge there in-
creased the Damages upon View to more than was given by the Jury.
The Court said, that the proper Way to reform this is by Writ of Error, for
none but the Courts at Westminster can increase Damages upon

3. But a Writ of Error being brought, and Error assigned, for that
an Inferior Court had increased the Damages given by the Jury upon
an Inspeftion of the Mayhem made by the said Battery, the Court held,
that the Inferior Court had Power to judge upon their View of the May-
hem, and to increase the Damages, and affirmed the Judgment. 2 Jo.

(M. 2)
(M. 2) Damages tax'd by the first Inquest, where there are more Juries than one.

1. In Trespass against two, if the one comes and pleads, and is convicted to the Damage &c. and the other comes and pleads, and is convicted, the 2d Jury shall not give Damages; for the 2d who pleaded shall be charged by the first Verdict. Quod Nota, Br. Damages, pl. 29. cites 44 E. 3. 7.

2. Forger of Deeds, by which he was disturbed of his Possession of such Tenements in D. in the County of K. and of such Lands in L. and alleged the Forging at D. in the County of K. and brought the Action in the County of K. and [as] to the Land in the County of K. the Defendant pleaded a Plea to the Issue and to the Land in L. other Issue, and the Jury of K. appear'd and found for the Plaintiff, and the Jury of L. did not appear, therefore it was order'd, that the Jury who appear'd, should tax Damages for the Whole, and therefore the Inquest afo'd Damages for the Land in K. to 161 and for Corps, if he be found at L. to 1o8., and for the Forging, as to the Tenement in London 81. and for Corps of his Suit, it be found for him, 48s over the 1o8. and fo Damages and Corps fever'd. Br. Damages, pl. 74. cites 21 H. 6. 51.

3. It two plead Not Guilty severally in Trespass, and several Venire Facias's are awarded, the Inquest that first pass'd shall affes Damages against all, and the second Jury shall not affes the Damages, and there the other Defendant shall be charged of the Damages, by the Inquest which pass'd upon the Issue, to which he was not a Party, but he was Party to the original, Quod Nota, and therefore may have Attaint also; Per Molie, &c. non negatur, and in this Case the second Inquest shall not affes Damages, Quod Nota. Br. Brief. de enquire pl. 8. cites 39. H. 6. 1.


5. If an Action of Trespass be brought against two, and they plead several Pleas, and afterwards one of them is found Guilty by a several Jury, That Jury shall affes all the Damages; and if the other be afterwards found Guilty, he shall be subject to the said Damages, although he was not Party to the said Jury; and by the fame Reason that he shall be charged with the same Damages, by the same Reason he shall Have Advantage of the Satisfaction of them made by his Companion, Per Clench. 3 Le. 122. pl. 174. Trin. 27 Eliz. B. R. Anon.

6. In a Writ of Quare Insistit Maritago non satis facta it was found for the Plaintiff, but no Damages were assized by the Jury, and the Value of the Marriage was found to be 500 l. And now the Question was, Whether the same might be supplied by a Writ of Enquiry of Damages? and the Court prima facie, seemed to doubt of the Case; For where the Party may have an Attaint, there no Damages shall be assized by the Court, if the same be not found by the Jury; and therefore the Court would be advised of it; but afterwards in the same Term it was adjudged, that no Writ of Enquiry of Damages should issue; but a Venire Facias de novo was granted to try the Issue again. GODD. 227. pl. 294. Mich. 1. Jac. in C. B. Cook's Cafe.

(N) For
(N) For what Causes they shall be recovered.
Not for the Delay of the Court.

1. If a Man appealed of Robbery continues long in Prison, and after is acquitted, he shall not have Damages for the long Continued Imprisonment in Prison, because it was a Default of the Justices that they did not deliver him at the first General Delivery. 42 Ann. 19. per Abridgment, pl. 30. cites S. C.

2. If the Conoscope of a Statute Merchant takes the Body of the Co-Defendant in Execution, without any Extent of the Land, after he hath released the Statute, yet in an Audita Querela the Conoscope shall recover Damages for the Imprisonment of his Body without Cause. 47 Eliz. 3. 1. b.

recovered Damages in this Action but where he is ousted of his Land. — Br. Damages, pl. 34. cites S. C. —— Fitzh. Audita Querela, pl. 2. cites S. C.

(O) In what Actions Damages shall be saved by the Confessio.


2. In Detinue, if the Garnishment be prayed, and the Garnishee comes, and cannot deny the Conditions to be broke, the Plaintiff shall not recover any Damages against him. 3 P. 6. 11.

3. If he makes Default; for Damages are given against the Garnishee to Delay. 3 P. 6. 11.

4. If a Man will avoid the Damages, because he hath been at all Times ready to render the Thing in Demand, he ought to come at the first Day. 17 Eliz. 3. 71.

5. In Detinue for a Writing against an Executor, Supposing it to come to his Hands after the Death of the Testator, the Demandant may come at the grand Ditrefes, and say, that he hath at all Times and been ready to deliver the Writing after the Time that it came to his S. P. but Hands, and thereby have Damages against him. 22 Ed. 3. 9. b. if he can not say so,Damages shall be recovered against him.

4 C 6. In
Damages.

In Annuity, if the Defendant be returned summoned, and does not come, but afterwards comes by Attachment, he shall not have Damages by suing, that he hath been at all Times ready, for he shall not have such Plea, insomuch as he did not come upon the Summons. 29 C. 3. 45. adjudged.

7. In a Writ of Aiel, Cofnage &c, where the Land and Damages are to be recovered, the Plea of Tout temps Prist is not good, because the Tenant of the Land there has no Title, but holds the Land by Wrench. Co. Litt. 33. a.

(O. 2) Saved. By Recouper.

1. The Lessee * distrains his Tenant for Life, after that a Term of Rent was Arrear, and continued feised, and the Lessee recover'd by the Ailiff, and the Rent which lapsed during the Setlin, by Diffelin was recouped, and because a Rent-Day was arrear before the Diffelin, and another Rent-Day after the Recovery by the Ailiff upon this Diffelin, therefore in Ailiff of Rent, brought by the Lessee against the Lessee after the Recovery, is had by the Lessee in the Ailiff against the Lessee, therefore the Jury were compell'd to sever their Damages, and so they did. Quod Nota. Br. Damages, pl. 94. cites 8 Att. 37.

2. In Ailiff of Land, the Defendant had Rent Charge, or Common, out of the same Land of which the Ailiff is brought against him, and therefore the Damages were Recouped or Abridged. Br. tit. Ab-bridgment, pl. 26. cites 3 H. 6. fol. 4e.

(P) In what Actions Damages shall be recovered. [And Where.] Upon a Penal Statute. [Or otherwise.]

Cro. C. 559 1. In an Action of Debt upon the Stat. of 1 and 2 Ph. and Ma. for 5 l. by the Party grieved, for taking more than 4 d. for a Distress, by which Act it is enacted, that it any takes more than 4 d. for impounding a Distress, he shall forfeit 5 l. to the Party grieved, over and above the Sum that he took more than 4 d. and it is found against the Defendant, the Plaintiff shall have Damages, though it be upon a Penal Law, because this is a Debit of 5 l. certain given by the Statute, and not as Damages, and the Damages are to be given for the Delay in not rendering the Debt upon the Return of the Summons, for this is not like to Penal Laws that give treble Damages, for there it appears, that they intend it for Damages, nor to the Statute of 2 C. 6. where Debt is given for the treble Value, for that there the Value is uncertain till the Recovery; but here the 5 l. is a certain Debt by the Statute, and it should be a small Remedy for the Party grieved to bring an Action for 5 l. without Damages or
2. **Damages shall be given to the Party grieved, in an Action upon the Statute of the 13 El. cap. 5. of Forgery of false Deeds. New Entries 163.**

3. **Damages shall be given to the Party grieved, in an Action upon the Statute of 21 H. 8. cap. 6. of Mortuaries. New Entries 164.**

4. If a common Informer brings an Information, or Action of *Mar. 58. pl; Debt, tam quam sc. upon a Penal Statute, for a Sum certain given by the Statute, he shall not recover his Damages. **Br. 15 Car. B.** In the said Cafe of North and Mutuals, per Curiam, and the Clerks agreed it to be the common Court and Practice.

5. **In Writs of Execution, no Damages shall be recovered. 50 E. Br. Damages, pl. 56 cit.**

6. In a *Scire Facias* no Damages shall be recovered, 2 H. 6. Br. Damages pl. 3. cit. S. C. — See the Plea next following, and the Note, and see pl. 13. in the Notes.


8. In *Decline* Damages shall be recovered. 2 H. 6. 15.

9. In an *Attaint of a Freepold*, Damages shall be recovered at the **Common Law. 3 H. 4. 15.**

---

though there are Precedents there that no Damages were given, yet this does not prove that they were not due. — *Mar. 66. pl. 88. S. C. adjournator* — *ibid. 61. pl. 94. S. C. Brampton and Jones* conceived that the Damages were well assailed upon the Precedents cited, but Barkley doubted, and conceived upon Pilford's Cafe, to Rep. that no Costs should be given; and as to the Precedents, he said that they did not bind him, for perhaps they paffed sub silentio; Et adjournator.

---

283

**Damages.**

or Costs. **Bich. 15 Car. B. R. between North and Musgrave, per Curiam, adjuged upon a Writ of Error upon such Judgment in Banco, where Damages were given, by the Direction of the Court, upon good Advice. Intreat, *Tem. 15 Car. Rot. 975.*

C. B. affirmed per Cur. and cites Co.' Ent, and said, that

---

10. **III**
Damages.

In a Warrantia Charta, if the Plaintiff recovers pro Loco & Tempore, he shall not recover Damages, and yet he counts of Damages. 21 E. 3. 57. b. Marle 18 E. 3. 43. b.


Br. Damages pl. 183. cites S. C. but it is that a Man shall recover Damages in Warrantia Charta, where he did not lose the Land.—Fitzh. Damage pl. 69. cites S. C. — S. C. cited Hob. 23.

In Writ of Mesi between Ld. and Tenant, the Defendant acknowledged Acquittal by Fine, whereupon the Plaintiff afterwards sued Sci. Fa. to say why he did not acquit him, and Defendant made Default, whereupon a Deed of Acquittandum issued, but not returned, then an Alias issued and the Sheriff returned Juries, whereupon the Plaintiff prayed a Writ to inquire of Damages, but could not have it; because in Sci. Fac. and Writ Judicial, a Man shall not recover Damages, but in an Original Writ; but at last they awarded another Writ of Deed of Acquittandum, upon which if he comes and cannot excuse himself, he shall recover Damages; Per Belke, but not upon his Default. Br. Damages pl. 56. cites 50 E. 5. 22. — Br. Sire Lucas pl. 54. cites S. C. — In Writ of Mesi if he denies the Deed of Acquittal, and it is found against him he shall recover his Damages without inquiring whether he was disheartened in his Dishearted in his Default; Per Belknap. Fitzh. Damages pl. 69. cites 42 E. 3. 7.

In Writ of Mesi if the Defendant pleads, That not disheartened in his Default, there the Plaintiff shall recover his Acquittal immediately, and Damages when the Juries is tried. Br. Damages pl. 196. cites 15 E. 4. 6.

14. The Law is the same, though the Defendant delays him by denying his Deed. Contra, 42 E. 3. 7. b.


7 H. 6. 6. 54. S. P. & S. C. — Br. Damages pl. 66. cites S. C. — Ibid., between the Pleas 58. & 52 is a Nota that in Nuper oblit the Defendant shall recover Damages. 38 E. 3. 8. in a short Note.


* Fitzh. Damages pl. 19. cites S. C.


by Martin and says that the Reason is because after he is adjudged to account, it may be that he shall not be found in Arraies, and so the Court is not ascertained, whether he be damaged or not, besides it lies all in Arraies and in Effect he shall recover Damages there. — Br. Damages pl. 66. cites S. C. ± Br. Damages pl. 156 cites S. C. — Fitzh. Damages pl. 50. cites S. C. adjudged per tot. Car.


Objection, where in Account against a Receiver of Monies to render Account Quando ad hoc requisitus fuerit, Damages were given in C. B. and this was assigned for Error in B. R., and notwithstanding all Objections to the contrary the Judgment given before was affirmed. See pl. 43. and the Notes.
In a Writ of Partition by one Coparcener against the other
Damages shall be recovered, though the Defendant hath not been
at all Times ready to make Partition. 21 E. 3. 57. b. adjudged.
contra * 7 H. 6. 35 b.

In an Appeal of Maihem he cannot count of Damages, and
yet he shall recover Damages. 10 5. 6. 18 b.

In an Audita Querela Damages shall be recovered. 26 C.
3. 73. b. per Thorp.

In Audita Querela for suing Execution upon a Statute
against his own Release, Damages shall be recovered. 17 E. 3.
39. b.

A Prohibition to the Ecclesiastical, Court, for a Matter tri-
able at the Common Law, if the Plaintiff declares upon a Prohibi-
tion and alleges, that the Defendant hath prosecuted the Suit in the
Spiritual Court after the Prohibition granted, and the Defendant
pleads thereto, and several Issues are joined upon severall Causes,
and one Issue also joined, whether he prosecuted in the Court Chris-
tian after the Prohibition granted, and at the Nisi Prius this Issue is
found for the Plaintiff, by that the Defendant had prosecuted ther-
£ after the Prohibition granted, the Plaintiff shall have Damages to
be taxed by the Jury, as well upon this Declaration, as upon an
Attachment upon a Prohibition. Bich. 15 Car. 2. R. between
Facy and Lang, adjudged per Curiam, and then was vouch'd a
Pecedent in Banco, between Ball and Berry, Cr. 7 Cat. where it
was to be resolvd per Curiam, upon the View of many ancient
Precedents.

A Prohibition, Quare secutus est in Curia Christi-
rapidus de laco locodo, as for the Lay-day of Black-Acre, where he had
White-Acre in Satisfaction of Etches Time out of Mind as, if this
be found against the Defendant, the Plaintiff shall have Damages,
Co. Ragna Chatta. 499.

In a Writ of Ward of the Body and Land, Damages shall be
recovered. 27 E. 3. 79. b.

In a Writ of Account, as Receiver to Merchandize, he shall
render Damages for the Profit that he had, or might have made of
the Hony.

not recoverable, for it is founded upon a Faith and Trust, and is not brought for a Wrong.

D 28. [But]
Damages.

3 Lc. 230. pl. 511. 28. [But] In Writ of Account, as Receiver to deliver over to another, or to re-deliver, and not to Merchandise, there no Profit shall be given in Nature of Damages. 2 R. 2. Account 45.

Robinson, cites S. C. and H. 7, 11; and it was assigned for Error, that the Jury had assessed Damages, which ought not to be done in Action of Account; But the Book of Entries 22. was cited, where in a Writ of Account against one as Receiver for to render Account, Damages were given by the Jury for the Plaintiff; And in the Case of an Account against one as Bailiff, Damages shall be given; For if my Bailiff, by the Employment of my Monies, wherein he was Receiver, might have procured Profit and Gain unto me, but he neglects the same, he shall be chargeable to me to answer the same; And here in our Case, Damages shall be given Ratios Implicationes; And afterwards, notwithstanding the Exceptions, the Judgment was affirmed.

* Firth. Account, pl. 72. cites S. C.

* Fol. 175.

29. [56] In a Writ of Account, as Receiver of 20 l. if the Defendant comes the first Day, and is ready to account, and accounts, and is found in Arrears, yet he shall not pay any Damages nor Costs. Cr. 4 Ja. B. R. in a Nota per Curiam. 14 E. 3.

But if he pleads Never his Receiver, and after accounts, and is found in Arrears, he shall render Damages. Cr. 4 Ja. B. R. in a Nota adjudged. 3 E. 3. 160. b.

30. [But] In an Account as Receiver (as it seems) if the Defendant be adjudged to Account, and he will not Account, but lies in the Fleet for two or three Years, and then the Plaintiff prays his Judgment according to what he has counted, and has it, yet he shall recover nothing of the Profits, for the mean Time he was in Detention, and this proves, he shall not recover Damages in an Account. 14 E. 3. Account 109.

32. West. 2. cap. 36. 13 E. 1. None shall procure any to distrain another to make him appear at the County Court, or any other Inferior Court, on purpose to vex him and put him to Charge and Trouble, in Pain to make Fine to the King, and to pay to the Party grievous, treble Damages.


34. In Cessavit, the Demandant shall recover Damages upon the Arrears and Surety tender'd after Verdict, and before Judgment. Br. Damages, pl. 147. cites 21 E. 3. 23.

35. Trespass is brought by A. against B. Vi & Armis & contra paenam, for the taking and detaining of Charters; and he doth not shew in the Count, what Lands the Charters concern; the Defendant pleads Not Guilty; a Verdict is found for the Plaintiff. He has Judgment for 100 l. Damages; It is affirmed in Error, because that this Action is Trespass, in which Damages only are recoverable, and not the Charters; and also because no Exception was taken to the Declaration before Verdict. Jenk. pl. 39. cites in Marg. * 21 E. 3. 28. and Fitzh. Trespafs, 213. 10 All. 3.

4 This was Trin. 21 E. 3. 28. a. pl. 26. Fitzh. Trespa.s, pl. 213. cites Trin. 21 E. 5. 28. but not 10 Aff. 3. which is not the S. P. and so Jenk. seems misprinted.

36. In Ejectment of Ward the Proclamation was returned, and the Plaintiff recover'd the Ward, and had Writ to in-quire of the Damages, ubi per Statutum non dantur in hujusmodi causa. Br. Ejectione &c. pl. 6 cites 24 E. 3. 33.

37. In Replevin the Defendant avow'd upon J. N. who came Gratias, and joined to the Plaintiff, for that he had lost'd to the Plaintiff for Years, which yet continues, and they declined', and well, and the Tenor, who was Plaintiff, recovered the Damages only; for he was distrain'd, and was Sole Plaintiff, and had all the Loans by the taking of his Beasts. Br. Damages, pl. 172. cites 45 E. 3. 7.

38. Though
38. Though a Man declares of Damages in Account, yet he shall not recover Damages in Action of Account, but in Appeal of Mayhem a Man shall not count of Damages, and yet he shall recover Damages. Br. Chal-
lenge, pl. 192. cites 10 H. 6. 18.
39. In Per<nedon of Rent, the Demandant shall not recover Arrears; For Damages are not given in this Action. Br. Damages, pl. 14. cites 33 H. 6. 47.
40. Falle Imprisonment for imprisoning the Defendant till he be made an Obligation of 40 l. by Durels to the Defendant and others Ignitos, and held pl. 119. cites for the Obligation is not the Effect, but the Imprisonment, and of this he shall recover Damages, and not for the Obligation; for he is not thereof yet damned, and may plead Durels when it is fixed, but of Imprisonment, till be makes Fine, he shall recover Damages for both then; for he is grieved by the Fine prefently; contra by Obligation. Br. Faux Imprisonment, pl. 20. cites 2 E. 4. 19.
41. A Man shall not recover Damages for the Issues and Profits, in Diff al seas} an Action upon the Statue of 5 R. 2. but only for the Entry; For the Action is, Quod ingregilis et, ubi Ingresflus non datur per Legem. Br. Damages, pl. 120. cites 2 E. 4. 24. for damage recover Damages for the first tortuous Entry, but not for the mean Profits in this Action, be made a Retrop; And here note, that also he shall recover his Costs of Suit, Expense Littis, which Litt. doth include within the Words, (Damages &c.) Co. Litt. 257. a.
43. In Warrantia Charter, & Curia Claudenda, the Plaintiff shall recover the Warranty, and the Incloflure and Damages. Br. Damages, pl. 118. cites 16 H. 7. 9. 10.
44. By the Common Law a Man could not recover Damages in a Real Action. Br. Damages, pl. 143.
Regularly in Personal and Mixt Actions Damages were to be recovered at the Common Law, but in Real Actions no Damages were to be recovered at the Common Law, because the Court could not give the Demandant that which he demanded not, and the Demandant in Real Actions demanded no Damages, neither by Weit nor Count; but'dex non reddis plus quam potens ipse requisit, and it is a Maxim in Law, Que do< ne done plus que fait demande; and therefore in Real Actions, where Damages are given by this Act, viz. Statue of Gloucester, the Demandant shall recover Damages Pe-
Dente brevi, because the old Form of the Count remains. The Words of the Act are, " Against " him who is found Tenant" He may be Tenant by Title, by Wrong, or by Act in Law. 2 Infl. 386.
47. In Damage.
46. In a Writ of Recaption, Damages shall be recovered for the second Dis-trefs taken. F. N. B. 71. (E)

47. Upon a Writ De Securitate Pacis, and the Plaintiff shall recover Damages. F. N. B. 80. (A)

But he shall not recover Damages as for Loss of a Seige-nary or Court; for the seignary remains, and the Loss of the Court is only pro hac Vice. F. N. B. 98. (M) in the new Notes there (f) cites 17 E. 5. 31. 57.

48. If a Man recovers in a Precip in Capite by Default, where the Lands are not holden of the King, nor has not the Lord's Licence to sue in C. B. the Lord shall have a Writ of Dischiet, and recover Da-

49. In Forchile Entry upon the Statute of 8 H. 6. where one entereth with Force, or where he entereth peaceably and detaineth it with Force, or where he enthrh by Force, and detaineth it by Force; without any regrets the Plaintiff shall recover treble Damages, as well for the mean Occupation, as for the first, by Force of the Statute. Co. Litt. 257. b.

50. The Plaintiff in Account shall not recover Damages, for the un-certainty of his Demand; But Hales said, that the Books are agreed, that if the Defendant pleads in Discharge of the Account before the Auditors, upon which they are at Issue, and found for the Plaintiff, in this Cafe he shall recover Damages; For they are at Issue upon a collateral Matter. Dal. 18. pl. 12. Anno. 3 & 4. P. & M. cites Trin. 14 E. 3. Fitzh. Account. 109. and Trin. 2 H. 7. 13.

51. Error of a Judgment in Replevin, where the Defendant avow'd for an Effray, for that the Defendant had Return awarded, with Costs and Damages, whereas no Costs are given by the Statutes of 7 H. 8. or 21 H. 8. The Court doubted of it, but conceived it was Error. Cro. E. 257. pl. 36. Mich. 33 & 34 Eliz. and 329. Trin. 35 Eliz. B. R. Hallip v. Chaplen.

52. In an Action against a Receiver, upon an Alias Capias in B. R. the Plaintiff declar'd of a Debt due to him &c. and had Damages given him for his Debt, because by this Receiver he lost it, though the Writ is only in Nature of a Plea of Trespass, and though it was not shown, that the Receiver knew that the Plaintiff would declare for this Debt. But if in this Cafe the Sheriff &c. had suffered a negligent Escape, he should only be charg'd with the Damages in the true Plea, as the Writ fupposeth, and not for the Debt. Lane. 70. 71. Trin. 7 Jac. in Scacc. Kent v. Kelway.

53. In an Account a Man shall recover Damages upon the second Judg-ment. Arg. fai'd to be clear. Mar. 99. in pl. 171. Trin. 17 Car. C. B.

54. In an Action of Debt for 2001. upon the Statute 2 E. 6. for Tribes of Land in the Parish of Rington, alias, Royton, the Defendant plead-ed the Statute 31 H. 8. and that the Lands were discharged in the Hands of the Prior of Mount Bretton, at the Time of the Dissolution, and Issue joined upon the Discharge; and upon a Trial at Bir, the Defendant not making good his Plea, the Court ruled the Value to be taken as confessed, because the Issue is joined upon a collateral Point. And the Defendant took not the Value by Protestation, and so the Verdict was given for 2001. but neither Damages nor Costs. All. 88. Mich. 24 Car. B. R. Bowles v. Broadhead.

55. Attachment upon a Prohibition, and the Plaintiff declared, that the Defendant fined in the Ecclesiastical Court after a Prohibition granted, for the Profits of the Office of Register, to the Archdeacon of Huntington;
Judgment by Default, and a Writ of Inquiry, and Damages and Costs tax'd; it was objected, that Damages &c. could not be given in a Prohibition; but Judgment was given for the Plaintiff, for the Damages and Costs. 3 Lev. 360. Patch. 5 W. & M. in C. B. Heywood v. Foster. 36. In Case for removing a Distress for Rent, and Not Guilty pleaded, a Verdict was for the Plaintiff, whereupon he prayed his treble Damages, on the Statute 2 W. & M. Suff. i. cap. 5. But because he did not show that the Distress was appraised, nor conclude contra formam Statut., he could not recover them, and Judgment accordingly. Ld. Raym. Rep. 342. Patch. 10 W. 3. C. B. Anon. 57. Action brought in the Court of C. B. upon several Promises; Judgment by Default; Writ of Inquiry executed, and 424. Damages given. Error brought in the Court of B. R. Plaintiff in Error did not proceed. The Court was moved upon 3 H. 7. cap. 10. that the Defendant in Error, should, besides the Costs, have Interest allowed him, for the Sum adjudged due to him, pending the Time of the Writ of Error from the Judgment. It was resolved by the whole Court, that the Defendant upon a Writ of Error, brought into B. R. should not have † Interest allowed him by way of Damages, for the Sum adjudged due to him, from the Time of the first Judgment, pending the Writ of Error. For at the Time of making the Statute 3 H. 7. cap. 10. which gives the Damages upon the Writ of Error, all Interest was reputed unlawful; and therefore that Statute could not give it. In Fact, when Interest run highest, as at 10 per Cent. Interest has not been allowed. In Writs of Error brought into the Exchequer Chamber, Interest is never allowed; and a Uniformity in Practice to be wil'd and endeavoured. 10 Mod. 274. 278 Hill. 1 Geo. 1. B. R. Holroyd v. Ebizlon. 58. By the Common Law in every Action of Debt, Damages are given Occasionem Detentwris Debiti, either by Writ of Inquiry, or by the Court. Per Parker Ch. J. 10 Mod. 277. Hill. 1 Geo. B. R.

(P. 2) In what Actions nothing shall be recover'd besides Damages. Or what more shall be recover'd.

I N Reception a Man shall recover Damages only. Br. Reception, pl. 3. cites 47 E. 3. 7. 2. In Recous nothing shall be recover'd but Damages. Br. Recous, pl. 28. per Brooke. 3. An Assumpsit gives only Damages and Costs, and varies from a Judgment for Debt, which gives the Debt, Damages and Costs, where a Debt is due. Jenk. 331. pl. 65. cites Cro. J. 544. 17 Jac. Heath v. Dauntley.
(Q) For what Things the Damages shall be said to be given.

1. If an Action upon the Cafe be brought for speaking of Words all at one Time, and upon Not Guilty pleaded, a Verdict is given for the Plaintiff; though some of the Words will not maintain an Action, if any of the Words will maintain the Action, the Damages may be given in one, for it shall be intended that the Damages were given for the Words which will maintain the Action, and only increased for the other Words, and that they are mentioned only for Aggravation.

2. But if the Action be brought for several Words spoke at several Times, and the Action will not lie for the Words spoke at one Time, but will lie for the Words spoke at another Time, and upon Not Guilty pleaded, a Verdict is found for all the Words, and more Damages given, this is not good.

3. In an Action upon the Cafe for Words spoke at one Time, if the Defendant pleads Not Guilty as to part of the Words, which Words will not maintain an Action, and he justify's the other Words, and the Plaintiff replies De non Tort Demine, without such Cause, and a Verdict is found for the Damages; in this Case more Damages may be given, because now in part, by the Confession of the Party, and in part by the Jury, it is found that he spoke the Words as they are alleged in the Declaration, fictit, at one Time, and then it shall be intended the Damages were given for the Words, which will maintain the Action, and that the other Words were but for Aggravation. 

4. In an Action upon the Statue of Monopolies, if the Plaintiff declares, That the Defendant, colore cupiditum Proclamationis &c. 7 Jan. 20 Car. procured the Plaintiff to be taken and imprisoned, and to be confined in Prison for twenty Weeks next ensuing, and certain Wines of the Plaintiff, till he made a Fine for the Deliverance, and by Colour aforesaid, after, fictit, 14 Jul. 20 Car. supraedit' tales & tanta mina de imprisonamento corporis Quennus, ad tune & ibi dem ei intulerunt, quod Quena per longum tempus, fictit, a præd. 14 Jul. Anno 22 supraedito, utique diem imperationis juris sit, fictit, 14 Junii, Anno 21 Caroli Regis, circa negotia sua necessaria palam intendero non audierat, and upon Not Guilty pleaded, a Verdict is given for the Plaintiff, and more Damages. In this Case the Declaration is repugnant as to the Menace of Imprisonment, if it be interpreted according to the Words, inasmuch as it is alleged before that he procured him to be imprisoned 7 Jan. 20 Car. and then it is said, that afterwards, fictit, 14 Jul. 20 Car. he menaced &c. which was before Jan. 20 Car. and after says, that he dealt not go about his Business, a præd. 14 Jul. 20 Car. till the Bill exhibited, so in Words repugnant, yet inasmuch as in Law, when he alleges the Day, and after says, that afterwards, fictit, 14 Jul. 20 Car. this which comes after the fictit, * being contrary to that before alleged, shall be void, and a void Allegation, and then the Reference thereof, as to not having to go about his Business, having Reference...
Damages.

291

To the said void Allegation of the 14 July till the Bill ex- ized to be void) Time mentioned in both Places being in 

sented, is also void, and then by Law it shall be taken as if no more had been alleged, but that he be accused him, by which he be erect not go about his Business for a long Time, which would be sufficient of it self without more, and then in this Case it shall be taken and intended by the Law, that the Jury gave Damages for that as it was alleged in Law materially, and not as it is alleged under the sci- ent, and so that they gave Damages for menacing him, by which he be erect not go about his Business, and to the Damages well aflected. Ant. 23 Car. B. R. between Sims and Gregory, adjudged for the Plaintiff, after several Possions in Arrest of Judgment. In the Jury, March. 23 Car. Rot. 274.

Consideration of the Jury in taxing the Damages; and Judgment was given for the Plaintiff.

5. In an Action upon the Case upon a Promise, if the Plaintiff de- All. 67. clares, That whereas the Defendant was potelled of a Shop in B. Proved v. Goods, &c. C. the Defendant advanc executed the Art or Mystery of a Grocer, the De- fendant, in Consideration the Plaintiff would marry C. the Daughter affirmed of the Defendant, affirmed and promised to pay so much Money for B. R. her Portion, and to much for Apparel, and that the would transfer, Prag. Angler, would turn over to the Plaintiff negotiationum Gemell v. Goof, Angler, her Trade in B. pread; and the said Shop of the Defendant there, and so much of the Goods and Chattels of the Defendant, in the said Shop, which should be worth 10 l. and that she would not, at 27. ever, the Plaintiff in B. R. any Time after, exercise her said Trade in B. aforesaid, and that the Roll J. did, would lend to the Plaintiff 10 l. till a certain Time, and assigns a that if Dis- Brench in all; and among other Things, that the non transfable, Angler, did not turn over to the Plaintiff negotiationum Gemell for some pread in B. aforesaid, nor the Shop pread; and all found for the Plaintiff, and noe Damages given, and though it is impossible, to assign aforesaid, consequent, her Trade, yet it shall be inten- tended, if it be void and impossible, and signifies nothing, and it is impossibile, of no Sense or Meaning, that the Jury did not give any Damages for the Damages it Tinn. 24 Car. B. R. between Goof and Pragwel, adjudged in a Writ of Error upon a Judgment in Banco, and the Judgment affirmed. Intratur. P. 24 Car. Rot. 217.

6. In an Action upon the Case, if the Plaintiff declares, That Sy. 27. whereas the Defendant had bargained and sold 40 Tun of Currants, at Brier v. the Rate of 46s. 8d. for every 100 Weight, to be delivered to the Plaintiff within three Months then next ensuing, discomputando ex jurament, S. C. ad- codem pretio pro quattuor mensibus, the Defendant, in Consideration the — Ibd. 32. Plaintiff had then paid to him in Hand 400 l. in Part of Payment, and affirmed to pay the Residue to be due, discomputando ut præsentur, for the Currants upon the Delivery of the Currants to the Plaintiff; the S. C. ordered Defendant, in consideration inde, affirmed to deliver to the Plaintiff to be regarded the Currants within three Months then next ensuing, and aligns a Brench for the Non-delivery of the Currants at the End of three Months, according to the Promise, and upon Not Guilty pleaded, a Verdict is found for the Plaintiff, and Damages assailed generally. And though it was objected, that it is not known what is intended by the Words in the Bargain, to pay 46s. 8d. for every 100 l. discom- computando ex pretio pro quattuor mensibus, yet although the Court does not know what is intended thereby, yet it is well known to the Per-
Damages.

Merchants, and all is to be given in Damages, and if it be not of any Sense, nor is known what is intended thereby, then it shall be intended by the Court, that the Jury did not give any Damages for it. Mich. 23 Car. B. R. between Brewer and Southwood, adjudged per Civilian. Intratru. Hill. 22 Car. Roi. 1372.

7. If an Action be brought for Words spoken at one Time, and for other Words spoken at another Time, and for the Words spoken at one Time an Action In pl. 11. Mich. 23 Car. B. R. entirely asliffed, no Judgment shall be given, for the Action is brought for all the Words, and Damages for all; Per Popham. Cro. E. 329. pl. 2. in Case of Brook v. Clark, cites it so held Eliz. in the Ld. Adjuv. in Case of Penfion v. Gooday. — S. P. Arg. Cro C. 217.

in pl. 10 where the Case was, that the Defendant said of the Plaintiff, being a Merchant, viz. Thou art a Rogue, and a beggarly Rogue, and I shall produce a Banknote before the next Term; and at another Day be said of the Plaintiff to J. T. Tools to wit, for he will be thy working. Found for the Plaintiff, and Damages not. It was said, the second Words were not actionable, and then the Damages inter and not well given. Resolved, that the Words spoken were not actionable, and then the Damages inter not well given. Resolved, that the Words spoken at the second Time, as at the first, were actionable, and tend to the same Sense, and aggravate the first Words; Adjudged for the Plaintiff. Cro. C. 217. pl. 19. Mich. 7 Car. B. R. Jaxon v. Tanner.

S. P. held accordingly by Brampton J. Mar. 43 in pl. 76. Trin. 15 Car. in Case of Thurston v. Ummixon.

3. A Justice of the Peace brought an Action upon the Case, against the Bishop of Coventry and Lichfield, because he wrote a Letter to the Earl of Leicester one of the Privy Council, wherein were certain scandalous Things of the Plaintiff; upon Not Guilty, it was found for the Plaintiff, and 300l. Damages; Resolved, that although only some of the Words will be Action, yet the Damages are well ascribed, because they are put in only to increase the Damages in Circumstance; and Judgment for the Plaintiff. Mo. 141. pl. 238. Patch. 25 Eliz. Broughton's Cafe.

9. If the Plaintiff declare, That he bought of the Defendant divers Bona & Catalla, viz unum Tulumus letis, Anglice a Field-Bedhead, with a Testern and Curtains of Sely; unum Campan, vocat a Canopy, &c. and that the Defendant asme to deliver Bona Præs, but bad not &c. and there is a Verdict for the Plaintiff, and general Damages; it shall not be presumed, that any Damage was given for the Testern and Curtains, which were not alleged pyaeius, but only expiatory; and this Expiation is too extensive, for tulumus signifies the Bedhead only; and by 36 E. 3. all Pleadings ought to be entred in Latin; adjudged. 10 Rep. 130. a. 132. b. Mich. 2 Jac. Osborn's Cafe.

10 In Action on the Case for Words, there were divers Words spoken some of which were Actionable, and some of them not, and the Jury have given intire Damages for all the Words in General. This being ascribed for Error, the whole Court agreed in this, that some of the Words were Actionable, and some of them not, and that the Damages given by the Jury in general, shall be said to be given for the Words, which are Actionable, and not for the other Words, and fo the Judgment well given, and fo by the Rule of the Court, Judgment was affirmed. Bult. 37. Trin. 8 Jac. Lynker v. Stanwell.

Where a Man speaks Words which are in Part actionable, and others only put in for Agravation, and Damages is affirmed for the whole, it is good; Per Branston, Ch. J. Mar. 49. In pl. 76. Trin. 15 Car. Thurston v. Ummixon.

11. In an Action of Trespass for beating wounding and imprisoning of the Plaintiff, the Defendant pleads Not Guilty, as to Part, viz as to the Beating and Wounding, and as to the other Part, viz. Imprisoning, the Defendant justified, that what was done by him, was then done as a Conserver, and in the Execution of his Office, and so justified, the Jury found the Justification good; but find nothing of the other Matter, to which
Damages.

which Not Guilty was pleaded, and yet they ass't Damages to the Plaintiff, for the Wounding, for which they did not find the Defendant Guilty, and so the Jury gave Damages for that which was not found by them, which was void, there being no Ground for them to give the Damage, and so by the Rule of the Court, this giving of Damages for the Wounding, which was not found, is erroneous, and the Judgment of the Court was therefore for the Defendant, Quod Querens nil capiat per billam. Bult. 64. Mich. 8 Jac. Simplon v. Claye.

12. If Words were spoken at several Times, and some of the Words were Actionable, and some others not, and two several Actions brought for those Words, and both of them found for the Plaintiff, and Damages intire given, this is not good; But otherwise it is where there is but one Action brought for all the Words, and in the Declaration laid to be spoken at several Times, and intire Damages given, as in this Case, this is good, and the Damages well given; Per Haughton, J. and therefore by the Rule of the Court, Judgment was given for the Plaintiff. 3 Bult. 283. Hill.

13. H. brought an Action of Assault and Battery against L. for beating of his Servant, by reason whereof he lost his Service &c. for a long Time; and declares, that the Battery was done on the 19th of January, in the 16th Year of his Majesty's Reign that now is, and that he lost his Service for a long Time, viz. for the Space of six Months then next following; and after a Verdict for the Plaintiff, and entire Damages alleged, it was moved, that the Original did occur Before the End of six Months. And yet the Court gave Judgment for the Plaintiff, notwithstanding this Exception, for that the Viz. is more than needs. Hob 284. pl. 365. Tng. 17 Jac. Mefflyne v. Parnden.

14. A. covenanted with the Plaintiff to do two Things. The Plaintiff assigned the Breach in the not doing one of them, and concluded, that he was disannulled by the Conclusions Pro Fractione Conventionis praedicat to such a Sun. The Jury alleged Damages intirely viz. Pro Fractione Conventionis praeclat. It was mov'd, that this was a Covenant divided into two Parts, and that this alleging the Damages includes both Parts, and therefore is erroneous; but Montague, Ch. J. and Haughton, J. held, that it shall have Relation only to this Part, in which the Breach is assigned.


15. In Dibs upon a Concessi Sobrevee, Judgment was given for the Plaintiff. It was assign'd for Error, that there wanted the Words Pro Mols & Cottages, in the assailing the Damages; and so it does not appear, for what the Damages were assailed; And for this the Judgment was reverted, ibid. Sty. 198. Hill. 1649. Paffall v. Spiring.

16. In Dibs upon 2 B. 6 for Tythes of 70 Acres of Land &c. the Jury as to 66 acres gave Damages &c. and as to the five Acres residu give Damages &c. whereas it ought to have been as to the four Acres residu, yet this being only a Mischassiit of the Jury, and no Damage accrues to any by the Mischassiit, the Plaintiff had Judgment. Sty. 296. Mich. 1651. Creuit v. Burgis.

17. A. was indicted to F. S. in 61. and B. (A's Son) was indicted to F. S. in 63. J. in Consideration that F. S. would forbear Suing for the Debts for a Month, promised to pay both Debts. J. S. brought an Action for the 69 l. and bad Judgment. For it shall be intended, that the 69 l. are given as Damages for the 61 and in this respect the Plaintiff had good Cause of Action; For the Assumpit being to pay 69 l. is intire, and cannot be apportion'd by the Plaintiff, and therefore upon this Assumpit he cannot have Action for the 61 only. Sid. 39. pl. 8. Patch. 13 Car. 2. C. B. Bell v. Jolly.
Damages.

294


18. In Trespass the Plaintiff declared of an Assault, Battery and Wounding, the Defendant pleaded Not Guilty, Quoad the Force, and As to the Assault and Battery &c. mulliter Manus impotuit; upon which they were at Ilfue; and the Jury found the Defendant Guilty, de injuria sua propria, and so recited the whole Declaration of the Assault, Battery and Wounding, (where the Wounding was not in Ilfue,) and gave Damages Occasione Tranfgressioinis illius to 20l. Error was brought and affirmed, and all the Court præter Windham held, that it shall be intended, that the Damages are given for all in the Declaration, viz. the Wounding, which was not in Ilfue, and so it is Error; For the Plaintiff might have demurr'd on the Plea. Sid. 96. pl. 23. Mich. 14 Car. 2. B. R. Calvert v. Arnold.

Raym. 220. Hamilton v. Bere, S. C. Judgment was that d, and afterwards arraigned, because the Jury was guided by the Per quod — 2 Sound 169. S. C. and because the Damages were tax'd Generally, which shall be intended according to the Declaration, and if it should be intended otherwise, it would be uncertain what Time should be intended, whether for a Month or two, or till the Action brought, or the Verdict given, therefore Judgment was arreav'd per Cur. abintente Kightly Ch. J. — Comyn's Rep. 232. pl. 129. Mich. 2 Geo 1. cires &c. But in General against an Apprentice for going away out of his Service before his Time, per quod he left his Service for the Term, which is not yet expired, the Plaintiff demurred. Per Twislen, though this would be naught after a Verdict, yet being on a Demurrer it may be helped; For the Plaintiff may take Damages for the Departure only, and not for the Loss of Service during the Term, and then it will be well enough, and Judgment Nihil. Mod. 271. pl. 22 Trin. 29 Car. 2. B. R. Horn v. Chandler.

Comb. 195. S. C. Horner v. Bridges, and per Ch. J. and Eyre the Continuando is void, because it is impoſitable, and the Damages shall be intended for the Trespass only.

20. Trespass &c. upon Not Guilty pleaded, there was a Verdict for the Plaintiff; and it was moved in Arrest of Judgment, that the Declaration was ill; for it was for erecting and continuing 300 Perches of Stone Wall on the Soil of the Plaintiff 2 April Anno 2 W. & M. Tranfgressio juris praed. quoad Continuacione nulli praed. a 22 die Februarii Anno Primo W. & M. etq; diem exhibitionis Bille continuando, so that the Continuance is laid for one Year before the Commencement of the Trespass, and entire Damages being given all is void. Sed non accessor. For this Continuando being for a Time before the Commencement of the Trespass, is senseless and void, and it cannot be intended that any Damages were given for that Matter, which in itself is void; therefore the Plaintiff had Judgment. Carth. 230. Pech. 4 W. & M. in B. R. Bridges v. Horner.

21. Trespass for taking and carrying away &c. Continuando totan Tranfgresstonem praed. and it was moved by Cartew, that there could not be any Continuance as to the Caption. Holt Ch. J. said, It was resolved in the Case of Butler v. Hodges, in this Court, that no Damages should be intended to be given for that which is void, so here as to the Caption, which will not admit of a Continuando, Comb. 577. Trin. 8 W. 3. B. R. Hayward v. Willon.

(R) How
(R) *How much Damage shall be recovered* [In Respect of the Declaration.]

1. In Trespasses the Plaintiff shall not recover more Damages than *Br. Da._ the Plaintiff hath counted of, though the Jury give more; for when the Plaintiff knows how much he is damaged, better than any S.C. where the Plaintiff counted of 101. Damages, and the Jury found 15 1. he shall recover only 10 1. — Br. Damages, pl. 2. cites S. C. where the Jury may ari be, but not increas. — Firth. Damage, pl. 16 cites S. C. and with this accords Alough and Newton clearly, 18 H. 6 [but it seems it should be according to Rull 8 H. 6. 7. 2 pl. 11] and cites 22 E. 5, adjudged at Here. || This should be 10 Rep. 116. — Jer. 298. pl. 22. S. C. and that Plaintiff released the Surplus of the Damages, and then had Judgment for the Damages counted of, and the Costs. Damage are for the Wrong done before the *Writ* purchased; but Costs are *Pro Expiens Litis. Adjudged and affirmed in Error.*

Br. Damages, pl. 21. cites 42 E. 5. 7 S. F. — Ibid. 179. cites S. C. — *Ow. 24.* Patch 1; Ellis. Anon. cites S. C. where in Trespass of Assault and Battery the Plaintiff declared to his Damages of 20 l. and the Jury found for the Plaintiff, and gave 50 l. Damage; and by the Court, the Plaintiff shall recover no more than he has declared for, and this ought to be done of Course by the Clerks.

Trespass of a Register (and Bones of Writings &c.) taken ad voluntam 101. The Defendant pleaded Not Guilty, and it is *found Guilty ad Damnum* 20 l. and yet well, per Cur. For though it be not good but for 101, he may be damaged by the taking in 100. *Quod suit Conceffum.* Br. Damages, pl. 122, cites 7 E. 4. 51.

But where he counts of Damages of 10 l. he shall not recover more than he counted. Ibid. cites Patch. 2 H. 6. 7.

2. [So.] If the Tenant vouches, the Defendant shall not recover more Damages against the Douchee than he hath counted of; for the Douchee counts in lieu of the Tenant, and the Judgment is given against the Tenant. 8 H. 6. 11.

3. But the Plaintiff in Detinue may recover more Damages against the Garnisher than he hath counted of; for his Count was not against the Garnisher, but against the Defendant, and Damages against him are for the Delay after the Count. 8 H. 6. 5. 14. by the Interpleader of the Garnisher is wholly excused of Damages, and the Garnisher has taken this Matter upon him. — 10 Rep. 117. cites S. C. that in Detinue the Plaintiff shall recover more Damages than he hath counted of; [but says nothing against the Garnisher] — Firth. Damage, pl. 21. cites Mich. 18 H. 6. 4 S. C. and says that the better Opinion was, that he shall recover Damages as the *Inquest* shall fix; for the Garnisher shall recover Damages against the Plaintiff as the *Inquest* shall tax, and by the same Reason the Plaintiff shall do the same against him; and besides, the *Tort* which is in the Garnisher, is the Detinue, which is after the Garnishment; for, for the Detinue before he shall not recover any Damages; and cites it adjudged 7 H. 4. that the Plaintiff shall recover Damages against the Affiance. — 10 Rep. 117. cites S. C.

4. In Trespasses for refusing a Distress, to his Damage so much, if the* Defendant justifies the Reckless upon special Matter, upon which it is pl. 1. demurred for the Plaintiff, and adjudged for him, he shall have Damages as he hath counted; for the Defendant hath acknowledged the Trespass, and hath not denied the Damages. 21 C. 3. 4. b. [40 b.]

5. So in an Attachment upon a Prohibition, if the Defendant acknowledges all the Trespasses contained against him, the Plaintiff shall recover Damages as he hath counted. 21 C. 3. 40. b. adjudged.

6. [So.] If a Writ for substituting his Suit to his Mill, in the Debtor and Solicet to his Damage 40 l. if the Defendant says he cannot deny it, the Plaintiff shall recover Damages to 40 l. as he has counted, he
cause this Acknowledgment is as much as if he had laid, that he cannot deny that there is as much Damage as he hath counted. 29 C. 3. 13.

7. [So] In a Writ of Ward, if the Defendant acknowledges that the Plaintiff hath a Right to the Ward, the Plaintiff shall recover the Ward and Damages as he hath counted. 38 C. 3. 21. adjudged. Vide contra. 1 C. 3. 4. Annuity.

8. In an Action of Waste, if the Defendant demurs upon the Declaration, and it is adjudged against him, yet a Writ shall issue in quire of the Damages. 34 H. 6. 8.

9. The Jury may give as much Damage to the Plaintiff as he hath counted, and further give to him Costs by it itself, though the Costs exceed the Damages named in the Declaration; for the Damages are given for the Wrong for which the Action is brought, and the Costs for the Charge of Suit, the one before the Suit, and the other in and for the Suit. 31 Jac. B. R. between *Eagles and Vales, per Curiam, in an Action upon the Suit upon an Account. Co. 10. Robert v. Pilfield, adjudged in Trepass. Contea. D. 39 Ed. B. R. per Curiam. 12 H. 7. Kelway 21. b. dubitare.

It may be, that the Suit of Suit, through long Dependence, exceeded the Debt. — Yelv. 72. Vae v. Esq. S. C. & S. P. resolved.

If G. J. 207. pl. 5. Dawkes v. Pilfield, S. C. & S. P. resolved per tot. Cur. But for Damages only they may not exceed what is Plaintiff himself has declared, and denied; H. 7. 16. that the Damages and Costs assessed by the Jury ought not to be for more than the Plaintiff counts, to be Law; and so a Judgment in B. R. was affirmed in the Exchequer Chamber. — Cro. E. 268. pl. 2. Trin. 59 Eliz. B. R. Rivers v. Ooskirk, S. P. For non conflat at the Time of the Declaration what the Suit of Suit would amount unto. —— See pl. 11. infra.


* Sr. Damages, pl. 203. cites S. C. & S. P. but if they do, it is good for so much as is contained in the Count; Per Brian; but all agreed that they should not give Costs beyond the Sum in the Court. — 2 Inf. 288, 289. Ld. Coke, on the Statute of Gloucester, 6 E. I. pl. 1. cites S. C. and says, that Costs in Law are so coupled together as they are accounted Parcel of the Damages, and therefore if the Plaintiff in Trepass declare to the Damages of 20 Marks, and the Jury give 20 Marks for Damages, and 20 Marks for Costs, yet shall the Plaintiff recover in all but 20 Marks; for Damages, and Costs must not exceed the Damages which the Plaintiff demands by his Count, and the Entry reciting both the Damages and Costs, Que damn in ratio et antegn. &c. — In Trover it was held, that if the Damages and Costs had been intrinsically affected as more than mentioned in the Declaration, it had been ill; for non confart but that the Damages exceed the Damages mentioned in the Declaration; and Judgment accordingly. Cro. E. 568. pl. 2. Trin. 59 Eliz. B. R. Rivers v. Ooskirk.

11. But the Jury in the Cafe aforegoing cannot tax the Damages and Costs together to more than is contained in the Count, for then it will not be known how much they gave for Damages, and how much for Costs; for perhaps they might give more for Damages than the Plaintiff had counted. * 13 H. 7. 16, 17. Co. 10. Robert Pilfield 117. b.

12. In an Action of Debt upon a Bill, if the Plaintiff declares to his Damage of 10. and the Judgment is given for the Plaintiff by Nihil dicti, and the Judgment is, that the Plaintiff shall recover Debibum fum praed', & Damna sua Occasione Detentionis Debiti illius ad 121. 108. cite, &c. Quereunt ex affenius suo per Curiam hic adjudicat' &c. Though here are more Damages than he hath counted for, yet because it is the usual Course for the Court in such Cases to 

Fol. 477
Damages.

297

tar Damages and Costs, it is good; for it may be that all was for Costs, and it shall not be intended that the Court hath done otherwise than they ought. Rich. 8 Car. 5. R. between Sir Richard Greenvile and Sandwich, Adjudged in a Writ of Error upon a Judgment in Bancroft. Intraur. Palsch. 8 Car. Rot. 250. Trin. 24. Car. between Parsons and Batchelor, adjudged in a Writ of Error upon a Judgment in Bancroft. Intraur. Palsch. 22 Car. Rot. 381.


14. In Waffe the Jury found to the Damage of 40l. where the Plain-
tiff had declared but to the Damage of 20l. The Damages here were trebled, Arg. Fizh. Damages pl. 7. cites H. 34. E. 3. and says he believes the Rea-
son is because the Statute is that he shall recover the Treble of that which he supra. 7. Jury shall tax; for in other Action he shall not recover more than 2. and denied he counts &c.

Statute is to be intended of Damages lawfully taxed; and that so it was held by Lt. Dyer, Trin. 10 Eliz. in Waffe brought by the Lord Aberpavent that the Jurors cannot value the Waffe more than the Plaintiff has counted of; and that with this accords 3 E. 4. Rot. 17; Though in some Cases he may recover more than counted of, As in Detinue. See pl. 5. supra.

15. If a Man brings Debt upon Obligation in London, the Marshalsea, or elsewhere, and is long delayed, and after is nonsuit, and brings Action after in Bank, he shall not recover Damages for the Suit elsewhere, but only for the Suit in Bank. Br. Damages pl. 59. cites 2 H. 4. 22.

16. In Detinue, the Plaintiff shall have no more Damages than he has declared for; for the Judgment is to have the Thing detained, and Damages for the Detention; it the Thing detained cannot be had, the Sheriff shall inquire de Damnisi, and the Plaintiff shall have Judgment for the Value and Detention upon, and according to the Sheriff's Re-

turn; That he cannot deliver the Thing by the Defendant's Fault. Jenk. 288. pl. 22.

17. Where an Avozvant was intituled to Two Parts only of the Rent and the Jury alleged Damages for the whole Rent, the Court held that the Avozvant could not have Judgment unless he release the Damages. Mo. 281. pl. 434. Mich. 31 &c. 32 Eliz. C. B. in Case of Barry v. Trevillian.

18. In Caeo on a Preamble the Plaintiff declared to the Damage of 10l. and upon Issue tried, the Jury gave 13l. which was more than the Plaintiff counted for, and Judgment was given accordingly viz. that the Plaintiff recover the 13l. by the Jury alleged; but it was reversed for this Cause in B. R. For the Law supposes the Plaintiff to know bett his own Damage and he shall never recover more than he counts for. But after such Verdict the Plaintiff had released all the Damages but those of which he counted, and then had Judgment, this had been good. This Record was removed from the Court of Northampton. Yelv. 45. Hill. 1 Jac. B. R. Perilval v. Spenser.

19. Error was brought to reverse a Judgment in Detinue because it was for greater Damages than the Plaintiff counted for. The Court held that the Writ of Detinue declared no certain Damage, there he shall re-
cover such Damages as the Jury find, but where the Plaintiff counts of a certain Damage, and the Jury do find greater Damages, there the Plaintiff ought to have no greater Damages than according to his Count, and not as the Jury finds, they finding greater Damages then the Plain-
tiff declared upon, and in this Action the Plaintiff declaring to his Da-
amage 150l. and the Jury finding for the Plaintiff and Damages 150l. and he having his Judgment for 150l. according to the finding of the Jury.
Damages.

Jury, and in more then he counted upon, the Judgment was reversed. Built. 49. Mich. 8 Jac. Hoblin v. Kimble.

19. In Real Actions the Plaintiff shall not count of Damages, because it is uncertain what they shall amount to and they shall be recovered Pendent Brev. 10 Rep. 117. a. Mich. 10 Jac. in Pillord's Cafe.

20. But in Personal Actions they shall count to the Damage, because they shall recover Damages only for the Tort done before the Writ brought, but not for any Thing done pending the Writ. 10 Rep. 117. a. Mich. 10 Jac. in Pillord's Cafe.

21. In Trepass found for the Plaintiff, the Jury gave him Half a Farthing Damage; it was moved in Arrest of Judgment that the Damage given by the Jury ought to be valuable, and that there is no such Coin; Sed non allocatur; and Judgment for the Plaintiff. 2 Roll. Rep. 21, 22. Patch 16 Jac. B. R. Marham v. Butler.

23. In Cafe the Plaintiff declared, that he was seized of several Parcels of Land, and the Defendant, Tenant at Will of one Parcel, and there being a Discourse between him and T. S. for the Sale of these Lands, he (the Defendant) said to T. S. that he would keep the Possession till the 17th Day of August, at which Day the Defendant said, the Plaintiff had no Title to that Parcel, but one G. D. had; and to the Bargain broke off. Adjudged; that though the Words were spoken of a Parcel of the Land, yet the Plaintiff shall recover Damages for the Loss of the Sale of the whole. 2 Roll. Rep. 447. Trin. 21 Jac. B. R. Egerton v. Whittington.

24. The Defendant being a Coachman broke a Pipe of Wine in the Street by his Careless Driving the Coach, by which a great deal of the Wine run out, and was lost, and promised the Plaintiff, that in Consideration he would forbear to sue him, that he would pay as much as he was damnsified. In Action on the Cafe upon the Promise, the Plaintiff in his Declaration did not set forth, how much the Wine was worth that was spilt; but adjudged, that the Defendant is bound to take Notice of the Damage, and the Jury have made it certain; and Judgment for the Plaintiff. Sry. 458. Trin. 1655. Fowke v. Prefcott.

25. The Plaintiff declares, that the Defendant in Consideration of 10l. promised to let him enjoy certain Iron Mills for Six Months; and it appeared that the Iron Mills were worth but 20l. per Annum, and yet Damages were given to 500l. by Reason of the Loss of Stock laid in; and per Cur. the Jury may well find such Damages, for they are not bound to give only the 10l. but also all the Special Damages. Raym. 77. Patch 13. Car. 2. B. R. Nurfe v. Barns.

26. Ward brought an Action against Hatton Rich de Uxorre aludstâ, and keeping her from him nigh such a Day, which was some Time after the exhibiting of the Bill, and concluded Contra Fornam Statuti. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, and the Declaration was held good, notwithstanding the Impertinent Conclusion of Contra Fornam Statuti, there being no Statute in the Cafe. Secondly, the Court resolv'd, that Judgment should be flayed; for the Jury shall be intended to give Damages for the whole Time mentioned in the Declaration. As in Trepass, with a Continuando to a Day after the Writ brought, the Plaintiff shall not have Judgment after Verdict, which gives Damages by Intendment for the whole Time declared for. And Twilden laid, these two Cafes were resolved; A Tradefman brought an Action in an Inferior Court for standing of him in his Trade, by which he lost his Custom within the Jurisdiction of that Court & Alibi, and it was held maintainable notwithstanding the Alibi; The other was an Action brought upon the Sale of several Things for divers Sums of Money, Quæ quidem Petitionem Summarum attinient at
Damages.

299

10 l. whereas rightly computed they came but to 9 l. The Jury gave Damages les than 9 l. and it was held good. But if the Verdict had been for 10 l. it had been naught. Vent. 103. Mich. 22 Car. 2. B. R. Ward v. Rich.

26. In Cafe Plaintiff declared, that the 2d of July 6 W. 3. he was pos.

sessed of a Meadow next adjoining to a River, and to another Close contiguous to thesaid River, which Time out of Mind ran through his Mea-
dow to an ancient Mill of the Defendant's, without any over-flowing refted. —

That the Defendant's 3d of August 6 W. 3. enlarged the Foundation of Carth 366.

S. C. and his Mill further into the River, whereby he fo obstructed the River, and exalted the Water, that it drowned the Plaintiff's Meadow, per quod he

left the Ufe and Profits thereof, from the aforesaid 2d Day of July to the — — — — — — — — —

Time of exhibiting the Bill. Not Guilty pleaded, and Verdict for the 442.

S. C. and Judgment arrested. And it was moved in Arreft of Judgment, that intire Da-
mages are given to the Plaintiff, and from the 2d of July to the 3d of

August, he had no Damages at all by his own flewing; and it shall

not be intended, that the Damages given by the Jury are only for the

Time after the 3d of August, for the Damages shall be understood to be the

given not according to Law, but according to the Allegation of the

Defendant, who layeth his Damage, as resolved in Harbin and Green.rselfed. —

Cafe Hob. 191. Moor 887. And first, all the Court, except Rookey, And the

seemed to think it well enough; for it may be the Plaintiff laid up his

Meadow for Grazs from the 2d of July; but after Judgment was ar-

refted; for though he might have the Profits from that Time, he notwith-

standing could not leave the Ufe, if he had not paid (Ufum) they might above as

have given Judgment for him. This Cafe is the very fame with Har-


27. In Trephals, Assault, Battery, and False Imprifonment, the Plaintiff declares, that the Defendant assaulted, beat and imprifoned the Plaintiff, the first of October 9 W. 3. and detained him in Prifon four Months. Upon

Not Guilty pleaded, Verdict for the Plaintiff, and intire Damages were given by the Jury. It was moved in Arreft of Judgment, that the Declaration was a Declaration of Mich. 9 W. 3. and therefore the Damages being intire, and given for the Imprifonment of four Months from the first of October, it appears that the Damages were given for Imprifonment after the Action was commenced. And Judgment was arrested. Ld. Raym. Rep. 329. Patch. 10 W. 3. Brasfield v. Lee.

28. In an Action upon the Statute of Wincefter, in which the Plaintiff showed he was robbed of a Bank Bill. Upon Evidence at the Trial Summer Allies to W. 3. at Bmtnwood in Elide, before Hattell, Baron of the Exchequer, he directed the Jury to give Damages for the whole Value of the Bill, which they did accordingly. Ld. Raym. Rep. 727. Wind.

ler v. Cheifsford Hundred.

29. Action upon the Cafe for diverting a Water-Courfe x Jan. x Geo. and continuing it to March 1715. Per quod the Plaintiff lost the Benefit of the Water-Courfe Abinde till Apr. time prox' sequen'. And after Verdict for the Plaintiff, it was moved in Arreft of Judgment, that intire Damages were given, when part of the Time was to come at the Time of the Trial; Set non allocatur; for per Cur. the Time mentioned March 1715, not being then incurred, it was impossible; for at the Time of the Action it was not possible that the Diversion of the Water-Courfe had continued till a Time then not come; and therefore when he alleges, that he lost the Benefit of the Water-Courfe till Apr. prox' sequen', this is also impossible, and therefore the Jury could not have any Consideration of it. Comyn's Rep. 231, 232. pl. 129. Mich 2 Geo. 1. Valden v. Hubbarb.

30. In
30. In an Action of Trespass brought by the Plaintiff in the Court of C. B. for entering on his (the Plaintiff's) Land 25 March 4 Geo. with a Continuando the said Trespass to the 25 March 6 Geo. (which was two Years &c. ad damnum &c. The Defendant justified, by the Command of one Green; the Defendant replied, and set forth a Surrender made to him (the Lands being Copyhold) and that he was admitted a whole Year before he brought this Action of Trespass &c. and at a Trial there was a Verdict for the Plaintiff; and the Jury gave Damages for that Year only, whereas the Plaintiff had declared for two Years Damages; and now, upon a Writ of Error brought, it was infirmit, that though the Plaintiff had a Verdict, yet if the Jury did not find enough, it is an insufficient Finding, and here they had found Damages only for one Year, where the Plaintiff had declared for two Years Damages, and the Jury cannot sever the Damages for which the Plaintiff had declared; but this was over-ruled by the Court, and the Judgment affirmed. 8 Mod. 78, 79. Trin. 8 Geo. Moor v. Thompson.

31. A Judgment in C. B. was reversed, because the Jury, on the Writ of Inquiry, had given Damages for a longer Time than laid in the Declaration, and also to a Time after the Writ of Inquiry was executed. 2 Ld. Raym. Rep. 1382. Pauch. 11 Geo. 1. B. R. Baker v. Bache.

32. The Judge certified the Damages (which were 50l.) to be excessive; but the Action appearing to be brought for a very meritorious Prosecution for Felony, and the Plaintiff having been imprisoned and tried for Felony, the Court were of Opinion, that in the Nature of the Thing, the Damages appear'd to be moderate, and therefore refused to grant a new Trial. Barnes's Notes in C. B. 312, 313. Mich. 7 Geo. 2 Anon.

(S) What Damages shall be given; and for What.

1. W H E R E a Man brings Action, and declares of False Imprisonment till be made an Obligation of 40l. he shall not recover Damages for the Obligation, but for the Imprisonment; for he is not griev'd by the Obligation, till he shall be impailed, and there he may plead Duresfs, and e contra of Imprisonment till he makes Fine, he shall recover Damages for the Imprisonment and Fine; for there he is griev'd by Fine in Fact, which is tort executed. Br. Damages, pl. 119. cites 2 E. 4. 21.

2. A Man shall not recover Damages for the fines and Profits in Action upon the Statute of 5 R. 2. but only for the Entry; for the Action is quod Ingrifius eft, where Entry is not given by Law. Br. Damages, pl. 120. cites 2 E. 4. 24.

3. Note, that in Replevin of a Sow and Pigs, which Pigs were pigged after the taking, and yet the Plaintiff had Replevin of both, and shall recover Damages. Br. Damages, pl. 126. cites 12 E. 4. 5.

4. One affinns in Consideration of 4d. to pay 10 l. Damages. They shall be given to the 10l. on Non-Assumptis; not to the 4d. Mo. 419. pl. 576. Mich. 37 and 38 Eliz. Colman's Café.

5. The Defendant shall have an Action of Trespass against the Defendant, and recover his Damages for the first Entry without any Regrets; he may have an Action of Trespass with a Continuando; and recover as well for all the mean Occupation as for the first Entry. And here note, that Litt. doth here include Costs within Damages. Co. Litt. 257. a.

9. In
6. In suit put by Defendant in Debt on a single Bill, the Interest ought to be taxed by the Master of the Office in the Damages; per tot. Cur. And it was inferred Arg. and not denied, that it was the constant Practice in all the Courts of Westminster-Hall, upon Judgments upon Default, or Confession, to tax the Damages Occasioned Detentionis Debiti; and therefore the Non-Payment of Interest, when the Debt carries Interest (as all English Bills do) is a Damage to the Plaintiff; but as to the Cafe of Rent, it does not carry Interest; and therefore, in such Cafe, no Interest shall be given. 2. Ld. Raym. Rep. 773. Trin. 1 Ann. in face Lapiere v. the D. of St. Albans.

(T) Given. In what Cafes.

1. Debt brought of 20l. by Obligation, and the Rent by lending, and the Defendant confessed the Obligation, therefore the Plaintiff had Judgment immediately of it, and to the Rent be pleaded to the Country, and the Plaintiff prayed Judgment of the Damages of that which was confessed, and could not have it till the other be tried, and alter at the Rent Penu of it the Plaintiff was Non-suited, and yet at the Day in Bank he shall have Judgment of the Damages of that which was confessed, and might have had it at first, if he would have released the Suit of the Rent, and so he recover'd Debt and Damages upon the same Original, upon which he was Non-suited. Br. Damages, pl. 25. cites 42 E. 3. 25.

2. The Defendant procured 7. S. to bring Forndexon against the Plaintiff Br. Diseit, by Collusion, by which he was forced to travel by the Suit, and in pl. 9 cites bringing a Writ of Warranty of Charters in defence of it, to the Damage of 40l. and because the Defendant could not deny the Collusion, the Plaintiff recover'd 20l. and nota, for Vexation and Collusion only. Br. Action for le Cafe. pl. 17. cites 43 E. 3. 20.

3. Error was brought upon Judgment in an Account. Because the Judgment was to recover Damages; but not allowed; for the Defendant hath delayed the Plaintiff, and pleaded to the Illus, which is found against him. So Occasione interplacitandi, he shall recover Damages. But otherwise, if the Defendant comes the 15th Day, and enters in the Account taken, for to make Account. Noy. 134. Brown v. Barwick. cites 2 R. 2. Account. 42. 5 E. 3. 40.

4. Upon Demurrer in Law the Justices may award Damages for the Party by their Discretion, or award Writ to inquire of Damages at their Election. Br. Damages, pl. 194. cites 14 H. 4. 39. 40.

5. Where a Bill in Chancery is adjudged Innsufficien upon Demurrer, the Defendant shall not have Damages; For the Statute does not mention, but only where the Suggestion is found true or not true, and here the Truth is not try'd. Br. Cofts. pl. 19. cites 7 E. 4 14. Per Cur.

6. Resolved by the Court, that wherefoever Damages are to be given in Debt, Cofts are to attend them; and the Reason of the Damages is, because the Money is not paid upon Demand; for if the Defendant pleads That temps prist &c. the Plaintiff must reply, and set forth a special Demand, whereupon Illus may be taken; and if it be found for the Defendant, the Plaintiff can have neither Damages nor Cofts. Comb. 224. Mich. 5 W. & M. B. R. Company of Cutlers &c. v. Hurley.

8. Judgment was in C. B. upon Scire Fac. on a Recognizance by Bail upon a Writ of Error. Quod, the original Plaintiff should have Execution upon the Recognizance, Et quod recuperet damna sua, which he had sustained Occasionis Executionis. And the Exception taken was, that the Court had no Power to award Damages for delay of Execution, but they should give them for Costs of Suit. Per Cur. Damages generally include Costs, which Word (Costs) properly signifies Costs of Suit, and Delay of Execution is properly Damage, viz. the being so long out of his Money, which the Court uses formerly to Affe's, by allowing the Party the lawful Interest: So Damages of delay of Execution, and Costs of Suit upon the Statute, are very different, and to be affixed by different Measures, and the Statute gives only Costs of Suit against the Bail &c. Ideo, per omnes, this is Error. 6 Mod. 157. Hill. 3 Ann. B. R. Fanthaw v. Morrison.

9. Where a Penal Sum is recovered, Damages are never given. Per Parker, Ch. J. 10 Mod. 277. Hill. 1 Geo. B. R.

10. But upon a single Bill, even by the Common Law, Damages are given for the Delay. Per Parker, Ch. J. 10 Mod. 277. Hill. 1 Geo. B. R.

(U) In what Cases. Where there is a Demurrer for Part, and Issue for the Rest.

1. Repsafs of Trees cut and Goods taken, the Defendant join'd Issue for Part, and demurr'd for the Rest, and the Demurrer adjudg'd against him, and the Nuf Prins upon the Issue, inquir'd of all the Damages, as well of the Part in the Demurrer, as of the Part in the Issue, and found the Issue for the Defendant, and tax'd Damages for the Rest to 10 l. Br. Demurrer, pl. 6. cites 38 E. 3. 25.

(W) In what Cases, against the Plaintiff, though Part of the Issue is found for him.

1. Repsafs, Assault and Battery, to the Damage of 10 l. and was found Guilty of the Assault, and acquitted of the Battery, and yet the Plaintiff recover'd 10 l. as he had counted, and was amerced for the Battery. Br. Damages, pl. 198. cites 40 E. 3. 26.

2. Note, in Assory, where Part is found for the Lord, and Part against him, he shall have Return of the Whole, and yet shall render Damages for the fame taking. Br. Damages, pl. 4. cites 2 H. 6. 4.
(X) Several Damages against several Defendants; and where Plaintiff has his Election.

1. *Assize against several, one alleged Jointenancy by Deed with a Stranger, who upon Process came not, by which the Affize was awarded, where the other had pleaded Misnomer of the Plaintiff, and all found for the Plaintiff, and against him who pleaded Jointenancy double Damages was awarded, and single Damages against the other, and the double Damage shall be levied of him who pleaded Jointenancy only, and the other Damages shall be levied of him, and the other in common.* Br. Damages, pl. 104. cites 22 Afl. 2.

2. *Trespass against A. and B. for beating of his Servant, and taking of Timber; the one was found Guilty of the Battery, and the other acquitted, and both found Guilty of the [taking of the] Timber; by which the Damages were severed, scilicet, for the Battery by it self, and for the Timber by it self; and so they did, scilicet, for the Damage of the Battery one Mark, having regard to the Service loit by the Master, and not to the Hurt which the Party has, and 100 s. for the Timber; by which it was awarded, that the one Mark shall be recovered against A. who beat him, and the 100 s. for the Timber against both in common, and the Plaintiff a merced against the one.* Br. Damages, pl. 107. cites 22 Aft. 76.

3. *In Trespass against two, if the one comes and pleads, and is convicted to the Damage &c. and the other comes and pleads, and is convicted, the second Jury shall not give Damages; for the second who pleads, shall be charged by the first Verdict, quod nota.* Br. Damages, pl. 29. cites 44 E. 3. 7. and lib. Aft. p. 5.

4. *A brings Trespass against three; one appears, and pleads Not Guilty; afterwards another appears, and pleads Not Guilty; afterwards the third appears, and confesses the Action; two Venire Facies's were awarded to try these two Issues; on the first Issue 200 l. Damages are found for the Plaintiff, the other Jury finds 150 l. Damages; the Plaintiff shall have his Election which Damages he will have; for 'tis not certain which of the Issues was first try'd; for they were try'd at the same Assizes, and the Damages tax'd by the first Jury ought to stand for all.* Jenk. 269. pl. 86.

5. *In Trespass against A. B. and C.— B. and C. justify; upon which there is a Demurrer, and A. pleads, and thereupon Issue is joined, and the Demurrer is adjudget against B. and C. and upon a Writ of Inquiry, Damages are given against B. and C. and after the Issue is found for the Plaintiff, and Damages given; the Plaintiff may have his Election which Damages he will take.* 1 Roll. Rep. 395. pl. 17. Trin. 14 Jac. B. R. Headley v. Mildmay.

6. *Error of a Judgment in an Appeal of Mayhem in Durham; the Error affigned, because the Plaintiff declared there, in an Appeal against them, That they, with a third, made the Mayhem. They pleaded several Pleas,*
Damages.

Plea, whereupon several Issues were joined, and Verdict for the Plaintiff, and against J. upon the Trial 50 l. Damages were found, and against R. 100 l. Damages; and the Plaintiff prayed Judgment against half for the 100 l. Damages, and Costs, and had it; and now Error is alleged and assigned, because the Plaintiff hath Judgment for the 100 l. Damages, and doth not release the Damages for the 50 l. But the Court conceived it to be no Error; for the Judgment being for the 100 l. by the Election of the Plaintiff, it is a Waiver of the other Damages, and he cannot have both; therefore he needs not release the Damages of 50 l. whereupon the Judgment was affirmed. Cro. C. 192. pl. 2. Trin. 6 Car. in B. R. Johns & al v. Dodsworth.

(Y) Where they shall be Joint.

1. A N Action upon the Stat. 1. 2. M. for driving Distresses and impending them in several Places, so that the Owner was put to several Repossess, and it was against Three Defendants, and upon Not Guilty it was found for the Plaintiff, and 40 l. Damage alleged by the Jurors against every Defendant severally. And Judgment was given for the Plaintiff, that he should recover the Penalty of the Statute (viz.) against every one 5 l. and for Damages against every one 40 l. trebled; Upon which a Writ of Error was brought, and Error assigned was in the Point of the Judgment (viz.) because the Damages and the Penalties are severally. (viz.) every Defendant by himself, where it ought to have been jointly, (viz) all one. And that was adjudged Error, and the first Judgment reversed. For but one 5 l. shall be inflicted upon all the Defendants, and not severally 5 l. by the Statute; yet the Words are that every Person offending shall pay 5 l. but the Meaning of the Statute is, that the Penalty shall be referred to the Offence, not the Persons, then because there was but one Offence in all the Defendants, there shall be but one 5 l. forfeited. Nov. 62. Hill. 39 Eliz. B. R. Patridge v. Emfon.

2. So by Popham. If two distresses, and they alike drive the Distresses, there shall be only one Action and one Penalty which was granted. Ibid.

3. So by Gawdy upon the Statute that enacts that every one that suits in the Admiralty for a Thing done upon the Land, shall forfeit 10 l. There if two commence an Action, Contra Formam Statuti, yet but one 10 l. shall be forfeited. Ibid.

4. So upon the Statute of 5 Eliz. of Forgery against Twenty but one double Damages shall be given against all. And by Popham and Fenner; That where Twenty are so jointly sued, a Release to one shall discharge all. But by Fenner, If the Plaintiff had brought his Action against them severally, every one should have paid 5 l. Sed Quære. Ibid.

(Z) Barr’d.
(Z) Barred by What.

1. In Affise if the Plaintiff enters into Parcel, he shall lose all his Damages, for they are intire and cannot be fevered. Br. Damages, pl. 180. cites 35 H. 6. 13.

(A. a) Writ. How it shall be.

1. NOTE by the best Opinion, that where Damages are given by Statute and new Form of Writ, the Plaintiff shall not recover Damages by the Statute, if he does not bring his Writ upon the Statute, as in Trefpafts de Malefactoribus in Parcis, but where the Statute gives Damages, and no new Form of the Writ, there the Plaintiff shall recover according to the Statute by the Common Form of the Writ; note the Diversity thereof; and in Affise if the Diftrisifin be found with Force, the Plaintiff shall recover double Damages, and yet the Writ is not but of the Common Form. Br. Damages pl. 8. cites 9 H. 6. 2.

(B. a) Writ of Inquiry of Damages; in what Cases awarded; and How it may be.

1. In Affise the Plaintiff prayed Estepeiment, and could not have it; and the Defendant commits Waste in the mean Time, between the Verdict in the Affise and the Judgment, and a Writ of Inquiry of Damages was awarded of this Waste and cutting of Trees; which note well, for the Verdict before can't give Damages thereof. Br. Brief de enquire &c. pl. 13. cites 21 E. 3. 3.

2. In Debt the Defendant acknowledged Part, and denied the rest, upon which they were at Issue, and the Plaintiff had Judgment of Part, and for the rest at Nisi Prius he was NonSuited; and yet, at the Day in Bank, he had a Writ to inquire of Damages, quod nota. Br. Brief de enquire &c. pl. 16. cites 42 E. 3. 25. 26.

3. In Dower the Tenant said, that he has been at all Times ready to Br. Tout, and the Defendant Dower, and yet is, by which the Demandant recover'd Dower and Prius, and aver'd the Contrary against the Tenant for her Damages. Br. Brief de enquire &c. pl. 18. cites 34 E. 3. and 77. 4. In Dower the Tenant made Default after Default, per quod the Demandant aver'd, that her Baron died seised, and pray'd a Writ of Inquiry of Damages, & habuit. Br. Brief de enquire &c. pl. 17. cites 44 E. 3. 3.

4 I

5. Where
5. Where the Defendant, or the Bishop, pleads *Ne Disturbis pas*, the Plaintiff shall have a Writ to the Bishop, and a Writ of Inquiry of Damages. Br. Brief de enquire &c. pl. 6. cites 22 H. 6. 44. and 21 H. 6. 56.

6. *Waste* was brought, and the Defendant demurred upon the Declaration, that the Reversion does not pass by Devise by Name of Tenement, nor without Attornment, which was *adjudged* against him in both Points, and there 'twas awarded, that he shall not have Writ of Inquiry of Waste, for he is *convinced* of the *Waste* by the Demurrer, but he shall have a Writ of Inquiry of Damages, but the Plaintiff released his Damages, and had Execution. Br. Brief de enquire &c. pl. 1. cites 34 H. 6. 7.

7. Error of a Judgment in Debt; The Error alligned because the Judgment is, *Ideo consideration est quod recuperet 40 s. pro misit & ensta-gis, omitting these Words, ex assefia suo per Cartam et adjudicat*. And it was held to be a material Part of the Judgment; for being by *Consec-tion or Default* Writ of Inquiry of Damages shall be awarded, unless the Party contends to take so much for Damages; and for this Caule it was reverfed. Cro. J. 415. pl. 3. Hill. 14 Jac. B. R. Machin v. . . . . . .

8. In an Action upon the Cafe, the Plaintiff declares to 17l. Damages, and upon Demurrer Judgment given for 17l. 10s. Damages by the Court. And now that Judgment was reverfed. Because the Damages being un-certain, there ought to Iffue a Writ of Inquiry of Damages. Otherwise where the Demand is certain, as in Debus, Note 11 H. 7. 5. b. Noy 96. Patch. 2 Car. B. R. Wood v. Brook.

S. C. cited 5 Mo. 119. 
S. C. cited 5 Skinn. 566. 
S. C. cited per Holt Ch. J. 12 Mod. 44. 
S. C. cited per Holt Ch. J. Comb. 344. 

9. Error of a Judgment in *Assumpsit* in an Inferior Court; the Parties being at Iffue, there was a Demurrer upon the Evidence, and thereupon the Jury was discharged; afterwards *Judgment* was given for the Plaintiff, and Damages found upon a Writ of Inquiry, where the Jury, which was to try the Ifeue, ought to have affied their Damages Conditionally, if Judgment should be given for the Plaintiff; and several Precedents were cited in Proof thereof; But the Court said, that if*the Precedents are good Law*, then it may be *inquir'd* by the same Jury Conditionally; But that it may be as well inquired of by a Writ of Inquiry of Damages, when the Demurrer is determined, and the most usual Course is, when there is a Demurrer upon Evidence, to discharge the Jury without more Inquiry. Cro. 143. pl. 21. Mich. 4 Car. B. R. Darrofe v. Newbolt.

10. Plaintiff in a *Replevin* was Non-suited after Evidence given to the Jury, and the Jurors did not find Cell and Damages; and afterwards a Writ of Inquiry of Damages was granted. And Asheley moved, that the Writ might not be filed. Because that the Writ of Inquiry of Damages could not Iffue, but be awarded from the Court; And the Plaintiff here being Non-suited was out of the Court, and that nothing might be done against him. And the Prothonotaries said, That in Cafe of a *Verdict*, where the Jurors omit to find Damages, a Writ of Inquiry is many Times granted. But they were command'd to search for Predecessors in Cafe of a Non-suited. Het. 161. Hill. 5 Car. C. B. Rawlins's Cafe.

11. In *Deinique of Charters*, there was Verdict for the Plaintiff and Damages, but the *Value of the Charters were omitted*, (which is Part of the Judgment, and to be had in Cafe the Charters cannot) and it was mov-
Damages.

ed, that it may be supplied by a Writ of Inquiry of Damages, and according to this is a Precedent Old Ext. Raft. tit. Judgment in detinue, pl 13. fol. 214. and 41 Eliz. in B. R. Rot. 916. Chipendale and Orr's Cafe. And the Reason why the Verdict may be supplied in such Cafe is, because it is only matter of Damages, upon which no Ataint lies, but the Court doubted of it. Sid. 248. Pack. 17 Car. 2. B. R. Burton v. Robinson.

12. In Replevin the Jury did not inquire of the Value of the Rents or Ward v. Carth. for znd. Mod. andlor because for Ld. —

the Court doubted & adjournatur.—Vent 40. S. C. the Court held, it could not be supplied. —

S. C. cited by Holt Ch. J. Skinn. 596. and says, the Reason is, because the Statute says, that such Inquiry shall be by the same Jury ——-Ed. Raym. Rep. 60. S. C. cited by Holt Ch. J. But where in Replevin and Avowry for Damage snafluid, the Plaintiff was Nonliit. The Omission of the Jury was supply'd by a Writ of Inquiry. Comb. 11. Hill. 1 & 2 Jac. 2. B. R. Humfrey v. Milede.

13. Where Damages are uncertain, they cannot be set in a Court of Equity but by a Jury. Vent 330. Trin. 30 Car. 2. in an Anonymous Cafe.

14. In Debt because the Demand is certain, the Courts here have sometimes affeived Damages without a Writ of Enquiry, but never in Trepass or Actions for Cafe, which lie wholly in Damages. Vent. 350. Trin. 30 Car. 2. in an Anonymous Cafe.

15. A Verdict is good, notwithstanding the Omission of inquiring of Damages on the Demurrer; for as to that, it is but an Inquest of Office, and may be supplied by another Writ; cites Dy. 133. 11 Co. 6. a. But if the Verdict would have been deficient for this Cause, it is aided by a Noble Proseque; for where a Verdict is insufficient by Affirmance of entire Damages, or Non-Affirmance of Damages and Costs, where they ought to be asfleved, it cannot be supplied by a Writ of Inquiry; but Release of Damages and Costs remedies Suits and Imperfections in the Verdict. Arg. 12 Mod. 12. Mich. 3 W. and M. in Cafe of Germin & UX v. Orchard.

16. 'Tis the Course of the Court to give Interest for Damages upon a single Bill, or Bill of Exchange (which must always be under the Sum laid in the Clofe of the Declaration) in Cafe of a Demurrer in Debt, and there needs no Writ of Inquiry. Per Holt Ch. J. Cumb. 243. Packh. 6 W. and M. in B. R. Anon.

17. A Differs was taken for a Poor's Rate and a Replevin brought, and upon Not Guilty pleaded by the Officer at the Trial, Evidence was given, and the jury charged and ready to give their Verdict, the Plaintiff became Nonliit, by which the Officer was intituled to Treble Costs solemnly declared, that the Court was moved for a Writ of Inquiry, and after being twice moved, Rule was given for a Writ of Enquiry. Skin. 595. Mich. 7 W. 3. B. R. Sir James Harbent's Cafe.

Ch J. the Jury here are discharged from giving their Verdict by the Nonliit, and therefore if they had given a Verdict for the Damages, this had been as an Inquest of Office, upon which no Aarrant would lie, if the Damages had been excessive; and therefore there is no Default in the Jury, or Damage to the Plaintiff, if it be supplied by a Writ of Inquiry; but where the Jury gives a Verdict, and does not give Damages, there such a Default shall not be supplied; for if the Jury had given Damages, this was as Part of their Verdict upon which an Aarrant lay, if they are excessive; and therefore this shall be supplied by a Writ of Inquiry, which is but an Inquest of Office; if the Damages are excessive, the Party shall be oppressed, without the Benefit of an Aarrant, and therefore according to Chip's Cafe, such Default shall not be supplied by a Writ of Inquiry. Skin. 595. in S C 3 Mod. 118. Herent v. W. of S C and a Writ of Inquiry was granted. ——-Salk. 205. pl. 3 S C —— Comb 344. S. C. the Writ was granted. ——-12 Mod 8t S C accordingly. ——-Ed. Raym. Rep. 59. S. C —— Cath. 562. S. C. and the Writ was granted after much Debate.

18. For
Damages.

In which Cases such a Default had been supplied after a Writ of Inquiry, 1 Cr. 141, and Holt Ch. J. cited 1 Roll Rep. 372, Brampton’s Café, and 2 Roll 112, as Cases [Rep.] in Point; Skin. 396. Sir James Harbert’s Café. — 5 Mod. 119. S. C. & S. P.


Holt Ch. J. said, that notwithstanding this Café of Burron v. Robinson, he remembered a Café about 14 Years ago, where a Writ was awarded in such Café, 3 Mod. 77, in Café of Hurcourt v. Wekes. — S. C. of Burron v. Robinson, cited by Holt Ch. J. Ed. Raym. Rep. 60, but said, that it was contrary to Law.

21. Action of Trespass, and the Defendant justifies by Virtue of the Statute of 43 Eliz. for the Poor’s Rates &c. the Plaintiff was non-suited but no Damages were found; therefore Counsel moved for a Writ of Error; Holt Ch. J. said he remembered a Café, where upon an Action of Detinue and upon Illuc Non detinet, the Jury did not inquire of the Value and afterwards we granted a Writ of Inquiry. It is every Day’s Practice, that if the Plaintiff in Repelvin be Non-suiter, the Jury shall find Damages and Costs for the Arowant. 5 Mod. 76. Mich. 7 W. 3. Gardiner v. Hobbs.

22. Where Judgment is by Default the Court may give the Damages without putting the Party to the Trouble of a Writ of Inquiry. 10 Mod. 274. Hill. 1 Geo. B. R.

23. The Plaintiff declared on Four Counts, and the Defendant demurred to one, and pleaded to Issue as to the other Three, and the Plaintiff joined in Demurrer, and had Judgment and a Writ of Inquiry, resting a Judgment de Premissis, and that Recuperare debuit Danna Oceâni praemissorum; and now it was moved in Arrest of Judgment, that a Writ of Inquiry would not lie on this Judgment, until Nolle Prosequi was entered as to the other Three Issues or a Venire to try them; for then, and not before, a Writ of Inquiry might be had to inquire of the Damages upon the Judgment in Demurrer; but in this Café the Plaintiff having rebelumed the Damages, as to the other three Issues, before the Judgment was entered on the Demurrer, it was held good; and the Matter the Office affirmed, that was the proper Method of Proceeding. 8 Mod. 108, 108. Mich. 9 Geo. Fleming v. Parker.

24. In an Action on the Cafe on several Promises the Plaintiff had Judgment by Default. It was assigned for Error that there was no Writ of Inquiry; and it seems the Cafe was, that the Inquiry of Damages was made by a Parcel of People got together of their own Heads, whom the Sheriff had no Authority to convene for that Purpose, so that it was urged that what they did, should be of no Account. But the Court held that the Want of a Writ of Inquiry was aided by the
In Trespass the Defendant appeared, and pleaded, and departed in Br. Default, despite, and after Plea pleaded, a Writ shall issue to enquire of all the Damages, but after the Plaintiff released the Departure. Br. Brief de enquire &c. pl. 3. cites 9 H. 5. 12.

2. In Trespass the Defendant acknowledged the Trespass, and justified, and after made Default at a Day of Adjournment, and the Inquest was awarded by Default, and there is no Writ to inquire of the Damages. Br. Brief de enquire &c. pl. 4. cites 9 H. 5. 12.

3. In Detinue the Plaintiff and Garnishee are at Issue, and at Nisi Prius the Garnishee made Default; Judgment shall be given by his Default, and the Inquest shall not be taken upon the Issue, because by Default the Issue is waived, and the Inquest shall inquire of the Damages, and the Garnishee shall not have Attaint; Per Martyn & tot. Cur. Br. Enquest. pl. 57. cites 8 H. 6. 5.

4. Trespasses against three, who impared till another Term, and at the Day one made Default, therefore a Writ of Inquiry of Damages was awarded against him, and yet the other two pleaded a Plea in Bar, and intitled the third to all, quod nota. Br. Brief de enquire &c. pl. 5. cites 19 H. 6. 8.


6. In Trespass against two, they pleaded in Bar, and in another Term the one made Default, Writ of Inquiry of Damages shall be awarded against him to continue the Process against him, but the Writ shall not issue; for the first Jury shall tax Damages against both, if they pass for the Plaintiff, and then the Writ of Inquiry shall never issue, and if they pass against the Plaintiff, then the Writ of Inquiry shall issue &c. quod nota. But where the first Jury affeks Damages, the second Jury shall not affeks Damages. Br. Diccontinuance de Process; pl. 25. cites 21 H. 7. 40.
(D. a) Inquiry of. Writ qualifi'd or superceded; for What; and When. And Notice; In what Cases; When; and How.

1. ERR O R assigued upon a Judgment in Shrewsbury Court; First, Because upon the Writ of Enquiry of Damages no Day was given to the Plaintiff. Secondly, Upon the Return of the Writ of Enquiry &c. It was entered Continuado Procesa, Jurata poenit. &c. in Respect that it is a proper Continuance 'for a Pannel to try an Issue and not upon an Inquest of Office, as so it is. But that ought to be restored to be executed, or that the Sheriff hath not sent the Writ, because it is not yet executed. And for these Errors Judgment reversed. Nov. 120. Harrington's Case.

2. Error of a Judgment in B. R. in Trover, where the Bill was for 450 Bushells of Pippins; and the Declaration was for 40 Bushells, and Judgment being given on Nibil dicit, the Writ of Enquiry recites the Trover of 400 Bushells at Damages found to 40 l. All the Justices and Barons held this to be Error; for the Judgment ought to be warranted by the Declaration on the Record; and Rule was given to reverse the Judgment. Cro. J. 294. pl. 14. Mich. 9 Jac. in Cam. Seacc. Cleynon v. Taylor.

3. Judgment in an Inferior Court was reversed, because being by Default the Writ of Inquiry of Damages was only by two Jurors, and Custom alleged to warrant it. But though the Writ is per Sacramentum proborum & legallum Hominum, and not Duodecim, as a Ventire, yet the Court resolved that there cannot be less than Twelve. Vent. 113. Pach. 23 Car. 2. B. R. Anon.

4. In an Attachment upon a Prohibition, it was alleged that the Defendant had made full Prohibition inde liti Deliberationem. The Defendant made Default, and upon a Writ of Inquiry of Damages, the Jury gave 100 l. And for these Damages and 20 l. Costs Judgment was given for the Plaintiff in Ireland, who was Defendant here; the Error assigned was, that the Jury upon the Writ of Inquiry did not come de Vicino et of the Spiritual Court, where the Prosecution was after the Prohibition, but elsewhere; and per Cur. for this Reason the Inquisition is void, and the Judgment was reversed. Hill. 31 & 32 Car. 2. B. R. 2 Jo. 129. Aungier v. Brogan.


6. In C. B. they never gave a Day upon a Writ of Inquiry, nor is it necessary; for nothing is to be done but to ascertain the Damages and it no Discontinuance; and though upon the Writ of Inquiry it was mentioned to be Per Sacramentum duodecim, and did not say Proborum & Legallum Hominum, yet it was held good; for the Entries in C. B. are always so. Ed. Raym. Rep. 388. Mich. 10 W. 3 R. R. Northcote v. Underhill.

7. In Trover for several Loads of Wood and Judgment by Default, and a Writ of Inquiry executed; it was moved to set aside the Writ of Inquiry, upon Affidavit that the Sheriff refused to receive any Evidence of the Value of the Wood, but directed the Jury to find the full Damages declared of, and for that it was set aside upon Payment of Costs. 12 Mod. 317. Mich. 11 W. 3 Earl of Kent v. Walters.

8. Con-
8. Convenient Notice is as Requisite to the executing a Writ of Inquiry, as for a Trial; agreed per Cur. and that by a late Rule of Court, if it is to be executed in London, or in Middlesex, and the Defendant doth not live above Forty Miles from thence, Eight Days Notice will suffice; but if he lives above Forty Miles from thence, then Fourteen Days Notice ought to be given, because at Twenty Miles per Day, a Man may come to London from any Part of England in Fifteen Days. Mod. Cafes 146. Pauch; 3 Ann. B. R. Williams v. Jackson.

9. 4 & 5 Anne. cap. 16. All Statutes of Jeofails shall extend to Judgments entered upon Confessions, Nihil dicet, or Non sum Informatus, in any Court of Court of Record, and no such Judgment shall be reversed, nor any Judgment upon any Writ of Inquiry of Damages executed thereon, be fay-ed or reversed for any Imperfection, Omission, Defect, or Thing which would have been aided, or cured by the said Statutes of Jeofails, if a Verdict had been given in the Action, so as there be an Original Writ and Warrants of Attorney duly filed.

10. It was moved in Arreft of Judgment that there was not Fifteen Days between the Tefe and the Return of the Writ of Inquiry; for in all Judicial Writs, where you proceed by Original, there must be Fifteen Days between the Tefe and Return, not only in the Writ, but also in the Subsequent Process. And accordingly the Court (Holt abfent) inclined that it was III. Sed adjournatur 11. Mod. 266. pl. 15. Mich. 8 Ann. B. R. Gately v. Gillingham.

11. It was declared by the Court, upon a Motion, that all Notices of Trial, and of Inquiries, and Countermands of Notices, ought to be in Writing, and that all Verbal Notices were void. Rep. of Prac. in C. B. 3. Pauch; 11 Ann. 1712. Anon.

12. Upon a Motion in Relation to the due Execution of a Writ of But in such Inquiry of Damages, the Court held, that after an interlocutory Judgment given, the Plaintiff need only give Common Notice of the Execution of a Writ of Inquiry, notwithstanding the Judgment was given above a Year before. Rep. of Prac. in C. B. 4. Trin. 11 Ann. 1712. Anon.

13. In this Case the Question was, whether upon the Execution of a Writ of Inquiry of Damages in Dover, Notice of executing that Inquiry should be given; and upon hearing Counsel on both Sides, the Court were of Opinion that Notice ought to be given, and for Want thereof, set aside the Writ of Inquiry; for upon any Writ of Inquiry whatsoever, it is very reasonable that the Party should have an Opportunity of defending himself in Respect to the Meaure of Damages. Rep. of Prac. in C. B. 14. Mich. 4 Geo. 1. Strangeways v. Afcoygh.

14. It is admitted, that in Covenant, where Damages are to be recovered, the Jury upon a Writ of Inquiry are the proper Judges of the Quantum of the Damages; and for that Reason the Court will not set aside their Inquiry where they give small Damages; but it is otherwise where the Covenant is for Payment of Money, and the Sum is ascertained, because in such Case the Sum being certain, the Jury cannot lessen the Damages; and this is the constant Difference in such Cases, and it is the same as if an Ajiumpst had been brought for Money upon a Note under Hand, for there the Jury cannot mitigate the Damages; if they do the Court will set their Verdict aside. 8. Mod. 197, 198. Mich. 10 Geo. in the Cafe of Parr v. Purbeck.

15. It
Damages.

It was held by the Court that Notice of Trial, or Inquiry must be delivered to the Defendant, where the Attorney is not known, or not to be met with. Rep. of Prac. in C. B. 62. Hill. 4 Geo. 2. Higgins v. Stuart.

Auction upon the Cafe for Goods sold and delivered upon the Execution of the Writ of Inquiry, 5ly allowed Plaintiff 61. 5s. Interest for the Balance of the Account due to him. Defendant moved to set aside the Inquisition; and Court were of Opinion that Interest could not be allowed in any Cafe, except upon Promissory Notes and Bills of Exchange, and that the Inquisition ought to be set aside. But by Consent the 61. 5s. Part of the Damages were ordered to be remitted by the Plaintiff to save the Expense of a New-Inquiry. Barns's Notes in C. B. 149. Pinock v. Willet.

An Auction upon the Cafe was brought on a Promissory Note, to which the Defendant, with Leave of the Court, had pleaded doubtly, viz. Nov Aff and Nov Aff infra sex annos. Plaintiff took Issue upon the Nov Aff, and replied an Original as to the Nov Aff, infra sex annos. And thereupon Issue was joined upon Null tien Record. Plaintiff, upon the last Issue, obtained Judgment; and thereupon proceeded to execute a Writ of Inquiry of Damages, without trial of the first Issue. Defendant moved to set aside the Writ of Inquiry; and the Court, upon hearing Counsel on both Sides, ordered the Writ of Inquiry and Inquisition taken thereon to be set aside. Barns's Notes in C. B. 150. Hill. 7 Geo. 2. Pryor v. the Earl of Iffley, Executor of the Earl of Suffolk.

A Motion to set aside an Inquiry, because one of the Defendants was not served with Notice of the Execution of the Inquiry. Per Cur. where the Proceedings are according to the Act 12 Geo. 1. and no Attorney appears, each Defendant ought to have Notice; to the Inquiry was set aside. Rep. of Prac. in C. B. 94. Mich. 7 Geo. 2. Kingdon v. Herne and Froft.

A Motion to set aside a Writ of Inquiry for Uncertainty in the Notice; the Notice given was, that the Writ should be executed at a certain Hour (mentioned in the Notice) or as soon after as the Sheriff could attend; the Court unanimously agreed that this Notice was irregular for the Incertainty, and granted a Rule to show Cause, which was afterwards made absolute. Rep. of Prac. in C. B. 99. Mich. 7 Geo. 2. Hannaford v. Holman.

Notice of the Execution of a Writ of Inquiry of Damages was given for a particular Day, but no Hour was mentioned. Defendant moved to set it aside, and obtained a Rule Nisi; Plaintiff, on the hearing Cause, swore that Defendant, after the Notice given, had declared he would make no Defence. Court was of Opinion, that this was not sufficient to make the Notice good, and therefore set aside the Inquiry, but without Costs. Barnes's Notes in C. B. 292. Mich. 7 Geo. 2. Langdale v. Lamb.

Plaintiff replied to a Plea of a Record of a former Recovery of the same Debt, quod non habetur aliquid tale Recordiertum, and gave Notice upon the Back of the Replication to execute a Writ of Inquiry of Damages, in Cafe Judgment went for him upon the Issue of Null tien Record. Defendant moved to set aside the Inquiry for want of due Notice, and insisted that this Cafe is not within the Letter of any of the Rules of Court obliging Defendants to take short Notice. A Rule was made to show Cause, which was afterwards discharged upon hearing Counsel on both Sides, if this Cafe be not within the Letter of the Rules, it is within their Intention.
Damages.

Intention, and is warranted by the constant Practice of the Court. 
Barnes's Notes in C. B. 174, Hill. 8 Geo. 2. Long v. Lindgood. 

22. Notice was given to execute a Writ of Inquiry of Damages, at the Sheriff's Office in Northampton, between the Hours of Ten and Two. Upon hearing Counsel on both Sides, the Court was of Opinion, that the Notice was bad, both as to Place and Time. It should have been expressed y. at what Sign, or whole House, the Sheriff's Office was kept at; and the Same Points of Time is too extensive, which ought to be confined to two Hours. The Writ cited as held accordingly, of Inquiry and Inquest taken thereupon, were set aside. Barnes's Notes in C. B. 211. Hill. 8 Geo. 2. Squire v. Almond. 

23. Notice of the Execution of the Writ of Inquiry was twice continued. Court held the second Continuance bad. A Notice can be continued but once. The first Continuance was also bad, not being serv'd within an Hour before the Time appointed for the Execution of the Writ of Inquiry; it should have been serv'd two Days before. Notes in C. B. 210. Mich. 8 Geo. 2. Price v. Bambridge. 

24. Notice was given of the Execution of a Writ of Inquiry of Damages, at the Three Tons in Brook-Street, without paying in Holborn, or in any other Place. The Sheriff was serv'd at the Writ. On a Motion to set aside the Writ of Inquiry for this Defect in the Notice, it was urged for the Plaintiff, that the Three Tons in Brookstreet, where the Sheriff of Middlesex constantly executes Writs of Inquiry in Vacant Time, is a well known Place to every Practitioner; but per Cur. the Rep. of Notice is not so certain as it ought to be, the Inquiry and Inquest Precise, in the Place mentioned. Barnes's Notes in C. B. 214, 215. C. B. 153. 

Trin. 10 Geo. 2. Le Mark v. Newham. 


26. Defendant had obtained a Judge's Order for Time to plead, pleading inexcusable, and taking Notice of Trial within Term, or if be should not plead, taking the like Notice of executing Writ of Inquiry. The Time for pleading expired February 5, when Defendant not pleading, Plaintiff signed Judgment; and February 7, gave Notice to execute Inquiry on the 8th. Defendant moved to set aside the Inquiry for Insufficiency of Notice, urging, that the Plaintiff ought to give as much Notice as he could. Per Cur. Plaintiff might have given Notice on the 6th; short Notice should be, at least, as much as is sufficient to countermand a Notice, viz, two Days. Let the Inquiry be set aside without Costs. Barnes's Notes in C. B. 217. Hill. 11 Geo. 2. Butler v. Johnson. 

27. Rule to shew Cauf by Writ of Inquiry, returnable on a general Return (and not at a Day certain, as it should have been, the Proceeding being by Bill) should not be set aside, discharged, because this is Matter of Error, appearing upon the Record, and not Irregularity; and whether it is helped, or no, by the Statutes of Jeolfalls, is not now the Question. Barnes's Notes in C. B. 152. Mich. 12 Geo. 2. Elmes v. Tomlinson.
28. Motion to set aside Inquiry for Irregularity, Notice being given to execute it at Eleven o'Clock, without naming any other Hour; Cur. held it regular, provided it was executed before Twelve; which appeared by Affidavit. Court discharged the Rule to shew Cause. Barnes's Notes in C. B. 218. Mich. 12 Geo. 2. Laft v. Denny.

(E. a) Writ of Inquiry. Executed. At what Time or Place, and what must be proved then.

Le. 178. pl. 1. In Trover and Conversion of 40 Loads of Corn, the Defendant as to 20 Loads pleaded not Guilty, and as to the Residue, a Special Plea to which the Plaintiff demurred, and it was adjug'd for him; whereupon illud a Writ of Inquiry of Damages; It was moved, that the Writ of Inquiry ought not to be, because the Issue was yet untried; It was said on the other Side, that it is in the Discretion of the Court to grant such Writ or not, which Wray granted, but said, it is what here to grant it presently. Le. 14t. pl. 197. Trin. 31 Eliz. Ward v. Blunt.


3. In a Quare Impedit, where the Writ of Inquiry was of the Value, it was executed on the Day of the Return; but the Jury did not give their Verdict till two Days after; adjudged good. Cited per Cur. Cro. E. 468. pl. 26. Pauch. 38 Eliz. as the Case of Buckler and the Queen.


5. Upon Judgment in Trespass on non sum Informat' and a Writ of Inquiry, it was moved, that the Writ should not be filed, because the Plaintiff on the Inquiry, did not prove that they were his Goods, but only the Value of them, and a Difference taken at the Bar, between an Action confess'd, and a Non sum Informat' but per Cur. both Cases are alike, and the Plaintiff is not bound to prove his Property in either of them, for the Writ commands the Value only to be inquired of, and if the Plaintiff should be bound to prove his Property, and fail thereof, it would be in Deformation of the first Judgment, which cannot be. But it is otherwise where Not Guilty is pleaded, for then the Trespass is deny'd, which must be prov'd and try'd by the Jury, and in that Case both the Value and Property do come in Question. Cro. J. 220. pl. 1. Pauch. 7 Jac. B. R. Goodwin v. Welch and Over.

6. Upon
Damages.

6. Upon a Writ of Inquiry upon a Judgment by Default upon an Assumption (if it be infinited upon) the Plaintiff must prove his Debt; for by the Judgment the Plaintiff is to recover; but the Quantum is to be inquired into by the Jury; and if the Plaintiff is to recover, and if the Plaintiff proves nothing, he must be content with a Penny, or some such small Matter of Damages. 2 L. P. R. 67.

7. An Indeb. Aff. was brought for 20l. as Executor to A. for so much of the said A's Money, had and received' by the Defendant in his Life-time; whereupon the Plaintiff had Judgment by Nikol Dicit, and upon a Writ of Inquiry, (the Plaintiff not being provided to prove the Debt, supposing it to be confessed by the Judgment) the Jury found but 2 Pence Damages. Ventris moved to set aside the Writ of Inquiry, for that the Plaintiff was not obliged in this Action to prove the Debt at the Executing of the Writ of Inquiry, no more than if he had brought an Action of Debt, citing Cro. J. 228. and Yelv. 152. Per Cur. this being in an Action upon the Cafe, which lies in Damages, the Debt ought to have been proved, and fo let it stand. Vent. 347. Hill. 31 & 32 Car. 2. B. R. Reve v. Cropley.

8. Upon executing a Writ of Inquiry the Defendants having confessed is not sufficient, but the Plaintiff must prove the Quantum and Value. 2 Show. 86. Hill. 31 & 32 Car. 2. B. R. Hodder v. Saunders.

9. A Writ of Inquiry was made returnable after the Term, but was executed within the Term, and the Court inclined to amend it. Carth. 70. Mich. 1 W. & M. in B. R. Hammond v. Purcell.

10. If there be Demurrer to part, and Plea to issue to part, and Judgment upon the Demurrer before the Issue tried, the Plaintiff, if he pleases, may enter a Non Pros. upon the Issue, and take a Writ of Enquiry of Damages upon the Judgment on Demurrer, but it is not to be taken out till after Non Prof. entered on the other; for if they will proceed upon the Issue, the Jury that try it ought to inquire of the Damages on the other; and here, because a Writ of Enquiry was taken out without entering of Non Pros' that Matter was moved in Bar of final Judgment, and thereupon it was stayed till they moved of the other Side. Per Cur. 12 Mod. 558. Mich. 13 W. 3. Anon.


12. In this Case it was held that in all Superior Courts the Judge sends his Precept to the Sheriff to enquire of Damages, but in London (and) in all other inferior Courts, an Inquest is summoned in Court, and the Court takes the Inquisition of Damages. 3 Salk. 460. pl. 2. Mich. 1 Ann. does not ap- pear.

13. After a Judgment by Default for the Plaintiff and a Writ of In- quiry brought, it was moved that it might be executed before the Ch. J. at the Sittings at Guildhall in London, the Action being brought for 2000l. and a Rule was made accordingly. 8 Mod. 240. Pash. 10 Geo. East India Company v. Ellis.

14. Plaintiff had given Notice of executing a Writ of Inquiry at St. Albans, Com' Hertf' and both Parties attended with Counsel and Wit- neesses on May 2, 1739. But when the Under-Sheriff was about to exe- cute the Writ, he perceived it to be returnable left Term, and would not proceed. Defendant moved for Costs upon Affidavit of great Ex- pence, and had a Rule to shew Caufe. Upon shewing Caufe it was ur- ged for the Plaintiff, that this Court had never yet given Costs for not proceeding to execute Writs of Inquiry according to Notice. And this is a near Mistake; Plaintiff was disappointed as well as Defendant. Per Cur. though there has been hitherto no Rule for Costs in this Court
(F. a) Inquiry of. New Writ granted; or necessary; in what Cases.

1. WASTE was brought by J. Archdeacon of D. of the Lease of his Predecessor; the Process issued to the Sheriff to inquire of the Waste, and he made Return. The Original was, That the Defendant feci Vaughan in Thuementis, which J. S. Predecessor of the Plaintiff, lease'd to the Defendant ad excededationem ipsius Archidioecos, but it did not determine if the Waste was in the Time of the Predecessor, or in the Time of the Plaintiff, and the Writ of Inquiry of the Waste was quod Venire fac. coram re Twelve &c. qui querentum nulla Affinit. attingat, and did not say eundem querentem nec defendenteum nulla Affinitate attingit, and therefore ill; for in this Writ the Sheriff is Judge and Officer, and the Party may challenge, and have Attaint; for which Default, and because it is not express'd in the Original, nor in the Verdict, if the Waste was in the Time of the Predecessor, or in the Time of the Plaintiff, therefore Mentio was made in the Roll of those Matters by Special Entry, and another Writ awarded to inquire of the Damages, and those Matters specially put in the Writ; quod nota. Br. Walf. pl. 58. cites M. 2 H. 4. 2.

2. In Trespass by a poor Woman for breaking her Cloce, Continuanda for six Years. Upon a Writ of Inquiry, the Jury found only 10s. Damages; whereas the Land was worth 64. a Year; and thereupon the Court moved the Case for a Melius Inquirendum, but it was denied; for so there might be infinite Inquiries. But it is sometimes granted upon the Motion of the Defendant, where the Damages are excessive, or some Mediators are alleged in the Plaintiff, but never to the Plaintiff, because the suing forth the Writ is bis own Act. 2 Lees. 214. pl. 272. Mich. 30 Eliz. C. B. Anon.

3. In an Affize of Novel Discease, the Diocese was found, and Damages taxed by the Recognizors; the Discease, after this Verdict, and before Judgment, cut down Timber to the Value of 10l. the Recognizors may be re-assembled to increase the Damages. By all the Sages of the Law, I understand this Case to have been before the Recognizors were discharged by the Court, and the Verdict entered. Jenk. 6. pl. 9.

4. The
Damages.

4. The Court was moved for a new Writ of Inquiry into London, and to stay the filing of a former, because of Excessive Damages, but it was denied. 1 Mod. 2. pl. 3. Mich. 21 Car. 2. B. R.

5. A new Writ of Inquiry was granted, where the Damages given were unreasonably small. 2 Show. 20. pl. 202. Patch. 34 Car. 2. B. R. Cre-fwick v. Saunders.

let. S P —— 2 Lc. 214. pl. 272. S. P. but deny’d to be granted, for so there might be infinite Inquiries. Anon. —— Rhodes J. cites the Councils of Derby’s Cafe, in Dower. Ibid.

6. In all Cases where Attain would lie against the Petit Jury for excessive Damages, there, if no Damages be assailed, such an Omifion shall not be supplied by a new Inquiry. 12 Mod. 12. Mich. 3 W. and M. Germin & Ux.’ v. Orchard cites 11 Co. 119. a.

7. In Covenant to pay 100l. and that upon Default the Covenantor might enter and take the Profits; the Defendant pleaded Entry and Prizel, &c. and the del Profits in Bar, and Judgment was for the Plaintiff upon Demurrer; Court look-ed upon the Writ of Inquiry the Jury gave Damages; and upon莫-ing upon the tion a Writ of Inquiry was awarded; for Debt might have been brought first Jury’s upon this Covenant, it being to pay a Sum certain, and this is not like an Iflie where the Jury are to give no more Damages than are proved to have been a Con.

But here the Jury are to give the Whole, unless the Defendant proves something in Mitigation, which was not done in this Cafe; therefore, theirs, after-though the common Rule holds, that no new Trial, or new Writ of Inquiry, shall be for too small Damages; yet there being a Contrivance in this Cafe, it differs. 2 Salk. 647. pl. 17. Mich. 10 Will. 3. B. R. held the Comm in Rule to be as in the principle Cafe, and said, that otherwise this Inconvenience might follow, viz. that the small Damages given by the first Jury, might influence the second Jury to give greater.

8. In an Action of Covenant for Non-Payment of Rent reserved upon a Lease for Years, there was Judgment against the Defendant by Default; and upon a Writ of Inquiry executed, the Jury gave the Plaintiff but 15s. Damages, and no more, though they were proved that the Defendant owed him 150l. for Rent. The Reason why the Jury gave 15s. and no more, was, for that the Defendant took this Lease of the Plaintiff of a certain Piece of Ground, in which he (the Leftee) covenanted to pay so much Rent; and the Lessor covenanted, that he should have such a Sewer, or Drain, to keep Water, he (the Leftee) intending to set up a Paper-Mill, but the Counsellors of Sewers had made the Water-Course so narrow, that he could not have Water sufficient for his Poerpe; and being unwilling to sue the Lessor upon this Covenant, he left the Land to the Leftee; and thereupon another Person entered, and was possed thereof, and set up a Cart-Mill, and the Miller paid the Rent; and all this being known to the Jury, who were of the Neighbourhood, they gave the Plaintiff 15s. and no more. The Court was of Opinion to set aside this Writ of Inquiry; for though the supposed Breach of Covenant (on the Plaintiff’s Side was true) viz. that the Defendant had not sufficient Water to set up his Paper-Mill, and that had been given in Evidence to the Jury on the Writ of Inquiry; yet they could not have mitigated the Damages on that Account, much less when it was not given in Evidence. ‘Tis true, the Leftee left the Land for that Reason; and another entered and possed it, which Entry &c. might have been given in Evidence upon the Trial of an Iflie joined, but not to a Jury upon a Writ of Inquiry after a Judgement upon a Demurrer; neither did the Defendant give it in Evidence to the Jury, but pretends they knew it themselves. 8 Mod. 196, 197. Mich. 10 Geo. 4 Parv v. Purbeck.

4 M (G. a) In
(G. a) In what Cases a Writ of Inquiry may be awarded after Reversal and Judgment Quod Recuperet and the Record remanded; And out of what Court.

A brought Trespass against B. in B. R. and upon Demurrer upon the Plea of Defendant, it was adjudged for Defendant. But that Judgment was reversed in the Exchequer-Chamber in Error, but no Writ of Inquiry was then given, and the Record was remanded; and adjudged accordingly, that the Plaintiff recover; and that Judgment shall be made by the Court, and all shall be done which appertains thereto; So that a Writ of Inquiry of Damages is to be awarded, which being return'd, there is to be a second Judgment, that the Plaintiff shall recover the Damages found; And adjudged accordingly.—Yelv. 74. S. C. but S. P. does not appear.

In the Case of Faldow v. Ridge, the Court of Exchequer Chamber after the Reversal &c. give Judgment quod Recuperet &c. But because they wanted Power to award a Writ of Inquiry, which was necessary in that Case, being on a Demurrer, and therefore it was sent back into B. R. for the Execution of that Writ, and thereupon to give Final Judgment for him. Carth. 181. Hill. 2 & 3 W. & M. in B. R. in Cafe of Philips v. Bury.

But if it is otherwise where the Judgment is against the Plaintiff in B. R. upon a Special Verdict, and that Judgment reversed in the Exchequer Chamber, for in that Case there being no Writ of Inquiry requisite, the Court of Exchequer Chamber does not only give Judgment of Reversal, but a compleat Judgment for the Plaintiff in the Action (viz.) Quod Recuperet &c. and for this Difference the Cafes (marked * infra) were cited. Carth. 181. in S. C.


2. And if Judgment had been given in Trespass in C. B. for Defendant, and reversed in B. R. such Course should have been taken, as if the first Judgment had been given against the Defendant. Cro. J. 206. pl. 1. Patch. 6 Jac. B. R. in Cafe of Faldowe v. Ridge.

3. If Judgment be given against the Defendant in King's-Bench, and a Writ of Error be brought thereupon, and Judgment reversed in the Exchequer-Chamber, the Exchequer-Chamber must give the Interlocutory Judgment, Quod quer' recuperet, and this Court award the Writ of Inquiry of Damages; and so is Faldow and Ridge's Cafe in Yelv. 74. 2 Cr. 206. 12 Mod. 153. Mich. 9 W. 3. Anon.

(H. a) What Damages may be given on a Writ of Inquiry.

Br. Damages, I. 1 N a Writ of Inquiry of Damages, the Sheriff returned, that he had extended the Land of which the Difficult was made at 26s. 8d. per Annum, and that from the Day of the Different, till the Day of the Inquisition taken, is a Year and a Half, and taxed the Damages at 10l. Per Danby, the Plaintiff shall recover the Damages taxed, for though the Land is worth but 26s. and 8d. per Annum, yet it may be that the Defendant has cut Trees upon the Land, or such like, so that in a Year and a Half upon such little Land he might do 20l. Damage, Quod Nota, good Reason. Br. Brief de Enquire &c. pl. 9. cites 7 E. 4. 5. 2. Where
2. Whereon Writ of Inquiry intire Damages are given, and for Part of which no Damages could be given, that Part shall be rejected as Surplusage. 12 Mod. 157. Trin. 9 W. 3. Wett v. Cole.

3. Writ of Error of a Judgment in C. B. where the Judgment was by Default and Damages separated by Writ of Inquiry, Per Holt, if there be two Plaintiffs, in many Cases there may be Judgment for one Party, and Non Pros' entered for the other; but the Judgment upon the Non Pros' is, Quod eat inde fine Die; but where the Non Pros' is only for Part of the Thing demanded it amounts to a Release only for so much. 12 Mod. 384. Pach. 12 W. 3. Stanhope v. Pemberton.

4. In Covenant to pay the Rent and maintain the Tenements, the Plaintiff had Judgment and a Writ of Inquiry issued, and was returned; it was assigned for Error, that the said Writ could not be a Writ in this Action, because it recited all the Facts in the present Tense, viz. that the Rent Adhibit infelicitus exilific, and the Tenements adhibic are out of Repair; whereas the Action of Covenant is only for Rent in Arrear, and Tenements not repaired at the Time of the Original feud; but this adhibic in the Writ of Inquiry refers to the Time of the Tesis of the Writ of Inquiry. Secondly, the Plaintiff ought to recover only for the Damages that he hath sustained at the Time of the Action brought; but here the Jury upon the Writ of Inquiry, have given Damages that the Plaintiff sustained the bringing of the Action, viz. until the Writ of Inquiry issued, which is erroneous, cites 2 Saund. 169. Hambleton v. Vere. Hob. 189. Harbin v. Green. Trin. 9 W. 3. B. R. Prince v. Moulton. But it was answered by the Ch. J. 1. That the Writ of Inquiry recited the Declaration in Hec Verba, which was well enough. 2. That it was not like the Cales cited, where more Damages were given then ought to have been given; because the Jury in this Case ought to give so much in Damages as would repair the Tenements, and put them into such Condition, as they ought to be in, and Damages also for the Rent; and therefore if the Tenements were become in a worse Condition since the Action brought, they ought to give Damages for them. And the Judgment was affirmed by the whole Cour. 2 Ld. Raym. 802. Mich. 1 Ann. Shortridge v. Lamplugh.

5. A Writ of Inquiry was executed, and Plaintiff moved to quail the Inquisition by Reason of the Smallness of Damages, which was denied. Where the Jury find any Damages, the Inquisition must stand; alter had they found no Damages, Barn's Notes in C. B. 152. Mich. 10 Geo. 2. Burges v. Nightingale.

(I. a) What Things are to be Inquired.

UPON the executing a Writ of Inquiry of Damages in Trespass for digging a Hole in the Plaintiff's Soil, whereby his Land was over-faced, continuando transfregshenon for nine Months; and it was insisted, that they might give Evidence of a consequent Damage after the nine Months, as well as in a Nuisance which continues for nine Months, and the Cause is removed, if the Effect continues after, Damage may be recovered for it; but Holt said, he was not satisfied that the Parity would hold, for the Gift of the Action in a Nuisance is the Damage; and therefore, as long as there are Damages, there is Ground for an Action; but Trespass is one entire Act, and the very Tort is the Gift of the Action; and therefore he said, he doubted whether an Action would
Damages.

would lie for the Continuance of a Trespass, as for that of a Nuisance. Note, in Writs of Inquiry, the Jury sit their Hands and Seals to their Verdict. 12 Mod. 519. Patch. 13 W. 3. the Case of the Farmers of Hampstead-Water.

(K. a) What may be done in or about the Executing a Writ of Inquiry.

1. THOUGH Defence be made upon a Writ of Inquiry, yet it would not aid a Judgment, if irregularly obtained. Per Holt Ch. J. i. Mod. 262. pl. 20. Mich. 8 Ann. E. R. in Case of Taylor v. 

(L. a) Inquiry of. In what Cases it must be by the First Jury, or not, and where by the Court.

1. IN Dower, the Tenant said that he has been ready at all Times to render Dower and yet is, and the Demandant averred the contrary, by which he recovered Dower, and for Damages prayed the Inquest to inquire of the Damages, and could not have it; for this is an Issue joined between the Parties, which shall be tried by Nisi Prius; per Cur. Br. Enquett. pl. 79. cites 34 E. 3. 2. Diceis tantum, the Inquest found that one had taken 10 s. and another 6 s. and another a Coat, Price 40 d. to the Damage of Ten Marks, and because the Damages were not sever'd, the Justices were in Opinion to have taken Inquest De Novo, by which the Plaintiff releas'd his Damages, and had Judgment. Quære, if this is intended this Inquest which gave the first Verdict, or other Inquest de Novo. Br. Enquett. pl. 6. cites 44 E. 3. 36. 3. In Trespass against several, they pleaded in Bar and are at Issue, and at another Term one of them made Default, and Writ was awarded to inquire of Damages against him in Order to continue the Proces against him and to avoid a Discontinuance, but this Writ shall not issue till the Issue be tried against the others; for if it paffes for the Plaintiff against the others, then they shall affiess Damages for the Whole and then the Writ of Inquiry shall never issue; for the Damages are tried against all by the Inquest which paffes upon the Issue. But if the Issue passes against the Plaintiff, then the Writ shall issue against him that made Default, and so it was done by Accord of all the Court. Quæd Nata. Br. Brief. de Inquert &c. 8. cites 39 H. 6. 1. 4. In Trespass, the Defendant imparted and at the Day &c. made Default, and therefore Writ of Inquiry of Damages was awarded, Quæd Nata. Br. Default pl. 72. cites 1 H. 7. 11.
3. And per Moyle, where two plead Not Guilty severally in Trespass, and several Venire Facias are awarded, the Inquest which first passes shall affect Damages against all, and the Second Jury shall not assess Damages, and there the other Defendant shall be charged of the Damages by the Inquest, which passed upon the Illuc, to which he was no Party, but he was Party to the Original, Quod Nota; and therefore may have Action also, &c. and in this Case the Second Inquest shall not affect the Damages, Quod Nota. Br. Brief de Inquire &c. pl. 8. cites 39 H. 6. 1.

6. In Trespass, they were at Illuc, and Venire Facias returned, and at the same Day the Defendant coustified the Action, and the Inquest [was] at the Bar, and by Award of the Court this Jury tried the Damages, and no new Writ, to inquire it, was awarded, Quod Nota. Br. Damages pl. 227, cites 18 E. 4. 7.

7. An Action of Battery brought before the Mayor of Plymouth, and Not Guilty pleaded; but afterwards the Illuc was waived and Judgment was given for the Plaintiff, and a Writ of Inquiry of Damages was awarded to the Serjeants at Mace, returnable at the next Court before the Mayor and Bayliff. Upon Error brought, it appeared upon the Record certified, that the Writ of Inquiry was executed before the Mayor, who was also the Judge of the Court, and for that Cause was reversed; for the Writ warrants the Inquiry to be made before the Serjeants of the Mace, who by the Writ for that Purpofe are made distinct Officers, and to an Inquiry before the Mayor was not warranted by the Writ which was directed to other Officers, and not to him. Brownl. 203. Trin. 3 Jac. Bailey v. Moon.

8. In an Action of Trespass against Churchwardens, where by the Yelv. 14 Statute 43 El. 2. If for a Diffreß taken by them for Money for the Relief of the Poor Trespass be brought against them, and Verdict pass for them, the Defendants shall recover Treble Damages, with their Costs, and that it be affid &c. by the same Jury, or by Writ of Enquiry of Damages; it was resolved, that treble Damages are well affected by the Jury, though that it be not done by the Court; because the Words are (by the same Jury to be affid) and not Damages to be trebled by them. Noy. 137. Okeley v. Salter.

Vexation, shall be affid by the Jury, but shall be trebled by the Court, and that the Court thereupon may give Costs De Incremento; For no Evidence for Costs can properly be given to the Jury, insomuch as it depends on the Usage of the Court in which the Suit is: And Ibid. says, that according to this Judgment was the Case Trin. 44 Eliz. B. R. Menal v. Ball.

9. If there be Demurrer to part, and Plea to issue to part, and Judgment upon the Demurrer before the Illuc tried, the Plaintiff if he pleates may enter a Non Pros upon the Illuc, and take a Writ of Inquiry of Damages upon the Judgment on Demurrer, but it is not to be taken out till after Non Pros' entered on the other; for if they will proceed upon the Illuc, the Jury, that try it, ought to inquire of the Damages on the other. And here because a Writ of Inquiry was taken out without entering of Non Pros', that Matter was moved in Bar of final Judgment, and thereupon it was laid till they moved of the other Side. Per Cur. 12 Mod. 558. Mich. 13 W. 3. Sutton the Marthall's Cafe.

For more of Damages, See Costs and the several other proper Titles.

4 N (A) Day-
(A.) Day-Writ.

1. **The King may grant Writ of Warrantia Diæ to any Person which shall have his Default for one Day, be it in Plea of Land, or other Action, and be the Cause true, or not; and this by his Prerogative, quod nota.** Br. Prerogative, pl. 142. cites F. N. B. 7.

2. "Tis against Law to grant Liberty to Prisoners in Execution, by other Writs than Day-Writs; But they shall have as many Day-Writs as shall be needful for Attendance on Commissioners, to whom the Cause being Matter of Account, was referred, and that without paying any Fees, either for making, or sealing them. Chan. Rep. 67. 9 Car. 1. Rigault v. Cloderry.

3. No Prisoner committed by B. R. ought to have the Benefit of the Day-Rule of going abroad in Term-Time; for their Imprisonment is their Punishment for their Contempt, or Misbehaviour. 2 Show. 88. pl. 80. Hill. 31 and 32 Car. 2. B. R. The King v. Deane.

4. One in Execution had a Habeas Corpus from the Lord Keeper (which they call a Day-Writ) returnable three or four Days after its Issue. By Virtue of this Writ, he went to the Wine-Licence-Office, but never to any Inn of Court or Chancery, or to the Lord Keeper's, and this in the Vacation. Per Pemberton Ch. J. this is a Habeas Corpus out of Chancery, which they may send at any Time, and by Virtue of the King's Writ, the Party was brought out of the Prison-House, and that is justifiable. Then all the Day, so long as there was a Keeper with him, he was in Custody till, and returning to Prison at Night, it is well enough, and no Escape; though Chancery may examine the Contempt, that is nothing to B. R. 2 Show. 298. pl. 299. Patch. 35 Car. 2. B. R. Harwood v. Manlove.

5. A Prisoner taken on an Escape Warrant before the Sitting of the Court the same Day, shall be discharged, if his Name was entered with the Clerk the Night before; but not if it was entered the same Morning only; and in the first Cafe the Prosecutor shall be committed. 8 Mod. 80. Trin. 8 Geo. Wilkinson v. Matthews.

6. **Entry of the Name in the Petition for a Day-Rule, signifies little, unlefs it be read in Court.** 8 Mod. 240. Patch. 10 Geo. The King v. Dunbarr.

For more of Day-Writ in General, See other proper Titles.
Deaf, Dumb and Blind.

(A) How consider'd; and Favour'd, or not, in Law.

1. In Writ brought by a Feme, the Tenant pleaded that the Demandant had nothing, unless in Coparcenary with one Alice her Sister, who is in full Life, not named &c. To which the Demandant replied, that the said Alice was Dumb and Deaf &c. by which the Tenant passed over, and vouch'd &c. Thel. Dig. 6. Lib. 7. cap. 7. 4. 536. cites Trin. 14. H. 3. Brief 877.


4. A Man when he was of sound Memory made and sealed a Charter of Fecoffment and Letter of Attorney to deliver Seifin, and before the Livery by Illness he became Paralitick, To that he Dumb at the Time that the Seifin was delivered, but by all Signis that a Man could perceive he agreed to the Livery of Seifin, and adjudged a good Fecoffment. Thel. Dig. 6. Lib. 1. cap. 7. S. 9. cites 25 Aff. 4.

5. A Man, who could neither speak nor hear committed Felony, and was arraigned, and therefore was commanded to Prison. Br. Corone pl. 216. cites 26 E. 3.

6. One was indicted of the Death of a Man, who could nor speak nor hear, and the Court was in Doubt what to do with him &c. wherefore they thought that he should be remanded to Prison. Thel. Dig. 6. Lib. 1. cap. 7. cites 26 Aff. 27.

7. One who had made his Will and became ill, and (as it seems) had left his Speech, the same Will was delivered into his Hands, and it was said to him that he should deliver it to the Vicar, if it would his Last Will, otherwise he should retain it, and be delivered it to the Vicar, and this was held a good Will. Thel. Dig. 6. Lib. 1. cap. 7. S. 8. cites 44 Aff. 36.

8. A Man Deaf and Dumb a Nativitate, is Non-Compos, but otherwise, it by Accident. But Deaf, Dumb, and Blind by Accident is Non Compos. Per Wakering, Reader of Lincoln's-Inn, June 1626. cited D. 56. pl. 13. Marg.

9. It appears by Oath, that the Defendant is both Senseless and Dumb, and therefore cannot instruct his Counsel to draw his Answer; and therefore ordered that no Attachment, or other Proceeds of Contempt are awarded against the Defendant for not answering, without Special Order of this Court. Cary's Rep. 132. cites 22 Eliz. Altham v. Smith.

10. One
Debt.

See And. 209. that Signs and other Dumb Motions are to be Conformed to Jus. Fin.

Law. Svo. 107 cites Perk. 5. that one born Deaf and Dumb may make a good Grant. For divers may have Understanding by their Sight only, but that for want of Sight, one born Deaf Dumb and blind can't grant. Perk. S. 25. B. that he may make a Gift if he has Understanding; but he says, it is hard that such a Person should have Understanding. For a Man ought to have his perfect Understanding by his Hearing, yet divers Persons have Understanding by their Sight &c. And a Man born Dumb and Blind may have Understanding; But a Man that is born Blind Deaf and Dumb can have no Understanding, so that he can't make a Gift or a Grant.

11. If a Blind Man has understanding he may deliver a Deed sealed by him. Jenk. 222. pl. 75. ad finem.

12. The Lord shall have the Custody of a Copyholder that is Deaf and Dumb; for else he shall be prejudiced in his Rents and Services, and adjudged for the Grantee of the Lord against the Prochein Amy of the Copyholder. Cro. J. 105. pl. 43. Mich. 3 Jac. B. R. Eavers v. Skinner.


And Bridgman Ch. cited the fame, allowing per Worden.

Warburton J. with Conform of the other Justices, after having examined and found him Intelligent, in one Hill's Case. Ibid.—And per Archer J. If there be good Intelligence such may make Feoffments, and make Contradits for their Good. They are admitted on Examination to marry, and on Examination to receive the Sacrament. Ibid. 54.

For more of Deaf, Dumb, and Blind, See Ley Sager (K) and other Proper Titles.

* Debt is what a Man may recover by Action, to his own Use.

Arg. 10

Mod. 165.

cites Bracte.

lib. 3. cap. 1.

This in Roll is in Folio 591.

S. P. Br. Debt. pl. 50 cites 50 E. 3. 16.

and that it was held, that the Writ being in the Detinect only, was good. Thel. Dig. 113. Lib. 10. cap. 25. S. 14. cites S. C. Ow. 32. Patk. 7 Eliz. Anon. the Court held, that where a Lease is made, referring to many Quarters of Wheat yearly, and the Leffer makes a Lease of the Rent Corn, referring a Rent, that the Reservation is good; For a Man may refer a Rent upon a Lease of Rent, and that the Rent is not Part of the Reversion, but only incident thereto, and the Leffer has the same Inheritance therein, as he hath in the Reversion.

(A) For what Things it lies.

1. If a Man leaves for Years, reserving so many Quarters of Wheat yearly, an Action of Debt lies for the Wheat, if it is Arrear. Tr. 3. Ja. B. R. between the Lord Denny and Parnell, admitted and adjudged.

2. 3f
Debt.

2. If Two submit to an Award, and they award a Collateral Matter to be done, and not any Money, no Action of Debt lies upon this Award. 3. 10 3a, 24.

3. Debt against the Executors of the Clerk of the Exchequer, by the King, of Receipt of the Clerk of 100 l., the Plaintiff delivered sufficient Acquittance, and that he shew'd the Liberate to the Clerk Anno 13, and offered Acquittance such another Day after, and the Defendant said, that he was ready the Same Day to have paid it, if the Plaintiff would have deliver'd Acquittance; and the Plaintiff demur'd in Law; and the Justices were in diverse Opinions, if he be Debtor without Acquittance offer'd; But after, Judgment was given for the Plaintiff. See the Book for the Form of the Declaration. It was held that the Patent, by which the King had granted the Debts, and the surrender of the Liberate, made the Clerk Debtor, if he has Affairs enter mains, without surrendering the Acquittance; And per Townend and Hulfey, the Clerk ought to pay and demand Acquittance; and yet it was agreed there, that the Clerk shall not have Allowance upon his Account without Acquittance. Br. Det. pl. 136. cites 2 H. 7. 8.

4. If Rent-Corn be referred upon a Lease for Years, and it is behind for 4 L. 46. two or three Years, the Lessor may have Debt for the Corn; and shall make his Declaration of so much Corn, and the same shall be in the Detinett; But yet he shall not have Judgment to have Corn, but for so much Money as the Corn was worth, every several Year being accounted; Per Cur. 3 Lc. 260. pl. 347. Mich. 32 Eliz. in the Exchequer, in Cheyn's Cafe.

5. A Writ of Debt properly lies where a Man owes another a certain Sum of Money by Obligation, or by Bargain for a Thing sold, or by Contrary, or upon a Loan made by the Creditor to the Debtor, and the Debtor will not pay the Debt at the Day appointed, that he ought to pay it, then the Creditor shall have an Action of Debt against him for the same. F. N. B. 119. (G).

6. The Lord may bring Action of Debt for his Fine against Copyholder; affirm'd by two, and not denied; and Twisden said, that if it was held 15 Jac. by Foieter J. which was not denied; but it was said the Opinion of Bacon was e contra. Sid. 58. in pl. 26. in a Note there. Mich. 13 Car. 2. B. R.


(B) Debt for Rent.
Who shall have the Action, and against whom.
Who shall have it.

1. He that is privy in Estate, shall maintain an Action of Debt for the Rent.

2. If a Man lesces for Years, rendering Rent, and after grants It was held over the Reversion, and the Tenant attorney, the Grantee shall have an Action of Debt for the Rent incurred after. Dubitation, 9 P. 6. 16. b.

Rent; for the Reversion comes to him lawfully. Br. Deed, pl. 142. cites 3 H. 7. 18. Ibid. in pl. 177. verius inem. 5 P. and cites 4 H. 5. for the Action of Debt runs with the Reversion.

40

3. So
Debt.

* Br. Debt, pl. 122, cites S. C. but I do not serve S. P.

there. — Br. Rent, pl. 10, cites S. C. and by Cottington and Palfen, the Heir shall have the Rent; For it is Parcel of the Reversion, and shall pass by Grant of Reversion, and yet it does not appear there that it was refer'd to the Leffer and his Heirs, Quod Nara.

* Fitzh. Debt, pl. 20, cites 9 H. 6, 42. S. C. lays it seems that he shall be put to his Action of Debt; because the Frank-tenement is in the Heir without Entry, and then the Lease is utterly determined; and therefore it seems he cannot disain. —— Br. Debt, pl. 7, cites S. C. lays, that though the Baron had never any Hulse by his Wife, (and so was not intitiled to be Tenant by the Curtesy,) yet Action of Debt lies by the Baron against the Wife well enough, for Rent incurred after the Wife's Death, till the Heir enters; Per Opinionem Curiae Quod Nara.

[i] Br. Debt, pl. 122, S. C. the Lease was of Lands which the Wife had in Dower, and held, that after the Wife's Death the Baron shall have the Rent, per Juyne; For the Tenant had the Occupation of the Land for the Rent, during the Life of the Wife, and consequently what incurred during the Wife's Life, the second Baron shall have; for the Tenant had Quid pro Quo; but the Heir cannot have it ut Videatur. —— Br. Rents, pl. 10, cites S. C.

Fitzh. Debt, pl. 57, cites S. C. and whether he had the Rent by the way of Dower or otherwise, it is all one; per Bb & Cott. For the Baron had Frank-tenement in the Rent, during his Wife's Life &c. —— R. N. B. 121. (C) S. P. and in Marg. cites S. C. —— See tit. Baron and Feme (H) pl. 1, S. C. and the Notes there.

6. If Baron and Feme join in a Lease for Years, rendering Rent of the Land of which the Wife is feited for Life, and after the Feme dies within the Term, it seems the Baron shall not have the Rent, because the Reversion is gone. My Reports, 14 Id. between * Smallman and Asborrough, per Curtains. Contra, 9 H. 6, 26.

7. Debt lies for Successor or Heir in some Case, As where a Man grants an Annuity and for Default of Payment to forfeit 40 s. Nomine Feme; the Heir or Successor shall have the Action of Debt; for it goes with the Annuity. Br. Dette pl. 86, cites 7 H. 6, 19.

8. It was held, where one leases his Manor for Term of Years, that the Lesse shall have Action of Debt against the Tenants of the Manor, after the Term ended, for their Rents Arrear within the Term. Thel. Dig. 19, Lib. 1. Cap. 21. S. 8, cites Mich. 19 H. 6, 42.


10. If the Lord grants his Seigniory for Years, the Grantee during the Years shall not have Action of Debt. 7 Rep. (39) 38. b. cites 9 H. 7, 17, a.

11. But how Aliences and Grantees at this Day shall have Actions See the Statute made Anno 32 H. 8. cap. 14. & 37. And by those and by the Statute 27 H. 8. of Uter, divers Persons who were Strangers and
Debt.

not Privies before this Statute, now are enabled to avow, and to maintain Actions in diverse Cases. Thel. Dig. 19. Lib. cap. 21. S. 9.


13. Leffe assigns Part, the Assignee enters B. The Question was, if the Leffe (the Reversion being out of him) might have Debt before he had continued the Reversion. D. 4. b. pl. 1. But in the Margin 5. a. pl. 6. faith he had heard that it was adjudged that the Action lay upon the first Contract.

14. It was said by Anderson, and agreed by the Court, that if a Man grants an Annuity out of Land, and has nothing in the Land, that yet this shall be good to charge the Grantor in a Writ of Annuity; and in the same Case it was also agreed by the Court, that if a Man grants an Annuity to a Woman, who takes a Husband, and after Arrearages do incur, and the Wife dies, fo that the Annuity is determined, that the Husband shall have an Action of Debt for the Arrearages by the Common Law. Shuttleworth said this is remedied by the Statute of Arrearages of Rents, and then at the Common Law it is but a Thing in Action. Perryman said an Annuity is more than a Thing in Action. Windham said he may grant it over, and fo the Opinion of the whole Court was, that Debt was maintainable. Goldsb. 30, 31. pl. 1. Mich 29 Eliz. Sellenger’s Case.

15. Leffe for Years grants the Rent. Leffe attorns; Debt lies for Grantee without his having the Reversion; Per Cur. The Attornement makes Privity; and Judgment for the Plaintiff 2 Jo. 1. Mich. 22 Car. 2. B. Goodman v. Packer.

16. An Action of Debt lies against a Returning Officer at Elections for 500 l. Penalty upon the Statute for not delivering a Copy of the Poll to the Candidates, being required. MS. Tab. May 3d. 1718. Smith v. Phillips.

(C) Debt for Rent. Against Whom it lies.

1. If Leffe for Years grants over his Term, an Action of Debt * 8. Debr, lies against the Grantee for Rent incurred after the Grant. 10 H. 6. 11. b.

2. [So] if Leffe for Life, rendering Rent, grants over his Estate, and after dies, Debt lies against the Grantee for Rent incurred after the Grant. 10 H. 6. 11. b.


S. P. adjudged accordingly; and that there it is held, that after the Death of the Baron, the Action of Debt in such Case will lie against his Executors.

4. If an Annuity was granted by a Bishop before the Statute of Elizabeth, and confirmed by the Dean and Chapter, and after Arrearages incur, and the Bishop dies, an Action of Debt lies for the Arrearages against the Successor. Cr. 10 H. 25. between Edwards and the Bishop of Ely.

5. A.
Debt.


6. B. leased Three Acres of Lands to H. for Years rendering Rent. H. leased one Acre to W. Then B. granted his Reversion to C. who brought Debt against H for the entire Rent; It was adjudged that the Action did well lie, because the entire Estate remained in Part of the Land, and so the entire Privity and Action remains for the whole, against the first Leffee, and that fo is Rutleden's Cafe [D. 4. b. s. a.] 24 H. 8. & 2 All. 52. And Judgment for the Plaintiff. Cro. E. 633. pl. 30. Mich. 40 & 41 Eliz. B. R. Broom v. Hope.

7. Debt against Two Administrators for Rent behind the Death of the Intermediate, they pleaded that before the Rent behind, they assigned the Term to M. of which the Plaintiff had Notice, and accepted of the Rent by the Hands of the Assignee. Adjudged per Cur. that the Plaintiff be barred. No. 600. pl. 829. Trin. 41 Eliz. Marrow v. Turpin.

8. Where a Man grants a Rent Charge for Life, and the Rent is Arrear, and the Grantor infeoff A. of the Lands, and the Rent Charge is in arrear in the Time of A. and then A. infeoffs B. and the Rent Charge is likewise arrear in his Time, and then the Grantee of the Rent Charge dies, his Executor shall have an Action of Debt against every one of them for the Rent which was in Arrear respectively in their Times, because Qui feticit Commodum fenitire debit & Onus; Resolved. 7 Rep. 39. Mich. 5 Jac. C. B. Lillingdon's Cafe.

9. Debt for Rent, the Defendant pleaded that after the Lease made to him, and before the Action brought, he assigned over his Term to J. & that the Leffer had received of the Assignee the Rent which grew due after the Assignment. All the Court resolved, that this Assignment and Acceptance of the Rent from the Hands of the Assignee is Notice of itself, and an Agreement that he is his Tenant, and then he cannot afterwards refort to the Leffee to recover his Rent of him, which was due after the Assignment. Cro. J. 334. pl. 1 Hill. 11 Jac. B. R. March v. Bracke.

10. After the Determination of a Rent Charge Debt does not lie against one Perfon only that received a Part of the Profits of the Lands, but it must be brought against all that had any Part of the Lands charged. Saund. 284. Trin. 21 Car. 2. Duppa v. Mayo.

(D) Debt.
The Gift of the Action.

In what Cases an Action of Debt lies, or Covenant.

1. If in a Deed sealed and delivered by A, it be recited, That whereas by Obligation of such Date, B. C. D. and E. stood bound in the penal Sum of 160l. to the said A. for the Payment of 86l. 18s. at a certain Day, Now this Writing witnifntich, that he,
Debt.

2. In some Cases no Action of Debt lies on a Covenant to pay Money, as if A. covenants that his Executor shall pay to B. within a Year after his Death. 10 l. Now because no Action of Debt lay against A. himself, it lies not against his Executor, but only an Action of Covenant. Wentv. of Executors, 123. says, it was held so in Q. Elizabeth's Time.

3. So if the Covenant is Conditional, as thus; viz. that if C. do not pay to B. 10 l. then A. will pay it. Went. of Exec. 123.

4. So perhaps, if the Covenant be in the Disjunctive, viz. to do such an Act, or to pay 10 l. Now if the Act be not done, yet Debt lies not, but Covenant only. Wentv. of Exec. 123.

5. A. by Indenture leased Lands to be for Years, Lessor covenanted to pay for the first Year 6 l. and afterwards 8 l. per Annum; after the first Year, for Arrears of the 8 l. either Debt or Covenant lies. Cro E. 797. pl. 45. Mich. 42 & 43 Eliz. R. Sicklemore v. Simmonds.

6. Debt lies not, but Covenant, on a Bill that ascertain's the Summe. Vide 2 Jo. 184.

7. The Plaintiff declared that the Defendant covenanted with him to pay him so much Money as he should expend for repairing and victualling a Ship for him, and avers that he expended 300 l. in repairing and victualling it, and that he gave the Defendant Notice of it at such a Day, and for Non-Payment he brings his Action of Breach of Covenant. It was objected that in this Case the Plaintiff should have brought an Action of Debt, and not of Covenant. But to this all, Roll answered, that it was well enough, for it is in the Election of the Plaintiff to bring either an Action of Debt, or an Action of Covenant, and that it has been heretofore questioned, whether an Action of Debt did lie in this Case, but it was never doubted, but that an Action of Covenant did very well lie. Sty. 31. Trim. 23 Car. B. R. Anon.

8. An Action of Debt was brought for 1500 l. upon a Deed of Charter-Party. The Plaintiff had a Verdict. Roll J. said, either an Action of Debt, or an Action of Covenant lies here, for it is upon a Charter-Party. Sty. 133. Alich. 24 Car. B. R. Frere's Case.


10. If Leislee assigns, and afterwards Leislee accepts of the Affiance for his Tenant, he cannot afterwards maintain Debt for Rent against the first
Debt.

Lej's, but he may maintain Covenant against him. Sid. 402, pl. 5. Hill. 29 & 21 Car. 2. 3. R. And the Ch. J. cited it as to adjudged in 13 Car. 1. in Middleham's Cafe, and to it was agreed now.

11. If A. covenants to pay B. so much as his Part of the Charge of a certain Sum between the Vicar of S. and the Plaintiff touching a Modus in the said Parish, and which concerned all the Parishioners, and B. brings Debt upon this Covenant and avers that B's Proportion, or Part amounts to such a certain Sum, Debt lies as well as Covenant; for the Damages, which before were uncertain, are by the Averment reduced to a Certainty. 3 Lev. 429. Mich. 7 W. 3. C. B. Saunders v. Marke.


13. In Debt upon Bond, the Defendant pleaded, that, since the last Continuance, the Plaintiff did by his Deed grant and agree to, and the Defendant to accept a Bond for the Building of a House in Satisfaction of the first Bond; and now it was held not to be a good Plea, for it amounts to no more than a Covenant, and not to a Releafe. 12 Mod. 559. Trim. 13 W. 3. Baber v. Palmer.

14. Plaintiff agreed to sell the Defendant so many Stacks of Wood, and the Defendant covenanted to pay the Plaintiff 351. for every hundred of the said Stacks, and bound himself in the Penalty of 1001. to do it. It was held, Per Cur. that the Plaintiff may have Debt or Covenant at his Election; for the Rate being certain, viz. 351. for every Hundred Stacks of Wood, when the Defendant has the Wood, the Agreement becomes certain, for which Debt lies. 2 Ld. Raym. Rep. 814. Mich. 1 Ann. Ingledew v. Crippe.

(E) What will be a good Consideration to raise a Debt.

Il The Gift of the Action, sicillicet, whether he shall have an Action of Debt, or Action upon the Cafe, or Covenant.

Br. Dette, pl. 104. cites 15 E. 4. 32. contra per tot. Cur. that the Action does not lie, because the Defendant has not Quid pro quo, Quod Nour; but cites 15 E. 3. and 33 H. 6. fol. S. to the Contrary——Br. Dette, pl. 117. cites 37 H. 6. 3. by the Justices that the Action does not lie; For the § Discussing and Remedy of the Marriage, to make him marry her lies in the Spiritual Court, and therefore the Action for the Money; and § of Legacies, Contrary where Titles are leaved or sold for 101. for there the Nature is changed, contrary above, and so two Justices against two.

If a Man promises another 201. in Consideration that he will marry his Daughter, or Cousin, this is a good Consideration, and after Marriage he shall have an Action of Debt. By Reports, 14 Jac. 17 E. 4. 4. b. 22 All. Placito 70.

2. [So]
2. [52.] If a Man promises another 20 l. in Consideration that he will marry A. S. a Stranger, Debt lies for it after Marriage. 51. pl. 4. C. ad
judged. — 2 Roll Rep. 259. 5 C. ad
judged for the Plaintiff. — But both those Reports mention it to be an Action on the Cafe, and not Debt — In such Cafe Debt lies; Per Cur. All. 6. Mich. 22 Car. 2. B. R. Obiter.

3. [52.] If a Man says to a Physician, or Surgeon, that if he will go Cory. J. 531. to J. S. who is sick, and make him well and sound, he will give him so much as Debt lies for the Surgeon, if he makes him well and sound. 37 H. 6. 9. per Houl.

4. So if a Man promises a Physician, or Surgeon, a certain Sum to cure such a poor Man, an Action lies if he cures him. 17 C. 4. 5.

5. So if a Man promises a Labourer certain Money for repairing such a Way, which is an Highway, an Action of Debt lies. 17 C. 4. 5.

6. If A. at the Request of B. and for the proper Debt of B. delivers Money to T. S. to be repaid to A. by B. upon Request, A. may have an Action of Debt for the Money against B. for this is a plain Con
trat between them, failles, that if he will pay at his Request a Debt that he owes J. S. he will repay him. 51. pl. B. between Adrian Henrique and Inigo de Truss Cornes Quarte adjudged for tomaim Curtin, this being moved in Arrest of Judgment after a Debit for the Plaintiff. Intrat. 17 Car. 18. 366. and after affirmed in a Deit of Error in Banco Regis.

7. If J. promise J. S. a certain Sum for the Commons of J. D. an Action of Debt lies for it. 17 C. 4. 5. for the Law intendts that J. S. is such an one, by whose Service I have Advantage.

8. If A. buys of me certain Cattle for a certain Sum, and B. at the same Time undertakes to pay it, if A. does not pay it the Day; if A. does not pay it, yet Debt lies not against B. for it sounds in Covenant. 18 C. 3. 13. it seems is so to be intended.

9. If J. retain a Carpenter to build an House, and that he shall S. P. though have 40 s. for the doing thereof, an Action of Debt lies for the 40 s. the House is to be built for another Person. Cro. 37 H. 6. 9.

10. If C. recovers 10 l. against A. and B. comes to C. and says, that if he will release the 10 l. to A. that he will be his Debtor, and he accordingly releaces the 10 l. to A. yet no Action of Debt lies, for that it sounds in Covenant. 9 H. 5. 14.

11. If J. retain a Counselor for a Year for 40 s. Debt lies for this 37 H. 6. 8. 6.

12. If a Stranger comes to an Attorney, and retains him to be Attorney for J. S. in an Action between him and J. D. and he is his Attorney accordingly, he may well maintain an Action of Debt against J. S. for his Fees, though this Retainer by the Stranger was Maintainance in the Stranger; for between J. S. and the Attorney this is lawful, and to the Consideration not against Law. 52. C. B. R. between Truffel and Moglow adjudged upon Demurser.

13. If a Solicitor of J. S. comes to an Attorney de Banco, and retains him to prosecute a Suit in Banco for the said J. S. against J. D. and Judg-
capiendo of the Solicitor pro se deo quislibet Termino 38. 4. ultra
alias misas & expensas per ipsam circa Prosecutionem Secte pred' firm'd. — a

14. If a Man promises another 20 l. in Consideration that he will marry A. S. a Stranger, Debt lies for it after Marriage. 51. pl. 4. C. ad
judged. — 2 Roll Rep. 259. 5 C. ad
judged for the Plaintiff. — But both those Reports mention it to be an Action on the Cafe, and not Debt — In such Cafe Debt lies; Per Cur. All. 6. Mich. 22 Car. 2. B. R. Obiter.
deponendas: in this Case an Action of Debt lies by the Attorney against the Solicitor for his Fees and Expenses disbursed in this Suit, for that the Contract is made between the Solicitor and Attorney, in the Name of the Solicitor himself, and not in the Name of his Bailer. P. 16 Tac. B. R. Rot. 416. adjudged in a Writ of Error between Woodhouse and Bradford. I have a Copy of the Record.

14. So if J. S., a Stranger for any Thing that appears by the Record, comes to an Attorney de Banco, and retains him to prosecute a Suit in Replevin for J. N. the Plaintiff, against W. S. the Defendant, then depending in Bank, Capiendo de J. S. pro foedus & expensis &c. as in Bradford's Case; in this Case an Action of Debt lies by the Attorney against J. S. because he made the Contract in his own Name, and it shall be intended that he shall have Benefit by it, and it cannot be in the Conscience of the Attorney how he is concerned that retains him. Contra, Cr. 6 Car. B. R. between Trelissian and Sands, in a Writ of Error, referred per Curiam, against the Opinion of Jones, that Debt did not lie, but that he is put to his Action upon the Case, and they gave a peremptory Rule for the Reversal of the Judgment, but this was afterwards stayed, upon Information that the Parties were about a Composition, which Information, Mich. 4 Caroll. Rot. 96. I my self was of Council with Trelissian the Attorney.

and that they were of the same Opinion, that Debt lies not, but only an Action on the Case. S. C. cited All. 6. Mich. 22 Car. B. R. Roll said, that the Judgment was not reversed on the Roll, and that his Opinion was, that the Judgment was good —— S. C. ditto to be Law 2 Show. 241. pl. 58. Hill. 56 & 37 Car. 2. B. R. and held, that the express Promise will well save an Action; And the Ld. J. Justice said, that he thought Roll's Argument in that Case was not to be answered. —— 7 Mod. 148. Hill. 1 Ann. B. R. Arg. cites S. C. as adjudged, that an Indebitatus Assumpsit will not lie; and by Holt Ch. J. Ibd. 149. an Indebitatus will not lie for being an Attorney to a third Person, because in that Case his being an Attorney on Record, is what initles him to Debt; and therefore if another does promise to pay, yet he for whom he is an Attorney on Record, is not discharged, and therefore the other cannot in that Case be liable to an Indebitatus.

15. In Debt the Count was for 10l. upon Fendition and for 100 s. the Rate which should be paid to re-pay &c. and held good; for in Debt and Detinue the Warrant of Attorney and the Effibon shall be in Placito Debiti. Thel. Dig. 84 Lib. 9. cap. S. 29. cites Pash. 32 E. 3. Brief 288.

16. If a Man puts his Cloth to the Taylor, who makes it of it a Robe and does not agree for the Price, the Taylor shall not have Action of Debt. Otherwise it is of Vintualls and Wine in a Tavern; for those Price is ascertained by the Clerk of the Market. Br. Dette pl. 158. cites 12 E. 4. 9. per Bryan.


18. There is a Diversity between Debt and Assumpsit. In Assumpsit, it is not necessary that the Contract to be Eviden Insancte, but it suffices if there be Inducement enough to the Promise, and though it is precedent, it is not material; but in Debt it is requisite that Benefit come to the Party, otherwise for Want of Quid pro Quo Debt lies nor. D. 271 b. pl. 29. Marg. cites 28 & 29 Eliz.

19. Error of a Judgment, where the Plaintiff declares his Debt for 256 l. for several Retainers to embroider several Gowns; Error aligned, because the Plaintiff declares (inter alia) That the Defendant retained
Debt.

though for and and after the Case held, an Action of the Cafe would not lie. Brownl. 73. Leech v. Phillips.

21. An Execut or brought an Action of Debt upon a Promife made to the Defendant for bringing up of Children and teaching; and after a Verdict for the Plaintiff upon Nil debt pleaded, it was moved that Debt would not lie in the Case, because it was not laid that they were the Plaintiffs Children. But the Opinion of the Court was for the Plaintiff. All. 6. Mich. 22 Car. B. R. Haines v. Finch.

22. Debt will lie upon a Promife made by a Stranger, as in N. B. 122. K. If one promises Money to another for marrying of a Poor Virgin; Debt lies. All. 6. Mich. 22 Car. B. R. Haines v. Finch.

(E. 2) Consideration Good; though there is not Quid pro Quo.

1. If I promise to Y. S. 30 s. to carry the Corn of W. N. to D. and he does it, he shall have Debt against me, and yet I have not Quid pro Quo, per Davers; and Danby agreed, that Debt does not lie. — Per Moyle, if I retain a Carpenter to make a House for 10 l. who does it, Action of Debt lies, and if I promise a Surgeon 10 l. to cure J. N. and he does it, Debt lies against me. Br. Contract, pl. 17. cites 37 H.

6. 8. 2. In Debt, a Man seized in Right of his Wife sold 400 Oaks for 20 l. and the Vendee took 200 in the Life of the Feme; the Feme died, the Baron not being Tenant by the Curtesy, the Heir entered, and the Baron brought Debt of 10 l. For the Vendee had paid the other 10 l. in the Life of the Feme; and per tor. Cur, because the Contract was good at the Time of the Bargain, and is intire, and cannot be severed, and he has part of the Oaks, and might have taken all the 400 in the Life of the Feme, and did not; therefore it is his Felly, and he shall render the intire Sum. Br. Contract pl. 26. cites 18 E. 4. 5.

3. But contra if a Day of the cutting had been agreed, and he had not cut before such a Day, and the Feme died before the Day. Debt does not lie, for he has not Quid pro Quo. Ibid.

4. If I take another Mans Horse and sell him for 10 l. and the Owner retakes him, yet Debt lies of the 10 l. for the Contract was executed by Delivery of the Horse, Et expectet Emptor. Ibid per Vavifour.


6. But, per Brian J. Fol. 22. if I sell a Horse for 10 l. I may retain the Horse till I am paid, and yet I shall not have an Action of Debt, till the Horse be delivered, and yet by the Bargain the Property is in the Buyer. Ibid.

7. But if the Buyer tenders the Money, and the other refuses, there he may take the Horse, or have an Action of Delinqu. Ibid.

4 Q
Debt.

(F) Consideration passed.

1. If I promise my Bailiff, upon his accounting to me, to pay him £1 at a Day certain for his Service paid, this is no good Consideration to maintain an Action of Debt, because the Service was ended before. 29 E. 3. 26.

2. In an Action upon the Cafe, if the Plaintiff declares, That the Defendant was indebted to him £1, pro parte pretii diversorum & merchandiziarum by the Plaintiff to J. S. being a Stranger, at the Influence and Request of the Defendant, ante tempus illud venerator & deliberatorum, & pro quibus mercurinounis & merchandizis, the Defendant ante tune promiserat to the Plaintiff, to see the Plaintiff satisfied; & sic indebitarius exilens, he promised to pay him at a certain Day; this is no good Consideration; for upon his own showing, it appears that this was not any Debt, nor could he have an Action of Debt for it, but only an Action upon the Cafe upon the Promise, militatis, as this is a Collateral Promise, and not in Nature of a Debt, for the Debt was made upon the Sale of the Goods to J. S. and between them; and though this was at the Request of the Defendant, yet this Request, without more, did not make any Debt in the Defendant without the Promise, which was made at another Day; and though the Request was sufficient, with the Promise, to maintain the Action upon the Promise, yet this did not make it a Debt in the Defendant; and also, this is but a Conditional Promise, seiliicet, that if the said J. S. did not pay, that he himself would. Cr. 22 Car. B. R. between Cogan and Green, adjudged, per Curiam, this being noted for Error upon a Judgment in Banco; which Incuriae in Banco Cr. 21 Car. Rter. 390, and now the first Judgment was affirmed.

(G) Where Debt lies.

The Gift of the Action.

1. For Arrearages of Rent of a Freehold, during the Time of the Continuance of the Freehold, Debt does not lie. 6 H. 4.

2. Where a Man may have Annuity, he shall not have an Action of Debt. 8 P. 6. b. agreed.

3. If a Man grants to another 10l. every Year he shall be resident within such a Parish, the Grantee cannot have Debt for it, but an Annuity, for this is Annual at his Eift. 4 P. 6. 91. b. 8 P. 5. 7.
Debt.

4. If a Man makes a Feoffment in Fee, reserving a Rent for ten Years to him and his Heirs, Debt lies for this Rent, for it is but a Chattel.

5. So if a Man leases for Life, rendering a Rent for one Year, Debt lies for it, for this is but a Chattel.

6. So if a Man leases for ten Years, rendering 10l. Rent to him Co. Litt. and his Heirs, upon Condition to have a Fee, and if he performs the Condition, referring 20l. per Annum; though the Fee passes presently, per it seems Debt lies for the Rent before the Condition performed, for before that it is but a Chattel. 7 C. 3. Oct. 147. ad judicat.

Term the Leesee had only for Years, and therefore the Action of Debt is maintainable.

7. If an Annuity be granted and a Nomine Poene every Day that it is Arrear, if the Nomine Poene be forfeited, Debt lies for it. 29 H. 6. 6. Contea. 8 H. 6. 6. b. Dubitatur, 7 H. 6. 40.

Perpetuity in Feud Simple, between the Parties and their Successors, and for default of Payment a Penalty, Debt lies of the Penalty, though the Annuity be Real and Inheritance, Quod Nulla. Br. Det. pl. 66. cites 11 H. 4. 83. by the best Opinion.—S. P. Br. Det. pl. 201. cites S. C and 7 H. 6. 19. 59. And per Skrene, if Rent-charge be granted to me, and if it be Arrear that I shall have such a Penalty, I may drain for Rent, and also for the Penalty; Quære inde, for it seems that he cannot unles he Deed expects that he may drain for both.

8. If by Prescription the Burgess of a Town ought every Year to elect a Man to collect the Rents of the Lord, and that he ought to pay to the Lord 22s. for the Profit of the Market, an Action of Debt lies for every 22s. by the Lord, for that though this be an Inheritance, yet it is a particular Duty by every Collector. 11 H. 6. 14. b. 15, that the Executor of the Lord shall have an Action.


Term of his Life certain Land, rendering 20l. per Annum, the Reversion to the Plaintiff, and surrender'd to the Plaintiff, facing his Action of the Arrearages, And per Kilron, he has not a men of whose Leases he holds, and yet has brought Debt of 20l. of the Arrearages of the Rent, Judgment of the Court, quære inde; For it was not denied, but that the Action of Debt well lies. Br. Det. pl. 8a. cites 35 E. 5. 10.

10. If a Man takes a Seigniores to his Wife, who dies, the Baron shall have Debt for Relief fallen during Coverture. 10 H. 6. 11. b.

11. Where Annuity granted Par Avter Vie, or for Years expires pending Writ of Annuity thereof or before, he shall not recover by Writ of Annuity, but is put to the Action of Debt. Br. Det. pl. 203. cites 34 H. 6. 20.

12. 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; for the Promise was never out of the Owner; for if the Diffiler comes upon the Land and infeoffs the Difiller, this is a void Feoffment and Remitter. Br. Property. pl. 27. cites 7 E. 4. 15.

13 In Debt, where a Man is bound to appear upon Writ at a certain Day, it is no Plea that the Writ is not returned, for he may have Special Entry of his Appearance, but it is a good Plea that the Bailiff to whom he is bound keep him in Prison till the Day of his Appearance; for he shall not gain a Porteiture by his own Act. Br. Det. pl. 109. cites 9 E. 4. 23.

14. If
14. If a Lessor borrow of his Lesse for Years 20 l. and after by Deed
indented between them, the Lessor grants, that his Lesse should recover
the Rent until he should be paid the 20 l. the Lesse cannot here have a
Writ of Debt for the 20 l. because he had etopped himself by Deed
indented to be contented another Way, viz. by Way of Recouper of
his Rent. But otherwise it is, where a Man owes me 20 l. and I grant
to him by Indenture that he may levy the Money of my Goods.
Here he has his Election, whether he will bring a Writ of Debt, or levy
Apon. cites 2 R. 3. pl. 15. S. P.

15. P. granted an Annuity of 5 l. per Annum to B. for Two Years, pay-
able at Michaelmas, or within Sixteen Days after; in Debt for this 5 l.
Plaintiff declared, that it was in Arrear at Michaelmas, Et albo aéro
exitit; Defendant demurred, it was intitled, that Debt lies not for
this Annuity during the Two Years but a Writ of Annuity; but per
Car. Debt lies, it being a Grant for Years; for it is by the Deed as
a Contract. Cro. E. 268. pl. 4. Hill. 34 Eliz. B. R. Brown v. Pen-
dlebury.

for Years cannot have an Action of Debt for the Arrearages, during the Term in the Annuity.

16. If Goods be pawned for Money, and the Goods be demanded and
detained, whereby the whole Property is in the Pawnner; there the Par-
ty who had the Pawn may maintain Debt for his Money. Per Fleming
Ch. J. and not denied. Yelv. 179. Trin. 8 Jac. B. R. in the Cafe of Rat-
ciffe v. Davis.

17. So if Goods perifhable in their Nature be pawned, and they do
perish of their own Accord, then Debt may be brought for the Money.
Per Fleming Ch. J. and not denied. Yelv. 179. Trin. 8 Jac. B. R. in
Cafe of Ratcliffe v. Davis.

18. For the Arrear of an Annuity for Years an Action of Debt lies,
but not for the Arrear of an Annuity for Life, or in Fee. Bulit. 151.
Trin. 9 Jac. in Cafe of Lucas v. Fulwood, alias Ward. Arg. cited to
have been so adjudged.

19. If Lesse for Years grants Annuity for Years to another, Debt lies
for it; Per Yelverton J. Bulit. 151. Trin. 9 Jac. in Cafe of Lucas v.
Fulwood alias Ward

Lev. 22.

Pachh. 15. Car. 2. B. R.
Robins v.
Cox. S. P.

20. Lessor, for Years, rendering Rent, granted the Rent; the Lesse
attorned; the Grantee of the Rent brought an Action of Debt against the
Lesse for Rent Arrear after the Attornment; and upon Demurrer it
was intitled that this Action of Debt would not lies, because there was
no Privity, the Reversion being still in the Lessor; but per Curiam,
the Attornment made a Privity, and Judgment for the Plaintiff. 2 Jo.

(H) Where
(H) Where Debt lies in Respect of the Estate by Matter subsequent.

1. If the Rent of the very Tenant be Arrear, and after the Lord 

Br. Debr, 

pl. 93 cites 

S. C. & S. P. 

though the 

Tenant 

attorns. Per Paffon.

2. So if a Paon leaves for Life, rendering Rent, and after Arrearages incur, and the Lettor grants over the Reversion, to whom the Tenant attorns, yet he shall not have Debt for the Arrearages, because the Freehold of the Rent continues. 19 D. 6. 42. b.

Br. Debr, 

pl. 92. cite S. C. & S.

Per Paffton, for 

there are 

the Acts of the Party himself.

3. If a Parfon hath an Annuity in Fee, and leaves it to another for but if 1 Years, and after Arrearages incur, the Lettor shall not have an 

Action of Debt during the Years for the Arrearages so long as the 

Estate of Inheritance of the Annuity continues. Rich. 1649. between 

*Tintal and Harrington, adjudged in Arrest of Judgment. Interpr. 

1645. Rot. 1612.

J. S. and the Annuity or the Rent Service is arrear, and the Term expires, J. S. shall have Debt. 

Br. Debr. pl. 95, cites 19 H. 6. 41. Per Afose — (The Year Book is of an Annuity granted by me to B and his Heirs, and by it granted to J. S. for Years, and the Annuity &c. being Arrear, the Term expires, the Tenant shall have Writ of Debt, (says the old Edition, but the new Edition says Derine,) and yet the Annuity continues; and so of the Rent Service, notwithstanding the Franken- tement continues in me 19 H. b. 42. a.) * Str. 162. S. C. it was moved, that he ought to have brought a Writ of Annuity, and cited 6 H. 4. 7 & 9 H. 6. 94. The Judgment was arrested till the Plaintiff should move.

4. If a Prebend hath an Annuity in Fee in the Right of his Church, and after Arrearages incur’d he reigns, he shall have 

Debt for the Arrearages, because the Person of the Grantor was 

at all Times chargeable before in Annuity, and now the Manner of the Action is changed into Debt for Necessity. Dubitatur, 19 H. 6. 41. b.

and Newton contra. And Brooke lays, that the beft Reason as it feems that the Action is, because it was the Folly of the Plaintiff himself —— 4 Rep. 48. b. *9. b. cites S. C.

5. So if a Parfon hath an Annuity, and he is deprived, he shall have Debt for the Arrearages due before. 19 H. 6. 42. b.

6. So he shall have Debt for the Arrearages after a Recovery against him and the Patron in a Quare Impedit. 19 H. 6. 42. b.

7. If Leffice for Life of a Rent acknowledges a Statute, and after 

relieves to the Tertenant, and then the Statute is extended, and after 

the Rent is Arrear, the Tenant by the Statute shall not have an Ac- 

tion of Debt for the Arrearages during the Extent; for though in 

Truth the Freehold is extince by the Release, yet as to him it is in 

Efe, as the Extent lay not; and during the Continuance of the Freehold, Debt lies not, though the Tenant, by the Sta- 

tute, hath but a Chattel, for this is deriv’d out of the Freehold. 

Hill. 4 Jac. B. between Duncombe and Lillington, per Curiam.

8. The very Lord shall not have an Action of Debt for Aid to 

marry his Daughter, or make his Son a Knight. Co. Lit. 47. 6.

4 R. 9. [50]
Debt.

9. [So] The very Lord shall not have an Action of Debt for Relief due to himself, for this is Part of his Seigniory, and he may disfain for it. Co. Lit. 47. b.


S. P.—Kelw. 153. 2. pl. 111. Per Keble, e contra, because it is only an Acknowledgment to be made to the Lord after the Ancestor's Death, and is not of the same Nature as the Rent 15; Pora Man cannot have a Præcie good redit of it as he may of the Rent 15; besides, it is not Annual but a Casualty, which perhaps the Lord may not have in all his Life,—1 Dil. 17 pl. 6. Anno. 1 & 2 P. & M. by the greater Opinion, the Lord himself may have Action of Debt for Relief, because it is not Annual as other Services are.—4 Rep. 49. b. that the Lord himself shall disfain, and shall not have Action of Debt, and cites 7 H. 6. 15. and 22 Aff. 52.—See tit. Tenure (N. 4) per annum.

10. [So] The very Lord shall not have an Action of Debt for Escuage due to himself for the Caféus afoffrain. Co. Lit. 47. b.


[But the other Editions are 39 E. 3. 22.]

S. P. by Fulthorp. J. for Deb. pl. 92. cites 19 H. 6. 41. ——S. P. Br. Deb. pl. 90. cites 19 H. 6. 29. but makes a Query if an Occupant enters where Leases himself dies, if it shall not render the Rent, and says, it seems he shall by Distress, but not by Action of Debt, during the Life of Caféuy que vie.—Br. Deb. pl. 195. cites 9 H. 6. 29. (and the other Editions at pl. 196. (the Numbers only varying) cites 9 H. 6. 29. but it seems it should be 19 H. 6. 29. per Fulthorp. All the Editions are (deviant) which seems misprinted for (durate)].

In Case of a Condition of Re-entry for Non-payment of the Rent, the Re-entry is the Cause of the Action, which cannot be by the Condition without Deed, for before the Re-entry he cannot have Debt, for it was then Frank-tenement, and now by the Easement being determined, Debt lies. Br. Deb. pl. 16. cites 29. (But it should be 39 E. 3. 22.)——Br. Deb. pl. 95. cites 19 H. 6. 41. Per Fulthorp. J.

13. But if a Lease be made for Life, rendering Rent, upon Condition for Non-payment to re-enter, and detain till the Arreagages paid; if the Leisur re-enters for Non-Payment, he cannot, during his Sellen, have Debt for the Arreagages before, because the Freehold remains in the Leslie, and the Lesour hath it but in Nature of a Distress. Contra. 30 E. 3. 17. adjudged.

S. C. cited Co. Litt. 203. a. S. P. Contra this he shall not have Debt, and therefore says, that the Book of 30 E. 3. fol. 7. which he cites in the Margin, which seems to the contrary, is false printed, and that the true Case was of a Lease for Years, as appears afterwards in the same Page of the Leaf.


14. Contra. 30 E. 3. 7. adjudged; but this Matter of the Freehold is not intended; but there in the same Folio is another Case of a Lease for Years, and it seems this is the same Case with the other, and to the other is misprinted, in that it calls it a Lease for Life; (But Fitzherbert abjures this Case to have been a Lease for a Yeat.)

15. If Leslie for Life, rendering Rent, does Waife after Arreagages due, and the Leslie recovers in an Action of Waife, he may have an Action of Debt for the Arreagages, because the Easte is determined by lawful Action to avoid his Distinbrerit. 19 H. 6. 42.
Debt.

16. So if such Lessee aliens in Fee, and the Lessee enters for a Forfeiture, he may have Debt for the Arrearages. 19 H. 5. 42. b. pl. 93. S. P. cites S. C. Per Futuror, J.

17. So if a Lease for Life be upon Condition, and the Lessee enters for Breach of it, he shall have Debt for the Arrearages. Debiturae. 83. cites 17 E. 3. 48, 73. b. but 18 E. 3. 9. adjudged. Contra, 19 H. 6. 38 E. 3. 22. (and Roll. 39 E. 3. &c. seems misprinted.)

18. So if Lease for Life be made rendering Rent and Lapses surrenders. F. N. B. 120. (O) in the New Notes there (b) cites 17 E. 3. 43. 18 E. 3. 10. 36 E. 3. 7. 38 E. 3. 10. contra by some; 19 H. 42. for the Re-entry is not a Penalty, fo of a Nomine Pome. And says, see 39 E. 3. 22. 19 H. 6. 42. 6 H. 7. 3. 19. If a Man leaves Land for Years and the Rent is arrear, and a Stranger recover the Land against the Lessee, yet the Lessee shall have Debt, Per Newton. Br. Dette pl. 93. cites 19 H. 6. 41.

20. Where Rent is arrear, and the Lessee disjoins, and the Tenant Tenant for Life surrenders and Jus Revendi, the Lessee may make Avowry, but Quere of Debt; it seems all one, if he shall have the Avowry he may have Debt; for it is his own Act to take the Surrender. Br. Dette pl. 93. cites 19 H. 6. 41.

21. Where a Thing determines by the Act of God, Action of Debt Br. Debit will lie, though it did not lie before, and so it is where it determines by Course of Law. But otherwise, where it is by the Act of the Party himself. 19 H. 6. 42. a. per Futuror.

22. If a Man sells Twenty Acres of Land for 10l. the Vendor may have Writ of Debt, though he has not enfeoffed the other of the Land, and the other has no Remedy but by Action upon the Case; for it his Folly that he had not taken better Surety to have been enfeoffed, Quod non Netur, Br. Action, Sur le Cafe, pl. 60. cites 22 H. 6. 44.


24. Debt lies for the Lord of a Lease made by his Bailiff, per Moi J. Quod non Negatur. And Choke J. that a Bailiff may lease at Will, for he is accountable to the Lord. Br. Dette. pl. 146. cites 2 E. 4. 5.

25. If a Man grant an Annuity for Years, the Grantee shall have Writ Br. Annuity; of Annuity as long as the Years continue, and after the Years expired he pl. 152. cites shall have Debte of the Arrears; for he has no other Remedy. Br. Dette S. C. pl. 144. cites 9 H. 7. 17.

26. So where a Man grants a Seigniory for Years, the Grantee may make Avowry during the Years, and after the Years shall have Debt of the Arrears for the Caufe aforesaid. Ibid.

27. Action upon the Case, that the Defendant affirmed to the Plaintiff, that if the Plaintiff discharged J. T. of such Execution, in which he is at the Suit of the Plaintiff, that then if the said J. T. does not satisfy the Plaintiff by such a Day, that then Defendants shall do it, and counted accordingly, and they were at Illue upon Non-Affirmavit, and the Evidence to the Jury in Proof of the Affirmavit, and the Truth of the Matter also was, that the Defendant affirmed to the Plaintiff's Wife, in the Absence of the Plaintiff, and when he came to his Wife he agreed to it and discharged J. T. without speaking with the Plaintiff, and per t. Cur. upon good Argument the Action upon the Case lies; and by the halt Opinion, for he shall have Action upon the Case, and not Writ of Debt. And by some he may choose the one or the other. Br. Action Sur le Cafe pl. 5. cites 27 H. 8. 24, 25.
Debt.

28. In most cases a man shall have action upon the cause, when he may well have other remedy, but this seems that it is in another degree. Ibid.

29. As where a man is indebted to me, and he promises to pay before Michaelmas, I may have action of debt upon the contract, or action of the cause upon the promise, and so this is in divers respects, for upon the promise action of debt does not lie. And this in B. R. Ibid.

30. Where a man grants an annuity to J. S. during the life of the grantor, and the annuity is arrear and the grantor dies, the grantee himself shall have action of debt of the arrears of the annuity, because the annuity is determined. Contra when the annuity continues, as it seems. Br. Dette pl. 191. cites Vet. N. B. Annuity.

31. If a man leaves lands for years rendering rent, and for default of payment, that he shall re-enter; if he do re-enter into the land for non payment of the rent, yet he may have an action of debt for the rent, for which he does re-enter, and in the writ shall recover the rent for which he re-entered. F. N. B. 120. (H.)

32. If a man leaves land for term of years rendering rent, and afterwards the rent is behind, and the leesee surrenders his term, yet, the leesor shall have an action of debt for the arrearages before, as it seems by P. 38. E. T. Tenen queere, for the opinion is contrary to 2 H. 6. P. N. B. 122. (A)

(I) Executor. Pl. 1. 2. 3. 5.

[Baron after death of the feme. Pl. 4]
[Leesee for years after the term expir'd. Pl. 6. 7.]

1. If a rent becomes due to the very lord, and after he dies, his executor shall not have debt for this rent, because the rent continues a freehold in the heir. 11 H. 6. 15. 19. P. 6. 41. b.

2. The executor shall have debt for relief fallen in the life of the tenant. 11 H. 6. 15. Co. Lit. 47. b. 8. d.

3. The executor shall have debt for escauge, aid pur faire Fitz Chivalier, &c. pur file marrier due in the life of the tenant. Co. Lit. 47. b. 8. d.

4. The baron shall have debt for relief fallen in the right of the feme during the coverture after the death of the feme. 10 H. 11. 11.

5. If there be a custom that a town ought yearly to choose a man to collect the rents of the lord, and to pay 22 s. to him for the profits of his fair, if there be 22 s. due by a collector, and after the lord dies, his executor shall have debt for it. 11 H. 6. 14. b. Dubitatur. (So it seems the lord himself might.)

6. If the grantee in fee of an annuity grants it over for years, and after the term expires, the lessee shall have debt for the arrearages, though the annuity continued of inheritance, because the
Debt.

341

the Estate of the Lessee is determined, and to be paid to no other Remedy, and the Person of the Tenant was chargeable before. 19 H. 6. 42.

7. So Lessee for Years of a Manor, after Term expired, shall have Debt for the Arrears, because he had no other Remedy, per the Inheritance continued. 19 H. 6. 42. 9 H. 7. Not quite the Reason thereof.

8. If Parish or Prebendary dies, his Executors shall have Debt for Writ of Non-Payment of an Annuity incurred in the Life of his Testator, de- (L)S. P. cause the Person of him that ought to pay the Annuity is chargeable in Writ of Annuity. 4 Rep. 49. a. in Principio. Hill. 29 Eliz. C. B. per Cur. in Ogne's Case.

(I. 2) Pleadings in Debt for Rent.

1. DEBT upon a Lease for Years, rendering Rent payable at another County, than where the Land is, and no Dispers's in the Inheritance, yet he distrain, and there Levied by Dispers's upon the Land and so he owes him nothing is a good Plea. Br. Vile, pl. 19, cites 44 E. 3. 42.

2. In Debt for Rent against Lessee for Years, if Payment in another County, or levied by Dispers's be pleaded, he shall conclude, And so he owes him nothing. Br. Depl. 27, cites 34 H. 6. 17.

3. A Lease was made of Tithes paying Rent with a Proviso, that if J. S. the Lessee, attempt or prosecute any Action against A. B. who pretended a former Lease made to him of the same Tithes, and if upon such Action a Verdict should pass against J. S. the Lessee, that then the Rent should cease. In Debt on a Bond entered into by the Lessee for Performance of Covenants the Breach alleged was Non-Payment of Rent; J. S. the Defendant pleaded, that A. B. enjoyed the Tithes by Virtue of his former Lease, so that the Defendant could not have and enjoy them according to his Lease, and so there were no Covenants to be performed no his Part; upon Demurrer the Opinion of the Court was against the Defendant, for the Rent is payable until a Verdict should pass. 318. b. pl. 11. Mich. 19 Eliz. Anon.

4. In Debt for Rent, the Plaintiff declares upon a Lease for Years rendering 31s. Yearly at Lady-Day and Michaelmas by equal Portions, and demands 15s. 6d. for Rent behind for one Year ending at Lady-Day last, the Declaration is naught; for the Demand of the 15s. 6d. being for the Arrears of the Rent of the whole Year, it ought to have been pleaded how he was satisfied the Rent paid; and for this Cauce after a Demurrer to the Defendant's Plea the Writ was abated. Cro. C. 137. Trin. 4 Car. Bailey v. Hughes.

5. Debt upon Bond for Performance of Covenants in a Lease; the Defendant pleads Performance, the Plaintiff replied and assigned a Breach for Non-Payment of Rent on such a Day, Secundum Formam & Efectum Conditionis Obligations præd. the Defendant rejoins and alleges an Entry by the Plaintiff on the Lands leased before the Rent due, and that he kept Possession till the Rent-Day was paid, and found for the Plaintiff; it was moved in Arrest of Judgment on the Plaintiff's Replication, it being that the Defendant did not pay the Rent Secundum Formam & Efectum Conditionis of the Bond, whereas there is no Mention of any Payment of Rent in the Condition of the Bond but in the Lease only; Sec non allocatur; because the Defendant by his rejoinder confessed that such Rent was arrears, and waived taken illue upon it, but took illue on another Matter, and so this is well enough after a Verdict. And per Hale 4 S. Ch.
Debt.

Ch. B. it is all one in Substance to plead, as the Plaintiff did, and to have pleaded Secundum Fomam & Edictum Indenture; For the Condition of the Bond comprehends all that is comprized in the Lease; but though it might have been a Question upon Demurrer, yet there can be no Doubt of it after a Verdict. Hard. 319. pl. 13. Mich. 14 Car. 2. in the Exchequer. Anon.

6. Debt for Rent upon a Lease for a Year, and so from Year to Year, quondam ambobus Partibus placotest; there was a Verdict for the Plaintiff for Two Years Rent. Sanders moved in Arrest of Judgment, that the Plaintiff alleges indeed, that the Defendant entered and was possession of the first Year, but mentions no Entry as to the Second. Per Twifden, the Jury have found the Rent to be due for both Years, and we now intend, that he was in Possession all the Time for which the Rent is found to be due. Mod. 3. pl. 10. Mich. 21 Car. 2. B. R. Goltwicke v. Mafon.

7. In Debt for Rent upon a Demise of a Fiefdom to the Defendant for Three Lives, the Plaintiff in his Declaration set out the Demise, Viritus Cujus the Lease entered, & usu & adhibit in idem Possessione. The Defendant pleaded Nil debet, and there was a Verdict for the Plaintiff. And Serjeant Prat moved in Arrest of Judgment, that it appeared on the Declaration, that the Estate for Three Lives was continuing, and therefore Debt did not lie, being a Rent infused out of a Freehold. Serjeant Hooper, in Answer, said, that this was well enough after a Verdict, for that Nil Debet put all the Matter in Issue, and if the Estate had not been determined, the Plaintiff could not have had a Verdict; and that the Matter indeed was the greatest Matter litigated at the Trial, and therefore the Continuing not appearing directly, the Court would take the Estate to be determined. Pratt said, that the Averment in the Declaration of the Fuit & adhibit &c. was an express Averment that the Estate did continue; but if it were only indifferent, it would not be good; for the Plaintiff ought to frame expressly in his Declaration, that the Estate for Three Lives was determined, or else he was not intitled to bring his Action of Debt, within the Statute of H. 8. which was agreed by the Court, and the Judgment arrested. 2 Ld. Raym. 1056, 1057. Mich. 3 Ann. Bishop of Winchester v. Wright.

8. If a Man distains for Rent and impeads the Distains and then brings Debt for the same Rent, the Defendant may, plead levied by Distains; Per Holt Ch. J. 11. Mod. 144. Hill. 6 Ann. in Case of Alton v. Jarvis.

9. In Debt for Rent the Plaintiff declared on a Demise by Mentionatur exilio; this was held to be Ill and not helped by Defendant's pleading over. 11. Mod. 258. Mich. 8 Ann. B. R. Joddrell v. Heath.

(K) Where
(K) Where Debt, Covenant, an Action upon the Case, or Account lies, without Contract.

1. If a Man delivers Money, upon Condition to be his Money, and that if it be not performed, that it shall be re-delivered; if the Condition be not performed, the Bailor may have Debt for it.

2. If a Man delivers $100 in a Bag unsealed to another, Debt does not lie for it, because the Property was never out of the Bailor. 6 P. 6. 26. b.

3. If I have a Rent out of Land, and the Tenant delivers it to another to pay to me, I cannot have Debt against him for what he hath received. 6 P. 4. 7. b.

4. If a Man delivers Money to you to pay to me, I shall not have Debt for it, because there is not any Contract between us. 6 P. 4. 8.

5. If a Man receives Rent of my Tenant by my Command, I shall not have Debt against him. 6 P. 4. 8.

6. So if he receives it of his own Head. 6 P. 4. 8.

7. If a Man by Obligation acknowledges that he hath received a Debt, pl. Sum ad prohiicendum & computandum, the Obliger may have Debt for it if he will. 42 C. 3. 9.

8. If a Man by Deed delivers certain Money to another, to render an Account thereof to him, he may have an Action of Debt for the Money at his Election. 28 C. 3. 93. b.

9. If there be a Custom that the Collector of the Rents of the See (I) pl. 7 Lord ought to pay 22 s. to the Lord for the Profits of the Market of S. C. the Lord, the Executor of the Lord may have Debt for the 22 s. without bringing a Writ of Account, for he is not a Receiver of this, but he ought to pay it, whether he receives the Profits or not. 11 P. 6. 14. b.

10. If a Man delivers Money to deliver to J. S. if he does not deliver it, yet J. S. cannot have a Writ of Debt against him. 19 P. 6. 5. b. 20 P. 6. 35. D. 28 P. 8. 21. S. 131.

11. So [But] if J. S. refuses the Money, the Bailor may have Debt against the Bailie for it. 19 P. 6. 35.

12. If a Man by his Deed acknowledges that he hath so much of the Money of J. S. due to him in his Hands, though there is no Contract or Borrowing between them, yet J. S. may have an Action of Debt against him. 11 P. 6. 39.

13. If I deliver Money to another to repay at a certain Day, Debt lies for it at the Day. 29 C. 3. 26. b.

14. [So] If I deliver Money to B, to keep safely, I may have an Action of Debt against B, for it. 2 R. 3. 15. D. 28 P. 8. 22. S. 137.

15. If
15. If A. by my Command pays Money to B. to my use, and B. does not pay it to me, I may have Debt for it against him. 36 Eliz. 6. 9. b. 16. If a Man leaves for Years, rendering Rent, and after devises the Rent to another, and dies, the Devisee may have an Action of Debt for the Rent, though it is become a Rent-Sec, because by the Original Creation thereof Debt lay. Rich. 11 Jac. B. R. between Holland and Hunt, per Houghton.

17. If a Sheriff levies certain Money upon a Lessor Facias out of Recognizance at the Suit of J. S. and after returns the Writ served, J. S. may have an Action of Debt against the Sheriff, as well as a Secre Facias, or Fict Facias, though there be not any actual Contract between the Sheriff and him; for this is a Contract in Law, sicurce, the levying the Money to the use of J. S. Hill. 15 Jac. B. between * Speak and Richards, per Curiam, adjudged. Hobert's Reports 279. the same Case. Patch. 15 Jac. B. R. between | Parkman and Gilford, adjudged per Curiam, that an Action of Debt lay against the Executor of the Sheriff, though it did not appear that the Fict Facias upon the Judgment was returned; for it is not material, namely as the Party be discharged by the Payment thereof, without the Return; and it is not grounded upon a Personal Tort, but upon a Contract in Law made by the Executor, upon the Receipt of the Money; and this is not a Simple Contract, but grounded principally upon the Record, so that the Executor cannot wage his Law, and therefore the Action lies against the Executor. Adjudged, this Matter being moved in Arrest of Judgment.

18. Debt lies in Bank of an Amenciament alleged in a Lett by the best Opinion of the Court. But Quere, because it was not much argued. Br. Dette. pl. 179. cites S. C. as adjudged accordingly. 11 Cro. C. 539. pl. 2 Perkinson v. Gilford. S. C. all agreed, that the Action well lay, and Judgment was given Niff &c. --- Jo. 450. pl. 2. S. C. adjudged by three J. (absence Brampton) this either Account or Debt lies at the Plaintiff's Election; and that it lies against the Administrator. --- Mar. 13. pl 53 & C and all conciv'd that the Action would lie. --- See tit. Sheriff (L.) Per toatum.

23. A Court for that in Consideration, he on such a Day &c. had controlled and by his Bill of Articles had bargained and sold unto the Defendant and his Heirs a Message, the Defendant promised to pay the Plaintiff 300l. on such a Day, which he had not paid; and upon Demurrer it was adjudged, that this Action would not lie, because in this Case he might have an Action of Debt; and where a Man may have an Action at Common-Law (as Debt is) an Action upon the Case will not lie. 2 And. 53. pl. 39. Trin. 38 Eliz. Wade v. Branch.

24. A delivered 10l. to B. to keep for him the said A. and to be re-delivered and paid to the said A. upon his Request; it was insinuated that C. held an Debt thereon, but Accompri; but adjudged, that on B's refusing to pay it, upon A's Request, Debt did lie for A. against B. D. 20. b. Marg. cites 40 Eliz. C. B. Brettton v. Barley.

25. A Man made a Lease for Life rendering Rent, and for Non-Payment to re-enter; and afterwards he brought an Action of Debt for the fame and recovered. Ibid. 21. a. Marg.

26. A Man delivers Money to another to buy certain Things for him, and he does not buy them, the Party may bring an Action of Debt, but he said that the Plaintiff ought to aver, that the Defendant had not re-delivered them. Ow. 86. cited by Glandville as adjudged, Hill. 41 Eliz. in Cafe of Brettton v. Barret.

27. Walmsley took a Difference between Goods and Money; for if a Horfe be delivered to be re-delivered, there the Property is not altered, and therefore Detinue lies. And if Portugal's or other Money that may be known to be delivered to be re-delivered, a Detinue lies, for they are Goods known; but if Money be delivered it cannot be known, and therefore the Property is altered, and therefore Debt will lie. Ow. 86. Mich. 41 & 42 Eliz. Brettton v. Barret.

28. A. gives Money to B. to buy Wares, and B. does not buy them. Debt was maintained for the Money. D. 20. a. pl. 119. in Marg. cites it as a Case cited by Glanvil Mich. 41 & 42 Eliz. as adjudged.


30. A. delivers Money to B. to pay it to C. for the Debt of A. A. himself afterwards paid the Debt, and afterwards B. pays the Money to C. and it was ruled that an Action of Debt lies against C. for the last Money, for the last Payment was upon a Tacit Condition, if the Debt was not paid before. Cited per Cur. Noy. 22. Trin. 15 Jac. C. B. in Cafe of Spark v. Richards.

31. In all Cases where the Party who receives Money, is to have any Allowance or Reward for the receiving thereof an Action of Account-render, and not an Action of Debt, or upon the Cafe must be brought against him. L. P. R. 30.

32. An Action of Debt, or an Action on the Cafe upon an Insimul. Computafet lies at the Election of the Plaintiff against one for receiving Money of a Third Person for the Use of the Plaintiff, although he had no Authority given him to receive it; Hill. 23 Car. 1. B. R. For it is the Interest that the Plaintiff hath in Money paid for his Use, that gives him the Cafe of Action, and it is a Receipt of the Money that makes the other Party liable to the Action, and it matters not by what Authority he received it. L. P. R. 30.

33. An Action of Debt was brought against the Defendant upon an Insimul Computation, and a Verdict and Judgment given against him where-
Debt.

whereupon he brought his Writ of Error, and affigns for Error that the Action was brought against him for Rent as a Tenant of Land and not as a Receiver, and therefore an Account did not lie; Roll Ch. J. cited 20 H. 6. Rent alone lies not in Account, because Rent is a certain Thing, and it is also the Reality; but if Rent be mixed with other Things, an Account will lie; but here it appears the Action is brought against the Defendant as a Receiver, and if one receives Money due to me upon Obligation, I shall have either an Action of Account, or an Action of Debt against him, if he receives my Rents without my Consent. Therefore let the Judgment be affirmed. Sty. 287. Trin. 1651. Hammond v. Ward.

34. The Nature of a Debt is not changed by an Account no more than accounting with an Executor, but a Specifc Promifte to the Husband to pay him a Debt due to the Wife Dwn Sola may alter the Debt. Sty. 473. Mich. 1655. Conie v. Lawes alias Lewis.

35. I oblige myself to pay so much at such a Day and so much at such a Day, Covenant lies, especially if both Days are not pafted; but Ch. Bar. Bridgman doubted how the Law would have been if the Words were Tenem & furnish Obligari, because those Words found in Debt and not in Covenant. Hard. 178. Hill 12 & 13 Car. 2. in Scacc. Norris’s Cafe.

36. Indictions for clipping being found against W. he gave K. a Newgate Solicitor 70l. to procure his Discharge and for his Pains; and W. not being prosecuted on these Indictions he brought an Indebitatus Asumpli and against K. for the whole 70l. Upon the Trial before Holt Ch. J. it being proved that the Defendant confessed that he had disposed of this Money in Bribes; the Jury by Direction gave a Verdict for the Plaintiff. Ld. Raym. Rep. 89. Trin. 8 W. 3. Wilkinson v. Kitchin.

37. If one Covenants or promises specially upon Receipt of Goods to be accountable for them, if he will not account, Action upon the Covenant or Promise will lie, and an Action of Account lies upon the General Receipt. Per Holt Ch. J. 12 Mod. 517. Pasch. 13 W. 3. B. R. in Cafe of Spurraway v. Rogers.


18. [1.] WHERE by the Statute of 14 H. 8. cap. 5. and the Letters-Patents of the King, it is enacted, That every one that practices Phystick in London without Licence of the College of Physicians, shall forfeit for every Month 5l. one Vote to the King, and the other to the College; though no Action is appointed for it, yet they have an Action of Debt for it. Trin. 4 Jac. 3. B. R. College of Physicians adjudged.

19. [2.] An Action of Debt lies upon the Statute of 2 E. 6. for the treble Value for not forfeiting forth of Titches, though the Statute does not mention any Action but only that he shall forfeit the treble Value, and does not mention to whom he shall forfeit it, nor by what Action it shall be recovered. Co. Entries. And this is now the common Practice.

20. [3.] An Action of Debt lies by a Sheriff upon the Statute of 28 Eliz. cap. 4. for his Fees given by the Statute, for an Execution served by him, though the Statute does not say that he shall have his Fees, or any Action for them, but only lays, that he shall not take
Debt.

347

take for any Execution served any Consideration or Recompence besides that thereafter in the Suit for mentioned, which it shall be lawful to have and receive, Fel. 12. b. for 20 s. where the Sum does not exceed 100 l. and 6 d. where above 100 l. 14 Jac. B. R. between Proby and Lawley, Plaintiff, and Mitchell, Defendant, adjudged. Intent. Part. 14 Jac. Rot. 531.

of necessity.—Roll. Rep. 424. pl. 54. adjudge; and it was said, that there was no Precedent of such Action having been brought before.—Nov. 75. 76. S. C. cited as adjudged.——S. C. cited as adjudge’d 404.——S. C. cited Lat. 173.—See tit. Fees Per totum.

(L) Upon an Account.


2. Debt lies for the Arrearages of an Account against the Bailiff of a Manor. 7 H. 4. 3.

3. If the Bailiff of a Manor accounts for the Issues before they are leviable, an Action of Debt lies for the Arrearages, for he hath voluntarily charged himself with them. 13 H. 4. 12. b.

4. If upon the Account of a Bailiff of a Manor it appears, that he hath paid more than he received, he may have Debt for this Surplusage. 7 H. 4. 3.

5. If upon the finding the Surplus the Lord promises to pay it, the Bailiff may have Debt for it. 29 C. 3. 25 b. fol. 599.

Debt upon Arrearages of Account the Plaintiff was examined, and found that it was for certain Stuff bought of the Plaintiff, and for this he had accounted before Auditors; and because it did not lie in Account, he was commanded to amend the Count, or the Defendant shall be dismissed, by which he declared upon a Contract. Br. Debs. pl. 19. cit. 8 H. 6. 15. But in such a Case the same Year, fol. 15. the Plaintiff would not amend his Count, by which the Defendant made his Law immediately.

6. If a Man accounts before Auditors for a Thing that lies not in Account, as for a Contract, Debt lies not for the Arrearages of the Account. 8 H. 6. 10. b. 15. b.

7. If a Man accounts against another as Receiver to a Stranger, if the Defendant be found in Arrearages before Auditors assigned; Debt lies not for the Arrearages upon the Account, because it appears that he is not accountable to the Plaintiff. 20 H. 6. 6.

8. But in an Account as Receiver of the Plaintiff, if the Defendant be found in Arrearages, Debt lies for it upon the Account, though in Fact he never was his Receiver. 20 H. 6. 6. contr. 12.

9. Debt lies against Executors upon the Arrearages of an Account by the Executor himself, of Receipts by the Testator. 2 H. 4. 13. b.

10. And the Court in this Case may be of Receipts in general, without mentioning the Particulars, because the Defendant was Party thereon. 2 H. 4. 13. b.

11. In a Debt of Account against another as Receiver, if the Defendant be found before Auditors in Surplus, yet he shall not have Debt against the Plaintiff for it, insomuch as he is charged as Receiver, and not as Bailiff, for a Receiver shall not have any Receipt of the Trustee, etc. Mitch. 12 Jac. B. R. between the Earl of Suffolk and Floyd, adjudged upon D’Murrer. 12. Debt.
12. Debt by Executor, and counted how a Stranger by his Will had
denied 100 l. to the Factor of the Plaintiff, which came to the Hands of
the Defendant, who recited by Indenture that it came to his Hands, and
that he had delivered 40 l. to J. N. for the Use of the Factor, and so there
remained 60 l. in his Hands for which Action accrued to the Plaintiff
as Executor, and by Award the Defendant was compelled to answer
without other Contract or Appointment, and without being put to Ac-

13. It was held for Law, That where Two Jointtenants are of a Ma-
nor, and the one of them assigns Auditors to hear the Account of the
Bailiff of the Manor, who is found in Arrear, the Action of Debt shall
be brought in both their Names &c. Thel. Dig. 26. Lib. 2. C. 2. S. 17.
cites Pach. 18 E. 4. 3.


1. If a Corporation that has Power by Charter or Prescrip-
tion to make By-Laws, makes a By-Law, and that if it
be broke, to forfeit a certain Sum to the Corporation, though it
be not appointed by the By-Law that it shall be recovered by Action
of Debt, yet an Action of Debt lies for it, because this is a Duty
in the Corporation, this being a By-Law, and this Sum forfeited to
them. Co. 5. Clark 64. Hobert's Reports 279.

13. [2.] Debt lies for an Amercement in a Court-Baron. Hobert's
Reports 279.

14. [3.] If a Talley be delivered to a Customer, Debt lies for it
as soon as the Money comes to his Hand. 1 H. 7. Hobert's Re-
ports 279.

Where the King is indebted to me, and assigns me to take it by the Hands of a Customer, and de-
1ives me a Talley of it, I by shewing of the Talley to the Collector, shall have Action of Debt upon
it against the Customer, if he has enough to pay. Br. Debt, pl. 17. cites 27 H. 6. 9. — S. P.
Br. Debt. pl. 120. cites 57 H. 6. 15. and if several have several Tallies to be paid &c. the Collector is
charged, first to him who shews him, and so to the Second, and so to the Third, as long as he has As-
serts in his in his Hands to pay, and the Administrator of the Creditor shall have Action, by shewing
the Talley) of the Intestate against the Collector. And 21. ibidem, is, that he who shews Talley
ought to offer Acquittance. — Br. Tail de Eschequer, pl. 1. cites S. C.

15. [4.] If there be a Custom that if any breaks the Pound of the
Manor, that he shall pay 3 l. to the Lord; admitting this to be a
good Custom, an Action of Debt lies for it. 11 H. 7. 14. by all the
Justices.

5. Debt was brought for that the Defendant had a Leer, and his
Steward commanded the Defendant, being Bailiff, to make a Pannel, who
would not, by which the Steward assigned a Fine upon him of 40 s. and
the Lord brought Action of Debt, and the Defendant demurred, Quare, and see Debt of Relief. Br. Debt pl. 85. (bis) cites 7 H.
6. 12.

6. Debt
Debt was brought upon a Custom, that if any break the Pound of the Lord in his Manor of D. that be shall forfeit 3 l. and that such a one broke it &c. Unde Actio accresit &c. And by the Justices; it the Custom was good as they thought it was not, because it cannot bind Strangers, then the Action shall lie well, Quod Nota. And yet he cannot prescribe in the Action. Br. Debr. pl. 127. cites 21 H. 7. 40.

7. In Debt brought for a Fine imposed by a Corporation against one elect ed Bailiff, for refusing to take the Declaration imposed by the Statute of Corporations, whereby the Election became void. After Judgment for the Plaintiff, it was assigned for Error, that the Statute (13 Car. 2.) did not enable the impoling any Fine, but only made the Office void. But the Court held, that the Refusal of the Oath is, by a Means, the Refusal of the Office, and consequently within their Power given by the Charter to fine for Refusal to accept the Office; And so Judgment was affirmed. 3 Lev. 116. Pauch. 35 Car. 2. C. B. Starr v. The Mayor &c. of Exeter.

(M) Upon what Judgment or other Record it lies.

1. A Man may have an Action of Debt upon a Statute-Merchant, * Br. Debr. for it is in Nature of an Obligation, and the Seal of the Party is put thereto. * 43 El. 3. 2. b. 73 E. 4. 27. 15 H. 7. 16. † Br. Debr., pl. 149. cites S. C. Dusbair.

2. But no Action of Debt lies upon a Statute-Staple, for the Seal of the Party is not put thereto, and this is a Duty made by a Special Law, which was not by the Common Law, and therefore he shall not have other Remedy for it than the Statute hath provided. 15 H. 7. 16.

3. But quere whether an Action of Debt lies upon a Recognizance in Nature of a Statute-Staple, inasmuch as the Seal of the Comitor is put thereto.


5. So an Action of Debt lies upon the Tenour of such Recognizance. D. 12 El. 369. 52.


7. If A. be Bail for B. in Banco by Recognizance acknowledged by him, and after Judgment is given against B. for the Damages and Costs, and after a Seire Factions is sued upon the Recognizance against A. and Judgment is had thereupon against him, an Action of Debt lies upon this Judgment against A. and if he hath Judgment therein, he may take his Body in Execution upon the Judgment in the Seire Factions. Bch. 10 Car. 2. R. between Regani and Carrick, adjudged 4 U. Debt was brought on a Recognizance in Chancery, and the Declaration was, that
Debt.

upon a Demurrer per Curiam, and the Defendant taken in Exe-
cution accordingly, and this afterwards affirmed in a Brev of
Error.

8. If A. be Sack for B. in a Recognizance of 100 l. in Banco, in
an Action against B. in which A. acknowledges himself to be bound
100 l. that if B. be condemned in the Action, then he shall pay the
Money, or render his Body to Prison, or he will pay it for him; An
Action of Debt lies upon this Recognizance, alleging, that Judgment
was had in the said Action against B. for 100 l. and that B. did not pay
it, nor render his Body to Prison, and that A. had not paid it, for A.
may add himself by Plea in this Action, as well as he may upon the
Seire Facias upon the Recognizance. hill. 14. Car. 2. R. between
Holmes and Faldoe. Inratut; Slech. 14 Car. R. 463. a Brev of
Error was brought upon a Judgment given in Banco, in an Ac-
Action of Debt upon such Recognizance; but the Parties after agreed.
But Hunter Hoddesdon said such Actions are usual.

9. Debt for 45 l. upon Account, and 20 l. upon Lands, the Defendant
pleaded that he granted to the Plaintiff to levy it upon his Land in D. and
C. which he has levied; and per Belk it is no Plea; For the Grant is
void; For he cannot levy it, Quod Non Negatur, by which he pleaded
ut supra, and concluded, And So be owed nothing, and a good Plea
now, per Thorp. Br. Dette pl. 29. cites 41 El. 3. 7.

10. So to plead Payment, and conclude Nihil debet, and this upon
Contrails; contrary in Debt upon Specialty. Ibid.

Br. Debt. pl.
127. S. P.
and cites
S. C.

11. If a Man recovers Land and Damages in Affife in Ancient De-
voifry, and the Defendant has nothing in the Franchise to render Damages,
as in London &c. there the Plaintiff may have Debt in C. B. of the
Damages, and court upon the Recovery, or may remove the Record into Chan-
cery and send it into Banco by Mittimus, and shall have Seire Facias there-
upon, and jo to have Executions in Bank upon the Record of another Court,

12. Debt was brought in Bank upon Recovery at E. in the Court of
Piecovers, and the Tenor of the Record was sent into Chancery by Cer-
torari and sent into Bank by Mittimus, and the Plaintiff declared upon
it. Roll tendered to demur for the not flowing of the Record and
it was held peremptory. And by the Opinion of the Court the Plain-
tiff has well declared, by which he passed over, and pleaded Notice
Record, and so it was agreed that he may do notwithstanding the Cer-
ificate of the Tenor of the Record Br. Dette. pl. 85. (bis) cites 7 H.
6. 18.

13. If in a Seire Facias to have Execution of an Annuity the Plaintiff
has Judgment, upon such Judgment he shall have an Action of Debt.
Per Wray Ch. J. 4 Le. 186. pl. 207. Mich. 17 & 18 Eliz. B. R. in Case
of Barnard v. Tufier.

14. B. recovered in a Seire Facias upon a Recognizance against T. and
afterwards brought an Action of Debt upon the same Recovery, and it
was adjudged maintainable, notwithstanding that it was objected, that
the Judgment in such Seire Facias is not to recover Debt but to have Exe-
cution of the Judgment. 4 Le. 186. pl. 207 Mich. 17 & 18 Eliz. B. R.
Barnard v. Tufier.

15. The Plaintiff brought a Seire Facias upon a Recognizance taken in the
Chamber of London, and had Judgment in the Seire Facias, and now he
brought an Action of Debt upon that Judgment; and upon a Demurrer to
the Declaration, it was objected that it was ill, because the Plaintiff
did not shew, that the Chamber of London was a Court of Record, but the
Court said, they well knew that there of London have a Court of Record,
Debt.

and that they have used to take Recognizances there; And Ld. Anderson said, that admitting the Recognizance was not well taken, yet because in the Scire Facias upon it, the Defendant did not then take Advantage thereof, he shall be bound by his said Admittance of it; and he said that it was in a Manner agreed by the whole Court, that if upon this Demurrer here, the Judgment in London, upon the Scire Facias, be reversed; yet the Court here must proceed, and not take Notice of the said Reverfal. Le 284. pl. 384. Hill. 29 Eliz. C. B. Hollinghed v. King.


(N) For what Thing the Judgment being, Debt lies upon it.
[And in what Court. pl. 9, 10.]

1. If a Man recovers Damages in a real Action, as in a Writ of Br. Debt, Ayel, * Coinage, or Entry for Difference, he may bring Debt upon the Judgment for the Damages, for by the Recovery they are in the Personality. || 43 C. 3. 2.

* Coinage, Damages were found to 40 l. upon a Writ of Inquiry of Damages, and one was received, and Damages were found against the Tenant by Receipt to 10 l. and Debt was brought of the 40 l., Br. Debt, pl. 230 cites 39 E. 3. 8.

2. So he may have Debt for the Damages recovered in a Writ of Br. Debt, Waite. 43 C. 3. 2. adjudged.

3. If a Man recovers the Arrearages of a Rent-Service, he shall not have Debt for them upon the Judgment, because their continue a Freehold. * 43 C. 3. 2. Contra, 9 E. 4. 50. b.

For the Thing is certain.

4. So a Man shall not have Debt for the Arrearages recovered in Br. Debt pl. 33. cites S. C. S. P.

5. Debt lies for Damages recovered in a Morndancefor, as Arrearages of a Rent. 46 C. 3. 25.

Finch, clearly, though it was objected, that it was of the Nature of the Rent, which is Frank rent.


In Debt upon Arrearages of Account, the Defendant pleaded Arbitrement, and held no Pleas; For the Account before Auditors is in a Manner a Record. Br. Debt, pl. 108. cites 4 H. 6. 17.

7. If a Man recovers a Deb, Debt upon this Judgment. 43 C. 3. 2. b.

8. If a Man recovers Debt or Damages in London, in an Action brought there by the Custom of the City, which lies not at Common Law.
Debt.

Law in the Courts of Westminster, yet when this is become a Debt by the Act of Debt lies in Banco or Banco Res ipsa upon this Judgment, Nich. 15 Car. B. R., in an Action between Mason and Nichols, adjudged upon a Demurrer to the Declaration.

9. If a Woman be enbowed of Copyhold Land by the Custum of the Manor, and the recoverer Dower within the Manor, and Damages to $0 l, for the Profits of the Land from the Death of her Husband, by the Statute of Berton, cap. 1, the Husband being sued, yet the shall not have an Action of Debt at the Common Law for the Damages, for upon such Judgment no Writ of Error or False Judgment lies but the Remedy is in the Court of the (*) Manor, or in Chancery. Co. 4. 30. b. between More and Thos. Johnson resolved.

10. But if a Man recovers Damages in a Writ of Right-Close, in Nature of an Aine, in a Court of Ancient Demesne, he may have an Action of Debt for these Damages at the Common Law. 8 E. 4. 6.

11. Debt lies of Execution of Damages recovered in Writ of Writhe or Action Real; for the Damages are Personal. Br. Execution, pl. 17. cites 43 E. 3. 2.

12. Where a Man recovers in Writ of Annuity or Allise, or has Avowry for Rent which is Frank-Tenant, and recovers the Arrears without Costs and Damages, he shall not have Action of Debt of it, but Such Facts; For it is Real but where he has Judgment of it with Costs and Damages, which go together, so that it be mixed with the Personalty, there lies Writ of Debt; note the Divinity per Cur. Br. Detre, pl. 212. cites 23 H. 8.

As to the Pies of Writ of Error pending, S.e more at Tr. Super. sedem, (A) to (P.)

13. In an Action of Debt for $0 l. The Plaintiff declared Quod cum recuperaret eorum justiciarum de Banco apud Welin' $0 l. pro Domn' against the Defendant, Proxt per Record' & Proceeds' que Dom' Rex & Reginae recerum eas causas erroris in eisdem corrigent. vicini fac; & que in Cur. dicti Dominii Regis & Domn' Regine in pleno Robore & Vigore remanente minime revocar' plen' apparat per quod Aetio accresc. &c. To this the Defendant demurred, supposing that the Judgment was suspended so far that an Action of Debt could not be brought upon it, pending the Writ of Error. But the Court held, if the Defendant could inflict upon this, he ought not to have Demurred; but to have pleaded specially, and demanded Judgment; if the Plaintiff should be answered pending the Writ of Error; so Judgment was given for the Plaintiff. So if he had pleaded in Bar of Abatement, that a Writ of Error had been pending, the Plea had not been good. 2 Vent. 261. Mich. 2 W. & M. in C. B. Birdolph v. Dauthwood.

(O) At what Time.

1. At Common Law, if a Man had recovered a Debt, he might have had an Action of Debt upon this Judgment after the Year. 43 E. 3. 2. b.
2. If a Man recovers a Scire Facias upon a Recognizance in Chancery, and has Judgment thereupon, and an Elegit is awarded thereupon, it seems he cannot have an Action of Debt upon the Recognizance afterwards, malmutch as he hath elected another Course to have his Debt. Contra, P. 40 Cl. B. R. between Cooper and Langworth, adjudged.

3. So after the Recovery in the Scire Facias, though he does not sue any Elegit, yet Debt lies upon the Recognizance, malmutch as it is changed into a New Judgment. Contra, P. 40 Cl. B. R. between Cooper and Langworth, per Curiam.

Being in Force, he might have new Action of Debt. So if one recovers in Debt upon an Obligation, yet that remaining in Force, he may have a new Action; for Popham said, the Difference is where one recovers in Trespass, or other Action, wherein he recovereth nothing certain, but Damages only; if he has Judgment in such an Action, there, when that Judgment is in Force, he cannot have a new Action; but where the Thing which is demanded is certain, as Debt &c. it is otherwise. Wherefore it was adjudged for the Plaintiff. — Mo. 545. pl. 724 S. C. held accordingly by Popham and Fennor, &c. ibid. Gawdy, and Charming.

4. If a Man recovers Damages in a Writ of Entry, and sues an Ele- git for them, although the Elegit be not returned, yet he shall not have Debt upon the Judgment afterwards, because he hath made the Action of his Election upon Record. D. 13 Cl. 299. 54. The same Law is if the Extent be returned upon the Elegit, although the Party disagrees thereto. * 52 C. 3. 5. b.

* Br. Debt, pl. 49 cites S. C. but adds a Quare.

5. If a Man recovers a Debt, and after the Parties refer them—Br. Debt, selves to an Award, and by Assent the Plaintiff was dismissed of the pl. 61. cites Court, by this Word (Dismittitur) he shall never have an Action of Debt upon this Judgment, because he was once incorrectly dismissed of the Court to have any Execution there. 11 D. 4. 44. adjudged.

6. [So] If a Man recovers Debt, and hath the Party in Execution, and he escapes, he shall not have Debt upon the Judgment against him afterwards. D. 11 D. 4. 45.

7. If a Man by Indenture acknowledges to J. B. that he hath so much of his Money due to him in his Hands, without limiting any Day of Payment, yet Debt lies presently. 11 D. 6. 39.

8. If a Man bargain with another to enfeoff him of certain Land for a certain Sum, so that there is a full Bargain between them, he may demand the Money in a Writ of Debt presently, 20 D. 6. 34. b. for it was his Folly not to take better Security. Br. Debt, pl. 99. cites 2 H. 6. 44 by Newton.

9. If a Man leaves Lands for Years, reserving yearly 20 at S. P. Br four Quarters, Debt lies for one Quarter before the other are paid, because it favours of the Realty, and is as several Contracts. Co. Lit. 47. b. agreed. Trin. 13 Jac. B. R. in Scarlett's Case; and that is so it is of a Statute. — 5 Rep. 22. a. arg. S. P. — 5 Rep. 81. b. Per Cur. S. P.

10. [So] If a Man leaves Lands for Years, reserving weekly during See (A) pl. the Term nine Quarters of Wheat, an Action of Debt lies for any 4 X Week's Notes there.
And see tit. Debt.

Week’s Quarter before the other are incurred, for this is a Rent. 

(C) pl. 1. 

11. But upon a Bill Obligatory for the Payment of several Sums at several Days, no Action lies till the last Day is past. Co. Lit. 47. b.


12. So upon a Contract Debt lies not till all the Days of Day, but the Action is past. Co. Lit. 47. b.


13. If a Man leaves for Years rendering Rent, and the Rent is arrear and the Term expires, he cannot have Diligets, but shall have Action of Debt for the Rent due before. Br. Dette. pl. 74. cites 14 H. 4. 39.

So it was laid upon Co.

14. Scire Facias upon Recovery of Debt and Damages the Defendant said that at another Time the Plaintiff sued Scire Facias, and the Sheriff levied the Money, Judgment &c. and it was said there that Pi. Fa. is not of Record before the Return thereof. Br. Executions pl. 6. cites 20 H. 6. 24, 25 & 26. S. P. and not adjudged here. But in 21 H. 6. 5. it was reheard again, and there the Plaintiff was compell’d to answer to the Plea of the Defendant, and so he did, and therefore a good Plea. So it seems upon a Taking of the Body by Capias ad Satisfacendum, where no Writ is return’d. But it was laid in Anno 21 H. 6. 5. That in Anno 19 E. 3. it was adjudged no Plea. Quare Br. Executions, pl. 6.

Note, that the Cafe of Scire Facias, which commenced Anno 20 H. 6. was here adjudged a good Plea; That the Sheriff had levied by Fieri Facias, and the Plaintiff answered to answer to it, by which he said, that the Sheriff had not made thereof Levy, Pritf and the others contra. But it was said, that M. 19 E. 3. it was awarded no Plea, because the Bail did not make mention thereof, nor did he shew Acquisition nor Tally of the Sheriff, by which Execution was awarded. Br. Executions, pl. 52. cites 21 H. 6. 3.

15. If a Man falls to another Twenty Acres of Land for 10l. the Vendor shall Action of Debt though he did not suffer the other, and the other has no Remedy, but Action upon his Cafe; for it is his Folly that he had not taken better Surety. Br. Dette. pl. 99. cites 22 H. 6. 44. Per Newton.

16. And by him in Debt of 20l. for Twenty Acres of Land sold, it is a good Plea that the Bargain was to pay at the Livery of Seisin such a Day, and that before the Day the Vendor promised to inform him, and upon this we paid the 20l. and he relied, Judgment nullo. Br. Ibid.

17. If a Man recovers Damages in Trespass in C. B. and the Record is removed for Error into B. R. there by all the Justices the Plaintiff may bring the Damages in C. B. or in B. R. at his Pleasure, and it lies notwithstanding the Writ of Error; for as yet the first Record is not reversed in Facio by the Writ of Error; but it was held that he shall recite the Record in his Count, and that it is removed into B. R. by Writ of Error, but he shall not shew the Record to the Court; but if the Defendant pleads Nul l toll Record, the Plaintiff shew it at his Peril Sub Pede Sigilli, quod Nota. Br. Dette. pl. 166. cites 18 E. 4. 6.

18. Bill of Debt was brought upon Arrears of a Lease before Michaelmas, and the Rent was not due before Michaelmas, and it was challenged because it was brought before it was due. And per Tremable, yet
yet the Bill is good; Quære, for it seems that these Words) Debt & Injus'te detinet were not true at the Time of the Issue of the Bill; for he cannot detain it till the Day of Payment be come, nor upon a Leafe it is no Debt before. But upon an Obligation it is a Debt before, but it seems that all is one; for it may be released before, yet it is not detained till the Day of Payment be come. Br. Dette pl. 126. cites 21 H. 7. 33.

19. L. Serjeant brought a Seire Facias upon a Recognizance, and had Judgment upon Default, Quod habeat Executionem; and afterwards he brought an Action of Debt upon the said Judgment, and Exception was taken to the Action; for that he ought to proceed upon the Judgment given upon the Seire Facias, and ought to sue Execution according to the said Judgment by Elegit, or Seire Facias, but not by Capias; but the Exception was not allowed; for the Recognizance is a Judgment in it'self, and an Action of Debt will lie upon it, without any Judgment in the Seire Facias; and Debt lies as well upon the Judgment as upon the Recognizance it'self; and so was the Opinion of the whole Court.


20. Debt on Bond was brought before the Day of Payment, and Judgment was given for the Plaintiff. Then Defendant brought Error, and pending the Writ of Error the Day of Payment happened. Now the Action is become good which was not so before. 2 Le. 20. pl. 26. Trin.


21. If a Man be bound to pay 10 l. such a Day, and 10 l. such a Day. Here the Obligee shall have his Action for the first, because the Duty was in itself several; Per Periam. Owen, Hill. 30 Eliz. Hunt v. Torney.

Eftct. 2 Inft. 395.—Cited Hard. 27.

22. If a Man be bound in a Bond of 100 l. to pay 20 l. for so many Years; he shall not have Debt till the last Year expired; Per Periam.

Owen, 42. Hill. 30 Eliz. Hunt's Cafe.

23. A. made a Bill of Debt to B. for the Payment of 20 l. at Four Days, seifeat, 5 l. at every of the said Four Days, and in the End of the Deed, covenanted and granted with B. his Executors, and Administrators, that if he make Default in the Payment of any of the said Payments, that then be he will pay the Refidue that then shall be unpaid; and afterwards A. fails in the first Payment, and before the Second Day B. brought an Action for the whole 20 l. By the whole Court the Action does well lie for the Manner, for if one covenants to pay me 100 l. at such a Day, an Action of Debt lies; a Tortiori, when the Words of the Deed are Covenant and Grant, for the Word Covenant sometimes founds in Covenant, sometimes in Contrad Secundum Subjectam Materiam. Le. 208. pl. 290. Mich. 32 & 33 Eliz. C. B. Anon.

24. Covenant to pay 5 l. per Annum for Five Years, and declares on a Bill sealed; Debt lies for Non-Payment of the 5 l. 3 Lev. 383. Mich. 5 W. & M. in C. B. March v. Freeman.

Cites Hard. 175 that Covenant lies at the first Day, but Quære of Debt. North's Cafe.

25. A. by Bill sealed covenanted to pay the Plaintiff 5 l. a Year for five Years at Two Payments, viz. 24 June and 25 December. The Court upon the first and second Argument inclined that Debt lay not till all the Days are past. But it was intifted, that this is not like Bills of Debt, but is a Covenant to pay at several Days, and Covenant lies on Breach 175. Note at every Day, as in Case of a Promise; and in this Case the 5 l. a Year is for Maintenance of a Daughter, to that without Payment the Coven¬nant lies at cannot be maintained in the mean Time. And afterwards Judgment the first Day, was
Debt.

was given for the Plaintiff, per tot. Cur. 3 Lev. 383. Trin. 5 W. & M. in C. B. March v. Freeman.


27. Exaudite, that it shall be lawful for any Person, having Rent due upon any Lease for Life, for Years, or at Will determined, to distrain for such Arrears after the Determination of the Leases.

(O. 2) At what Time; before Performance of the Consideration.

1. 1 If I sells my Land in D. for 100 l. Debt lies, and yet he has not the Land, nor can be take it without Livery. Br. Contraét, pl. 17. cites 37 H. 6. 18.

2. And where a Man is retained to be of Counsel for 10 l. per Anu. he may have Debt, and yet it may be that the other did not demand Counsel of him, but there he shall say that he was ready if &c. Ibid.

(P.) How it shall be brought; in what Cases in the Detinet; in Respect of the Persons.

Lane, 72. 
S. C. ad. 
judg'd ac-

1. 1 If A be in Execution upon a Judgment for B. and after B. dies, and after A. brings an Audita Querela against C. the Executor of B. and has a Scire Facias, and thereupon puts in Bail by Recognizance in Chancery, according to the Statute of 11 H. 6. cap. and after upon this Audita Querela Judgment is given against A. and afterwards a Scire Facias lies against the Bail, and after Judgment the Bail is taken in Execution upon the Recognizance, and the Sheriff suffers him to escape, upon which Escape the Executor brings an Action of Debt; this Action ought to be brought in the Detinet only, and not in the Debet and Detinet, for this Recognizance is in Nature of the first Debt, this being in a legal Course. 9. 8 Ja. Statcaro, between Carew and Broughton adjudged.

2. If an Executor brings Debt upon an Obligation made to the Tenantor, where the Day of Payment incurred after the Death of the Tenantor, yet the Debt shall be in the Detinet only, for he brings the Action as Executor. 20 H. 6. 5. 6.

Debt.

3. So if a Man binds himself to the Tellerator to pay him 100l. when such a Thing shall happen; if it happens after the Death of the Tellerator, yet the Debt of Debt by the Executor shall be in the Detinet only. 20 P. 6. 6. b.

4. When Debt is brought by Executors, and Recovery had, and after the Defendant escapes, and Debt is brought upon this Escape, this shall be in the Detinet according to the first Cause of Action. Holt. 79. Hill. 1 Car. in Calke of Townley v. Steele.

5. M. brought an Action of Debt against H. a Sheriff for an Escape, and had a Verdict against him. The Defendant moved in Arrest of Judgment, that the Action was brought by the Plaintiff, as an Administrator, for the Escape, which was made in the Life of the Intestate only. The Action ought to be brought in the Detinet only, the Plaintiff being but an Administrator, who recovers not to his own Use. Therefore say Judgment till the Plaintiff move. Str. 232. Mich. 1650. Martin v. Hootly.

6. Debt by an Executor for an Escape of one in Execution on a Judgment by Raym. of Tellerator, and declared in the Debt and Detinet; and after Verdict this Rep. 693. S. C. and it was admitted, that it was moved in Arrest of Judgment; and it being doubted whether it was helped by the general Words of (Matters of the like Nature) in the Statute of 16 and 17 Car. 2. to maintain it. At another Day were quoted 1 Sid. 379. 341. 2 Kel. 407. which is that it was helped after Verdict; but Holt Ch. J. said, that Debt always is where the Action is in the Party's own Right. Et adjournat, 12 Mod. 565. Mich. 13 W. 3. Holden v. Sutton.

not aided after Verdict by 16 & 17 Car. 2. cap. 8. because it would alter the Nature of the Action, and therefore the Right was not tried, and Judgment was say'd, Nisi &c.

(Q) In the Detinet only.

[In Respect of the Plaintiff Executor.]

1. If the Action be of such a Nature that he ought to name himself; Rep. 31. b. Mich. 42 & 42 Eliz. B. R. in Hargrave's Cafe S. P. laid down as a general Rule; because the Thing or Damages shall be Affris.

2. If an Executor recovers in Trespass for Goods taken out of his Possession, in Debt for the Damages recovered, the Verit shall be in the Debt and Detinet. 20 P. 6. 5. b. for he need not name himself Executor.

But if the Goods were carried away in the Life of the Tellerator, &c. and the Executor brings an Action and has Judgment to recover 201. and Damages for them, and upon this Judgment brings Debt, it shall be in the Detinet; Per Snig B. Lane 85. Mich. 7 Jac. in the Exchequer.

3. If a Man possessed for Years makes an Under-Leafe, rendring the Rent, if his Executor brings Debt for Rent incurred after his Death, the Verit shall be in the Detinet only. 20 P. 6. 5. b.

Chyl 134. August 1659 before Thope Judge of Affris; It was held, that it ought to be in the Detinet only. Jennings v. Ingerian.

4. If the Executor sues a Scire Faciatus out of a Recognizance made to his Tellerator, it shall be in the Detinet. 20 P. 6. 5. b.
358 Debt.

5. If an Executor takes an Obligation for a Debt due to his Testator by Contract, in Debt upon this Obligation the Writ shall be in the Debt and Detinet. 20 P. 6. 4. b. 5. b. Contra 25 E. 3. 40. adjudged.

6. But in Debt by Executors upon Obligation made to themselves, by which it appear'd that the Bond was for the Goods of the Testator sold to the Defendant, the Writ was in the Detinet only, and adjudg'd good. Dig. 113. Lib. 10. cap. 23. S. 5. cites Mich. 17 E. 3. 66. and Pach. 25 E. 3. 40.

The Action was in the Executor. F. N. B. 119. (M) in the new Notes there, (a) ad finem, cites 20. H. 6. 415. b. [but it seems misprinted, and that it should be as in Roll.] But adds, that it was adjudg'd, that it shall be in the Detinet, and cites 17 E. 3. Brief 87. [but it is 17 E. 3. 66. at Fitch. Brief, pl. 287.]

(R) By whom. [How in the Detinet or in the Debt and Detinet.]

Cro. E. 326. in pl. 4. Arg. cites all the fame Cases, and 10. H. 7. 5. b. that where Executor brings Debt for Arrearages of an Account found before Auditors assign'd by himself, and so in all Cases where an Executor sues for any Thing due to the Testator, or by Reason of any such Thing, As if an Executor recovers Damages in Trepsa De Bonis Testatoris aforis, and recovers, and then brings Debt for the Damages, it must be in the Detinet.—Thel Dig 114 Lib 10. cap. 23. S. 25. cites Hill. 11 H. 6. 21. and 50 H. 6. 5.—S. P. per Cor. Cro. J. 345. in pl. 5.

1. If in an Account an Executor recovers a Debt due to his Testator, in Debt for the Arrearages thereof upon the Writ shall be in the Detinet only; for though the Action is converted into a Debt by the Account, yet it is the same Thing which was received in the Life of the Testator. 11 H. 6. 17. b. Dubitatur. 20 P. 6. 4. b. 5. b. adjudged. Contra, 11 H. 6. 36. b.


2. If a Rent be granted to another for Years, the Executor of the Grantee shall have Debt for the Arrearages of this Rent incurred after the Death of the Testator in the Detinet only; for he had it as Executor. 11 H. 6. 36.

3. If an Executor recovers in Debt upon a Contract due to the Testator, and after brings a Writ upon the Judgment, the Writ shall be in the Detinet only. Contra, 20 H. 5. 5.

4. If the Executor sells the Goods of the Testator for a certain Sum, he shall have Debt for this in the Debt and Detinet. 20 H. 6. 5. b. Contra, 17 E. 3. 66. adjudged.

So if there are two Executors, one sells Testator's Good, he alone shall have Debt in the Debt & Detinet. For it is of his own Contract. Br. Debt, pl. 177, cites 11 H. 6. 7. and 16.


(S) Against
Debt.

359

(S) Against Whom.

[In the Debt and Detinet.]

1. Debt against an Executor shall be in the Detinet only. This seems to be misprinted for "Ibid."

2. [And] if a Debt be recovered against Executors of the Goods of a Deceased, and the Recoveror brings Debt upon the Judgment of an Administrator, the Writ shall not be in the Debt and Detinet, but in the Detinet only; 11 H. 4. 56. b. 11 H. 6. 3. b.

cause it was not in the Detinet only. Br. Debt, pl. 229. cites S. C. — Ibd. pl. 237. cites 10 H. 7. 5. S. P.

In Debt against Administrators, upon Recovery had against them before, the Writ was in the Debt and Detinet, and was abated by Judgment. Thel. Dig. 114. Lib. 10. cap. 25. S. 18. cites Patch. 11 H. 4. 56. and says, That so is the Opinion of 11 H. 6. 9. 20. 43. But that there the Plaintiff would maintain the Writ, by argufying that the Defendant had alienated the Goods of the Deceased, and had converted them to his own Use &c. by reason of which Suggeftion none of the Justices were in Opinion that the Writ was good, Sed non Adjudicatur.

Lev. 250. 251. Hill. 19 & 20 Car 2. B R. Wheatley v. Lane. S. P Action was in the Detinet only, and the Defendant demurred on the Declaration, but the Defendant did not come at the Day and maintain his Demurrer, and therefore Judgment was given for the Plaintiff. — Ibd. 255. 256. Mich. 20 Car 2. B R. between the same Parties, but there the Executor was charged in the Debt & Detinet upon a Devavavit, and Judgment for the Plaintiff, though it was expressed that it lay not in the Debt & Detinet; For if so, it would then charge the Executor of the Executor, which cannot be, because it is only a Personal Tort, and cited 9 H. 6. 9. 3 Cro. 530. and 11 H. 4. 16. — Sold. 597. pl. 4. S. C in the Debt & Detinet, and Judgment for the Plaintiff. — Saund. 216. S. C. accordingly, and Judgment for the Plaintiff. The Reporter adds a Note, that this was argued twice and much debated, and as he thinks is now settled, but as to the Conveniences or Inconveniences that may follow, they are not as yet known &c.

3. But otherwise it is if it be brought upon a Judgment de Bonis propriis. 11 H. 4. 56. b.

4. A Writ of Debt in the Debt and Detinet does not lie against an Executor, upon a Suggeftion that he hath wasted or converted the Goods of the Deceased, without a Writ depending. 11 H. 6. 7. b.

A Devavavit without a Judgment will not make an Action of Debt, but both do; If Executors waste, they that have Right cannot bring Debt upon the Writ; but there must be a Judgment. It is the Whole that makes the Action; Per Cur. Cart. 2. Mich. 16 Car. 2. C. B. Burrel v. Richmond.

Debt was brought in the Debt & Detinet against an Administrator, on a Suggeftion of a Devavavit; The Defendant demurr’d to the Declaration. Pollexen argued, that such Action does not lie against an Administrator in the Debt & Detinet, and so it was adjudged in the Case of Ent and Withers. The Ch. J. said, that here is a Suggeftion of a Devavavit by the Administrator, before an Action brought against him as Administrator, and admitting the Declaration true, yet there may be no Wrong to you; for besides the Goods wasted, the Administrator may have sufficient to pay you; and this is a new Practice not to be countenanced. Judgment pro Defendente. Comb. 47. Falic. 3 Jac. 2. B R. Davenport v. Calne.

5. So if a Man recovers in a Writ of Debt against an Executor, and in a Fieri Facias thereupon the Sheriff returns that he hath not Goods of the Deceased, the Recoveror, upon a Suggeftion that he hath wasted the Goods, shall not have a Writ of Debt in the Debt and Detinet against him, for upon this Return and Suggeftion he is to have a Conditional Writ of Scurt Facias to the Sheriff, &c.

The Case was, Debt was brought against B. H. for goods upon an Obligation, and was countenanced, that at another
Debt.

6. But if upon the Fieri Facias the Sheriff returns a Devolutive act by the Executor, the Plaintiff may have Debt thereupon in the Deed and Detinet. (It seems there ought to be a Judgment upon the Return) 11 H. 6. 16. 6.

7. If Leesee for 20 Years leaves for 10 Years, rendring Rent, and dies, his Executor or Administrator shall have Debt for the Rent incurred after the Death of the Tenant in the Detinet only. 43 El. B. R. between Sparke and Sparke, per Curiam.

8. If the Executor obliges himself to pay a Debt due by Contract by the Tenant, in Debt upon this Obligation the Suit may be in the Deed and Detinet, because the Obligation made it his own Debt. 11 H. 6. 17. 11.

9. In an Action of Debt against the Executor for Rent incurred in the Life of the Tenant, the Suit shall be in the Detinet only. 11 H. 6. 36.

10. In an Action of Debt against an Executor for the Arrears of a Rent, receiving upon a Lease for Years, and incurred after the Death of the Tenant, the Suit shall be in the Deed and Detinet, because the Executor is charged of his own Possession. 11 H. 6. 36. 41, 42 El. B. R. between Hargrave and Boddy annulled. But it was reverted for the same Cause in a Writ of Error in Camera Staccati.
Debt. 361


But otherwise it is for Rent, due in the Time of the Tresorer. Thel. Dig. 114. Lib. 10. cap. 25. S. 19. cites to H. 7. 5.

In Debt brought by Executors against Leflie for Years, of the Lease of the Tresorer, of which Parcel is due in the Time of his Tresorer, and Parcell after his Death, the Writ shall be in the Detinet only, per Englefield. Thel. Dig. 114. Lib. 10. cap. 23. S. 21. cites Patch. 19 H. 8. 8.

* Cro. E. 511. pl. 35. Body of Harragur, S. C. adjudged for the Plaintiff. But adds a Note, that afterwards this Judgment was reversed in the Exchequer Chamber, for the Point in Law; For they all held, that it ought to be in the Detinet only, because he is charged only by the Contract of the Interlocut. Mo 566. pl. 771. S. C. against Administrator, and adjudg'd good in the Debt & Detinet; and distinguish'd between Action brought, by or against an Executor or Administrator.—Brownl. 56. S. C. and Judgment reversed in Cam. Scacc. Cro. J. 546. in a Note added at the End of § 5 that in the Argument of the Case there of Rennull b. Longstaffe, it was then delivered by the Court, that Hargraves's Case § Rep 51. was afterwards reversed in Cam. Scacc in the Point of Debt & Detinet, according to the Book to H. 7. 5.—Bullit. 25. S. C. cited by Williams J. to be so adjudg'd, but that the same was afterwards reversed upon another Matter, and for other Reasons.—2 Brownl. 776. S. C. cited by Council Arg who said, that they were of Coun- sel with Hargraves, when the Judgment in B. R. was reversed in the Exchequer Chamber for this very Point, and for this Reason, because it was brought in the Debt & Detinet, whereas it should be in the Detinet only. —S. C. cited Cro. C. 225. 226. pl. 3. and by three Judges denied to be Law; and Jones J. said, that he knew it to be reversed in Point of Judgment for this Cause. But Mr. Dive, or Daughter of Hargraves, has made a Queue if the Book is not misprint, otherwise the Case is misapplied there, the Action there being brought by an Administrator, and not against one, for Rent incurred in the Time of the Interlocut.

† Cro. J. 258. pl. 1 S. C. adjudg'd well brought in the Debt & Detinet. —Bullit. 22. S. C. & S. P. agreed by all, and Judgment for the Plaintiff.—2 Brownl. 222. S. C. adjudged per tot. Cor. preter Velution in the Debt & Detinet. 46, 167, 169, Palm. 116, S. C. citi. Eale. Cro. J. 411. pl. 11. Mich. 14. Jac. B. R. Ipswich Bailiffs & v. Martin. S. P. adjudged for the Plaintiff.—Bullit. 211. S. C. adjudged. —Cro. J. 549. pl. 10 Mich. 17 Jac. b. R. Mawle v. Cacyttr. S. P. Palm. 116. Moule v. Moodie. S. C. and S. P. adjudged for the Plaintiff.—2 Roll. Rep. 151. Paul v. Moodie. S. C. 44. 22 225. Car. B. R. Roydon v. Cordyfe, the Court said, it was never doubted but that the Action might be brought in the Detinet only; but it had been much doubted if it might be brought in the Debt & Detinet. —Poph. 121. Patch. 29 Eliz. Popham said, that in such Cafe it shall be in the Debt & Detinet; For though they have the Lands as Executors, yet nothing thereof shall be implied to the Execution of the Will, but such Profits as are as above that which was to make the Rent, and therefore so much of the Profits as is to make or enforce the Rent, they shall have to their own Use to enforce the Rent, and therefore they have Quo pro quo, viz. so much of the Profits for the Rent, the Action ought to be brought against them in such Cases, but where they are to be charged in Debt for Rent, upon a Lease made to the Tresorer, and have not the Profits of the Lease left, nor Means, or Default therein to come to it; the Action of Debt ought to be against them in the Detinet only, and this is the Case here, and therefore the Court did not hold that—61. Eliz. Debet, &c. Jerritt. &. C. Bacon J. held it good in the Debt & Detinet. Roll J. said, it had been held Pro & Con to be good and bad; but that it must be in the Debt & Detinet, or else it will be mischievous to the Plain- tiff, and Judgment for the Plaintiff, Nifs & —S. C. cited All. 34 and other Cases, and fays, that the Reasons of these contrary Opinions, were the Inconvenience of the one Side and the other; for inasmuch as the Executors cannot waive the Term, it was hard if the Rent should exceed the Value of the Land, and they have no Allies, that they should be charged in the Debt of their own proper Goods, and yet, if the Action must be brought in the Detinet only, where fully Administered were a good Plea, then may they retain the Land, and with the Profits thereof pay Debts upon Specialty, whereby the Legator should be defeated of his Rent; for the avoiding of which Inconveniences, it was resolved, that they may be charged in the Debt & Detinet, for Prima Facie, the Land shall be intended to be of greater Value than the Rent is, if it be otherwise.


12. Writ of Debt brought against Executor upon his own Contingent with Quas ei injurie detinet only, was abated; for it ought to be Debt & Detinet. Thel. Dig. 113. Lib. 10. cap. 23. S. 11. cites Mich. 41 E. 3. Briel 545.

Debt.


15. Debt against the Executors of P. in the Debtor & Detinor for Rent incurred upon a Term after the Death of the Testator; they pleaded that Part of the Land was evicted in the Life of the Testator, and for the Restidue that they tendered &c. Et uncere prift, &c. Plaintiff demurred, but afterwards they agreed, and the Plaintiff accepted according to the said Apportionment without Costs or Damages of either Side. Dy. 81. b. pl. 67. Hill. 6 & 7. E. 6. Barrington v. Potter.

16. If an Action of Debt be brought against Baron and Feme upon an Obligation entered into by the Feme before Marriage it shall be in the Debtor & Detinor, for by the Marriage all the Perfonal Goods, and a Power of disposing of the Real, are by Law given the Husband, which he has to his own Use, and not as Executor to the Ufe of another; and resolved per tot. Cur. that this was Matter of Substance and the very Point of the Action. 5 Rep. 36. a. Trin 30 Eliz. B. P. Lloyd v. Walcot.

5. P. because the Heir is bound by Special Words in the Obligation, per Gawdy. Cro E. 712. in pl. 35. Mich. 41 & 42 Eliz. B. R.—It ought to be in the Debtor & Detinor; But after Verdict, it is cured by the Oxford Act of Jeoials. Lev. 224. Mich. 15 Car. B. R. Combers v. Watton.—Sid. 745. pl. 6. S. C. but doubted if it might be amended by Stat. 16 & 17 Car. 2. cap. 8.—The Wit against the Heir is in the Debtor & Detinor, which proves, that in Law it is his own Debt; Per Dyer, and he said, that he could shew a Precedent were such an Action was maintainable against the Executors of the Heir. 2 Le. 11. pl. 16. Hill. 20 Eliz. C. B.

18. Debt in the Detinor against Administratrix of her Husband for Arrearages of a Lease for Years viz. for a Quarters Rent due in the Life of the Intestate, and two Quarters in her own Time. It was moved that the Action ought to have been brought in the Debtor & Detinor, according to Hargrave's Cafe, 5 Rep. 31. but resolved, that the Action was well brought in the Detinor, she having the Interest only as Administratrix; and Hargrave's Cafe was said to be no Law, and that that Judgment was reversed. Cro. C. 225. pl. 2. Mich. 7 Car. B. R. Smith v. Norfolk.

19. An Action of Debt was brought upon an Obligation made to a Bishop and his Commissary for Payment of Debts and Legacies; the Action was brought by an Executor, and Judgment given by Default against the Defendant, the Judgment was reversed by a Writ of Error, because the Action was brought in the Debtor & Detinor; whereas it ought to have been brought in the Detinor only, because it was brought by an Executor. Sty. 278. Trin. 1651. Lydale v. Lytter.

(T) How it shall be brought in the Debtor and Detinor.

Br. Dette, pl. 1. If Debt be brought against Baron and Feme upon a Recovery of Damages against the Feme dum fata fur, it is good in the Debtor and Detinor. 47 E. 3. 23. b.

2. If
Debt.

2. If the Successor Prior brings Debt upon an Obligation made to Br. Debr, his Predecessor, the Writ shall be in the Debtor and Detinett. 47 E. pl. 44. cites S. C. 3. 23. B.

for where it is to his own Use it shall be Debtor, as it seems, contra Executor, for this is to another's Use.

3. Debt shall not be in the Debtor, but of Money only. Br. Ley Gager. pl. 26. cites 50 E. 3. 16. 4. Debt was brought against Administrators, the Plaintiff recovered and brought another Writ of Debt upon the same Record in the Debtor & Detinett, where the Defendants were convicted of this Plea of Plene Administrativit, and because in this Case they are only charged as Administrators, therefore they took nothing by their Writ, Quod Nota. But see if they had been convicted upon such Plea, where they should be charged de bonis propriis, as in 11 H. 6. 35. Br. Faux Latin pl. 20. cites 11 H. 4. 59. [but it should be 56 a. pl. 2. and the other Edit. is 56.]

5. Debt against Baron and Feme of the Contract of the Feme during Br. Debr, pl. Coverture, the Writ shall be Debtor & Detinett; for the Baron is 110. cites Debtor by the taking of the Feme, and both ought to wage their Law. Br. Faux Latin pl. 52. cites 9 E. 4. 24.

6. If a Feme be indebted and takes Baron, the Writ of Debt against the Baron and Feme shall be Debtor; for the Baron is Debtor by the Eipoufals. Br. Dette pl. 142. cites 7 H. 7. 1.

7. And if Debt be due to a Feme, who takes Baron, and they bring Debt, the Writ shall be, Quod Debtor to both, and shall count how the Debt accrued to the Feme Dam sola fuit and that after they inter-married, Ibid.

8. If an Annuity is granted to one for Years, so long as the Term continues, a Writ of Annuity lies for the same, but when the Lease is determined an Action of Debt lies for the same; Per Williams J. Bult. 152. cites 9 H. 7. 16, 17. and says, that so is the Old Book of Entries, Fol. 151. in Debt for an Annuity.

9. Debt against Executors, upon Arrears due in the Time of the Executors, upon a Lease made to the Trustor, the Writ shall be in the Detinett and not in the Debtor. Br. Dante, pl. 237. cites 10 H. 7. 5.

10. So where a Man recovers against Executors and brings Action thereof, this shall be in the Detinett. And so of Action of Debt upon Arrears of Account brought by Executors of Account made to them. Br. Dette pl. 237. cites 10 H. 7. 5.

11. Tanfield Ch. B. took this Difference, where the Action is grounded upon Privity of Contract it ought to be in the Detinett as 11 H. 6. 37. 11. H. 4. 46. 10 H. 7. 5. But otherwise it is, when grounded on a Tort, as 41. Aff. 15. Cro. J. 546. pl. 5. Mich. 17 Jac. in Cam. Seacc. in Cafl of Reynell v. Lancastre.

12. Where the Thing demanded is Current Coin, there the thing itself ought to be demanded and not the Value, and the Count ought to be in the Debtor & Detinett; but where a Foreign Coin is demanded, there it ought to be in the Detinett, and they may count to the Value; but of the Coin of the Realm they ought to take Notice what Value it bears, and to that Value it ought to be demanded; as in this Case, 100 nummi Aurei, vocat Guineas, Valoris viginti unius solidi. & 4 d. for to this Value they were coined at the Mint, which is their legal Value, and therefore their proper Denomination is 20 s. Pieces of Gold, Vocat Guineas. Per Holt Ch. J. Skin. 573. pl. 16. Mich. 6 W. & M. in B. R. in Case of Saint Leiger v. Pope.

Plaintiff may elect whether to declare in the Detinett, as for Guineas in Specie, or in the Debter & Detinett for the Value in English Money; But the Court agreed, that in that Case there must be a Default in Payment of the Foreign or Medal Coin in Specie, before the Party can bring Debt in the Debtor & Detinett for the Value,— Where Foreign Coin itself is demanded, the Action is in the De-
Debt.

Debt; but if the Value be demanded, it is in the Debtor & Detinent; and the Averment always is, that the Defendant has neither rendered the Foreign Coin nor the Value; Per Holt Ch. J. 12. Mod. St. S. C.——Lutw. 488. S. C and S. P. to which Holt Ch. J. and Eyre J. seem'd to agree.

(U) How it shall be brought. In the Debt and Detinent; and where in the Detinent only. In Respect of the Thing.

The Chancellor will never make a Writ in the Debt but of Money only, and therefore where Debt was brought for certain Rent-Corn, and Rent-Fowl, referred on a Lease for Years of Lands, the Writ, though in the Detinent only, was held good. Per tot. Car. Br. Debts, pl. 50. cites S. C.

As if a Man sells 20 Quarters of Wheat, or a Horse.

F. N. B. 119, (H)—In Debt of Things which are not Money, as Corn, Grain &c. the Writ shall be in the Detinent only, and he shall recover the Price or Value of the Thing, and not the Thing itself.

Quare. Br. Debts, pl. 211. cites 9 E. 4. 10. 15. 41.

3. The Writ was Quod reddat 10l. quas ei debet & injuste Detinet & bona & cattalla ad valorem &c. quae ei injuste detinet, and held good. Thel. Dig. 113. Lib. cap. 23. S. 9. cites Hill. 33 E. 3. Brief 913. And that so agrees the Register tol. 139. and Nat. brev. 152. where the Writ is brought in Banco, but when it is in Vincetiel, it shall be quod reddat 10l. quas ei Debet & Cattalla ad Valorem &c. quae ei injuste Detinet; for of Debt in the County the Writ shall say quas ei Debet only.

4. Debt in the Detinent; for that the Defendant owed him 600 Gilders, Moneta Polonia; and declares upon a Bill Obligatory, wherein the Defendant was bound to pay him 600 Gilders of legal Money Polonii, viz. ad valorem 220l. legalis Moneta Anglice. It was said the Action ought not to have been in Detiner, because it is upon a Bill Obligatory; the Opinion of the Court was that forasmuch as he is not to recover the Gilders, but the Value of them found by the Jury, and the Demand is not of any Sum certain, and the Value is not known to the Court that the Demand is good enough in the Detiner. It was adjudged for the Plaintiff. Cro. J. 617. pl. 2. Mich. 19 Jac. B. R. Rand v. Peck, in Cafe of Drapes v. Raffal.

5. If Debt for 48 s. in Debtor and Detinent, and for two Shirts in the Detinent only; and he declared, that the Defendant such a Year retained the Plaintiff to be his Servant in Husbandsry, giving him 48 s. and a Shirt by the Year; the Court said it was clear, that he may bring his Action fo by severa Precipes in one Writ. Win. 75. Paich. 22 Jac. C. B. Weaver v. Bell.

6. Debt upon a Bill, bearing Date in the Parish of St. Mary le Bow, London, which upon Oyer appeared to be dated at Hamwrough, and the Plaintiff declared in the Detinent only, for 61. Hamwrough Money; it was objected against this Declaration, that the Action ought to be brought in Debtor and Detinent; but adjudged 'tis well brought in the Detiner, because 'tis not for a certain Sum, but for 61. Hamwrough Money, which
which in English Coin is 40s. Value, and the Value of the Hambo-
rough Money not being well known amongst us by common Inten-
dment, it ought therefore to be demanded in the Detinet only; and

(X) What shall be a good Plea in Bar. [Of Debt on
Judgments.]

1. In Debt upon a Recovery in another Court, it is no good Plea
that the Court where &c. had taken him in Execution, if he does
not say that it was at the Instance of the Plaintiff. 7 H. 6. 19.

2. But if he says so, it is a good Plea in Bar. 7 H. 6. 19.

3. In Debt upon a Judgment, it is no Plea that there is an Error
in the Original Process, or Record of the first Judgment, for he is
put to his Writ of Error for that. 7 H. 6. 19

4. In Debt upon a Judgment, it is no Plea in Bar, that after the
Judgment the Parties put themselves to an Arbitrament by Award of
the Lord Chancellor &c; and that the Arbitrator had made such Award
&c. and that he himself had brought an Audita Querela to be relieved
upon this Award, for this Matter is not sufficient to maintain an
Audita Querela, and if it was, yet he could not plead it, but is
put to his Audita Querela. Cr. 7 Jac. 3. Miles Fast's Cafe adj.

5. In Debt the Plaintiff counted upon a Recovery of Debt and Damages
in the Court of Record at King's upon Hill, and the Defendant pleaded,
that they were discharged by the Court of Hull in the same Action, by Assent
of the Plaintiff, because it appeared to the Court that the Parties had put
themselves in Arbitrament; and therefore to say Quod dimittetur Judgment
Si Aetio, and it was awarded by the Court that the Plaintiff shall take
nothing by his Writ, and is a Bar. And per Hank and Thirm, Arbitrament
made, or Arbitrament pending and not finished, is a good Bar in
Action Personal; and per Hank, in Action Real; but Skrene contra.
Br. Detee, pl. 61. cites 11 H. 4. 12.

6. In Debt of 10l. the Plaintiff counted that he recovered against the
Defendant in a Special Assize 10l. in Damages before such Justices; the pl. 63. S. P.
Defendant said, that within the Year he sold Fieri Facias to the Sheriff,
by which he levied it, and paid to the Plaintiff Judgment Si Aetio; and
the Payment over to the Plaintiff was of little Regard but only the
levying by the Sheriff. And Hill and Hank held the Plea no Plea,
and that the Defendant shall render to the Plaintiff, and shall have his
Remedy against the Sheriff; but Thimre was strongly contra; and that
the Debt is of Record, and by the Fieri Facias is levied of Record by
an Officer of Authority, and if he pays it to the Plaintiff, or sends it
into Court or not, this is no Default in the Defendant, and that the
Levy was good, and the Defendant cannot compel the Sheriff to send
them into Court, nor deliver them to the Plaintiff, and therefore no
Default in him, and he is excused, which is the best Opinion, and the
Reporter concordat. And after the Parties agreed; and the Wit
will'd Quod Denarios illos habeas hic in Cur. taht Die &c. Et fiit Cor-
ram Juciticiarios Aff'tunc Denarios illos habeas ad Proximam Sejlion' &c.
Br. Executions, pl. 35. cites 11 H. 4. 58. And says, see * 26 H. 6 25.
tit. and Lib. Intrac. 170. that it is admitted for a good Plea in
Scire Facias, and if it be taken thereupon, and the Plaintiff may have Ac-
count
Debt.

count thereupon against the Sheriff, who levied it, and did not deliver them to the Court, nor to the Plaintiff, as it seems there.

7. If the Plaintiff who has recovered the Debt had brought Writ of Debt upon the first Judgment, there the bringing Writ of Error upon the first Judgment is no Plea. Br. Executions, pl. 136. cites 10 H. 6. 6.

(Y) What Thing will extinguish a Debt. [Acceptance of] a higher Thing.


1. If a Man accepts an Obligation for a Debt by Contract, this extinguishes the Contract. 13 H. 4. 1.

2. If a Man accepts an Obligation for the Arrearages of an Account before Auditors assigned in Pais, this extinguishes the Arrears; for the Auditors are not of Record; or of this the Law lies, and for that the Obligation is bigger. Contra * 11 H. 4. 79. b. 13 H. 4. 1. adjudged.

3. If an Infant makes a Contract for his Diet and Clothing, and after enters into an Obligation with a Penalty to pay it, and after the Infant avoids this Obligation, as he may for his Infancy, yet it seems the Contract shall not be revived. Dibutarie, P. 32 (El. B. R.

4. It is a good Plea that the Plaintiff took Obligation of the Parcel of the Sum for the whole Debt; for Contract is intire. And the Plaintiff said that the Obligation was for a Debt due by another Contract &c. and the others e contra. Br. Dette, pl. 57. cites 3 H. 4. 17.

5. Debt upon Arrearages of Account before Auditors, the Defendant said that after the Account the Defendant had taken Obligation of the same Sum, and no Plea by Award; for it was a Duty by Record before, in which the Defendant cannot wage his Law. Br. Dette, pl. 64. cites 11 H. 4. 79.

6. One who hath a Debt due to him by Simple Contract, takes an Obligation for the same Debt, or any Part of it, the Contract is determined. 6 Rep. 45. 5 in Higgins’s Cafe, cites 3 H. 4. 17. b. 11 H. 4. 79. b. 9 E. 3. 50. b. 51. a.

7. So when a Man hath a Debt by Obligation, and gets Judgment upon it, the Contract by Specialty is changed into a Matter of Record. 6 Rep. 44. b. in Higgins’s Cafe.

(2) Extin-
Debt.

367

(Z) [Extinguishment by] Acceptance of a Thing of equal Altitude.

1. The Acceptance of an Obligation for a Debt due by another S. P. But taking of an Obligation of the same Duty, is a Dis-termination of a Contrast of the same Duty due before; For there he might have wager his Law. Br. Deb., pl. 64. cites 11 H. 4. 79.—One Chose en Action cannot be discharged by another Chose en Action of the same Nature, As one Obligation is not discharged by acceptance of another Obligation in lieu of it. 3 Lev. 257, 258. Mich. 1 Jac. 2. C. B. in Case of Scarborough (Mayor &c.) v. Butler. — See tit. Conditions (E. d) pl. 1. and the Notes there.

2. Where an Award creates a New Duty, the Old is extinguished Carth. 379; thereby; But where it only ordains a Releafe to discharge the Old Duty, his otherwise. 1 Salk. 69. Hill. 8 W. 3. B. R. Freeman v. 12 Mod. 130. S. C. & S. P.—

3 Salk. 45. S. C. & S. P.

(A. a) [Extinguished by] Acceptance of a lower Thing.

1. If a Man accepts an Obligation for the Arrears of an Account before Auditors assigned of Record, this does not extinguish the Arrears, because they are higher. 20 H. 6. 45. b. (It does not appear whether the Auditors were of Record.)

See (Y) pl. the Difference between Auditors assigned on Pais, and as here of Record. Fol. 604.

2. If the Leffor accepts an Obligation for Rent due upon a Leafe for Years, this does not extinguish the Rent, because the Rent is higher, being Real, for of this the Law does not lie. 11 H. 4. 79. b. 13 H. 4. 1. 20 H. 6. 45. b.

(B. a) In what Cases a Collateral Thing may be given in Satisfaction without a Deed.

1. If a Rent be recoverd by Deed upon a Leafe for Years, it is no good Deed without a Deed, that by the Command of the Leffor he retained the Rent in Satisfacftion of the Repiration of the House, which he had done, whereas the Leffor ought to have done it. 14 H. 4. 27.

Leafe for the Leffor to repair; and the House was ruinous. Per Hill and Hank.

See tit Conditions, (S. c) and (E. d) per totum.

2. The same Law is if the Rent was recoverd without Deed, for he hath acknowledged the Duty by the Pleading. 14 H. 4. 27.
3. So if I lend Money to you, if you pay the Money to another by my Command, yet this is not a good Satisfaction without Deed.

14 H. 4. 27.

(B. a. 2) Declaration &c. in Debt.

1. The Plaintiff in his Count must show Deed in Debt and Annuity, and there the Writ and Specialty ought to agree; Per Finch. Br. Montrans &c. pl. 15 cites 41 E. 3. 23.

2. In Debt upon a Contract, Hull said, you had thereof Obligation after, Cul. said No, but of another Contract, and the Issue was, if the Obligation was for this Contract or not. Br. Issues joins, pl. 50. cites 3 H. 4. 18.

3. Debt upon an Obligation by J. F. the Defendant said, that he made and delivered the Obligation to another J. F. and not to the Plaintiff, and a good Plea, and the Plaintiff was compelled to answer to it, Quod Nota; and if it seems that there were two J. F. and the wrong J. F. got the Obligation and brought the Action. Br. Obligation pl. 82. cites 12 H. 6. 7. and Fitzh. Barr. 17.

4. If in Debt upon a Bond, A. counts that B. alone was bound, B. shall say that he and H. were jointly bound, Judgment of the Writ and a good Plea, without anySans ego, and the other may say that he was sole bound &c. Br. Traverse per &c. pl. 82. cites 21 H. 6. 3.

5. Debt upon a Bond of 40l. the Defendant pleaded Receipt by the Plaintiff of 10l. Parcel of the Demand after the last Continuance, Judgment of the Writ and a good Plea without Acquittance, or other Specialty, where it is pleaded to the Writ, contra where it is pleaded in Bar, there it ought to be by Specialty against Specialty. Br. Brief pl. 337. cites 5 E. 4. 138, and after fol. 140. by four Julicies against three, it is no Plea to the Writ, without shewing Specialty. Ibid.

6. Where a Man is bound with Condition in the Obligation for the Advantage of the Obliger, he shall shew it in his Count, and otherwise it is ill; contra, where it is to his Disadvantage, or if it be indisposed, and is not in the Obligation. Br. Obligation pl. 58. cites 21 E. 4. 36. per Vavilor.

7. Debt upon a Bond of 40l. to pay 20l. the Defendant said, that the Plaintiff had received Part of the said lesser Sum, pending the Writ; And per Cur. the Plea is good of this lesser Sum of which the Condition was made, Quere Causam, for the Reporter contra, and that he ought to allege Payment of the whole at his Day, or to shew Specialty of the Receipt, because the Action is upon Specialty, but if he was paid, he ought to say, that it was paid after the last Continuance, otherwise ill. Br. Brief pl. 318. cites 5 H. 7. 41.

8. Debt upon an Obligation brought by J. P. the Defendant said, that there were J. P. the Father and J. P. the Son, and he made the Obligation to J. P. the Father who is Dead, and he who brought the Action is J. P. the Son, Judgment li Aélio, and a good Plea, and shall not be compelled to say Quod non est Factum, for this is false. Br. Obligation pl. 95. cites 16 H. 7. 7.

9. Error of Judgment in an Action of Debt on a Bond for Performance of Covenants in an Indenture, which was, that if the Plaintiff paid the Defendant
fendant 100 l. at Micklemais next; then the Defendant would pay to the Plaintiff 10 l. Yearly afterwards during his Life; and the Breach alleged was, that the Defendant had not paid the 10 l. yearly without mentioning the Payment of the 100 l. first by the Plaintiff, and this was alleged for Error; but adjudged that it is no Error, and the first Judgment affirmed; because the Defendant in the first Action by pleading Conditions performed, had confessed the Payment of the 100 l. to him by the Plaintiff; and the Default of the Payment thereof ought to have been thrown on the Part of the Defendant, and not on the Part of the Plaintiff. Mo. 365. pl. 497. Mich. 36 & 37 Eliz. B. R. Goodwin v. Isham.

10. In Error of a Judgment in Debt in C. B. upon an Obligation, it was alleged, because the Count was pr Scriptum fium Obligatorium concedi fe tenei &c. without saying Sigillo fio Sigillat' as the Courfe is in B. R. though otherwise in C. B. But Gawdy said, the Declaration was well enough though not according to Precedents; for by saying Per Scriptum fium Obligatorium, All the necessary Circumstances are intended to concur viz. the sealing and Delivery of the Deed; because it is not otherwise a Writing Obligatory, and Delivery is never alleged, which proves that it is not necessary to allege the Sealing, for the one is as necessary as the other. And accordingly the Judgment was affirmed. Cro. E. 737. Hill. 42 Eliz. B. R. Penjon v. Hodges.

11. Plaintiff declared in Debt for that the Defendant retained him such a Year, Day, and Place to embroider a Sattoon Gown for a Maid Servant of her Daughter's, and to take for the same 40 s. It was alleged that Debt lies not in this Cafe because there is not any Place alleged, where he should embroider it; nor that it was done before the Action brought, and it was traversable, that he did not embroider it, and then there is not Place for the Venue, wherefore the Declaration is not good. Sed non allocatur. For he cannot traverse but ought to have pleaded, Non Debtor, and he need not allege the Place where he did it, for it may be done in diverse Places; and it shall be intended to be done where the Retainment was, and it is not requisite that the Time of embroidering thereof ought to be precisely alleged; For it shall be intended to be before the Action brought; otherwise he could not have had his Action; And the Prothonotaries of C. B. certificated, that it was not their Courfe to allege the Day or Place of the Performance of a Contract. Wherefore the Court held it to be well enough, especially as the Cafe is here, where the Party Defendant did not take Illue thereupon; but let pas the Advantage thereof, and is condemned by a Nihil Dictum, as here the was. Cro. E. 880. pl. 11. Pash. 44 Eliz. B. R. Lady Shandois v. Simpson.

12. Where a Man was indicted to another in 20 l. he came to the Party and denied him to forbear this for a certain Time and that he would pay the same to him at a Day certain by him prefixed, there if he fays him for this 20 l. after the Day, he needs not shew how this grew due, for the taking of this Day certain to pay the same, this proves the Verity and Certainty of the Duty; but if a Man be indicted to another upon a Simple Contract, and fues for it upon a Promise to pay it, be it upon such a Promise, or the like, the Plaintiff ought to shew the Cause of this, in his Declaration, to specify how, and in what Manner the same grew due; for in the latter it was due presently, but a Day given for Payment but in the other Cafe, not so; therefore he ought there to shew the Special Cause how the same grew due, and so is the Difference, which was agreed to be fo by Yelverton and by the Court, Quod Nota. Bull. 153. Trin. 9 Jac. Dean v. Newby.

13. Debr &c. in which the Plaintiff declared upon Two Bonds, one to; Bull. 244. Meletine v. Neill. Hall S. C.

200 l. on thefe Bonds, and Satisfaction was acknowledged for the 10 l. adjudge'd for 3 B After the Plaintiff.
Debt.

After a Verdict and Judgment for the Plaintiff, Error was brought, the Error assigned was, that it did not appear on which of the Bonds the Plaintiff did acknowledge Satisfaction of this 10l. but the Judgment was affirmed; because the Plaintiff might lawfully put both Bonds in Suit, and therefore he might acknowledge Satisfaction of Part generally, without shewing of which it is. Rolll. Rep. 423. pl. 15. Mich. 14 Jac. B. R. Hall v. Malyn.

14. It a Bond be made to one, and he doth not say in the Bond that it shall be paid to the Obliger, in this Case the Plaintiff must shew that it is to be paid to him, though not expressed in the Bond. Brownl. 72. Hill. 14 Jac. Anon.

15. W. brought an Action of Debt against M. and declared that the Defendant bought Timber of him for 10l. Solvent' Modo & Formae sequenti viz. 5 l. ad quinum Pach, proxime sequentem, and says nothing when the other 5l. should be paid, and the Plaintiff recovered the whole 10l. by Verdict, and now it was spoken in Arrêt of Judgment for the Cauze aforesaid, but yet by all the Court it was good enough; for the Law intends the other Part of the Money to be due presently, if no certain Day of Payment be alleged. Golsb. 116. pl. 11. Willoughby v. Milward.

16. If one brings Debt for Part of a Debt due upon a Contrat, or Obligation, and does not acknowledge Satisfaction of the Remain, the Action is not well commenced; Arg. and Judgment accordingly, by which a Judgment in C. B. was reversed. Cro. C. 456. pl. 6. Hill. 11 Car. B. R. in Cofi of Clothworthy v. Clothworthy.

17. The Plaintiff obtained a Judgment in an Hundred Court for 58 s. 4d. and brought an Action of Debt upon that Judgment in this Court for 58 s. only, and did not shew that the 4d. was discharged, and upon Nullielic Record pleaded, and a Demurrer to that Plea, the Declaration was held to be naught for that very Reason; for if a Debt upon a Specialty be demanded, the Declaration must be for the whole Sum; if for less you must shew how the other was satisfied. 3 Mod. 41. Pasch. 36 Car. 2. B. R. Marthv. Cutler.

18. Debt on Covenant to pay so much Quarterly for four Quarterly Payments Arrear, without saying when due and ending is naught, and so a Judgment in B. R. was reversed. Show. 8. Mich. 4 Jac. 2. in Cam. Scacc. Pitarfe v. Darby.

19. Error upon a Judgment in C. B. where the Action was Debt upon a Bond of 1000l. Penalty, conditioned that if such an one, being an Apprentice, should purloin, or embezzle any Thing to his Master's Damage, that then he should make it good. Breach assigned was, that he did embezzle and purloin 200l. Upon this Issue was joined, and Verdict for the Plaintiff and Judgment accordingly. Now upon Error brought it was inflected, that this Breach was not well assigned; for the Condition of the Bond, tying it up to such purloining as should be to the Damage of the Master, the Plaintiff in the original Action should have averred, that this was a purloining to the Damage of the Master. But the whole Court thought the Judgment of C. B. was well given. For the Words purloining and embezzling are always taken in a bad Sense, Et ex vi Terminii import Damage to the Master; and what appears plainly need not be averred, according to that Maxim of Law, Quid conicit clarum et non debet verificari. Judgment nifi. 10 Mod. 149, 153. Hill. 11. Ann. B. R. Thornicraft v. Barns.
(C. a) What shall be a good Bar in Debt.

Eviction. [Diffeafion &c.]

1. If a Man sells Land to another for a certain Sum of Money, in an Action of Debt for the Money, it is no Bar in Bar that the Land is evicted. D. 37 El. 3. per Curiam.

Days, in this Case, though the Goods are re-taken by one that has Right to them, before the Day, yet the Vendor shall have Action of Debt, in respect of the Contract. 3 Rep. 22. a. Arg.

2. [But] If a Man possessed of a Ward sells it to another for a certain Sum, in Debt for the Sum, it is a good Bar that the Ward is evicted by a Stranger. D. 37 El. 3. per Curiam.

3. If Leffee for Years, rendering Rent, causes a Stranger to enter upon him, and ouit him, by which the Stranger defeats the Receipt by Diffeafion, per the Leffer may have an Action of Debt for the Rent arrear after, for this lies upon the Contract, notwithstanding the Diffeafion. B. 3 Ja. 3. R. between Carpenter and Collins, cited to be adjudged in B.

4. If a Man leaves for Years to commence at Mich. rending Rent, and the Leffee enters before Mich. by which he is a Diffeafor, and so continues after Mich. and the Rent incurs, the Leffer may have Debt for this Rent, and this Diffeafion shall not be any Impediment by Reason of the Privyty of Contract which is between them. B. 32 El. 3. R. between Alexander and Dier adjudged, accordingly.

—See D. 8. a. Marg. pl. 111. S. C. and other Cases cited, as to the Leffee's Entry before the Day. S. C cited Lit. Rep. 17 by the Name of Alexander v. Sextie, adjudged for the Plaintiff; but says, that if the Leffee had claimed Fee, it would be otherwise, and Ibid. cites 2 Jac. C. B. Barton's Case, where the Leffee entered before the Day, and made Feoffment after the Day, yet Debt lies for the Rent.

5. [So.] If Leffee for Years, rending Rent, makes a Feoffment in D. 4. b. pl. Fee, yet this shall not be a Bar of the Rent arrear after, for the Privyty of Contract continues, notwithstanding the Feoffment, and the Estate is not determined but at the Election of the Leaffer.

Cafe. S. P. argued.—Ibid. Marg. pl. r. it is a Note, that it was ruled for Law in C. B. that if Leffee for Years, yielding a competent Rent, makes Feoffment in Fee, that yet the Privyty of Contract is not so gone, but that the Leffer may have Debt against his Leffee; For otherwife three or four Years Rent may be Arrear, and the Leffer without Remedy by a private Feoffment, which is not reaforeable.—Ibid Marg. pl. 8 says, it is in Experience held at this Day, that if the Leffee makes Feoffment, the Leffer shall have Debt against him; or otherwise the Leffee by his own Act may determine the Leaffe, and compel the Leffer to enter for a Forfeiture, which is inconvenient.


8 H. 6.—Ibid. 14. a. pl. 72. Trin. 28. H. 8. Goodale's Case. S. P. But by Fincherbert, it is otherwise of a Leafe at Will.—And in Debt against Leffee for Years, for the Arrearages of Rent returned upon it, he need not declare that the Leffe had entered; for the Contract is the Ground of the Action. 4. I.e. 18. pl. 61. Per Dyer cites 24. Eliz. 5. —The Occupation is not material, where the Leffe is for Years or Life; but otherwise of a Leffe at Will. Heil. 54. Mich. 3 Car. C. B. Jeckill v. Lime—Verit. 41. Mich. 21. Car. 2. B. R. Anon. S. P. that in Case of a Leafe at Will, there must be an Averment that the Leffe occupied the Lands.—Ibid. 108. Hill 22 & 23. Car. 2. S. P. in Calthorpe's Cafe.

7. A
Debt.

7. A Man brought Debt, and shewed an Obligation in which A. was bound to him for Tithes, bought of the Plaintiff; in 10 l. and 'twas adjudged a good Answer, that another had recover'd the Tithe by an elder Right, so that he cannot have the Tithes, and therefore 'twas adjudged that he shall not have the Debt. Br. Contrad., pl. 12. cites 21 E. 3. 11.

8. If a Man who has Estate Conditional, or Defeasible, makes a Lease for Years, rendring Rent, and a Man enters by former Title, or for Condition broken, this is a good Bar for the Leslee to plead. Br. Debt, pl. 225. cites 45 E. 3. 8.

9. Where a Man leaves Land for Years, rendring Rent, and is bound by Obligation to pay the Rent, there in Debt upon Obligation it is a good Plea that a Stranger enter'd by Title, which Matter shall discharge the Obligation, quod nota. Br. Dette, pl. 178. cites 20 H. 6. 23.

10. Debt upon an Obligation, the Condition was for Performance of Covenants contain'd in certain Indentures, the Defendant said that the Place of St. A. with Oblations, was leased to him by the same Indentures for Term of Years, rendring certain Rent, and that within the Term, and before this Day of Payment, the Pope had annulled the Privilege, and the Pardon of St. A. so that he is oufht of the Profits by Force of the Lease. Frowicke Ch. J. said, the Plea would have been the better, if he had said, that the Pope, by Writing proclaim'd and publish'd at such a Place, had refused the Pardon; for otherwise it cannot be try'd in England &c. Brooke says Quære; for it is admitted a good Plea, if it may be try'd. Br. Dette, pl. 123. cites 21 H. 7. 6.


12. Eviction or Expulsion may be given in Evidence on Nil Debtor; held per Cur. But the Reporter adds a Nota, that this Point was formerly controverted. Sid. 151. pl. 18. Trin. 15 Car. 2. B. R. in Cafe of Drake v. Beere.

(D. a) Pleadings. Nil Debtor, or Nil Detinet &c.

1. U pon a Lease for Twenty Years expired if he counts for Eight Years, he need not to confess himself satisfied of the Rent, but in Debt upon an Obligation of 10 l. and he counts of 5 l. he ought to confess Payment of the rent, for it is one entire Debt; but upon a Lease, every Term is a Dejinition Debt, and in the Cafe of the Lease, Entry into any Parcel of the Land leas'd is a good Plea for all; for the Rent cannot be apportioned. Br. Dette pl. 89. cites 7 H. 6. 26.

2. In Debt upon Arbitration the Defendant said, that No such Submission, and the best Opinion was, that because in this Cafe the Defendant may wage his Law, and where he may wage his Law he shall not traverse the Contrad, nor the Cause of the Debt, as to say that he did not buy of the Plaintiff, nor borrow of him &c. But in Debt upon a Lease for Years of Land, or upon Arrears of Account before Auditors he may say Non Damit, or no such Account; for there he cannot wage his Law, therefore he cannot wage his Law, therefore the Plea above ought to be Nihil Debtor, and give the Matter in Evidence. Br. Dette pl. 88. cites 8 H. 6. 5.
3. Debt by a Servant against his Master, who was retained for 20 s. by the Year and every Year at Robe or 5 s. for the Robe, and that the Salary was arrear by so many Years, and the Robe by Four Years and the Action accru'd to demand so much for the Salary and 20 s. for the Robes; the Defendant said, that he paid the Roles at D. in the County of S. according to the Renter; and per Moyle, this is only Nihil Debet Argumentative, but by others the Plea is good; for if he pleads Payment of the Money this is no Plea, but (say Nil Debet, but where he pleads Delivery of another Thing. Per Littleton, Choke, and Needham. J. Br. Dette. pl. 112. cites 9 E. 4. 36.


5. In Debt by Executors for the Arrears of an Annuity, the Defendant S. C. pleaded Nil Debet (fupposing that by the Death of the Grantee the Deed has lost its Force, and that the Action is founded upon the Debet only, and not upon the Deed. But per Frowike this Action is founded merely on the Deed; for without the Deed the Action fails, so though the Nature of the Action is changed, and the Annuity determined, this does not prove that the Action is founded on the Deed; Quod tota Curia conceit. Kellw. 47. b. pl. 4. Mich. 18 H. 7. Anon.

6. In Debt for taking of a Savage Contre Forman Statuta, the Defendant may plead Nihil Debet per Patriam, per Tremail & Finance not withstanding that it be founded on a Statute; for it is not only upon the Statute, but upon the Statute and upon Matter in Fati. Br. Ifues join, pl. 23. cites 21 H. 7. 14.

7. But in Debt upon Escape against Warden of the Fleet, or upon Recovery of Damages, it is no Plea as it his said; Quare, for they were in Doubt of the Illue, Et Rede contra, and that it is no Plea. Ibid.

8. In Debt upon a Pain given by Statute, Nil Debet per Patriam, is a good Plea; but doubted in Debt against a Gaoler. Heath’s Max. 82. cites 3 & 4 Maria. D. 145 & 50 Ed. 3.

9. An Action of Debt was brought upon the Statute of Purveyors, because he had cut down Trees against the Form of the Statute of 5 Eliz. The Defendant pleaded Not Guilty; and it was moved that this was an evil Illue; for he ought to have pleaded Nil Debet; and the Court commanded him to plead Nil Debet. Goldsb. 39. pl. 16. Mich. 29 Eliz. Anon.

10. In Debt upon the Statute of 32 H. 8. cap. for the Arrears of an Annuity devised to M. the Plaintiff’s Wife for Life (but she died before the Action brought) against the Administrator of the Terre-Tenant. The Defendant pleaded Nil Detinum. Per Hale Ch B. a Will is not a Deed, though it is as effectual to pass a Thing as a Deed is, yet it is not a Deed in its own Nature; because there needs no Sealing nor Delivery to a Will, which is essential to a Deed; and therefore Nil Detinum is a good Plea to an Action of Debt grounded on a Will, as well as to an Action of Debt grounded on a Tally: And the Action here is not so much grounded on the Will itself, as upon a Statute Law, which enables Men to dispose of their Lands, and Rents out of their Lands, by Will. Hard. 332. Nic. 15 Car. 2. in the Exchequer. Wilton’s Cafe.

11. Nil Detinum is no good Plea to a Deed; as in Cafe of Debt on a Bond, or otherwise upon Special, but where an Action of Debt is grounded upon Matter in Fasi only, as upon Prescription, or upon a Deed that is not requisite to maintain the Action, as for Rent referred upon a Leaf by Deed there it is a good Plea; Arg. and cites severall Books which go upon this Difference. Hardr. 332. Mich. 15 Car. 2. in Wilton’s Cafe.

12. In Debt upon a Grant of a Rent, Nil Detinum is a good Plea, because the Plaintiff has other Remedy to havy it viz. by Disjunct; but to an Action grounded upon a Grant of a bare Annuity, it is not a good Plea; because

Br. Annuity. pl. 23. cites 332. 

Br. Debt pl. 124. cites 82. 

Br. Deed
Debt.

cause the Grantee in such Cafe has no Remedy by Diligence; and therefore in that Case the Defendant must avoid it by Matter of as high a Nature, as by Acquaintance under Seal, or the like. Per Hale Ch. B. Hardr. 333. Mich. 15 Car. 2. in Wilfon’s Cafe.

13. Upon Nil Debtor pleaded, Entry and Suspension may be given in Evidence. Arg. which the Court did not deny. Mod. 118. Patch. 26 Car. 2. B. R. Brown v. . . .

14. Debt on a Bill sealed for Payment of 500l. and Interest. The Count was for 500l. without taking any Notice of the Interest, and held good; for the direct Obligation is to pay 500l. 2 Show. 32 pl. 23. Hill. 30 & 31 Car. 2. B. R. Hinton v. Wilmore.

15. A Lease was made of Tithe for Three Years, rendering Rent at Michaelmas and Lady-Day; and an Action was brought for Rent Arrear for Two Years; upon Nil Debtor the Plaintiff had a Verdict, and it was now moved in Arrest of Judgment, that the Declaration was too general, for the Rent being reserved at Two Fasfs, the Plaintiff ought to have showed at which of those Fasfs it was due. But the Council for the Plaintiff said, that it appears by the Declaration that Two Years of the Three were expired; so that there is but one to come, which makes it certain enough. Curia, This is helped by the Verdict, but it had not been good upon a Demurrer. 3 Mod. 70. Trin. 1 Jac. 2. B. R. Pye v. Breton.

16. In Debt against a Sheriff, the Plaintiff declared upon a Judgment obtained against J. S. and had sued out a Fieri Facias, and delivered it to the Defendant, who Virtue thereof had levied the Money. The Defendant pleads Nihil Debtor and adjudged a good Plea. And this Difference was taken, that where the Writ has not been returned, the Plea is good because it is Matter of Fact, whether he has levied the Money or not; so where the Writ is returned Fieri Loc. 12 Mod. 604. Mich. 13 W. 3. Cole v. Acorn.

17. Debt on a Bond solvendum to such Money to the Plaintiff himself, his Attorney, or Assigns; and upon Oyer of this Bond it appeared to be Solvendum to his Attorney or Assigns, without mention of himself; on Demurrer, Exception was taken to the Variance between the Bond on which the Plaintiff had declared, and the Bond fet forth, upon the Oyer; but to this it was anwered, that the Declaration need not be according to the Letter of the Bond, but according to the Operation of Law upon it; as if A gives a Bond to B. solvendum to C. who is a Stranger, a Payment to C. is Payment to B. and the Count must be upon a Bond solvendum to B. and per Cur. if A gives Bond to B. if B. appoints one, Payment to him is Payment to B. And if B. does not appoint one, then it shall be paid to B. himself: 6 Mod. 228. Mich. 3 Ann. B. R. Roberts v. Harnage.

18. Wherever Matter of Fact is mingled with a Specialty, or with a Record, Nil Debtor is a good Plea, as in Debt before Auditor, it is a good Plea. Arg. 8 Mod. 107. Mich. 9 Geo. Warren v. Confer. It is no good Plea to an Action on a Policy of Insurance, nor to an Action on a Deed on Penal Statutes, and to Actions of Debt upon Awards or to Accounts

2 Silk 619. pl. 5, S. C. the Court held this to be no Variance; For Payment to the Plaintiff or his Attorney, is the same Thing; The teneri made it a Debt to the Plaintiff; and in Consequence it may be paid to him; and a Solvendum to any body else would be Repugnant; But Payment to the Plaintiff’s Attorney or Assignee, is the same Thing.
Debt.

Counts before Auditors, and the Reason is, because there are not the Deeds Bail Bond, of the Parties. Arg. 8 Mod. 107. Mich. 9 Geo. in Case of Warren v. Connett.

Debors to be done, to charge the Insurers and Bail. Ibid. 109. It is not good to an Action on a Bond, because the Debt is immediately due: Admitted. Ibid. 323.

20. Plaintiff brought Debt and declared upon an Indenture by which he covenanted to transfer &c. and Defendant covenanted that he would receive and pay for the Transfer &c. and bound himself in 280o l. Penalty to perform the same, and for Non-Performance Plaintiff brought his Action, adjudged in C.B. and affirmed in Error, that Nil Debtor is no good Plea. 8 Mod. 106. Mich. 9 Geo. Warren v. Connett.

Because this Action be- aux auxiliary to the Deed, the Plea of Nil Debtor was no good Plea. Ibid. 332. Pach. 1 Geo. 2. S. C.


(E. a) Pleadings in General.

1. In Debt upon a Lease of Tithes levied by Diffreys is no Plea, Per Skrene, because it is not Land, in which he may drain by the Tithes sever'd; for it is the Thing leafed. Contra Till. Br. Detre, pl. 234. cites 11 H. 4. 46.

2. In Debt upon an Obligation the Defendant pleaded Condition if any Goods which the Plaintiff delivered to J. Hillary are Fesign'd that they J. Hillary should pay and satisfy the Value, and said that the Goods were Fesign'd, and the Plaintiff brought Action in London against J. Hillary, and recover'd 26l. Damages, and had his Body in Execution; and no Plea; for Body in Execution, is no Payment nor Satisfaction. Br. Detre, pl. 26. cites 33 H. 6. 47.

3. Debt upon Lease of four Acres for 3l. &c. The Defendant said that he leased the four Acres and a Redlory, and a Rent, and a View of Frank-Pledge for the 3l. Judgment of the Count. And so see that he pleaded to the Count; but the Matter is argued if he ought to traverse or not. Br. Count, pl. 23. cites 35 H. 6. 38.

4. Debt upon an Obligation the Defendant pleaded, that the Plaintiff had received Part of him pending the Writ, and the Opinion of the Justices was, that it is no Plea without Specialty, quod Mirum; for Plea to the Writ may be without Specialty; Contra of Plea in Bar; but this was held to be in Bar for the Parcel. Br. Detre, pl. 153. cites 7 E. 4. 15.

5. In Debt the Plaintiff counted that the Defendant put his Feme and Son to the Plaintiff to board, and the Plaintiff leaved to the Defendants a Chamber for the Feme and Son, rendering for the Chamber and Board for every Week 6s. the Defendant said, that Non Dionys Cameranes &c. and the best Opinion was, that it is a good Plea to all, without answering to the Boarding; for Contrafl is inuite, and therefore destroy it in Part, and it is destroy'd in all. Br. Detre, pl. 106. 324. 9 E. 4. 1.

6. In Debt the Defendant said, that he put into his in certain Land in Pledge, and if he will re-insoff him, he is ready, and always has been, to pay him; and the best Opinion was, that it is a good Plea. But S. C. several
several were of Opinion, that where the Contract is single at the Commencement, and after Pledge is given for the Debt, that it shall be no Plea in Debt that the Plaintiff has pledg'd &c. Contra, where Pledge is deliver'd for the Debt at the making of the Contract; for in the other Case, the one shall have Debt, and the other Deinue of the Goods; Contra where it is put in Pledge at the making of the Contract.

Br. Detre, pl. 111. cites 9 E. 4. 25.

7. It is a good Plea for the Master, that the Servant departed out of Service the first Year, and shall not be compell'd to the General Issue. Br. Detre, pl. 112. cites 9 E. 4. 36.

8. Debt upon Arrears of Account before Auditors assign'd, where a Man pleads Nikol Debent, or Payment in a Foreign Country, this is a good Plea, and yet the Action is founded upon Matter of Record by Authority of the Stat. Wilt. 2. 11. quod non negatur. Br. Detre, pl. 141. cites 5. H. 7. 33.

9. In Debt upon an Infinitul Compuitorum, the Defendant pleads, that he did not account & hoc parasus &c. per Patriam; it was objected, that this was no Plea; For in such Cases where the Party may wage his Law, the Contract is not traversable; But that he ought to say, that He could him nothing, and is ready to over by his Law, or by the Country; For this is the Point of the Writ, or otherwise the Plea is not good; and after the Defendant, by Advice of the Court, waiv'd his Plea. Kelw. 39 a. pl. 4. Trin. 13 H. 7. Anon.

10. In Debt the Plaintiff counted of a Horse sold &c. It is no Plea for the Defendant to say, that he did not buy the same Horse, because he may wage his Law. Kelw. 39 a. pl. 4. Trin. 13. H. 7.

11. In Debt upon Arbitrement, the Defendant may plead No such Arbitrement; and yet he may wage his Law in the same Action, but the Reason is, because this Arbitrement lies in the Notice of a third Person, and so the Lay-Gents may have Conscience of it, and for that Reason the Plea has been held good. Kelw. 39. in. pl. 4. Trin. 13 H. 7. Anon.

12. In Debt the Plaintiff counted of a Contract; the Defendant pleaded that he made a Contract for a less Sum, Absque hoc, that he made any Contract for the Sum compris'd in the Writ as the Plaintiff has supposed. The Court held that he shall not have the Plea, because he may wage his Law. Mo. 49. pl. 148. Paclt. 5 Eliz. Anon.

13. So in Debt the Plaintiff counted of the buying of a Horse, and the Defendant pleaded, that the Buying was of two for the same Money. Ibid. 14. Or where the Plaintiff supposed the Contract to be between him and the Defendant, and the Defendant pleaded, that it was made between them and another. Ibid.

15. So where the Plaintiff supposed the Buying of an Ox, and the Defendant said, that it was a Horse; in these Cases the Defendant may wage his Law, and ought not to traverse the Contract. Ibid.

16. In Debt on a Bill for 5l. in which were these Words, to be paid as I pay my other Creditors. The Declaration ought to be Special, according to the Bill. Cro. E. 256. pl. 39. Mich. 33 and 34 Eliz. B. R. Bright v. Metcalfe.

17. In Debt, Not Guilty is not a good Plea; but if Issue is join'd thereupon, and a Verdict is given, it is now good, and help'd by the Statute of Jeofails, because it is only mis-joining of the Issue; per Cur. Nov. 56. Anon.

18. Debt
18. Debt on a Bond conditioned to save the Plaintiff harmless of
and from an Obligation, in which the Plaintiff, at the Request of the
Defendant stood bound with him for the Payment of the 11 l. on such
a Day in May, which was before the Date of the Obligation; the De-
fendant pleaded Payment Secondum Formam & effectum Conditionis; Plaintiff
demurred and Judgment was given for him; for the Defendant
ought to have pleaded New Damnificatus. Gouldsb. 159. pl. 90. Hill 43

19. A Debt due by Promise is not discharged by Account. 3 Lev.

20. Debt was brought upon a Bond for Performance of Covenants;
Defendant pleaded in Bar, that for all the Breaches till such a Time,
he had brought Covenant and recovered Damages, and that there were no
Breaches since that Time; and Demurrer, and Judgment for Plaintiff; for
the very Plea the Bond is forfeited. Though Carthew objected, one
might wave the Benefit of a Forfeiture of a Bond, as well as the For-
feiture of a Copyhold Estate &c. and the bringing of Covenant was a
Waver of the Forfeiture of the Bond and so a Bar. But per Cur. even
in Equity it would be no Bar till Satisfaction; as if two be bound in a
Bond, Judgment against one is no Discharge to the other before Satis-

21. Debt upon a judgment, Defendant pleads in Bar, that a Capias ad
Satisfacendum was taken out against him at such a Time, by Virtue
whereof he was taken in Execution; and that the said Capias was re-
turned on Record, but did not over that the Execution continued, or that
the Debt was paid; and on Demurrer, Holt Ch. J. said, If he was once
in Execution, it must be intended he continues so, if he has not paid the
Money; or if he has escaped, you should reply that of your Side
that are Plaintiffs, for this is a Plea in Bar, and good to Common In-
tent. And he quoted two Cases, where he had known Escape replied
unto such a Plea; and a taking in Execution is a Bar to all other Remed-
dies while it lasts, and we cannot intend an Escape. 12 Mod. 541.

22. Sedem ante Diem is no Plea in Bar to Debt upon Bond, because no
S. C. cited, material Issue can be joined upon it. 10 Mod. 147. Hill. 11 Ann. B.

for the Plaintiff to help himself but by Demurrer. 10 Mod. 167. Mich. 1 Geo. 1. B. R. Arg. cites
also the Case of Atwood and Coleman. — Arg. cites S. C. 10 Mod. 304. Paflch. 1 Geo. 1. B. R.
and cites also the Case of Hill and Manby.

23. But there is no Doubt that Accord with Satisfaction before the
Day may be pleaded in Bar of Debt upon Bond, because being pleaded
by Way of Excufe it supposeth Non-performance, and the Defendant
must prove his Plea. Arg. 10 Mod. 304. Paflch. 1 Geo. B. R. and per
Prat. J. 306. & vide 307 in Case of Weddall and Manucaptors of
Jocar.

For more of Debt in General, See Actions and the several Kinds of
Actions &c. throughout this Work.

5 D

Decies
Decies Tantum.

(A) For what Act or Thing it lies.
What shall be said a Taking.

1. A Man buys Lands of one Party, and has the better Bargain to maintain the Suit, this is a Taking, for which he shall be punished by this Writ. Adjudged. 41 Ed. 3. 9. b.

2. 34 Ed. 3. cap. 8. If either of the Parties to the Suit will prosecute a Juror that has taken a Bribe on either Side to give his Verdict, he shall have his Plunn by Bill presented before the same Justices, and the Juror shall answer without Delay; and if any other shall prosecute such Juror, the Offence shall be heard and determined as aforesaid, and such Prosecutor shall have Half the Fine; and the Parties to the Plaint shall recover their Damages by Assesment of the Inquest, and the Offender shall be imprisoned for a Year, and be incapable of a Pardon; and if the Party will prosecute before other Justices, he shall have the Suit as aforesaid.

3. 32 E. 3. cap. 12. If a Juror takes any of either Party to give his Verdict, and be attained thereof by Proceeds contained in the Article of Jurors of the 34 E. 3. cap. 8. be it at the Suit of the Party that will sue for himself, or for the King, or at the Suit of any other, he shall pay ten times so much as he hath taken, to be divided amongst the King and the Procurator, and all Embracers that procure such Inquest, shall incur the like Punishment.

If the Juror or Embracer have not whereof to make Gnee, he shall suffer for a Year's Imprisonment.

But no J u r or, or other Officer, shall inquire of this Offence ex Officio.

Decies Tantum was brought before Justices of Nisi Prius, of taking Money in Quare Impedit, and the Inquest found against them, by which the Justices awarded them to Prifon, and gave Day over in Bank, and it was awarded, that the King and Party recover 10 Times so much Scc. the one Moety to the King, the other to the Party, and the Juror awarded to Prifon, and the Party was first satisfied, and after the King; for per Morris, the King has not this as a Debt, but as a Fine; and where the King has Fine, the Party shall be always first serv'd, by which they satisfied the Party, and found Suryey to satisfy the King, and were delivered out of Prifon. Quod Non. Br. Decies Tantum, pl. 6. cites 41 E. 3. 15. — Fitzh. Decies Tantum, pl. 10. cites S. C.

Decies Tantum against an Embracer, for taking of Money for Embracery, and the Count is ill, because it is not alleged whether he embraced in full, or did not embrace, per Cur. Quod Nota; For the Effect of the Statute is, that a Man shall not Embrace; For if he takes Money to Embrace, and does not Embrace, the Action does not lie, per Cur. And per Priet, the Statute is against Embracers, to that it ought to be the Plural Number; But Jurors are Jurors as soon as they are Sworn, and therefore if they take Money for saying their Verdicts, and after the Plaintiff is not satisfied before Verdict, yet the Action lies; But otherwise it seems, if the Juror be struck out before he be Sworn, for then he is no Juror, and after Issue was taken, whether the Embracer did take the Money, and the others contra, Quod Non, notwithstanding the Opinion aforesaid. Br. Decies Tantum, pl. 14. cites 37 H. 6. 51. — Fitzh. Decies Tantum, pl. 2. cites S. C.

Certain Jurors took Money of the Party after their Verdict, given without Consent thereof made before, viz. Every one half a Mark, and where thereof convicted by Verdict, and were put to Fine, viz. Every one half a Mark. And so see that it is out of the Cite of the Statute of Decies Tantum. But the Statute wills, that they shall be Imprisoned for a Year, without making a Fine, and this seems to be where they take Conta Formann Statuti. Br. Decies Tantum, pl. 15. cites 59 Aff. 19.

4. Note,
Decies Tantum.

4. Note, by the Statute of *27 E. 3. cap. 3. That where Jurors take * So are all
Money to give their Verdict, the Party may have Bill against them immedi-
ately before the Justices of Nisi Prinis, or other Justices; but per Thorp,
they can't award them to Prison before Judgment. Br. Bill, pl. 46. 
cites 41 E. 3. 15.

But it seems it should be the Statute of 34 E. 3. cap. 8.

5. If a Man impeannell'd and return'd upon Issue takes Money of the one
Party for his Verdict, and after is no Juror upon the Issue, yet Decies
Tantum lies, by some Justices, but others e contra, and that Action of
Maintenance lies, quod nota inde. Br. Maintenance, pl. 15. cites 21
H. 6. 54.

6. Upon Issue of Decies Tantum in Middlesex, the Jury may give
their Verdict generally quod recepserunt Denaries præsint &c. though the giv-
ing of the Money was in another County; for the Matter is not local,
and this by Conscience, and the Attaint does not lie; for it is true quod
cerepserunt Argentum &c. but they cannot say that Guilty in the County of
Northfolk expressly, by Starky and some of the Justices, and several Ap-
prentices; But Brian J. contra; for then the Delendants shall be doubly
charg'd, if the Plaintiff brings another Decies Tantum in another County, this Recovery will not be a Bar, which seems not to be Law;
for he may aver, that it was all of one and the same Receipt, and the
Place nor County is not traversable where it is not of Things local, as of
Trees cæ, Ghosts trampled, or the like. Br. Attaint, pl. 120. cites 22
E. 4. 19.

7. So in Issue upon Assets enter Mains. Ibid.

(B) Writ. Pleadings and Proceedings.

1. Decies Tantum against several, and supposed that 7. N. and
W. received where the Receipt of the one is not the Receipt of the
other, Judgment to et non Allocatur, by which they pleaded Not Guilty; Nota Not Guilty alter Issue. Br. Decies Tantum
pl. 4. cites 40 E. 3. 33.

2. A Writ of Decies Tantum was maintained against the Jurors and
Embroacers. Thel. Dig. 106. Lib. 10. Cap. 15. S. 8. cites Pach. 41
E. 3. 9.

3. Decies Tantum by the Baron and Feme, and because the Feme was
named the Writ was abated. Br. Decies Tantum pl. 20. cites 43 E. 3. 16.

4. Decies Tantum against Jurors, whereof the one had taken 10 s. and
another 8 s. 8 d. and the Third a Coat of the Price of 40 d. to the Damage
of Ten Marks, and were thereof attained, and beause the Plaintiff had
not seuered his Damages the Court was of Opinion to have taken the In-
quêt de Novo, and the Plaintiff released his Damages, by which it was
awarded, that the King recover the Moiety of so much as they had
taken, and the Party the other Moiety, Et quod capiatur. And after
the Three came and tendered Ten Times as much &c. Per Mom-
bray they ought to go into the Receipt [of the Exchequer] and there to
pay it, and they shall fend Writ to them, and then they shall be deliver-
ed out of the Fleet, and after Eftreats were delivered into the Exche-
quer by the Command of the Court. And the Serjeants of the King or
one of the Justices, shall go into the Receipt of the King with the
Money adjudged to him, and there pay it, and have Tally to the Barons of the Exchequer, Ex hos Vide. Br. Decies Tantum pl. 8. cites 44 E. 3. 36.

5. In Decies Tantum, the Sheriff returned Nihil, the Plaintiff prayed Capias in a Foreign County and could not have it, contra in Action upon the Statute of Labourers; for in the one Case the Law presumes that he is sufficient, and in the other not. Br. Proces pl. 128. cites 47 E. 3. 4.

6. In Decies Tantum the Process may be Capias infinite, or Difter's Infinite; But not Capias in a Foreign County. Br. Decies Tantum pl. 9. cites 47 E. 3. 4.

7. Decies Tantum is well brought by Baron alone, though it be founded upon Cui in Vita brought by him and his Feme; the Reason seems to be that he is to recover only a Chattel, and he counted of a Receipt and did not say by whose Hands, and yet good. Br. Decies Tantum pl. 10. cites 7 H. 4. 2.

8. In Decies Tantum the Writ was in Loquela que suit inter J.P. Plaintiff and W. T. Deforcant per Breve Noftrum de Judicio de uno Mosnagio &c. And the Defendant pleaded to the Writ, because he did not broach by what Writ of Judgment. Per Afton it appears, but let that be saved to you, therefore anwer Quod Nova. And the beft Opinion was, that the Writ was good. Br. Decies Tantum, pl. 2. cites * 3 H. 6. 23. And such a Writ of Difcit was fued Anno || 20 H. 6. 10. upon calling of Protection, and the Writ awarded good notwithstanding such Exception.


10. If Decies Tantum varies from the Record it is not good, as if the first Record is J. D. of A. Toman, and the Decies Tantum is J. D. only; by the best Opinion. Br. Variance pl. 6. cites 9 H. 6. 1.

11. In Decies Tantum it is no Plea that no Verdict was given; for if they take Money they offend against the Statute, if they give Verdict or not, and so if they take Money and give true Verdict; by which they said that they did not take any Money for paying their Verdict, Frit. Per Newton, you ought to plead this severally for every one of them, and so he did. Br. Decies Tantum, pl. 11. cites 21 H. 6. 20.

12. In Decies Tantum against J. N. of D. he said that he was conversant, and dwelling at S. the Day of the Writ purchased and at all Times after; And the best Opinion was, that this is a good Plea and is at Common Law, though it be in Action in which Proces of Outlawry does not lie, and shall serve at this Day after the Statute. Br. Decies Tantum, pl. 12. cites * 21 H. 6. 52.

13. And by some of the Justices, No such Record by which he was sworn is no Plea, for the Action lies though he was not sworn. And some e contra, therefore see the Statute, and that where he takes Money and is not sworn, Action of Maintenance lies. Ibid.

14. Decies Tantum at Grave Damnum, and in our Contempt, and did not say at Grave Damnum of the Plaintiff, and yet the Writ awarded good, lor it is Action Popular, which every Perfon may have who will, and
and therefore it is not more (grievous) to the Plaintiff than to another. Br. The other Editions of Br. is pl. 11.

and cites 21 H. 6. 5. but it should be 21 H. 6. 54. b.

15. Decies Tantum against J. N. who said, there is Nulliæ Record in he was sworn, and by some Justices the Action lies though he was not sworn, and some contra, and that Writ of Maintenance lies, and the Defendant demurred upon the Plea. Br. Record pl. 26. cites 21 H. 6. 54.


18. Decies Tantum against Jurors for taking of Money for giving his Verdict, who said that be did not take any Money for giving his Verdict, Priif; and a good Illue, and fo Note that it is not Pregnant. Br. Negativâ &c. pl. 20. cites 22 H. 6. 20.

19. Decies Tantum, and the Writ was in Lequela, which was between J. P. Plaintiff and W. D. Defensor, per breve notseum de Judicio de uno Moliegio &c. and did not show what Writ of Judgment; and the Opinion was that it is well. Br. Brief pl. 35 cites 35 H. 6. 30.

20. In Decies Tantum by W. M. the Defendant pleaded an Ill Bar, and the Plaintiff replied, and would not demur; the King cannot demur, for he is not intitled but by the Party, and to this the Reporter agreed, for the King is not intitled before Judgment, But he is intitled immediately by the Judgment upon a Cap. Utlägary, and therefore by him the King there may demur. Br. Utlägary. pl. 33. cites 38 H. 6. 1.

21. If the Party grieved releases to the Jury who have taken Money, this is not good, but a Stranger may have Decies Tantum, and shall not be barred by the Release. But if the King had released, all should have been barred. Br. Decies Tantum pl. 16. cites 5 E. 4. 2.

22. Decies Tantum for embracing and taking of 10 l. for the Embracery the Defendant said, that he is learned in the Law, and at N. was retained to be of Counsel with the Party, by which &c. and took of him 6 s. 8 d. and gave Evidence to the Jury, and prayed them that if his Evidence proved true to pass with his Client, which is the same Embracery &c. and no Plea, because he did not answer to the Rest of the 10 l. by which be said as above Abique hoc, that he took more than 6 s. 8 d. &c. Br. Decies Tantum pl. 17. cites 6 E. 4. 5.

23. Decies Tantum was found for the Plaintiff, who prayed Judgment; Fairfax prayed for the King that they would not give Judgment; but for there is another Decies Tantum pending of taking of greater Sums, and this Suit is by Covin. Pigot said, it may be that the Parties agreed in the other Suit, and this may be by Covin, by which Judgment was given that the Plaintiff recover. Br. Decies Tantum pl. 13. cites 9 E. 4. 4.
(C) Punishment.

1. **J U R O R S** who are convicted in *Decies Tantum*, shall be imprisoned, and so they were, and satisfy'd the Party, and found Surety for the Part of the King, upon Deliverance out of Prison, quod nota. Br. Imprisonment, pl. 4. cites 41 E. 3. 15.

2. In *Writ* upon the Statute against Juries, the Sheriff return'd *Nihil* at the Grand Diary, and prayed *Exigent*, and could not have it, and after he prayed that they shall be distrained by all the Lands which they had the Day of the Inquest, and could not have it but only the Day of this Writ purchased. Quod nota. Br. Decies Tantum, pl. 7. cites 44 E. 3. 12.

For more of Decies Tantum in General, See other Proper Titles.

---

**Declaration.**

(A) Want of Form. And what is Form; and what is Matter.

1. **P L A I N T** in Affile was challeng'd, because *Wood* was put before *Paffure*, &c non Allocatur. Br. Plaint, pl. 27. cites 8. Aff. 24.

2. *Quod ei deforçat by two, as Heirs to the Tail in Gavelkind*, the Demandant alleged *Espikes in the Donees*, and also in themselves, which is Surplufage, and yet because the Statute of 34 E. 3. cap. Ultimo is that the Count shall not abate for Want of Form, if it has Matter sufficient, the Count was awarded good, notwithstanding this Surplufage. Br. Count, pl. 31. cites 46 E. 3. 21.

3. *Formedon of the Moiety of 30 Acres of Land*, which R. together with another Moiety of 30 Acres of Land, gave &c. and because he did not say with another Moiety of the aforesaid Acres of Land, therefore the Writ was abated. Br. Demand, pl. 6. cites 5 H. 5. 8.

4. The Form shall be observed in Matters which are not traversable, as Attachment on Prohibition and Esplices in Formedon &c. and yet they are not traversable. Br. Count, pl. 11. cites 9 H. 6. 61.

5. Count or Declaration must be formal, containing, 1. Plaintiff's and Defendant's Names. 2. The Nature of the Action. 3. Time, Place, and Aff. 4. The summing up the Grievance or Conclusion, viz. *Per quod Actio*
Declaration.

Actio accrescit ad Exigendum &c. or Unde dicit quod Deterioratus est & damnum habet ad &c. Brown's Anal. 3.

6. Declaration must be Good. 1. In Substance to every Intent. 2. Sometimes by Inducement. Doubt'd, if hurt by Surplușage. Brown's Anal. 3.

(B) Good, or Not. Certainty. In what Cases it must be Formal and Certain; and what shall be said to be so.

1. It seems by several Books, that nothing shall be forepris'd in Præ- cipe quod reddat, but what which lies in Demand by Præcipe quod reddat. Br. Demand, pl. 40. cites Tempore E. 1. and Fitzh. Brief 866.

2. And therefore Advowson shall not be forepris'd in Præcipe quod reddat; for Præcipe does not lie thereof. Ibid.

3. Trespass in uno Tenemento with a Post adjacent, containing four Acres of Land, there it was agreed, that this Word Tenementum is uncertain, but because the four Acres shall be intended to be the Tenement, as here, therefore well, otherwise it is in a Demand. Br. Demand, pl. 27. cites 3 H. 4. 17.

that Ejecutum de uno Tenemento, is ill for the Uncertainty, because in that Act the Thing itself must be recovered, and Tenementum may signify a Thing for which Ejecutum will not lie, as an Advowson &c. but in Trespass, where Damages only are recoverable, the Word will serve well enough.

4. In Debt the Plaintiff counted upon an Obligation made at D, where it bare Date at the Manor of D. and yet well by the beit Opinion; for the Manor of D. may be in D. and may extend into D. C. and E. and then the Manor of D. shall be uncertain. Br. Lieu. pl. 4. cites 34 H. 6. 1.

5. Where a Man demands Land, he shall show the Certainty of the Acres; But where he brings Debt upon a Lease or Trespass, e contra; For in the one Case he shall recover the Land, and in the others not, and so no Plea to the Bill. Br. Brief. pl. 244. cites 36 H. 6. 26.

6. If the Manor of B. extends into B. and S. and is demanded by Name of the Manor of B. in B. he shall recover only that which is in B. and some e contra, and that Foreprisal shall be made, Quare. Br. Demand, pl. 50. cites 9 E. 4. 17.

7. Declaration must be certain, containing. 1. Such a sufficient Certainty whereby the Court may give a Peremptory and Final Judgment upon the Matter in Controversy. 2. That Defendant may make a Direc- t Answer to the Matter contained therein. 3. That the Jury, after the Issue join'd, may give a Complete Verdict thereupon. 4. No Blank or Space to be left therein. Brown's Anal. 3.

8. Though the Rule of Law is, that Declarations shall not be taken by Intendment, but ought to have Certainty; yet this has an Exposition and a Meaning, viz. That where the Uncertainty is so great, that it is in- different to take it either Way; But where one Way is more strong, and the Intendment this Way much exceeds the Intendment the other Way, such In- tendment shall be allowed, and Declarations shall by adjudg'd good by such Intendment. As in Debt against an Heir, the Court shall be good, notwithstanding the Plaintiff does not shew that the Executors have no Af- fets; for it shall be intended, because it shall be presumed, that other- wise the Plaintiff would not have brought his Action. Pl. C. 193 a. b.


6. A
9. A Declaration ought to contain two Things, viz. Certainty and Verity; for that is the Foundation of the Suit whereunto the adverse Party must answer, and whereupon the Court is to give Judgment. Co. Litt. 303. a.

10. In the Book of Entries is set forth, that Trespass was brought for Haeps of Stones, without mentioning any Certainty; cited Arg. But Doderidge said, that the Counsel who cited it, never saw an Action for a Heap of Stones; but perhaps it might be for a Cart-Load, or the like, of Stones. Palm. 447. Hill. 2 Car. B. R. in Case of Clapham v. Middleton.

11. An Action of Trespass was brought Quare teftas diversas (Anglice) (Earthen Pots) tpfius querentis cepit. And moved that it is naught for the Uncertainty, and so was the Opinion of the Court, as 5 Rep. 34. Trespass was brought quare pices fuis cepit, without thew'ing the Number, or what Nature they were, and therefore naught. Nov. 91. Mich. 2 Car. B. R. Clapham v. Middleton.

12. Action for the Case, and declares that whereas A. was indebted to him 20 s. & altrœ B. in Consideration he would forebear it, promised to pay him. After Verdict, Judgment was arrested, because of the Uncertainty of the Sun in the Declaration. Frem. Rep. 443. pl. 601. Mich. 1676. Canon's Case.


14. In Case for negligently managing his Ship, that it ran over the Plaintiff's Barge, The Plaintiff declared, that he was puffled of a Barge laden with diverse Goods and Merchandizes Generally &c. The Declaration is too General, and the Particular Goods ought to have been mention'd, as in Case for Burning a Houfe of Goods, or otherwise no Damages shall be recover'd; per Holt Ch. J. at the Sittings at Guild-Hall. Hill. 2 Ann. Martin v. Henrickfon.

(C) Good. Pursuant to a Destructive Deed.


2. In Annuity the Count was, that the Prior of M. in Southwark, granted to the Plaintiff in London, such a Day and Year &c. 63 Preservic in Curia the Writing aforesaid, whose Date is in the Chapter-House of the said House, which can't be intended to be made in L. because the Chapter-House is in S. which is another County, Judgment of Count, and yet good. Br. Count, pl. 60. cites 5 E. 4. 6.

3. For Danby Ch. J. Laycon and Brian, the Chapter-House is where the Chapter assembles; for the ancient Chapter-House may be thrown to the Ground, and then where they make their Congregation in another Houfe, this is their Chapter-House for the Time, and the Prior and Convent may come into London and seal the Deed there. Ibid.
Without setting forth what will make against himself.

1. Annuity granted by R. till be promont to the Plaintiff to a Benefice, the Plaintiff counted of Simple Grant and of Arrearages for five Years, and well, without making mention of the Condition, and the Defendant say, that it was granted till he was promoted &c. and that he tender'd to him a Competent Benefice, and the Plaintiff refused, and the Plaintiff need not say, that he is not yet advanced, because the Condition goes in Defeasance of the Annuity, and in his Diff-Profit which shall come of the Part of the Defendant to shew, but where Annuity is granted, if the Grantee does such Act, there the Plaintiff shall shew the Performance of the Act, for by this his Annuity commenced. Br. Count, pl. 43. cites 14 H. 7. 31. and 15 H. 7. 1.

(E) Declaration. Repugnancy, or Suplusage.

1. ERROR to reverse a Judgment given in the Court of Hall, in an Action on the Case, where the Plaintiff declared that he was seized of a Messuage, and that the Defendant built another near it, and continued the said Building from such a Day to the Time of the Leying of the Plaintiff, by Reason whereof he stopped up his Lights & adhuc obtupavit. There was Judgment for the Plaintiff and entire Damages given; and now the Error aligned was, that by Reason of the Words adhuc obtupavit, Damages were given for something after the Plaintiff levied. To which it was answered, that the Word Obtupavit doth refer only to the Time of bringing the Plaintiff, and not to any Thing which happens afterwards; it is to shew, that the Defendant has not abated the Nuissance; they are Words only of Form, and used in most Declarations viz. Solvare contradixit & adhuc contradixit &c. And so are the Pleadings in the Entries in this very Case viz. that the Defendant built a New House, by Reason whereof the greatest Part of the Plaintiff's Houfe Magna Tenebritate Obscurata fuit & adhuc existit; and for this Reason the Plaintiff having Judgment. 4 Mod. 152, 153. Mich. 4 W. & M. in B. R. Carter v. Calthorp.

2. Trespass for taking and carrying away his Timber and Brick, Super Terram sua jacent! erga Confectionem Domus de novo edificat. And the Court held this infenfible, for they could not be Materials towards the Building of a Houfe already built. Sed Quare, if that was not Suplusage? 1 Salk. 213. in pl. 4. cites Hill. 9 W. 3. B. R. Lawley v. Arnold.
3. In Covenant against an Apprentice, the Plaintiff a

amended it, and Defendant pleaded it again for other Default, and the Plaintiff amended it again, and it seems that in one and the same Term, the Defendant may plead several Times to the Count. Br. Count, pl. 4 cites 3 H. 6. 19.

2. Holt Ch. Justice declared, that by the Course of the Court a Man may amend his Declaration the Second Term, but that when the Declaration is amended, new Rules for Pleading must be given; for the Plaintiff perhaps must thereby be put to a New Defence. 11 Mod. 198. Mich. 7 Ann. B. R. Withers v. Baker.

3. Declaration was allowed to be amended after Issue joined and Notice of a Trial, in a Cafe, where the Nature of the Action was not thereby changed. Gibb. 193. Hill. 4 Geo. 2. B. Duchefs of Marlborough v. Wigmure.

(G) Abated.

1. In Trespafts, the Writ was to the Damage of 40 l. and the Count 40 l. Damages, by which the Defendant demurred upon the Count. Per Thorpe this is a good Cause to abate the Count. pl. 34 cites 38 E. 3. 21.

2. In Quare impedit, the King counted upon Two Presentments, by which the Defendant pleaded it in Abatement of the Count, Et non Alloca-

3. In Account against a Man as his Bailiff and Receiver in Kirby, the Defendant said, that there are Two Kirbies in the same County, and the Plaintiff counted in Kirby Skirke, and therefore the Defendant pleaded it to the Count not warranted by of the Writ, Et non allocatur. Br. Count pl. 27. cites 43 E. 3. 14.

4. In Trespafts against one N. and one W. the Plaintiff first counted against N. and be pleaded Not Guilty, and after the Plaintiff counted against W. that he with N. did the Trespafts at another Day then was supposed in the first Count, and W. pleaded in Bar, and at another Term W. would have abated the Count for the Variance between the Two Counts, and was not received, inasmuch as he was a Stranger to the last Count. Thel. Dig. 193. Lib. 13. cap. 1. S. 6. cites Mich. 46 E. 3. 25.

5. Trespafts of Battery in Middlesex, and the Plaintiff counted in the Palace of Westminster, where the Sheriff has no Jurisdiction, and per Mar-

cen the Count shall abate; for it is infra and not De; for the Pal-

ace
(H) Declaration.

Necessary in what Cases.

1. Ent'y in the Quibus against two, the one appear'd at the Grand Cape, and the other made Default after Default; there the Demandant shall not Count, for he shall not Count against him who comes by the Grand Cape, before he has saved his Default, Quod Nota. Br. Count, p. 48. cites 14 H. 6. 3.

2. But where it is brought against three, the one always appears, and the other makes Default after Default, and the third appears at the Grand Cape, there the Demandant shall Count against him who always appear'd, that he is the others dispossessed him, and against the other pray Selin of the Land. Ibid.

3. Seire Fascias in Dower, the Tenant made Default, yet the Demandant shall make his Demand; For the Writ does not comprehend Certainty, contra in Præcipe Quod Reddat, Caufa patet. Contra in Affise & C. by Default. Br. Count, pl. 55. cites 38 H. 6. 18, 19.

(I) Necessary. Though Defendant makes Default.

1. The Demandant shall not count against the Prayee in Aid in Præcipe, quod reddat, but he shall have Oyer of the Writ and Count, which was made against the Tenant for Life, and he had, and Vouched. Br. Count, pl. 6, 7. cites 11 H. 4. 11.

2. If Affise is taken by Default, yet the Plaintiff shall make Plaintiff, &c. Br. for the Writ does not comprehend Certainty, Quod Nota, and the same Plaintiff, pl. 16, in cites 2 Ald.
3. In Writ, when the Defendant makes Default at the Grand Juries, or in a Quaere Impedit, or in an Avowry, in such Cases the Plaintiff ought to count; but he has no Occasion to count of a Year and Day; for the Defendant in one Case, and the Plaintiff in the other, where such Default is, has no Day in Court to make a Defence; but in both Cases a good Title ought to be shewn. Jenk. 124. in Cafe 51.

(K) De Novo.
In what Case the Plaintiff may declare De Novo.

1. FOroedon against Baron and Feme, the Demandant Counted, and after the Baron made Default, by which Petit Cape issued, and the Baron made Default again, wherefore the Feme came and prayed to be received, and pleaded to the Count, because no Eschees were alleged in the Ancestor of the Demandant, feicicer, in the Donee, and 'twas well argued, whether the Demandant should count anew, and 'tis said there, that Mich. 4 H. 6. the Demandant counted anew; for 'twas said, that it was New Tenancy given by the Statute, and New Tenancy shall have New Count, and at the Petit Cape if the Demandant releases the Default, the Demandant shall count anew. Quod Nota. Br. Count, pl. 7. cites 3 H. 6. 41.

2. And if the Plca be without Day by Protection, there at the Re-jummons, the Demandant shall count anew. Quod Nota. Ibid.

3. And against Vouches, the Demandant shall count anew, Mutatis Mutandis. Ibid.

4. But 'tis said elsewhere, that the Prayee in Aid, nor the Garnishee, shall not have but Oyer of the Count. Ibid.

5. In Detinue the Garnishee shall have Oyer of the Writ; But 'twas said, that the Plaintiff shall not count anew against him; Nota. Br. Count, pl. 35. cites 8 H. 6. 16.

6. If the Plaintiff counts in Debt or Trespass, and the Defendant pleads to the Jurisdiction, the Count shall not be entred before the Jurisdiction be affirmed, and if Continuance be taken till the next Term, it shall be upon the Writ, as if no Count had been, and at the next Term the Plaintiff shall count anew. Br. Count pl. 36. cites 8 H. 6. 18.

7. Precipe quod reddat against Tenant for Life, who prayed Aid of him in Reversion, who appeared Gratisf and joined in Aid, and the Deman- dont counted anew against the Tenant and the Prayee, and they vouch-ed the Common Vouchee, and suffered Recovery for Affurance, and yet it is said, that the Prayee shall not have but Oyer of the Count. Br. Count pl. 87. cites 22 H. 7.

(L) Where
Declaration.

389

(L) Where a Second Declaration may vary from the Former.

1. S C I. Fa. was \textit{funeud de Nobis \& Hered nostris}, and the Prayee in Aid cæpf Protection, and after the Year the Plaintiff sold Regarum, which was \textit{tenendum de diíno Patre nostro}, and the Defendant pleaded to the Writ for the Variance; \& non Allocatur; for all is of one and the same Effect. Br. Variance, pl. 11. cites 40 E. 3. 18.

2. If a Man brings Replevin, and declares, and is Nonfuitet after De- but if this cleration, so that Certainty may appear, and brings second Deliverance, he cannot vary in it, in Year, Day, Place, or Number of Acres, or the like. Br. Second Deliverance pl. 3 cites 3 H. 6. 9. Per Opinionem Curie.

(M) Double.

1. T Respofts, because the Devisor was possesed of a Leafe for Years by Deed indented, and devised to the Plaintiff, and died, and the Executors bailed to him, and the Defendant took it, and carried it away, and the Defendant demanded Judgment of the Count, because he alleged the Devisor and the Bailment of the Executors, and so double, \& non Allocatur; for 'tis Conveyance, and so well. Br. Count, pl. 14. cites 27 H. 6. 8.

2. The Plaintiff declared, that whereas the Defendant 6 Maii 1695, for 120 Weeks Dyed then past, had promised to pays him \$ s. per Week, and that the Plaintiff Poísea, viz. 5 Maii 1695, having found the Defendant Dyet 120 Weeks then past, the Defendant promised to pay the Worth, and that it was worth \$ s. per Week; upon Non Assumpsit and Verdict pro Quer' it was now moved in Arrest of Judgment, that the Weeks in the Quantum Meruit are not said to be other than those laid in the Special Promiss, so that the Defendant is twice charged for the same Thing. Sed non Allocatur; for they do not appear neceffarily to be the same, and without Necessity, the Court will not intend them to be the same. Tulk. 213. pl. 3. Mich. 9 W. 3. B. R. Wet v. Troles.

(N) Aided by Intendment.

1. I N Replevin, where a Man makes Avowry, or counts for Annuity granted for Term of his Life, to be Steward of the Manors of A. B. and C. and says, that he exercised the Office, it suffices, though he does not say in all the Manors; For it shall be so intended. Br. Count, pl. 62. cites 5 E. 4. 104.

2. The Plaintiff declared of a Leafe made by one Christmas, the 6th Velw. 182. of May Anno 7; of one Melfinage &c. In D. by Reason whereof the Plain- Davis v. tiff Pardy.
D E B T in the County of N. and declared upon an Obligation made at H. Rolfe demanded Judgment; for H. extends into the County of N. and into the County of L. and the Plaintiff has not declared in what Part of the Vill the Obligation was made, & non Allocatur; for it shall be intended in the County of N. by the bringing of the Writ there, as where there are two Vills of one and the same Name in two Counties, and he brings his Action in the one Country, and counts there, and does not say in which County, yet it shall be intended in the County where the Writ is brought, Per Cur. by which he paffed over. Br. Count, pl. 6. cites 3 H. 6. 35.

2. That which is alleged by way of Conveyance or Inducement to the Substance of the Matter, need not be so certainly alleged, as that which is the Substance itself. Co. Litt. 303. a.

3. Where a Matter of Record is the Foundation or Ground of the Suit of the Plaintiff, or of the Substance of the Plea there it ought to be certainly and truly alleged, otherwise it is where it is but Conveyance. But the Proceedings and Sentences in the Ecclesiastical Courts may be alleged summarily. As that a Divorce was had between such Parties, for such a Cause, and before such a Judge, and Concurrentibus his qua in jure requiruntur; for the Judge must be alleged, to the Intent the Court may write to him if it be denied. Co. Litt. 303. a.

(O) Aided by Intendment. As to the Place where the Thing is supposed to be done, there being two several Counties &c. to which it may refer.
(P) Names. By what Names Things must be demanded, the Nature of them being changed from what they formerly were, as Lands into Houles &c.

1. Recordare, the Defendant avow'd because the Dean and Chapter of N. held two Houses, forty Acres of Land, twenty Acres of Pasture, and four Acres of Wood of the Father of the Defendant, whose Heir &c. by certain Rent and Services, and for so much Arrear he avow'd, and the Dean and Chapter join'd to the Plaintiff, because they had lost him for Term of Years yet continuing, and both said, made before the Statute of Quia Emptores terrarum, and before the Statute de Religiosis, and after Time of Memory gave the two Yard Lands to the Dean and Chapter, and their Successors, to hold by Realty, and left Rent for all Services, which Eulate the Donor of the Acoverant had in the Signory, and demanded Judgment if for more Services he ought to avow, and because the Houses, Meadow, Land-Pasture, and Wood, cannot be intended to be two Yard Lands; therefore the Plaintiff, by the best Opinion of the Court, joiced the Houses were built after the Gift, and that Pasture was approved into Wood, and part into Meadow, and part into Pasture &c. so that it may appear to be all one and the same Thing, for it cannot be demanded now, but by Name as it is now, quod futurum censetur, Quod Nota. Br. Pleadings, pl. 60. cites 39 H. 6. 8.

(Q) Special; though the Writ is General. And Vice Versa.

1. A Man may have Writ of Nuisance of a Mill levied &c. And in his Court say, that it is a Wind-Mill, or a Water-Mill. Thel. Dig. 87. Lib. 9. cap. 7. S. 33. cites 4 E. 3. 150.

2. In Replevin the Plaintiff may count of divers several Takings at divers Days. Thel. Dig. 87. Lib. 9. cap. 7. S. 31. cites Pach. 10 E. 3. 508.—And so he may at divers Places. Ibid. cites Pach. 29 E. 3. 320.

3. In Perdomed the Writ was upon a Gift, and the Gift maintain'd by the Count, by which it was shewn that the Land was deviseable by Testament, and that donor devis'd in Tail &c. and held good, and the Tenant compelld to traverse the Devise, and not the Gift. Thel. Dig. 86. Lib. 9. cap. 7. S. 1. cites Mich. 15 E. 3. Briet. 324. And says, that so may a Man maintain by recovery in Value. Ibidem

4. In Quare Impedit by the King of Disturbance made to present to the Chapel of B. and so was the Commencement of the Count, and afterwards in the Count the King made Title for his Tenant to present a Covenable Parson to an Abbey, and that the Abbot ought to present this Parson to the Ordinary &c. and inasmuch as the Chapel was void, and the Heir within Age, the King presentd to the Abbot, and he relitigatd &c. and held a good Special Count, and Special Disturbance. Thel. Dig. 86. Lib. 9. cap. 7. S. 3. cites Mich. 24 E. 3. 39.

5. In
5. In Trefpafs the Writ was, that the Defendant had committed divers Extortions and Oppressions, and the Count was, that he had committed Extortions and Grievances, viz. impark'd their Beasts, and detain'd them till they made several Fines, and detain'd them per Sovent Diffreys, by which &c. and held good. Thel. Dig. 86. Lib. 9. cap. 7. S. 4. cites Hill. 31 E. 3. 335. 6. In Trefpafs the Writ was, Quare aportavt bona et catalina, and the Count was de quingdoliiis Vini and held good. Thel. Dig. 86. Lib. 9. Cap. 7. S. 5. cites Trin. 39 E. 3. 24. 7. But where the Writ is bona & Catalina, a Man shall not count de Denariis. Thel. Dig. 86. Lib. 9. Cap. 7. S. 5. cites 39 E. 3. 30. And that fo agrees Trin. 46 E. 3. 16. 8. But a Man shall count well of Ten Quarters of Barley. Thel. Dig. 86. Lib. 9. Cap. 7. S. 5. cites Trin. 46 E. 3. 16. 9. So of dead Trees, and Corn. Thel. Dig. 86. Lib. 9. cap. 7. S. 5. cites 43 E. 2. Brief 569. 10. So he shall not count of Live Chattles. Thel. Dig. 86. Lib. 9. Cap. 7. S. 5. cites 13 H. 6 Trefpafs 70. 11. In Writ of Error by Heir in Special Tail per Formam &c. By the Writ he may be suppos'd Heir General, and shew those bow he is special Heir per Formam &c. to this Land, notwithstanding that his Father has another General Heir. Thel. Dig. 86. Lib. 9. Cap. 7. S. 9. cites Hill. 3 H. 4. 17. 12. The Writ was general upon the Statute of Labourers for departing out of the Service of the Plaintiff, and counted specially that he committed with him to serve him in the Office of Carpenter, and held good. Thel. Dig. 86. Lib. 9. Cap. 7. S. 13. cites Mich. 11 H. 4. 53. 13. Writ of Custodia Terra & Heredem' shall be general, and the Count special. But in Writ of Ward of the Land only, it shall be Quod reddat Custodiam et Heredem Terra. Thel. Dig. 87. Lib. 9. Cap. 7. S. 29. cites Patch. 11 H. 4. 64. and that fo agrees the Register, Fol. 161. 14. In Trefpafs the Writ was, Quare cepit Psifem, and the Count was of divers Fines, and adjusted good; for Pifcis is Nomen Collectivum. Thel. Dig. 86. Lib. 9. Cap. 7. S. 15. cites Hill. 4 H. 6. 11. 15. In every Writ founded upon the Case all the special Matter ought to be put in the Writ; for it is not sufficient to have General Writ and make special Count. Thel. Dig. 87. Lib. 2. Cap. 7. S. 27. cites Trin. 7 H. 6. 47. 16. In Action upon the Case against one, who was retained, by the Plaintiff, to be of his Counfell to buy a Manor for the Plaintiff in such a County, which Defendant had fallly, and in Decret &c. purchased the Manor to himself &c. The Writ was abated because it did not appear by the Writ of whom the Manor should be brought, notwithstanding that it was thown by the Count. Thel. Dig. 87. Lib. 9. Cap. 7. S. 28. cites Mich. 16 H. 6. Action fur le Cafe 44. 17. In Writ of Entry forcible, upon the Statute of Anno 8 H. 6. the Writ was of Entry into divers Lands and Tenements, and the Count also, by which it abated; for the Count shall be certain. Thel. Dig. 87. Lib. 9. Cap. 7. S. 30. cites Mich. 38 H. 6. 1. 18. In Writ of Entry upon the Statute of Rich. The Writ was, Quod ingressus est diversa Terras & Tenementa, and by the Count the Certainty of the Lands appeared, and it was held in ill Writ, and yet the Defendant paffed over. Thel. Dig. 86. Lib. 9. Cap. 7. S. 19. cites Patch. 4 E. 4. 19. and says lee 38 H. 6. 1. & 5 E. 4. 26. & Register 182. 19. In Debt by the Heir of Caify que Ufe for Rent, Arrear upon a Lease for Years made by his Ancestor, he ought to make special Count, and prove how the Ancestor made Feoffment to his Ufe, and after Leailed. Thel. Dig. 87. Lib. 9. Cap. 7. S. 21. cites Trin. 21 H. 7. 25. per Opinionem. 20. Where
20. Where Feoffment is made in Fee to the Use of the Feoffor in Tail after the Statute of 27 H. 8. The Writ of Forndom for the Issue shall be that the Feoffees gave to the Feoffor in Tail, and in the Count the special Matter shall be specified. But where A. infeoffs B. in Fee to the Use of a Stranger in Tail, the Issue of any use Issue shall have Forndom, that the Feoffor gave to the Use in Tail, and the Count shall be special. Thel. Dig. 87. Lib. 9. cap. 7. S. 23. cites 7 E. 6. Plow'd. 59. Agreed by Mountague.

21. So where Feoffment in Fee is made to the Use of the Feoffor for Life, and afterwards to the Use of B. in Tail, before the said Statute, and after the said Statute. The Tenant for Life died, and B. discontinued and died; his Issue in Writ of Forndom shall say that the Feoffor was Donor &c. and the Count shall contain all the special Matter with short mention of the Execution of the Estates by the said Statute. Thel. Dig. 87. Lib. 9. Cap. 7. S. 24.

22. And Bromley Ch. J. was of Opinion that the Demandant might count generally, and if the Gift be traversed, maintain the Count by the special Matter in the Replication. Thel. Dig. 87. Lib. 9. Cap. 7. S. 25. cites 1 M. 1. and Br. Forndom pl. 46. 49. and says fee 42 E. 3. 6.

(R) In Real Actions. Names. By what Names Things shall be demanded.

1. Demand was of a Rod of Land, and the Writ awarded good. Br. Demand, Br. Demand, pl. 22. cites 3 E. 3. and Fitzh. Brief 740. pl. 38. cites S. C.

2. Mortdancetor was brought of eight Feet of Land in Breadth, and fix in Length, and good, notwithstanding that he did not say of a Place containing so many Feet. Br. Demand, pl. 41. cites 6 E. 3. and Fitzh. Brief 650.

3. A Carve of Land is good, Per Herle; for it was said there, that Carve is a Common Demand. Br. Demand, pl. 37. cites 6 E. 3. 42. and Fitzh. Brief 730.

Acre where it was a Carve, therefore the Writ was abated.

4. Where Affise is brought of the Hospital-House, there is no other Br. Affise, Plain, but de uno Meffagio curn pertinentiis; for he cannot have it of Chapter, or such like. Br. Demand, pl. 15. cites 8 Aff. 29.

5. Therefore quere if a Man diffuse a Parson of his Church unde querae erit facta? Ibid.

6. Hospital or Chappel, the Demand or Plain in Affise of them, shall be per nomen Meffagii. Br. Demand, pl. 29. cites 8 Aff. 29.

7. Mortdancetor was challeng'd because two Parts of the Meety of a Mill was demanded, which is a third Part of the Whole, Judgment of the Writ & non Allocatur. Br. Demand, pl. 17. cites 11 Aff. 29.

8. And a Demand of a Meety of the Meone of a Carve of Land, is a good Demand. Ibid.


10. In Affise the Plain was of a Place containing 40 Feet in Length, S P. But and twenty in Breadth, and found for the Plaintiff, and he recover'd, and demand of a yet Parch. 15. E. 2. Plain of a Croft was amended; for it was said that Place of Land without certainty.
Decree.

11. A Selion of Land is no good Demand as it seems; for it was recus'd in a Forepriest. Br. Demand, pl. 40. cites Tempore E. 3. and Fitzh. Brief 866.

12. Tenement is no Term to demand a House, but in Trespafs of Nuance to it, there Tenement is a Word sufficient; Per Opinionem &c. Br. Demand, pl. 54. cites 11 H. 7. 25.

13. In Writ of Forfeiture of Marriage, the Count was, that the Ancestor died in his Homage &c. And the Defendant said, that the Ancestor made Feoffment &c. Absque hoc, that he died in the Homage &c. And the Plaintiff said, that this Feoffment was made to the Use of the Ancestor and of his Heirs &c. And held a good Maintenance of the Count by this Special Matter. Thel. Dig. 87. Lib. 9. cap. 7. S. 22. cites Pach. 27 H. 8. 3.

For more of Declaration in General, See the several Titles of Actions throughout this Work, and other proper Titles.

Decree.

(A) Bound by Decree; Who Parties, or Not Parties.

1. A Decree was against the Lessee, and all claiming under him; he surrenders to him in Reversion, and he was adjudged to be bound by the Decree for so long Time as the Leaf should have endured. Toth. 123. 23 and 24 Eliz. Chapman v. Biflow.

2. If an Infant suffers a Decree by Consent, it is for ever reverisible, but otherwise of an adversary Bill. 2 Freem. Rep. 127. pl. 147. Trin. 1667. Anon.

3. A Decree by Consent for a Leaf, or other Personal Estate, shall bind Purchasers, or otherwise the Ld. Keeper said, you will blow up the Court of Chancery. 2 Freem. Rep. 127. pl. 148. Trin. 1667. Windham v. Windham.

4. Several Causes were brought to hearing together, where some that were Parties to one Bill were not so to another; Finch. C. on hearing of them, said, the Justice which was to be done on them all appeared, and it was decreed accordingly, and you shall not sever them now, and so decreed against one that was in Party to that Suit. 2 Chan. Cases 234. Trin. 29 Car. 2. Car. 2. Turner v. Daws and Mayor.

5. An Order that Defendant shall take no Advantage at the Hearing for Want of Proper Parties is void in itself and cannot take away the Defendants just Exceptions unlefs it had been by Consent. Arg. Vern. R. 122. pl. 112. Hill. 1632. Curson v. the African Company.

6 A.
Decree.

6. A Person indebted to Tefator's Estate in 10000 l. by Mortgage not Party to a Suit having Notice of a Decree by being present at the Hearing &c. by which Decree a Co-Executor was to receive no more Money, and the other Co-Executor was to have a perpetual Injunction against her, and a Clause was inserted in the Order, that no Creditor should pay her any more Money; but before any thing further done thereupon, the Morgagor paid the 1000 l. to the Co-Executor, and who delivered him up his Mortgage to be cancelled. Upon a Bill by the other Co-Executor, against the Mortgageor for Repayment of the 1000 l. and he having full Notice, and it being a pure voluntary Payment to avoid the Decree of the Court, it was decreed Per Lord Nottingham. Vern. 57. Trin. 34 Car. 2. Harvey v. Montague.

7. None are bound by a Decree but such as are Parties to the Suit. Vern. 291.

8. But decree 5 Car. 1. that all the Miners within the Parith of D., as well for the Time being, as to come, shall pay to the Vicar for Tithe of Lead Bar, the Tenth Dilh cleaned. Per Cor. the Decree extends to all Miners within the Parith, then or hereafter, to the Defendats are within the Letter, and expressly bound by the Decree, and as long as the Decree stands in Force must obey. 2 Vern. R. 184. pl. 168. Mich. 1690. Brown v. Booth.

9. A Bill was brought by some few of Greylock Manor, against the Lord to settle the Customs of the Manor, as to Fines upon Deaths and Alienations, and an Issue was directed to be tried at Law, and found that upon the Death of the Lord or Tenant, there was due an uncertain Fine, but not exceeding a Twenty-penny Fine, that is Twenty Years Old Rent; and upon Alienation of the Tenant, a Fine altogether uncertain and arbitrary; and it was infibred upon, that there being but some of the Tenants Parties to this Bill, the reit would not be bound by this Trial; but my Ld. Keeper held they would, he said, he remembred the Case of Nether-Wiridale, between Ld. Gerard and some few of the Tenants, and Lord Nottingham's Cafe, in the Dutchy, concerning the Customs of Daintree Manor for gridding and baking at the Lord's Mill and Bakehous, and said, in thee and a hundred others, all were bound, though only a few Tenants Parties; else where there are such Numbers no Right could be done, it all must be Parties, for there would be perpetual Abatements; and it is no Maintenance for all the Tenants to contribute; for it is the Cafe of all; and in the Exchequer and Dutchy, it would certainly be so, and no Difference when it is here, and he cited Sir William Boothby's Cafe in the Dutchy last Michaelmas Term, where a Bill concerning the Custom of gridding at the Lord's Mill was amended, and made to be on Behalf of the Plaintiffs, and all the rest of Tenants; and as to the Objection, that the Courts of Exchequer and Dutchy, are Courts of Revenue, add go by other Rules than ordinary Courts of Equity; he said, that was of no Weight, and held that all must be bound here as well as there. Equ. Abr. 103. cites Mich. 1701. Brown v. Howard.
(B) Bound by Decree. What.

1. Decree, that Consecrate of a Statute entered into by the Father, for Performance of an Agreement with the Plaintiff to pay him so much per Ann. till &c. should hold the Land against his Heir, an Infant, and his Guardian, till he be satisfied his Debt and Arrears. N. Ch. R. 45. 1649. Morton v. Kinman and Poplewell.


(C) In what Cases.

1. THIS Court is cautious to make a Decree without a Precedent. Chan. Rep. 240. 15 Car. 2. Roberts v. Wynn.


3. Where there is a Remedy at Law for one Thing in a Bill which is complicated with other Matters which are proper in Equity, in such Case Equity will determine the whole Matter; per Lord Chancellor.

2 Freem. Rep. 58. in pl. 64. Trin. 1680.

4. Where there is but one Witness against Defendant's Answer, the Plaintiff can have no Decree. Vern. R. 161. pl. 151. Patch. 1693. Alam v. Jourdon.

(D) Stayed or avoided, or barr'd; By what; And How.

* Nelf.

1. V. the Plaintiff mortgaged a College Lease to F. the Defendant, who was let into Possession of the Profits. Afterwards F. assigned to N. V. the Son of K. V. the Plaintiff, and on a Bill by K. V. F. was declared to account for the whole Time, though N. V. the Assignee was no Party. Afterwards F. not being able to perform this Decree, brought a Bill against K. V. * [and N. V.] setting forth a Fraud and Practice between them, and that he was willing to account to the Time of the Allignment, and to comply with the Decree as far as he was able; and pray'd that N. V. might account from the Time of the Allignment. Then N. V. exhibited another Bill against his Master, claiming the original Lease by a Title paramount ben's, and it appearing that he had such a Title paramount, F. was discharged of the Decree against him. Chan. Cafes. 2. 3. Trin. 12 Car. 2. Venable v. Foyle.

2. Upon
Decree.

2. Upon a Bill of Review the Question was, whether a Copyhold Estate, devised to be held by the Executor to pay Debts, and afterwards sold accordingly, should be Assises at Law and in Equity, or at Law only; for it only at Law, then a Decree which makes them Assises in Equity, without a Trial at Law, is erroneous; and it was held, that the Decree could not be reversed, because it cannot now appear, whether upon the Proof it appear'd to be Matter of Law or Equity; and after a Decree, it shall be intended, that the Court adjudged on the whole Proof, according to the Purport thereof. Hard. 174. Mich. 12 Car. 2. Fanlhow's Cafe.

3. Plaintiff sues as Sole, and after Marries, and then a Decree is made, yet it is not erroneous. Chan. Rep. 232. 14 Car. 2. Cranborne v. Dalmahoy.


6. Bill to set aside a Decree and Sequestration for Payment of Money, the Plaintiff having a Title by Statute-Staple, and Judgment Prior to the exhibiting the now Defendant's Bill, on which they obtained their Decree and the Decree was set aside accordingly. Fin. 126. Mich. 26 Car. 2. Witham v. Bland.

7. Upon a Demurrer to a Scire-Faciats-Bill to have Execution of a Decree, the Defendant pleaded, that he was a Purchaser without any Notice of the Decree, and that a Fine with Proclamations was levied, and five Years past'd without Claim. Ld. K. Finch inclin'd to think that it should bar the Decree, and seem'd to continue of the same Opinion, but said, that he would consult with the Judges, and hear the Cafe argued. Frecn. Rep. 311. pl. 381. in Chancery. Giffard's Cafe.

8. Where a Decree is temporary, or for special Ends, an original Bill lies See tit. Barton to put a Period to it, and to shew the Purposes of the Decree satisfied, and that the matter is quiet. Chan. Cafes. 251. Hill. 26 & 27 Car. 2. in Cafe of Whorsewood v. Whorsewood.

9 Mod. 6. in Cafe of the Mayor and Burgesses of Coventry v. Ld. Craven.

9. Where no ordinary Process upon the first Decree will force for the Execution thereof, there must be a new Bill to pray Execution of the first Decree by a second Decree. 2 Chan. Rep. 127, 128. 29 Car. 2. Lawrence v. Berney.

10. Verbal Agreement though subsequent to the Decree, yet shall not set aside the Execution of it but the Remedy must be by Original Bill. But other-


11. After a Decree of Dismission affirmed on Appeal to the Lords, a Bill is brought for discovery of a Deed said to be burnt, pending the Appeal which made out the Plaintiff's Title, so that after such Discovery, the Plaintiff might apply to the Lords for Relief. Defendant demurred, but was ordered to answer; but the Plaintiff to proceed no further with our leave of the Court. Per Jeffries C. Vern. 416. pl. 395. Mich. 1686. Barbone v. Scarle.

12. Where there is a Decree it cannot be altered but by Bill of Review, but where there is only a Dismission, an Original may be brought upon
Decree.

upon a new Equity; Arg says it is an allowed Difference, Vern. 417.

13. A Rule, that whenever a Decree is entered by Consent, the Merits after shall never after be enquired into, unless there be an Objection, that the Word Consent be struck out of the Order. MS. Tab. February 1702. Norcot v. Norcott.

14. An Original Bill, barely in Nature of a Bill of Revivor, and not broader or longer than a Bill of Revivor only, does not open the first Decree, to have it looked into; but if it be to enforce a Decree, or carry it further, then it opens the Caufe. Pach. 1706. Abr. Eqw. Cazes, 383. Varie v. Wordall.

15. Bill to redeem after a Decree of Foreclosure signed and enrolled 1697, suggesting Fraud and Surprise in obtaining the Decree, and a Parol Declaration before and after the Decree, that the Mortgagee was willing to take his Principal Interests and Costs, and quit the Estate; the Defendant pleads the Decree of Foreclosure, and by Answer denies the Fraud &c. Several Witnesses were read in the Caufe to prove such a Parol Declaration by the Mortgagee, that he was willing to quit the Estate upon Payment of what was due to him, and that the Plaintiff and Defendant in the former Caufe had the same Clerk in Court &c.

Per Harcourt C. the Plaintiff comes too late after such a length of Time to be let in to redeem. I know no instance where a Man has been let in to redeem by a new Bill after a Decree of a Foreclosure signed and enrolled upon any Parol Agreement or Declaration, or by Reason of Over-Value of the Estate; such a Thing would be of Dangerous Consequence and shake Abundance of Titles; perhaps there may be an Instance of Relief upon a Bill to redeem after a Decree of Foreclosure, but then the Bill was brought in a very short Time after the Decree, and there must be some extraordinary Circumstances in the Case, but I do not remember any such Case of Relief. Bill dismissed with Costs, and afterwards Decree affirmed in Dem. Proc. MS. Rep. Pach. 12 Ann. in Canc. Whit hall v. Short.

16. The Defendant Conyers in 1712, brought a Bill against the new Plaintiff Hicks and Mary his Wife, who was the Widow and Executrix of B, for an Account of the Estate of B. and obtained a Decree, and then Mary died, and before the Decree was enrolled the new Plaintiff Hicks petitioned for a Re-hearing, and at the same Time preferred an original Bill suggesting new Matter come to his Knowledge since the Decree, and obtained an Order to Re-hear the former Caufe at the Hearing of this Caufe &c.

The Plaintiff's Counsel admitted, that the Decree in the former Caufe was just and right upon the Pleadings and Proofs in that Caufe, but intilled, that upon the Pleadings in the present Caufe, the Merits appeared otherwise, and therefore prayed a New Decree, in Favour of the new Plaintiff, and to let aside the former Decree.

Per Cowper C. it is irregular to bring a New Bill to alter and vary a Decree already pronounced. It is true the Defendant in this Court may bring a Cross Bill, before any Decree pronounced in the original Caufe, and if the Original Caufe is heard before the Cross Caufe, the Decree in the Original Caufe may afterwards be varied by the Decree in Cross Caufe but in that Caufe, the Cross Bill must be brought before any Decree made in the Original Caufe. By the Court of the Court, if the Original Decree had been enrolled, the now Plaintiff upon Affidavit of new Matter come to his Knowledge, since the former Decree, might have a Bill of Revivor, but he cannot now be relieved against the former Decree by this new Bill and Re-hearing the former Caufe; for the Decree is right upon the Pleadings and Proof in the Caufe, and therefore cannot be varied upon a Re-hearing; and the now Plaintiff cannot
cannot be relieved upon his New Bill, because it is contrary to the Course of the Court to alter a Decree upon a New Original Bill exhibited after the Decree pronounced. The Bill dismissed and the former Decree affirmed. MS. Rep. Trin. 11 Geo. in Canc. Hicks v. Conyers.

17. A Decree, before Involvement thereof, ought to be delivered to the adverse Party or his Attorney, who are in eight Days to return the same signed by the Council of that Side, or to make their Objections to the Draft. MS. Tab. March 6, 1720, Cheevers v. Geoghegan.

18. The same Decree gives Liberty to try the Title at Law, and yet awards Injunctions to put Plaintiff into Possession and quiet him in his Possession; revered as repugnant. MS. Tab. April 29, 1721. Ed. Lanesborough v. Elwood.

19. What might have been supplied by Motion is no Objection to a Decree. MS. Tab. Nov. 24, 1721. Banbury v. Bolton.

20. Assignee of a Mortgage (by circumventing of the Mortgagor) Gilb. Equ. got Possession by Ejectment the next Term after the Mortgage forfeited, and after brought a Bill to foreclose, and by false Affidavits got the Cause to be heard Ex Parte, and a Decree and Report thereupon signed and enrolled; afterwards the Mortgagor died, and his Heirs brought a Bill to redeem; and the Defendant the Assignee pleaded this Decree and Report, and both made affidavit, signed, and enrolled. Ld. Macchesfield said, that all their Circumstances of Fraud ought to be answered, and the Defendant being signed and enrolled the Plaintiff has no other Remedy, and over-ranked the Plea that it should not stand for an Answer. And it being objected, that according to this Rule a Decree might be set aside by an Original Bill; His Lordship replied, that such a 1729, when Gross fraud as this, was an Abuse on the Court and sufficient to set any he came of Decree aside. 2 Wms's Rep, Trin. 1722. Lloyd v. Manell.

21. Ordered, that no Application shall be made against the Minutes after a Week; and no further Time to be allowed to petition for a Rehearing but within a Week after that. Sel. Cales in Canc. in Ed. King's Time 21 Trin. 11 Geo. 1. Anon.

22. On a New Bill to carry a Decree into Execution, Court may vary and alter what is thought proper; but on a Rehearing, no further than the Petition extends; but if the Petition be against the Decree in General, though particular Reasons are given, the whole is open; but otherwise it is, if the Petition be only against one or two Particulars. Sel. Cales in Canc. in Ed. King's Time, 13, 14 Palch. 11 Geo. 1. Colchester v. Colchester.

23. The Rule of Court is, that an Appeal the whole Cause is open; but on a Rehearing, only so much as is petitioned against; if all do not petition, it is open only to the Petitioners. Sel. Cales in Canc. in Ed. King's Time 24, Trin. 11 Geo. 1. Hayward v. Colley.

25. Decree may be altered upon proper Application the same Term, it is pronounced without a Rehearing. MS. Tab. May 3d, 1725. Vaughan v. Blake.


27. Matters, proper to be excepted to upon the Masters Report, shall never be objected to a Decree after the Report confirmed. MS. Tab. April 29, 1726. Parker v. Stanley.

28. All Appeals from the Rolls are to be made to the Lord Chancellor, and Decrees made at the Rolls must be signed or approved of by the Chancellor to make them Decrees of the Court of Chancery. MS. Tab. March 13th, 1727. Morfe v. Dubois.

29. A Decree gained by Fraud may be set aside by Petition, as well as a Judgment at Law by Motion; a Portiori may such Decree be set aside by Bill. 3 Wms's Rep. 111. Pach. 1731. Seldon v. Fortescue Aland.

30. If a Decree be obtained and enrolled, to that the Cause cannot be re-heard, then there is no Remedy but by Bill of Review, which must be on Error appearing on the Face of the Decree, or on Matters subsequent thereto, as a Release, or a Receipt discovered since. 3 Wms's Rep. 371. Trin. 1735. Taylor v. Sharp.

(E) Of the Inrolment of Decrees; and of Caveats to prevent the same.

1. A Decree pronounced in the Testator's Life-time, not to be passed under the Seal by the Executor. Toth 127. cites Patch. 1634. Ewer v. Freer.

A Decree was made, but the Party died before Inrolment, yet it was ordered to be inrolled, 2 Chm. Cafes, 221. Hill. 28 & 29 Car. 2. Anon.


Cited ibid. 74, by Name of Sabine v. Allen.

2. A Decree was ordered to be inrolled, if the Party died before Easter. 3 Ch. R. 27. 22 Feb. 20 Car. 2. Labyne v. Alley.

3. T. an Administrator obtain'd Decree, and died Intestate. The Inrolment was pay'd; for the Title of T. as Administrator is gone. 2 Chn. Cafes 247. Hill. 30 and 31 Car. 2. Warren v. . . .

4. On a Motion for a Re-hearing a Cause decreed, sign'd and inrolled by the late Lord Chancellor, Ld. Keeper North ask'd Serjeant Maynard, if he knew any Law whereby he could justify the Re-hearing a Cause sign'd and inrolled by his Predecessor? for that was to vacate a Record. The Chancellor, or Himself, was Master of his own Inrolment, and might on his Memory know no Reason for Re-hearing of it, but he could not do it, unless there was some Surprise or other Inregu-

arity
Decree.

A Decree was reversed, though there was no New Matter; but the Cause on which it was founded was mistaken. Toth. 129. cites Trin. 5 Car. Durham (Bp) v. Martin.

2. Bill of Review to reverse a Decree 22 Jac. The Plaintiff for Error says, the Cause was referred to four Commissioners, and but three certified; and also, that the Lease, which the Plaintiff now insists on, was not then in issue, and the Plaintiff never consented to the Certificate. Upon reading the Proceeds it appeared by Depositions of two Witnesses, that there was an Agreement for settling the Differences, and in regard the Decree was so long since, and nothing done against the same in all this Time, being sixteen Years, this Court would not reverse the Decree. Chan. Rep. 139, 140. 15 Car. 1. Goddard v. Goddard.

3. Pending a Reference to a Master to take an Account the Suit abated by Death of one of the Defendants afterwards. The Master proceeded in the Account, and made his Report, and the same was decreed and enrolled near twenty Years since. On a Bill of Review, this was held no Error, or Cause of Reversal. Chan. Causes 122, 123. Hill. 20 and 21. Car. 2. Slingsby v. Hale.

4. It is no Error for the Court to decree for the Defendant to hold free of Equity of Redemption on the Plaintiff's Bill; for Circuity of Action is to be avoided, and there are many Precedents of Decrees in this Manner for the Defendant. Chan. Causes 122. Hill. 20 and 21. Car. 2. Slingsby v. Hale.

5. A Stranger, that is bound by a Decree gotten by Fraud, may falsify it; per Lord Keeper. Ch. Causes 152. Mich. 21. Car. 2. in Cause of Style v. Martin and Boysville.

6. A Decree ought not to be made to bind the Inheritance, where there has been but one Trial at Law; per North. K. Vern. 293. Hill. 1684. in Cause of Fittow v. the Earl of Macclesfield.

(F) Reversal. Error.

(G) Opened, or Amended &c.
2. Sir George Downing brought an Appeal in the House of Lords from a Decree made in the Court of Chancery, as by Consent, suggesting, that though the Registrar, in drawing up the Order, had drawn it as a Decree by Consent, (and the Minutes were so too) yet be never did consent to such Decree nor his Counsel neither; or if they did, it was without his Authority, and made Affidavit of it, but the Appeal was dismissed. Eq. Abr. 165. pl. 4. cites Hill. 1699. Downing v. Cage.

3. Where Facts appearing on the Decree as drawn up and enrolled, they are plainly erroneous, the Decree was opened. Chan. Proc. 260, 261. pl. 211. Trin. 1706. Grice v. Goodwin.

4. Where Matters have been examined in Equity, and determined, the Court will be cautious of unravelling former Decrees, Agreements, or Releaseth. Wms's Rep. 723 &c. pl. 259. Trin. 1721. Cann v. Cann.

(H) Performance of a Decree. Inforced How.

1. One in the Fleet was ordered to be laid in Irons, because he refused to perform a Decree. Toth. 129. South v. Gardiner.

2. Fine was imposed for Breach of a Decree. Toth. 166. cites Trin. 6 Car. Longman v. Hopgood.

3. A Defendant lay in the Fleet for Breach of a Decree, the Plaintiff nevertheless prefers a Bill to discover an Estate; Defendant demurred because a Double Execution; yet over-ruled. Toth. 137, 138. cites Hill. 1633. Audley v. Harris.

4. An Original Bill to execute a Decree of Lands against a Purchaser, who claimed under Parties bound by that Decree, was allowed good on Demurrer thereto; per Lord Keeper. Chan. Cases 231. Trin. 26 Car. 2. Organ v. Gardiner.

5. A Sequestration may be granted in the Exchequer, as it has been always practiced in Chancery where a Decree is for a Personal Duty, otherwise the Jurisdiction of the Court of Equity would be to little Purpose, if it had not Authority sufficient to see its Decrees executed; per three Barons; but the Lord Ch. Baron doubted, because the Lord Ch. Baron Hale could never have prevailed upon to grant it, nor the Lord Montague, to whose Learning, he said, he must greatly subscribe; but by the Opinion of the other Three it was granted. 2 Freem. Rep. 99. pl. 109. Trin. 1687. in the Exchequer. Guavers v. Fountaine.

For more of Decree in General, See Chancery And other Proper Titles.

Deeds:
Deeds.

(A) The different Operations of the several Sorts of Conveyances

1. By Feoffment or Fine all Ufes and Possibilities are convey’d by rea-
son of the inestimable Operation of it: but this otherwise by Bargain and Sale. Le. 33. pl. 60. Mich. 15 Eliz. Anon.

Where the Ufe of a Fine or Feoffment is limited to the right Heirs of the Feoffor or Conunor, it was held by Anderson, Periam, Walmesley and Fenner J. and Popham, then Attorney General, and Coke, now Attorney General, that this is a Remainder and not a Reversion; for that the Fine or Feoffment was a Determination of all the old Ufes in the Feoffor or Conunor, and the Limitation upon the Fine or Feoffment, is to be read all new. But upon Conference of all the Judges of England, all the others held, that it was a Reversion; and the old Ufes not destroy’d. Mo. 235. pl. 425. Patch. 53. Fenwick v. Metforth.

Le. 182. pl. 356. Patch. 51 Eliz. S. C. And by Gawds, this Feoffment to his right Heir is merely void, to which Wray agreed, as if he had made a Feoffment to the Ufe of one for Life, without any further Limitation.—And. 238. pl. 297. Milford v Fenwick. S. C. adjudged per tot. Cur. that the Lease was good; because the Fee Simple remained in the Leffor, and was a Reversion; for it cannot take Effect in the Heir of him who limits it, unless by Defcent.—S. C. cited 2 Rep. 91. b.

They ran-fuck the whole Eftate, and pass or extinguish &c. all Rights, Conditions, Powers &c. belonging to the Land, as well as the Land itself. Per Hale. Vent. 218. King v. Melling.—But yet this does not have his Heir at Law, but he may enter notwithstanding. Per Trevor, Ch. J. 21 Mod. 151.

2. Bargain and Sale is not so strong a Conveyance as a Livery; As if I have a Rent Charge in Right of my Wife out of the Manor of D. and afterwards I purchase the Manor, and afterwards, by Deed indented and inroll’d, I bargain and sell the Manor; the Rent Charge than’t passes. Arg. Le. 6. pl. 10. Mich. 25 and 26 Eliz. in the Exchequer in Cafey of Stoneley v. Bracbridge.

3. At Common Law, before the 27 H. 8. of Ufes where the Ufe was limited upon Covenant to stand feized, there could not but one Person own, and his Heirs be trust’d with the Land, so that by the taking a Wife, acknowledging a Statute, dying without Heir, or making a Forfeiture, the Ufe was destroy’d or prejudiced; But upon Eftate executed, a Man might have trust’d several together, so that the Eftate might survive, and the Trust continue in others after his Death, and the Land not be subject to his Incumbrances. Also if a Man will limit Ufe upon Covenant, he ought to have effectual Consideration; but upon Eftate executed, he may limit Ufe without Consideration; upon Covenant he ought to have a Deed, but upon Eftate executed Not. Upon Covenant he can’t reserve a Power to make Leases, Fountiers, or to preter younger Children, but upon Eftate executed he may. Arg. Mo. 351. pl. 506. Mich. 36 and 37 Eliz. in Perton’s Cafe.

4. Baron and Feme are Jointenants of a Term. The Leffor indorses the Baron, who dies seised. The Wife survives and claims the Term. But held that by the Acceptance of the Feoffment, the Baron had surrended the Term and it is extinguished. But if the Conveyance had been by Bargain and Sale untitled, or by Fine, it had been otherwise. Cro. E. 912. Mich. 44 & 45 Eliz. B. R. Downing v. Seymour.

5. A
Deeds.


7. By a Lease and Release nothing passes but what lawfully may pass without Hurt or Damage to another; for it cannot divert a Fee and thereby gain a Fee to convey; Arg. Pollex 91. 22 Car. 2. cites [Mich. to Jac.] 96. Seymour's Cafe.

8. As, if a Man has an Estate in Fee upon Condition and conveys it over by Lease and Release, the Releefee can have but an Estate upon Condition. Ibid. 92.

9. So if a Man has an Estate to him and his Heirs, as long as J. S. has Heirs of his Body, and he conveys his Estate by Lease and Release, the Releefee must be bound by this Limitation. Ibid. 92. 22 Car. 2. Arg. in Cafe of Carpenter v. Smith.

10. A Feoffment being a Common-Law-Conveyance, and executed by Livery, makes a Transmutation of Estate. But a Conveyance by the Statute of Uses, as a Covenant to stand seised &c. makes only a Transmu- nation of Possession and not of Estate; because no Estate passes by those Conveyances, but only an Ufe. L. P. R. 609. cites 2 Lev. 77. 1 Vent. 378. [Trin. 24 & 25 Car. 2. B. R. in Cafe of Pipus v. Mitford.]

Twifden, J. fiad, he saw no Dif-ference be- tween a Feoffment to Uses, and a Covenant to stand seised; for if a Feoffment be made to the Ufe of one for Life, the Ufe, which is not disposed of, shall return, as well as upon a Covenant to stand seised. Ibid. 576 —— Per Hale Ch. J. in all Cafes touching Ufes, there is a great Difference between a Feoffment to Ufes, a Covenant to stand seised, and a Conveyance at the Common Law. If a Man by Feoffment to Ufes conveys Land to the Ufe of A. for Life, he may remit the Ufe to himself and the Heirs Male of his Body by the same Deed, and fo alter that, which before was a Fee Simple, and turn it into another Estate. But if A. gives Land to B. for Life, Remainder to A. and the Heirs Male of his Body, the Remainder is void, because a Man cannot give to himself. For a Man cannot convey to himself by a Conveyance at the Common Law.

Ibid. 377, 378.

11. There is a great Difference between a Conveyance at Common-Law, and a Conveyance to Ufes; at the Common-Law the Heir cannot take where the Ancestor could not; But it is otherwise in Cafe of Ufes. Per Wylde J. Vent. 373. Trin. 26 Car. 2. B. R. in Cafe of Pipus v. Mitford.


(B) How to be taken where they may operate several Ways; or where they can't take Effect as the Parties intended.

1. A Deed comprehending Deed & Concoff was pleaded as a Feoff- ment. Arg. Godsb. 128. cites 21 and 22 H. 6.

A Letter, by the Words Deed, Concoff, by Confirmation, conveyed to the Lease and his Heirs, with Letter of Attorney to make Livery, per An- derson, Ch. J. he may take it as a Feoffment, or a Confirmation; and it was held a good Feoffment. Godsb. 25. pl. 6. Trin. 28 Eliz. Lennard's Cafe.

2. Bargain
2. Bargain and Sale may be pleaded as Release or Confirmation. See D. 116. b. 172. a. pl. 71, 72. Paich. 2 & 3 P. & M. Ibrgrave v. Lee. Ibd. See the Nota in Margin, pl. 72.

3. A. and B. were Joint-Tenants of Land charged with Rent of 20l. per Ann. to the King, who in Consideration of Money &c. paid by B. by Patent granted, remitted, released and renounced to B. and his Heirs the said Rent, Habend' & Perceptiend' Reditum pred' to B. and his Heirs. B. devided this Rent to J. S. Per Dyer, the Patentee may use the Patent as he pleaseth, either as a Grant or Release, and he, having devised the Rent, has declared his Election. D. 319. b. pl. 16. Mich. 14 and 15 Eliz. Anon.

4. A. levied a Fine, and declared the Ufe to A. and his Heirs, until in, his Heirs &c. should make Default in Payment of 20l. a Year to B. at every Michaelmas, till 800l. be paid; and after such Default, until B. and his Heirs shall have received so much as shall be Arrear; and after the said Debt so paid, then to the Ufe of A. and his Heirs for ever. Afterwards A. bargains and sells the Land to J. S. and afterwards Default is made of Payment, and B. enters, and after the Money is paid. It was held by the Judges, that B. is not estopp'd, but that he shall have the Land again, notwithstanding the Indenture of Bargain and Sale. For at the Time of the Bargain and Sale, he had an Estate in Fee, determinable upon a Default of Payment, which Estate only pass'd by the Indenture of Bargain and Sale, and not the New ESTATE accord'd by the latter Limitation after the Debt paid; for that was not in Effet at the Time of the Bargain and Sale. But if the Conveyance, instead of Bargain and Sale, had been by Feoffment or Fine, it had been otherwise; for that would have carried all Ufes and Possibilities, by reason of the forcible Operation of it. Le. 33. Mich. 27 and 28 El. at Serjeant's-Inn, pl. 49 Anon.

5. Feoffment to Lease for Years in Possession is good, though it be by Deed, and he may take Livery after the Delivery of the Deed, and shall be deem'd to be in by Force of the Feoffment, although the Lease may take the Deed by way of Confirmation, and then the Livery is but Surplusage and void. Ow. 7. the third Resolution, Trin. 28 Eliz. C. B. in Cafe of Haverington, alias, Hamington v. Rider.

6. The Lord relieves and grants his Seignioriy to the Husband, who is seized of the Tenancy in Right of his Wife to him and his Heirs. The Husband dies, and his Heir disclaims the Rent upon the Lands. It was held, that it shall ensue 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 should have it. Cro. E. 163. pl. 3. Mich. 31 and 32 Eliz. C. B. Anon.

7. A. by Indenture in Consideration of Love which he bare to his Son, and for natural Affection unto him, bargained and sold, gave, granted and confirmed certain Land unto him and his Heirs. The Deed was involv'd; the Question was, Whether this Land should pass? And it was held, it should not, unless Money had been paid, or Estate were executed for the Use shall not pass. But because the Son was then in Possession, it was held to ensue by way of Confirmation. Cro. J. 127. pl. 17. Trin. 4 Jac. B. R. Osborn and Bradhaw v. Churchman.

8. A Lease made by Virtue of a Power refer'd on a Fine, in Construction S C cited of Law precedes the first Estate for Life, and all the Remainders; for Mod. 108, after 109. Arg.
after the Lease made, it is as if the Use had been limited originally to the Leesee for the said Term, and then the other Limitations in Construction of Law follow it; and this is the Reason that the usual Clause in such Indentures is, that the Conueses and their Heirs shall stand seised to the Use of such Leases &c. so that in the first Case, the Leesse derives his Estate out of the Estate which passes by the Fine of the Leesor, which he has for Life. 8 Rep. 71. Hill. 6 Jac. C. B. in Case of Whitlock.

9. In Judgement of Law, Us Res magis Valeat, Executory Devises shall precede, and the Disposition of the Leasor, till the Contingent happens, shall be subsequent, and so all shall well stand together. 3 Rep. 95. b. Trin. 7 Jac. Matthew Manning’s Case.

10. If one makes two several Deeds, one purporting an Estate in Fee, the other an Estate Tail, and they are made to one and the same Person, and he brings both the Deeds in his Hands, and makes Delivery of both Deeds with the Land; By this both Deeds shall take Effect, and by them Estate Tail, and also Fee Simple, shall pass; Per Doderidge J. who cited a Case in which it was so held. 2 Roll. R. 23. Patch. 15 Jac. B. R. in Case of Thurman v. Cooper.

11. The Husband being possess’d of a Term for 999 Years, for good and valuable Considerations in the Indentures contained, by Lease and Release, grants, bargains, sales and devises to Trustees and their Heirs, to the Use of himself and his Wife for their Lives, and the Survivor of them; Remainder to the Heirs of the Wife, and covenants that he was seised of the Fee. The Wife dying without Issue, made a Writing, in Nature of a Will, and devised it to J. S. and his Heirs. It was inferred, that nothing passed by this Settlement, for that being a Term in Gross, no Use passed to the Trustees by the 27 H. 8. that by the Lease for a Year, which was only a Bargain and Sale, no Use passed, and there was no Attornment to vest it as a Reversion, and the Release being to ensure upon it by way of Entailment of the Estate, if nothing passed by the Lease, or if that transferred no Possession, then there was no Estate for the Release to operate upon, and that the Limitation to the Heirs was void, and to a Release by her Heir at Law to J. S. and his Heirs could have no Effect, and so the Term must go to the Husband. Per Lord Cowper, though the Settlement could not operate as a Lease and Release, yet the Husband being in Possession, and the Word Grant being in the Release, it took Effect as a Grant or Assignment of his whole Interest at Common Law; and though it could not go to the Heirs of the Wife, yet he should not be admitted after to derogate from it, and therefore should vest in those in whom by Law it might. and should go to the Administrator of the Wife; for as the Husband intended to devit himself of the whole Fee, had it been a Fee, there was no Reason that it should not pass when it appeared to be a less Interest. Ch. Prec. 490. pl. 301. Hill. 1717. Marthall v. Frank.

(C) Operation of Conveyances. Whether by Inrolment, or Livery, or Fine.

But if Live-ry had preceded the Inrolment, then that had prevent-ed it palling

A Tenant in Tail, Remainder in Fee to his Sisters his Heirs at Common Law. A, made a Deed thus, I the said A have given, granted, and confirmed for a certain Piece of Money &c. without the Words Bargained and Sold; and the Habendum was to the Feoffee with Warranty against A. and his Heirs, and a Letter of Attorney was
Deeds.

407

to make Livery and Seisin; and the Deed was, To all Christian People &c. The Deed was inrolled after the making it. The Deed was indented. Four Months after the Delivery of the Deed the Attorney made Livery of Seisin. A died without Issue, the Sifters entered and the Feeoffee outled them of the Land and they brought Trespass, and held for the Plaintiff; for here is no Discontinuance; for the Conveyance is by Bargain and Sale, and not by Feoffment, because the Livery comes too late after the Inrolment, and then the Warranty shall not hurt them, and the Deed being indented and the Parties Seals to it is sufficient. 3 Le. 16. pl. 39. Mich. 14 Eliz. B. R. Anon.

2. And per Cur. the Words give for Money, Grant for Money, confirm for Money, agree for Money, Covenant for Money; if the Deed be duly inrolled, the Land passes both by the Statute of Uses and by the Statute Inrolments, as well as upon the Words Bargain and Sale, and per 3 J. the Party ought to take by Bargain and Sale, and cannot take by Way of Livery. But when all is in one Deed, and takes Effect equally together, in such Case the Grantee has Election. But in this Case the Bargain and Sale (the Deed being inrolled) doth prevent the Livery, and takes his full Effect before. 3 Le. 16. pl. 39. Mich. 14 Eliz. B. R. Anon.

3. Land was bargained and sold, Bargainee leisves a Fine of the Lands, and afterwards with Six Months the Deed is inrolled; it shall pass by the Fine, and the Conveyance shall have the Land. *For the Inrolment shall relate to the Time of the Bargain and Sale. 4 Le. 4 pl. 18. Popham's Cafe.


4. If a Bargain and Sale be of a Manor, and before Inrolment, Livery and Seisin is made of the Denefuer, and then the Deed is inrolled, the Services do not pass. 2 And. 203. pl. 19. Arg. cites D. Patch. 25 Eliz. Bracebridge's Cafe. It seems to be the Cafe of Stonely v. Bracebridge, which is in 1 Le. 5. pl. 10. Mich. 25 & 26 Eliz. B. R. and Ibid. 6. Arg. S. P.


J. S. seised in Fee, Livery and Seisin is made of the Denefuer, and then the Deed is inrolled, the Services do not pass. 2 And. 203. pl. 19. Arg. cites D. Patch. 25 Eliz. Bracebridge's Cafe.


5. J. S. seised in Fee, leisves a Fine to the Use of himself and his Heirs, until he, his Heirs, Executors &c. shall make Default in Payment of 20 l. per Annum, till 500 l. be paid, and after Default to the Use of A. his Heirs &c. till the 500 l. received of the Rents &c. and then to the Use of himself and his Heirs for ever; afterwards J. S. by Deed indented and inrolled, bargains and sells the Land to a Stranger; Default is made Payment; A. enters, and afterwards the 500 l. is paid. J. S. shall have his Land again, notwithstanding his Bargain and Sale before the Entry, for at the Time of the Bargain and Sale he had an Estate in Fee, determinable upon a Default in Payment, which accrued to him the Fine and Deed of Uses between him and A. which Estate only passed by the said Indenture of Bargain and Sale, and not the new Estate, which is accrued to him by the latter Limitation, after the Debt paid; for that new Estate was not in Effe at the Time of Bargain and Sale. But if the Conveyance by Bargain and Sale had been by Feoffment or Fine, it had been otherwise; for by such Conveyance, all Uses and Possibilities had been carried by Reason of the forcible Operation of it. Le. 3. 53. pl. 40. Mich. 27 & 28 Eliz. at Serjeant's Inn. Anon.

6. Feoffment

7. A Bargained and sold Lands to B. and his Heirs; and the Deed not enrolled. A delivers Seisin of the Land, Secundum Formam Charite indenture practicet. This is a good Feoffment. 2 And. 68. pl. 51. Denton’s Cafe.

8. A infeoff’d B. of all his Lands in S. and afterwards bargains and sells to B. all his Lands in S. and covenants to make further Assurance of all such Lands as he had bargained and sold to him, whereas by the Feoffment A. had not any Lands in S. at the Time of the Bargain and Sale, and in Debat upon Bond for Performance of Covenants, the not making further Assurance was assigned for Break. But for the Reason above, the Court held it not well assigned. But if one enfeoffs another of his Lands, and afterwards bargains and sells them by Name, and covenants to make further Assurance, he is bound to make Assurance accordingly. Cro. E. 833. pl. 3. Trin. 43. Eliz. B. R. Lane v. Hodges.

9. Bargain and Sale was made by W. R. Tenant in Tail of a Houfe in London to J. S. and delivered the Deed but not on the Land, in Order to make a Tenant to the Precipice to suffer a Common Recovery; three Days afterwards W. R. made a Feoffment to J. S. of the Missions, which was executed by Livery and Seisin; adjudged, that the Houfe did pass by the Bargain and Sale, though not enrolled (for Houses in London are out of the Statute of Inrollment) and not by the Feoffment; because it was made to the fame Perion, who had the Inheritance of the Houfe at that Time, by Virtue of the Bargain and Sale, and a Possession executed shall always hinder a Possession Executory. Yelv. 123. Hill. 5 Jac. B. R. Darby v. Bois.

10. Tenant in Tail makes a Bargain and Sale and the Deed is enrolled; by this all the Estate, which he lawfully had in him, shall be devestf’d out of him, but no more, and until Inrollment nothing doth pass, after the Inrollment a Fine is levied, which is no more than a Feoffment of Record; This Fine is but a Release of his Right with Warranty. Per Coke J. Bull. 162. Trin. 9 Jac. in Cafe Heywood v. Smith, alias Seymour’s Cafe.

(D) By
(D) Conveyances by Lease and Release. And Pleadings thereof.

1. **ENTRY &c.** the Tenant pleaded Lease for Years, and Release in Fee to his Possession, and the Opinion was, that he shall plead certainly what Day the Leifor leas'd; for it may be that it was made to commence four Years to come, and then Release made meane is not good, Quod Nota. Br. Pleadings, pl. 154. cites 32 H. 6. 8.

2. At the Common Law when an Estate did not pass by Feoffment, the Leifor or Vendor made a Lease for Years, and the Leifee actually entered, and then the Leifor granted the Reversion to another, and the Leifee attorned, and this was good. Afterwards when an Inheritance was to be granted, then also was a Lease for Years usually made, and the Leifee entered as before, and then the Leifor released to him, and this was good. But after the Statute of Uses, it became an Opinion, That if a Lease for Years was made upon a Valuable Consideration, a Release might operate upon that, without an actual Entry of the Leifee, because the Statute did execute the Lease, and raised an Use presently to the Leifee; Sir Francis Moor, Serjeant at Law, was the first who practised this Way. But because there were some Opinions that where Conveyances may ensure two Ways, the Common Law shall be prefer'd, unless it appear that the Party intended it should pass by the Statute, thereupon the usual Course was to put the Words Bargain and Sale into the Lease for a Year, to bring it within the Statute, and to allege that the Lease was made to the Intent and Purpofe that by the Statute of Uses the Leifee might be capable of a Release; but notwithstanding this, Mr. Noy was of the Opinion, that this Conveyance by Lease and Release could never be maintained, without the actual Entry of the Leifee. 2 Mod. 252. Trin. 29 Car. 2. C. B. in Cafe of Barker v. Keat.

3. North Ch. J. said, He had known it rul'd several times that a Lease and Release in the same Deed, was a good Conveyance; for Priority should be suppos'd. Freeman Rep. 231. pl. 266. Parch. 1678. in Cafe of Barker v. Keete.

---


1. **LEASE** re-demifes his whole Term to Leifor, reserving Rent; Leifor dies; Leifee brings Debt against the Guardian of the Heir of the Leifee, who receiv'd the Profits as Executur de bon Tort in the Debet and Detinett. It was argued, that here is no Term in being for any one to be Executur de bon Tort of; for this Re-demise was a complete Surrender in Law, and therefore this differs from an Assignment made by Leifee for Years of his whole Term to a Stranger; for Debt will lie on the Contract there, because an Interest pass'd to him in Reversion, and as to this Purpofe a Term is in Effect by the Contract of the Parties, and so it would be here against the first Leifor, who was Leifee upon the Re-demife; but now because of the Surrender, the Heir is intitled to enter, and the Guardian Defendant enters in his Right as Guardian, which he, being his Mother, may lawfully do; so that Debt lying only on the Contract, the Term being gone, the Plaintiff can't charge any as Executur de bon Tort in the Debet and Detinett. Had the Re-

demise
demise been upon Condition, the Surrenderor by Entry for Non-Performance might have revoked the Term, and Judgment accordingly; and told the Plaintiff, he might resort to Equity if he thought fit. 2 Mod. 174. Hill. 28 and 29 Car 2. C. B. Loyd v. Langford.

2. Demise and Re-demise are but one Conveyance in the Law, and such Conveyance is better than a Grant of a Rent-Charge, because all subsequent Grants stand on an equal Bottom with the first, and therefore if the last Grantee make the first Distress, he will be first satisfied; therefore this Conveyance was found out for the Benefit of the Perfon who is to have the Rent-Charge. Arg. N. Ch. R. 169. Mich. 1690. in Cafe of Bladen v. E. Pembroke.

(F) Conveyance Good. Though it cannot take Effect as the Parties intended.

1. Ad. Possessed of a Term, grants it to B. and his Heirs, it passes the Whole; so to B. for Life it shall pass the whole Interest, and go to his Executor. Parl. Cafes 226. in Cafe of Jermin v. V. Cort cites Pl. C. 424. and 3 Cro. 534.

2. Baron possessed of a long Term for Years, convey'd it as a Fee to Trustees, and their Heirs for the Wife and her Heirs, for a Valuable Consideration. She by Will devise the Lands to J. S. to whom her Heir at Law released. The Baron claimed it as a Chattel as Administrator to the Wife. But Lord Cowper decreed it to J. S. Ch. Prec. 480. pl. 301. Hill. 1717. Marshall v. Frank.

(G) Bargain and Sale.


1. Ad. By Indenture inrolled bargains and sells Land to B. with a Way over other Land; the Grant of the Way is not good; for nothing but the Uses paffes by the Deed, and there cannot be a Ufe of a Thing which is not in Effect, as of a Way, Common &c. which are newly created, no Ufe can arise by Bargain and Sale. Cro. J. 189, 190. pl. 13. Mich. J Jac. B. R. Bewdly v. Brooks.


If a Man bargains and sells Lands, preferably the Bargainer has actual Possession.

3. Upon a Bargain and Sale for Years of Lands, whereas the Bargainer himself is in Possession, and the Bargainee never entered; it afterwards the Bargainer makes a Grant of the Reversion (reciting this Leave) it is a good Conveyance of the Reversion, and the Estate was vested and executed in Lefsee for Years, by the Statute, though not to have Trespass.
Deeds.

pafs without Entry and actual Possession. Resolved by the Two Ch. fefton, he Justices and Ch. Baron Cro. J. 604. pl. 32. Mich. 18 Jac. in the Courte of Wards. Lutwicn v. Mitton.

he cannot bring Trespafl. Per Bridgman, Ch. J. Cart. 66. Paflch. 18 Car. 2. C. B. in Cifc of Geary v. Beacroft. But if the Words are Bargain and Sale for Consideration of Money, he is in Possession upon Execution of the Deed, to bring Trespafl, to take a Release &c. by the Statute of Ufes. Woods Infl. 262.

4. An Estate does not pafs by a Deed of Bargain and Sale, but only an Ufe. L. P. R. 207.

(H) Bargain and Sale of Land.
Good. In Respect of the Manner and to whom.

1. A Bargain and Sale cannot be to one, to the Ufe of another; for a Ufe cannot be upon a Ufe; but a Bargain and Sale may be of Land by Deed, rendering Rent, and the Reversion will be good. Poph. 81. per Popham Ch. J. cites 36 H. 8.

2. Bargain and Sale before, or after the Statute 27 H. 8. by Deed, for 200l. to B. in Fee to the Ufe of the Bargainer for Life &c. or in Fee, or to the Ufe of a Stranger, this Ufe so limited is utterly void, for the Anon. S. P. Bargain for Money implies in it a Ufe, and the Limitation of the other Ufe is meerly contrary. And. 37. pl. 96. Mich. 4 & 5 Ph. & M.

Tyrrel's Cafe.

pl. 20. S. C. in the Court of Wards, and S. P. held accordingly.

3. If after 1 R. 3. Cofly que Ufe, by Words of Bargain and Sale only, had sold the Land to a Stranger, No Possession had pailed by this to the Vendee but the Ufe only. No. 34. pl. 113. Trin. 4 Eliz. C. B. Anon.

4. A. by Deed indented and inrolled in Consideration of 100 l. paid by B. bargains and sells the Lands to B C. and D. Parties to the Indentures; in this Cafe the Lands pafies to them all; for although the valuable Consideration be expressed to be paid by one, yet it must be intended, that it was paid for them all, to the End, that the Land may pafs to them all, according to the Meaning of all the Parties, and a Consideration given by one of the Parties is fufficient to convey the Land to them all. 2 Infl. 672.

5. It must be by Writing, and not by Print or Stamp. Secondly, it must be Written in Parchment or Paper, and not upon Wood, Stone, Lead, or other Material. 2 Infl. 672.

6. If the Deed begins Hec Indentura, or, This Indenture, yet, if the Deed is not indented, it is no Indenture; but if the Deed be indented the Deed does begin This Deed made, without mentioning the Word (Indenture) yet it is a Writing within this Statute. 2 Infl. 672.

7. A Bargain and Sale for a valuable Consideration of Houfes, or Lands in London &c. by Word only is fufficient to pafs the fame; for that Houfes and Lands in any City, &c. are exempted out of the Act 27 H. 8. and at the Common Law such a Bargain and Sale by Word only raifed an Ufe. And the Statute of 27 H. 8. cap 10. does transfer the Ufe into Possession. 2 Infl. 672.

8. If a Bargain and Sale be void in Part it is void in all. Brownl. 37.

9. In
9. If in the Habendum of a Bargain and Sale of Land a Trust is declared, this does not make the Bargain and Sale void, but the Conveyance being to the Trustees by Bargain and Sale, it was wisely done to declare the Confidence and Trust. 10 Rep. 34 a. Mich. 10 Jac. B. R. Per Cur. in Sutton's Hospital's Cafe.

10. If one makes a Bargain and Sale to A. and afterwards makes a Bargain and Sale to B. of the same Land, and the Deed to B. is first enrolled, but the Deed to A. is not enrolled within Six Months, the Bargain and Sale to B. is good. But if the Deed to A. had been enrolled within the Six Months, the Deed to B. had been void. Per Hobart Ch. J. Hob. 165. pl. 194. Patch. 14 Jac. Arg.

11. A Bargain and Sale made by one who is not in Possession, nor receives the Rents, though it be by Deed enrolled in Conveyance of Money is not good, if there be no Livery thereupon. (Mich. 23 Car. 2.) But if there be Livery it passes; for the making of the Livery puts the Bargainee into Possession. So likewise if the Bargainer enters and takes Possession, and then sells and delivers the Deed upon the Land. But if the Bargainer be in Possession, or receives the Rents, then the Estate will well pass by Deed enrolled, without Livery. L. P. R. 207.

---

(I) What amounts to, or shall be said a Bargain and Sale.

1. If be in the Reversion upon a Lease for Years, grants his Reversion to his Leesee for Years, by Words of Ded, Convey, Feoff, and a Letter of Attorney is made to make Livery and Setin, the Donee cannot take by the Livery, for that the Leesee has the Reversion presently. Per Wray and Catline. 3 Le. 17. pl. 39. Mich. 14 Eliz. B. R. Anon.

2. If Lands are convey'd by the Word Ded, without any Words of Bargain and Sale, and there is a Conveyance of Money, and the Deed is Debito Modo enrolled, the Ufe will pass as well if the Words Bargain and Seal had been in the Deed, because of the Money paid. 4 Le. 110. pl. 224. 19. Eliz. B. R. Gray v. Edwards.

3. V. having a Rent Charge in Fee by Indenture, which was enrolled within six Months, gives and grants it to H. in Fee, and there was no Attornment. (Nota, in Truth the Cafe was, that he for a certain Sum of Money, gives, grants, and sells the Rent &c. But it was pleaded only, that he by Indenture Dedite & Conceive) and it was ruled without any Argument, that the Rent without Attornment passes not, being only by way of Grant, and not of Bargain and Sale, although the Deed was enrolled. Cro. E. 166. pl. 2. Hill. 32 Eliz. B. R. Taylor v. Vale.

4. A the Bargainer reciting by Indenture, that whereas J. S. was bound for him in a Recognizance and Bonds, he now, for divers good Considerations, bargained and sold, the Lands to him and his Heirs; the Deed was enrolled within six Months, but it was found that no Money was paid within the six Months. Adjudged, this was not a good Bargain and Sale, because in every Bargain and Sale there ought to be quid pro quo; but the same might be good by the Way of Covenant, if there had been apt Words, viz. a Covenant to stand teied to Ufes, tor if I bargain and sell Lands to my Son, no Ufe ariseth thereby; but it is a good Consideration to raise Ufe by Way of Covenant. Cro. E. 294. pl. 19. Patch. 37 Eliz. C. B. Ward v. Lambert.

5. A
Deeds.

5. A Demise and Grant was adjudged to amount to a Bargain and Sale, within the statute of Uses. For to make a Freehold or Inheritance pafs by Deed indented and inrolled, there need not the precise Words of Bargain and Sale, but Words tantamount are sufficient. 8 Rep. 94. Hill. 7 Jac. Fox's Cafe.

accordingly.——— If the Words of a Lease are Demise, Grant &c. the Lease is not in Poffeflion to bring Trefpaus, or take a Release to enlarge an Estate &c. till actual Entry; But if the Words are Bargain and Sell for Consideration of Money, he is in Poffeflion, upon Execution of the Deed, to bring Trefpaus, to take a Release &c. by the Statute of Uses. Wood's Inst. 262.——— So the Words Alien and Grant, in a Deed indented and inrolled, amounts to a Bargain and Sale, if it be for Money, and the Land shall pafs without any Livery and Seffion; Per Cur. 8 Rep. 94. a. in Fox's Cafe.

6. A Bargain and Sale is a real Contract upon valuable Consideration for palling of Manors, Land, Tenements or Hereditaments, by Deed indented or inrolled within six Months after the Date of it, without Livery of Seffion, or Attenment of Tenants. 2 Inst. 672.

7. Though it be good to Use, those Words mentioned in the Act of 27 H. 8. yet they are not of Necessity to be used; for whatsoever Words, upon valuable Consideration, would have raised an Use of any Lands, Tenements or Hereditaments at the Common Law, the fame do amount to a Bargain and Sale within this Statute, 2 Inst. 672.

8. As if a Man by Deed, inrolled according to this Act covanants for valuable Consideration to ftrand feised of Lands to the Use of another &c. this is in Nature of a Bargain and Sale within this Act. 2 Inst. 672.

9. As feised of certain Lands in Fee, demifed the fame to C. for Life, Remainder for Life, referring a Rent at the Feath of St. Michael, and of the Annunciation; A. by Indenture, in Consideration of $50. does demife, grant, let, and to farm let the fame Lands to B. for 99 Years, referring a Rent at the fame Feaths presently, and C. the Leafee for Life, did not attorn; and it was adjudged, that the said Demife and Grant, upon the Consideration of $50. amounted to a Bargain and Sale of the said Term. 2 Inst. 672.

10. So if a Man, for Valuable Consideration by Deed indented and inrolled, aliens or grants the Land to a Man and his Heirs &c. this is a Bargain within this Statute &c de similibus. 2 Inst. 672.

11. But inasmuch as the Intention of the Parties is the Principal Foundation of the Creation of Uses, if by any Clause in the Deed it appears, that the Intention of the Parties was to pass it in Poffeflion by the Common Law, there no Use shall be raised; and therefore if any Letter of Attorney be in the Deed, or a Covenant to make Livery, or the like, there nothing shall pafs by way of Use, but, according to the Intention of the Parties, a Poffeflion by the Common Law. 2 Inst. 672.

(K) Bargain and Sale.

Inrolment by Statute. And by Whom.

1. In Cafe of a Deed made by Baron and Feme to be inrolled, the It shall be Feme ought not to be received to make Acknowledgment, and inrolled by such Deed shall not be received in Chancery, by reason of the Cover- ture of the Feme; though otherwise in London by Guftons. And Error was brought of such Acknowledgment taken in C. B. because the Court had no power to take the Examination without a Writ, but no Judge- — The ac- know. —ment

5 N
Deeds.

shall be-ment was given. See Br. Faits inroll. pl. 3 cités 24 E. 3. 64. and Ibid. fore the Re-corder, and
an Alderman, and the Feine shall be examined, and shall bind a Fine at Common Law by the Caf-tom, and not as a Deed only; and it is without Livery of Seisin. Br. Ibid. pl. 15. cites 29 H. 8.

2. One came to inroll a Deed, and Littleton examined him if he was willing, or Not; who said, Yes. Then he examined his Age. He said, he was 26 Years old. Littleton bid him be advised; for that if it be inroll'd, he could never after say that it was not his Deed, nor that he was within in Age, nor that it was by Durefs. Br. Faits inrol. pl. 11. cites 7 E. 4. 5.

3. Bond by Baron and Feine, during Coverture, shall not be inroll'd, because it is not the Deed of the Feine. Br. Faits inrol. pl. 11. cites 7 E. 4. 5.

4. 27 H. 8. cap. 16. S. 1. No Lands or Hereditaments shall pass whereby any State of Inheritance or Freeheld shall be made, or any Ufe thereof by reason only of any Bargain and Sale, except the Bargain and Sale be made by Writing indented and inrolled in one of the King's Courts of Rec-ord at Westminster, or within the County where the Lands lie, or be-fore the Cuftos Rotulorum and two Justices of Peace and the Clerk of the Peace of the County, or two of them, whereof the Clerk of the Peace to be one; and the fame Inrolment to be made within six Months after the Date of the Writings, the Cuftos Rotulorum, or Justices of Peace and Clerk taking for the Inrolment, where the Land exceeds not the Yearly Value of 40s. 25. viz. 12d. to the Justices, and 12d. to the Clerk; and for the Inrolment of such Writing, wherein the Land comprised exceeds 40s. in Yearly Value 5s. and the Clerk of the Peace shall inroll the Deeds, and the Rolls thereof, at the End of every Year, shall deliver unto the Cuftos Rotulorum, to remain in his Cufbody amongst other Records of the Counties.

5. S. 2. This Act shall not extend to Lands within any City, Borough, or Town Corporately, wherein the Mayors, Recorders, or other Officers, have Au-thority to inroll Deeds.

6. Note by the Justices where two Jointenants were, and the one alio did all his Lands and Tenements in D. after the Statute of Inrolments of Anno 27 H. 8. cap. 16. and before the Inrolment, the other Jointenant died, so that his Moiety survived to the Vendor, and after the Vendor within the Half Year inroll'd the Deed, yet nothing pass'd but the Moiety; for the Inrolment had Relation to the Making and Delivery of the Deed; so that it shall give nothing but that which was sold by it at the Time of the Delivery of the Deed, Quod Nota. Br. Faits inrol. pl. 9. cites 6 E. 6.

7. A. feied of Land in Fee by Indenture dated 4 October for 200 L. bargains and sells in Fee. It was held, that this Deed being inroll'd 21 March next following, which was the last Day of the six Months, accounting Lunar Months, and accounting the said Day of the Date of the Indenture for none of them. And all the last intire whole Day of 4 Oct. above shall be accounted in Law the Day of the Date of the Ind-enture, and any Part of 31 March which was the last Day of the Month, shall be said Infra Sex Menses. But this was a narrow Pinch in the Cafe. D. 218. b. pl. 5. Mich. 4 and 5 Eliz. Thomas v. Popham.

8. The Statute of Inrolments does not hinder the rising of any Ufe, but only upon Bargains and Sales, which shall not execute by Bargains and Sales but by Indenture inroll'd; but all other Utes are at the Common Law, which arife on Conideration of Marriage &c. Arg. Cro. E. 345. pl. 16. Mich. 36 and 37 Eliz. in Cafe of Callard v. Callard.

9. Albeit the Indenture may be either on Parchment or Paper, yet the Inrolment must be on Parchment only; and so it is expressed in the Clause of
Deeds.

415

of Inrolment by the Clerk of the Peace, viz. that he shall sufficiently inrol and ingrofs in Parchment the same, and so much is implied when the Inrolment is in any of the King's Courts of Record at Westminster; and so it was adjudged as Mr. Plowden cited it before the Lords in Parliament Anno 25 Eliz. in the great Case between Herbert and Vernon, which I heard and observed. 2 Init. 673.

10. If an Infant bargain and sells Lands which are in the Realty by Deed indented and inrol'd, he may avoid it when he will; for the Deed was of no Effect to raife an Ufe; and this Statute is to be intended of lawful and effectual Bargains and Sales, and such as would have raifed Ufes at the Common Law, and does only restrain the Execution of them that be of no Effect, except the Deed be inrol'd. And this stands with the Reason of the Common Law, that none but effectual Deeds ought to be inrol'd; and therefore a Deed of Feoffment ought not to be inrol'd before Livery. But in Case of a Fine, the Infant must re-verte it during his Minority; for the Conufance is taken by Force of the King's Writ before a Judge, and is voidable by the Common Law.

2 Init. 673.

11. A. poffefled of a Leaf for Years, bargain and sells it; the Ufe is executed, and paffes without Inrolment; for it is not within the Statute 27 H. 8. of Inrolments; but otherwife it is where A. is feated of Land in Fee, and bargain and sells a Leaf for Years out of it; for this ought to be inrol'd. Per G. Croke, to which all the Court feem'd to agree. 2 Roll. R. 205. Mich. 19 Jac. B. R. Shortgrave v. Rone.

12. It may be inrol'd the fame Day on which it is executed. Per Doderidge J. Lat. 14. Mich. 2 Car. in an Anon. Cafe. cites Dal. 4 Eliz.

13. By the Statute of 27 H. 8. 10. of Ufes, the Estate paffes by the Contract, and the Ufe executed by the Statute; then comes the Act of Inrolment, cap. 16, of the fame Year, and enacts, that no ESTATE shall paff without Inrolment of the Deed indented, and this within six Months. The Words are, (unless it be by Deed indented and inrol'd) not (until) but (unless) and the Contract there is with the Party that has the Estate, and the Deed is appointed to be inrol'd within certain Time, but is otherwife in Cafe of Commissiofiers of Bankrupts, who have only a Power and no Estate, and there to pafs the Estate, there must be not only a Deed indented, but the fame must be inrol'd also, and in that Cafe there is no Relation; for in this Cafe no Time is mentioned within which it is to be done, fo that it might extend to 7 or 20 Years, which would be dangerous. Adjudged accordingly. 2 Jo. 197. Patch. 34 Vent. 36 c.


per tot. Cur. that Inrolment is Necessary before any Thing can pafs by Such Deed of Affignment, or Bargain and Sale from the Commissioiners.——S. P. and when it is inrol'd it vails not by the Statute of Inrolments, but by the Statute of Ufes presently. Hob. 156, in pl. 135. by the two Chief Judges, and Ch. Baron. Patch. 13 Jac. in Dimmock's Cafe, sent out of the Court of Wards.——Cro. J. 409. pl. 5. S. C. and S. P. held accordingly.


15. Where two are Parties, the Acknowledgment of one binds the other.

1 Salk. 389, in Cafe of Taylor v. Jones.

16. If a Man lives in New England, and would pafs Lands here in England, they join a meer nominal Party with him in the Deed, who acknowledges it, and it binds. 1 Salk. 389, in Cafe of Taylor v. Jones, and says, it is the Practice.

(L) Bargain
(L) Bargain and Sale.

In what Cases the Deed must be inrolled.

1. A Seized of Lands in Fee makes a Lease of Lands for Years, and after by Deed indented bargains and sells the same Lands to the Leesee and his Heirs, without any Word of Give or Grant expressed in the Deed. Per Omnes J. Nothing passes by the Deed, unless it be inrolled, for without Inrolment the Frantement does not pass, and this is no Confirmation. Mo. 34, pl. 113. Trin. 4 Eliz. C. B. Anon.

2. Rent paid to the Bargainer at the Rent-Day incurred after the Bargain and Sale is good, and the Bargainer has no remedy, because it is a Thing executed. Ow. 150. Pach. 5 Jac. in the Court of Wards, in Case of Sir Hen. Dimmock.

3. After the Statute of 27 H. 8. cap. 10. of Transferring Uses into Possession a Man by his Deed had bargained and sold for Valuable Consideration, any Lands &c. of any Estate of Inheritance, Freehold or for Years, the same had been executed by the said Act of 27 H. 8. cap. 10. Now this All of Inrolments refrains only Estates of Inheritance and Freehold; and therefore Bargains and Sales for Years, for what Number forever, are not restrained by this Act, though it be not by Deed indented nor inrolled. 2 Indl. 671.

4. A in Consideration of Blood covenants to stand seised to the Use of B. his Son and the Heirs of his Body, and in Default of such Issue, then to the Use of J. S. in Consideration of 100l. B. died without Issue, the Deed was not inrolled; Quere if the Uses can arise partly by Covenant to stand seised, and partly by Bargain and Sale, or whether it must arise wholly one Way, or wholly the other, and not by Fractions. Bridgman Ch. J. said in this Case there was a Mixt Consideration, and there needed no Inrolment. See Cart. 144. Mich. 18 Car. 2. C. B. Garnish v. Wentworth.

5. Though the Inrolment of a Bargain and Sale shall relate to the Delivery of the same Deed to avoid Moine Incumbrances, yet every Bargain and Sale, before Inrolment, is void, and can't be made good by any Relation, because the Bargainee has no Estate before Inrolment, and if so, he cannot grant any Estate. Carth. 178. Hill. 2 and 3 W. and M. in B. R. Bennet v. Gandy.

(M) Bargain and Sale.

Inrolment. At what Time; and Where.

1. The Inrolment may be in any of the King's Courts of Record at Westminister; That is, in B. R. the Chancery, the C. B. and the Exchequer. And though the Words be (at Westminister) for that at
Deeds. 417

the Time of the making of this Act these Courts were there; yet if these be adjourned into another Place, the Inrolment may be in any of these Courts; for the Inrolment is confined to the Courts, wheresoever they be holden. 2 Init. 673, 674.

2. Or else in the same County &c. before the Cairos Rotulorum, and two Justices of Peace, and the Clerk of the Peace &c. 2 Init. 674.

3. The six Months shall be accounted after the Computation of 28 A Deed Days to the Month. After the Date, and after the Day of the Date upon may be in this Act is all one; so as the Date itself is taken exclusive. And yet in the Report of Justice Dallison it is said that it was helden Anno 4 Eliz. Date, but that if it be inrolled the same Day it bears Date, it is sufficient; but that is by the fayer Way is to inrol it after the Day of Date. And yet where it reason of has a Date, and is delivered after, it shall take Effect to pass from the Intent of Bargainer from the Delivery; for then it became his Deed, and not from and nor by the Date; but the Deed must be inrolled within six Months after the the Letter Date. 2 Init. 674.

4. If the Deed indented has no Date, then the Day of the Delivery. If Bargainer is the Day of the Date of that Deed, and may be inrolled within six Months after the Delivery. And when the Deed is inrolled within the good Godb. six Months, then it passes from the Delivery of the Deed. And albeit 270, pl. 376. after the Delivery and Acknowledgement, either the Bargainer or the Hill; 15 Jac. Bargainer dies before Inrolment, yet the Land passes by this Act; for the Words thereof be, No Manors, Lands, Tenements, or Hereditaments. v. Danch. shall pass of any Estate of Inheritance of Freehold, except the Deed be inrolled. So as by the Common Law and the Statute of 27 H. 8. of 229, in pl. Utes, it shall have paied. And by the Words of this Statute when the Deed is inrolled it passes ab initio. 2 Init. 674.

of either Bargainer or Bargainee before Inrolment, that it is good if it be inrolled within the fix Months.

(N) Bargain and Sale. How the Estate is, and what the Bargainee may do before Inrolment.

1. If the Bargainee of Land after the Bargain and Sale, and before Inrolmet bargains and sells the same by Deed indented and inrolled, Bargainee is sold to another; and after the first Deed is inrolled within the Six Months, bargains and sells over, and after the first Deed is inrolled, the second Bargain and Sale is void. Arg. Roll R. 425. cites it to have been so adjudg'd. 3 Jac. in Bellingham's Cafe.

Arg. Ow. 149, cites to Eliz. Mockett's Cafe; and 3 Jac. Bellingham v. Alsop. - Cro J. 52. Per three J. against two, such second Bargain and Sale may be good. Bellingham v. Alsop. - Nov. 166 § C. that it is not good. - S. C. cited Hob. 156. pl. 183, and S. P. agreed by the two Ch. Jullissie and Ch. Baron, that the Bargainee cannot bargain and sell to another before his own Deed is inrolled. - Bargainee cannot grant over before Inrolment. Carth. Hill 2 & 3 W. & M. B.R. Bennet v. Gandy.

2. If there be a Bargainee of a Reversion and the Tenant makes Wiff, the Bargainee shall not have Wait unless the Deed be inrolled before the Wait committed. Arg. Ow. 149, 3 Jac.

5 O 3. Until
3. Until Inrolment the Land remains in Bargainor, for the Bargain and Sale on the Statute 27 H. 8. 16. is but Indebitum & non Perfeftum, for the Indenture of Bargain and Sale gives nothing to the Bargainee till the Deed is inrolled according to the Statute. Arg. 3 Bull. 216. Mich. 14 Jac.

4. The Bargainor, and not the Bargainee, shall have Transfer, or Assign before Inrolment. Arg. 5 Bull. 216. Mich. 14 Jac.

5. Bargainee may suffer a Recovery before Inrolment, and this is warranted by the Common Practice; Vent. 361. Hill 33 & 34 Car. 2. B. R. in Cafe of Perry v. Bowes.


1. A Man gave in Tail, the Remainder to the King; the Remainder shall not pass without Inrolment, and by the Inrolment it shall pass a Principio, As Remainder to the Right Heirs of W. N. who is alive, and after dies, and so see Relation. Br. Relation, pl. 20. cites 1 H. 7, 31.

2. Where a Man sells his Land by Deed indented to one, and after he sells it by another Indenture to another, and the last Deed is first enrolled and then the first Deed is inrolled within the half Year, there the first Vendee shall have the Land; for it has Relation to make it the Deed of the Vendor, and to pass the Land from the Delivery of the Deed; for the Statute is that Frank-tenement, nor Ufe thereof shall not pass, nor change from one to another by Bargain and Sale only, unless it be by Deed indented and inrolled within the half Year; therefore if by Deed indented and inrolled within the half Year it shall pass, as the Ufe might pass at the Common Law by the Sale of Land, which was immediately upon the Sale. Br. Fails enroll. pl. 9. cites 6 E. 6 Per severa Juflices.

3. 5 Eliz. cap. 26. 8. 1. All Inrolments of such Writings indented, as are mentioned in the Statute of 27 H. cap. 16. of Lands &c. in the Counties of Lancaster, of Chetfield, and the Bishoprick of Durham, being enrolled within Six Months after the Date thereof, Coiz, tho's in Lancashire, in the Chancery at Lancaster, or before the Juflices of Afsi there; tho's in Cheshire, in the Exchequer at Chester, or before the Juflices of Afsi there; and tho's in the Bishoprick, in the Chancery at Durham, or before the Juflices of Afsi there shall be as good in Law, as if they were inrolled in any of the Courts at Westminster.

4. S. 2. This Act shall not extend to Lands in any City, or Town Corporat, wherein the Mayor or other Officer has Authority to inrol Deeds.

5. A Bargain and Sale to K. Edward the 6th in Exchange, and acknowledged before a Master in Chancery, and also before the Chancellor of the Augmentations, and delivered in the Court and there put in a Deed but not enrolled till several Years after. It was held that such Inrolment would not vefl any Interest in the Queen. Hill. 19 Eliz. D. 355. a. pl. 37.

But See in Margin ibid. where it is said, that the Judges denied they gave any such Opinion as reported by Dyer; and that Patch 30 Eliz. in Sceau, this Cafe of Dyer was denied to be Law; and Nanwood denied his Opinion to be as reported there; For that after the Acknowledgment of the Deed, the Delivery of it to be inrolled makes it a Record —- but ibid. 35 Eliz. it was agreed by all the Juflices in England, that such Inrolment was good, and Judgment given accordingly, in the Cafe of Dean and Chapter of Windsor v. Middleton —— And says, that the same was debated and agreed in the Parliament Hous; and that it was resolved by all the Juflices, that the Acknowledgment of the Deed before the Master in Chancery, and the Delivery of it in the Augmentation Court, does not make it a sufficient Record before Inrolment to vefl the Interest in the King, but when it is now inrolled with other Date, it vefls the Interest in the King with Relation. For all Men are eftopp'd to say, it is not Inrolled according to the Date, and cites to this Purpose Pl. C. 234. in the Cafe of Fairford v. Grettin.

6. Inrol-
6. Inrolment after Livery shall not have Relation to the Date of the Deed, because now it takes Effect by the Livery which was before the Inrolment. Arg. Goldsb. 18. Patch. 28 Eliz. says it has been so adjudged. 

7. If a Man makes a Leaf for Life rendering Rent, and then the Rent be Leffer for bargains and sells the Reversion, and before the Inrolment the Rent is behind, and the Bargainee demands the Rent which was not paid and then the Deed is inrolled, yet he cannot enter for the Forfeiture. Ow. 69. Trin. 42 Eliz. Arg. said to have been so adjudged.

8. S. was feified of certain Lands in Fee, and acknowledged a Recognition to T. whose Executrix brought a Scire Facias upon the Recognition bearing Date the 9th of November, Anno 41 Eliz. against S. and alleged him to be feified of the said Lands in Dominico suo ut de Feo do the Day of the Scire Facias brought, which was traversed by the other Party. And the Truth of the Cafe being by long pleading disclosed to the Court, was this; S. on the 9th of November before the Recognition acknowledged, by Deed indented for Money had bargained and sold the said Land to another, and the Deed was inrolled 20 Novem. following. The Question was, whether S. was, upon the whole Matter, feified in Fee the 9th Day of November, the Deed not being inrolled till the 20th of the said Month. And it was adjudged Una Voci, that S. was not feified in Fee of the Land the 9th of November, for that when the Deed was inrolled, the Bargainee was in Judgment of Law feified of that Land from the Delivery of the Deed. And it was resolved, that neither the Death of the Bargainor, nor of the Bargainee before Inrolment, shall hinder the passing of the Eftate. 2 Inf. 674. cites Trin. 42 Eliz. C. B. Mallory v. Jennings.

9. A Bargainor, and B. Bargainee, before Inrolment they both grant a Rent Charge by Deed to C. and after the Indenture is inrolled; some have said, that this Charge is avoided, for, say they, it was the Grant of A. and by the Inrolment it hath Relation to the Delivery, which (say they) shall avoid the Grant notwithstanding the Confirmation of the other, which had nothing in the Land at that Time. But the Grant is good, and after the Inrolment by the Operation of the Statute, it shall be the Grant of B. and the Confirmation of A. But if the Deed had not been inrolled, it had been the Grant of A. and the Confirmation of B. And so Quacunque Via data the Grant is good. Co. Litt. 147 b.

10. If a Man for a valuable Consideration by Deed indented bargains and sells Lands to another and his Heirs, and before the Deed be inrolled he leaves a Fine, or makes a Forfeiture to Bargainee and his Heirs of the same Lands, and after, and within the Six Months the Deed be inrolled, the Bargainee shall be in by the Fine or Forfeiture, and not by the Bargain and Sale, both by Reason of this Word (only &c.) and that the Eftate by the Common Law vested shall be preferred. 2 Inf. 671, 672.

11. A Release of a Stranger to the Bargainee before Inrolment is good. So if a Devisor as it holds nor by Relation between the Parties by Fiction of Law, but in Point of Eftate, as well to them, as to Strangers also. 2 Inf. 675.

12. A
Deeds.

12. A Recovery suffered against the Bargainee before Incumbrance, (the Deed indented being after, within the Six Months, inrolled) is good, for that the Bargainee was Tenant of the Freehold in Judgment of Law at the Time of the Recovery. And non refert when the Deed indented is acknowledged, so it be inrolled within the Six Months. And all this was afterwards affirmed for good Law by the Court of C. B. Trin., 3 Jac. Regis upon a special Verdict given upon an Ejecution firme between Lellingham v. Alcopp. 2 Inst. 675.

13. Bargain and Sale, the 1st of May and Bargainee covenants to grant over all his Land, which he had the 1st of May, and after the Deed is inrolled he is not bound to grant this Land, which he has by the Bargain and Sale. Roll. R. 425. Mich. 14 Jac. B. R. cites Sir John Curt's Cafe.

14. A bargain and sold Land to B. by Deed indented bearing Date 11th June 1 Jac. afterwards 12th June the same Year Common was granted to B. for all Manner of Cattle commonly upon the Land; 17th June the Deed of Bargain and Sale was inrolled, and it was adjudged a good Grant of the Common; and the Inrolment shall have Relation as to that, though for Collateral Things it shall not have Relation. Godb. 270. pl. 377. Mich. 15 Jac. B. R. Ludlow v. Stacy.

15. A Leave for Years made by Bargainee before Incumbrance is void, and Incumbrance after shall not make it good. Cru. C. 119. pl. 2. Patch. 4 Car. C. B. in Cafe of Iham v. Morrice.

(P) Bargain and Sale. Pleadings &c.

3 Le. 175. pl. 227. Holland v. Bonis. S. C. in Deed, in toto tandem is taken to be. Verbs; only that the Word (cited) is there mingled (relation upon), the one printed (relation, as to) — Le. 183. pl. 237. Holland v. Franklin. Hill 31. Eliz. in R. the S. C. argued — Sav. 41. Holland v. Dawn. S. C. the Point was if against the Time of Incumbrance a Deed in Chancery Averment cannot be taken, that the Deed was first delivered at a Time after the Incumbrance, and adjudged against the Defendant; and it seemed to the Court, that a Stranger shall not be stopped by the Incumbrance, but the Parties shall be bound by it; for though the Incumbrance is reputed to be of Record, yet it is not a Record created by any Judicial Act; for it is not like a Recognizance; and in all Recognizances Nulli videlicet Record is a Plea. The Scoring and Delivery is the Force of such Deeds, and not the Incumbrance; but in Cases of Recognizances, there they take their Force and Effect by the Incumbrance and the Cognizance only, and not by the Delivery; and therefore he may well enough be received to deny the Time of the Delivery, which is only a Matter of Fact; but the Consequence before a Judge is Matter of Record, and there-whereby the Debtor is creat. But Obligations, Indentures, and Deeds of Feoffment, take their Force by the Delivery, and consequently is a perfect Act before the Consequence is taken and before any Incumbrance, and so the Suit to the Answer was adjudged good, and Judgment was given for the Plaintiff. — Ov. 158. Howard's Cafe, S. C. says that in 't ruth it was delivered, acknowledged, and inrolled afterwards, and that it was held that the Bargainee (but femo be miemprinted for [Leftlee]) was without Remedy at the Common Law; For he cannot plead that it was acknowledged or delivered after the Date of the Day acknowledging it, and that if such a Plea should be admitted contrary to the Record, it would shake most of the Affurances in England.
Deeds.

2. If a Man bargains and sells his Land in Fee, and by these Words only, and makes Liberty, yet the Bargainee may plead, that the Indenture was not involved. For a Bargain includes a Grant. Per Curtam. No. 66. Olmond and his Wife.

3. If a Man pleads a Bargain and Sale, in which no Consideration of Money is expressed, there it must be averred, that it was for Money, and the Words (for divers Considerations,) shall not be intended for Money without Avurement, but if the Deed express a Consideration, the Sum of Money, though the Certainty of the Sum be not expressed, it is good enough; For against this express Mention in the Deed, no Avurement, nor Evidence shall be admitted; Resolved per rot. Cur. clearly, and Judgment accordingly. Mo. 569. pl. 777. Trin. 41 Eliz. Fisher v. Pulley.

4. Albeit no valuable Consideration be expressed in the Indenture, yet if any were given, the same may be averred, and the Land does fulfill. 2 Inst. 672.

5. If a Deed be sworn in Court, or in the custody of the Court, and by Mistake the Seal is broken off, the Court shall roll the Deed in Court for the Avail of the Party. 2 Inst. 676.

6. In Declaration setting forth an Indenture of Bargain and Sale involved, it is not enough to say, that it was involved "utrata formiss statv
ti," but it must likewise have in what Court, that the Court may know whether it be duly involved, and the Party may know where to search for it. Cro. J. 291. pl. 9. Nich. 9 Nich. 9 Jac. B. R. Warley v. Perkin.

7. An Indenture was pleaded to be made before T. a Justice of Peace of the Well Riding in Yorkshire, and W. Clerk of the Peace there; it was held clearly, that though the Words of the Statute are (before the Justice of Peace of the County) yet it will serve before a Justice of Peace of the Well-Riding, if the Lands lie there. Hob. 128. pl. 163. Hill. 13 Jac. Perkin v. Perkin.

8. A Lease for Years, rendering Rent half yearly, and afterwards bargain and sold the Recession by Deed bearing Date before the Rent-Day, but the Rent-Day incurred before the Deed was involved; In Debt for this Rent the Bargainee declared upon this Deed, and averred, that it was involved within six Months, according to the Statute; Exception was taken to the Declaration, because the Plaintiff did not shew whether the Deed was involved before or after the Rent-Day; but the Court agreed, that it is well enough it being pleaded to be according to the Statute; and if it was not involved before the Rent was due, that ought to be shewn by the Defendant. Lat. 157. Trin. 2 Car. Hall v. Devye.

9. In Debt for Rent the Plaintiff declared on a Lease for Years made by Stranger, who by a certain Indenture Debita modo involutis in Chancellor, sold the Recession to the Plaintiff; Upon nil Debet pleaded, the Plaintiff had a Verdict; but the judgment was arrested, because he did not set forth that the Indenture was within Six Months, nor Secundum Formam Statuti; and though it was said (Debito modo involutus) that would not help, because it might be so at Common-Law, and Verdict could not make the Declaration good for Want of a Convenient Certainty for the Foundation; and therefore on great Deliberation adjudged against the Plaintiff. All. 19. Trin. 23 Car. B. R. King v. Somerland.

10. A Bargain and Sale pleaded of Rent, but without setting forth any Consideration, is ill, but upon Illus of Non concilium, the Want of feting S. C. ad-
setting it fort is cured by Verdict; for it shall be intended to be proved on the Trial; and Judgment accordingly. Lev. 308, 309. Hill. 22 & 23 Car. 2. B. R. Mannington v. Guilms.

Mannington, S. C. mentions the Deed as ducly inrolled, but it being pleaded by Way of Bargain and Sale, and that by Virtue thereof and of the Statute for transferring of Ufes into Possession he was held, and yet alleges no Confederation, no not so much as Proquidam Pecunie fimma, it is not good.

11. Where a Man in pleading sets forth his Title by a Conveyance in which are the Words give, grant, release, confirm, bargain, sell &c. he must expres to which of them he will use it; Per Twidien. Vent. 109. Hill. 22 & 23 Car. 2. B. R. in a Note at the End of the Cafe.

12. 10 Anne cap. 18. § 3. Where in any Declaration, Assayry, Bur, or other Pleading whatsoever, an Indenture of Bargain and Sale enrolled shall be pleaded, with a Prodert hic in Curia, the Person so pleading it, may produce a Copy of the Inrolled of the Bargain and Sale; which being examined with the Inrolled and signed with the proper Officer, and proved on Oath to be a true Copy, shall be of the same Effect, as if the original Indenture of Bargain and Sale were produced.

Provided that this All shall not give any Benefit in Pleading or deriving a Title to any Rent, which hath not been paid, or levied within Twenty Years next before the Time of such Pleading or deriving a Title.

For more of Deeds in General, See Facts, Inrolled, And other Proper Titles.

Deer.

(A) How far protected.

1. If Deer are killed in an Inclosure which is No Park, the Owner shall recover Damages. Kelw. 209, 21 H. 8.

And if a Deer go out of the King's Forest into a Man's Land, though the Man ought, or used to Pale against the Forest, yet neither the Forester, or any elfe can take them out, for now the King has no Property in them, because they are wild Beasts. Per Brian. Kelw. 6. Mich. 14 H. 7. Owner of Land may Hunt such Forest Deer, and if the Deer fly to the Forest, and the Hounds pursuite them, he ought to call in his Dogs, and so he may justify. Per Doderidge J. Poph. 162. Patch. 2 Car. B. R.

(A) Deer-
Deer-Stealing.

(A) Proceedings against Deer-Stealers, and Exceptions to Convictions.

1. THE Method of Prosecution on 3 and 4 W. and M. 10. per Holt 12 Mod.
Ch. 1. is thus, viz. The Person convicted, it present, may be 314, 316.
detained in Custody two Days, in which Time the Justice ought, by W 3. S. G.
Warrants &c. at his Discretion to make what Inquiry he can, to as to The King
inform and satisfy himself whether the Penalty may be levied by Di-
and difpers; And if he finds there is nothing to disCrete, then he must make a
Record thereof by way of Adjuration, viz. that it appearing to him
that the Party hath not any Goods by which the Penalty may be levied by
Dispers, therefore in Purfiance of that Statute be doth award him to Prison
(at the End of two Days, but not before.) If the Person is absent when
convicted, then the Justice must make a Warrant to diSer in; and if there is Nothing
on which a Dispers may be made, then after two Days
he must make a Record thereof ut supra, and then iflue out his War-
Chandler.

2. Information on the Statute of Deer-Stealing. Exception was taken 2 Show.
to a Witness, because he was Party and President. The Exception was
overruled. Comb. 35. Mich. 2 Jac. 2 B. R. The King v. Drake. Exception
taken, and
to this the Court shook a little, and Ed. Herbert declared it unreasonable that it should be so, but
here was a particular Law which made the Offence, and creates a Particular Form of Proceeding;
And per Wythens, J. the two Justices of Peace are sole Judges of the Credibility of the Witnes's;
and so all the Court delivered their Opinions Seriatim & Separatim, that it was well enough; Et sig
non Allocatur.

3. On a Conviction of Deer-Stealing, Exception was taken, 1st, That
two Justices, upon a single Oath, have convicted a Man for breaking and
entring a Park, and courting a Deer, and imposing 20 L Penalty for it;
whereas there is no Statute against breaking the Park; and the Offence
by 13 Car. 2. cap. 10. is Courting &c. and the Penalty they have im-
plored is pro Offenda pred. generally; But the Exception was disfallow'd,
and it was answer'd, that the Offence was Hunting the Deer. 2 Show.

4. 2dly, They have not said, that we did come without their Consent,
but only that we did break the Park without their Consent; now we might
break the Park without their Consent, and have their Consent to Hunt-
ing notwithstanding; These Words without Consent, can never go to the
Whole; for if it is not placed in the Beginning, nor in the End, but
only in the first Clause, describing the Manner how, just before the Ad-
verb Illicit; then comes the other Clause, & unam Damam illicitae
fugaverunt; But this Exception was disfallow'd; for the Abiique Con-
fenru shall go to the Whole. 2 Show. 490 S. C.

5. 3dly, That here are several Penalties for one Courting; whereas the
Deal of the Statute, by the Dividend of the Penalty, seems to be only
only to give a Satisfaction for the Deer spoiled; But this Exception was disallowed; for by the Words of the Statute, every several Person forfeits 20l. a-piece. 2 Show. 490. King v. Drake.

6. The Defendant was indicted at a Quarter-Sessions, for breaking a Park and taking away a Deed De Bonis & Catalis &c. 1st Exception. Because one cannot have such a Property of a Deer in a Park, as De Bonis & Catalis. 2d. It is Extitit Presentatum, for extitit. 3d. That the Price is Quadrangulum. But it was answered by the Court. 1st, The Offence is, Killing the Deer &c. which is well laid, and De bonis & catalis, is Surplusage. 2dly, Extitit, or Extitit, is good both Ways. 3dly, It is good without any Price. Cites Co. Ent. 362. And the Indictment was confirmed. Comb. 69. Mich. 3 Jac. 2. B. R. The King v. Foot.

7. Three were convicted of Deer-Stealing on the late Act, one on his Confession, and two on Evidence, and the Judgment faith, that all Three were Convict de Separabimus offensibus by Confession and Testimonium, and held good Redendo ingulis, ingulis, but for another Exception (Venus in Parcalum) the Conviction was quashed. Cumb. 233. Hill. 5 W. & M. in B. R. The King v. Mofely.

8. The Defendant was convicted (upon a Conviction for Deer-Stealing) for a Year, and til such Time as he should be set in the Pillory; whereas the Act says, for a Year only, and therefore he was discharged. Comb. 305. Mich. 6 W. and M. in B. R. Clark's Café.

9. Upon a Conviction for Deer stealing; Northey took Exception, that whereas by the Statute the Offender ought to be prosecuted within Twelve Months, which must be understood Lunar Months, Here the Offence was 14 Augusti 7 W. 3. the Conviction 13 Augusti 8 W. 3. Indeed it is said, Ipso P. debito modo procurer ininfra 12 Menses post Officium. The Court seemed to allow of the Exception. Holt said, here is a special Jurisdiction newly set up, and not known in Law before, and therefore the Act must be strictly pursued, and must appear to be so, they need not set forth every Step of their Proceedings, but so much that it may appear to be debito modo in Respect of Time &c. for perhaps they might confine十二 Months to be all one with a Year. Comb. 439. Trin. 9 W. B. R. The King v. Peckham.

10. On a Warrant directed to all Constables, it is the same as if directed to each particular Constable, and every one is bound to execute it in his particular Jurisdiction; but if one Constable returns, that he has no Discrefs in the County at large, it is ill. 12 Mod. 314. Mich. 11 W. 3. King v. Chaloner.

11. F. was convicted in a summary Way on the Statute of Deer-Stealing; to which it was objected, 1st, That it did not appear on the Record that the Defendant had any Notice to come and make his Defence, Et Citatio est de Jure Naturali, that none be convicted without an Oppor.
Deer-Stealing.

Opportunity of making Defence; Quod Car* concepit. But this being by Persons by Law intrusted with the Administration of Justice, we will intend they have proceeded regularly and legally, if the contrary appear not. 3dly, Not shewed to be the Offence described by the Statute; for it is not said that Deer were usually kept there for Ten Years before. Per Cur. If that be notoriously known, it need not be averred, 3dly, It is said, we killed the Deer without the Consent of the Owner on such a Day; so they tie up the Want of Consent to the Day, and that is ill, for the Consent might have been given the Day before to kill the Deer the next Day, and then it would be a lawful killing, though in strictness without the Owner’s Consent on that Day. But per Cur. a Consent to Day to kill a Deer any Day for a Month is a Consent for every Day till it be executed or revoked, which cannot be till Notice. Lastly, It was moved to say the affirming the Conviction, because there was an Information for Perjury against the Witnesses on whose Oath it was, till that were tried. But nevertheless it was confirmed. 12 Mod. 453.

{Patch. 13 W. 3. The King v. Ford.}

12. Exceptions to a Conviction of Deer-stealing, where the Fact was laid to be done in Foresta ultitata for keeping Deer, and that the Defendant killed a Deer without the Consent of the Keeper; and insinched that Eistat might be meant of a long Time before, and there might be the Consent of the Ranger; fed non allocatur, for the Leave of the Ranger is the Leave of the Keeper, and (insect) speaks the present Time, as well as Time past. 1 Salk. 377. pl. 22. Mich. 1 Ann. B. R. The King v. Smith.

13. In a Conviction of Deer-Stealing, it was agreed. 1st, That the Fact in the Conviction need not be laid Contro Poenam; for mere Form, or Form or Formality is not required in these nor any other Summary Proceedings, Et per Northev Attorney General, This is not the King’s Prosecution, (he can have no Fine) but the Prosecution of the Party, and this is the Memorandum of what the Justice had done in that Matter. 1 Salk. 378. pl. 23. Mich. 1 Ann. B. R. The King v. Chandler.

14. Secondly, That inter such a Day, and such a Day be killed three Deer is good; for if a Day certain were alleged, the Informer is not tied up to that; now in these Cases he is confined to give Evidence of a killing within these Days, so that it is more certain and better for the Defendant. 1 Salk. 378. in S. C.

15. Thirdly, That an unlawful killing is sufficient, and it need not be for a Hunting, nor how the Deer was killed. 1 Salk. 378. in S. C.

16. Fourthly, That ido confederatum est quod consiitns est, without Et quod forsisfactit, is sufficient; for the Statute gives that in consequence, and the Judicial Part ends at the Conviction; the rest is only Consequence and Execution. 1 Salk. 378. in S. C.

17. Fifthly, That if the Owner of the Park dies before Execution, and the Conviction is affirmed here; his Executors shall have a Levari Facias (if fed videtur, it must be upon Affidavit, and then the Matter suggested on the Roll) to may the Churchwardens without Suggestion or Scire Facias, and to may the King. 1 Salk. 378. in S. C.

18. A Conviction against the Defendant for killing Deer was remov- ed into this Court by Certiorari, and was quashed, because it was laid only, that he killed Deer in Quodam Loco, where they had been usually kept, and did not lay included. 2 Ed. Raym. Rep. 791. Tin. 1 Ann. B. R. The Queen v. Moore.

19. It was moved to quash a Conviction of Deer-Stealing on 3 & 4 A Conviction-W. & M. taken by a Justice who entered into a Glover’s House, and finding a Deer-Skin, asked him how he came by it; the Glover said, he bought it of J. S. who not giving a good Account of himself was convicted. And

425
Deer-Stealing.

1. Caftody, without saying, that the Skins were found in his House, is not sufficient, but was quafh'd; For his Conviction must be taken strictly, MS. Rep. Trin 7 Ann. Jennings's Cafe.

20. Upon the Statute of 3 & 4 W. & M. the Question was, Whether Justices of Peace might convict the Offender in his Absence, upon his Default to appear after being duly summoned; and after several Arguments in several Terms, the Court held that they might, and the Conviction adjudged good. 10 Mod. 248. Trin. 13 Ann. and 341. Mich. 3 Geo. and ibid. 378. Hill. 3 Geo. B. R. The Queen v. Simpson.

21. An Information granted against Two Justices for Convicting a Person of Deer-Stealing, because he had in his Caftody Four Buck-Skins drizzled into Leather, and made a Third Person give Bond for Payment of the Fines; for Buck-Skins drizzled into Leather are not within the Statue any more than a Man's having a pair of Buff Breeches. They must be freth raw Skins. Patch. 2 Geo. B. R. The King v. Sadler.

22. Conviction upon Deer-Stealing quashed, because it did not appear when the Deer was killed, and the Prosecution must be within a Year. MS. Caiies P. 2 Geo. B. R. The King v. Dell.

23. The Defendant was convicted upon the 3 and 4 W. and M. cap. 10. for killing Deer in the Bishop of Winchester's Park; Exception was taken to the Conviction, 11th, Because it set forth that f. S. took an Oath to say the Truth concerning the Premises & sic juravit & sotit deposit & juravit, without saying, Supra Sacramentum, simul prædictum, which it was said was necessary to make what he swore, to appear to be Sworn in pursuance of the Oath, which he took to declare the Truth upon the Premises, for it might be, that what he did Depose was in pursuance of an Oath extrajudicially administered, and so the Uncertainty would prevent his being Convicted of Perjury if his Oath was false, but disallowed per tot. Cap. and it was held, that the Words in the Conviction did sufficiently shew, that what he deposed was in Pursuance of the Oath aforesaid, and as certain as the Entry of all Verdicts. 2dly, Because it said, that the Defendant profsumptuum ei debito modo falsi appeared, but did not set forth the Day of the Summons, nor that it was to answer to that Information, both which it was said were necessary; the first that the Court might Judge, whether the Defendant had a reasonable Time to prepare for his Defence; the second, that the Defendant might know what to answer unto; but the Court over-ruled the Exception, and held, that Debito Modo Summonic' was sufficient, and that it was the Common Form, and that in this Case, there was no Need to mention any Summons, because the Defendant appeared, and that it had been often so adjudged, and that his Appearance and Defence made the other Part of the Exception wholly Groundless. 3dly, Because it said, that Causa Information' praet. & Information praed. &a Evidentia per præd. f. S' (who was the Witness) audit' & plane Intellect', whereby it appeared, that the Causa of the Information &c. was heard and understood by the Witnesses, but did not appear that it was heard &c. by the Defendant; but the Court disallowed this Exception, and held, that per præd. J. S. referred to Evident' & not to Audit' &c. and that Audit' & Intellect' extended to every one that was present and concerned, and that the subsequent Words, viz. that the Defendant was spoke to by the Justice, if he had any Thing to say why he should not be convict'd of the Premisses, showed that he was sufficiently acquainted with the Matter. N. B. Eyre said, that it would have been better,
Deer-Stealing.

better, if instead of per præd. J. S. it had been per præd. the Defendant audit' &c. MS. Rep. Trin. 4 Geo. B. R. The King v. Coldham.

24. The Defendants were severally convicted of Deer-Stealing, upon the 3 & 4 W. 3, cap. 10. Two Exceptions were taken to both the Convictions; 1st Because the Person, upon whose Testimonies the Defendants were convicted, appeared to be of the same Parish where the Offences were committed, and so might be indicted to Part of the Penalty, and consequently not indifferent and credible Witnesses. The second, Because the Judgment was only, that the Defendants should pay 30l. whereas it ought to have been for 30l. or imprisonment &c. but both were over-ruled per tot. Cur. the first, because the Justice of Peace hath averred them to be credible Witnesses, and it doth not appear that they were of the Poor of the Parish. The second, because the Judgment for 30l. is to be first given, and that this Exception hath been before over-ruled. MS. Rep. Mich. 5 Geo. B. R. The King v. Wilford and Savage.

25. Record of Conviction for Deer-Stealing, was enter'd without any Judgment, as Ideo forisfaciat, and therefore quashed. Gibb. 124. pl. 9. Hill. 3 Geo. 2. B. R. The King v. Hawkes.

(B) Execution. How.

1. On a Conviction for Deer-Stealing, the Execution shall be by And if the Sheriff return Nulla Bona, then a Captus against the Body. See 13 Car. 2. cap. 10. ibid.

2. It was agreed per totam Curiam, that Deer-Stealer was not to be imprisoned, but upon Failure of Payment and Distress. 12 Mod. 315. in Case of King v. Chisnoler.

3. If all the Sum were levied to a small Matter, yet the Party for Default thereof shall undergo the Corporal Punishment too, viz. the Pillory, and a Year's Imprisonment; per tot. Cur. 12 Mod. 330. Mich. 11 W. 3. in Case of the King v. Speed.

4. F. and the other Defendants were convicted of Deer-Stealing by Justices of Peace, according to the late Act of Parliament; and the Convictions, being removed into B. R. by Certiorari, were there confirmed. And after the Confirmation, and before Execution awarded, the Person, who was as well the Informer as the Owner of the Deer, died; and his Wife being his Administratrix, suggested his Death upon the Roll, and that she was Administratrix, and upon that fact a Levari Facias upon the said Convictions, confirmed as aforesaid, to levy the Penalties; which were levied accordingly by the Sheriff, and distributed as the Statute directs. It was moved, that this Execution should be set aside as irregularly obtained, 1st, Because a Levari Facias does not lie, 2dly, Because the Execution ought not to have been sued by the Administratrix without a Scire Facias &c. But as to the first Objection, the whole Court held, that a Levari Facias well lay. But they held, that this Execution was irregular; because in no Case where the Parties to the Judgment are changed ought Execution to be sued by any other without a Scire Facias. Whereupon Restitution was granted of the Money levied. 2 Lord Raym. Rep. 768. Patch. 1 Ann. B. R. The Queen v. Ford, & al'.

5. The
Deer-Stealing.

5. The Defendant was convicted of Deer-Stealing, and a Warrant was awarded to the Constable to levy &c. He accordingly discharge, and then came a Certiorari to remove the Conviction; and after the Record removed, the Constable sold the Goods, but would not part with the Money, or return the Warrant. And the Court held, if, That the Convictible might well proceed in the Execution after the Certiorari, because it was begun before, and the Certiorari no more stays it than a Writ of Error of a Judgment in C. B. stays the executing of a Fieri Facias already begun to be executed. And in that Case, if the Sheriff returns want of Buyers, C. B. may award a Venditiones exponas, notwithstanding the Writ of Error pending, 2dly, That this Court had no Power over the Warrant, being granted before the Certiorari illused, and therefore they refused to make a Rule upon the Constable to return it; comparing it to the Case of a Writ of Execution delivered &c. before a Writ of Error. But they said, the Justices might fine him, if he would not return his Warrant, or deliver over the Money to the Prosecutor. 1 Salk. 147. pl. 12. Mich. 1 Ann. B. R. The Queen v. Nath.

6. One was convicted for Deer-Stealing, and a Warrant was directed to the Defendant to levy the Forfeiture by Ditties, by Virtue whereof he discharged Cattle, and sold them, before he paid the Money to the Prosecutor, he was informed it was dangerous for him to sell the Cattle; whereupon he restored the Money and the Cattle, and now the Prosecutor moved for a Mandamus, to compel him to pay the Money to him; but it was denied, though inflected for him, that he could not charge the Defendant in an Action, without giving the Warrant in Evidence, which he could not do, because it was in the Custody of the Defendant. It was held, that a Copy of the Warrant was good Evidence. 6 Mod. 83. Mich. 2 Ann. B. R. Morley v. Staker.

7. If the Constable leaves the Penalty, but does not return the Warrant, he is indigible. 11 Mod. 53. pl. 50. Pasch. 4 Ann. B. R. The Queen v. Wiatt.

8. If a Man is under three Convictions, and his Goods are sufficient to answer two of them, the Money shall be paid, and he shall stand in the Pillory for the third; per Holt Ch. J. 11 Mod. 54. Pasch. 4 Ann. B. R. in Case of the Queen v. Wiatt.

9. But on one Conviction, if he wants but 2s. in the Whole, the Justices cannot take it, but he must be imprisoned, and stand in the Pillory for it afterwards; per Holt Ch. J. in the S. C.

(C) Aiders and Abetters.
Who are.

UPON a Conviction of Deer-Stealing by Justices of Peace on the late Statute, the Question was, Whether one not present, but procuring, advising, and abetting, by lending his Gun, Dog &c. before the Fact, should be laid to be aiding and abetting therein? Holt Ch. J. inclined, 11, That he was not within the Words, not being actually present at the Fact, because the Statute is to be construed strictly, for that it takes away the Privilege of a better Trial viz. per Pares. 2dly, Because
Default. Appearance.

Because it adds a farther Penalty to what was an Offence before; He said, there might be an Aiding and Abetting before the Fact, viz. by Advice &c. or in the Fact, by being present; or after the Fact, by abetting the Party, says, See Dy. 187. Co. Ent. 56. The other Judges held, that Aiders in the Fact would be Principals, and then Aiders and Abettors would mean nothing, Quod Holt Negavit, saying, All that are present may be said to be Principals as to an Action of Trespass, but not as to the Penalty of this Statute; And this Diversity is apparent in other Cases, for one aiding and abetting upon the Statute of Stabbing, shall have his Clergy; whereas a Principal shall not, so in the Case where two went to break a Houfe, one broke it and enter'd, the other stood upon the Ladder and received the Goods; he that stood upon the Ladder shall have his Clergy, and the other shall not, he being a Principal.


2. Rolle and others were convicted of Deer-Stealing upon 3 and 4 W. and M. cap 10, and that Whittler was illece & injuste auxilius & affitens praefato Rolle, &. in illece & injuste venatione & occasione Deer praed. viz. persuadendo & incitando praefat. Rolle to kill the same Deer, and landing Digs to hunt and kill, and Horses to carry away the said Deer, contra Formam Statutis; and whether this was an Aiding and Assisting within the Statute, was the Question. Powell, Powys and Guild, Justices, held that it was; but Holt Ch. J. contra held, That the Conviction ought to be quashed, for that where a Statute makes that Felony, which was not so at Common Law, Aiders and Abettors, according to the Notion of the Common Law, are within the Statute, though not expressed, but where an Offence at Common Law is only made more penal, Aiders and Abettors are not to be understood of such as aid before and after the Fact, but such as are present only; These were only Acediaries at Common Law, and are not within the Act; and cites 1 Cro. 478. Dal. 11. 22. Poistea in the same Cafe, Holt Ch. J. said, he held the same Divinity with this farther, that this is to be understood when an Offence at Common Law is made more penal by a particular Description of the Fact, and not under any General Denomination of the Crime; so this Statute had enacted these Penalties on them, as Trespassers, as this done by the Statute de Malefactibus in Parcis. 2 Salk. 542. pl. 2. Hill. 1 Ann. B. R. The Queen v. Whittler.

For more of Deer-Stealing in General, See the several Statutes relating thereto.

Default. Appearance.

(A) Appearance. What shall be said an Appearance.

1. If the Tenant or Defendant be in Court, yet if he says that he will not appear, this is not any Appearance. * 8 Hy. 6. 7. b. 8. 7 Hy. 6. 38 b. 8 Hy. 6. 8. adjudged. cites S. C.— Br. Counsel, pl. 26. cites S. C.— Firth. Default, pl. 2. cites S. C.— Br. Default, pl. 26. cites S. C.

* Formed by J S against H. C. who were at Ilue, and H. C. was Proctor in B. R. and the Demandant 8 R.
Default.

mandant pray'd at the Day of the Jury, that he might be brought in, that he might not take the Ad-
vantage of the Imprimisment, because he did not appear, and it was granted him, and he was brought in
by the Marshal in Ward, and was demanded, and would not appear, and was brought to the Bar,
and Baib, demanded of him if he would appear, who said No; Baib said, Then you shall not have Ad-
vantage to avoid your Default, and Petut Case was accorded, and the Demandant pray'd, that all be
entered, and fair rates, and pray'd upon his Presence, that the issue be taken, which was denied; for
it's Presence is no Appearance, and by his Non-appearance, he shall be intended another Perfon; and
after he was sent back to Prison Br. Default. pl. 33. cites 7 H. 6. 38.—Br. Saver Default, pl.
21. cites S. C. and 8 H. 6. 16 and that the Court lent him back, and recorded his Presence, but
not his Appearance; But if he had been Prisoner to the same Court, his Appearance had been
recorded; For if the Presence of the Prisoner is always of Record in that Court to which he is Prisoner, con-
trol it in another Court; but says, it seems reasonable, that if he takes Advantage of the Imprimisment,
the other shall flaw, that he was present at the Bar, and might have appear'd, and would not. And
Ibid. cites the Opinion of Martin, in Affile § 6. 8. at the End, that by this Special Entry made for the
Prisoner, that he was present, and might have appear'd, and would not, that he shall not ex-
cute his Default after by Imprimisment. —Firth. Default. pl. 1. cites S. C.

Br. Default, pl. 6. cites S. C. Firth. Default pl. 2. cites S. C. The Pre-

Pre-

officer

Court, and of

Sheriff upon

his

Book of

Keb. 497. pl. 27. S. C.

* Sid. 154. 156. pl. 8. Poch. 15 Car. 2. B. R. The King v. Paget. S. P. and that he shall not ap-
pear by Attorney, nor shall my Process issue against him, but that upon reading the Information (as
the Cafe there was) against him, the Court will give Judgment against him; And Twilten. J. cited
the Book of h H. 6. 38. b. Where such Proceedings seem to be against an Attorney of C. B. —

6. But it is otherwise of him that is a Prisoner in another Court.
8 H. 6. 16.

7. If a Man comes in by Cepi Corpus to two Writs, and to three
other Writs he hath Day by Distress, he ought to answer to thefe to
which he comes in by Cepi. 12 H. 6. 2.

8. He soought also to answer to thefe in which he hath Day by Di-
tress, for he is in Ward by the Return of Cepi Corpus. 12 H. 6. 2.

9. But if upon the Capias the Sheriff had returned Non est inven-
tus, and he had come in gratis, he might have answered to the Writ
out of which the Capias issued, and not have answered to the ref.
16 H. 6. 2.

10. In an Action of Debt against Baron and Feme for the Recusancy
of the Feme, the Baron cannot appear by Supercedes only, for
either both ought to appear, or both be out-lawed. Hobert's Reports
24. Lovelum's Case, resolved per Curiam.

11. If an Action be brought against an Attorney de B. R. and his
wife, and he declares against the Baron, being an Attorney of the
Court, in proper Person, and against the Feme in Custodia Pest-
tenial, upon Bail filed for the Feme only, this is not good; be-
cause Bail cannot be filed only for the Feme, without Bail for the
husband, and the Baron cannot have his Privilege in this Case when
the Action is brought against him and his Wife. Ten. 1670. between
North-
Default.

Northwain and Elly, adjudged, this being moved in Arrest of Judgment, Mich. 23 Cat. B. adjudged accordingly for an Attorney in Bank, between Smith and Smith.

12. In Mordancettor in Middlesex the Tenant was effoign'd and after made Default by which Bacon awarded a Refummons against the Tenant where the Demandant intended to have the Affign by Default, which the Tenant made after the Effoign; But nota, that Effoign is not any Appearance, and so Nota Bene. Br. Mordancettor, pl. 18. cites 8 All. 13.

13. In Effoign the Lord of D. demanded Conrassiance, and the Tenant said, that it is out of his Franchise, and so to Issue; and when the Effoign came ready to pass upon this Issue, the Tenant was demanded and appeared by Bailiff, and no Appearance by Award; for it is against a Stranger to the Affign; for he may appear and plead against the Plaintiff in the Affign by Bailiff, but not against a Stranger as here, and so a good Appearance against the Plaintiff, and Default against the Lord, Quod Nota. Br. Default. pl. 102. cites 28. All. 13.

14. By Process quod reddat, the Tenant as to Parcel pleaded Non-tenure and so to Iliue &c. and to the rust wretched, and Proces's sued till the Sequestrum, which was not returned; and so to the Parcel the Tenant calls EFFOIGN. Thinn said, the Effoign does not lie; for he ought to appear upon the Iliue; for the Dilrels is returned against the Jury, and be cannot appear and be effoign'd all at one and the same Day upon one entire Original, which is not by several Process, by which he made Default. Br. Default, pl. 100. cites 11 H. 4. 8.

15. A Man cannot appear as Tenant and make Default as Tenant all at one and the same Day; but he may appear as Tenant and make Default as Voicue all at one and the same Day, as it is said elsewhere; for he may eloign as Vouchee. Br. Default, pl. 93. cites H. 4. 82.

16. When Effoign is fcall for the Tenant by one Roll, and Appearance entered in another Roll at the same Day, the Appearance shall defeat the Effoign, Quod Nota. Br. Default, pl. 43. cites H. 6. 6.

17. A Man may appear and be by Protection all at one and the same Day in diversif Respects, Quod Nota Bene. Br. Default, pl. 40. cites Br. Protection. 52. cites 21 H. 6. 41. S. C.

18. In Action Personal if the Defendant does not appear at the Return of the Original the Entry of the Filizer is, Et quod vi rumor obtulit &c. 40. Die against the Defendant, Et ipso non venit inquis capitane &c. and so at the Alias Cape, and other Process, and yet by the best Opinion this is no Appearance of the Plaintiff to conclude him to deny but that this is his Suits. Br. Default, pl. 50. cites 27 H. 6. 23.

19. When the Defendant in Action Personal makes Default at the Original by which it is entered, Quod vi rumor obtulit &c. 40. Die against the Defendant, and bas Copias, and so at the second Appearance, this is not properly an Appearance of the Plaintiff to the Suit, and then without Appearance it cannot be said his Suit. Br. Eltpropel, pl. 105. cites 37 H. 6.

20. The Abbots of C. brought Affis against F. S. and had nisi Prius against him the same Day in Action Personal, and the Defendant appeared in Person to the Affis and cast Pretension, Quia morat in the Nisi Prius, and did not appear to it and yet good; for in diversif Actions a Man may be nonjudit and may appear all at one and the same Day. Br. Default pl. 66. cites 5 E. 4. 3.

21. Where upon any Process the Defendant does appear, although the Day of Appearance be not lawful, yet he shall be put to answer. 2. I.e. 4. in Savacks Cafe. cites 9 E. 4. 18. where there are many Cafes to the same Purpose.

22. The
22. The Abbot of St. A. entered into Account in the Exchequer by Bailiff, and pending the Account L. brought Bill of Debt of 20l. against him upon Obligation, and prayed that he should answer. Catesby said, he has not yet appeared, Urswick Ch. B. said, he has appeared by Bailiff, which is his own Appearance, and during his Account he ought to answer. Quod Nota. Br. Bille, pl. 12. cites 15 E. 4 25.

23. In Debt the Appearance of the Defendant was recorded for all the Term, except pro Juratoribus; Brooke says, it seems that this shall not serve in another Action purchased by another. Br. Default, pl. 103. cites 21 E. 4 37.

24. A. is bound in a Recognizance to appear in C. B. at such a Day, and A. is there that Day; it was moved, that though his Appearance be not recorded, yet he shall have Averment, and it shall be tried per Pais, but this was denied by Brynkell, and Coningsby J. but it was said, that it A. will aver, that he himself was imprisoned, he shall have a Writ directed to the Gaoler to know the Truth thereof, Keilw. 180. pl. 1. Trin. 8 H. 8. B. R. Anon.

25. Debt against Husband and Wife Executrix of her former Husband, the Husband appeared upon the Exempt, and would have put in a Superfedeas for himself alone, without Appearance for the Wife, which at first the Justices thought he might, but upon a Precedent thereupon, 13 Eliz. in one Summer's Case, who would have put in such Superfedeas for him self alone, but was not suffered to do so, but was compelled to put in Appearance, Attorney and Superfedeas for his Wife also; whereupon all the Justices held now accordingly; otherwise an Exempt Denovo shall issue out against him. Cro. E. 118. pl. 4. Mich. 30 & 31 Eliz. B. R. Billford v. Fox.

26. W. A. Prisoner in the Fleet, was brought to C. B. Bar by Habas Corpus, to the Intent to have him appear to an Original in Debt brought against him; and being demanded by Goldsborough Clerk, whether he were the same Party against whom the Original was brought, confessed it, but denied to appear to the Action; the whole Court said, this was no Appearance, whereby he was remanded to the Fleet; And the Plaintiff proceeded to the Outlawry against him. Goldsb. 118. Hill. 43 Eliz. Afcough's Case.


28. In an Action of Debt upon a Bond, being entred into to the Sheriff, for the Appearance of another here in Court, at a Day certain, at which Day...
Default. Appearance.

Day the Party did not appear, but two Days after he did appear; whereupon it being moved for the Party to have this Appearance now allowed of, and so to have a Discharge of his Bond, the Court held clearly, that this Appearance, though after the Day, is to be allowed for a good Appearance, and to be a sufficient Discharge of the Bond, for that the whole Term is but as one Day in Law; and so was allowed of by the Court, and the Appearance was recorded, and the Bond discharged. 2 Bull. 255. Mich. 12 Jac. Daly v. Fryar.

29. Appearance in the King's Bench, is, the Defendant's filing either of Common Bail or special Bail, if the Action be by Bill; but if it be by Original, then the Appearance must be with the Philazer of the County where the Arrest was. But if the Appearance be in the Common Pleas, then it must be entered with the Philazer there; But if it be by Bill (which in some few Cases it is) it must then be entered with the Protonotary. L. P. R. 83.

30. There can be no Appearance in B. R. but either by special or Common Bail; for it is the putting in of Bail, that attaches the Cause in Court. 7 May, 1650. B. S. L. P. R. 84.


32. It is a general Rule that where a Defendant appears voluntarily it shall be of no Force, unlefs the Plaintiff fences out his Latitat, or Bill of Middleex, and within a Fortnight. Cumb. 244. Pach. 6 W. & M. in B. R. Anon.

33. The Filing a Writ of Habeas Corpus is not an Appearance, but a Procedendo may go notwithstanding; but if Bail, either Common or Special, be put in, then no Procedendo to go. Per Holt Ch. J. 12 Mod. 215. Mich. 10 W. 4. B. R. Anon.

34. An Appearance to an Indictment differs from Appearance in a Civil Action, where if there is once an Appearance, it is an Appearance to the End of the End of the Suit; but an Appearance to an Indictment, is of Course but of that Term, and then if it be not prosecuted, then the Defendant is out of Court the next Term, and may be outlawed, and the Outlawry is a Conviction while it stands unreversed. 12 Mod. 448. Pach. 13 W. 3. B. R. The King v. Fositer.

35. If before a Writ be taken out, an Attorney promises to appear to it, and after it is taken out and sworued to him he ought to appear, but it is no actual Appearance, but if such Undertaking be after Writ taken out it is an Appearance. Per Holt Ch. J. 6. Mod. 42. Mich. 2 Ann. B. R. Anon.

36. The Defendant, being a Justice of Peace, was found Guilty upon an Information for maliciously convicting and imprisoning the Prosector for telling Ale without a Licence, without ever summoning him, or admitting him to make any Defence; and it was moved that till the Court should give Judgment upon him, his personal Appearance might be dispensed with, on a Cleric in Court undertaking to appear for him, and this was infufed upon as a Motion of Course, which was never denied in any Cause, where the Punishment will be only pecuniary, and not corporal. But this was opposed, unlefs the Defendant would make an Affidavit of Sicknes, or other reasonable Excuse; the Court were clearly of the same Opinion, and said it was by no Means a Motion of Course, but merely of Favour and Discretionary; that the Court has a Right to demand his Appearance, and whatever the Punishment may happen to be, his Publick and Personal Attendance in Court is Part of it; it was moved again at another Day, but denied very strongly by the whole Court. Afterwards the Defendant appeared in Perfon, and was fined 300l. Pach. 11 Geo. 2 B. R. The King v. Harwood.
(A. 2) Where, upon Coming into Court for another Purpofe, one shall be obliged to Anfwer in the Caufe in Court.

1. E who came by Capias Ultagatum, was compell'd to anfwer to an othcr's Exigent, which was at another Suit, at the Prayer of the Plaintiff in the other Suit. Br. Refponder, pl. 61. cites 38 E. 3. 25.

2. One was Prayer in Aid as a Man who was within Age, and was made to come to be view'd, and was adjudged of full Age, and was not awarded to anfwer, but Procefs was made againft him to anfwer, becaufe he did not come to anfwer, but to be view'd; and contra in the Time of R. 2. and that he who is within Age, and Prayer in Aid, and awarded of full Age, shall anfwer prefently. Br. Refponder. pl. 8. cites 2 H. 4. 6.


(B) What shall be faid an Appearance.
In Cui fodia Marefchallii.

Cro. E. 605. 1. Therc shall never be a Declaration againft a Man in Cui- sodia Marefchallii, but where there is a Committitur made of the Party, or Bail put in for him. Pat. 40 Cl. B. R. in Holland's Cafe, by Dopham.

Cro. E. 605. 2. Upon an Appeal, if the Sheriff returns Cepi Corpus, the Plaintiff cannot declare againft the Defendant in Custodia Marefchallii, without declaring againft him upon the Original, upon which the Cepi Corpus is returned; for ther is no Reafon to commit the Defendant to Prison, when he is ready to anfwer the Writ upon which he was taken. Patch. 40 Cl. B. R. Holland's Cafe adjudged.

3. A Declaration was delivered to one in Custodia Marefchallii, who im- mediately removed himself to the Fleet. All the Juftices held, that the Party may proceed againft him upon the Declaration; and after Judgment they'd that he may remove him into B. R. again by Habecas Corpus. Sid. 100. pl. 3. Hill. 14 and 15 Car. 2. B. R. a Nota.

(B. 2) Notice

1. A Question arose upon the late Act of Parliament, touching Notice to be given upon the Copy of Proces, Whether the Day to be expressed in the Notice must be the Effoin-Day, or the Appearance-Day? In this Case Notice was given for the Appearance-Day, which the Court held to be good. This Motion was after Judgment; but the Merits not having been tried, a Rule was made to shew Caule why the Judgment should not be set aside upon Payment of Costs, but no Cause was ever shewn. Notes in C. B. 202. Pach. 6 G. 2. Allop v. Bagott.

2. A Question did arise, Whether the Day to be inserted in the English Notice to appear upon Proces pursuant to the late Act of Parliament, should be the Effoin-Day of the Return, or the Quarto die post. Court held, that it must be the Effoin-Day, which in this Court is the Return-Day, and not the Quarto die post, which is only a Day of Grace. Notes in C. B. 204. Trin. 6. and 7 Geo. 2. Allop v. Nichols; cites Dyer 269. pl. 21. Co. Litt. 135. Finch 427. Carth. 172 Sid. 229. Salk. 626. pl. 8. Harvey and Broad, pl. 9. Davis and Salter.

3. Upon hearing Counsel on both Sides, and after taking Time to consider, the Court were of Opinion, that a Notice to appear on Monday January 21, as the Return-Day of Olisib Hill was bad; it ought to have been to appear on the 20th, which, although it be Sunday, is the true Day of the Return. Notes in C. B. 206. Hill. 7 G. 2. Green v. Watkins.

(C) Who are demandable.

1. If an Attorney of the Common-Pleas sues an Action there, he is not to be demanded, because he is supposed always present at the Court. 20 P. 6. 44. b.

2. An Information was exhibited against the Caflos Brevium of B. R. for Abuses and Misdemeanors committed in his Office. He at first refused to appear in Person, but offered to appear by Attorney; but the Court were of Opinion, that he cannot appear by Attorney, in as much as he was an Officer of the Court, and presumed to be always present. Sid. 134. Pach. 15 Car. 2. B. R. The King v. Paget.

(D) At what Time the Parties are demandable.

1. In an Action of Debt, after a Demurrer upon the Plea in Bar, the Plaintiff is demandable. 20 P. 6. 44. b.

After Demurrer joined, if the Court gives a Day over, the Plaintiff or Demandant is demandable at that Day, and therefore may be Nonuit. Co. Litt. 159. b. (c) and in Marg. cites 9 H. 5. 5. and 8 R. 2. Nonuit 34.

2. It
Default. Appearance.

2. If the Bishop certifies a Man to be a Battard or Mulier, he is not demandable, but Judgment shall be given. 25 H. 6. 44. b.

3. Where the Second Dehence is not served, the Defendant shall not compel the Plaintiff to count against him, though he has Day by the Roll. Br. Jours, pl. 25. cit. 21 E. 3. 43.

4. In Forenoon the Tenant may appear at the first Day, and may abate this Writ, and a New Writ may be brought bearing Date nearer between the first Day and the fourth Day, and for this it shall not abate. Br. Jours, pl. 33. cit. 24 E. 3. 24.


6. In Debt against Executors, they were at first in the Court, and the Court rose and were going to their Houses after the Inquest charged and sued together, and after they were warned that the Inquest was ready to give their Verdict, by which they came back and would not demand the Plaintiff, because the Court was riven; but took their Verdict in Eafe of the Jury, so that they might take Meat and Drink and go to Bed, who found for the Defendant, and the Justices charged them to remain together at their Eafe, and to come back the next Day, when the Court is sitting, and give their Verdict again, Quod Nota, and then the Plaintiff shall be demanded, and may be nonsuit. Br. Verdict pl. 9. cit. 2 H. 4. 21. 22.

7. In Forenoon the Demandant is demandable the first Day, and if he does not come, and no Effoign be caid for him, the Default shall be recorded the first Day, and Judgment shall be given upon this the fourth Day after. Br. Default, pl. 23. cit. 12 H. 4. per Hank.

8. But the Tenant has no Occasion to appear before the fourth Day, and the Entry is Obuulit de quarto Die &c. Ibid.


10. Contra in Writ of Right, as appears elsewhere. Ibid.

11. In Affo, if Day is given to the Parties by Adjournment to Westminster 15 Pafch, the Parties shall not be demanded till the 4th Day. Br. Demand, pl. 12. cit. 1 H. 6. 4.

12. But where Day is given Die Lunae, or Die Martis &c. they shall be demanded the very Day, quasi Nota. Ibid.

13. Where a Man impares to no Day certain, there his Appearance is of Record at every Day all the Term, so that he cannot be nonsuit in this Term; and so fee that there is no Diversity where he impares the same Day, whether he impares to No Day certain, and whether he impares to any Day certain, be it in this Term, or in another Term; for where any Day certain is given, he is demandable, contra ubi no Day certain is given. Br. Departure in Defpite, pl. 1. 3 H. 6. 14.

14. In Writ of Right the Party is demandable at the first Day, and Effoign lies at the first Day, therefore the Sheriff cannot serve the Writ after it; but the Fourth Day is for Appearance, and this by the Curtsey of the Law; Per Priort; but the Entry is Quod querens obuulit &c. 40 Die against the Defendant, Et iple non Venit. Br. Jours, pl. 7. cit. 33 H. 6. 42.

15. And per Lakon, he who is bound to appear, his Appearance shall not be recorded nor accepted till the Fourth Day &c. Ibid.

16. Andita Querela upon a Release made after Judgment in Trespass, and Vo. Fa. ifficted against him who released, and the Sheriff did not return the
Default. Appearance.

the Writ, and the Defendant prayed that the Plaintiff be demanded, Ere non allocatur; because the Writ is not returned hereunto notwithstanding he has Day in Court. Br. Jours, pl. 51. cites 6 E. 4. 9.

17. At the Grand Cape, or Petit Cape returned, the Tenant is demandable. Per rot. Cur. and because he was not demanded Tenant he brought Writ of Error thereof upon the Recovery by Default. Br. Dem. pl. pl. 11. cites 21 H. 7. 31.

18. At Common Law upon every Continuance, or Day given over before Judgment, the Plaintiff might have been nonfuited, and therefore before the Stat. 2 H. 4. [Cap. 7.] after Verdict given, if the Court gave a Day to be advised, the Plaintiff was demandable at that Day, and therefore might have been nonfuited which is now remedied by the Statute. Co. Litt. 139. b.

19. The Difference as to the Demand is thus, (viz.) that the Defendant or Tenant is not demandable, but upon the Quarto Die Poft, but the Plaintiff may be demanded Primo Die Placiti, and for Non-Appearance may be Nonfuited. Per Holt Ch. J. Cart. 173, Hill. 2 & 3 W. & M. in B. R. in Cafe of Clobery v. The Bishop of Exon.

20. Where Appearance of Bail is not put in according to the Paper Aff in Eight Days we must examine the Matter in Court and make a Record and give Judgment; It is a Question, whether Bail must be filed within Eight Days after the Writ returned, or after it is returnable; Per Holt Comb. 326. Trin. 7 W. 3. B. R. Smith v. Butler and Us.


(D. 2) Plaintiff Demandable.
In what Cases.

1. A Man was out-laws'd by Name of J.S. Husbandman, and came by Cap- tias Ulatagatum, and said, that at the Day of the Writ purchas'd be was Hoffer, and not Husbandman, by which Scire Facias illud against the Plaintiff, who came and maintain'd the Writ, and they were at Issue, and per Cur the Plaintiff is not demandable; for his Suit is determin'd by the Out-lawry, and he cannot be nonfuited, nor can he declare upon the Original; Contra in Scire Facias upon Charter of Par- don after Out-lawry; for there the Original is reviv'd, and he may de- clare, and the other shall answer, and there the Plaintiff may recover, or be barr'd, as the Issue is found. Br. Demand, pl. 55. cites 21 H.

6. 50.

against him, then the Award shall be, that the Plaintiff take nothing by his Writ.

2. In Debt, they were at Issue upon Specialty non of Felatum, and Jurry charged, and upon this the Defendant confess'd the Debt, and showed Matter in Conscience of Damages; by which the Inquest was charged upon the Damages and Costs, and came back; and therefore at this Day the Plaintiff shall not be demanded; for he shall not be nonfuited; for because he has confessed the Issue, therefore the Jury is now only an Inquest of Office, at which there shall not be any Party demanded. Br. Jours, pl. 55. cites 16 E. 4. 1.

5 T

(E) To
(E) To what Appearance.

[At what Time the Parties may appear and plead, in Respect of the Action.]

1. In Replevin, if the Process continues till a Pluries issues out of Chantry, and the Sheriff thenceupon returns in Bank, that the Defendant claims Property, though by this Writ no Day is expressly given to the Parties, but to the Sheriff only, to excuse his Contempt for not serving the Process before, yet upon the Return of this Writ, the Parties may appear and plead, sic et alibi, the Plaintiff may decline, and the Defendant plead thereto; and this will not be erroneous, for there is no other Writ to be sued after this Writ, and therefore if the Parties cannot plead thereto, they would be at great Disadvantage. Trin. 38 El. 3 R. between Gawen and Ludlow, adjudged. Nure. D. 8 El. 246. 67.

2. So if this Case, if the Pluries be returned Tres Michaelis, and nothing is done in Term, nor till Easter after, yet at this Term the Parties may appear and plead if they will. Trin. 38 El. 3 R. between Gawen and Ludlow, adjudged.

(E 2.) Appearance. Aided by it; What. Defects in Mfine Process &c.

1. Writ in Suffolk, the Process was continued in Essex, and because it was well continued by the Record, and now the Defendant is ready in Court, the Process was awarded good. Br. Discourteus de Process, pl. 15. cites 38 E. 3. 20.

2. In a bate Court the Summons was st a quo sit coram Solicitoribus and in the Roll this Word (coram) was wanting, and the Tenant appeared and pleaded, and lost, and for this Cause brought of False Judgment, Et non allocutur; for when he appears by the Summons he shall not take Advantage to say he was not well summoned. Br. Summons, pl. 22. cites 46. E. 3. 30.

3. So if he be esigned; for all this affirms the Summons. Ibid.

4. Executors sued Execution of Damages recovered by their Tenant, the Defendant alleged Acquittance of the Tenant, and Writ issued against the Executors to answer to it returnable Ox. Hill. and the Sheriff returned that he was sworn them, and they did not come, by which the Defendant went quit. Br. Peremptory, pl. 64. cites 47 E. 3. 24.

4. If a Man comes by one Writ, where he ought to come by another, yet he shall answer. Br. Responder, pl. 12. cites 12 H. 4. Per Hanc.

6. Where Impedist against a Patron and Incumbent, who appeared at the Dissrefs, and said, that the Pone is not served against the Incumbent, and prayed new Pone, Et non Allocutus, but were awarded to answer because they appear'd; and so it seems that a Miscontinuance of Process is not material where the Parties appear, so that Judgment is upon their Pleas, or at Appearance, and not upon their Default. But otherwise it seems of Dif-

Br. Process pl. 47 cites S. C.
H. 5. 3. and says that it seems Br. Ibid. pl. 1. which cites 3 H. 6.3.
7. Default after Imparivance in Action Real or Personal on the Part of
the Defendant, Tenant, or Voucher, is peremptory, and in the one Case
the Plaintiff shall recover his Debt and Damages, and in the other, the
Demandant shall recover Scipin of the Land, without Petit Cape being
H. 16. 17.
8. Scire Facias out of a Fine was returned Tarde, and the Plaintiff
appears; where it is used to bring other Scire Facias returnable 15 Mich. which was not a Com-
mon Day, but too late; and per Moile and Chocke, when the Party
appears this is no matter. Br. Jours, pl. 36. cites 9 E. 4. 18.
9. But, the Return, yet, if he has only 11 Days, if he appears it is good, and he shall be compelled to an-
swer; and so it was by Award; QuodNota. Ibid.
Where ill Procesfs is awarded, and the Tenant appears, he shall be compell'd to answer, per Need-
10. And per Danby and others, upon ill Day awarded, and he appears, he shall answer. Ibid.
11. Note, per Moile, if the Procesfs be miscontinued, yet if the Party
appears he shall answer. Br. Responder, pl. 47. cites 9 E. 4. 18.
12. And in Affife if the Tenant be not attached Fifteen Days before the
Day of Affife he shall not answer. Ibid.
13. And in other Actions, if there are not Fifteen Days between the
Telle of the Writ and the Day of the Return, the Defendant shall not
be compelled to answer. Per Chocke. Br. Responder, pl. 47. cites
9 E. 4. 18.
14. But in those Cases it seems, that he ought to plead this Exception.
Ibid.
15. And per Needham, if Disprocesfs issues by Pone, or Capias, where it
should be Horius Capias, and the Party appears, he shall be compelled to
16. But if he has Day, which he ought not to have by the Law, he shall
not be compelled to answer; Note the Diversity. Ibid.
17. Miscontinuance of Procesfs (as where one Procesfs is awarded for
another, or mis-retumed) may well be aided by Appearance of the Par-
ties; But Discontinuance in Appeal of Murder is not. Cro. J. 283. pl. 4.
18. The Error assigned in a Judgment in Allumpit was, that the De-
fendant was sued by the Name of Sir Francis Fortrefcue, Knight of the
Bath only, when he was both Knight of the Bath and Baronet; but be-
cause he appeared to that Name and pleaded, the Judgment was affir-
Markham.
19. Where Judgment is given by Default upon a Procesfs, and there was
no Appearance, the Procesfs ought to be according to Law. But where
it is given Verdict or Default after the Party has appeared and pleaded, there
a Miscontinuance will not hurt at the Common Law; for the Defen-
dant slipped his Advantage when he appeared and pleaded. Jenk. 57.
pl. 5.
20. At this Day, if Judgment be given by Default, a Discontinuance,
or Miscontinuance before appearance is not aided, but such Judgment is re-
verifiable. A Miscontinuance is, where the Continuance is made by un-
due Procesfs; a Discontinuance is, where no Continuance is made at all.
Jenk. 57. pl. 5.
21. Wrong Procesfs, as a Summons instead of a Scire Facias, or a
In Falfe Im-
capital instead of a Venire Facias, is cured by Appearance for upon De-
Fendant's Appearance, the Procesfs is at an End. Jenk. 57. pl. 5.
22. A Suit commenced against the Plaintiff in an Inferior Court. Plaintiff demurred, because it was
not shewn that a Summons was issued fift, and Inferior Courts can award no Capias, but on a Sum-
mons first return'd. Per Hale Ch. J. A Suit in the Procesfs is aided by Appearance &c. yet falls

Default. Appearance.
default. appearance.

fault: imprisonment lies here on it, and the officer cannot justify here as upon process out of the courts of wethamster. vent. 230. trin. 24 car. 2. b. r. Reid v. wilmot.

appearance aids error in process where a capias issues without an attachment in an inferior court. 2 Soldier. raym. rep. 1344. mich. 2 geo. 2. bleakston v. bles.

cro. j. 211.

20. default was brought for 40 l. at the pluries capias, an entry was made upon the roll of the process, quod queri obtruit se in placto debiti 40 l. at the exigner, the defendant appears and conffesses the action; the plaintiff has judgment upon it. the said appearance takes away all discontinuance and bad process before it; and the said words 40 l. in the obtruit se, is superfluous. judgment affirmed in error. jenkin. 341. pl. 99.

21. it was affirmed by keeling j. that the law is, and hath been adjudged, that ill addition, or no addition, is cured by the appearance of the party. sid. 247. pl. 11. patch. 17 car. 2. b. r. in cafe of the king v. warren.

22. though one do appear in court upon the return of the writ, issued forth against him, yet he doth not admit the writ to be good by such his appearance; for he cannot have ofer of the writ until the party hath declared against him (hill. 22 car. 1. b. r.) for he is arrested upon a warrant made by the sheriff upon the receipt of the writ, and doth not see the writ. and the law will not preclude any person to admit a thing, which he knows not what it is, and may be prejudicial to him to admit it. l. p. r. 83.

23. if one appear by a name, which is not in truth his right name, and thereupon the plaintiff declares against him by that name, he shall be stopped, after to say that he is not right name (20 oct. 1560. b. s.) for he shall not be suffered to take advantage of his own wrong to prejudice another thereby. l. p. r. 85.

24. where the first process in an inferior court is a capias, (which ought not to be,) it is falsified by an appearance. lott. 954. because the defendant hath by his appearance admitted the process by which he is brought into court to be legal. l. p. r. 85.

cro. j. 108.

25. error in exeter court. the error alligned was, that there was no summons; and for that cited 2 cro. 108. which was said to be the fame cafe with this. but, per curiam, it was held to be well enough; for by appearance all defaults before are falsed, though it be in an inferior court; and so wylde said, it had of late been constantly ruled, contrary to 2 cro. 108. freem. rep. 468. pl. 642. trin. 1678. wheeler v. 

ld. raym. rep. 20. s. c. & s. p. accordingly.

26. exception was taken to a return, because it was said, corpus praefat & c. paret habeo & c. ubiciunque, the which is uncertain, and not according to the form of the return; for though the writ be, that he should have the body in the king's bench ubiciunque, because it is uncertain, where the court shall be at the day of the return, yet when the day is come, he ought to return the body into court, which then is in a place certain, and not to say he had the body ubiciunque, the which the court said was a blunder, but it is aided by the appearance. skinn. 444. trin. 6 w. & m. in b. r. wilson v. law.


27. if the writ and return had been ill, the appearance had aided it, if the party appears and pleads; but if he appears and takes exception for a defect in the writ and return, such defect is not aided by appearance; but if he pleads over he waves the advantage of such exception, and he was ruled to proceed to trial. per eyres j. skinn. 554. mich. 6 w. & m. in b. r. wilson v. law.

ld. raym. rep. 21.

28. a
28. A Writ of Error was executed the same Day with the Return of the Pone, and so might be before any Pone issued out. And Judgment was reserved for this Error, for no Appearance can help that. 12 Mod. 524. Trin. 13 W. 3. B. R. Bidolph v. Veal.

29. Sir. Fa. upon a Fine wanted the due Number of Days, because the Telle and Return, and that Writ did partake of the Nature of a Real Action, yet if Party appeared and pleaded to it, it made it good. Per Holt Ch. J. 12 Mod. 452. Patch. 13 W. 3. B. R. in Cafe of Wilmot v. Tiler.

30. So if Writ of Covenant to levy a Fine wants Fifteen Days between the Telle and Return, yet if Party appear, and Fine be levied it is good. This indeed has been after questioned by some Judges, but was adjudged to be a flat doctrine, and needs no new Settlement; for it the Defendant appears and answers without taking Advantage of this Fault of the Writ, as if it were in Affile, and he not attached Fifteen Days before, the Fault of the Writ is thereby cured. Per Holt Ch. J. 12 Mod. 452. In Cafe of Wilmot v. Tiler.


33. The King v. the Mayor &c. of Wilton.

34. The Queen v. Barrett. S. P.—5 Mod. 257. S. C.

35. Defendant moved to stay the Proceedings, the Process not having been served upon him, but upon another Person, it was inflished by Plaintiff that an Appearance being now entered, the Defendant was in Court, and the Miskake was cured. But per Cur. The Appearance is entered by the Plaintiff, according to the Statute, and by no Means cures the Miskake. Barnes's Notes in C. B. 291. Trin. 8 & 9 Geo. 2. Weitall v. Finch.

---

(F) Appearance. At what Time.

In what Cases a Man [or Corporation, pl. 8.] may appear where the Process is not served.

[Or where it is not returned, or returned Nihil, pl. 7.]

Where an Inheritance is to be left, or other Thing.

1. W Here a Man is to lose an Inheritance if he doth not appear, he shall appear without a Return of the Sheriff gratis by the Day in the Roll. 16 H. 7. 11. b.

2. As in a Sequestrum sub Periculo against a Vouchee, he may appear. * First, at the Day of the Return, though no Writ be returned, for that otherwise he should lose in Value. * 22 Ed. 3. 4. adjudged. 7 b. ad. s. c. —

judget. 29 Ed. 3. 40. b. 2 Ed. 3. 40.

Br. Jours, pl. 95. cites


5 U

3. "
Default. Appearance.

3. If the Defendant be out-lawd in Debt, and after hath a Charter of Pardon, and sues a Scire Facias against the Plaintiff if the Writ be not returned, the Plaintiff cannot appear by the Roll, for he is to lose nothing. * 39 Ed. 3. 7. b. Contra, ¶ 27 Ed. 3. 77.

Fifth. Ref. ponders, pl. 83. cites S. C.

4. But if the Writ be returned tardy, the Plaintiff may appear. 27 Ed. 3. 77.

5. When a Ban is to have a Corporal Pain if he appears not, he may appear without the Return of the Sheriff gratis by the Day in the Roll. * 10 P. 7. 11. b. Citra. 39 Ed. 3. 7. b.

6. In Trespass, if after the Exigent is sued, the Defendant renders himself, and hath a Superfideas; though the Sheriff does not return the Exigent at the Day, yet he may appear by the Roll. 38 Edw. 3. 20. b. adjudged.

7. In a Scire Facias against a Garnishee, if the Sheriff returns Nihil &c. and so upon the Alias, the Garnishee cannot appear gratis by the Day in the Roll, because he is not to have Corporal Punishment. Contra, 38 P. 6. 16.

8. In a Quod Permittat against a Bailiff and Commonalty, if at the Return of the Grand Directs no Writ is returned, the Bailiff cannot appear gratis by the Day in the Roll without the Commonalty (for they are but one Corporation.) 29 Edw. 3. 49. b. adjudged.

9. In an Audita Querela, if the Defendant be returned Nihil per quod potest Sumoniri, yet he may appear gratis. 21 Edw. 3. 13. b. adjudged.

10. In a Writ of Debt, if no Original be returned, nor any Return made, yet the Defendant may appear by the Roll. 29 Edw. 3. 18.

11. But he cannot compel the Plaintiff to count against him, because perhaps there is no Original. 29 Edw. 3. 18.

12. In a Writ of Debt, if the Sheriff returns the Original Nihil &c. yet the Defendant may appear for fear of the Capias. P. 10 Ta. B. R. between Dame Dame Slaney and Vincarry, adjudged.
In Debt the Defendant was out-law'd, and had Charter of Pardon, and Scire Facias against the Plaintiff, which was not return'd, and the Plaintiff appear'd and pray'd that the Defendant be demanded, inasmuch as the Plaintiff has Day by Roll & non Allocatur, inasmuch as the Process was not serv'd; Contra, where the Party is to have Corporal Punishment or Dures, by which the Plaintiff, by Advice of the Court, sued Scire Facias to have himself warn'd, so that he might appear. Br. Averment contra &c. pl. 26. cites 39 E. 3. 7.

In Proplefs the Sheriff return'd Quod cepit Corpus, and had him not at the Day, by which, upon Change of the Sheriff, itlue Disturbing quondam Viccom. ad balend. Corpus against the Old Sheriff, and he amerc'd, and the New Sheriff return'd Quod Distrixt quondam Vicecom. but had not the Body; and per Thorp the Defendant may appear and plead, notwithstanding the Return. Br. Averment contra &c. pl. 33. cites 44 E. 3. 2.

In Second Deliverance, the Sheriff return'd No Writ, but the Defendant appear'd, and pray'd that the Plaintiff count against him, or that he might have Return irrepressible, and could not have it, but Sicut Alias, and yet he had Day by the Roll. And so it seems that a Man shall not be received contrary to the Return of the Sheriff, nor where the Sheriff does not return, unless in Case where he is to be at a Loss, or to have Corporal Pain. Br. Averment contra &c. pl. 28. cites 49 E. 3. 2.

In Precipe quod reddat, the Tenant vouch'd, and Proceeds continued against the Vouchee till the Squatter, which Writ was not serv'd, and the Tenant said that the Vouchee died between the issuing of the Writ of Squatter, and the Day of the Return, and pray'd that he might re-touch. Br. Averment contra &c. pl. 27. cites 14 H. 6. 7. And the same Year, fol. 19. the better Opinion of the Jurisses was, that he shall have the Plea.

So where the Tenant vouches, and the Summons and Grand Cape be return'd serv'd, and the Vouchee does not come, the Tenant may say that the Vouchee is dead; for if judgment be given against a dead Peron, it is Error; for at those times the Land is to be lost. Br. Averment contra &c. pl. 27. cites 14 H. 6. 7. 19.

So at the Second Return of Nihil upon Scire Facias upon Charter of Pardon after Outlawry, he may appear gratis, otherwise the Charter shall be allow'd without Answer. Br. Averment contra &c. pl. 27. cites 14 H. 6. 7. 19.

In Replein at the Pluries the Sheriff return'd Quod Averia Elongata sunt, and Withernam was awarded of the Goods of the Defendant for the Plaintiff returnable 15 Mich. and the Sheriff return'd tardy, and the Defendant came and was ready, and pray'd that the Plaintiff should count against him. And the best Opinion was, that because no Pledges de Propequento & de return habendo in &c. are found, and also the Writ is not serv'd, therefore it is in a Manner contrary to the Return of the Sheriff. And per Arden
Default. Appearance.

Arden and Danby he cannot appear; for without Return of the Sheriff, it cannot appear to the Court if he be the same Perfon or not, and especially as here, where he is not to have Corporal Punishment. But where Capias or Exigent is awarded, he may appear, by reason of avoiding Corporal Punishment. But where *\text{[illegible]}\text{are to be left, and the Writ is not served, there he cannot appear; and also he }\|\text{ cannot appear before Pledges are found; for in Deed if the Defendant be return'd Summonitus off, and no Pledges return'd, the Defendant shall not be put to answer, nor the Plaintiff shall not be demanded; for he cannot be non-suited before Pledges found, Quod tota Curia consensit. And he who is touch'd may enter into the Warrant the first Day, but if Processes be awarded which is not served, he cannot enter gratis; and Newton agreed that he shall not answer as here. Br. Averment contra &c. pl. 15. cites 22 H. 6. 29. 22. In Def at the Capias the Sheriff return'd Capi Corpus, &c. &c. by which issued Duces rebus, and the Sheriff did not return the Writ, but the Defendant appear'd and prayed that the Plaintiff count, and it was greatly debated, if he might appear before the Writ came in; and the best Opinion was, that because the Plaintiff did not deny but that he who appeared is the same Person, that therefore he ought to declare, notwithstanding that he shall be intended to be in Ward of the Sheriff by the first Return; for it may stand with that that he was then in Prifon &c. and, and now At large and Sound, and therefore the Plaintiff declair'd, and the Defendant prayed to be by Attorney, and the Court advis'd. Br. Default, pl. 67. cites 5 E. 4. 69. 23. In Andita Querela Venire Facias issued against the Defendant, and the Sheriff did not return the Writ, and the Defendant came gratis and prayed that the Plaintiff be demanded & non Allocatur, because the Writ is not returned serv'd, and he is not to have Corporal Pain. Br. Averment contra &c. pl. 30. cites 6 E. 4. 9. 24. Replevin suos Lanices, the Sheriff return'd that the Plaintiff was Eligibilis, so that he could not have the View; for it was in Homine Replegiando, and no Day was given to the Defendant, but to the Sheriff to know &c. per tot. Cur, the Appearance is good for the Misdemeanor of Withernam; for when the Sheriff returns Eligens, and if the Defendant has not appear'd, Capias in Withernam shall be awarded, by which he shall be imprisoned; by which it was awarded that the Plaintiff recover his Damages, and to the Appearance of the Defendant good at the Day of the Return of the Eligendum, Quod Nota. Br. Default, pl. 71. cites 7 E. 4. 5. 25. Seire Facias upon Annuity recover'd, the Sheriff return'd Quod nibil habet nec ef inventus, the Defendant came and said that he had resign'd before the Writ purchas'd to the Ordinary at D. and to Not Pasions; and per Cur. the Defendant may plead this, though he has no Day in Court by Return of the Sheriff; because the Defendant is at a Misdemeanor; for upon the first Seire Facias return'd upon a Recovery, the Plaintiff shall have Execution; for he who recovers shall have Favour, and the same at the Capias & Exigent; But because he is not Pasion, nor warned as Pasion, J. B. Receptor de D. therefore no Misdemeanor; for the Execution shall lie only against the Parson. Br. Seire Facias, pl. 175. cites 8 E. 4. 15. 19. 26. But in Seire Facias upon Charter of Pardon, there shall be two Notis return'd before that the Charter shall be allow'd, if the Plaintiff does not appear before. Br. Seire Facias, pl. 173. cites 8 E. 4. 15. 19. 27. Where a Man is bound to appear upon Writ at a certain Day, it is no Plea that the Writ is not return'd; for he may have Special Entry of his Appearance; but it is a good Plea that the Bailiff to whom he is bound keep him in Prifon till the Day of his Appearance; for he shall not
Default. Appearance.

not gain a Forfeiture by his own Act. Br. Dette, pl. 109. cites 9 E.

25. A Man appeared by Capias Utlag, and pleaded the last Term, and had Day to 15 Mich. and came at O'hab. Mich. and prayed that his Appearance be recorded for all the Term, and Townsend would not before the Day, but Brian and Catesby [bid them] record it. Conisby said, it has been done between Party and Party, but not where the King is Party as here. Per Townsend, in Appeal he ought to appear at every Day, and shall not have his Appearance recorded as here, but per Conisby the contrary has been done, where he is a poor Man. Br. Default pl. 63. cites 1 H. 7. 27.

29. In Error the Scire Facias against the Defendant was returned Nikil, and Scit alias illusi, the Defendant was not received to appear Gratis. Br. Default, pl. 64. cites 3 H. 7. 8.

have Corporal Pain. Br. Jours. pl. 43. cites S. C.

30. Contra upon Capias or Distrefs, where Corporal Punishment is to be bad, or Iffues to be left, and the same in Scire Facias upon Charter of Par- don, as upon this Scire Facias. Br. Default pl. 64. cites 3 H. 7. 8.

31. So where the Sheriff returns Tarde or embazis the Writ; for it was said that he has Day by the Roll, Et non Allocatur here. Ibid. Br. Jours; pl. 48. cites S. C.

32. Scire Facias upon Writ of Error, the Sheriff returned Nikil, the Defendant came and prayed that the Plaintiff shold affign the Errors, Et non allocatur, inasmuch as the Writ is not returned served, and yet he has Day by the Roll. Br. Averment contra &c. pl. 32. cites 3 H. 7. 8.

33. But, per Cur. where the Sheriff returns upon Capias Quod non est inventus, the Defendant may appear and plead; for otherwise he shall have Corporal Punishment by Arrest by other Capias. Per Cur. Br. Averment contra &c. pl. 32. cites 3 H. 7. 8.

34. So upon Distresse in Salvation of the Iffues; for this is a Loaf, QuodNota, Per Cur. by which Scit alias illusi. Br. Averment contra &c. pl. 32. cites 3 H. 7. 8.

35. Where a Man has Day by the Roll ad respondendum, he may appear as well upon the Roll, as upon the Writ; but when it is Ad Satisfac- tiundum he shall never be received to render himself to Prifon, unlefs the Writ be returned, viz. Cepi Corpus, or Capias ad Satisfactiundum, or Redditud fe upon exigent; Per Mordaunt. Kelw. 166. b. pl. 3. Hill. 5 H. 8.

36. Upon a Capias against A. the Sheriff returns him Sick, so that he cannot have his Body at the Day without the Danger of his Death; upon Affidavit that A. is grown Well a Duces Recum, Subpoena of a certain Sum of Money shall be awarded to the Sheriff, to have his Body in Court at a certain Day. Jenk. 94. pl. 82.

37. In Debt, Trespass, or other Personal Action against A. upon the Summons or Attachment, the Sheriff returns, Non est inventus & Nikil habi- bit in his Bailiwick; at the Day of this Return A. cannot appear. Jenk. 94. pl. 82. & 122. pl. 47.

38. But upon a Capias against him to imprisomn his Body, or upon a Process, upon which Iffues are to be left, or Land to be lost, or his Life brought into Danger he may appear, although such a Return, as above, were made by the Sheriff's for he has a Day in Court by the Roll, and his Non-Appearance would be of great Prejudice to him. Jenk. 94. pl. 82. & 122. pl. 47.

5 X 39. In
446

Default. Appearance.

39. In an Appeal against A. for the Death of a Man, he Sheriff returns, that the Writ came too late to him; A. may appear and plead notwithstanding this Return. Jenk. 94. pl. 82. & 122. pl. 47.

40. Whenever a Writ returnable is awarded, the Return Day is a Day to both Parties to appear, and though the Writ be returned not served, the Defendant may appear to prevent any Ill Consequence, as to prevent a Capias, 5 E. 4. 69. So here to save himself on a Writnam, Respond. 57. (52) 7 E. 4. 5. Upon a Disturbing Proximas Villas &c. the Defendants have no Day, yet they may appear and traverse. In a Common Replevin the Original gives no Day, for this is Vicissitude and so is the Alias, but the Plurisy is returnable in B.R. and though there is no Summons nor Attachment in the Writ, yet the Day of the Return is a Day to the Parties and the Entry is Attachment ex. ad Respondendn' de Placito quare cepit &c. and the Reason is because though in Truth there was not actually an Attachment, yet virtually and in Consequence of Law it is so, he being bound upon Peril of a Withernam. 2 Salk. 582. pl. 3. Mich. 12 W. 3. B. R. Moor v. Watts.

41. By the ancient Rule of Court, there could not be a voluntary Appearance without a Writ was taken out, but even now there must be a Writ taken out before or after; for without a Writ the Parties have no Day in Court, without which they cannot appear; and he fees no Difference between a Voluntary Appearance and one upon a Cepi Corps, for sure the Plaintiff ought not to be put in a worse Condition for his Kindness in not arresting the Defendant. If a Writ be returnable Craft Animar' and a voluntary Appearance to it, it will be the same, as if it were upon a Cepi Corps. Per Holt Ch. J. 12 Mod. 404. Trin. 12 W. 3. B. R. Anon.

(G) In what Cases a Man shall be compelled to appear [and answer] where the Process is not served.

1. If a Man sues Execution upon a Statute, and the Conufor sues an Audita Questra upon the Acquittance of the Conufor returnable immediately, which is not served, and the Conufor comes and prays Execution, he shall be put to answer to the Acquittance upon this Writ, for he hath Day by the Roll, though the Writ is not served. 30 E. 3. 21. b. adjudged.

2. A. is condemned in Trespass at the Suit of B. and is outlawed upon the Judgment, and is in Execution upon a Cap. Ul. B. releases to A. all Executions; A. upon this Release brings an Audita Questra, upon this a Venire Facias against B. B. can't appear, for he is not to lose his Liberty, or Illsues, or Freehold; an Alias Venire Facias illus and is served and returned; B. appears, and pleads the said Outlawry against A. and 'tis a good Plea; for the Audita Questra is only to defeat the Execution, and not to reverse the Judgment as Error would do ex directo, and an Attaint ex consequenti. Jenk. 126. pl. 53.

(G. 2) Ap-
(G. 2) Appearance. Necessary to what Purposes.
Or, What cannot be done without Appearance.

1. **In** Information and Indictments, **no** Judgment can be given, unless the Defendant appears. Per *Eyre* 10 Mod. 250. Hill. 3 Geo. 3. B. R. in Case of the Queen v. Simpson.
2. **But** Judgment of **Outlawry** may, because of his Contempt for not appearing. *Ut sup.*
3. Conviction of Deer-Stealers may be without their appearing, so that they be summoned, and make Default. 10 Mod. 378. Hill. 3 Geo. 1. B. R. The Queen v. Simpson.
4. Corruption of Blood, and Forfeiture of *Estate*, may be by **Outlawry** for *Treason* or *Felony*; for the Law interprets Absence in such Case as a **Sufficient Evidence of Guilt**. 10 Mod. 379. Hill. 3 Geo. 1. B. R. in the Case of the Queen v. Simpson.
5. In *Real Actions* the second Default is final and conclusive, and the Court, without regarding the Merits of the Cause, will give Judgment that Defendant shall lose the Land. 10 Mod. 379. in Case of the Queen v. Simpson.

(H) In what Cases the Husband shall be obliged to appear for his Wife.

1. **In** an Action against Baron and Feme in B. R. if the Baron appears upon the Exigent, he shall remain in Prison till he puts in Bail for his Wife. Hill. 37 El. 3 B. R. by *Popham*.
2. As in an Action of *Debt* against Baron and Feme, for the Debt of the Feme, if the Baron be taken by Capias or Exigent, he shall remain in Prison till he hath put in Bail for his Feme. Hill. 37 El. 3 B. R. by the Clerks this is the Common Court.
3. But in an Action against Baron and Feme in B. if the Baron comes upon the Capias or Exigent, he shall not be compelled to put in Bail for his Wife. Hill. 37 El. 3 B. R.
4. If the Baron appears upon the Original in B. R. where it is against him and his Feme, he ought to put in Bail for his Wife. Hill. 37 El. 3 B. R.
5. In an Action of Debt against Baron and Feme in B. R. upon the *Cro. E. 370.* Statute of of Recusants, for the Recusancy of the Feme, the Baron, who is in Custodia Marefralli, shall remain in Prison till he hath put in Bail as well for his Wife as for himself. D. 37 El. B. R. adjudged, the Case of *Philipa and Young*, and their Heiresses.

See tit. *Baron & Feme*.

6. But it is in the Election of the Court whether they will compel him to give Bail for his Wife or not, for all Bails are in the Discretion.
7. In an Action of Debt brought against Baron and Feme in Hance, if the Baron appears, and the Feme makes Default—

8. If Proceeds issues out of B. R. for, a Lattar against Baron and Feme, and the Feme is arrested, but not the Baron, the Baron in this Case shall not be compelled by the Court of the Court to appear for himself and his Wife, the Baron not being arrested. Mich. 10

9. In Debt at the Capias the Sheriff return'd Quod cepit Corpus, and that he is Languidus in Prison, and yet the Defendant was received to appear; for he has Day by the Roll, and pray'd that the Plaintiff be demanded, and so he was, and because he did not come, therefore he was nonsuit'd, Quod Nota. Br. Return de Briefs, pl. 102. cites 3 H. 6. 3.

10. And at the Capias in Trespass against the Baron and Feme, the Sheriff return'd the Baron Non est inventus, and that he had taken the Feme, who was in Ward, and Protection was cast for the Baron, and was allowed, and yet he had no Day by the Return of the Sheriff, Quod Nota. Brooke says, the Reason seems to be insinuach as he is to have Corporal Punishment upon Capias. Ibid.

(H. 2) Appearance.

Against Return of the Sheriff.

1. In Trespass at the Capias the Sheriff return'd Non est inventus, yet the Defendant may appear at the same Day by Attorney, or in proper Person, at his Pleasure. Br. Jours, pl. 20. cites 3 H. 4. 2.

2. But it is said that after Exigent awarded, he can't appear by Attorney, but first in Person. Br. Jours, pl. 20. cites 3 H. 4. 2.

3. In Debt, at the Capias the Sheriff return'd, Quod cepit Corpus & quod est Languid in Prisona, and yet the Defendant was received to appear; for he has Day by the Roll, and pray'd that the Plaintiff be demanded, and so he was, and because he did not come, therefore he was nonsuit'd, Quod Nota. Br. Retorno de Brief, pl. 102. cites 3 H. 6. 3.

4. And at the Capias in Trespass against the Baron and Feme, the Sheriff return'd the Baron Non est inventus, & quod Cepit the Feme, who was in Ward, and Protection was cast for the Baron, and was allowed, and yet he had no Day by Return of the Sheriff, Quod Nota. Brook says, the Reason seems to be insinuach as he is to have Corporal Punishment upon Capias. Ibid.

5. Defendants
Default.

5. Defendants plead in Bar to the Action, but do not appear and plead Noc in proprio Perjura Noc per any Attorney but only thus, Et pradicit A, and B. per C. Attornatum suum Vim & Injuriam quando &c. and therefore Judgment per Quer. 2 Lutw. 1386. Trin. 4 Jac. 2. Gardiner v. Peyton.

(I) Departure in Despite of the Court.
In what Cases it is.

1. If the Defendant or Tenant impart to another Day in the same Term, and makes Default at the Day, this is a Departure in Despite of the Court. 9 P. 6. 58 b.

2. [So] If a Man imparts till another Term, if he makes Default at the Day of Appearance, this is a Departure in Despite of the Court. 9 P. 6. 39 b. 41 b.

3. But if the Court gives Day to the Defendant * till another Term, if the Defendant makes Default at this Day, this is no Departure in Despite of the Court, for he departs by Leave of the Court.

4. In a Real Action if the Tenant vouch, and the Demandant has Leave to impart upon the Voucher, and returns, and the Tenant is demanded, if he makes Default, this is a Departure in Despite of the Court. 38 C. 3. 13 b.

5. In Trespass the Defendant appear’d and pleaded, and after Plea pleaded Departed in Despite, and therefore Writ of Inquiry of Damages was awarded, and after the Plaintiff released the Departure, and the Defendant pleaded Not Guilty. Br. Deparrure, pl. 4. cites 9 H. 5. 15.

6. Note, that Departure in Despite is always of the Part of the Tenant or Defendants, when his Appearance is of Record the same Day, and Retracts is of Part of the Demandant or Tenant, or Plaintiff, when his Appearance is of Record the same Day, and upon this he shall be bared, and of the Part of the Tenant or Defendant he shall be Condemn’d. Br. Deparrure in Despite, pl. 1. cites 3 H. 6. 14.

7. But Ibid. says, that Note that it appears 9 H. 5. 5. and 3 H. 4. 2. that where the Defendant appears and imparts the same Day, as he may well, there be is not Demandable, and therefore if he makes Default when the Defendant comes back and pleads Bar, or tenders his Law, the Plaintiff shall be bared, and shall not be suffer’d to be Nonjustit; For this is a Retrospect, because it is all One and the Same Day.

8. But if he imparts till another Day, be it in the same Term or in another Term, and notwithstanding that it be to the next Day in the same Term,

9. If a Man imparts till another Term, and makes Default at the Day of Appearance, this is a Departure in Despite of the Court. 9 P. 6. 39 b. 41 b.

10. But if the Court gives Day to the Defendant * till another Term, if the Defendant makes Default at this Day, this is no Departure in Despite of the Court, for he departs by Leave of the Court.

11. In a Real Action if the Tenant vouch, and the Demandant has Leave to impart upon the Voucher, and returns, and the Tenant is demanded, if he makes Default, this is a Departure in Despite of the Court. 38 C. 3. 13 b.

12. In Trespass the Defendant appear’d and pleaded, and after Plea pleaded Departed in Despite, and therefore Writ of Inquiry of Damages was awarded, and after the Plaintiff released the Departure, and the Defendant pleaded Not Guilty. Br. Deparrure, pl. 4. cites 9 H. 5. 15.

13. Note, that Departure in Despite is always of the Part of the Tenant or Defendants, when his Appearance is of Record the same Day, and Retracts is of Part of the Demandant or Tenant, or Plaintiff, when his Appearance is of Record the same Day, and upon this he shall be bared, and of the Part of the Tenant or Defendant he shall be Condemn’d. Br. Deparrure in Despite, pl. 1. cites 3 H. 6. 14.

14. But Ibid. says, that Note that it appears 9 H. 5. 5. and 3 H. 4. 2. that where the Defendant appears and imparts the same Day, as he may well, there be is not Demandable, and therefore if he makes Default when the Defendant comes back and pleads Bar, or tenders his Law, the Plaintiff shall be bared, and shall not be suffer’d to be Nonjustit; For this is a Retrospect, because it is all One and the Same Day.
Term, there he is Demandable, and if he makes Default be shall be Nonsuit, notwithstanding it be all in one and the same Term; Note the Diversity, where the Impairance is all in one and the same Day; as in the Case of a Common Recovery, and where it is till another Day in the same Term. Br. Departure in Defpite &c. pl. i. cites 9 H. 5. 5. and 3 H. 4. 2.

9. If it seems of the Part of the Defendant, Tenant, or Vouchee to Warranty, if in a Common Recovery for Affurance of Land, the Vouchee impairs and is demanded again the same Day and makes Default, and therefore Judgment is given against the Tenant, and he to have over in Value. Br. Departure pl. i. cites 9 H. 5. 5. & 3 H. 4. 2.

10. Or if he had impaired till another Day, and had made Default Pet-rit Cape ad Valentiam should Issue; Nota inde bene. Ibid.

11. A Departure in despite of the Court is on the Part of the Tenant, and is when the Tenant or Defendant after Appearance, and being pre- sent in Court, upon demand makes departure in despite of the Court; and then the Entry is, Et practid tenens feu defendens licet solemniter exæctus, non revenit, sed in contemptum Curiae recessit, & desulto- feicit, ideo &c. Co. Lit. 159. a.

(K) What shall be said a Departure in Despite of the Court.

1. If at the Return of a Capias ad Valentiam the Vouchee makes Default, and the Attorney of the Tenant is enjoined, and the Demandant prays Selin of the Land, and after the Attorney of the Te- nant appears, and prays that the Elfin be drawn, which is done, and presently he departs from the Bar, and then the Tenant is demanded, and no Body answers for him, yet this is not any Departure in De- spite of the Court, though the Presence of the Attorney be recorded, for he did not appear upon any Demand of the Demandant, and when he appeared, the Demandant laid nothing against him. 22 Ed. 3. 2. b. adjudged.

2. In Precipe quod reddat, they were at Issue and the Parties appeared, and the Inquœst was sworn, and when the Inquœst came back to give their Verdict the Demandant appeared, and the Tenant made Default, by which the Demandant prays Judgment upon the Departure, and had it immedi- ately, Quod Nota. Br. Departure in Defpite, pl. 14. cites Itin. Derb. Tempore E. 3.

3. In Square Impedit, if the Defendant makes Default after Appearance, the Plaintiff shall recover immediately his Presentation and his Damages; Contra if he has Day by Continuance and after makes Default, there the Plaintiff shall have only Diffres, as appears H. 6. R. 2. Br. Departure in Defpite, pl. 11. cites 2 H. 4. 1.

4. In Debt the Plaintiff appeared and declared, and thereupon the Defendant tendered to perform his Law immediately, by which the Plaintiff departed from the Bar to be nonsuit without Leave of the Court, and therefore Rikhill awarded, that the Defendant should perform his Law, but if he had imparked to the Law, he might have been nonsuit- ed. Br. Departure in Defpite, pl. 10. cites 3 H. 4. 2 & 3 H. 6. 14. accordingly.

5. In Replevin, the Defendant justified the taking by Tenure of his Magest, and the Plaintiff pleased in Remanency in the Land &c. and Day was given over in the same Term, and the Defendant made Default, by which the Plaintiff recovered 4l. taxed by the Court, and it was said that this was no Departure because they had Day over &c. scil. it was no Departure
(K. 2) Departure in Despight of the Court.
In what Cases Judgment shall be given thereon.

1. In Precipe in Capite the Tenant vouch'd, and the Demandant impar'd, and came back the same Term, and the Tenant made Default, and upon this Departure in Despight the Demandant recover'd Seilim of the Land. Br. Departure in Despight, pl. 5. cites 38 E. 3. 13.
2. In Precipe quod redlat the Tenant appeared, and pleaded Bar, and the Demandant reply'd, and the Tenant was demanded at another Day in the same Term to have rejoind and made Default, this is a Departure in Despight of the Court, therefore Seilim of the Land shall be awarded, and not Petit Cape; contra it is said elsewhere, if it was in another Term. Br. Departure in Despight, pl. 2. cites 9 H. 6. 59.

(L) Retraxit. By whom, and in what Manner, and by what Words, one may make a Retraxit.

1. A Retraxit is always of the Part of the Plaintiff or Demandant. Co. 8. Brevier 59.
2. If the Plaintiff says he will not sue, this is a Retraxit. 8 P. 6. 8. Brook Departure in Despight 13. 21 C. 4. 43.
3. But if he says he will not appear, this is not a Retraxit, but a Nonuit. 8 P. 6. 8: contra.
4. A Retraxit cannot be, unless the Plaintiff or Demandant be in Court in proper Person. Co. 8. Brevier 58: refuted.

The Plaintiff has a Verdict in Debt against the Defendant; after this Verdict, the Plaintiff's Attorney Non vult alterius prospexit; and it is so entered; and Judgment is given for the Defendant; it is
Default.

is Error; for this is not a Retraxit. A Retraxit ought always to be by the Plaintiff, in his proper Person; such Confession is stronger against him than a Verdict. In Preparatory ad judicium favoror Actori; because the Law presumes, that no Man will sue without a Cause, and therefore a Retraxit is only allowable, when the Plaintiff comes in Person. Jenk. 255; pl. 12. cites 8 Rep. 58. a. 6 Jac. Beach's Caf.  

5. In Affise by Baron and Feme, Trem. prayed, that Return be entered, for they were to agree; Stouff J. refused it, but Trench agreed, that if the Baron came he should be required to extinguish his Agreement during his Life, and to enter the Return upon him alone, but Stouff would not assent to it, because they were Plaintiffs in Common, and therefore nothing was done. Br. Departure in Delfipe, pl. 8. cites 15 Aff. 9.  

6. It seems that there is no Cafe where a Man may appear and be non-  

suis at all one and the same Day, but in the Cafe where the Plaintiff  

appears, when the Jury appears, and when they come with their Verdict  

be makes Default, this shall be a Nonfuit and not a Retraxit, and in no  

other Cafe, as it seems. Br. Departure in Delfipe, pl. 1. cites 3  


7. In Error a Man was bound to retract all Suits, which he had against  

W. C. by such a Day &c. and said that such a Day (which was the  

Fourth Day of the Term after the Award made, that he should retract it)  
did not purjue further after this Day, but suffered it to be discontinued,  
and per Cur. this no Retraxit; for where there shall be a Retraxit be  
shall come into Court in Person, and say, that he will no further prosecute in this Plea; for a Nonfuit or Discontinuance is no Retraxit; for after  
Nonfuit or Discontinuance be may commence his Suit again, but Retraxit is a Bar of the Action. Br. Departure in Delfipe, pl. 9. cites 21  

E. 38.  

8. Dower against Two Tenants, one of them pleaded Non-tenure to the  
whole, the other Non-tenure as to Part, and in Bar to the Refidue, upon  
which they were at Iffue; and afterwards he who pleaded in Bar Retrarc  
Verification sua confessed the Actus; and the Demandant had Judgment  
against him, and said, she would no further proceed to try the Iffue of  
Non-tenure, but would enter a Retraxit, and so it was ordered by the  

9. Note, It was said by Welton and Bendlices, That a Retraxit can  
not be before a Declaration; which Leonard and Fillmer, Prothomotar  
ries, granted; and Dyer said, that it being before a Declaration, it is  
but a Nonfuit; and Wheatley and Fillmer affirmed the same; and there-  
for it was adjudged, that such a Retraxit in the Court of Huftings be-  
fore the Sheriff, is no Plea in Bar. 3 Le. 19. pl. 47. Pauch. 14 Eliz.  
C. B. Anon.  

10. The Diversity is between a Retraxit before Judgment and after,  
for if it be a Retraxit before Judgment to one, it is a Release to all;  
Secus after Judgment against one, for there Retraxit against the others  
shall not serve for him, against whom Judgment is given. Roll R.  

10. A Retraxit is ever, when the Demandant or Plaintiff is present  
in Court (as regularly he is ever by Intendment of Law, until a Day  
be given over, unless it be when a Verdict is to be given, for then he  
is demandable) and this is in two Sorts, one from the other  
Provisos. Provisos, as upon Demand made, that he made Default and  
departed in Delfipe of the Court; and then the Entry is, Et postea co-  
den De deuenti ad Barram praadii tenent, & pred' petens inae soliciiter  
exactus non venit, sed a Setia sua praedita in Contemptum Curiae re  
retrasit, i.e. Conflatation eft &c. Pojitive, as when the Entry is, Et super  
loci idem querebatur, ut quod ipse non valet alterius placatum innum. Praedicitum pro-  
sequit, sed abinde omnino retrasit &c. Ideo &c. Another Form thereof is,  

quod
Default.

(M) Retraxit.
The Effect thereof.

1. 


2. In Affise the Defendant pleaded in Bar a Retraxit by the Plaintiff in another Affise, and the Tenant had Day to bring in the Record and failed. And therefore the Plaintiff released his Damages and recovered, quod nota the Failer and also that a Retraxit is a Bar. Br. Affise, pl. 408. cites M. 15 E. 3.


4. Trophys against C. and S. they imparte, at the Day S. did not appear and Judgment by Nil dicit against him; C. pleaded in Bar; Plaintiff replied; C. demurred, and Day given to the next Term, and then the Plaintiff entered Judgment; Plaintiff entered a Nolle Prosequi against S. and had a Writ of inquiry of Damages against C. and upon Return thereof adjudged against him. C. and S. brought a Writ of Error, because the Nolle Prosequi is against S. only, where Judgment is entered against both C. and S. and that a Retraxit against one is as strong as a Release, which is a good Discharge as to both, and so the Judgment against C. is erroneous; and so it was adjudged, but the Judgment was reversed. Cro. Eliz. 762. pl. 25. Patch. 42 Eliz. in the Exchequer Chamber. Green v. Charnock.

5. A Writ of Error lies after a Confeffion, or Retraxit; not after a Disclaimer. Jenk. 283. pl. 12.

6. A. and B. were bound in a Bond jointly and severally to C. the Plaintiff, C. brought Debt against A. who pleaded. Afterwards C. entered a Retraxit of his Suit against A. and then sued B. who pleaded ibid. Matter. There were only Crooke and Berkley J. in Court, and they were divided in Opinion, whether this Plea was good and a Bar to the Plaintiff, as Berkley held it was; but Crooke J. thought it no Release in Facio, nor in Law, but Quasi an Agreement that he will not further prosecute, or that it is by Way of Esdoppel only between A. and the Oblige; Adjornatur. Cro. C. 551. pl 3 Trin. 15 Cat. B. R. Dennis v. Payne.

In the Defendant's Plea.— Mar. 91. pl. 166. S. C. but states it, that Debt was brought against both A. and B. and Berkley and Crooke differ'd in Opinion.

As to the Difference between a Retraxit, Nonfuit, Departure &c. See tit. Nonfuit. (F. 2.)

5 Z (N) What
Default.

(N) What shall be said a Default.

1. If a Man be enjoined of the King's Service, and does not bring his Warrant at the Day, which he hath by the Enjoin, this is a Default at the Common Law. 21 E. 3. 37. 62. b. 29 E. 3. 36. ad judged. 30 E. 3. 19. b.

2. Precipe quod reddat, if a Man makes Attorney, and after the Tenant is effign'd and not his Attorney, this is a Default, and if the Tenant cannot have it, Sales of the Land shall be awarded. Br. Default, pl. 90. cites 21 E. 3.

3. If the Plaintiff in Debt appears, and will not count, it shall be awarded that he take nothing by his Writ. Br. Default, pl. 19. cites 2 H. 4. 15.

4. Where the Tenant in Precipe quod reddat appears at the Nisi Prius by Attorney who has no Warrant, this shall turn him in Default at the Day in Bank, though the Jury be taken and pass for the Demandant. Br. Default, pl. 26. cites 14 H. 4. 16.

5. Precipe quod reddat against Baron and Feme, Precipiam quia Protectus was cast for the Baron, and immediately Invoceimus was cast, by which the Protection was annulled. And by all the Justices this was a Default of the Tenants, Quod Nota. Br. Default, pl. 55. cites 1 H. 6. 6.

6. Where Protection is cast for the Garnishee at the Day of Nisi Prius, and is repealed at the Day in Bank, yet this shall not turn the Party in Default, because it was allowable at the first Day. Br. Default, pl. 44. cites 4 H. 6. 9.

7. A Man was bound in a Recognizance to have J. N. in the Chancery such a Day, and in Scire Facias he said that he had him there that Day, and because his Appearance was not entered of Record, therefore no Plea; per Cont. Ball. June and Froy. Quære. Br. Default, pl. 32. cites 7 H. 6. 26.

8. And if a Man be returned in Iffues upon Diffrefs and appears, and his Appearance is not of Record, he shall not have his Iffues, Quod Nota. Ibid.

9. If one is bound to appear in B. R. at Westminster such a Day to answer &c. though the Term is adjourned to H. yet he ought to appear in B. R. or otherwise he shall forfeit his Bond; Per Cur. cites 9 E. 4. and fays, that so are diverfe Precedents. Cro. E. 466. pl. 16. Hill. 53 Eliz. B. R. Corbet v. Cook.

Mo. 450. pl. 601. Hill. 55 Eliz. Corbet v. Downing. S. P. that by appearing at H. the Party has not forfeited his Obligation, but makes a Quære if he had not appear'd there, but at Westminster, whether he had forfeited it. Popham seem'd that the Word (Westminster) in the Condition, would make the Obligation * void by the Statute of 23 H. 6. because there is not any such Name in the Writ for Appearance.

* See Pl. C. 68. a. 5.

(N. 2) What shall be such a Default, on which Judgment shall be given.

1. In Precipe quod reddat the Tenant would't two, and by the Nuisance of the one pray'd that the Perol demur' and the Demandant said that he was of full Age, and pray'd that he might be view'd in Court, by which
Default.


2. Where a Man says that he will not appear, the Plaintiff cannot recover Quia Nihil dict; for this Appearance was not to the Action, but to shew that he would not appear, and if he had not appeared to the Action, the Plaintiff could not declare, and without Declaration the Defendant shall not be condemned Quia Nihil dict; for he is not bound to answer to the Writ, but to the Declaration, Quod Nota, and Declaration cannot be made; for he has not appear'd to the Action. Br. Default, pl. 36, cites 8 H. 6. 7.

3. In Debt if the Plaintiff alleges that the Defendant is in the Fleet, and prays that the Warden bring him in, who does so, and says that he is the same Person, and that he will not appear, he shall be condemn'd; Per June quod omnes conceffuent. Ibid. — But contra 2 H. 5. and contra in the Cafe of Cole, because he was Prisoner to another Court.

(O) In what Cases the Default of the one shall be the Default of the other, Baron and Feme. [Corporations] pl. 12. 13.


2. As if at the Pluris Capias the Baron appears, and the Feme makes Default, this shall not be the Default of the Baron for the Corporal Punishment. *11 P. 4. 72. Contra +3 P. 6. 19. Exigent shall issue against both, For the Feme is amenable by the Baron, and so the Default of the Baron, that the Feme had not come; Per Martin, quod non negotium.—And S. P. Br. Baron and Feme, pl. 55. cites 9 E. 4. 23. Per Choke and Danby. Brook says, Quod mirum, where Corporal Punishment shall be as here.

* Br. Baron and Feme, pl. 38. cites S. C. ‡ Br. Baron and Feme, pl. 1. cites S. C.

3. So upon the Capias if the Baron makes Default, and the Feme appears, this shall not be the Default of the Feme. *12 P. 4. 1. Placeto 1. +3 P. 6. 19. Fizth. Default, pl. 11. cites S. C.

† Br. Baron and Feme, pl. 1. cites S. C. that Exigent Facias issued against Baron, and Idem Dies given to the Feme.—Br. Process, pl. 6. cites S. C.—Fitzh. Process, pl. 63. cites S. C.

4. At the Exigent return'd against the Baron and Feme, if the Baron appears, and Feme makes Default, this shall not be the Default of the Baron for the Corporal Punishment. 9 P. 6. 8. b. *44 Die, though E. 3. 1. b. adjudged. +39 E. 3. 18. b. adjudged.


* Br. Baron and Feme, pl. 76. cites S. C. but the Feme was waived.—Ibid. pl. 18. cites S. C.

† Br. Reponder, pl. 26. cites S. C. that the Baron came ready to answer, and because the Exigent was ill against the Feme, it was discontinued, and Exigent de Nosse was awarded against her, and
5. So if upon the Exigent the Baron and Feme have a Super-

Fol. 585.

* Br Baron and Feme, pl. 75, cites S. C. by

which Exigent de Novo issued against the Feme, and the Baron had Idem Dies. And if the Baron makes Default at the Day &c. Distinctions shall issue against him. — Br. Barre, pl. 6, cites S. C. — Br. Proces, pl. 8, cites S. C. — Fitzh. Proces, pl. 84, cites S. C.

6. But otherwise it is where the Baron is not to have any Corporal

and Feme, pl. 58, cites S. C. — ibid. pl. 65, cites S. C. — Fitzh. Default, pl. 10, cites S. C.

7. As in a Plea of Land if the Baron appears, and the Feme makes Default, a Grand Cape shall issue of the Whole. * 11 H. 4. 72. + 29 C. 3. 91. b. adjudged.


Fitzh. Af.

* Br. Baron and Feme, pl. 58, cites S. C. — Fitzh. Default, pl. 10, cites S. C. — Br. Default, pl. 52, cites S. C.

9. So if Baron and Feme are attach'd in a Trespass, the Default of the Feme is the Default of both, and to the Issues forfeited. * 14 H. 6. 14. Conta || 22 Ass. 46. adjudged.

Fitzh. Af.

* Br. Baron and Feme, pl. 65, cites S. C. — Fitzh. Default, pl. 40, cites S. C.

10. If Aid be granted of Baron and Feme in Reverion, the Default of the Baron shall not be of both. 21 C. 3. 13. adjudged.

11. In an Affise the Default of the Feme shall be the Default of the Baron. 29 Ass. 67.

12. In a Quod Permittat against Bailiff and Commonalty, the Default of the Commonalty shall be the Default of the Bailiff at the Grand Distress; for both are but one Corporation, and so one Defendant. 29 C. 3. 40. admitted.

13. So where there are Two Bailiffs and one Commonalty, the Default of one Bailiff shall be the Default of all. 30 C. 2. 1. In Precipe quod reddat, against Baron and Feme the Baron is Es-

fque de Servizio Regis and at the Day did not bring his Warrant, but the Feme was esseque de Servizio Regis without warrancing the Essayson of the Baron, and well; for the shall not warrant it. Br. Default, pl. 99, cites 30 C. 3. 19. and Fitzh. Essign 7.

15. And
Default.

15. And if the Baron had appeared and had not warranted the Effoign, he had lost the Land, but by his Default and the Effoign of the Feme, the Land is saved, and so the Default more profitable than the Appearance, as here, quod nota bene. Ibid.

16. Feme was received in Default of her Baron and after made Default, and Judgment was given upon the Default of the Baron, Br. Default, pl. 83, cites 38 E. 3. 12 and now no mention shall be made of the Receipt as it is said in the Time of H. 8.

17. Decease against Baron and Feme who made Default, and Grand Cape siled, and at the Day the Baron came, and the Feme not, and he said, that he is Tenant of the whole, absolute box, that the Feme any Thing has, ready to answer, and because the Default of the Feme is the Default of the Baron and Feme, therefore the Demandant recovered Seilills of the Land, quod nota. Br. Default, pl. 5, cites 41 E. 3. 24. in the S. C.

18. Decease against the Baron and Feme, the Feme was seized, and the Baron appeared at the Exigent, and the Plaintiff counted of a Breach to the Feme dam sola fuit, and therefore because the Process is determined, and this is of the Act of the Feme to which he cannot answer without her, therefore by Award, the Baron went Sine Die; for as to losing If- fues &c. upon Diffreis returned against Baron and Feme, the Default of the Feme is the Default of the Baron and Feme; contra in Cafe of Capias and Exigent &c. which are Corporal Punishments, quod nota. Br. Default, pl. 7, cites 43 E. 3. 18. & 44 E. 3. 1. & 34 H. 6. concordat.

19. Appeal of Mayken against Baron and Feme after the Exigent awarded, the Baron rendered himself, and found Mainprife, and had Superideas notwithstanding the Feme did not come. Br. Baron and Feme, pl. 33, cites 8 H. 4. 6.

20. In Precipio quod reddat against Baron and Feme, the Default of one is the Default of both; for one cannot answer without the other. This no Inconvenience to the Wife; for upon Default, after Default of the Husband, the may be received to defend her Right. Jenk. 27. in pl. 50, cites 25 H. 6. Default 4.

21. In Forcible Entry and in Trespass against Baron and Feme, if the Baron appears at the Pluries Capias, and the Feme not, the Baron shall answer alone, and the Reason is, where the Entry is supposed to be by both, then he shall answer alone, but contra where the Entry is supposed by the Feme dam sola fuit; for in this Cafe, the Default of the Feme shall not be the Default of the Baron and Feme, contra, where the Entry is supposed by both, there the Default of the Feme is the Default of the Baron and Feme, and so he shall answer alone; and in Debt against Baron and Feme it shall be intended the Debt of the Feme, and so if the Baron appears, and the Feme is saved at the Exigent against both, the Baron shall go without Mainprife. Br. Reponder, pl. 29, cites 36 H. 6. 1.

22. In Debt the Default of the Feme, where the Baron appears is the Default of both, and Capias shall issue against both; Per Choke and Danby, Quod mirum where there shall be Corporal Pain. Br. Default, pl. 47, cites 9 E. 4. 23.

Where the Default of the Baron shall be the Default of the Feme, so that the one shall not answer without the other. See tit. Baron and Feme. (1. a)
Default.

(O. 2) Default of one (not Baron and Feme,) where it shall be the Default of another.

1. ASSISE against two Tenants in Common, the one appeared and the other made Default, and he who appeared was fuller; and he who appeared was full ofDefault, for the Whole, but in such a Case Semper awarded the Assise by Default for the莫ity. Br. Default, pl. 89. cites 9 All. 16.

2. Debt against two who wag'd their Law, and at the Day the one makes makes Default, this is the Default of both; and the Plaintiff shall recover, but if he sufferers the one to wage his Law, he shall take nothing by his Writ. Br. Default, pl. 96. cites 40 E. 3. 35.

3. Two were Outlaw'd in Debt at the Suit of two, and the one purchased Charter of Pardon, and Scire Facias against the Plaintiffs, and the one was return'd warned and did not come, and the other was return'd Nihil, and the Defendant would have gone quit by the Default of him who was warned, because the Default of the one Plaintiff in Action of Debt, is the Nonfault of both; Tamen quere as here, where the Action is against them, by which he had Sicut Alias against the other, and at the Day if both the Plaintiffs appear, and this Defendant only without his Companion, the Plaintiff shall not count against him, till the other has fixed his Charter, and appear'd likewise, for they were impleaded jointly. Br. Default, pl. 12. cites 49 E. 3. 3.

4. When two are to recover a Personal Thing, there the Default of one, is the Default of both; but when they are to discharge themselves of a Personality, it is otherwise. 6 Rep. 25. b. Per Cur. cites this Diversity taken, and agreed in 2 H. 4. 16. a. b.

5. Scire Facias by three, two were effuif'd, and the Effoun was quash'd per Cur. because Delays are ousted in Scire Facias by the Statute of Westminster 2. cap. 43. Quia de his que recordat. sint &c. and Scire Facias ad quosdeinde sunt dividendi against the two, and the one of the Tenants made Defaul, and his Default was Recorded, and Day given over. Br. Ef-

6. A Man recovered Debt, and the Defendant was committed to Prison for Execution thereof, and after the Plaintiff made Three Executors and died, and the one Executor released to the Defendant, by which Scire Facias ensued against the Three Executors to dismiss the Defendant, and they were returned warned, and two appeared, and he who made the Release made Default, and the Two pleaded that the Third Ne relef't Pas by the Deed; and the bell Opinion was, that the Default of the Third is peremptory, and that the Prisoner shall be delivered; Quere. Br. Scire Facias, pl. 232. cites 10 H. 6. 2.

7. In Debt against two Executors, and they are at Issue, and after one makes Default, yet the Inquet shall not be taken by Default against the other, Quere if it was not as Executor. Br. Default, pl. 86. cites 21 H. 6. 45.

8. If a Man is bound to Two in a Statute Staple, and the one releases and both sue Execution, the Defendant brings Andita Querela against both, and the one comes and the other not, the Default of the one is the Default of both, and by this the Conutor shall go quite discharged against both. Br. Default, pl. 94. cites 11 E. 4. 8.

9. In Precipe quod reddat against two, if they impaire jointly, and after the one makes Default, this is the Default of both, per Davers; but Brian & Kebil contra. Br. Default, pl. 65. cites 4 H. 7. 17.

10. But

Br. Scire Facias, pl. 45. cites S. C.
Default.

10. But in Debt against Two the Default of the one, after joint Im-
parlance, is the Default of both. Ibid.

11. Where a Grand Cape is awarded against Two Tenants of full Age,
and the one excuses himself by a Flood of Water, and the other says nothing,
the Writ shall abate against him that excused himself, and shall stand
good against the other; Per Frowike. Keilw. 51. b. pl. 2. Trin. 19

12. In Writ of Entry, two Executors came and prayed to be received to
serve their Term by Default of the Tenant, by the Statute of Gloucester,
and after the one relinquished the Receipt and made Default, and per Rede
Ch. J. this shall not be the Default of both; for that which is most Bene-
cfial for the Testator shall be taken; for where they plead two Pleas, the
Plea which is most beneficial shall be taken and first tried, and if they
plead Release, and the one makes Default after, the other shall be per-
mitted to prosecute for the Advantage of the Testator. Per Kings-
mill. J. after they have joined in Plea the Default of the one is the
Default of both. But the saying of Rede seems to be Law, and he
who relinquished would have surrendered and was not suffered; for
the Court has no Warrant but to record his Default, theReason seems
to be inasmuch as he is not Party to the Original. Br. Refceit, pl. 79.
cites 21 H. 7. 25.

13. An Information was brought against 6 for an Assault; they all plead,
Not Guilty. Upon the Trial all but one make Default. The Court
held, that the Default of the rest shall not bind him; for though they
joined in the Plea of Not Guilty, yet being in a Criminal Case, it is
Shaft Several Pleas; and the Default of one shall not be the Default of
others; and the Inquest was taken by Default only against those that did
not appear. Cro. C. 251. pl. 1. Pasch. 3 Car. B. R. 'The King v. Wing-
field & al.'

(P) Of the Plaintiff's.

1. If two Obligees sue one Bailee of the Obligation, if one of the
Plaintiffs makes Default, this is the Default of both.

2. But if divers Obligors are warned, and one makes Default, this
is not the Default of all, although upon the Matter all are Plai-
ntifs, for they claim not a Duty, but a Difcharge. *2 Br. 4. 16. 3 pl. 4. 7. B

Obligors, and had its At the Day they were return'd warn'd, and two came, and the third made
Default, and there it was awarded, that the Default of the one shall not condemn his Companions.
—— In Debt upon the same Obligation against the three, the Default of Pliea of the one, shall not
charge the other; But ex altera Partie the Nonfault or Release of one of the Plaintiffis shall prejudice the other,
Br. Ibid. — But if the three Obligors had brought Writ of Distine of the Obligation and Defendant
had had Garnishment against the Obligors, and the one of them had made Defaults, Quere, if the other
two shall be received to enter-plead; for the two Obligors above, were received to enter-plead.
Br. Ibid. — Fitchb. Enter-Pleader. pl. 12. cites S. C.

3. Two brought Precipe quod reddat against N. the Tenant, and the one Br. Procefs,
of the Demandants made Default, andSummon to Sequandum final was Ph. 79. cites
awarded, and Grand Cape of the Whole; for if the other Demandant will appear, then they shall recover the Whole upon the Default of the Ten-
ant, and if not, then only the Moiety for the one Demandant. Br.
Default, pl. 46, cites 4 H. 6. 28.

4. If
Default.

460

4. If a Man is outlaw'd in Debt, and the Defendant purchase a Charter of Pardon and Scire Facias against the Plaintiff; and he makes Default, this is peremptory, and the Defendant shall go quit. Br. Default, pl. 87. cites 22 H. 6. 7.

5. Survey of the Peace was taken against E. B. who had Day by Main-prize Menle Pachne, and did not appear at the Day, there his Mainperners have forfeited the Bond, though J. N. who took the Peace, did not appear at the Day and demand the said E. B. and yet Scire Facias was awarded to answer the Sum. Br. Default, pl. 60. cites 39 H. 6. 26.

6. But where a Man is taken by Capias at the Suit of J. N. and is bound with Mainperners to appear such a Day, and neither he or the Plaintiff appears, there the Defendant or his Mainperners shall forfeit nothing, because the Plaintiff did not appear; quod fuis concessum, but it was said that the Cases are not alike. Ibid.

(P. 2) Excused or Discharged. By What.

1. A Man recover'd by Default against an Infant, and the Infant brought Writ of Error, and recover'd it for his Nonage; and contra if he had appear'd and left by Plea or by Voucher, he shall not reverse it by Nonage. Br. Saver Default, pl. 50. cites 6 H. 8. B. R. 22. and concord. 7 E. 3.


3. Note by Award of Babington Ch. J. that in Precipe quod reddat at the Grand Cape the Tenant appears, and the Demandant counted; by this the Default is released, and the Tenant need not save the Default. Br. Saver Default, pl. 41. cites 8 H. 6. 3.

4. The Demandant may release the Default against the Will of the Tenant, per Fitzh. and Shelly; but per Fitzh. if the Tenant had tendered his Law by Attorney, the Demandant cannot release the Default without the Will of the Tenant, by many Books, as it is said, Quare inde. Br. Saver Default, pl. 1. cites 27 H. 6. 13.

5. The best Opinion was, that Infirmity, or a Fall from a Horse in a Journey, that he was in Danger of Death of the Hurt is not sufficient Cause to save Default, but in Precipe quod reddat, but Imprisonment and Inundation of Water are good Causes to save Default; and yet per Grynhad and Movile, in the Time of Sir R. Hankeford, || Outlawry was reverted by Infirmity at the Time of the Outlawry; Contra per Pristot. Br. Saver Default, pl. 28. cites 38 H. 6. 12.

| Malady | Good | Excuse | against Outlawry, Quare Legem, and if the same Law be to save Default in Precipe quod reddat, it seems that it is not; for Malady may be justified; Contra of Floods of Water, and Imprisonment, and Nonage. Br. Saver Default, pl. 45. cites 4 H. 5. & Fitzh. Challenge 153.—Co. Litt. 159. B. S. P.——S. P. that Malady was pleaded in Avoidance of Outlawry and accepted 4 H. 4. therefore, Quare, if it be Cause to save Default in Plea of Land. Ibid. pl. 48. cites the printed Book of Abridgment of All. fo. 43.

6. Precipe
6. Precipe quod reddat, at the Nisi Prius the Tenant and his Attorney made Default, and the Default recorded, and at the Day in Bank the Tenant came and had his Presence recorded for all the Term, and he pleaded that he and his Attorney had only three Days Notice before the Nisi Prius, and showed where this was held in the County of York, and the Distance, and that he and his Attorney were searching for their Evidences to have come at the Nisi Prius and were hindered by Water in the County of Durham. See the Pleading there at large, good Matter, pleaded by a Prothonary; for Chocke and Littleton, Servants of the Tenant refused to plead for him, because it was expeditious, and the Demandant demurred upon the Plea, and it was much debated if it should serve or not; and it was admitted that his Plea goes as well to the Attorney, and for him, as for the Tenant; but it was said that this shall not serve the Attorney because he refused to plead it; and this was, because the Court did not favour the Matter for the Sufficing; and this per Billing and Laicon Servants for the Demandant. Br. Saver Default, pl. 29. cites 38 H. 5. 31.

7. Precipe quod reddat against Four, who made Default at the Day of the Grande Cape, two appeared in Person and tendered their Law of Non-summons, and the other two by Attorney tendered their Law of Non-summons, and the Demandant released the Default of the two who appeared in Person, and would have Advantage of the Default of the other two. And per Danby Ch. J. and several others, the Releafe of the Default of one, is to of all, for the Sum is intire; for one Jointenant in Action against several cannot be Summoned, but it is the Summons of all. Br. Saver Default, pl. 32. cites 3 E. 4. 21.

8. There be divers Causes allowed by Law for saving a Man's Default; at first by imprisonment, whereof Littleton here speaks. 2dly, Per Undationem Aquorum. 3dly, Per Temporatem. 4thly, Per Pemtem Fratrum. 5thly, Per Norvignam subfratrum, Per Fraudem petenti; non enim deber quis le periculis & intortunis gratis exponere, vel subjicere. 6thly, Per Minorum Aetatem. 7thly, Per Defensionem [Defaltam vel omilionem] summononis per Legem. 8thly, Per Mortem Attornati, si tenens in Tempore non novit. 9thly, Si Petens effoniatus fit. 10thly, Si placitum mittatur sine Die. 11thly, Per Breve de Warrantia Dies. Co. Litt. 239. b.

(1. 3) Declaration; necessary in what Cases, notwithstanding the Default of the Defendant.

1. At the Grand Cape in Precipe quod reddat, if the Tenant wages his Law of Non Summons, there at the Day the Demandant cannot release the Default and count against the Tenant. Contra at the first Day, as it is said elsewhere. Br. Default, pl. 96. (bis) cites 42 E. 3. 8.

2. Cessavit against an Infant who made Default at the Summons, and after came at the Grand Cape, and was not compelled to have his Default, by reason of the Intancy; but the Demandant counted against him without taking him at the Default; for otherwise his Writ shall abate; for an Infant shall not have his Default; for he can't gage his Law of Non Summons. Br. Saver Default, pl. 51. cites 3 H. 6. 10.

3. So it seems of Coverture. Ibid.

4. In Scire Facias where the Affize is taken by Default, yet the Plaintiff shall make his Plant. Br. Default, pl. 56. cites 38 H. 6. 18.

6 B

5. 8e
Default.

5. So in Dower by Default the Plaintiff shall make his Demand; for those Writs do not comprehend Certainty. Ibid.
6. Contra in Precipe quod reddat; for there appears Certainty, note the Difference. Ibid.

(P. 4) Pleadings to the Writ after Default.

2. Nor at the Return of the Writ. Ibid. cites 12 Aff. 2.
3. In Writ of Entry after it was pleaded to the Inquest, the Tenant made Default, and at the Day of Petit Cape return'd he was Esjoin'd de Servitio Regis, and at the Day faid'd of his Warrant, and afterwards he would have pleaded that he was Vilein to such a one, and held in Villeinage &c. and was not received, but Seifin was awarded. Thel. Dig. 210. Lib. 14. cap. 16. S. 2. cites Pach. 32 E. 1. Saver Default 83.
4. In Writ against Baron and Feme the Baron appear'd at all times, and the Feme made Default after Default, upon which the Baron was received to say that his Feme was esjoin'd by the Demandant. Thel. Dig. 210. Lib. 14. cap. 16. S. 3. cites Pach. 16 E. 2. Saver Default 77. and says see 10 E. 3. 522. and Pach. 11 E. 3. Vifne 59.
5. In Formedon by two Parceners the one was summon'd and fever'd, and the Tenant after made Default after Appearance, and at the Day of the Petit Cape return'd, he was received to plead the Death of him who was fever'd after the Severance without having his Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 5. cites Hill. 5 E. 3. 174.
6. At the Grand Cape against a Prior he said, that the Priory is a Cell to such an Abbey, and that he is Conmooin to the Abbott, and so the Frankenement in the Abbett &c. Sed non Allocatur. Thel. Dig. 210. Lib. 14. cap. 16. S. 6. cites Hill. 5 E. 3. Saver Default 64.
7. In Writ against two, if the one appears, and the other makes Default, and the Grand Cape of the Moiety return'd, if he make Default at another Time, the one may take the entire Tenancy and plead. Thel. Dig. 211. Lib. 14. cap. 16. S. 34. cites Mich. 5 E. 3. 209.
9. In Dower at the Grand Cape returned, the Tenant was received to say that the Demandant after Default made, has received certain Teneiments in Allowance of her Dower without having his Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 11. cites Trin. 13 E. 3. Saver Default 36.
10. At the Petit Cape return'd against an Infant he was esjoin'd de Servitio Regis, and at the Day given he failed of his Warrant, and would have pleaded by Guardian, that he was within Age and that the Demandant dideffed him &c. and was not received. Thel. Dig. 210. Lib. 14. cap. 16. S. 12. cites Trin. 14 E. 3. Saver Default 40.
11. At the Petit Cape return'd against Two, each of them severally took the Entire Tenancy, and alleged Imprisionment to save their Defaults severally, upon which the Demandant was compelled to maintain his Writ. Thel. Dig. 210. Lib. 14. cap. 16. S. 14. cites Trin. 18 E. 3. 27.
12. At the Grand Cape return'd against the Baron and Feme, the Feme came and was received to shew Discontinuance of Proces, inasmuch as the Grand Cape was only of the Moiety, without being received
Default.

13. At the Grand Cape returned executed against the Baron and seine,
the Baron was not received to fay that his Senne was dead the Day of the
Writ purched without faving his Default, because the Writ was ferved.
14. It is faid that at the Petit Cape ad Valentiam the Vouchee fhall not
fay that the Tenant is dead without faving his Default. Thel. Dig. 211.
15. At the Day given to make his Law of Non Summons, the Ten-
ant was figned, and at the Day given by the Effign he would have
pleaded that the Demandant had taken Baron after the Ley-gager, without
16. It is adjudged that at the Grand Cape returned against feveral,
each of them may take feveral Tenancy of Parcle, and wage Law of Non-
Summons feverally, and the Demandant fhall maintain his Writ, other-
Mich. 38 E. 3. 33.
17. At the Petit Cape returned, the Tenant cannot fay that the Deman-
dant has taken Baron after the laft Continuance, but he fhall plead Pro-
fiffion in the Demandant; for this extinguishes Right. Thel. Dig. 210.
18. At the Grand Cape, the Tenant was received to plead Mifioner
of himself. Thel. Dig. 211. Lib. 14. cap. 16. S. 23. cites Hill. 40 E.
3. 1.—In his Surname and in Name of Baptifm Ibid. S. 23. cites 40
E. 3. 46.—And Mifpition Apparent of his Name in the Writ. Ibid.
cites 42 E. 3. 3.
19. After Ley-gager of Non-Summons by feveral Tenants in Comman, the
one of them cannot take the intire Tenancy. Thel. Dig. 211. Lib.
see 42 E. 3. 16. & Hill. 8 H. 6. 37 Quere.
20. At the Grand Cape the Tenant fhall plead feveral Tenancy, and
Jointenancy, with Ley-gager of Non-Summons, but not Non-Tenure.
12 E. 4. 1

(Q) In what Cases the Inq unfit shall be taken by Default.
[And in what, Process shall illufc.]

1. In all Actions which depend in the Realty, if the Parties No Inq unfit
plead to illufc, the Inq unfit cannot be taken by Default upon De-
fault of the Defendant, but a Diltringas illufc in Lict of a Petit
Cape. 30 C. 3. 29.

2. As in a Writ of Customs and Services, the Inq unfit ought not to be
taken by Default, for this is to affirm the Seigniority. 30 C. 3. 29.

3. So if a Writ of Meine, if the Seigniority be defented. 30 C. 3. 29.
will prove it.

4. In a Precipe quod reddat, if after the Petit Cape the Tenant
pleads Imprifonment in another County, / BUS, in Middlefex, upon
which they are at illufc in Middlefex, and there tried against the Te-
nant, and he brings an Attaint in Middlefex, and the Sherif returns
that he hath nothing to be summoned by, the Inq unfit not be taken
by
by his Default, but a Writ shall issue to the County where the Land is. 42 Afl. 14. adjudged.
5. If an Action had been brought at the Common Law against the Petit Jury, and they had been returned attached, and yet had made Default, yet the Inquest should not be taken by Default, but Process should be awarded.
6. So at Common Law, in this Case if some of the Jurors had appeared, and others had made Default, yet the Inquest should not be taken by Default, but Process should have been awarded till all had appeared (*) || 27 H. 6. 8. b. And so is the Statute de Actionibus of 13 El. 2. but this is now aided by the Statue upon the Grand Inquests returned. 21 H. 6. 42.
7. In Annuity, the Defendant said, that at the Time of the Gift made he was within Age, and upon this they were at Issue, and at the Day the Inquest appeared, the Defendant made Default, by which the Inquest was taken by Default, which fee in the Addition of the Writ of Venire Facias, in Natura Brevium, 172, P. E. 3. Br. Inquest. pl. 91. cites 7 E. 3.
8. In Mortducefer, if at the Summons the Tenant is effoign'd and after makes Default, Re-Summons shall Issue, and not Affix by Default. Br. Default, pl. 93. cites 8 Afl. 13.
9. In Quinto juros clamat the Defendant claimed Fee, and upon this they were at Issue, and Venire Facias issued, returnable &c. at which Day the Attorney of the Defendant was effoign'd, and the Essoigne qual'd, and therefore the Inquest shall be taken by his Default. Br. Inquest, pl. 92. cites 10 E. 3.
10. In Ward, the Parol was Sine Die by Pretention, and revived by Re-summons, and the Sheriff returned the Defendant Nihil, and yet the Plaintiff cannot have the Inquest by Default. Br. Inquest, pl. 96. cites 14 E. 3. and Fitzh. Inquest, 9.
11. In an Appeal of Rape the Defendant pleaded Not Guilty, he was let go by Mainprize, and made Default at the Day of Trial; an Inquest shall not be taken by Default in favorem Vitae, but a Capias shall issue, and an Alias & Pluries, and an Exigent. Jenk. 68. pl. 30. cites 16 Afl. pl. 13.
12. In Waft, at the Venire Facias returned, the Defendant made Default, and the Plaintiff prayed the Inquest by his Default, and could not have it, but had Dilatingas ad audiendum Juratores. Br. Inquest, pl. 94. cites 18 E. 3. and Fitzh. Inquest. 3.
13. In Assowy after Issue, the Defendant made Default at the first Day, Distrefs shall Issue ad audiend' Jurat', but if he makes Default at the second Day, the Inquest shall be taken by his Default. Br. Inquest, pl. 71. cites 20 E. 3. and Fitzh. Inquest, 11.
14. Debt
17. Action of Land against the Baron and Feoff, and J. S. and at the Nisi Prius / S. appeal'd by Attorney, and the Baron and Feoff made Default, and the Defendant prayed the Inquest of the Moity, and could not have it. The Reason seems to be insufficent as upon the Default recorded Petit Cape shall issue of the Moity at the Day in Bank. Br. Inquilt, pl. 62. cites 28 E. 3. 27.

18. Scire Facias by two Coparceners, the one made Default at the Nisi Prius But in Writ Prius. Per Fisher, if in Suit against two Tenants, the one makes Default at the Nisi Prius, yet the Inquest shall be taken; and the Jurisdiction of the one made Default shall have been taken the Inquest, but it remained for Default of Jurors. Br. Inquilt, pl. 69. cites 32 E. 3, and Fitzh. Inquilt, 6. Brown and Fisher, we cannot take the Inquest; For if he can save the Default at the Petit Cape, all the Writ shall abate, or if the Defendant receives the Default, all the Writ shall abate; which Babbington Ch. J. agreed. Br. Inquilt, pl. 75. cites 12 H. 6. 7. and Fitzh. Inquilt. 56.

19. In Wafe, if the Defendant makes Default after Appearance, the Plaintiff shall have Ditrefs infinite, and not Write to Inquire of the Waife. Br. Default, pl. 82. cites 7 H. 4. 15.

20. If the Prayers in Act makes Default at the Day of Nisi Prius, the Inquest shall be taken immediately. Br. Default, pl. 98. cites 7 H. 4. 16.

21. If Nisi Prius ceases by Protection, and at the Day in Bank is re-As the Nisi Head'd, new Process shall be made against the Jury, but if it be disallowed at the Day, the Inquest shall be taken by his Default. Br. Proces, pl. 170. cites 14 H. 4. 16. Default, and at the Day in Bank the Defendant was Head'd, Protection was taken, and yet the Inquest was not awarded by Default of the Defendant at the Nisi Prius; For the Protection was taken in Force, and yet the Day of Nisi Prius, and the Day in Bank is one to diverse Expects, by which they demanded the Defendant, and he made Default, wherefore then the Inquest was awarded by Default. But where Protection is Head'd at the Day of Nisi Prius, and the Inquest were not taken the Inquest, but record it, and at the Day in Bank the Protection is disallow'd, there the Inquest shall be taken by Default, and in this Case the Default was never Headed, contra above. Br. Inquilt, pl. 25. cites 21 H. 6. 25.

In Action Personal at the Nisi Prius, the Defendant made Default, and the Default recorded, and after Protection was Head'd by A. B. and recorded, and at the Day in Bank, Protection was Head'd, and therefore the Inquest was awarded by Default, and the Reason seems to be, insufficent as the Default was recorded before the Protection was Head'd, and in this Case the Defedt has lost his Challenges; but it is said elsewhere, that he may give Evidence. Br. Inquilt, pl. 91. cites 4 E. 4. 1.——Br. Protection, pl. 71. cites S. C.

22. Quare Impedit against Patron and Incumebant, who came at the Dis. Br. Ditrenses, and had Issue of the Writ, and said, that the Pain was not served in presence of the processes, pl. 14 cites Court, therefore he was compelled to answer; And so it seems that nisi prius serving
ferving of Process, or ill Return, is material, where the Party appears, and where the Judgment is not upon the Default, but upon the Plca and Appearance of the Party. Br. Procs. pl. 47. cites 9 H. 5. 3.

23. If in Process quod reatum dat the Tenant makes Default after Appearance, by which Petit Cape Issues, and after this is released or faced, and are at Issue, and the Tenant makes Default again, now the Inquest shall be taken by Default, as in Plea Personal, and shall not have Petit Cape; For Petit Cape shall not Issue after Petit Cape. Per Westbury; Quere. Br. Inquest, pl. 52. cites 9 11, 5. 12.

24. If the Defendant makes Default at the Day of the Imparlance, he shall be condemn'd by his Default. Br. Default, pl. 78. cites 11 H. 6. 31.

25. Debt against four Executors of 200l. the Plaintiff recovered the 200l. of the Goods of the deceased, and 20l. Damages de bonis propriis, and after the Plaintiff brought Seire Facias against the four Executors, and they were at Issue, and at the Nisi Prius one appear'd and three made Default, and by the best Opinion, the Inquest shall be taken, and not Judgment be given by Default of the three. For that Executor who best pleads, or does, for the Testator shall be admitted; Per Newton, Patton, and Ascue, J. and if the one Executor confesses the Action or release, this shall bind the others; but if the one be Non-judged, yet the others shall sue forth; and the Opinion was, that if Judgment shall be given by Default, yet of the 20l. which was de bonis propriis, Judgment shall not be given by Default against all for the Default of any of them, but only of the 200l. which was of the Goods of the Deceased; but by the best Opinion, the Inquest shall be taken. Br. Executors, pl. 77. cites 21 H. 6. 45.

26. In Trespass, they are at Issue, and Venire Facias issued, and after other Venire Facias issued the Defendant made Default, the Inquest shall be awarded by his Default. Br. Inquest, pl. 56. cites 22 H. 6. 4. Per Newton.

27. Re-attachment was sued in Trespass, and Re-bobble Corpora against the Jury, and the Defendant made Default; by which the Inquest was taken by his Default; Per Cur. Br. Inquest, pl. 74. cites 1 R. 3. 4. and Fitzh. Inquest, 26.


(R) [Inquest taken by Default.]

In Respect of the Issue in the Action.

1. In a Writ of Mefine, if the Issue be whether the Plaintiff was dis-strained in Default of the Defendant, and after the Defendant makes Default, the Inquest may be taken by Default, because the Issue the Acquittal, which makes the Action real, is acknowledged, and the Issue is only in Right of Damages. 30 Ed. 3. 28. b. adjudged.

2. In Debt the Defendant came by Capias and pleaded to Issue, and found Mainprize to keep his Day, and failed at his Day, by which the Inquest was awarded by his Default, but no Capias upon the Mainprize; for this shall be double Pain. Br. Inquest, pl. 21. cites 38 E. 3. 14.

3. In Debt the Defendant pleaded a Release, and the Plaintiff said, that Non est Fallum, and at the Day of Venire Facias, the Defendant made Default, and the Inquest was taken by his Default, and found for the
the Defendant, by which the Plaintiff took nothing by his Writ; and yet if the Plaintiff had prayed it, he might have had him condemned by the Default before the taking of the Verdict; and so see Folly in the Plaintiff. Br. Inquest, pl. 5. cites 40 E. 3. 15.

4. In Trespass, the Defendant confessed the Trespass, and justified, and after made Default at the Day of Adjournment, by which the Inquest was taken by Default, and not Writ to inquire of the Damages. Br. Inquest, pl. 20. cites 9 H. 5. 15.

5. In Debt it was said for Law by Forresee, that if the Defendant pleads a Release upon which they are at Issue, and after the Defendant makes Default, he shall be condemned by Default. Br. Inquest, pl. 3. cites 34 H. 6. 24.

6. But upon such Release and Default in Trespass, the Inquest shall be taken by Default, and no Diversity or Reason is given by him, but that the Usage has been so; But Brook says it seems to him, that the Reason is, that the Debt is certain, and the Damages in Trespass is uncertain. Br. Inquest, pl. 3. cites 34 H. 6. 24.

7. In Debt the Defendant pleads a Release made to him by the Plaintiff, the Plaintiff replies, that this Release was made by Duress, and upon this they are at Issue, the Defendant makes Default, the Inquest shall be taken by Default. Jenk. 81. pl. 59.

seems to be, if the Defendant had appeared, and an Inquest had been taken, and it had been brought against him, the King should have a Fine; and the Default of the Defendant hinders this. Jenk. 81. pl. 59.

8. But if the Defendant being sued in Debt, had pleaded Novus falli, and had made Default at the Trial, he should be condemned without taking an Inquest. Jenk. 81. pl. 59.

by the Plea. See Roll. 586. pl. 2. and pl 7.

9. But in Trespass the Defendant pleads a Release, and Issue is joined upon it that it is not the Plaintiff's Deed, and the Defendant makes Default, in this Case an Inquest shall be taken; for Trespass is uncertain for the Damages, and a Jury ought to find them; the Debt is certain, and appears to the Court. Jenk. 81. pl. 59.

10. Upon an Issue, whether Payment was made or not, the Inquest shall be taken, although the Defendant makes Default. Jenk. 68. pl. 30. cites 1 H. 7. 2. and 15 Ed. 4. 25.

11. In Trespass the Defendant justified for a Way &c. and Issue being joined, the Cause came down to be tried at nisi prius. But the Defendant made Default, and so the Inquest was taken by Default; and now the Issue being immaterial, the Court was moved for a Repleader. Et per Holt. Ch. J. the Defendant is out of Court by the Default, and that to all Purposes but this, viz. That Judgment may be given against him; therefore being out of Court, there cannot be a Repleader, unless the Default could be waived, or the Party could be brought into Court again. 1 Salk. 216. Trin. 2 Ann. B. R. Staple v. Hayden.

(S) In
(S) In what Cases upon a Default Judgment shall be given, or Inquest taken by Default.

Fitzh. Af. 1. In an Affile, if the Tenant makes Default at the first Day; the Inquest shall be taken by Default. 30 Anti. 17. adjudged.

In Debt the Defendant was sworn at the Warrant Facias, and at the Day thereof was sworn a Servito Regis, and at the Day of this did not bring his Warrant, and the Plaintiff prays the Inquest by Default, and could have only 40s. Damages for the Delay, and Nisi Prius awarded where the Statute of Gloucester cap. 7. hath given a Penalty for it. 21 Eliz. 3. 62. b. But quire 29 Eliz. 3. 36. adjudged.

(T) In what Cases upon a Default an Inquest shall be taken by Default, or Judgment is to be given.

1. It seems that where before Issue upon Default Proceeds shall issue, and Judgment is not to be given, there after Issue upon Default, the Inquest shall be taken by Default. 11 P. 4. 32.

2. If by the Issue the Action is confessed, and a Matter subsequent in Discharge in Trial, if the Defendant makes Default, Judgment shall be given without taking the Inquest, but otherwise e contra. 11 P. 4. 32.

Jenk. 81. p. 59 cites S. C. —— In Debt, if the Defendant pleads Release, and after makes Default, Judgment shall be given by his Default, For by such Plea the Debt is confessed. Per. Cur. Br. Default, pl. 92. cites 4 Eliz. 6.

See (X) pl. 5. 3. If in Debt upon an Obligation, the Defendant says he made it by Durefs, upon which they are at Issue, if the Defendant afterwards makes Default, the Inquest shall be taken, for the Obligation was never acknowledged. 11 P. 4. 32.


4. But
4. But in Debt upon an Obligation, if the Defendant pleads the S. P. And Release of the Plaintiff, upon which they are at Issue upon the Demand if hepleads Acquittance, and ater the Defendant makes Default, Judgment shall be given against the Defendant, for by the pleading of the Release the Jury has acknowledged the Debt. 14 H. 4. 2. 12 H. 6. 7. 34 H. 6. 32.

5. If a Man, in Execution upon a Condemnation in trespass, sues a Third Scire Facias against the Recoveror upon his Release, who denies it, upon which they are at Issue, if the Recoveror makes Default at the S. C. Trial, Judgment shall be given upon the Default, that the Plaintiff shall be quit, and the Inquest not taken upon the Default. 12 H. 6. 7. adjudged.

6. In Detinue, if the Garnishee and Plaintiff are at Issue, and the Defendant, Garnishee makes Default at the Nisi Prius, Judgment shall be given upon the Default, for the Plaintiff is joined, and the Inquest ought not to be taken by Default. 8 H. 6. 5. The Inquest shall not be taken upon the Issue; for by the Default the Issue is vass'd, and the Inquest shall inquire of the Damages, and the Garnishee shall not have Access. Br. Inquest, p. 57. cites S. C.—Jenks. St. pl. 59. S. P. In Detinue the Defendant pr'y'd Garnishment and had it, and at the Day the Garnishee and the Plaintiff appeared, and the Defendant made Default, yet the Plaintiff could not have Judgment by Default, for the Defendant has done all that he can do, and the Action is now between the Plaintiff and the Garnishee upon Inter-pleader, and upon this the Garnishee pleaded Release of all Actions, and it was accepted. Br. Default, pl. 91. cites 59 E. 3.

7. In Debt upon an Obligation, if the Defendant denies the Deed, generally, and after Issue makes Default, the Inquest ought to be taken by Default, and not Judgment given, for he does not acknowledge the Obligation by the Plead. 12 H. 6. 7. Plaintiff may proceed to Trial, and have the Inquest taken by Default; but he shall not have Judgment by Default, unless in few spec'd Cases. In Debt upon a Bond, if the Defendant pleads a Release, and Issue is then upon joined, and at the Trial the Defendant makes Default, the Plaintiff may pray Judgment by Default and the Inquest need not be taken by Default, for by this Plea the Duty is confessed, and the Plea is not made good; after upon Non eft Judicium, for thereby the Duty is denied, therefore in that Case the Inquest may be taken by Default; But in Trespass, if the Defendant pleads Release, and makes Default, the Plaintiff cannot pray Judgment by Default, but must pray the Inquest by Default; for the Debt was certain, but the Damages are uncertain. 1 Salk. 216, 217. Trin. 2 Ann. B. R. Staple v. Hayden.

8. In Account as Receiver, if the Defendant traverses the Receipt, upon which the Parties are at Issue, and after the Defendant makes Default, no Judgment shall be given, but a Capias to hear the Jury; and if he makes Default (C) thereupon, the Inquest shall be taken by Default. 30 E. 3. 12 adjudged.

9. So in a Quia Mes juris claimat, if the Defendant claims a Fee, upon which they are at Issue, and after the Defendant makes Default, the Inquest shall not be taken by Default, but the Plaintiff shall recover the Land. 30 E. 3. 29.

10. In a Quaere impedit, if the Defendant comes at the Grand Distrefes returned, and pleads to the contrary, and after makes Default, the Writ shall be awarded to the Bishop without taking the Inquest. 12 E. 2. Quaere impedit 168.
11. In Debt if the Defendant pleads Release and the Plaintiff denies the Deed, and at the Day of Venue Faciws returned, the Defendant makes Default now he shall be condemned by Default if the Plaintiff prays it, but if he takes the Inquest by Default, and they find against him, he shall be barr'd quod nota. Br. Default, pl. 6. cites 42 E. 3. 1.

12. Debt upon an Obligation, the Defendant pleaded Release of all Actions, and the Plaintiff denied the Deed, and so to Issue, and at the Day he did not come by which he had another Day, and at the Day the Defendant did not come, by which he was condemned by Default quod nota; for by the pleading of the Release the Obligation is not denied, quod nota, and is as confessed. Br. Default pl. 9. cites 45 E. 3. 10.

13. And note there, that if the Defendant, after that he had pleaded to the Inquest upon the Release had made Default at the first Day after that he had joined Issue, he shall not be condemned at this Day; for the Statute gives him one Issue, or one Default, so that at the next Day he may purrie &c. Ibid.

14. If Four bring Writ of Error upon Outlawry pronounced against them in Appeal of the Death of the Baron brought by the Feme, and she is returned warned and does not come, and two of the Plaintiffs appear and two not, the Feme Defendant shall not be demanded if all the Plaintiffs do not come, and Severance does not lie. Br. Demand. pl. 3. cites 7 H. 4. 45.

15. Where Protection is saft at the Day of the Nisi Prius, and repealed at the Day in Bank, and the Defendant makes Default, the Plaintiff shall not recover by Default, but shall have the Inquest by Default; for the Default at the Nisi Prius was saved by the Protection. Br. Default, pl. 27. cites 14 H. 4. 23.

16. In Debt the Defendant pleaded Release of all Actions Personal, the Plaintiff said that he made the Deed by Dures; and at the Nisi Prius the Defendant made Default, and yet per tot. Cur. the Defendant shall not be condemned by Default, but the Inquest shall be taken by Default, for the Deed is not denied, but is avoided by Dures and by Matter in Law, and to see upon Deed denied and Default made after, the Plaintiff shall recover, and the Defendant shall be condemned by Default. Br. Default, pl. 28. cites 9 H. 5. 13.

17. A Man condemned by Ca. Sa. got Release of the Plaintiff and had Scire Facias ad cognoscend. factum, and the other comes and denies the Deed, by which they are at Issue, and after the Plaintiff makes Default, the Defendant shall go quit. Br. Default, pl. 76. cites 12 H. 6. 7. and Fitzh. Scire Facias 148.

18. Trespa's against Three who impared to another Term, and at the Day one made Default, and the Two pleaded to Issue in a Foreign Place, and therefore Inquest to inquire of Damages was awarded against him who made Default. And To see that by Default after Importance the Defendant shall be condemned, quod nota, and yet the other two pleaded, which intitled the Third to the whole. Br. Default, pl. 38. cites 19 H. 6. 8.

19. If Tenant by Receipt joins Issue upon Jeofalit, and after makes Default, by this all the Issue and Jeofalit is waived, and Judgment shall be given upon the first Default of Tenant for Term of Life, and all done by the Tenant by Receipt is waived. Br. Waiver des Choles, pl. 46. cites 20 H. 6. 37.

20. Debt upon an Obligation of 40 l. the Defendant pleaded Release of all Actions &c. and Ven. Facias returned, and the Defendant made Default, and it was argued, if he shall be condemned by Default, as if he had pleaded Acquittance, which confisits the Debr, and alter had made
made Default, and after several Precedents were shewn, that all was
ou by which the Defendant was condemned by Default; Nota. Br.
Default pl. 63. cites 5 E. 4. 86.
21. Contra where he pleads Matter in Faet, as Condition in Arbitra-
ment, or the like, after Default made, there the Inquest shall be award-
ed by Default, but he shall not be condemned by Default; Per Choke
J. Qued non negatur. Ibid.
22. In Account the Defendant pleaded that he was not his Receiver &c.
and found against him, by which he was adjudged to account, and he
alleged Payment before the Auditors, and after he made Default, and the
Plaintiff prayed Judgment by his Default and could have only Inquest
23. Contra, where a Man in Debt upon an Obligation pleads Acquits-
tance, and after makes Default shall be condemned by Default; Note
the Diversity, where he pleads Deed of the Plaintiff, and where he
pleads a Matter without writing. Ibid.
24. In a Writ of Right brought by the Lord Windfor, the Plaintiff
and Four Knights, and Eleven of the Grand Affife appeared, and the
Tenant made Default; The Prokonotaries said, that the Default of the
Tenant shall only be recorded, and the Jurors shall not be demanded,
for the Inquest shall not be taken by Default in this Case, as in Personal
Actions. But says that Glanvil in his Treatise De Magna Affife
&c. is to the contrary. Dy. 98. a. pl. 51. 52. Patch. 1 Mar. Ld.
25. Husband and Wife Tenants in Writ of Right, they made Default,
after the Wife joined, and after the Wife was received to join the Affife
again, but if the Party shall have Sefion of the Land without a Petit-
Cafe, in that the Books differ. Dy. 98. a. pl. 53. Patch. 1 Mar. Ld.
Windsor v. St. John and Ux.
26. Holt Ch. J. said, that some old Books hels, that where the Defen-
dant made Default after Issue joined, Judgment should be given by Default,
and not the Inquest taken by Default. Some old Books indeed are so,
but I never understood the Reason of them. A Difference has been
taken indeed, where a Reliefs was pleaded, and where other Matter; in
the first Case, because that Plea conteinles the Debt, if the Defendant
made Default at the Trial, Judgment shall be given against him by
Default; but even in that Case they agree, that the Plaintiff may go on
to Trial, if he will. As to all other Cases it is a general Rule, that there
shall be no Judgment by Default after Issue joined. By the Statutes
of Weftm. 2. & Marlb. the Defendant can have but one Default after
Issue joined, and that must be Ad proximum Diem. Now you always
appear upon the Return of the Venire Facias. But in those Days the
Defendant was called solemnly upon the Return of the Venire Facias;
and if he made Default, then went a Disturbing, in which was inferred
a Clause to disjoint the Defendant to appear; but if he made Default,
then there was no other Proceed to bring him into Court again, and so
his Default was peremptory. And warned the Bar never to make De-
faults any more; for it will be hard to maintain, that any Judgment
can be given for the Defendant, after he has made Default. Powell J.
said, that a Defendant that has made Default, is not fit out of Court,
but that Judgment may be given against him, but he can never have a
Day in Court again. 2 Ld Raym. Rep. 925. Trin. 2 Ann. in Cafe
of Staples v. Heydos.

(U) In
(U) In what Cases Judgment shall be given upon a Default.

[And in what Cases a Writ shall issue ad Audiendum Judicium.]

Fitzh. Jour. 1. I N Debts, if there be a Demurrer in Judgment upon a Plea in Bar, pl. 34. cites S. C. — and after the Plaintiff makes Default, a Writ shall issue against him ad Audiendum Judicium. 20 H. 6. 44. b.

In Debt if the Writs are at issue or demurr, and after the Defendant makes Default, the Judgment shall be upon Default, and the Demurrer or Issue waived. Br. Default, pl. 36. cites 35 H. 6. 35. Per Moyle.

Br. Audita Querela, pl. 2. cites S. C. — Br. Default, pl. 79. cites S. C.

3. But if he pleads, and after makes Default, a Writ ad Audiendum Judicium shall issue. 47 C. 3. 1. b.

A Man demanded Summi of the J. N. in E. R. by which he waived in Ward, and upon this he brought Bill of Alibitum against him, and they appear'd to the Bill, and Day was given in this Form viz. Ad illam biliam comptensitem tam Querente quam Defendentis super hoc dies datum est ultque in Dian Jorris &c. salvis defendenti exceptionibus suis ad illam, ad Peribonam, et avanagiis quibuscumque, and after the Defendant was demanded and made Default. Vampage said, if a Man appears and says nothing, the Plaintiff shall recover for want of Answer, and if he appears and makes Default in the same Term, he shall be condemn'd. For this is a Departure in defecte, and if he impares and makes Default at the Day, he shall be condem'd ; by which he pray'd, that he shall be condemn'd. And the first Cases were not denied which Vampage put, but in this Case, because the Day was given by the Court, therefore he is out of the Cafe, and shall not be condemn'd, Quod Nots, for he did not demand the Day as upon Imparlance, nor had Oyer of the Bill, therefore shall not be condemn'd, Quod Nots, by Award, and those Matters are in Personal Actions, and not in Actions Real, but there upon Imparlance it seems, that the Tenant shall have Seisin of the Land, and in the other Cases Petit Cases shall issue, as it seems. Br. Default, pl. 54. cites 7 H. 6. 59. 41. —— Br. Bille, pl. 6. cites S. C.

Br. Bille, pl. 6. cites S. C.

In Annity if the Defendant makes Default after Appearance, the Plaintiff shall recover the Annity. 2 D. 4. 4.

8. But 2 D. 4. 1. b. per Curiam, a Writ shall issue to hear Judgment.

9. In a Writ of Annity, if the Defendant hath Aid of the King Patron, and of the Ordinary, and after a Procedendo comes, and the Defendant
Defendant and the other Praises make Default, no Writ shall issue to Audientud Judicium, but he shall be summoned to answer. 29 C.

10. Where no certain Thing is demanded, if the Defendant after Appearance makes Default, no Judgment shall be given, for it cannot be adjudged by the Judges, otherwise where the Thing demanded is certain. * 2 D. 4. 23.

11. As in Trespass, if the Defendant pleads a Release, and after makes Default, the Plaintiff shall not have Judgment. 2 D. 4. 23.

12. But if in Deed it is otherwise, for there the Demand is certain. 2 D. 4. 23.

at the Day of the Imparlance the Defendant made Default, and the Plaintiff demanded Judgment to recover by his Default, and per tot Cur. except Myole, he shall have Judgment to recover by the Default after Appearance, Quia Nihil dicta; for if whoe appears and pleads, does not maintain it, this is Quasi Nihil Dicta and after by Advice of all the Judges, the Plaintiff recovered his Deed, and Damages, raised by the Court. Br. Default, pl. 58. cites 25 H. 6. 32.

† Br. Quoilet, pl. 11. cites S. C.—But in Plea Reall, upon such Default after Imparlance, shall issue Petit Cape. Br. Ibid. —But it seems, that in Trespass upon such Default, where there is no Demand certain, there Quoilet shall be taken by his Default. Br. Ibid. —Br. Peremptory, pl. 27. cites S. C.

‡ Br. Quoilet, pl. 11. cites S. C.—But in Deed of 20 Quarters of Corn, the Defendant had peremptory Day after Imparlance, to answer, and did not come, and the Plaintiff prayed his Debt and Damages to be ass'd by the Court; Brian denied it; for this varies from the Common Ainion of Debt of Money which is Debt and Detent; but this Aison is in the Detent only, and therefore the Value of the Corn shall be inquired at the Time 8c; and therefore Writ shall be to inquire of the Value, per Judicium. Br. Default, pl. 104. cites 11 H. 7. 5.—See (T) pl. 7. and the Notes there.

13. When an Ille is found for the Demandant, if the Tenant makes Default after Judgment shall be given; for after Ille nothing remains but to give Judgment. 4 D. 6. 29.

pl 45. cites S. C.—Fitch Judgment, pl. 7. cites S. C.

14. In a Writ of Confage, if Baffard is pleaded in the Demandant, S. P but and returned by the Bishop that he is a Muller, if at this Return the Tenant makes Default, the Demandant recover, and no Petit-Cape shall issue, for the Ille is found for him. 4 D. 6. 28

have Judgment to recover, but shall have Petit Cape; But per Martin, This is a Trial as Trial by Verdict, and after Trial by Verdict, the Demandant shall recover the Land, notwithstanding, that the Tenant makes Default, by which the Demandant prayed his Judgment at his Peril, and had it. Br. Default, pl. 45. cites 4 H. 6. 28.—Fitch Judgment, pl. 7. cites S. C.—Br. Judgment, pl. 108. cites S. C.

15. So if after Ille found for the Plaintiff at the Nisi Prius, if a Day be given in Banco, and the Defendant makes Default, Judgment shall be given against him. 4 D. 6. 28.

16. In Quare impedit, If the Defendant makes Default after Appearance, the Plaintiff shall recover the Possentment and his Damages, and have Writ to the Bishop, but if he had taken Continuance and had made Default, Dittoes ad Audientud Judicium should Ille. Br. Default, pl. 50. cites 2 H. 4. 1. & 6 R. 2.

17. If Voichee appears by Attorney, and after costs Protection, which is repeated the next Day, Selin of the Land shall be awarded; for Default and Appearance cannot be all at one and the same Day. Br. Default, pl. 18. cites 9 H. 4. 19.

18. Where Tenant in Precept quod reddat appears at the Nisi Prius by Br. Garnitian Attorney, who has no Warrant, this shall turn him in Default at the Day de Attorney, in Bank, though the Jury be taken and pays for the Demandant and Petition, S. C. that at the Day in Bank, Hall would not record any Warrant, and so it was taken as a Default. 6 E 19
19. In Debt, the Defendant pleaded Mifnomer, and the Plaintiff imparked and at the Day the Defendant made Default, and by the Opinion of all the Justices, except Moile, the Plaintiff shall recover, and no Diftrefs ad Manutencion plactium shall issue. Br. Default, pl. 51. cites 27. H. 6. 27.

20. So if he had pleaded in Bar, and after had made Default, and this in Plea Personal; but in Plea Real, Petit Cape shall issue. Ibid.

21. If Tenant in Precipe quod reddat appears and imparks, and after makes Default, Seilin of the Land shall be awarded and not Petit-Cape; Per Prifict quod non negatur quod nota. Br. Default, pl. 58. cites 38. H. 6. 33.

22. And per Prifict in Confimili Cafu 39 H. 6. 16, every Default after Imparance is peremptory, and fo in Writ of Right if the Tenant vouches, and the Vouchee appears and enters into the Warranty, and imparks, and after makes Default, the Demandant shall recover Seilin of the Land against the Tenant, and the Tenant over in Value &c. Ibid.

23. In a Writ of Right, Quia Dominus remittit Curiam fiam Domino Regi, by Baron and Feme, where the Wife appeared per Præcipe any being within Age, the Tenants vouched the Common Vouchee, who entered and joined the Mife upon the meer Right, and afterwards made Default, and Judgment final was given against the Vouchee and his Heirs, and against the Tenants and their Heirs. Dyer. 50. a. pl. 17. Trin. 35 H. 8. Anon.


24. In a Writ of Right if the Tenant makes Default after the Mife joined the Judgment shall be final. F. N. B. 6. (N)

25. Error of a Judgment in Dower; after Issue the Tenant being an Infant made Default, a Petit Cape was awarded, and Judgment given by Default; the Court held it no Error, especially it being after Appearance, for he cannot save his Default by Non-Summons. Cro. E. 308. pl. 16. Mich. 35 & 36 Eliz. B. R. Gore v. Purdue.

26. Error of a Judgment in a Writ of Right of Lands in T. The Writ was Quia Dominus nobis remittit Curiam fiam; The Defendant after divers Imparances made Default and final Judgment was given in Durham, Error assign'd was, becaufe final Judgment was given upon a Default after Imparance, where it ought to have been only a Petit Cape; the Court did not give any Resolution in that Point, but seemed to incline that a Judgment final should not be given, unless upon a Departure in Defpite of the Court, which is upon a Default of the Tenants the same Term after Imparance. But if Day be given to any other Term, or Time certain, and then the Tenant makes Default, it shall be otherwise. Cro. J. 292. pl. 2. Mich. 9 Jac. Lilburn v. Heron.

S. C. the whole Court seem'd all clear of Opinion, that the Judgment given at Durham was erroneous, but the Reverend it was not pronounced, and upon the declaring the Opinion of the Court, the Parties ended the fame between themselves, without further moving of the Court herein. — Tile 211. S. C. and the Difference taken between General and Special Imparance, which is to a Day certain, in which Case the Tenant is not bound to appear till the Day, and there may be some Cause whereby to excuse his Default, and then no Laches in him, and consequently no Reason that he should lose his Land peremptorily, where the Right appears not to the Court, and where he is not guilty of any Contempt. Quad Non; Per vos. Cur.
Default.

27. Error was brought of a Judgment in Quod ci decretat at the Grand Sessions in Wales, and aligned for Error that Judgment final was given upon Default after Appearance, where it ought to be Petit Cape in all Real Actions upon Default after Appearance, and Grand Cape upon Default before Appearance, which the Court held manifesty Error. Lev. 105. Trin. 15 Car. 2 B.R. Slaughter v. Tucker.

28. If the Tenant makes Default in a Real Action, a Grand Cape is awarded, and upon the Return of it, if the Demandant insist upon the Default, he must have Judgment final, but the Demandant may waive the Default, and take an Appearance upon the Grand Cape; and that is regular because the Tenant comes in by Proceeds; and so it is of a Default in a Petit Cape, but in a Personal Action there is no Proceeds to bring the Party into Court again; also the Day of the Nisi Prius not being the same with the Day in Bank, a Default at Nisi Prius cannot be waived at the Day in Bank. Per Holt Ch. J. 1 Salk. 217. Trin. 2 Ann. B. R. in Case of Staple v. Hayden.

29. A Writ of Right for Land is brought against A. he does not appear; a Grand Cape issues, he makes Default at the Grand Cape; Judgment final shall not be given till Appearance and Trial by Battle after the Mite joined upon the meer Rights, or Trial by the Grand Assise; or after the Mile joined, and a Departure in Dispite of the Court; or after the Mite joined, and a Default and a Petit Cape awarded, and upon this the Default not saved. In these several Cases final Judgment shall be given. Jenk. 141. pl. 91.

(X) In what Cases after Plea pleaded Judgment shall be given upon Default without a Writ ad Audientiam Judicium.

1. If the Defendant makes Default after such Plea pleaded, which is Br. Enquest, a Confession of the Action, and only a Matter of Discharge subsequent, Judgment shall be given upon the Default, but otherwise e contra. 11 P. 4. 32.

2. As in an Action of Debt, if the Defendant pleads an Acquit, * Br. Enquest or Release, and after makes Default, Judgment shall be upon the Default, because the Duty is acknowledged. * 11 P. 4. 32. || 11 P. 7. 1. † 2 P. 4. 23. 12 P. 6. 7.


3. In Replevin, if the Defendant avows, and after makes Default, Br. Default, Judgment shall be thereupon for the Damages, because the Taking and Detinue are acknowledged. * 11 P. 4. 32. || 14 P. 4. 2. S. C. Per Thinning and Hank.

* Br. Enquest, pl. 16 cites S. C. but not S. P.—Fitzh Condemnation, pl. 10. cites S. C. || Fitzh. Condemnation, pl. 11. cites S. C.

4. But otherwise it is e contra. 5. As
5. As in Debt upon an Obligation, the Defendant pleads that he made it by Duress, and after makes Default, no Judgment shall be, but Process shall issue for it, because here the Deed was never acknowledged. 11 P. 4. 32.

6. In Account as Receiver, if the Defendant traverses the Receipt, and after makes Default, no Judgment shall be, but Process. 30 C. 3. 12. adjudged.

7. Where the Defendant in Action Personal appears and pleads, and after makes Default, he shall be condemned by Default, nisi Nikil dicit. Br. Default, pl. 58. cites 38 H. 6. 33 per Prifon.

8. In Trespass the Defendant came by Capit Corpus and pleaded in Bar, and the Plaintiff replied, upon which the Defendant demurred, and was let to Mainprise de die in diem, and as the Day made Default, and by Award he was condemn'd by Default, and Writ awarded to inquire of the Damages and Cape pro fine Regis against the Mainprinors. Br. Default, pl. 73. cites 18. E. 4. 7.

9. So where he pleads to Issue and makes Default; and if he pleads to Issue and remains in Ward, there he shall not be condemn'd by Default, but the Warden shall be commanded to bring him in, but if he was by Mainprin, the Inquet shall be awarded by his Default. Ibid.

(Y) After Default. Where a Writ is to be awarded ad Audientum Judicium, what Process there shall be.

1. In a Writ of Debt, if the Defendant comes by Exigent, and pleads in Bar, and after makes Default, a Capias shall be awarded. 11 P. 4. 32.

2. And if he makes Default upon the Capias, what Process shall be awarded, quere. 11 P. 4. 32.

3. Where the one of the Demandants and the Tenant make Default at the Summons, Grand Cape shall issue of the Whole, and Summons ad sequent' simul, and if the other Demandant who made Default, appears, and the Tenant makes Default again, they shall recover the Whole, but if the other Demandant and the Tenant make Default again, there the other Demandant who appears shall recover the Moiety only, Quod Nota. Br. Processe, pl. 79. cites 9 E. 4. 2.

(Y. 2) Judgment for Default. At what Time.

1. A Man shall not be condemn'd by his Default, but after Plea pleaded or Imparlance; For the Dies datus is always before the Count, and the Imparlance is after the Count. Note the Difference, for it is good. Br. Default, pl. 1. cites 19 H. 8 6.

(Z) Who
Default.

477

(Z) If who shall be put to answer. [One who comes or is brought into Court for another Purpose.]

1. If a Man comes in Bank upon a Capi Corpus, and I have a Writ Br. Respon- der, pl. 48. cites S. C. and that so it is, if he

be in the Custody of a Sheriff, who has Process against him out of Bank, he shall answer, unless he denies that he is the same Person, but if he denies his being the same Person, then he shall not. Cases, if he comes by Writ in Ward of the Sheriff of London, upon a Plaint there, for in that Case he is a Prison-

er to the Bank, and not to the Bank.

2. If a Man be committed to the Fleet by the Common Pleas, and another sues a Writ against him, the Warden of the Fleet shall be commanded to bring him in, and when he comes into Court, he shall be put to answer thereto without Writ. 9 H. 6. 55.

Two Writ of Trepass were brought against one and the same Man, he came upon the one Writ by Exigent Quaere exaudis, and therefore by Newton, he shall be Prisoner to the Fleet, and shall pay Fees, and he should not have appeared to the other Writ, but because he is the same Person, and is Prisoner to the Fleet, therefore the Court compell'd him to answer to the other Writ also, Quod Nota; For they may send for him to the Warden of the Fleet, and if he will not answer, he shall be Condemn'd. Br. Default, pl. 42. cites 22 H. 6. 51.—Br. Responder, pl. 21. cites S. C.

3. If a Man be imprisoned in B. R. he brought in Banco by Habeeas Br. Default, Corpus to answer a Writ there depending, when he comes he shall be put to answer thereto, for he was brought there for this Purpose, yet he is not committed in Banco. 9 H. 6. 54. b.

ed by Writ, but contra if he be impeached by Plaint, cites 28 H. 6. 50.—Br. Imprisonment, pl. 28. cites S. C. but a Quare is there added, if this Suit by Writ or by Plaint, shall be intended of the Suit in B. R. or of the Suit in C. B.

4. If a Man be brought in Banco upon an Habeas Corpus to have the Privilege because he was arrested coming to Court, if another hath a Writ against him, he shall not be put to answer thereto, because he is not in Ward of the Court, but in the Custody of the Sergeant who brings him in; and the Question only is, whether he is to be de-

livered, or to be remanded. 9 H. 6. 54. b.

5. In Plea of Land at the Petit Cape return'd the Demandant was offi'd, and bad Day till now, and the Demandant held him to the De-

fault. Trewe said, the Default cannot be taken; for it is gone by the Efsion, and notwithstanding this, the Tenant was compelled to answer to answer to the Default. Br. Ellinage, pl. 87. cites 5 Atl. 10.

6. He who is taken in Pains by Warrant of a Justice of Peace, and after is taken by Capias out of C. B. he shall answer in Bank, and shall be by Maimpris, and then shall be remitted into Pains to answer before the J uities of Peace there. Br. Responder, pl. 33. cites 2 H. 7. 2.

7. H. upon a Habeas Corpus was return'd by the Warden of the Fleet, and now a Stranger would declare against him here in B. R. in an Action. But Coke Ch. J. cites 31 H. 6. 10, that if a Man declares against another in B. R. before he is in the Marshallea by Writ, this is Coram non Judge, but it is not material what Writ it is he comes into the Mar-

shalla by; if he is there; And so in this Case no Declaration can be

good
(A. a) *To what Thing the Answer ought to be made.*

1. If a Bill be in B. R. de Placito Transgressionis & de insultu, & verberatio ne vi & Armis, and the Plaintiff declares of an Assalt and Battery, and that the Defendant at the same Time took of him extorive 10s &c.

2. If the Parties are at Issue, or Demurrer be in Plea Real, there Petit Cape shall be awarded to answer to the Default only, and all the Issue and Demurrer is void'd. Br. Default, pl. 58. cites 38 H. 6 33

3. And per Prior upon the Grand Cape, the Tenant shall answer to the Default and to the Demand also, but upon Petit Cape the Tenant shall answer to the Default only, and not to the Matter; Per Prior. Ibid.

(B. a) *As what Time he shall be put to answer.*

[Fol. 589.]

[Where there are two Defendants, and one makes Default.]

1. In a Precipit quod reddat against Two, if one appears, and the other makes Default, by which the Grand Cape issues of a Moity, he that appears shall not be put to answer till the Grand Cape be returned, because that at this Day he that made Default may accept the entire Tenancy, and have his Default. 12 E. 6. 6. b.

2. In a Writ of Ward against Two, if one appears, and the other makes Default, he that appears shall not be put to answer before the other comes, because the Ward is intire. 17 E. 3. 70. b.

3. But other wise it is in an Ejectment of Ward, because this is but in Nature of a Trespass. 17 E. 3. 70. b.

4. The same Law is for the same Reason in a Ravishment of Ward. 17 E. 3. 70. b.

5. In Trespass against Baron and Feme, if the Baron appears, and the Feme makes Default, admitting this is not the Default of both, the Baron shall be put to anwer presently. 22 All. 46. adjudged.

6. In an Action of Trespass against Baron and Feme, if the Baron comes by the Exigent, and the Feme does not come, and because it appears to the Court that the Exigent was discontinued against the Feme
For in Fitzh. "the Br. th^ of the Feme, "and the Feme appears, the Feme shall not be put to answer till the Baron comes or be outlawed."

shall be received to answer alone. Br. Default, pl. 61. cites S. C.—Fitzh. Responder, pl. 45, cites S. C.—Br. Responder pl. 52. cites S. C.

8. In an Action of Debt against Baron and Feme, if the Baron appears, and the Feme makes Default, the Baron shall not be put to answer, but Proces shall issue against the Feme, and idem dies given to the Baron. Mich. 11 T4. 25, between Throowood and Dunnam.

9. In all real Actions where the Proces is by Attachment and Distraint, and the Action is brought against Two, and one comes by the Distraint, but he shall not be put to answer without the other, which did not appear, for the other shall not lose his Freehold by his Plea. 39 E. 3. 15. b.

10. As in a Quod permitrat against Two, if one comes by Attachment and Distraint, yet he shall not be put to answer without the other. 39 E. 3. 15. b.

11. In an Action against Two, if the Proces be determined against one, and the other appears, he shall be put to answer. 39 E. 3. 15. b.

12. As in an Action of Wait against Two, if at the great Distraint returned one makes Default, and the other appears, he shall be put to answer, because by the Statute the Proces is determined against the other. 39 E. 3. 15. b, adjudged.

13. Scire Facias upon a Recovery against Baron and Feme, the Baron came, and not the Feme, and the Tenant took the intent Tenancy Absque hoc that the Feme any Thing bad, and well notwithstanding the first Judgment against both; for the Tenancy may be transposed after. Br. Default, pl. 97. cites 43 E. 3. 5.

14. A Writ of Conspiracy is brought against Two; one appears and pleads Not Guilty, the other makes Default; the Jury finds that he who pleads, conspire with the other who makes Default; the Plaintiff has Judgment and affirmed in Error; For although he who makes Default cannot be convicted of the said Conspiracy, because he does not appear, yet the Law gives such Credit to this Verdict, that it shall be intended to be true as to the Conspiracy against him who pleaded, until it be disproved by an Attaint. Jenk. 27. pl. 51.

(C. a) Saved in Plea Real. By what Plea.

1. In Writ against Two, at the Grand Cape the one took the entire Tenancy, and was received to Wage his Law of Non-Summons for all. Thel. Dig. 189. Lib. 12. cap. 27. S. 2. cites Patch. 4 E. 3. 151. Mich. 6 E. 3. 284.

2. In Writ brought by two against three at the Grand Cape returned against all, the Tenants came and Waged their Law of Non-Summons in Common, and at the Day given two came and the Third made Default, upon which it was said that he who made Default is Dead, yet the other two made their Law, by which the Writ abated for the two Parts,

3. In Writ against several, if the Demandant holds himself to the Default made by one of them, and he makes his Law or saves his Default all the Writ shall abate. Thel. Dig. 189. Lib. 12. cap. 27 S. 4. cites Mich. 7 E. 3. 345. For there all the Writ abated because the Demandant held himself to the Default made by one who was an Infant at the Time of the Default made, and it is said there, that the Demandant cannot release the Default of the one and hold to the Default of the other, 13 E. 3. 35. 4. In Writ by two against one at the Grand Cape returned the Tenant came, and against one of the Demandants pleaded his Release of all Rights made after the Default, and against the other be waged his Law of Non-Summons, and was received to it. Thel. Dig. 189. Lib. 12. cap. 27, S. 5. cites Mich. 9 E. 470.

5. At the Grand Cape returned, the Tenant was effoigned de Servitio Regis, and at the Day given by the Effoign, he came and disfavowed the Effoign, and tendered his Law of Non-Summons, and said that the Effoign was not call for him &c. but the Demandant refused his Law, by which the Writ was abated. Thel. Dig. 189. Lib. 12. cap. 27, S. 6. cites Trin. 11 E. 3. Ley 44.

6. The Tenant was effoigned and after made Default, and at the Grand Cape returned he was effoigned de Servitio, and at the Day given he would have waged his Law, that the Effoign de Servitio Regis was not call for him, and was not received, but Selin was awarded to the Demandant; but if the Tenant be effoigned of Common Effoign, and afterwards effoigned de Servitio Regis, and then makes Default, there at the Day of the Grand Cape returned he may defeat all by his Law and abate the Writ. Thel. Dig. 189. Lib. 12. cap. 27, S. 8. cites Hill. 12 E. 3. Saver Default 43, and fays see 12 H. 4. 14, 15.

7. The Tenant being Dwub, but he could hear and understand that which one said to him, put his Hand upon the Book, and the Words of the Charge were read to him, and then the Demandant waived the Default, by which the Writ abated. Thel. Dig. 189. Lib. 12. cap. 27, S. 7. cites Pach. 13 E. 3. Ley 49.

8. In Writ against two, at the Grand Cape they waged their Law of Non-Summons, and at the Day given the one did not come, but the other came and made his Law, by which all the Writ abated &c. Thel. Dig. 189. Lib. 12. cap. 27, S. 10. cites Hill. 18 E. 3. 6. Quare. And fays see 7 E. 3. Ca. 29 E. 3. 11. That it shall not abate but only for the Moiety. And that so agrees 38 E. 3. 33 & 41 E. 3. 2.

9. In Writ against Four at the Grand Cape returned, one of the Tenants came, and took general Tenancy of the Moiety, and made his Law of Non-Summons by Affent of the Demandant immediately, by which the Writ abated for the Moiety, and Selin awarded of the rest. Thel. Dig. 189. Lib. 12. cap. 27, S. 11. cites Hill. 22 E. 3. 7.

10. The Baron and Feme and a Third Person waged their Law of Non-Summons, and at the Day given they came, but the Third was within Age, by which Thorp made the Baron and Feme to swear alone and the Writ abated. Thel. Dig. 189. Lib. 12. cap. 27, S. 12. cites Pach. 38. E. 3. 10.

11. In
11. In Writ against Tiso, it they wage their Law of Non-Summons in Common, and at the Day given, if the one makes Default and the other comes, he who comes then cannot take the entire Tenancy and make his Law for all, but only for the Moleity. Thel. Dig. 190. Lib. 12. cap. 27. S. 15. cites Hill. 41 E. 3. 2.


13. If the Tenant wages his Law of Non-Summons, and at the Day given is ready to make his Law, at this Day the Demandant cannot waive the Default and put the Tenant to plead over without the Assent of the Tenent. Thel. Dig. 189. Lib. 12. cap. 27. S. 13. cites Hill. 42 E. 3. 8, and cites Hill. 19 E. 2. Saver Default 81.

14. In Writ against Baron and Feme, the Baron made Default, and the Feme appeared always by Attorney, and at the Day of the Grand Cape returned both appeared, and the Baron alone waged and made his Law of Non-Summons, and the Feme not, by which the Writ was abated. Quære; For it was said, that the Law ought to be made by the Baron and Feme. Thel. Dig. 189. Lib. 12. cap. 27. S. 14. cites Mich. 44 E. 3. 38.

15. Precipe quod reddat, at the Petit Cape the Demandant held him to the Default; by which the Tenant said, that he had an Attorney, who died before the Day, we not knowing it, and the Demandant said, that he had Notice of his Death; and per Cur. he knew at what Place he had Notice by Reason of the Vicife; and for a good Plea; Quod Nata. Br. Saver Default, pl. 15. cites 50 E. 3. 9.

16. The Vouchée in Precipe quod reddat, shall not wage his Law, that he was summoned upon the Summons, for he need not have his Default at the Grand Cape ad Valentiain; but if he be returned summoned, when he was not summoned, and after Grand Cape ad Valentiain issues, he shall have Disject of the Return &c. Br. Ley-gager, pl. 27. cites 50 E. 3. 16.

17. Note, per Belknap, that the Vouchée who came by the Grand Cape Thel. Dig. ad Valentiain need not have his Default at the Summons, nor shall any take Advantage thereof; for Land is demand against him in certain &c. yet by Non-Summons at the Writ of Summons and Grand Cape the Vouchée shall have Writ of Dilict, and yet the Summons cannot be defeated by Ley of Non-fummons, nor by any other Issue; Quod Nemo negavit, &c. in Action of Dilict. Br. Saver Default, pl. 42. cites 50 E. 3. 17.


18. In Formedon the Petit Cape issified against the Tenant, and afterwards the Parcel was put without Day by Demise of the King, and at the Re-fummons the Tenant made Default and Grand Cape awarded, by which the Tenant came and waged his Law of Non-Summons, and was receiv'd. Thel. Dig. 190. Lib. 12. cap. 27. S. 17. cites Mich. 2 H. 4. 14. and lays fee 15 H. 4. 9. that Thirning agreed to it, and Hankford denied it.

19. Petit Cape issified returnable such a Day, the Tenant came and said that his Attorney died a little before the Day in Court, of whose Death he had no Notice before the Petit Cape awarded, and was ready to answer; and the Demandant held him to the Default, and said that the other died Three Weeks before the Petit Cape awarded; by which the Tenant had Notice before the Petit Cape awarded; and the Tenant durst not demur, but pleaded an overflowing of Water at a certain Place, upon which
Default.

which they were at issue. Br. Saver Default, pl. 17. cites 12 H. 4. 1.

20. Præcipue quod reddat an to Baron and Feme, the Baron at the Grand Cape came and said that he is fes Tenant and tendered his Law of Non-Summons, and the Demandant said, that the Baron and Feme were Tenants the Day of the Writ purcahafl; Per Cor. this is no Plea. Quære. Br. Saver Default, pl. 3. cites 3 H. 6. 23.

21. Writ of Aiel, the Tenant made Default at the Summons, and came at the Grand Cape, and said that he was imprisoned in the Castle of O. upon a Statue Merchant at the Suit of J. S. at the Time of the Summons returned, and by the Opinion of the Court this a good Plea; for he is imprisoned by the Order of the Law, notwithstanding it was by Reason of his own Aet; Quod Nota, and Outlawry shall be reversed for such Cause. Br. Saver Default, pl. 4. cites 3 H. 6. 48.

22. It is said, that Corporation, Rectia, and Decrepit, cannot make their Law, but that their Summons shall be trid per Pafl. Quære. Thel. Dig. 190. Lib. 12. cap. 27. S. 18. cites Hill. 33 H. 6. 8.

23. Thel. Dig. 189. Lib. 12. cap. 27. S. 1. says, it seems that at the Time of Brafion, the Writ should not abate notwithstanding that the Tenant made his Law of Non-Summons, for he wrote in his 'Treatise, 3. Lib. 5. cap. 1. fol. 360. Ad Diem vero Legis, aut tenens faciat Legem suam, aut defciat in Lege facienda, si autem Legem recerit tanquam exculatus a Defalta eodem Die ad placitum Principale respondebit, sufficet enim ad Dilatationem & pro Rationali Summonitio tenentes Tempus intermedium inter Legem vadiatam & Legem faciat. And a little afterwards in anwering to the Quelion, for what Reason the Writ should not abate by the making of the Law of Non-Summons, he says, sufficet ei pro commodo propria Seiliae Reformatio.

(D. a) In Real Actions. What Plea may be pleaded before the saving the Default.

1. At the Grand Cape returned against the Baron and Feme, the Baron appear'd and was received to say, that he had no Feme the Day of the Writ purcahafl, without saving his Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 4. cites Trin. 19 E. 2. Saver Default 33.

2. At the Grand Cape returned the Tenant was received to say, that he was the Villein of such a one, and held the Land in Villeinage &c., without saving his Default; because he had not appeared before to affirm the Tenancy in his Perfon. Thel. Dig. 210. Lib. 14. cap. 16. S. 7. cites Pasch. 6 E. 3. 254.

3. At the Grand Cape return'd the Tenant was received to say, that the Demandant had diffeifed him after the Default, and is yet Tenant by this Diffeifion without saving his Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 9. cites Pasch. 9 E. 3. 388.


6. In Dower at the Petit Cape return'd, the Tenant was received to say, that the Demandant had diffeifed him after the Default made, without saving.
Default.

83

7. At the Grand Cape return'd against several it is said, that they cannot plead several Tenancy of the Money to the Writ without having their Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 13. cites Hill. 16 E. 3. 32.

8. Precipe quo reddat by a Firme; at the Petit Cape return'd, the Tenant said, that the Demandant had taken Baron after the laft Continuance, Judgment of the Writ, per Belke, A Relate of Rights she may plead before the Default saved &c. but not this Plea. Per Chelr. she may plead Diffinition by the Demandant done to the Tenant, and may allege Profession in the Demandant, which Kniver agreed; for this extinguishes the Rights; by which it was advertised that the Demandant recover Seilin of the Land; Quod Nosc. Br. Saver Default, pl. 23. cites 29 E. 3.

9. At the Petit Cape the Tenant cannot say that the Tenements are seised into the Hands of the King by Office, by which it was found that they were the Tenements of an Idea &c. notwithstanding that he shews Writ of the King settifying it, and Patent of the King of Grant made of them for this Cause &c. without having his Default. But Execution was stay'd. Thel. Dig. 210. Lib. 14. cap. 16. S. 18. cites Mich. 31 E. 3. Saver Default 37.

10. Precipe quo reddat against Those who made Default, and at the Grand Cape they appear'd, and each pleaded several Tenancy of Parcel to the Writ, and tender'd their Law of Non-Summuns. Per Belk. you cannot plead to the Writ before your Default saved. And per Monbray, because you do not deny the several Tenancy, you shall take nothing by your Writ. Br. Saver Default, pl. 25. cites 38 E. 3. 28.

11. Precipe quo reddat; at the Grand Cape the Tenant came and said, that A. was seised before the Writ brought, and leaved to him in Fee by Deed rendring Rent upon Condition that if she paid 40l. that she should re-enter, and that after the Default made A. paid the 40l. and re-enter'd, and fo the Writ abated in Law, Judgment of the Writ; and it was admitted there that it is a good Plea before the Default saved; by which the Demandant relinquished the Default and counted, and the Tenant pleaded in Bar. Br. Saver Default, pl. 24. cites 39 E. 3. 28.

12. At the Grand Cape return'd the Tenant cannot say that he held the Land in Mortgage, and that the Mortgagor had paid the Money to him after the Default made, and entered &c. without having his Default. Thel. Dig. 211. Lib. 14. cap. 16. S. 22. cites 35 E. 3. 36.


14. At the Petit Cape the Tenant was received to plea Discontinuance of Preces without having his Default. Thel. Dig. 211. Lib. 14. cap. 16. S. 29. cites Mich. 40 E. 3. 34. and 2 H. 5. 2.

15. And to shew that his first Appearance was by Attorney, where he had not any Warrant of Attorney &c. Thel. Dig. 211. Lib. 14. cap. 16. S. 29. cites Trin. 43 E. 3. 19.

16. Formed; at the Petit Cape by Default after Appearance, the Tenant came and said that the Demandant had enter'd upon him after the laft Continuance, and fo abated his own Writ; and because he did not have his Default, Seilin of the Land was awarded and Prestation entered of this Entry made by the Demandant to have Allife for the Tenant. Br. Saver Default, pl. 10. cites 40 E. 3. 43.

17. Precipe quo reddat, at the Grand Cape the Tenant came and pleaded Joint-tenancy with J. N. &c. ready to perform his Law, and was not suffer'd to have the Plea before the Default saved; by which he waged his Law of Non-Summuns, and yet per Finch, he shall not be stopped at another Time to plead Joint-tenancy; for in another Action he shall...
Default.

shall have the View, and by Consequence plead Jointenancy. Br. Sav-

18. At the Grand Cape returned, the Tenant cannot plead jointly with
one not named without having his Default, Thel. Dig. 211. Lib. 14.
cap. 16. S. 26. cites Patch. 42 E. 3. 11. Hill. 8 H. 6. 37. but lays,
Martyn denied it there, and cites 14 H. 6. 4. 33 H. 6. 24 Quare.

19. At the Grand Cape the Tenant may plead Non-tenuire without fa-

20. Cellaivic, the Tenant appeared at the Grand Cape, and tender'd the
Arrerages, as the Demandant had counted, and it was accepted; and
it was not spoken of there, of having his Default first; Quod Nota;
For the Statute of Gloucester, cap. 4. wills, that if the Tenant comes be-
fore Judgment, and tenders the Arrerages and Damages, and finds
Sureties &c. that he shall retain the Land; and so it seems, that the
Saver of the Default is only in Precipe quod reddat at Common Law, and
not in Actions given by Statute of Saffavit. Br. Saver Default, pl. 43.
cites 50 E. 3. 22.

21. At the Petit Cape return'd, the Tenant said, that he held for Term
of Life of one A. which A. is dead, and be in Recovery has enter'd &c.
without having his Default, and admitted a good Plea, and Iffie taken
7 R. 2. Saver Default, 30.

22. Formedon, Petit Cape issued, and after the Parol was put without
Day by Denoue of the King, and Re-fummons was sued, and the Tenant
made Default, and Grand Cape issued returnable &c. at which Day he
made Default, and the Demandant prayed seizin of the Land, and the
Tenant tender'd his Law of Non-fummons; Read said, he ought to have
the first Default upon the Petit Cape. But per Cur. he need not; For
the Parol was without Day by Demise; and there per Cur. if Petit
Cape was awarded in a Franchise upon Conuance of a Plea granted,
and the Demandant sues a Re-fummons for failure of Right there &c.
the Tenant shall not have this Default; and after the Attorney waged
his Law and was received. Br. Saver Default, pl. 16. cites 2 H.
4. 8.

23. Precipe quod reddat, the Tenant waged his Law of Non-fummons,
and at the Day call Pretetion, and after the Re-fummons is sued, the
Tenant shall not be compelled to have his first Default; Per Calpepper

24. Precipe quod reddat against two, the one made Default after De-
fault, and the other appear'd at the Grand Cape, and pleaded Jointenancy
with a Stranger not named, and to have his Default, tender'd his Law
of Non-fummons; In this Case the Demandant shall not count against
the Tenant before he has sued his Default. Br. Saver Default, pl. 25.
cites 14 H. 6. 3.

25. Precipe quod reddat, the Tenant pleaded Jointenancy with a Stran-
ger at the Grand Cape, and tender'd his Law of Non-fummons. Per New-
ton, he shall not plead the Jointenancy before he has sued his Default,
but first he shall have his Default, and after he shall plead Jointenancy
in a new Action. Per Chaunt, No; For this shall be Etippeled to us,
if we wage our Law of Non-fummons, as sole Tenant. But Juyn,
and all the Justices held, that he shall have the View in a new Writ,
and therefore he may plead Jointenancy; For this is a Plea which goes
upon the View; Quod Nota, that the Ley gage of Non-fummons is al-
tways before the View, therefore he shall have the View in the new Writ,
and by consequence the Jointenancy. Br. Saver Default, pl. 26. cites
14 H. 6. 4.

26. Precipe
26. Precipe quod reddat, against two who made Default at the Summons, and after came at the Grand Cape and tendered to wage their Law of Non-simmons, and at the Day &c. the one came and said, that his Companion is dead, and be is ready to perform his Law; and by the beli Opinion there, he shall not plead this to the Writ before he has saved his Default; For Forreluce said, that a Man shall not lay upon the Grand Cape, that the Feme Demandant has taken Barren after the left Continuance, nor that the Demandant has entered after the left Continuance; for those Pleas proves that the Writ is only abatable. But to say that one of the Demandants is dead, proves, that the Writ is abated, which he shall have before his Default saved; for if the Tenant does not plead it, but suiters Judgment, he shall have Writ of Error after, by which the other Gratis averr’d the Life of the other at such a Place; Quare of the Matter supra? for the same Law seems to be of the Death of one of the Tenants, and of an Entry pending the Writ; but taking of Baron, Mifnominer, Falle-Latin &c. are otherwise. Br. Saver Default, pl. 6. cites 20 H. 6. 2.

27. Precipe quod reddat against two, at the Grand Cape be may plead Nontenure, without saving his Default; For he need not save his Default when he has nothing in the Land; for then he cannot lose his Land; Per Prift, in a Nota; Quare. Br. Saver Default, pl. 45. cites 33 H. 6. 2.

28. Precipe quod reddat, the Tenant after two Defaults upon the Original, and upon the Grand Cape blew Matter to save the Default upon the Grand Cape, and III, per tot. Cur. because he did not save the fist Default also. Br. Saver Default, pl. 28. cites 38 H. 6. 12.

29. Dower against Two, at the Grand Cape the one made Default, the other appeared and said that he was Tenant of the whole jointly with N. not named in the Writ abique hoc, that he who made Default for any thing bad, and tendered his Law; Per Jenny and Pigot, he shall not have the Plea of the Jointancy, but ought frist to save his Default, and in a new Writ he may plead this Plea. Brian, Littleton, and Neale, contras, and that the Tenant cannot do otherwise, as here; for otherwise the Demandant shall recover the Money against him who made Default, and in a new Writ the Tenant shall be espoused, to say, but that the other was Tenant with him by Reason of his General Ley-gater of Non-simmons. Br. Saver Default, pl. 35. cites 12 E. 4. 1.

30. Precipe quod reddat against Two, who made Default, and Grand Cape issued, and at the one came and said, that after their Default the other is dead; Judgment of the Writ; and per Briggs he shall have the Plea before the Default saved, for this Plea proves the Writ abated in Fact. Contra, of Entry into the Land after the left Continuance, Coverture and taking of Baron &c. Saver Default, pl. 37. cites 21 E. 4. 16.

31. At the Petit Cape returned, the Tenant shall plead Out-lawry in the Grand Cape after the left Continuance without laying his Default. Thel. Dig. 211. Lib. 14. cap. 16. S. 31. cites Mich. 14 H. 4. 15. But says, the contrary is said, Mich. 20 H. 6. 2. Saver Default. Where at the Grand Cape returned against two, the one came and said that the other is Dead and voyed his Law of Non-simmons, but it was held that the Plea was good without waging his Law; for if the Demandant accepted the Law, the Writ shall abate, and if he lays nothing it shall abate, but it was granted that in such Case the Tenant shall plead the Death of one of the
Default.

the Demandants without waging his Law &c. and says see 21 E. 4. 19.
95 agreeing.
32. In Precept quod reddat, the Tenant may plead a Release of all the Right before the Default faved. Br. Saver Default, pl. 38. cites 21 E. 4. 80.
33. And by some the same Law of a Release of all Actions; for where the Action or Right is released, the Demandant cannot recover. Contro of Pleas, which prove the Writ to be only abatable, as taking of Baron after the last Continuance, Entry into the Land, Jointenancy &c.

Ibid.

(E. a) Sav’d in Plea Real.
By what Appearance.

1. PRECIP E quod reddat against Baron and Feme; Profeftion quia
Profeftor was cast for the Baron, and immediately Innuocations
was cast, by which the Profeftion was annulled, and therefore it was
awarded by Advice of all the Justices, that this shall turn the Tenants
into a Default; and so see that such Profeftion shall not save the De-
fault. Br. Saver Default, pl. 27. cites 1 H. 6. 6.
2. Formedon against Baron and Feme, the Feme was received in Default
of her Baron, and pleaded to Issue, and at the Nisi Prius she made Default,
and at the Day in Bank the Demandant prayed Seifin of the Land, and had it,
notwithstanding that the Feme tendered to save her Default by Floods of
Water; Per ter. Cur. she cannot save this Default by this Means, nor any
other, because immediately upon the Default she is out of the Court, and
so the Demandant recovers. Contro of the Tertenant. But here she was
as Tenant by Refceit; for as Tertenant the and her Baron made De-
fault before, upon which Default now the Land shall be lost. Br. Saver
Default, pl. 22. cites 22 H. 6. 13.
3. Note that if the Vouchee makes Default at the Summons, and after
appears at the Grand Cape, he shall not save the Default, but may enter
into the Warranty and plead, and the same Law of him who makes
Default at the Summons and Pone in Quare Impediet, Writ of Meline or
Action of Waft, and appears at the Ditreets, he shall not save the first

(F. a) Judgment.
How the Judgment shall be.

1. WHERE some of the Demandants appear, and some not, and the
Tenants make Default after Default, and the Proces(s shall
serve against the Tenants, and the Summons ad sequent’ simul against
some of the Demandants. Br. Proces(s, pl. 175. cites 13 E. 3. and
Fitzh. Grand Cape 15.
2. Petit Cape was awarded upon Default of the Tenant in Scire Facias
after Issue join’d between the Plaintiff and the Tenant, Quod Nota,
which is the Proces(s upon Default after Appearance in Scire Facias. Br.
Proces(s, pl. 185. cites 42 E. 3. 2.
3. In
Default.

3. In Affidavit of Nuisance if the Defendant had the View, and after is
affirmed, and then makes Default, the Plaintiff shall not have Distress ad
respondent, to the Plaintiff, and to the Default also in Lieu of Petit
Cape, but Distress ad respondent, parti only. Br. Proceses, pl. 124.
cites 42 E. 3. 9.

4. The same Law in Quod permissat. Ibid.

5. In Debt; per Prinor clearly, where the Tenant impairs in Precipe
quod reddat, and after makes Default, Seisin of the Land shall be
awarded, and not Petit Cape, but upon other Default after Appearance

6. Formed, the Tenant appear'd and vouch'd, and the Vouchee enter'd
into the Warranty and vouch'd over, by which Summons ad Warrantian-
sum, and the Sheriff returned him summoned, and he made Default,
by which issued Grand Cape ad voluntiam; and Pigot offer'd to appear
and plead for the Vouchee; Per Brian Ch. J, it you will not fave your
Default at the Grand Cape, you shall lose your Land. Pigot e contra,
Br. Saver Default, pl. 36. cites 19 E. 4. 3.

7. Note that if Parties are at issue to fave the Default of the Tenant
which passes for the Tenant, the Judgment shall be that the Writ shall
abate; Quod Nota; per Cur. Br. Saver Default, pl. 49. cites 10 H. 7. 21.

8. In Debit or Trepass, if the Defendant appears upon the Exigent, and
has Dies datum, and after makes Default, Diffres shall issue, and if he
be return'd Nihil, three Capias's and Exigent shall issue again, Quod

9. In Writ of false Judgment the Defendant after Appearance made De-
fault, Grand Diffres issued against him; and if he made Default at
another Time, or came and would not fave his Default, the Plaintiff
shall have Judgment to recover Seisin of the Land. Br. Saver Default,
pl. 44. cites F. N. B. 10. 19.

10. A Quo Warranto is brought in B. R. The Defendant being sum-
mon'd, makes Default; and another Default at the Return of the Venire
Facies; Judgment shall be, that the Franchise shall be seized into the
King's Hands; and not that it shall be forfeited; for it does not yet
appear whether there be Cause of Forfeiture. No Man shall finally lose
his Land or his Franchise upon any Default, if he has never appeared.
By the Judges of both Benches. Jenk. 141. pl. 91.

11. Two Nihil's returned upon a Scire & alias Scire Facias amount
to a Sciri Feci; whereupon if the Plaintiff give a Rule, and the De-
fendant doth not appear, the Plaintiff shall have his Judgment quod
habet Exectionem by Default. But where a Man hath a Release, or
any other Matter which he might have pleaded, there he shall not be
absolutely concluded without a Sciri Feci returned; for after two Ni-
chils he may have his Writ of Audita Querela, which he cannot have after
the Return of a Sciri Feci. L. P. R. 86.

(G. a) Recovery by Default. What is; and pleaded
How.

1. In pleading a Recovery by Default, the Party ought to aver that he
against whom &c. then was Tenant of the Land, and therefore it
seems that the other may have Answer to it without being put to Writ

2. Every Recovery upon Departure in Delphire of the Court, is a

For more of Default, See Exonign, Nonstiff, And other proper
Titles.
Defeasance.

(A) What Persons may make it.

1. If an Obligation be made to a Prior, his Defeasance is a good Discharge without the Convent, without an Avowment that the Thing in the Defeasance was for the Advantage of the House. 47 C. 3. 23. b. adjudged, for it is in Nature of an Acquittance.

3. If a Statute be acknowledged to Baron and Feme, the Defeasance made by the Baron is a good Discharge. 48 C. 3. 12. b.

3. So where a Statute is acknowledged to Two, and one makes a Defeasance, it is a good Discharge. 48 C. 3. 12. b.

(A. 2.) Defeasance where Good.

1. A Man granted a Rent in Fee and after the Grantee and another made a Grant to the Grantor, that if be, the same Grantee, brought such Writ against the Grantor, that then the Rent should cease; this is a good Grant, and upon this the Grantor after an Alliſe passed against him by Default for the same, the Grantee of the same Rent brought Certificate of Alliſe, and it well lies, and the Grant good, and it seems to be good Reason, for the Grantee may releafe his Rent, and therefore he may determine it by his Grant. Br. Grants, pl. 163. cites 32. All. p. 1.

Br. Grants, pl. 79. S. C. 2. If a makes a simple Feoffment, or simple Release and after the other grants to him, that if he pays him 10l. such a Day, that the Feoffment, or Release shall be void, this is not good, for this cannot restrain the simple Deed that was made before, to if he grants to the other to re-enter. Br. Grants, pl. 139. cites 43. All. 44.

Br. Grants, pl. 79 S. C. 3. But if one, who has Warranty of Land from me, grants to me, that if he be afterwards impieſed, that he will not vouch, nor rebut by this Warranty; this is a good Grant, for it is a Thing Executory, but the Feoffment and Release before were executed. Br. Grants, pl. 139. cites 43 All. 44.

4. If
Defeasance.

439

4. If a Man grants by Deed to his Tenant for Life that he shall not be implanted for Waifs, and after the Tenant grants to the Lessee that he will not plead his Deed in an Action of Waifs, nor will not have Action thereupon, this is a good Grant, for it is of a thing Executory, and of a thing of which the force cannot be taken, but by Action taken. Br. Grants, pl. 79. cites S. C. and S. P.

5. If a Man grant to me that if he does not pay to me 100 l. at such a Day, that I may enter into his Land, there it he does not pay, yet I cannot enter; Per Perle. Br. Grants, pl. 79. cites 43. Aff. 44.

6. If the Deed be released to the Deedor, and after the Deedor grant to the Deedee by Deed, that it be not implanted by the Deedee that he will not plead the Release; this is good Grant, for the Pleading is a Thing Executory. Br. Grants, pl. 79. cites 43. Aff. 44. Per Wich and Perle.

7. Debt upon a single Obligation, the Defendant pleaded: Defeasance of the Plaintiff by Deed Poll and good; though it was not indented, for it is the Deed of the Plaintiff, which suffices, Quod Nota. Br. Defeasance, pl. 12. cites 7. E. 4. 29.

8. If a Man pleads Defeasance in Debt upon an Obligation of a Thing to be done Beyond-Sea, which cannot be tried here, or in two Counties, as London and Wiltshire, where the one cannot join with the other, so that Trial cannot be had, this is void and the Obligation is single. Br. Defeasance, pl. 13. cites 22. E. 4. 2.

9. Debt upon an Obligation of 100 l. The Defendant pleaded, that after the Obligation made, the Plaintiff by Indenture covenanted, that if he paid 100 l. such a Day the Obligation should be void, and alleged that he paid it at the Day; it was the Opinion of the Court it was a good Plea, and the Defendant shall not be put to his Action of Covenant by Circuity of Aktion, but that the Plaintiff shall be barred. Cro. E. 623. pl. 16. Mich. 40 and 41. Eliz. B. R. Hodges v. Smith.

10. B. acknowledged a Statute to S. and sold Lands in the County of H. to T. afterwards the Land in H. in the Hands of T. were extended by the Statute. B. brought Audita Querela on a Defeasance, viz. that if the Land in H. should be extended by the Statute, then the Statute should be void. Adjudged that the Defeasance was good and not repugnant; for he might the Execution of Land in another County, or of his Goods or Persons. Mo. 811. pl. 1997. Mich. 8 Jac. in Canc. Trot v. Spurling.

11. Defeasance must contain proper Words of Defeasance, as that the Thing should be void. 2 Salk. 575. pl. 2. Hill. 10 W. 3. B. R. in that of Lucy v. Kinalton.


(B) To whom it may be made.

1. If the Obligee afterwards by Indenture between him and a Stranger grants, that if a Stranger performs certain Conditions, then the Obligation shall be void; this is no good Defeasance, although the Stranger perform the Conditions, because the Obligor is a Stranger to this Indenture, and therefore cannot put it in Trial. Dubitatitur, 3 Q. 6. 18. b. 26. b.

shall not plead it.—— Fitzh. Debt, pl. 15. cites S. C.

6 I

(C) Of
Defeasance.

(C) Of what Things.

For he may rebut, but not Vouch afterwards.

1. If a Man makes a Feoffment with Warranty against all Men, and the Feoffee by collateral Indenture regrats for him and his Heirs, that if the Feoffee be vouch'd by force of the Warranty, then the Warranty should be void, this is good Defeasance of the War-
ranty. 7 H. 6. 34. by all the Justices.

2. If a Man releases all his Right to another, and the Releasee after grants, that if the Releasor does such a Thing, the Release shall be void; this is not a good Defeasance to avoid the Release. Con-
tra, * 17 All. 2. || 7 H. 6. 34.

3. In Allife the Tenant pleaded Release in barr, and in Defeasance of it the other pleaded Payment and Tender of the Money by force of the Condition which be fixed'd in Specialty. And note that the Common Opinion there was, that simple Release may as well be avoided by Deed, &c. as Charter of the Feoffment, Obligation, Recognizances, Statutes, &c. But Shard Contra, and there the Plaintiff recovered, and therefore the Release is defeasible by the Deed of Defeasance; Quod Nota. Br. Defeasance, pl. 6. cites 17. All. 2.

4. A Man made simple Feoffment, and after by Deed rebothsirg it, the Feoffee granted to the Feoffor, that if the Feoffee pay 10 l. by such a Day, that the Deed and Feoffment shall be void. Tank said Defeasance can be of no Effect of Lands which pass by Livery, if the Livery be not made as well upon the Defeasance as upon the Charter of Feoffment, and the Opinion of the Court was with him. Br. Conditions, pl. 113. cites 30. All. 11

(D) At what Time it may be made.

Cro. E. 8. 7.

1. If a Defeasance be made to avoid a Judgment before the Judgment given; this is not good to be pleaded in a Seize Facias to have Execution, though such Judgment be contested upon an Agree-
ment when the Defeasance was made. Trin. 43. Pl. 7. B. R. between Cage and Shirland, per Curiam.

2. If
Defeafance.

2. If a Defeafance of a Statute be made, and after another Defeafance is made, the first Defeafance is made void thereby, and the Second only in Force, as in a Bill. [Note: Patch. &c. 3d. agreed.]

3. In Affife the Tenant shew'd how he was bound to the Plaintiff in a Br. Affife, Statute Merchant, and that the Plaintiff had sued Execution and had Execution delivered to him of this Land by the Sheriff, and after Execution the Plaintiff by Deed granted to the Defendant to enter, by which he entered, and after Covenant was bad between them, that if the Defendant shall pay 20l. to the Plaintiff that the Recognizance shall be null, and thereat an Accquittance of Payment of 8l. in part of Payment of the Debt of 20l. and the other demurr'd because it cannot be intended in Part of Payment thereof; for now by the Execution it is no Debt, and then it shall be intended for another Debt, for the Debt of the Statute is extinct by the Execution, and the Opinion of the Court was Contra, and that it is a good Bar. And fo fee a good Defeafance of the Statute after that Execution was sued and executed, Quod quare without Words that Execution shall be void. And Brooke says, it seems to him that the first Entry it is in Law a Surrender. And after the Plaintiff said, that this 8l. was for another Debt, and not for the Debt of the Statute, and because he did not shew any Cause of other Debt, this Bar was good, and the Plaintiff was barr'd by Judgment. Br. Defeafance, pl. 7 cites 20. Art. 7.

4. If I Grant to you that if you be Obliged to me in 20l. by Obligation that the Obligation shall be void, and after you are Obliged to me in 20l. yet the Defeafance is void; for there was no such Obligation at the time of the making of the Defeafance, quod Fortescue concilier. Br. Defeafance, pl. 5 cites 19. H. 6. 62.

5. An Eatee once made shant be defeated by a Defeafance made after the Eatee. Arg. Pl. C. 133. 6 E. 6 in Case of Browning v. Beeton, and cites 5 E. 3. where it is held that if a Feoffment is made and the Feoffee afterwards at another Time makes a Defeafance, viz. that if the Feoffor does such an Act, that then the Livery and Seilin and his Eatee shall be void; this shall not defeat the Eatee first veited. — And so where W. borro'd of R. 42l. and in justice of Payment inoff'd R. of his Land in Fee on Condition, that if he paid the said Sum at the Day after'd, then the Feoffment should lose its Force. W. did not pay all the Day, but afterwards died and his Wife took to Baron one B. who by Agreement between him and R. paid the Money to R. whereby B. had the Land, and afterwards R. died and his Feme brought Writ of Dower; and it was adjudged that the shall have Dower, because the Eatee of R. was not avoided or defeated by the Agreement made after the Condition broken. Pl. C. 133. a. b. cites it is so held 42 E. 3. 1.

6. A new Defeafance may be made to an Obligation with Condition, but then it must be by Writing; Agreed per Cur. No. 573. pl. 789. Hill. 41. Eliz. in Case of Hollond v. Andrews.

7. A. coveneants with B. that if he obtains Judgment against B. and B. on such a Day pay unto him 100l. that he would not sue Execution, and the Judgment should be void, in Sci. Fa. on the Judgment Payment of the 100l. is no Plea; for a Defeafance can't be made of a Judgment before the Judgment is given, and cites 19 H. 6. 62. and B. has no Remedy but by Writ of Covenant on his Deed. Cro. E. 837. pl. 11. Trin. 43 Eliz. B. R. Gage v. Shurfland alis Thuriland.

8. There is a Diversity between Inheritance executed, and Inheritance Executory; as Lands executed by Livery, &c. cannot by Indenture of Defeafance be defeated afterwards. Co. Litt. 236. b. ad finem.

9. And so if a Difference relates to a Difference, it cannot be defeated by Indenture of Defeafance made afterwards; but at the Time of the Release of Feoffment, &c. The same may be defeated by Indenture of Defeafance;
Deafeance. For it is a Maxim in Law, *Sue incontinenti sunt in effe evadentur.* Co. Litt. 236. b.

10. But Rents, Annuities, Conditions, Warranties, and such like that be Inheritances Executory may be defeated by Deafeance made, either at that Time, or at any Time after; and so the Law is of Statutes, Recognizances, Obligations, and other things Executory. Co. Litt. 237. a.

11. Debt upon Bond, the Defendant pleaded, that after making the Bond, viz. on the same Day the Plaintiff made a Deafeance, by which he promised, that if before such a Day he did not produce Witnesses, to prove that the Money mentioned in the Condition was a true Debt, and that the Defendant, before making the Bond, had promised to pay it, then the Bond should be void &c. And averred, that the Plaintiff did not produce any Witnesses &c. And upon Demurrer to this Plea, Judgment was given by Twifden (Rainsford and Morton, J. Saying Nothing, and Keeling being absent) for the Plaintiff, because the Defendant had pleaded a Deafeance made after the making the Bond, and such Deafeance cannot make the Bond void; for it ought to be made at the same Time, or eodem Intante the Bond was made. 2. Saund. 47. Hill 21 and 22. Car. 2. Fowell v. Forrest.

(E) To one. In what Case it shall be to others.

Ld. Raym. Rep. 695. S. C. & S. P. by Holt Ch. J. in delivering the Opinion of the Court. 1. *I* F a Deafeance be to one of the Parties, it is to all, for if several Covenants jointly and severally, a Deafeance to one of them is a Deafeance to all; and it is impossible to defeat as to one, without defeating as to all; and if a Deafeance works a Release and Discharge, a Deafeance to one is a Deafeance to all, as a Release to one is a Release to all. 12. Mod. 550, 551. Trin. 13 W. 3. Lacy v. Kynaston.

(F) What amounts to it.

1. *I* F a Man grants a Rent to J. S. in Fee, and the Grantee by another Deed grants to the Grantor, that if the same Grantee brings such an Action against the Grantor, that the Rent shall cease; this is no Condition, but it is a good Deafeance, and shall serve as well as a Condition. Quod Noc. Br. Condition. pl. 235. cites 32 All. 1.

2. If A. releases to B. all his Right in the Land which B. has by Differsiit made to A. and after B. grants to A. that if he pays 101. at such a Day
Defeafance.

Day, that the Release shall be void, and be may re-enter; this shall not
void the Release, because the Right goes simply before, but it seems
clear, that if the Condition had been in the Release, that then the
Condition had been good. Br. Releas'es, pl. 39, cites 43. Afl. 12. per
Cur. and the same Year, pl. 44. accordingly.

3. Where Release is simple, and Indenture of Defeafance comprehends a
Condition in fact also upon it, there it the Release and Indenture of De-
feafance are delivered into Infants, this is sufficient upon the Performance
of the Defeafance to defeat the Release, per Treffilian and Wich. quod

4. If a Man be bound in an Obligation of 100 l. and the Oblige grants
to him by his Deed, that he will not fied him, he shall plead this in Barr, in
Lieue of the Release, Per Martin; and Per Babington he shall have thereof
Action of Covenant if it be by another Deed, and if it be contained in the
same Obligation, then it is void; and Brooke says, it seems to be Law
that it is void in Fact in the fame Deed, for it is Repugnant, and shall
void all the Force of the Obligation; but by another Deed, a Man may
discharge it as well by Grant as above, as by Release, as it seems clear-
ly. Br. Defeafance, pl. 4. cites 7 H. 6. 43.

5. Debt upon Obligation, the Defendant pleaded a Grant of the Plain-
tiff, made to him after by Deed, that he should not be sued, vexed, or
troubled upon the Obligation before Mich. and that, if he be impeached,
that he should plead the Grant as an Acquittance, and that the Obligation
should be Void, and per Coningsby and Elliot, it is a good Bar, and it is
a Release in the Law; and a Release of Actions, or of Right for an
Hour, is so for ever. But per Moore and Tremayle to the Contrary,
that it was a Sparing for the Time, but no Releafe. And Fineux
Ch. 1. to the fame Intent at first, and that itounds only in Covenant,
and that if the Party breaks the Covenant, he shall have only an Ac-
tion of Covenant. But after Fineux changed his Opinion. Br. Barre,
pl. 52. cites 21 H. 7. 23.

6. And per Fineux, there is a Difference between a Defeafance of an
Obligation, and a Condition of an Obligation; For if a Condition be re-
pugnant to the Obligation, it is void, and the Obligation good. As
if the Condition be, that he shall not tue the Obligation, this is a void
Condition; So of a Peoffment, upon Condition that he shall not take
the Profits, the Condition is void, but here is a Grant to defeat the Obli-
gation, and it is good by way of Defeafance, though it be repugnant to
the Obligation, and therefore by him this Grant made the Obligati-
on void, and fo Fineux, Coningsby and Elliot, contra Tremayle and

7. There is a great Difference between a Promise not to fide, and a
Promise to forbear to fide; for the first excludes him from fuing at all,
but the last is only for a Time. Per Periam and Fleming Ow. 110.
Pach. 36 Eliz. in Cam. Scacc. in Caele of Sackford v. Philips.

8. And per Walmley, There is a Difference where the Words are
spoke by Plaintiff, and where by Defendant. For if Plaintiff says, I
will forbear to tue you, if you will promife to pay me, and upon this
the Defendant makes a Promife accordingly; the Plaintiff ought never
to fide. But if Defendant only speaks the Words, It you will for-
ber to fide, I will promife to pay you, and the Plaintiff agrees, and for-
Defeafance.

bears for a Time certain, yet he may have his Action afterwards. Ow. 110. in S. C.

9. A. was in Execution on a Statute Merchant, at the Suit of B. A. shews certain Articles between him and B. to discharge him of the Statute, and prays to be bailed, but deny'd; And per Cur. one in Execution ought not to be bailed on a Surmise, and the Articles are not sufficient to discharge him of the Execution. But his Remedy is to have an Action of Covenant upon them. Cro J. 218. pl. 7. Hill, 6 Jac. B. R. Beeton v. Robinson.

10. B. [the Plaintiff] and M. were bound to K. and K. makes a Bond to M. in the Sum of 100l. that if M. be not fixed upon the first Bond, then the Bond of K. to M shall be void; The Plaintiff alleged, that K. did both fixe him and M. and that he had no Notice of the second Bond, that he might have pleaded it, and so pretends, that the second Bond should be a Deference of the first, and Judgment was given for the Defendant. Brownl. 29. Trin. 13 Jac. Bird v. Kirton.

11. If I grant to one against whom I have Cause of Action, that I will not sue him within a Year, this is no Sufpension of the Action. Bridgm. 117. Trin. 15 Jac. in Cafe of Lee v. Wood, cites it as said per Brudennell, 21 H. 7. 30 in John de Putero's Cafe, upon which it is Inter'd, that it is to be observed, that I may sue, and the other is put to his Action of Covenant.

12. A Letter of Licence recited, that A. had Right in an Hose, and thereby agreed to impower B. to sell it, and divide the Money among the Creditors proportionably, and upon Receipt of such Proportions, every of those Creditors should give A. a Release of all Matters &c. And it was further agreed, that in the mean Time, and until the House should be sold, and from henceforth after, the said A. shall not be prosecuted or sued at Law, or his Perfon or Goods molested by any of the said Creditors named in the said Articles, for any Thing past, Sub pana Reliotionis & Exuorationis Debiti vel Debitorum taliuis Personarum as shall sue or prosecute &c. Per tot. Cur. this is a Deference and no Release, and is pleadeable in Bar. Carth. 210. Hill. 3 W. & M. in B. R. Carvil v. Edwards.

13. Where two Deeds are made at the same Time, and they have no Reference the one to the other, they shall not be construed as Defeasances. 12 Mod. 221. Mich. 18 W. 3. Clayton v. Kinaton.

14. Obligee reciting the Bond, covenants to save Obliger harmless, it is an absolute Deference, and if it be to save him harmless on a Contingency, it is a conditional Deference, because it has an express Relation to the Deed, but otherwise, where the Deed is only to indemnity against all Covenants heretofore made, or hereafter to be made, this does not destroy a Deed made at the same Time. 2 Salk. 574. Patch.

15. A. and B. are jointly and severally bound to H.; H. covenants with A. not to sue A. this is no Deference as to B. but if A. only had been bound, such Covenant had been a Defeasance. 2 Salk. 575. in Cafe of Lucy v. Kinalton.

16. Indenture
Decease.


17. Where a Deed intends mutual Remedies, it is not to be construed a Decease. 12 Mod. 550. In Cafe of Lacy v. Kynaston.

18. The Nature of Decease. So, that upon Condition performed, or upon such and such Terms, the Thing to be deceased is to cease. 12 Mod. 550. In Cafe of Lacy v. Kynaston.

19. A Man made a Feoffment in Fee with Warranty against all Per. S. P. Br. sons, Feoffee by his Covenant, grants and agrees not to take Advantage of this Warranty, and then he is impleaded and vouches the Feoffor, he may not, may plead his Covenant in Bar of the Warranty; but if the Covenant withholding had been not to bring a Warrantia Charta, or not to wash, then it had been a Covenant only, and the Covenantor hath other Remedy and Ule left him of his Warranty; and the Covenant would not be a Re-well rebutt, impleaded in that Cafe, because it doth not exclude all his Remedy upon the cites 7 H. Warranty. 12 Mod. 552. Trin. 13 W. 3. In Cafe of Lacy v. Ky. 6. 43. Kynaston.

20. A. covanteens with B. to pay him 300 l. for the Ule of A. only for her S. C. cited by Holt Life; and covenant was brought upon this and Breach affirmed, that C. J. Ld. there was so much of the 300 l. Arrear; Defendant pleads, that there was another Indenture between him and the Plaintiff since the Date, or Rep. 601. Delivery of the Covenant-Deed declared on reciting the said Covenant and Agreement for the Payment of the 300 l. wherein it was covanteened and agreed, that so long as A. and his Wife did co-habit, the Payment of the 300 l. should cease and averys that they did co-habit for the Time the said Arrear became due and pleads this in Bar of the first Covenant; and there are express Words that the Payment should cease during the Co-habitation and there had been no great Harm to conrue this as a Releafs of the Arrearsages during the Co-habitation; but yet it being a Sum in Gros, and the Covenant Temporary, and not perpetual, they held it no good Bar. Per Holt Ch. J. 12 Mod. 552. Trin. 13 W. 3. cites 2 Vent. 219. Gawden v. Draper.

21. In Debt on an Obligation, the Defendant pleaded in Bar, that it was given for compounding Felony; on a Demurrer it was inquired, that this was contrary to the Import and Condition of the Bond, and alter some Doubts it was adjudged per tot Cur. for the Plaintiff; and by Fortescue a Parol Agreement can no more be set up against a Bond, than a Parol Decease can against a single Bill. Gibb. 75. Trin. 2 & 3 Geo. 2. C. B. Andrews v. Eaton.

(G) Pleading.

1. Where Debt is brought upon an Obligation of 100 l. the Plaintiff shows the Indenture of Decease proving it, and not the Obligation, the Action lies not, Per Belke. Br. Monitras, pl. 38. cited 42 E. 4. 19.

2. In Debt the Defendant pleaded Decease to discharge the Plaintiff of 100 l. against A. B. that then &c. He ought to show how he has discharged him by Releafe, Acquittance, Payment, or otherwife, Per Judicium. Br. Dette, pl. 204 cites 35 H. 6. 12.
Defeasance.

3. Where a Bond is made, and after a Deafeance is made thereof, if he pays a lefser Sum &c. there it he pleads the Deafeance and the Tender of the lefser Sum, he needs not lay Tent Temps Prifi; nor by the Tender he was discharged of all. But otherwise of an Obligation with Condition to pay a lefs Sum. Cro. E. 755, pl. 16. Pafch. 42 Eliz. C. B. Cotton v. Clifton.

4. Debt upon Bond conditioned to pay severall Sums on Feueral Days, the Defendant pleaded Payment of all the Sums due before such a Day, at which Day the Plaintiff per Scripture summa signed under his Hand, which the Defendant Prolert his in Curia, agreed to defer the Payment of the Residue till a farther Day not yet come; and upon a Demurrer to this Plea, it was adjudged ill, because this Action being founded on a Deed, there cannot be a Deafeance made thereof without a Deed, and Scripture ub Manu doth not imply a Deed. 3 Lev. 234. Trin. 1 Jac. 2 C. B. Blemherhit v. Pierfon.

5. Where a Provifio goes by Way of Deafeance of a Covenant, it must be pleaded on the other side, otherwife, where by Way of Explanation, or Restriction of the Covenant; Per Holt Ch. J. 2 Salk. 574. pl. 2. Hill. to W. 3 B. R. Cleyton v. Kinaeton.

6. A. entered into a Bond to B. conditioned for Payment of 40 l. afterwards B. agreed and entered into a Covenant, that if A. (the Defendant) pay 5 s. in the Pound for every 20 s. due to the Plaintiff from the Defendant, and so at the same Rate, for every greater or lefser Sum than 20 s. on or before the 25th of December, the Plaintiff should and would accept the same in Discharge of all Sums, as then due, or on the 25th of December should be, due from the Defendant to the Plaintiff. The Ch. Juflice delivered the Opinion of the whole Court for the Defendant; that this is a Deafeance to this Bond and sufficiently relates to it; for it is not neceffary to recite the Bond, no more than where a Power of Revocation is inferred in a Deed; a Revocation by a subsequent Deed is good, though it does not recite or mention the Power, or in direct Words refer to it. Comyns's Rep. 569, 570. Trin. 11 Geo. 2. C. B. Trever v. Angus.

For more of Deafeance, See Conditions, Covenants, Estates, Extinguishment, Release, Titles, And other proper Titles.
*Defence.*

(A) In Pleadings. Necessary in What Cases.

1. **Assise of Nuisance Viscontial before the Justices in Bank, the Defendant made Defence and pleaded.** Br. Defence, pl. 2. cites 46 E. 3. 23.

2. **Contra it seems before Justices of Assise; for the Pleading in Assise of Nuisance before Justices of Assise, and before the Justices of Bank much varies.** Br. Defence, pl. 2. cites 46 E. 3. 23. 6. 1.

3. **Praecipe quod reddat; At the Grand Cape the Demandant released the Defaulter, and counted against the Tenant. Roll defended Tort and Force and demanded Judgment, if the Court would take Consideration, and pleaded Ancient Denunxiation &c.** Br. Defence, pl. 5. cites 8 H. 6.

4. **Note per Fortescue, Arguendo in Attaint, that in Assise, Dower, Perque Servitutia and Attaint, a Man shall not make Defence, and so Br. Defence feems by the Entries no more in Assise of Morltdancei, than pl. 23. Br. Ancient Demesne, pl. 21. cites 3. 9. 5.**

5. **Note, that in Assise and Scire Facias there is not any Defence.** Br. s. P. nor in Attachment upon Prohibition. Br. Defence, pl. 22.


7. **In this Defence there be Three Parts to be considered. First, Coke says when he defends the Wrong and the Force, this has a double Efficit, viz. that a Man cannot plead to the Jurisdiction without making his plea by this Part of the Defence, as it appears here by Littleton, that if the Defendant will plead in Disability of the Person of the Plaintiff, he must first make himself Party by this first Part of the Defence, neither can he plead to this Jurisdiction of the Court without this Part of the Defence.** Co. Litt. 127. b.

---

Defence cometh of the Word (Defendo) so called from the Manner of the Pleading viz. Predict. A. B. defendant fide Iniurian &c. for Example in a Personal Action brought by

**Note** per Fortescue, Arguendo in Attaint, that in Assise, Dower, Perque Servitutia and Attaint, a Man shall not make Defence, and so Br. Defence seems by the Entries no more in Assise of Mortdancei, than pl. 23. Br. Ancient Demesne, pl. 21. cites 3. 9. 5.
Defence.

In [Trespass], by the Defence of the Damages, he affirms that the Plaintiff of Corvus taken, the Defendant defends Tort and Force, and demands Judgment & Corvus comproprie unit; For he says, that he is Party of B. calve &c. and takes Trises. And Sec, Vide, that he who pleads to the Jurisdiction, shall defend the Tort and Force, but not the Damages; For this will affirm the Jurisdiction. Br. Defence, pl. 8. cites 39 E. 3. 23.

9. 3dly, And by the last Part viz. and all that which he ought to defend, when and where he ought, he affirms the Jurisdiction of the Court. Et sic de similibus. And of such necessity is it for the Tenant, or Defendant to make a lawful Defence as albeit he appears, and pleads a sufficient Bar without making Defence, yet Judgment shall be given against him. Co Litt. 127. b.

10. In Pleading Excommunication in the Plaintiff, Hale Ch. J. doubted, if Defendant ought not to have made some kind of Defence though no full Defence is to be made. Vent. 222. Trin. 24 Car. 2. B. R. Jay v. Bond.

11. In Assumpsit on a Bill of Exchange, the Defendant pleaded in Bar without Defence, and upon a General Demurrer this was objected, and the Question was, if this was Matter of Form, and so aided by the General Demurrer. And prima facie the Court was of Opinion, that this was Matter of Subsistence; because the Defendant is not Party to the Action without Defence; but after having consulted the Judges of B. R., where it has been a long Time held Matter of Form, they agreed that it was aided by the general Demurrer, though at the same Time they seemed to comply with that Opinion, rather than to approve it with their own Judgments, to the End that there might be a Conformity between the two Courts. Ld. Raym. Rep. 282. Mich. 9 W. 3. Bellasis v. Heiler.

12. In Ejectment the Defendant venit & dicit, that the Land is Ancient Demesne, without making any Defence; to this there was a special Demurrer. Et per Holt Ch. J. The Plaintiff might have refused the Plea for want of a Defence; but if he receives the Plea he admits a Defence. If one plead Outlawry, he ought to plead it sub pede figilli, and if he does not to plead it, the Plaintiff may refuse it; but if he accepts the Plea he shall not demur for that Cause; for it is well enough if he allows it. 1 Salk. 217. Patch. 4 W. and M. in B. R. Ferrer v. Mil- ler.

S. P. 5. Lev. 184. Trin. 56 Car. 2. C. B. in Calo of North v. Hoyle. Per Car. and the Precedents, where ancient Demesne was pleaded, sometimes with Defence, and sometimes without it, prove only, that it may be well pleaded with Defence, but does not prove that it may not be pleaded without Defence; and thereupon the Plea without Defence was ruled good.


(B) The Manner. And in what Actions.

1. In Appeal of Mayhem, the Defendant defended vim & Injuriam, and all Felonies and Appeals of Mayhem, and whatever is Contrary to the Act of the King, Coronam & Dignitatem suam. Br. Defence, pl. 18. cites 40 Aff. 9.

In Trespass, he who pleaded to the Personal De-
Defence.

the Person, and did not say haec verba quando &c. for this goes to the said Tort Damages, and is full Defence. Br. Defence, pl. 21. cites 40 E. 3. 36.

Damages, according to Viz. Heath's Max. 25. cites S. C. 21. 26. says, that by Piovden, in Caece of Graylock in per Howter Prohostonary the Ufe has been in fuch Cafe to make Pro- teffation before the Defence, andthen to make full Defence; and June thought this Form good; quod nota of Profeffation before Defence. Br. Defence, 9. cites 14 H. 6. 18.

excluding of a Conclufion, and (by that Book) ought to be after the Defence, which is (in that Point) left doubtful by the Book of 21 H 6. 26. and may not be contrary in itfelf, or double. As Profeffando that he made no Testament, pro Plauto, that he made not the Plaintiff his Executor; be- cause if he made no Testament, he could make no Executor.

4. In Writ of Right, the Form in Writ is after the Count reheared to Heath's maie Defence de novo, and then to wouch over or plead in Bar; And the Max. 24. cites S.C. fame Form is where the Demandant replies to the Bar, the Defendant ought to make Defence, and then to anfwer to the Title &c. Br. Defence, pl. 7. cites 21 H. 6. 26. per Newton.

5. He who pleads Villenage to the Person of the Plaintiff or Defendant Br. Defence cannot make full Defence, but shall defend Tort and Force only, and de- mand Judgment if he shall be anfwered. Br. Defence, pl. 11. cites Litt. Tenures tit. Villenage.

6. In Maintenance the Defence is ven' et defend' vim & injuriam &c. & Brown's quieuid & &c. and the same in Acton upon the Statute of Labourers; for Anl. 6. thes are Actions upon Statute. Br. Defence, pl. 23.


Brown's Anal. 67.


9. And in Writ of Participations facienda, ven' et defend' vim et injuriam quando &c. and not jus suum; for no Land is in Demand. Br. Defence, pl. 25. (bis.)


14. In

15. In Writ of Intrusion, and every Praecipe quod reddat, venit & defendit Jus suum quando &c. and the same in Ad Terminum qui præterit. Br. Defence, pl. 33.


27. Action upon the Caph, veni & defendi Vim & Injuriam quando &c. Br. Defence, pl. 44.


(C) What
(C) What may be pleaded after Defence made.


2. After Defence of Damages done, and after hearing of the Writ, the Defendant may say, that the Plaintiff is a Monk professed, and Feme Defendant may say, that she is a Covert of Baron. Thel. Dig. 203. Lib. 14. cap. 1. S. 2. cites Hill. 44 E. 3. 4. & 32 H. 6. 27.

3. In Quare Impedit, the Defendant defended the Tort, and Force, and Damages, and demanded Oyer of the Writ, and pleaded that the Plaintiff is a Chanon professed, Judgment, if he shall be answered, and the Plaintiff replied, because he has made a full Defence and has had Oyer of the Writ, Judgment, if he shall say Nonability to the Person after; for after such Matter in Action against a Feme he shall not say that he is Covert Baron, which Caund expressly denied, and said, that he shall have the Plea. And per Cur. this Plea is to the Action, and also Nonability of the Person, therefore answer, by which he said, that such a Prior is Patron of the Vicaridge of B. where the Plaintiff is Vicar, and have used Time out of Mind to present one of their Chanons, and such Chanon so presented Vicar has been perpetual and not removable, and have imploade and been imploade Time out of Mind Judgment, and the belt Opinion was, that he his not by this discharged of his Profession but only of his Obedience, and that in this Case he is a Person able to have all Actions touching this Vicaridge, but this Quare Impedit was used upon a Grant made to the Plaintiff of another Advowson, therefore Quare as here; for it was agreed, that he may be elected Prior of the first House at an Avoidance. And per Finch if a Man recovers the Patronage, where he is Vicar, against the Prior, he shall return to his House, and shall be Obedient again. Br. Nonabilitie, pl. cites 44 E. 3. 4.


5. In Praeipe quod reddat, the Defendant made Defence, and demanded the View, he shall not plead to the Jurisdiction upon the View, but shall have it to the Writ, if the Land lies in Wales, but otherwise it seems of ancient Domayne. Br. Defence, pl. 13. cites 7 H. 6. 36.

6. In Praemunire, the Tenant defendit Vim & Injuriam and demanded Judgment, if the Court would take Consideration, and alleged the Matter to be in Cheyler, which is a County Palatine. Br. Defence, pl. 14. cites 8 H. 6. 3.

7. Superfedas of Privilege in Chancery was allowed by Award after Defence made. For it seems that there is great Difference between pleading to the Jurisdiction and Superfedas of Privilege. Br. Defence, pl. 17. cites 19 H. 6. 32. & 3 H. 6. 30.

6 M 3. After
The Difference is, where the Pleas is in disability of the Person, as Alien, Enemy, Outlawry &c. it cannot be pleaded after full Defence, because it is repugnant to the full Defence, the Defendant has admitted the Plaintiff able to recover Damages, but other Pleas in Abatement may be pleaded after full Defence; for a full Defence never admits an Ill Writ Per Powell J. Ld. Raym Rep. 117. Mich. 8 W. 3. in Cafe of Britton v. Gradon.

S P. said accordingly.

12 Md.


in Cafe of Clerk v. Butler; but Curia advisare vult.

S. C. cited Heath's

Max. 25. — Brown's

Anal. 7.

S. P. but, whether one shall take his Proteftation before or after Defence, dubitatur — General Defence is a Conclusion to plead Mifnomer after License to imitate de Perfona & de Villa; For it is contrary to the Name afforded by the general Defence and Impairance, and therefore he ought to say that 8, of S. case is imploded by the Name of J. S. of C. defendit Iuriam &c. for puts Iurisdiction in impermeable agine Outlaw, Hildiatis &c. and then it is well, quod Curia consentit. Br. Defence, pl. 15. cites 19 H. 6. 1.

11. Trefpafs, Affault, Battery, the Defendant venit & defendit Vim & Injuriam quando &c. and pleads Outlawry in Abatement after Impairance; the Plaintiff demurs; and adjudged that the Defendant ansver over; because he cannot plead such a Plea after a full Defence, by which he has admitted the Plaintiff able to recover Damages. Ld. Raym. Rep. 117. Arg. cites Trin. 35 Car. 2. B. R. Rot. 1528. Gawen v. Surby.


13. After the Defendant has made a full Defence in Trefpafs by adding the Words quando &c. to the Words (Venit & defendit Vim & Injurium) he cannot plead in Disability that the Plaintiff is in Alien born &c. but he ought to omit the (Quando) because by that Word, the Defendant hath admitted that the Plaintiff hath Capacity to sue. Carth. 230. Patch. 4 W. and M. in B. R. Jentreet v. Jenkins.

14. Affirmavit was brought against R. G. Esq; the Defendant Venit & defendit Vim & Injuriam quando &c. and pleads that he is a Gentleman, Aisque hoc that he is an Esq. &c. upon Demurrer it was argued for the Plaintiff, that the Defendant by saying Vim & Injuriam quando &c. has made a full Defence, and after that he cannot plead in abatement; but it was answer'd on the other Side that it is good either way; for this is not a full Defence, but the Moiety of a Defence; for that a full Defence is when the Defendant proceeds and says, & Damma et quicquid quid ipse defendere deber, and cited Patch. 3 and 4 W. and M. in B. R. Rot. 449. that the Defendant after Vim & Injuriam quando pleaded that the Defendant was an Alien Enemy, and the Court held that it was good the one way or the other. But per Powell J. Quando &c. amounts to a full Defence, and Damma & quicquid quod ipse defendere debet' is never put in. No Judgment was given as tothis Point.
De Injuria sua propria.

Point, but all agreed, that the Misfonuer being pleaded in abatement by Attorney is ill; and a Repondeas Outed awarded. Ld. Raym. Rep 117. Mich. 8 W. 3. Briton v. Gradon.

15. Defendant came and defendit Vim & Injuracion quando, and then would plead Misfonuer; and said he could not plead that after pleading defendit Vim & Injuracion; for that he had admitted himself by that Name. Curia advisare vult. 12 Mod. 235 Mich. 10 W. 3. Clerk v. Butler.

For more of Defence in General, See other proper Titles.

De Injuria sua propria.

(A) In what Cases it is a good Plea.

1. In Trespafs the Defendant justify'd for taking of the Villein of his Master, and the Plaintiff said that De fon tort &c. pl. 35. cites 4 E. 3. 2.

2. In Replevin of taking of Cattle the Defendant justify'd for Execution of a Recovery of 38 s. in a Court Baron, the Plaintiff said, that De fon tort demeane abique tali causa, and it was held that he shall not have such general Averment contrary to the special Matter, by which he said, that the Cattle were not deliver'd in Execution. Br. De fon tort &c. pl. 36. cites 38 E. 3. 3.

3. In Trespafs of taking a Horfe, the Defendant justify'd, because T. held of him by Heriot Service to render his best Beast tempore Mortis, and the Plaintiff as Executor got the Horfe which was the best Beast, and the Defendant took it for Heriot, and the Defendant said, that De fon tort demeane, Prift &c. and the others contra. Br. De fon tort &c. pl. 10. cites 38 E. 3. 7.

4. In Trespafs the Defendant justify'd, because the Plaintiff was in Ward of the Prince, by which he sai'd and granted to the Defendant, whereupon he enter'd and Occupied &c. and the Plaintiff said, that De fon tort demeane without such Cause, and no Plea per Cur. but ought to answer to the special Matter, by which Issue was taken that he held in Socage, and not in Chivalry. Br. De fon tort &c. pl. 6. cites 44 E. 3. 18.

5. In Rescuses the Defendant justify'd to make Replevin by Warrant of the Sheriff, the Plaintiff said, that De fon tort demeane without such Cause et non allocatur contra to this special Matter by which he said, De son tort demeane Abligne loc, that he had Warrant from the Sheriff at the time of the Delivery. Br. De fon tort &c. pl. 28. cites 13 R. 2. and Fitzh. tit IIuf. 163.

6. In Replevin the Defendant made Coniance as Bailiff of R. B. and the Plaintiff said, that De fon tort demeane without such Cause, and no Plea but shall answer to the Coniance. Br. De fon tort &c. pl. 27. cites 2 H. 5. 1. and Fitzh. tit IIuf. 132.

7. Tresp.
De Injuria sua propria.

7. Trespass of taking two Beasts as B, the Defendant said, that the Plaintiff held the Place where & of J. by Rent and for the Rent arrear, J. disfavored the Beasts, and the Defendant at the desire of the Plaintiff intreated J. for the Beasts, and J. delivered them to him upon Condition, that if the Plaintiff paid the Rent within a Month that he should deliver them, and if not, that he should deliver them to J. which Matter the Defendant showed to the Plaintiff upon which he agreed that the Defendant should put them in the Place, where &c. and that if he did not pay as above, that he should retake them and deliver them to the Plaintiff, and because he did not pay &c. he took them and re-delivered them to J. Judgment &c. There De fut tont doense without such Cause is adjudged a good Replication without anwering to the special Matter because it is only a Summis Quod Nuta. Br. De fon tort &c. pl. 30 cites 10 H. 6. 3.

8. But where Lease or Licence is pleaded, the Plaintiff shall not say De fon tort demense abique tali Caufa, but shall answer to the special Matter. Br. Ibid. cites to H. 6. 9.

9. Nata where Patente of the King comes to justify the Matter, De fon tort demense abique tali Caufa is no Plea; for the justification is by Matter of Record. Br. De fon tort &c. pl. 32 cites 33 H. 6. 29.

10. Trespass of cutting Trees the Defendant pleaded Gift of the Plaintiff to which the Plaintiff said, that De fon tort demense, contrary to 9 E. 4. Br. De fon tort &c. pl. 34.

11. Trespass of Suijault and Battery against three Defendants, two of them pleaded that they were Leases of certain Lands, and there were certain Poifs on the Land, and the Plaintiff would have taken them away, and they gently took them from him; and the third pleaded, that he found the Plaintiff and the other contending about the Poifs, and he parted them by laying his Hands Molliter on the Plaintiff &c. que est cadem &c. the Plaintiff repl'd de Injuria sua Propria abique tali Caufa, &c. and it was found for the Plaintiff; it was moved, that here was no Illice, because the Plaintiff ought to have made several Replications, and abique tali Caufa can be no Illice to all. But per Cur. though it is no good Form of Pleading, yet by reasonable Contrauction the Words (abique tali Caufa) being Nomen equivocum shall be refer'd to every Caufe; and so Judgment for the Plaintiff. Cro. E. 139. pl. 15. Trin. 31 Eliz. B. R. English v. Pellitory.

12. De Injuria Sua Propria is no Plea, where the Defendant justifies by claiming an Interest in the Freehold to himself; But where one claims not any Interest, but justifies by Command, or Authority derived from another, it is otherwise. Cro. E. 539. pl. 2. Hill. 39 Eliz. B. R. Arch Bishop of Canterbury v. Kemp.

13. In Replevin the Defendant as Bailiff to one Pyne, who was seiz'd of the Third Part of the Place, where &c. justifies for Damage seafant. The Plaintiff says, that a Stranger was seiz'd of the other Two Parts, and by his Licence he put in his Castle. The Defendant says De Injuria sua propria abique tali Caufa &c. And the Plaintiff demurs, and it was adjudged to be no Plea; but he ought to answer to the special Matter in the Bar. Cro. E. 812. pl. 19. Hill. 43 Eliz. C. B. Whitnel v. Cook.

14. When the Defendant in his own Right, or as Servant to another, claims any Interest in the Land, or Common or Rent out of it, or Way or Passage.
De Injuria sua propria

Pleading upon it, there De Injuria sua propria generally is no Plea. 8 Rep. 61 a the second Resolution, Mich. 6 Jac. Crogates's Case.

15. But if the Defendant justify as Servant, there De Injuria sua propria in the said Cases with a traverse of the Commandment is good, where the Commandment is material, and this will reconcile the Books.

For the General Plea De Injuria sua propria &c. is properly when the Defendant's Plea consists merely upon Matter of Excuse, without any Matter of Interest whatsoever. And it is said, De Injuria sua propria, because the Injuria properly in this Sense is to the Person or his Reputation, as Battery or Imprisonment to the Person, or Scandal to his Feme, there if the Defendant excuses himself, as upon Son Affault Demetne, or upon the levying Fue and Ciy, there properly De Injuria sua propria Generally is a good Plea; for there the Plea conffits only of Matter of Excuse. Resolved. 8 Rep. 67. Mich. 6 Jac. in the second Resolution in Crogates's Case.

16. When by the Plea of the Defendant, any Authority, or Power, is meditated, or immediately, derived from the Plaintiff, there, though no Interest be claimed, the Plaintiff ought to answer thereto, and shall not reply generally De Injuria sua propria. And the Law is the fame of an Authority given by the Law, as to see Woff &c. Resolved. 8 Rep. 67. a. b. Mich. 6 Jac. Crogates's Case.

17. De Injuria sua propria is a good Replication to a Justification by the Common Law, or by a General Act of Parliament. 2 Salk. 628. pl. 3. 130 S. C. by Name of Chancey v. Wynn & al. &c. &c.

18. If one come into my House by my Consent, and he will not go away when I would have him go, I may by Authority in Law turn him out; if he brings Trefpals for this, and I set out all the Matter specially in my Justification, De Injuria sua propria generally will be a good Plea. Per Holt Ch. J. 12 Mod. 582. Mich. 13 W. 3. in Case of Chancey v. Win & al.'

19. If in Trefpals against a Constable he justifies, for that he was a Constable, and the Plaintiff was breaking the Peace, for which he committed him; may not the Plaintiff reply, De Injuria sua propria abique tall Caufa? Per Holt Ch. J. 12 Mod. 582. Mich. 13 W. 3. in Case of Chancey v. Win & al.'

20. Trefpals for taking and impounding a Gelding at Scarborough, Defendants plead, that the Place where the Gelding was taken is called Woopenes, containing 1000 Acres in Scarborough, of which the Bailiff and Burgesses of Scarborough were seised in Fee, and the Defendants as their Servants, and by their Command, took the Cattle Damage Feajant. To which the Plaintiff replies, De Injuria sua propria generally. To which the Defendants demur, and flew for Cause, that the Plaintiff did not traverse. And Judgment was given for the Defendants. First, because several Things are put in Issue, which is a Reason in Crogates's Case. 8 Co. 67. a. Secondly, Because where Interest is in Land, or claimed out of Land, the Plaintiff cannot reply De Injuria sua propria. Coynys Rep. 582, 593. pl. 254. Trin. 11 Geo. 2. Cockerel v. Armtrong & al.'

For more of De Injuria sua propria in General, See other Proper Titles.

6 N  Demand.
Demand.

(A) Sufficient. What is.

S. C cited 1. In Debt upon a Bill of 70l. to be paid upon Demand, it was in- 
Cited 454. pl. 49. - by bringing an Action will not serve the Turn; But adjudged well 
Cited 454. pl. 49. - of Demand 4. Addition in pl. 49. - is a duty pretently and so needs no Demand. Cro E. 
Cited 454. pl. 49. - Mich. 25 & 30 Eliz. B. R. 

2. Where one is indebted to me severally in several Sums of Money to be paid upon Request, or Demand made, and I go and say to him pay me what you owe me, this is not a sufficient Demand or Request. 3 Le. 
Cited 454. pl. 49. - 266. pl. 166. Paich. 30 Eliz. B. R. said to have been adjudged. 

3. If a Will appoints Payment of Money, and mentions no Place, there must be a Request. Browal. 46. Mich 14 Jac. Anon. 
Cited 454. pl. 49. - But in Debt or 
Cited 454. pl. 49. - Demand were the 
Cited 454. pl. 49. - very bringing 
Cited 454. pl. 49. - the Action 
Cited 454. pl. 49. - is a Re 
Cited 454. pl. 49. - quest, if the Defendant appears at the first Summons, then he excuses himself, otherwise he shall be subject to Damages, but the Request needs not be so precisely alleged. Godb. 405. Paich. 

5. A in Debt to B. in 12 l. for Goods, B. refused to trust him further, on which C. comes to B. and pray him to Trust A. and if he would, he would pay him the Old Debts, and whatsoever A. should be in Arrear more, if it did not exceed 100l. C. would pay, B. fold after to A. several Goods amounting to 19l. and lent A. 3 l. One De 
Cited 454. pl. 49. - mand is sufficient for the three several Sums. Htitl. 84. Paich. 4 Car. 

6. If a Man promises to pay Money at any Time within a Month upon Request, the Creditor may Request after the Month, and the Debtor shall have a Month's Time after the Request to pay the Money. Freem. Rep. 

7. Note, to pay 50l. to B. at any Time during their Joint Lives, within three Months after A. should demand the same, the Demand ought to be Personal. 2 Show. 235. pl. 232. Mich. 34 Car. 2. B. R. 

8. Demand
Demand.

8. Demand Oste Tenus in some Cases is good, as in Cafe of Stock to be transferred, it is the Usage amongst Merchants to make all their Demands Oste Tenus upon such Bargains, as well as sometimes by Writing at the East-India House, and not to seek after the Person of the Vendor, and Judgment accordingly. Carth. 269. Pach. 5 W. & M. in B. R. Hall v. Cupper.

9. Distress for Rent is a Demand in itself. See Rent (I) pl. 2. and 9.

(B) Necessary, or not. In what Cases, and where.

1. A Lease was made for Years, rendering Rent payable at a Place off the Land, and the Court was moved, whether a Demand of the Rent may not be made upon the Land, but denied by the whole Court; for they laid, that the Demand must be made at the Place of Payment, although it be off the Land. Brownl. 96. Trin. 5 Jac. Ventris v. Farmer.

2. An Executor brings Tresor of Goods taken from his T McMaster by a Transferee. It was held the Executor must first make a Demand of the Transferee before he can bring this Action. Clavt. 122. pl. 215. March 1647, before Germaine one of the Judges of B. R. Coldwell's Case.

3. In Action of Debt upon a Bond with Condition to pay 50l. to the Plaintiff, and to add 11. to every 100 if it were denominated; The Defendant pleaded Payment of the 50l. and that he added 11. to every 100. secundum formem Conditionis præcéd. The Plaintiff traversed the Addition of 11. to every 100. secundum formem Conditionis præcéd; after Verdict, it was moved in Arrears of Judgment, that the Plaintiff ought to have alleged a Demand, and for this Cause, Judgment was given against the Plaintiff, for this being Matter of Substance, without which the Plaintiff had no Causse of Action, was not helped by the Illue nor Verdict; notwithstanding the Words secundum formem Conditionis, which was pretended to imply a Demand. Allen 55. 56. Pach. 24. Car. B. R. Hill v. Armstrong.

4. A Distress was taken by Serjeant Jones, between a Limitation which depends on the doing of some Collateral Aff, which is to be done but once, and the Payment of a Rent falling out of the Land, which hath a Collateral Aff, that in the last Case there ought to be a Demand, but not in the first. Fearn. Rep. 24. Hill 1671. pl. 32.

5. Debt upon a Bill obligatory, fell, borrowed of J. S. 10l. which I Promise to pay upon Demand, the Plaintiff lays, Quod hic necessitatis requisitum he had not paid it, but does not lay any actual Demand; and Verdict being for the Plaintiff, Baldwin moved in Arrears of Judgment, because no particular Requett in Time and Place is averred; and cited the Case of Brown v. Darnery, Hob. 268. But per Curiam a Requett is not here necessary, it being for the payment of a Debt, and between the Parties; but if it had been upon a Penalty, or a Promise by a Stranger, or for some collateral Matter, there a Requett must be laid; but here appears that a Debt was due, and it being for the Payment of the Money by the Debtor, although it be laid upon Demand, yet the bringing of the Action is a sufficient Demand. Fearn. Rep. 113. pl. 135. Trin. 1673. Abenden v. Clayham.

6. A was indebted to B. and A. dies, and after B. comes to C. and demands the Money, and C. in Consideration that B. would forebear his Debt, (or

Skin. 201. pl. 27. S. C. and Judgment accordingly, the constant Practice being an Exposition of these Words.
(or to sue) did promise to pay him. Objection was made that this being a
collateral Promise, and no Debt due from the Defendant, here ought to
have been a Request. But to that the Court answered, that a Request
was not necessary, the Promise being generally to pay, and not upon Re-
7. Debt for a Rent referred upon a Lease for Years, in which there was
a Promise, that if the Rent be behind, and unpaid by the space of a Month
next after any, or either of the Days of Payment, then the Lease to be
void. The Plea was, that the Rent was behind a Month after a Day,
on which it was referred to be paid, and to the Lease is void; to which
Plea the Plaintiff demurred, because the Defendant did not say that the
Plaintiff demanded the Rent; for though the Rent be due without the
Demand, yet the Interest shall not be determined without it, which
must be expressly Lisd in the Pleadings, and of that Opinion was the
Court, except Justice Atkyns who doubted. 2 Mod. 264. Trin. 29
Car. 2. C. B. Steward v. Allen.
8. Ejectment at Chelmstord Affizes held by Ld Ch. J. Pemberton,
that if Legacies be given by Will, and that in Case of Non-payment, the
Legates may enter and enjoy the Profits of such and such Land till satisfied,
no Demand is necessary; for it is no Forfeiture, but an Executory De-
vice, although there be a Place and Time appointed for Payment &c.
So was the Case of Tyrrel v. Glasick here. 2 Show. 185. pl. 192. Hill.
33 and 34 Car. 2. B. R. Peirfon v. Sorrel.
9. Where the Condition of a Bond given by a Member of a Society is
to pay such Sums as shall be due, an Action may be brought for Non-
payment without any Demand; for it is a Sum in gros. Ld. Raym.

(C) In Actions Real. Of what Things. Pleadings.

1. SELION shall not be demanded by Precipe quod reddat per Ju-
dicium; because it does not contain certainty; for it may be an
Acre or Half an Acre. Thel. Dig. 69. Lib. 8. cap. 17. S. 1. cites Temper
Pore E. 1. Brief. 866. And says, that 9 E. 3. 479. it was said two Selions
do not contain but one Acre of Land.
2. Thel. Dig. 66. Lib. 8. cap. 4. S. 5. says, it seems by the Opinion
of Trin. 4 E. 2. Brief 793. that a Man shall have Precipe quod reddat
de Poffaggio ultra a gumam &c. but not against him to whom the Court of
the Water is, nor Affile de Poffaggio, cites 31 E. 3. Affile 449. but against
other Occupier or Disturber, for the quod permittat lies against the Ten-
ant &c.
3. Precipe quod reddat does not lie of Ezzors, nor Dozer. Thel.
Dig. 68. Lib. 8. cap. 6. S. 1. cites Mich. 2 E. 3. Dower 122. but says
the contrary is said Mich. 7 E. 3. Affile 138. per Herle and Shard of
Precipe quod reddat.
4. Bosvata terre, which is an Oxgange, lies in Demand. Thel.
Dig. 69. Lib. 8. cap. 13. S. 1. And says, it was held Mich. 2 E.
3. 57. that Meadow, Pature and Wood, may be appurtenant to an
Oxgange of Land, and comprized in the Words, Cum Pertinentis. And
that it is said in Plowden, 168. That an Oxgange of Land may con-
tain in it Land, Meadow, Pature and Wood, and other Things. And
yet it is adjudg'd Mich. 15 E. 3. Brief 243. That Oxgange of Mirth
does not lie in Precipe; And it was said, that Bosvata is always of
Things which tall in Tillage. Thelol says, that an Oxgange of
Land in his Country contains 10 Acres of Land.
5. Carvinta
5. Carnuta terre is another Quantity of a Thing which lies in Demand. Thel. Dig. 69. Lib. 8. cap. 12. S. 1. cites Mich. 4 E. 3. 161. and 6 E. 3. 293. where it was held, that a Houte, Mill, and Teft, may be comprised within a Carve of Land. And says, See 35 H. 6. 29. where Prior faid, that a Carve of Land is greater in one Country than it is in another Country. And fo it is of an Oxgange; Moor, Wood, and Meadow, may be within a Carve of Land, cites Tempore E. 1. Brief 611.


7. A Man shall not have Precipe quod reddatt de Poffato, five Stagno. Thel. Dig. 66. Lib. 8. cap. 4. S. 6. cites Hill. 8 E. 3. 381.

8. A Man shall not have Precipe quod reddatt of a Pifchary. Thel. Dig. 66. Lib. 8. cap. 4. S. 7. cites 8 E. 3. 391. But fays, that fuch Precipe was brought in the Time of E. 1. Brief, 861, where it was faid, that Precipe quod reddatt lies de Stagno, and fays, See Affife of Pifchary, 12 H. 3. Affife 427. And of Common of Pifchary, 34 Aff. 11. And that Fine was levied of a Pifchary. Hill. 1 E. 3. 4. And fays, See Mich. 13 E. 3. Entry 57, where it was faid, That where a Man is to demand Pifchary from fuch a Place to fuch a Place in a Water, he fhall make his Demand of the Soil. And fays, See Writ of Aiel brought of a Pifchary. Trin. 20 E. 3. Brief 635.


10. But in Mortadofier, Where it is fay'd, that the Ground of a place containing fo many ares, was held good, without faying, a Place containing fo many ares. Thel. Dig. 69. Lib. 8. cap. 19. S. 1. cites 16 Aff. 2. Hill. 16 E. 3. 650.


12. A Formuion was maintain'd of an Office of the Serjeanty in a Church Cathedral. Thel. Dig. 67. Lib. 8. cap. 5. S. 1. cites Trin. 18 E. 3.

13. Writ of Entry ad terminum qui praterit was maintain'd de una Bedellaria. Thel. Dig. 67. Lib. 8. cap. 5. S. 1. cites Patch. 19 E. 3. View 77.


15. And fo it was de balliva Cuftodiendi saltem porcurn. Thel. Dig. 67. Lib. 8. cap. 5. S. 1. cites Mich. 7 E. 3. 361, and Mich. 8 E. 3. 423, and fays, See Patch. 10 E. 3. 508.

16. In Affife Plaint was made of two Furlongs of Land. Thel. Dig. 69. Lib. 8. cap. 18. S. 1. cites 40 Aff. 42. And fays, that Hill. 4 H. 3.

17. It was granted, That a Man fhall have Precipe quod reddatt quamdam Particem terre &c. Thel. Dig. 69. Lib. 8. cap. 19. S. 1. cites Hill. 11 H. 4. 43, and that fo agrees Mich. 5 H. 7. 9.


6 O 19. A
19. A Man shall have Praecipe quod reddat de una Aera terre cum aqua coporta, or de una Aera terre generaliter at his Election. Thel. Dig. 66. Lib. 8. cap. 4. S. 3 cites Mich. 12 H. 7. 4. Per Vatifer.

20. Thelocal fays, he has not seen any Praecipe quod reddat de Fo-dina, nor de Minera, but there is a Form of Writ of Covenant in the Regifter, fol. 165. De Minera plumbi et cajenfium: Generalis metalli cum partin in &c. Thel. Dig. 68. Lib. 8. cap. 8. S. 1.

21. Thel. Dig. 69. Lib. 8. cap. 9. S. 1. fays, That in Glanvile, fol. it appears, That at the ancient Law, a Man should have Praecipe quod reddat de una terre, but Thelocal makes a Queere of what it contains, and fays, See the Regifter, fol. 25, and Bracton, fol. 434.

(D) Count or Declaration. In what Order the several Things shall be Demanded.

1. ALWAYS the Thing of greater Dignity, shall be put before the Thing of les Dignity, and the Thing Special, and the entire, before its Parts. Thel. Dig. 70. Lib. 8. cap. 26. S. 1.

2. And becaufe Land upon which a Houfe is built, is of more Dignity than Land without an Edifice, Houfe shall be demanded before Land; And of Edifices, a Castle shall be demanded before a Millhouse; because it is of a greater Dignity, and a Place of Force and Defense againft the Enemy in Time of War, and againft the Rebels in Time of Rebellion, and in Time of Peace for Confequence of great Mifiders by Imprifonment, and a magnificent Habitation for the Nobles, and fo it shall be put in Demand before a Manor, notwithstanding that it may be Parcel of a Minor, as appears 1 E. 3. 4. and 7 H. 6. 39. And this Order is to be obferv'd, of Things of greater Dignity. See Plowden, 168, 169. Thel. Dig. 70. Lib. 8. cap. 20. S. 2.

3. And fo it shall be of Things General, as Land is to Meadow, Pasture, Wood &c. and shall be put in Plaint or Demand before them; For Meadow is a Species of Land upon which the Hay grows, and is mov'd, and Pasture, Wood, Ruby Ground and Marth, &c. are Species or Kinds of Land. And fo Wood is a Genus to Land, where all Manner of Trees grow, and therefore shall be put in Demand before Alder Beds, and Willow Beds, which are only Species of Wood. Thel. Dig. 70. Lib. 8. cap. 25. S. 3.

4. So the entire Thing shall be demanded before the Misty or other Part or Parts of the same Entire, as appears in the Register, and in the Natura brevium. Thel. Dig. 70. Lib. 8. cap. 29. S. 4.

5. Yet, notwithstanding the said Rules, a Writ was adjudg'd good, by which Land was put in Demand before a Mill. Thel. Dig. 70. Lib. 8. cap. 20. S. 5. cites Hill. 9 E. 3. 444.

6. There is a Note in the Register, fol. 81. in Repleven, That if live Beasts, and dead Charters are to be Replevye'd, the live Thing shall be put in the Writ before the dead Thing &c. Thel. Dig. 70. Lib. 8. cap. 20. S. 6.

(E) Demand;
(E) Demand; In the Disjunctive.

1. "In Assize the Plaintiff was of a Robe, Price 10s. or 10s. for the Robe, at the Feast of Christmas, and held good. Thel. Dig. 74. Lib. 8. cap. 24. S. 1. cites 3 E. 3. It North. Assize 175. And that to it is agreed. 11 Aff. 8. and 29 Aff. 7. Trim. 11 E. 3. Variance, 69.

2. And in Annuity, notwithstanding that the Specialty be of a Robe, price 10s. or of 10s. yet the Writ may be of a Robe only. Thel. Dig. 74. Lib. 8. cap. 24. S. 2. cites Palfch. 11 E. 3. Annuity, 27.

3. And it was adjudg'd in such Case, that the Writ of Annuity may be Quod reddat unam Robam, or 10s. &c. Thel. Dig. 74. Lib. 8. cap. 24. S. 3. cites Palfch. 5 E. 4. 6. And says, See Mich. 13 E. 4. 4. That a Writ of Debt was brought of 20l. &c. where the Specialty was of 20l. of 20 Packs of Wool, and says, See the same Case 9 E. 4 29.

4. A Writ of Error was brought upon a Judgment given in a Writ of Entry in the Pott, upon which a Recovery was had in the Common Pleas; And the Error assigned was, because the Writ of Entry was, De tuo annuiis redditum juro Peseone 4. Marcarem exaunt. de Ecclesia fove Reftoria. It was refused. That the Writ was good, for there is not any Uncertainty in it, for one of two Things is not severally demanded, but one Thing only, for the Demand is of Rent, or a Person of four Marks, so as there is not but one four Marks. And Reditum & Peseone are all one; And the Words exaunt. de Reftoria prove it to be a Rent, for if it should be an Annuity, the Rectory should not be changed, but the Person of the Parson, in respect of the Rectory. 5 Rep. 40. a. 41. a. Palfch. 35 Eliz. B. R. in Dormer's Cafe.

(F) Of divers several Things, or of Things of different Natures, in one Plaintiff or Demand.


2. So of a Carse of Land, and of Corody. Thel. Dig. 75. Lib. 8. cap. 26. S. 1. cites 7 Aff. 18. 11 Aff. 13. 23. and 7 E. 3. Assize, 138. in which Books it was said, that a Man in the same Plaint, may put Franktement at the Common Law, and Franktement by Statute.

3. So of two Rent Services, and Rent Service, and Rent Charge. Thel. Dig. 75. Lib. 8. cap. 26. S. 1. cites 15 E. 3. Charge 9. And so agrees 15 Aff. 11. but lays, See Mich. 17 E. 3. 32. 75. that it was doubted if a Man should have a Plea of two Rents, and at last adjudg'd that the Plaintiff should recover.

4. An Assize was maintained of four several Rent Charges. Thel. Dig. 75. Lib. 8. cap. 26. S. 2. cites 22 Aff. 52. 66. And lays, it seems by 5 E. 4. So. that a Man shall have Writ of Entry of diverse Rents. And lays, see 12 E. 3. Assize 112. that the Plaint in Assize was of 40s. Rent, 52s. Rent, 7 * direct and the Rent of a Robe severally upon several. * Quære the Meaning of the Titles &c. and adjudg'd good.

5. A the World.
Demurrer.

5. A Writ of Annuity was maintained of 4l. Annuity where the Deed was that four Marks were granted for one Cause, and 2 Marks for another Cause. Thel. Dig. 75. Lib. 8. cap. 26. S. 3. cites 29 E. 3. Grant 101.

(G) Pleadings.

1. A Lease was made of a House except certain Chambers, rendering Rent with Clause of Re-entry. The Lessor entered for Default of Payment and in an Action brought by the Lessor, the Lessor justified for this Cause, and averred that he demanded the Rent Ad Damnum prsedittum [Domuni præditam]. It was moved in Arrest of Judgment, because he did not shew in what Part of the House he made his Demand; for perhaps it was demanded in the Chambers excepted; fed non Allocatur, for Domus prædict’ is intended to be Domus præmiss’ [prædmiss’] 2 Roll. Rep. 42. Trin. 16 Jac. B. R. Dorrell v. Truflell.

For more of Demand in General, See Actions, Condition. Rent. Request, and other Proper Titles.

Demurrer.

(A) Demurrer. How.

1. The Form of Demurrer upon Matter apparent in the Writ, and in its return is first to Demand Over of the Writ and of the Return, and after to say that they are insufficient &c. as appears in the Affise of Wymbilie &c. Plowden fol. 73. Thel. Dig. 217. Lib. 15. cap. 9. S. 1.

2. And the Ancient Form of Demurrer upon the Count is to say, that non debit eiden petenti ad hanc Narrationem, & ad hoc breue respondere &c. Dicit enim quod &c. And to shew the Cause of the Demurrer &c. Unde petit Judicium &c. Thel. Dig. 217. Lib. 15. cap. 9. S. 2. cites Mich. 7 E. 3. 349.

3. There is another Form, to say, ex quo Narratio prædict’ ad breue prædict’ manumtenendum non est sufficient, in Lege petit Judicium de breue. Thel. Dig. 217. Lib. 15. cap. 9. S. 3. cites Parch. 11 H. 6. 36.

4. Demurrer is an Allegation of the Defendant, which, admitting the matters of Fact, or some of them, alleged by the Defendant to be true, shews that as they are set forth by the Complainant himself, they are insufficient for him to proceed upon, or to oblige the Defendant to Answer; and therefore demands the Judgment of the Court, whether
Demurrer.

ther the Defendant shall be compelled to make Answer to the Plaintiff's Bill, or to some certain Part thereof. P. R. C. 131.

(B) 'What may be done upon, or after Demurrer.

1. T H E R E can be no Striking out, Amendment, or Alteration after a Demurrer. Per tot. Cur. 1 Bullit. 204. Pach. 10 Jac.

Anon.


3. After a Demurrer by the Defendant, the Court ordered that the Plaintiff reply to the Answer notwithstanding the Demurrer, and proceeded to Examination of Witnesses, and Hearing the Cause, but no Costs allowed. 3 Ch. R. 57, 58. Trin. 22 Car. 2. Gascoigne v. Scott.

4. When a Defendant has demurred, he may Sign another Cause of Demurrer at the Bar Paying Colts, and if such Demurrer is over ruled, he ought to pay double Colts; but when a Defendant has pleaded, and there is no Demurrer in Court, he can't demurr at the Barr, though he would pay Colts. Vern. R. 78. pl. 72. Mich. 1682. Durdent v. Redman.

5. Where a Demurrer to a Bill of Review is allowed, it may be Inrolled, but if over ruled it can't be inrolled so as to prevent the Demurrer being re-argued. 2 Vern. R. 129. pl. 119. Hill. 1690. Woots v. Tucker.

6. When a Demurrer is joint'd, the Court ought first to determine the Matter of Law, whether, Sufficient or minus Sufficient before they pronounce Judgment, and the Judgment must be enter'd with Et quia videtur Curiae hic quod placuit Praedi et c. 1 Salk. 402. pl. 10 Mich. 1 Ann B. R. in Cafe of Atwood v. Burr.

7. Defendant demurs to a Bill, and the Demurrer is allowed. Ld. Agreeable Lechmere Chance lor of the Durbry gave the Plaintiff's leave to amend, though Defendantittenually insisted on it to be Irregular, because by allowing the Demurrer the Cause was out of Court, though before arg ing it he might have amended. 2 William's Rep. 300. Trin. 1725.


to the whole Bill allowed the Bill is regularly out of Court, and no Inference of Leave to amend it. Iibid in a Note at the End, cites 9 December, 1736. ——— v. Baines

8. A Defendant cannot demur and plead, or demur and Answer to the same Part of a Bill; for the Plea &c. over rules the Demurrer. 3 Wim's. Rep. 82. Mich. 1730. in Cafe of Jones v. Stratford.

6 P' (G) Set
(C) Set aside.

1. The Plaintiff exhibited his Bill to be relieved for a Promise supposed to be made by the Lady Lutterell for a Lease of certain Lands and for stopping certain Ways; the Defendant had a Commission to take her Answer, and demurred, that the Plaintiff may have his Remedy by Law, which Cause seems insufficient, and not to be allowed of, and the Answer for the Defendant having a Commission to take Answers, in the Country did demur, therefore a Subpoena is awarded against them to make a better Answer. Cary's Rep. 75. cites 18 & 19 Eliz. Stuckly v. Lady Lutterell & al.

2. The Defendant put in a Demurrer to the Plaintiff's Bill without showing any Cause of this Demurrer. Therefore ordered a Summons be awarded against him to make a better Answer. Cary's Rep. 153. cites 21 Eliz. Onley v. Magda.

3. Because the Defendant did not put in his Demurrer, according to the Rule of the Court, it was moved to have it entered, but denied. Toth. 149. cites 14 Car. 136 the v. Paget.

4. The Defendant pleaded that there was a former Bill depending, and brought by the same Plaintiff, for the same Matter as in this Bill. And demurred, for that there was no Equity in the Bill, and that the same being 200 Sheets of Paper, was stuffed with Repetitions, Tautologies, and Impertinences. It was moved by the Counsel for the Plaintiff, that by Reason of the Demurrer, he could not procure a Reference to the Matter, to examine whether there was a former Suit depending or not. Thereupon the Court over-ruled the Demurrer with Costs, and referred it to the Master to examine into the former and this Bill, if he found it for the same Matter, then to tax Costs for the Defendant. Fin. R. 179. Mich. 26 Car. 2. Dumford v. Dumford.

5. Demurrer though not formally joined may be sufficient to bring the Matter before the Court. Per Cur. Resolved. 3 Lev. 222. Trin. 1 Jac. 2 C. B in Café of The King v. Butler.

6. Defendants had leave to plead Answer and Demurrer, but not to demur alone. They demurred and answered only by denying Combination, or some such trifling Matter, no ways material. The Court discharged the Demurrer as not complying with the Order, it being in Effect a Demurrer only. 2 Wms's Rep. 286. Trin. 1725. Stephenfle v. Gardiner.

(D) What is Good Cause of Demurrer.

1. The Defendant put in a Demurrer to the Plaintiff's Bill, because the Plaintiff was outlawed at the Suit of Strangers, yet ordered to answer. Toth. 137. cites Mich. 9 Jac. Skyes v. Rawlinon. — Ibid. 139 cites 10 Jac. Morris Owen.

2. Demurrer, because excommunicated, over-ruled about. 4 Car. Toth. 137. 4 C. Plunton v. Headlam.

3. Scire
Demurrer.

3. Sire Pacias upon a judgment against several Tenants, who came in and pleaded several Pleas; the Plaintiff replied and said, "Quod separatis placitis &c." Upon Demurrer the Point was, whether the Plaintiff should say, "Quo placita of the one &c." and lo to answer to each Plea particularly; or if the Words "Separalit placita ought to be referred to the several Pleas, Redendo lingula lingsulis; and the Court held, that the Saying "Separalia placita is good," and shall be continued "Redendo lingula lingsulis." Sid. 39. pl. 2. Patich. 13 Car. 2. B. R. Curtis v. Bateman.

4. It is allowed a good Cause of Demurrer in this Court, that a Bill is brought for Part of a Matter only, which is proper for one entire Account, because the Plaintiff shall not split Causes and make a Multiplicity of Suits. Vern. 29. pl. 24 Hill 1681. in Cafe of Purefoy v. Purefoy.

5. Demurrer to scandalous Matter suggested in a Bill; Per Sir J. Churchill, as Amicus Curiae, the Court of the Court in such a Case is not to put the Defendant to answer the scandalous Matter, but to strike out the Word Demurrer, and leave the Plaintiff at Liberty to prove it. Vern. R. 137. pl. 96. Mich. 1682. Page v. Ncole.

6. A Plea amounting to the General Issue is not always good Cause of Demurrer, as if it be confederate and avouched. In Law for Rent a Releaf is a good Plea, yet it might be given Evidence upon the General Issue, Et in de mand. Per Hl. Cumb. 322. Trin. 7 W. 3 Anon.

7. Not concluding to the Country upon Issue completely joined is good Cause of Special Demurrer Per Car. 7 Med. 105. Mich. 1 Annæ B. R. Crogae v. Martin.

8. Where a Bill was exhibited to have an Execution of an Award, which was performed by neither Party; and the Defendant demurred because there was no Precedent that a Court of Equity had ever carried such Awards into Execution; and the Demurrer was allowed. Abr. Equ. Cases 51. Mich. 1704. at the Rolls. Bishop v. Webber.

9. Where a Tort is said to be done after the Action brought, the Defendant may take Advantage of it on a Special Demurrer. Gilb. Hist. of C. B. 106.

(E) To What. To Bills in General.


3. An Original Bill was brought to explain a Decree. The Defendant demurred. The Plaintiff inlisted, that the Demurrer confedered the Matter of the Bill, but the Court allowed the Demurrer good. 2 Freem. Rep. 179. pl. 242. 19 Car. 2. in Ganc. Read v. Hanby.

for that it was to alter or change the Decree; and it was inlisted for the Defendant, that no Original Bill ought to explain a Decree upon any Matter precedent to the Decree, and that it would be dangerous, for it would be introductory of a Means to blemish and hinder the Execution of Decrees; and the Demurrer was allowed.

4. Bill for Performance of Agreement. Demurrer, because there was but 20s. paid as Earnest to bind the Bargain, which is but an Inconsiderable Execution of the Agreement, and it being not under Hand to be paid by the Plaintiff
Demurrer.


5. A. and M. his Wife (the Plaintiff's Father and Mother) were seized in Fee of Lands in which P. had Estate for Life. In 1643, A. and M. conveyed to levy a Fine to the Use of themselves for Life, Remainder to the Plaintiff in Tail male, Remainder over. A. surved and then (as the Bill suggests) forged another Deed declaring the Uses of the Fine to be to the Father and Mother, and to the Survivor of them, and to his or her Heirs, under which Deed the Defendant purchased the the Lands of the Father who is since dead; and P. the Tenant for Life being Bill Living, the Plaintiff exhibited his Bill, to perpetuate the Testimony of his Writings to prove the true, and to disprove the forged Deed. The Defendant demurred to the Bill for that he was a real Purchaso under the pretended Deed, believing it was true and real Deed; and therefore insisted as it was to draw under Examination a Matter of Forgery against a dead Person, who could not answer for himself, and to get And to impeach a real Purchaso, the Defendant did insist upon it, that he ought not to answer, nor the Plaintiff be permitted to proceed any farther. 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 in Justice to preserve a Title at Law, which by such Impediment could not at present be tried, the Demurrer was overruled. Nelf. Chan. Rep. 125, 126. Anno 20 Car. 2. Seabourn v. Chilton.

6 A Bill for 20l. promiss to the Wife, if she would procure a Release from her Husbands for Purchase Money, which was Part paid and the Rents secured, Defendant demurred for that it was no Consideration, because the Defendant was released by Law, by Payment and Security, and allowed. Per Ld. Keeper Bridgman, 3 Ch. B. 70. 24 July, 1671. Stuckly v. Cook.

7. The Plaintiff brought a Bill against the Defendant, as Executor of the Obligor, to recover Affets, and to compel the Payment of the Debt. The Defendant demurred, for that the Plaintiff had brought an Action against him at Law; to which the Defendant had pleaded Pien Administravit. But the Demurrer was overruled, and the Defendant ordered to answer without Payment of Costs. Nelf. Chan. Rep. 127, 128. Anno 21 Car. 2. Pitt v. Scarlet.

8. Plaintiff having obtained a Decree against the Defendant for Money out of Affets in their Hands, they being Executors, and they having denied Affets, Plaintiff brought a Bill to discover Affets. Defendants demurred, for that it did not appear that the Decree was signed and sealed, or the Defendant served with any Decree under Seal. Demurrer allowed and Bill dismissed. Fin. R. 33. 34 Mich. 25 Car. 2. Braithwait v. Davis.

9. A Bill was brought to bastardize the Issue, and set aside and overthrow the Marriage of his late Father with the other Defendant his Mother. The Defendant demurred, for that the Validity of the Marriage and Legitimacy of the Defendant is properly tried at Law, and that the Defendant the Mother, is not bound to discover upon Oath that she is Guilty of such a Crime, as will subject her to the Penalty of the Statutes, and
and Laws of the Realm, and that the Bill was scandalous and impertinent. The Demurrer was allowed, and the Bill to be taken off the File and burned. Fin. Rep. 72, 73. Hill. 25 Car. 2. Trevor v. Le-quire.

10. Joint Executors, one died, the Executor of the Executor brought a Bill for Relief against an Action of Trover brought by the surviving Executor for Goods of the first Executor; the surviving Executor demurred, for that the Personal Estate belongs to him, as surviving Executor, and he is the Person that is in Law accountable to the Legatees for the same, and for that the Plaintiff's Bill contains no Equity, The Court allowed the Demurrer. Fin. R. 171. Mich. 26 Car. 2. Burgh v. Davis.

11. The Plaintiff exhibited a Bill to discover several Matters, and to examine Witnesses, in Order to prove a Codicil, which he pretended was made by the Defendants Titor, whereby he devised to the Plaintiff all the Goods of him, the said Titor, then in the Possession of the Plaintiff. But it appearing, that this Matter was depending upon an Appeal to the Archives, the Defendants demurred; for that this is a mere Testamentary Cause, and properly within the Comiance of the Spiritual Court, where the same is now litigated, and where the Plaintiff has a proper Remedy for the Recovery and Relief. The Court allowed the Demurrer. Fin. Rep. 218. Trin. 27 Car. 2. Cawston v. Helwes.

12. Bill to discover several fraudulent Conveyances set up against a Mortgage, one of the Defendant's demurred, for that the Bill is for different Matters, against different Defendants and the Plaintiff did not distinguish for what particular Conveyances or Incumbrances made by the several Defendants he would have a Discovery made; Plaintiff's Counsel argued, that the Bill was for a Discovery of Incumbrances made by the other Defendants, wherein this Defendant was not concerned, and this appearing to the Court, the Demurrer was over-ruled, and this Defendant was ordered to answer, but not to any Incumbrances made by the other Defendants. Fin. R. 240. Mich. 27 Car. 2. Draper v. Jalon, Partridge & al.

13. Bill against an Executor to enjoin him to exhibit an Inventory and to give Security to account before he goes beyond Seas. Demurrer, for that this Bill is to make an Injunction in the Nature of the Writ Ne Exeat Regnum &c. The Court allowed the Demurrer. Fin. R. 257. Trin 28 Car. 2. Bridge v. Hindall.

14. Bill to be relieved concerning an Agreement for Tythes and Verdicts for Tythes, and to discover what the Agreement was, and what due for 4 or 5 Years last past, Defendant demurs, for that Plaintiff ought to have set forth the Substance of the Agreement, or what Sum was [to be] paid in Lieu of Tythe, or what was actually paid, and for what Tythes, all which was within Plaintiff's own Knowledge, and though Bill does not charge that the Witnesses to prove this pretended Agreement were either Dead, or beyond the Seas, when Plaintiff was sued at Law and a Verdict against him, so that he might have pleaded the Composition at Law, or given the same in Evidence at the Trial, the Defendant need not set forth the Quantities, Qualities, and Value of the respective Tythes, due for Four or Five Years past, the same being properly in the Comiance of the Plaintiff, who was Owner and Proprietor of the Lands out of which they were to be paid. Demurrer allowed. Fin. R. 389. Trin 30 Car. 3. Tregonnel v. Forbes.

15. One Thousand Pounds was left by Will to purchase a Dukecon within a Year for the Head of a Family, a Bill was exhibited to have the Money applied accordingly, but upon Demurrer it was adjudged against the Plaintiff, as well because it is illegal to acquire Honour for Money, as also, because the Bill was exhibited in Time, so as to attach
the Money in Equity within the Year. Vern. 5. pl. 3. Paflch. 1681.
Earl of Kingston v. Lady Pierpoint.
16. In a Bill by Obligee against the Heir of the Obliger for Payment of
the Debt, out of Affairs alleged to be decedent; if the Bill does not
allege that the Heir was bound by the Bond, Defendant may Demurr. Per
17. The Bill was, that the Plaintiff had obtained Judgment against
J. S. for 100l. and that the Defendant upon Pretence of a Debt due him-
self, and to prevent the Plaintiff's having the Benefit of his Judgment, had
got goods of J. S. of great Value into his Hands, sufficient to satisfy his
Debt with a great Overplus; and prayed an Account and Discovery of these
Goods. The Defendant demurred because the Plaintiff had not alleged
that he paid out Execution, and had actually taken out a Fieri Facias; for
untill he had so done, the Goods were not bound by the Judgment nor
the Plaintiff intituled to a Discovery or Account thereof. The Court al-
low'd the Demurrer; the Plaintiff ought actually to have paid out
Execution before he had brought his Bill. Vern. 399. pl. 371. Paflch.
18. Defendant demurred, because the Bill was against several De-
defendants, for several Distinft Matters but was over ruled, because the Plain-
tiff by his Bill had charged the Defendant with Combination which De-
1686. Pourell v. Arden and Chevall.
19. The Bill was to examine Witnesses to preserve their Testimony touch-
ing the Title of certain Lands in the Bill mentioned. The Defendant
demurred, because there was no Impediment that hinder'd the Plaintiff from
trying his Right at Law; and that he had not obtained any Verdict in Af-
firmation of his pretended Title. Demurred allowed. Vern. 441. pl.
20. Bill to reverse the Lord of a Manor, to receive a Petition in Na-
ture of a Writ of False Judgment to Reverse a common Recovery demurred
to, and allowed. 2. Chan. Rep. 387. 1 Jac. 2. Ash v. Rogle and
the Dean and Chapter of St. Paul's.
21. If an Original Bill be brought for matters, part of which are in a
former Bill and Decree, and Part new or by way of Supplemental Bill,
The Court will on a Demurrer, to so much as was continued in the for-
er Decree, fend it to a Matter to fee what was, and what was not in
the first Bill, and allow the Demurrer accordingly. G. Equ. R. 184.
Hill. 12 Geo. 1. in Canc.

(F) To Bills. Want of Parties.

1. Demurrer for that an Infant sued not by his Guardian, and the Fa-
ther not being thought proper to be Guardian, he being Defen-
dant, the Eldert xix Clark was appointed for that Purpose. N. Ch. R.

2. A. made J.S. and J. N. Executors durante Minoritate of B. his
Son, and gave a 100l. Legacy to C. his other Son. B. attained his full
Age and dy'd. C. brought his Bill for the 100l. against J. S. and for
an Account of the Surplus of As Estate J. S. Demurred for that he and J.
N. where made Executors durante Minoritate of B. who attained his
full Age, so that the Exentorship being determined some other Executors or
Administrators ought to be called to Anwer, who might politly make
out
Demurrer.

out some sufficient Release or Discharge. He Demurred also as to the Account of the Surplus, because there are others to whom Defendants are liable to account, as well as to the Plaintiff, and they not Parties. The Demurrer was over ruled as to the Legacy, but allowed as to the Demand of the Account. Fin. Rep. 113. Hill. 25 Car. 2. Atwood v. Hawkins.

3. Bill to be relieved against an Award made by some Members of the E. of Company touching the Quantum of Freight due from the Company to the Plaintiff. The Arbitrators and some particular Members being made Defendants, they Demurred to the whole Bill, because the Plaintiff can have no Decree against them, nor will their Answers be Evidence against the Company, and the Plaintiff might examine them as Witnesses. Demurrer allowed without putting them to Answer as to Matters of Fraud and Contrivance. 2 Vern. 380. pl. 347. Trin. 1700 Dr. Steward v. E. I. Company.

4. Demurrer to a Bill for Want of proper Parties, was allowed as to Part, and disallowed as to Part. Fin. R. 113. Hill. 25 Car. 2. Atwood and Davis v. Hawkins.

(G) To Bills. Matter at Law, and want of Equity.

1. Subpoena in Chancery by W. against B. to render certain Goods and Chattels to the Value &c. which T. B. forfeited to the King by Reason that he was attainted of Treason, and which came to the Hands of the Defendant, and which the King gave to the Plaintiff by his Letters Patents &c. And the Defendant demanded Judgment of the Subpoena, for the Plaintiff may upon this Matter have Damnum at the Common Law, and then he shall not sue in Equity by the Subpoena; for Subpoena does not lie but where he has no Remedy at the Common Law, and then when the Common Law fails, he shall have Subpoena in Chancery, and per Cur. the Subpoena lies well, by which the Defendant was commanded to make Inventory of all the Goods which he had of the said T. B. against the next Day, or he should be committed to the Fleet. B. Conscience, pl. 6. cites 39 H. 6 26.

2. A Bill laying a Promise to assure Lands for 10s in Hand, and 2100l. at Days, Demurred and Allowed, because it was but a Preparation for Action upon the Cafe. Toth. 135. Trin. 38 Eliz. William v. Nevil.


4. A Bill was brought after a Verdict on an Action for Cafe, Suggesting Matters in Defendants Cognizance, which the Plaintiff could not prove at the Trial. Defendant pleaded the Verdict, and that the Effect of the Matter (which was a Letter) was given in Evidence on the Trial, and Demurred for want of Equity, and Plea and Demurrer allowed. Chan. Cases 65. Hill. 16 and 17 Car. 2. Sewell v. Freestone. to be of ill Consequence, and allow'd the Demurrer to the Bill.

5. Plaintiff in a Bill of Revivor, Demurred to so much of the Answer to it, as did set forth a pretended Irregularity in the Examination of the Witnesses in the Original Cause, and allow'd to a variation of the Evidence,
Demurrer.


6. A Bill was brought at the Relation of several Freemen of the Weavers Company, against the Defendants, Wardens &c. of the said Company, setting forth their Charters of Incorporation and Rules. But the Defendants had been Guilty of many Breaches thereof, and had opprefled the Freemen &c. and mentioned some particularly, and for a Discovery of the reit, and that they might be decreed for the future, to observe the Charters, and to have an Account of the Revenue of the Corporation, which the Defendants had unjust &c. was the End of the Bill to which the Defendants demurred, because as to Part of the Bill, it was to subject them to Prosecutions at Law, and to a Quo Warranto, and as to the other Parts, the Plaintiffs have Remedy by Mandamus, Information, or otherwise, and not here, and of the fame Opinion was my Lord Keeper, who said, it wouldifer too much on the King's Bench, and that he never heard of any Precedent for such a Case as this, and to allowed the Demurrer. Abr. Equ. Cafes. 131. Mich. 1725. Attorney General v. Reynolds, &c. al.

7. The Plaintiff brought his Bill to have an Account of the Real and Personal Estate of his late Husband, and to have Satisfaction thereon for Defect of Value of her Jointure Lands, which he Covenantated to be, and to continue of such Value. The Defendants intited, it was a Matter properly triable at Law, and the ought to be sent there to try it, for if the were damnified, this Court could not offer Damages; but my Lord Chancellor said, The Matter might enquire into it well enough; and therefore sent it to him to examine and report, and said, if he found there was any Difficulties in it, he could send it to be tried afterwards. Abr. Equ. Cafes, 131, 132. Mich. 1729. Hedges v. Everard.

(H) To Bills after Suits elsewhere.

1. Demurrer, because the Matter was dismisshed in the Court of Requests, over-ruled. Toth. 136. cites 30 Eliz. Haddon v. Salter.

2. Demurrer, because the Matter was depending in the Exchequer before the Bill, over-ruled. Toth. 137. cites 35 Eliz. Biller v. Elliot.


4. After an Examination and Dismissal of a Cause, whether a Will or no Will in the Exchequer, without Prejudice in Law or Equity, an original Bill was brought in Chancery for Relief as to the fame Matter, the Court ordered, that the Plaintiff might examine any Witnesses that were not examined in the Exchequer, and that as to the Matters examined unio there, the Plaintiff might examine the fame Witnesses De bene effe, and how far those De bene effe should be used, the Court would farther consider. Chan. Cafes, 136. Hill. 21 & 22 Car. 2. Anon.

(1) To
(I) To Bill. Length of Time.

1. A Bill was brought to redeem an ancient Mortgage, the Mortgagee demurred, in which Case there was Infancy and Coverture for 60 Years, the Demurrer was saved to the Hearing. 3 Chan. Rep. 55, 56. 22 Car. 2. Pratt v. Allen.

(K) To Bills. Where it is to Subject to a Penalty, Forfeiture &c.

1. A purchased the Office of Deputy of a Bishop's Register, for a Term of Years of the Defendant, but was turn'd out before the Years expired, and the Defendant having got the Deed in his own Hands, reliev'd to deliver it to the Plaintiff. A brought his Bill for Relief. Defendant demurred upon the 5 and 6 Ed. 6. against Sale of Offices of Justice, or the Deputation thereof; and aver'd, that the Office of Register concerned the Administration of Justice, and for that the Plaintiff by his Bill had concluded, that he had given Money, or contracted for it contrary to the Meaning of the Statute, therefore he was disabled to execute the same, and the Demurrer was held good. N. Ch. R. 27. 9 Car. 1. Luke v. Pridgeon.

2. A presented a Parson to a Living, and took a Bond to resign on Request at any Time within seven Years; A's Housekeeper being the Parson's Sitter, set away the Bond, and deliver'd it over to the Parson. A brought a Bill to discover, and to be relieved; Defendants demurred, and Demurrer allowed. 2 Vern. R. 242. Mich. 1691, in the Case of Brainham v. Mannings, cited per Com'r. Hutchins, as Forfeuce's Cafe.

3. Pickering seised of Land, and Sir J. Werden of a Fee Farm insuing out of it, paid Taxes only after the Rate of 1 s. and 3 d. per Pound, and retained for the Fee Farm at the Rate of 4s. at which the Land-Tax was, on which Sir J. Werden, Owner of the Fee Farm Rent, brought his Bill in the Exchequer, and prayed that Pickering should set forth the Value of the Land, and what Kent he receiv'd, and what he had paid for Taxes, to which Bill Pickering demurred, and the Demurrer allowed, notwithstanding the Case of Sherrington was cited; the whole Matter there appearing, and this being on a Demurrer, which was made the Difference. 12 Mod. 171. Hill. 9 W. 3. Pickering's Case.

(L) To Bills by Purchasers.

BILLS to discover a Trust of a Mortgage, and to redeem, was brought by the Heir; Defendant demurs, for that it was to secure the Payment of Money borro'd of them by the Ancestor, without any Trust, and for that the Defendants were willing to re-convey, free from Incum-
brances done by them, on Payment of Principal and Interest, by which
Means the Plaintiff may have the Estate again, in as good Condition as
when it was made over to them by the Ancestor, so that it was not
material to the Plaintiff, if there was any Trust repose'd in the Defend-
ants in the said Mortgage or not; Demurrer allow'd with Costs.

(M) To Bills. For not setting forth any Title.

1. D

Demurrer because Colly que vie was not shown to be alive, and
expressed the Demurrer not to be good. Toth. 136. cits 37
Edw. Act v. Red

2. Plaintiffs claim a Title under a Fine and Recovery on a Deed to lead
the Unv. Defendant demurr'd, for that Plaintiff made out no Title, be-
cause the Fine and Recovery was never levied or Incumber'd, or if it
were, yet it is not alleged that the Parties to the Fine or Deed of
Ufs were then, or afterwards, seized or Possessor of the Lands in the Bill,
whereby to enable them to make such Assurance as in the Bill, so that
the said Bill is very uncertain and insufficient in those Particulars there-
of whereby any Relief or Discovery is sought; Demurrer allowed with
Costs, and Plaintiff to amend his Bill as he shall be advised. Fin. R.

3. Bill by an Occupant against Defendant who had got the original Lease
and threatened to cancel it and take a new Lease from the Bishop. De-
endant demurr'd for that the Plaintiff did not aver the Life or Lives of
any of the Nominees in the Lease were then in being at the Death of the
Lease, and that this Court doth not countenance the Title of an Occupant
against a Purchaser for a valuable Consideration. Demurrer allowed,
but without Costs, and dismissed the Bill. Fin. R. 270. Mich. 28 Car.
2. Roffer v. Evans.

4. Executor brought a Bill for Recovery of some of Tenant's Assets, but
the Bill did not show that he had proved the Will in any Court, whereupon
the Defendant demurred. And upon the Court's asking the Register
what the Course of the Court was in this Point, he said, that the Plain-
tiff's Bill ought to allege that he had duly proved the Will; but
though he did not mention in what Court it would be well enough;

5. A Sci. Fa. was brought by an Executor to revive a Decree. The
Testator died feoff'd of bona Notabilis in 2 Dioceses within the Pro-
vince of Canterbury, and the Executor proved the Will only in the
Arch Deaconry of S. Ld. C. Macclesfield, upon this being pleaded,
ordered, that the Plaintiff should not proceed any further in his Suit un-
less he prove the Defendant a sufficient Probate of the Will. Wms's. Rep.
(N) To Bills of Revivor or Review.

1. A Bill of Revivor was brought, which was to review all former Proceedings, and particularly an Order by Consent. The Defendant demurred to the Bill, for that it sought to Revive that Order, whereas the party who was Party to it, was Executor, and only during her Widowhood and her Executorship to caste on her Marriage, and she being married since, her Executorship, and consequently her Consent, was determined. And upon Debate (which was the only Work of the Day) the Demurrer was allowed. Chan. Cases. 77. Mich. 18 Car. 2. Hampden v Brewer.

2. A Demurrer was to a Bill of Review exhibited on New Matters for that it ought not to be admitted where the Matter was of the Knowledge of Defendant at the Time of the Answer and Hearing, though then b. C. says, there was no Proof, but afterwards the Proof came to light, and herein was cited a Case where the Defendant for such Deeds that made a Title by Answer, but were left afterwards, and a Decree against them, but coming the Plaintiff, to Light afterwards, the Bill of Review was admitted. But his Lordship declared, that the Case is not like the other, and join in fact dismissed the Bill, but then gave Time to produce Precedents. 3 Ch. R. 76. July 1672. Chambers v. Greenhill.

the Plaintiff's Purpose, and dismissed the Bill of Review.

3. Bill of Review was brought, and Errors annexed in the Decree. Three Errors were alleged; Defendant pleads Money still due to him, which Plaintiff ought to have paid before he be admitted to a Bill of Review, and demurred as follows, viz. For that there doth not appear such Error in the Body of the Decree, for which the same ought to be reviewed or altered, and that the supposed Errors arise from Matters of Fact not therein mentioned. The Court over-ruled the Demurrer as to the first Error, but allowed the Demurrer to the second and third Errors. Fin. R. 36. Mich. 25 Car. 2. Tredcroft and Rigge v. White.

(O) To Answers and Replications.

1. Demurrer to an Answer to a Bill of Review, which tendeth to a fresh draw into Examination de Novo an Agreement contained in the Rep. 184. Decree; though the Court thought it unreasonable, yet doubted what 5. C. rates to do as to the Demurrer; some at the Bar said, that the Court should have been moved in this special Case for an Order to restrain an Examination to Minute of Matters formerly examined, and it was now ordered that no to a Bill of Matter examined before should be re-examined. The Reporter says, Review; he takes it that this was the Rule that was given Sed Quare, Ch. and that the Cales 56. Trin. 16 Car. 2. Williams v. Owen and Arthur. Demurrer cause it would tend to Perjury, and Infiniteness, to examine Things examined and decreed, and that the Court was of that Opinion, but that as well the Defendant's Counsel as the Court said, that there could be no Demurrer upon an Answer in Equity, but Sergeant Glym for the Plaintiff said, he had known it. The Court made an Order that there should be no Examination of that which had been examined before, and that was the Rule.

2. The
Demurrer.

2. The Plaintiff putting Matter in the Replication, which was not contained in the Bill, and which Matter the Plaintiff knew of at the exhibiting the Bill, the Defendant pleaded and demurred to the Replication, which this Court allowed of. Chan. Rep. 259. 17 Car. 2. Goodfellow v. Marshall.

3. A Decree being made, and a Bill brought to execute the Decree, the Defendant set forth a Parol Agreement in Bar. The Plaintiff demurs, and Ld. Chancellor allow'd the Demurrer, though the Agreement was subsequent to the Decree. The Decree shall proceed, and if the Defendant will have Advantage of the Agreement, let him bring an Original Bill; for if he have Advantage by it in way of Defence, one Witness may serve his turn, but to an Original Bill here if he in his Answer denies the Agreement one Witness will not convict him, so as by this way of Answer the Plaintiff should lose the Benefit of his Answer. 2 Ch. Cafes 8. Mich. 31 Car. 2. Walklin v. Walchall.

(P) To Subpoena &c.

1. THE Demurrer was to a Subpoena in the nature of a Scire Facias, and it was because he that brought the Subpoena did not thereby allege himself to be the Heir or Executor to him that had the Decree; resolved, that there never was any Demurrer of this nature before, and the Subpoena was no Record nor any where filed, and to not to be demurred to; but the Cause was to be shewn upon the Return of the Writ on the Order, and the Order did mention him that brought the Writ to be both Heir and Executor, so this Demurrer was conceiv'd very ridiculous and over-ruled. Ch. Cafes. 50. Patch. 16 Car. 2. Wan v. Lake.

(Q) What shall be over-ruling a Man's own Demurrer.

1. Defendants having Demurred, for that the Plaintiff had made no Title to himself in the Bill. (as in truth he had not) Hutchins informed that the Defendant had over-ruled his own Demurrer by having answer'd over to several Parts of the Bill. But the matter of Fact being denied, and there being no Books in Court the Matter was adjourned. Vern. R. 90. pl. 79. Mich. 1682. Savage v. Smallbrook.

2. Where a Man demurs, for that the Bill contains several Matters not relating one to the other, and in some whereof the Defendant is not concern'd, if by Answer the Defendant doth more then barely deny Combination and Confederacy, he over-rules his Demurrer. Per Jeffries C. Vern. Rep. 463. pl. 442. Trin. 1657. Heifer v. Welton.

(R) At
Demurrer.

(R) At Law. In what Cases; and how considered.

1. Inquisition found that J. S. held certain Lands of the King, as of his Honour of Gloucester which is not in Capite, upon which Process issued against W. S. who had intruded &c. and to sue for Livery, and because this Tenure is not in Capite, and therefore Livery is not due, the Party demurred in Law upon the Record; for there is no Cause of Livery. Br. Demurrer, pl. 25. cites 32. H. 8.

2. And where a Man declares upon a Statute, and recites it otherwise than it is, or pleads a Statute otherwise than it is, the other may demur upon it; for there is no such Law, if it be misrecited. Ibid.


4. Where a Demurrer is proper, the other Party is bound to join; and though it be on a Plea in abatement if the Demurrer is proper, and appoint the other must join. Comb. 306. Mich. 6 W. and M. in B. R. Campbell v. St. John.

5. There can be no such Thing as a Demurrer in abatement. Per. The Defendant demurred in Abatement, and Plaintiff joined in Bar, and Judgment found for the Plaintiff; For the Court said, they knew not what a Demurrer in Abatement was, for if the Cause be apparent to the Court, they would abate the Writ &c. themselves, or else thought to be pleased, and they find they would turn all such Demurrers into Bars, though Eye quoted Wimble v. Willoughby, in Plowd. for a Precedent of a Demurrer in Abatement. 6 Mod. 198. Trin. 3 Ann. B. R. Anon. 1 Silk. 232. Dominique v. Davenant. S. C. held accordingly.

(S) Where it is a Confeffion of Matters of Fact.

1. In Trophys the Defendant justified to retain Goods in Pledge for 10 l. due by the Plaintiff, and the Plaintiff demurred generally; by this he confessed the Debt, by the Opinion there, therefore ought to have taken Prosecution of the Debt, and then to have demurred upon the Plea &c. Br. Demurrer, pl. 24. cites 5 H. 7. 1.

2. A Demurrer is a Confeffion of all Matters in Fact, but not of Matters in Law; for by it they are put in Judgment of the Court. Pl. C. admits nothing but what is well pleaded; Per Cur.


3. A Demurrer in Law, is never a Confeffion of a Thing against the If a Thing Record, but only of that which may stand with the Record, for otherwise, be it alleged.
Demurrer.

As a Demurrer at Common Law did confess all Matters formally pleaded; to now by the Statute a General Demurrer does confess all Matters pleaded though unwarrantedly, according the Forms meant by the Statute 27 Eliz. 5. For such Forms are now not material, not being expressed in Demurrer. Hob. 233. at the End of pl. 295. Mich. 12 Jac. in the Cafe of Heard v. Baskerville.

5. A General Demurrer confesses not the Matter; As if in Debt upon a Bill, Defendant pleads Payment, and the Plaintiff demurs, that Defendant does not confess the Payment; Per Warburton J. Arg. Hutt. 15 Trin. 13 Jac.

6. If the Count, Plea, Replication, &c. upon which the Demurrer was, is good; then all the Matter which is contained in the Count or Plea is confessed, but it the Count or Plea be vicious, then it is otherwise. 2 Roll. R. 22. Patch. 16 Jac. B. R. in Cafe of Holford v. Plat, cited Per Cur. as a Difference taken 17 All. pl. 2. 31 H. 6. & 22 H. 6.

7. On a Scire Facias to repeal a Patent to B. for a Market to be held at C. reciting that there was an Ancient Market long before kept at K. within half a Mile of C. and that there was an Ad quod damnum taken out before the new Patent, and the Inquest thereupon taken, found it not to be to the Damage of any, and that it was executed by Sur- prise and without Notice; and that notwithstanding it was to the great Damage of the former Market &c. to this Scire Facias B. demurred. But the Ld. Chancellor Finch (sallited by North Ch. J. of C. B. and Jones J. gave Judgment for repealing of the Patent; for the Return of the Writ of Ad quod Damnum, was not conclusive, and here by the Demurrer it is confessed to be to the Damage of the former Market. 2 Vent 344. Hill 31 & 32 Car. 2. in Case Sir Oliver Butler’s Case.

8. Indebatam Affinitatis for a Horfe fold for 20l. The Defendant pleaded within Aye. The Plaintiff replied, that he sold him his Horfe for his Conveniency to carry him about his necclary Affairs; to which the Defendant demurred. And the folo Question was, whether an Action would lie against an Infant for Money Ior a Horfe fold? It was urged on the Defendants Part, that an Infant was chargeable only for Necellaries, as Meat, Drink, Cloaths, Lodging, and Education, and cited 3 Cro. 175. 1 Cro. Aylliff v. Archbold. Laich. 169. But the Court were of a contrary Opinion, for the Plaintiff having averred, that he sold him the Horfe to ride about upon his necellary Occasions, and the Defendant having confessed it by his Demurrer, it must now be taken to be so; If the Defendant had traversed, then the Jury must have judged of it, whether it were necellary or convenient, or not, and to likewise of the Price of the Horfe, whether it was excessive or no. Jud. pro Quer. Nili Freem. Rep. 531. pl. 715. Mich. 1660 Barier v. Vincent.

9. An Action on the Café brought upon an Inland Bill of Exchange, in which the Plaintiff declared upon a Special Cafion in London, for the Bearer to bring the Action &c. and upon a Demurrer to the Declara- tion it was held, that the Defendant having demurred, without travers- ing the Cafion, he had thereby confessed there was such a Cafion, though in Truth there was not, and for that Reason the Plaintiff had Judg- ment; for though the Court takes Notice of the Law of Merchants,
Demurrer.

527


The Plead ex Confession, and it be demurred unco, that does not confes it; for this be a Course of the Court it is Law, and if it be Law we are to take Notice of it. Per Holt Ch. J. Obiter. 12 Mod. 573. Mich. 13 W. 3.


A Demurrer is admitting the Matter of Fact, since it refers the Law arising on the Fall to the Judgment of the Court; and therefore the Fact is taken to be true on such Demurrer, or otherwise the Court has no Foundation on which to make any Judgment. Gilb. Hist. of C. B. 55.

(T) General Demurrer; What is aided by it. Duplicity.

1. H E who demurs for double Plea cannot demur by the Common S. P. For Demurrer that the Plea is Insufficient, but ought expressly to de-mur for the Doublets; For a double Plea may be found a sufficient Plea, unless for the Inconvenience, that the one may be found for him and the other against him; Per Fortescue. Br. Demurrer, pl. 7. cites 37 H 6. 6.

2. In Case of a General Demurrer, he shall have Benefit of every Thing mentioned in the Record, or of every Point given him by the Law, but otherwise in a Special Demurrer. Per Monraque Ch. J. Pl. C. 66. Mich. 4 E. 6. in Case of Dive v. Manningham.


4. If one demurs generally to a Double Plea, it is not good at this Day; Per Anderlon Ch. J. Gouldsb. 52. in pl. 1. Trin. 29 Eliz. Upon a gen-eral Demurrer Duplicity is not fatal. Comyns’s Rep. 115. Patch. 15 W. 3. B. R. in Case of Lamplugh v. Short-ridge.

5. At this Day by the Statute of Eliz. where there is a Plea without a Colour, a Plea amounting to a general Illus; the Demurrer to such Pleas ought to be Special; So if there be only want of Form, a general Demurrer is not sufficient, as it was at the Common Law. The Law rejects double Pleas, and Pleas amounting to the general Illus; because they are superfluous, and incumber the Roll. Lex rejicit Su-perflua. Jenk. 133. pl. 72.

6. In Trefpaifs &c. the Defendant as to the Force and Arms, pleaded Not Guilty, without saying, &c de hoc ponit fe super patriam, and pleaded over to the Trefpaifs; The Plaintiff demurred to this Plea, for that it was double, insufficient, and wanted Form; Per Cur. the want (Et de hoc ponit fe fu-per Patriam) is Matter of Form, and therefore the Plaintiff shall not have Advantage thereof upon this Demurrer, without thermg it for Caufe, and for that Reason Judgment was given for the Defendant. Sid. 216. pl. 20. Trin. 16 Car. 2. E. R. Thacker v. How.

7. In
Demurrer.

7. In Demurrer for Duplicity, it is not sufficient to demur quia duplici or duplicius in materia; but the Party must shew wherein.

For the Statute, by requiring to shew A cause, intended to oblige the Party to lay his Finger upon the very Point; Per Holt Ch. 1 Salk. 219. pl. 5. Pauch. 13 W. 3 B. R. Lamplugh v. Shortridge.

8. By the 4 & 5 Anne. 16. no Advantage can be taken upon a general Demurrer, of such Faults in Form as would be cur'd by Verdict, but such Defects in pleading are aided upon a general Demurrer by that Statute. 10 Mod. 251 348 Trin. 13 Ann. and Hill. 3 Geo. 1. B. R. Cole v. Hawkins.

9. Debts was brought upon a Judgment in C. B. and the Declaration was Exeff Sext.; though the Judgment was at Westminster, and therefore the Action ought to have been brought in Middlesex; the Defendant demur'd generally. It was urged, that this was aided by 4 & 5 Ann. cap. 16. that the laying the Action in a wrong County goes only to the Form and Course of Proceeding, and not to the Right of Action; that if a Trial had been in this Case by an Exeff Jury, it would have been good after a Verdict; yet the Statute 16 and 17 Car. 2. aids only such Defects as do not hinder the Court from giving Judgment according to the Right of the Action, and non allocutus; for the 4 and 5 Ann. does not give any Remedy upon Demurrer, but in matters of the same Nature with those which are there specified. Judgment for the Defendant. But Plaintiff was afterwards allow'd to discontinue on Payment of Costs. Comyn's Rep. 305 Mich. 5 Geo. 1. C. B. Hedgethorn v. Thurlock.

(U) Peremptory. In what Cases.


2. Where the Demurrer is upon the Cause of removing the Plea, the Judgment is peremptory to the Defendant. Theil. Dig. 239. Lib. 16. cap. 11. S. 9. cites Mich. 27 H. 6. 4.

3. In Entry fur Difficult in Demurrer upon Plea to the Writ, or to the Assize of the Writ, is not peremptory. Br. Peremptory, pl. 68. cites 34 H. 6. 8.

4. Contra if Issue be therefor joined and tried per part, this is peremptory to the Tenant, and only to the Writ as to the Demandant. Ibid.

5. Cui in Vita of four Acres of Land in D. the Tenant plead'd to the Writ, that the Demandant himself had recover'd one Acre parcel of the Demand against the Tenant, and entered upon Plea plead'd in the Allise to the Writ, and the Demandant plead'd an Exception that the Tenant shall not say, that P. in which the Recovery by the Allise was bad, was a Hamlet of D. upon which they demur'd. Per Littleton, this is only a Repuds Nutter. But Moyle fad yet, that it was more for you were at Issue in the Cui in Vita, and this Plea was plead'd to the Writ, viz. the Recovery of the Parcel, by the Allise in P. which is a Hamlet of D. and upon
Demurrer.

upon the Demurrer to say this you are Etopp'd, and therefore the Iffue is void'd, and so the Demurrer is peremptory; for it is not like to a Plea pleaded in Abatement of the Writ before Iffue join'd and Demurrer had upon it, which all the Justices granted, quod nota, and fo fee that Demurrer upon a Dilatory Plea after Iffue join'd is peremptory; for it is pleaded to avoid the Iffue, and an Iffue tried is always peremptory. Br. Peremptory, pl. 45 cites 2 E. 4. 10.


7. In Appeal it was said, that if the Defendant demurs upon a Plea which is adjudg'd against him, he shall be hang'd, quod vult concealem; but this does not seem to be of Pleas to the Writ which are not in Bar. Br. Demurrer, pl. 17. cites 14 E. 4. 7.

8. Iffue being joined upon noe Guilty in Battery, at the Affifes at Huntington, the Defendant pleaded an Accord without alleging Satisfaction; to which the Plaintiff demurred; and the Plea being certified upon the Back of the Point, the Plaintiff gave the Defendant a Rule to join in Demurrer; but the Defendant retaling, the Plaintiff enred Judgment, and took the Defendant in Execution. The Court held that the Defendant retaling to join in Demurrer, the Plaintiff might lawfully enter upon his Judgment. Preem. Rep. 252, 253. pl. 267. Pach. 1678. Abbot v. Rugelley.

(W) To the Writ or Declaration. Good.

1. In Debt the Defendant pleaded Accquittance, which had no Print of any Seal, nor it could not be perceiv'd that ever there was a Seal, by which the Plaintiff said, that because no Print appeare'd, no Law shall put him to answer, and the Defendant said, Sir, because you do not deny that it is your Deed, Judgment &c. and so see Special Demurrer. Br. Demurrer, pl. 5. cites 14 H. 4. 30.

2. In Disceit, if the Defendant pleads Not his Deed in Debt upon an Obligation, and demurs in Law upon the Declaration, the Demurrer is void, and the Plea shall be taken, Per Primon. Br. Demurrer, pl. 1. cites 33 H. 6. 10.

3. So in the Writ of Disceit the Defendant said, that the Summoners and Veyors were other Persons than those who appear'd, and gave Addition, and the Plaintiff said, that those who appear'd were the same Persons who were return'd upon the Precipe quod residat, and to the Plea pleaded by the manner &c. and therefore per Prifin, the Replication shall stand, and the Demurrer is void; and they are at Iffue which shall proceed, viz. by Examination of the Justices of those who appear'd; For where the Sheriff has return'd it, that these are they, who were return'd in the first Action, the Parties shall not have Averment to the Contrary. Ibid.

4. Trespass of a Horse, and Bridle carried away, by H. S. against B. who said, that he knoweth was thereof bestowed as of his proper Goods, till H. S. of B. took them and gave them to the Plaintiff, and the Defendant re-took them at the Time of the Trespass. The Plaintiff said, that this H. S. named in the Bar, and H. S. now Plaintiff, are one and the same Person, and not divers, and to the Plea pleaded by the Manner, no Law &c. and so the Parties demur'd in Law, and the Opinion of all the Justices was, that the Plea was good, and well pleaded, by which the Plaintiff had Writ to inquire of the Damages; For by the Nutt Desire of the Defen-
Demurrer.

...it is confessed, that the one and the other, are one and the same Person; for it otherwise, then the Defendant might have taken Issue upon it, and by the Nient Dider, the Plea of the Defendant is not good, but amounts to Nee Guilty. Br. Demurrer, pl. 12 cites 13 E. 4. 7.

5. Treposa by H. B. Guardian of the Chantery of B, and the Chaplains thereof, the Defendant said, that he B. was seized in Fee, and lead to the Defendant for Years, which yet continues, and gave Colour to the Plaintiff for the Term of Life of the Lessee. And the Plaintiff said, that the said H. B. and this H. B. Guardian &c. are one and the same Person, and not drivers, and that the said H. B. never had any Thing in the said Land, unless in Right of the Chantery aforesaid, and to the Plea pleaded by the Manner, and so demuir'd &c. and so a good Demurrer by the disclosing of the Special Matter, and otherwise not. Br. Demurrer, pl. 13. cites 21 E. 4. 76.

6. The Defendant demuir'd specially, because he was traflated to Abbot of another House, after the making of the Obligation, and the Goods did not come to the last House, and so demuir'd. Br. Demurrer, pl. 9. cites 3 H. 7. 11.

7. In a Demurrer to a Declaration, it is not enough to say, Quod caret Forma, but the particular Want of Form must be shown. 2 Ld. Raym. Rep. 802. Mich. 1. Ann. B. R. Shirridge v. Lumphug.

8. A Seize Factas was brought in C. B. to which the Defendant demuir'd as to a Declaration. The Plaintiff joind in Demurrer, and infinits that his Writ is good, and Judgment was given for the Plaintiff. Error was brought in B. R. and there the Judgment was affirmed. 2 Ld. Raym. Rep. 1504. Trin. 13 Geo. 1, and 1 Geo. 2. B. R. Blake v. Dodehead.

(X) To Pleas. Good.

1. In Nisance against three, the one pleaded in Bar, and another made Defend, and the third said, that the Land extended into two other Vills not named in the Writ. Judgment of the Writ. The Plaintiff said, that he, who pleaded to the Writ, had nothing in the Franktenement, and therefore to the Plea pleaded by the Manner &c. For he who is not Tenant to the Franktenement shall not plead this to the Writ. Br. Demurrer, pl. 21. cites 5 E. 3. 10.

2. In Debt upon Arrears of Account, the Defendant tender'd his Law, and praid that the Plaintiff be examin'd, and upon the Examination, it was found that the Matter lay in Account, and upon this the Defendant pleaded in Bar, to which the Plaintiff said, that inimine the Defendant praid Examination, which Examination is said against him, therefore to the Plea pleaded by the Manner &c. and so demuir'd; for so his Pretence this is preteritory. Br. Demurrer, pl. 22. cites 10 H. 6. 21.

3. In Precipe quod reddat against two, if the one takes the entire Tenancy and Vouches &c. absoe box that the other any Thing has, the Demandant may say, that both are Tenants as the Writ supposes, and demuir upon the Voucher, and this is good Issue; for the Tenant tender'd Travers before. Br. Illues joins, pl. 61. cites 9 E. 4. 36. If the other any Thing has, the Demandant may say, that both are Tenants as the Writ supposes, and demuir upon the Bar pleaded by the one olone, per Catesby and Littleton. Ibid.—Br. Demurrer, pl. 16. cites 5 C.

4. In
Demurrer.

4. In Formacion against Baron and Fene, the Baron for his Fane pleaded Nontenure, and the Baron took the entire Tenancy and Vouch'd &c. Captisby said, the Baron and Fene the Day of the Writ purchase'd, were Tenants of the Fra hattements in June Usuris &c. Et hoc &c. and to the Voucher demurred. Per Littleton, In Affile against several, if the one takes the entire Tenancy and pleads in Bar, the Plaintiff may say that he holds jointly with the other, and to the Plea plead by the Manner. Br. Demurrer, pl. 20. cites 9 E. 4 36. and 22 H. 6. 44. accordingly.

5. In Dict upon an Obligation with diverse Condition, if the Defendant says that it is induced upon such Condition, and flaws one only, which he has performed, the Plaintiff may say that it is induced upon this Condition and others, to which the Defendant has not answer'd, and therefore to the Plea pleaded by the Manner &c. and demurred; for otherwise he shall lose the Advantage of tho' Conditions. Br. Demurrer, pl. 18. cites 21 E. 4 78.

6. Tri'Proceed of Goods care'd away in B. The Defendant justify'd in S. in the same County, abique hoc that he is Guilty in B. Vavior said. S. is a Hound of B. and to the Plea pleaded by the Manner, no Law &c. and well; for now he has justify'd, and also plead not Guilty as appears by the Replication, and therefore a good Demurrer. Br. Demurrer, pl. 14. cites 22 E. 4 50.

7. So in Affile the Defendant pleaded Feoffment of J. N. and gave Colour. The Plaintiff said, that he said J. N. and the Plaintiff are one and the same Person and not divers, and to the Plea pleaded by the Manner no Law shall put him to Answer &c. And a good Demurrer, by which Suliard pleaded over another Plea. And so fee special Demurrer by Declaration of the special Matter, and upon this concludes with Demurrer. Br. Demurrer, pl. 14 cites 22 E. 4 50.

8. In Replevin the Plaintiff declared in a Place called S. in B. The Defendant said, that his Father was seized of 150 Acres of Land in B. called M. and died seised, and the Land descendent &c. and Answered for Damage seafant, Abique hoc that he took them in the Place called S. and demanded Judgment of the Writ and prayed Return, and the Plaintiff said, that the 150 Acres are so well known by the Name of S. as by the Name of M. and that the Place called S. and the 150 Acres called M. are one and the same Place, and not diverse et hoc &c. And to the Plea pleaded by the Manner &c. No Law shall put him to Answer. Br. Demurrer, pl. 8. cites 1 H. 7. 11.

9. Replevin of taking in a Place called B. in N. the Defendant justify'd in a Place called S. in N. aforefind for Damage seafant Abique hoc that he is Guilty in B. the Plaintiff said, that the Place is known by the one Name and the other, and to the Plea pleaded by the Manner &c. and demurred. Br. Demurrer, pl. 19. cites 1 H. 7. 21.

10. Replevin; upon Demurrer the Case was, That the Plaintiff in Bar to the Answer shows that the Land was Copyhold Land grantable in Possession or Resurrection for Life, or in Fee, and that the Lord granted the Resurrection unto him after the Death of W. who was Tenant for Life, and thus was the Death of W. whereby he entered. And it was hereupon demurred; because he did not plea the beginning of W's. Estate, nor by whom W. had the Estate granted him. And it was held to be no Caufe of Demurrer, because it is not the Plaintiff's Title, but Matter of Conveyance thereto; wherefore it was adjudged for the Plaintiff. Cro. J. 52. pl. 24. Mich. 2 Jac. C. B. Lodge v. Frye.

11. Debt for Rent. The Defendant pleads Nil deleet and so Iffue joined, and at the Day of Nill Priss the Defendant pleads good puts durius e attenuance the Plaintiff releaged to him and does not name any Place where he releaged, so as no Iffue could be taken; and to this the Plaintiff demurred. And it was adjudged a Fault incurable. Freem. Rep. 112. pl. 132. Trin. 1673. Gardner v. Bloxam.

(Z) In
Demurrer.

(Y) In what Cases a Demurrer makes a Discontinuance.

1. In Trover for a Box and 290 Pecius Argenti, the Defendant demurred to the Declaration, and the Plaintiff demurred to the Defendants Demurrer, and concluded & hoc parasus ei verificare; The Defendant maintained his Demurrer, and put the Matter upon the Court. The Court held that all is discontinued by the Plaintiff's not joining in Demurrer, but demurring upon the Defendants Demurrer; for there is no difference between pleading over when Illue is offered, and not joining in Demurrer but pleading over; both are alike and make a Discontinuance. 1 Salk. 219. pl. 4. Trin. 6 W. and M. in B. R. Campbell v. St. John.

2. In Scire Facias on a Judgment against the Defendant, he pleaded in Abatement no Specification. The Plaintiff demurred in Bar. Respondent's Offer was awarded. Afterwards the Defendant pleaded the same Matter in Bar. The Plaintiff demurred; and Carthew took Exception, that there was a discontinuance here; because upon the Plea in Abatement the Plaintiff had concluded his Demurrer as if it had been in Bar. Sed non allocatur. For where the Defendant pleads a good Plea in Abatement, and the Plaintiff replies new Matter, he ought to maintain his Writ; but if the Defendant pleads an ill plea, though the Plaintiff replies and concludes in Bar, it is not material. Ld. Raym. Rep. 393. Mich. 10 W. 3. Lug v. Goodwin.

S. C. cited 2 Salk. 599. pl 5. Lug, v. Goodwin S. C. the Scire Facias was against the principal Defendant, and was (in haec Parte.) And per Holt Ch J. on search of Precedents, where it is against the Defendant him self, it should be (in haec Parle) but where against the Bail, it should be (in ea Parte) and this will reconcile the Precedents—12 Mod. 214. Luck v. Goodwin. S. C. is, that in Scire Facias Exception was taken, that whereas it was said, "Petit judicium pro Missis & Causis in haec Parte," that it should have been "in ea Parte." But "in haec Parte," was held good.


If the Demurrer was in Abatement, then it was a Discontinuance, and the Plaintiff might take Judgment; but nevertheless he was not bound to do it, and therefore had his Election, and might Join in Demurrer, and the Court upon this Joiner shall give him Judgment in Bar. For the Court is not hindered by the Conclusion of the Demurrer in Abatement to give Judgment, as of Right they ought, upon the whole Record. Per Cor. 1 Salk. 5. pl. 8 the second Resolution, in the Cafe of Cros v. Bilhon.


(Z) To
Demurrer.

(Z.) To Pleas. Where a stay of Proceedings.

1. In Wait it was agreed, that where a Man joins Issue for Part, and demurrers in Law for part he shall not have Venire Facias or Writ to enquire of the Waif, or Writ to enquire of the Damages till the Demurrer be adjudg'd. Br. Demurrer, pl. 2. cites 48 E. 3. 15.

2. In Scire Facias Per Huls and Tirwit, where a Man joins Issue for Part, and demurrers for the refi, the Issue shall be try'd before the Demurrer adjudg'd. Br. Demurrer, pl. 3. cites 11 H. 4. 5.

3. Where they are at Issue for Part, and at Demurrer for the refi, the Issue should be try'd first to enquire of the Damages, to that Judgment may be given aiter of all at one and the same Time, Per Thiriit et non negatur. Br. Demurrer, pl. 4. cites 11. H. 4. 75.

4. In Trespofs of Beasts taken, the Defendant pleaded to parcel Not Guilty, and to the refi another Plea, whereupon the Plaintiff demurr'd and the refi Issue was found against him by Nisi Prius, and he pray'd Judgment upon it, and had it before the Demurrer try'd. And to see the Issue try'd before the Demurrer, and Judgment also before that the Demurrer was dictus'd. Br. Demurrer, pl. 23. cites 32 H. 6. 5.

5. Trespoffs upon Anno 5. R. 2. the Defendant pleaded not Guilty to Part and to Issue, and pleaded another Plea of the refi, whereupon the Plaintiff demurr'd in Law, and yet Venire Facias Issued to try the Issue. Br. Demurrer, pl. 10. cites 3 E. 4. 2.

(A. a) Demurrer to Part, and Plea to Part.

1. If a Man in Action demurrers for Part, and joins Issue for the refi, Venire Facias, or Writ of Inquiry of Damages, or Writ of Wait, or the like shall not Issue before the Demurrer be try'd, by Reason of the Damages. Br. Trials, pl. 129. cites 48 E. 3. 15.

2. In Scire Facias, if he joins Issue for Part and demurrers for Part, the Issue shall be tried before that the Demurrer shall be adjudged, Per Huls and Tirwit. Br. Trials, pl. 24. cites 11 H. 4. 5.

(B. a) Judgment on Demurrer on Plea to the Writ, or on Plea in Maintenance of the Writ.

1. The Judgment upon Demurrer, if the Action lies without showing Specialty or not, it is peremptory to the Tenant. Thel. Dig. 238.

Lib. 16. cap. 11. S. 4. cites Mich. 18 E. 3. 50. 56. and in diversie other Books; But it is to the Action.

2. Where the Plaintiff shows Matter in his Replication varying from the Matter comprised in his Writ, and the Defendant for this Variance demands Judgment of the Writ and demurrers thereupon, the Judgment against the Defendant shall be peremptory, if the Court awards against him.
Demurrer.


3. In Affis of Rent Charge in Warblington, the Deed of the Grant was to take and Warblington, and by the Clause of the Distresses Liberty was given to dispossess in either Tenements also in another County &c. for which Judgment was demanded of the Writ for the not naming of the other Tenements &c. upon which was a Demurrer, and the Judgment a Repondens, and not peremptory. Thel Dig. 238. Lib. 16. cap. 11. S. 3. cites Trin. 41 E. 3. 15. Charge 6. 41. All. 3.

4. In Debt the Defendant pleaded forth Superiedades of the Chancery, testifying that he was a Mensal Servant of the Chancellor &c. and demanded Judgment it the Court &c. and the Plaintiff tendered to aver, that he was not his Servant &c. which Averment was refused by the Defendant, by which he was awarded to answer. Thel Dig. 239. Lib. 16. cap. 11. S. 14. cites 21 H. 6. 22. But says that this Exception goes to the Jurisdiction.

5. In Precise quod reddat of Rent, the Tenant pleaded a Devain Seisin in the Demandant, to which the Demandant said, that he was not seized &c. And the Tenant pleaded Plea containing Matter to eflapp the Demand to say, that he was not seized of the Rent, upon which the Tenant demurred in Law, and adjudged against the Tenant that he should answer over, for it was not peremptory. Thel Dig. 239. Lib. 16. cap. 11. S. 16. cites Mich. 37 H. 6. 8.

6. The Judgment upon Demurrer upon Plea to the Jurisdiction of the Court is only a Repondens. Thel Dig. 239. Lib. 16. cap. 11. S. 12. cites Mich. 35 H. 6. 4.

7. The Demandant and the Prayee to be received were at Affis upon the Counteplea of the Recapts, and afterwards the Prayee pleaded that the Demandant had entered after the last Contumensi &c. Upon which the Demandant demurred, and it was adjudged that he recover Seisin of the Land. Thel Dig. 239. Lib. 16. cap. 11. S. 10. cites Mich. 37 H. 6. 2.

8. It is held, that after Demurrer in Law, if the Tenant makes Default, Petit Capt shaul be awarded. Thel Dig. 239. Lib. 16. cap. 11. S. 13. cites Patch. 8 E. 4. 4.

9. In an Action of Debt upon a Bond in C. B. the Plaintiff declares, quod cum the Defendant at London, &c. per quoddam summa Obligatiorum &c. omitting the Word Scriptum, the Defendant prays Over of the Bond, and it is entered in hæc Verba, and pleads in Bar, that the Plaintiff had not specified the Bond according to the Act of Parliament, and the Plaintiff demurred. It was moved that this was a good Plea in Bar, for it was a Temporary Bar. If this be no Plea in Bar, yet now by the Demurrer the Plaintiff has confessed, that he has not specified the Bond, and therefore the Court cannot give Judgment for him; for by the express Words of the Act of Parliament the Debt is not recoverable. Trevor Ch. J. As to the Demurrer, though it does confess the Matter of not specifying, yet that shall not hinder the Plaintiff from having his Judgment; for Want of a Specification like all other Matters, must be taken Advantage of in a Regular Way and by proper Pleading. 2 Ld. Raym. Rep. 1055. 1056. Mich. 3 Ann. B. K. Copley v. Delauney.

For more of Demurrer in General, See Amendment and Repondens, Pleadings, Plea and Demurrer, and other proper Titles.

Deodand.
(A) Deodand.

1. If a Man be driving a Cart, and the Cart falls and kills a Man, the Cart and Horse are a Deodand. Hale's Hist. Pl. C. 420; cites 3 E. 2. Corone 338.

2. And so if a Cart runs over a Man and kills him, the Cart and Horse are forfeited. Ibid. cites 8 E. 2. Corone 403. 3 E. 3. Corone 326.

3. So if the Timber that hangs a Bell falls and kills a Man, the Timber and Bell are both forfeited. Hale's Hist. Pl. C. 420.

4. If a Man be getting up a Cart by a Wheel to gather Plums, and Hawk. Pl. of the Cur. 66. cap. 26. S. 6. says it is said that if a Ship by a Fall from which a Man is drowned in the Fresh Water, shall be forfeited; but not the Merchandize therein because they no Way contribute to his Death; and by the same Reason it is, that if a Man getting up the Steps of a Waggon falls to the Ground and breaks his Neck, the Horse and Waggon only are forfeited and not the Loading, because it no Way contributed to his Death; for which Cause, where a Thing not in Motion causes a Man's Death, that Part only, which is the immediate Cause, is forfeited. But if he had been killed by a Brushe from one of the Waggon Wheels, being in Motion, the Loading also would be forfeited; because the Weight thereof made the Hurt the greater.—See pl. 17.

5. If a Man falls from an Hayrick whereby he dies it is said (nota, not adjudged) that it shall be forfeited. Hale's Hist. Pl. C. 422. cites 3 E. 3. Coron. 348.

6. If a Man be killed, the Property of his Goods are in his Executors or Administrators, and are not Deodand, per Belk. Br. Property, pl. 42. cites 8 R. 2. and Fitzr. Indictment, 27.

7. If a Man kills another with my Weapon, the Weapon is forfeited as Deodand, and yet no Default in me, unless for not better keeping it from him. Br. Forfeiture de terre, pl. 112. cites Doct. & Stud. Lib. 2. cap. 51. fol. 157.

8. If my Horse strikes a Man, and afterwards I fell him, and afterwards the Man dies, the Horse shall be forfeited. Arg. Pl. C. 268. b. Mich. 4 & 5 Eliz. in Cafe of Hales v. Petit.

9. If a Man riding in a River is drowned by the Violence of the Stream, Cur. J. 483. or sudden Flux of Water, the Horse shall be no Deodand. Per Montague and Haughton, J. 2 Roll R. 23. Psch. 16 Jac. B. R. The King v. the Lord Cavendish. Cite feems to be S. C. & S. P. held accordingly per tot. Cur.—For the Water, and not the Horse was the Caufe of his Death. Per Cur. Poth. 156. Anon. seems to be S. C.

If the Horse carry his Rider further into the River than he wanted, so that by the Depth or Strength of the Stream he is drowned, there the Horse shall be a Deodand. Per Haughton J. 2 Roll Rep 29.—But if the Horse throw him, and the Stream carried him to a Mill, and the Wheel of the Mill killed him, the Horse and the Wheel are both forfeited cited by per Pollexfen Ch. 3. to have been so adjudged. 1 Sick 222.—But then this Throwings must not be by the Violence of the Water. 1 Sick. 222. cites Cur. J. 483. Lord Chandos's Cafe.—Hawk. Pl. C. 66. cap. 26. S. 6. says, it seems clear. That when a Man riding over a River, is drowned through the Violence of the Stream, the Horse is not forfeited; because, not that, but the Waters, caused his Death.—Hale's Hist. Pl. C. 422. S. P. cites 8 E. 2. Corone, 389.

10. A Man was hang'd by a Bell-Rope in the Church; The Question Sid. 204. was, If the Bell shall be forfeited? The Court was divided. Lev. 136. S. C. the Trin. Court divi-
Deodand.

11. A Door or Gate which per Vinu Venti Ec. kills a Man by being forced upon him, is not a Deodand. Arg. Quod quiit Conceitum per Cur. Sid. 207. Trin. 16 Car. 2. B. R. in Case of the King v. Grollo and Dabyn, alias Axminster Parish's Cafe.

12. If a Jack-Weight falls and kills a Man, nothing is forfeited but the Weight, and not the Jack which moves it, because Part of the Freehold. Arg. Sid. 207.

13. Part of a Load of Tyan with the Earth fell'd a Man, adjudge'd, that nothing should be forfeited but that Part which fell. Arg. Sid. 207. cites 12 R. 2. Fitzh. Forfeiture, 20.

14. A Sail of a Windmill kill'd a Man as it was turn'd with the Wind. Arg. Sid. 207. cites it as held per Clench and Fenner, J. that the Sail shall not be Deodand, because it is Parcel of the Frank-tenement, and shall go to the Heir and not to the Executor. Clench said, that the Linnen might be forfeited, but Fenner denied it, because it participates of the Nature of the Sail itself.

15. In Aqua Dulci a Ship may become a Deodand, but in the Sea, or in Aqua Salta, being an Arm of the Sea, no Deodand of the Ship or any Part of it, though any Body be drowned out of it, or otherwise come by their Death in the Ship, because on such Waters, Ships and other Vessels are subject to such Dangers upon the raging Waves, in respect to Wind and Tempest, and this Diversity all our ancient Lawyers do agree in, and it does more especially appear in the Parliament Rolls, where, upon a Petition it was desired, That if it should happen, that any Man or Boy should be drowned by a Fall out of any Ship, Boat, or Vessel, they should be no Deodands; Whereupon the King, by great Advice of his Judges and Counsel learned in the Laws, made answer, The Ship, Boat, or Vessel, being upon the Sea, should be adjudged no Deodand, but being upon a fresh River, it should be a Deodand, but the King will shew Favour. There are abundance of other Petitions, upon the like Occasion, in Parliament. 2 Molloy 225. cap. 1. S. 13.

16. A Ship lying at Redriff, in the County of Kent, near the Shore, to be careen'd and made clean, it happened that one of the Shipwrights being at Work under her at low Water, the Vessel (then leaning alittle,) fortunatly to turn over the contrary Side, by means of which, the Shipwright was killed; Upon a Trial at Bar, where the Question was, Whether this Deodand did belong to the Earl of Salisbury, who was Lord of the Manor lying contiguous to the Place where the Man was slain, or to the Almoner, as a Matter not granted out of the Crown? In that Case it was resolv'd, That the Ship was a Deodand, and the Jury thereupon found a Verdict for Lord of Salisbury, that the same did belong to his Manor. 2 Molloy 225. cap. 1. S. 13.

17. A
Deodand.

17. A Cart met a Waggon loaded upon the Road, and the Cart endea

vouring to pass by, the Waggon was driven upon a high Bank, and

overturned, and threw the Person that was in the Cart just before the

Wheels of the Waggon, and the Waggon ran over the Man and killed

him. In the home Circuit this was referred to Pollexfen Ch. J. and

Gregory, and they gave their Opinions, that the Cart, Waggon, and

all the Horses are Deodands, because they all moved ad mortem. 1

Hawk. Pl. 67. cap. 26. S. 6. says, It is a Ge-

eral Rule, that where-

over the

Thing,

which is the

Occasion of

a Man's Death, is in Motion at the Time, not only that Part thereof which immediately

wounds him, but all Things, which more together with it, and help to make the Wound more dangerous, are for-

feited also; For the Rule is, that Omnux quasi movet ad Mortem sunt Deodanda.

18. It is said in the Books, that if a Tree fall on the Branch of another

Tree, and both fall to the Ground, and the Branch kills a Man, the

Tree and the Branch are both forfeited. 1 Salk. 220. in Case of the

Lord of the Manor of Hampstead.

19. Inquisition before the Coroner super vitium Corporis found, That Hawk. Pl.

the Wheel of a Forge moved to the Death of the deceased. And now it C. 66. cap.

was moved to Ray' Proces for seizing it as a Deodand, because Parcel of

a Freehold, as the Wheels of a Mill or Millstone, which were agreed by the Op-

to be Freehold, andideo not capable of being a Deodand. And per

Holt Ch. J. A Mill is a known Thing in Law, and so are the Parts

thereof; and therefore if the Owner of a Mill takes out one of the

Mill-stones to pick or gravel it, and deviles the Mill, while the Stone to the Free-

is levered from it, yet it shall pass as Part of the Mill; and a Bell can

hold, as a Wheel of a

Mill, a Bell

hanging in a

Steeple &c.

might be Deodands, but by the later Resolutions they cannot, unless they were levered before the

Accident happen'd.

20. If the Party wounded dies not of this Wound within a Year and

a Day after he received it, there shall be nothing forfeited, for the Law
does does not look on such a Wound as the Cause of a Man's Death,
after which he lives so long; But if the Party dies within that Time, the

Forfeiture shall have Relation to the Wound given, and cannot be


21. Nothing can be forfeited as a Deodand, nor seized as such, till found by the Coroner's Inquest to have caused the Death of a Man; But

where the Officer seized it before

after such Inquisition the Sheriff is answerable for the Value of it, and

may lay the same on the Town where it fell, and therefore the Inquest


For more of Deodand in General, See other Proper Titles.
Departure.

(A) Departure in Pleading. What is.

1. A Departure in pleading is said to be when the second Plea contains a Matter not purificant to his former, and which fortifies not the same, and thereupon it is called Decesfus, because he departs from his former Plea; and therefore whenever the Rejoinder (taking one Example for all) contains Matter subsequent to the Matter of the Bar, and not fortifying the same, this is regularly a Departure, because it leaves the former and goes to another Matter. Co. Litt. 304. a.

2. In Mortdansctor the Tenant pleaded Fine and Nonclaim in the Demandant, and he said that he was within Age at the Time &c. and the Tenant pleaded another Fine and Nonclains when the Demandant was of full Age, and was not received to it, the Reason seems to be inasmuch as it is a Departure. Br. Departure de fon ple, pl. 17. cites 2 Aff. 6.

3. Trespass of Battery Anno 17. E. 3. the Defendant pleaded Release Anno 16, and to any Trespass after Not Guiltly, and the Plaintiff said, that it was made by Duty, and this is a Non-Maintenance of his Day, and therefore is a Departure from his Day, Per Opinionem, by which he maintained his first Day. Br. Departure de fon ple, pl. 28. cites 22 Aff. 86.

4. Trespass by J. Citizen of N. against the Bailiffs of S. because King H. granted to those of M. that they should be quit of Toll throughout all England, and the Plaintiff came to S. and bought a Ton of Wine, and the Defendant disentrained him for 20 s. The Defendant pleaded that King John had Cafton in S. fel. of every Ton of Wine sold 8 d. which be granted to those of S. by Patent, rendering 200 l, and the Plaintiff bought the Wine, and be levied of him 8 d. which is Cafton and not Toll, and also King John granted that this Grant should not be defeated by any Charter of later Date, and the Plaintiff replied, that Composition was made after upon Suit in B. R. between those of M. and those of S. fel. Southampton, where it was agreed that those of M. should go quit against those of S. and those of S. quit against them, and showed thereof Exemplification confirmed by this King
King, and demanded Judgment, and it was held there No Departure where he claims to be discharged of Toll, and the other Jutifies by Charter, and the Plaintiff replies by Complication; Brooke says, Quod Miror! It seems to be ill Pleading; for it seems that where the Defendant justifies for Custom and not for Toll, the Plaintiff ought to have maintained his Writ. Br. Departure de fon ple, pl. 8. cites 39 E. 3. 13.

5. Writ of Scire Facias upon a Fine, the Tenant said, that tho' he, who were Parties to the Fine, had nothing at the Time &c. but one was feised, Que Ejusfeate he has, and the Plaintiff replied, that if, N. had nothing at the Time of the Fine, and per Cur. be shall maintain the Fine that the Parties were feised, the Reason seems to be inasmuch as otherwise it shall be a Departure. Br. Departure de fon ple, pl. 3 cites 40 E. 3. 3.

6. In Scire Facias upon a Fine the Tenant said, that tho' who were Parties to the Fine had nothing at the Time &c. but one, Que Ejusfeate he has, and demanded Judgment fi Aetio, and the Plaintiff said, that if, N. had nothing at the Time, &c. and this is no Replication; for he ought to maintain the Fine that the Parties were feised &c. for otherwise it is a Departure. Br. Replication, pl. 9. cites 40 E. 3. 30.

7. Reasons of Differences taken in a House and two Tofts held of him. Belke said, he took them in one Acre of Land, which is Hors de fon Fee, Afsigne he that he took them in the House and Tofts. There the Plaintiff ought to maintain the Place in the Count, for other Matter will be a Departure. Br. Departure de fon ple, pl. 32. cites 30 E. 3. 32.

8. Replieon of taking the Fourth Day of May, the Defendant avowed in the same Place another Day for Damage feantant in his several, the Plaintiff said that it was his Common &c. and by this it shall be intended that it was taken the Day that the Defendant has avowed which is a Departure from his Count, by which the Plaintiff maintained his Count; but it seems that in this Case the Defendant ought to have traversed the Day in the Count. Br. Departure de fon ple, pl. 31. cites 43 E. 3. 11.

9. In Avovery in D. if the Plaintiff pleads Hors de fon Fee and the Defendant says that he took them in E. this is a Departure. Br. Departure de fon ple, pl. 25. cites 8 H. 4. 16.

10. In Affise against Baron and Feme, the Baron upon Adjournment made Default, and the Fene was received and pleased Fine levied to W. P. and J. D. and to the Heirs of W. Que Ejusfeate R. T. had and the Land descendent from R. T. to the Tenant, and gave Colour. The Plaintiff said, that if, D. was thereby feised in Fee and imposed him and he was feised and disposed of &c. Afsigne he, that R. T. had the Estate of the said W. P. and J. D. And the Tenant said, that this J. D. is the same J. D. named in the Fine, who had only for Term of Life by the Fine, Judgment if he shall be received against the Fine, to say that he had Fee. Ex non allocation; because the Plaintiff had made Title and traversed the Que Ejusfeate, therefore the Defendant cannot make Departure, or do any Thing but maintain the Issue which he tendered and which the other has traversed. For where the the Party pleads a Plea and traverses the other, it is no Matter, if the Matter of the Plea be true or not; for he cannot say any Thing but maintain the Traverse. Br. Departure de fon ple, pl. 4. cites 11 H. 4. 81.

11. In Affise the Tenant pleaded Release of the Plaintiff, bearing Date at E. the Plaintiff said, that be at this Tale &c. was imprisoned at D to which the Defendant said, that after the Imprisonment the Plaintiff delivered to him the Release at L. at large; and because he had departed from the Place where the Deed bore Date, therefore the Affise was awarded. Br. Departure de fon ple, pl. 13. cites 1 H. 6. 3.
12. A Man delivered an Acquittance the 5th Day of March, and the other made Obligation bearing Date the 16 Day of March, and delivered it the 9th Day of May, and he brought Debt upon the Obligation, and the other pleaded Acquittance. The Plaintiff replied, that after the Acquittance filed, the 9th Day &c. the Obligation was Primo siti deliberat, this is a Departure, for he ought to count that the Defendant per Scipium hum &c. dated the first Day of May, &c. primo ei deliberat the 9th Day of May conceifit se teneri &c. Br. Departure de fon ple, pl. 14. cites 7 H. 6. 4.

13. Trespas of Grafs spoiled, the Defendant said W. was seized in Feo, and gave to J. N. in Tail, who had issue D. and died, and after D. died, and the Defendant entered as Daughter and Heir of D. and gave Colour by D. the Plaintiff said, that J. was seized in Feo and insuff'd the Plaintiff by whom he entered and was seized till the Trespas, and the Plaintiff said, that J. was seized and died seized, and D. entered and died, and after the Defendant as Heir of D. entered and died, and after the Defendant as Heir of D. entered and was seized till by the Plaintiff quittance upon whom he entered. And by the beit Opinion, this Rejoinder is a Departure; for by the Bar the Gift in Tail is their Title, and by the Rejoinder the Dies seized is their Title. Br. Departure de fon ple, pl. 5. cites 21 H. 6. 32.

14. Trespas of a Close broken and Grafs cut, the Defendant pleaded his Franktenement, the Plaintiff pleaded that to this be shall not be received, for his Father whose Heir &c. insuff'd him with Warranty by the Dies, Judgment it against the Deed of his Ancestor, which comprehends Warranty, he shall be received. And the Defendant said, that R. was seized in Feo, and insuff'd his Father and him, and to the Heirs of the Son, and the Father insuff'd the Plaintiff, by which the Defendant entered into the one Moity by Alienation to his Disinheretance, and took the other Moity by Protestation. Newton said, this is a Departure; for by the Bar that it is his Franktenement he intitles himself to the whole, and by the Rejoinder he intitles himself only to the Moity, therefore a Departure, by which the Defendant rejoin'd for the whole feizd, the one Moity for the Alienation, as above, and the other for the Dijffenf to him &c. Br. Departure de fon ple &c. pl. 6. cites 22 H. 6. 39.

15. Debt upon an Obligation of 25 l. to pay Annually the Farm of B. at the Foot of Eafter and St. Michael, the Plaintiff alleges'd Arrear at Eafter, and the Defendant alleged't Tender to the Plaintiff at Eafter and refus'd by the Plaintiff, to which the Plaintiff said that be was Arrear at Mich. This is a Departure, and by this they repealed after Verdict, quod nota. Br. Departure de fon ple &c. pl. 27. cites 22 H. 6. 57.

16. In Quare Impedt the Plaintiff counted of an Advoufyn in Grofs and that be presented, and after the Church voided and be presented, and the Defendant disturbed him, and the Bishop, one of the Delendants, pleaded, that he claim'd nothing but Admission, Institution and Induction as Ordinary, and demanded Judgment if without special Disfurbsance &c. The Plaintiff replied, that such a Day, Year and Place, be presented to him his Clerk, and be refus'd, the Bishop rejoined, that such a Day be presented, and one J. N. presented also, by which the Church became ligirous, and after the six Months pass'd be made Collocation by Latef, Abjures his, that be refus'd after this Day; and to this the Plaintiff said, that such a Day, after this Day, he be required him to present his Clerk and be refus'd; and by the Opinion of the Court this is a Departure; For first the Bishop justified the special Disfurbsance the Day that the Plaintiff complains of, and then the Plaintiff alleges Disfurbsance at another Day, which is a Departure. Br. Departure de fon ple. pl. 2. cites 33 H. 6. 14.

17. In
Departure.

17 In Præcipe qual reddat the Tenant said, that J. N. was thereof seised in Fee, and that it is.deceivable &c. and dev'd the same Land to him in fee and died, by which he entered and gave colour &c. The Plaintiff said, that J. N. was seised in Fee and died seised, and he entered as heirs, and that J. N. at the Time of the Devise was within the Age of 21 Years et hoc &c. The Tenant said, that the Cogitation is, that every Infant of 15 Years may devise his Land there, and that J. N. was of the Age of 15 Years at the Time of the Devise &c. and the Opinion of the Court was, that the Rejoinder is a Departure, by which the Defendant amended his Plea, and put all in the Bar, quod nota. Br. Departure de fomple. pl. 9. cites 37 H. 6. 5.

18. In Debt upon an Obligation the Defendant said that it was indors'd, that if the Defendant and all the Tenants of J. of his Manor of D. fland to the acknowledge of the Plaintiff of all Matters, that the Obligation shall be void, and the Plaintiff did not makeAward between the Defendant and the Tenants &c. And the Plaintiff said, that he awarded such a Day that the Defendant should pay to the Tenants 10l. by such a Day, which he has not paid, and after, to be sure, he swore the Names of the Tenants, and the Defendant said, that they were no Tenants at the time of the Obligation made &c. And the other defendant'd by which he said, that every one of them held an Ace of Land by d. at the Time &c. of the said J. as of his Manor of B. and so they were Tenants, Preist, and the others contra, and the best Opinion was that it is no Departure to pay that they are not Tenants, for the Bar is, that no award was made &c. and the other said, that they awarded that they should pay 10l. to the Tenants Sell. A. and B. and the other said, that A. and B. were not Tenants which proves that no Award was between the Defendant and the Tenants of J. and so no Departure; Nota bene. Br. Departure de fomple. pl. 15. cites 39 H. 6. 6.

19. Trespass by a Fewe of a Box of Evidences taken; the Defendant said, that after the Trespass the Plaintiff took to Baron B. who released to him all Actions and Demants, and they'd the Deed as he ought, Judgment &c. The Plaintiff said, that in the Release all Actions which the might have by the Testament of her first Husband, are excepted, and that the first Husband was pofse'd &c. and made her Executrix &c. and died, and the Plaintiff was pofse'd till the Defendant took them and did the Trespass, to which the Defendant said, that the first Baron was seised of 20 Acres of Land in B. which the Charters concern'd, in fee and died seised, and they descended to the Defendant as Son and Heir to him, and the Defendant entered as heir and took the Box and Charters before that the Plaintiff was thereof pofse'd, &c. &c. &c. and this is a Departure per Cur; for the Release is his Bar, and the Defeat and Suffer of the Evidences is his Rejoinder and therefore a Departure; for Per Jenny clearly, Rejoinder ought to be always a sufficient answer to the Replication, and that it be subuentuent and in enforcement of his Bar, and not to be a new Matter; by which the Defendant took the rejoinder for his Bar, quod nota. Br. Departure de fomple. pl. 16. cites 39 H. 6. 15.

20. A Rejoinder ought to base these two Properties, that is to say, it Br. Departure de fomple. pl. 16. cites S. C. ought to be sufficient for Answer to the Replication, and ought to be subsequent and inferring of his Bar, and not new Matter. Br. Replications pl. 26. cites 39 H. 6. 16. per Jenny.

21. As in Trespass the Defendant pleaded Release, the Plaintiff replied, that this Action is excepted in the Release; for it was of a Box of Charters, the Defendant rejoined, that those Charters concern'd four Acres of Land in B. of which his Father died seised in Fee, and he is Heir to him, and entered and took the Charters, and per Cur. this is an ill Rejoinder and Departure, by which the Defendant pleaded the Rejoinder for his Bar. Ibid. 6 Y

22. Trespass
22. Trespass upon Ann. 5 R. 3. the Defendant pleaded, that B. was seised and gave to C. and his Family in Tail by Fine, and that the Land defended to O. as Heir in Tails to the Donors Scit. Son of C. Son of C. to the Donors, by whom B. entered and P. was seised in Tail, and died, and 
and A. entered as Daughters, and Heir and had Issue the Defendant and died, and the Defendant entered and gave Colour to the Plaintiff to which the Plaintiff replied and confess'd it the Fine, and that the Land defended to C. Brother of O. who entered and gave in Tail to the Father and Mother of the Plaintiff who were seised and died seised, and the Plaintiff entered and was seised till the Defendant did the Trespass, and the Defendant rejoined, that after the Gift made by O. that C. re-enter'd and died seised, and the Land defended as above, and so a Remitter, and by the said Opinion of the Court this is a Departure; For the Bar supposes O Heir to the Donors immediate, and the Rejoinder supposes O. Father of O. to be seised so that O. was Heir to C and not Heir immediate to the Donors, quod non, by which the Defendant waiv'd this pleading. Br. Departure de non pl. pr. 23. cites 1 E. 4. 4.

23. And per Danby J. if a Man pleads Feoffment in Affife in Bar, he shall not say in the Rejoinder, that it was Lease and Release; for that is a Departure. Ibid.

24. And if Bar be made by dying seised without Heir as Alienated, and the Rejoinder is by Alienator this is a Departure, per Coke J. Ibid.

25. And in Affife if the Tenant pleads Feoffment of J. and the Plaintiff says, that he was seised to J. for Life who infeffed the Tenant by which he entered for the Forfeiture, and the Tenant says, that after the Lease and before the Feoffment J. the Plaintiff rejoined to O. and his Heirs, this is no Departure. Br. Departure, pl. 23. cites t E. 4. 4.

26. And if Recovery be pleaded in Affise, and the Estate of the Plaintiff unseized &c. and the Plaintiff says, that he, against whom the Recovery pass'd, had nothing at the time of the Recovery, and the Tenant says, that he was Pernor of the Profits, this is no Departure. Ibid.

27. In Affise where the Entry or Diffolution is supposed to be by two, and the one dies or pleads a plea, and the other pleads another Plea and the Plaintiff makes Title, he shall conclude that both entered upon him &c. or that he was seised till by both diffoluted, and shall not lay by until the one dissoluted; for this is a Departure from his Writ. Br. Patents, pl. 101. cites 12 E. 4. 6. and 7.

28. J. B. brought Writ of forcible Entry against N. the Defendant said, that A. was seised in Fee, One Estate be his and gave Colour to the Plaintiff, and the Plaintiff said, that after the Defendant had the Estate of A. W. B. Coifn of the Plaintiff was seised in Fee whose Heir he is, and died seised, and the Land defended to him as Coifn and Heir &c. and they'd How &c. by which he entered was seised in Fee till the Defendant dissoluted, and the Defendant said, that before that W. any thing had, the said A. was seised till by J. S. dissoluted who infeff'd one A. who infeff'd the said W. and that after A. died, and the Fee and the Right descendent to this Defendant as to the Coifn and Heir, and they'd how; and after W. B. died dissoluted this same N. living within the Age of 21 Years, by which the Defendant entered, and demanded Judgment &c. And Per Littleton the Rejoinder does not maintain the Bar, and then it is a Departure, for in the Bar he said, that A. had Feoffment before the dying seised of W. B. and by the Rejoinder he confess's that he had no Feoffment before the dying seised but only a Right and so a Departure, by which Catesby demurr'd in Law upon it &c. Br. Departure de non ple. pl. 7. cites 15 E. 4. 33.

29. In Trespass [of Sheep taken] the Defendant pleaded Sale in Market court by B. and gave Colour, and the Plaintiff said, that he himself was posseffed till the Defendant took and delivered them to the said B. who forthwith to the Defendant, and the Defendant said, that the Plaintiff sold them to B. and B. sold
Departure.

frold them to the Defendant, and per Cur. this is a Departure; for by the Life of E. and gave Colour &c. and the Plaintiff says, that he was seised till by B. distressed, and be entered, and the Defendant says, that the Plaintiff released to him, this is no Departure per Brian and Collow; for it is purgant to the first Matter. Ibid. 31. Entry for Difficulty against the Baron and Feoff, the Baron said, that E. was seised, and leaged to him for Life of E. and gave Colour &c. The Defendant said, that before that the said C. any Thing bad, the Tenant was seised and seised A. who seised the Defendant, who was seiseed till the Tenant seised, and after the Tenant seised G. who leaged to the Defendant as in the Bar; the Tenant said, that E. leaged to him at Will, and after the Tenant seised A. who seised the Defendant as in the Replication, and after the Tenant entered upon the Demandant, upon whom E. entered, and after leaged to the Tenant for Life, as in the Bar, and it was adjudged a good Rejoinder and no Departure from the Bar. Br. Departure de non ple. pl. 24. cites 18 E. 4. 26. 32. Trespass of Allain and Batter, 1 July Anno 1 E. 5. the Defendant justified by the Allain of the Plaintiff himself at another Day, Alque no, that he was Gully before, or after this Day, the Plaintiff said, that De son Tert Denufis &c. this is an ill Replication; for by this he departs from his first Day and therefore ought to say that Guilty mode & Forma &c. Br. Replication, pl. 67. cites 2 R. 3. 11. 33. If one inutis himself to Land by Seoffment of J. S. and Defendant pleads that before the Seoffment J. S. was attaint, now if the Plaintiff Seff a All of Parliament anneulling the Attainder; this is no Departure; for the Matter of the Title is not changed, but remains as it was at first, viz. by the Seoffment; per Popham Ch. J. Yelv. 14. cites 3 H. 7. Sellenger's Case.

34. Quare impedit against the Bishop of E. who said that he is Ordinary and that he claimed nothing but Admission and Infitution as Ordinary. Judgment, if without Special Disturbance Action &c. the Plaintiff said, that he was seised of the Advowson, and presented his Clerk, who was admitted, and now the Church xeited by his Death, by which be, the 23th Day of May, presented his Clerk to the Defendant as Ordinary, and be reseed him within Six Months at B. in the County of N. and so be disturbed him, to which the Bishop said said that the 15th Day of May after said, one P. presented to him D. his Clerk as Patron, and after the Plaintiff presented as in the Bar by which the Church became litigous, and demanded Judgment, and the Plaintiff demurred, and by fome this is a Departure; for by the first Plea the Plaintiff might have had Writ to the Bishop, contrary upon the Rejoinder of the Bishop, therefore a Departure, and the others e contra, therefore Quare. For the one Plea and the other belong to the Ordinary. Br. Departure de non ple. pl. 19. cites 5 H. 7. 19.
Departure.

35. Trepass of Goods taken at L. the Defendant said, that J. S. was
possessed Ut de Propria, and bailed them to the Plaintiff and after gave them to the Defendant, by which he took them, Judgment, &c. The Plaintiff said, that he himself was possessed till J. S. took them out of his Possession and gave them to the Defendant and the Plaintiff took them after the Gift and was possessed till the Defendant took them, and the Defendant rejoined that the Plaintiff himself after the taking of J. S. gave the Goods to J. S. who gave to the Defendant, as in the Bar. And it was held that the Replication is good, and the Owner may retake the Goods, notwithstanding the Gift of the Trespaflor, and may take them, or have Replevin, and per Vavitor and Brian this is a good Rejoinder, and neither a Departure or Repugnant, for it stands with the Bar and infuses the Bar. Br. Departure de non ple. pl. 21. cites 6 H. 7. 8.

36. In Formemud, the Tenant said, that Ne dona pas, the Demandant said that after Land was given, and this Land was recovered in Value and fo Dona. Br. Departure de non ple. pl. 22. cites 7 H. 7. 2.

37. And the like in Cai in Vita, that Yr dimift &c. the Tenant said, that Non dimittis, and the Demandant said, that he suffered a Recovery, and so dimittis, and no Departure; for there is no other Form of Write &c. Ibid.

38. In Affixe the Tenant pleaded Feoffment of J. S. and gave Colour, the Plaintiff said, that at the Time of the Feoffment he was within Age and entered at full Age, and intitled the Plaintiff &c. the Plaintiff said that the Caufon of the same Vill is, that every one of the Age of Fifteen Years may make Feoffment, the Plaintiff said, that this is a Departure, Newport said No, and put a Difference between the Cape 37 H. 6. Vol. 5. and this Cape; for there the Tenant pleaded Devises Bar, which is a Caufon at the Common Law, and alter in his Rejoinder be alleged special Caufon in the same Vill only, and therefore because his Bar is a Caufon and he did not show the whole Caufon in his Bar, therefore this is a Departure, but here the Bar is a Feoffment, which the Plaintiff voided by Novage, therefore the Defendant came Time enough to allege the Caufon and in Inforcement of the Bar, and Rede and Trenaile J. affirmed the Difference which Newport put, Quod Nota. and Quare. Br. Departure de non ple. pl. 10. cites 21 H. 7. 17.

39. Office was found for the King, and that the Tenant of the King made Feoffment to his Use, and died seised of the Use &c. and J. S. came and traversed the Office, inasmuch as the Feoffment was to another Use and that Recovery was had to this second Use, and traversed the dying seised in Ufe and the King's Attorney replied, that the Recovery was by Ovis, and per Rede J. this is a clear Departure, for as a common Person ought to warrant his Count by Pleading and allo his Bar, fo the King, when he is intitled to the Office which is traversed, ought to inforce himself to the same Office by his Replication, and maintain the same Title in the Office, and not to make a New Title by Matter in Fact, or otherwise; for this was never found by Matter of Record, and also it is a new Title which is not found in the Office or in any other Office, Quod non nagatur. Br. Departure de non ple. pl. 11. cites 21 H. 7. 18.

40. In Aovory, if the Plaintiff counts that his Father was seised and leased rendering Rent, or granted a Rent Charge, and the Defendant avows the Defendant indebted, or the Plaintiff in Replevin says, that the Lessor or Grantor at the Time of the Domus, or at the Time of the Grant had nothing in the Land, the other Party cannot say that at the Time &c. J. and B. were seised in Fezco his Use, and so seised he leased or granted; for all this ought to be shown in the Count or Aovory, Per Rede Ch. J. and King-
Departure.

Kingsmill J. and therefore it items clearly a Departure, Quod Nota. Br. Departure de fon ple, pl. 12. cites 21 H. 7. 25.

S C. cited per Cur. Pl. C. 105, b. Mich. 2 Mar. in Cafe of Fulmerton v. Seward, and said it was a Departure; because by the Aworwy it shall be inferred that the Father was killed in War, and that the Grant was good by the Common Law, whereas now by the Rejoinder the Defendant does not maintain it, but would enable himself by the Statue Law. — Litt. Rep. 215. cites S C.

41. Forfeiture of Marriage; the Plaintiff counted that the Father of the Defendant held of him in Cheapcy and died in his Hermage, and the Defendant said that his Father made Feoffment, Alleging he was in his Hermage, and the Plaintiff said that this Feoffment was to the Use of him and his Heirs, and to the Heir in Ward by the Statue 4 H. 7. and the Defendant said, that this Feoffment was to the Use of his Feme till he came to Twenty-one Years, and after to the Use of the Heir in Tail and Remainer over &c. the Remainer over in Fee to his Right Heirs. And per Fitzherbert and Willoughby clearly this Rejoinder is a Departure; for he might have pleaded this Matter at first and did not, Quod Nota. Br. Departure de fon ple, pl. 1. cites 27 H. 8. 3.

42. In Replevin, the Avenant set forth, that long before the taking one J. S. was seized of the Lands in Fee, and made a Lease to the Avenant for Forty Years, and sworn Damage Feoffant; the Plaintiff replied, that the said J. S. was only Tenant in Tail &c. and conveyed the Tenant to himself as Heir in Tail, and that he entered upon the Lease &c. the Defendant rejoined, that the said J. S. referred a Rent on the said Lease, which Rent the Plaintiff, as Son and Heir, had accepted after the Death of his Father, Judgment &c. And this was held a Departure. The Reporter adds, Quaere bene. D. 95. b. pl. 49. Mich. I M. Anon.

Rejoinder, he sets forth the Acceptance of the Rent referred upon a Lease made by the Defendant in Tail.

43. Lease for Years by Indenture without Impeachment of Waifs, in which the Defendant covenanteth that at every Fall of Wood he would make a Fence to face the Spring, and gave Bond for Performance of Covennants; in Debt brought on this Bond, the Defendant pleaded, that he had not felled any Wood &c. the Plaintiff replied, and sets forth, that he had felled two Acres of Wood, but had not made any Fence to give the Spring; the Defendant rejoined, that he had made a Fence &c. and so to Huce; This was held a Jecordial and a Departure. D. 253. b. pl. 101. Trin. 8 Eliz. Anon.

44. In Trespass for chasing his Beasts in Berkshire, Defendant justified Damage Feoffant; the Plaintiff replied, that afterwards he drove the Cattle into Oxfordshire and sold them, Defendant demurred, and the Declaration was in Berkshire, yet the Sale made him Tort-Fearor ab Intito. For where the Replication maintains the Title and only removes the Impeachment, it is good. Arg. Litt. Rep. 215. cites Mich. 23 & 24 Eliz. C. B. Rot. 2297. Pledall v. Clark.

45. Debit upon a Bond for Performance of an Accord, which was to pay to the Plaintiff 10l. and 10 pennies other Things. The Defendant pleaded Performance, and showed How. The Plaintiff replied, and alledged the Breach in Non-payment of the 10l. The Defendant rejoined, that he tendred in the Plaintiff, and he refused it. It was the Opinion of Dyer, that this is a Departure; For in the Bar the Defendant pleads Performance, and shew'd How; and now in the Rejoinder, he pleads a Tender and Re-julal.
Departure.

It was full, which is not a Performance, though it is not any Breach, of the


For the pleading Performance is the same Thing as pleading Payment &c. and then when he rejoins,

that he is ready to pay &c. he by this relinquishes his first Plea, and Judgment for the Plaintiff. Sid


46. Trespa is for entering into his House, and breaking his Close; the De-

fendant pleaded, that it was his Freehold; the Plaintiff replied, that the

Place and Close in which the Trespass was supposed to be done, of a

Humus Measuring and so made a Title to the Measuring. Upon Not Guilty, it

was found for the Plaintiff, but because he made Title in his Replication
to the Measuring only, and did not maintain his Declaration, which

was for the Measuring and Close, Judgment was, Quod nil capiat per

Billam. But the Reporter says, Quezre, if it amounts not to a Disconti-

nuance of the Close only, and so help'd, by Verdict. Goldsb. 139, pl.

69. Hill. 43 Eliz. Anon.

47. In Case for taking Toll of the Plaintiff for Passage over the Bridge

of W. Schooling a Title by Letters Patents 20 H. 6. to All Souls College

in Oxford for them their Tenants and Farmers to be quit of Toll, letting

forth, that he was Farmer to the College &c. the Defendant pleaded in

Bar the Statute 28 H. 6. of Reclamation of all Liberties &c. granted by

him; the Plaintiff in his Replication set forth the Statute 4 H. 7. by which

the Letters Patents granted by H. 6. to the College were made good. Non-

Obstante the Statute 28 H. 6. &c. and upon Demurrer it was objected, that

this Replication was a Departure from the Declaration, but ad-

judged, that it is not; for there is not any new Matter contained in the

Replication different from what was in the Declaration, for the

Plaintiff's Title still remains upon the Letters Patents, and relies up-

on it; and the Title shewn in the Declaration and Replication, is all


Wood v. Haukshead.

Non, as shewn to the Court, but mentions it as Mich. 42 & 43. Eliz. Rot. 597, by the Name of Wood-

head's Cate, and that it was held to be no Departure, but, as it were, a Contention and Avoiding——


48. If a Man pleads Performance of Covenants, and the Plaintiff replies,

that he did not such an Act according to the Covenant, the Defendant

says, that be offered to do it, and the Plaintiff refused it, this is a Depart-

ure, because the Matter is not purfuant; for it is one Thing to do a

Thing, and another to offer to do it, and the other refused to do it; there-

fore that should be pleaded in the former Plea. Co. Litt.

204. a.

49. When a Man in his former Plea pleads an Estate made by the

Common Law, in the second Plea regularly he shall not make it good by an

Act of Parliament. So when in his former Plea he intimates himself gene-

rally by the Common Law, in his second Plea he shall not enable himself by a

Custom, but should have pleaded it first. Co. Litt. 304. a.
Departure.

547

the Custom he might make a Covenant which should bind him; but the Reporter says, Quære of this Opinion, for that many doubt of it.

The Rule was agreed, that upon a Declaration grounded upon a Fact at Common Law, one cannot maintain it by Replication of a Custom or Statute; As in Covenant upon an Indenture of Apprenticeship, the Defendant pleads Infancy &c. the Plaintiff cannot maintain his Declaration, by saying, that there is a Custom that Infants may bind themselves Apprentices &c. 2 Ld. Raym. Rep. 565. Parish. 2 Ann. B. R.

50. In Trespass forcharging his Beasts, 14 May, 1 Jac. the Defendant justified as for Eqray; and that 16 May, 1 Jac. be deliver'd them. The Plaintiff replied, that 15 May be labour'd and worked them. The Defendant demurred. This was held no Departure, but the Working maintaine'd the Trespass done the 14th, and made him a Trespassor ab Initio. Arg. Litt. Rep. 215. cites Hill. 4 Jac. Bagshaw v. Gower. Cro. J. 147. pl. 6. S. C.


51. Debt upon Bond for Non-performance of an Award; the Defendant pleaded, that the Award was, that he should release all Suits to the Plaintiff, which he had done; the Plaintiff replied, that it was true such an Award was made, but that the Arbitrators did farther award, that the Defendant should pay unto the Plaintiff 15 l. at such a Time and Place, alike for, that they had made such an Award only, as the Defendant had alleged; the Defendant rejoins, that true it is, that they did award, that he should pay the Plaintiff such a Sum; but they did farther award, that the Plaintiff should release to the Defendant all Actions &c. which he had not done; and upon Demurrer, the Court feem'd clear of Opinion, that the Rejoinder of the Defendant is a plain Departure: For that he might (and ought) to have shew'd all this at the first. 2 Bulst. 38. 39. Mich. 10 Jac. Linley v. Aiton.

52. On Trespass for an Assault, Battery and imprisoning the Plaintiff on the last Day of October, 6 Car. at W. the Defendant justified, for that 13 Aug. 6 Car. a Supplicant issued out of Chancery, and by a Warrant from the Sheriff, &c. on the 21st Day of September, arrested the Plaintiff, and detained him two Days, and then delivered him to the Sheriff &c. the Plaintiff replied, and confesst'd the Writ, Warrant and Arrest 21 Sept. and imprisonment for two Days, and then sets forth, that afterwards he gave Bail to the Sheriff, and was discharged; and that the Defendant opposes vis. Fred. 1 Die Oct. 6 Car. assailed and imprisoned him of his own Wrong; and upon Demurrer, all the Court conceived, that the Replication was not good, by its varying from the Day in his Declaration, and is a Departure therefrom. Cro. C. 228. pl. 6. Mich. 7 Car. B. R. Tyler v. Wall.

53. In Replevin the Defendant avow'd the taking in O. for a Rent Charge granted out of the Manor of S. which extended into S. and O. The Plaintiff replied, that he recovered in Dowser, and had a third Part &c. assign'd in S. and so was seised as Tenant in Dowser, till the Defendant disreign'd her Beasts in a Place called the Warren in S. Upon Demurrer the Court held, that this was a Departure; and agreed, that in every Replication there ought to be a Vill, and a Lien Conus, and that here the Warren is the Lien Conus, and S. is the Vill, and therefore cannot be in O. where the Avowry is made, because one Vill cannot be in another Vill, nor one Lien Conus in another Lien Conus, and here O. shall be intended a Vill; then in this Replication S. must be a Vill, or no Vill, if it be not a Vill, the Replication is not good, because a Vill is wanting; and if it is a Vill it cannot be in O. because one Vill cannot be in another; and Judgment for the Defendant. Sid. 9. pl. 5. Mich. 12 Car. 2. C. B. Welton v. Carter. 45. If
54. If one pleads a Statute, and the other replies, that it is re-pealed, the Defendant may re-join, that it is revived by another Statute; Agreed per Cur. Lev. 81. Mich. 14 Car. 2. B. R. in Cafe of Mole v. Wallis, or, Bold v. Warren.


55. If Defendant pleads a Statute, and the Plaintiff replies, that it was to continue to such a Time only, which is expired, the Defendant may re-join, that the first Statute was afterwards made perpetual; because it is no more than fortifying the first Matter; Agreed per Cur. Lev. 81. Mich. 14 Car. 2. B. R. in Cafe of Mole v. Wallis, or, Bold v. Warren.

Raym. 22. S. C. adjudg'd a Departure.


S. C. of Ed. Ch. J. Kelvyn's, then in his Hand, and is according to what is cited Keb. 999.—It is no Departure, for it is only an Answer for the Time to the Plea, which before was not material. Lev. 111. Hill. 15 Car. 2. C. B. cites it in the Cafe of Lee v. Rogers as adjudg'd, as he heard, in the Cafe of Bremion v. Evelin.

S. C. of Lee v. Rogers was cited per Parker Ch. J. in delivering the Opinion of the Court, and Judgment accordingly, but he cited it by the Name of Lee v. Raynes, And he said, that in the old books indeed, this would have been a Departure, and cited 22 Aff. 86, and that unites that what, strictly speaking, is a Departure, be some Times allowed, unites the Plaintiff (where the Defendant by his Juxtaposition, makes the Time or Place material) may follow the Defendant's Plea, though it leads him to another Time or Place, all that Doctrine, That in transitory Actions where Time and Place are not material the Plaintiff may declare at any Time or Place, must fall to the Ground. Hill. 5 Geo. 1. B. R. 10 Mod. 359. Cole v. Hawkins.

Raym. 94. S. C. it was inferred that it was a Departure, because the Defendant cannot re-join concerning an Award, when he has pleaded before, that there was no Award, and for the Departure Judgment was given for the Plaintiff. —Keb. 678. pl. 72. S. C. adjudg'd for the Plaintiff. —Lev. 127. S. C. and per Cur. Nul Award is no Award at all, and hold this a Departure. —Judgment for the Plaintiff. —Ibid the Reporter adds, that Judgment was given in a Nul Award. —Mich. 14 Car. 2. R. Horfe v. Launder.

56. In Covenant &c. the Lessor pleaded Performance generally; the Plaintiff replied, and assigned a Branch in Non-payment of Rent; the Defendant re-joined, that the Plaintiff had ejected him, and held him out &c. upon several Arguments the Court held, that this is a Departure, because the Rejoinder is not in Affirmance of the Plea; but the Defendant ought to have pleaded this Special Matter at first. Sid. 77. pl. 10. Pash. 14 Car. 2. B. R. Granger v. Henborow.

57. Affirmavit upon a Promisie 1 May, 3 Car. 1. for Money lent, Defendant pleaded, that the Writ was first brought 4 Feb. 14 Car. 2. and that he did not promise within six Years before the said 4th of February. After Verdict it was moved in Arreit of Judgment, that the Declaration is a Departure from the Count. But adjudg'd, that it was not a Departure, for the Time put in the Declaration was not material, For he might declare of Affirmavit at any Time. But when the Defendant made the Time material by his Plea, the Plaintiff may by his Replication answer to this Plea, to maintain his Action for the Time, which before was not material, and the Plaintiff had Judgment. Lev. 110. Mich. 15 Car. 2. B. R. Lee v. Rogers.

58. In Debt on a Bond condition'd to perform an Award, the Defendant pleaded Nullas sequent Arbitrium. The Plaintiff replied and plead'd as Award. The Defendant rejoin'd, that there were other Things submitted, and so no Award. Adjudg'd on Demurrer, that this is a Departure; For the Defendant ought to have pleaded this Special Matter in his Plea at first. Sid. 180. pl. 16. Hill. 15 & 16 Car. 2. B. R. Morgan v. Man.
59. In Assumpsit for 5000 Royds, the Defendant pleaded the Statute of
Limitations; the Plaintiff replied, and tendered an Issue as to Parcell, and
as to the Refuses, he said, the Defendant was indebted to him at Teneriffe
in the Canary Islands, in Warda de Cheap, &c. and upon a Demurrer to
judge, this Replication, it was objected, that it is a Departure, because the
Plaintiff had declared for a Debt due in London, and in his Replication he
alluded it was at Teneriffe; but adjudged that it is not a Departure, be-
cause it is a Personal Thing, for he who is indebted to me in one Place,
is in every Place. Sid. 223. pl. 24. Mich. 16 Car. 2. B. R.
Bevin v. Chapman.

60. Debt upon a Bond. The Condition was to save a Parish basket
from the Charge of a Ballard Child. The Defendant pleaded non Damini-
catus. The Plaintiff replies, that the Parish had laid out 3s. for keeping
the Child. The Defendant rejoins that he tendered the Money; and the
Plaintiff paid it as injury sua peptra. Whereupon it was demurred,
liad, the Rejoinder is a Departure; you should have pleaded
thus, viz. that Non tuit damniificat till such a Time; and that then you
offered to take care of the Child, and tendered &c. Judgment for the
Plaintiff, Nifi &c. Mod. 43, 44 pl. 97. Hill. 21 and 22 Car. 2. B. R.
Richards v. Hedges.

joynatur. Ibid. 619. pl. 7. S. C. held a Departure, and Judgment for the Plaintiff.

61. Debt upon Bond conditioned, that if the Defendant sent the
Plaintiff's Account to a Brewer's Clerk, and performed such Covenants, then
the Bond to be void; the Defendant pleads Performance of all &c. The Plain-
tiff replied, That one of the Covenants was to give to the Plaintiff a true
Account of all Money which should receive &c. which he had not done;
the Defendant rejoined and confessed that be received such a Sum &c. and
that he laid it up in the Plaintiff's Wardrobe, it was stolen by certain
Malesfactors, to him unknown, et hoc paratus et verificare; upon De-
murrer it was objected, that it was a Departure from the Plea, because
that was, that he performed all the Covenants, one whereof was to ac-
count, but the Rejoinder is rather an Excuse why he should not ac-
count; adjudged no Departure, but a Forfeiture of the Bar, for shew-
ing that he was robbed, is giving an Account. Vent. 121. Patch. 23

Eto paratam eft Verificare; upon which the Plaintiff demur'd. The Court held it no Departure. And as
to the Conclusion, they held it better than to have concluded to the Country; because, now the
Plaintiff has Liberty to traverse the Robbery; Sd adjudicat. But afterwards in Term Term, the
Demurrer was waived, and Issue taken upon the Robbery —— 2 Leb. 761, pl 50. S. C. says, that
in the Rejoinderer was expressed, that he gave Notice of the Robbery the next Day after the Night
it was done in, and being then required to account, he did thus give an Account; and the Court held
it no Departure. —— S. C. circa 6 Mod. 151, and allowed't to be Law; and that the rejoining that
he was robbed of the Money, whereof he gave Notice to the Plaintiff, certainly maintains the first
Plea; For it was a legal Account of it.

62. Debt upon Bond for Performance of Covenants, the Defendant in his
Plea set forth the Intenature, which was to return all the Effects of Goods
sent to Barbadoes, and that he had performed all the Covenants; the
Plaintiff replied, that such Goods were sent, of which he had not returned
the Effects; the Defendant rejoined, that he had no Order to return them,
and upon Demurrer this was adjudged a Departure, because there was
nothing of Order mentioned in the Covenants; But Per Hale if the Coven-
ant had been to return them on Order, the Plea had been good. The
Reporter adds two Queres. 2 Leb. 61. Mich. 24 Car. 2. B. R. Wood
v. Kirkham.

63. A Covenant is to pay, the Defendant pleads Performance, the Plain-
till replies that he did not pay; The Defendant rejoins that he tendered. Rec. in
This B. R. 195.
Departure.

Winchelsea (County of) v. Higgins, S. P.  adjudged for the Plaintiff, that it is a Departure; for the Matter in the Rejoinder going only by Way of Excuse.  Tender and Refusal not being Payment, but only discharges the Party from Damages.

In the Case above was cited the Case of [Mr. v. Mr.], speaking the same Term in C. B. where the Action was Debt on Bond, with Condition to save the Plaintiff harmless from Tonnage of Coals, the Defendant pleaded Non Damnificatus; the Plaintiff replied, a Differs taken for it; the Defendant rejoined, that none was due.  Upon this there was a Demurrer; but that Court held it to be no Departure.  The Ch. J. agreed that Case to be Law; and said, that the Rejoinder there fortified the Bar.

64. Debt upon Bond conditioned to pay such Sums as the Obligor should receive within 14 Days after Receipt at such a Place in W. as the Plaintiff (the Obliger) should appoint; the Defendant pleaded Payment; the Plaintiff replied Non-payment of such a Sum received by the Defendant at a Place by the Plaintiff appointed; the Defendant rejoins, that the Plaintiff had appointed no Place; upon Demurrer this was adjudged a Departure, for the Defendant in his Plea ought to have pleaded first, that he had paid all but such a Sum, for which, as yet, the Plaintiff had appointed no Place of Payment.  2 Mod. 31. Patch. 27 Car. 2.  C. H. Sams v. Dangerfield.

65. In Debt on an award, the Defendant pleaded Nullum secernunt Arbitrium, Plaintiff replied, and set forth the Award, that the Defendant should pay 20l. to the Plaintiff in Satisfaction of all Trespasse; and likewise that they should give mutual Releaves to the Time of the Award, and alligns Breach in Non-payment of the 20l. Defendant rejoins, that there were Trespasse done between the Submission and the Award.  All the Court were of Opinion, that when the Plaintiff in his Replication set forth the Award, it was no Departure to shew that Trespasse were committed betwixt the Submission and the Award; for by that the award appears to be void, and so fortifies the Bar of Nullum Arbitrium.  Freem. Rep. 265. 266. pl. 290. Mich. 1679. Ayland v. Nicholls.

66. Debt upon a Bond for Performance of an Award, the Defendant pleaded no Award made; the Plaintiff replied and set forth the Award made, that the Defendant should pay the Plaintiff 250l. in Right of his Wife, as a full Matter of the Share of the Estate of H. P. her Father, and that upon Payment thereof the parties should seal general Releaves, but that the Defendant has not paid the Money awarded; the Defendant rejoins, and sets forth that he and the Plaintiff differed about all the personal Estate of H. P. which they submitted to Arbitrators, but that the Award by them made was not of all the Personal Estate of the said H. P. Upon a Demurrer the Court was clear of Opinion that this Rejoinder was a Departure from the Plea; and the Plaintiff had Judgment.  Lutw. 332. 335. Mich. 1 Jac. 2. Mitchell v. Pope.

67. Debt upon Bond, conditioned, that if the Defendant paid the Plaintiff or his Attorney all the Charges of a Suit &c. with which the said Attorney should Charge the Plaintiff, and should discharge the Plaintiff thereof, then the Bond to be void; the Defendant pleads, that he had paid to the Plaintiff all the said Charges; the Plaintiff replied, that the Attorney had charged him with 4l. 16s. which the Defendant had not pay'd, nor discharged the Plaintiff thereof; the Defendant rejoins, that the Attorney had not delivered to the Defendant any Bill of Costs under his Hand, as by the Statute required; Upon Demurrer the Court held the Plea to be too general; for he should have shewed that the Attorney charged so much and no more, which he had paid, and all agreed that the Rejoinder was a manifest Departure from the Bar, for he pleaded, that he paid all the Charges &c. and by his Rejoinder he would excuse the Non-Payment, because the Attorney had not delivered him a Bill of Costs under his Hand.  Lutw. 419. 421. Trin. 4 Jac. 2. Parkes v. Middleton.

68. Trespasse
68. Trespass for breaking his House, and taking and carrying away his Goods; the Defendant justified the taking and carrying away Nomine Disfruits for Damage feaftant; the Plaintiff replied, that after the Distiff's aforesaid, viz. codem Die &c. the Defendant converted them to his own Use; upon Demurrer it was inquired, that this Replication was a Departure; for it does not make good the Plaintiff's Replication in Trespass, but hews rather that the Plaintiff should have brought Trover and Conversion; Sed non allocatur; for he that abuses a Distiff is a Tref- pasfor ab Inicio, and therefore if in Trespass the Defendant justifies No- mine Distiffions the Plaintiff may shew an Abuse and it is no Departure, but makes good his Declaration, and so in this Case; for the Converting is a Trespass or Trover at Election, and the Matter disclosed in the Replication makes good this Election; For it proves a Trespass as well as a Trover. 1 Salk. 221. pl. 1. Hill. 2 W. and M. in C. B. Gargrave v. Smith.

69. In Debt upon Bond for Performance of Covenants in a Lease, one 12 Mod. 54; whereof was to pay so much clear of all Taxes, the Defendant pleaded Per- formance; the Plaintiff replied. Non-payment of so much for half a Year's Rent; the Defendant rejoined, that so much was paid in Money, and so much in Taxes upon the Statutes for lying 43. per Pound on Land, which being allowed amounted to the whole. Holt Ch. J. Upon Demurrer held that the Matter of this Rejoinder being by way of Excuse, ought to have been set forth in the Bar; but as it is here, it is a Departure; for whereas he said at first, that he had performed the Covenants, he fays now, that he is not obliged to perform them. Judgment for the Plain- tiff 1 Salk. 221. pl. 2. Trin. 5 W. & M. in B. R. Arran (Countefls of) v. Cripke.

70. In Trespass for taking his Cattle in the King's Highway, the De- fendant justified the taking &c. Damage-feaftant; the Plaintiff replied, that Time out of Mind &c. there had been a certain House and Foot way pro omni- nibus inter such and such a Place, and that he drove his Cattle over the Way, and that en Passant they eat &c. The Defendant rejoined, that the Cattle were Connemont in via predilicta. Ifue was join'd thereupon and found for the Plaintiff. It was moved for a Repleader, the Trespass tried be- ing not the same Trespass for which the Plaintiff had declared. Per Holt Ch. J. This was a tranitory Trespass and the mentioning it as done in alta via Regia was nothing to the Purpose, but was idle, out of time and mere Surplufage; and therefore the Plaintiff, by following the Defendant to another way in his Replication, does not depart, for a Departure must be from something material; and when the Ifue is taken upon the Comorancy, it admits the Plaintiff had a Way, but that he continued longer than he should in it. Judgment for the Plain- tiff. 1 Salk. 222. pl. 3. Patch. 6 W. and M. in B. R. Primer v. Phil- lips.


72. Case &c. for Work done, and six several Promises were all laid upon 16th October, the Defendant pleaded Infra Eatasetum to all generally, the Plaintiff replied as to two of the Promises precludi non debit &c. becau- se the Defendant was at that Time of full Age, and as to the rest they were for his necessary Apparel; Defendant demurred, alldging that it was re- pugnant, because the Defendant could not be of Age, and not of Age at one and the same; but adjudged, that the Time was only a Circum- stance and not material nor Part of the ifue, nor is the Plaintiff tied to a practive Day in his Declaration, and if the Defendant, by his Plea, forces him to vary, it is no Departure. 1 Salk. 223. pl. 5. Patch. 8 W. 3. B. R. Howard v. Jennison.

Days, the Plaintiff may lay them all at one Time, and if he is forced from his Day, it is no Departure. Judgment for the Plaintiff.
552

Departure.

Lutw. 111. 114. Laugh to v. Ward. & C. 2 Lutw. 1435. 1437. S. C. re- solved accordingly — If De- fendant by his Plea makes a tri- butory Action local, the Plaintiff may an- swer the Plea, and it will be no De- parture. As in Tres- pas by Executor de Bonis af- portatis in Fili Trestatoris apud East R in Nottinghamshire, the Defendant pleaded, that A was seized of a t- late called W in North H. in the same County, and made a Lease thereof to the Defendant, by virtue of which he entered, and at Lease he justified the taking of the Goods, as Damage featur, and transferred the taking at East R. The Plaintiff replies, that before A was seized of that Place &c. in Fee, J. S. was seized of the Place, &c. in Fee, and leased to the Plaintiff's Trestator, who entered and put in his Goods, that the Defendant of his own Wrong took them, oblige loe, that A. was seized in Fee prow; the Defendant demurred, replying his to be a Departure, but Judgment was given for the Plaintiff, for the Rejoinor set off. Arg. Ld. Raym. Rep. 6. Mich. 8 W. 3 in Case of Serle v. Darford. cites Trin. 13 Car. 2. C. B. Rot. 795. Taylor v. Gabetus.


74. Trespas &c. for an Assault &c. at H. the Defendant pleaded that he was seized of a Close of T. and that the Plaintiff entered, and refusing to Depart, the Defendant, without manus imposuit on him to maintain his Possession, and traversed the assault &c. at H. The Plaintiff replied, and claims a Way over the Close to T by prescription and that the Defendant adus &c. did break the Plaintiff's Head, and traversed that he was not manus imposuit &c. prout &c. and upon Demurrer. Exception was taken that this Replication was a Departure from the Declaration which was of an Assault &c. at H. and the Replication admits that it was at T. but it was anwered that it is a Transitory Action, and if the Defendant makes it local by his Plea, the Plaintiff may an- swer the Plea, and it will be no Departure. And of this Opinion was the whole Court; for in tri- butory Actions the Plaintiff may lay it where he pleases, and if the Defendant makes it local by his Plea, the Plaintiff may vary his Replication either in Time or Place. And Judgment for the Plaintiff. Ld. Raym. Rep. 120. 121. Mich. 8 W. 3. Serle v. Darford.

75. If a Man lays a Day in his Declaration that is not material, and the Defendant by his Plea makes it material and then the Plaintiff in his Replication varies from the Day in the Declaration, it will be a Departure, other wise if the Day had not been made material by the Plea. Per Holt Ch. J. 6 Mod. 115. Hill 2 Ann. B. R. Anon.

76. In Trespas, Assaults, and Battery, if the Plaintiff lays the Assault one Day, and the Defendant pleads a special Matter that justifies at ano- ther Day, whereby the Day becomes material, the Plaintiff may re- ply an Assault at another Day; and it is no Departure, although it has been otherwise held, for the Day is not material, and the Plaintiff may maintain his Count; Per Holt Ch. J. 2 Ld. Raym. Rep. 1015. Hill 2 Ann. Anon.

77. In Debt on the Recognizance of the Bail, the Defendant pleaded that there was no Capias ad Satisfaciendum presented and returned against the Principal before the Day of exhibiting the Bill against the new De- fendant. The Plaintiff replied, that a Capias ad Satisfaciendum was fined out, and returned before the exhibiting this Bill. Defendant rejoined that the Defendant in the first Action brought a Writ of Error on the Judgment before the Ca. Sa. was presented returned and filed. Upon De- murrer it was adjudged for the Plaintiff, because the Rejoinder is a Departure from the Bar. 2 Ld. Raym. Rep. 1256. Pach. 3 Ann. B. R. Parkins v. Willon.

78. In Debt on Bond conditioned that J. L. should be a true Prisoner without making any Escape. The Defendant pleadst that J. Larkin did
Depositions.

The Plaintiff brings an Action of Dett upon a Bond; Defendant pleads the Condition, which was that he should execute such an Office without the Affiance of the Plaintiff, and says, that he did execute it without his Affiance; Plaintiff replies that he did not execute it without his Affiance; Defendant rejoins, and says, that if the Plaintiff did give him his Affiance, it was voluntary. To which the Plaintiff demurs. And the Demurrer was held to be good, for that the Rejoinder was a Departure from the Plea. Barnard. Rep. in B. R. 4. Mich. 13 Geo. Whight v. Clever.

Defendant's Books out of his Custody without his Consent from the 22d of April 1725, to the 24th of June next following, Et Libros illos tempe abinda detinuit, cussutorit, & illos eidem William deliberare decernit, per quod the Defendant, after the detaining of those Books out of his Custody, the Money &c. fully could not collect; for Plea says, Quod voidum est that the Plaintiff in propriis Personis ibus exercitavit Officium prædictum a prædicto 22 Die Aprilis Annos supradicto usque prædictum 24 Dies Junii fecit quod prædictus, the Plaintiff voluntarie sustinet & Officium prædictum a tota Tempore prædicto exercuit &c. Rejoinder for Plaintiff, that the Defendant paratus est collabatur &e. The Plaintiff demurred specially, and shewed for Cause, that the Rejoinder was a Departure from the Bar; the Defendant joined in Demurrer. The Court was of Opinion, that the Rejoinder was not; because there did not amount to shew, that the Defendant had executed the Office, and the Defendant ought not to have joined issue with the Plaintiff upon the Offer made by him in his Rejoinder; and given this Matter in Evidence; but if the Fact set out in the Rejoinder was only an Exeque for the Defendant not having executed the Office as the Court took it to be; then it was a Departure from the Bar; and the Defendant ought not to have pleaded, that he did execute the Office; and to have rejoined this Matter; but ought to have pleaded this Matter at first Judgement for the Plaintiff, Nov. 3, 1726.

For more of Departure in General, See other Proper Titles.

(A) Depositions read in what Cases.

1. A Person was examined as a Witness in a Cause, and after became Plaintiff for the Interest in that Business; allowed and not to be suppressed. Toth. 211. cites 9 Car. Drury v. Drury.

2. A Witness examined for the Plaintiff, and to be Cross examined for the Defendant, but before he could be Cross examined, died; yet this Court
Depositions.

Court ordered his Depositions to stand. 2 Chan. Rep. 18. 20 Car. 2. & 22 Car. 2. Mofely v. Maynard.

3. Proofs in an Original Cause were not allowed to be read on a Bill of Review. 2 Chan. Rep. 18. 20 Car. 2. & 22 Car. 2. Mofely v. Maynard.

4. Depositions taken in either Cause, ordered to be used in both, which Order was after Publication in the first Cause, wherein the Proof was made, but before Publication in the second Cause. Chan. Cafes 236. Mich. 26 Car. 2. Norcliff v. Worley.

5. Depositions taken in a former Cause cannot be read in another Cause against one that does not claim under the Party against whom those Depositions were taken; but Serjeant Phillips said, that it is a Common Cause, that if a Legatee bring a Bill against the Executor and proves Affairs, another Legatee, though no Party, may have the Benefit of those Depositions. Vern. R. 413. Mich. 1866. Coke v. Fountain.

6. Creditors of L. obtain a Decree for Payment of their Debts, and to let aside Conveyances got by Fraud, and Sir H. J. and the Legatees are Defendants. The Legatees having a Bill against Sir H. J. the Question was, if the Depositions in the former Cause could be read in this; for Cur. the Question being the same in both Causes, and Sir H. J's Defence the same, they ought to be read. 2 Vern. R. 417. Mich. 1793. Nevill v. Johnston.

(B) Depositions in Chancery read at Law; in what Cases.

1. Though a Bill be dismissed yet the Depositions taken on such Bill are to be made Use of here or at Law, especially the Bill not being dismissed on the Point of Right, but for Matter of Form. And it is usual and frequent to Use Depositions taken in one Cause, if for the same Matter that is in Controversy in another, especially if against the same Defendant, which was admitted by the Counsel of the other Side. Chan. Cafes 174, 575. Trin. 22 Car. 2 Arg.

2. But as to the using Depositions in a Cause dismissed, this Difference was taken, that though where a Cause is dismissed, the Matter of it not being proper for Equity to decree, yet the Fact in this Cause proved may be used as Evidence in that Fact between the same Parties whenever it shall come in Question again. Chan. Cafes, 175. Arg.

3. But when a Cause is dismissed not upon that Ground but upon Irregularity: as for that it comes by Revivor, when it should come by Original Bill, so that in Truth there never was regularly any such Cause in Court, and consequently no Proofs, those Proofs cannot be used; for Proofs cannot be exemplified without Bill and Answer, nor can they be read at Law, unless the Bill on which they were taken, can be read. Arg. and so it was afterwards ruled about Mich. Term. 1699. by the Ld. Keeper. Chan. Cafes 175. in Cafe of Backhouse v. Middleton.

(C) De-
Depositions. 555

(C) Depositions. Suppressed.

1. If Witnesses in Chancery depose contrariety or be false in Parcels they shall be rejected, and the Party commanded to bring other Witnesses. Br. Concl. Conf. 16. E. 4. 9.

2. When Depositions are published, yet new Proofs may be examined and are called Proofs Obornment; but those are only Explanatory of the first Proofs: As if it was depose that A. and B. did such a Thing, and this is obliquely said without saying how he knows it, and this is published the Dependent being dead; A. and B. may depose that they were present &c, according to the first Deposition &c. But if they depose any thing contrary, and which alters any Part of the Matter this Deposition is void. Kew. 96. a. pl. 4. M. 22. H. 7.

3. A. exhibited his Bill against B. by Practice of Purpose to examine Witnesses, and did examine Witnesses accordingly, whereas the Cause chiefly concerned W. R. and S. T. and therefore ordered that the Depositions should be suppressed, and the said R. and T. shall exhibit a Bill into this Court, against all such as they think to be Parties to the fraudulent abusing of this Court. Cary's Rep. 79. 80. cites 19 Eliz. Wallis v. Walford.


5. Depositions suppressed, because the Solicitor's Clerk in the Cause, did write as a Clerk in the Execution of the Commission. 2 Chan. Rep. 393. 2 Jac. 2. Newe v. Foot.

(D) Depositions supplied or amended.

1. A FTER Publication the Court would not amend a Deposition mislaid. Toth. 145. cites 39 and 40 Eliz. Chamberlain v. Pope.

2. A Man after Examination supplies his Deposition, at Informandum Concomitant. Toth. 145. cites 5 Car. Wynn v. —

3. A Witness having committed a Mistake in his Examination before Commissioners, apply'd to them to rectify it, but the Commission being returned to London he went there, made Oath of it, and that he was suppressed by an faulty Examination; but the Commission not being opened, it was returned back to the Commissioners with a special Commission to open it, and permit the Witness to rectify his Mistake; the special Commision being executed and returned, it was moved to suppress the Depositions as unduly taken, and that no such special Commission ought to have been, and they were suppressed. N. C. R. 92. 15 Car. 2. Randall v. Richards.

Court deposes that the Commissioners have set down their Deposition, otherwise than they did depose; therefore it is ordered those Depositions shall be void, and the same Witnesses shall be examined again. Cary's Rep. 66. cites 2 Eliz. Fol. 145. Peacock v. Collins.

4. The
Depositions.

4. The Lord Chancellor took Notice of what dangerous Consequence it would be, that if after Publication passed, and People seeing where a Cause pinch'd they should then be at Liberty to look out Witneffes to boulter up the faulty Part of the Cause, the necifary Conquence would be Perjury, Vern. 47. Pach. 1682. In Cae of Jones v. Purefoy.

5. After a Witneff is fully examined, the Examinations are read over to him and the Witneffs is at Liberty to alter or amend any thing; After which he figns them, and then, and not before, the Examinations are compleat and good Evidence. Wins's Rep. 415. Pach. 1718. by the Reporter.

6 Therefore where a Witneff was examined, and before figning his Examination died, the Master of the Rolls upon advising with a Matfer in Chancery then in Court denied the making uf of the Depofitions, as being not perfeét. Wins's Rep. 414. Pach. 1718. Copeland v. Stanton.

7. But where after an Order for Publication, Defendant examined a Witneff and then perceiving the Irregularity (it being after Publication) the Defendant on the usual Affidavit by himself, his Clerk in Court, and Solicitor, that they had not, nor would fee any of the Depofitions, get an Order to re-examine this Witneff; but before Re-examination the Witneffs died; upon Affidavit of this, Ld. C. Parker ordered that the Defendant might make Ufe of the Depofitions, the Re-examination of him being prevented by the Act of God. Wins's Rep. 415. cites Mich. 1720. Debrox v. ——.

8. On a Petition to amend the Depofition of a Witneff, who, being examined, fware only, that he was induced to believe, that he did not express himself in the Manner the Depofition was taken, and was positive he did not intend or mean to swear as the Examiner had taken it, but really as in the Amendment defired. Lord C. King faid, that where it appears to the Court, that either the Examiner is miftaken in the taking, or the Witneff in making, the Depofition, he thought it was for the Advancement of Truth and Justice to amend it, and the sooner the better, in regard of Death or Abience, and it would be unjust to pin a Witneff down to a Miftake by denying to rectify it, and as to the amending it alter Publication, it could not be known before and order'd it to be amended, and the Witneff to fwear it over again. W. Wins's Rep. (646.) Mich. 1731. Grielles v. Gannell.

For more of Depositions in General, See Evidence, Examination, Hearing, and other Proper Titles.

Deputy.

(A) Who may make a Deputy.

Mo. 845. 1. A Constable may make a Deputy, and he may execute the Warrants directed to the Constable, and do other Things belonging to the Officer of Constable, though he is not sworn to execute
Deputy.

execute it well, as the Constable himself is. M. 13 Jac. B. R. and referred between Phelps v. Winchcombe for this is not any Judicial Office.

by the Equity of the Statute 7 Jac. cap. 5 may plead the General Issue. —— 5 Build. 77. 6 C. and the whole Court agreed, that a Constable might make a Deputy, but no Judgment given, the same being read (as the Reporter says he heard) by Agreement between the Parties. —— Roll Rep. 274. pl. 49. S. C. & S. P. and the Justices inclined that the Deputy of the Constable is within the statute 7 Jac. cap. 5, to plead the General Issue, because he comes in the Right of the Constable and represents his Person. —— 3 Salk. 252. pl. 8. cites S. C. —— As to the Point of the Constable's making a Deputy, which was mentioned in Sir Walter Vane's Case, Sid. 355. pl. 5. Hill. 19 & 20 Car. 2. B. R. the Court were not agreed in it norwithstanding the Case of Phelps v. Winchcombe was cited. —— Lev. 225. in Sir Walter Vane's Case, S. C. Twifden J. cited Hill. 9 Jac. Rot. 249 B. R. Phelps v. Winchcombe to be resolved that a Constable cannot make a Deputy; but that Justices e contra.

2. In Writ of Falsse Judgment it was assign'd for Error, that Justices came to the Sheriff to hold Plea of 1000 l. and he held it before his under Sheriff, and enter'd in the Roll that the Plea was held before him, and therefore it seems that a Judge cannot make a Deputy, but that an Officer may make a Deputy, as the Sheriff &c. may serve Capias by Bailiff or Servant, contra in Redziffen, Writ of enquiry of Wait &c. where he is Judge and Officer, quere for it was not adjudg'd. Br. Deputy pl. 19. cites 21. H. 6. 37.

3. Where Supplisravit comes to the Sheriff to take Surety of the Peace of J. N. and if he refuses, then to send him to the next Gaol, there it is agreed by 4. Justices that the Sheriff cannot make a Deputy to take the Surety but shall do it himself; for of this he is Judge but he may award a precept to another to arrest the Party, for of this he is Officer. Br. Deputy pl. 20. cites 9. E. 4. 31.

4. So in Redziffen this shall be judged by the Sheriff himself and the Coroners; But to make Execution, the Sheriff may award Precept to another. Note the diversity that Minister or Officer may make a Deputy contra of Judge or Justice. Ibid.

5. It was laid that a Judge or Justice of Record cannot make a Deputy; Contrary of the Sheriff who is an Officer. Br. Judges, pl. 11. cites 9. 4. 31.

6. Officer of Trust cannot make a Deputy unless the Grant be [by these Words] to exercise by himself or his sufficient Deputy. Br. Deputy, pl. 9. cites 11. E. 4. 1.

7. A Minorial Officer may make a Deputy, but he ought to make Returns in the Name of the Immediate Officer. Per Doderidge J. Roll Rep. 274. pl. 49. Mich. 13 Jac. B. R.

8. The Justices in Eyre could not make a Deputy at Common Law; but now they may by Statute, per Coke Ch. J. Ibid.

9. Sir W. V. having an Estate in the Manor of D. was chosen Reeve to gather the Lord's Rents, he moved for a Writ of Privilege, as a Captain of the Guards, and so his personal service requisite in the Court of the King, but the Writ was denied, because they all (but Twifden) held that he may make a Deputy Reeve. Sid. 335. pl. 5 Hill. 19 and 20 Car. 2. B. R. Sir Walter Vane's Cafe.

10. A Deputy cannot make a Deputy; because it implies an Affirmation of his whole Power, which he cannot assign over; But he may impover another to do a Particular Act. 1 Salk. 96. Patch. 13. W. 3. B. R. per Holt Ch. J. in delivering the Opinion of the Court in the Cafe of Parker and Kett.

11. Tenant for Life of the Bailiwick of the Savoy from the Crown made a Lease thereof for a Year to an Under-Deputy and adjudged good; For by the Statute 5 E. 6. cap. 16. all Officers of Fee are excepted, and so are all Sub-Grants and Sub-Demises thereof. 3 Salk. 252. pl. 7.
Spry, Deputy.


For more of Deputy in General, See tit. Officers &c. Letter (I) to Letter (M) Priviledge, and other proper Titles.

Defcent.

(A) Defcent by the Custom of Gavelkind or Borough English.


1. If the Custom of a Copshold be, That the eldest Daughter shall have the Land, the eldest Aunt shall not have it by the Custom, for she is not within the Custom. Patch. 8 Jac. 3. Ratcliffe and Chapman, per Curiam.

2. The youngest Brother shall not have Borough English Land, for he is not within the Custom. Patch. 8. Ta. 5.

S. C. cited by Holt Ch. J. Wms's Rep. 68. Hill. 1703. in delivering the Opinion of the Court in the Case of Clement and Scudamore.

3. If a Custom be, that if a Man dies without Heir Male, that his eldest Daughter shall have the Land, and if he hath no Daughter, that the eldest Sister shall have the Land, and if he hath not a Sister, the eldest Cousin; but if he hath an Heir Male, that he shall have it before any of them, and the Tenant of the Land hath several Daughters, but no Heir Male, and the eldest Daughter dies in the Life of the Tenant of the Land, having Issue a Daughter, this Grandchild is within the Custom, and shall have the Land by Defcent upon the Death of the Grandfather. Mich. 10 Jac. 25. 21. b. between Godfrey and Bullock, per Curiam.

And says, that by the Common-Law the Eldest Daughter has not the Preference before the rest, but all inherit equally; yet Custom may give the Inheritance to the Eldest Daughter, and then her Issue shall take it in Jure Representationis; And this is as strong as strong as a Defent in Borough-English.

4. By
Defect.

4. By Custum when one Brother dies without Issue all the other Brothers may inherit Gavelkind Lands. Co. Litt. 140. a. b. cites 23 All. 21.

5. There is a special Kind of Borough Englishe Land ; as it shall descend to the Younger Son if he be not of the Half-blood, but if he be, then to the Eldest. Co. Litt. b. cites 32 E. 3. Age. 81.

6. The Father being seised in Fee of Borough-Englishe after the Stat. of 27 H. 8. made a Proffment in Fee to the Use of himselfe and the Heirs Males of his body according to the Course of the Common Law, and afterwards died seised, leaving Issue two Sons ; It seemed to all the Board in Servants Inn, that the Younger Son shall have the Lands by Defect, by Virtue of the Custum, notwithstanding those Words. Dyer 179. b. pl. 45. Pach. 2 Eliz. Anon.

7. Where a Proffment is made of Borough-Englishe Lands upon a Condition to be performed, which was not done, the Heir at Common Law shall take the Advantage of the Non-Performance of such Condition, but the Younger Son shall be entitled to all Allions in Right of the Land, As to a Writ of Error to reverse a Judgment, by which the Lands are affected, or Attaint &c. Nelf. Ab. 396. pl. 2. cites Mich. 26 Eliz. This is taken from Hughes's Abr. tit. Customs, 546. cap. 4. pl. 31. which cites it as adjudged.

8. The Father havin't the Impropiet Tithes arising out of the Manor of W, which is Borough-Englishe, had two Sons, the Question was, which of the Sons should have the Tithes ; Adjudged that the Eldest Son shall have them, because Tithes do not arise naturally from the Land, but by the Labour and Industry of Man ; besides, of Common Right Tithes are not Inheritances defendable to an Heir, but come in Succession from one Clergyman to another ; it is true, by the Statute of Dissolution of Monasteries they are made defendable to Heirs, but that being within the Time of Memory the Custum of Borough-Englishe will not prevail in such Cases. Nelf. Ab. 397. pl. 6. Mich. 10 Jac. This is taken from Hughes's Abr. tit. Customs, 546. cap. 4. pl. 50. cites it as the Opinion of the Court.

9. If a Man have Issue two Sons by several Wives and having Lands holden in Socage in the Nature of Borough-Englishe dies, the Younger Brother being within the Age of fourteen Years, the Elder Brother of the Half-blood shall not have the Custody of the Land, because by Possibility the Elder may inherit the Land ; for if the Youngest dies without Issue, and the Land descend to an Uncle, the Elder Brother of the Half-blood may be Heir unto him. Co. Litt. 88. b. (m) Part is not in Hughes.

10. If the Youngest Son makes his Title to Land in Borough-Englishe he must plead that Time out of Mind the Custum of the said Manor has been, that when or at what Time oever a Copyholder dies seised of any Copyholder in the same Manor having divers Sons, that the same has used just Hereditario to descend unto the Younger Son &c. Calth. Reading 44.


(B) [Borough]
Iff. I. be seised of Copyhold Lands in Fee of the Nature of Borough-English Land, and surrenders it into the Hands of the Lord, by Intention that he should re-grant it to him and his Wife, and to the Heirs of himself, and the Lord re-grants it accordingly, and there is a Custom, That if any Person be seised in Fee of any such Customary Land, and dies so seised, that the Land shall descend after his Death Filio juniori hujsynodi Tenents customariœ bic obientes sibi libantum Naturam of Borough-English Land; and after his Death, the youngest Son dies in the Life of his Wife without Issue, it seems the Elder Son shall have this Land as Heir to the Youngest, and not the Middle Son, for the Custom cannot extend to a collateral Descent, neither, to direct the Descent between Brothers, for this is out of the Custom, and the Custom was once satisfied by the Descent to the Youngest, and the Custom fixed the Land in the Youngest, and there is an End of the Custom; and when the Custom fails, the Common Law shall guide the Descent; and by this Special Custom, this Son, which was the Youngest at the Time of the Death of his Father, ought to have the Land, and not any other who should come to be the Younger after. 

2. If the Custom be, that the Youngest Son shall inherit, and a Man has Issue two Sons, and the Eldest has Issue two Sons, and dies, and after the Lands descend to the Youngest Son, who dies without Issue, the Eldest Son of the Eldest Brother shall have the Land, because the Custom holds not in the Transferable Line, but only in the Lineal Descent. 9. 24 & 25 Eliz. at Hertford Term, relisted per Curiæ, cited 9. 10 Jac. 3. 

3. A. seised in Fee of Land in Borough-English, makes a Feoffment to the Use of himself, and the Heirs Males of his Body, according to the Course of the Common Law; these Words, according to the Course of the Common Law, are void; for Customs which go with the Land, as this is and
Defent. 561

and Gavelkind, and such like Customs, which fix and order the Defents Sarjeant's of Inheritances, can be altered only by Parliament. By Catlin, Dyer, Sanders, Whiddam, Browne, and Sendlowes. Jenk. 220. pl. 76.

4. Resolved, That where Land in Borough-English descends to the younger Son, and he dies without Issue, it shall not go to the younger Brother without a Special and particular Custom. Cro. J. 198. pl. 27. Mich. 3 Jac. B. R. Bayly v. Stevens.

5. If the younger Son in Borough-English dies, the middle Brother shall have the Land by the Custom, Per Williams J. 1 Bult. 93. Mich. 8 Jac. in Cafe of Davis v. Hales.

6. In Trespass done in Lands within the Dutchy of Cornwall, which were Borough-English where the Custom was, that if there were an Estate in Fee in those Lands, that they shall go to the younger Son, according to the Custom; but if in Tail, they should descend to the Heir at Common Law; and it was moved, that the Custom was not good, because it cannot be at one Time Customary, and go according to the Custom, and at another Guildable. The whole Court (Crooke only being absent) held, that the Custom was good. Mar. 54 pl. 82. Mich. 15 Car. Chapman v. Chapman.

7. Twidten J. denied the Opinion of Lambert, That if the King purchased Gavelkind Lands, that it should go to all his Sons; for Lambert had it out of Blowden, 247. a. from Southcote's Opinion, and he from 35 H. 6. 28. a. and Mallet and Foster were of the same Opinion. Raym. 77. Pach. 15 Car. 2. B. R. in Cafe of Wifeman v. Cotton.

8. The Copyhold Lands of every Tenant dying seized, were by the Custom of the Manor descensable to the youngest Son, and a Survivor was made to the Wife of B. and his Heirs, who died before Admittance. It was agreed, it B. had been admitted, the youngest Son, after his Death, should have inherited, but in regard B. died before Admittance, the Quetion was between the eldest and youngest Son of B. who should have the Land? and adjudged, that in this Cafe, the eldest Son should have the Land, because of the Straitness of the Custom, and there never was any suit in the Ancient; but by my Report it would be otherwise, had it been alleged, that the Lands were in the Nature of Borough-English, which it was not, but only for this as a particular Custom; for the Law takes Notice of the Custom of Borough-English, but not of this Special Custom; which is likewise the Reason, why in pleading that Lands are of the Nature of Borough-English, you need not set forth the Nature of the Custom especially. Wms's Rep. 60. cited by Holt Ch. J. as about 15 & 16 Car. 2. C. B. Hale's Cafe.

9. In Special Verdict in Ejeftment in N. the Cafe was, a Copyholder in Fee held of the Manor of T. had five two Daughters, and died; that the Custom of that Manor was, that the eldest Daughter shall inherit the Whole for her Life, and after her Death, the next Heir Male to the Father, who may make a Defent by Male, shall have the Lands to him and his Heirs, and if there is no such Heir Male, then they shall escheat to the Lord; after the Death of this Copyholder, his Widow married, having her Widow's Life, and in her Life the eldest Daughter died, and then the Widow died; and the Question was, Whether the second Daughter should have had the Land, or it should escheat to the Lord? It was argued, that it such a Custom had been annexed to Lands in Fee at Common Law, it had been void, because a Fee Simple can never escheat as long as there are Heirs to inherit it; but this Estate being created by Custom, may be modified by Custom, not only as to the Enjoying, but to the Extent of it; and though such a General Custom shall not be good

Lev. 172. S C adjudged that the Custom was good, and that the second Daughter should have had the Land within the Custom.
good, yet in this Cafe it may be good ratione loci, because this Manor borders on Scotland, and the Scots in former Times usually made Invasions, and therefore it was safe for the Lords there, to provide themselves of such Tenants as might defend their Possessions, viz. Men and not Women. After several Arguments this was adjudged a good Custom, and that the Daughter was within this Custom for the eldest Daughter in this Case, shall not be only Primogenita Filia, but the eldest at the Death of her Mother, who derived her Estate from her Husband, by the Custom. Sid. 267. pl. 18. Trin. 17 Car. 2. B. R. Newton v. Shaftoe.

10. Land of the Nature of Borough-English is granted to A. and his Heirs for three Lives; A. dix. The Question was, whether the eldest Son or the youngest Son shall have it? and the Court all inclined that the youngest should have it, for he is in Defect. And he is not in as a Person designed by Description, for then an Executor might have it; but that it is held, that if it be granted to a Man and his Executors, the Executor shall not have it; and Hale said, the Reason of that was, because the Law will not suffer a Freehold to run out of its Chanel. Adjournatur. Freem. Rep. 395. pl. 513. Trin. 1675. Barksdale v. Dowdswell.

11. The Law takes Notice of Borough-English and Gavelkind Customs. 6 Mod. 121. in Case of Clement v. Scudamore.

12. One sealed of a Copyhold in Fee in Nature of Borough-English, has five Sons, the youngest dies in the Life of the Father, leaving Issue a Daughter, and then the Father dies; the youngest Son's Daughter is inheritable. Holt Ch. J. in delivering the Opinion of the Court, said, that wherever this Custom has obtained, the youngest Son is there placed in the Room of the Eldest, who inherits by the Common Law; and there is no Difference in the Course of Defects, but that the Custom prefers the youngest Son, and the Common Law the Eldest; and therefore, as by the Common Law, the Issue of the eldest Son, Female as well as Male, de Jure Representationis, inherit before the other Brothers, so by the same Reason, when this Custom has transferred the Right of Defect, from the eldest to the youngest Son, it shall also by the like Representation, carry it to the Daughter of the youngest Son; and there is no Ground to make any Difference belwixt a Defect by this Custom, and by the Common Law. Wms's Rep. 63, 64. Hill. 1703. Clements v. Scudamore.

13. A Lease was made to a Man and his Heirs, during three Lives of Lands in Borough-English, the youngest Son should inherit that indefinable Freehold, though it were a new created Estate; because the Custom was so annexed to the Land, as to affect that Estate, cited by Holt Ch. J. 2 Ld. Raym. Rep. 1028. Hill. 2 Ann. as adjudg'd in B. R. in one Townend's Cafe.

14. So if a Rent be granted out of Lands of the Nature of Gavelkind, or Borough-English, to a Man and his Heirs, it shall descend to the Youngest, or all the Sons; cited per Holt Ch. J. 2 Ld. Raym. Rep. 1028. Hill. 2 Ann. as adjudged in Townend's Cafe.

15. If Lands of the Nature of Borough-English, or Gavelkind, are settled to certain Uses, as to all but the Reversion in Fee, but the Reversion in Fee is not furred, this Reversion, as Part of the old Estate, shall descend in Gavelkind, and Borough-English, as before; per Ld. Chancellor and the Judges Aifitants. 3 Wms's Rep. 62, 63. Trin. 1730. Obiter, in the Case of Chetler v. Chetler.
Defcent.

(B. 2) Ancient Manner of Defcent.

1. **By the Law used in England before, and at the Time of the Conquest, all the Defendants of a Person dying Intestate had Preference not only in Personal, but also in Real Estates; for if a Man had died having three Sons and a Daughter, they all equally inherited his Real Estate; and this appears in Seld. Eadm. 184. Lamb. Saxon Law 66. Siquis intestat' decesserit liberij suis hereditatem aequale etiam dividendo. But after the Conquest, the Kingdom and Constitution were to be new modelled; and this Alteration was made in the Time of Henry I. and then Daughters were excluded if there were Males, and it was by the 36th Law of H. I. See Lamb. 202, 203, and then the Males did inherit all alike, especially all the Common Socage Men. But even then if one had died without Issue, and had a Father or Mother, the Land should not go to any Collateral, but to the Father or Mother; and this appears by the Law of H. I. Lamb. ubi supra. Siquis fine liberis decesserit Pater aut Mater in hereditatem succedat vel Frater aut Soror, si Pater & Mater deit; fo the Collateral was not to come in but upon Failure of Father and Mother. And where 1 Inl. ii. a. this is taken Notice of as an exploded Opinion; But Coke had not seen the Laws of H. I. then, and the Red Book in the Chequer, that he contradicts, is very ancient, and of great Authority in Law. 12 Mod. 623. Hill. 13 W. 3. B. R. in Cafe of Blackborough v. Davis.

2. But this Law did not continue long, but was altered, between the Reigns of H. 1. and H. 2. and the Father and Mother altogether excluded, and then the Law came to be adjudged as it is to this Day, that the Land should not accede to Father or Mother, but rather go to Collaterals; and this appears by Glanvill, Lib. 7. 1, 2, 3, 4. C.—But this Alteration was only as to Real Estates; and Personal Estates were left as they were. 12 Mod. 624. in Cafe of Blackborough v. Davis.

3. The Feudal Succession came in this Manner: The Lords gave Lands unto such Persons as behaved themselves well in the War, for their Lives only; sometimes they also married their Daughters to them. Then by their Feudal Donations, they limited the Lands to go not only to the Feudary himself, but also to the Issue of that Marriage; and this brought in the Notion of Succession among the Northern Nations that invaded the Roman Empire. The Lands therefore in the elder Times went to the immediate Defendants of such Marriage, and originally to none else; and first they went to Males, as the most worthy of Blood, and most capable of doing the Services annexed to such Donations; for want of Males it went to Females, as Defendants of the same Marriage. The Feud was united in the eldest Male, because he was obliged to do the Duty in the Wars; and for every Knight's Fee, was to go out 40 Days with his Lord; so that the Feud did not divide among the Males because the Duty could not be divided commodiously. Because 2dly, the Males were to keep up the Grandeur of the Family, therefore the Inheritance was not shared nor broken. Hence it came to pass, that among the Males the Eldest was preferred as the most worthy, since he was foonest able to go to the Wars, and do the Duties of the Tenure. Gilb. Treat. of Ten. 9.
(C) Bastard, Mulier.

[By what Dying seised the Mulier shall be bound.]

1. If a Bastard enters after the Death of the Father, and continues seised for an Year, and after alienates to another, and the Alience dies seised without any Interruption, yet this Dying seised of the Alience shall not bind the Right of the Mulier, for this is not within the Maxim. 36 Alb. 2. adjudged.

2. If a Feme has Issue a Daughter Bastard and another Daughter Mulier and dies, and both enter and make Purparty, and the Bastard dies seised of her Purparty and her Heir enters, the Mulier cannot enter but has lost the Land. Br. Difcent, pl. 9. cites 21 E. 3. 34.

3. Affize. Bastard Eigne and Mulier Puifne; the Bastard entered, and the Mulier made continual Claim; the Bastard died seised and his Heir entered and the Mulier entered, and the Heir ousted him, and he brought Affize; And so fee that continual Claim shall avoid the Decent of the Bastard. Br. Baltardy, pl. 13. cites 14 H. 4. 9. 10.


5. If a Bastard dies seised and his Issue enters the Wife of the Bastard, yet is not the Entry of the Mulier lawful upon the Tenant in Dower; for his Right was barred by the Decent. Co. Litt. 244 a.

S Rep. 101. b. S. P. and says the Law is the same, if the Feme of the Father of the Bastard Eigne and Mulier Puifne be endowed yet the Issue of the Bastard shall have the Reversion thereof for the Reason aforesaid mentioned.

6. If a Bastard eigne enters into the Land and has Issue and enters into Religion, this Decent shall bar the Right of the Mulier. Co. Litt. 244 a.

7. If a Man has Issue such Bastard as is aforesaid and dies, and the Bastard enters and dies seised, and the Land descendent to his Issue, the collateral Heir of the Father is bound, as well as where there be two Sons. Co. Litt. 244 a.

8. If a Man had Issue Bastard-Eigne and Mulier-Puifne and the Bastard in the Life of the Father has Issue and dies, and then the Father dies seised, and the Son of the Bastard enters as Heir to his Grandfather and dies seised, this Decent shall bind the Mulier. Co. Litt. 244 b.

9. If the Bastard dies seised without Issue and the Lord by Escheat enters, this dying seised shall not bar the Mulier, because there is no Decent. Co. Litt. 244 a.

10. And so it is to be understood albeit the Mulier after the Decease of the Bastard does enter before the Heir of the Bastard, for the Decent binds and not the entry of the Heir. Co. Litt. 244 a.
Descent.

11. If the Bastard enter and the Mulier dies, his Wife Provenience enseint with a Son, the Bastard has Issue and dies seised, the Son is born, his Right is bound for ever. Co. Litt. 244 a.

Possession without Interruption the Mulier shall not allege against the Issue Bastard who is dead.

12. But if the Bastard dies seised, his Wife enseint with a Son, the Mulier enters, the Son is born, the Issue of the Bastard is barred, for Littleton puts his Case, that there must not only be a Dying seised, but also a Descent to his Issue. Co. Litt. 244 a.

13. The Descent of Services, Rents, Receivings expectant on Estates Tail, or for Life, whereupon Rents are retarved &c shall bind the Right of the Mulier; But a Descent of these shall not drive them, that have Right, to an Action. Co. Litt. 244 a.

pl. 26. but it shall not toll the Entry or Claim of the Difeife. — Co Litt 15. a. says it is clear, that if the Father makes a Gift in Tail, or Lease for Life referring a Rent and dies, and the Bastard receives the Rent and dies, this shall bar the Mulier.

14. Bastards, or Children born out of Wedlock, were totally excluded from all feudal Succession though their Parents had afterwards intermarried, because the Lords would not be served by any Persons that had that STain on their Legitimation, nor fuller such Innominalities in their several Clans, though the Civil Law admitted them as adopted by the subsequent Marriage, and to the Canon Law, because the Matrinony wiped off the precedent Guilt. Gilb. Treat. of Ten. 17.

15. The Issue of the Bastard eigne not only gains a Right of Possession but a Right of Property by the Enjoyment of his Ancestor. Such Issue are held legitimatized by the Civil Law, because they are adopted by the Marriage of the Mother; to by the Canon Law because, the Martrimonium subsequens tollit resumum precedent; but by the Feudal Law they were excluded, because such a claim was thought to continue from the Crime of the Parents, that they could not do the Feudal Service with Honour to the Feudal Lords therefore they were anciently excluded, nisi nominatio ad feudas legitimation. But by our Law, if they had an uninterrupted Enjoyment during Life, the Issue for ever inherited; for since there was no Objection to their Legitimation during their Lives, the personal Defect must die with their Person, inasmuch as it were Inhumanity to throw Reproach on them after their Decease; and having done the Feudal Duties without Objection, the Objection comes too late when then the personal Dishonour ceases, and to the next Person in Possession no Reproach can arise. Gilb. Treat. of Ten. 26. 27.

(D) Who shall be bound by the Descent from the Bastard.

Bastard and Mulier.

1. If Tenant in Tail hath Issue Bastard-Eigne and Mulier-Puisne, pl. 16 cites S. C.

2. But it seems the Issue of the Mulier shall not be bound by such Defect, for then (c) this should be a Bar of the Tail by the Act of his Father, which is against the Statue.

3. If
Defcent.

3. If there be Tenant in Tail, the Remainder over to another, and the Tenant in Tail dies, having Issue Baflard-Eigne and Mulier-Pufine, and the Baflard enters, and dies feised, having Ifue, the Defcent from the Baflard shall not bind the Right of him in Remainder, but he shall have his Action; for the Continuance of the Possiflion by the Baflard shall not be prejudicial to him. 39 E. 3. 38. b.

4. If the Baflard dies feised, the Mulier being within Age, it shall bind him. Contra, Brooke Defcent 29.

5. If Baflard-Eigne and Mulier-Pufine are, and the Baflard enters and makes a Peacefment and dies, this is no Bar to the Mulier; for the Maxim is taken strictly that he shall die feised. Br. Defcent, pl. 41. cites 6 E. 2. and Firzh. Baflard 24.

6. In Ifue A. is feised in Fee, and has Ifue T. Baflard-Eigne, and J. Mulier-Pufine, and dies; T. the Baflard enters, and dies feised, and has Ifue E. and the Mulier has Ifue J. and dies; there if the Defcent be in the Time of the Mulier who was of feall Age (as in that Cafe it feems he was) then the Heir of the Mulier has no Remedy. Br. Defcent, pl. 26. cites 31 Litt. 18. and 22.

7. Nevertheless it feems clear, that if the Defcent of the Baflard to his Heir had been in the Time of the Heir of the Mulier, who was Infant during his Nonage, then clearly the Entry of the Heir of the Mulier is lawful. Br. Defcent, pl. 26.

8. If the Baflard enters after the Death of the Father, and the Mulier affifts him, and after the Baflard deffifes the Mulier, and hath Ifue, and diect feised, and the Ifue enters, then the Mulier may have a Writ of Entry for Diffiition againft the Ifue of the Baflard, and shall recover the Land &c. and fo you may fee a Diflription where fuch Baflard continues the Possiflion all his Life without Interruption, and where the Mulier enterch and interrupts the Possiflion of fuch Baflard &c. Lit. 401.

9. This Defcent differs from other Defcents; For this Defcent bars the Right of the Mulier, whereas other Defcents take away the Entry only of him that Right hath, and leaves him to his Action; But here by the dying feised of the Baflard, his Ifue be become lawful Heir. Co. Lit. 244. a.

10. If a Man has Ifue two Daughters, the Elder being a Baflard, and they enter and occupy peaceably as Heirs; now the Law in Favour of Legitimation, shall not adjudge the whole Possiflion in the Mulier (who then had the only Right) but in both, fo as if the Baflard has Ifue and dies, her Ifue shall inherit. Co. Lit. 244. a.

11. If
(D. 2) What shall be an Interruption of the Possession of Bастard-Eigne.

1. If the Mulier interrupts the Bastard's Possession, or a Stranger does it, and he agrees in the Bastard's Life (as when a stranger enters to avoid a Fine, and within the five Years he that has Right effects) in this Cafe the Re-entry of Bastard, and his dying feifed, bars not the Right of the Mulier; but if the Bastard recovers in Affize against the Mulier, this avoids the Interruption of the Bastard's Possession by the Mulier's Entry. Hawk. Co. Lit. 330.

2. If the Mulier comes in the Land by Consent of the Bastard, he shall as it is not avoid his Possession thereby; but if he cuts down a Tree, or does any other Act which must be either a Trespas or an Entry, he thereby avoids the Bastard's Possession, for where an Act may be done lawfully, the Law will not adjudge it to be wrongful. Hawk. Co. Lit. 330.

or to dine with him, or to hawke, hunt, or sport with him &c. Co. Lit. 245. b.

3. If the Bastard enters, and the King seizes for a suppos'd Contempt &c. Co. Lit. of the Bastard, and he dies, and his Issue is restored on Petition, the Mulier is barred; for the Possession of the King, when he has no good Right to seize, shall be judged to be the Possession of him in whole Right he feited. But if after the Father's Death the Mulier be found Heir of Knight Service Land, and within Age, and the King seizes, the Bastard is foreclosed for ever; and if the King seizes for a Contempt of the Ancestor, and the Issue of the Bastard be restored on his Petition, for that the King feited without Cause, the Mulier is not barred. Hawk. Co. Lit. 330, 331.

(E) Heir. What Things shall descend to the Heir or Executor.

1. If a Nobleman, Knight, or Esquire be buried in a Church, and hath a Coat of Armour and Pennons, with his Arms, and such other Emins of Honour as belong to his Degree of Office put in the Church, or if a Grave-Stone or Tomb be laid or made to, for a Monument of him; in this Cafe, though the Freelsey of the Church be in the Parson, and there are anned to the Freesley, yet the Parson or any other cannot take them or deface them, but he is subject to an Action to the Heir and his Heirs, in Honour and Title to that Cafe.
Descent.

mory of whose Ancestor they were put there. Ditch. 10 Ja. B.

Pyn's Case, per Curiam. Co. Lit. 18. b.

 cites 9 E. d. 14. the

Dame

Wiche's Case, in which the S. P. was adjudged accordingly. — 3 Inf. 202. cites Corven v. Pym.


Heir is inheritable to Arms as to Heir-Looms. cites 50 E. 3. 2. 39 E. 3. 14.

Godh. 200. pl. 286. S. P. cited by Coke

Ch. 1. to

have been adjudged 9 E. 4. 14. in Dame Wiche's Case. And he said that he had seen a Judgment in 6 E. 6. That if Executors lay a Grave Stone upon the Tefator in the Church, or set up his Coat Armour in the Church; if the Parson or Vicar removes them or carries them away, they or the

Heir may have the Action on the Case against the Parson or Vicar. — Mo. 871, pl. 1232. Pym v.

v. Gorwyn S. C. but not S. P. but Coke Ch. J. cited the Lady Grap's Case, who put up the Arms

and Helmet of her Husband in the Church at his Funeral, and in Trewpati brought by her against

the Parson for pulling them down, the Action was adjudged maintainable. — 12 Rep. 194 in Cor-


Pym, and Lady Wiche's Case.

3. In some Places the heir by the Custos shall have the best Chat-

tle of his Ancestor, by the Name of an Heir-Loom. Co. Lit. 18. b.

(E. 2) What shall be said a Descent by Relation &c.

1. W H E R E the Tenant by the Custom surrenders to the Heir, and

he is unspeeded by Wit of Entry, his Entry shall be supposed by

his Mother, and not by the Tenant of the Custom; for he is in her,


2. If Tenant in Tenant in Tail enfeoffs his Son and after diffeis him and

the Son enters, he shall be adjudged in by the Feoffment and not by


3. And if the Father and Son diffeis 7. N. and after the Son re-

leaves to the Father all his Right, and after the Father dies, the Son shall

not be adjudged in by Descent but by Diffeisn, for he was Party to the


4. But if the Father diffeis 7. N. and after enfeoffs his Son, and after

diffeis the Son and dies, the Son shall be adjudged in by Descent. Per


5. Diffeisor, Abator, or Intruder enfeoffs A. who dies seized, and after

his Heir enfeoffed and enfeoffs the Diffeisor, Abator or Intruder, he shall

be adjudged in by the Feoffment of the Heir against all except the

Diffeisor and those against whom he did the Wrong; and against them

he shall be adjudged in as Abator, Diffeisor or Intruder, as he was at

first, as he was Party to the Wrong, Per Keeble. Br. Difcent, pl. 33.

cites 5 H. 7. 6.

6. If the Diffeisor himself dies without Heir and the Lord enters by

Efeate, the Diffeisor may enter; for there was no Descent. Br. Difcent,

pl. 92. cites 9 H. 7. 24.

7. The Wife after the Death of her Baron owning Jointure made after

Marriage, has such Relation and Operation in the Law, that now upon

the Master the Baron was ab Initio sole feized, and by Consequence the


P. R. Butler v. Baker.

(F) What
(F) What Persons may be Heir to another, and to Whom.

1. 

B 

Aftard-Brothers cannot be their own to another. 43 Ed. 4. 8.

2. 

If there be Father and Son, and the Son makes Lease for Life and dies, and the Reversion descends to the Uncle and he dies, the Reversion shall not descend to the Father but shall escheat; because he must make himself Heir to the Son and not to the Uncle who had the Reversion cast upon him. Arg. Show. 246. in Cafe of Kellow and Rowden, cites 1 Inst. 11. 5 Ed. 4. 7.

3. 

If a Son purchaseth Lands in Fee-Simple and dies without Issue, living, Rep. his Father, the Uncle shall have the Land as Heir to the Son and not the Father; For Inheritances may lineally descend but not ascent. But if in such Cafe the Son dies without Issue and the Uncle enters and claims any lands without Issue living the Father, the Father shall have the Land as Heir to the Uncle; because he comes to it by Collateral Descent and not by Lineal Ascent. Litt. S. 3.

make himself Heir to him, who was left actually seized.

4. 

Idots, Madmen, Lepers, Outlaws in Debt, Trespassers or the like, Persons excommunicated, Men attainted in a Præmunire, or convicted of Heresy may be Heirs. Co. Litt. 8. b.

(F. 2) Who, by Way of Preference, shall take as Heir.

1. 

If there is Grandmother, Mother and Son, and the Mother has a Brother and the Grandmother has a Brother, and the Son purchaseth and dies without Issue, the Grandmother’s Brother is Heir. D. 314, pl. 95. Trin. 14 Eliz. Cleer v. Brook.—Pl. C. 444. 451. a. Patch. 15 Eliz. S. C. and S. P. agreed by all the Justices.

2. 

If an Advoceacen descends from the Son to the Uncle, the Father shall not have it, if the Uncle dies before he does or can present; So of a Rent. Co. Litt. 11. b. ad finem.

3. 

It is an old and true Maxim in Law, that none shall inherit any Lands as Heir but only the Blood of the first Purchaser, for Refert a quito fuit perquiriment. Co. Litt. 12. a.

4. 

The next of the Worthiest Blood shall ever inherit as the Male, and all Descendants from him before the Female, and the Female of the Part of Father before the Male or Female of the Part of the Mother, because the Female of the Part of the Father is of the Worthiest Blood; and so among the Male, the eldest Brother and his Povery shall inherit Lands in Fee Simple as Heir before any Younger Brother or any descending from him. Co. Litt. 14. a. in Principio.

5. 

By the Ancient Custom of Wales Females cannot inherit. 4 Inst. 241. cites a Charter to that Purporte.

6. 

None can be Heir to a Fee Simple by the Common Law but he that hath sanguinem Dupecitante, the whole Blood both of the Father and the Mother; and therefore the half Blood is not inheritable by Descent. Co. Litt. 14. a. 84. b.

7 F 7. Where
Defcent.


Hale's Hist. of the Com. Law 244. &c. S. P.

8. If a Son purchase and dies without Issue, the Father, Grandfather, and Great Grandfather and so upward, all the Male Line are dead except Brother or Sister; But there is Great Grandmother and Grandmother, and each of these have a Brother, the Grandmother's Brother here shall inherit the Son, because he is the next Heir to the Son on the Father's Part, but if the Father purchase and dies without Issue, the Great Grandmother's Brother is then heir to him on his Father's Part; But if the Father dies having a Son and that Son dies without Issue, the Lands here must go to the next Heir of his Father on his Father's Part, and that is the Son's Great Grandmother's Brother, and the Father's Mother's Brother is not to take, for the whole Line is spent; for here is the same Devolution and and Hereditary Succession, as if the Father had died without Issue; but if the Son enters, and is sifted, the Lands devolve upon the Son's Grandmother's Brother (i.e.) the Father's Mother's Brother. Hales de Success. 96. &c.

(G) [Who may be Heir]

By Matter subseuent.

1. A Bastard may be Heir against a Stranger by Continuance. 43

Bail. Voucher
(T) pl. 1. cites 21 E. 3. 46. S. P. — A Bastard may be Heir by Continuance of Possession. B Purlo Demur &c. pl. 12. cites 21 E 3. 46. Per Thorp. — Co. Litt. 8. 2. in Principio S. P. — See (C) pl. 1.

2. An Hermaphrodite, that is as well Male as Female, shall be Heir either as Male or Female, according to the Sex which prevails. Co. Litt. 8. [a. in Principio.]

3. If an Alien be made a Denizen, the Issue which he hath after shall inherit him, but not the Issue that he hath before. Co. Litt. 8. [a. in Principio.]

4. If an Alien hath Issue in England two Sons, these Sons are Devisees, and yet the one of them cannot be Heir to the other of them, because there never was any Inheritance Blood between the Father and them, and where the Sons could by no Possibility be Heir to the Father, the one of them shall not be Heir to the other. Co. Litt. 8. [a. veris Principio.]

5. If a Man hath Issue two Sons, and after is attainted of Treason or Felony, the Sons may be Heirs one to the other, for the Attainder of the Father corrupts the Linear Blood, but not the collateral Blood between the Brothers, which was vested in them before the Attainder. Mich. 409, 411 El. in Scaccario, Hobby's Case; quod vide, Co. Litt. 8.

Blood between the Sons and Father, yet upon the Rule put by Littleton, there is lawful Blood of the Part of the Mother. — Noy. 158, to 171. The King v. Borellon and Adami S. C. argued very fully but no Judgment. — S. C. cited and affirmed by Bodridge and Haughton J. to have been revolved in the Exchequer, 2 Roll, Rep 93. — Cro. J. 559. pl. 7. S. C. cited as adjudged, that the Daughter shall inherit — Cro C. 543 pl. 8. cites S. C. — S. C. cited Litt. Rep. 28. as adjudged that he should not be Heir to the Brother, because the Bridge was broken by the Attainder of the Father. — 2 Sid. 255, 275 cites S. C. — S. C. cited by Lit. Ch. B. Hale, Vent. 425. as ruled, that the Sister should inherit her Brother.

6. But
6. But if a Man be attainted of Treason or Felony, and after hath Issue two Sons, in this Case they cannot be Heir one to the other, because they never could be Heir to their Father, nor ever had any Inheritable Blood in them. Co. Lit. 8.

in Case of Care of Collingwood v. Face, it held contra, and says that so it appears in the Case of Barstow and Adams, Nov. 159, 1599, and in the MS. and that for Authorities there is only the single Opinion of Ld. Coke; 1 Inst. 8. a. in Hobbis's Case, which is against this Judgment, and says, that this is Confirmed by the Cases of Godfrey v. Dixon, in Cro. J. 539. and by Foster and Ramsey's Case, 3 Rep. 8. b. —See tit. Blood corrupted. (b)

7. He that is born deaf and dumb may be Heir to another. Co. Lit. 8. [a. versus finem.]

8. So he that is born deaf, dumb, and blind, may be Heir to another. Co. Lit. 8. [a. versus finem.]

9. When the Tenements given in Frank Marriage to one Daughter are put in Hatchet between other Parties, they become in the same Course as other Tenements, of which the common Ancestor died seised. Br. Mortdancetor, pl. 24. cites to Aff. 14.


11. One was Tenant by the Curtesy and the Heir within Age, and Affise of Rent was brought against them, and the Tenant by the Curtesy Surrender'd to the Heir pending the Writ, and died pending the Writ; and per June he shall not be adjudg'd in by Defect as to the Plaintiff to abate the Writ, because the taking of the Surrender is his own Act, and if the Tenant by his Curtesy had charg'd, the Heir should hold charged during his Life. Per Roll, if Writ of Entry be brought against the Heir after the Surrender, he shall be supped in by his Mother, and not by the Tenant by the Curtesy. Br. Surrender, pl. 24. cites 1 H. 6. 1.

12. If a Man has Issue a Son and a Daughter, the Son purchases Land in Fee Simple, and dies without Issue, the Daughter shall inherit the Land; But if the Father has afterwards Issue a Son, this Son shall enter into the Land as Heir to his Brother, and if he has Issue a Daughter and no Son, she shall be Coparcener with her Sister. Co. Litt. 11. b. (b)

13. If the Daughter consents to a Ravisber, and the next Heir enters and the Daughter dies, the Heir is now in by Defect; Per Jones. Palm. 405, in a Note.

(H) What shall be an Impediment of a Descent.

1. If a Man hath Issue two Sons, and the Eldest is attainted of All the Felony, and dies in the Life of the Father, and after the Father dies fled of Lands, this shall descend to the second Son, or to the Daughters of the Father, if he hath no Son; for the Attacker of the Eldest Son did corrupt the Blood between the Blood between the Youngest Son and the Father. 46 Aff. 1. Curia. Co. Lit. 8. dubitat. 27 E. 3. 77. b.

nor in 46 Aff. pl. 2. cited by Mr. Danvers. —But if the Son attainted has a Son at the Death of the Grandfather the Land should escheat. Br. Devonst. pl. 22. cites 27 Aff. 11. —D. 42 n. pl. 16. Mich. 52 H. 8. S. P. held accordingly in Case the Eldest Son had no Issue living, but if he had, the Land should escheat and not go to the Younger Son, because such Issue would be inheritable by the

Sid. 201. Patch. 16 Cir. 2. in the Exchequer Chamber

the Law had it not been for the Attaint—or S. P. and same Diversity by Berkley J. and Jonas said, that when he was judge in C. B. it was so adjudged in Mackwilliam's Case, and so also in B. R. in Case of Coke v. Kiley and afterwards affirmed in a Writ of Error. Cro. C. 455. To 7. Arg. cites 20 E. 2. Firth. tit Defcent [16] & D. 48. a. —Hob. 334. in a Note at the End of Mackwilliam's Case cites D. 48. 8. S. P.

S. P. but in such Case the Land shall escheat to the Lord as it seems there; but if he dies without Issue living the Father, then another Heir of the Father shall have it, who is next of Kin to the Son attainted, provided that he is not his Son. Br. Dicent, pl. 22. cites 27. Aff. 11. —An attainted Person cannot be an Heir, nor have an Heir, unless his Blood be restored by Act of Parliament; neither can his Children, if he has any, be Heirs to any other Ancestor. Co. Litt. 291. b. —Rep. 41. a. They cannot inherit either Father or Mother; see Want of Sanguinem Duplicatum. —Hob. 334. in a Note at the End of Fitzwilliam's Case cites D. 48. 32 H. 8. S. P. —Jo 24 Arg. cites 8 C. and Fitch. Dicent [16] 20 E. 2. S. P. —Cro. C. 435. & P. by Berkley and Jones J. * See tit. Blood corrupt (B) pl. 2. and the Notes there,

2. But if the Eldest Son, being attainted of Felony, survives the Father, he shall be an Impediment to his Brother or next Heir to have the Land by Defcent from the Father. 26 Mt. 1. [2] adjudged. 1 D. 4. Rotullo Parliamenti, Numero 132. a Petition was preferred, That where the Eldest Son, during the Life of his Father, is attainted, the next Brother might notwithstanding succeed as heir to his Father &c. To which it was answered by the king, Let the Common Law run. Co. Lit. 8.

3. If a Man hath Issue an Eldest Son, born out of the Allegiance of the King, and after hath Issue a Younger Son born in the Realm, the Youngest Son shall be Heir to the Father, and the Eldest shall not be any Impediment to him, because the Eldest never had any Inheritable Blood in him. Co. Lit. 8.

4. Treasons of a Cloie broken. Prior intitled the Defendant because the Defendant was born Ultra mare, and that he was seized of eight Acres of Land, where &c. in Fee, and in the Time of H. 4. went beyond Sea without Licence of the King out of the Allegiance of the King, and there espoused B. who had Issue there the Plaintiff, and there remained all their Lives without Licence, and died sole without any other Issue of his Body, and the Land defecated to W. as Cofin and Heir, and they espoused How Cofin &c. who entered and enfeoffed B. Que Eiterate the Defendant has, and gave Colour to the Plaintiff, Judgment &c. Newton said, if he who was born beyond Sea survived his Father, there he cannot be Heir, nor any other of the Blood of him who died seised; for there is a Meane Impediment. Br. Defcent, pl. 12. cites 22 H. 6. 38.

5. A Man has Issue two Sons, the Eldest is attainted &c. and dies; the Father dies seised, the Youngest Son shall inherit, otherwise if the Eldest had any Issue. Dy. 43. a. pl. 16. Trin. 32 H 8. Anon.

6. There is a Diversity between a Disability Personal and Temporay and Disability Absolute and Perpetual: As where one is attainted of Treason and Felony, this is an Absolute and Perpetual Disability by Corruption of Blood for any of his Politerity to claim any Hereditament in Fee Simple, or as Heir to him or to any other Paramount him; But when one is disadmitted by Parliament (without any Attainder) to claim the Dignity for his Life, this is a Personal Disability for his Life only, and his Heir after his Death may claim as Heir to him or to any Ancestors Paramount him; Resolved. 11. Rep. 1b. 39 Eliz. in Ld. Delaware's Case.

7. If a Man be seised of Lands in Fee, and has Issue two Daughters, and one of the Daughters is attainted of Felony, the Father dies, both Daughters being alive; the one Moiety shall descend to the one Daughter and the other Moiety shall escheat. Co. Lit. 163. b.

8 But
Defcent.

8. But if a Man make a Lease for Life, the Remainder to the right Heirs of A. being dead, who has Issue two Daughters, whereas the one is attainted of Felony, in this Case some have said that the Remainder is not good for a Moiety, but void for the Whole, for that both the Daughters should have been (as Littleton says) but one Heir. Co. Litt. 163. b.

9. If a Son has a Son who purchases Lands, and the Mother of the Son is attainted, and he dies without Issue, the Uncle on the Part of the Father shall inherit, for he does not convey nor make a Defcent by the Mother. Arg. Noy. 159. Trin. 4. Car. in the Exchequer in Case of the King v. Borelton and Adams.

10. So it the Issue of a Bastard purchases Lands and dies without Issue, although that Land cannot descend to any Heir on the Part of the Father, yet the Heir of the Part of the Mother may. So if the Bastard was attainted. For the Heirs of the Part of the Mother makes not any Conveyance by the Bastard. Arg. Noy. 159. in the Exchequer in the Case of the King v. Borelton and Adams.

11. The Husband and Wife have several Inheritances and they have Issue one Son, and die, this Son supplieth the Place of several Heirs and makes his Claim and Defcent to Land severally, viz. to the Lands of the Father as Son and Heir to the Father, and shall not intitle himself to that Land as Son to his Mother, nor name his Mother, and to the Land of the Mother as Son and Heir to the Mother, and never mention the Father; and yet it is true that the Son, as he had a Father, so had he a Mother, and from them both does derive his Blood and Issue; yet will it not follow, that by the Attainder of the Father the Son shall be disabled to inherit the Mother; nor by the Attainder of the Mother be disabled to inherit the Father; for the Son claimeth not to be Heir to both by the Intire Blood he receiveth from both, but severally to be Heir to the Father by the Blood from the Father, and to the Mother by the Blood of the Mother. There is hisus naturalis and fanguinis hereditarius. The Son as touching his natural Blood has it proceeding both from the Father and the Mother, jointly, intirely and inseparably; But as touching his hereditary Blood that is descended unto him, he has that dividibly and severally, viz. from his Father for his Inheritance, and from his Mother for her Inheritance; Therefore the Father's Attainder which does not corrupt Sanguinem, but jus Sanguinis, is not the natural but the hereditary Blood, may be an Impediment that the Son cannot be his Heir because between them the hereditary Blood is corrupted, but it can be no Impediment to the Son to inherit the Mother's Land, for that hereditary Blood between the Mother and the Son is not corrupted by the Attainder of the Father. Arg. Noy. 168. in Case of the King v. Borelton and Adams.

12. If the Father is attainted of Felony in the Life of the Grandfather and afterwards the Grandfather dies, the Land shall eftcheir; for the Son ought to make his Defcent by him, which cannot be; Per Berkley, J. Cro. C. 435. Hill. 11. Car. B. R.

(1) In what Cases a Man shall be said to be in by
Descent, or by Purchase.

1. If a Man devises Lands to one that is his Heir, this is void,
and it shall operate by Descent. Hobart's Reports, 42, "Cauden's Case, for where there is not any Alteration of the Estate
by the Devise of the Estate which the Law gives to him, he shall be
in by Descent, which by Intendment is more for his Advantage,
as to take away an Entry, and for a Warranty, and is the more
ancient Title.

2. If a Man devises Lands to his Wife for Life, the Remainder to
J. S. who is his next Heir in Fee, this is a void Devise to J. S. and
he shall be in after the Death of the Devisee by Descent, for the Alter-
ation of the Estate in Reversion, which the Law gives him, to a Remainder,
which is given by the Devisee, is not any Alteration of the
Estate in Point of Estate, and therefore he shall be said to be in by
Descent, which is the more ancient and better Estate, and not by
Purchase by way of Remainder. Sir H. 24, 25, 26 Car. 2, between
Fryatt and Holmes, adjudged upon a Special Ceremony. 2 C.

3. If a Man devises Lands held by Knight's Service to his Wife
 till J. S. who is his next Heir, comes to the Age of 24 Years, and at
that age he devises all to the said J. S. in Fee, and when he comes to
the said Age of 24 Years, that his Wife shall have the third Part for
her Life, and if J. S. dies before the Age of 24 Years, then the Land
shall remain to the Wife during her Life, and after her Decease, (if
J. S. have no Issue) the Remainder to his Daughter in Tail, the Re-
mainder to the right Heirs of the Devisee; the Wife dies after the
Heir comes to the Age of 24 Years; in this Case no Intail is made
by the Will, but J. S. shall have it by Descent in Fee. D. 2, 3.
154, 38, adjudged.

4. If a be Seized of a Copyhold in Fee, and surrenders it to the
Use of his Will, and after by his Will devises it to B. his Cousin, for
his Life, and after his Decease to the Heirs of his Body begotten for
ever. ( ) In this Case the Word Heir being limited to the Body of
him Nomen collectivum, and all one with the Word heirs, and
the Words for ever, in Case of a Devise, makes a Fee, and is only
put to show his Intention, as is usual when Land is given to an-
other and his Heirs for ever; and therefore in this Case this is a Fee
executed in B. and his Heirs is in by Descent, and not by Purchase;
and it is not like to Archer's Case. Co. 1, where the Devisee is to one
for Life, and after to his Heirs Male, and to the Heirs Male of such
Heir Male, for there the Inheritance is limited to the Heir of the Body of
the Heir Male, p. 1651, adjudged in a Writ of Error upon
a Judgment in Banco, upon a Special Verdict between
Payne and Lowdall, and the Judgment given in Banco; e contra referred for
this
Descent.

5. If a Man leaves to one for Life, the Remainder to tbe right Heirs of J. S. J. S. being dead at the Time, his right Heirs hath the Remainder by Purchase. 27 E. 3. 87.

6. So the right Here shall have the Remainder by Purchase, though J. S. was living at the Time of tbe Grant. 27 E. 3. 87.

7. When the Ancestor by any Gift or Conveyance takes an Estate of Freehold, and in the same Gift or Conveyance an Estate is limited immediately to his Heirs in Fee or in Tail, the words, his Heirs, are Words of Limitation, and not of Purchase, for his Heirs shall be in by Descent. Co. 1. 104. * 40 E. 3. 9. & 45 E. 3. 19. S. C. ——

8. It it be if an Estate in Fee or in Tail to his right Heirs be * limited immediately. Co. 1. 104. * 40 E. 3. 10. unjudged. 11 E. 4. 74. || 24 E. 3. 36. 27 E. 3. 87 b. 

9. If a Copyholder of Inheritance surrenders it to the Use of another and his Heirs, and he to whom the Surrender was made dies before Admittance, and after the Lord admits his Heir, he shall be said to be Purchased, and not by Descent, for he is in the Lord, for nothing is in his Father by the Surrender before Admittance. Cr. 10 El. B. Moore's Case.

10. If A. bargain and sells Land to B. in Fee for Money, and after dies before Inheritance of the Deed, and after the Deed is enrolled, the Deed shall be in by Descent; and if it be held in Capite, shall the Liberty he be of full Age, and shall be in Ward within Age, for upon the Inheritance it rests in the Bargainor, between the Bargainor and him, as intimated by the Statute of Uses, and the Statute of Involvements says. That nothing shall pass except it be involved, so that if it be involved it passes not by the Statute of Involvements, but by the Statute of Uses. Webster's Reports 184. Dimmock's Case.

11. Where Land is given in Tail, the Remainder to the right Heirs of the Donate, and he dies without issue, his Heir Collateral shall be adjudged in by Descent from his Ancestor, and not by Purchase from the Donor. Theel. Dig. 177. Lib. 11. cap. 54. S. 54. cites Hill. 30 E. 3. Entry 58.

12. And so it shall be where Leave is made to one for his Life, the Remainder to his Right Heirs. Theel. Dig. 177. Lib. 11. cap. 54. S. 54. cites 43 E. 3. 19. and 33 H. 6. 5.

13. Where Land is given 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 died, and after the Son died without issue, and the youngest Son entered, and was adjudged to pay Relief, as Heir to his eldest Brother, and not to be Purchaser by Name of Right Heir of the Father. Br. Ellopell, pl. 25. cites 43 E. 3. 9.

14. In Allife, a Man leased to the Baron and Feme for Life, Remainder to A. in Tail, A. by Deed released to the Baron and Feme all his Right without
without Warranty, and after died, his Issue within Age; the Baron alien'd to B. in Tail, Remainder to C. in Fee, and after B. died without Issue, and then the Heir of A. entered upon C and C. ousted him, and A. brought Issue and recover'd; For his Entry was lawful, because by the Release without Warranty, nothingpass'd but his own Estate for his Life who releas'd, and the Entry is good upon the Feme Covert, and the is put to her Cui in Vita. Quod Nota. Br. Ente congeable, pl. 83. cites 43 All. 17.

15. If the Son disfifes J. N. to the Use of his Father, and J. brings Issue against the Father and Son, and the Father dies pending the Writ, the Writ shall abate, for the Writ is in by Defcent. Br. Defeant, pl. 17. cites 1 H. 6. 1.

16. Land is given to W. and A. his Feme, in Special Tail, the Remainder to R. in Tail, the Remainder to the right Heirs of R. the Baron died without Issue, and A. his Feme fecundo, and is Tenant in Tail after possibility of Issue extinct, and took another Baron and had Issue, and after R. died without Issue, to whom A. the Feme is Heir, and after A. died, the second Baron shall be Tenant by the Curtesy, for when the Remainder in Fee came to the Feme Tenant in Tail, after possibility of Issue, the Frank-tenement was extinct, in the Fee, and so A. was seised in Fee, but per Pigot, if A. was within Age, the shall not have her Age, nor the shall not be in Ward, for the had the Possession by Purchase; Per Pigot and Choke; and per Needham, if he in the Reversion or Remainder had charged the said A. should hold discharged. Br. Estates, pl. 25. cites 9 E. 4. 17, 18.

17. If the Heir within Age recovers by Writ of Entry sur Disfeisus, he shall lie in Ward; For he is as if his Heir infant died feised, and he is vis by DEF. and the same Law if the Heir within Age recovers by Writ of Coimage. Br. Gard. pl. 42. cites 15 E. 4. 10. Per Browne.

18. If a Man gives in Tail the Remainder to his right Heirs, the Fee Simple never was out of him, and therefore it descends to his Heirs. Br. Livery, pl. 61. cites 32 H. 8.

19. But otherwise it feems where a Man makes a Feoffment in Fee in Possession, and disfifes himself of all, and re-takes for Life the Remainder in Tail, the Remainder to his right Heirs and dies, and after the Tenant in Tail dies without Issue, there the Heir who is right Heir, is Purchasor. Ibid.

20. But if the Tenant in Tail had died without Issue, in the Life of the Tenant for Life, and after the Tenant for Life dies, there the Fee Simple was vested in the Tenant for Life, by Extinguishment of the Mefe Remainder, and therefore there the Fee Simple defends. Ibid.

21. If Baron makes Feoffment in Fee, to the Use of himself and Feme in Tail, (within the 11 H. 7. cap. 10. ex Proviso visi) Remainder to the Heirs of the Husband, they have Issue a Daughter, the Baron dies; the Wife precequent consort with a Son; the Feme before the Birth of the Son continues a Fine, or suffers a Common Recovery; in this Case, though the Daughter do or do not enter, or though the Daughter had joined in the Fine, or had been vouched in the Common Recovery, or by any other Act had disabled herself to take Advantage of the Act, yet the Son born afterwards shall take Advantage of it, for the Daughter cannot do any Act to bar the Son of his Entries; But upon the 6 R. 2. cap. 6. which enacts quod proximus de fagnune eorundem rapientium, et rap- tornum cui Hereditas defendere &c. debereot poti morem rapientis vel rapte habeat Titulum &c. intrandi &c. Here if the Daughter enters, the shall retain it always against the Son born afterwards, for the Daughter by this Statute has the Land merely as a Perquisite in Fee Simple; For the Statute says, intras &c. et renebit de Jure Hereditario. 3 Rep. 61. b. Mich. 37 & 38 H. 8. in a Nota by the Reporter. 22. And
22. And compare it to the Case, where if a Remainder is limited to the right Heirs of J. S., and he dies, having a Daughter, the Daughter shall have this as a Purchaser, and shall retain the Land against the Son born afterwards, but when the Daughter enters by 11 H. 7, the Heir is in an Estate Tail Per forseam Doni and so in Nature of a Descend, and not merely as a Purchaser, for the is to claim as if the Wife had been dead.

3 Rep. 61. b. 62. a in a Note by the Reporter, cites 9 H. 7. 25. b.

23. If a Man leaves for Life, the Remainder over in Fee, and he in Remainder dies, his Heir within Age; his Heir shall not be in Ward, and Man leaves no contra if the Tenant for Life, who was Tenant to the Lord, dies; For there the Heir has the Remainder and Land by Descend. Quod Vide in the Writ of Ejectment of Ward, in Old Nat. Brev. Br. Garde, pl. 113.

24. If a Man seised of the Manor of S. covenants with another, that when J. S. shall issue off him or the Manor of D. then he will stand seised of the Manor of S. to the Use of the Covenantee and his Heirs, the Covenantee dies, the Heir within Age, J. S. enfeoffed the Covenantor: and here it was helden in Wood's Case. (3 Eliz.) that the Heir shall be adjudged to be, in Course and Nature of a Descend, and yet there was no right Title, Action or Ufe which descended, but only a Possibility of an Ufe, which cannot be released or discharged, but this might, if the Condition had been performed, have vested in the Ancestor, then the Heir must have had claimed by Descend, and therefore the Heir in this Case was not in by Purchase, but by Course of Descend. 1 Rep. 98. b. 99. a in Shelly's Cafe, cites Pl. C. 284. a. Chapman's Cafe.

25. The Father made a Feoffment to A. for Life, the Remainder unto to the Heirs Males of the Body of the Feoffor, the Remainder to his own Heirs in Fee. The Father had two Sons, and the Elder had a Daughter and died, and it was adjudged for the Daughter against the Uncle, either because the Entail to the Heirs Males was void, or because it ceased in the elder Son. Hob. 30. cites D. 156. Mich. 4 & 5 P. & M. Grefield's Cafe. the Limitation of this Remainder in Tail void; because the Donor cannot make his own Right a Purchaser without departing from the whole Fee Simple out of himself, and for the one Cause or the other the Justices were against the Tail and with the Heir General, and adjudged accordingly.—Mod. 284 S. C. cited per North, Windham and Atkins, who agreed that at Common Law, a Man could not make his Right Heir a Purchaser without parting with the whole Fee, but that in Way of use he might; that Grefield's Case in Dyer is of an Estate executed.—S. C. cited 2 Mod 2 Mod 209 Arg. and W. 517 per Cur. Patch 29. Sir. 2. C. B. and they held the Opinions of Dyer and Saunders there to be good Law.

26. E. S. had Issue H. and R. H. dies, having Issue M. a Daughter, and leaving his Wife Provost enfeAth with a Son; E. S. being tenant in Tail, suffers a common Recovery to the Use of himself for Life, and after, to the Use of the Heirs Males of the Body of E. S. lawfully begotten, Remainder over; E. S. dies the very Day the common Recovery paffes, and Execution is slided after his Death; R. the Uncle enters. A Son is born to H. deceased, and be enters ; adjudged lawful, for the Uncle did not enter as a Purchaser; for if the Father had lived, he would have had the Estate, and not the Uncle; Adjudged by the Ld. Chancellor Bromley, and all the Judges except one of C. B. 1 Rep. 93. b to 107. Trin. 23. Eliz. Shelly's Cafe.
27. An Use is limited to the Use of himself for Life, Remainder to the Use of his Heirs, and the Heirs Females of the Body of the said Heirs; the Heir here takes by Purchafe; for then the Words subfequent, viz. "And of their Heirs Females of their Body," shall be void; Per Anderson. 1 Rep. 95. b. Trin. 23 Eliz. in Shelly's Cafe.

28. Where the Heir is to take any Thing which might have vested in his Ancestor, the Heir shall be in by Defcent; So that although an Eftate or Right do firit vested in the Heir, and not all in the Ancestor, yet the Heir shall take this in the Nature and Courfe of Defcent. 1 Rep. 98. a. Trin. 23 Eliz. in Shelly's Cafe.

29. When an Eftate for Yeares is limited to the Ancestor, the Remainder to another for Life, the Remainder to the right Heirs of the Lefsee for Yeares; the Heirs here are Purchafors. 1 Rep. 104. a. Trin. 23 Eliz. in Shelly's Cafe.

30. So if the Remainder be limited to the Heir in the Singular Number, upon a Lease for Life. 1 Rep. 104. a. in Shelly's Cafe.

In another Cafe 1 Rep. 66. Nich. 39 & 40 Eliz. agreed that the Heir shall be a Purchafor.

Cro. F. 335. pl. 1. S. C. the Daughter married and had Issue; Gawdward and Fenner held that R. had only an Eftate for Life, and that her Heir shall take as a Purchafor, but Popham held a contra, Et adjournatur.----

Ow. 148. Lilly v. Taylor S. C. and Gawdward and Fenner held it, an Eftate for Life only in R, and that the Issue was a Purchafor; but Popham and Clerih hold a contra —— See tit. Remainder (G) pl. 7, in the Notes where this Case is fully and truly rated by the Ld. Ch. J. Raymond.

31. M. devised Lands to R his Daughter, for Life, and if she marry after my Death, and have the Issue of her Body lawfully begotten, then I will, that her Heir after my Daughter's Death shall have the Lands, and to the Heirs of their Bodies begotten, the Remainder to a Stranger; Adjudged, that he had not Eftate Tall, but for Life only, and the Inheritance in her Heir by Purchafe, it resting in Abeyance all his Life, and fettling in the Infant of her Death. Mo. 593. pl. 803. Hill. 35.


32. Devife to Trustees to the Use of the Heir, for so long a Time as he and his Heirs should live. B. to enjoy &c. the Son doth not take by Defcent but Purchafe. No. 727. pl. 1013. Pach. 36 Eliz. in the Court of Wards. Digby's Cafe.

33. If Lands be given to A. and B. so long as they jointly live together, the Remainder to the right Heirs of him that dies first. A. dies, his Heir is now in by Defcent. Co. Litt. 378. b. in Principio.

34. In the Cafe of an Exchange, if one of the Exchangers enters and dies and the Heir of the other enters, after his Father's Death he hath it by Defcent although his Father hath nothing in it. Jenk. 249. pl. 40.

35. So of Covenant upon a Consideration and a Condition precedent to raise an Use to A. and his Heirs, and A. dies before the Performance of it, and the Condition is performed afterwards; yet the Heir of A. shall take by Defcent. Jenk. 249. pl. 40.

36. So of a Condition broken in the Life-time of the Father, or after his Death and the Heir enters for the Condition broken; the Heir is in by Defcent. Jenk. 249. pl. 40.

37. So of a Fine by Render to the Conwife and his Heirs, and the Conwife dies before Entry, his Heirs shall have it by Defcent. Jenk. 294. pl. 40.

38. A Man having Issue by one Vener R. and S. by a second Vener, covenants to stand fized to the Use of his Heirs in being or to be begotten on the Body of Jane his second Wife, and he makes none in by Defcent; But if S. did not take by Defcent, yet he was a contingent Use in him by Purchafe; for the Limitation was, that the Body J. will make a Special Heir to serve the Turn, and not to Have, the
the Heirs of the Body of the second Wife is a good Name of Purchafe. *Stowell, 2 Mod. 211. Pach. 29.

Car. 2. C. B. — 2 Vern. R. 735. & C. cited per Cowper C. and holds with Hale Ch. J. that the Implication was needful, and that Milford took by Purchafe and Decription; and that Wynde, as convinced, by his Argument decla ed he was of the latter Opinion; so that the Opinions of Hale and Wynde may outweigh by Way of Authority the Opinion of Cook. Obiter in Shelly's Cafe, and that of Hobart in Cafe of Couden v. Clarke, their Opinions not being upon the Point adjudged.


mitation is made to his Right-Heirs, the Right Heir shall not be Purchafor. Co. Litt. 22. b.

40. The Rule, that where a Man takes Frank-Tenement and the Efiate is after limited to his Heirs that they shall take by Deceit, fails in divers Cafes; As if Lands are given to A. for Life, Remainder to B. for Life, and if A. dies before B then to the right Heirs of A. In this Cafe the Heirs shall take by Purchafe. Arg. Litt. Rep. 258. Pach. 5 Car. C. B.

41. So Lease to A and B and if A. dies, living B. the Remainder to the Heirs of A. The Reason seems to be, because there is no Possibility that the Frank-Tenement and the Fee shall be conjured in A. during his Life. Arg. Litt. Rep. 258. Pach. 5 Car. C. B.

42. But if Lease be to A and B. for the Lives, and if J. S. dies during their Lives* there the Right Heirs of A. shall take by Deceit, because there is a Possibility that J. S. may die during their Lives. Arg. Litt. Rep. 258. Pach. 5 Car.

43. An Use of a Term to the Husband and Wife, and after to their Issue, they then having none, is all one as limited to them and the Heirs of their Bodies; the Issue takes nothing as a Purchafor. Per Lord Keeper. Chan. Cafe 266. Mich. 27 Car. 2. Bullock v. Knight.

44. Though at Common Law a Man could not be Donor and Donee without he part with the whole Efiate; yet it is otherwise in a Covenant to stand seized to Uses; Resol.ved. 2 Mod. 211. Patch. 29 Car. 2. C. B. Southcote v. Stowell.

45. Where the Heir takes by a Devise with a Charge, as paying 20L Freem. Rep. &c. he does not take by Deceit but by Purchafe. Per North Ch. J. 248. pl. 265. and Atkins. 2 Mod. 286. Hill. 29 and 30 Car. 2. C. B. Brittan v. Charnock.

46. In Debt upon Bond brought against the Defendant as Heir to his Father, and Rents per Deceit pleaded, the Plaintiff replied Affets, and Issue thereupon; and the Evidence was, that the Obliger, the Defendant's Father, devolved to the Defendant his son and Heir certain Meutaghts in Exchequer Alley in Fee, but chargeable with an Annuity or Rent-charge payable to the Defendant's Mother; and it was held by Holt Ch. J. that these Meutaghts descended to the Defendant and were Affets; for (by him) the Difference is, where Devise makes an Alteration of the Limitation of the Efiate, from that which the Law would make by Deceit; and where the Devise conveys the same Efiate, as the Law would make by Deceit, but charges it with Incumbrances. In the former Cafe the Heir takes by Purchafe, in the latter by Deceit. ld. Raym. Rep. 728. cites Trin. 13 W. 3. E. K. Guildhall London; Emerson v. Incbird.

47. Heirs.
Defcent.

47. Heirs or Heir Male cannot be a Name of Purchafe, but Heirs Males of his Body may; Therefore if there is no such Thing in Propriety of Speech as an Heir Male, without faying of whose Body, for that Reafon Heir Male of his Body, or Heirs Males of itfelf, where the Law will fill if are Words, of his Body, as it will in a Devise may be a good Name of Purchafe; but yet the Party who would take by fuch a Limitation mift be fuch a Perfons as may be an Heir by the Common Law, and would take by that Name. 3 Salk. 336, 337, pl. 2, Mich. 7 Ann, Lord Offufborne’s Cafe.

48. The Diſtribution between taking by Defcent and taking by Pur- chafe, where the Words are the fame, though it be mentioned in Books of good Authority yet, it seems to have no fufficient Foundation of Reafon or Authority of Law to fupport it, and if it should prevail, in all Cafes would overthrow another Rule as certain, viz., that a Man may take by Pur- chafe if he be fufficiently defcribed, though without Addition of Christian or Surname, nay, though his Christian Name be fälle or miftaken, as appears by feveral Cafes put in Co. Litt. 3. a. per Lord Cowper. Ch. Prec. 463. Hill. 1716. in Cafe of Brown v. Barkham.

49. If a Feoffment is made to feveral Uses, the Reversion in Fee to the Heirs of the Feoffor, in fuch Cafe the Heir fhall take the Reversion by Defcent, becaufe it was part of the old Estate of the Feoffor; For fo much of the Ufe of the Lands as he did not defpofe of by the Feoffment ftil remained in him as Part of the old Estate. 3 Mod. 23. Mich. 7. Geo. in Cafe of Smith v. Trigg.

See the copyhold. (C.e)

(K) In what Cafes it fhall defcend to the Half Blood. What fhall be a Seffion to take away the Defcent.

1. If J. hath three two Daughters by feveral Venter, and dies feid of Sogage Lands, and the Lord fefies the Land to know who fhall be his Tenant, and for the Safety of his Rent, and leaves it for seven Years for the Sullenance of the Daughters of J. faying his Rent; this fhall not make fuch a Seffion in the Eldeft, but that af- ter her Death the Second Daughter fhall have the Land. 34 Art. 10. adjudged.

2. So if the Eldeft Daughter being an Infant, releases to the Abator after the Death of her Father, this does not make fuch a Seffion in him, but that it fhall defect to the Youngest Daughter. 34 Art. 10. adjudged.

3. But if the Eldeft Daughter being an Infant, enters upon the Ab- tor, and makes a Feoffment, this fhall bar the Youngest of the half Blood, for this Entry made a Seffion in him. 34 Art. 10.

Br. Difcent, pl. 25. cites S. C. Br. Mort- dancefter

4. If a Man leaves for Life, rendering Rent, and dies, having three two Sons by feveral Venter, and the Eldeft Son dies before the Rent-Day, the Second Son fhall pay it as Heir to his Fa- ther, becaufe the Eldeft had not the actual Possession. 35 Art. 2.

Br. Difcent, pl. 28. cites S. C. which was that A. was fefied
Defent.

5. But otherwise it would have been, if the Rent-Day had not
occurred in the Life of the Eldest, and he had received the Rent, for
this would have made an actual Seisin in him. 35 Eliz. 2.

14. per Amnum to A. and his Wife which A. had by his First Wife, and C the Plaintiff by
the second Wife, the Rent was payable at Michaelmas and Easter, and K. seized Michaelmas, but he
died before that he received the Rent, and B. seized him and died before Easter, so that he had only a
Seisin in the Law of the Rent, and no Seisin in Fact, and after B. died, and then S. Tenant for Life
died, and D. as Confin and Heir of B. entered, and C. as Heir of A. ousted him, and D. re-entered
and intestate against whom C. and her Husband brought Affiz and recovered, and so fee that the
Reversion shall be to the Heir of the Father of Half Blood, if it fall not in Demesne to the Son of
the first Venter in the Life of the Son. Br. Seisin, pt. 25, cites S. C. but Brooke says, Quere if
the Eldest Son had had Payment and had died in the Life of the Tenant for Life, whether this
Seisin of the Rent had been sufficient Seisin of the Reversion to disappoint the Daughter of the
Half Blood

If the Father makes a Lease for Life, or a Gift in Tail and dies, and the Eldest Son dies in
the Life of Tenant for Life, or Tenant in Tail, the Younger Brother of the Half Blood shall inherit,
because the Tenant for Life, or Tenant in Tail is lefted of the Freehold and the Eldest Son had no
thing but a Reversion expirant upon that Freehold or Efface Tail, and therefore the Youngest Son
shall inherit the Land in Heir to his Father who was last feised of the Actual Freehold, Co Litt. 15. r.
And albeit, a Rent had been reserved upon the Lease for Life, as the Eldest Son had re-
ceived the Rent and dies, yet it is holden by some that the Youngest Brother shall inherit, because
the Seisin of the Rent is no Actual Seisin of the Freehold of the Land. ibid. — Br. 35 Eliz. pl. 2.
seems to the contrary, because the Rent Iffues out of the Land and is in Lien thereof, where the
only Question is, whether such a seisin of the Rent be such an Actual Seisin of the Land to the
Eldest Son as the Sitter may in a Write of Right make her Iff as Heir of this Land to her Brother.
Co Litt 15 a

If a Man has Iffue a Son and a Daughter by one Vener, and a Daughter by another Vener, and
Leases to another for Term of his Life without any Rent referred and dies and the Reversion defends
to his Son who has Iffue a Son and dies, and the Son dies without Iffue, and then the Tenants for Life
dies; The two Daughters shall have the Land notwithstanding there was a Defect of the Reversion
to the Son of the Son; by the Opinion of the Judges of C. B. and Co Litt. 3. 30. b. 34.

6. If there be a Gift to the Baron and Feme in Special Tail, the
Remainder to the right Heirs of the Baron, and they have Iffue, and
the Feme dies, and the Baron takes another Feme, and hath Iffue and
dies, and the Eldest Son enters, and dies without Iffue, the Second
Son of the half Blood shall have the Remainer, because the Eldest
was not feised thereof in his Demesne. * 37 Eliz. 4. adjudged, but
there the Reason is given, because the Remainer did not come
ience till after the Gift. 24 Eliz. 3. 30. b. 34.
by Award; for the Remainer in Fee cannot come into Seisin till the Table be determined, and yet
it was in the Eldest Son to give or forfeit, but it was not in Possession; for it is the Possession which
makes the Heir of the Eldest to be inheritable. — Fitzh. Affiz, pl. 147. cites S. C.
† Fitzh. Defent, pl. 11. cites S. C. and S. P. as the Case above except that in this the Remainer
was limited to the Right Heir of the Feme, who had Iffue by the first Baron and afterwards had

7. If Land be given to J. for Life, the Remainder to R. his Son
in Tail, the Remainder to the right Heirs of J. and J. dies, and R.
enters as Tenant in Tail, and dies without Iffue, T. the Son and
Heir of J. of the half Blood to R. shall have the Land by Defent,
and not the Heirs of R. because R. was never feised of the Fee in
Demesne. 39 Eliz. 3. Defent 5.

8. So if a Gift be to another in Tail, the Remainder to his own
right Heirs, and after the Donee dies, having Iffue a Son by one
Vener, and a Son by another, and the Eldest Son enters, and dies with-
out Iffue, his Brother of the half Blood shall have the Land by
Force of the Remainer as heir to his Father, because his Brother
was never feised of this Estate in Demesne.

9. So if the Eldest Son be feised in Tail, with a Remainer or
Reversion by Defent to him from his Father in Fee, and dies without
Iffue, his Brother of the half Blood shall have this Remainder or

7 1
Reversion
§32

Defcent.

Recension by Defcent, because his Brother was never listed thereof in Denumic. 32 E. 3. Defcent 9. adjudget. 5 E. 3. Defcent 14. adjudget.

10. If a Man lists of an Advowson in Gros hath Issue a Son and a Daughter by one Venter, and a Son by another, and dies, and the Eldest Son dies before any Presemtation, the Youngest Brother shall have the Advowson, because the Elder never had any Seisin thereof. 9 D. 2.

11. But if the Eldest had presented, and died without Issue, the Youngest Brother should not have had the Advowson, because this Presemtation puts the Seisin in him. Fitz. Nat. 36. E. contr. 19 E. 2. Quare Impedit 177. adjudget.

12. If two Daughters by several Venter makes Partition of an Advowson in Gros, to present by Tuns, and after one dies without Issue, before any Presemtation, the other shall have the Advowson, because there was no Seisin thereof. Fitz. Nat. 34. E.

13. But o herwise it would have been, if the had had presented after the Partition. Fitz. Nat. 34. E.

14. If Landes depend to two Coparceners, and they make Partition, being of the half Blood, and after one dies without Issue, the other shall not have it, because the ought to have it as Heir to her, and not as Heer to the Ancestor. Contra, 19 E. 2. Quare Impedit 177.


16. J. was seised and had Issue, Robert the Eldest, and Richard the Youngest, and died, and Robert entered and took Feme, and had Issue Alice, the Feme died, and he took another Feme and died, the Feme procuration enxtent to a Son, and the Lord seised the Ward of the Land, and of Alice, for the Nonage of Alice, and leded the Ward to J. who endowed the Feme of Robert, and after the Feme is delivered of W. a Son, by which the Lord refesed the Ward of W. and W. lived 10 Years, and died without Issue, by which H. the Plaintiff entered as Heir of Richard the youngest Son of J. and Alice cutted him, and he brought Affisfe, and prayed the Diversion of the Julicises. And because W. to whom Alice was of Half Blood, was seised, it was awarded, that Henry should recover. And fo Note, that the Seisin of the Guardian makes the Heir of the Infant of the entire Blood to be Heir, and the Sifer of the Half Blood was barred of the Land, but by the Opinion of the Court the Doect of the Feme shall revert to Alice, because W. was not seised of it, Quære. Br. Difcent. pl. 19. cites 8 All. 6.

But Brookes says, it seems that all is one; For it is said elsewhere, that where the Heir is seised, and endows his Mother, and she dies, and a stranger enters, the Heir shall have the Mortal tithe, and not Affis of the Defcent, and see Littleton, Br. D. sect. 9. If the Defcent dies seised, and his Feme is endows by his Heir, the Entry of the Defcent is revocd., for the third Part put in Dower. And P. 19 E. 2., where the Heir takes Feme, and enters and endows his Mother, and sets the Reversion and the Mother dies, and after the Mother dies the Feme of the Heir shall not have Dower of the Land of which the Mother was endowsd; For the Seisin of the Heir, who was her Feme, was determinded by the Endowment, and the Feme is in by her Heir, and not by the Heir; For if the Heir is a Minor, the shall hold it clear, and noted. And to see above, that the Seisin of the Lord of the Ward is sufficient security for the Infant to bring Affisfe.

41a. If a Man hath Issue a Son and a Daughter by one Venter, and a Son by another Venter, if the Father dies seised, and the Son dies before Entry, the Sifer of his Whole Blood shall have the Land, as Heir
to her Brother, and not the Brother of the Half Blood, because the Eldest Brother had the possessio caoff on him, by Curteis of Loxe, and the Freehold also was in him, and therefore the Sitter shall have the Land, as Heir to him, and not the Younger Brother of the Half Blood &c.

Kelw. 110. pl. 31. cites it as adjudged, 8 E. 3.

and shall make immediate Devise to him from his Father, and not mention his Brother, and yet the Elfe was in his elder brother to grant or charge, or intitle his Wife to Dowry. Trin. 11 Car. B. R. Reeve v. Muller.

18. In Affife, if a Man has Ilifie three Daughters by one Venter, and one by another Venter, and dies seised of Land, and all enter, and after two of the first Venter dies, the Third of the first Venter shall be Heir to them, and shall have their two Parts, and the fourth shall have only her fourth Part, as before, and no Part of the two Parts; for the cannot be Heir to them, because she is of Half Blood to them. Br. Difcent, pl. 29. cites to Aff. 27.

19. A Man has Ilifie a Son and a Daughter by one Venter, and a Son by another Venter, and gives his Land to his Eldest Son in Tail, the Father dies, the Fee defends to his Eldest Son, and the Eldest Son after dies without Heir of his Body, and by all the Justices of C. B. the Youngest Son shall have the Land, and not the Daughter. The Reason seems to be, because it was in Reversion, and cannot vest in Possession to the Eldest Son, during the Tail. Et possedum fratris &c. facit fororem eft Haredem, and not Reverens fratris. And Thorpe Justice of B. R. said, that the Daughter shall have it, nevertheless, the Law teats to be contrary. Br Difcent, pl. 13. cites 24 E. 3. 13.

20. Land was seised to Fine by Baron and Feoff, and the Heirs of the Feoff, who had Ilifie two Sons by divers Barons, and they died, the Eldest Son entred and died without Ilifie, and the Youngest of Half Blood brought Scire Facias, and obtained: for Possedum fratris or such like de taceo simplici factor come & eft Haredem, and here was no Possedum, Quod Nota Bene. Br. Difcent, pl. 14. cites 24 E. 3. 30.

21. Scire Facias upon a Fine that was leaved to J. and A. his Feoff in Tail, the Remainder to A. in fee, the Baron and Feoff had Ilifie a Son, the Baron died, and after the Fee took another Baron, and had Ilifie another Son, and died, the Eldest Son entred and died without Ilifie, and the Heir Collateral of the Eldest Son entred 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 belt 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, and 37 E. 3. Lib. Aff. 4. it is adjudged for the Youngest Son, and yet the Eldest Son by Feeome might have given the Fee Simple, or charged it, or forfeited it by Attainer or Felony, but yet it was not executed in him, therefore whoever is Heir to the Ancestor, when the Fee falls, he shall have Execution thereof, Quod Nota. Br. Scire Facias, pl. 126. cites 24 E. 3. 30. 62.

22. It the King be seised of Land injure Crown, and of other Land by Purchase, or by Reasons of the Dutchy, and has a Son and a Daughter by one Venter, and a Son by another Venter, and dies, the Eldest Son enters into all, and dies without Ilifie, there the Youngest Son shall have the one Land, and this seems to be e Juris Coronarum, and the Daughter shall have the other Land. Per Moyle Arg. which none denied. Br. Difcent, pl. 5. cites 34 H. 6. 34.

23. A Man had Ilifie a Son and a Daughter by one Venter, and three Daughters by another Venter, and enfeoff'd four to perform his Will, and after to enfeoff his Heirs, and declared his Will and died, the Son died,
the Will not perform'd, and by the Reporter, the Daughter by the first
Venter shall have Subpoena, to have Execution of the Eftate of the Land
of the Feeoffice, for the Will is no Impediment of Potfullion of the Ufe
and Potfullion fratis of the Ufe facit foorem elfe Haredem to the Ufe of
the Fee Simple. Nevertheles, Quare if it be Potfullion, because the
Will is not fulfilled, notwithstanding it is faid here, that the taking of the
Profits of the Land in Ufe is such Potfullion by the Brother, as shall make
the Daughter of the Whole Blood to be Heir as of Land, but the one
and the other muft be of Fee Simple. And by the Reporter, the Will to
take the Profits during a Term, is no Impediment, but that the Brother
has good Potfullion, and e contra of a Will &c. to take the Profits for
Life, or other Eftate of Frank-Tenement. Note the Difference, for the
one is in Nature of a Revolutions, and the other not. Br. Difcent, pl. 36.
cites 5 E. 4. 7.

24. Feeoffes are faid to the Ufe of A. who has a Son and a Daughter
by one Venter, and two Daughters by another Venter, and makes
a Will [and devises] for Years and dies, the Eldest Son dies within the
Years, yet the Daughter shall be Heir to the Ufe, for Potfullion fratis
&c. contra where the Will is for Life. Br. Feeoffes al' Ufes, pl.
Ufes, pl. 33. cites 5 E. 4. 7.

25. Ceftby que Ufe has illue a Son and a Daughter by one Venter, and
a Son by another Venter, and dies. The Eldest Son takes the Profits,
and dies, without illue. The Ufe shall descend to the Daughter, as
Sister and Heir of him, and not to the Younger Son. Arg. D. 16. b.
cites 5 E. 4. 7. 2.

26. In Trefpafs the Defendant said, that f. N. was faid in Fee, and
took to Wife A. and had illue the Wife of the Defendant, and A. died,
and he took K. to Wife, and had illue the Wife of the Plaintiff, and died,
and the Eues entered, and the one married the Plaintiff, and the other
the Defendant, and fo they held in Commone, Judgment is Aetio, the Plain-
tiff confiff'd the Bar, and said further, that f. N. had illue W. by the
second Wife, and the Wife of the Plaintiff, [and that] f. N. died, and
after W. the Son of f. N. entered as Son and Heir, and was faid, and
died faifed without Heir of his Body, and the Wife of the Plaintiff as Sifer
and Heir of the Whole Blood entered, and was faifed till the Trefpafs.
Pigot maintain'd the Bar Abique hoc, that W. died faifed, and the
illue was faifer'd, and yet the Seifby of the Brother suffices, notwithstanding
he that be not did die faifed, and Seifina fratis facit foorem elfe Hare-

27. If the Difопредел dies faifed, the Entry of the Difsius is toll'd,
but if the Hor of the Difsius endows the Feme of the Difsius, there the
Difsius may enter into the Land allign'd in Dower; For she was in by
her Baron, and not by the Heir, and so the Difsius remain'd. Br. Ten-
nant per Corfoes, pl. 10. cites Littleton tit. Difsius.

28. Where a Man dies faifed, and has two Sons of half Blood, and the
Eldest dies before Entry made by him, the Youngest of the half Blood
shall have the Land; Quod Nota the Entry. Br. Difcent, pl. 51. cites
Littleton tit. Fee Simple.

To make
Potfullio
Fratis
Land there
must be an
Entry, or
other Actual Seifia in the Brother. Arg. Show. 246. Mich. 2 W. & M.

3 Rep. 41.
b. S. P. —
Ca. Inst. 15.
b. S. P. —
Show. 2. 6.
Arg. S. P. —

29. Advoeion shall descendent to the Brother of the half Blood, unlefs
the first hath presented to it in his Life-time; But if he has presented in his
Life-time, then it shall descend to the next Heir of the entire Blood.
Dod. of Advoeions 21.

30. Re-
30. Recovery by the Brother, without Execution, will not make the Sitter to be Heir; for without Execution, he has not Possession, and so the Execution makes the Judgment full and perfect. Arg. Pl. C. 43. B. Mich. 6 E. 6. in Case of Winifhbo v. Tailboyes.

31. A has a Son and a Daughter by one Venter, and a Daughter by another Venter, and he makes a Lease for Life of Land, without reserving any Rent, and the Father dies, and the Reversion descends to the Son, and the said Son has Issue a Son, and dies, and the said Reversion descends to his said Son, who dies without Issue, and after Lease for Life dies, now both the Sitters of divers Venturers shall have the same Land as Heir to their Father, and not the Sitter of the first Venter only. Per the Justices of C. B. Ben. 143. pl. 202. Mich. 7 Eliz.

32. A Copyholder in Fee has Issue a Daughter and a Son by two Venturers; the Lord commits the Custody of the Land, and of the Son, to the Mother, who takes the Profits, and the Son dies before any Admittance; this Copyhold was ordered also for the Heir Collateral against the Sitter of the half Blood, because the Mother's Possession serveth for the Son. Cary's Rep. 8. cites 12 Eliz. D. 291.

33. Two Daughters by two Venturers enter after Death of their Father, and take the Profits jointly several Years of a Copyhold Estate before any Admittance of the Lord; Eldiet dies without Issue. Per 2 Just. The Possession aforesaid is sufficient, without any Admittance, to make the Collateral Heir inheritable, and it was ordered by the Lord Keeper accordingly. D. 291. b. pl. 69. Trin. 12 Eliz. Anon.

34. A telleth of Land in Fee has two Daughters by several Venturers, B. the Eldiet, and C. the Youngest; he devises a Moity of the said Land to his Wife for seven Years, and that B. in the Marriage shall enter into the other Moity; A. dies, his Wife enters and educates the Daughters; C. enters with her Husband into the other Moity; C. dies without Issue; the Heir of the whole Blood of C. shall have her Moity. For the Possession of the Mother for seven Years was an actual Possession in C. and if the Wife had not entered at all, the Entry of B. although of half Blood only, would have given Possession to C. Adjudged in both Benches, Jenk. 242. pl. 25. cites 17 El. 1. 342. cites the Cafe of Cower v. Breverho. S P. adjudged accordingly, because it was against the Intent and Mind of the Devisee, by the Words of the Will as it appears,—But Palm. 373. Dodderidge said, that if one has five Daughters and devises all his Land to one of them, she takes all by the Devise and nothing by the Decent; for her Title is intire, And fee Reading v. Royfon accordingly.

35. The Husband is seised in Right of his Wife of certain Customary Lands in Fee, and he and his Wife, by Licence of the Lord, make a Lease for Years by Indenture, rendering Rent, have Issue two Daughters, and the Husband dies; the Wife takes another Husband, and they have Issue a Son and a Daughter, the Husband and Wife die, the Son is admitted to the Reversion, and dies without Issue; and by Mannwood that Reversion shall descend to all the Daughters, notwithstanding the half Blood, for the Estate for Years, which is made by Indenture by Licence of the Lord, is a Devise, and a Lease according to the Common Law, and according to the Nature of the Devise the Possession shall be adjudged, which Possession cannot be said Possession of the Copyholder, for his Possession is customary, and the other is mere contrary, therefore the Possession of one shall not be the Possession of the other, therefore there shall be no Possession Fratris in this Case; But if one had been the Guardian by Custum, or the Lease had been made by Surrender, there the Sitter of the half Blood should not inherit. And Mead said, the Cafe of the Guardian had been adjudged. 4 Le. 48. a. 103. Mich. 17 Eliz. C. B. Anon.

36. Devise for Years enters, that will make a Possession Fratris. Jenk. 242. pl. 25. cites D. 342 [a b pl. 54. Trin. 17 Eliz. Anon.] 7 K

37. De-
37. Descentes of a Manor extend into two Counties, the Eldest Son enters into the Desmesne in one County only, and takes the Profits in one County only, and dies without Issue, his Sister of the whole Blood shall have and inherit the Desmesne and Services whereof her Brother was seised, and her Brother of the half Blood the rest. Per Manwood J. Lc. 265. pl. 355. 20 Eliz. C. B in Bracebridge's Cafe.


If a Man has a Son and Daughter by one Venter and makes a Lease for Years and dies, the Eldest Brother dies during the Term, this is no Impediment of Pollesion, but that the Eldest Daughter of the whole Blood shall be Heir to him. Br. Difent, pl. 36. cites 5 E. 4. 7. —— Co. Litt. 15. a. (k) 5. P. and cites S. C.

Fin. Law, 8vo pag. 20. — For the Selfin given to his Ancestor is sufficient for him and all his Heirs. D. 291. b. 69. and in Marg. 25 Eliz. Holmes v. Fane.

39. There shall be Pollesio Fratris of a Copyhold before Admittance, said per Wray Ch. J. to have been so adjudged lately. 4 Rep. 23. b. Trin. 26 Eliz. B. R. Clerk v. Pennyfeather.

40. If a Gift be to A. and the Heirs of his Body, and he has Issue a Son and a Daughter by one Venter, and a Son by another Venter; A. dies; the Eldest Son enters and dies; the Youngest Son shall inherit per formam Doni; For he claims as Heir of the Body of the Donee, and not generally as Heir of his Brother. 3 Rep. 41. b. Hill. 34 Eliz. B. R. in Ratcliff's Cafe.

41. If a Man has Issue two Sons by divers Venters, and the Elder purchases Lands in Fee Simple, and dies without Issue, the Younger Brother shall not have the Land, but the Uncle of the Elder Brother, or some other his next Cousin shall have the same, because the Younger Brother is but of half Blood. Litt. S. 6.

42. If a Man has Issue a Son and a Daughter by one Venter, and a Son by another Venter, and the Son of the first Venter purchases Land in Fee, and dies without Issue, the Sister shall have the Land by Descent as Heir to her Brother, and not the Younger Brother, for that the Sister is of the whole Blood of her Elder Brother. Litt. S. 7.

43. If there be two Brothers by divers Venters, and the Elder is seised of Land in Fee, and dies without Issue, and his Uncle enters as next Heir to him, who also dies without Issue, now the Younger Brother may have the Land as Heir to the Uncle, for that he is of the whole Blood to him. Litt. S. 8.

44. If Lands are given to a Man and his Wife and the Heirs of their two Bodies, the Remainder to the Heirs of the Husband, and they have Issue a Son and the Wife dies, and he takes another Wife and has Issue a Son, the Father dies, the Eldest Son enters and dies Issue, the second Brother of the Half-Blood shall inherit; Because the Eldest Son by his Entry was not actually seised of the Fee Simple, being expectant, but only of the Estate in Tail. And the Rule is, that Pollesio Itratri de seculo Simple, facit fororem efsi heredem, and here the Eldest Son is not pollesied of the Fee Simple, but of the Estate Tail. Co. Litt. 14. b.

45. If the Father makes a Lease for Years, and the Lessee enters and dies, the Eldest Son dies during the Term before Entry or Receipt of Rent, the Younger Son of the Half-Blood shall not inherit, but the Sister; because the Possession of the Lease for Years is the Possession of the Eldest Son, so as he is actually seised of the Fee Simple, and consequently the Sister of the Half-Blood to be Heir. Co. Litt. 15. a.

46. If the Eldest Son enters and gets an actual Possession of the Fee Simple, yet if the Wife of the father be endowed of the third Part, and the Eldest
Defcent.

Son dies, the Younger Brother shall have the Reverion of this third Part notwithstanding the Eldett Brother's Entry, because his antal Seisin which he got thereby was by the Endowment defeated. Co Litt. 15. a.

47. But if the Eldett Son had made a Leafe for Life, and the Leasee had endowed the Wife of the Father, and Tenant in Dower had died, the Daughter should have had the Reverion, because the Reverion was changed and altered by the Lease for Life, and the Reverion is now expectant on a new Estate for Life. Co Litt. 15. a.


49. If a Rent or an Advowson defends to the Eldett Son, and he dies before he has Seisin of the Rent, or presents to the Church, the Rent or Advowson shall descend to the Youngest Son, for that he must make himself Heir to his Father. Co Litt. 15. b.

50. The like Law is of Offices, Courts, Liberties, Franchises, Common of Inheritance, and such like. And this Case differs from the Case of the Tenant, by the Courteys, for there if the Wife dies before the Revised Day, or that the Church become void, because there was no Laches or Default in him, nor Possibility to get Seisin, the Law in Respect of the Issue begotten by him will give him an Estate by the Courteys of England. But the Case of the Defent to the Youngest Son stands upon another Reason, viz. to make himself Heir to him that was last actually feised, as hath been said. Co Litt. 15. b.

51. Poffeffio fratris holds not of Lands of the Poffeffions of the Crown, nor Half-Blood is no Impediment to the Defent of the Lands of the Crown, as it fell out in Experience after the Death of E. 6. to Queen Mary, and from Q. Mary to Q. Eliz. both which were of the Half-Blood, and yet inherited not only the Lands which E. 6. or Q. Mary purchased, but the ancient Lands, Parcel of the Crown also. Co Litt. 15. b.

52. If the Elder Brother grants the Reverion (expectant upon a Freehold) for Life, it shall cause Poffeffio fratris. Co Litt. 197. b.

53. In Case of two Sons or Daughters by divers Ventrers and a Remaunders or Reverions is purchased by the Father upon Estate for Life, where the Father dies having Lease for Life, and the Eldett Son or Daughter die living Leasefee, Half-Blood shall inherit, for in this Case the Claim is from the Father, and where Father is seised in Fee, and Eldett Son after the Death of his Father dies before Entry, the Younger Son of the Half-Blood shall inherit. Otherwise, if the Father made Lease for Years, and Leasee entered, or had purchased Remaunders or Reverion upon Estate for Years, and Leasee entered, the Half-Blood shall never inherit; for Possession of this Leasee serves both where the Eldett Son survives the Father, being of Half-Blood to the Younger Brother, and dies before Entry, the Youngest Son shall inherit the Land of the Father. The Law is, in Case of Poffeffio Fratris, for the Sitter of the Whole-Blood to be Heir to her Brother before the Younger Brother of Half-Blood. The Reason is, every Heir for Fee Simple in Demesne ought to make himself Heir to him who last died seised. Jenk. 242. pl. 25

Hob. 120. pl. 152.

54. A has Elis, B. a Son, and M. a Daughter, by one Venter, and N. and O. Daughters by another Venter, and C. a Son by a third Venter, and S. C. adadpag. devises all his Land to his Wife Durante Vidaestate, and dies, the Wife is for the enters into all. B. before antal Entry, dies. Adjudged, the Will was void for a third Part, and that the Entry of the Wife into all made her seised, but of two Parts and in common with her Son of the third Part, and that the Entry of the Wife shall vest such Possession in common in the Son of the third Part as shall make Poffeffio Fratris in him for his Sitter


57. The Defect between Brothers differs from all other Collateral Disents whatever; in no other Defents Collateral the Half-blood doth inherit, but in a Defent between the Brothers the Half-blood doth impede the Defent, which argues that the Defect is immediate. The Uncle on the Part of the Father hath no more of the Blood of the Mother, than the Brother of the second Venter. The Brother by the second Venter hath the immediate Blood of the Father, which the Uncle (viz.) the Father's Brother hath not, but only as they meet in the Grandfather.

The Brother of the Half-blood is nearer of Blood than the Uncle, and therefore shall be preferred in the Administration. And to it hath been resolved in 5 E. 6. in Brown's Cafe, and though the Book of 5 E. Br. Administration 47. mistakes the Law in preferring the Brother of the Half-Blood before the Mother, yet it hath been right in the Cafe of a Competition between him and the Uncle; and yet the Uncle is preferred in the Defent before the Brother of the Half-Blood, and the Reason is, because that is a mediate Defect, mediate patre; but the Defect to the Brother must be immediate if at all, and therefore the Half-blood impeded it. Again, it is apparent, that if in the Line between Brother the Law took Notice of the Father as the Medium thereof, the Brother and Brother by the second Venter should rather succed the other Brother, because he is Heir to his Father; therefore in a Defent between Brothers the Law requires only the mediate Relation of the Brothers as Brothers, and not in Respect of their Father, though it is true, the Bosom or Foundation of their Confanguinity is in the Father and Mother. Vent. 424. Powch. 16 Car. 2. in Cam. Sace. in Caele of Collingwood v. Pace.

Relation to increase the Number of Dispensations from Rome but the Corruption by the Civil Law is otherwise. 2 Wms's Rep. 667. Mich 1754. in Caele of Cowper v. Earl Cowper.

Mod. 120. 58. Admittance of particular Tenant for Years of Copyhold Land is Admitted of him in Remainder in Fee to make a Poissellio Frarris. Vent. 260. Moore v. Graves. S. C. adjudged. 5 Keb. 263. pl. 11 S. C. adjournatur. Ibid. 529. pl. 24 Black-Adjudged. Drsom v. Graves S. C. ad

Barnes v. Graves S. C. adjudged. 5 Keb. 263. pl. 11 S. C. adjournatur. Ibid. 529. pl. 24 Black-


Holt's Rep. 166 pl. 11. Hill 5 Ann. The Court gave Judgment for the Plaintiff, and Holt delivered the Opinion of his Brother, viz. that the Edict 60a

60. Ejection. D. seised in Fee according to the Custom, which is, for Lands to defendant to the Younger Son, and the Wife to have an Estate during her Life. The Father had Issue a Son at one Venter, and another a Venter; the Father dies, the Wife enters, and then the youngest Son dies without Issue. 1. Whether the intermediate Estate of the Wife to broke the Defent from the Younger Son, as to make the Elder Son of the Half-Blood to the Younger incapable of Inheriting. Per Powell J. this Customary Estate for Life he compared to the Caele of the Freehold, which hindered the Defent of the Deneman and Freehold, and the Court seemed to incline strongly to confute the Defent according to the
Defcent.

589


for there was no Admittance upon the Surrender which was made 4 Car. 1; and therefore the Surrenderor did continue seised as he was before, Powell said, there could be no Admittance by Implication; to the Second Point he said, that the Wife having this Customary Freeloak after the Death of her Children, and the dying, then the Eldest Son should take as Heir to the Father according to Estate at Common Law; and he said, where the Custom is doubtful, it is the best Way to follow the Rules of the Common Law, as this Court did in the Case of Clements v. Scudamore.

61. Two Daughters by a first Venter being then Heirs, on the Death of their Father their Step-Mother enters, takes the Profits, held Courts in the Name of the Daughters as Heirs at Law, cut down Timber for Maintenance, and three Months after a Son is born, who lived about nine Months and died. It seems the Possession of the Mother shall be such a Possession of the Son as to carry the Estate from the Daughters to the Heir of the Son. But Ld. Cowper thought it a Case of so much Compassion, that he said he would give (the Plaintiff, Heir of the Intant) no Relief (as to the removing Terms for Years kept on Foot by the Daughters though the Truths were satisfied, by which Terms the Plaintiff was hindered bringing Ejecutments at Law) unless it should appear that the Daughters were otherwise wife provided for. Ch. Prec. 299. pl. 225. Pach. 1709. Whitcomb v. Whitcomb.


(L) To the Half Blood.

Of what Estate.

1. An Estate Tail may descend to the half Blood, notwithstanding being an actual Seisin in the half Blood before, for there he comes in by the Statute de Donis, and so as Heir to the Donor, * 37 Ant. 15. adjudged. 32 C. 3. Defent 8. adjudged. 19 C. 2. Quare Impinet 177.

and this is the Reason why Littleton says, that Posselio Fratris de Feodo Simplici facti Sororem effe Heredem. — Co. Litt. 15 b. S. P.

2. But an Estate in Fee shall not descend from him that is actually seised in Dembine of the Estate to his Brother, Sister, or Cousin, of the half Blood. * 37 Ant. 15. admitted. † 40 A. 6. adjudged. 

3. The Brother must be in etnal Possession; For Posselio ex quasi pedis Politico. 2dly, De feodo simplicet, exclude Estates in Tail. 3dly, Facit forororem esse heredem. So as Soror ex heres facta; and therefore some 7 L
Defcent.

Acht must be done to make her Heir, and the Younger Son is heres natus, if no Acht be done to the contrary. And albeit the Words are facit-severum esse heredem, yet this extends to the Iffue of the Syster &c. who shall inherit before the Younger Brother. Co. Litt. 15. b.

4. Dignities whereof no other Possession can be had but such as descendent (as to be a Duke, Marquis, Earl, Vicount, or Baron) to a Man and his Heirs, there can be no Possession of the Brother to make the Syster so inherit, but the Younger Brother being Heir (as Littleton faith) to the Father, shall inherit the Dignity inherent to the Blood, as Heir to him that was first created Noble. Co. Lit. 15. b.

4. Hill. 16 Car. S. P. was moved in Parliament, and resolved accordingly by fall the

(L. 2) To take away an Entry.

In what Cases.

1. It seems that a Usurpation within the Year cannot be an Interruption, and a Defcent cannot toll Entry of the Lord who enters for Mortmain; For he has no Right of Entry, but only a Title of Entry, which may be taken any Time within the Year. Br. Quare Impedit. pl. 40. cites 18 E. 3. 121.

2. If a Man leaves a Fine and after dies seised before Execution, yet the Entry of the Conuice upon the Heir is lawful, as well after the Year as within the Year; e contra of Re-entry and dying seised after Execution had. Br. Dillicent, pl. 46. cites 33 E. 3. and Fitz. Title 4. and 14.

3. But if a Man enters upon the Tenant pending the Writ and dies seised, and the Demandant recovers, yet the Recoveror cannot enter upon this Defcent, and yet the Tenant and his Feoffee shall be bound notwithstanding the Defcent in them, for they are in the Per, contra of the Diffeife or for it is admitted to be an Entry without Title, for otherwise it should abate the Writ. Br. Difcent, pl. 45. cites 33 E. 3. and Fitzh. Title. 4. 14.

4. Where a Man has Iffue two Sons and dies seised, the Eldest Son being beyond Sea, and the Youngest Son enters and dies seised, and so to the fourth Degree, and the Eldest dies and his Iffue to the seventh Degree, and the other continues for eighty Years, and the Iffue who came of the Eldest Son enters, his Entry is lawful by reason of the Privity of the Blood; per Wichenham and Tankerville, quod nullus negavit. But e contra, if the Eldest had entered, and the Youngest had dispossessed him and died seised, the Entry shall be tolled. Note, a Diversity, for in the one Case, where the Eldest does not enter, the Youngest has Colour as Heir; contrary where the Eldest does enter. Br Entre cong. pl. 6. cites 40. E. 3. 24.

5. A Defcent within the Year after Alienation in Mortmain does not take away the Entry within the Year, for it is only Title of Entry, and not Right of Entry; for upon Right of Entry he may have an Action. Br. Entre cong. pl. 13. cites 47 E. 3. 11.

6. If a Bajard purchases in Fee and is dispossessed, and the Diffeife gives in Tail by Free the Remainder over in Fee, the Tenant in Tail dies without Iffue, and he in Remainder enters, there the Entry of the Diffeife is lawful. Br. Entre cong. pl. 17. cites 3 R. 2.

7. If an Infant be a Diffeife, and another Man disposes and dies seised, and his Heir is in by Defcent, the Entry of the first Diffeife is taken away;
Deputy.

591

away; but if the Infant enters or recovers the first Disfiefion may enter, and so fee that the Entry of one shall give Advantage to a Stranger. Br. Entrc congeable pl. 35. cites 4 H. 6. 2. 3.

8. If fomeff a Man upon Condition, and the Feoffee is disfiefcd, and the Heir of the Difjeifor in by Defcent, or the Feoffee makes a Follment over and the Heir of the fegond Feoffee is in by Defcent, yet J. may enter upon the Defcents for the Condition broken, for fuch Defcent does not take away my Entry; for I have no other remedy, nor no Action but only Entry; per Newton. Br. Entre cong. pl. 34. cites 21 H. 6. 17.

9. But where my Tenant for Life aliens in Fee, there I may have an Action; for there if a Defcent be had I cannot enter, but am put to my Action; quod nota. Per Newton. Br. Entre cong. pl. 34. cites 21 H. 6. 17.

10. In Trefpafs the Defendant juftified, in fuch a W. was feascd in Fee and Leafe to one Alice at Will, by which he was Servant of A. and by her Command entered &c. and gave Colour, to which the Plaintiff faid that S. was feascd and died feascd, and the Land descended to the Plaintiff as Country Heir, and followed bow, by which he entered and was feascd till the Defendant did the Trefpafe, & adjourned. Br. Titles pl. 42. cites 33 H. 6. 49.

11. Defcent to J. N. as Heir, where the King has Title, does not toll his Entry; Per Littleton. Br. Dicfent. pl. 60. cites 35 H. 6. 37.

12. If a Man recovers against another, and after there are three or four Defcents before his Entry, yet he may enter upon the Defcents, becaufe the Recovery binds the Blood and difproves the Title of the Tenant. Br. Dicfent. pl. 37. cites 6 E. 4. 11.

13. Dying feascd in Tail tolls the Entry, but not where he dies without issue of his Body, for then there is no Defcent, per Fairfax. Br. Traverfe per &c. pl. 266. cites 21 E. 4. 65.

14. Where a Fine and Recovery is pleaded in bar in Affife, dying feascd after this in him or his Heir against whom the Fine or Recovery was had, is no Title, for the Entry is lawful upon them; but contra if Execution had been hut, and after J. had re-entered and died feascd for this is a Difjeifion after Execution. Br. Dicfent. pl. 45. cites 33 E. 3. and Firjam. Title. 3.

15. If a Man is feascd and goes beyond Sea, or is imprisoned after, and Defcent is had he cannot enter. Per all the Justices. Br. Entrc congeable, pl. 91. cites 9 H. 7. 24.

16. Contrary if he was within Age at the Time of the Difjeifion, and after goes beyond Sea or is imprisoned. Per all the Justices, and Serjeants at Law. Br. Entrc congeable, pl. 91 cites 9 H. 7. 24.

17. Nota per omnes, That in Affife of Rent, if the Plaintiff makes Title by dying feascd of his Father, and Defcent to him, this is not material of Rent in Gros, quod nota. And therefore it feems that it shall not be any Bar in Affife of Rent in Gros. Br. Titles, pl. 64. cites 10 H. 7. 23.

18. 3 H. 8. cap. 23, Whereas divers have entered by Strength and Force, The Feoffee and without Title &c. The Dying feascd of any Difjeifor, having no Right or of a Difjeifion, shall not be such Defcent in Law to take away the Entry of any (such as at fefor is out of the Time of the Defcent had lawful Title of Entry, except such Difjeifor had peaceable Possession five Years next after the Difjeifion committed, without Entry or continual Claim of fuch Persons as have lawful Title.

But to a Difjeifor, the Statute is taken favourable for the Advancement of the Ancient Right. For whether the Difjeifion be without Force, or with Force, it is within the Statute Co. Litt. 238. a.

And albeit the Statute speaks of him that at the Time of such Defcent had Title of Entry &c;
Defcent.

or his Heirs, yet the Successors of Estates Politick or Corporate, so you hold yourself to a Defcent, are within the Remedy of this Statute; for the Statute extends clearly to the Predecessor being defeised; and consequently without naming his Successor extends to him; for he is the Person that at the Time of such Defcent had Title of Entry. Co. Litt. 238 a.

But if a Man makes a Lease for Life, and the Leesee for Life is defeised, and the Defceissor dies seised within Five Years, the Leesee for Life may enter; but if he dies before he does enter, it is said, that the Entry of him in Reversion is not lawful, because his Entry was not lawful upon the Defceissor at the Time of the Defcent, as the Statute speaks. Co. Litt. 238 a. ——Pl. C. 47. Arg. S. P.

But if Leesee for Life had died first, and then the Defceissor had died seised, he in the Reversion had been within the Remedy of the Statute; because he had Title of Entry at the Time of the Defcent as the Statute speaks, and so within the express Letter of the Statute, albeit the Defceissor was not immediate to him, and the like is to be said of a Remainder &c. Co. Litt. 238 a.

It is said, that Assignors and Assignees are out of this Statute, because the Statute is penal, and extends only to a Defceissor, and that was the most Common Miliechif. Co. Litt. 238 a. ——Pl. C. 47. a. Mich. 4 E. 6. S. P. Arg.

This Statute extends not to any Feoffs or Domes of the Defceissor immediate or mediate, but they remain still at the Common Law. Co. Litt. 238 a.

The Preamble has the Words of Defceission with Force; and the Purview helps such Defceussions; yet this Statute is expounded by Equity to extend also to Defceissions without Force; for the Miliechif is equal; and the Statute provides against the Miliechif which was at Common Law; such was this Defceissor last mentioned. The Defceissor dies seised within two Days after the Defceission, without Entry or Claim made; now neither the Defceissor nor his Heir can enter upon the Heir of the Defceission. Jenk. 226. pl. 83.

Note, that it is ruled in the Serjeant's Case, that where a Common Person leased Land for Years, rendering Rent with Clause of Re entry, and after grants the Reversion over, and the Tenant attorns, the Grantee may re enter for the Condition broken by this Statute by express Words. Br. Entro con-
gene. pl. 159 cites 4 M. 1.

So of the Grantees of King E. 6 and all other Heirs to King H. 8, by the Equity of this Statute, which provided Remedy for the Patientes of King H. 8, and for Grantees of Common Patiences, Br. Entro Cong pl 159. cites 4 M. 1.

19. A. seised of Land in Knight Service, leased it to J. S. Habend to J. S. and J. N. for their Lives rendering Rent, then A. devised it to M. for Life, Remainder to W. R. in Fee, which was void for a third Part, and died. B the Heir of A. by Attorney, entered and seiffed J. N. who died seised. J. N. before the Feoffment was in Possession, and claimed to be in as Leesee, and paid the Rent to M. But being no Party to the Leesee, it was void as to him, and that he was not Tenant at Will, when the Attorney entered and seiffed it, and so was not in Possession for his Leesor. M. but if he was Tenant at Will, his taking the Feoffment of a Stranger determined his Will, and so his Entry cannot reduce the Possession to M. Quacunque Via, it is a Defeit, and tolls the Entry. Cro E. 115. pl. 10. Mich. 30 & 31. Eliz B R. Reynoald v. Kingman and Brown.

Ow. 141.
S. C. The Case was this, a Man seised of Land in Sogage, devised it to his Younger Son and died seised, the Elder Son enters and dies seised, and his Heirs enters, and the Younger Son enters upon him, the Question was, if his Entry be taken away by this Defeit. Judgment was given by Anderson, that this Defeit does not take away the Entry of the Defeissor.

S. P. Cro. C. 200. for then he might not maintain any Action, never having had any Seifin and so should be without Remedy, where there is only a Defeit and no binding Matter of Barr.

21. If Tenant or alter Vie continues in Possession after the Death of Coby que Vie, He is but Tenant at Sufferance, and his Defeit shall not take away an Entry. This was said by Wray to be held at an Assembly of all the Justices, to which Gawdy agreed, and that 18 E. 4. 25. is not Law. Cro. E. 238. pl. 5. Trin. 33 Eliz. B. R. in Cafe of Allen v. Hill.

22. Devise
Defcent.

22. Devise in Fee to his Heir, with a Limitation over, on Non-pay-
ment of Legacies, and Defcent in the Interim, shall not toll the Entry
of the Devises, for it is not as a Defcent by a Stranger after a Devise
before the Entry of Devisee, which perhaps tolls the Entry, because it is
not as an immediate Devise, but it is Quali a Devise on a Limitation,
or upon a Condition broken, which no Defcent shall take away or pre-

23. If one devise another in Time of War, which is called Occupation,
dies and devise also in Time of War, Difiee may enter. Hawk. Co. 412. — In
Times of

the Courts of Justice are not open, the Defcent gives no Right of Possession, though the Devise
was done in *Time of Peace, for it were in vain for a Difiee to exert his Right of Possession, when
the Courts of Justice are not open; nor can there be any such Thing as the Act of Law to
give a Right of Possession when the Law itself is silent; but in Times of Foreign War, when there
is Justice and Peace at Home, a Defcent will give a Right of Possession; for to encourage Enter-
prises in such War was such Privilege given to the Heir of the Difiee. Gilb. Treat. Ten
31. 32.

24. No dying feised (where the Tenements comes to another by Succession) shall take away the Entry of any Person &c. as of Prelates, Abbots,
Priors, Deans, or of the Parson of a Church, or of other Bodies Politick;
&c. albeit there were 20 dyings feised, and 20 Successors, shall possess,
not put any Man from his Entry. Litt. S 413.

as a De-

for a Successor is to by his own Act; for it is by his own concurrent Act, that he comes to be install-
ed into the Rights of his Predecessor, and therefore he can have no more than he had; but once
the Predecessor had a naked Possession, and not the Jus Possessionis, the Successor can have no more.
Besides, the Successor pays no Relief, unless by Grant or Pre-emption; for Ecclesiastical Lands were
not relieved into the Hands of the Lord for Want of a Tenant being given in Fec-Alms, or to
do Service by Proxy; and since the Lands are not relieved into the Hands of the Successor for a Confor-
mate paid, he doth not acquire a Right of Possession. Besides there is no Reason to encourage the
Predecessor to dare in War, who either went not at all, or else by Proxy; and therefore no Reason
such Succession should get a Right of Possession. Gilb. Treat. of Ten. 32.

25. A Difiee makes a Leafe to a Man and his Heirs during the Life
of J. S. and the Leafe dies, living J. S, this shall not take away the
Entry of the Difiee. 3 Wms's Rep. 368. in a Nore of the Reporter,
cites 1 Inft. 239.

26. Defcents which toll Entries are two Sorts, viz. where the De-
cent is in Fee, or in Fee Tail. Co. Litt 385.

27. If a Difiee dies feised, and his Heir enters, and endows his Wife
of the third Part, the Difiee may enter on that, for she is in by her
Husband, and the Law judges no mean Seisin between Husband and Wife,
Hawk. Co. Litt. 326.

28. If a Difiee has Iftime, and entered into Religion, by Force where-
by of the Lands descend to his Ilftime, this does not toll the Entry of the

29. If a dying feised takes not away the Entry of him that Right
has at the Time of the Defcent, It shall not by any Matter Ex Post
Fando take away his Entry. Co. Litt. 241. b.

30. A Defcent which tolls Entry ought to be an immediate Defcent; and therefore if a Female Difiee-Bros take husband, and has Iftime and
dies, and after the Husband dies, the Defcent to the Ilftime does not take
away Entry, because the Interposition of Tenant by Currety does im-
pede it. Per Holt Ch. J. at Nili Prinns. 1 Salk. 241. pl. 1. Hill.

6 W. & M. Carter v. Talh.

Patch. 9 H. 7. per tot. Cur. and Nich. 37 H. 6. yet Ld. Coke says, that this is an Addition
and to be padd over, and that at this Day this Cafe of Littlehen is holden for clear Law.—
And Ld. Coke says, that here was a Defcent of a Reversion at the Time of the Dying feised;

7 M for
Defcent.

for the Estate of a Tenant by the Curesy had Commencement by having of Issue and is consummated by the Death of the Wife, to as the Fec and Franktenement did not after the Declase of the Wife defend to the Heir, and albeit the Tenant by the Curesy dies afterwards, and that the Franktenement is cut upon the Heir, so as now he has the Fee and Franktenement by Defcent, yet because the Heir came not to the Fee and Franktenement at once immediately after the Declase of the Wife, such a mediate Defcent shall not take away the Entry of the Difficree. On the other Side, an immediate Defcent may take away an Entry for a Time, and immediately may be avoided by Matter ex Poll Patts, as hath been said. Co. Litt. 241. b.

31. If a Man be disfeised and the Diffessor dies in peaceable Possession immediately after such Disseisn, the Heir acquires just possesfionns, if the Disseisor suffers the Ancestor quietly to enjoy; for the presumptive Right is then in the Heir, but if the Disseisor has re-entered within a Year and a Day before such Defcent, then the Heir doth not acquire the just possession.
First, because there is no Laches in the Difficree, and the Act of Law would do Wrong and Injury (which it cannot do) if it should alter the Right when the Disseisor has done, what in him lay, to continue the Right of Possession. Secondly, because there is no Presumption that the Disseisor had Right if the Disseisor continues the Claim; for the Law cannot presume the Right of Possession to be derived contrary to the manifest Act of the Disseisor. Thirdly, The Lord ought not to take the Heir for his Tenant; and there is sufficient Warning for the Ancestor in his Life-time not to do the voluntary Service, nor for the Heir after his Decease to pay the Relief. Gibb. Treat. of Ten. 33.

(M) To take away an Entry.

In what Cases where the Entry is given by a Record.

* Fithz. En. 1. If a Man recovers against another that is seised in Fee, and after the Recoveree dies seised, and it descends to his Heir, yet this Defcent shall not take away the Entry of the Recoveror, because he had but a Title of Entry, and the Entry is to execute the Judgment, and so relates to it, being executory against the Heir that is prior to the Judgment that it binds the Blood. Contra. * 49 C. 3. 23. b. 7 H. 7. 14. b. 16 H. 7. 8 b. agreed clearly per Curiam.
7 Br. Dis. 3 C. 4. 7. + 6 (C. 4. 11. b. 3 H. 7. 3. per Browne. 5 H. 7. 31. b.
cent. pl. 37. ll 21 H. 6. 17. b.
cites S. C. that tho' there are three or four Defcent before his Entry, yet he may enter upon the Defcents, because the Recovery binds the Blood and disposes the Title of the Tenant.—Fithz. Monetanno, pl. 3. cites S. C.

2. So if the Recovery be against Tenant in Tail that dies seised, this Defcent to the Title shall not take away the Entry of the Recoveror, for the Cause aforesaid. 33 C. 3. Entry Congeable 31.
3. So if I acknowledge the Right to another by Fine, and he grants and renders it to me again, and after dies seised, this Defcent shall not take away my Entry, because the Fine was executory; (it seems 33 C. 3. Entry Congeable 31. is intended of a Fine Come eco which is execrated.)
4. If a Man recovers against A, who after dies, having Issue Baftard-Eligne and Mulier-Pulifie, and the Baffard enters, and dies seised, and this descends to his Issue, this Defcent shall not take away the Entry of the Recoveror, for the Continuance of the Baffard hath made
made him as her; and so prov'd to the Recovery. 5 H. 7. 2. But vide, that after Recover, the Entry is lawful, on him that comes in as Heir to the Tenant who loth, for this Title is bound; for if the Tenant enters and dies seised; Note the Diversity, for he is not in properly as Heir. — Ibid. pl. 133. cites S. C. & S. P. accordingly by Fairfax and Kechle; but this was denied by others; Briscoe says the Reason seems to be because they are not Heir; and that so it seems, after the Recovery, if one refuses the Tenant before Execution and dies seised, and his Heir enters, that the Entry of him who recovered is taken away.

5. If a Man recovers Land, and, after a Stranger to the Recovery, see the Title false, per this shall not take away the Entry of the Recoveror, but make Title to the Heir, and the Title relates to execute the Recovery of the Judgment. 6. If a Man recovers against another, and enters and files Execution, and after the Recoveror seizes him, and dies seised, this Title shall take away the Entry of the Recoveror, for the Recovery held was executed, and cannot be executed again, and this is a Punish Title. 3 C. 7. Contra, * to H. 7. 5. b. Litt. 7 H. 7. 15. shall not make Title after an Act of Parliament, Fine or Recovery, unless by Matter of later Time; for by such Act against his Father, if he enter again and dies seised, and his Heir enters, this will not make a Title to the Heir, without shewing Title to the Recovery &c. — Kelw 43. b. pl. 4. Trin. 17 H. 7. it was held for clear Law in C. B. as well by all the Bench as the Bar, that such Dilettin and Defect after the Recovery executed shall not toll the Entry of him that recovered; for the Heir of the Recoveror is privy and bound by the Recovery, but otherwise it is of a Fine, and in Margin cites all the same Cases in the Plea of Roll, in H. 7's Time — Kelw 170. a. pl. 2. Mich. 6 H. 8. S. P. held accordingly; but that if a Stranger enters and dies seised, then the Recoveror is put to his Scire Facias, per Guy Palmes, but the Book says, Tamen Quere — Co. Litt. 237. b. 328 a. says, that if after the Execution of the Recovery, the Recoveror seizes the Recoveror and dies seised, this Defect shall take away the Entry of the Recoveror, but otherwise it be before Execution — Defect before Execution shall not take away the Entry of the Recoveror, because the Title is bound and he can have no other Remedy. Br. Entre Congeable, pl. 34 cites 21 H. 6. 17. per Newton. — Co Litt 238. b. in Principio S. P. that if after Execution the Recoveror had crossed the Recoveror and dies seised, this Defect shall take away the Entry of the Recoveror within the Express Word of Littleton; and that so it is in Case of a Fine.

7. If a Man recovers against one who has alien'd pending the Writ, and If a Man the Alienee dies his Heir within Age, the Demandant may enter upon the Heir within the Year; for by the Judgment the Title of the Forfei 15 is bound. Per Thrining and Tirwhit. Br. Entre Congeable, pl. 18. cites 2 H. 4. 16. 17.

Defects, yet he who recovered may enter, for the Title is bound, and so by Consequence upon the Heir of the Alienee of him who lost the Recovery; for he cannot be in a better Condition than the Tenant who lost, per Nele Sergeant, which was not denied. Br. Entre Congeable, pl. 116. cites 6 E. 4. 11.

8. A Recovery is had against Tenant for Life, where the Remainder is over in Fee Tenant for Life dies; he in the Remainder enters before Execution, and dies seised. The Entry of the Recoveror is lawful, because he is prov'd in Effect. Otherwise it is, if the Defect had been after Execution. Co. Lit. 238. a.
(N) Of what Things a Defcent shall take away an Entry.

1. If a Copyholder in Fee in Facto upon an Admittance dies seised of a Copyhold, and it descends to his Heir, yet it shall not take away the Entry of another that has Right to the Copyhold. Mich. 15. In B. R. between Lee and Browne, agreed per Curiam, upon Evidence at the Bar.

Gravenor v. Todd. — Pope 33: 35. Gravenor v. Brook, S. C. that he had no Right to be Copyholder of it, and therefore cannot die seised of it as a Copyholder, and by the Dying seised of a Copyholder at Common Law, it shall be no Prejudice to him that has Right; for he may enter; but here coming in by Admittance of the Lord at the Court, the Occupation cannot be toruius to the Lord, and therefore was no Defcent at Common-Law by the Copyholder's Dying seised; because it was only an Occupation at Will. — Defcent of a Copyhold shall not take away an Entry. Mar. 6. pl. 13. Page. 15 Car. — See the Case of Joyner v. Lambert at tit. Copyhold. (D. b) pl. 9.

2. King R. 2. had Land in Ward by Defcent from King E. 3. For Chattel shall descend in Case of the King, contrary of a common Perfon, and granted the Lands by Letters Patents to W. for Life, the Remainder to J. in Fee. Br. Aid del Roy, pl. 28. cites 7 H. 4. 41.

3. It was held that Defcent of a Rent does not take away an Entry, but he may diatrain be it Parcel of a Manor or not, but otherwise it seems to be if the Defcent be of the Manor. Br. Entre cong. pl. 98. cites 5 E. 4. 6.

4. If a Man receives my Rent in gross without Authority and dies seised thereof, yet I may alter diatrain; and contra, where the Rent is Parcel of a Manor and he receives it and enters into the Demesnes and dies seised by Diffe, but if he diffes me of the Demesne, and dies seised without Receipt of the Rent, there I may diatrain. Note, a Diverfity, for he is not my Diffe for but at my Pleasure. Br. Entre cong. pl. 131. cites Littleton Tit. Arretons.

5. Where a Man is seised of a Manor and gives Parcel of it in Tail, rendering Rent, and is disseized of the Manor, and the Tenants of the Manor and the Tenant in Tail pay their rents to the Diffe, who dies seised, this does not toll the Entry nor Diphets of the Rent reserved upon the Gift in Tail, for by the Gift this Land is seerved from the Manor for the Time, and the Reversion remains in the Donor, and the Rent is incident to it, and therefore by the Seizin of the Donee in the Land, the Donor may diatrain him for the Rent. Br. Entre cong. pl. 131.

6. So of a Lease for Life or Years of Land Parcel of a Manor rendering Rent, the Payment of the Rent to a Stranger is no Bar to the Lessee to diatrain for his Rent, so long as the Tenant continues Possession in the Land demised &c. Br. Entre cong. pl. 131.

7. Descents of Inheritances which lie in Grants, as Advantages, Rents, Commons in Gross &c. which are Inheritances incorporeal, do not put him that Right hath to an Action. Co. Litt. 237. b.

(N. 2.) To
(N. 2) To take away an Entry.
Of what Estates.

1. DESCENT. Of Rent shall not take away the Disfiefs of the Dis-
fessor, be the Rent Parcel of a Manor or not, by the Opinion Br. Dict. of the Court. But per Lactanon rit Discent, if it be Parcel of a Manor, cent. 66, and the Tenant attorns, this shall take away the Disfiefs of the Distresser, for there it is of the Nature of the Land contrary of a Rent * in Grous.
Br. Lucent, pi 63 cites 5 E. 4. 0.
2. Stranger cites a clergy in a vacant Piece of Ground in the Marg. Lord, King's Manor and enjoys it, paying no Rent, the King grants the Manor to A. who never enters into it or takes any Rent for the Staple; Queht. the Occupier of the Staple dies in Possession and his Son enters; per 4. no Possession. 381. that Juiceth it is no Distressor, but Manwood and Wray, Serjeants, c. contra. thereby—

3. Discents in Tail which take away Entries are; as if a Man be dis-
feated, and the Distressor the same Land in another in Tail, and the Tenant in Tail hath Issue and death of such Estate disfeated, and the Issue enters, in this Case the Entry the Distressor is taken away and he is put to fine against the Issue of the Tenant in Tail a Writ of Entry for Dis-
feasin. Litt. S. 386.

4. Note, that in such Discents which take away Entries, it behoveth If a Distressor, that a Man dies disfeated in his Demise or Fee or Fee Tail; for a dying a the Time of his Death, but not the Fine in him, it cannot be cast upon his Heirs; for then there is no Danger that the Precedent should want a Possession; therefore the Law creates no Title to such Possession in the Heir at Law; for it were incongruous that the Law should support the Right of Possession in the Heir, when the Possession is in another at the Death of the Ancestor. The Law will not afterwards create him a new Title, in Prejudice of the Person that has the Right of Proprietors for another. Litt. S. 387.

5. If the Distressor therefore makes a Lease for Life, he parts with the Possession, and cannot transmit to the Heir, since he had parted with it at the Time of his Death, and he Distressor a Recession will not make a Right Possession, for nothing descends to the Heir in Reversion, but the Right of the evasion and that is a Right against all other Persons but the Distressor. For since only the Right descends, the Heir can be in no better Case than the Distressor was at the Time of his Death; and therefore when Tenant for Life dies, he has only the naked Possession, as the Distressor had it. But if the Distressor had died in Possession, the Law, for the Reason afo sayd, calling the Possession on the Heir, makes it a Right for that is properly a Right which a Man comes to by the Act of the Law; and since the Heir in such Case would come the Possession by the Act of the Law it must be called a Right of Possession; and it could not be a Right of Possession, if he could not defend it against all Dis-
feasors. Therefore in such Case the Right of Entry is taken away from all others; and hence the Distressor came to be made between jus Possessionis and jus Proprietatis. Gisb Treat of Ten. 19, 20.

5. If he in the Recession disfeates his Tenant for Life, and dies feised
This Distressor shall take away the Entry of the Tenant for Life. Co. Litt. 239. a.

7 N 6. 9
6. So it is if there be Tenant for Life, and the Remainder in Tail, the Remainder in Fee, and Tenant in Tail divides the Tenant for Life, and dies seized. This shall take away the Entry of the Tenant for Life. Co. Litt. 239. a.

7. Defent of a Reversion or Remainder, does not take away an Entry. So as in those Cases which take away Entries by Force of Descents, it behoveth that he dies seized of Fee and Freehold, or of Fee Tail and Freehold at the Time of his Death; or otherwise such Defent doth not take away an Entry. Litt. S. 388.

8. If a Man be seized of certain Land in Fee or in Fee Tail upon Condition, to render certain Rent, or upon other Condition, albeit such Tenant seized in Fee or in Fee Tail, died seized, yet if the Condition be broken in their Lives, or after their Death, this shall not take away the Entry of the Feoffor or Donor, or of their Heirs, for that the Tenancy is charged with the Condition, and the State of the Tenant is Conditional in whose Hands forever it cometh &c. Litt. S. 391.

9. Also if such Tenant upon Condition be defeised, and the Defeisee dies thereof seized, and the Land descents to the Heir of the Defeisee, now the Entry of the Tenant upon Condition, who was defeised, is taken away. Yet if the Condition be broken, the Feoffor or the Donor which made the Estate upon Condition, or their Heirs, may enter Causa qua supra. Litt. S. 392.

10. If the Defeisee makes a Lease to a Man and to his Heirs during the Life of J. S. and the Lease die, living J. S. this shall not take away the Entry of the Diffeisee, because he that died seized had but a Freehold only; and Heirs in that Cafe were added to prevent the Occupant, for the Heir in that Cafe shall not have his Age as it was adjudged in Lamb's Cafe. Co. Litt. 239. a.

11. A Lease is a Covenant Real, that binds the Possession of Lands into whose Hands forever afterwards they come, if the Lands be not evidence by a Superior Title; but the Termor has not the Freehold in him, but holds the Possession as Bailiff of the Freeholder, Nomine alieno by Virtue of the Obligation of the Covenant. Therefore if such Termor is ousted, and the Freeholder defeised, the Diffeisee has the naked Possession bound by the Covenant, and if afterwards a Defeisee is called, the Heir of the Diffeisee has the Right of Possession, bound also by the Covenant; for the Heir of the Diffeisee has only the Right of Possession which was in the Diffeisee, and that was bound by that Covenant, and therefore it must be bound by the same Covenant in the Hands of the Heir of the Diffeisee; and were it otherwise, the Right of the Termor would be in-
Defcent.

599
tirely destroyed; for he cannot have a Right of Possession distinct from the

(N. 3) Defcent to toll an Entry.

Bound thereby Who; and where they claim by the same
Title.

1. If Tenant for Years holds over his Term, he is Tenant at Sufferance,
and his Defcent shall not take away Entry; but if Tenant for Term
of another's Life holds over his Term, he is an Intruder and his Defcent
shall take away Entry. Quod suitor concessum per Dyer. Ow. 35, Mich.
13 and 14 Eliz. Anon.

2. A devises Lands to B. and dies; A Stranger enters and dies seized be-
fore any Entry by Devicee, now is the Devicee without Remedy. Arg.
2 Le. 147. pl. 182. Trin. 30 Eliz.

3. There is a Divercity between a Right for which the Law gives
a Remedy by Action, and a Title, for which the Law gives no Reme-
dy by Action but by Entry only. The Feoffee upon Condition in this
Cafe has a Right to the Land, and therefore his Entry may be taken
away because he may recover his Right by Action. Co. Litt. 240. a.

4. But the Feoffor or Donor that have but a Condition, their Title can-
not be taken away by any Defcent, because they have no Remedy by Ac-
tion to recover the Land, and therefore if a Defcent should take away
their Entry, it should bar them for ever; and the Law is all one,
whether the Defcents were before the Condition broken or after. Co. Litt.
240. a.

5. Another Reason wherefore a Defcent shall not take away the Entry
of him that has a Title to enter by Force of a Condition &c is, for
that the Condition remains in the same Essence that it was at the Time
of the Creation of it, and cannot be divested or put out of Possession, as
Lands and Tenements may. Co. Litt. 240. b.

6. If a Woman has Title to enter Causa Matrimonii Prælocuti no De-
cent shall take away her Entry; because she has but a Title and no

7. If a Defeather makes Gift in Tail, the Remainder in Fee and the Do-
nee dies without Issue, leaving his Wife Presentent eausent with a Son.
He in the Remainder enters, and after the Son is born, who enters into
the Land, this Defcent shall not take away the Entry of the Defeather,
because the Issue comes not to the Land immediately by Defcent
after his Father's Decease. Co. Litt. 241. b.

8. If one dies seized in Fee or in Tail, and leaves two Sons, and the
Younger, whether of the Whole or Half Blood, abates and his Issue and
dies, yet the Elder or his Heir may enter, for it shall be intended, that
the Younger did not set up a new Title, but that he claimed as Heir
to his Father in the Elder Brother's Absence, and that it was his In-
tent to prefer the Possession against Strangers; And for this Reason,
one Brother shall not have Mortdancer against the other. And the
Law is the same if there be divers Defcents, or if the Eldest Brother

But if the
Younger Son
makes a
Fragment in
Fee, and the
Feoffor dies
seized, that
Defcent shall
take
away the
Entry of the
Eldesf,
in

If a Man had Issue bastard eigne, and Mulier Paufe, and the Bastard in the Life of the Father has
Issue and dies, and then the Father dies seized, and the Son of the Bastard enters as Heir to his Grand-
father, and dies seized, this Defcent shall bind the Muter. Co. Litt. 244. b.

9. If
9. If the Younger Son of a Man enters by Abatement, and dies seized, this does not toll the Entry of his Elder Brother; but if the Elder Son enters and is seized, and the Younger Brother dispossesses him, and dies seized, having Issue, the Elder Brother cannot enter. Litt. S. 395, 397.

10. If a Man has two Daughters and dies, the Eldest enters into all the Lands, claiming all to her &c. and has Issue and dies seized, and the Issue enters, and dies, leaving Issue, and such second Issue enters, yet as to one Majesty the Youngest Sister may enter; but if both Sisters had been once seized, and the Eldest had dispossessed the Youngest of her Part, the Youngest Sister nor the Heirs cannot enter. Litt. S. 398.

11. If after the Decade of the Father a Stranger first enters and abates, upon whom the Youngest Son enters and dispossesses him, and dies seized. This Defcent shall bind the Eldest; for he entered by Distinction, and not by Abatement. Co. Litt. 242. b.

12. If a Man be seized of Land in the Nature of Borough-Fuglys, and has Issue two Sons and dies, and the Eldest enters before any Entry made by the Youngest, enters into the Land by Abatement, and dies seized; this shall not take away the Entry of the Youngest Brother. Et sic de Similitibus. Co. Litt. 242. b. 243. a.

13. Lands were given to the Husband and Wife, and to the Heirs of their two Bodies, they had Issue Daughters, the Wife died, the Husband had Issue by another Wife four Sons, and died, the Eldest Son abated and died seized, this Defcent did take away the Entry of the Daughters, because they claimed not by one Title. Co. Litt. 242. a. b.

14. If the Father makes a Lease for Life, and has Issue two Sons and dies, and the Tenant for Life dies, and has Issue two Sons, and dies, and the Tenant for Life dies, and the Youngest Son intrudes, and dies seized, this Defcent shall not take away the Entry of the Eldest. But if the Father had made a Lease for Years, it had been otherwise, because the Possession of the Lessee for Years makes an actual Freethold in the Eldest Son. Co. Litt. 243. a.