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A

General Abridgment

OF

LAW and EQUITY

Alphabetically digeſted under proper TITLES

WITH

NOTES and REFERENCES
to the WHOLE.

By CHARLES VINER, *Eſq;*

Favente Deo.

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

TABLE

OF THE

Several TITLES, with their Diviſions and Subdiviſions.

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Declaration.

With their Diviſions and Subdiviſions.

ABATEMENT.

(A) Of Writs. By Plaintiff's *own Shewing.*

TRESPASS *upon the Caſe* againſt a Miller. The Writ was Quod cum præd' Quer. &c. *molere debuerunt ſine multura* &c. prædict' Def. prædictum querentem *ſine multura molere vi & armis impedivit* &c. and was abated; for it appears that he ought to have General Writ of Treſpaſs of his Corn carried away by Force and Arms. Thel. Dig. 117. Lib. 10. cap. 27. S. 3. cites Mich. 41 E. 3. 24. Vide 43 E. 3. 29. 44 E. 3. 20.

2. In General Writ of Treſpaſs of a *Horſe taken*, it appear'd by the Replication of the Plaintiff, that it was taken *in the High Street* of the King; upon which the Opinion was, that the Writ ought to abate, and that the Plaintiff ought to have Special Writ &c. Thel. Dig. 117. Lib. 10. cap. 27. S. 6. cites Mich. 43 E. 3. 30.

He ought to have a Special Writ upon the Statute of Marlbr. cap. 15. which prohibits the taking Diſtreſſes by any but the King or his Officers, having ſpecial Authority, out of his Fee, or in the King's Highway, or in the common Street. 43 E. 3. 30. a. pl. 16. But the Reporter cites 11 R. 2. that in Replevin ſuch Writ was maintainable, notwithſtanding he might have his Writ upon his Caſe.——Fitzh. Avowry, pl. 87. cites Trin. 11 R. 2. accordingly.

3. *Præcipe* quod reddat *againſt two*; the *one diſclaimed*, the *other vouch'd him*. The *Demandant confeſs'd that he, who diſclaim'd, had nothing, and counter-pleaded, that he nor his Anceſtors* &c. And upon the Confeſſion the Writ was abated. Br. Brief, pl. 151. cites 21 E. 3. 33.

4. *Aſſiſe of Land in 2 Vills*, and makes his *Plaint of all the Land in one Vill*, all the Writ ſhall abate; per Cur. Br. Brief, pl. 16. (bis) cites 9 H. 6. 42.

5. Detinue of Charters *incloſed in a Cheſt*. The *Defendant came by Exigent*, and the *Plaintiff declared of one Charter in Special*; and the *Defendant of the reſt wag'd his Law*, and did it *immediately*; and *of the Charter in Special he ſaid, that he did not detain*, and the others e contra. And Paſton J. held clearly, that the Writ ſhall abate by the Declaration of the Plaintiff himſelf, becauſe he declares *of a Charter concerning Franktenement, of which Exigent does not lie*; for a Man cannot join in one and the ſame Writ a *thing whereof of Parcel the Proceſs ſhall be Diſtreſs infinite, and of the reſt Exigent*; and if this had been apparent in the Writ, the Writ ſhall abate clearly; and ſo where it appears in the Declaration by him. But quære of this Opinion; for this is often permitted elſewhere. Br. Brief, pl. 236. cites 14 H. 6. 1.

6. Where the Writ abates *in Part* of the Plaintiff's own Shewing, there it abates in the Whole; per Frowike Ch. J. Kelw. 56. M. 20 H. 7. Pl. 5.

7. In Maintenance *againſt two*, the *one pleaded that he was the Party's Attorney, and retain'd Counſel for his Client, and gave* 10 s. *of his Maſter's Money*;

Money; and the *Plaintiff ſaid that he gave* 40 d. *to the Jury* &c. and the others e contra; and the *other pleaded Not Guilty*, and *all found for the Plaintiff*. And per tot. Cur. except Needham, becauſe the Action is brought of Joint Maintenance, and the *Plaintiff in pleading has confeſs'd of Record that it was of ſeveral Maintenances*, the Writ ſhall abate by his Confeſſion, where by the Law, *if ſuch Matter had been found by Verdict, the Plaintiff ſhould have recover'd; or if Part had been found for him, and Part againſt him*; and ſhould have been amerc'd for the reſt; As in *Treſpaſs againſt* 2, who *plead Not Guilty*, the *one is found guilty of Part, and acquitted of the reſt*; and the *other is found guilty of the reſt, and acquitted of the firſt Part*; or *in Decies tantum it is found that they took Money ſeverally*, the Plaintiff ſhall recover. Br. Brief, pl. 245. cites 36 H. 6. 27.

8. *Where* the *King granted to thoſe of P. Conuſance of Pleas ariſing in P. and that no Burgeſs of P. ſhall be impleaded, unleſs in P. of any Act done there*, in an Action againſt a Burgeſs he pleaded it to the Writ, by which the Writ was abated by Award, becauſe by the Count it appear'd that the Treſpaſs was in P. Br. Brief, pl. 323. cites 9 H. 7. 12.

7 Mod. 89. Arg.

9. If a Man *demands a Debt of* 20*l.* and *confeſſes he has no Right to* 10*l. of it*; or demands 100 Acres, and confeſſes he has no Right to 50 of them, no doubt the Court, ex Officio, or the Party, either by Plea in Abatement, or as Amicus Curiæ at leaſt, might take Knowledge, and abate the Writ. But if they went on to Iſſue, and a *Verdict* be given where the Statute gives Relief, it doth as well when it appears of the Party's ſhewing as otherwiſe. Hob. 279. Mich. 13 Jac. in Clanrickard's Caſe.

10. It is regularly true, that if the *Plaintiff himſelf diſcovers* to the Court any thing, whereby it may appear *that he had no Cauſe of Action* when he commenced it, his Writ ſhall abate. As if he will demand a Debt, or diſtrein for a Rent before the Day of Payment, of his own ſhewing it is againſt him. Hob. 199. Mich. 15 Jac. in Caſe of Brickhead v. the Archbiſhop of York.

As if a Man has *Cauſe* to have Writ *of Treſpaſs againſt* 2, and he *brings his Writ againſt one* of them, and after *confeſſes the Treſpaſs to be done by the two*, his Writ ſhall abate. Theloal's Dig. lib. 5. cap. 18. S. 1. cites Mich. 9 H. 6 36 —— So if he declares, that he with the other did the Treſpaſs. Hob. 199. in Caſe of Birckhead v. the Archbiſhop of York.——

11. *So* if, of his own ſhewing, tho' he *had Cauſe of Action, yet 'twas in another manner*, it will be againſt him. Hob. 199. in Caſe of Brickhead v. the Archbiſhop of York.

But if he brought his Action againſt one alone, and the Defendant had *pleaded that he with others did the Treſpaſs*, and that the Plaintiff had *releaſed to the other*, and the Plaintiff denies the Releaſe, whereby he doth in a manner confeſs that the other were joint Treſpaſſors, yet this Action ſhall not abate. Hob. 199. in Caſe of Brickhead v. Archbiſhop of York.——11 Rep. 5. b. Hob. 164. 261. 9 Rep. 53.

(B) Abatement. By Act of the Party.

If a *Lord brings Ceſſavit*, and the *Tenant infeoffs a Stranger*, and the *Feoffee does Homage to the Lord pending the Writ*, and after the Lord recovers, the Feoffee may falſify the Recovery; for the Writ was abated by the taking of the Homage. Br. Faux de Recov. pl. 15. cites 36 H. 6. 32.

1. IF a Man brings Ceſſavit *againſt N. who aliens to S. pending the Writ*, and the *Demandant takes the Rent and Homage of S. and after recovers againſt N.* there S. may avoid the Recovery; for by the Acceptance of the Rent and Homage the Writ is abated, and the Action extinct. Quære. Br. Ceſſavit, pl. 15. cites 21 E. 3. 18. per Stone.

6. It

2. It seems that a *Suspension of the Action for a Time, by the Act of the Plaintiff* himself, pending the Writ, is an Abatement of the Writ. Br. Brief, pl. 308. cites 42 Ass. 21.

3. *Assise of Rent against W. and R.* R. made Default, and W. appear'd, and answer'd as Tenant of the Land and Pernour of the Rent. (Quære how he can be Tenant and Pernour; but he may be Tenant and Deforceor,) and that the Land was given in Tail to A. his Ancestor, and convey'd by Descent to his Mother; and that the Mother died, and the Land descended to him pending the Writ, Judgment of the Writ. The Plaintiff said that *R. Father of W. had the Land by the Curtesy the Day of the Writ purchased, and surrender'd to W. pending the Writ, to which W. agreed*, by which W. became Tenant, and yet is; and W. not knowing of the Surrender, demurr'd in Law; and *the Truth was, that R. surrender'd to W. pending the Writ, and died pending the Writ.* And per June Ch. Baron, the Writ is good; for the taking of the Surrender is the *Act of the Tenant pending the Writ*, which *makes it good, as a Purchase pending the Writ makes the Writ good*; for if the Tenant by the Curtesy had charged the Land, he should have held charged. But Rolf contra; for if Writ of Entry be brought against W. after the Surrender, *he shall be supposed in by the Mother*; *and* if the *Son disseises a Man to the Use of his Father*, and Assise is brought against Father and Son, if the Father dies, the Writ shall abate. Paston said, in Præcipe quod reddat against the Son, after the Surrender, he shall have his Age and all Advantages, as if he had come to the Possession by Descent, and therefore the Writ shall abate; quod Hulse concessit. And all the Serjeants deny'd it, by which the Tenant was awarded to answer. Quod nota. But Rolf had his Challenge thereof. Quod nota. And quære; for 'tis a good Case. Br. Brief, pl. 240. cites 1 H. 6. 1.

4. In Cui in Vita *of* 3 *Acres*, it was agreed, that if the *Demandant by another Action recovers one of the* 3 *Acres, and enters*, it shall abate all the Writ, because it is the Act of the Demandant to recover it, and to enter, and therefore she shall abate her Cui in Vita. Quod nota, that Recovery in Assise of Parcel of the Land shall abate the Cui in Vita for all the 3 Acres. Br. Brief, pl. 338. cites 1 E. 4. 3. 4. and 2 E. 4. 10.

5. Every *Discontinuance of Process* abates the Original, but not a *Miscontinuance*. Bulst. 143. Arg. cites 1 H. 7. 1. b. and 21 H. 7. 10. b.

6. If the Plaintiff in *Quare Impedit* be *nonsuit after Appearance, discontinue* his Suit, or be *made a Knight* pending the Writ, these are his own Acts, and shall abate the Writ. 7 Rep. 27. b. Pasch. 40 Eliz. Sir Hugh Portman's Case.

7. B. brought *Trespass* vi & armis, *for taking his Horse* the 14th of October. The Defendant *justifies as Bailly &c. for an Estray*; and that he delivered it to the Plaintiff the 16th of October. And the Plaintiff *replies, That the Defendant* himself said that the 16th Day of October, *before the Re-delivery he had* us'd and *work'd the said Horse*. Resolved, on Demurrer, That by his *Acceptance* of his Horse, be it before or hanging the Action, the Plaintiff has not abated his Writ. Noy 119. Baglhaw v. Gawen.

Yelv. 96. Hill. 4 Jac. S. C. adjudged for the Plaintiff.—Cro. J. 147. pl. 6. Bagshaw and Goward, S. C. adjudged for the Plaintiff.

8. In *Action for Words against Baron and Feme*, the *Baron died*, and pending the Suit the *Feme took another Husband*; The Court inclined, that the Writ was abated, because the Defendant by her Marriage had chang'd her Name, but took Time to advise. Sty. 138. Mich 24 Car. White & Ux. v. Harwood and Ux.

(C) Abate-

See tit. Other Action.

(C) Abatement. By other Action.

1. IT is said, That if *Tenant by Elegit* be *ouſted*, and he *brings Aſſiſe*, and *he in Reverſion brings another* Aſſiſe, as to the one the Writ of the other ſhall abate. Thel. Dig. 192. lib. 12. cap. 30. S. 27. cites Mich. 12 H. 6. 4. and Mich. 48 E. 3. 21. where it is said, That the Law is *ſo in all the Caſes where two may bring Action for the ſame thing ſeverally.*

2. If *ſeveral Perſons bring ſeveral Actions for the ſame thing* to which they have all *equal Right*, and the *Writs are all return'd on the ſame Day*, they ſhall all abate, becauſe it is uncertain to the Court (if the Tenants conſels the Actions) to whom they ſhall award Seiſin, ſince their Titles are all alike, and all returned at one and the ſame Day; for the *Date* in this Caſe is not material; for they are not of Record before the Return; and for the *Uncertainty* all the Writs ſhall abate. Arg. Pl. C. 10. b. in Manſell's Caſe.

Whenever it *appears on the Record, that the Plaintiff has ſued out two Writs againſt the ſame Defendant for the ſame thing*,

3. Two Actions were brought at the ſame Time againſt the Defendant for the ſame Thing, with ſome *little immaterial Variation* in the Duty preſcribed for. The Defendant averr'd, that both were for the ſame Duty, and ſo pleaded the one in Abatement of the other, mutually; and they were both abated. Freem. Rep. 401. pl. 526. Trin. 1675. The Mayor &c. of London v. B.

the firſt not being determined, the ſecond Writ ſhall abate; for the Law abhors Multiplicity of Actions; and will not allow that a Man ſhall be twice arreſted, or twice attached by his Goods for the ſame thing; for if ſo, he might ſuffer in infinitum G. Hiſt. of C. B. 205, 206.——New Abr. 13. has the ſame Words, and ſo goes on tranſcribing for a long Way.

4. An *Action* brought *in the Marſhalſea* was *ſtaid by Habeas Corpus, and removed into B. R.* where the *Plaintiff delivered a Declaration varying from the former Plaint.* The Defendant pleaded the Plaint in the Marſhalſea, and the Removal thereof, and that it was for one and the ſame Cauſe of Action. Upon Demurrer it was held, That the Habeas Corpus does not remove the Cauſe of the Inferior Court; and a Plaint pending in an Inferior Court is no Plea to an Action brought in the Courts at Weſtminſter; and there is Difference between a Recordari, Certiorari, and a Habeas Corpus. And Judgment was, That the Defendant ſhould anſwer over. 2 Ld Raym. Rep. 1102. Hill. 3 Ann. Seers v. Turner.

(D) By taking &c. the Thing ſued for, or in Diſpute.

S. P. Br. Dette, pl. 2. cites 5 H. 7. 7. 41. Per Cur. and 15 H. 7. 10—

1. IN Debt of 10 l. the Defendant *ſaid, That the Plaintiff has received 5 l.* of it *pending the Writ*; and no Plea, but ſhall anſwer to the Debt; but *Acquittance of Part* ſuffices to diſcharge all the Action. Br. Dette, pl. 137. cites 3 H. 7. 3.

Debt upon *Obligation of* 20 *l* upon *Condition to pay* 10 *l.* &c. the Defendant *pleaded Payment of Part of the* 10 *l. pending the Writ*, this is a good Plea to the Writ, Per Brian; And Per Cur. it is a good Plea to *plead Payment of the Sum in the Condition*; and this *by reaſon of the Condition*; for otherwiſe Payment is no Plea in Debt, unleſs it be by reaſon of the Condition; and ſo is 15 H. 7. 10. But *Acquittance of the Receipt of Part pending the Writ goes to all the Writ.* Br. Dette, pl. 222. cites 5 H. 7. 41.—And *in Debt againſt Leſſee for Years, Payment of Part in a foreign County, is a good* Plea *to all the Writ* Ibid.—*And* by 9 H. 5 2. *where Payment is a good Plea*, as in the Caſe of the Leaſe and Condition, the *Receipt pending the Writ, is a good Plea without Acquittance.* Contra where Payment is no Plea in Bar; there it is no Plea to the Writ; Quod

Quod nota, by all the 3 Books. Note a good Diverſity. Ibid.—In *Debt upon an Obligation*, the Defendant ſaid that the Plaintiff had *received Parcel* of the Debt *pending the Writ, and* thereof *ſhewed Acquittance*, and demanded Judgment of the Writ; Sed non allocatur; but was compell'd to anſwer to the reſt. Thel. Dig. 188. lib. 12. cap. 22. S. 1. cites Hill. 15 E. 2. Brief 819. and 34 H. 6. 2. Per Priſot. And Hill. 39 H. 6. 45. Contra it is held 1 E. 4. 4. 2 E. 4. 11. See 5 H. 7. ultimo, inaſmuch as the Plea is to the Action for Parcel. And it was held there, that ſuch Plea is not good, without ſhewing Acquittance; but Moyle econtra. And ſee as to this Point, that the Juſtices were in diverſe Opinions Mich. 5 E. 4. 139, 40. But the Opinion of the Juſtices, Trin. 7 E. 4. 15. is, that the Plea is not good without ſhewing Acquittance; and ſo it is agreed 22 E. 4. 50. in Writ of Annuity, and Trin. 15 H. 7. 10.

It was ſaid by Needham, That ſuch a *Plea by Acquittance ſhewn goes to all the Writ*, if the Plaintiff does not deny his Acquittance; but if he denies it, and it be *found by Inqueſt for the Defendant*, the Writ is good for the reſt. Thel. Dig. 188. lib. 12. cap. 20. S. 2. cites Mich. 4 E. 4. 35.

In Debt upon *Obligation*, with Condition *to pay a leſs Sum*, it is a good Plea to plead *Receipt of Parcel of the leſs Sum* in Abatement of the Writ; but the Receipt ought to be *after the laſt Continuance*. Thel. Dig. 188. lib. 12. cap. 22. S. 3. cites 5 H. 7. fol. ult.

In *Debt, upon Obligation* of 80 l. the Defendant *pleaded, that Plaintiff had*, by the Cuſtom of London, *attached* (*pending the Bill*) 40 *l. in the Hands of J. S. in Satisfaction of the Debt*; and prayed the Bill might abate. It was objected, that this amounted only to an Acceptance of Part pendente Billa, and is in Bar, and not in Abatement. And all the Court (except Popham) conceived, That it is a Plea in Bar, but not in Abatement; for the Plaintiff for this Part is to be barred for ever; and this Receipt of Parcel is a lawful Act. Cro. E. 342. pl. 21. Mich. 36 & 37 Eliz. B. R. May v. Middleton.——Mo. 598. pl. 820. Moy v. Middleton, S. C. accordingly.——S. C. cited by Holt Ch. J. 12 Mod. 542. in Caſe of Pearce v. Paxton.

In *Debt, upon a ſingle Bill* of 50 l. the Defendant after Imparlance pleaded, That after the laſt Continuance the Defendant had *paid* the Plaintiff 5 *l. Parcel* of the 50 l. and demanded Judgment of the Bill. Whereupon the Plaintiff demurred; and becauſe the Defendant did *not allege* that he had *an Acquittance*, which he ought to produce, Judgment was given againſt the Defendant, that he ſhould anſwer over &c. All. 63. Paſch. 24 Car. B. R. Loder v. Hampſhire.

In *Debt on a ſingle Obligation*, the Defendant *pleaded Payment of Part* ſince the Action brought. Per Cur. This is a good Plea in Abatement of the Writ, but not in Bar of the Action. Sty 212. Paſch. 1649. Hollingworth v. Whetſtone

If in Debt the Defendant pleads, that ſince the purchaſing the Writ, the Plaintiff has received Part of the Debt, the whole Writ ſhall abate, becauſe it *appears the whole Money is not due, as by the Writ is demanded*, which he had already begun in a Court of Juſtice. G. Hiſt. of C. B. 203.

But in Debt on an *Obligation to deliver* 20 *Quarters of Barley*, it is no Plea in Abatement to ſay, that *pendente placito the Plaintiff had received* 15 *Quarters*, for it is *collateral*, and not the Sum contained in the Obligation. And if it be a Plea, it is in Bar. And Judgment for the Plaintiff. Cro. E. 253. pl. 23. Mich. 33 & 34 Eliz. B. R. Stone v. Radiſh.——G. Hiſt. of C. B. 203. cites S. C. and ſays, That the Condition not being fulfill'd, the Penalty is ſtill in Force.——Cro. E. 260 pl. 44. in the ſame Term, Andrews v. Kirke, S. P. And there being a Verdict for the Plaintiff, it was reſolved that it was help'd by the Statute; and the Plaintiff had Judgment, tho' it was moved to be no Plea, and ſo no Iſſue; and no Deed was ſhewn.

It was moved in Debt upon *Contract*, that Receipt of Parcel is no Plea, and that in *Debt upon Leaſe for Years*, Payment of Parcel in another County ſhall abate all the Writ. Thel. Dig. 188. lib. 12. cap. 22. S. 4. cites Hill. 3 H. 7. 3. Quære.

2. In every Action where one *demands Land, or other thing expreſsly* by his Writ, if he comes to the ſame thing pending the Writ, the Plaintiff abates his own Writ; but where a Writ is brought for a Tort done, as Writ of Raviſhment of Ward, wherein the Ward is not demanded; ſo that it is only an Action of Treſpaſs in its Nature, by the Common Law; and alſo in Treſpaſs for Goods taken, it is no Plea for the Defendant to ſay, that Plaintiff is ſeiſed of the Goods; for he does not demand any Goods by his Writ; and yet, if he has not the Goods again before Verdict, he ſhall recover the Value of them, but if he has, the Damages ſhall be aſſeſs'd for the Treſpaſs only; but in *Detinue, Replevin*, or *Quare Impedit*, ſuch Plea is good, becauſe it is a Falſification of his own Writ. Keilw. 20. b. pl. 6. Hill. 12 H. 7. Canterbury (Archbiſhop) v. Conway.

3 In *Debt, Receipt of Part*, hanging the Writ, abates all the Writ; Per Foſter J. 2 Brownl. 130. Peto v. Checy. Kelw. 20. b. pl. 6. Arg. S. P. *But* in *Treſpaſs* for Goods taken, *coming to the Goods hanging the Writ* does not abate the Writ; for he does not demand any Goods by his Writ; and yet if he has not the Goods again before the Verdict, he ſhall recover the Value of them: But in *Detinue, Replevin*, or *Quare Impedit* coming to the thing hanging the Action, is a good Plea in Abatement; Per Fineux Ch. J. and Rede. Kelw. 20 b. pl. 6. Hill. 12 H. 7. Archbiſhop of Canterbury v. Sir Hugh Conway.

(E) By Seiſin &c. of the Demandant or Plaintiff.

1. IN *Replevin* it is no Plea to ſay, *That the Plaintiff was ſeiſed of the Beaſts the Day* of the Writ purchas'd. Theloall's Dig. 149. lib. 11. cap. 36. S. 3. cites Tempore E. 1. Replevin 28.

2. In *Mortdanceſtor by three, two were ſummoned and ſevered*; and *as to the 3d, the Tenant ſaid that the Demandant himſelf was ſeiſed of that which belonged to his Purparty the Day* of the Writ purchas'd &c. and held a good Plea, without pleading over to the Points of the Writ. But it is not ſo of Non-tenure. Theloall's Dig. 149. lib. 11. cap. 35. S. 18. cites 8 E. 2. It. Kanc. Mortdaunc. 40. And ſeiſed at his Will in Aſſiſe. 22 Aſſ. 19.

A Man may *plead that* the Demandant is *ſeiſed of the Moiety of the Land demanded, without ſhewing How* he is

3. In Writ of Land, to ſay that the Demandant himſelf was *ſeiſed of Parcel the Day of the Writ purchas'd*, is a good Plea to the Writ for all. Theloall's Dig. 148. lib. 11. cap. 35. S. 4. cites Paſch. 4 E. 3. 132. contra 32 E. 3. Brief 345. in Waſte 162. 25 E. 3. 39. 27 E. 3. 82. 28 Aſſ. 50. and 5 H. 7. 7. notwithſtanding that he could not have other Writ of this Parcel againſt any other.

ſeiſed. Theloall's Dig. 148. lib. 11. cap. 35. S. 6. cites Mich. 8 E 3. 440.

4. In Writ of Waſte againſt Tenant for Life, it is a good *Plea* to the Writ to ſay, *that the Demandant himſelf was ſeiſed* of the Land the Day of the Writ purchas'd. Theloall's Dig. 148. lib. 11. cap. 35. S. 5. cites 4 E. 3. 147. and 11 E. 2. Waſte 114. and in Aſſiſe, 27 Aſſ. 30. 51.

5. Where 2 *Parts of a Manor are in Demand*, it is a good *Plea* to the Writ to ſay *that the Demandant is ſeiſed of an Advowſon and 2 Acres of Land Parcel* of the whole Manor. Theloal's Dig. 148. lib. 11. cap. 35. S. 6. cites Mich. 4 E. 3. 162.

6. In *Formedon of Rent-Service*, if the Defendant *pleads that the Plaintiff is ſeiſed of Parcel of the Land* out of which the Rent iſſues, this is to the Action for the Portion, and not to the Writ. Theoloal's Dig. 148. lib. 11. cap. 35 S. 3. cites Mich. 17 E. 3. 57.

7. In Writ by E. againſt F. it was pleaded that E. *was Tenant the Day of the Writ* purchaſed &c. to which it was *replied, that before the Writ purchaſed, F. recovered the Land againſt E. by a Dum fuit infra ætatem, and had ſued Execution, and is now ſeiſed &c.* Upon which the Writ was adjudged good. Theloal's Dig. 146. lib. 11. cap. 35. S. 19. cites Trin. 22 E. 3. 8.

8. In *Formedon*, the Tenant pleaded *that he brought an Aſſiſe of the ſame Land againſt the Demandant and recovered, and before Execution ſued this Writ is purchaſed* &c. And held a good Plea, and the Demandant compell'd to maintain his Writ that the Tenant was ſeiſed the Day of the Writ purchaſed. Theloal's Dig. 148. lib. 11. cap. 35. S. 8. cites Paſch. 27 E. 3. 80. But ſays, that in the ſame Caſe the contrary was adjudged, becauſe the *Tenant by the Recovery in Aſſiſe was Tenant and ſeiſed in Law.* Mich. 28 E. 3. 95.

9. In *falſe Judgment againſt* him who was *Party to the Recovery*, the Tenant *pleaded that the Plaintiff was ſeiſed of the Franktenement the Day* &c. *and yet is* &c. And held a good Plea by Finchden; but Knivet contra, quære. Theloal's Dig. 149. lib. 11. cap. 35. S. 11. cites Mich. 38 E. 3. 41.

10. In *Scire facias* the Tenant *pleaded that the Demandant was Tenant the Day of the Writ purchaſed, and yet is.* And held a good Plea. Theloal's Dig. 149. lib. 11. cap. 35. S. 13. cites Mich. 39 E. 3. 37.

11. In Writ of *Forcible Entry* upon the Statute of 8 H. 6. it is no Plea to *ſay that the Plaintiff was ſeiſed the Day of the Writ purchaſed*, and if it

be

be a Plea it is to the Action. Theloal's Dig. 149. lib. 11. cap. 35. S. 16. cites Hill. 22 H. 6. 42. per Newton.

12. In Writ of *Right of Advowſon*, to ſay *that the Demandant is ſeiſed of the ſixth part of the Advowſin the Day of the Writ purchaſed* is a good Plea to all the Writ, and ſo it is of a Manor and ſuch entire thing &c. But it is otherwiſe if the Demandant be of Acres, and the Tenant ſays that the Demandant is ſeiſed of one Acre Parcel &c. Theloal's Dig. 149. lib. 11. cap. 35. S. 17. cites Mich. 5 H. 7. 7. quære.

[F] By Miſnoſmer..

1. ENTRY, that the Tenant *enter'd by W. and K. his Feme*, the *Tenant ſaid that her Name is J.* Priſt, and the *Demandant ſaid* that ſhe is *known by the one Name and by the other* ; & non allocatur, but was compelled to maintain that her Name is K. Br. Brief, pl. 155. cites 21 E 3. 47, 48.

2. In Aſſiſe *againſt A. and B. and Margery his Feme*, the Baron ſaid that before the Writ purchaſed he had a Feme named Margery, who died before the Writ, and now he has another Feme named *Margaret*. Judgment of the Writ, and the Writ abated ; quod nota. Br. Brief, pl. 300. cites 30 Aſſ. 16.

3. It was held by Seton, that *in Treſpaſs* the *one Defendant ſhall not plead the Miſnoſmer of the other*. *But in Writ of Ward* againſt two they may join in pleading Miſnoſmer of the one of them. Theloal's Dig. 123. lib. 11. cap. 5. S. 8. cites Mich. 30 E. 3. 22.

* S. P. For he himſelf may plead it. Br. Miſnoſmer, pl. 10. cites 35 H. 6. 50, 51.

4. *Quare Impedit by the King againſt the Provoſt of the Houſe of C.* the *Defendant ſaid that the ſame King gave Leave to T. B. to give the Manor of P. to found a Chauntery of a Provoſt and* 10 *Chaplains*, and that he ſhould be *named Provoſt of the Chauntery of C.* Judgment of the Writ which calls him *Provoſt of the Houſe* of C. And therefore the Writ was abated notwithſtanding that the King *averr'd that he is known by the Name of Provoſt of the Houſe* &c. The Cauſe ſeems to be becauſe the King ſhall take Conuſance of the Name, which he himſelf appointed, by his Writ.. Br. Brief, pl. 137. cites 38 E. 3. 14.

S. P. Br. Miſnoſmer, pl. 24. cites S. C.

5. *Scire facias* was maintain'd *againſt Executors* out of a Recognizance *without naming them by their proper Names*. Theloal's Dig. lib. 6. cap. 2. S. 4. cites Hill. 41 E. 3. Brief, 539.

6. In Formedon *of the Manor of A. juxta K.* the Tenant demanded Judgment of the Writ, becauſe *Parcel of the Manor of A. is in K.* where the Writ is A. *juxta K.* and in Truth the Name was A. *beſide K.* Finch ſaid where one is *named W. Son of John, where his Father's Name is Richard*, and *brings Writ by Name of W. Filius Johannis in Latin*, it is a good Plea to ſay that his Father's Name is Richard ; Judgment of the Writ. And ſo in this Caſe becauſe it is put in Latin, by which by Reaſon of the Opinion of the Court, the Demandant ſaid that A. is juxta K. Priſt and the others e contra. Br. Brief, pl. 67. cites 44 E. 3. 12.

Br. Miſnoſmer, pl. 12. S. P. cites 40 E. 3. 22.

7. *John* Abbot of Colcheſter *was indicted of Treaſon*, who came and *ſaid that his Name is Roger* &c. which was witneſſed by the Biſhop of London, and not denied by the King's Attorney, by which he went Sine Die. Theloal's Dig. 123 lib. 11. cap. 5. S. 12. cites Hill. 11 H. 4. 41.

But where one Walter Blake was indicted of Treaſon, and one brought to the Bar ſaid his Name was Walter Blakeford &c. Notwithſtanding, he was put to anſwer to the Treaſon, inaſmuch as it is the Suit of the King ; but otherwiſe it is in Appeal at the Suit of the Party. Thel Dig. 123. lib. 11. cap. 6. S. 14. cites Trin. 1 H. 5. 5.

8. M.

8. *M. de T.* & *M. T.* cannot be intended one and the ſame Perſon, per 3 Juſtices, but Hanke contra, and adjudg'd accordingly againſt Hanke. Br. Miſnoſmer, pl. 22. cites 11 H. 4. 70.

Br. Variance, pl. 35. cites S. C.

9. *Covenant againſt the Parſon of D.* he *ſaid that he is Parſon of S. and not of D.* Judgment of the Writ. Hanke ſaid if he was Parſon of D. at the Time of the Covenant, and after made Parſon of S. the Writ ſhall be *Parſon of S. late Parſon of D.* And ſo of a Biſhop, it ſhall be Biſhop of W. late Biſhop of D. &c. Br. Brief, pl. 126. cites 12 H. 4. 5.

10. An *Executor cannot plead Miſnoſmer of his Companion, but* he may plead *that he has a Co-executor* in full Life who has adminiſtred and is *not named* &c. *and name him*, who is miſnamed, *by his true Name.* Theloal's Dig. lib. 11. cap. 5. S. 15. cites 14 H. 6. 3. and 21 H. 6. 29.

Br. Traverſe per Sans &c. pl. 161. cites S. C.

11. Account *againſt R. S. of L. Merchant, Nuper Attorney of Peter Medices and of the Society of Merchants of Florence in the Court of Rome* Choke prayed Judgment of the Writ; for the Defendant's Name is R. S. of L. Merchant only, abſque hoc that his Name is R. S. Attorney &c.. Priſt, and no Plea by Judgment; for *that which comes after the Nuper is void, and is not traverſable unleſs where the Action is founded upon it, as* in Action *againſt J. S. late Sheriff*, late *Eſcheator*, Cuſtomer, or the like, *of an Act when they were Officers*; there *it is a good Plea, that never Sheriff, Eſcheator*, or Cuſtomer. *Contra where he counts of other Matter which does not touch the Office.* Note the Diverſity. Br. Brief, pl. 252. [256.] cites † 38 H. 6. 23, 24. and 4 E. 4. 10. accordingly.

12. Debt againſt *A. and E. and E. Son and Heir of the ſaid A.* Choke pray'd Judgment of the Writ; for E. cannot be Heir to A. in his Life; and yet good per Danby; for Treſpaſs lies Quare Filium & Heredem ſuum rapuit & abduxit. Br. Brief, pl. 481. cites 3 E. 4. 12.

13. *Decies tantum againſt J. N. of D.* where *he was of S.* and Iſſue was thereof taken, as Miſnoſmer at Common Law, tho' Proceſs of Outlawry does not lie in this Action. Br. Brief, pl. 439. cites 21 H. 6. 54.

14. In Treſpaſs againſt Jo. Strayt, the Defendant came and ſaid, you have here Jo. Strete in proper Perſon, who is impleaded by the Name of Jo. Strayt, and defend' &c. and ſaid that his Name Jo. Strete and not Jo. Strayt &c. And held good by the Court, and that *Strayt and Strete* are not all one. Theloal's Dig. Lib. 11. cap. 5. S. 21. cites Mich. 5 E. 4. 57.

4 Le. 205. per 2 Juſtices in an Anon. Caſe.

15. *Miſnoſmer* of one Defendant ſhall abate the Writ againſt all the Defendants. 2 Le. 162. pl. 196. 21 Eliz. C. B. in an Anon. Caſe.——But in *Treſpaſs* againſt two *Miſnoſmer of one of the Defendants* ſhall not abate the whole Writ, but it ſhall be good as to him who is rightly named. Mich. 8 Jac. 8 Rep. 159. b. in Blackamore's Caſe.

16. After the Death of an Obligor his Son and *Heir* was *ſued by the Name of Son and Heir apparent* of the Obligor, and Judgment being given againſt him was reverſed for that Reaſon. Owen. 17. Paſch. 35 Eliz. B. R. Audley's Caſe.

Hob. 249. pl. 327. Cuppledike v. Tirwhite, Trin. 16 Jac. S. C. Where it is ſaid, that no Opinion was given by the Court upon this Matter.——And in Hutton's Reports of this Caſe, not any Mention is made of the Court's Opinion as to this Point; but Hughes's Abr. Tit. Amendment 5. pl. 15. has it as Nelſon, and Nelſon ſeems to have copied it from Hughes.

17. *Quare Impedit againſt Richard Biſhop of Lincoln* the Patron and Incumbent, who *pleaded that at the Day* when the Writ was brought *there was no ſuch Richard Biſhop of Lincoln*; and this was held a good Plea in Abatement. 3 Nelſ. Abr. Quare Impedit 38. pl. 19. cites Hutt. 31. Coppledike v. Tanſey.

18. An *Indictment* may be abated by Miſnoſmer. Carth. 299. Hill. 5. W. & M. in B. R. Ld. Banbury's Caſe.

19. Demurrer to a Plea in Abatement, where the Defendant ſaid ſhe was baptized by the Name of *Mary* and *not* of *Patience*, but ſhe does *not ſay* that *ſhe was ſo called at the Time of the Bill ſued*; and adjudged that ſhe

ſhe *ought to give the Plaintiff a better Writ.* Skin. 620. Mich. 7 W. 3. B.R. Nichols v. Shepherd.

20. The *Bail* cannot plead the Miſnoſmer *of the Principal* in Abatement tho' the Principal may. 8 Mod. 289. Trin. 8 Geo. Addiſon v. Paterſon.

(G) By Matter Subſequent.

1. IF *Aſſiſe or Præcipe* quod reddat is brought *againſt J. N. and he aliens pending the Writ*, the Writ ſhall not abate. Br. Brief, pl. 271. cites 15 Aſſ. 8. In *Præcipe* quod reddat *againſt Tenant of the King, who aliens pending the Writ*, by which the *King ſeiſes*, yet the *Writ ſhall not abate*; for the King ſhall not have the Land, but ſhall retain for a Fine. Br. Brief, pl. 541. cites tempore E. 3. Itin. Not.

3. *Account upon Receipt in Newcaſtle* upon Tyne, brought in the County of Northumberland. The Defendant demanded Judgment of the Writ; for Newcaſtle is a County in itſelf; and becauſe it *was made a County after the Teſte of the Writ*, therefore the Writ was awarded good. Br. Brief, pl. 530. cites 2 H. 4. 18.

3. Where a *Man who brings an Action is made a Knight, pending the Writ*, the Writ ſhall abate. Br. Noſme, pl. 18. cites 7 H. 6. 15. S. P. 7 Rep. 27. Paſch. 40 Eliz. in Sir Hugh Portman's Caſe.

4. If a *Leaſe* be made *to 2 for Life*, and *Præcipe* quod reddat *is brought againſt the one* of them, and *pending the Writ the other releaſes to him all his Right*, if he pleads Jointenancy with the other who releaſed, the Writ ſhall not abate. Br. Brief, pl. 380. cites 18 E. 4. 25. *But if* he in Reverſion *prays to be received*, and *ſhews how he leaſed to the 2, and that they are in full Life*, he ſhall have the Plea. Br. ibid.

5. In *Præcipe quod reddat*, if they are at *Iſſue upon Plea for ſaving the Default of the Tenant*, which *paſſes for the Tenant*, the Writ in this Caſe ſhall abate by Judgment Quod nota. Br. Judgment, pl. 154. cites 10 H. 7. 21.

6. In *Writ of Annuity*, if the *Term expires pending the Writ*, the Writ ſhall abate, and the Plaintiff ſhall have Debt of the Arrears. Br. Brief, pl. 220. S. P. per Shute J. Sav. 28. in Caſe of Booth v. Lord Cromwell.

7. *Adminiſtration granted to Executor de ſon tort*, pending an Action againſt him, ſhall not abate the Writ. Arg. Ow. 69. Trin. 42 Eliz. in Caſe of Malloy v. Jennings.

8. In Treſpaſs, where ſeveral are *joint Defendants*, if *Verdict finds one Guilty, and the others not*, upon joint Plea or ſeveral Pleas by them pleaded, Plaintiffs ſhall have Judgment; for ſuch Verdict in Treſpaſs, in ſuch Caſe, does not abate the Writ; for the Treſpaſs may be ſeveral, or it may be joint, and Plaintiff does not confeſs any thing contrary to his Writ. Jenk. 101. cites 11 Rep. Sir J. Heydon's Caſe.

9. If *Proceſs* be ſued *againſt Feme Covert as Feme Sole*, ſhe cannot avoid it by Writ of Error; and if ſhe pending the Writ *takes Baron*, this ſhall not abate the Writ; but the Recovery againſt her upon the firſt Writ is good. But per Doderidge J. If after the original Proceſs ſued, and before the Return, ſhe takes Baron, this ſhall abate the Writ. Quære. 2 Roll Rep. 53. Mich. 16 Jac. B. R. Haydon v. Miller. *But if* Feme Covert *be Plaintiff* at the Time of the Action brought, it is pleadable in Abatement, and ſhall not be aſſign'd for Error in Fact. 10 Mod. 166. Trin. 12 Annæ, B. R. Grolvener v. Stephens.

11 Mod. 142. pl. 14. Etherington v. Reynolds, the Court was inclined to give Judgment for the Defendant; but as an Indulgence for the Equity of the Cauſe, it was adjourned to Hill. Term next.

10. In *Debt againſt the Defendant as a Feme Sole* in the Palace-Court, *ſhe pleaded, and afterwards married, and then removed the Cauſe by Habeas Corpus* into B. R. and there the *Plaintiff declared againſt her in Cuſtodia Mariſchalli. She pleaded* in Abatement, *that ſhe was married at the Time of the Habeas Corpus brought.* Upon Demurrer this was ruled a good Plea; for here the Proceedings are De Novo; but the Courſe had been for the Plaintiff to move upon the Return of the Habeas Corpus, and the Court would grant a Procedendo; for tho' it is a Writ of Right, yet the Court may refuſe it, where 'tis brought to abate a rightful Suit. 1 Salk. 8. pl. 20. Mich. 6 Annæ, B. R. Hetherington v. Reynolds.

(H) By Depoſition, Deprivation, Ceſſion, Reſignation, Tranſlation &c.

1. WRIT *by an Abbot* ſhall abate by his *Depoſition* pending &c. Thel. Dig. 186. lib. 12. cap. 17. S. 5. cites Tempore E. 1. Treſpaſs 242. and Mich. 27 E. 3. 84. Mich. 8 H. 6. 3. and 9 E. 4. 25. And that this Exception goes in Bar, cites 16 H. 7. 17.

* S. P. For if it ſhould abate by his Depoſition, a Man ſhould never have a good Writ againſt an Abbot.

2. But Writ *againſt an Abbot* * *ſtood*, notwithſtanding he *was depoſed pending the Writ*; but afterwards his Succeſſor ſaid that he, who was depoſed, died, by which the Writ was abated. Thel. Dig. 186. lib. 12. cap. 17. S. 2. cites 30 E. 1. Brief 885. Treſpaſs 242.

Thel. Dig. 186. lib. 12. cap. 17. S. 3. cites Trin. 4 E. 2. Cui in Vita 22. 15 E. 3. Brief 320. 15 Aſſ. 8. 22 H. 6. 51. 18 E. 4. 19. 15 E. 3. Error 7. 18 E. 3. 24. But that contra it is ſaid 10 H. 6. 11.

3. In *Aſſiſe by the Warden of an Hoſpital*, it was pleaded in Bar of Aſſiſe that the Plaintiff was vilited, and *deprived by the Ordinary* of the Place &c. And it was held good, inaſmuch as he has loſt his Name. Thel. Dig. 186. lib. 12. cap. 17. S. 4. cites 8 E. 4. 437. 451. 8 Aſſ. 29. 31.

The *Plaintiff*, by Name of J. D. *Prior* &c. *reſign'd*, and was *re-elected pending the Writ.*

4. If Aſſiſe or Præcipe quod reddat be brought againſt a *Parſon of a Church, Warden, Prebendary*, or ſuch like, and he *reſigns pending the Writ*, the Writ by this ſhall not abate. Br. Brief, pl. 272. cites 15 Aſſ. 8.

And yet the beſt Opinion was, That the Writ ſhall abate upon the Reſignation pleaded to the Writ after the laſt Continuance. Br. Nonabilitie, pl. 14 cites 9 H. 5. 1.

In *Annuity againſt a Vicar*, who *ſaid that he had reſign'd*, Judgment of the Writ, & non allocatur; For he *ought to ſay that he had reſign'd before the Writ purchaſed*; for Reſignation pending the Writ ſhall not abate the Writ. Br. Brief, pl. 406. cites 10 H. 6. 10.

Deprivation &c. on the Part of the Tenant, is Cauſe to abate the Writ, becauſe the *Succeſſor comes in by the Law. Contra of Tenant who purchaſes pending the Writ.* Br. Brief, pl. 417. cites 15 E. 3.

5. *So* per Thorp, if he be *deprived* pending the Writ. Br. Brief, pl. 272. cites 15 Aſſ. 8. but cites 9 H. 5. 1. contra.

6. In Writ *againſt a Prior*, if he be *depoſed* pending &c. quære if he himſelf may plead after as Party or not. Thel. Dig. 186. lib. 12. cap. 17. S. 6. cites 18 E. 3. 24. and 29 E. 3. 39. Quære.

7. Writ brought *by a Biſhop* ſhall not abate by his *Tranſlation* to another Biſhoprick. Thel. Dig. 186. lib. 12. cap. 17. S. 7. cites Mich. 22 R. 2. Brief 936.

8. Writ

8. Writ ſhall abate by *Reſignation* of the Plaintiff, notwithſtanding that he be *re-elected* afterwards; Per Opinionem. Thel. Dig. 186. lib. 12. cap. 17. S. 8. cites 9 H. 5. 1.

9. Writ of *Annuity againſt a Vicar upon Title of Preſcription*, ſhall not abate by the *Reſignation* of the Vicar pending the Writ. Thel. Dig. 186. lib. 12. cap. 17. S. 10. cites Mich. 10 H. 6. 11.

In *Scire facias on a Recovery in* Writ of *Annuity againſt a Parſon*, he ſaid, that before the Writ purchaſed, he had *reſigned* to the Hands of the Ordinary &c. and held no Plea, without ſaying, *And ſo not Parſon* &c. Thel. Dig. 186. lib. 12. cap. 17. S. 11. cites Trin. 7 E. 4. 16. and ſee Hill 9 E. 4. 52.

10. If Writ be *brought by Name of J. Mayor of D.* Sheriff, Bailiff, &c. and he is *removed pending the Writ*, the Writ ſhall abate; for his Name is determin'd pending the Writ. Br. Brief, pl. 415. cites 32 H. 6. 28. 29.

But if he be named J. N. Mayor, Sheriff, Bailiff, &c. and *the Office ceaſes pending the Writ*, the Writ ſhall not abate; for he had the Office tempore &c. and he has *ſufficient Name* which *remains*, ſcilicet, his proper Name and Sirname in the laſt Caſe; but in the firſt Caſe he was named by his proper Name and Name of Office, without the Sirname. Contra in the laſt Caſe. Br. ibid. ——— But Brooke ſays, This is *not* to be underſtood *where he brings the Action as Mayor*, Sheriff, Bailiff &c. *but* where he brings the Action *in jure proprio*, and names himſelf as above. Br. ibid.

11. In pleading of Depoſition, Divorce, and Deraignment, he ought to *ſhew before whom, and for what Cauſe* &c. Thel. Dig. 186. Lib. 12. cap. 17. S. 12. cites Trin. 9 E. 4. 25.

12. If a *Prior* be *impleaded by his Name of Corporation*, and not by his proper Name, *and after is depoſed pending the Writ*, the Writ ſhall not abate; for *it is by his own Act*. Br. Corporation, pl. 31. cites 15 E. 4. 1. Per Littleton.

In Detinue againſt the Prior of E. Præcipe the Prior of the Houſe and Church of St. Croſs of E. quod reddat &c. Huſſey pray'd Judgment of the Writ; for one John was *Prior the Day of the Writ purchas'd*, and *after was depos'd* before L. Biſhop of E. Ordinary there; *and after this Defendant was elected Prior*; Judgment of the Writ. And Per Pigot and Choke, This Writ is abated in Fact by the Depoſition. And after the Defendant pleaded in Bar, but not by Coertion of the Court; for it is not adjudged if the Writ ſhall abate by the Depoſition, or not; but it was ſaid there, that the Writ ſhall be good, by reaſon that the *Prior is not named by proper Name, but by Name of Corporation.* But quære inde. Br. Brief, pl. 739. cites 18 E. 4. 18. 19.

13. *Contra* if he be *made a Biſhop*; for this is the Act of the Pope. Br. Corporation, pl. 31. cites 15 E. 4. 1. Per Littleton.

Where an *Abbot Defendant is made a Biſhop pending the Writ*, there the Writ ſhall not abate; Per tot. Cur. Br. Brief, pl. 379. cites 18 E. 4. 18. 19.

(I) Nature of the Action being changed.

1. IN Writ of *Annuity, upon a Grant* made *by the Defendant to the Plaintiff till* the Defendant had *procured to the Plaintiff a Benefice*; the Defendant pleaded, *That he* being Patron of ſuch a Church, *preſented the Plaintiff* to the ſame Church, being void &c. *which Preſentment he received.* And it was held a good Plea to the Writ, and that the Plaintiff ſhould be put to his Writ of Debt for the Arrearages incurr'd before the Preſentment. Thel. Dig. 182. lib. 12. cap. 18. S. 1. cites Hill. 4 E. 3. 123.

And it is held, That the Tender of a Benefice pending the Writ, determines ſuch Annuity. Ibid. cites 14 H. 7. 33. and Hill. 19 H. 6. 54. S. P. And ſo if Tenant

2. *Tenant by Statute Merchant, who had Land by Extent for a Sum which might incur in ten Years, brought Aſſiſe*, and *pending it the ten Years expired*; by *Elegit*

brings Aſſiſe, pired; and it was doubted if he ſhall recover, or not. Br. Brief, pl. 411. cites 11 H. 6. 6.

and the Term or *Extent expires pending the Writ*, the Writ ſhall abate. Br. Brief, pl. 220. cites 9 E. 4. 50. Per Choke and Danby.——S. P. Per Clench J. as to the Tenant by Statute Merchant. Sav. 28 in Caſe of Booth v. Lord Cromwell ——If *Tenant by Statute Merchant brings Aſſiſe*, and the *Franktenement deſcends to him pending the Writ*, the Writ ſhall abate. Br. Brief, pl. 415. cites 32 H. 6. 28. 29.

It is held, That *Aſſiſe* brought *by Tenant by Statute Merchant*, ſhall abate, if the *Term* of the Extent be *paſs'd pending the Aſſiſe*. Thel. Dig. 186. lib. 12. cap. 18. S. 2. cites Mich. 11 H. 6. 8. and adds, Quære; but ſays, it is agreed there, that Writ of *Waſte*, or of *Covenant*, or *Quare Ejecit infra terminum*, ſhall not abate by the Expiration of the Term pending the Writ; and that ſo agrees Hill. 9 E 4 55. and 14 H. 8. 14. for the Waſte.——So if *one has Execution of a Statute Merchant againſt his Father, and* after *is ouſted* of this Land, *and ſues Aſſiſe, and his Father dies pending the Aſſiſe*, his Writ ſhall abate, inaſmuch as the Deſcent comes upon him by Courſe of Law. Thel. Dig. 186. lib. 12. cap. 18. S. 4. cites Hill. 32 H. 6. 5.

As if an Action of *Waſte* be brought *againſt Tenaut pur auter Vie*, and hanging the Writ *Ceſty que Vie dies*, the Writ ſhall not abate; but the Plaintiff ſhall recover Damages only, becauſe if Ceſty que Vie had died before any Action brought, the Leſſor might have an Action of Waſte for the Damages. Co Litt. 285. a.——It was agreed, that *if* Action of *Waſte be brought*, and the Term expires pending the Writ, yet the Writ is good. Br. Brief, pl. 411. cites 11 H. 6. 6.— S. P. Per Choke and Danby. Br. Brief, pl. 220. cites 9 E. 4. 50.——If an Action of *Waſte* be brought *by Baron and Feme in Remainder in ſpecial Tail*, and hanging the Writ the *Wife dies without Iſſue*, the Writ ſhall abate, becauſe every kind of Action of Waſte muſt be ad Exhæredationem. Co. Litt. 285.

3. When an Action is well begun, and *Part of the Action determines by Act in Law*, and yet the *like Action for the Reſidue is given*, there the Writ ſhall not abate, but proceed; but where by the Determination of Part the like Action remains not for the Reſidue, there the Action well commenced ſhall abate. Co. Litt. 285. a.

By *Act in Law*, the Nature of the Action may be changed; As if a Man make a *Leaſe for Term d'auter Vie*, and the Leſſee does *Waſte*, and then Ceſty que Vie *dies*, an Action of Waſte ſhall lie for Damages only, becauſe the other is determined by Act in Law. Co. Litt. 285. a.

The Plaintiff cannot have Judgment to recover the Land, but he may have Judgment of Damages. Per Manwood Ch. B. Sav. 28. in Caſe of Booth v. Lord Cromwell.——Co. Litt. 285. a S P. becauſe Ejectment lies after the Term for Damages only.——S. P. by Warburton J. 2 Brownl. 133.—— S. P. reſolv'd S Mod. 382. Paſch. 1 Geo. Shaw v. Weigh.

4. *So* where the Term expires pending Writ of *Ejectment within the Term*. Br. Brief, pl. 411. cites 11 H. 6. 6.

S. P. by Manwood Ch. B. Sav. 28. pl. 66. that at Common Law the Writ ſhall abate.

5. *But if the Heir comes to full Age, or dies pending a Writ of Ward*, yet the Writ ſhall ſtand; Per Cott. and Paſton, by the Statute. Quære. Br. Brief, pl. 411. cites 11 H. 6. 6.

S. P. accordingly. Co. Litt. 285. a. becauſe Aſſiſe is not maintainable for Damages only.——*So in Præcipe* quod reddat *againſt Tenant pur auter Vie*. Br. Brief, pl. 220. cites 9 E. 4. 50. Per Choke and Danby.——S. P. *If he in Reverſion enters pending the Writ*. Br. Brief, pl. 192. (bis) cites 15 E. 4. 4.——In Formedon againſt one, the Caſe was ſuch, that *A. was Tenant for Life*, the *Remainder over to B. in Fee*, and *A. granted his Eſtate to C. the Tenant in the Formedon, and died pending the Writ*. And by all the Juſtices, except Littleton, and by diverſe Serjeants, the Writ is not abated, if he in *Remainder has not entered*. Br. Brief, pl. 380. cites 18 E. 4. 25.

The *King leaſed* Land *to E. for Life, who leaſed his Eſtate to A. againſt whom N. brought Præcipe* quod reddat; the *Tenant ſaid, that the King leaſed to E. for Life, who granted his Eſtate to him; and that E. died pending the Writ*, Judgment of the Writ; for now the Franktenement is determined in the Tenant; and becauſe the Demandant could not deny it, therefore Nihil cepit per breve; for the Franktenement is devolved to the King. Br. Brief, pl. 195. cites 24 E. 3. 24.——And yet 18 E. 3. 24. the Writ is *good till he in Reverſion enters*. Per tot. Cur. Ibid.

S. P. And the Writ fails for ever, becauſe no like Action can be maintained for the Arrearages only, but for the Annuity and Arrearages. Co Litt. 285.

7. Where an *Annuity is granted for* a Term of *Years*, if the *Term* be *incurr'd pending the Writ* of Annuity, it ſhall abate. Thel. Dig. 186. lib. 12. cap. 18. S. 3. cites Mich. 34 H. 6. 20. and 15 H. 7. 1.

(K) By Birth of a nearer Heir pending the Writ.

1. THel. Dig. 185. lib. 12. cap. 14. S. 1. ſays, See 11 Aſſ. 6. That Mention is made that *Aſſiſe* brought *by an Heir againſt a Guardian*, was abated becauſe another nearer Heir was born after the Writ purchaſed &c.

2. And *ſo where a Man has a Daughter, and dies, his Feme privement enſient with a Son*, if the Daughrer ſues Aſſiſe of Mortdanceſter, and after the Son is born, the Writ ſhall abate. Thel. Dig. 185. lib. 12. cap. 14. S. 1. cites 32 H. 6. 35.

Br. Brief, pl. 415. cites 32 H. 6 28. 29. S. P.

(L) By Recovery pending the Writ.

1. IN *Writ of Ward of the Body*, it is no Plea for the Defendant to *ſay that a Stranger of whom the Father of the Infant held by Service of Chivalry, brought Writ of Ward againſt him, to whom he render'd the Body* of the Infant *out of Court, before he knew* any thing *of the Suit of this Demandant* now &c. Thel. Dig. 190. lib. 12. cap. 30. S. 1. cites Trin. 2 E. 2. Brief. 781.

In *Writ of Ward* it was pleaded *that a Stranger by Writ* of Ward *of elder Date recovered the ſame Ward againſt him pending this Writ by Verdict found againſt the Defendant upon Jointenancy in the Services pleaded by the Defendant*; and held a good Plea *with Allegation that the Stranger was ſeiſed by Force of the ſame Judgment*, otherwiſe not. Thel. Dig. 192. lib. 12. cap 30. S. 22. cites Hill. 40 E. 3. 7. Where it is ſaid that in Plea of Land, Recovery pending ſhall not abate the Writ if Execution be not ſued &c. And that ſo agrees 7 H. 4. 30. 17.

2. Recovery by a Stranger *of Parcel pending the Writ ſhall* not *abate* the Writ but *only for this Parcel.* Thel. Dig. 190. lib. 12. cap. 30. S. 2. cites 3 E. 3. Itin. North. Brieſe 739. Paſch. 9 E. 3. 452. Trin. 15 E. 3. Brief 285. 18 E. 3. 28. 20 E. 3. Br. 687. and 22 E. 4. 8.

3. In *Writ of Entry, in which* the *Tenant had not Entry unleſs by Jo.* &c. The Tenant *ſaid that his Mother had recovered the third Part* of the Tenements *againſt the ſaid Jo. by Writ of Dower, and* thereof *ſued Execution* againſt the Tenant *after this Writ purchaſed* &c. And held no Plea, inaſmuch as the Recovery was againſt a Stranger to the Writ. Thel. Dig. 190. lib. 12. cap 30. S. 3. cites Trin. 5 E. 3. 203 Brief 723.

4. In *Writ of Right* after the Miſe joined, and at the Day that the 4 *Knights were come to chooſe the Grand Aſſiſe*; the *Tenant ſaid that one Alice, after the Miſe joined, had recovered againſt him the third part by Writ of Dower by his Default* &c. And adjudged no Plea, but the 4 Knights were ſworn. Thel. Dig. 190. lib. 12. cap. 30. S. 5. cites Paſch. 7 E. 3. 311.

5. In *Formedon againſt A. B. and C.—A. made Default after Default*, and *B. and C. took the entire Tenancy and pleaded to Iſſue* &c. and after *C. made Default, and at the Petit Cape another Default*, upon which the Demandant pray'd Seiſin of the Moiety, and *B. being an Infant, came by Guardian, and ſaid that he himſelf pending this Writ brought Aſſiſe againſt the ſaid A. and C. of all the Tenements now demanded, and recovered* againſt them *by Verdict of Aſſiſe, and ſo their Tenancy deſtroyed* &c. Yet the Demandant had Judgment to recover. But it was ſaid by Stone, that otherwiſe it ſhould be if B. had produced the Record of the Aſſiſe. Thel. Dig. 190. lib. 12. cap. 30. S. 4. cites Paſch. 7 E. 3. 320. quære.

6. In *Formedon* of a Manor, the Tenant *pleaded that one Jane, pending the Writ by Writ of Dower, had recovered* againſt him *the third Part by Ac-*

tion tried &c. the Demandant replied, *that the Tenant, before the Writ of Dower* purchaſed, *had render'd to Jane her Dower of the ſame Manor, and after by* Conſent and *Colluſion between them,* the ſaid *Jane brought her Writ of Dower, and recover'd &c. to abate this Writ.* And adjudg'd a good Replication. Thel. Dig. 191. lib. 12. cap. 30. S. 6. cites Mich. 7 E. 3. 358. and the Writ awarded good.

7. Recovery *by the Tenant againſt the Demandant by Default* ſhall abate the Writ. Thel. Dig. 191. lib. 12. cap. 30. S. 7. cites 7 E. 3. 360.

8. In *Aſſiſe* the *Tenant ſaid that a Stranger recover'd againſt him pending the Writ by Action tried* &c. to which the Plaintiff replied *that the Tenant was Tenant the Day of the Writ purchaſed, and this Eſtate continues and is yet Tenant &c.*. And upon this to Iſſue, and it was *found that the Recovery was had by Conſent between them, and the Livery made by the Bailiff, but the Tenant and his Goods remained always there* &c. Upon which the Opinion of the Court was to abate the Writ becauſe the Interruption is found, and ſo the Reverſe of the Iſſue is found. Thel. Dig. 191. lib. 12. cap. 30. S. 8. cites 7 E. 3. 368. & 43 E. 3. 21.

So it is of the *Reentry of the Feoffee without Recovery* in ſuch Caſe. ibid. cites Mich. 15 E. 4. 5.

9. If the *Tenant pending the Writ infeoffs a Stranger, and after diſſeiſes his Feoffee,* and his *Feoffee recovers againſt him,* ſuch Recovery ſhall not abate the Writ. Thel. Dig. 191. lib. 12. cap. 30. S. 9. cites Paſch. 9 E 3. 452. & 11 H. 6. 56.

10. In *Writ againſt J. and M.—J. ſaid that he was Tenant of the whole the Day of the Writ purchaſed* &c. *and that M. recover'd all againſt him pending the Writ* &c. Judgment of the Writ, and *M. ſaid that ſhe had nothing the Day of the Writ purchaſed, and that ſhe recover'd againſt J. pending the Writ* &c. Judgment of the Writ. But Herle held the Writ good againſt M. Thel. Dig. 191. lib. 12. cap. 30. S. 10. cites Paſch. 9 E. 3. 355.

Recovery had by a Stranger againſt the Tenant pending the Writ by Nient dedire, *or by Render or* by *Default,* ſhall not abate the Writ. Ibid. S. 16. cites Trin. 18 E. 3. 28. and ſays ſee 9 H. 6. 42. quære, and that ſo agrees Trin. 7 H. 4. 15. ———*But* it is held that Writ ſhall abate for Recovery had by a Stranger againſt the Tenant pending the Writ upon *miſpleading of the Tenant, where the Tenant has other better Matter to plead.* Thel. Dig. 191. lib. 12. cap. 30. S. 16. cites Trin. 18 E. 3. 28.

11. Thel. Dig. 191. lib. 12. cap. 30. S. 11. Says it ſeems by the Opinion of Hill 10 E. 3. 486. That *Recovery* had *by a Stranger pending the Writ upon Nient dedire in a Writ purchaſed after the Writ pending* ſhall not abate the Writ. But ſays quære if it was purchaſed before, and cites 5 H. 7. 40. quære.

12. In Writ againſt D. he *pleaded to the Writ, that before this Writ purchaſed, one C. brought Writ againſt B. of other Lands,* the which *B. vouch'd D. now Tenant,* and *D. enter'd into the Warranty and loſt,* upon which *C. recover'd againſt B. and he over in Value againſt D. before this Writ purchaſed, and after* this Writ purchaſed *Execution was ſued by B. againſt D. of the Land now demanded, which B. after infeoffed one A. thereof, who is now Tenant* thereof &c. And held a good Plea. But the Demandant maintain'd that D. was now Tenant &c. and Iſſue thereupon. Thel. Dig. 191. lib. 12. cap 30. S. 12. cites Trin. 15 E. 3. Brief 285.

13. *After Verdict and before Judgment* the *Tenant ſhall not plead Recovery* had *againſt him by a Stranger before the Inqueſt taken,* notwithſtanding the Inqueſt was taken in Pais at the Niſi Prius. Thel. Dig. 191. lib. 12. cap. 30. S. 13. cites Mich. 17 E. 3. 55.

14. In *Formedon* the *Tenant pleaded to the Writ that a Stranger recover'd* the Tenements *againſt him by Aſſiſe and Action tried pending the Writ* &c. And held and adjudged a good Plea *without ſaying that the Diſſeiſin was done before this Writ purchaſed,* and the Demandant was not received to falſify this Recovery by Covin or Conſent, and by Traverſe that the Diſſeiſin was done before this Writ purchaſed. But *otherwiſe* it ſhould be

if such Recovery had been pleaded in Bar. Thel. Dig. 191. lib. 12. cap. 30. S. 14. cites Mich 17 E. 3. 72. but cites 33 E. 3. Maint. de Brief 65.

15. In *Writ of Escheat* the *Tenant said that it was found by Office for the King, that he, by whose Felony the Land is claimed, adhered himself to the Enemies of the King, by which the Land was seised into the Hands of the King, upon which the Tenant sued to the King by Petition, and Process sued in B. R. which was found for the King, by which it was awarded that the Land remain in the Hands of the King, and this after the last Continuance, and so* has the *King recover'd by Action tried* Judgment of the Writ; and adjudged a good Plea. Thel. Dig. 191. lib. 12. S. 15. cites Trin. 18 E. 3. 26.

16. But Writ shall abate for the Parcel by *Recovery* had *against the Tenant by a Stranger, by Writ of Dower of later Date, by Render of the Tenant, with Monstrans that she who recover'd had Right to recover.* But it is held there, that the Demandant *may falsify* this Recovery, *by saying that the Baron* of the Feme *had nothing; but not* to say *that the Recovery was by Covin and Consent, without counterpleading the Right.* And it is said there, that Writ shall abate by the *Recovery in Writ of Dower of* * *elder Date, had by Default of the Tenant, with Monstrans that she had Right* as above. Thel. Dig. 191. lib. 12. cap. 30. S. 17. cites Trin. 20 E. 3. Br. 687. But cites 31 E. 3. Brief 323. contra. Quære.

* *But in Assise* it is adjudg'd that the *Writ shall not abate by Recovery* had *against the Tenant by Default, by Writ of elder Date.* Thel. Dig. 191. lib. 12. cap. 30. S. 18. cites Mich. 22 E. 3. 12. ——*Nor* by such Recovery had *by Reddition.* Thel. Dig. 191. lib. 12. cap. 30. S. 18. cites 22 Ass. 2. *And* says, that he *ought always to plead such Recovery certainly.*

Writ shall abate by Recovery had pending the Writ *by Writ of elder Date by Default, notwithstanding Demandant said that it was upon false and faint Title,* and so adjudg'd. Thel. Dig. 192. lib. 12 cap. 30. S. 20. cites Mich. 28 E. 3. 96.

17. Where an *intire Manor is in Demand,* the *Writ shall abate for all, by Recovery had of the 3d Part by Writ of Dower.* Thel. Dig. 191. lib. 12. cap. 30. S. 19. cites Hill. 26 E. 3. 57. And see 3 E. 3. sup.

But Assignment of Dower *in the Chancery shall* not *abate the Writ,* but *only for the Parcel* in such Case; and so note, that such Assignment in the Chancery shall abate the Writ for the Parcel as well as Recovery. Thel. Dig. 191. lib. 12. cap. 30. S. 19. cites 26 E. 3. and says, see 10 H. 7. 1.

18. Writ brought *of a Castle, and of other Land. As to the Castle the Tenant vouch'd, and to the Land he pleaded to the Writ, That pending this Writ the Demandant had recover'd against him the Manor* of Tatsal, *of which the Land is Parcel* &c. by which the Writ abated for the Land. Thel. Dig. 192. lib. 12. cap 30. S. 21. cites Trin. 38 E. 3. 16.

19. *Execution sued by Tenant by Scire Facias* pending the Writ, shall not abate the Writ. Thel. Dig. 192. lib. 12. cap. 30. S. 22. cites Hill. 41 E. 3. 5. Brief 532.

30. Thel. Dig. 192. lib. 12. cap. 30. S. 30. says, see *Recovery* had *against the Tenant pending the Writ pleaded by the Vouchee.* Pasch. 41 E. 3. 11.

21. *Where Recovery* had, *and Execution had pending the Writ, is pleaded in Abatement, it is good Maintenance* of the Writ *to say that the Tenant was Tenant the Day of the Writ purchased, and yet is* &c. Thel. Dig. 192. lib. 12. cap. 30. S. 31. cites Trin. 43 E. 3. 21.

22. Writ of *Detinue of Charters* shall not abate by *Recovery had by a Stranger against the Defendant of the same Charters, by another Writ* of Detinue pending the Writ. Thel. Dig. 192. lib. 12. cap. 30. S. 24. cites Hill. 8 H. 6. 23.

But Cottesmore said, that if *A. delivers a Charter concerning his Land to B. to re-bail to him,* and *B. delivers it to C. to re-bail to him,* and after *A. recovers the Charter by Writ of Detinue against C.* If *A. brings another Writ* of Detinue *against B.* upon the first Bailment, B may plead this Recovery had against C. Thel. Dig. 192. lib 12. cap. 30. S. 24. cites Trin. 9 H. 6. 17.

23. A Man may *falsify a Recovery pleaded to the Writ by Action tried*, by saying that it was *by Covin* and Consent, *and by Traverse to the Issue tried, and* by *shewing of the Cause of the Covin.* Thel. Dig. 192. lib. 12. cap. 30. S. 25. cites Mich. 9 H. 6. 41.

24. In Scire Facias it was pleaded to the Writ, that a *Stranger had recover'd against the Tenant by Verdict of Assise pending the Scire Facias*, the which Stranger was *seised by Force of the Judgment, and leased to the Tenant for* Term of *Years, which Term yet continues* &c. To which the Demandant replied, *that the Tenant was seised after the Scire Facias purchased, and infeoff'd the Plaintiff in Assise, who was seised till by the Tenant disseised, of which Ouster he brought the Assise; absque hoc that the Plaintiff in* the Assise *had ever any thing before the Scire Facias purchased* &c. And it was held by 3, that the Writ should abate. But Martyn held the contrary. Thel. Dig. 192. lib. 12. cap. 30. S. 26. cites Trin. 11 H. 6. 57. see 9 E. 3.

25. It is no good Form in pleading a Recovery of Parcel to the Writ, to *say that a Stranger recover'd* 100 *Acres of the said Acres inter alia; but* he ought to say *that such a one recover'd* 200 *Acres, of which* 20 *Acres now in Demand are Parcel* &c. Thel. Dig. 192. lib. 12. cap. 30. S. 28. cites Pasch. 22 E. 4. 8.

26. In *Formedon* the *Tenant vouch'd one A. who vouch'd one B. an Infant*, by which the *Parol demurr'd*; and after *Resummons was sued against the Tenant and the first Vouchee, but not against B.* And now the *Tenant pleaded, that after the Parol was put sine Die by the Nonage, a Stranger recover'd the Land against him in Formedon by Confession of the Tenant, by Force of which he enter'd, Que Estate the Tenant now has*; and he said further, *that the Estate of the Demandant was mesne between this Judgment and the Title of the Stranger* &c. Judgment of the Writ &c. And *adjudg'd no Plea to the Writ* in the Mouth of the Tenant, *but* it shall be *good in Bar* in his Mouth. And Brian held that the Plea was not good, because *Covin* appear'd by the Confession; but Townsend held the contrary, with the Averment. Thel. Dig. 192. lib. 12. cap 30. S. 29. cites Trin. 5 H. 7. 40. but says it is agreed, Mich. 10 H. 7. 1. That such Recovery by Confession, and without shewing Title in the Recoveror, is not Covin or Collusion apparent, before that the Covin be alleg'd by the Demandant; and that such Recovery by Confession, in Writ of elder Date, is good enough in Abatement of the Writ, without affirming Title in the Recoveror, and cites 18 E. 3. 20 E. 3. 7 H. 4. 15. 22 E. 3. Quære.

(M) Writ abated by Return of the Sheriff.

1. THELOALL says, we find in our Books that when Exception was taken that the Writ was not served, sometimes the Defendant was put to answer before the Return was amended, and sometimes Sicut Alias was awarded; but *rarely* that *any original Writ was abated for any Default in the Return. But Judgments have been arrested* for Defaults apparent in the Returns, and Judgments have been reversed also by Error for such Cause, and *especially where such* Judgments have *pass'd by Default.* Thel. Dig. 218. lib. 16. cap. 1. S. 14.

2. *Upon Distress* the *Sheriff return'd Mainpernors, and that Non sunt exitus* &c. and adjudg'd good. Thel. Dig. 218. lib. 16. cap. 1. S. 5. cites 7 H. 6. 10. Quære. Hill. 29 E. 3. 7.

3. In *Scire Facias against Elen, Prioress of W.* the Sheriff *return'd Scire Feci Prioressæ de W. without saying Elenæ Prioressæ*, and held good. Thel. Dig. 217. lib. 16. cap. 1. S. 1. cites Pasch. 29 E. 3. 33.

4. In

4. In *Præmunire* Facias *againſt ſeveral*, the Sheriff *return'd that they were warn'd; but* he did *not* return *at what Day* they were warn'd, and held an inſufficient Return; becauſe by the Statute they ſhould be warn'd 2 Months before the Day in Court, and upon this Sicut Alias was awarded. Thel. Dig. 218. lib. 16. cap. 1. S. 2. cites Hill. 42 E. 3. 7. and 39 E. 3. 8.

5. In *Treſpaſs againſt an Abbot and his Commoigns*, the Sheriff *returned Pledges for the Abbot, and that the Commoigns had nothing* &c. And it was held good, without putting the Abbot to find Pledges for his Commoigns. *But* the Sheriff ought to return Pledges, as well *for Feme Covert as* upon *her Baron.* Thel. Dig. 218. lib. 16. cap. 1. S. 4. cites Mich. 48 E. 3. 26. but adds, Quære. But ſays, it is held the Feme ſhall not be attached by the Goods of the Baron.

6. Upon *Scire facias againſt ſeveral Tenants*, the Sheriff *return'd Scire feci quod ſint* &c. *modo & forma* ſecundum quod iſtud br' exigit &c. And held good, *without ſaying ſeparatim.* Thel. Dig. 218. lib. 16. cap. 1. S. 6. cites Hill. 2 H. 4. 13. and ſays, See 3 H. 4. 19.

7. It ſeems per Opinionem, That if the Sheriff *returns more than 24 Recognitors in Aſſiſe*, the Writ ſhall abate. Thel. Dig. 218. lib. 16. cap. 5. S. 7. cites Hill. 8 H. 4. 20. Hill. 10 H. 4. 8. and adds, Quære; for the Statute of Weſtminſter 2. cap. 38. is Quod de cætero non ſummoneantur in una Aſſiſa plures quam 24.

8. The *Scire facias* was *againſt G. K.* and the Sheriff *return'd Scire feci G. K. without ſaying Infranominat' nor infraſcript', but* it was, *Prout iſtud breve inſe exigit* &c. *ſecundum formam brevis* &c. adjudged good. Thel. Dig. 218. lib. 16. cap. 1. S. 9. cites Mich. 1 H. 6. 7. and 11 H. 7. 28. But it is ſaid, That it is *amendable, if* it be not *good.* Ibid. cites 12 H. 7. 19.

9. It is ſaid by Priſot, That *after the Tenant has appeared* in Court, he *ſhall never have Advantage of Default of Form of the Return*; and if it be not good, it may be *amended* by Diſcretion &c. Thel. Dig. 218. lib. 16. cap. 1. S. 11. cites Mich. 33 H. 6. 31.

(N) Writ abated, or made good by the View.

1. WHere a Man *pleads Nontenure of Parcel* of the Tenements demanded, the Demandant may maintain that the Tenant is fully Tenant of the Tenements put in View; for the Demandant by the View may bring the Quantity to his Demand, and ſo amend his Writ, or falſify his Writ by the View. Thel. Dig. 218. lib. 16. cap. 2. S. 1. cites Mich. 3 E. 3. 107. and Paſch. 4 E. 3. 132. *But* where the *Writ was of two Parts of the Moiety of a Manor*, the *Tenant ſaid, that the Demandant himſelf was ſeiſed of a Wood, Parcel of the whole Manor* &c. To which the Demandant *replied, That the Tenant was fully Tenant of the Tenements put in View*, and was not received without maintaining his Writ of the Tenements demanded. Thel. Dig. 219. lib. 16. cap. 2. S. 5. cites Mich. 4 E. 3. 162.

2. Where one *demands* by his Writ *a Houſe, and* 10 *s. Rent*, and *puts nothing in View but only a Houſe*, it ſhall abate his Writ. Thel. Dig. 218. lib. 16. cap. 2. S. 2. cites Trin. 5 E. 3. 193. and Paſch. 11 E. 3. Dower 63.

3. It is ſaid, That where a Man *demands a Carve* of Land, he may *put in View the Moiety of a Carve, or 2 Carves*; and yet it ſhall not abate the Writ. Thel. Dig. 218. lib. 16. cap. 2. S. 3. cites Paſch. 6 E. 3. 265.

4. If the *Demand be of a Manor*, and the *Tenements put in View are only one Houſe and one Carve of Land of another Name* than the Manor is of, the Writ ſhall abate. Thel. Dig. 218. lib. 16. cap. 2. S. 4. cites Paſch. 6 E. 3. Brief 727.

5. *But* where the Manor of S. was in Demand, the *Tenant ſaid that the Tenements put in View are only one Houſe and ten Acres of Land Parcel of another Manor, and that ſuch a one held one Acre of the Tenements put in View* &c. And held no Plea without pleading the Non-tenure of the Tenements demanded; for tho' the Demandant *puts more in View than he demands*, yet his Writ ſhall not abate. Thel. Dig. 218. lib. 16. S. 4. cites Trin. 18 E. 3. 22. Br. 357. Quære. But ſays the contrary is held Paſch. 19 E. 3. Brief 468. where it is granted by the Court, that the Demandant ought to maintain his Demand according as he has demanded, and according as it is put in View; and that ſo agrees Mich. 20 E. 3. Brief 373. 375.

(O) By Want of proper Parties. Plaintiffs or Defendants.

1. ACTION againſt J. N. who *ſaid that he had nothing in the Land, unleſs in Right of his Wife*; Judgment of the Writ, and if &c. Nul tort &c. the Exception was found; by which the Plaintiff took nothing by his Writ. Br. Brief, pl. 285. cites 25 Aſſ. 10.

2. Fine was levied *to a Feme ſole*; ſhe *took Baron*, and *brought Quid Juris clamat* againſt the Tenant *in her Name alone*; and he went without Day, by not naming of the Baron. Br. Brief, pl. 522. cites 11 H. 4. 7.

3. It was argued Arguendo, That *in Debt by one upon a Leaſe for Years*, it is a good Plea to the Writ, *that he and another leaſed, who is alive, not named*; Judgment of the Writ. Br. Brief, pl. 37. cites 36 H. 6. 38.

Br. Brief, pl. 188. contra, That it is no Plea to the Writ, that the *Leaſe was made by the Plaintiff, and one A. who is alive, not named*; for the Leaſe of one Coparcener is good to the Tenant, if the other does not enter; but it is a good Plea to the Writ, that the Plaintiff and one A. made the Leaſe, who is alive not named, *abſque hoc that the Plaintiff leas'd alone*, Judgment of the Writ; cites 22 H. 6. 24.

4. *Or that* the Leaſe *was made to the Defendant, and another, who is alive* &c. Br. Brief, pl. 37. cites 36 H. 6. 38.

5. *Or of buying a Horſe* &c. to ſay *that the Defendant, and another in full Life bought &c. or that* the *Plaintiff and another in full Life ſold* &c. and this *without Traverſe*. Br. Brief, pl. 37. cites 36 H. 6. 38.

6. *Contra to ſay that the Plaintiff leaſed this and other Land for the ſame Rent* &c. For there he *ought to traverſe*; for the Leaſe of one thing is not the Leaſe of two. Br. Brief, pl. 37. cites 36 H. 6. 38.

(P) By Default in the Count. Want of Certainty. And How aided. By Intendment or Relation.

1. IN *Treſpaſs by an Abbot of Goods taken in the Time of Vacation*, and the Writ was *ad exhæredationem Eccleſiæ prædict.* and adjudg'd good, notwithſtanding that no Church is named; for it ſhall have Relation to the Abbot who was named before. Thel. Dig. 102. lib. 10. cap. 10. S. 17. cites Mich. 18 E. 2. Treſpaſs 237. and ſays ſee 38 E. 3. 9.

2. In Writ of *Treſpaſs by an Abbot againſt the Parſon of the Church of C.* the Writ was *ad deterioracionem Eccleſiæ prædict.* and it was abated, becauſe there was *not any Church mention'd before*, to which the Prædict. might have Relation, but only to the Church of the Defendant. Thel. Dig. 101. lib. 10. cap. 10. S. 1. cites Mich. 18 E. 2. Brief 828.

3. In *Cui in Vita* by Helena, who was Wife of William de C. *againſt J. de N. in quæ idem J. non habet ingreſſum niſi per prædictum Will.* quondam virum &c. and it was held certain Intendment enough, that J. had Entry by the other. Thel. Dig. 99. lib. 10. cap. 9. S. 2. cites Hill. 4 E. 3. 122.

4. The Writ was *Quod reddat maner' de W. cum pertin' except' uno Meſuagio & advocatione eccleſiæ ejuſd. Manerii.* It was held, that *ejuſdem manerii* ſhall have *Relation* only to the Advowſon, and not to the Houſe, by which the Writ was abated, becauſe the Houſe was not in any Place. Thel. Dig. 101. lib. 10. cap. 10. S. 2. cites Hill. 4 E. 3 117.

5. In *Formedon in Remainder, by the Son and Heir of him in Remainder*, he *need not ſuppoſe the Death of his Father*; for he cannot be intended Heir to his Father if he be not dead. Thel. Dig. 99. lib. 10. cap. 9. S. 1. cites Mich. 5 E. 3. 206. And where he is *made Heir to his Grandfather*, he ſhall *not ſuppoſe the Death of his Father*. Thel. Dig. 94. lib. 10. cap. 6. S. 2. cites 23 E. 3. 22. ——— But ſuch Writ was *abated by Omiſſion* of this Clauſe, *eo quod præd' les donees obierunt ſine Hæred'* &c. Thel. Dig 94 lib. 10. cap. 6. S. 2. cites Trin. 10 E. 3. 515. and Mich. 39 E. 3. 34. and 3 H. 6. 1. and Paſch. 11 H. 6. 34.

6. When a *Word of a Writ has double Intendment*, the *one according to Law, the other againſt Law*, a Man ſhall take the Intendment which is according to the Law. Thel. Dig. 99. lib. 10. cap. 9. S. 11. cites Trin. 5 E. 3. 197. As in *Treſpaſs* the Writ was *Quare averia ſua cepit & imparcavit & ea detinuit without Paſture* &c. *Ita quod* 30 *eorum perierunt* &c. it ſhall not be intended that by thoſe Words the Defendant ought to give Paſture to the Beaſts; but it ſhall be *intended that the Defendant would not ſuffer the Plaintiff to give them Paſture* &c. Thel. Dig. 99. lib. 10. cap. 9. S. 11. cites Trin. 5 E. 3. 197.

7. In Writ of *Intruſion* by Ro. *againſt W. in which W. had not Entry unleſs by Abatement, after the Death of Simon the Son of Thomas Upholl*, that the Tenant held for Term of his Life of the Leaſe of Thomas Upholl, Grandfather of the Demandant, and made the Deſcent from Thomas to Simon, and from Simon to the Demandant, yet it ſhall not be intended that Simon the Tenant for Life, and Simon the Father of the Demandant, are the ſame Perſon; for it may be that Thomas had two Sons of the ſame Name. Thel. Dig. 99. lib. 10. cap. 9. S. 3. cites Hill. 7 E. 3. 301.

8. *Feoffavit* in a Writ ſhall be intended of Feoffment *in Fee*, if other Eſtate be not expreſs'd. Thel. Dig. 99. lib. 10. cap. 9. S. 4. cites Paſch. 8 E. 3. 392. Mich. 18 H. 6. 24.

9. In *Treſpaſs de* Domo proſtrata, & *maheremio* inde *aſportato* &c. this ſhall be intended the Timber of the Plaintiff. Thel. Dig. 99. lib. 10. cap. 9. S. 12. cites Hill. 9 E. 3. 442.

10. In

10. In Attaint of a Verdict paſs'd of one Meſſuage cum pertinentiis, and after there was in the Writ de Tenementis prædictis cum pertinentiis, and yet held good; for *ſeveral Tenements may be intended to be in this Word Houſe*, with the Appurtenances. Thel. Dig. 99. lib. 10. cap. 9. S. 13. cites Mich. 9 E. 3. 468.

* This is miſprinted, and ſhould be (nunc), and ſo is the Year-Book.

11. In *Scire Facias againſt a Prior*, out *of a Recovery* had *againſt his Predeceſſor*, the *Writ ſuppoſed that the Recovery was had againſt the then Prior*; and adjudg'd a good Writ, without putting a Diverſity in the Name of Baptiſm of the Defendant and of his Predeceſſor; for by the tunc Priorem, and * hunc Priorem, they ſhall be intended diverſe Perſons. Thel. Dig. 99. lib. 10. cap. 9. S. 14. cites Hill. 17 E. 3. 1.

Thel. Dig. 104. lib. 10. cap 12. S. 4 cites S. C.

12. Quare Impedit *ad Præbendam de Moreton Majorem in Eccleſia*, &c. It is adjudg'd that *Majorem* ſhall have *Relation* to Præbendam, and not to Moreton. Thel. Dig. 101. lib. 10. cap. 10. S. 6. cites Trin. 18 E. 3. 29.

13. The Writ by *one Præcipe* was *of Land in Brugh near Wingfield*, and the *other Præcipe of Land in eadem Villa* &c. The Opinion of the Court was that it ſhall abate; for *eadem Villa* ſhall have *Relation* to Wingfield. Thel. Dig. 101. lib. 10. cap. 10. S. 7. cites Trin. 20 E. 3. Brief. 371.

14. The Writ was *in Villa de Pontefracto W. and G.* And held good without ſaying Villis; for *Villa* ſhall have *Relation* to Pontefracto only, and not to the other Vills. Thel. Dig. 101. lib. 10. cap. 10. S. 8. cites Trin. 30 E. 3. 3.

15. In *Formedon* the Writ was *of a Gift made to Jo. and Ja. his Feme and that after the Death of the aforeſaid Jo. and Ja.* without ſaying his Feme, and yet adjudg'd good; for it cannot have Relation to any other. Thel. Dig. 101. lib. 10. cap. 10. S. 9. cites Hill. 31 E. 3. Brief 326.

16. *Scire Facias out of a Recognizance againſt a Tertenant*, the Writ was *Quare Præd' ſumma de terris ſuis levari non debeat*, and held good; for ſuis ſhall have relation to his Lands which were the Conuſor's, and ſo it ſhall be intended. Thel. Dig. 101. lib. 10. cap. 10. S. 16. cites Mich. 30 E. 3. 30.

Thel. Dig 101. lib. 10. S. 10. cites S. C and 18 E. 3. 3. and 18 E. 2.

17. Treſpaſs the Writ was *Pone per vadios Abbatem de N. & A. & B. converſos ejuſdem domus*, where *domus is not in the Writ before*; Judgment of the Writ, becauſe *it is not converſos ejuſdem Abbatis*. Finch ſaid all is one, and awarded the Writ good. Br. Brief, pl. 135. cites 38 E. 3. 8.

18. In *Treſpaſs by an Abbot of Goods taken in the time of Vacation*, and the Writ was *ad exhæredationem eccleſiæ prædict.* And adjudg'd good notwithſtanding that no Church is named; for it ſhall have Relation to the Abbot who was named before. Thel. Dig. 102. lib. 10. cap. 10. S. 17. cites Mich 18 E. 2. Treſpaſs 237. and ſays ſee 38 E. 3. 9.

19. A *Feme* ſhall be *intended to be of the ſame Vill which her Baron is of*, and ſo ſhall a *Commoign of an Abbot*, and *Parſon of a Church*. Thel. Dig. 100. lib. 10. cap. 9. S. 20. cites 3 H. 6. 31. 7 H. 6. 1. and 10 H. 6. 8.

S. P. Br. Count, pl. 12. cites 20 H. 6. 18 & 4 E. 4. 14

20. By Default in the Count the Writ ſhall abate per Cotteſmore, and not denied, quod nota. Br. Count, pl. 7. cites 3 H. 6. 41.

accordingly, and not denied, quod nota. Br. Count, pl. 7. cites 3 H. 6. 41.—— S. P. Br. Count, pl. 12. cites 20 H. 6. 18. & 4 E. 4. 14. accordingly. —— Br. Count, pl. 24. cites S. P. 35 H. 6 40.——S. P. Br. Brief, pl. 247. cites 38 H. 6. 1. ——— S. P. Br. Brief, pl. 254. cites 39 H. 6. 7.— ——S. P. in Writ of Right, Quare Impedit, or other Actions, per Forſcue and Hengeſton & nullus negavit, and it ſeems to be clear Matter, for there is no other Judgment for Default in the Count, but quod Petens or Querens *Nihil Capiat per breve, and* the other that *eat inde ſine die*, quod nota bene. Br. Brief, pl. 413. cites 31 H. 6. 15.—— S. P. Br. Count, pl. 8. cites 9 H. 6. 10.——S. P. Br. Brief, pl. 38. cites 35 H. 6. 36.—— S. P. Br. Brief, pl. 395. cites 21 E. 4. 63. 64. ——S. P. And he ſhall not make a new Count. Br. Brief, pl. 488. cites 17 E. 4. 7. ——S. P. Nor ſhall he amend his Count. Br. Count, pl. 74. cites 31 H. 6. 15.

As in *Monſtraverunt*, where *ſeveral join*, as they may, and they alſo join in Count, and *ſome are able to bring the Action*, they being frank, *and others not*, by reaſon they are Villeins, there the Count ſhall abate the Writ, quod nota, per Belk J. quod non negatur. Br. Brief, pl. 223. cites 39 E. 3. 6.

21. Writ was *againſt Margaret who was Wife of T. S. of Norton Davy* &c. And it was held by Babbington, that the Vill of *Norton Davy ſhall have Relation to the Feme* who is ſued, *and not to T. S.* Quære. Thel. Dig. 101. lib.

lib. 10. cap. 10. S. 12. cites Mich. 4 H. 6. 4. but ſays the contrary is adjudg'd in an Indictment, Hill. 9 E. 4. 50.

22. The *Writ* was *of Land in A. B. and C. in Inſula de W.* and held that *C. only ſhall be intended to be in Inſula de W.* Thel. Dig. 100. lib. 10. cap. 9. S. 19. cites Mich. 7 H. 6. 8.

23. And the *Chancellor of Oxford* ſhall be *intended commorant there.* Thel. Dig. 100. lib. 10. cap. 9. S. 20 cites 8 H. 6. 38

24. *Scire Facias out of a Fine againſt Richard Abbot of W.* and by the Writ the *Demandant intitled himſelf by one Richard Stile*, and afterwards in the Percloſe, he *made himſelf Coſin and Heir to the ſaid Richard*, and held ſufficient Intendment enough that the ſaid Richard ſhall have Relation to Richard Stile and not to Richard Abbot, who is alive. Thel. Dig. 100. lib. 10. cap. 9. S. 30. cites Hill. 8 H. 6. 29.

25. In Treſpaſs of *Battery* of his Servants, *Ita quod negotia ſua remanſerunt infecta at ſuch a Place* &c: without ſaying in what County, and held good; for it ſhall be *intended in the ſame County where the Battery was.* Thel. Dig. 100. lib. 10. cap. 9. S. 26. cites Mich. 20 H. 6. 15.

26. Treſpaſs of *Goods carried away in D. and S.* and *did not ſhew what was carried away in the one and what in the other*, and yet well. Br. Faux Latin, pl. 4. cites 20 H. 6. 9.

27. *So* of *Præcipe quod reddat in A. and B.* and did not ſhew how much in the one and how much in the other, quod nota. Br. Faux Latin, pl. 4. cites 20 H. 6. 9.

28. Where *Writ* is brought *of Land in* 3 *Vills*, Parcel ſhall be intended to be in each Vill. Thel. Dig 100. lib. 10. cap. 9. S. 22. cites Mich. 31 H. 6. 13.

29. *So* in *Replevin* the *Defendant demanded Judgment of the Court*, becauſe *no Place is ſhewn where the Taking was, and a Space was left*; and becauſe *it was entered the laſt Term*, therefore Judgment was, that the Writ abate. Br. Count, pl. 24. cites 35 H. 6. 40.

S. P. Br Count, pl. 12. cites 20 H. 6. 18 & 4 E. 4. 14. accordingly.

——S. P. Br. Count, pl. 64. cites 4 E. 4. 14.

30. In Scire facias to execute a Fine, the *Tenant ſhall be intended Party, or privy to the Fine*, if he does not allege the contrary. Thel. Dig. 100. lib. 10. cap. 9. S. 25. cites 36 H. 6. 18.

31. *So* in forcible Entry, the *Defendant in another Term demanded Judgment of the Count, becauſe the Certainty of the Land*, as 12 Acres of Land, 4 Acres of Meadow, and the like, *is not alleged*; and therefore the Writ was abated, and cannot be amended; for it was counted of another Term. Br. Brief, pl. 247. cites 38 H. 6. 1.

32. In *Replevin*, the *Plaintiff in his Count ought to ſhew the Place where* the Defendant took the Beaſts, *but not in the Writ*; and *if he miſtakes the Place*, ſo that the *Count ſhall abate*, the *Writ ſhall abate*; Per Brian Ch. J. quod non negatur. Br. Brief, pl. 395. cites 21 E. 4. 93. 64.

33. A *Plaint in a Court Baron* was *againſt two jointly*, *for taking the Plaintiff's Goods*, and he *removed* the Plaint *by a Recordare jointly*, as the Plaint is, *and after counts of taking his Goods ſeverally*; and ſo varies from the Plaint and the Recordare alſo. Adjudged that the Writ abate. Hetl. 76. Hill. 3 Car. C. B. Wimberley v. Taylor & al'.

34. In a *Quod ei deforceat in Nature of a Writ of Right*, the *Count was of* 20 *Acres of Jampna & Brueria*, which ought to have been ſhewn certainly: And this was aſſigned for Error; but held to be well enough, for Jampna & Brueria are not intended Lands of ſeveral Sorts, but one and the ſame Land. C. Car. 178. pl. 2. Hill. 5 Car. Gryffyth v. Jenkins.

(Q) By Want of a Forepriſe, or Exception.

S. P. Br. Brief, pl. 539. cites the Regiſter, fol. 229. and 4 E. 3. 47.

1. FOrepriſe *ſhall not be made in Præcipe* quod reddat, *but of a thing which lies in Præcipe*; and therefore where a Man *demands the Manor aforeſaid, with the Appurtenances*, and *an Advowſon is appendant*, it needs not any Forepriſe; for Advowſon does not lie in Præcipe. Br. Brief, pl. 421. cites the Regiſter, fol. 229.

2. If Forepriſe does *not expreſs where the Land forepriſed lies*, the Writ ſhall abate, as in D. or in the ſame Manor. Br. Brief, pl. 539. cites Fitzh. Brief 710.

3. Where a *Manor, except* 20 *Acres, is in the County of E.* and *the* 20 *Acres is in the County of H.* the Demandant may demand the Manor in the County of E. except 20 Acres in S. Per Priſot, quære how the 20 Acres ſhall be demanded. Br. Brief, pl. 538. cites 33 H. 6. 4.—and ſee better, 7 Aſſ. 10. ibid.

S. P. Br. Brief, pl. 246. cites 36 H. 6. 32.

4. If a Man brings *Action of a Manor whereof Part is in another County*, or in Wales, or in the Cinque Ports, *and does not make Forepriſe of this Parcel*, all the Writ ſhall abate. Br. Faux. de Recov. pl. 15. cites 36 H. 6. 30. Per Taverner.

Br. Præcipe quod reddat, pl. 12. cites S. C. Brook ſays, Quære inde; for it ſeems, that he by this ſhall recover only that which is in the two Vills; and ſuch Gift by Feoffment or Fine, ſhall give only that which is in the two Vills.

5. If *Aſſiſe or Præcipe* quod reddat be brought *of the Manor in A. and B.* the *Defendant may ſay that two Acres of it extends into C. not named* in the Writ, Judgment of the Writ; and becauſe he makes no Forepriſe, the Writ ſhall abate. Br. Brief, pl. 330. cites 5 E. 4. 103.

6. Where a *Man brings Action* againſt me *of the Manor of D. in D.* and *he himſelf, or another* Man *is ſeiſed of Parcel of the Manor in the ſame Vill*, there he ought to make Forepriſe; *but if he demands the Manor of D. in D.* he ſhall not make Forepriſe of that which is in another Vill; Per Brian. The Reaſon ſeems to be becauſe it is not in Demand, and it is in vain to forepriſe that which is not demanded. Per Littleton, The Writ is not good to demand the Manor of D. in D. except an Acre in S. and at this Day Danby, Littleton, and Needham held, that it is no Plea; but Moyle and Choke contra. Br. Brief, pl. 216. cites 9 E. 4. 6.

7. Treſpaſs upon the Statute of 5 R. 2 ubi ingreſſus non datur &c. of *entring into the Manor of D. in S.* the *Defendant ſaid that* 40 *Acres Parcel of the Manor is in D.* Judgment of the Writ; & non allocatur; for nothing ſhall be recovered but Damages, and no Franktenement; and *Forepriſe cannot be made in Action of Treſpaſs* as in Præcipe quod reddat; and therefore he was awarded to anſwer. Br. Brief, pl. 371. cites 10 E. 4. 10.

8. A Man brought Writ of *Waſte*, and *declared of a Leaſe of a Manor*; and the *Defendant ſaid, that the Leſſor was ſeiſed of the Manor, except three Acres, and leaſed*, and ſo he ought to have a Writ with Forepriſe; & non allocatur, becauſe it goes in Bar for this Parcel. But Brooke ſays, the Reaſon ſeems to be, becauſe *no Land is in Demand*. Contra where Land is in Demand. Br. Brief, pl. 316. cites 5 H. 7. 7.

(R) For

(R) For Default of Suppoſal of Property &c. in the Writ; and what ſhall be ſufficient Suppoſal.

1. WRIT of Treſpaſs of entering into his Manor; and that they *took a Writing, and tore it* &c. *without ſaying* Scriptum *ſuum, nor that it was taken out of the Poſſeſſion of the Plaintiff*; and yet adjudged a good Writ. Thel. Dig. 109. lib. 10. cap. 18. S. 1. cites Mich. 1 E. 3. 24. Regiſt. 106. But ſays, it ſeems Hill. 2 E. 3. 29. That the Plaintiff, by his Count, ought to ſhew that the Remainder of certain Land was intailed to him by this Writing.

2. In *Replevin* the Writ was brought *by an Executor de quodam bove ipſius Ro. Executoris capto* &c. and adjudged good. Thel. Dig. 109. lib. 10. cap. 18. S. 2. cites Mich. 24 E. 3. 46.

3. The Property of the *Thing taken tortiouſly* ſhall be *intended to be in the Taker*. Thel. Dig. 109. lib. 10. cap. 18. S. 4. cites 27 Aſſ. 64. and 1 H. 5. 3.

4. In *Waſte ly* the *Prior* of the Hoſpital of St. Jo. the Writ was *ad exhæreditationem domus & hoſpitalis prædict.* and held good, without ſaying Hoſp. Eccleſiæ prædict. Thel. Dig. 109. lib. 10. cap. 18. S. 15. cites Mich. 42 E. 3. 21.

Writ of Waſte ad exhæreditationem eccleſiæ was held good. Thel. Dig. 109. lib. 10. cap. 8. S. 6.

5. Writ of *Treſpaſs* was brought by a Prior, *Quare bona & catalla domus dictæ eccleſiæ* ſancti Cuthberti & Nicholai prædeceſſoris nunc prioris tempore prædict. Nicholai &c. Thel. Dig. 109. lib. 10. cap. 18. S. 5. cites Mich. 47 E. 3. 23. Thel. Dig. 109. lib. 10. cap. 18. S. 14. ſays the Opinion of Mich. 9 E. 4. 35. is that Writ brought by Succeſſor of Goods taken in the Time of the Predeceſſor is good with theſe Words, Quare bona domus & eccleſiæ cepit &c. as it is uſed of Goods taken in the Time of Vacation, and not to ſay Bona prædeceſſoris &c. and cites Mich. 18 E. 2. Treſpaſs 237. 42.

6. And *ſo of Trees* cut in the Time of the Predeceſſor, the Writ ought to be Quare Arbores domus & eccleſiæ &c. Thel. Dig. 109. lib. 10. cap. 18. S. 6. cites Mich. 2 H. 4. 4. 7 E. 4. 15. 9 E. 4. 35. Regiſter 101. 96. Tempore E. 1. Treſpaſs 242.

7. In *Treſpaſs* the Writ was *Quare quand. bagga'* cum 20 lib. in pecunia numerata in eadem bagga cont' *cepit* &c. and it was held that the Writ was not good, becauſe it is not ſuppoſed to whom the Property of the Bag was. Thel. Dig. 109. lib. 10. cap. 18. S. 7. cites Mich. 13 H. 4. 11. But contra it was held Hill. 19 H. 6. 48.

Detinue of a Bag, with 100 l. therein contain'd, was maintain'd, without ſaying that the Bag was ſeal'd, by which it appears that the Property of the Bag and Money is in the Plaintiff. And ſo it is not of Money bail'd to keep. Thel. Dig. 109. lib. 10. cap. 18. S. 9. cites Mich. 18 H. 6. 20.

8. Writ of Treſpaſs by Church-wardens, Quare *bona & catalla parochianorum* in their Cuſtody being, ceperunt &c. and held a good Writ. Thel. Dig. 109. lib. 10. cap. 18. S. 13. cites Trin. 8 E. 4. 6.

9. Writ of Treſpaſs was maintain'd Quare domum intravit, and one Goſhawk and *one Hawk, of the Goods of the Plaintiff*, taken and carried away. Thel. Dig. 109. lib. 10. cap. 18. S. 16. cites Trin. 16 E. 4. 7.

10. Writ of *Treſpaſs* Quare clauſum ſuum fregit, and 4 *young Goſhawks* in their Neſts being, pretii ſo much &c. *cepit* & aſportavit &c. adjudg'd good, without ſaying that they were reclaim'd or tame, and held good. Thel. Dig. 109. lib. 10. cap. 18. S. 11. cites 14 H. 8. 1. Regiſter 93.

And ſo is Writ Quare clauſum fregit, and 6 *Damas ſuas ibidem inventas cepit* &c. But Writ Quare 6 Damas apud B. inventas cepit &c. is not good, without ſuppoſing the breaking of

of the Close or Park &c. Thel. Dig. 109. lib. 10. cap. 18. S. 11. cites Trin. 22 H. 6. 76. 43 E. 3. 24.

(S) For want of setting forth the Price or Value of the Thing. And what setting forth is good.

1. PRetium *fœrarum* may be shewn in the Count, and the Count not the worse; per Opinionem. Thel. Dig. 109. lib. 10. cap. 19. S. 2. cites Mich. 5 E. 3. 233.

2. Writ of Annuity was maintain'd of 8 *Robes*, without putting the Price of them in the Writ. Thel. Dig. 109. lib. 10. cap. 19. S. 3. cites 17 E. 3. 48. 73.

3. The Writ of Trespass was, that he had *arrested, Vi & Armis, certain Wool* &c. and detain'd it till the others were bound to the Defendant in 12 l. for the Deliverance &c. and adjudg'd good, without putting the Value of the Wool in the Writ. Thel. Dig. 110. lib. 10. cap. 19. S. 4. cites Pasch. 29 E 3. 41. 11 H. 4. 31.

4. A Sack of Wool, Price 100 s. was demanded by Writ, where in the Specialty there was not any Price, and yet adjudg'd good; for a Man shall not have *Writ to demand a Chattel* without putting the Price in the Writ. Thel. Dig. 110. lib. 10. cap. 19. S. 5. cites Trin. 29 E. 3. 50.

5. In Writ of breaking of a Warren, and of *taking Partridges or Pheasants*, a Man shall not put any Value to them, nor of a *Couple of Hounds* &c. Thel. Dig. 110. lib. 10. cap. 19. S. 14. cites Pasch. 8 E. 4. 5. Pasch. 43 E. 3. 14.

6. In Trespass of taking *Gold and Silver*, a Man shall not put any Value. Thel. Dig. 110. lib. 10. cap. 19. S. 7. cites Trin. 46 E. 3. 15.

7. Thel. Dig. 110. lib. 10. cap. 19. S. 9. says it is held Mich. 11 H. 4. 30. and Hill. 8 H. 5. 5. That where *Goods are taken, and the Plaintiff has them back again*, in Writ to be brought for this Trespass, a Man shall not put the Value of the Goods; for the Form is Quod cepit & detinuit per tantum tempus &c. and cites the Register 94. 95. 96. 97.

8. In Trespass the Writ was *Quare cepit* 12 *Oxen in one County, and chaced and impounded them in another* County; *by which* 6 *of the Oxen, Price* 3 *l. died of Hunger* &c. And the Writ was abated, because the Price of all the Beasts was not in the Writ. *But* the next Day such Writ *Quare* 112 Sheep *fugavit* from one County into another, & imparcavit, by which 20 Price 20 s. interier' &c. was adjudg'd *good, because there was not (cepit) in the Writ*; for in the first Writ the Property was intended to be out of the Plaintiff by the taking &c. Thel. Dig. 110. lib. 10. cap. 9. S. 8. cites Hill. 1 H. 5. 3. 44 E. 3. 20.

And so where the Writ is *of things without Life*, and inanimate,

9. Where the Writ is *de averiis, or of any Beasts certain taken*, it shall be *Precii* tantum. And where it is * *de Bonis & Catallis*, it shall be *ad Valentiam*. Thel. Dig. 110. lib. 10. cap. 19. S. 10. cites Pasch. 21 H. 6. 43. and says, See the Register agreeing with this Opinion.

by general Words, as Corn, Grass, Trees, Hay, Germin &c. it shall be *ad Valentiam*. *But* if it be *of things certain and special*, as so many Quarters of Corn, so many Loads of Corn, so many Oaks, one Ship taken, one Millstone, and such like, the Writ shall be *Precii*; and it seems that it shall be *so* where the Writ is *for any thing by Number, Measure, and Weight*, or a certain Millstone. Thel. Dig. 110. cap. 19. S. 10.

* The Writ of *Detinue de Bonis & Catallis* shall be *ad Valentiam*. Thel. Dig. 110. lib. 10. cap. 19. S. 6. cites Hill. 33 E. 3. Br. 913.

10. Thel. Dig. 110. lib. 10. cap. 19. S. 11. says the Register, Fol. 94. is of a Writ de Piscar' in several Piscaria &c. & *herbam falcaverunt* &c. & *herbam illam ac piscem ad valenc'* 100 *s. ceper'* &c.

11 And

11. And Writ Quare clauſum fregit & 3 *pullos eſperviorum ſuorum pretii* ſo much, or tot *cuniculos ſuos pretii* &c. cepit &c. Thel. Dig. 110. lib. 10. cap. 19. S. 12. cites Trin. 22 H. 6. 67. 10 E. 4. 15. Regiſter 95.

12. In Writ of Treſpaſs of *Charters and Writings in a Cheſt* contained &c. a Man ſhall not put any *Value of the Cheſt*. Thel. Dig. 110. lib. 10. cap. 19. S. 13. cites Mich. 20 E. 4. 29. Regiſter 95.

(T) By Want of Form.

WRIT *Original*, which *wants Form*, ſhall abate; for it is made in the Chancery, and pleadable here. Contra of *Writ judicial*, as Scire facias; for if this wants Form, and has Matter ſufficient, it is good; and therefore Deſcendere debet, inſtead of Executionem habere non debet, is not material. Br. Scire facias, pl. 18. cites 41 E. 3. 13. Br. Faux Latin, pl 91 cites S. C. Per Finch. —S. P Br. Scire facias, pl. 129. cites 4 H. 6. 3.——Br. Faux Latin, pl. 48. (bis) cites S. C.——Thel. Dig. lib. 10. cap. 12. S. 6. cites S.C.——And Ibid. 116. lib. 10. cap. 26. S. 19. cites S. C.

2. In Mortdanceſtor of 2 Acres of Land, and the Moiety of an Houſe &c. as the Order is to demand the *intire Thing before the Parts* of any thing, yet in the Clauſe to make the View the Houſe ſhall be firſt named before the Land, becauſe the intire Houſe ſhall be put in View. Thel. Dig. 104. lib. 10. cap. 12. S. 3. cites Hill. 16 E. 3. 650. 11 Aſſ. 21. and 12 H. 4. 19.

3. In *Formedon* the Writ was, And *that after the Death of the aforeſaid Alice and John*, the Donees, where it ſhould be after the Death of the aforeſaid *John and Alice*; and therefore the Writ was abated. Br. Faux Latin, pl. 3. cites 3 H. 6. 33. Thel. Dig. 104. lib. 10. cap. 12. S. 5. 6. cites S. C.——Thel. Dig. 116. lib. 10. cap. 26. S. 19. cites S. C.——Br. Faux Latin, pl. 48. (bis) cites S. C.——S. P. 2 Le. 59. Hughes's Caſe.——*But* in *Scire facias upon Recovery* of Damages the *Name of the Feme was before the Name of the Baron*; and it was *of a Recovery by the Feme dum ſola fuit*; and Exception taken, & non allocatur; for *Writ judicial* ſhall not abate for Want of Form, if it has Matter ſufficient.——Br. Scire facias, pl. 129. cites 4 H. 6. 3.—— Thel. Dig. 116. lib. 10. cap. 26. S. 19. cites S. C.—— *So* in Scire facias *againſt Baron and Feme of Damages recovered againſt the Feme dum ſola* fuit; and yet the Writ did not abate. Br. Brief, pl. 206. (208) cites 4 H. 6. 3. 4.

4. In Writ againſt Heirs, Executors &c. they ought to be *named Heir or Executor* &c. *in the firſt Name*, and *not in the Alias dictus*. And ſo the Addition by the Statute ſhall be put in the firſt Name &c. Thel. Dig. 104. lib. 10. cap. 12. S. 7. cites 30 H. 6. 5. 32 H. 6. 33. 5 E. 4. 142.

5. Writ *of Diſceit* ſhall not abate for Form, if it hath Matter of Subſiſtence. F. N. B. 95. (E) Marg. cites 19 H. 6. 50.

6. Tho', by good Order, the *moſt worthy ſhall have the Precedency*, and ſhall be preferr'd before the leſs worthy, and a *Thing intire* ſhall be preferr'd *before Part &c.* yet if the ſaid Order be *not preciſely purſued*, the Judges will not abate the Writ, or Count, for it. 11 Rep. 55. b. Mich. 12 Jac. in Savil's Caſe, alias Hammond v. Savil.

(U) By Omiſſions in the Writ.

1. IN *Raviſhment of Ward by Guardian in Socage*, the *Writ was, Cum Cuſtodia terr' & Hæred' &c. ad ipſum pertinet* &c. and concluded that he raviſhed the Heir only, without ſuppoſing any Ejectment of the Land; and yet held good. Thel. Dig. 113. lib. 10. cap. 23. S. 4. cites Mich. 4 E. 3. 163.

So in Treſpaſs in D. it is no Plea to ſay, that there are 2 *D.'s, and none without Addition*; for *if he be guilty in the one or the other, it is ſufficient*, and it was pleaded to the Writ; and this by reaſon of the *Viſne*, as it ſeems. Br. Brief, pl. 13. cites 9 H. 6. 5.——S. P. But if he *has Juſtification in any* of the 2, he may plead it, *abſque hoc that he is guilty in the other*; and the ſame in Aſſiſe or Account. Contra in all other Actions. Br. Brief, pl. 341. cites 3 E. 4. 26. And ſays, See 2 E. 4. 10. not adjudged; but that 9 H. 6. 5. it is no Plea. Ibid.

2. In Aſſiſe *of Common of Turbary in O.* it is no Plea, that there *are two O.'s in the ſame County, and none without Addition*, Judgment of the Writ; for the *Plaintiff ought to recover by View of the Jurors*; ſo that the Recovery ſhall be in the Vill where the View was made; and ſo the Writ was awarded good. Br. Brief, pl. 258. cites 5 Aſſ. 9.

So it is agreed, That in Waſte in A. and B. *it is no Plea to the Writ, that there are 2 A.'s, and none without Addition*; for he ſhall recover by View of the Jury. Br. Additions, pl. 7. cites 9 H. 6. 42.

So in Debt upon a Bond the Defendant imparl'd, and at the Day ſaid where he is named J. S. of D. that there is Over D. and Nether D. &c. Judgment of the Writ; and Per Cur. he is eſtopp'd by his own Bond, and yet Attorney ſhall have the Plea; for he is compellable to make his Warrant according to the Writ. Br. Brief, pl. 378. cites 18 E. 4. 9.——But M. 21 E. 4. 51. contra. Ibid.

But in *Forger* de Faits brought *in London of Tenements in S. in the County of D.* Over D. and Nether D. and none without Addition, is a good Plea, by reaſon of the Viſne; for if the Defendant ſays that the Plaintiff was never ſeiſed of the Tenements, the Viſne ſhall be of S. Br. Brief, pl. 400. cites 10 H. 6. 5.

But Writ was abated by Omiſſion of an (&) *between the Name of* 2 *Vills.*

3. *Quare impedit* for the King *againſt Electum Confirmatum Herford*; and held good, notwithſtanding that an (&) *was wanting* between Electum & Confirmatum. Thel. Dig. 94. lib. 13. cap. 6. S. 7. cites Trin. 18 E. 3. 29. and ſays, See 4 H. 6. 1. accordingly.

Thel. Dig. 94. lib. 10. cap. 6. S. 7. cites 39 E. 3. 25.

4. In *Aſſiſe of Rent-charge*, if *all the Tenants of the Tenements charged are not named in the Writ*, the Writ ſhall abate; and it is a good Plea that ſuch a one is Tenant of Parcel not named, Judgment of the Writ; and ſo it appears very often elſewhere. Br. Brief, pl. 280. cites 22 Aſſ. 10.

5. Debt upon a Bond; a *Space was left in the Count for the Place of the making of the Bond*, and the Plaintiff would have put it in, in another Term, and was not ſuffer'd, but the Writ was abated. Br. Brief, pl. 482. cites 4 E. 4. 14.

6. Præcipe &c. was *dated* 12th Day of May, and *Me-ipſo was wanting*, and therefore the Writ was abated without being amended by the Statute of 14 E. 3. quod nota. Br. Faux Latin, pl. 100. cites 24 E. 3. 69.

Contra if leſs was in the Writ than in the Specialty; Note the Difference; Per Cur. *For* the ſame Year Fol. 14. the *Bond was that John Prior of D.* was bound, and the *Writ was Prior of D. only*, [*without John.*] And the Opinion was that the Writ ſhall abate for the Variance. Ibid.

7. Annuity. The *Writ was againſt J. N. Chantor of the Chapter of Exeter*, where the *Specialty was J. N. Chantor of Exeter*, and yet this Exception not allow'd; for the Writ ſhall not abate for the Surpluſage. Br. Nugation, pl. 6. cites 40 E. 3. 3.

8. In *Treſpaſs de Averiis carucæ capt'*, this Clauſe was wanting in the Writ, *& interim averia illa deliberari facias* &c. and yet held good. Thel. Dig. 94. lib. 10. cap. 6. S. 24. cites Hill. 33 E. 3. Brief 915.

9. In

9. In Writ of Scire Facias for the King (*ibi*) was left out in the Clauſe and *habeas ibi Som'*, by which it was abated. Thel. Dig. 94. lib. 10. cap. 6. S. 10. cites Mich. 33 E. 3. Brief 918.

10. *Waſt* againſt an Executor, the Pereloſe was *that the ſame Executor did Waſt, without a proper Name*, and well, and he counted that he leaſed to the Teſtator. Br. Brief, pl. 140. cites 38 E. 3. 17.

11. *And* becauſe the Writ was *againſt A. as Executor of the Leſſee*, where he was *Executor of the Executor* of the Teſtator, the Writ was abated upon Exception thereof. Br. Brief, pl. 140. cites 38. E. 3. 17.

12. *Debt againſt J. H. of C.* and *J. came and pray'd that the Plaintiff count againſt him*, and the *Plaintiff ſaid that his Suit is againſt J. C. the younger, and he who appears is J. C. the elder*, and *after the Plaintiff ſaid that his Suit is againſt J. H. of South C. and he who now comes is of C.* and becauſe *South was not in the Writ* the Writ was abated. Br. Default. pl. 48. cites 39 E. 3. 5.

13. Formedon of Land *given to J. of B.* &c. and *that after the Death of the aforeſaid J. B.* &c. And it was challenged becauſe the Premiſes were J. of B. and the Subſequent is J. B. and *of* is omitted, and yet the Writ awarded good; for this Word *aforeſaid J. B.* reſolves that it is the ſame J. of B. who is named in the Writ before. Br. Brief, pl. 228. cites 39 E. 3. 27.

14. In a Writ in the Clauſe *Niſi fecerit*, *Niſi was left out*, by which it was abated. Thel. Dig. 94. lib. 10. cap. 6. S. 13. cites Hill. 46 E. 3. 3. in MS. Brief 595.

15. Treſpaſs upon the Caſe upon an Aſſumpſit ought to contain the *Place where the Aſſumpſit was made*, and otherwiſe the Writ ſhall abate by Plea of the Party. Br. Brief, pl. 511. cites 48 E. 3. 6. and that the Regiſter is accordingly.

S. P. Notwithſtanding he alleged it in his Count, quod nota. Br. Action ſur le Caſe, pl. 24. cites S. C.

16. *Annuity* was brought *by J. M. againſt the Provoſt of the College of D.* and the *Deed was diſcreto viro Magiſtro Johanni*, and theſe Words *diſcreto viro Magiſtro omitted*, Judgment of the Writ and the Defendant awarded to anſwer. And it was *granted by Name of the Provoſt of D. without other Name*, and therefore the Defendant demanded Judgment of the Writ. Per Hull, *it ſhall be named in the Count what Name of Baptiſm he has*, and if an Abbot be bound in 20 l. with Aſſent of his Covent and dies, Action may be brought againſt the Succeſſor accordingly, and he declare the Name in the Count. Br. Brief, pl. 125. cites 12 H. 4. 5.

Br. Variance, pl. 34. cites S. C.—*So in Writ of Entry of Diſſeiſin made to the Predeceſſor*, the Name of the Diſſeiſee ſhall be in the Writ, by which Trem. declared the Name of Baptiſm certain &c. Br. Brief, pl. 125. cites 12 H. 4. 5.

17. *Aſſiſe by the Prior of D.* and *made Title* to certain Wheat *by Preſcription as Parſon of P.* and becauſe that he *was not named Prior of D. Parſon imparſonee of P.* the Writ was abated by the Opinion of the Court, for Default of the Name of Parſon. Br. Brief, pl. 127. cites 12 H. 4. 21.

18. *Præcipe J. Maſter or Warden* of the College of C. and the Pereloſe was, & ſummoneas *the aforeſaid Maſter without* ſaying *Warden* &c. And well. Br. Brief, pl. 431. cites 7 H. 6. 13.

So of J. Earl of S. and ſuch like. Br. ibid.

19. In Scire Facias upon a Fine, the Defendant *pleaded to the Writ becauſe it is brought againſt Richard Abbot*, and the *Plaintiff convey'd the Title to himſelf by Richard S.* and *in the Pereloſe he was made Heir of the aforeſaid Richard*, which may be intended the Defendant, *and therefore the ſurname ought to have been named in each Place.* Per Cotton Juſtice, *he to whom he makes himſelf Heir is dead and Richard the Defendant is alive, and ſo the Writ has ſufficient Intendment*, and ſo the Writ good, quod nota. Br. Brief, pl. 171. cites 8 H. 6. 27.

20. *In*

20. *In Waſte in A. and B.* it is a good Plea to the Writ, that *A. is a Hamlet of B. and not a Vill by itſelf*; per Cur. But per Paſton, he ſhall ſay in this Caſe that No ſuch Vill. Br. Additions, pl. 7. cites 9 H. 6. 42.

21. *Recordari* Fac' loquelam directed *to the Mayor and Bailiff of D.* is good, *without naming their proper Names*, and ſo are all the Certioraries in London, to the Mayor and Sheriffs, and the Writs of Right in the Huſtings. Br. Brief, pl. 237. (bis) cites 14 H. 6. 21.

So in Scire Facias out of a Recovery *of a Manor, to have Execution in A. and B.*

22. Treſpaſs upon 5 R. 2. that the Defendant *enter'd into the Manor of C.* &c. Caty. pray'd Judgment of the Writ; for the *Manor extends into C. and W.* and therefore ſhall ſay accordingly, and yet the Writ is good by Award, and ſo in Præcipe quod reddat. Br. Brief, pl. 346. cites 4 E. 4. 15.

the Tenant demanded Judgment of the Writ; for the *Manor extends into A. B. and C.* Per Brian, This is no Plea; for it ought to agree with the Recovery or Fine whence it iſſues. Br. Brief, pl. 315. cites 4 H. 7. 7.

Treſpaſs *againſt J. S. of M.* Exception was taken, that *M.* is a great Place, *containing in it ſeveral Vills*,

23. Debt *againſt J. N. of the Pariſh of S.* The *Defendant ſaid, that there are* 3 *Vills in the ſame Pariſh, and he dwelt in one of them*, and a good Plea; and yet he *did not ſhew in which* of them he dwelt. And per Moyle, where he ſays that there is Over D. and Nether D. and none without Addition, he ſhall not ſhew in which of them he dwells. Br. Brief, pl. 483. cites 4 E. 4. 39.

and therefore the Defendant ought to be named of one of them, Judgment of the Writ; and no Plea, per tot. Cur. becauſe he *does not name of which Vill* he is, ſo that the Plaintiff may have a better Writ; quod nota. Br. Brief, pl. 353. cites 5 E. 4. 1.——Br. Brief, pl. 483. cites S. C.

In Debt *againſt J. N. of the Pariſh of N.* and there *were* 4 *Vills in the ſame Pariſh*, and becauſe he did not ſhew of which Vill, therefore the Writ was abated. Br. Brief, pl. 459. cites 22 E. 4. 2. and 22 H. 6. 41. 42. and 35 H. 6. 30. in Treſpaſs.

24. In Replevin, if the *Defendant in Scire Facias ſays that the Plaintiff in Scire Facias is a Knight not named* Knight, Judgment of the Writ he ſhall not have the Plea *after a Continuance*, tho' it be a Continuance given between the Parties by the Court, *Quia Curia nondum adviſatur de Judicio ſuo* inde reddendo, ideo dies datus eſt partibus prædict. hic &c. no more than after Imparlance taken by the Party. Br. Brief, pl. 331. 5 E. 4. 103.

(W) By Omiſſions in the Proceſs.

1. WRIT *againſt Phi. and Tho. and Ann his Feme*, by diverſe Præcipes, and *in the Summons Ann was omitted*, by which the Writ was abated. Thel. Dig. 94. lib. 10. cap. 6. S. 1. cites Trin. 2 E. 3. 39. and Paſch. 8 E. 3. 405. and Mich. 10 E. 3. 532. and 27 H. 6. 6. accordingly.

2. Aſſiſe *againſt N. and M. Abbeſs of S.* and *in the Pone it was* put *the aforeſaid M. omitting* this Word *Abbeſs*, and by the Opinion of the Court the Writ ſhall abate. Br. Brief, pl. 286. cites 26 Aſſ. 11.

3. Audita Querela was J. S. *Parſon of the Church of N. near M.* and theſe Words *near M. was omitted in the Venire Facias*, and Exception taken, & non allocatur. Br. Variance, pl. 22. cites 47 E. 3. 25. 26.

4. *Præcipe* quod reddat. The *Tenant vouch'd*, and *Summons* ad Warrant' awarded *againſt the Vouchee at the Suit of A. B. and C.* who were Demandants; and the Writ was Summoneas J. S. ad Warrant' A. B. and

and C. and *in the Percloſe of the Writ* was *quem A. & B. vocaverunt* ad Warrant' and *C was omitted*, by which he pray'd that the Writ abate. Per Thirn, the Writ contains other Matter ſufficient, notwithſtanding that theſe Words quem * A. & B. vocaverunt were omitted, and therefore the Writ was awarded good; and ſo ſee he pleaded to the meſne Proceſs. Br. Brief, pl. 104. cites 3 H. 4. 11.

* The Year-Book is, that the Name of one of the Vouchees was omitted.

5. *Præcipe* quod reddat *by ſeveral Præcipes*, ſcilicet, *Præcipe R. A. & J. C.* &c. *and Præcipe J. N. quod juſte* &c. reddat; and the *Summons was & Summoneas prædict. J. & R. and J. N. was omitted*, and it could not be amended; for it did not appear which J. was omitted: For if *one wages his Law of Non-ſummons*, all the Writ ſhall abate; and ſo was the Opinion of the Court. Br. Brief, pl. 525. cites 27 H. 6. 6.

(X) By Surpluſage.

1. THE Writ was by *one Præc. quod redd' terram in Dale*, and by *another Præcipe* quod redd' terram *in ead' Villa de Walle*, which was not named before, by which the Writ was abated. Thel. Dig. 96. lib. 10. cap. 7. S. 5. cites Mich. 24 E. 3. 35.

2. In *Scire Facias* out of a Recognizance againſt Tertenant, the Writ was *Quare prædicta ſumma de terris & Catallis ſuis levar' non debet*, and it was abated for the Surpluſage of *Catallis* &c. For the Chattles of the Tertenant ſhall not be charged with the Debt. Thel. Dig. of Writs, lib. 10. cap. 7. S. 17. cites Mich. 30 E. 3. 30.

3. Annuity. The *Writ was againſt J. N. Chantor of the Chapter of Exeter*, where the *Specialty was J. N. Chantor of Exeter*; and yet this Exception not allow'd; for the Writ ſhall not abate for the Surpluſage. Br. Nugation, pl. 6. cites 40 E. 3. 3.

Contra if leſs was in the Writ than in the Specialty. Note the Difference; per Cur. *For* the ſame Year, Fol. 14. the *Bond was that John Prior of D.* was bound, and the *Writ was Prior of D. only*, [*without John*] and the Opinion was, that the Writ ſhall abate for the Variance. Ibid.

4. Where one *makes himſelf Heir to his Father, and to his Mother*, where *his Title is only as Heir to his Mother*, his Writ ſhall abate, notwithſtanding the Name of his *Father* is only Surpluſage. Thel. Dig. lib. 10. cap. 7. S. 18. cites Mich. 41 E. 3. 24.

5. Writ ſhall not abate becauſe the *Death of one* is *ſuppoſed, which was not neceſſary.* Thel. Dig. lib. 10. cap. 7. S. 9. cites 43 E. 3. 12.

As in *Formedon* the Writ was upon a *Gift* made *Emmæ* de A. *& hæredibus de Corpore ipſius Emmæ per Will. procreat. & quæ poſt mortem prædict. Will. & Emmæ* prefat' petenti ut filio & hæredi ejuſdem Emmæ per prædict. Will. procreat' &c. and held good, notwithſtanding that it was *not neceſſary to ſuppoſe the Death of William.* Thel. Dig. 96. lib. 10. cap. 7. S 3. cites Mich. 20 E. 3. Brief 377.

6. Formedon in Remainder; the Writ was *Præcipe quod reddat one Meſſuage and one Acre of Land* &c. ſo that if the aforeſaid Donee dies without Heir &c. that then the aforeſaid *Meſſuage, Land, and Meadow*, ſhould remain to the Demandant &c. So that there was *more in the Percloſe than in the Premiſes*, by this Word Meadow &c. and therefore Fencot pleaded it to the Writ; but Per Finch, you have had the View, therefore you are paſs'd the Advantage, and it *is only Surpluſage*, which ſhall not abate the Writ. Fencot ſaid of Falſe Latin, and a thing apparent in the Writ, a Man ſhall have Advantage always before Judgment; quod non negatur, and the Writ awarded good; and this by Reaſon that it is only Surpluſage, as it ſeems. Br. Brief, pl. 68. cites 44 E. 3. 14.

Thel. Dig. of Writs, lib. 10. cap. 7. S. 10. cites S. C. but ſays the Writ was abated, inaſmuch as Meadow is not mentioned before.

7. *Debt* was brought *by J. L. Vicar of D. Executor* of W. P. and the *Teſtament was J. L.* only; and for this Surpluſage the Writ was abated; quod nota. Br. Brief, pl. 100. cites 3 H. 4. 1.

Br. Scire facias, pl. 58. cites S. C.

8. One attainted was reſtored by Act of Parliament, and brought a Scire facias, which had this Word *reſumi*, and which was *more than was in the Act of Parliament of Reſtitution*, yet it ſhall not abate the Writ. Br. Brief, pl. 109. cites 7 H. 4. 20.

S. P. Br. Action ſur le Caſe, pl. 37. cites S. C. —— Br. Nugation, pl. 9. cites S. C. —— Thel. Dig. lib. 10. cap. 7. S. 11. cites S. C.

9. In Action upon the Caſe becauſe the *Defendant did not pay Toll in the Market* of the Lord of B. *but carried away the Toll, and refuſed to pay it*, [the Defendant] demanded Judgment of the Writ, becauſe Toll cannot be carried away, for it cannot be Toll till it be paid, but becauſe it was void, and theſe Words, he refuſed to pay, are ſufficient, therefore the Writ awarded good. Br. Brief, pl. 113. cites 7 H. 4. 44.

10. *Formedon* ſhall not abate, notwithſtanding that *Mention is made* in the Writ of *one inheritable, who was never ſeiſed.* Thel. Dig. 97. lib. 10. cap. 7. S. 19. cites Trin. 11 H. 4. 72.

11. Writ of *Treſpaſs*, containing *Quare ipſe ſimul cum aliis Malefactoribus* &c. *without naming their Names*, is not good, by the Opinion of Martyn and Preſton. Thel. Dig. of Writs, lib. 10. cap. 7. S. 12. cites Hill. 8 H. 5. 5.

Br. Dette, pl. 78. cites S. C. —— Br. Nugation, pl. 11. cites S. C. Br. Adminiſtrator, pl. 21. cites S. C.

12. Where a *Man brings Action by Name of Adminiſtrator*, or Executor, or Carpenter, or J. N. of B. where he is of L. and *where he is not Executor*, Adminiſtrator, Carpenter, nor of *B. this is no Matter of the Part the Plaintiff*; for it is not but Addition or Surpluſage. *Contra* it ſeems *of the Part of tae Defendant.* Br. Additions, pl. 22. cites 9 H. 5. 5.

13. Where a Man brings Action of *Treſpaſs by Name of Executor of W. P.* and *counts of his own Goods taken and carried away*, it is no *Plea that he is not Executor of W. P.* Per Strange, quod Curia conceſſit. Br. Dette, pl. 78. cites 9 H. 5. 5.

14. If the Writ be *Quod reddat 20 l. quas ei Debet & injuſte Detinet & quas ad certum diem ſolviſſe debuiſſet* &c. it ſhall abate for this Surpluſage; for it paſſes the Form. Thel. Dig. lib. 10. cap. 7. S. 13. cites Mich. 3 H. 6. 2.

Surpluſage *on the Part of the Plaintiff* ſhall abate the Writ. Br. Nugation, pl. 1. cites 3 H. 6. 23. ——As in *Debt* upon a Bond *brought by J. E. Eſquire* in the Writ, and the *Bond was J. E. without more*; and for this Surpluſage on the Part of the Plaintiff the Writ was abated. Br. Nugation, pl. 23. cites 28 H. 6 8. ——S Rep. 161. a. in Blackamore's Caſe, cites S. C. ——Br. Brief, pl 27. cites S. C. ——Br. Variance, pl. 82. cites S. C. ——Br. Amendment, pl. 93. cites S C. ——*But* Brooke ſays, it ſeems as if the Writ had been *J. E. Eſquire, alias dictus J. E.* then it had been well. Br. Nugation, pl. 23.

15. Where there is *more in the Writ than in the Specialty*, in the Name or Addition of the Plaintiff, the Writ ſhall abate. Thel. Dig. lib. 10. cap. 7. S. 14. cites Hill. 3 H. 6. 24. and Tr. 28 H. 6. 9.

But where the *Obligee is made a Knight after the Bond*, he ſhall be named Knight, as appears 2 H. 6. 9. for this is now Parcel of his Name, and is not Surpluſage; quod nota. Br. Nugation, pl. 1. cites 3 H. 6. 23.

S. P. For there ought to be Addition. Br. Nugation, pl. 23. cites 28 H. 6. 8. ——As in Debt upon a Bond, the Bond was, that 3 *were bound by Names of A. B. and C. Yeomen*, and the *Writ called every one of them Yeomen*, by which they pleaded this to the Writ for the Surpluſage; Et non allocatur; for this is of Neceſſity by the Statute of Additions. Br. Nugation, pl. 1. cites 3 H. 6. 23. ——Br. Variance, pl. 5. cites S. C. ——Br. Additions, pl. 3. cites S. C.

16. *But of the Part of the Defendant* it is *not* ſo. Thel. Dig. lib. 10. cap. 7. S. 14. cites Hill. 3 H. 6. 24. and Trin. 28 H. 6. 9.

17. Annuity againſt J. Abbot of D. alias dictus J. Lord Abbot of D. and counted by Preſcription. Wangford demanded Judgment of the Writ; for he uſes *Alias dictus* where he *counts by Preſcription*, and need not; but *otherwiſe* it would be, if he counted *by Deed*; but it was well, and only

only Surpluſage, by which the Abbot was awarded to anſwer. Br. Nugation, pl. 5. cites 32 H. 6. 12.

18. *Entry into the Manors of D. and C. and into* 20 *Acres in P. where there is no ſuch Vill as P.* yet the Writ ſhall abate only for the 20 Acres; for thoſe ſhall be intended to be in P. and the two Manors ſhall be intended to be Vills by themſelves. Br. Expoſition, pl. 36. cites 19 E. 4. 7.

19. If Writ of *Falſe Judgment* be brought *againſt the Suitors and the Steward*, the Writ ſhall abate for Surpluſage; for it ought to be againſt the Suitors, without the Steward. Br. Nugation, pl. 22. cites 1 E. 5. 3.

20. *Right of Advowſon againſt J. D. Dean of S.* the *Defendant ſaid that the Corporation is diſſolved by Act of Parliament*; Judgment of the Writ. Per Wood, This is no Matter when it is brought by proper Name; for then *Dean* is only Surpluſage. But per Brian Ch. J. the Writ ſhall abate clearly. Br. Brief, pl. 313. cites 4 H. 7. 6. 7.

(Y) By his Petitum &c. or demanding &c. the ſame thing twice.

1. IN *Dower* the Demand was of the *third part of a Manor of a Houſe, and of a Carve of Land* &c. And adjudg'd good, notwithſtanding the *Houſe and Land were Parcel* of the Manor. Thel. Dig. lib. 8. cap. 25. S. 2. cites Mich. 4 E. 3. fol. 166. and 21 E. 4. 28. it ſhall abate for the Parcel.

2. But otherwiſe it is of *Rent*, for a Man cannot demand Land and Rent out of the ſame Land. Thel. Dig. lib. 8. cap. 25. S. 2. cites T. 5 E. 3. 193. 11 Aſſ. 6. Hill. 3 H. 7. 3. S. P. Ibid. S. 10. cites Trin. 5 E. 3. 193. 11 Aſſ. 6. and Mich. 12 E. 3. Brief 257. —— Dower [was brought of] reaſonable Dower which happened to her de libero tenemento &c. *in D. C. and E.* and the *Demand was of four Manors and* 20 *s. Rent*, the *Tenant pleaded to the Writ that the* 20 *s. Rent is Parcel of the one Manor*, and ſo his Petitus; and per tot. Cur. he ſhall anſwer to the reſt, for this does not not go to the Writ, but for this Parcel. Br. Brief, pl. 392. cites 21 E. 4. 24.

In *Formedon of an Acre of Land*; per Brian, it is a good *Plea that the Demandant has brought another Formedon of* 2 *s. Rent iſſuing out of the ſame Land*; Judgment of the Writ, but Keeble contra. Br. Brief, pl. 463. cites 3 H. 7. 3. 4. ——Thel. Dig. lib. 8. cap. 25. S. 11. cites S. C. per Brian; and ſo agrees Trin. 5 E. 3. 193. —— *But* it was agreed that *in Præcipe of a Manor and* 10 *l. Rent*, it is a good *Plea that the Rent is Parcel of the Manor*, becauſe his Petitur &c. But Brian maintain'd his Opinion that he cannot have the Land and Rent out of it. Br. Brief, pl. 463. cites 3 H. 7. 3. 4. ——Thel. Dig. 74. lib. 8. cap. 25. S. 1. cites Trin. 3 E. 3. 85. and 11 E. 3. Dower 63.

3. And Thel. Dig. lib. 8. cap. 25. S. 3. ſays it ſeems by the Opinion of Paſch. 6 E. 3. 267. That where a *Manor and an Advowſon* are demanded, that the Writ ſhall abate if the Advowſon be *appendant* to the Manor; And that ſo agrees Mich 33 E. 3. Brief 919. But that otherwiſe it is in a *Scire facias*, which ought to agree with the Fine there, 36 H. 6. 18. And that ſo it is adjudg'd, Mich. 26 H. 6. Brief 104. in Scire facias of a Manor and of a Hundred; and 27 H. 6. 2.

4. In *Writ of* Ward of a *Manor and* 20 *Acres of Land*, the Writ ſhall abate if the Land be Parcel of the Manor, and therefore he abridg'd the 20 Acres. Thel. Dig. lib. 8. cap. 25. S. 4. cites Paſch. 39 E. 3. 13. *Formedon of a Manor and* 20 *Acres of Land and a Mill*, the Tenant demanded Judgment of the Writ, for *the Land, Mill, and one Houſe make the Manor*; and he was compell'd to ſay that the Land and the Mill was not Parcel of the Manor; for otherwiſe he demands one thing twice, and then the Writ ſhall abate, nota. Br. Brief, pl. 76. cites 46 E. 3. 26. ——Thel. Dig. lib. 8. cap. 25. S. 5. cites S. C and 9 H. 6. 42.

So

So in *Præcipe quod reddat of the Manor of D. and two Acres of Land in D.* it is a good *Plea that the two Acres are Parcel of the Manor*; for he demands one thing twice. Br. Brief. pl. 16. (bis) cites 9 H. 6. 42.

Thel. Dig. lib. 8. cap. 25. S. 5. cites S. C.

5. Formedon *of the Manor of B. cum Pertinentiis and* 20 *Acres cum Pertinentiis*, and ſo there is twice cum Pertinentiis, and well per Cur. And it was of the Manor of B. cum Pertinentiis *except* 10 *Acres of Land*, and *in the Forepriſe it was not cum Pertinentiis*, and yet good. Br. Brief, pl. 41. cites 40 E. 3. 25.

6. Writ brought *in H & W.* and becauſe *W. was a Hamlet of H.* ſo he demanded one thing twice, therefore he took nothing by his Writ. Br. Brief, pl. 50. cites 41 E. 3. 22.

Br. Voucher, pl. 36. cites S. C.

7. *Præcipe* quod reddat *againſt J. N. of* 2 *Acres* of Land, *and another Præcipe in the ſame Writ againſt W. S. of* 2 *Acres* of Land, and *J. N. vouch'd W. S. who* came and *ſaid* that the Land demanded againſt him by one Præcipe, and the Land demanded againſt J. N. by the other Præcipe *is one and the ſame Land*, Judgment of the Writ; for he demands one Thing twice. Per Finch, you who are Tenant by the Warranty cannot abate the Præcipe for this Land in the Præcipe againſt the Tenant who vouch'd, where *he who vouch'd has affirm'd the Writ good*, no more than you who are vouch'd by him. Br. Brief, pl. 78. [79.] cites 46 E. 3. 33.

Contra 'tis ſaid *if he had demanded by one and the ſame Writ by diverſe Præcipes*, but the two Writs above were upon diverſe Gifts, and therefore can be no Plea. Br. Brief. pl. 98. cites 2 H. 4. 22.

8. A Man brought 2 *Writs of Formedon* againſt C. and *demanded by the one the fifth part of the Manor* of A. and *by the other* 2 *Acres of Land*, the Tenant demanded Judgment of the Writ; for *the* 2 *Acres are Parcel of the ſaid 5th part of the Manor*, and ſo he demands one thing twice, & non allocatur, but the Writs awarded good. Br. Brief, pl. 98. cites 2 H. 4 22.

9. Præcipe quod reddat *againſt M. and N.* of certain Land *by ſeveral Præcipes by one and the ſame Writ*, and *demanded* 7 *Acres againſt M. and* 7 *Acres againſt N.* Rolf pray'd Judgment of the Writ; for the 7 Acres demanded againſt M. is the ſame 7 Acres which are demanded againſt N. and the 7 Acres which are demanded againſt N. are the ſame 7 Acres which are demanded againſt M. & non allocatur, but the Tenants compell'd to anſwer; quod nota. And Rolf pray'd to have Bill of Exceptions ſealed, which was granted; but it ſeems that the Law is againſt him. Br. Brief, pl. 208. cites 4 H. 6. 14.

Thel. Dig. lib. 8. cap. 25. S. 6. cites Paſch. 7 H. 6. 39. That if the Cattle be Parce of the Seigniory the Writ ſhall abate.

10. In Formedon of a *Seigniory*, *Caſtle and Manor*, As to the Caſtle, he pleaded that it is Parcel of the Seigniory, and ſo he demands one thing twice, Judgment of the Writ. Cotteſmore ſaid the Caſtle is in Groſs by itſelf, abſque hoc that it is Parcel of the Seigniory Priſt &c. Br. Brief, pl. 165. cites 7 H. 6. 36.

11. In Treſpaſs of *Entring into an Houſe and of breaking a Cloſe*; it is no Plea to ſay that the Houſe and the Cloſe are all one and the ſame Place. Thel. Dig. lib. 8. cap. 25. S. 7. cites 22 H. 6. 8.

12. Thel. Dig. lib. 8. cap. 25. S. 9. ſays ſee Plaint of *Office and of the Profits of the Office* 22 H. 6. 11. and 8 E. 4. 23.

S. P. Thel. Dig. lib. 8. cap. 25. S. 8. cites Hill. 3 4. 31. 5 E. 4. 88. & 16 E. 4. 10.

13. Bill againſt R. F. Servant of the Common Bank, for *entring into one Houſe and* 2 *Shops* where Entry is not given by Law; Laicon pray'd Judgment of the Bill, for the *Shops are Parcel of the Houſe*, and no Plea, for it is only *Treſpaſs* in which a Man ſhall not recover Franktenement but Damages only, and therefore *he ſhall recover Damages for the Houſe by itſelf, and* Damages *for the Shops by themſelves*; but *contra* it ſhall be *in Præcipe*

Præcipe quod reddat, for there a Man ſhall recover the thing demanded, and have Damages twice if it ſhould be ſuffer'd, and therefore the Defendant was awarded to anſwer over; quod nota. Br. Brief, pl. 344. cites 3 E. 4 28.

(Z) By naming the ſame Perſon twice.

1. ASSISE *againſt J. B. and the Dean and Chapter of D.* who ſaid that *J. B. is one of the Chapter*, Judgment of the Writ; & non allocatur. The ſame Law to ſay that he is one of the Commonalty in Writ againſt J. and the Mayor and Commonalty. Br. Brief, pl. 51. cites 41 E. 3. 29. S. P. Thel. Dig. lib. 5. cap. 10. S. 1. cites 41 E. 3. 21. 46 E. 3. 23. 8 H. 6. 1. 15. & 9 H. 6. 36.——Ibid. 11. cap. 6. S. 2. S. P. cites 41 E 3. 22. and ſo agrees Mich. 46 E. 3. 23. and, ſo ſeems the Opinion of Babington to be Mich. 8 H. 6. 15. in Treſpaſs againſt a Mayor and Commonalty and againſt one of the Commonalty, but Martin held the contrary there, and Mich. 9 H. 6. 36.

2. *Treſpaſs of taking of Toll* was brought *againſt the Mayor and Commonalty of J. and R. P.* where it was pleaded to the Writ that *R. P. is one of the Commonalty*. And the beſt Opinion was that the Writ is good; for it is *in diverſe Reſpects*. Br Corporations, pl. 24. cites 8 H. 6. 1. 14.

3. Aſſiſe of *Nuſance* was well brought *againſt the Dean and Chapter of E. and J. W.* which *J. W. is one of the Chapter*, and ſo by his Pretence *twice named*, Judgment of the Writ, & non allocatur; for the *Dean and Chapter ſhall render Damages of their Goods which they have in common, and the Third of his proper Goods*. Br. Corporations, pl. 13. cites 46 E. 3. 27. Br. Nuſance, pl. 6. cites S. C.—— Br. Brief, pl. 455. (454.) cites 46 Aſſ. 9. S. P.—— S. P. Thel. Dig. lib. 5. cap. 10. S. 1. cites 41 E. 3. 21. 46 E. 3. 23. 8 H. 6. 1. 15. and 9 H. 6. 36.——S. P. Ibid. lib. 11. cap. 6. S. 2. cites ſame Caſes.

(A. a) By demanding more than it ought, as the Whole inſtead of a Part only.

1. IN *Dower of* 3 *Houſes and a Mill*, one of the Tenants, who had taken the intire Tenancy, was *not admitted to ſay that he had not any Mill*. Thel. Dig. lib. 8. cap. 27. S. 1. cites Mich. 2 E. 3. 58.

2. In *Formedon of* 10 *s. Rent*, the Tenant pleaded that the Rent *is only* 12 *d.* and ſaid that *Ne dona pas*. Thel. Dig. lib. 8. cap. 27. S. 6. cites 3 E. 3. 107.

3. In *Aſſiſe of a Manor*, the Tenant pleaded that the Tenements put in View *are only* 2 *Houſes and* 2 *Carves, and not a Manor* &c. and held a good Plea. Thel. Dig. lib. 8. cap. 27. S. 9. cites Hill. 6 E. 3. 242.

4. In *Dower*, where the Demand was *of the* 3*d Part of* 5 *Houſes*, the Tenant was received to *ſay that the Tenements put in View are only one Houſe, and one Piece of Land* &c. and to plead in Bar thereto. Thel. Dig. lib. 8. cap. 27. S. 2. cites Hill. 10 E. 3. 490. and ſays it is agreed the ſame Year, Fol. 494. That a Man may do ſo where Land is in Demand. But it was doubted there where 4 *l. of Rent* is demanded, if the Tenant may ſay that the thing demanded *is only* 40 *s.* of Rent, and vouch &c.

5. In *Aſſiſe of* 40 *Acres of Land, and* 10*s. Rent*, the Tenant *ſaid* that *they are only* 16 *Acres of Land, and* 6*s. Rent*, and pleaded further, that he was in without Tort &c. and held good; for be the Plaint more or leſs the Recovery ſhall be by View of the Jury, ſo that the Plaintiff by more large View cannot recover more than is demanded. Thel. Dig. lib. 8. cap. 27. S. 3. cites Trin. 14 E. 3. Aſſiſe 108.

6. In Dower of 40*l. of Rent*, the Tenant *pleaded that it was only* 10 *Marks of Rent*, and pleaded in Bar; and as to the Reſidue he was compell'd to ſay that the Baron was not ſeiſed of more. Thel. Dig. lib. 8. cap. 27. S. 6. cites Mich. 44 E. 3. 32.

7. In *Dower of* 2 *Mills*, the Tenant pleaded that *at the Time of the Writ purchaſed he had not any Mill, but* 2 *Toſts*; and adjudg'd a good Plea to the Writ, notwithſtanding that he had Mills at the Time of the Demand made. Thel. Dig. lib. 8. cap. 27. S. 7. cites Hill. 13 H. 4. Dower 175. But the contrary is held Mich. 1 H. 5. 11.

8. In *Aſſiſe* where the Plaint was *of* 4 *Houſes*, the Tenant pleaded that this which is put in View *are* 4 *Toſts, and not Houſes* &c. and held a good Plea to the Writ. Thel. Dig. lib. 8. cap. 27. S. 8. cites Trin. 26 H. 6. Aſſiſe 13. and Mich. 2 H. 7. 4. accordingly, where the *Plaint was of Rent*, and the Tenant *pleaded that the Land put in View is an Acre* &c. and the *Plaintiff replied that it was an Houſe* &c. and held that the Plaintiff may do ſo.

But otherwiſe it is where the *Demand* is *of Acres*, and the *Tenant ſays that the Demandant is ſeiſed of one Acre*; for this is ſeverable. But if he *ſays that the Demandant has enter'd into one Acre pending the Writ, this ſhall abate all the Writ*; for this is his own Act; per tot. Cur. Br. ibid.

9. If a *Manor be demanded*, and the *Tenant ſays that the Demandant is ſeiſed of an Acre*, this will abate the whole Writ; for the Manor is intire, and not ſeverable, and he cannot abridge his Demand, nor can he recover according to his Demand. Br. Brief, pl. 316. cites 5 H. 7. 7.

(B. a) By Miſtake of the Place.

1. *Præcipe* quod reddat *in Haſton Rekell*, the *Tenant ſaid that Haſton is one Vill*, and *Rekell* is *another* Vill, Judgment of the Writ, ſuppoſing the 2 to be but one Vill, and for this Cauſe the Writ was abated; and yet if the Writ had been in H. and R. it had been good. Br. Brief, pl. 226. cites 39 E. 3. 19. 20.

2. *Ejectment* of Ward *of Land in E.* The *Defendant ſaid that* the Land *is in C. and not in E.* Judgment of the Writ, and the Plaintiff pray'd Leave to inquire a better Writ. Quod nota. Br. Brief, pl. 128. cites 14 H. 4. 17.

3. If a Man be named *J. N. of C.* it is no *Plea that he was not of C. the Day of the Writ purchaſed*; but *ſhall ſay further, nor ever after*; for if he comes and dwells at C. pending the Writ, it makes the Writ good; as a Man who purchaſes Land pending Præcipe quod reddat againſt him; per Martin. Br. Brief, pl. 167. cites 8 H. 6. 9. But Brooke ſays, quod quære.

4. Debt *againſt J. S. Parſon of D.* who *ſaid that he dwelt at S. and not at D.* & non allocatur; for he ſhall be *intended* to dwell there, becauſe he is bound to be Reſident there, by which he *ſaid that he had another Benefice*; *and yet non allocatur.* Br. Brief, pl. 401. cites 10 H. 6. 8.

5. In

5. In Debt *againſt J. N. of C.* if he *ſays* that he was and is *dwelling at H. and not at C.* it is a good *Replication that H. is a Hamlet*; for then it is ſufficient to name himſelf of the principal Vill, by which the other ſaid that H. is a Vill by itſelf. Br. Brief, pl. 402. cites 10 H. 6. 12. Debt upon a Bond *againſt J. N. of C.* Newton ſaid that the *Defendant*, the Day of the Writ purchaſed, *was and is yet dwelling at C. Over*, and *not at C. without Addition*, Judgment of the Writ, and 'twas ſaid that this is a good Plea, per Cur. notwithſtanding that he *did not ſay that it is a Vill by itſelf, and C. Over is another Vill by itſelf*, and he was and is dwelling at C. Over, and not at C. without Addition; quod nota, by ſeveral there; and after Caund. ſaid that C. Over is a Hamlet of C. Br. Brief, pl. 238 cites 14 H. 6. 23.

6. Treſpaſs againſt *W. C. of F.* Foſcu prayed Judgment of the Writ; for *the Day of the Writ purchaſed he dwelt at D.* and *did not ſay, and Not at F.* And therefore no Plea Per Cur. by which he *ſaid, that he dwelt at F. before the purchaſing of the Writ, and after he removed to D. and left two Infants at F. at Nurſe, abſque hoc* that he dwelt at F. the Day of the Writ purchas'd in other Manner; and this was pleaded in Perſon; for Attorney cannot plead it, becauſe it is contrary to his Warrant. Per Newton, You ſhould traverſe that you did not dwell at F. the Day of the Writ; for the Nurſing of the Infants is not dwelling. Br. Brief, pl. 173. cites 19 H. 6. 1.

7. Where *Action* is brought *againſt J. N. of D.* it is a good Plea at this Day, *in Action in which Proceſs of Outlawry does not lie, and* in other Actions *at Common Law*, to ſay that he was known, and *dwelt at S. the Day of the Writ purchas'd, and all Times after*; Judgment of the Writ; quod nota. Br. Miſnoſmer, pl. 33. cites 21 H. 6. 54.

8. *Treſpaſs upon 5 R. 2.* of entring *in A. B. and C.* where Entry is not given by Law. Fairfax prayed Judgment of the Writ; for *all the Land is in A. and B.* and none in C. And the beſt Opinion was, that it is no Plea; for *no Land is in Demand*, and here is nothing to be recover'd but *Damages only*. Br. Brief, pl. 350. cites 4 E. 4. 31. *Contra in Aſſiſe and Præcipe* quod reddat; for there the *Land ſhall be recovered*, and Warranty ſhall be dereign'd. Br. ibid.

9. Debt *againſt J. S. of London.* Laken ſaid, London extends into two Counties, viz. Middleſex and London, and *he was dwelling the Day of the Writ &c. in Middleſex*; Judgment of the Writ, and good by Attorney, Per Littleton. Br. Brief, pl. 484. cites 5 E. 4. 2.

10. In Treſpaſs upon the 5 R. 2. for entring *into the Manor of D. in S. No ſuch Vill*, Hamlet, nor Lieu conus out of Vill and Hamlet, in the ſame County, Judgment of the Writ, is a good Plea, by reaſon of the Viſne, which ſhall be of S. in this Caſe; *But* if it had been *for entring into the Manor*, there it is no Plea that the Manor is in S. for the Viſne ſhall be of the Manor. Br. Brief, pl. 319. cites 6 H. 7. 3.

(C. a) By bringing Action in a Place not being Vill, Hamlet, &c.

1. *ASSISE* was brought in ſuch a *Place, which was in the Foreſt of D.* and *out of every Vill and Hamlet*; and yet well, becauſe the Place is out of every Vill and Hamlet. Br. Brief, pl. 276. cites 17 Aſſ. 30.

2. *Debt in Middleſex, upon an Obligation dated in London at Clerkenwell*; and becauſe London is a County in itſelf, therefore upon Plea of the Party, the Writ was abated; and the Reaſon ſeems to be inaſmuch as London is a County known, but *Clerkenwell may be a Place in London*; and Br. Brief 531. cites S. C.

and therefore it ſeems that he may bring Action in London, and *count upon a Deed in London made in Quodam loco vocato Clerkenwell.* Br. Brief, pl. 102. cites 3 H. 4. 4.

3. *Waſte* ſhall be brought in a Vill or Hamlet, Per Opinionem &c. And per Hank. if the Place where &c. be *Manor, or ſuch Place*, it ſuffices. Br. Brief, pl. 106. cites 7 H. 4. 8.

4. *Treſpaſs* upon the Statute *of Foreſtalling*, and *counted* that it was *in Portu Ciceſter.* Paſton ſaid the Port is not Vill nor Hamlet, nor Lieu conus out of Vill and Hamlet, but is a Place which extends into the Vills of A. B. and C. and an ill Plea; for by the firſt he ſays it is not a Place &c. and by the ſubſequent he ſays that it is a Place which extends into divers Vills, and ſo double and repugnant, by which he held to the laſt Part of the Plea, which was held a good Plea to the Writ; quod nota, by reaſon of the Viſne. And it was agreed, that where a *Lieu conus* is in a Vill, the Writ ſhall be brought in the Vill, and not in the Lieu conus; quod nota. Br. Brief, pl. 161. cites 7 H. 9. 22. 35.

Præcipe quod reddat does not lie in a Hamlet, but in a Vill, or in Lieu conus out of a Vill; but all *Actions perſonal* may be brought in Vill, Hamlet, or Lieu conus.

5. *Præcipe* quod reddat *of Tenements in D.* Laken ſaid *No ſuch Vill nor Hamlet, nor Lieu conus out of Vill and Hamlet in this County*, Judgment of the Writ. Needham ſaid there is ſuch a Hamlet &c. Per Moyle, Aſſiſe, *Dower, and Treſpaſs may be brought in a Hamlet or Lieu conus*, but *not Præcipe* quod reddat; quod Danby conceſſit, and ſaid that the Books are ſo adjudged. And the ſame Year in Debt, fol. 1. and 2. Priſot ſaid that Præcipe quod reddat may be brought in a Vill or Hamlet &c. or otherwiſe in Lieu conus out of Vill and Hamlet; but *at this Day it does not lie in a Hamlet, which is in a Vill, but ſhall be brought in the Vill.* Br. Brief, pl. 526. cites 34 H. 6. 18.

And Per Cur. Aſſiſe, Writ of *Dower*, and *Scire facias upon a Fine*, may be brought in a Hamlet, which was ſaid there that Trin. 8 E. 3. *Nuper obiit*, was maintained in a Hamlet. Br Brief, pl. 366. cites 8 E. 4. 6.

Præcipe quod reddat does not lie in a Hamlet, but in a Vill, Per Cur. quod nota bene Quære in *Lieu conus out of every Vill*, as in the *Foreſt of Shirwood* &c. Br. Brief, pl. 219. cites 9 E. 4. 36.

(D. a) By Repugnancy.

Br. Brief, pl. 203. (205) cites S. C. accordingly; and that Damages of the Principal cannot be recovered, but the Principal, and Damages for the Detainer.

1. IN *Scire facias* out of a Recovery *of* 100 *l. Debt, and* 80 *l. Damages*, the Writ was *Cum Recuperaſſet* 100 *l. de quodam debito* 100 *l. ac etiam* 80 *l. de prædict'* 100 *l. pro Damnis* &c. The Writ was abated for the Repugnancy; for 100 l. cannot be recovered of 100 l. nor 80 l. of Damages of the Debt. Thel. Dig. 102. lib. 10. cap. 11. S. 11. cites Mich. 24 E. 3. 30.

2. Recordari de *Loquela between Ro. Executor of the Teſtament of Jo. Plaintiff*, and A. Defendant *de quodam bove ipſius Ro. capto*; adjudged no Repugnancy, notwithſtanding that it was ſaid that by the Name of Executor the Property ſhall be intended to be in the Teſtator. Thel. Dig. 102. lib. 10. cap. 11. S. 4. cites Mich. 24 E. 3. 35.

3. In *Scire facias* out of a *Fine*, by which Land was *rendred to J. for his Life*, the *Remainder to P. and his Feme in ſpecial Tail*, and the *Writ was ex inſinuatione R. filii & hæredis P.* &c. and after *Oſtenſurus quare* &c. *præfat' R. filio & hæred. prædict' P. and his Feme remanere debet* &c. the Writ was abated, inaſmuch as it was contrary in itſelf, making the Demandant Heir to the Baron only in one Place, and Heir to the one and to the other in the other Place. Thel. Dig. 102. lib. 10. cap. 11. S. 6. cites Trin. 29 E. 3. 47.

4. *Scire*

4. *Scire facias upon Redisseisin*, the *Writ was, that he had recovered in Assise, and had Execution*, and *after was* [*the Writ required him*] *to answer why Execution he ought not to have*, and so *contrary* in itself, Execution and no Execution; and therefore the Writ was abated. Br. Brief, pl. 453. cites 30 Ass 35. Thel. Dig. lib 10. cap. 11. pl 19. cites S. C.

5. In Scire facias out of a Fine, the Writ was *Cum quidam finis levatus fuisset de Manerio de H. & B.* &c. and after *Quare prædictum Manerium de H. B.* it was held a Repugnancy, because in one Place Mention is of two Manors, and in the other only one &c. yet the Tenant was compell'd to aver, that they are two Manors. Thel. Dig. 103. lib. 10. cap. 11. S. 17. cites 31 E. 3. Brief 293.

6. *Scire Facias* out of a *Fine*, by which Land was *render'd to J. M. and Dionise his Feme, and to the Heirs of the Body of J. the Remainder to J. his Son in Tail*, and the *Demandant sued Execution as Heir to J. M. the Son, and supposed by his Writ that J. M. the Father died without Issue*; yet adjudg'd a good Writ, and held no Repugnancy; for it may be that J. the Son was born before Espousals, or that it was his Surname &c. Thel. Dig. 103. lib. 10. cap. 11. S. 18. cites Mich. 13 R. 2. Brief 645. and so agrees Trin. 17 E. 3. 42.

7. If the Writ be *Jo. Tal. Seniori Filio Jo. Tal.* it shall not be intended any Repugnancy; For Jo. the Father may have 2 Sons named Jo. Thel. Dig. 103 lib. 10. cap. 11. S. 25. cites Hill. 32 H. 6. 34.

8. In Action upon the *Case*, the Writ was *Quod cum ipse habeat quoddam Chiminum ratione tenuræ* &c. the *Defendant levavit murum, per quem le pl' Chiminum habere non potest* &c. And held per Prisot, that the Writ is not good for the Repugnancy. Thel. Dig. 104. lib. 10. cap. 11. S. 26. cites Trin. 33 H. 6. 26.

(E. a) By Variance between the Writ and Declaration.

1. IN Formedon the Writ was, that Post Mortem B. the Donee, to the Demandant as Cousin and Heir descendere debet &c. and by the Count he made the Descent from B. to H. as Son and Heir, and from H. to the Demandant as Son and Heir, and held good. Thel. Dig. lib. 9. cap. 6. S. 3. cites Pasch. 5 E. 2. Formedon 51.

2. In Trespass the Writ was of 2 *Horses*, and the Count was of 2 *Mares*, by which it was abated. Thel. Dig. of Writs, lib. 9. cap. 5. S. 13. cites 6 E. 3. 249.

3. The Writ of Ward was *Quod reddat Custodiam terræ & hæredis*, and the Count of Land and Rent. Thel. Dig. lib. 9. cap. 5. S. 22. cites Trin. 22 E. 3. 10. and says see 21 H. 7. 39. and 14 H. 6. 24. in Quare se intrusit Maritagio non satisf.

4. A Man shall not have *Writ quod Catalla cepit*, and *Count of Money*; for of Money there is a Special Writ given in the Register. Br. Brief, pl. 478. cites 39 E. 3. 23.

5. Where a Man in his *Writ alleges divers Covenants*, and *alleges the Breach but in one* only, yet the Writ is good. Quod nota. Br. Covenant, pl. 4. cites 40 E. 3. 5.

6. *So in Waste*, if *the Writ rehearses the Waste in Lands, Houses, Woods, and Gardens*, yet he may *declare Waste in the one thing only*. Br. Covenant, pl. 4. cites 40 E. 3. 5.

7. Trespass *de Bonis & Catallis*, and counted of 10 *Quarters of Wheat*, and good. Br. Brief, pl. 509. cites 46 E. 3. 16. So in Trespass the Writ was quod *Bona & Catalla ad Valenc' cepit* &c. and the *Count was of* 100 *Angels pretii* &c. and held good. Thel. Dig

Dig. lib. 9. cap. 5. S. 37. cites Mich. 10 H. 6. 23. But the Opinion of 21 H. 6. 42. is to the contrary. Vide 22 E. 4. 12.

But where Writ of Treſpaſs was Quare Bona & Catalla cepit &c. and *the Court was of a Cheſt ſeal'd, with Charters and Muniments*, the Opinion of the whole Court was that the Writ ſhould abate; becauſe Charters are not forfeited by Outlawry, nor paſs by Gift of all Chattles. Thel. Dig. lib. 9. cap. 5. S. 47. cites Paſch. 22 E. 4. 12.

8. In *Appeal of Mayhem*, if the *Count* be *of Battery*, the Writ ſhall abate. Thel. Dig. lib. 9. cap. 5. S. 44. cites Paſch. 12 R. 2. Cor. 110.

9. In *Debt againſt 2 by ſeveral Præcipes*, and by Count it appear'd that they *were obliged & ſinguli eorum* &c. and held good. Thel. Dig. lib. 9. cap. 5. S. 31. cites Paſch. 21 R. 2. Brief 934.

Thel. Dig. lib. 9. cap. 5. S. 33. cites S. C.

10. Reſcous *Quod cum querens diſtrinxit pro quodam Amerciamento. The Defendant had made Reſcous*, and *counted of Amercement of 6 d. at a Leet-Day for his not coming in, and for ſuch another Amercement at ſuch another Leet-Day in another 6 d.* The *Defendant demanded Judgment of the Writ, becauſe he has counted of two Amercements, and the Writ is* of *quodam Amerciamento*, & non allocatur; for all is but one Amercement. Quod nota. Br. Reſcous, pl. 4. cites 2 H. 4. 15.

11. In Mayhem the *Writ was contra Pacem nuper Regis*, and the *Count contra Pacem Regis nunc*, by which it abated. Thel. Dig. lib. 9. cap. 5. S. 34. cites Paſch. 8 H. 4. 21. and 2 E. 4. 25.

Thel. Dig. lib. 9. cap. 5. S. 33. cites S. C.

12. In Treſpaſs the *Plaintiff* by his Writ *ſuppoſed the Treſpaſs to be done at Weſtminſter*, and the *Writ was to the Sheriff of Middleſex*, and he *counted of an Aſſault* and Battery *in the Palace of Weſtminſter*; and the Court was in Doubt, upon Not Guilty pleaded, to whom the Venire Facias ſhould iſſue, to the Sheriff or to the Warden of the Palace; But per Martin, the Plaintiff by his Count has abated his Writ. Br. Brief, pl. 5. cites 2 H. 6. 7.

Br. General Brief, pl. 9. cites S. C.

13. Treſpaſs quod *cepit Piſcem*, and *counted of ſeveral Pikes* &c. *in the plural Number*, and well, and the Count ſhall not abate the Writ; for Piſces is Nomen Collectivum, which has no plural Number; and in Waſte quod fecit *vaſtum*, and he counts of ſeveral Waſtes, and well. Br. Brief, pl. 207. cites 4 H. 6. 11.

14. The Writ of the Caſe ought to comprehend the Subſtance of the Matter, and ſpecial Matter, the which the Plaintiff has not done, by which it was awarded that the Plaintiff take nothing by his Writ. Quod nota; for there *was more in the Count than in the Writ*. Br. Action ſur le Caſe, pl. 50. cites 7 H. 6. 45.

15. In *Quare impedit*, if *ſeveral join in Action*, and *vary in their Count in Conveyance*, the Writ ſhall abate, as in *Aſſiſe*, *Coſinage*, and the like. Br. Brief, pl. 359. cites 6 E. 4. 10. Per Littleton.

The Writ was of *Forger de diverſis factis falſis & muni-mentis*, and

16. In *Forger of falſe Deeds*, the Writ was Quod *falſa facta fabricavit*, and the *Count was only of one Deed*; and yet adjudged good. Thel. Dig. lib. 9. cap. 5. S. 36. cites H. 8 H. 6. 35. but the contrary is adjudged Trin. 20 H. 6. 45. And ſo it is held 35 H. 6. 37. 7 E. 4. 30.

the *Count was of a Deed of Feoffment, and of a Writing and Muniment, by the which one was made Attorney to deliver Seiſin*; Exception was taken to the Variance; and Priſot was of Opinion, that the Count was not warranted by the Writ. Quære. Thel. Dig. lib. 9. cap. 5. S. 40. cites Mich. 35 H. 6. 37.

17. A Man *cannot* maintain, nor *ſupply the Default in Writ of Formedon* by the Count. Thel. Dig. lib. 9. cap. 5. S. 49. cites 11 H. 6. 26.

18. In *Detinue* the Writ was Quod reddat *Bona & Catalla* &c. and the *Count was of* 3 *Tallies*, each of 10 l. and held good. Thel. Dig. lib. 9. cap. 5. S. 38. cites Hill. 21 H. 6. 32.

19. In Writ of *Debt againſt J. B. of* 20 *l.* and upon the Count and View of the Obligation *it appeared that two others were named* in the Obligation *jointly with the ſaid J. B.* and yet held good, if the Defendant does

does *not say that the two others have sealed &c. and are alive.* Thel. Dig. lib. 9. cap. 5. S. 42. cites Trin. 28 H. 6. 3. And see such a Writ held good, where *he who was not named in the Writ was within Age.* 14 H. 4. 33.

20. In *Quare Impedit* against 3, if the *Count* be *only against* 2, all shall be discontinued. Thel. Dig. lib. 9. cap. 5. S. 39. cites Hill. 31 H. 6. 16. So in *Quare impedit by several*, if they *vary in Count*, all shall abate. Thel Dig. lib. 9 cap. 5. S. 43. cites Hill. 6 E. 4 10.

21. In *Trespass* the Writ was *of taking Bona & Catalla* &c. and the *Count was of a Register only.* The Opinion of the Court was, that the Writ should abate. Thel. Dig. lib. 9. cap. 5. S. 45. cites Hill. 7 E. 4. 30. So in Trespass the *Writ was* for taking *Bona & Catalla*, and the *Declaration was*, for taking *a Bale of Woad.* It was awarded, that the Writ should abate; for a Bale in the singular Number cannot be said Bona & Catalla; and the Writ should be one Bale of Woad. Keilw. 35. pl 1 Trin. 13 H ?. Anon. ——See F. N. B. 91. (D) and (E) in principio.—— So where the Court was of taking a 3d Part of a Dish of Lead-ore, it was moved not to be good; and tho' it was objected that there was not any Original at all (as in Truth there was not) yet it was said that the Count was contrary in itself; for a particular Thing cannot be said to be Goods and Chattels. Adjornatur. Win. 35. Trin. 20 Jac. C. B. Gell v. White.

22. It was touch'd, that *in Assise*, if the Plaintiff makes his Plaint, or *counts of more or less than is in the Writ*, there the Writ shall abate, because it is * [not] warranted by the Writ; Quod nota inde. Br. Brief, pl. 216. cites 9 E. 4. 6. So in Anuity, because it appeared by the Deed shewn in the Count, that the Plaintiff by the Writ *demanded more than he ought to have before the Writ purchased*, therefore the Writ was abated. Thel. Dig lib. 9. cap. 5. S. 4. cites Pasch. 5 E. 3. 185. and 11 H 6. 68. in Replevin.

* The Word (not) is not in any of the Editions of Brooke, nor in the old Year-books, but it is in the last Edition of the Year-books.

23. In *Annuity* the Writ was 10*l.* 6*s.* and *in the Count* 6*s.* was omitted, and the Plaintiff recovered, and for that Cause it was revers'd by Error; for it is not Misprision, for the Count is made by the Party, and not by the Clerk. Br. Variance, pl. 53. cites 9 E. 4. 51.

24. *Trespass in two Vills*, and *counted of Trespass but in one Vill only*, and yet well; for *Trespass is several in itself*, and he might have *omitted the one Vill in the Writ.* But contra of Debt; for this is intire. Note the Diversity. Br. Variance, pl. 100. cites 16 E. 4. 11.

25. Where there is *no other Form of Writ* but the common Writ, there the *Writ shall be general, and the Count special.* Br. General Brief, pl. 13. cites 7 H. 7. 2. S. P. Co. Litt. 52. b. 53.—— *But where a Man may have a Writ according to his Case*, if the Writ and Declaration vary, the Writ shall abate. Arg. 2 And. 96. 97. pl. 56. Hill. 38 Eliz. in Case of Arden v. Darcy.

26. *As in Warrantia Chartæ unde Chartam suam habet*, yet he *may count of Homage Ancestrell.* Br. General Brief, pl. 13. cites 7 H. 7. 2. S. P. Br. General Brief, pl. 8. cites 24 E. 3. 35.

27. *And in* Writ of *Waste quod tenet ad terminum annorum*, yet he may *count of Lease for half a Year.* Br. General Brief, pl. 13. cites 7 H. 7. 2. S. P. Br. General Brief, pl 6. cites 8 H. 6. 34.——The Count in this Case shall not abate the Writ, because he cannot have any other Writ upon the Matter. Co. Litt. 52. b. 53.

28. In *Rescous*, where it *appears by the Count that Parcel of the Rent supposed to be in Arrear was not yet due*; the Opinion was that the Count was not good. Thel. Dig. lib. 9. cap. 5. S. 5. cites T 9 H. 7. 3.

2. In

29. In Debt the *Writ demanded* 165 *l.* 13 *s.* 4 *d.* and the *Count was of* 171 *l.* 10 *s.* And Judgment was reverſed for this Variance. Cro. E. 198. pl. 17. Mich. 32 & 33 Eliz. B. R Berkenhead v. Nuthall.

30. *George* in the Writ and *Geo.* in the Count is a good Plea in Abatement. 2 Roll. Rep. 232. Trin. 8 Jac. B. R. in Caſe of Yarley v. Turnock.

31. Caſe againſt the Sheriff, for that the Plaintiff having good Cauſe of Action againſt A. ſued out a Latitat againſt him, and the Defendant being Sheriff arreſted him, and ſuffer'd him to eſcape, and return'd non eſt inventus. At the Trial before Hale, the Plaintiff was nonſuit, becauſe he *declared upon a Latitat in Placito Tranſgreſſionis*; and the *Writ itſelf was in Placito tranſ. ac etiam Billæ for* 20 *l.* which the Chief Juſt. held incurable. 2 Lev. 85. Paſch. 25. Car. 2. B. R. Gunter v. Cleyton.

32. Writ of Formedon is of 20 *Meſſuages* inter alia; the Count is that a *Fine* was levied of the Tenements aforeſaid inter alia per Nomen of 16 *Meſſuages*. The Reporter ſays the Defendant cannot recover according to his Writ, and by Conſequence he has falſify'd and *abated the Writ by the Count.* 2 Lutw. 974. Hunlock v. Petre.

33. In Replevin &c. the Writ was for taking Averia, and ſo was the Declaration with a. viz. one Mare. And upon a Demurrer it was objected that a Mare could not be Averia; and Judgment for the Defendant. 2 Lutw. 1179. Hill. 9 W. 3. Ginns v. Lam's.

(F. a) By Variance between the Writ and Specialty.

Br. Variance, pl. 93. cites S. C.

1. IN Aſſiſe, a *Clauſe was in the Original which was not in the Patent*, and *ſeveral* were *named in the Original which were not in the Patent*, and therefore the Writ was abated. Br. Aſſiſe, pl. 238. cites 22 Aſſ. 20.

* Orig. is (Auſtr.)

2. Aſſiſe de libero tenemento, the Plaint was of *reaſonable Eſtovers Apprendre in a Moor to burn in a* * *Chimney of a Houſe, and this in ſuch a Vill*, the Defendant demanded what he had of the Eſtovers, who *ſhew'd Specialty of Eſtovers apprender in a certain Croft of Moor for his Chimney in a Houſe in the ſame Vill*; and Judgment was demanded of the ſaid Variance between the Writ and the Specialty, & non allocatur, but by all the Juſtices upon Adjournment upon this in C. B. it was agreed that the Writ was brought in the beſt Manner; and it was ſaid that he might have taken the ſame Exception between the Writ and the Plaint if it had been material Br. Variance, pl. 68. cites 23 Aſſ. 1.

3. Debt upon an Obligation, the Defendant was *named J. M. of M. in the Obligation*, and in the Writ *M. was left out*, therefore the Writ was abated, quod nota. Br. Variance, pl. 39. cites 38 E. 3. 24.

S. P. For he is not bound to ſhew Deed unleſs the Defendant demands it, and if he demands it *the Action does not lie by him in Remainder without ſhewing Deed*, for *this Action is not properly founded upon the Deed*, as Action of Debt *is founded upon the Obligation*; note the Diverſity. Br. Variance, 108. cites 10 H. 6. 8.——S. P. Br. Variance, pl. 14. cites 41 E. 3. 23.

4. If Waſt be brought by him in Remainder, and there is a Variance *between the Writ and the Deed of Remainder*, yet it is good. Br. Variance, pl. 18. cites 42 E. 3. 19.

5. In Covenant the *Writ was of one Houſe and* 20 *Acres of Land in D.* where the *Specialty was of all Lands and Tenements which he had in D.* And yet good notwithſtanding the Variance; for the Writ ought to be certain. Br. Covenant, pl. 14. cites 47 E. 3. 25.

6. In Debt the Writ was *John de Lore Vicar of A. Executor of the Teſtament of J. W.* and the *Obligation was J. de L. only* without the Words Vicar

Vicar of A. and therefore was abated for the Variance. Br. Variance, pl. 81. cites 3 H. 4. 1.

7. Debt upon a Bond of 20 l. Newton ſaid the *Bond is Wiginti libris* and the Writ *Viginti*, Judgment of the Writ for the Variance. Per Babb. it has ſufficient Intendment, therefore well, to which Paſton agreed. Br. Obligation, pl. 4. cites 9 H. 6. 7.

For Villiams and *Williams* and *T. Thomas* and *Thomas* is all one,

and *two V's and one Double W.* is all one, and there is not any W. in the Croſs-row in the Latin or French Alphabet. But per Cott. J. *Wyſe and J. Vyſe* is not all one, but in this it ſeems different, by Reaſon of the Engliſh, but *in Latin double W. and ſingle V. is all one.* Ibid.

8. *Quare Impedit* which varies from the Specialty ſhall not abate. Br. Variance, pl. 108. cites 10 H. 6. 8.

S. P. Br. Variance, pl. cites 14 H. 6. 1.——Quare Impedit upon a *Grant of the next Preſentation granted to J. N. Gent.* and *in the Writ brought by J. N. this Word (Gent.) is omitted*; and the Defendant demanded Oyer of the Deed, and had it, and the Variance no Matter; for the *Action of Quare impedit is founded upon the Diſturbance*, and *not upon the Deed*, as Action of Debt is founded upon the Obligation. Br. Variance, pl. 109. cites 2 E. 6.

9. Debt upon an *Obligation* which *was J. D. of B.* and the *Writ was J. D. of B. Underhill*, and ſo a Variance, and yet well. Br. Variance, pl. 78. cites 21 E. 4. 79. 80.

(F. a. 2) By Variance in the Names of Plaintiff or Defendant.

1. IN *Treſpaſs againſt Maſter, Confreres and others*, the *Count was that the Confreres and the others did the Treſpaſs* without mentioning of the Maſter, by which the Writ was abated. Thel. Dig. lib. 9. cap. 5. S. 11. cites Mich. 1 E. 3. 24.

2. *Aſſiſe of Rent by W. N. Knight*, and the *Specialty was not Knight*, and therefore the Writ was abated. But Herle did contra, where the Specialty was Maſter J. C. of S. and the Writ was only J. C. without Maſter, and of S. and the Writ awarded good, Anno 5 E. 3. Br. Variance, pl. 65. cites 11 Aſſ. 8.

Debt againſt J. N. Executor of J. S. and the *Specialty was Maſter J. S.* and the Writ for the Want of Surpluſage.

wanted this Word Maſter, and the Defendant pleaded it to the Writ, & non allocatur; of ſuch Words as Maſter, Reverend, Nephew, Doctor, or the like, are not traverſable, but Contra of Knight, Taylor, Carpenter, &c. Br. Variance, pl. 10. cites 35 H. 6. 55.

3. In *Writ* brought *by two Heirs*, the *Writ was that the common Anceſtor was Grandfather to the one, and Couſin to the other*, and *by the Deſcent in the Count it appear'd, that he was Grandfather to the one, and Great Grandfather to the other*, by which the Writ was abated. Thel. Dig. lib. 9. cap. 5. S. 17. cites Trin. 13 E. 3. Joinder in Action 29.

4. In Aſſiſe; *Rent* was *granted to T. Quintin*, Parſon, Father, *by Name of T. his Son*, and he *brought Aſſiſe of the Rent by Name of T. Q. of N.* and did *not ſay T. Son of T. Q.* and yet the Writ good. Quod nota. And yet in Annuity it ought to agree with the Specialty. Br. Variance, pl. 70. cites 26 Aſſ. 38.

5. *Debt by J. of P.* becauſe the *Plaintiff leaſed a Manor to R. for Term of Life, rendring* 10 *l.* per Ann. *with Clauſe* and Condition *to re-enter by Indenture*, which R. leaſed his Eſtate to S. who leaſed it to T. now Defendant; and for 3 Terms Arrear the Leſſor re-enter'd, and brought Debt of the Arrears, and becauſe the Writ is J. of P. and *the Indenture is J. P. the younger*, the Writ was abated for the Variance; for he cannot re-enter by the Condition, if the Leaſe had not been by Deed, and then *the Deed, the Condition, and the Re-entry is the Cauſe of this Action*; for during the Franktenement he cannot have Action of Debt, and therefore for the Variance the Writ was abated; quod nota. Br. Variance, pl. 54. cites 39 E. 3. 22.

S. P. Br. Dette, pl. 116. cites 29 E. 3. 22.

S P. Br. Variance, pl. 18. cites 42 E. 3. 19.——S P. Br. Variance, pl. 6. cites 9 H. 6. 11. by the beſt Opinion.——S. P. Br. Variance, pl. 56. cites 14 H. 6. 1. For the Obligation ſhall be ſhewn in the Declaration, and therefore Variance is material, and ſhall abate the Writ.——S. P. Br. Variance, pl. 108. cites 10 H. 6. 8.——S. P. Br. Variance, pl. 14. cites 41 E. 3. 23.

S. P. *And ſo in* Action of *Covenant upon an Indenture*; for in theſe Caſes the Bar is *merely founded upon the Specialty.* Br. Variance, pl. 20. cites 44 E. 3. 42.

6. Debt upon a Bond. The *Writ was Prior of D.* and *the Bond was that J. Prior of D. was bound*; and the Opinion was, that for this Variance the Writ ſhall abate. But ſee [(X) pl. 15.] that where more is in the Writ than in the Bond, this is good. Br. Variance, pl. 12. cites 40 E. 3. 23.

7. *Debt upon* an Indenture of *Leaſe for Years rendring Rent*, and *the Indenture was J. K. Clerk*, and the *Writ J. K. only*, and yet awarded good, notwithſtanding the Variance, for it was ſaid that the *Action is maintainable without the Indenture*, and therefore it is no Matter. Br. Variance, pl. 20. cites 44 E. 3. 42.

8. *Debt by R. and S. his Feme* againſt P. *upon an Obligation made to the Feme, dum ſola fuit, by Name of Feme of D.* and therefore the Defendant pleaded this to the Writ for the Variance, becauſe ſhe was named Feme of R. where ſhe ſhould be named *Heretofore Feme of D.* and the Opinion of the Court was that the Writ is good; for by the laſt Marriage her *Name is chang'd.* Br. Variance, pl. 23. cites 48 E. 3. 23.

Br. Nugation, pl. 1. cites S C.—Br. Variance, pl. 5. cites S. C.

9. Debt upon Obligation, and the *Obligation was that A. B and C. Yeomen, were bound*, and this Word Yeomen put for all their Names; and *in the Action of Debt every one was named Yeoman particularly*, and this was pleaded to the Writ for Surpluſage, & non allocatur; for this is of Neceſſity by the Statute of Additions. Br. Additions, pl. 3. cites 3 H. 6. 23.

Br. Variance, pl. 42. cites S. C.—Br. Ibid. pl. 89. cites S. C.

10. *Annuity by J. N. Clerk*, where the *Grant was Maſter J. N.* and yet well; for the King will not write any Man Maſter nor Seignior; quod nota by Award. Br. Additions, pl. 26. cites 8 H. 6. 23.

But Brooke ſays it is uſual at this Day to ſay it in an *Alias Dictus, to make it agree with the Specialty.*——In Debt or Annuity, *where the Plaintiff* in Count counting *ought to ſhew Specialty*, there the *Writ and the Specialty ought to agree*; per Finch. Br. Variance, pl. 14. cites 41 E. 3. 23.

In Debt by Executors upon a Teſtament, there *the Teſtament* ſhall be ſhewn in the Declaration, and where the Deed ſhall be ſhewn in the Count, there Variance is material, and it ſhall abate the Writ. Br. Variance, pl. 56. cites 14 H. 6. 1.

11. *Debt by A. D. againſt M. as Executor of R. D.* and the *Writ was* Præcipe N. quod reddat *A. D. Executor of the Teſtament of R. D. and* the Defendant had Oyer of the *Teſtament*, which *was that he made A. his Wife his Executrix*; and becauſe the Writ was not *A. D. late Wife of R. D. Executrix of the Teſtament of the ſaid R. D.* therefore the Writ was abated for the Variance; for tho' the Action be not founded upon the Teſtament, but upon the Obligation, yet the Teſtament enables him to the Action, and therefore it ſhall agree with it, and if not the Writ ſhall abate. Br. Variance, pl. 57. cites 14 H. 6. 5.

S P. Br. Variance, pl. 6. cites 9 H. 6. 1. by the beſt Opinion. S. P. Br. Variance, pl. 14. cites 41 E. 3. 23.

12. *Formedon in Remainder.* Fulth demanded what he had of the Remainder, and Chaunter *ſhew'd Deed* which was *to Dolby*, and the *Writ was Dalby*; therefore Judgment of the Writ is demanded by the Tenant; and by all the Juſtices, except Cotteſm. the *Writ* is good; for *it is not founded upon the Deed, but upon the Gift*; for *the Deed is not traverſable* as Ne dona pas by the Deed, but ſhall ſay Ne dona pas. Br. Variance, pl. 56. cites 14 H. 6. 1.

Br. Nugation, pl. 23. cites S. C.

13. *Debt upon a Bond* in which *J. D. was bound to T. E.* and the *Writ was Quod reſpondeat T. E. Armigero*; and for this *Surpluſage of Armigero* in the Writ more than in the Bond, the Writ was abated; and it was

ſaid

ſaid there, that before theſe Days Writ ſhould abate for *Surpluſage of the Part of the Defendant*, but *not* for Surpluſage *of the Part of the Plaintiff*. Br. Brief, pl. 27. cites 28 H. 6. 8.

14. In Debt upon an Obligation, by which the Defendant *acknowledg'd himſelf* to be *indebted to the Plaintiff in certain Corn, to be deliver'd* to the Plaintiff *at ſuch a Place and Day, and for Performance bound himſelf in* 100 *s.* &c. *without ſaying to whom* &c. It was held that the Plaintiff might *count that the Defendant obliged himſelf to Him.* But Littleton pray'd that the Entry ſhould be Per hæc verba, and ſo it was done. Thel. Dig. lib. 9. cap. 6. S. 1. cites Mich. 2 E. 4. 22. and that ſo it was held Mich. 4 E. 4. 31. where the *Obligation was teneri W. PP in* 10*l. ſolvendis Jo. Def.* &c. yet the *Count was enter'd ſolvend' to the Plaintiff.*

15. *Debt by E. Haſtinges*, and *counted that he, by Name of E. Haſtings, recover'd* certain Land in ancient Demeſne, and 100 l. *Damages, and brought the Action of the Damages.* Quære if the Count ſhall abate the Writ; for the Writ is *Haſtinges*, and the Count is by Name of *Haſtings*. And per Chocke, Needham, Littleton, Fairfax, and Jenney, becauſe the *Action is founded upon a Matter in Fact, and not upon Record or Writing*, it is no material Variance; for *it ſuffices if he be the ſame Perſon*, and theſe Words *by Name* &c. *is only Surpluſage*; for this Recovery ſhall be tried *per Pais, and not by the Roll*; for Nul tiel Record is no Plea, but he ſhall ſay Nul tiel Recovery; for if the Rolls are burnt, yet the Plaintiff ſhall recover. But Danby and Moyle J. contra, and that the Count ſhall abate the Writ. Br. Variance, pl. 52. cites 9 E. 4. 42. Br. Noſme, pl. 27. cites S. C.

16. Debt upon Indenture againſt the Abbot of W. *the Indenture was* between *the Abbot of the Monaſtery of St. Mary of W.* and rehears'd diverſe Covenants *ad quas conventiones perimplendas the Abbot of W. Obligavit ſe* in 10 l. and *did not ſay the aforeſaid Abbot*, and yet good; for *it ſhall be intended he who is Party to the Deed*; and the Writ was for the Abbot of W. and not St. Mary &c. as in the Indenture: And therefore the Opinion was, that the Writ ſhall abate for the Variance; for where it is founded upon Specialty, they ſhall purſue the Specialty, and ſhall not ſay, that Known by the one Name and the other, as he ſhall ſay where it is founded upon Matter in Fact. Br. Variance, pl. 77. cites 11 E. 4. 2.

17. In Debt upon a Bond *againſt J. S. of D. Yeoman*, it is no Plea that there are two *J. S.'s, elder and younger, within the ſame Vill, and none without Addition*, becauſe the Action is founded upon the Bond, and agrees with it; quod nota by Award. Br. Brief, pl. 325. cites 9 H. 7. 21.

18. In *Treſpaſs* &c. the Writ was Quare *clauſum fregit*, and the Declaration was *Clauſa* fregit; and for this Variance the Judgment was revers'd. Cro. Eliz. 185. pl. 5. Trin. 32 Eliz. B. R. Edwards v. Watkin. S.P. adjudg'd contra; for by Rolle Ch. J. the Word Clauſum is Nomen aggregativum, and may contain many Cloſes; and ſo may well enough agree with the Declaration. Sty. 109. Trin. 24 Car. Burrel v. Lancaſter.——S. P. accordingly Per Cur. and ſaid that it had been ruled often of late, that there is no Variance between the Writ and Count, tho' the Writ is Clauſum, and the Count is Clauſa. 2 Lutw. 1543. Trin. 2 Jac. 21. Meriton v Benn.

(F. a. 3) By Variance in the Sum or Value.

Br. Variance, pl. 38. cites S. C.

1. IN Treſpaſs Wich challeng'd the Count, becauſe he had *counted of Goods* carried away *to the Value of* 40 *l.* and the *Writ was not but to the Value of* 40 *s.* Thorp ſaid, this is a good Diverſity to abate the Count. Br. Variance, pl. 87. cites 38 E. 3. 21.

Br. Variance, pl. 50. cites S. C. but Brooke ſays, Quære if it be material, and if it may not be amended by the Statute of 14 E. 3.

2. Debt *of* 20 *l. Quatuordecim ſolid'* where *the Bond is Quatuordecem ſolid'* with (e) but *in the Count he confeſſed himſelf ſatisfied of the* 14 *s.* And Rolf pleaded the Variance between the Writ and the Bond to the Writ; and becauſe nothing is in Demand but the 20 l. which is according to the Bond, and the 14 s. is confeſs'd to be paid, therefore the Writ was awarded good: But note, that in the Writ there was only 20 l. and in the Count he counted of a Bond of 20 l. 14 s. and confeſs'd Satisfaction of the 14 s. Br. Brief, pl. 212. cites 4 H. 6. 26.

(F. a. 4) Variance between the Writ and Count. In reſpect of the Place where.

* Debt upon *Obligation, bearing Date in the County of L.* but it did not appear in what

1. 6 *Ri.* 2. cap. 2. *THAT Writs of Debt and Account, and all other ſuch Actions, be taken in their Counties where the ſame did riſe It is ordained, that if in Pleas upon the ſame Writs it ſhall be* * *declared, the Contract thereof was made in another County, that then incontinently the ſame Writ ſhall be utterly abated.*

County the Action was brought, and *in the End was put the Name of a Scrivener who was abiding in London*, by which the Defendant prayed that the Attorney may be examined where the Deed was made; and the Court was in Opinion to have examined him, by which the Attorney took upon him to bring in his Maſter the next Day, by which the Court ſpared him. Quære inde; for this ſeems to be by the Equity of this Statute. But *quære if this Statute has Equity in it*; for by 21 E. 4. 79. 80. he ſhall not be examined, but where the Deed bears † *Date at a Place certain*, and the Action is brought in another County; but where the Deed is dated at large, there no Examination lies. And ſee Debt 3 H. 6. 35. Per Martin, the Defendant ſhall have it by way of Plea, that the Deed was made in another County, Judgment of the Writ; by which Rolf paſs'd over, and replied that it was not. Quod nota, and quære; and ſee, in the principal Caſe, that Martin was in Opinion that the Party may plead it to the Writ; but Babbington Ch. J. contra, for then the Deed ſhall be confeſs'd by him, ſo that he cannot ſay Non eſt factum afterwards. And Martin ſaid, that he may ſay by Proteſtation that he has an Acquittance, and for Plea that it was made in another County. Quære. Br. Examination, pl. 2. cites 3 H. 6. 29.

† S. P. Br. Examination, pl. 1. cites 3 H. 6. 15. and 21 E. 4. 79. 80.

2. *Debt by Executors upon an Indenture in the County of C.* and the *Defendant ſaid that the Indenture was made in the County of D.* and prayed that the Executors be examined, and ſo they were. Br. Examination, pl. 16. cites 5 H. 5. 1.

3. In *Treſpaſs* the Writ was, that the Treſpaſs was done *at the Vill of Weſtminſter*, and the *Count was*, that it was done *in the Palace of the King* &c. And the Opinion was, that the Writ ſhall abate. Thel. Dig. lib. 9. cap. 5. S. 33. cites Paſch. 2 H. 6. 7.

4. In *Debt* the *Plaintiff counted* in one Action, *that the Obligation was made in one County*, and *by another Action that it was made in another County*; And yet Per Martin, it is out of the Caſe of the Statute where a Man brings Action in one County, and declares in another, for there his Writ ſhall abate; but it is good here, and there upon this Matter pleaded to the Writ, it was ruled againſt the Defendant; quod nota. And there-

fore

fore it ſeems, in this Caſe, that no Examination lies. Br. Examination, pl. 1. cites 3 H. 6. 15. and 21 E. 4. 79. 80.

5. In *Debt upon an Obligation*, which was *dated at the Manor of Dale*, the Plaintiff was received to *count that it was made at Dale*; for the Manor may extend into diverſe Vills. Thel. Dig. lib. 9. cap. 6. S. 7. cites Mich. 34 H. 6. 1.

6. In *Treſpaſs* the Writ was *of Aſſault and Menace* made *at London*, and the *Count was, that the Aſſault and Menace was at London, ſo that the Plaintiff could not do his Buſineſs at Iſlington*; and yet held good. Thel. Dig. lib. 9. cap. 5. S. 41. cites 36 E. [H.] 6. Treſpaſs 159. and ſays, See 37 H. 6. 3. accordingly, and 20 H. 6. 15. *But* where the Writ was of the Menace made *at Dale, ſo that he durſt not go to his Buſineſs there* &c. and the *Count* was, *that he durſt not go from the Vill of Dale to the Market* and Fair *of the Vill of Downe*, the Writ was abated. Thel. Dig. lib. 9. cap. 5. S. 41. cites Paſch. 26 H. 6. 15.

7. In Debt *the Attorney of the Defendant pleaded Foreign Acquittance in another County*; the *Attorney of the Plaintiff ſaid, that his Maſter never came there*, and *prayed that the Defendant's Attorney be examined*; and ſo he was by Oath, and *ſaid that he did not know the Truth*, by which he was compelled to plead other Plea &c. Br. Examination, pl. 30. cites 21 E. 4. 22.

8. In an Action of *Waſte* done in ſeveral Places, the Declaration *aſſigned the Waſte* to be committed *in one Place more than* was *named in the Writ*; and this was held to be a Fault incurable, and that the Writ ſhould abate. Hob. 37. pl. 43. Cumberland (Earl of) v. Cumberland (Counteſs of). Mo. 862. pl. 1185. Hill. 12 Jac. S. C. and S.P. accordingly; but Per Cur. otherwiſe it is where the Count is *of leſs than the Writ*, as Writ of Waſte in two Vills, and the Count is of Waſte in one.

(G. a) Variance between Writ and Record.

1. ATTAINT upon Quare Incumbravit; the Writ was abated for *Variance* between this and the firſt Record *in rehearſing the Iſſue*; but it does not plainly appear what Variance. Br. Variance, pl. 40. cites 21 E. 3. 42.

2. In *Quare non admiſit againſt the Biſhop of N.* making Mention of the Writ by which he recover'd, Propter quod mandaverimus eid' Epiſcopo &c. quod non obſtante reclamatione &c. and the *Record was*, that the *Writ was awarded to the Biſhop Elect of N. & Confirmato*, for which Variance the Writ was abated, for it ought to be Mandaverimus *eid' Epiſcopo tunc electo & confirmato*. Thel. Dig. lib. 9. cap. 1. S. 3. cites Mich. 22 E. 3. 13.

3. In Aſſiſe the Parol demurr'd, becauſe the Land was in Cuſtody of the King's Committee, and after *Writ of Procedendo* iſſued out, *which did not agree with the Record verbatim*, yet becauſe the Writ *comprehended the Effect*, therefore Exception was not allowed, by which the Tenant pray'd that his Exception be enter'd; and agreed in the End there, that the Procedendo *is good, if it agrees in all the Pleas*; quod nota. Br. Variance, pl. 94. cites 22 Aſſ. 28.

4. In Aſſiſe of Rent the *Tenant pray'd Aid of the King* and had it; and now the *Plaintiff brought Procedendo, ſuppoſing the Aſſiſe to be arraign'd before S. and B. where it was* arrain'd *before A. S. and B.* And yet becauſe that which was done before three was done before two, and alſo they had Writ of *Si non omnes*, therefore they ſhall proceed. Br. Variance, pl. 73. cites 31 Aſſ. 1.

Br. Variance, pl. 30. cites S. C. —Br. Waſte, pl. 64. cites S. C.

5. In Waſte where the Plaintiff *had the Reverſion ex Aſſignatione J. which J. had it ex Aſſignatione of W. by Fine* &c. And it appear'd by the *Fine ſhew'd, that W. and R. granted the Reverſion to J.* &c. by which the Writ of Waſte abated, notwithſtanding that the Plaintiff alleged that *R. had nothing in the Reverſion at the Time* of the Fine levied. Thel. Dig. lib. 9. cap. 1. S. 10. cites Mich. 11 H. 4. 1.

S. P. But per Babb. it ſuffices if it be Counted in his Count accordingly; Quære inde. Br. Decies tantum, pl. 1. cites S. C.

6. If Decies tantum *varies from the Record* it is not good; *As* if the *firſt Record is J. D. of E. Yeoman*, and the *Decies tantum is J. D. only*. Br. Variance, pl. 6. cites 9 H. 6. 1. by the beſt Opinion.

7. *So in Conſpiracy, Scire facias upon a Fine, Attaint, Writ of Error*, &c. Br. Variance, pl. 6. cites 9 H. 6. 1. by the beſt Opinion.

8. In *Writ* of Maintenance *by the Abbot beatæ Mariæ de Miſſenden* &c. of Maintenance in quadam Querela, quæ fuit inter predict' Abbatem and one B. The Defendant *pleaded that there is a Record of Action between the Abbot of Miſſenden*, and the ſaid B. &c. *Abſque hoc that there is any Record that the Abbot beatæ Mariæ de Miſſenden has any Action againſt him* &c. But ſuch Pleading was not received, becauſe it is triable by the Juſtices, and therefore he pleaded Nul tiel Record generally, and it ſeem'd by the Opinion there that the Writ is good enough if the Plaintiff in his Count ſhews the Maintenance in Loquela, which was between the aforeſaid Abbot per Nomen &c. Thel. Dig. lib. 9. cap. 1. S. 15. cites Mich. 10 E. 4. 19.

(H. a) Variance between Original Writ and Judicial or other Writ.

1. SOmetimes an Original Writ ſhall abate for Variance between it and Writ or Proceſs Judicial, as in *Writ of Meſne of Tenements in Burton*, and the Defendant came in *by the Grand Diſtreſs* by which *the Tenements were ſuppoſed to be in Birton* &c. for which Variance the Defendant went ſine Die &c. Thel. Dig. lib. 9. cap. 2. S. 1. cites 6 E. 3. 277. But ſays ſee that Default in Judicial Writ ſhall not abate the Original. Hill. 11 H. 4. 43.

2. Writ of *Audita Querela* was to the Juſtices Quod *ſi conſtare poterit* &c. that they had aſſented ad evacuationem recognitionis prædict' &c. And the *Scire facias was, if the Defendant knew any thing to ſay wherefore the Plaintiff ſhould not be diſcharged of the Recognizance*; and yet all was adjudg'd good, inaſmuch as all is one Intendment. Thel. Dig. lib. 9. cap. 2. S. 2. cites 6 E. 3. 280.

3. *Writ original* ſhall not abate for Variance between it *and the Pone in a Surname*. Thel. Dig. lib. 9 cap. 2 S. 2. cites 6 E 3. 296.

4. In a Patent of Aſſiſe there was no *ſuch a Clauſe Et alios in brevi noſtro originali contentos* &c. And *ſeveral were named in the Original which were not in the Patent*, by which the Writ abated. Thel. Dig. lib. 9. cap. 2. S. 3. cites 22 Aſſ. 20.

5. Scire facias againſt the *Prior of St. John of Jeruſalem in England* upon a Recovery which was *Prior of the Hoſpital of St. John in England*, and Exception taken, and not abated for the Variance; for Thorp ſaid it is known by the one Name and the other, therefore [ruled him to] anſwer; quod nota. Br. Variance, pl. 19. cites 44 E. 3. 16.

6. Scire

6. Scire facias upon Garniſhment in *Writ* of Detinue of a Writing, the Original named the Plaintiff *J. Shipſted*, and the *Scire facias J. Shiplow*, and therefore it was awarded that he ſhall ſue a new Scire facias, notwithſtanding it was a Judicial Writ. Br. Variance, pl. 27. cites 3 H. 4. 8. Br. Scire facias, pl. 56. cites S. C.

7. In *Writ of Maintenance ſuppoſed to be made in an Aſſiſe, the which Aſſiſe was adjourn'd* &c. It was held that he *need not make Mention of this Adjournment in the Writ*; for it is founded upon the Maintenance which is the Matter, and not upon the Record. Thel. Dig. lib. 9. cap. 2. S. 6. cites Mich. 21 H. 6. Brief 90. Quære of Severance and of Garniſhment in Detinue. *But* in Maintenance *ſuppoſed to be made in an Aſſiſe quæ capta fuit, where* in Truth the *Plaintiff was nonſuited* in the Aſſiſe, the Writ ſhall abate, per Gaſcoigne. Thel. Dig. lib. 9. cap. 2. S 7. cites Mich. 7 H. 4. 30.

(I. a) Variance between Writ and Declaration made good by Alias Dictus.

1. IN Debt the Writ was quod reddat *J. T. Clerk*, and the *Obligation was Chaplain*, and for the Variance the Writ was abated quod nota; and note alſo, that an *Alias Dictus* would have remedied the Matter, as it ſeems; Quære *of the Part of the Plaintiff*, but it is clear of the Part of the Defendant, for there he is bound to give Addition. Br. Variance, pl. 55. cites 39 E. 3. 23.

2. If a Man be *bound to J. N.* and *after he is created a Biſhop*, he ſhall ſue by Name of Biſhop, and the Variance is not material; per Ham & Perſey; and per Fulth. this is true, by reaſon of the Name of Dignity. *Quære* if the Law be ſo; for *Alias Dictus* is uſed. Br. Variance, pl. 23. cites 48 E. 3. 23.

3. Debt *by J. S. and Joan Newton his Feme, as Executors of J. N. to accord with the Specialty*, and becauſe ſhe has loſt her Surname by taking of the Baron, and is named J. N. therefore the Writ was abated by Award; but it was ſaid that the Name of Daughter, Siſter, or Coſin may remain &c. And it ſeems that *Alias dicta* would have ſerved here. Br. Brief, pl. 92. cites 2 H. 4. 1.

4. Writ of *Debt* was abated, becauſe it was *againſt J. K. of G. in the County of C.* where the *Obligation was J. K. of G. without naming of the County of C.* &c. But at this Day this is remedied by an *Alias Dictus*. Br. Variance, pl. 25. cites 2 H. 4. 24.

(K. a) What ſhall be ſaid to be Variance.

1. *ASSISE of a Robe of 20 s. Price.* The Defendant demanded what he had of the Robe, who *ſhew'd Deed which will'd a Robe with Furr of the Price of 20 s. and* yet per Cur. becauſe it is *intended Parcel of the Robe*, the Plaint nor the Writ was not abated by the Variance. Br. Variance, pl. 67. cites 22 Aſſ. 10.

2. In Debt the Writ was Præcipe *Prior of T.* quod reddat, and *the Obligation was Prior of the Monaſtery of T.* and for this Omiſſion of (Monaſtery)

(Monaſtery) the Writ was abated for the Variance. Br. Variance, pl. 13. cites 40 E. 3. 25.

3. Waſte by him in Remainder, who was compell'd to ſhew Deed, and ſo he did, and the *Deed was J. Son of W. of T.* and the *Writ was J. of T.* and becauſe all was of one and *the ſame Intendment*, therefore well. Br. Variance, pl. 14. cites 41 E. 3. 23.

4. *But* becauſe the *Writ will'd it to remain to him and his Heirs*, and the *Specialty was to him and the Heirs of his Body*, therefore for this Variance the Writ was abated. Br. Variance, pl. 14. cites 41 E. 3. 23.

5. *Replevin was Henry Abbot of D.* and the *Pone*, which was brought at the Suit of the Plaintiff, *was Abbot of D. without Henry*, and therefore the Replevin was abated; quod nota; and therefore no Return awarded. Br. Variance, pl. 15. cites 41 E. 3. 24.

6. Protection and Writ vary'd, becauſe the one was *Militi* and the other *Chevalier*, and yet awarded good; quod nota; for they have one and the ſame Intendment, as it ſeems. Br. Variance, pl. 17. cites 42 E. 3. 9.

7. Debt upon an Obligation. The *Obligation was Alice, who was the Wife of R. B.* and the *Writ was Alice Heretofore Wife of R. B.* and becauſe (was Wife) and (heretofore Wife) have one and the ſame Intendment, therefore the Writ was awarded good; quod nota. Br. Variance, pl. 4. cites 3 H. 6. 17.

Br. Additions, pl. 3. cites S. C.—Br Negation, pl. 1. cites S. C.

8. Debt againſt 3 upon *an Obligation*, which *was that A. B. and C. Yeomen, were bound* &c. and the *Writ was by this Word (Yeoman) after every one of their Names*, and well, and no Variance; for this is by Neceſſity of the Statute of Additions. Quod nota. Br. Variance, pl. 5. cites 3 H. 6. 23.

9. In Debt the Writ was againſt an Executor, ſcilicet, J. B. *Executor of the Teſtament of W. B. Brother of the ſaid W.* where the *Teſtament is (His Brother)* and yet well; for it is all the ſame in Effect. Br. Variance, pl. 83. cites 9 H. 6. 19.

Br. Protection, pl. 54. cites S. C.

10. The Record was Treſpaſs againſt *A. B. of O. in the County of H. Eſq;* and the *Protection was A. B. of O. Eſq; in the County of H.* alias dictus A. B. of O. Paſton ſaid, it ſhall not be allow'd for the Variance; but Aſcue and Fulth. ſaid Yes; for it has *ſufficient Intendment* to be one and the ſame Perſon. Br. Variance, pl. 47. cites 22 H. 6. 3.

11. *Debt of 40 s* upon an Obligation. The Defendant demanded Judgment of the Count for the Variance; for he *counts of 6 l. Flemiſh, as the Obligation was*, and that 40s. Sterl. and 6 l. Flemiſh, were one and the ſame Sum. Quære; for it was not adjudg'd. Br. Variance, pl. 9. cites 34 H. 6. 12.

12. In Caſe the *Writ was for raiſing of the Yard*, and the *Declaration is for exalting the Yard, and making a Gutter therein*; and ſo there is more compriz'd in the Declaration than in the Writ; and for this Cauſe the Court held it ill, and not aided by the Statute of 18 Eliz. Cro. E. 829. pl. 34. Paſch. 43 Eliz. Norton v. Palmer.

(L. a) By * Death of the Plaintiff.

* By the *Spiritual Law* the Death of the Party never ſhall abate any Suit. 2 Roll Rep. 20. Paſch.

1. IN Writ by Executors, the Death of him who is ſever'd ſhall not abate the Writ; per Judicium. Thel. Dig. 178. lib. 12. cap. 1. S. 5. cites Trin. 5 E. 2. Br. 802. and ſays that ſo it was adjudg'd in Treſpaſs brought by Executors, Trin. 16 E. 2. Executors 111. and that ſo agrees

agrees 3 H. 7. 1. but ſays the contrary is adjudg'd Paſch. 38 E. 3. 13. and Hill. 20 E. 3. Accompt 78. 16 Jac. B. R. Dobſon v. Scott.———

Wherever the Death of any Party happens pending the Writ, and yet the Plea is in the ſame Condition as if ſuch Party were living, there ſuch Death makes no Alteration; For where the Death of the Parties makes no Change of Proceeding, it would be unreaſonable that the ſurviving Parties ſhould make any Alteration in the Writ; and it would be abſurd, that what made no Alteration ſhould change the Writ and the Proceſs; and on this Rule all the Diverſities turn. G. Hiſt. of C. B. 195.

But it was adjudg'd that Writ of Aiel ſhall abate by Death of one of the Demandants who was ſever'd. Thel. Dig. 179. lib. 12 cap. 1. S 6. cites Hill. 5 E. 3. 174. and that ſo it is adjudg'd Mich. 19 R. 2. Brief 925. and 37 H. 6. 11. in Formedon; but the contrary is adjudg'd Hill. 42 E. 3. 28. in Scire Facias.

In Aſſiſe by 2, if the one be ſever'd, the Writ ſhall not abate by the Death of him who is ſever'd. Thel. Dig. 179. lib. 12. cap. 1. S. 12. cites 38 E. 3. 43. per Thorp.

It is held that in Writ of Ward of the Body by two, the Writ ſhall not abate by the Death of him who is ſever'd: But the contrary is held in Writ of Ward by Parceners, inaſmuch as he who ſurvives, and the Heir of the other, ſhall have Re-ſummons by the Statute. Thel. Dig. 179. lib. 12. cap. 1. S. 13. cites Mich. 38 E. 3. 43. Quære.———So it is held that in Aſſiſe by Parceners the Writ ſhall abate by the Death of him who is ſever'd; and ſo of Jointenants after the Severance. But per Davers, the Aſſiſe ſhall not abate by the Death of one of the Plaintiffs Jointenants before the Severance. Thel Dig 179. lib. 12. cap. 1. S. 12. cites Mich. 37 H. 6. 11.

In Formedon it was ſaid, that where 4 *bring Formedon, and one is ſummon'd and ſever'd*, and the others proſecute the Suit, and *he who is ſever'd dies*, that this ſhall abate the Writ. Quære. Br. Brief, pl. 119. cites 11 H. 4. 19. 20.———In ſuch Caſe it was held by Priſot and Danby, that the Writ ſhould abate. Contra Moyle and Needham; and ſee 38 E. 3. 11. 36. that the Writ ſhall abate; contra 16 E. 3. and H. 42 E. 3. 2. and ſee Joinder with an Alien 11 H. 4. 26. and 39 E. 3. 13. But Priſot agreed, that where he who ſurvives may recover the Whole, there the Death of the one ſhall not abate the Writ, as in Writ of Ward or Quare Impedit. Contra where he who ſurvives ſhall not recover but a Moiety; for the Writ is falſe when one is dead; and alſo when the one recovers the Moiety, the other may enter with him; and ſo the beſt Opinion was, that the Writ ſhall abate. Br. Brief, pl. 231. cites 37 H. 6. 9.

2. Where 2 ſued Execution of a Statute-Merchant, the one died, and the other was compell'd to ſue new Writ upon his Caſe. Thel. Dig. 179. lib. 12. cap. 1. S. 8. cites Hill. 25 E. 3. 38. If two ſue a *Statute-Merchant*, and one dies *before Execution*, it ſhall go on. In the Caſe of Defendants 'tis different; Proceſs is expreſsly given upon the Statute-Merchant; per Bridgman Ch. J. in delivering the Opinion of the Court. Cart. 195. Paſch. 19 Car. 2. C. B. in Caſe of Law v. Tothill & Rawlins.

3. The Death of the *one Plaintiff in Monſtraverunt* ſhall not abate the Writ. Br. Brief, pl. 145 cites 38 E. 3. 35. S. P. D. 279. b. pl. 8. cites 1 H. 5.

4. *Two brought Writ of Warrantia Chartæ*, and the *one died*, and the Writ was abated; and yet another Writ may be brought in the Name of the other after the Aſſiſe determined; for no Default is in the Plaintiff, quia cauſa mortis. Br. Brief, pl. 82. cites 48 E. 3. 22. Thel. Dig. 179. lib. 12. cap. 1. S. 5. cites S. C. that the Writ abated, notwithſtanding that he who died had only an Eſtate for his Life, and the Fee was in the other who ſurvived.

5. In *Quid juris clamat* by two, if the one dies the Writ ſhall not abate. Br. Quare impedit, pl. 67. cites 48 E. 3. 31 & 32. S. P. Br. Brief, pl. 145. cites 38 E. 3. 35.——*Three brought Quid juris clamat upon Grant of Reverſion by Fine to them, and to the Heirs of one*, and the *one, who had for Term of Life only died, pending the Writ*; and yet the Writ awarded good. Br. Brief, pl. 83. cites 48 E. 3. 31.———S. P. Thel. Dig. 179. lib. 12. cap. 1. S. 9. cites 48 E. 3. 32. and ſo agrees Paſch. 18 H. 6. 2.

6. In Debt by 3, after Iſſue and the Darrein Continuance, it was pleaded that one of the Plaintiffs, viz. Jo. Dale, was dead; to which Plea his Attorney and the 2 other Plaintiffs imparl'd; and at the Day given he who was alleg'd to be dead appear'd in proper Perſon, but the Attorney of the Defendant ſaid that Jo. Dale was dead, and would not ſay any thing elſe; by which the Plaintiffs had Judgment to recover, becauſe the Juſtices ſhall adjudge if he who now appears, and he who made the Attorney, be the ſame Perſon or not. Thel. Dig. 179. lib. 12. cap. 1. S. 11. cites Trin. 34 H. 6. 45.

7. In Homine replegiando by 3, quære if the Writ ſhall abate by the Death of one of them. Thel. Dig. 179. lib. 12. cap. 1. S. 14. cites 8 E. 4. 16.

8. Aſſiſe of an Office by two joint Patentees ſhall abate by the Death of one of them. Thel. Dig. 179. lib. 12. cap. 1. S. 18. cites Paſch. 9 E. 4. 5.

So in *Dower* there was *Judgment by Default*, and a *Writ to inquire if the Husband died ſeiſed, and of what Eſtate*, either in Fee or Tail, and Judgment thereon, and a *Writ of Error brought*, and *after the Record removed the Widow died*; Per Cur. The Writ ſhall not abate. Yel. 112. Mich. 5 Jac. B. R. Bromley v. Littleton.

9. It is ſaid, That in Writ of Error of Judgment given againſt the Tenant in Præcipe quod reddat of Land, the Death of one of the Plaintiffs in the Writ of Error ſhall abate the Writ. Thel. Dig. 179. lib. 12. cap. 1. S. 16. cites Hill. 3 H. 7. 1. and 2 R. 3. 1. Quære.

But where R. had *Judgment in* an Action on the *Caſe againſt* 2. in C. B. and *they brought a Writ of Error* in B. R. and *before the Errors were diſcuſs'd one of the Plaintiffs in Error died.* It was adjudged that the Writ ſhall abate, and that R. is put to his Scire facias againſt the Executor of him that is dead. Yelv. 208. Mich. 9 Jac. B. R. Spenſer and Woodward v. the Earl of Rutland.

In *Writ of Error by* 2. and one dies pending the Writ, the Plaintiff in the original Action, by entering a Suggeſtion on the Roll, that one of the Parties in Error is dead, may take out *Execution on the Judgment*, without ſuing out a *Scire facias* either againſt the Heir or Executor of the dead Perſon. 8 Mod. 108. Mich. 9 Geo. Pennoire v. Brace.

S. P. Cro. J. 16. pl. 4. Mich. 1 Jac. B. R. Leigh and Brown v. Bargany.

10. The Death of one of the Plaintiffs in Audita Querela ſhall not abate the Writ, becauſe the Suit is only to diſcharge them. Thel. Dig. 179. lib. 12. cap. 1. S. 16. cites Hill. 3 H. 7. 1. and 2 R. 3. 1. Quære.

But in all Actions, where one of the Plaintiffs dies, the Writ abates, *except* in Actions *brought by two Executors*, Per Cur. And Hale Ch. J. ſaid that ſo it ſhould in a *Quare impedit*, but that it is revivable by Journey's Accounts. Vent. 235. Hill. 24 & 25 Car. 2. B. R. Dacres v. Duncomb.

11. The Death of one of the Executors Plaintiffs ſhall not abate the Writ. Thel. Dig. 179. lib. 12. cap. 1. S. 16. cites Hill. 3 H. 7. 1. and 2 R. 3. 1. Quære.

12. Two *Grantees of a next Preſentation brought Quare impedit; one died pending the Writ.* Three Juſtices held that the Writ ſhould abate. D. 279. pl. 8. Mich. 10 & 11 Eliz. Anon.

13. Under-leſſee and his Aſſignee of Part of the Land for Years being ſued in the Spiritual Court for *Tithes*, join in a *Prohibition*; the Prohibition ſhall not abate by the Death of one of them, becauſe *nothing is to be recover'd*, but they are only to be *diſcharged* of Tithes. Owen. 13. Hill. 36 Eliz. B. R. Bartue's Caſe.

14. *Avowry by two*, one dies where the Avowry was made *en auter Droit*, the Suit ſhall not abate; otherwiſe if in *their own* Right. Mo. 395. pl. 513. Hill. 37 Eliz. Short v. Tucker & al'.

If there be 2 *Jointenants* or Copartners, and they *bring a real Action*, and *one is ſummon'd and ſever'd*, the other ſhall proceed for his Moiety; and if the *Perſon ſever'd dies*, the Writ abates, becauſe he goes [on] for the whole, in Caſe of the Death of the Jointenant, or of the Coparcener, without Iſſue; and it would be improper to do it on that Writ, where by the Summons and Severance he went [on] only for a Moiety before, and the Writ cannot have a double Effect to go on for a Moiety in Caſe of Summons and Severance, and for the whole in Caſe of Survivorſhip. And therefore, ſince the *State of the Things is changed* by the Death of one of the Parties, there muſt be a new Writ. G. Hiſt. of C. B. 197.———And it is the *ſame Law*, if ſuch *Jointenants* ſhould *proceed without Summons or Severance*; for ſince Both by the Writ might by Poſſibility recover their Moiety, they ſhall not go on for the whole in Caſe of Survivorſhip, becauſe the Words and Effect of the Writ, at the Time of its firſt Purchaſing,

15. If 2 *Jointenants bring Treſpaſs*, and one dies, the Action is gone, Per tot. Cur. for on the Plaintiff's Part, if one dies all the Writ or Bill ſhall abate, unleſs in Caſe of Neceſſity, as in a *Quare impedit*, where the 6 Months peradventure might be paſs'd, ſo as if the Bill ſhould abate, the Action fail'd. Cro. J. 19. pl. 4. Mich. 1 Jac. B. R. Leigh and Brown v. Bargany.

was

was, that each might recover his Moiety; and therefore a new Writ must be purchased to enable one to proceed for the whole G. Hist. of C. B. 197.

But in personal and mixt Actions, where there is Summons and Severance, the Plaintiff goes on for the whole, there, if one of them dies, yet the Writ shall not abate, because they go on for the whole after Summons and Severance; and if they were to have a Writ, it would only give the Court Authority to go on for the whole. G. Hist. of C. B. 197.

16. In *Trover* brought *by* 2 *Plaintiffs*, the Defendant pleaded that pending the Action *one of the Plaintiffs died.* Adjudged that the Trover being brought for the Goods of both, the Action survives to the other. 2 Bulst. 262. Mich. 12 Jac. Spring v. Barrett.

17. *Before a Judgment*, if there be *two Plaintiffs*, and *one dies*, tho' the Interest survives, the Writ shall abate, so 'tis in *Debt*, *Trespass* &c. tho' if *one of the Defendants die*, the Writ shall not abate. Cart. 190. Per Bridgman Ch. J. in delivering the Opinion of the Court, in Case of Law v. Tothill & Rawlins, Pasch. 19 Car. 2. C. B.

18. It was held per Cur. that where *four took out a Bill of Middlesex*, by the Death of one of them the Writ abated; and a *new Writ* should have been taken out in *the Name of* the three *Survivors by Journies Accounts*; and when *one of them died* the Bill abated, and a *new Bill* should have been taken out *in the Name of the two Survivors only, by* Journies Accounts. 12 Mod. 188. Pasch. 10 W. 3. B. R. Temple v. Bishop.

19. *Fieri Facias* abates not by the Plaintiff's Death, and the Sheriff may proceed in the Execution; for he has nothing to do with the Plaintiff, for the Writ commands him to levy and bring the Money into Court, which the Plaintiff's Death does no Ways hinder; besides, an Execution is an entire thing and cannot be superseded after it is begun. 1 Salk. 322. pl. 10. Mich. 3 Ann. B. R. Clerk v. Withers.

6 Mod 290: S. C. and Judgment affirmed accordingly.—11 Mod. 34. S. C. and Judgment accordingly.

(M. a) By Death of the Defendant.

See (A. b)

1. IN *Mortdancestor* against *Jointenants*, the Writ shall not abate by the Death of one of them, nor in *Scire facias*, inasmuch as the Survivor has all by Right of Survivor; but it is otherwise of *Parceners*. Thel. Dig. 180. lib. 12. cap. 2. S. 5. cites Tempore E. 1. 857. 858. and says see 40 Ass. 15. and 43 E. 3. per Judicium. Thel. Dig. 181. lib 12. cap. 2. S. 26. cites Pasch. 43 E. 3. 16. and 9 H. 6. 57.

But Writ of *Formedon against Jointenants* shall abate by the Death of one of them, but if one of the * Disseisors dies, yet the Writ is good if the other Disseisor be alive. *Br. Brief*, pl. 291. [295]

In *Assise against two Jointenants*, if the *one dies* pending the Writ the Writ shall abate; cites 27 Ass. 45.

* The large Edition is (Disseisees,) but the others, and the Year-book, are (Disseisors.)

2. In *Assise of Common* of Pasture against two. The Death of one who is not Tenant of the Waste out of which &c. shall not abate the Writ. Thel. Dig. 180. lib. 12. cap. 2. S. 4. cites Tempore E 1. Br' 864.

3. In *Assise against two*, where *the one the Day of the Writ purchas'd was sole Tenant*, and *pending the Writ infeoffed the other and a Stranger not named* in the Writ, and after the *Feoffor died*, by which the Writ was abated by Judgment. Thel. Dig. 180. lib. 12. cap. 2. S. 7. cites Mich. 1 E. 3. 22. and 1 Ass. 12.

4. In *Præcipe quod reddat against three*, who *at the Grand Cape return'd gaged their Law of Non-Summons in Common*, and at the Day given &c. *two came and said that the third was dead*, sed non allocatur, by which they two made their Law, and the Writ abated for two Parts, and the Demandant

But it is held that such Death is pleadable to the Writ

without saying the Default. Thel. Dig. 180. lib. 12. cap. 2. S. 9. cites 20 H. 6. 2. and 21 E. 4. 19. 95.

mandant recover'd the third Part. Thel. Dig. 180. lib. 12. cap. 2. S. 9. cites Mich. 6 E. 3. 278.

5. In a *Writ of Right Patent* removed by Pone *unde ſuch a one held ſo much, and a Feme and her Son held ſo much*, & ſic de ſingulis &c. It was *pleaded that the Feme was dead*, by which it was adjudg'd that the Writ ſhould *abate as to this* (*unde*) *notwithſtanding it was alleg'd that her Son was ſole Tenant.* Thel. Dig. 180. lib. 12. cap. 2. S. 11. cites Hill. 7 E. 3. 300.

6. In Writ of Entry againſt Dioneſe and one Ro. at the Day of the Grand Cape return'd againſt Dioneſe, ſhe made Default, by which Ro. took the entire Tenancy abſque hoc that Dioneſe any thing had, and the Demandant ſaid that they held in Common &c. And upon this to Iſſue, and after Dioneſe died, by which the Opinion was that the Writ ſhould abate notwithſtanding that each was eſtopp'd againſt the other. And therefore the Demandant waived his Writ. Thel. Dig. 180. lib. 12. cap. 2. S. 12. cites Trin. 7 E. 3. 325.

7. In Writ by ſeveral Præcipes, the Death of the Tenant in one Præcipe ſhall not abate all the Writ. Thel. Dig. 180. lib. 12. cap. 2. S. 14. cites Paſch. 9 E. 3. 449. Brief, 945. 729. 12 H. 6. 2.

8. In *Writ againſt two*, if the *one Diſclaims* the Writ ſhall not abate by his Death, quod ſuit conceſſum. Thel. Dig. 180. lib. 12. cap. 2. S. 16. cites Paſch. 10 E. 3. 509. and Mich. 13 E. 3. Brief 678. and Mich. 14 E. 3. Procedendo 4.

9. In *Writ of Right or* of *Eſcheat by the King againſt ſeveral*, the Writ ſhall not abate by the *Death of one* of them. Nor in *Scire facias* ſued *out of a Petition ſued to the King.* Thel. Dig. 181. lib. 12. cap. 2. S. 18. cites Paſch. 13 E. 3. Br. 260. and 7 H. 4. 33. and ſays ſee Trin. 27 E. 3. 83. quære.

10. In *Writ of Meſne againſt two Parceners*, they *were Forejudg'd*, and after the one of them and the Heir of the other join'd in Writ of Error, and aſſign'd for Error that the *one of the Parceners was dead before the Judgment* given in the Writ of Meſne. And adjudg'd a good Plea to reverſe the Judgment, notwithſtanding that the Survivor might have pleaded the Death of her Siſter in the Writ of Meſne; for Death ſhall abate the Writ without Plea. Thel. Dig. 181. lib. 12. cap. 2. S. 21. cites 19 Aſſ. 8. and ſays ſee 20 H. 6. 2. agreeing, and 18 E. 4. 20. and Trin. 2 H. 5. 9. agreeing, that the Writ by Death ſhall abate immediately.

11. Death *of Diſſeiſor* in Aſſiſe of Land ſhall not abate the Writ *if* there is *another Diſſeiſor and Tenant alive.* Thel. Dig. 180. lib. 12. cap. 2. S. 4. cites 23 Aſſ. 10.

Regularly *Judicial Writs* ſhall not abate by the Death of one of the Plaintiffs, per Bridgman Ch. J. and Rawlins.

12. Aſſiſe *by Baron and Feme who recover'd* the Land and Damages, and *after the Year they* ſued *Scire facias againſt the Tertenants* to have Execution of the Damages, and one came and ſaid that the Baron is dead, Judgment of the Writ; and upon Nient dedire the Writ abated. And ſo ſee that *Judicial Writ, in which a Man has Day to anſwer*, may abate by Plea. Br. Brief, pl. 293. cites 28 Aſſ. 45. in delivering the Opinion of the Court. Cart. 194. Paſch. 19 Car. 2. C. B. Law v. Tothill

13. In *Debt againſt 2 upon a joint Contract*, the *one was outlaw'd*, and the *other pleaded that he who was outlaw'd died before the Outlawry* pronounc'd; and adjudg'd a good Plea, and that the Writ ſhould abate. Thel. Dig. 181. lib. 12. cap. 2. S. 39. cites Trin. 40 E. 3. 26.

Three recovered againſt J. N. and he

14. In Writ of *Error againſt the Heir of the Party and* againſt *the Tenant*, the *Heir died pending the Writ*, and yet the Writ ſtood againſt the Tenant, and Scire facias granted againſt the Heir of the Heir. Thel. Dig.

Dig. 181. lib. 12. cap. 2. S. 25. cites 42 Aſſ. 22. in Fine. And 44 E. 3. Brief 584. agreeing. And 44 E. brought *Writ of Error and Scire Facias* thereupon, and the Sheriff return'd the one dead, and the other two warn'd, and yet the Writ good Per Keble and Wood; for the Plaintiff is not to recover any thing, but to be diſcharg'd of the firſt Judgment: But Vaviſor contra; for he is to be reſtor'd, and Reſtitution cannot be awarded againſt a dead Perſon. Br. Brief, pl 310 cites 3 H. 7 1.——Thel. Dig. 182 lib. 12. cap. 2. S 42. cites S. C. and Trin. 14 H 7. Fol. ultimo, That in Writ of *Error of a Judgment* given *in a perſonal Action* brought *againſt* 3 who were *Plaintiffs in the firſt Action*, the Death of the one ſhall abate the Writ; Per Opinionem.

A *Writ of Error* was brought *againſt* 2 *upon a Recovery in a Præcipe quod reddat*, and *one* of them *died*; the Queſtion was, if it ſhould abate? It was inſiſted, that it ſhould not, becauſe it is no more than a Commiſſion to examine the Record, and the Party ſhall recover nothing thereby; and it is not like a Præcipe. But the Juſtices ſaid, that if the Recovery were in a *real Action*, as here it was, the Writ ſhall abate; for the Judgment is, that he ſhall be reſtored to the Land. But if Error be brought on a Recovery in a *perſonal Action*, it is otherwiſe; and that ſo is 3 H. 7. 1. Godb. 66. pl. 79. Mich. 28 & 29 Eliz. B. R. Anon.——Godb. 68. pl. 82. Mich. 28 & 29 Eliz. B. R. Sir Edward Hobby's Caſe, Same Difference taken; and Gawdy and Clench Juſtices bid them bring a new Writ of Error; for that is the ſureſt Way.

Error was brought *upon a Judgment* in B. R. and pending the Writ one of the Parties died; Per Cur. The Writ ſhall abate. Trin. 30 Eliz. Goldsb. 98. pl. 18. Trin. 30 Eliz. Anon.

In a *Writ of Error*, if the *Defendant dies*, the Writ is not abated; but it is otherwiſe if the *Plaintiff dies*. And the Secondary inform'd the Court of the Caſe of Thynn and Corie, where the Defendant in Error died, and a Scire facias ad audiendum Errores went againſt the Executors. Vent. 34. Trin. 21 Car. 2. B. R. Anon.

15. *Ejectione firmæ* ſhall not abate by the Death of one of the Defendants. Thel. Dig. 181. lib. 12. cap. 2. S. 27. cites Trin. 44 E. 3. 22. In Ejectione firmæ againſt 2, after Verdict for the Plaintiff, and before Judgment one of the Defendants died; and adjudged that the Writ ſhould ſtand good againſt the Survivor. Goldsb. 80. pl. 16. Hill. 30 Eliz. Clayton v. Lawſell. ——In *Ejectment, between the firſt Day of Aſſize and Verdict* the *Defendant died*; and upon Affidavit of this Fact the Defendant's Counſel moved to ſtay Execution; and ſaid this was not helped by 17 Car. 2. and quoted 1 Sid. 131. Hard. 51. where the like Motion had been granted, and as often denied; but Per Cur. Let things ſtay till Notice of Motion to Plaintiff; but after the Court held the Judgment well entered. 12 Mod. 241. Mich. 10 W. 3. B. R. Robertſon v. Moor.

16. In *Scire facias of Damages recovered in Aſſiſe* againſt 2, if the one dies the Writ ſhall not abate, if he be only *Diſſeiſor and not Tenant*. Thel. Dig. 181. lib. 12. cap. 2. S. 28. cites Mich. 47 E. 3. 7.

17. In *Writ of Ward againſt* 2, the Sheriff *returned that the one was dead*. Thel. Dig. 181. lib. 12. cap. 2. S. 31. cites 50 E. 3. 7. Quære. But *Ejectment of Ward, and Raviſhment* of Ward, ſhall not abate by the Death of one of the Defendants. Thel. Dig. 181. lib. 12. cap. 2. S. 31. cites Mich. 12 H. 4. 10.

18. In Debt againſt 2, at the Capias the Sheriff returned Cepi Corpora of both &c. yet the one of them was received to ſay that the other was dead, and abate the Writ notwithſtanding the Return. Thel. Dig. 181. lib. 12. cap. 2. S. 30. cites Hill. 50 E. 3. 7.

19. In *Audita Querela againſt* 2, the *one* of them *died after Iſſue joined, and the Niſi Prius ſued*; by which it was held by the Court, that the Original ſhould not abate, but that he ought to ſue a new Venire facias. Thel. Dig 181. lib. 12. cap. 2. S. 32. cites Hill. 11 R. 2. Brief 638.

20. *Detinue of Charters againſt* 2 *Executors*; the *one died* pending the Writ, and all the Writ abated. Quod nota; for *otherwiſe in* Writ of *Treſpaſs*. Br. Brief, pl. 96. cites 2 H. 4. 18. Br. Executors, pl. 125. cites S. C. ——S. P. Thel. Dig. 181. lib. 12. cap. 2. S. 34. cites Paſch. 2 H. 4. 25.——*So* in Debt againſt Executors, the *one died pending the Writ*; and by the Opinion of the Court the Writ ſhall abate againſt all. And Littleton prayed Judgment that it ſhould abate, to the Intent to have a new Writ againſt the others, and had it; for to his Intent the Writ is abated in Law by the Death of the one, but is not abated in Fact till Judgment be given. Br. Brief, pl. 232. cites 37 H. 6. 16.——Thel. Dig. 181. lib. 12. cap. 2. S. 34. cites S. C.—— In Debt *againſt three Executors, if one dies* pending the Writ, the Writ ſhall abate; but on Surmiſe of this by Plaintiff's Counſel, a new Writ was granted by Journey's Accounts. Le. 44. pl. 57. Mich. 28 & 29 Eliz. C. B. Knight's Caſe.

21. In *Treſpaſs againſt ſeveral*, who *pleaded Not guilty*, notwithſtanding that *one* of them *died after Verdict* found againſt them, and before Judgment, yet the Writ did not abate, unleſs againſt the deceaſed, and the Plaintiff recover'd againſt the others. Thel. Dig. 181. lib. 12. cap. 2. S. 36. cites Trin. 2 H. 6. 12.

Br. Treſpaſs, pl. 7. cites S. C. but ſays, that 3 H. 4. 5. and 21 H. 6. 22. there is a *Diverſity* where it is by *joint* Venire facias *and* where by *ſeveral Venire* facias's.——In Treſpaſs *againſt* 4 in B. R. by one, and the *one died* meſne *between the Niſi Prius and the Day in Bank*; and therefore the Plaintiff prayed Judgment againſt the others; but Markham ſaid he might have *Judgment againſt all*, for none can have Error but the Executors of the deceaſed, and not the other Defendants: And ſo it ſeems, that he may have Judgment againſt the others, for the Writ *ſhall not abate but againſt him who is dead*, and not againſt the others. Br. Brief, pl 357. cites 5 E. 4. 6. 7.

In *Treſpaſs &c. againſt* 4 Defendants, *one* of them *died before the Verdict*, and the *Jury found* them *all guilty*, and aſſeſs'd Damages &c. The Court was moved, that the Plaintiff might have Judgment againſt the other 3. Roll Ch. J. ſaid, that upon his *relinquiſhing the Damages* as to him who was dead, he may have Judgment againſt the reſt. Sty. 299. Mich. 1651. Preſton v. Mortlock.

So in Treſpaſs upon 5 R. 2. *againſt* 3, they were at Iſſue, and *after Iſſue one died*, and notwithſtanding this, *Diſtringas was awarded againſt all*; which Matter was after alleg'd in Arreſt of Judgment, and that the Writ ſhould abate; & non allocatur, for tho' it was ill againſt the dead Perſon, yet it was good againſt the others. Br. Brief, pl. 314. cites 4 H. 7. 7.—Br. Repleader, pl. 29. cites S. C.

In *Treſpaſs* againſt 2, and *after Iſſue* joined, *and Puis darrein continuance*, *one* of them *dies*, the Plaintiff may, *at the Trial*, *get his Default recorded*, and proceed to Trial, and have a Verdict againſt the other; and he may *before Judgment* come and *ſuggeſt the Death* of the Defendant who died, and have Judgment againſt the other. And taking the Inqueſt againſt one, where there are two Defendants, and one of them dies Puis darrein continuance cannot be Error, if the Default of the other be recorded, and his Death be ſuggeſted before Judgment; and one cannot plead Death of a Party in Abatement Puis darrein continuance; Per Holt Ch. J. 12 Mod. 668. Hill. 13 W. 3. B. R. Anon.

* Br. Brief, pl. 160. cites 7 H. 6. 21. S. C. and P. For Proceſs cannot be enter'd againſt a dead Perſon, nor it cannot be continued againſt one where it was againſt two at the firſt. Br. Brief, pl. 160. cites 7 H. 6. 21.

22. And if the *one dies after the Niſi Prius granted*, *and before the Inqueſt taken*, the Writ ſhall ſtand, and a new Venire Facias ſhall be awarded. Thel. Dig. 181. lib. 12. cap. 2. S. 36. cites Paſch. * 7 H. 6. 23. 3 H. 7. 5. 10 H. 6. 10. 4 H. 7. 7.

But in ſuch Caſe the Proceſs againſt the Inqueſt was continued and taken, and held. Thel. Dig. 181. lib. 12. cap. 2. S. 36. cites 4 H. 7. 7.

23. In Detinue, if the Defendant dies after the Garniſhment, the Writ ſhall abate. Thel. Dig. 181. lib. 12. cap. 2. S. 37. cites Paſch. 21 H. 9. 39.

24. In Writ of *Forcible Entry againſt* 2, the *one* had *made Default after the Declaration* and Appearance, and *the other was at Iſſue*, and after the Niſi Prius granted the Plaintiff ſaid that *he who was at Iſſue died after the laſt Day* &c. and the Attorney of the Defendant tender'd to aver the Life of his Maſter, and was not received, but the Plaintiff pray'd Writ to inquire of the Damages againſt the other. Thel. Dig. 181. lib. 12. cap. 2. S. 38. cites Hill. 31 H. 6. 15.

Br Brief, pl. 489. cites S. C.—— Thel. Dig. 181. lib. 12. cap. 2. S. 27. ſays it was touch'd Trin 44 E 3. 22. that Writ of Conſpiracy againſt two ſhall abate by the Death of one of them; but cites the Caſe 18 E. 4. 1. above contra; and ſays, See Mich. 22 R. 2. Br. 888. Quære.

25. *Conſpiracy* againſt 2; the one pleaded that his Companion is dead pending the Writ, and no Plea to the Writ. Per Cur. The Reaſon ſeems to be, becauſe it may be found that the Defendant, and he who is dead, conſpired. Br. Brief, pl. 376. cites 18 E. 4. 1.

26. In *Treſpaſs againſt* 2, the Plaintiff at the Aſſiſes ſaid, that *one of the Defendants died after the laſt Continuance*, and prayed the Juſtices to proceed to take the Inqueſt againſt the Survivor only, and ſo they did; and the Plaintiff had Judgment. D. 175. a. pl. 24. cites Mich. 9 H. 7. Rot. 292.

27. The *Death of the Defendant in Writ of Warrantia Chartæ* ſhall not abate the Writ of Warrantia Chartæ, which is ſo expreſs'd, that if the Warrantee dies pending the Plea, by this the Writ ſhall not be quaſh'd, but

but his Heir ought to be re-ſummon'd to anſwer to the ſame Writ. *Br.* Brief, pl. 409 cites the Regiſter, fol. 158.

28. In *Attaint* between H. and J. in B. R. and pending the Writ J. died. The Writ ſhould not abate by Reaſon of the Stat. of 23 H. 8. [cap. 3.] upon which this Attaint was brought. D. 129. b. pl. 65. Paſch. 2 & 3 Ph. & Ma. Heydon v. Ibgrave.

29. In *Replevin*, after Verdict for the Plaintiff, the Defendant's Counſel, as Amicus Curiæ, alleg'd *that one of the Defendants died after the laſt Continuance*. The Court, præter Brown J. after adviſing a long time, held that the Writ ſhall not abate. D. 175. pl. 24. Mich. 1 & 2 Eliz. Sackvill's Caſe. In Replevin againſt 2, they were at Iſſue, and afterwards *one* of them *died*. The other moved that the Writ might abate; but the Opinion of the Court was that it ſhould not abate, but ſtand good againſt him; and Walmſley ſaid he had known it twice ſo adjudg'd in his Time. Cro. E. 574. pl. 17. Trin. 39 Eliz. C. B Wythers v. Rooks & Smith.

30. In a Writ of *Entry ſur Diſſeiſin* againſt Sir H. R. *Tenant for Life*, who *made Default* after Default. He in *Reverſion was received*, and the *Jury found againſt the Demandant*; but after the Trial, and *before the Day in Bank, the Tenant for Life died*. Afterwards the Appearances of the Demandant and Tenant by Receipt, by their Attornies, were recorded; and the Demandant pleaded the Death of the Tenant for Life, and pray'd that the Writ might abate, and that Judgment might not be enter'd againſt him; but the Tenant by Receipt moved, that upon the Return of the Poſtea the Judgment might be enter'd, and would not anſwer to the Death. The Court doubted what to do, and would adviſe. D. 258. b. pl. 17. Hill. 9 Eliz. Sir Humphrey Ratcliff's Caſe, alias, the Earl of Suſſex's Caſe. Ibid Marg. ſays, it ſeems that by his Death the Writ ſhall abate, becauſe no Judgment can be given againſt a dead Perſon, and cites 21 H. 6. 11. 9 H. 7. 23. 20 H. 7. 10. and ſays that in *Præcipe quod reddat againſt Baron and Feme*, the *Baron made Default*, and the *Feme was received, and traverſed the Action, and* it was *found againſt her*; and after the Feme ſaid, that her *Baron died after the Verdict*; and yet the Plaintiff had Judgment to recover. Cites Mich. 2 E. 3. 88 Fitzh. Judgment 193. and Cutter 9 H. 4. 1. that one died after Verdict, and yet Judgment was given for the Plaintiff, who was dead; but ſays, ſee in Waſte that the Writ was abated Mich 34 E 1. Fitzh. Brief 854. and ſays, ſee Fitzh. Brief 202. and Quare Imp. 71. and Monſtrans 7.——Le. 187. pl. 264. Trin. 31 Eliz. in Jſlep's Caſe, cites it as lately adjudg'd in Derick James's Caſe, who died the Day after the Verdict, and yet Judgment was not ſtaid; becauſe the Court after Verdict cannot examine Surmiſes, and they have not a Day in Court to plead.

31. In Account, if the *Defendant* is *awarded to Account, and does* account, *and is found in Arrears, and dies*, the Writ ſhall not abate, but the Executors ſhall be charged; per Manwood J. Le. 263. pl. 352. 19 Eliz. in C. B. Anon. 3 Le. 68. pl. 103. Mich. 20 Eliz. C. B. S. C. in the ſame Words——

If the *Defendant* in Account *dies before the ſecond Judgment*, the Writ ſhall not abate. Noy 146. in Caſe of Cutter & Ux' v. Barber & Ux'——*But* if the *Plaintiff* in Action of Account *dies before the ſecond Judgment*, the Writ ſhall abate. Brownl. 25. Anon——But Cro. J. 356. Mich. 12 Jac. B. R. Metcalf v. Wood is, that the Death of any of the Parties in Account, before the 2d Judgment, abates the Writ.

If *two be adjudg'd to Account*, and Proceſs iſſues, and *one dies*, the other ſhall account alone. Brownl. 25. Anon.

32. *Aſſumpſit againſt* 2. The Plaintiff had a Verdict, and *before the Day in Bank one of the Defendants died*; and after Judgment the *ſurviving Defendant brought a Writ of Error*, and it was clearly agreed that the Death of one of the Parties did abate the Writ, and the Judgment was reverſed. Cro. E. 105. pl. 19. Trin. 30 Eliz. B. R. Meggot v. Broughton. 2 Le. 54. pl. 77. Mich. 29 Eliz. B. R. Meggot and Baun's Caſe, S. C.

And it was ſaid that the Caſe is not like the Caſe of an Action of Treſpaſs; for every Treſpaſs done by many is ſeveral by each of them; but every Aſſumpſit is joint, and not ſeveral.

24. Death

33. Death of one Defendant in *Debt* abates the Whole, but not in *Treſpaſs*. Noy 72. in the Sheriff of Nottingham's Caſe.

Caſe &c. againſt P. and B. Sheriffs of London,

34. *Eſcape againſt two Sheriffs, one died*, the Court gave no Opinion. Noy 72. Sheriff of Nottingham's Caſe.

for an Eſcape on meſne Proceſs. After Trial by Niſi Prius, and before the Day in Bank, B. died; and this was ſuggeſted by Affidavit, without entring it on the Roll, becauſe no Roll is made till after the Term, and then it would be too late. It was moved that the Suit ought to abate, as in an Action of Debt, Accompt, or Caſe againſt 2 upon a joint Contract, or againſt Executors, where one dies the Action falls; but it was anſwer'd, that an Eſcape is in Nature of a Treſpaſs and a Tort, and committed by both and each of them; for they are diſtinct Perſons, tho' but one Officer; and 'tis not like a Contract which is intire, and cannot be ſever'd in Judgment, but like Treſpaſs againſt Husband and Wife, which, tho' but one Perſon in Law, yet if the Husband dies the Suit ſhall proceed againſt the Wife. Hard. 161. Mich. 1659. in the Exchequer. Harris v. Phillips & Biggs.

But in Action *againſt two Sheriffs for inſufficient Security on* 23 *H.* 6. by them taken, if *one dies* it does not abate the whole Writ. Noy 72. Paſch. 2 Jac. C. B. Mounſon v. Sheriff of Lincoln.

Cro. C. 5-4. pl. 16. The King v. Sir John Dryden, Gybbs, & al'. S. C. and S. P. agreed by all the Court; but adjornatur. —Ibid. 583. pl. 10. Paſch. 16 Car. B. R. the S. C. and no one arguing for the King, the Court all retain'd their former Opinion that the Writ ſhould abate, and that Judgment ſhould be enter'd accordingly.

35. In a Writ of *Right of Advowſon againſt* 3 Defendants, a *Special Verdict was found*; and afterwards, and *before Judgment, one of the Defendants died*; and this was alleg'd on Record in Abatement of the Writ, and that the Defendants were Coparceners. The Attorney-General alleged that they were Jointenants, and not Coparceners. Sed per Curiam, whether *Coparceners or Jointenants*, the Writ ſhall abate. But upon Motion of the Attorney-General, Day was given to ſpeak to it the next Term. W. Jones 452. pl. 5. Hill. 18 Car. B. R. The King v. Kingſmill & al'.

36. If a Writ of *Covenant* be brought *againſt three*, and *one* of them *dies*, the Writ is abated only as to him, and abateable as to the reſt; per Roll Ch. J. But Latch inſiſted ſtrongly that it is abated to all. The Reporter makes a Quære. Sty. 421. Trin. 1654. Jones v. Graves.

37. Where Action is brought againſt two, and one dies, the Writ ſhall abate, tho' they are Executors; but *on Tort* not. Sid. 259. Trin. 17 Car. 2. B. R. in Caſe of Wirrall v. Brand.

38. Six Defendants all pleaded jointly Not Guilty. A Venire Facias was awarded, and a Diſtringas with a Niſi Prius; but *before the Day of Niſi one died*. The Plaintiff ought to have made a Special Entry of the Death of ſuch Defendant, with *Nihil ulterius verſus eum fiat, and then take Judgment only againſt the Survivors*, and not againſt him who was dead. Carth. 149. Trin. 2 W. & M. B. R. Woolridge v. Cloberry.

40. If *one of the Defendants dies* pending the Writ, this ſhall not abate the Action againſt the other Defendant; becauſe this is the *Act of God*, &c. and no Fault in the Plaintiff. G. Hiſt. of C. B. 200.

(N. a) Where Baron and Feme are Parties. In what Caſes the Writ ſhall abate by the Death of either.

In Treſpaſs againſt Baron and Feme, after *Verdict for the Plaintiff*, and *between the Day of Niſi Prius and Day in Bank, the Husband died.*

1. IN Writ *againſt Baron and Feme*, if the *Baron dies after Verdict* in Pais, at the Niſi Prius, *and before the Day in Bank*, the Writ ſhall abate, inaſmuch as the Name of the Feme is chang'd. Thel. Dig. 180. lib. 12. cap. 2. S. 10. cites Mich. 6 E. 3. 295. It was held by all the Court, That the

the Death of Plaintiff or Defendant after Verdict by Nisi Prius, and before the Day in Bank, shall abate the Writ; and tho' Baron and Feme be but one Person in Law, yet on Death of the Baron before the Day in Bank, no Judgment may be enter'd, and if enter'd it is Error: But because this Action is personal, the Court doubted; for if the Feme had been dead and the Baron survivy'd, Judgment should have been enter'd against him; and the same Reason is that she surviving should be chargeable. Sed adjornatur. Cro. C. 509. pl. 1. Trin. 14 Car. Anon.

2. *Assise against Baron and Feme, and others.* The *Baron died.* The Feme pleaded this to the Writ. The Writ shall abate against the Feme only, and not against all, if Disseisor and Tenant remain alive. Br. Brief, pl. 268. cites 11 Ass. 15. Thel. Dig. 180. lib 12. cap 2. S. 17. cites S. C. and says that so seems to agree 27 Ass. 45 where in Assise against Baron and Feme, and a 3d Person, the Baron died; but it was found that the 3d Person was sole Tenant and not Disseisor, but that the Baron and Feme were Disseisors; by which the clear Opinion was that all the Writ should abate. And so agrees 28 Ass. 37. because the Feme of the deceased Baron had lost the Name of Feme.——*And in Trespass* against Baron and Feme, and others, the Writ shall abate only against the Feme by the Death of the Baron. Thel. Dig. 181. lib 12. cap. 2. S. 17. cites Mich. 11 H. 7. 6. and says see Postea, 50 E. 3.——But Br. Brief, pl. 291. cites 27 Ass. 45. That in Assise *against Baron and Feme*, if the *Baron dies pending the Writ*, the Writ shall abate.

3. In *Quare Impedit* the Writ was abated by the Death of one of the Plaintiffs. Thel. Dig. 179. lib. 12 cap. 1. S. 7. cites Hill. 17 E. 3. 11. the which Writ was brought *by* the *Baron and Feme and a third Person*, and the *Feme died.* A Qua. Imp. was brought by Baron and Feme and a third Person, the Feme died and the *Baron was intitled to be Tenant by the Courtesy*, yet the Writ was abated. D. 279. b, pl. 8. cites Hill. 17 E. tit. Brief in Fitzh. 665.

4. In *Writ against Baron and Feme*, the Feme came and *pleaded as Party and said that her Baron was dead*, to which it was *replied that pending the Writ, Divorce was* made between her and her Baron, and *that she is now Covert of another*; and yet the Writ was abated. Thel. Dig. 181. lib. 12. cap. 2. S. 22. cites Pasch. 25 E. 3. 39.

5. In *Præcipe* quod reddat *against Baron and Feme*, at the Grand Cape return'd against them, the Baron came and said that the *Feme was dead before the Writ purchased*, sed non allocatur; because the Writ was served and her Death not return'd by the Sheriff, but Seisin of the Land was awarded. Thel. Dig. 181. lib. 12. cap. 2 S. 23. cites Mich. 26 E. 3. 68.

6. In *Attaint against Baron and Feme and a third Person by one Summons, and against another by another Summons*, the Feme and the third Person pleaded *that the Baron was dead* &c. And the Opinion of the Court was that the Writ should abate as to this Summons. But *otherwise* it is *in Writ of Error*, where it is not requisite that the Tenant be named, but he who was Party to the Judgment. Thel. Dig. 181. lib. 12. cap. 2. S. 24. cites Mich. 28 E. 3. 9.

7. In *Appeal of Mayhem against Baron and Feme and a third* Person, the Sheriff *return'd that the Baron was dead*, upon which it was held that the Feme would not be put to answer upon this Writ; but the Plaintiff continued his Process against the third Person. Thel. Dig. 181. lib. 12. cap. 2. S. 29. cites Hill. 53 E. 3. 1.

8. In Assise of *Darrein Presentment against Baron and Feme*, the Sheriff return'd that the *Feme was dead*, and yet it was held that the Writ should not abate. Thel. Dig. 181. lib. 12. cap. 2. S. 33. cites Pasch. 21 R. 2. Brief 935.

9. If the *Baron and Feme bring Action*, and the *Baron dies pending the Writ*, there the Writ shall abate; for now the Feme is not his Wife. Br. Brief, pl. 415. cites 32 H. 6. 28. 29.

10. In Writ *against* Baron and Feme, *she pleaded that her Baron died after the last Continuance*, and Issue taken that he did not die after the last Continuance, and held a good Issue, and that she could *not* plead such Death after Continuance taken *as Party but as Amicus Curiæ.* Thel. Dig.

182. lib. 12. cap. 2. S. 40. cites Mich. 38 H. 6. 9. but says see 18 E. 4. contra, quære. And see 14 H. 6. 9.

7. If an Action of *Waſt* be brought by *Baron and Feme*, in Remainder in eſpecial Tail, and hanging the Writ, the Wife dies without Iſſue, the Writ ſhall abate; becauſe every kind of Action of Waſte muſt be ad Exhæredationem. Co. Litt. 285.

Hutt. 37. Trin. 17 Jac. S. C. by the Name of Whittingtoll's Caſe, per tot. Cur. the Writ ſhall abate, for the Wife cannot recover as a Feme ſole, and tho' the Writ be *Judicial*, yet 'tis

12. *N. obtained Judgment and made J. his Executrix and died*, and *before Execution J. died inteſtate*, whereupon *S. adminiſtred to the Goods of N. and took to Huſband W.* and they *both brought ſeveral Scire facias's againſt ſeveral Tertenants of the Defendant, ſome* of whom *appeared and pleaded, and ſome made Default*, and *Judgment paſſed againſt them and* Writs of *Elegit awarded, but before any Execution thereon W. the Husband died.* The Queſtion was, whether all the Writs of Scire facias, as well thoſe againſt the Tertenants who appear'd and pleaded, as againſt thoſe who had Judgment againſt them, ſhould abate or not? But hereof the Court would adviſe. Hob. 287. pl. 374. Whittingham & Ux. v. Tertenants of Lord Darby.

in Nature of an Original.——If Husband and Wife ſue a Scire Facias and the Husband dies, the Scire Facias ſhall abate; for it is no more a Judicial Writ, but as it were an Original to revive a Judgment. Brownl. 64.——The Death of one of the Parties *in an Original Writ* abates the Writ; but otherwiſe in a *Judgment*. Brownl. 64.

13. In an *Action againſt Baron and Feme as Daughter and Heir to W.* and pending the Writ the *Baron died*; it was moved that the Writ ſhould not abate becauſe brought againſt the Feme as Daughter and Heir when the Land is Aſſets, in which the Baron had nothing. And Hobart Ch. Juſt. was of that Opinion, but Day was given over. Winch. 102. Mich. 22 Jac. C. B. Holman v. Sir Tho. Pope and Eliz. his Wife.

(O. a) Where Corporations are Parties. In what Caſes the Writ ſhall abate by the Death of one of them.

But in Aſſiſe againſt an Abbot, the Tenant pleaded that this Writ was purchaſed in the Time of his Predeceſſor, and that he found his Church ſeiſed &c. And adjudg'd no Plea. Thel. Dig. 180. lib. 12. cap. 2. S. 3. cites 13 E. 1. Br. 869.

1. IN Writ againſt an Abbot, it was pleaded that he was depoſed pending the Writ, ſed non allocatur. And after it was pleaded by the Succeſſor, that he, who was depoſed, died, upon which the Writ abated by Award. Thel. Dig. 180. lib. 12. cap. 2. S. 2. cites 30 E. 1. Br. 885.

2. It is held in Writ of Entry ad terminum qui præteriit againſt Dean and Chapter, that the Writ ſhall abate by the Death of the Dean. Thel. Dig. 180. lib. 12. cap. 2. S. 8. cites Paſch. 5 E. 3. 148. and 21 E. 4. 78. and ſays ſee 7 E. 3. 320. in Quare Impedit. And that Aſſiſe of Nuſance abated by the Death of the Dean. 41 E. 3. 23.

3. In Debt by a Dean and Chapter, the Defendant was outlaw'd, who had his Charter of Pardon, and ſued Scire facias &c. and at the Day of the Return the Defendant ſaid that the Dean was Dead, which was not denied, by which the Charter was allow'd. Thel. Dig. 179. lib. 12. cap. 1. S. 10. cites Mich. 11 H. 6. 1.

4. Writ by *Mayor and Commonalty* ſhall not abate by Death of the Mayor. Dig. 179. lib. 12. cap. 1. S. 15. cites Trin. 12 E. 4. 10. and 18 E. 4. 9.

5. Where

5. Where an Action is brought *by Dean and Chapter*, and *not by Name of Baptiſm*, the *Dean dies*, and *another is choſe before the Day in Court*, the Writ ſhall not abate. Contra if he was named by Name of Baptiſm, or if he was not elected by the Day in Court; and here it appears that the Writ is good without Name of Baptiſm. Br. Brief, pl. 389. cites 21 E. 4. 16. S. P. Thel. Dig. 179 cap. 1. S. 15. cites 21 E. 4. 18. 19. but ſays the Writ ſhall abate by the Death of the Abbot.

(P. a) By the Death of one who is not Party to the Writ.

1. IF Aſſiſe be brought, and the Tenant brings Warrantia Chartæ againſt another, the Writ of Warrantia Chartæ ſhall not abate by the Death of the Plaintiff in the Aſſiſe. Thel. Dig. 184. lib. 12. cap. 10. S. 1. cites Mich. 32 E. 1. Brief 876.

2. Writ of Meſne ſhall not abate by the Death of the Lord Paramount pending the Writ. Thel. Dig. 184. lib. 12. cap. 10. S. 11. cites Mich. 32 E. 1. Brief 876. and Trin. 13 E. 3. Meſne 12. and 4 H. 6. 28. But if Fore-judgment be made, then it ſhall abate; for a Man ſhall not be made attendant to a dead Perſon. Ibid cites Mich. 32 E. 1. Brief 876. and Trin. 13 E. 3. Meſne 12. and 4 H. 6. 28. and Trin. 21 E. 3. Meſne 48. but cites Mich. 10 H. 6. 27. and 13 H. 6. Meſne 3. where in Writ of Meſne 3 Men were ſuppoſed to be Lords Paramount, the Writ was not abated by the Death of one of them, notwithſtanding that Fore-judgment was made; for the Judgment ſhall be no other than that the Meſne ſhall be forejudg'd, and that the Tenant ſhall be attendant to the Chief Lord, viz. to thoſe who are alive.

3. Writ of Ward of the Land ſhall not abate by the Death of the Heir pending the Writ. Thel. Dig. 184. lib. 12. cap. 10. S. 2. cites Mich. 34 E. 1. Brief 853. and ſays, See 46 E. 3. Brief 776. in Writ of Ward of the Land.

4. In Conſimili Caſu of the Alienation of one A. who held for Term of Life, the Writ ſhall not abate by the Death of A. after the Writ purchaſed. Thel. Dig. 184. lib. 12. cap. 10. S. 3. cites Trin. 6 E. 2. Brief 807.

5. Where Writ is brought againſt Tenant for Term de auter Vie, if Ceſty que Vie dies pending the Writ, and he in Reverſion enters, the Writ ſhall abate, by Shard, which Parning denied. Thel. Dig. 184. lib. 12. cap. 10. S 4. cites Trin. 5 E. 3. 203. and ſays, See 39 E. 3. 36. 46 E. 3. 29. 9 E. 4. 53. and 15 E. 4. 5. But before the Entry of him in Reverſion, it ſhall not abate; Per Opinionem. Ibid. cites 18 E. 4. 26.——Writ of Waſte againſt Tenant for Term de auter Vie, ſhall not abate by the Death of Ceſty que Vie. Thel. Dig. 184. lib. 12. cap. 10. S. 9. cites Hill. 9 E. 4. 53.

6. *Præcipe quod reddat* was brought *againſt Tenant pur auter Vie*, who ſaid that pending the Writ *Ceſty que Vie* died, and becauſe the Demandant could not deny it, therefore by Award the Writ was abated. Quod nota. Br. Brief, pl. 380. cites 24 E. 3. 5. The Dutcheſs of Lancaſter's Caſe.——But Brooke ſays quod nota, againſt the Opinion of the Court 18 E. 4. 25. But if Leſſor brings *Waſte againſt Tenant pur auter Vie*, and pending the Writ *Ceſty que Vie dies*, the Writ ſhall not abate; becauſe no other Perſon can be ſued for Damages but the Survivor. Arg. 3 Mod. 249. Mich. 4 Jac. 2. B. R. in Caſe of Carel v. Saltonſtall.—Co. Litt. 285.——Br. Brief, pl. 192. (bis) cites 15 E. 4 4. S. P.

7. Where the King had leas'd to B. for his Life, and B. leas'd his Eſtate to R. Writ brought againſt R. was abated by the Death of B. Thel. Dig. 184. lib. 12. cap. 10. S. 5. cites Hill. 24 E. 3. 24. 25.

8. If

8. If *Writ* is brought *againſt J. S. the younger*, and *pending the Writ J. S. the elder dies, and another J. S. the younger is born*, yet the Writ remains good. Br. Brief, pl. 291. cites 27 Aſſ. 45.

9. Writ of Raviſhment of Ward by a Guardian in Socage was not abated by the Death of the Infant. Thel. Dig. 184. lib. 12. cap. 10. S. 6. cites Hill. 10 R. 2. Brief 932. But ſays that Paſch. 2 H. 4 19. Writ of Ward was abated by the Death of the Infant, as the Reporter heard, but he was not preſent. Quære. And that ſo it was held in Writ of Ward of the Body, 9 E. 4. 53. but not in Raviſhment of Ward.

10. Jo. leas'd to B. for his Life, Remainder to Ro. and his Feme, and the Heirs of their Bodies &c. who had Iſſue, and after the Feme died, and Ro. brought Writ of Waſte againſt B. pending which Writ the Iſſue died &c. And the Opinion of the Court was, that the Writ ſhould abate by the Death of the Iſſue, inaſmuch as Ro. now is only Tenant in Tail after Poſſibility of Iſſue extinct. Thel. Dig. 184. lib. 12. cap. 10. S. 7. cites 2 H. 4. 20. 22. 3 H. 4 5.

11. The *Garniſhee in Detinue*, nor the *Vouchee in a Præcipe quod reddat*, are not Parties to the Writ; and therefore their Death could not abate the Writ, but the Plaintiff or Demandant might have Reſummons againſt the Tenant or Defendant. Br. Brief, pl. 15. cites 9 H. 6. 36.

Br. Brief, pl. 175. cites S. C. That the whole Court was againſt Markham, that it ſhould not abate by the Death of the one; for *it is only Meſne Proceſs.*

12. In *Detinue* the *Defendant prayed Garniſhment againſt* 2, and had it, and the *Scire facias return'd againſt the one warn'd, and the other dead.* Markham ſaid the Scire facias ſhall abate now, for it is in Lieu of the Original; & non allocatur; but *alias Scire Facias* againſt the Executors *& Idem Dies* given to him who was return'd warn'd. Quod nota, that it was not abated. Br. Scire facias, pl. 111. cites 19 H. 6. 9.

Br. Brief, pl. 184. cites S. C.—— Ibid. pl. 437. cites S. C.

13. Second Deliverance *by T. P. againſt S. who made Avowry upon the ſaid T.* and *his Feme*, by which *T. pray'd Aid of his Feme, and had it*, and Proceſs; and *ſhe came upon the Proceſs, and join'd*, by which they were *at Iſſue*, and *Venire facias return'd*, and *no Jury appear'd*, by which *iſſued Diſtreſs with Decem tales*; and *at the Day the Plaintiff ſaid that his Feme died after the laſt Continuance, Judgment if the Inqueſt ought they to take*; & non allocatur, inaſmuch as *ſhe was not Party to the Original*, and *yet ſhe was Party to the Iſſue*; for Per Newton, where the *Avowry is made upon a Stranger*, and the *Plaintiff pleads Hors de ſon Fee*, and *pending the Iſſue the Stranger dies*, yet the Iſſue ſhall not abate, and ſo here, and all one, by which the other paſs'd over. Br. Iſſues Joines, pl. 87. cites 21 H. 6. 23.

14. *Three were received by Reverſion by Default of the Tenant for Life*, and *join'd Iſſue*, and *at the Venire Facias return'd, the one of the* 3 *was dead*; and yet the Iſſue ſtood, and a Venire Facias de Novo awarded; but note that this Death cannot abate the Writ; for he who died *was not Party to the Writ, but came collaterally.* Br. Brief, pl. 381. cites 19 E. 4. 4.

15. Death of an *Attorney* ſhall not abate the Writ. Thel. Dig. 184. lib. 12. cap. 10. S. 10. cites 5 H. 7. 3.

(Q. a) By Death. At what Time.

1. IN Treſpaſs *againſt* 4, the *one ſaid that another Defendant was dead before the Writ brought*; and becauſe the Plaintiff could not deny it, the Writ was abated by Award. Br. Brief, pl. 297. cites 29 Aſſ. 62. *But* in Treſpaſs *againſt* 3, the one ſaid that the 2 *were dead before the Writ purchaſed*; Judgment of the Writ, & non allocatur, but againſt them. And ſo ſee the Death of ſome ſhall not abate the Writ againſt all. But Brooke ſays mirum, as here before the Writ purchaſed; for then it is falſe &c. but Death pending the Writ ſhall not abate all the Writ. Br. Treſpaſs, pl. 60. cites 47 E. 3. 18.——Br. Brief, pl. 79. cites S. C——And where an Aſſiſe was adjourn'd before Thorp, upon ſuch a Point, becauſe there was another Diſſeiſor and Tenant named in the Writ, the Writ was awarded good. Brooke ſays Quod mirum! upon a falſe Writ. Br. Brief, pl. 297. cites 29 Aſſ. 62.——*So* in *Quare Impedit againſt two*, the one pleaded that the *other Defendant was dead the Day of the Writ purchaſed*, Judgment of the Writ for all, & non allocatur; but Brooke ſays Quod mirum! Br. Brief, pl. 112 cites 7 H. 4 24.——But Br. Treſpaſs, pl. 174. cites 19 H. 6. 4. That in Treſpaſs *againſt* 2, if the *one ſays that the other was dead the Day of the Writ purchaſed*, it ſhall abate the Writ againſt all; for there the *Writ was always falſe*.——Br. Brief, pl. 281. cites 23 Aſſ 10. S. P. accordingly.

2. Treſpaſs *againſt ſeveral*. They are at Iſſue, and *one of the Defendants before the Writ of Ven. Fac. is returnable*. There it ought to be return'd for thoſe who are alive, and not for thoſe that are dead, if the Death be alleg'd to the Court and confeſs'd by the Plaintiff. Quod nota bene, inde. Br. Brief, pl. 312. cites 3 H. 7. 6. *After Iſſue join'd*, one of the Defendants dies; Ven. Facias was awarded afterwards, and Iſſue try'd. Adjudg'd no Error. Cro. Car. 426. Mich. 11 Car. B. R. Tyffin's Caſe.

3. Aſſiſe of *Novel Diſſeiſin* was brought *againſt* 4. *After Verdict one of* them *died*. This ſhall not be pleaded in Abatement of the Writ, becauſe there is no Day in Court for the other to plead it; but upon a Writ of Error brought, this Matter ſhall aid the other, if Judgment be given; ſo that now by his Death the Writ is abated. Bendl. 42. pl. 74. Paſch. 2 & 3 P. & M. Granefield v. Stretch. D. 132. pl. 76. &c. Granefield v. Stretch, S. C. and S. P. but nothing ſaid as to this Point by the Court.

4. If *one be condemn'd* in an Action upon the *Caſe, or Treſpaſs upon Nihil dicit, Demurrer* &c. and he *dies after* a Writ of *Inquiry of Damages awarded, and before the Return thereof*, the Writ ſhall not abate; for the Awarding the ſaid Writ is a Judgment; per Dyer & Manwood. Leon. 263. pl. 352. 19 Eliz. C. B. Anon. 3 Le 68 pl. 103 Mich. 20 Eliz. S. C. in totidem Verbis. * S P. Noy 146. in Caſe of Cutter & Ux' v. Barber & Ux'.

5. In a *Partitione facienda by Conſent*, quod Partitio fiat, and a Writ was to the Sheriff to make Partition, and *before that it was filed, (but after the Return)* the Court being inform'd that *one of the Wives was dead*, it was pray'd that the Writ ſhould not be filed. By the Court, If it ſhould be filed, then the Court ſhould give an erroneous Judgment againſt the dead Perſon. And a Day was given to the other Party to ſhew if the Wife was dead; and in the Interim the Filing of the Writ was ſtaid. But after, becauſe it appear'd that ſhe was not dead until after the Return-Day of the Writ, to which Day the Judgment ſhall have relation, it was ruled that Judgment ſhall be given, and the Writ filed. Noy 145. 146. Cutter & Ux' v. Barber & Ux'.

6. 17 *Car.* 2. *cap* 8. *The Death of either Party, between Verdict and Judgment, ſhall not be alleg'd for Error, ſo as ſuch Judgment be* In an *Information* in the Exchequer *enter'd*

by the Attorney-General,

enter'd within two Terms after such Verdict. Made perpetual by 1 *Jac.* 2. 17.

a *Verdict* was given *against the Defendant*, and after Verdict, and *before the Day in Bank*, the *Defendant dies*; and Question was, if this Information was within the Statute 17 Car. 2. c. 8. and upon solemn Argument by Ward, Powis, and Hatsell, (Lechmere absent) it was held that an Information was not within the Word *Action*, nor the *King* within the Word *Party*, and that it was never said the Death but the *Demise of the King*; and adjudg'd that the Information should be *discontinued*. 12 Mod. 228. Mich. 10 W. 3. in the Exchequer. Attorney-General v. Buckley.

7. *Judgment* was *enter'd as of Trinity-Term*, and a *Writ of Inquiry returnable in Michaelmas-Term*, and the *Plaintiff died in the long Vacation.* Resolved that as the first was but an Interlocutory Judgment, the Action abated by the Death of the Plaintiff. Mod. 5. pl. 17. Mich. 21 Car. 2. B. R.

8. *Debt* against 2, if one dies *before Verdict*, the Action is abated. Cumb. 169. Mich. 1 W. & M. B. R. Dove v. Martin.

See 6 Mod. 142. 1 Salk. 42. 8 Mod. 115. 1 Salk. 352.—And see Tit. Executors.

9. 8 & 9 *W.* 3. *cap.* 11. *S.* 6. *In all Actions commenced in any Court of Record after March the 25th*, 1697. *if the Plaintiff dies* after an Interlocutory Judgment, and before Final Judgment, *the said Action shall not* abate, *if the Action might be originally prosecuted by his Executors or Administrators*; *and if the* Defendant dies *after such* Interlocutory Judgment, *and before Final Judgment, the Action shall not abate, if such Action might be originally prosecuted against his Executors or Administrators*; *and the Executors or Administrators of such Plaintiff, after such Interlocutory Judgment, may have a* Sci. Fa. *against the Defendant if living, or if dead against his Executors or Administrators, to shew Cause why Damages should not be assess'd and recover'd against him or them*; *and if he or they do not appear at the Return, and shew sufficient Cause to arrest the Final Judgment, or being return'd warn'd, or upon two Writs of Sci. Fac. it being return'd that the Defendant had nothing whereby to be summon'd, or could not be found, a Writ of* Inquiry of Damages *shall be awarded, which being executed and return'd, Judgment Final shall be given for the said Plaintiff, his Executors, or Administrators.*

S. 7. *If there be* 2 or more Plaintiffs or Defendants, *and one dies, if the* Cause of Action survive *to the surviving Plaintiff, or against the surviving Defendant, the Writ or Action shall not abate*; *but such Death being suggested upon the Record, the Action shall proceed.*

10. *Verdict* in Easter-Term, and *before Judgment sign'd* the *Plaintiff died*; Per Holt Ch. J. that shall not hinder the Judgment being enter'd, provided it be within 2 Terms after; and the Statute of Frauds &c. only requires the Time of *signing the Judgment* should be enter'd on the Roll, and that is only for the Benefit of Purchasers. 1 Salk. 401. pl. 9. 1 Ann. B. R. The Duke of Norfolk's Case.

In Ejectment the Case was this. The *Assises began* on the *Monday*, and the *Defendant died the Day before*, and yet a *Trial was had*, and a *long Defence, and* a *Verdict for the Plaintiff*; and now it was moved that Judgment should be arrested. 'Twas objected that this is Matter of Fact, and not assignable after Verdict, but that they ought to bring a Writ of Error. Per Holt Ch. J. If he had *died the Day the Assises began*, tho' the Cause had been tried after, the Trial had been good, tho' he had died at One o'Clock in the Morning; for there is no Fraction of a Day, according to Shelley's Case in 1 Co. in which Case my Lord Hobart said any Man, as an Amicus Curiæ, may inform the Court of such an Error. Adjornatur. 11 Mod. 136. Falmouth v. Strode.

11. Death of either Party *before the Assises* is not remedy'd by the Statute; but if the Party dies *after* the Assises begins, tho' the *Trial be after his Death*, that is within the Remedy of the Statute; for the Assises is but one Day in Law, and this is a remedial Law, and shall be construed favourably. And the Court further held that it was in their Discretion whether on Motion to *arrest Judgment*, or put the Party to a *Writ of Error.* 1 Salk. 8. pl. 21. Mich. 6 Ann. B. R. Anon.

12. *Judgment* was given *Nisi such a Day*; at which Day it was urged that the Plaintiff being lately dead, the Suit abated; but per Cur. there

was

was Judgment Nifi, ſo the Rule muſt be made abſolute. 8 Mod. 381. Paſch. 11 Geo. Colvin v. Fletcher.

(R. a) Abated, or abatable only. And How.

1. BY the *Entry* of the Plaintiff in Aſſiſe *to take Livery* on a Feoffment to him by the Tenant pending the Aſſiſe, the firſt Aſſiſe was abated; and ſo ſee that an Entry ſhall abate a Writ in Fact, and upon this the Writ was awarded good. Br. Brief, pl. 302. cites 35 Aſſ. 4.

2. *Præcipe* quod reddat, *at the Grand Cape*, the *Tenant* came and *ſaid that before the Writ purchaſed A was ſeiſed in Fee, and infeoffed him by Deed, upon Condition that upon Payment of* 40 l. *to re-enter, and that after the Default A. had paid and enter'd*, and ſo the Writ abated in Law; Judgment of the Writ. And ſo ſee that *Entry is only an Abatement in Law*, as it is admitted there; for it ſeems that it is *not* an Abatement *in Fact before Judgment be given*. Caund. ſaid, if Writ be brought *againſt Tenant pur auter Vie*, and *Ceſty que Vie dies pending the Writ*, the Writ ſhall abate. And agreed that the Entry in the other Caſe is an Abatement in Law alſo, nota. Br. Brief, pl. 229. cites 39 E. 3. 28. But Brook ſays ſee in the ſecond Caſe if it be abated before Entry, by 18 E. 4. 25. 26. it ſeems that it is not, and ſo it is agreeable that it is only an Abatement in Law. Ibid.

3. By *taking of Baron pending the Writ* on the Part of the Plaintiff, the Writ is only abateable. Br. Brief, pl. 232. cites 37 H. 6. 16. per Littleton.

G. Hiſt. of C. B. 84. S. P. — *But* if an *Action* be brought *againſt a Feme Covert as ſo'e*, this makes another Man's Property liable without giving him an Opportunity of defending himſelf, which would be contrary to common Juſtice; and therefore the Writ is de facto abated. G. Hiſt. of C. B 199.

4. When a Man pleads to the Writ by *Death pending the Writ*, he *ſhall not plead it after the laſt Continuance*, becauſe by this Writ is abated in Fact. Br. Brief, pl. 379. cites 18 E. 4. 18. 19.

5. Præcipe quod reddat *againſt two* who were *Eſſoign'd at the Summons, and made Default* at the Day, by which Grand Cape iſſued, and at *the Day the one appear'd, and ſaid that after the Day of their Default the other died*, Judgment of the Writ. And per Brigg. he ſhall have the Plea without ſaving his Default, becauſe it proves the Writ abated in Fact; contra of Entry after the laſt Continuance or ſuch like, for by this the Writ is only abatable. Br. Brief, pl. 390. cites 21 E. 4. * 16.

S. P. Br. Brief, pl. 396 cites 21 E. 4. 80. And Brook ſays it is to be underſtood againſt both there — * Quære, if it ſhould not be (So.)

6. If there *is no Tenant at the Return of the Writ* the Writ is abated; but the Court cannot abate an abatable Writ without Plea. Ld. Raym. Rep. 476. Arg. cites 9 E. 4. 12. per Littleton, and that there is *no Difference between a Writ abated and abateable as to a Stranger*; for tho' the Tenant does not take Advantage of it by Plea, yet that will not prejudice a Stranger.

7. If the *Plaintiff* in an Action *is made a Knight*, the Writ is only abateable. G. Hiſt. of C. B. 84. cites 2 H. 6. 13.

(S. a) Abatement

(S. a) Abatement in Part or in All.

Thel. Dig. 236. lib. 16. cap. 10. S. 5. cites S. C. — Misnosmer *of one in Assise* shall not abate the Writ but against him only, if there be another Tenant and a Disseisor named. Thel. Dig. 236. lib. 16. cap. 10. S. 5. cites 11 Ass. 15. —— *So* in assise *against two*, and the *one was misnamed* in the Writ *in the Words of the Attachment*; and the Opinion was, that *if he was Tenant* the Writ should abate in all, and *if Disseisor* then but against himself only; but the Assise was against several, so that it seems it is intended there is another Disseissor named in the Writ; for if Tenant or Disseisor is wanting in Assise the Writ does not lie. Br. Brief, pl. 279. cites 22 Ass. 8.——Thel. Dig. 236. lib. 16. cap. 10. S. 13. cites S. C. but adds Quære.

1. IT was said that if *one of the Tenants* be *misnamed in Assise of Rent* against several, it shall abate the Writ against All; *contra* in Assise *of Land*. Br. Brief, pl. 257. cites 5 Ass. 6.

Note by the Justices in C. B. that by *Misnosmer of one Defendant* all the Writ shall abate, but it is not express'd therein what Action this was. Br. Brief, pl. 414. cites 32 H. 6. 24.——S. P. Br. Misnosmer, pl. 79. cites S. C.

But of a *thing apparent in the Writ* between several, *one alone may shew it* in Abatement of all the Writ. Br. Brief, pl. 267. cites 11 Ass. 9.

2. *Assise against three*, the *one pleaded a Plea which went to the Writ against all*, and to abate the Writ for all the Defendants; yet the others were put to answer also; quod nota. Br. Brief, pl. 264. cites 9 Ass. 6.

In *Præcipe* quod reddat *upon Cessavit against three* who *waged their Law of Non-Summons* at the Grand Cape, and *at the Day two appear'd* ready and the *third made Default*, and the *Demandant pray'd Seisin of the Land against the three*; for by the Default of the one the Summons is affirm'd. Per Wich. it is good first to pray Seisin of the third Part, for if the two make their Law the Writ shall abate, by which one came and was received for the third Part, and the two made their Law, and the Writ was abated by Award for the two, and stood good for the third Part, quod nota abated in Part. Br. Brief, pl. 81. cites 48 E. 3. 13.

3. A *Præcipe quod reddat* was *abated for the Moiety, by Ley Gager of Non-summons, by one* of the Tenants, and the Demandant recover'd the Moiety against the other. Thel. Dig. 236. lib. 16. cap. 10. S. 2. cites 9 E. 3. 470. 22 E. 3. 2. 29 E. 3. 11. and 48 E. 3. 14.

So in Quid Juris clamat, *Ancient Demesne as to Parcel* shall abate all the Writ. Thel. Dig. 236. lib 16. cap. 10 S. 21. cites Hill. 31 E. 3 Ancient Demesne 16.

But in *Præcipe* quod reddat *of two Acres*, whereof the *one is Ancient Demesne*, the Writ shall abate thereof, and stand for the other, per Hall. Br. Privilege, pl. 12. cites 14 H. 4. 21.

4. It is held that if *Parcel of the Tenements* be *Frankfee, and Parcel Ancient Demesne*, all the Writ shall abate. Thel. Dig. 236. lib. 16. cap. 10. S. 4. cites Mich. 10 E. 3. 541. Quære.

5. It is said that if the *Baron brings* Writ of *Trespass against his own Feme and others*, all shall abate. Thel. Dig. 236. lib. 16. cap. 10. S. 6. cites Hill. 12 E. 3. Br. 481. 670. quære.

6. In Writ of *Ward of the Body and Land*, as to the Body the Writ was abated by the *not naming of the Feme of the Defendant*, and stood for the Land. Thel. Dig. 236. lib. 16. cap. 10. S. 7. cites Trin. 14 E. 3. 279.

Br. Assise, pl. 66. cites S. C.

7. In *Assise*, the *Tenant said by Bailiff that the Plaintiff had taken the Profits of half an Acre Parcel of the seven Acres in Plaint, pending the Assise*, Judgment of the Writ, and if &c. Nul tort, and *found accordingly, and that of the rest the Plaintiff was seised and disseised*. And as to the half Acre the Plaintiff took nothing by his Writ, and recover'd the rest. Br. Brief, pl. 430. cites 21 E. 3. 34.

8. In *Trespass against the Prior of B.* and *one of his Commoignes*, the *Prior did not come* at the Pone, and the *Commoigne said that he was Commoigne to the Abbot of B. and not to the Prior*, which was not denied by the Plaintiff,

Plaintiff, by which he took nothing by his Writ. Thel. Dig. 236. lib. 16. cap 10. S. 10 cites Paſch. 21 E 3. 13.

9 In Treſpaſs if *one of the Parties is a Villein to the Defendant*, all ſhall abate. Thel. Dig. 236. lib. 16. cap. 10. S. 11. cites Mich. 22 E. 3. 18. *But* it ſeems that Writ of *Monſtrave-runt* ſhall not abate for all, notwithſtanding that *ſome of the Plaintiffs are Villeins to the Defendant.* Thel. Dig. 236. lib. 16. cap. 10. & 24. cites Paſch. 39 E. 3. 8.

10. *In Formedon laſt Seiſin of Parcel* ſhall abate all the Writ. Thel. Dig. 236. lib. 16. cap. 10. S. 17. cites Trin. 27 E. 3. 81.

11. In *Scire facias of Rent out of a Fine*, as to Parcel the *Tenant was Tenant of Parcel of the Rent*, and as to other Parcel of the Rent the Tenant was *Tenant of the Land out of which* this Parcel was iſſuing as Rent-charge; and the Writ abated for one and ſtood for the other. Thel. Dig. 236. lib. 16. cap. 10. S. 20. cites Hill. 31 E. 3. Brief 331.

12. Writ of *Mortdanceſter* may *abate in Right of one Summons, and ſtand of the Remainder.* Thel. Dig. 236. lib. 16. cap. 10. S. 18. cites 28 Aſſ. 25. Br. Several Præcipe &c. pl. 2. cites S. C. —— Br. Maintenance de Brief, pl. 18. cites S.C.

13. Where a Man *confeſſes Part* of his Writ *to be falſe*, there it ſhall abate in all. Br. Confeſſion, pl. 6. cites 46 E. 3. 9. S. P. Br. Abridgment, pl. 12. cites 14 H. 6 4 ——So if he confeſſes that his Action does not lie in Part. Br. Brief, pl. 18. cites 9 H. 6. 54

In *Aſſiſe againſt A. and B.* and *A. pleads a Releaſe of all the Right, and of all Actions*, if the *Plaintiff confeſſes it*, the Writ ſhall abate againſt all, tho' A. be Diſſeiſor and not Tenant. Br. Brief, pl. 267. cites 11 Aſſ. 9. ——*So* if the *Plaintiff confeſſes that any one named in the Writ is not Diſſeiſor.* Br. ibid. ——*Or that* it may be *found that any one named in the Writ by Record was at another Time acquitted.* Br. ibid.

Where the *Writ is ſpecial*, as in *Debt of* 10 *l.* whereof he *confeſſes himſelf paid* 3 *l.* it ſhall abate in all, for it is falſe in Parcel; for the Writ ſhall be of the Duty only, and the Confeſſion ſhall be in the Count Br. Brief, pl. 485. cites 6 E. 4. 5 ——But in *Aſſiſe of Rent of* 10 *l.* the *Defendant pleaded Releaſe of* 3 *l. thereof*, and the *Plaintiff confeſs'd it*, and yet the whole Plaint was not abated; for it ſeems in Bar of this Part. Br. Confeſſion, pl. 54. cites 8 Aſſ. 37.

14 *Contra* where it is *found by Verdict*. Note the Diverſity. Br. Confeſſion, pl. 6. cites 46 E. 3. 9. *As* if *Debt* be brought *againſt* 3 *Executors*, and it is *found upon Iſſue join'd that the one is Executor and the others not*, it was agreed that the Writ ſhall not abate in all, but the Plaintiff ſhall be barr'd againſt him, and recover againſt the other, notwithſtanding his Writ is falſe in Part, becauſe this Matter is found by Verdict. Br. Confeſſion, pl. 6. cites 46 E. 3. 9.

15. It was agreed, That a Man may *plead to the Count as to Parcel, and in Bar for the reſt*, and there the Count ſhall not abate but for the Parcel. Quod nota. Br. Ceſſavit, pl. 10. cites 48 E. 3. 4.

16. In *Treſpaſs of* his Servants, viz. *Jo. and A. taken out of his Service* &c. it was *pleaded* to the Writ, *that A. was Feme of the Plaintiff*; upon which as to A. the Writ was abated, and ſtood for the reſt. Thel. Dig. 238. lib. 16. cap. 10. S. 65. cites Mich. 7 Rich. 2. Treſpaſs 206.

17. In Treſpaſs upon the *Caſe of diverſe Treſpaſſes, Tenancy in Common between the Plaintiff and the Defendant of Parcel*, ſhall not abate all the Writ. Thel. Dig. 237. lib. 16. cap. 10. S. 35. cites Paſch. 19 R. 2. Brief 927.

18. Quære if Writ of *Treſpaſs* brought *againſt a Clerk privileged of the Chancery and others*, or *againſt a Monk and others, without his Sovereign*, ſhall abate for all, or not. Thel. Dig. 237. lib. 16. cap. 10. S. 39. cites Hill. 14 H. 4. 21. and 34 H. 6. 29. and 22 H. 6. 43. Quære.

19. In Writ of *Debt of* 20 *l.* where the Count is of 10 *l. by Obligation, and* the other 10 *l. upon Contract*, if there be a Variance between the Obligation, all ſhall abate Per Hank. and Hull, and Thirning to the

contrary. Ibid. Adjudg'd to abate for the Parcel. Thel. Dig. 237. lib. 16. cap. 10. S. 38. cites 1 H. 5. 4.

20. In *Treſpaſs of entring into his Warren Vi & Armis, and chacing there, and taking of Cones* &c. the Writ was abated as to the entring into the Warren Vi & Armis, and ſtood for the reſt. Thel. Dig. 237. lib. 16. cap. 10. S. 41. cites Mich. 3 H. 6. 13.

It was held, that Obligation made to a Monk is void for

21. Writ of *Debt by a Monk profeſs'd, and by others*, ſhall not abate againſt all. Thel. Dig. 237. lib. 16. cap. 10. S. 42. cites Hill. 3 H. 6. 23. and ſays, Vide in Profeſſion 7 H. 4. and quære.

Want of Capacity, and that the Sovereign ſhall not ſue it. Br. Nonability, pl. 2. cites 3 H. 6. 23.

S. P. Br. Brief, pl 18. cites 9 H. 6.

22. Writ which is *falſe in Part* ſhall abate in all. Br. Brief, pl. 14. cites 9 H. 6. 10.

54.——S. P. Tho' it appears by Defendant's Plea. Arg. Roll. Rep. 307. cites 22 E. 4. 4. 9 H. 6. 10 — *Whatever proves the Writ falſe at the Time of ſuing it out*, ſhall abate the Writ intirely, as if it *appears on the Plaintiff's own ſhewing, that he has no Cauſe of Action for Part.* G. Hiſt. of C. B. 199.

Thus if an Action of *Treſpaſs* be brought *againſt* 2 *Defendants*, and the *one pleads that the other was dead Die impetrationis brevis, or that there is none ſuch in rerum Natura*, the whole Writ ſhall abate; for it is the Plaintiff's Fault to abuſe the Authority of the Court, to call in a Man that was dead; and it was no leſs an Abuſe of the Proceſs to iſſue it againſt a feigned Perſon. G. Hiſt. of C. B. 199. 200.

But this Falſification of the Writ *muſt be in a material Point*; for in a *Præcipe quod reddat againſt* 2, if *one pleads Non-tenure*, and the *other takes the whole Tenancy* on himſelf, the Writ ſhall not abate in the whole, but ſtand good againſt him that has accepted the Tenancy, becauſe he is a proper Defendant to the Action, and the Non-tenure of the one does no Way prejudice the other Defendant. G. Hiſt. of C. B. 200.

Thel. Dig. 238. lib. 16. cap. 10. S. 57 cites 11 H. 6. 6. S. C. and 9 H. 7. 3. and ſays, That ſo it is of an Obligation, containing divers Days of Payment.

23. *Debt for Rent due at two Rent-days*, and payable at two Rent-days, *of which the one Day is not yet come*, the Writ ſhall abate in all; for it is falſe in Parcel. *Contra of Bar which ſerves for Part*, and not for all. Quære *of Avowry for Rent* due at two Rent-days, of which the one is not yet come; for by the beſt Opinion, in this Caſe the Defendant ſhall have Return, and as it is ſaid elſewhere, ſhall be amerc'd for the other Day. Br. Brief, pl. 410. cites 11 H. 6. 5.

——In Reſcous the Plaintiff *counted that he diſtrained for Rent of* 2 *Rent-days*, and it *appeared that the one was come and the other not*, and the Defendant to the Reſcous pleaded Not Guilty, and was found Guilty; and becauſe the *Jury aſſeſs'd the Damages intirely*, where Per Brian they ought to have ſever'd the Damages, the Plaintiff ſhall not recover; but Per Vavaſor, it may be good in Part, and abate in Part, as in *Waſte of Oaks and Thorns*, or in *Dower of Land and Common*; and after the beſt Opinion was, that the Action lies in Part, as here, and ſhall not abate in all, tho' the Plaintiff in his Declaration has ſhewn, that the one Day is paſs'd and not the other. Br. Brief, pl. 322 cites 9 H. 7. 3.——Br. Verdict, pl. 56. cites S. C.

24. In *Debt againſt ſeveral upon Specialty*, if the *Writ* be *variant from the Specialty*, and this ſhewn or pleaded by one, yet the Writ ſhall abate againſt all, notwithſtanding the others ſhould plead to the Action. Thel. Dig. 237. lib. 16. cap. 10. S. 48. cites Paſch. 11 H. 6. 42.

25. *Treſpaſs* brought *againſt the Parſon of N.* and others. The *Parſon ſaid that he was Parſon only of the Moiety of the Church of N.* Judgment of the Writ; and for this Cauſe the Writ was abated againſt all. Br. Brief, pl. 178. cites 21 H. 6. 4.

26. *Debt againſt* 2 Executors. The *one ſaid where he is named of S. he was of D.* the Day of the Writ purchaſed; Judgment of the Writ; and it is agreed that if it be found for him, the Writ ſhall abate againſt both, and yet the other ſhall anſwer now, and the other Plea ſhall be firſt try'd. Br. Brief, pl. 180. cites 21 H. 6. 4.

27. In *Præcipe* quod reddat *by ſeveral Præcipes* againſt ſeveral, if *one wages his Law of Non-ſummons*, all the Writ ſhall abate; and ſo was the Opinion of the Court. Br. Brief, pl. 525. cites 27 H. 6. 6.

28. In

28. In *Ceſſavit*, if the *Lord receives Part of the Services pending the Suit*, the Writ ſhall abate in all. Br. Brief, pl. 256. cites 39 H. 6. 43. Per Laicon. *So* in *Debt*, if the *Plaintiff receives Part* pending the Writ, all the Writ ſhall abate. Br. Brief, pl. 480. cites 2 E. 4. 10. per Cur.——*But* if the *Defendant tenders Part in Court, and the Plaintiff receives it by Judgment*, then 'tis otherwiſe. Per Moyle. Br. Brief, pl. 480. cites 2 E. 4. 10.——S P. per Moyle J. Br. Brief, pl. 338. cites 1 E. 4. 3. 4.——See pl. 17.

29. If the Defendant *pleads Acquittance of Parcel before the Writ purchaſed*, the Writ ſhall abate in all; for it never was a good nor true Writ; *and* if he makes an Acquittance of Parcel *pending the Writ*, then he has falſify'd his own Writ, and ſo his Writ by this ſhall abate in all. Br. Brief, pl. 256. cites 39 H. 6. 43. per Aſhton.

30. Formedon *againſt 5* Perſons, who plead to Iſſue, *of 2 Manors* &c. and now the *one of the 5 pleads that the Demandant, after the laſt Continuance, has enter'd into one Manor*; Judgment of the Writ. And by all the Juſtices, this is a good Plea by one only, and to all the Writ, if it be found for him; but perchance the other 4 then ſhall have thereof Advantage; and the Reaſon is, becauſe that he by his own Act has falſify'd his own Writ. Quod nota. Br. Brief, pl. 351. cites 4 E. 4. 32. Thel. Dig. 188. lib. 12. cap. 21. S. 21. cites Mich. 4 E. 4. 34. S. C. accordingly. But ſays the Iſſue for the others was not waived, and cites 5 E. 4. 117. and 5 H. 7. 7. agreeing.

31. *Variance between the Writ and Count in Parcel* ſhall abate all the Writ. Thel. Dig. 238. lib. 16. cap. 10. S. 51. cites Paſch. 7 E. 4. 10.

32. And it is held there that in *Treſpaſs againſt ſeveral*, if the *one has not any Addition*, the Writ ſhall not abate but againſt him only. Thel. Dig. 238. lib. 16. cap. 10. S. 51. cites Paſch. 7 E. 4. 10.

33. In Writ of *Entry*, *upon the Statute of Richard*, *into a Manor*, *and into an Advowſon*, it was held that the Writ ſhould abate for all, per Markham, inaſmuch as ſuch Action does not lie of an Advowſon; but Laicon held, that it ſhould abate only for the Parcel, inaſmuch as the Plea is to ſuch Action for the Advowſon; but otherwiſe it ſhall be where the Plea for the Parcel goes only to the Writ. Thel. Dig. 238. lib. 16. cap. 10. S. 52. cites Paſch. 8 E. 4. 3. Quære.

34. In Treſpaſs of a *Cloſe broken*, *and Trees taken* &c. the Defendant as to the Trees *pleaded that the Plaintiff was ſeiſed of ſuch a Manor*, of which the Place where &c. *and that he was Bailiff of the ſaid Manor* to the Plaintiff *at the Time* &c. Judgment of the Writ; and it was held that it goes only to Parcel, and not to all. Thel. Dig. 238. lib. 16. cap. 10. S. 54. cites Hill. 18 E. 4. 28. Quære.

35. In *Dower of a Manor*, *Houſes*, *and Rent*, to ſay *that the Rent is Parcel of the Manor* &c. goes only for the Parcel, ſcil. for the Rent only. Thel. Dig. 238. lib. 16. cap. 10. S. 63. cites Paſch. 21 E. 4. 28.

36. In *Treſpaſs of Aſſault*, *Battery*, *Impriſonment*, *and of taking a Bag with 20 l.* therein contain'd &c. *without ſaying who was the Owner of the Bag*; and it was held that all the Writ ſhould abate for this Cauſe. Thel. Dig. 237. lib. 16. cap. 10. S. 38. cites Mich. 13 * E. 5. 11. Quære. * This is miſprinted, and Quære what it ſhould be?

37. If one brings an Action *for one thing for which he has Right*, *and for another for which he has no Right*, his Writ ſhall abate for all; per Williams J. Bulſt. 1. cites 9 H. 7. 3. per Fineux.

38. *Diſcontinuance againſt one of the Defendants in Appeal*, is no Diſcontinuance againſt all for the Advantage of the King. Thel. Dig. 236. lib. 16. cap. 10. S 9 cites Trin. 21 E. 3. 34. Quære of Miſnomer of one in Appeal, and cites 21 H. 7. 31. *Diſcontinuance of Part of the Matter in the Writ, or againſt one of the Defendants in Treſpaſs*, ſhall abate the Writ in all. Br. Brief, pl. 360. cites 7 E. 4. 10.

39 In

39. In *Entry ſur Diſſeiſin*, the Defendant pleaded for Part, that he *had nothing but in Right of his Wife not named* &c. and ſo demanded Judgment of the Writ; and *for the reſt he pleaded in Bar*, and they join'd Iſſue for Both, and found both the Iſſues for the Defendant. Agreed by all the Juſtices, that the Writ ſhall abate but in Part, and Judgment ſhall be given for the reſt, and ſo for the Reſidue the Judgment was Nil capiat per Breve. Goldsb. 85. pl. 8. Paſch. 30 Eliz. Carleton v. Carr.

40. A Bill may be abated *as to Part of a Treſpaſs*, and ſtand good for the reſt. Agreed Per Cur. but ſaid they never knew it abated *as to one Defendant*, and ſtand good againſt the other. 2 Ld. Raym. Rep. 926. Trin. 2 Ann. Arg. in Caſe of Staples v. Heydon.

8. Action upon 3 *ſeveral Promiſes*, the 1ſt for 55 *l.* the 2d for 65 *l.* and the 3d for 65 *l.* The Defendant pleads *as to Part Non Aſſumpſit*, and as *to Part in Abatement* thus, viz. *Quoad* 50 *l. of the firſt Promiſe*, 60 *l. of the 2d, and* 60 *l. of the 3d, quod breve caſſetur, becauſe* there were 3 *Actions in the Exchequer for the ſame Sums.* Judgment of Reſpondeas Ouſter was given in C. B. but in Error B. R. held the Judgment well given; for a Plea in Abatement muſt go to the whole, and not to Part; and the 3 Actions depending in the Exchequer might have been pleaded in Bar of the whole. 10 Mod. 285. Hill. 1 Geo. 1. B. R. Aylwood v. Woolley.

(S. a. 2) Abatement in Part or in all. By Death.

Thel. Dig. 236. lib. 16. cap. 10. S. 14. cites S. C.

1. IN Aſſiſe againſt ſeveral, the Defendant *pleaded Death of the one named in the Writ before the Writ purchas'd*; and yet Thorp upon this being found, awarded that the Writ ſhall abate but againſt him only; but Per Knivet clearly, it ſhall abate againſt all, becauſe it is falſe in Part, and the Plaintiff cannot have a better Writ againſt him. Br. Brief, pl. 281. cites 23 Aſſ. 10.

S. P. in Aſſiſe, Thel. Dig. 236. lib. 16. cap. 10. S. 14. cites S. C. and ſo it is in Treſpaſs.

2. Where one is *named R. where his Name is J. or* if a *Feme* be *named Sole where ſhe is Covert*, there the Writ ſhall not abate but againſt him or her alone; for there a *better Writ is given*. Contra of Death before the Writ purchas'd. Br. Brief, pl. 281. cites 23 Aſſ. 10. Ibid. cites Hill. 14 H. 4. 22.

3. In *Scire facias* out *of a Fine*, by which Parcel of the Land was granted, with a *Remainder to the Father of the Demandant in Tail, after the Death of Ro. and Jane his Feme*, who held this Parcel for their Lives, and *other Parcel was granted in the ſame Manner*, which Jo. and Alice his Feme held for their Lives &c. and by the Writ the Death of all was ſuppoſed. The Tenant *pleaded that Alice was alive* &c. and it was held that the Writ ſhould not abate but only for this Parcel. Thel. Dig. 237. lib. 16. cap. 10. S. 32, cites Mich. 44 E. 3. 39.

(S. a. 3) Abatement in Part or in all. By Jointenancy &c.

1. WHERE *a Parſon and others join in a Suit for Tithes*, it may be pleaded againſt the Parſon to the Writ, and it ſhall abate all the Writ againſt all; for the others ought not to join with him. Br. Brief, pl. 267. cites 11 Aſſ. 9.

2. *Parcenary in Parcel of the Part of the Demandant* ſhall not abate all the Writ. Thel. Dig. 236. lib. 16. cap. 10. S. 12. cites Trin. 22 E. 3. 10. Brief 384.

3. In Aſſiſe *the Tenant pleaded in Bar of Part, and Jointenancy by Deed of the reſt*, and after the Plaintiff, becauſe he would not be delay'd of the reſt by the Jointenancy, *confeſs'd the Jointenancy*, and pray'd the Aſſiſe of the reſt, and had it; and the Writ did not abate in all, by the Confeſſion of the Jointenancy of Part. Br. Brief, pl. 277. cites 19 Aſſ. 14.

4. A Writ of *Debt, and Detinue of Chattle* brought *againſt an Abbot and his Commoign upon their joint Contract and joint Detinue* was abated for all. Thel. Dig. 236. lib. 16. cap. 10. S. 23. cites Hill. 33 E. 3. Brief 913.

5. In *Treſpaſs of a Cloſe broken and of Goods taken, Jointenancy of the Part of the Plaintiff in the Cloſe* ſhall only abate the Writ as to the Cloſe. Thel. Dig. 237. lib. 16. cap. 10. S. 28. cites Mich. 43 E. 3. 24. Brief 567.

6. In *Aſſiſe againſt* 2, the *one pleaded Releaſe in Bar*, the *other Jointenancy to the Writ*, and the *Releaſe was found for the Plaintiff*, and the *Jointenancy againſt him*, and all the Writ was abated, and the Plaintiff recover'd no Part. Br. Brief, pl. 454. cites 44 Aſſ. 30. Thel. Dig. 237. lib. 16. cap. 10. S. 29. cites S. C. and 44 E. 3. 23.——

S. P. Br. Aſſiſe, pl. 23. cites 44 E. 3. 22.— Br. Aſſiſe, pl. 9. cites 44 E. 3. 23. S. C.

S. a. 4) Abatement in Part or in all. Where there are ſeveral Places.

1. WHERE *Parcel of the Land demanded is in another County*, all the Writ ſhall abate; Per Wilby. Thel. Dig. 236. lib. 16. cap. 10. S. 16. cites Mich. 26 E. 3. 68.

2. Where *Tenements are demanded in A. and B.* if the Tenant *pleads that B. is a Hamlet of another Vill not named* in the Writ, it ſhall not abate but for the Portion. Thel. Dig. 236. lib. 16. cap. 10. S. 19. cites Paſch. 29 E. 3. 39. Quære. *But in Waſte againſt M. late Wife of Thomas Earl A.* the *Defendant* pleaded to the Writ, becauſe it is *brought in A. B. and C.* and *No ſuch Vill as C. in the ſame County*. And Per Martin, it is a good Plea to all the Writ, without anſwering to the Reſidue; for this goes to all the Writ. Br. Brief, pl. 6. cites 2 H. 6. 11.——*So* in Treſpaſs *in F. and H.* the *Defendant ſaid that No ſuch Vill or Hamlet as H. in the ſame County*, Judgment of the Writ. And by the beſt Opinion it goes to all the Writ; for falſe in Parcel is falſe in all, and the Damages are intire. Br. Brief, pl. 397. cites 22 E. 4. 4.—Thel. Dig 238. lib. 16. cap. 10. S. 56. cites S. C.——Br. Deux Plees, pl. 26. cites 22 E. 4. 3. 4. S. C.

3. Where Writ of *Account* was brought, that the Defendant was his *Bailiff and Receiver in two Places, whereof the one was of the Cinque Ports, and the other guildable*, the Writ was abated for the one Part, and awarded good for the other, and ſo abated in Part. Quod nota. But the Caſe was of *Reſceit in P.* and *Parcel of P. was in the Cinque Ports.* Br. Brief, pl. 86. cites 49 E. 3. 24. Thel. Dig. lib. 16. cap. 10. pl. 34. ——In *Account againſt* one as *Receiver*, it was abated for Part, and Judgment given for the Reſidue Quod Computet. 11 Mod 18; Mich. 7 Ann. B. R Biſhop v. Eagle.

4. Aſſiſe *in Great Dunmow and Little Dunmow*, the *Tenant ſaid that all* the Tenements *are in Great D.* and demanded Judgment of the Writ. And the Opinion was, that the Writ ſhall abate, becauſe it is *falſe in Part*, by which the Plaintiff was nonſuited by Reaſon of the Opinion of the Court; Quod nota bene. Br. Brief, pl. 166. cites 8 H. 6. 12. 13.

5. *Two Dales and none without Addition* [being pleaded to] a Vill named in the Writ of Account, ſhall abate all the Writ. See Thel. Dig. 237. lib. 16. cap. 10. S. 49. cites Hill. * 21 H. 6. 23.

* But it ſhould be 21 H. 6. 21. b. pl. 42.

6. Dower *de libero tenemento in D.* and made her *Demand of the third Part of the Manor of D. and S.* the Tenant demanded Judgment of the Writ, becauſe 20 *Acres of Land Parcel of the Manor of D. extends into P.* And there it was argued if this Plea ſhall abate all the Writ, or only for the ſaid 20 Acres, and at the laſt by Award the Tenant was compelled to anſwer to the Remnant; quod nota. Br. Brief, pl. 28. cites 33 H. 6. 4.

7. *Præcipe* quod reddat *of Land in D. S. and W.* the Tenant demanded Judgment of the Writ, for *all the Land is in D. abſque hoc* that any Part of it is in S. or W. and the Demandant ſaid that 100 Acres are in D. and 100 Acres in S. and the reſt in W. and ſo to Iſſue. Br. Brief, pl. 32. cites 34 H. 6. 45.

8. Entry upon the Statute of 5 *R.* 2. for entring *into the Manors of H. P. and S. and one Meſſuage* 100 *Acres of Paſture, and* 20 *Acres of Wood, and* 40 *Acres of Meadow of the Plaintiff in Peckham, D. and S.* and the *Defendant as to the Manors pleaded that he did not enter Contra Formam Statuti*, and *found againſt him*, and *to the reſt* pleaded *that there is Eaſt Peckham and Weſt Peckham, and none without Addition*, and was *found for the Defendant.* And the Queſtion was, if the Writ ſhall abate in all or in Parcel, becauſe by ſome the Manor ſhall be intended to be in Peckham, as well as the Houſe and Land; but contra per Cur. and that the *Manors ſhall be intended to be Vills in themſelves, and the Houſe and Land in Peckham D. and S. only and not the Manors*, and therefore ſhall not abate but in Part; and the Plaintiff ſhall have Judgment for the Damages of the Entry into the Manors, for there was taken a *Diverſity* per Cur. *when the Plea goes to the Action of the Writ and when to the Writ only*; for where it goes to the Action of the Writ as above, and where Parcel is in Ancient Demeſne and Parcel in the Guildable, there it ſhall abate for Parcel and ſtand for the reſt, for it is in a Manner one Bar; but contra where it goes merely to the Writ, as in Action againſt two, the one pleads Bar, and the other pleads the Death of one of the Defendants the Day of the Writ purchaſed, it goes to all the Writ; note the Diverſity per Cur. Br. Brief, pl 382. cites 19 E. 4. 6. 7.

(S a. 5) Abatement in Part or in All. Where the Action is brought for ſeveral Things.

1. DEBT of 20 *l.* 10 *l. by Contract and* 10 *l. by Bond*, the *Defendant waged his Law of the Contract and denied the Bond*, and he perform'd the Law, and the *Bond found for the Plaintiff*, by which he was barred of 10 l. and recover'd 10 l. Br. Brief, pl. 516. cites 3 H. 4. 2.

2. *Debt*, Parcel *upon a Leaſe for Years*, Parcel *for Work*, and the *reſt upon buying of Stuff*; the *Defendant to the Leaſe ſaid* that *Ne Leſſa Pas*, and *as to the Work tender'd his Law*, and *to the reſt tender'd the Money in Court*, and to the firſt Part the *Plaintiff maintain'd the Leaſe*, and to the ſecond *refuſed the Law*, ſo that of this he took nothing by his Writ, and was amerced, and *to the third Part tender'd* &c. *he received it*, and took nothing by his Writ of thoſe two Parts, and the Iſſue ſuffer'd of the other Part. And ſo ſee that they ſhall not abate the Writ, and all by the

the Receipt of Part pending the Writ; And ſuch Matter in Debt 38 E. 3. as it was ſaid there. Br. Brief, pl. 121. cites 11 H. 4. 55.

3. *Intruſion* of Ward *ſuppoſing* 20 *Acres of Land and* 8 *d. Rent to be held*, Norton pray'd Judgment of the Writ ſuppoſing Rent to be held, for *Rent does not lie in Tenure*; but per Hank. the Writ is good; contra Hill, clearly, for in Writ of Ward of the Heir of the Meſne, where there is Lord, Meſne, and Tenant, the Writ ſhall ſay Quod terram ſuam tenuit, and not Quod redditum tenet. And there by him *where ſuch Matter comes of the ſhewing of the Plaintiff himſelf* the Writ, and the Count ſhall abate in all, and not only in this Parcel, and to be good of the Land; quod nota by the beſt Opinion. Br. Brief, pl. 123. cites 11 H. 4. 82.

4 In *Debt* if the Count be *for Arrears of Rent-Service as to Parcel, and for Rent upon a Leaſe for Years of the Reſidue*, by the Opinion of Babbington all ſhall abate. Thel. Dig. 237. lib. 16. cap. 10. S. 45. cites Mich. 10 H. 6 5. for ſuch Action does not lie of Rent-Service at the Common Law. Quære.

5. Detinue *of two Writings*, whereof the *one appertain'd to the Plaintiff* and *the other not*, yet it goes but to the Action for the one, and to the other the Defendant anſwer'd; for the Writ ſhall not abate for all, by the beſt Opinion. Br. Brief, pl. 391. cites 9 H. 6. 54.

Detinue was brought by J. N. *of two Deeds*, and *in his Count it appear'd the one appertain'd to him, and the other* appertain'd *to him and his Feme*; and becauſe his Feme was not named, it was abated for the one and ſtood for the other; quod nota. Br. Brief, pl. 253. cites 38 H. 6. 24. 25.

6. *And* it was ſaid that if *Waſt*, *Dower* or *Aſſiſe* be brought, and the *Writ is general*, and the *Plaint*, *Demand*, or Count is of *things whereof the Action lies of ſome and of ſome not*, yet the Writ ſhall not abate in all but in Parcel. Br. Brief, pl. 485. cites 6 E. 4. 5.

S. P. as in Waſte *in Aſhes and Thorns* where *Thorns is not Waſte*, yet the Writ ſhall not abate in all. Quod nota; and this Exception was pleaded to the Count. Br. Brief, pl. 14. cites 9 H. 9. 10.——S. P. Roll. Rep. 307. Arg. cites 22 E. 4. 4. 9 H. 6. 10.——S. P. And ſo Writ of Dower ſhall not abate for all, by the Demand of Dower of ſuch thing of which a Feme is not dowable. Quære; for Babington denied it, if ſuch Matter be acknowleged by the Plaintiff. Thel. Dig. 237. lib. 16. cap. 10. S. 43. cites 9 H. 6. 10. 46. 48. 54. and 10 H. 6. 5. and ſee 8 E. 4. 3. 9 H. 7. 4. 22 H. 6. 28. Brief 94. 5 E. 4. 89. 18 E. 4. 28.

So in Waſte in a Houſe, and breaking of a Wall or Pale, where *it appears that Waſte does not lie for the Wall or Pale, unleſs it was cover'd*, the Writ ſhall not abate in all, as if the Party had *confeſs'd that his Writ had not lain in Part*; for otherwiſe it is where it comes by *Surmiſe in Writ or Declaration.* And ſo ſee a Diverſity between a Confeſſion of the Plaintiff, and where the thing comes of the Surmiſe of the Plaintiff in his Writ or Declaration. Br. Confeſſion, pl. 18. cites 22 H. 6. 24.

So in *Ejectment of the Cuſtody of Land and Body* where it lies not of the Body. Arg. Roll. R. 307. cites D. 23 El. and 9 H. 6. 54.

7. Where a *Writ* is brought *for ſeveral Sums*, it is in nature of 2 ſeveral Actions; ſo that tho' it be void as to one it is well enough for the other, it being *only a Miſpriſion* in his Writ or Count; *but where* one beings an *Action for two Things*, *and ſhews* by his own Confeſſion *that for the one he had not any Cauſe of Action or is to have another Action* it is otherwiſe; per Cur. Cro. J. 104. pl. 40. Mich. 3 Jac. B. R. cites 10 H. 6. 5. 41 E. 3. 2. 9 H 6. 10. 9 H. 7. 3. 21 H. 7. 34.

Where *Debt for ſeveral Sums* is brought as upon the Statutes of Uſury for 40 l. corruptive lent &c. againſt the Form of the Statute ſuch a Day, and that he lent 20 l. &c. againſt the Statute, but ſays not corruptive. Tho' this is ill as to the 20 l. for Want of the Word corruptive, yet being *good for Part* he ſhall have Judgment for that Part, for 'tis *in the Nature of two ſeveral Actions*, and tho' it be void for one yet it is well enough for the other. being it *is but a Miſpriſion in his Writ or Count.* Cro. J. 104. pl. 40 Mich. 3 Jac. B. R. Woody v.

8. *Where* a Man brings Action for two things and of his own ſhewing, it appears that he cannot have Action or *better Writ* for one of them, there the Writ ſhall not abate *for the Whole*, but ſhall ſtand for that which is good; but when a Man brings Action *for two Things*, and it appears that he cannot have his Writ for the one Thing but may have another in another

S. P. by Coke Ch. J. Roll. Rep. 77 in Caſe of Bullen v. Gedfrey S. C.—

S. C. cited Arg. Saund. 285.—— S. C. cited 7 Mod. 89. Arg —— G. Hiſt. of C. B. 209. cites S. C.——New Abr. 12. the laſt Plea, cites S C. in the very Words of G. Hiſt. of C. B.

another Form, then the Writ ſhall abate in the Whole, and ſhall not ſtand for that which is good. By the Reporter. 11 Rep. 45. b. Mich. 12 Jac. in Godfrey's Caſe.

(T. a) Againſt one, where it ſhall abate againſt the other.

G. Hiſt. of C. B. 204. S. P. accordingly.

1. IT was ſaid by Herle, that in Treſpaſs, if the Writ abates by *Plea of one as to the Form* it ſhall abate againſt all, tho' the others had before pleaded to Iſſue, But the *one may abate the Writ as to the Matter* as by reaſon of Miſpriſion of a Name &c. Yet the Writ *ſhall ſtand againſt the others*. Thel. Dig. 236. lib. 16. cap. 10. S. 2. cites 6 E. 3. 278.

2. *Præcipe* quod reddat *againſt E. and N.* and *E. ſaid that N. is his Villein, and N. ſaid the like*, by which he went ſine die, and *E. pleaded to the Writ, becauſe now it appears that N. had nothing the Day of the Writ purchaſed*, & non allocatur; for he is Tenant to the Writ and the other is as *Diſclaimer*, and therefore all veſted in the other, by which he was awarded to anſwer. Br. Brief, pl. 147. cites 21 E. 3. 14.

3. Writ of *Audita Querela* may abate againſt ſome of the Defendants *for Non-tenure*, and ſtand againſt the others. Thel. Dig. 236. lib. 16. cap. 10. S. 15. cites Paſch. 25 E. 3. 41.

4. *Præcipe* quod reddat *againſt 2, who waged their Law of Non-ſummons*, and *at the Day the one came and did it*, the *other made Default, by which the Demandant recover'd the Moiety*, and the Writ abated for the other Moiety; but 'twas ſaid that had there been View, then by the Ley Gager of the one all ſhall abate; for the one cannot be ſummon'd without the other. Br. Brief, pl. 469. cites 41 E. 3. 2.

S. P. Br. Brief, pl. 360. cites 7 E. 4. 10. and ſo of ill Addition.

5. It was adjudg'd, that *Miſnoſmer in Treſpaſs of one* of the Defendants ſhall not abate the Writ, but againſt him only, and not againſt his Companions. Br. Brief, pl. 355. cites 5 E. 4. 2.

6. In Formedon *againſt the Baron and Feme, and two others, the two pleaded Nontenure*, and the *Baron and Feme pleaded in Bar*, and were at Iſſue, and the other 2 pray'd Judgment that the Writ ſhould abate againſt them; and by two or three Juſtices, they ſhall not have Judgment; for if Judgment ſhall be, the Writ ſhall abate againſt all; for it *cannot abate againſt ſome but againſt all, but the 2 ſhall go quit, and no Continuance ſhall be againſt them*, nor the Demandant is not compellable to maintain that Tenants as the Writ ſuppoſes, unleſs he will; but by one of the Prothonatories, the Writ ſhall abate againſt the two. Quod nota. Br. Brief, pl. 335. cites 5 E. 4. 125.

Show. 75. S. C. adjornatur.—— Comb. 144. S. C. adjornatur.

7. J. S. brought *Treſpaſs againſt A.* and *afterwards brought Treſpaſs againſt A. and B for the ſame Treſpaſs*; and they both plead this Matter in Abatement. It was objected, that if this be a Plea for A. it is not ſo for B. Holt Ch. J. doubted, but the other 3 inclin'd that the Plea was good as to both Defendants. Carth. 96. Mich. 1 W. & M. in B. R. Rawlinſon v. Oriett & Benſon.

New Abr. 11. in the ſame Words.

8. If there be 2 *Executors*, and *one is named of D. and ſays he is of C.* the Writ ſhall abate againſt both, becauſe they are both the Repreſentatives of one Perſon, and muſt both be legally ſummon'd; as *they are both but one Perſon in the Eye of the Law*, the Plaintiff cannot proceed againſt the one without the other; but in this Caſe the other Defendant will

will be obliged to plead, though the Defendant's Plea in Abatement ſhall be firſt determin'd, and if it be found for him, ſhall abate the Writ in toto. G. Hiſt. of C. B. 200.

9. If there be 2 *or more Plaintiffs*, a *Diſability in one* of them ſhall ſtop the others Proceedings on their Writ; for as they have made it a joint Demand, the Defendant by diſabling one of them, ſhews the others have no Right to proceed; for they cannot all recover, and the Writ has ſuppoſed them all to have an equal Right. G. Hiſt. of C. B. 204.

(U. a) Writ abatable. Made good by what.

1. IN *Writ de Rationabili parte*, the Tenant *pleaded that they held in common* the Day of the Writ purchaſed; Judgment of the Writ; to which the Demandant *replied that the Tenant held now in Severalty* &c. yet the Writ was abated; for it is not like to the Purchaſe of Parcel made by the Tenant pending the Writ; for in this laſt Caſe the Tenant cannot plead the Nontenure of Parcel the Day of the Writ &c. without aſſigning that he is Tenant at the Time of the Plea pleaded, and ſo the Writ ſhall be held for good. Thel. Dig. 219. lib. 16. cap. 3. S. 1. cites Hill. 2 E. 2. Brief 780.

2. If the Tenant *recovers, and has Execution againſt a Stranger* of thoſe Tenements pending the Writ, it is good. Thel. Dig. 219. lib. 16. cap. 3. S. 3. cites Paſch. 8 E. 3. 400. and 22 E. 3. 8.

So if a Man brings *Aſſiſe or Præcipe* quod reddat againſt another, and *pending the Writ the Defendant, who had nothing before, * recovers the Land in demand and enters*, there the Writ by this is made good. Quod nota by Award. Br. Brief, pl. 289. cites 26 Aſſ. 38.

* *So* if he *takes a Surrender of it*; per Littleton. Br. Brief, pl. 379. cites 18 E. 4. 18. 19.

3. *But* if he comes to the Tenements *by Deſcent*, the Writ ſhall abate. Thel. Dig. 219. lib. 16. cap. 3. S. 3. cites Paſch. 8 E. 3. 400. and 22 E. 3. 8. and 18 E. 4. 27. and 32 E. 3. Brief 290. and 41 E. 3. 5. 3. 5. 1 H. 6. 1. 18 E. 4. 26.

S. P. Arg. Ld. Raym. Rep. 476. cites 41 E.

4. It is ſaid that *in Aſſiſe and Quare Impedit* the *Defendant may make himſelf Diſſeiſor and Diſturber, who was not* Diſſeiſor nor Diſturber *before the Writ purchaſed* &c. viz. *by Counterpleading* of the Action or Title of the Plaintiff, but not by Delays made in the Suit. Thel. Dig. 219. lib. 16. cap. 3. S. 4. cites Mich. 17 E. 3. 71. and 34 Aſſ. 3. and 44 Aſſ. 31.

5. If *Writ* be brought *againſt him in Reverſion, living the Tenant for Life*, and after the *Tenant for Life dies*, the Writ ſhall not be made good; for he is in by Title in Law. Thel. Dig. 219. lib. 16. cap. 3. S. 6. cites Trin. 30 E. 3. 4. and Hill. 31 E. 3. Brief 336.

But where there is *Tenant by the Curteſy*, and the *Writ is brought againſt him in Reverſion*, and *after the Writ* purchaſed *the Tenant* by the Curteſy *ſurrenders to him in Reverſion, and dies after the Surrender*, yet the Writ is good, notwithſtanding this Deſcent after the Surrender. Thel. Dig. 219. lib. 16. cap. 3. S. 9. cites Mich. 1 H. 6. 1.

6. Aſſiſe *in O.* The Defendant *ſaid that the Tenements are in B. and not in O.* Judgment of the Writ, *and if* &c. *he holds jointly by Charter with N. not named* &c. And by the Opinion of the Court, becauſe *by the firſt Plea he has pleaded to the Aſſiſe, and* has *pleaded ill naming of the Vill as ſole Party*, he has loſt the Advantage of the Jointenancy. Br. Brief, pl. 299. cites 30 Aſſ. 2.

7. Writ brought *againſt Baron alone, of Tenements* which he *held jointly with his Feme* the Day of the Writ purchaſed, ſhall not be made good

by the *Death of the Feme pending the Writ.* Thel. Dig. 219. lib. 16. cap. 3. S. 7. cites Paſch. 32 E. 3. Brief 290. and Mich. 18 H. 6. 26. accordingly.

Br. Nonabilitie, pl. 14. cites S. C.—Thel. Dig. 219 lib 16. cap. 3. S 8. cites S C.

8. *Debt by J. D. Prior* of the Friars of S. The *Defendant ſaid that after the laſt Continuance the Plaintiff reſign'd*; Judgment of the Writ, *and did not ſay and ſo not Prior*; for it may be that he reſign'd, and was re-elected *before the Return of the Writ*; and yet the beſt Opinion was that it is a good Plea. Br. Brief, pl. 134. cites 9 H. 5. 1.

that Writ which abates by *Reſignation* ſhall not be made good by Relation; but adds Quære.

If Action of *Detinue* be brought *againſt a Feme*, and ſhe has a Baron, which *Baron dies pending the Writ*, yet the Writ is abatable; for it was never good; per Littleton J. Br. Brief, pl. 380. cites 18 E. 4. 25.

9. *So* where a *Feme ſole brings Action, and takes Baron, who dies before the Writ return'd.* Br. Brief, pl. 134. cites 9 H. 5 1.

10. Quære where a Man is *outlaw'd pending his Writ*, and *obtains a Pardon pending the Writ.* Br. Brief, pl. 134. cites 9 H. 5. 1.

S. P. Per. Littleton. Br. Brief, pl. 379. cites 18 E. 4. 18. 19. —— S. P. Arg. Ld. Raym. Rep. 476. cites 41 E. 3. 5. 1 H. 6. 1. 18 E. 4. 26.——*But if* Writ be brought againſt one who has nothing the Day of the Writ purchas'd, and *he after purchaſes the Tenements to himſelf and to another jointly* &c. in ſuch Caſe the Writ is not made good, but it ſhall abate. Thel. Dig. 219. lib. 16. cap. 3. S. 5. cites Paſch. 18 E. 3. 14.

11. *But Purchaſe pending Præcipe* quod reddat makes the Writ good. Br. Brief, pl. 134. cites 9 H. 5. 1.

12. In *Aſſiſe of Tenements, Parcel in Franchiſe, and Parcel out*, one of the Tenants demanded Judgment of the Writ for this Cauſe &c. To which the Demandant *replied, that the Writ was brought againſt one of the Bailiffs of the Franchiſe*, and ſo the Writ good; to which the *Tenant ſaid, that this Bailiff was diſcharged, and another choſe* &c. yet the Writ held good, inaſmuch as it was well purchaſed. Thel. Dig. 219. lib. 16. cap. 3. S. 10. cites H. 10. H. 4. 9.

And it is held by Herle, that it is a *good Maintenance of the Writ* againſt ſuch Entry or Diſſeiſin pleaded, to ſay *that the Tenant is now Tenant, as is ſuppoſed by the Writ.* Thel. Dig. 188. lib. 12. cap. 21. S. 22. cites Paſch. 8 E. 3. 388. but ſays, See that this is denied by Fitzh. Paſch. 26 H. 8. 1. 7.

13. In *Præcipe quod reddat*, if the *Demandant enters pending the Writ*, the Writ is abateable, but if the *Tenant re-enters* the Writ is good. Thel. Dig. 188. lib. 12. cap. 21. S. 22. cites Trin. 4 H. 6. 27. 34 H. 6. 9. and 5 H. 7. 7. 41.

14. In Formedon, the *Tenant alleged Deſcent to him and another, and* that *Partition was made between them* by Prochein Amy, *and this Land was allotted to him*; and therefore he *pray'd Aid of the other*, and that the Parol demur; and the *other alleg'd the Partition to be void, becauſe it was by Prochein Amy*; and therefore the other pleaded to the Writ, for if the Partition be void, the Writ ought to be brought againſt both: Et non allocatur; for by the *Aid Prayer*, he has *affirm'd the Writ good*; Per Cur. Br. Brief, pl. 12. cites 9 H. 6. 5.

15. *Præcipe* quod reddat is *brought in S. where the Land is in D.* the *Tenant accepted the Writ, and vouch'd, and the Vouchee enter'd into the Warranty, and pleaded in Bar*, where *he might have pleaded* this Matter *to the Place*, and ſo he loſt the Advantage; for he cannot abate the Writ for this Miſtake of the Vill, becauſe the Tenant has affirm'd it, but for that he might have drove him from the Place. Br. Brief, pl. 186. cites 22 H. 6. 12. 13.

16. Where Writ is *abateable*, as *by Jointenancy, ſeveral Tenancy, Miſnoſmer, or* by *taking of Baron* by the Plaintiff pending the Writ, and the like, if the Party pleads and admits it, he ſhall not have Writ of Error after;

after; *but where* the Writ *is abated*, as by Death pending the Writ, and the Party admits it, yet there he ſhall have Writ of Error after; Per Pigot and Choke. Br. Brief, pl. 379. cites 18 E. 4. 18. 19.

(W. a) The Order of Pleading.

1. THere ought to be good Regard, that no Word or Sentence in a Writ be writ before or after another, *contrary to the uſual Form*; Sed quod habeat in verbis Cancellariæ ordinatam diſpoſitionem & verborum ordinem; otherwiſe it ſhall abate. Thel. Dig. 104. lib. 10. cap. 12. S. 1. cites Bract. 188.

2. The Order of Pleading is, 1ſt. To the *Juriſdiction*. 2dly. To *the* * *Perſon*. 3dly. To the *Count*. 4thly. To the *Writ*. And 5thly. To the *Action*. And if he fails of any of theſe, he ſhall not go back again. Br. Exception, pl. 1. cites 17 E. 3. 74.

And if he fails of any of theſe, he has affirm'd the firſt Matter. Br. Pleadings, pl. 14. cites 35 H. 6. 12. Per tot. Cur.——Br. Exception, pl. 5. cites 35 H. 6. 11. S. P. Per Cur.——Co. Litt 303. a accordingly, and that the Plea to the Perſon muſt firſt be to the Perſon of the Plaintiff, and then to the Perſon of the Defendant.——R. S. L. 3. cites Kitchin 95. That the Plea to the Juriſdiction is called a *foreign Plea*, becauſe it either alleges that the Matter ought to be tried in another Court, or elſe refuſes the Judges as incompetent, for that the Matter in Queſtion is not within his Juriſdiction. The Pleas to the Perſon of the Plaintiff are there ſaid to have been 6, viz. *Villeinage*, *Outlawry*, *Alien*, *Out of Protection*, *Profeſs'd in Religion*, and *Excommunication*: That the Pleas to the Count are for *Variance between the Writ or Count, or Specialty and Record*, and for *Uncertainty in the Plaint or Count*: That the Pleas to the Writ are for *Variance between the Writ and Regiſter*, *Uncertainty*, *Death of Parties*, *Miſnoſmer*, *Jointenancy*, and the like: That thoſe to the Writ are, Where one pleads ſome Matter which *ſhews the Plaintiff had no Cauſe to have that Writ brought, but ſome other Writ*. G. Hiſt. of C. B. 40. 41. 42. ſays, 5thly to the *Action of the Writ*, and 6thly to the *Action itſelf in Bar thereof*; and ſays this is the natural Order, becauſe by this Order each ſubſequent Plea admits the former. As when he pleads to the Perſon of the Plaintiff, he admits the Juriſdiction of the Court; for it would be *nugatory to plead any thing in that Court, that has no Juriſdiction in the Caſe*. When he *pleads to the Count, he allows that the Plaintiff is able to come into that Court* to implead him, and he may there be properly impleaded; *but* in pleading to the Count *he does not admit the Writ to be good*; yet if the Count be vitious the Writ is conſequently deſtroyed; for tho' the Writ in itſelf may be good, yet it is not purſued: But *in pleading to the Writ he admits the Form of the Count*, becauſe by an Objection to the Form of the Writ, he allows the Count to be ſufficient in Form; if the Writ be good, it is not to any Purpoſe to object to the Form of ſuch Writ, if the Form of the Count be thereupon inſufficient; but if the Count be in Subſtance variant, the Defendant may ſhew it any Time in Arreſt of Judgment, becauſe the Court has no Authority to proceed in a Matter of Subſtance different from the Original. If a Man *pleads to the Action of the Writ, he allows both the Form of the Count, and the Writ*; for if he admits, that if the Form of the Writ and Count were adapted to the Plaintiff's Caſe, that ſuch Form is good and ſufficient, ſince to object to the Action not quadrating to the Plaintiff's Caſe, does admit, that if it be ruled by the Count, that it does allow that the Plaintiff has before the Court a Count in Form ſufficient. If the Defendant *pleads in Bar to the Action, he admits the Form of the Writ and Count*; for he anſwers to the Right in Demand, and puts that Right in Iſſue, and thereby admits that there is a ſufficient Form to put in Iſſue; and therefore, tho' a Man pleads Non Aſſumpſit modo & forma, yet the Modo & Forma does not traverſe the Form of the Writ or Count, but the Subſtance of the Promiſe only; which is the true Reaſon why you may give another Promiſe in Evidence different in Time and Place mentioned in the Declaration, tho' not different in Subſtance.

* See tit. Courts, Alien &c. and Recuſant (d)

3. Thel. Dig. of Writs, lib. 10. cap. 1. S. 21. ſays, See Mich. 30 E. 3. 20. how the Order is obſerved well; firſt, *Excommunication to the Perſon of the Plaintiff before full Defence made, and after to the Count*, and *then to the Writ for Default of the Place in the Writ*; and after that Contra pacem was in the Writ, which ought not to be &c. *and after to the Action*.

4. It was held, That *after Plea to the Writ*, a Man may plead *to the Matter of the Count*. Thel. Dig. lib. 10. cap. 1. S. 19. cites Mich. 24 E. 3. 47. 35.

A Man ſhall not plead to the Count after Plea to the Writ; but as *Amicus Curiæ* a Man *may ſhew Matter apparent* in the Count. Thel. Dig. of Writs, lib. 10. cap. 1. S. 30. cites Mich. 19 H. 6. 10. 11. and 4 H. 6. 16. and H. 22 H. 6. 19.

In

In *Debt*, the *Defendant took Exception to the Writ* for certain Cauſes, and they were ruled againſt him, and *after he took Exception to the Count*, and was not ſuffered, becauſe he had pleaded to the Writ before; quod nota. Per Markham, it is *Matter apparent in the Count*; and *therefore a Stranger may aver it as Amicus Curiæ*, to inform the Court for Error, by which he was admitted to aver it to the Court, and not otherwiſe. Quod nota. Br. Exception, pl. 1. cites 19 H. 6. 10.

Pleas in Abatement are *to the Count firſt, and after to the Writ*; but to the Matter of the Count a Man may plead after he has pleaded in Abatement of the Writ. Fin. Law 8vo 363.

5. *By Exception to the Count* the Writ ſhall abate; for there is no other Judgment of it but Quod querens nihil capiat per breve ſuum. Br. Brief, pl. 14. cites 9 H. 6. 10.

6. In *Waſte in A. and B.* the 1ſt Exception was *to the Count*; the 2d *Two Dales, and none without Addition*; the 3d that *A. is a Hamlet of B.* and the 4th that *B. is in A. and not a Vill by itſelf.* Thel. Dig. of Writs, lib. 10. cap. 1. S. 29. cites Mich. 9 H. 6. 42.

In Reſpect of the Concluſion. See (C. b)

(X. a) Pleas to the Writ.

1. PLeas to the Writ are, 1ſt. Such as are *apparent in the Writ.* And of this the Defendant may at all Times take Advantage. 2dly. Such as *reſt upon the Defendant's Plea*, as Miſnoſmer, Jointenancy, Non-tenure, Non habetur aliqua talis Villa, or Over-Dale or Nether-Dale of the Place where the Action is laid, and not of which the Defendant is named, *unleſs* in Caſes *where Outlawry lies*; or that the Lands lie in A. and not in B. which Pleas the Defendant is bound to take in Time, and have a Care that he be not concluded of them by his general Appearance, Continuance, or Imparlance. 3dly. Obſerve, that if the Defendant *for Matter apparent in the Writ*, pleads in Abatement thereunto, that he ſhall both in the Beginning and Ending thereof, pray Judgment of the Writ, viz. *Petit Judicium de Brevi prædicto* &c. *but* if *for Matter out of the Writ*, as Excommunication, then he ſhall pray Judgment *in the Concluſion of his Plea only.* Brown's Anal. 5.

2. Scire facias upon a Fine *by the Heir of him in the Remainder*; the Tenant ſaid that the Fine was *to H. for Life*, the *Remainder to the Father and Mother of the Plaintiff in Tail*, and that the *Mother* of the Plaintiff, *after the Death of the Tenant for Life entred* into the Land, *and was ſeiſed* by Force of the Fine, *Judgment of the Writ*; and admitted a good Plea to the Writ. Quære if it be not to the Action of the Writ; and the other ſaid that H. inſeoff'd his Mother, and pray'd Execution. And Per Perſey, Kirton, and Clapton, *this is a Surrender*, and ſo ſeiſed by Force of the Fine; and if the ſaid H. Tenant for Life had charg'd and inſeoff'd him in Remainder, yet he ſhould hold charg'd for Life of the Tenant for Life, and not after; and yet Belknap awarded the Writ good. Quod mirum! Br. Scire facias, pl. 53. cites 50 E. 3. 6.

3. *Interlining* in a Bond, and the Writ is made according to it, ſhall not abate the Writ; per Thirn. But a *Raſure* goes to the Action, but the Variance by the Interlining is to the Writ; per Hort. Br. Brief, pl. 129. cites 14 H. 4. 18.

4. Where the Tenant pleads the Entry of the Demandant pending the Writ, he ſhall conclude to the Writ &c. Thel. Dig. 215. lib. 15. cap. 4. S. 5. cites 4 H. 6. 27. Mich. 34 H. 6. 8. and 4 E. 4. 35.

5. Where a Man pleads that the Plaintiff is an Alien born, or a Villein, or outlaw'd, he may chooſe to conclude to the Writ, or to the Action.

Action. Thel. Dig. 215. lib. 15. cap. 4. S. 4. cites Hill. 32 H. 6. 27. and 10 H. 7. 11.

6. *Annuity* of 11 s. per Ann. *by Prescription.* The *Defendant said that he held the Advowson of D. of him by* 11 *s. per Ann. which is the same Rent*, and demanded *Judgment of the Writ*, and the Defendant was awarded to answer over; for *it is only Argument.* Br. Brief, pl. 30. cites 33 H. 6. 34.

7. In Trespass of Goods taken, the Defendant may *say that the Plaintiff bail'd them to him, and so he may have Writ of Detinue*; Judgment of the Writ; this is a good Plea; per Choke J. Quod non negatur. Br. Brief, pl. 340. cites 2 E. 4. 25.

8. *Plenarty by* 6 *Months of the Presentation of a Stranger* is no Plea for the *Incumbent* to plead; per tot. Cur. For *it is not to the Writ*; for he does not give a better Writ against any Person certain, *nor* it is not *to the Action*; for it does not intitle him to the Patronage. Br. Plenarty, pl. 9. cites 16 E. 4. 11. Br. Quare Impedit, pl. 134. cites S. C.

9. In Cessavit, if the *Tenant says* that *he holds of the Plaintiff by several Tenures, and not by one intire Payment*, this goes to the Writ, and not to the Action; per Cur. Br. Cessavit, pl. 42. cites 10 H. 7. 24.

(Y. a) Pleadings to the Action of the Writ.

1. *LAST Seisin in Writ of Possession without Title* is to the Writ, and *by Title* it is to the Action *in every Writ, but in Writ of Right.* Br. Mortdancestor, pl. 16. cites 5 Ass. 1.

2. *Debt upon a Bond by J. T. Grocer of L.* which Words *(Grocer of L.) were interlin'd* in the Bond, and Horton pleaded it to the Writ. Thirn Ch. J. said, that that which is interlin'd *is only to give Addition*, and therefore the Plea goes to the Action, and not to the Writ, by which he awarded that the Defendant answer, contrary to the Opinion of Hank. and Hill, two of the other Justices. Br. Variance, pl. 85. cites 14 H. 4. 18.

3. Avowry *because the Plaintiff held* 4 *Rod of Land by* 10 *s.* The *Plaintiff said that he held two Houses by* 5 *s. absque hoc that he held the* 4 *Rod by* 10 *s.* Judgment of the Avowry. And per Martin and Hull, this is to the Action of the Avowry, and not in Abatement of the Avowry; but if he *says that the four Rod are held by one Service, and the two Houses by other Services*, this is a good Plea in Abatement of the Avowry. Br. Avowry, pl. 49. cites 5 H. 5. 4.

4. Quare Impedit quod permittat ipsum presentare *ad Ecclesiam de B.* Welton demanded Judgment of the Writ; for the *Defendant is Parson of H. and B. is a Chapel and Parcel of H.* and those of B. take their Sacrament at H. and B. is only a Chapel of Ease, and has been adjoin'd, and is Parcel of the Church of H. time out of mind, and demanded Judgment of the Writ; and per Newton, This goes in Bar, and not to the Writ. Br. Quare Impedit, pl. 76. cites 8 H. 6. 32.

5. Detinue *of* 2 *Deeds*, the *one by which A. leased to W. for Life, the Remainder to the Plaintiff*, and the *other by which A. released all his Right to the said Tenant for Life, who is dead.* And the best Opinion was, that because the one Deed appertain'd to the Plaintiff, and the other not, *it goes to the Action of Parcel, and not only to the Writ*; for *Action may lie in Parcel, and in Parcel not*, As of Dower of Land in Common, or Præcipe quod reddat of Land and Advowson, and the like; *but if a Man confesses that his Action does not lie in Parcel, or if it be false in Parcel*, it

goes to all the Writ. Note the Diverſity. Br. Brief, pl. 18. cites 9 H. 6. 54.

6. Where a Man is *outlaw'd upon Capias ad Satisfaciendum, by Name of W. S. of S.* and comes by Capias Utlagatum, and *ſays that he was of D.* &c. *and not of S.* if *this Iſſue* be *tried between the Parties it ſhall bind the King, and if it* be *found between the King and the Party Defendant, it ſhall bind the Plaintiff*; per Brown Prothonatory: But Scire Facias was awarded to warn the Plaintiff, notwithſtanding his Saying; and by him, if this Matter had been *pleaded to the Writ before the Outlawry*, it had not gone but to the Writ; *but* now *after Judgment* it goes to loſe all, or gain all; ſo that now it is peremptory, where at firſt it had gone but to the Writ if it had paſs'd for the Defendant; but if it had paſs'd againſt him, then it had been peremptory on the Part of the Defendant; contrary on the Part of the Plaintiff. Br. Peremptory, pl. 17. cites 21 H. 6. 21.

7. In Quare Impedit, where the Plaintiff in his *Count makes Title to the Advowſon appendant*, and the *Defendant ſhews Fine levied of the Moiety*, ſo that the Moiety is in Groſs, Judgment of the Writ; and it was doubted if this goes to the Writ, or to the Action. Br. Quare Impedit, pl. 10. cites 33 H. 6. 11.

But it is no Plea in Action perſonal, that the Plaintiff is an *Alien born*; contra in Action real or mixt. Br. Nonabilitie, pl. 40. cites 38 H. 8.——Br. Denizen, pl. 10. cites S. C.

8. In *Aſſiſe by* 2, the *Defendant ſaid* that the *one is Alien born*, Judgment &c. This is to the Action againſt him. Quod nota bene. Br. Nonabilitie, pl. 51. cites 7 E. 4. 29.

9. In *Debt upon Recovery of* 10 *l.* if the *Defendant ſays that the Plaintiff has levied Part*, it is no Plea to the Writ, but to the Action; Per Littleton. So of Acquittance. *Contra* it ſeems if it was *levied pending the Writ*. Br. Brief, pl. 486. cites 7 E. 4. 32.

S. P. Br. Brief, pl. 428. cites 9 H. 5. 4.—— Where it appears by the Plaintiff's Declaration, or the Defendant's Plea, that the Plaintiff ought *not to have the ſame but another Writ*, it is in the Defendant's *Election* to conclude either to the Writ, or to the Action of the Writ; as where *Dower* is brought *againſt a Guardian* who pleads that he is not Guardian, and prays Judgment of the Writ. Brown's Anal. 5.——Heath's Max. 22. in totidem Verbis.

10. *As* in *Dower againſt Guardian*, who *ſaid that he was not Guardian*, Judgment of the Writ, and admitted for a good Plea to the Action of the Writ. Br. Brief, pl. 490. cites 9 E. 4. 31.

If a Man pleads to the Action of the Writ, he *may chuſe to conclude Judgment of the Writ, or Judgment ſi Actio*; Per Fitzherb. and Shelley Juſtices. Br. Brief, pl. 492. [488] cites 26 H. 8. 1.——Br. Brief, pl. 405. [409] cites S. C.

11. It ſeems that he who *pleads to the Action of the Writ*, ſhall *conclude to the Writ*. Br. Brief, pl. 490.

(Z. a) Pleadings to the Writ, and over to the Action.

1. IN *Mortdanceſtor by* 3 *Parceners*, as *to one of them the Tenant ſaid that ſhe was ſole ſeiſed of that which belonged to her Portion the Day of the Writ purchaſed*, Judgment of the Writ, and admitted, without pleading over to the Points of the Writ. But it was ſaid that he *might have pleaded Non-tenure of this Portion, and* if it be found &c. Thel. Dig. 216. lib. 15. cap. 5. S. 5. cites 8 E. 2. It. Kanc. Mortdaunc. 40. & 22 Aſſ. 19.

2. In

2. In *Juris Utrum*, the Tenant *pleaded that a Stranger held Parcel not named*; and if it be found &c. *that the Demandant is ſeiſed of his Fealty of thoſe Tenements &c and* if found &c. he ſaid *that is Lay-fee, and not Frankalmoigne* &c. and held a good Plea. Thel. Dig. 215. lib. 15. cap. 5. S. 1. cites 12 E. 2. Juris Utrum 12. So in Juris Utrum the *Tenant vouch'd*, and the Demandant *counterpleaded the Voucher, that he who is vouch'd, nor none of his Anceſtors* &c. To which the *Tenant ſaid That ſeiſed, priſe* &c. *And* if it be found that not &c. *that the Tenements are his Lay fee* &c. and admitted. Thel. Dig. 215. lib. 15. cap. 5. S. 2 cites Hill. 17 E. 2. Counterple de Voucher 112.

So where the Tenant in Juris Utrum *pleaded Miſnoſmer of the Demandant, and* if found &c. *that the Demandant has recovered his Fealty, and* if found &c. he pleaded *a ſpecial Title, with So His Lay-fee, and not &c.* all was admitted Per Cur. Thel. Dig. 216. lib. 15. cap. 5. S. 9 cites Paſch. 11 E. 3. Juris Utrum 3.

3. In *Aſſiſe of Nuſance*, the Tenant *pleaded that he had nothing in the Place where &c. but only in Parcenary with* ſuch a *one not named* &c. *And* if it be found &c. he ſaid *the Plaintiff had nothing in the Tenements to which* &c. *at the Time* of the Nuſance, *but ſuch a one* was ſeiſed &c. and pray'd that it be inquired by Aſſiſe, and ſo it was. Thel. Dig. 215. lib. 15. cap. 5. S. 3. cites Mich. 18 E. 2. Aſſiſe 374.

4. In *Mortdanceſtor*, the Tenant *pleaded Non-tenure of Parcel, and* if it be found &c. he is *ready to bear the Recognizance.* Thel. Dig. 216. lib. 15. cap. 2. S. 4. cites 2 Aſſ. 10. and that ſo he ought to plead; and cites 12 Aſſ. 8.

5. In *Aſſiſe*, one who *pleaded Miſnoſmer of himſelf* did *not plead over to the Aſſiſe*; and admitted. Thel. Dig. 216. lib. 15. cap. 5. S. 7. Mich. 5 E. 3. 224.

6. In *Cui in Vita of Tenements in* 3 *Vills*, the Tenant *pleaded that all the Land in Demand is in one of the Vills, and* pleaded *over in Bar by the Deed of the Anceſtor of the Demandant, with Warranty*, and was received, and the Demandant was received to maintain his Writ, and to reply to the Bar. Thel. Dig. 216. lib. 15. cap. 5. S. 6. cites Mich. 6 E. 3. 290.

7. It is ſaid, that *in Attaint* a Man ſhall not plead *Si trove ſoit* &c. Thel. Dig. 216. lib. 15. cap. 5. S. 8. cites Mich. 8 E. 3. 439. But Ibid. cites Paſch. 16 E. 3. Nontenure 14 and 21 H. 6. Maintenance de Brief 23. that in Attaint the Tenant *pleaded Nontenure generally, and* if found &c. *they have made good Oath.* And *ſo* where *Tenancy in Common was pleaded to the Writ*, he was forced to *plead over to the falſe Oath.* Ibid. cites 27 Aſſ. 61. 29 Aſſ. 9.

8. Where the Tenant *pleads Not attach'd by 15 Days, and* it is *found that he was* by Examination of the Bailiff upon his Oath, yet the Tenant *may plead over* Quia nulla pœna. Thel. Dig. 216. lib. 15. cap. 5. S. 10. cites 22 Aſſ. 19.

9. In *Aſſiſe*, the Tenant may *plead that he is an Earl not named Earl, without pleading over* to the Aſſiſe &c. becauſe it is triable by Record if he be an Earl or not. But otherwiſe it is of Abbots, Priors &c. Thel. Dig. 216. lib 15 cap. 5. S. 11. cites 22 Aſſ. 24.

10. A Man ſhall *plead Jointenancy of the Part of the Plaintiff, and Miſnoſmer* of the Plaintiff, *without pleading* over *to the Aſſiſe.* Thel. Dig. 216. lib. 15. cap. 5. S. 12. cites 28 Aſſ. 36. Quære.

11. In *Aſſiſe, with every Plea to the Writ* that is *triable by Aſſiſe, he ought to plead over to the Aſſiſe. But* a Man ſhall plead *Outlawry* or *Excommunication* in the Plaintiff, *without* pleading over to the Aſſiſe. Thel. Dig. 216. lib. 15. cap. 5. S. 13. cites Trin. 40 E. 3. 29.

12. *But in* Aſſiſe of *Nuſance before the Sheriff in the County*, the Defendant *ſhall plead to the Writ Matter triable by Aſſiſe, without pleading over, if* it be found &c. becauſe the Jurors ſhall not have the View but the Party himſelf. *But before the Juſtices he ought to plead over, if* found &c. *Nul tort* &c. *or Not levied to Nuſance.* Thel. Dig. 216. lib. 15. cap. 5. S. 14. cites Hill. 50 E. 3. 11.

13. In

13. In *Ceſſavit* the Tenant *pleaded that he held by ſeveral Services, &c. and as to this Parcel*, that *it was open and ſufficient* to his Diſtreſs &c. Thel. Dig. 216. lib. 15. cap. 5. S. 16. cites Paſch. 10 E. 4. 2.

(A. b) In what Caſes there ſhall not be any Plea in Abatement.

1. IN Recordare which removes the Plea, the Words of the Garniſhment which ſhould be to the Plaintiff were to the Defendant, by which it was pleaded to the Writ, & non allocatur; for *Pone or Recordare* cannot be abated; for the *Plea is not held upon them*, and therefore Special Writ of Garniſhment was awarded, for the Court is lawfully ſeiſed. Br. Brief, pl. 494. cites 3 H. 6. 2.

2. 8 & 9 *W.* 3. *cap.* 31. *S.* 3. *No Plea in Abatement ſhall be admitted in a Suit for* Partition, *nor ſhall the ſame abate by reaſon of the Death of any Tenant.*

(B. b) What Pleas ſhall be ſaid Pleas in Abatement, and what in Bar.

1. *THAT the Demandant himſelf is ſeiſed of Parcel*, may be to the Writ or to the Action, at the Election of the Tenant. Thel. Dig. 149. lib. 11. cap. 35. S. 19. cites Trin. 22 E. 3. 8.

2. Aſſiſe againſt 2. The *one pleaded in Bar, and the other pleaded Jointenancy to the Writ*, and the *Plaintiff choſe him who pleaded in Bar for his Tenant*, and ſaid that the other had nothing; and *found* by the Aſſiſe *that he who pleaded in Bar had nothing, and that the other was Tenant.* And they were in Opinion that the Plaintiff ſhall anſwer to the Jointenancy; and ill by the Reporter; for by the *miſcleding of his Tenant* the Writ ſhall abate, *as well where each pleads in Bar ſeverally, as where the one pleads in Bar and the other to the Writ*; and after, becauſe the Plaintiff could not deny the Jointenancy, the Writ was abated. Quod nota. Br. Aſſiſe, pl. 25. cites 44 E. 3. 23.

3. A Man ſhall not plead *Entry of the Plaintiff pending the Writ to the Writ*, nor *Acquittance of the Debt in Writ of Debt pending the Writ, unleſs it be pleaded after the laſt Continuance.* Br. Brief, pl. 88. cites 50 E. 3. 4. Per Perſey & Hamm.

4. Treſpaſs for taking of 20 Iron-Bands for a Waggon. Yelverton ſaid, that the Vill of B. is an ancient Vill, in which has been *held a Fair* ſuch a Day yearly time out of mind, and the Cuſtom is that *every one who brings any thing to the Vill to ſell, ſhall pay ſo much* to the Vill *for Cuſtom, and that the Plaintiff* at ſuch a Fair *brought his Merchandizes* there to ſell, *and he as Bailiff of the Vill requir'd him to pay* his Cuſtom, *and he refuſed, by which we took the ſame Goods for Cuſtom*, and *after he came to us and paid* the Cuſtom, *and we deliver'd them to him*, and ſo he was poſſeſs'd of them the Day of the Writ purchaſed, Judgment of the Writ; and he was awarded to anſwer; for *this is no Plea to the Writ*; for he *ſhall have this in Evidence to qualify Damages*, but ſhall not have it for Plea. Br. Treſpaſs, pl. 130. cites 19 H. 6. 34

5. *So*

5. *So of Beasts taken, and they come back to the Owner*, yet the *Writ shall be general*, and the Matter shall be in Evidence; and so it seems here that it is a *good Plea in Bar*, but shall not conclude to the Writ. Br. Trespass, pl. 130. cites 19 H. 6. 34.

6. *Debt upon an Obligation against A.* who demanded Oyer of the Obligation, and had it; and that it appear'd by the Obligation that *this A. and one B. were bound, which B. is in full Life not named*, Judgment of the Writ, and ill; for he *shall say in Fact that A. and B. were bound, which B. is in full Life* &c. Quod nota by Award. Br. Pleadings, pl. 139. cites 28 H. 6. 2.

7. *In Debt*, if the *Defendant pleads Receipt of Parcel pending the Writ*, by the best Opinion this does not go to the Writ, but *to the Action of this Parcel*. Br. Brief, pl. 498. cites 34 H. 6. 1. 2.

Contra of *Receipt of Parcel before the Writ*; it is *false in Parcel*. Br. ibid.

8. Debt against R. W. late of London, Gentleman. Laicon pray'd Judgment of the Writ; for the *Tower of London is within London*, which is a County in itself, and *not of London, but is out of the Jurisdiction of London*, and extends into the County of Middlesex; and that the *Defendant the Day of the Writ purchased, and all times after, dwelt in London in the Tower of London, absque hoc that he ever dwelt in the City and County of London, out of the Tower of London*, & hoc &c. and because it was *pleaded by Attorney*, and this Plea is *contrary to his Warrant* of Attorney, therefore no Plea by the Opinion of the Court. Br. Brief, pl. 347. cites 4 E. 4. 16. 17.

9. Debt upon a *Bond of 20 l.* The Defendant pleaded that the *Plaintiff had received 5 l. thereof pending the Writ*; Judgment of the Writ, & non allocatur, *without shewing Specialty* thereof against Specialty; for it was held that it goes in Bar for this Parcel; but if it was merely to the Writ, it seems there that it shall be a good Plea to the Writ. Br. Brief, pl. 361. cites 7 E. 4. 15.

Br. Dette, pl. 153. cites S. C. Brooke says Quod mirum; for Plea to the Writ may be without Specialty; contrary of Plea in Bar.

10. In *Detinue* the Defendant *said, that the Deeds were deliver'd to him by the Plaintiff, and by J. B. and his Feme, upon certain Conditions, and pray'd Garnishment*, and had Scire Facias return'd served, and the *Baron came and demanded Judgment of the Writ, because it is of the Delivery of the Baron and Feme* made *during Coverture*, which shall be said the Delivery of the Baron only. But per Piggot & Choke, the Writ is good; for there is *a Diversity between Writ Original and* Writ *Judicial* as here; for such Writ of Detinue shall abate, for it is the proper Suit of the Plaintiffs; but this is the Act of the Court, and therefore if it be *awarded by the Court against 2, where it should be but against one*, yet it is good against the one. Br. Brief, pl. 367. cites 8 E. 4. 15. 16.

11. Trespass *against M. and R. of* 20 *Sheep* taken, the *Defendant said that the Property of* 10 *the Time of the Trespass supposed was to M. only absque hoc* &c. that it was in Both, *and that the Property of the rest was in R.* as above &c. *absque hoc* &c. Judgment of the Writ brought by them in common, and a good Plea. Br. Brief, pl. 369. cites 10 E. 4. 4.

12. *Assise by the Master and Confreres of the Fraternity of the nine Orders Angels in B.* the *Defendant said that no such Corporation*, this is in Bar, and not to the Writ, by which he said that the Fraternity was incorporated *by the Name of Master and Confreres of the Fraternity of All Saints and the nine Orders of Angels in B. Absque hoc that* it is incorporated by the Name as above, and if &c. Nul tort, and this is to the Writ, quod nota. Br. Brief, pl. 398. cites 22 E. 4. 34.

13. In Scire facias *of* 200 *Acres* of Land, the *Defendant pleaded a Recovery against him by A. pending the Writ, of* 100 *Acres of the said Land inter alia*; Judgment of the Writ, and no Plea because he did *not say* 100 *Acres Parcel of the* 200 *Acres*. Br. Brief, pl. 461. cites 22 E. 4. 8.

Thel. Dig. 192. lib. 12. cap. 30. S. 28. cites S. C.

In *Debt upon Bond*, Defendant pleads *Payment of Part Puis darrein Continuance*, which the Plaintiff accepted in Bar.

14. In *Debt upon Contract*, and *Receipt of Part* Puis darrein Continuance was pleaded. And it was held to be *no good Plea, becauſe it might be given in Evidence: but* if it had been upon *Debt upon Specialty*, it muſt have been pleaded in Bar. Per Holt Ch. J. 12 Mod. 542. cites 3 H. 7. 3. b.

Per Holt Ch. J. the Defendant could not have pleaded it in Abatement, but muſt have done it in Bar. 12 Mod. 541. Trin. 18 W. 3. Pierce v. Packſton.

15. Formedon *againſt A. M. who vouch'd R. who enter'd and vouch'd over W.* who *enter'd and vouch'd an Infant*, and after the *Plea was ſine Die by Demiſe of the King*, and *Re-ſummons was ſued*; the Tenant ſaid that *after the Plea was put ſine die J. N. brought Formedon againſt him and recover'd by Confeſſion of the Action, and he enter'd One Eſtate he has* in the Land *and had in the Life of the Recoveror, and the Title of the Demandant meſne between the Title of the Recoveror and the Judgment*, Judgment of the Writ; and was not ſuffer'd to the Writ, but in Bar by Reaſon that it was upon Re-ſummons. And it was agreed that Recovery upon Confeſſion had upon elder Title, and averr'd accordingly is good notwithſtanding that it be *upon Confeſſion* and cannot be to the Writ, for it appears that he had purchaſed it pending the Writ. Br. Brief, pl. 535. cites 5 H. 7. 38. 39.

16. *So in Waſte* quas *tenet* the *Tenant may plead that he has ſurrender'd*, Judgment of the Writ, quas tenet. Br. Brief, pl. 543. cites 10 H. 7. 11.

So if the *Annuity expires* or determines *pending* the Writ is gone, and the Plaintiff is put to Action of Debt.

17. In *Annuity till* he be *promoted to a competent Benefice*, if the *Defendant tenders to him a competent Benefice pending the Writ* and *he refuſes it*, this is to the Action. Br. Brief, pl. 441. cites 15 H. 7. 1.

Br. ibid.

18. When a Man *pleads a Plea which goes to the Action of the Writ, he may* chooſe if he will *conclude to the Writ or to the Action* of the Writ, per Fitzh. and Shelley Juſtices. Br. Brief, pl. 405. cites 26 H. 8.

In Debt *againſt S. as Executor, and after Imparlance* ſhe

19. One who had *Letters of Adminiſtration being ſued as Executor* may plead this in Abatement of the Writ which named him Executor &c. Quære. D. 305. b. pl. 61. Mich. 13 & 14 Eliz. Anon.

pleaded Actio non for that her Baron died inteſtate and ſhe took Adminiſtration abſque hoc that ſhe is Executor or ever adminiſtred as Executor; Per Cur. This Plea is only in Abatement and not pleadable after Imparlance; and Judgment for the Plaintiff. 2 Lev. 190. Paſch. 29 Car. 2. B. R. Granwell v. Sibly.

The pleading that he is Adminiſtrator is no Plea in Bar. 1 Salk. 296. pl. 4. Mich. 5 W. & M. in B. R. Harding v Salkill. —— S. P. *But* he may plead this in Abatement. And per Holt Ch. J. if a Judgment be had againſt him in ſuch Action, and afterwards he is ſued as Adminiſtrator in another he may plead the former Judgment in Bar Ultra quod &c. and the Caſe of D. 305. b. was denied to be Law. 12 Mod. 46. Mich. 5 W. & M. S. C.

20. *Two brought Debt upon a Bond*, the Defendant *pleaded that the Bond was made to them and to another, and that all 3 had an Action of Debt pending againſt him*, and demanded *Judgment Si Actio.* Upon Demurrer it was adjudg'd, that the Bond being made to 2, upon which they counted, cannot be intended a Bond made to 3; and if it be a Plea it is in Abatement of the Bill, and not in Bar. Cro. Eliz. 202. pl. 31. Mich. 32 & 33 Eliz. B. R. Iſham v. Hitchcock.

21. In Debt upon *Bond*, The Condition was *to deliver* 20 *Quarters* of Wheat, Defendant pleads that *Pendente Billa the Plaintiff had accepted* 15 Quarters, and demands Judgment of the Bill. And adjudg'd no Plea, for it is *Collateral* and not Parcel of the Sum contain'd in the Obligation, and if it be a Plea it is in Bar and not in Abatement. And adjudg'd for the Plaintiff. Cro. E. 253. pl. 23. Mich. 33 & 34 Eliz. B. R. Stone v. Radiſh.

21. In

22. In Debt on Bond, Defendant pleads *foreign Attachment of Part pending the Bill.* This is a Plea in Bar and not in Abatement. Cro. E. 342. pl. 21. Mich. 36 & 37 Eliz. B. R. May v. Middleton.

23. There is a *Difference between a Plea in Abatement* and a Plea *in Bar*, for in a Præcipe quod reddat it is a good Plea that the *Demandant enter'd* into the Land after the laſt Continuance without alleging any Eſtate in him; quod fuit conceſſum, per Coke Ch. J. And the Reporter remarks that it ſeems ſuch Plea ſhall be good only in ſuch Actions, where by Intendment the Entry of the Plaintiff is not taken away, for there by his Entry he is ſeiſed in Fee having a Right. Roll Rep. 322. Hill. 13 Jac. B. R. Loyd v. Bethel.

24. The Plea that there are *other Tertenants not ſummon'd* is good in *Perſonal Actions* but not in *Real* Actions; for in Real Actions, if one Tertenant anſwers without the other he is at no Prejudice, for more Land cannot be recover'd againſt him than what he is ſeiſed of. But in Perſonal Actions this Plea ſhall not be allow'd, for the one may be charg'd with the intire Debt. Per Haughton J. and agreed per Doderidge J. & non negatum. 2 Roll. Rep. 54. Mich. 16 Jac. B. R. Michell v. Croft & Al.

Cro. J. 507. pl. 19 S. C. and S. P. per Haughton, and it being in a Real Action the Plea was allow'd good, but that the Writ ſhould not abate, and that the Defendant would not anſwer till the other was warn'd, and therefore adjudg'd for the Defendant.——2 Roll. Rep. 54. ſays Judgment was quod Breve caſſetur, and that a new Writ of Scire facias ſhould iſſue againſt the Perſon not ſummon'd and the other Tertenants.

25. When a Plea *concludes in Abatement*, it is not peremptory; but if a *Plea in Abatement be pleaded in Bar*, it is peremptory. Allen 65. Trin. 24 Car. B. R. Beaton v. Foreſt.

S. P. in Debt upon *Bond.* Paſch. 16 Car. 2. B. R. Sid. 189. Burden v. Ferrars.——S. P. in Treſpaſs, where Defendant pleaded in Abatement *that he with others did the Treſpaſs*; and it was prayed, that tho' he pleaded this in Abatement, yet inaſmuch as he had confeſs'd the Treſpaſs, Judgment final ſhall be given; but the Court were of Opinion that it is only a Reſpondeas Ouſter, inaſmuch as he had ſo pleaded it. Sid. 190. pl. 18. Paſch. 16 Car. 2. B. R. Wright v. Bright.

26. Twiſden J. ſaid, That it hath been always agreed for Law, that if Debt or Trover &c. be brought for a Moiety, and Nil debet pleaded by the Defendant who is a Stranger, this hath made the Declaration good. And if ſuch Plea as here be pleaded *by a Stranger*, this is in Abatement. And if it be *by a Tenant in Common againſt* his Companion, this Plea is in Bar; which was granted. Sid. 49. pl. 11. Mich. 13 Car. 2. B. R. Cole v. Banbury.

27. If an *Original* bears *Teſte before the Money is due*, it is abateable; but a *Latitat* may be taken out before the Money is due, yet the Party muſt not be arreſted on it before. Vent. 28. Paſch. 21 Car. 2. B. R. Hanway v. Merry.

2 Keb. 503. pl. 70. Merrey v. Hanway, S. C.

28. In *Trover* the Defendant *pleaded that the Plaintiff never had any thing in the* &c. *Niſi conjunctim & pro indiviſo with two others, and concluded in Abatement.* The Court held the Plea good in Bar, though pleaded in Abatement; for the Defendant ſhews that the Plaintiff hath no Cauſe of Action, and ſo it ſhall be taken in Bar. 2 Mod. 63. Hill. 27 & 28 Car. 2. Stubbings v. Bird & al'.

In *Trover* declares, that N. J. S. and himſelf were poſſeſs'd, that the others died, and the Goods came to the Defendant's Hands &c. Defendant pleads that they were *joint Merchants*, and no Survivor by Law amongſt them; and ſo prays that the Plaintiff as to the joint Goods, may be barr'd. Demurrer and Judgment pro Quer'. for tho' no Survivor, yet the *Plaintiff had Right to a Purpart*, and *Jointenancy* ought to be pleaded in Abatement, and not in Bar. 12 Mod. 3. Mich. 2 W. & M. Kemp v. Andrews.

29. In Debt on a Judgment the Defendant pleaded in Abatement *a Writ of Error pending*; upon Demurrer and Argument it was held per tot. Cur. to be no Plea; and that the Law was always ſo taken till one Caſe in Pemberton's Time, when a Difference was made between ſuch Plea in Bar and in Abatement. But the Court held it all one, and Judgment

12 Mod. 48. Mich. 5 W. & M. Anon. S. P. and Holt ſaid he would be

bound by constant Resolutions in this Court, which are,

ment for the Plaintiff. And afterwards it was pleaded in Bar, and the Plaintiff had Judgment. Show. 146. Hill. 1 W. & M. Rottenhoffer v. Lenthall.

that this is no Plea in Bar or in Abatement, tho' there had been some contrary Resolutions in Lord North's and Ld Chief-Baron Turner's Time, but that was a new Notion; and Dolbin and Eyre J. (absente Gregory) agreed; and that there was no Difference between its being pleaded in Abatement and in Bar; and that so it was 8 W. 3. Per tot. Cur.—In *Debt upon a Judgment* in B. R. the Defendant pleaded that after the Judgment a *Writ of Error* was brought in Cam Scacc. directed to the Chief Justice of B. R. upon which the Cause was removed before the Judges there, where it yet *remains undetermin'd*, and *pray'd Judgment if he shall be compell'd to answer quousque* the Cause be determin'd there; upon which the Plaintiff *demurr'd*, and adjudg'd that the Defendant answer over; for this is not a Plea either in Bar or in Abatement; and such a Conclusion quousque is not good; for it is not like a Plea of Excommunication; for there he is only stopt till the Sentence discharg'd, and the Party may have a Re-summons or Re-attachment, but the Law does not give any such Remedy here; and Holt Ch. J. said, That this might be pleaded in Abatement, but not in Bar; for tho' the Plaintiff has commenced *his Action too soon*, it is not a Reason why he should be barr'd, though it may be a Reason why the Suit should be abated, *but* if a *Scire facias* in such Case had been brought, *quare Executionem* habere non debet, in such Case a Writ of Error pending might be pleaded in Bar of the Execution. Skin. 590. Mich. 7 W. 3. B. R. Rowley v. Ralphson.

Debt on a Judgment in B. R. the Defendant pleaded in Abatement Error depending in the *Exchequer Chamber*, and held good; but if the Defendant concludes *non debet respondere quousque*, it is not good because we have no Re-summons. 5 Mod. 68. Mich. 7 W. 3. Dashwood's Case.

Lutw. 600 602 Mich. 11 W. 3. Denton v. Evans S. P. And Powel J. said that this Action has been allow'd ever since H. the sixth's Time, and that sometimes it has been pleaded in Abatement, and sometimes in Retardatione of the Suit; but he said it cannot be good, because there can be no certain Time for Re-summons of the Party when the Judgment should be affirm'd, as there is in the Case of Protection. But no Resolution was given whether the Plea was good or not, or what Conclusion ought to be made. But there is a Nota that in Mich. 9 W. 3. C. B. Alford v. Lavering, such Plea was adjudg'd ill, because it concluded Petit Judicium de Brevi.——See tit. Superfedeas (B) pl. 4. and the Notes there.

Ld. Raym. Rep. 345. Owen v. Butler, S. C. a Respondeas Ouster was awarded.

30. In *Debt on Bond* the Defendant *pleaded that the Day of Payment is not yet come*, and concluded in Abatement. Adjudg'd that it was no good Plea in Abatement, for it ought to be pleaded in Bar; for in every Plea in Abatement the Defendant ought to shew the Plaintiff how to bring a better Writ, whereas here he shews that the Plaintiff ought to have none at all. Comb. 483. Trin. 10 W. 3. B. R. Owen v. Bulkley.

Dal. 33. pl. 22. S. C. accordingly.—S. C. cited by Holt Ch. J. 12 Mod. 525. Trin. 13 W. 3. in Case of Slanney v. Slanney.

31. If Plea to the Writ be for any *Matter appearing in the Writ*, he shall begin it with a Petit Judicium de Brevi, and shall conclude in the same Manner; *but if* it be for any thing out of the Writ, as Jointenancy, Non-tenure, or the like, the Conclusion only, and not the Beginning of the Plea, shall be in such Manner; Per Dyer, quod Browne concessit. Mo. 30. pl. 99. Trin. 3 Eliz. Anon.

* See May v. Middleton.

32. *Whenever a thing which in its Nature is a Bar*, happens *and is pleaded Puis darrein continuance*, it admits of no Answer; and this he said was *not like the Case of* * *foreign Attachmene*, tho' that has been held to be Matter of Payment, and therefore a good Plea in Bar; *nor like* the Case of the Demandant's *Entry into Part* of the Land Puis darrein Continuance; for that is the *Party's own Act only*; Per Holt Ch. J. 12 Mod. 541, 542. Trin. 13 W. 3. in Case of Pierce v. Packston.

Carth. 243. Butcher v. Porter.—1 Salk. 94. S. C.

33. In *Replevin Property in a Stranger* may be pleaded either in Bar or in Abatement; for it utterly destroys the Plaintiff's Action. Mich. 2 Ann. B. R. 1 Salk. 5. Presgrave v. Saunders.——6 Mod. 81. S. C.——2 Lev. 92. Wildman v. North.——Vent. 249. S. C.——S. C. cited Per Holt Ch. J. Carth. 244

34. A Plea that goes *to the Action*, *and not to the Person* of the Plaintiff, ought to be pleaded in Bar, and not in Abatement; and if pleaded in Abatement it may after a Respondeas Ouster be pleaded in Bar. L. P. R. 4. cites M. 4 Annæ.

35. In *Debt by H. as Adminiſtrator* to T. F. *quoad one Bond only*, the Defendant *pleaded in Abatement that Adminiſtration was granted before to J. C. of this Bond, which J. C took on him the Adminiſtration, and is alive, and thoſe Letters of Adminiſtration in full Force* &c. Exception was taken that this was Matter in Bar, and could not be pleaded in Abatement, becauſe it *perfectly deſtroys all Right of Action* in the Plaintiff; whereas in a Plea in Abatement the Defendant muſt always give the Plaintiff a better Writ; and the Difference is where it is pleaded in the Plaintiff or Defendant himſelf, or in a Stranger; as if the Suit is againſt the Defendant as Executor, who pleads that J. C. died inteſtate, and Adminiſtration was granted to him, this is pleadable only in Abatement; but where the Plea is that a Stranger is Executor or Adminiſtrator, it is a Bar. And per tot. Cur. accordingly; and therefore a Reſpondeas Ouſter was awarded. 2 Ld. Raym. Rep. 1207. Mich. 4 Ann. Hackett v. Tilly. 11 Mod. 93. Mich. 5 Ann. Hacket v. Tilly is not S. P.

36. A Man *covenanted not to ſue* Husband and Wife upon *a Bond* enter'd into *by the Wife during the Life of her Huſband*, afterwards, contrary to this Agreement, he *puts the Bond in Suit*. This Covenant cannot be pleaded in Bar, but muſt be pleaded in Abatement only. Arg. 10 Mod. 162. Trin. 12 Ann. B. R. in Caſe of Williams v. Miles.

37. In *Debt againſt an Heir* on the Bond of his Anceſtor, the Defendant *pleaded Infancy*, and pray'd that the Parol demur. The Court (abſente the Ch. J, and Lee J.) held this a temporary Plea in Bar, and not in Abatement. 2 Barnard. Rep. 145. Paſch. 5 Geo. 2. More v. Eyles.

(C. b) Concluſion of Pleas in Abatement.

See (X. a) See (B. b) pl. 30.

1. THE Concluſion of the Plea of *Divorce, and ſo not his Feme*, wav'd the Precedent, which was triable by the Certificate of the Ordinary, and made the Concluſion to be triable per Pais. Br. Waiver de Choſes, pl. 18. cites 30 Aſſ. 8.

2. In *Formedon* upon Grant *of a Reverſion*, the Concluſion ſhall be Per formam Donat' & Conceſs' præd' Thel. Dig. 113. lib. 10. cap. 23. S. 15. cites Hill. 50 E. 3. 2. and the Regiſter, fol. 239. and if it be Per formam Doni & Finis præd' cites eod. fol.

3. In *Forger of falſe Deeds*, the Bill was that the Deed was wrote in the Time of H. 5. and the Publication and Proclamation in the Time of H. 6. and concluded in Contemptum Domini Regis nunc &c. and held good Per Martin J. and Weſton Serjeant, but Rolf contra. Thel. Dig. 114. lib. 10. cap. 23. S. 23. cites Mich. 4 H. 6. 4.

4. By 8 H. 6. 18 and 19. in London, or other Places where they have ſpecial Grant not to be impleaded elſewhere, there they conclude *Judgment de brevi*, and ſhall not conclude to the *Juriſdiction*. And 38 H. 6. 19. where the Defendant's Plea doth prove that the Plaintiff may have another Writ in the ſame Court, there he ſhall conclude to the Writ and not to the Juriſdiction; * but by Priſot 37 H. 6. 24. if the Plea be in Bar, and the Concluſion to the Writ, it ſhall be taken in Bar; and ſo is 34 H. 9. 1 & 2. Heath's Max. 33. *But* contra 37 H. 6. 48. in *Forcible Entry*, if the Defendant pleads to the Writ, and concludes to the Action, he ſhall be condemned, becauſe by his Concluſion he hath admitted the Writ to be good. The like Law if he pleads to the Juriſdiction, and concludes to the Writ. Heath's Max 33.

* S. P. Br. Bar, pl. 47. cites 37 H. 6. 23. and ſhall not be taken to the Writ, according to the Concluſion; Per Priſot, quod non negatur.

5. He who *pleads ſeveral Tenancy* ſhall not conclude to the Writ, but vouch or plead over in Bar; and yet the Demandant ſhall not anſwer to

the Bar nor to the Voucher, but maintain his Writ. Quod nota. Br. Traverſe per &c. pl. 70. cites 19 H. 6. 13.

Br. Eſtopple, pl. 90. S. P. cites S. C.— In *Aſſiſe*, if the *Tenant pleads a Plea in Bar, and concludes*

6. In Forger of Deeds, if a Man *pleads in Bar, and concludes to the Writ, or e contra*, the *Court ſhall take the Plea as it is*; per Pole and Porting. accordingly. And per Newton, if a Man pleads in Bar, and concludes to the Writ, the Court ſhall award that he anſwer as to the Writ, and ſhall compel the Plaintiff to anſwer to the Bar. Br. Brief, pl. 440. cites 22 H. 6. 53.

Judgment of the Writ, it ſhall be taken to the Action, and not to the Writ; per Priſot. Quod non negatur. Br. Brief, pl. 234. cites 37 H. 6. 24.——S. P. Br. Barre, pl. 47. cites 37 H. 6. 23. per Priſot, according to the Concluſion.

If a Plea be good in Matter, and wants its ordinary Concluſion as affirmative, *& hoc paratus eſt* &c. and Eſtoppel *petit Judicium ſi* ad hoc admitti debet, this is vicious, and the Plea not good. Br. Faux Latin, pl. 91. cites 22 H. 6. 53. and 37 H. 6. 24.

Br. Eſtopple, pl. 90. S. P. cites S. C.

7. *In Aſſiſe*, if the *Tenant pleads Releaſe with Warranty*, and ſays no more, the Plaintiff ſhall recover; for he ought to *aver his Plea, and conclude* formally. Br. Brief, pl. 440. cites 22 H. 6. 53.

A Man may *plead to the Action, and conclude Judgment of the Writ*;

8. In Debt, if the *Defendant pleads a Plea which goes to the Action, and concludes Judgment of the Writ*, yet it ſhall go in Bar. Br. Brief, pl. 498. cites 34 H. 6. 1. 2.

for if he cannot have Action he cannot have Writ; per Littleton. Quod non negatur. Br. Brief, pl. 243. cites 36 H. 6 18.

When a Man *pleads a Plea which goes to the Action of the Writ, he may* chuſe if he will *conclude to the Writ, or to the Action* of the Writ; per Fitzh. & Shelley J. Br. Brief, pl. 405. cites 26 H. 8.

But in forcible Entry, if a Man *pleads to the Writ, and concludes to the Action, Judgment ſi Actio*, and the *Plaintiff demurs*, the Defendant ſhall be condemn'd; for *by the Concluſion the Writ is affirm'd*. Br. Brief, pl. 243. cites 36 H. 6. 18.

9. If *one Writ* be *brought where it ſhould be another* Writ, he ſhall conclude *Judgment of the Writ*; but if Writ be *brought in one Court, where it ſhould be* brought *in another* Court, he ſhall conclude *Judgment ſi Curia cognoſcere velit*. Br. Faux Latin, pl. 105. cites 38 H. 6. 18.

10. *But* is no Plea *that 2 Acres, Parcel* of the Manor, *extend into C. Judgment of the Writ*; and ſo the firſt Plea was alſo to the Writ, as it ſeems, and this is no Plea; for *he ſhall not recover the Manor in this Action, but Damages. Contra where the Land may be recover'd*. Br. Brief, 215. cites 9 E. 4. 3.

11. If a Man *cannot plead to the Writ, unleſs by ſhewing of the Matter of Bar*, there he *may ſhew it, and conclude to the Writ*. Br. Brief, pl. 543. cites 10 H. 7. 11.

12. *In Debt* the *Defendant may plead Outlawry* in the Plaintiff, and *conclude to the Perſon*, and yet the Matter goes in Bar, and after he may plead in Bar alſo. Br. Brief, pl. 543. cites 10 H. 7. 11.

If the Defendant *pleads* a Plea *to the Writ, and concludes*

13. When a Man *pleads a Plea which goes to the Action of the Writ, he may* chuſe if he will *conclude to the Writ, or to the Action* of the Writ; per Fitzh. & Shelley J. Br. Brief, pl. 405. cites 26 H. 8.

Judgment ſi Actio, he ſhall be condemn'd; for the Concluſion waves the Plea to the Writ. *Contra if he pleads* a Plea *to the Action, and concludes Judgment of the Writ*, this is good. Br. Waiver de Choſes, pl. 31. cites 36 H. 6. 18.

14. In *Debt againſt an Executor*, he *pleaded that there was another Executor living, who had adminiſter'd*, and concluded *Judgment ſi Actio*, where he ought to have pleaded in Abatement of the Bill. The Plaintiff replied that Billa caſſari non debet; and held good, notwithſtanding the Bar of the Defendant would have eſtopp'd him from concluding to the Action. Mo. 692. pl. 958. Onely v. Fontleroy.

15. In

15. In *Replevin* the *Defendant made Conuſance, and alleg'd the Property in H. S.* and not in the Plaintiff, and therefore demanded *Judgment of the Writ.* The Plaintiff demurr'd generally, and it was adjudg'd againſt the Plaintiff; for it was reſolved that the Defendant has Election to conclude his Plea in Abatement, as here, or to plead in Bar, viz. Et ſic petit Judicium ſi Actio. 2 Roll Rep. 64. Hill. 16 Jac. B. R. Salkill v. Skelton. Ibid. The Reporter makes a Quære if the Demurrer had been ſpecial.—— Cro. J. 519. pl. 1. S. C. but S P. does not appear.——Mod. 214. pl. 48. Paſch. 28 Car. 2. in C. B. Major & Stebbing v. Bird & Garriſon, Reſolved that a Plea may be a good Plea in Abatement, tho' it contains Matter that goes in Bar, and relied on the Caſe in 10 H. 7. 11. as a Caſe in Point, and the Caſe of Salkell v. Skelton above; and Judgment was given accordingly.——S. C. cited Arg. Comb. 483. and 1 Ld. Raym. Rep. 343.—— S. C. cited 2 Mod. 63. per Cur.

16. In Debt on Bond the Defendant *pleaded* a Plea *in Bar, and concluded in Bar*, whereas the *Plea itſelf was only a Plea in Abatement*, and conſequently a Reſpondeas Ouſter would in ſuch Caſe be awarded; yet per Cur. it being pleaded in Bar, Judgment Final ſhall be given, and ſo it was. Sid. 189. pl. 18. Paſch. 16 Car. 2. B. R. Burden v. Ferrers. *But* where *in Treſpaſs* the Defendant *pleaded* in Abatement, *that he with others did the Treſpaſs*; and it was moved that tho' he had pleaded it in Abatement, yet having confeſs'd the Treſpaſs, Judgment Final ſhall be given; but the Court held that only a Reſpondeas Ouſter ſhould be awarded. Sid. 190. pl. 18. Paſch. 16 Car. 2. B. R. Wright v. Bright.——Keb. 715. pl. 41. S. C. and Reſpondeas Ouſter was awarded.

17. The Nature of a Plea in Abatement is to intitle the Plaintiff to a better Writ; but where the Defendant *ſhews that the Plaintiff hath no Cauſe of Action*, tho' he concludes his Plea in Abatement, yet it ſhall be good in Bar. 2 Mod. 64. 65. Hill. 27 & 28 Car. 2. C. B. Stubbins v. Bird.

18. In Treſpaſs againſt 4 Defendants they all appear'd, and after diverſe Continuances 3 of them pleaded the Death of the 4th after the laſt Continuance; & petunt Judicium de brevi & quod breve prædict' caſſetur. And upon Demurrer it was adjudg'd ill in the Concluſion, which ought to be Et petunt Judicium ſi Curia ulterius procedere vult, and not Judicium de brevi & quod breve caſſetur; for the Writ was actually abated by the Death of the other Defendant, and a Reſpondeas Ouſter was awarded. 3 Lev. 120. Trin. 35 Car. 2. C. B. Hallowes v. Lucy. 3 Salk. 117. pl. 3. Ellwayes v. Lucy, S. C. adjudg'd accordingly. ——By the Courſe of the *B. R.* whereſoever you *commence by Bill*, a *praying Judgment of the Count* is a Plea in Bar; and in that Caſe, if you *plead in Abatement of the Count*, you muſt *not* pray Judgment of the Count, and that the Count may be quaſh'd; but you *muſt pray Judgment of Bill*, and that the Bill may be quaſh'd. Judgment affirm'd. 12 Mod. 133. Trin. 9 W. 3. in Cam. Scacc. Leaves v. Bernard.

19. A *Difference* was taken by Holt Ch. J. upon 33 H. 6. 18. that a Plea which *begins in Abatement*, tho' it *concludes in Bar*, is a Plea in Abatement; and that e contra a Plea *concluding in Bar*, tho' it *begins in Abatement*, is a Plea in Bar. Show. 4. Paſch. 1 W. & M. *Carneth v. Priour. If the Plea *be in Bar*, and *concludes to the Writ*, it ſhall be taken as a Plea in Bar.

If the Defendant *pleads to the Writ*, and *concludes to the Action*, the Plaintiff ſhall have Judgment againſt him, for admitting the Plaintiff's Writ to be good by the Concluſion of the Plea. The like Law where the Defendant pleads *to the Juriſdiction*, and *concludes to the Writ*. If he pleads *to the Action* of the Writ, he muſt *conclude to the Writ*. Brown's Anal. 8.——* Comb. 196. 197. S. C. by the Name of Calvert v. Prior, and S. P. accordingly, and that if it ſhould not be ſo, yet the Plaintiff having replied *caſſari non &c.* hath made it ſo.

20. In Debt on a Judgment in B. R. it is a good Plea in Abatement that *Error* is *pending in the Exchequer-Chamber*; but if the Defendant concludes *Non debet reſpondere quouſque*, it is not good; for B. R. has no Re-ſummons; per Holt Ch. J. 5 Mod. 68. Mich. 7 W. 3. Daſhwood's Caſe.

21. In

Ld. Raym. Rep. 593. S. C. and Northey argued that Petit Judicium de Narratione is always in Bar in B. R. and that in Abatement it is *Petit Judicium de Billa & quod Billa caſſetur*, and that Judgment quod Billa caſſetur cannot be given in this Caſe, becauſe it is not pray'd. Holt Ch. J. admitted this true *in Demurrers*, but not *in Pleas* becauſe there it is *Actio non*; for a Man may plead in Abatement of the Declaration. Per Gould J. the Matter of this Plea is plainly in Bar, it being *new Matter out of the Declaration*, and the Defendant ſays, in quo Caſu the Plaintiff ought not to have his Action, which is in Bar. Holt ſaid * if one *pleads Matter which goes in Bar* but *begins and concludes* his Plea *in Abatement*, it will be a Plea in Abatement, for it is the Beginning and Concluſion that makes the Plea. But if he *begins in Bar*, tho' he *concludes in Abatement or vice verſa*, it will be a Plea in Bar.

* S. P. by Holt Ch. J. accordingly; quod non fuit negatum. Show. 4. Paſch. 1 W. & M. in Caſe of Carneth v Prior.

21. In Caſe for ſelling a Lottery Ticket affirming it to be his own, whereas it was another's; Defendant pleaded that he bought it Bona Fide, and ſo ſold it; *Et petit Judicium de Narratione & quod Narr. prædicta caſſetur*; Plaintiff demurr'd. The Court took this Plea in the Concluſion of it to be in Bar; but becauſe it was faſeſt for the Plaintiff they gave Judgment to anſwer over; ſaying that could not be aſſigned for Error by the Defendant, becauſe it was for his Advantage. 1 Salk. 210. Trin. 12 W. 3. B. R. Medina v. Stoughton.

But where it *only traverſes a Particular Matter* as *Abſque tali Warranto &c.* it ought to be averr'd. Ibid.

22. The Court ſeem'd to think that where an *Abſque hoc compriſes the whole Matter generally as Abſque tali Cauſa*, it may conclude *& de hoc ponit ſe ſuper Patriam.* 1 Salk. 4. Mich. 1 Ann. B. R. Haywood v. Davis.

But if the Plea *commences in Bar with a good Matter*, and concludes to the Writ in Abatement, it will be well; for the Plaintiff cannot have a good Writ, if he has not a good Cauſe of Action. Per Holt Ch. J. 12 Mod. 525. cites 36 H. 3. 18.

23. If one begins *in Abatement and concludes to the Action* 'tis ill, if the *Plea be not ſufficient in Bar*, according to the Concluſion; and if Demurrer be to ſuch Plea, in that Caſe Judgment ſhall be againſt the Defendant, for his *Concluſion affirms the Writ* good. Per Holt Ch. J. 12 Mod. 505. Trin. 13 W. 3.

24. If a *Writ be abateable in itſelf*, as being for a wrong Man, Defendant may ſay *Petit Judicium de Billa*, becauſe there the Action is ill conceived; but where the Writ *is well conceived but bad for Miſnoſmer*, Defendant can't conclude ſo. Per Cur. 7 Mod. 150. Hill. 1 Ann. B. R. Silveſter's Caſe.

10 Mod. 192. B. R. Johnſon and Altham. S. P.

25. If a Man pleads in *Form of a Plea in Abatement that which for the Matter might be pleaded in Bar*, this is a Plea in Abatement, and ſo Vice verſa; for it is the *Concluſion* of the Plea and not the Matter of it that make a Plea in Abatement, or in Bar. 10 Mod. 112. Mich. 11 Ann. B. R. Alice and Gale.

26. To a *Scire facias* the Plea in Bar is always concluded by an *Executio Non*, as *in other Caſes* by an *Action Non*. 10 Mod. 112. Mich. 11 Ann. B. R. Alice and Gale.

But if there *is neither Writ nor Bill* (which is Error) neither of theſe two Forms are proper, for as to Petit Judicium de Billa it cannot be, there being no Bill; nor Judicium de Narratione, for it was not the Caſe in the Declaration, but the Want of a Bill that is the Error, ſo the Plea ſhould be *Petit Judicium ſi reſpondere compelli debeat.* 10 Mod. 211. B R. Johnſon and Altham.

27. The Concluſion of a Plea in Bar generally is *Petit Judicium de Narratione*; for where there is either a Writ or a Bill, the demanding Judgment of the Declaration is a Conſeſſion that the Writ or Bill is good. 10 Mod. 192. Mich. 12 Ann. B. R. Johnſon and Altham. And the Form of Pleading in Abatement is Petit Judicium *de Billa*. 10 Mod. 210. S. C.

28. In Action for ſeveral Promiſes, Defendant *pleaded that he is chargable as Bailiff*, and therefore the Action ſhould have been in Account, and and concludes *& ideo petit quod Narratio caſſetur*. Per Cur. the Plea is in Bar,

Bar, and the Difference is where a Plea concludes as this does, and where it concludes *quod Billa caſſetur*; for that is only in Abatement. Judgment was given in Bar. Barnard. Rep in B. R. 45. Paſch. 1 Geo. 2. Felila v. Rawlins.

(D. b) Rules as to Pleas in Abatement. And what is to be done.

1. WHERE a Man may have a *Writ according to his Caſe*, he muſt have ſuch an one, or otherwiſe 'tis not good. Arg. 2 And. 97. pl. 191. Trin. 24 Eliz. in Caſe of Arden v. Darcy

2. It is a general Rule that in all Actions where the *Thing demanded cannot be had, or the Perſon againſt whom* the Thing is demanded *cannot yield the Thing* the Writ ſhall abate. As in a Writ of Annuity by Grantee for Years, if the Term expires, the Writ ſhall abate. Arg. Le. 330. Trin. 30 Eliz. B. R. in Caſe of Wade v. Preſchall.

3. Where the *Pleading is ſuch as your Writ cannot be good*, there it is a Ground that *you ought to maintain your Writ*; *but* if a *Præcipe quod reddat* be brought *againſt two*, and the *one pleads Non-tenure* and the *other accepts the intire Tenancy, abſque hoc &c. and pleads in Bar*, there you *may anſwer to the Bar*, becauſe there peradventure the Writ is good notwithſtanding; as if a Writ be brought againſt the Feoffor and Feoffee upon Condition, or Mortgagor or Mortgagee; and ſo there is a Diverſity. Goldsb. 98. pl. 1. Mich. 30 & 31 Eliz. by Anderſon, in Caſe of Hazelwood v. Haſelwood.

Where *Special Matter is pleaded to Writ*, the Plaintiff in his Replication muſt *only maintain his Writ.* L. P. R. 7. cites 3 Ann. B. R.

4. A Plea in Abatement muſt be pleaded certainly. Co. Litt. 203. a.

5. There needs no Plea to abate that which is abated *of itſelf*. See 2 Roll. Rep. 272. Anon.

6. Upon a *Demurrer* to a Plea in Abatemen, the *Faults in the Declaration* can't be examined. Adjudg'd. 2 Lutw. 1592. Trin. 9. W. 3. in Caſe of Bellaſis v. Heſter.

Cited by the Reporter, ibid. 1604. —*After a Plea* in Abatement there muſt be no Exceptions to the Declaration. But becauſe it appear'd by the Plaintiff's own ſhewing that he had no Cauſe of Action when it was brought, the Pluries Mandamus being after Mich. Term begun, and the Memorandum of the Bill enter'd generally of that Term which Fault might be ſhewn as Amicus Curiæ, the Plaintiff had Leave to amend, and Judgment was given quod reſpondeat ulterius. Carth. 171. Hill 2 & 3 W. 3. B. R. Rich v. Pilkington.

7. One can *not plead twice in Abatement*. 12 Mod. 230. Mich. 10 W. 3. Anon.

8. Where one pleads in Abatement *another Action* depending ex eadem Cauſa, he need *not plead all the Continuance*, but yet he muſt *ſhew the Action is not determined*. Per Holt Ch. J. 12 Mod. 578 Mich. 13 W. 3.

9. If *Excommunication* in the Plaintiff be tender'd for Plea in Abatement, tho' it be ſign'd by Counſel, by the Courſe of the Court it is not to be received unleſs it be *produced under Seal*, tho' the Plea need not mention that it is ſo produced. And ſo of an Outlawry; Per Cur. 6 Mod. 180. Trin. 3 Ann. B. R. Anon.

10. 4 & 5 *Ann. cap.* 16. *S.* 11. Enacts, That *no dilatory Plea ſhall be received in any Court of Record, unleſs the Party offering ſuch Plea, do by Affidavit prove the Truth thereof, or ſhew ſome probable Matter to the Court, to induce them to believe that the Fact is true.*

Appellee in Murder pleaded in Abatement, that the Vill in which he was Commorant was (Shauford) and not (Shalford.) It was objected, that this being a dilatory Plea, could not be *received without an Affidavit*. And the Court at firſt inclined to that Opinion, Criminal Cauſes

Cauſes not being excepted out of the Act (the Exception in the Act relating only to the preceding Clauſe;) but the next Day they held otherwiſe, becauſe tho' this Plea be for the moſt Part dilatory, yet in this Caſe it is not, becauſe the Appellee muſt plead over, and the Iſſue be join'd on that as well as upon Not guilty, and both may be tried at the ſame Time. 11 Mod. 217. pl. 5. Paſch. 8 Ann. B. R. Young v. Slaughterford.

A Plea in Abatement, *that the Original is not returned, nor Pledges found* by the Plaintiff, was ſet aſide for Want of an Affidavit; and tho' it was urg'd that this appeared upon Oyer of the Original, and where ſuch Matter appears upon the Record (as Variance) an Affidavit is not neceſſary by this Act; but Per Cur. This does not appear on Oyer of the Writ; for nothing appears but the Writ itſelf. 2 Ld. Raym. 1409. Mich. 12 Geo. B. R. Hughes v. Alvarez.

11. Pleas in Abatement *muſt go to the whole*, and not to Part. 10 Mod. 285. 286. Hill. 1 Geo. 1. B. R. Aylwood v. Woodley.

(E. b) Where in Pleas in Abatement the Defendant muſt give the Plaintiff a better Writ.

In Writ of *Entry ad terminum qui præteriit, in which the Tenant had not Entry unleſs by Jo. to whom the Father of the Demandant leaſed a Term which is paſt* &c. the Tenant *cannot ſay that he did not enter by Jo. without ſhewing by whom he entred*, becauſe it is to the *ſecond Degree*. But *otherwiſe* it ſhould be, *if the Plea was to the firſt Degree*; for then it ſhould be to the Action. Thel. Dig. 212. lib. 15. cap. 1. S. 3. cites Hill. 6 E. 3. 244.

1. IN *Writ of Entry*, in which the Tenant had not Entry, unleſs by A. to whom B. leas'd &c. the Tenant was received to *plead to the Writ that B. did not leaſe to A. without ſaying to whom he leas'd; but if he traverſes the Entry he ought to ſay by whom he enter'd.* Thel. Dig. 212. lib. 15. cap. 1. S. 1. cites Mich. 14 E. 2. Brief 817. and Mich. 4 E. 2. Entre 65.

In *Writ of Entry into which the Tenant had not Entry unleſs by P. to whom Ro. leas'd, who diſſeiſed the Father of the Demandant* &c. the Tenant was received to *ſay that P. did not enter by Ro.* without ſaying by whom he enter'd &c. but the Iſſue was taken that Ro. did not leaſe to P. &c. Thel. Dig. 212. lib. 15. cap. 1. S. 7. cites Mich. 9 E. 3. 480. Quære.

2. In *Writ of a Manor*, if the Tenant *pleads that Parcel* of the Manor *is in another County*, he *ought to ſhew How much* is in the other County, ſo that the Demandant may have a good Writ with Forepriſe. Thel. Dig. 212. lib. 15. cap. 1. S. 2. cites Paſch. 4 E. 3. 137.

3. And *ſo where two Manors are demanded*, the Tenant ſhall not *plead Nontenure of Parcel* of the Demand, *without ſaying of which* Manor he pleads the Non-tenure. Thel. Dig. 212. lib. 15. cap. 1. S. 2. cites Paſch. 5 E. 3. 184.

4. In *Dum fuit infra ætatem, upon a Demiſe made by the Demandant himſelf*, the Tenant was received to *plead* to the Writ, *that the Demandant and another leas'd to him* the Tenements, without giving other Writ, becauſe the *Plea was to the Matter of the Writ, and not to the Form* of the Writ; by which the Demandant to maintain his Writ ſaid that the other was dead. Thel Dig. 212. lib. 15. cap. 1. S. 4. cites Hill. 6 E. 3. 245. 296.

5. In Writ of *Waſte againſt Tenant for Life of the Demiſe of the Father of the Plaintiff*, it is ſufficient for the Tenant to *ſay that the Father of the Demandant did not leaſe to the Tenant modo & forma*, without giving another Writ. And ſo it is in Dum fuit infra ætatem. Thel. Dig. 212. lib. 15. cap. 1. S. 5. cites Paſch. 6 E. 3. 260.

6. *Aſſiſe againſt A. and B.* who *pleaded* that *Non diſſeiſiverunt* &c. and it was *found that the ſaid B. diſſeiſed the Plaintiff, and infeoff'd A. and that A. did not diſſeiſe the Plaintiff*, by which the Plaintiff recover'd, and was amerc'd for his falſe Plea againſt A. and ſo where Verdict ſhall be found againſt

againſt the Plaintiff, and yet he ſhall recover. Quod nota; for he *cannot have other Writ but* that Both *diſſeiſiverunt eum, and he ought to name Diſſeiſor and Tenant.* Quod nota. Br. Verdict, pl. 25. cites 7 Aſſ. 14.

7. In *Præcipe quod reddat of Rent againſt* 2, *each* of them *took ſeveral Tenancy of Parcel of the Land out of which* &c. in Abatement of the Writ, and were not received *without ſhewing Matter by which the Demandant might have another good Writ*, by ſaying that the Rent was *Rent-ſervice*, or other ſuch like; for if it be *Rent-charge* the Writ ſhall not abate by ſuch ſeveral Tenancy. Thel. Dig. 212. lib. 15. cap. 1. S. 6. cites Paſch. 9 E. 3. 453.

8. *Interpleader of Nontenure of Parcel*, he ought to *ſhew that he was Tenant* of this Parcel *the Day of the Plea pleaded.* Thel. Dig. 212. lib. 15. cap. 1. S. 8. cites Paſch. 10 E. 3. 497.

9. In Writ of *Waſte againſt Tenant for Life upon Demiſe made by the Plaintiff himſelf*, the Tenant was received to *ſay that the Plaintiff and his Feme leas'd to him* &c. Judgment of the Writ, *without ſaying* in certain *what Eſtate he had* by this Demiſe &c. *becauſe the Plea was to the Matter of the Writ.* Thel. Dig. 212. lib. 15. cap. 1. S. 9. cites Trin. 10 E. 3. 525.

10. In *Dower of the 3d Part of a Manor in ſuch a Vill*, the Tenant was received to *plead* to the Writ, *that Parcel of the Manor extended into another Vill not named* &c. *without ſhewing how much* extended itſelf into the other Vill; for it is ſufficient to give a good Writ without giving a good Demand. Thel. Dig. 212. lib. 15. cap. 1. S. 10. cites Trin. 17 E. 3. 44.

11. *Detinue of a Writing of* 100 *l. in which A. was obliged to the Plaintiff, which was delivered to the Defendant by the Plaintiff and A. upon certain Condition in indifferent Hands, and the Condition is broke of the Part of A.* The *Defendant ſaid that a Writing of a greater Sum was delivered to him by them, upon Condition contain'd in an Indenture remaining in the Hands of the Defendant, abſque hoc that he received a Writing of the Sum in the Count*, and a good Plea, tho' he *does not ſay of what Sum*; for he *pleads it to the Action.* But if he had pleaded it *to the Writ*, he ſhould ſhew what Sum, to the Intent to give a better Writ; and the Iſſue was enter'd that he did not receive Writing of ſuch a Sum as the Plaintiff counted, Priſt, and the others e contra. Br. Charters de Terre, pl. 27. cites 21 E. 3. 30.

12. *In Debt* the *Specialty was Obligari ad reddendum compotum* &c. The Defendant demanded *Judgment of this Writ, becauſe he ought to have Writ of Account* &c. Sed non allocatur; for the Plaintiff may chuſe the one Writ or the other. Thel. Dig. 213. lib. 15. cap. 1. S. 15. cites Mich. 28 E. 3. 98. and Paſch. 42 E. 3. 9. and ſee Paſch. 41 E. 3. 10.

13. The *Writ was of Tenements in Dale and Sale.* The Tenant *ſaid to the Writ that Sale is a Hamlet of Down* &c. *without ſaying how many of the Tenements* were in Sale &c. but the Tenant afterwards relinquiſh'd the Plea. Thel. Dig. 212. lib. 15. cap. 1. S. 11. cites Paſch. 29 E. 3. 39.

14. In *Treſpaſs of Goods taken*, the Defendant may *ſay that he had them of the Delivery of the Plaintiff*, Judgment of the Writ, inaſmuch as he gave the Plaintiff Writ of Detinue. Thel. Dig. 213. lib. 15. cap. 1. S. 16. cites Mich. 43 E. 3. 30. 16 H. 7. 3. and Mich. 2 E. 4. 26. *But* in Treſpaſs *of a Horſe taken*, the Defendant *ſaid that the Plaintiff lent him the Horſe for* 20 d. *to ride to ſuch a Place* &c. *and concluded to the Action.* Thel. Dig. 213. lib. 15. cap. 1 S. 17. cites Mich. 1 H. 5. 13. ——— *And* in Treſpaſs *of Goods carry'd away*, the Defendant *ſaid that one Ro. was poſſeſs'd of the Goods, and made the Plaintiff and one Alice his Executors, and died, after whoſe Death Alice was ſole poſſeſs'd of the Goods, and made the Defendant her Executor, and died; after whoſe Death the Defendant found the Goods among other Goods of the ſaid Alice, and took them for ſafe-keeping to the Uſe of the Plaintiff* &c. *Judgment of the Writ; for he ought to have* Writ of *Detinue* &c. But it was held that *the Plea is to the Action.* Thel. Dig. 213. lib. 15. cap. 1. S. 17. cites Paſch. - E. 4. 3. Quære.

15. In

But in Treſpaſs againſt Jo. S. of M. it is no Plea for the Defendant to

15. In *Writ of Maintenance againſt Ro. Poynings of Poynyngs*, the Defendant *ſaid that he was never of Poynyngs, without ſaying of what Vill he was* the Day of the Writ purchaſed, and held good. Thel. Dig. 213. lib. 15. cap. 1. S. 12. cites Mich. 11 H. 6. 13.

ſay that M. is a great Place, containing in it ſeveral Vills &c. *without ſaying in certain of what Vill he is*, and ſo give a better Writ. Thel. Dig. 213. lib. 15. cap 1. S. 12. cites Paſch. 5 E. 4. 1. b. and ſo it is where Addition is of a Pariſh which contains ſeveral Vills. ——And *in Debt where the Addition is of ſuch a Vill, or late of ſuch a Vill*, it is no Plea to *ſay that he was never abiding at ſuch a Vill, without ſaying at what Vill he was abiding.* Thel. Dig. 213. lib. 15. cap. 1. S. 13. cites Mich. 33 H. 6. 38.

Thel. Dig. 213. lib. 15. cap. 1. S. 13. cites S. C.

16. If a Man pleads Non-tenure, or No ſuch Vill &c. or No ſuch in rerum Natura, he *ſhall* not *give the Plaintiff a better Writ*; and in ſeveral other Caſes e contra. Br. Brief, pl. 496. cites 33 H. 6. 38.

17. Where one *pleads Entry pending the Writ*, he ſhall not give a better Writ, and ſuch like &c. Thel. Dig. 213. lib. 15. cap. 1. S. 14. cites Mich. 34 H. 6. 8.

18. Treſpaſs by G. of Goods taken. Jenney ſaid *before the Plaintiff any thing had, L. was poſſeſs'd ut de propriis, and made E. his Feme and R. his Executors, and died; and E. married the Plaintiff, and was Covert at the Time of the Treſpaſs, and after E. died, and ſo the Action ought to have been brought by R. the other Executor who ſurvived, not named*; Judgment of the Writ. And it was held no Plea to the Writ, becauſe he did not give the Plaintiff a better Writ; for R. and the Plaintiff cannot join in Action. Br. Brief, pl. 386. cites 20 E. 4. 18.

2 Salk 601. pl. 11. S. P. in S. C.—— 2 Roll Rep. 54. S. P. in Caſe of Mitchell v. Crofts & al'.

19. Judgment ſhall not be to abate a Writ, but where the Plaintiff *may have a better.* 6 Mod. 226. Mich. 3 Ann. B. R. in Caſe of Adams v. Tertenants of Savage.

10 Mod 208. Arg.—— Yelv. 112. in S. C.——And therefore if Defendant be *ſued by the Name of E. J. Baronet*, it is not enough for him to ſay that He is not a Baronet, *without ſhewing what he is.* Ld. Raym. Rep 117. Trin. 4 Ann. Warner v. Irby.

20. Every one that will abate the Plaintiff's Writ, *muſt give him a better.* Brownl. 139. Mich. 5 Jac. in Caſe of Thompſon v. Collier.

21. When the *Defendant pleads a Matter which gives the Plaintiff a better Writ*, he ſhall abate the other; *As* if *Treſpaſs* be brought *by one Tenant*, the Defendant may *plead that he was Tenant in common with a Stranger*; for this falſifies the Plaintiff's Demand, and ſhews that he has no Right to the Action he has commenced. G. Hiſt. of C. B. 204.

(F. b) When to be pleaded.

1. AFTER *Errors* are *aſſign'd*, *and the Tenant* has *reply'd* thereto, he cannot plead in Abatement of the Writ of Error. Thel. Dig. 209. lib. 14. cap. 15. S. 1. cites Paſch. 3 E. 3. 81.

2. A Writ was abated for want of Form *after Non-tenure pleaded*, and ruled over. Thel. Dig. of Writs, lib. 10. cap. 1. S. 18. cites 19 E. 3. Brief 244.

3. *Præcipe* quod reddat *againſt* 3, who *made Default*, and *at the Grand Cape they came*, and *every one alleg'd ſeveral Tenancy of Parcel, and tender'd their Law of Non-ſummons.* Per Belk. You ſhall not have Plea to the Writ *before your Default ſaved*, and may take this Matter by Proteſtation;

tion; and becauſe the Demandant did not deny the ſeveral Tenancy, Mombray abated the Writ. Br. Brief, pl. 142. cites 38 E. 3. 28.

4. If a Man pleads *that a Stranger has recover'd the Land in Demand againſt him after the laſt Continuance, Judgment of the Writ*, he *ought to ſay that the Recoveror had Execution*, for otherwiſe it ſhall not abate the firſt Writ which was brought againſt the Tenant. Br. Brief, pl. 16. (bis) cites 9 H. 6. 41.

5. Debt *againſt J. B. Citizen of York*, and *does not give to him Vill nor Addition*, if he *appears and pleads, and is convicted*, he cannot plead this in Arreſt of Judgment; for the *Statute is, that the Writ ſhall abate by Exception of the Party*; and therefore becauſe he did not plead it, he has loſt it. Br. Brief, pl. 500. cites 35 H. 6. 11.

6. Entry ſur Diſſeiſin of Rent, the *Defendant pleaded Bar of Rent-charge*, and the *Plaintiff made Title of Rent-ſervice by Tenure*; to which the *Defendant ſaid that pending this Writ the Demandant had diſtrain'd for the ſame Rent-ſervice in the ſame Land, and of the Diſtreſs is yet ſeiſed*, Judgment of the Writ. Per Pigot, by the Bar he has affirm'd the Writ; and by all the Juſtices he ſhall have the Plea to the Writ; for *it may be that the Demandant has two Rents out of the ſame Land*; and when the Demandant has made Title to other Rent which is not in Bar, the Defendant ſhall have a new Anſwer to it, and may plead to the Writ of this Rent. Br. Brief, pl. 373. cites 12 E. 4. 10. 11. Br. Enter en le per, pl. 35. cites S. C. and ſays, that the Tenant had new Anſwer to the Writ; for the Bar was not pleaded to this Rent-ſervice.

7. *As in Treſpaſs* the Defendant pleads Bar, the *Plaintiff aſſigns the Treſpaſs in a new Place*, the Defendant pleads Jointenancy in it with a Stranger, or Tenancy in common. Br. Brief, pl. 373. cites 12 E. 4. 10. 11.

8. Where a *Man appears as Attorney for a Corporation which is miſnamed, and imparles*, they ſhall not plead Miſnoſmer in Abatement of the Writ after, notwithſtanding that he has not put in his Warrant; for the *Court ſhall compel him to ſhew Warrant, and if the Party* comes and *tenders to diſallow him, it ſhall not be admitted*; but he ſhall have Action upon the Caſe againſt the Attorney; *and the Corporation was not ſuffer'd to put Warrant in according to their true Name*. Quod nota. Br. Garrant de Attorney, pl. 15. cites 15 H. 7. 14.

9. A Man ſhall not *take Advantage of* a Plea in Abatement of the Writ *after a Plea in Bar*, where it does not *appear to the Court* that the Writ ought to abate; but where it does appear to the Court that the Writ ought to abate, there the Court *ex Officio* ought to abate the Writ, tho' the Party admits it by pleading in Bar. Roll. Rep. 176. Paſch. 13 Jac. B. R. Anon.

10. In an *Indebitatus Aſſumpſit againſt an Executor of J. S.* the *Defendant appear'd and imparl'd*, and afterwards *pleaded* in Abatement of the Writ, *that J. S. made other Executors not nam'd*. Upon Demurrer Exception was taken that this Plea is not good after Imparlance, becauſe it is of a thing in the Defendant's Knowledge, and ſo might have pleaded it before; and cited 35 H. 6. 36. And Jerman J. abſente Roll, held this Exception good; for by the *Imparlance* he had *admitted the Writ good*, and order'd him to plead in Chief, niſi &c. Sty. 220. Trin. 1650. Blackden v. Harvy. In Indebitatus Aſſumpſit it was held, that the Defendant cannot plead in Abatement after Imparlance. Vent. 183. Hill. 23 & 24 Car. 2.

B. R. Butcher v. Cowper.——The Defendant pleaded *after a general Imparlance*, that ſhe was *Covert* with one Y. and prayed Judicium de Billa; this is ill, and a Reſpondeas Ouſter was awarded. 2 Keb. 143 pl. 16 Hill. 18 & 19 Car. 2. B. R Linch v. Beale.

S. P. in Indebitatus Aſſumpſit, that before the Action brought ſhe was married, and her Husband living, and not named, & petit judicium ſi ipſa ad actionem præd' reſpondere debeat. Judgment was Quod reſpondeat Ouſter, becauſe the Plea was only in Abatement, and not pleadable after Imparlance. Lutw. 22. Paſch. 3 Jac. 2. Bartelot v. Burton.

11. No Plea in Abatement ſhall be received *after a Reſpondeas Ouſter*; for then this would be pleaded in infinitum. G. Hiſt. of C. B. 151. cites 2 Saund. 41.

In *Formedon* one cannot plead in Abatement after the

12. *After a View* there can be no Plea in Abatement, unleſs ſuch as ariſes upon the View. 3 Lev. 219. Trin. 1 Jac. 2. C. B. Dinghurſt v. Batt.

View, unleſs it be *a Thing which cometh upon the View.* Kitch. of Courts 426. cites 41 E. 3. 39. 40 E. 3. 35.

Formedon after View, the Tenant cannot plead in Abatement, that *ſome of the Degrees* were *omitted*; for it is not apparent to the Court. Kitch. of Courts 426. cites 49 E. 3. f. 20 ——But he may plead *Ancient Demeſne* after the View; for it may be that Parcel in the Town is Ancient Demeſne, and Parcel Frank-fee, and it cometh upon the View to know that. Kitch. of Courts 426. cites 50 E. 3. f. 9.

In Formedon where there is *Matter apparent in the Writ, to abate* it he may plead it after the View. Kitch. of Courts 426. cites 11 H. 4. f. 70.

After the View one cannot plead *No ſuch Town, but* he may ſay *that the Tenements are in another County*, for that cometh upon the View; but after the View he *cannot plead to the Juriſdiction*, yet he *may plead that they are in C. and* that they are *impleadable there, and demand Judgment of the Writ*, and *not* Judgment, *if the Court will* take Conuſance. Kitch. of Courts 426. cites 7 H. 6. f. 39. ——*So in Dower of a Freehold in D. and S.* after View one cannot plead *No ſuch Town of D.* for he is eſtopped of that, for that he hath Knowlege of the Town before the View; but he may plead *Jointenancy and Non-tenure*, which comes upon the View. Kitch. of Courts 426. cites 19 H. 6. fo. 10.

Formedon of a Houſe, and *in the Percloſe* of the Writ, there *is a Houſe and Meadow*; and after View the Tenant cannot ſhew this in Abatement, for it is but a *Surpluſage*. Kitch. of Courts 426. cites 44 E. 3. f. 14.

2 Show. 443. pl. 408. S. C. adjudg'd in B. R. and affirm'd in Cam. Scacc.

13. In Aſſault and Battery, the Defendant *impar'd ſpecially*, and after making a *full Defence* pleaded Outlawry in Abatement; and upon a Demurrer a Reſpondeas Ouſter was awarded. Lutw. 5. Trin 35 Car. 2. Gawen v. Surby.

for the Plaintiff; for after full Defence the Plea was too late.

If *Declaration* be *delivered before Craſt. Animarum* or *menſ. Paſch.* the Defendant has *not Time till next Term* to plead in Abatement, *but only till the Rules are out*; *but if* it be *delivered after that Time*, the Defendant has till the Eſſoign-day of the next Term to plead in Abatement; Per Cur. 12 Mod. 522. 523. Anon.

14. If one will plead in Abatement, he muſt do it *before the Rules are out*, and ſhall not have till *Eſſoigns of next Term* for it; and formerly the Courſe was to ſerve Rules for pleading generally, and after they were out to ſerve Rules peremptory; Per Cur. 12 Mod. 522. Trin. 13 W. 3. Anon.

Tho' a *Declaration* be *delivered as of a Term before*, yet if the *Rules of Pleading* be *not out*, one may plead in Abatement the ſubſequent Term; Per Cur. 12 Mod. 504. Anon.

15. If a *Declaration be delivered the laſt Day of a Term*, the Defendant ſhall have 4 *Days in a ſubſequent Term* to plead in Abatement; and if a Declaration be *delivered* the laſt Day of a Term, *as of a precedent Term*, the Party ſhall have 4 *Days after the actual Delivery* of the Declaration to plead in Abatement. But Judge Powell ſaid, one could not plead as of a precedent Term without Imparlance; to which Mr. Clarke anſwered, he might *enter it upon the Poſt-roll without any Imparlance*, and then the Plea is of that Term of which the Declaration is. 7 Mod. 62. Mich. 1 Ann. B. R. Fiſh v. Horner.

19. *And* note, the Declaration muſt be as of that Term in which Bail is filed, and the Defendant in another Term is not bound to accept a Declaration as of a Term precedent. And Mr. Clarke ſaid, that though *by Conſent* the *Defendant does accept a Declaration the laſt Day of Trinity Term as of Hillary Term*, yet he ſhall have 4 *Days in Michaelmas Term* to plead in Abatement. 7 Mod. 62. Mich. 6 Ann. B. R. Fiſh v. Horner.

17. *Marriage* after Suit in Inferior Court commenc'd, is pleadable in Abatement in the Superior Court, after Removal; but the Courſe of the Court is to move the Matter to the Court upon the Return of the Habeas Corpus,

Corpus, and the Court will grant a *Procedendo*. 1 Salk. 8. pl. 20. Mich. 6 Ann. B. R. Hetherington v. Reynolds.

19. Nothing ſhall be pleaded in Abatement *of a 2d Scire facias upon a Judgment* that was pleadable in the Action; for it would be unreaſonable he ſhould diſable the Plaintiff from having Execution, ſince he admitted him able to have Judgment; all *Matters in and before the Writ muſt be pleaded in Abatement*, for no Advantage can be taken of it by Error. G. Hiſt. of C. B. 208.

But *otherwiſe* it is *where it is after the Writ*. Ibid.

(G. b) Plea to the Writ after other Plea pleaded.

1. IN *Aſſiſe* after that the Tenant has pleaded in Bar, he *cannot* waive it, and *plead that the Tenements are in another Vill, nor other Plea to the Writ*. Thel. Dig. 209. lib. 14. cap. 14. S. 1. cites 1 Aſſ. 17.

2. In Aſſiſe *of Rent*, the *Tenant pleaded Hors de ſon Fee* &c. and the Defendant *after would have pleaded Miſnoſmer* of his Name. And if &c. to the Aſſiſe, and was not ſuffer'd becauſe he had pleaded in Bar before. And ſo it ſeems that he who pleads in Bar in Aſſiſe *may wave the Bar, and plead to the Aſſiſe Nul tort, but* not Miſnoſmer, *nor no other Plea to the Writ*. Quod nota. Br. Aſſiſe, pl. 111. cites 3 Aſſ. 9. Thel. Dig. 209. lib. 14. cap. 14. S. 2. cites S. C. accordingly. — So after ſuch Plea he ſhall not plead that the Plaintiff is *ſeiſed of Parcel*. Thel. Dig. 209. lib. 14. cap. 14. S. 7. cites 30 Aſſ. 12

3. In *Treſpaſs by Baron and Feme of Treſpaſs done to the one and to the other*, the Defendant *pleaded Not Guilty*, and after the Court abated the Writ; becauſe the Feme ſhall not recover Damages for the Treſpaſs done to the Baron. Thel. Dig. 209. lib. 14. cap. 14. S. 13. cites 3 E. 3. It' North. Brief 737.

4. Thel. Dig. 88. lib 10. cap. 1. S. 7. ſays it ſeems by the Opinion of Mich. 1 E. 3. 139. that where the Defendant pleads *a Plea which goes to the Action*, and *concludes to the Count, and waives it, or is ruled over*, he ſhall plead another Plea to the Writ.

5. *And* he who *pleads Miſnoſmer and over to the Aſſiſe* ſhall not be ſuffer'd to *plead in Bar afterwards*, becauſe he has pleaded to the Aſſiſe before; quod nota bene. Br. Aſſiſe, pl. 111 cites 3 Aſſ. 9.

6. The *Writ of Land in Dale and Sale*, and the Tenant *after the View pleaded the Releaſe of the Anceſtor of the Demandant in Bar for all*, but *the Releaſe ſhew'd did not comprehend any Land but in Dale only*, and after the Tenant would have pleaded *that all was in Dale and nothing in Sale* and was not received. Thel. Dig. 209. lib. 14. cap. 14. S. 3. cites Trin. 6 E. 3. 273.

7. After the Tenant has *pleaded to the Count in the Form of Eſplees, and ruled over*, he *was received to ſhew that there was not any Vill named in the Writ*, by which it was abated. Thel. Dig. 89. lib. 10. cap. 1. S. 12. cites Mich. 7 E. 3. 361.

8. After the Tenant had pleaded in Bar he was received to ſay *that the Writ was without Date*; for it was Auguſti where it ought to be Auguſti. Thel. Dig. 209. lib. 14. cap. 14. S. 4. cites Mich. 10 E. 3. 533.

9. In Writ of *Entry of Diſſeiſin made to the Grandfather of the Demandant*, thoſe Words (*quæ clam' eſſe jus & hæred' &c.*) *were left out*. But is was held that after Plea to the Action the Defendant could not ſhew this Omiſſion in Abatement of the Writ; becauſe *there was Matter ſufficient in the Writ without thoſe Words of Form*. Thel. Dig. 209. lib. 14. cap. 14. S. 15. cites 21 E. 3. 18. 32. and adds Quære, and ſays ſee the New Nat Brev. fol. 21.

10. If

10. If the *Plaintiff in Avowry prays Aid*, and has the Aid, *he ſhall not plead in Abatement of the Avowry after*; for the Aid Prayer and Voucher are in Lieu of Bar, and for bringing a Bar, and therefore 'tis contrary to the Order of Exceptions to plead in Abatement after it; quod nota. Br. Exceptions, pl. 7. cites 24 E. 3. 26. 27. 51. 52.

11. In *Bill of Treſpaſs containing diverſe Treſpaſſes*, after that the Defendant had pleaded he was not received to ſay *that a thing done out of the County was ſuppoſed to be done by the Bill* &c. Thel. Dig. 209. lib. 14. cap. 14. S. 5. cites Trin. 27 E. 3. 82.

12. In Oyer and Terminer of the *Raviſhment of an Heir in Ward*, the the *Writ was rapuit, where it ought to be cepit & Abduxit* &c. If the Defendant pleads to the Action he ſhall not plead this Matter to the Writ, for *the Writ is affirm'd.* Thel. Dig. 209. lib. 14. cap. 14. S. 6. cites 29 Aſſ. 35.

13. In *Debt againſt Baron and Feme and another upon Contract made during the Coverture*; for the Feme it was *ſaid that a Feme Covert cannot make a Contract, Judgment ſi Actio*, and *for the Baron, and the third was pleaded the ſame Matter to the Writ*, and were not received, by which they pleaded to the Action. Thel. Dig. 209. lib. 14. cap. 14. S. 8. cites Hill. 34 E. 3. Brief 923.

14. *Debt againſt two*, the *one came*, and *the other made Default*, ſo that *Exigent was pronounced* againſt him, and the *Plaintiff counted upon a Joint Contract or Cauſe*, there he who appear'd was compell'd to anſwer, notwithſtanding that he alleg'd he ought not to anſwer without the other becauſe it is upon a Joint Obligation, by which the *Defendant pleaded the Death of him who is outlaw'd before the Exigent pronounced*; and becauſe the other could not deny it the Writ was abated by Award after he had pleaded that he ſhould not be compell'd to anſwer without the other; and the Reaſon ſeems to be becauſe the Plea of the other was not recorded. And with this agrees 41 E. 3. 1. that in Account againſt 2, if the one dies or be outlaw'd the other ſhall anſwer for the whole; Nota. Br. Reſponder, pl. 4. cites 40 E. 3. 26.

15. In Writ *againſt an Hoſtler* after Plea in Bar pleaded, the Defendant was received to ſhew that the Plaintiff by his Count had *not ſhewn that the Defendant was a common Hoſtler*, upon which the Writ was abated. Thel. Dig. 209. lib. 14. cap. 14. S. 14. cites Hill. 11 H. 4. 45.

16. In *Waſte* againſt Beatrice, who was the Feme of the Earl of Arundel, firſt the *Exception* was taken *to the Count in the Aſſignment of the Waſte*, and *after to the Name of Dignity of the Defendant*, inaſmuch as ſhe was not named Counteſs, and *then to the Form of the Writ* by which Waſte was ſuppoſed in Hominibus and not Exilium, *and laſtly no ſuch Vill.* Thel. Dig. lib. 10. cap. 1. S. 26. cites Trin. 2 H. 6. 11.

17. After that the Defendant has *pleaded to the Form of the Addition*, he *may plead that he was Commorant at another Place abſque hoc* &c. Thel. Dig. lib. 10. cap. 1. S. 27. cites Mich. 4 H. 6. 4.

18. Where a Man *pleads to the Writ, or prays in Aid*, and the *Demandant demurs* thereupon, if it be *adjudg'd againſt the Tenant he ſhall not plead newly to the Writ, nor pray in Aid*; per Fulthorp. Thel. Dig. of Writs, lib 10. cap. 1. S. 31. cites Hill. 22 H. 6. 46.

19. In *Writ againſt 2*, if the *one pleads to the Writ, and the other to the Action*, he who pleads to the Action cannot reſort to the other Plea to the Writ. Thel. Dig. 209. lib. 14. cap. 14. S. 16. cites Paſch. 11 H. 6. 42.

20. In *Scire Facias* out *of a Fine*, if the *Demandant does not ſhew by the Writ, or in the Roll, How he is Couſin* to his Anceſtor, the *Tenant* after pleading in Bar, and Admittance thereof, *may plead this Matter in Abatement* of the Writ, and it ſhall abate by Judgment. Thel. Dig. 209. lib. 14. S. 9. cites 38 H. 6. 4. 20. 22.

21. In

21. In *Attaint* the Defendants *pleaded Quod bonum & Legale fecerunt Sacramentum*, and afterwards they would have pleaded *Variance between the Writ of Attaint and the firſt Record*, and were not received. But it was ſaid that it ſhould be otherwiſe if the *Record* be *in the ſame Court*. Thel. Dig. 209. lib. 14. cap. 14. S. 10. cites Trin. 9 E. 4. 24. Quære.

22. In *Treſpaſs of a Cloſe broken*, after *Plea in Bar*, *and new Aſſignment* made by the Plaintiff, the Defendant may plead to the Writ *that the Plaintiff has nothing but in common with ſuch a one not named* &c. Thel. Dig. 209. lib. 14 cap. 14. S. 11. cites Mich. 12 E. 4. 11.

23. In *Writ of Entry of Rent* the Tenant *pleaded in Bar a Rent-charge*, and the *Plaintiff made Title to a Rent-ſervice*, and after the *Tenant ſaid that the Demandant took Diſtreſs pending the Writ for the ſame Rent, and of this Diſtreſs he is yet ſeiſed*; and held a good Plea, after the Plea in Bar, by all the Juſtices. Thel. Dig. 188. lib. 12. cap. 23. S. 4. cites Mich. 12 E. 4. 11.

24. If an *Aſſiſe in Treſpaſs* be made of Land in A. and the Defendant does not take Exception to the Writ, but pleads over, he cannot plead in Abatement of the Writ afterwards. 2 Roll Rep. 175. 176. Arg.

(H. b) In what Caſes the Defendant may plead ſeveral Pleas to the Writ, One after another.

1. *Exceptions out of the Writ lie after the Exceptions which a Man may have by View of the Writ*; per Shard, who pronounced this as a Rule. And there after an *Exception* taken *to the Form* of the Writ, and ruled over, the Defendant was admitted to plead that there was *another Writ pending* of the ſame thing &c. Thel. Dig. of Writs, 88. lib. 10. cap. 1. S. 6. cites H. 3 E. 3. 70.

2. In *Dower* the Demand was *of the 3d Part of a Manor, and of a Meſſuage* &c. The Defendant *pleaded that the Houſe was Parcel of the Manor* &c. and demanded Judgment of the Demand; and it was awarded no Plea; and yet the Tenant was admitted afterwards by the Court to plead Miſnomer of the Vill &c. viz. *Nul tiel Vill* &c. For it was ſaid that he had pleaded to the Matter of the Demand, and * therefore his Plea to the Demand was Matter in Fact, & dehors &c. as I think. But it was granted there that a Man ſhall plead *in Aſſiſe to the Plaint, and after to the Writ*. Thel. Dig. 89. lib. 10. cap. 1. S. 9. cites Mich. 4 E. 3. 166.

* The Orig. is (Pur ceo que.)

3. In Writ of *Waſte againſt Tenant for Years, upon Leaſe* made *by the Plaintiff to one W. who leaſed over to the Defendant for the ſame Term* &c. The Defendant *pleaded* in Abatement of the Writ, *that the Demiſe was made by the Plaintiff to one A.* and awarded no Plea. And after the Defendant would have pleaded *Non-tenure*, and was not received. Thel. Dig. 89. lib. 10. cap. 1. S. 10. cites Mich. 5 E. 3. 228.

4. In *Juris Utrum* the Tenant, *after Plea* taken *to the Form of the Writ, and ruled over, pleaded to the Juriſdiction* that the Land was *ancient Demeſne*; but the Jury was awarded to inquire if the Land be Frankalmoigne or Lay-fee only. Thel. Dig. 89. lib. 10. cap. 1. S. 13. cites Hill. 8 E. 3. 373.

5. In Writ of *Aiel of an Office*, the Tenant took Exception to the Writ, inaſmuch as it was *not brought in any Vill*; and after was received to take *another Plea* to the Writ *upon Cauſe apparent in the Writ*, viz. the Suppoſal of the Seiſin in Demeſne of an Office, which ought to be

only Ut de ſeodo. Thel. Dig. 89. lib 10. cap. 1. S. 15. cites Mich. 8 E. 3. 424.

6. In *Scire Facias* out *of a Recovery againſt a Prior*, after *Miſnoſmer of himſelf* pleaded, he was received to plead *that he is Succeſſor to him againſt whom the Recovery paſs'd, not named Succeſſor*, by which the Writ was abated. Thel. Dig. 89. lib. 10. cap. 1. S. 17. cites Mich. 16 E. 3. Brief 656.

7. In *Formedon in Reverter* the Tenant pleaded *Non-tenure*, and was ouſted, inaſmuch as this Writ was purchaſed by Journies Accounts; but he was afterwards received to falſify the Deſcent, As to ſay that *another not named was Iſſue* in Tail who ſurvived, *and held the Eſtate.* Thel. Dig. 89. lib. 10 cap. 1. S. 16. cites Mich. 18 E. 3. 42.

8. In *Formedon in Remainder*, after *Age had, and Oyer* had *of the Deed of Remainder*, the Tenant was received to *plead Non-tenure*; for the ſhewing of the Deed is only to make the Demandant anſwer. Thel. Dig. 89. lib. 10. cap. 1. S. 20. cites Hill. 26 E. 3. 57. and ſays, contra it was held of Jointenancy Hill. 45 E. 3. 2.

9. In Writ of *Entry againſt Baron and Feme, ſuppoſing that the Feme had not Entry, unleſs by* &c. Exception was taken to the Writ that the *Entry of the Baron was not ſuppoſed* with the Feme, and ruled over &c. The Tenants were received to plead Matter, which proved *that the Writ ſhould be en le poſt*, for *the firſt aroſe upon Matter apparent in the Writ.* Thel. Dig. 89. lib. 10. cap. 1. S. 22. cites Mich. 39 E. 3. 33.

10. In *Quare Impedit de Prebenda vocata Major pars Altaris in Eccleſia de Sarum*, the Defendant *pleaded* to the Writ *that there were ſeveral Collegiate Churches of divers Saints in Sarum, and alſo 2 Sarums &c. ſcil. New Sarum and old Sarum &c. that the Plaintiff does not ſpecify in which Church or Vill the Prebend was.* It was held by Finchden, that after this Plea the Tenant *cannot plead* to the Writ by Monſtrans *that the Writ does not make Mention of what Saint the Church was*, as he ought, becauſe the *firſt Plea was Matter in Fact.* Thel. Dig. 89. lib. 10. cap. 1. S. 23. cites Paſch. 40 E. 3. 17.

11. *Waſte againſt M. late Wife of Thomas Earl of A.* the *Defendant pleaded to the Writ* becauſe *ſhe was a Counteſs not named Counteſs*, & non allocatur; for theſe Words (late Wife of Thomas, Earl) *imply* that ſhe is a Counteſs, unleſs ſpecial Matter be ſhewn to the contrary; for Writ Præcipe Thomas Earl of A. and M. his Wife is good, by which ſhe *pleaded yet to the Writ*, becauſe *it is fecit vaſtum in Domibus & Hominibus*, where it ſhould be *exilium in Hominibus*, ſcil. Villeins, & non allocatur; for the Writ ſhall be *General.* And ſo in Dower, it ſhall be de libero tenemento, and ſhe ſhall have ſpecial Declaration of Villeins, by which ſhe pleaded further to the Writ, becauſe it is *brought in A. B. and C.* and *no ſuch Vill as C. in the ſame County.* And per Martin, it is a good Plea to all the Writ, without anſwering to the Reſidue; for it goes to all the Writ. *Contra* 9 H. 6. 42. if he *ſays that there are two C.'s and none without Addition*, for there there is ſuch a Vill with Addition, and the Plaintiff ſhall recover by View of Jurors, note the Diverſity. And ſo ſee here that the Defendant *ſhall have* * 3 *Pleas to the Writ one after another*; but it does not appear if any of them were pleaded and demurr'd to, and adjudg'd after Demurrer. For quære then if ſhe ſhall plead it again. Br. Brief, pl. 6. cites 2 H. 6. 11.

* Br. Dilatories, pl. 3. cites S. C.

12. *But* it appears 3 H. 6. 5. that if a Man prays Aid of the King and the *Cauſe is not ſufficient*, but he is put over; yet *he may allege new Cauſe and ſo infinite, in one and the ſame Term, contra after Adjournment*; and quære if the ſame Law be not upon Pleas to the Writ, for in 3 H. 6 1. he ſhall have ſeveral Pleas to the Writ likewiſe. Br. Brief, pl. 6.

(I. b) By whom it may be. By Plaintiff or Demandant himſelf, or Garniſhee * Vouchee &c.

* See tit. Voucher (K. c)

1. IN *Quare Impedit againſt Baron and Feme*, the *Plaintiff would have abated his own Writ by the Death of the Feme to extort the Damages*, and was not received, for the Baron pray'd Writ to the Biſhop for himſelf. Thel. Dig. 196. lib. 13. cap. 9. S. 1. cites Mich. 7 E. 3. 364.

But in *Quare Impedit by two Parceners*, the *one was received to ſay that the other was dead*, and to pray that the Writ be abated, and that he might ſue a New Writ. Thel. Dig. 196. lib. 13. cap. 9. S. 2. cites Mich. 38 E. 3. 42.

2. If a Man ſees that his Writ is abateable, he may *pray Leave to acquire a better Writ* to have Advantage in the ſecond Writ *by Journies Accounts*. Thel. Dig. 197. lib. 13. cap. 9. S. 6. cites Paſch. 34 E. 3. Journes Accounts 23.

But Mich. 33 H. 6. 34. the *Demandant confeſs'd that the Tenant was not Tenant*; and pray'd Leave to purchaſe a better Writ, and could not, but the Writ was abated. Thel. Dig 197. lib. 13. cap. 9. S. 7.

3. Formedon *againſt A. who vouch'd E.* who *enter'd into the Warranty and vouch'd D.* and Proceſs returnable Octavis Michaelis at which Day *D. came, and ſaid that T. had brought Formedon againſt A. the Tenant, and had recover'd by Action try'd*, Judgment of this Writ; and he ſhall have the Plea clearly, per Finchden Juſtice; for *he is in Place of the Tenant*, and the Tenant himſelf cannot now have it, for he is out of Court. Br. Brief, pl. 506. cites 41 E. 3. 10. 11.

4. In *Quare Impedit for the King* where it was *found for the Defendant*, the Opinion was, that *the King could not abate his own Writ*, notwithſtanding that there was Matter apparent to abate it. Thel. Dig. 196. lib. 13. cap. 9. S. 3. cites Mich. 3 H. 4. 2. for the *Plaintiff ſhall never be received* to ſuggeſt a thing to the Court which ſhall abate his own Writ. Per Hank. ibidem. Quære.

5. But in *Reception* it was moved, per Fulthorpe, *that the Plaintiff was dead after the laſt Continuance*, and pray'd Leave to acquire a better Writ by which the Writ was abated. Thel. Dig. 196. lib. 13. cap. 9. S. 4. cites Hill. 11 H. 6. 17.

6. In *Forcible Entry againſt 2*, the *one made Default after Imparlance*, and the *other pleaded to Iſſue*, and after the Plaintiff came, and *ſaid that he who had pleaded to Iſſue was dead*, and pray'd Writ to inquire of Damages againſt the other at his Peril. Thel Dig 197. lib. 13. cap. 9. S. 5. cites Hill. 31 H. 6. 15.

7. In Replevin, the *Prayee in Aid* ſhall not plead in Abatement of the Writ or Avowry, *unleſs as Amicus Curiæ* to inform the Court for Error, per tot. Cur. Br. Brief, pl. 499. cites 34 H. 6. 8.

So of the *Garniſhee in Detinue*; for it ſeems that none can plead *to the Writ but the Parry to the Original*, by whoſe Death the Writ may abate. Br. Brief, pl. 499. cites 34 H. 6. 8.

8. *Baron and Feme* are *Jointenants*. Action is brought againſt the Baron, who makes Default, the Wife can't be received not being Party to the Writ. But the Reverſioner may be received and plead *Join-tenancy* in Abatement of the Writ. Mo. 242. pl. 381. Mich. 29 Eliz. C. B. Cane's Caſe.

(K. b) Ex

(K. b) Ex Officio. In what Cafes.

1. NOte by the Juſtices, That where *Declaration*, *Indictment* &c. is *inſufficient by Matter apparent*, the Court ought ex Officio to ſee it in Pain of Error, As Indictment of Conſpiracy wanted *the Year, Day, and Place where it was done*, and was of *Impriſonment of certain Perſons till they ſhould make Fine* &c. whereas this *ſounds in Oppreſſion*, and not in Conſpiracy; and becauſe they condemn'd him, it was revers'd by Writ of Error. Br. Office del &c. pl. 5. cites 24 E. 3. 74.

2. Writ was *Filio & Heire*, inſtead of *Filio & Hæredi*, and abated per Cur. Br. Office del &c. pl. 6. cites 41 E. 3. 21.

3. *Formedon as Couſin and Heir* of the Donee, and *did not ſhew how Couſin in the Writ, but in the Count*; and therefore the Writ was abated ex Officio Curiæ *after the View*. And therefore it ſeems that the Party is paſt pleading to the Writ. Br. Office del &c. pl. 2. cites 12 H. 4. 1.

4. In *Formedon* it was ſaid, That the Court ex Officio ought to abate the Writ, if it appears to them *by a thing apparent that it is not good*, As by falſe Latin, Want of Form &c. notwithſtanding that the Demandant makes Default; and the Matter was that it was *Rex Hiberniæ*, in the Writ *for Dominus Hiberniæ*, and the Eſſoignee or Stranger as Amicus Curiæ may ſhew it. Br. Office del &c. pl. 6. cites 4 H. 6. 16.

5. Writ of Debt may be abated or adjudged upon Matter apparent without Demurrer tender'd by the Defendant, viz. the Action was againſt the Executor, upon ſimple Contract of the Teſtator, who might have waged his Law; and therefore Littleton awarded, upon Appearance of the Plaintiff's Attorney to the Action, that the Plaintiff take nothing by his Writ. Quod nota. Br. Office del &c. pl. 4. cites 15 E. 4. 25.

3 Keb. 768. pl. 5. S. C. 6. *Scire facias* brought by an Adminiſtrator, *teſted 12 Feb. Upon Oyer of the Letters of Adminiſtration* after Imparlance, it appeared that the Letters of Adminiſtration *bore Date 26 March afterwards*, whereupon Defendant pleaded it in Abatement; the Plaintiff demurred, becauſe a Plea in Abatement could not be after an Imparlance; but *it appearing upon the Record that* the Plaintiff's *Writ* was *before the Cauſe of Action*, the ſame was ex Officio abated; Per Cur. 2 Lev. 197. Trin. 29 Car. 2. B. R. Harker againſt Moreland.

S. P. For if the Matter of Abatement be extrinſick, the Defendant muſt plead; if intrinſick, the Court will take Notice of it themſelves. 1 Salk. 220. pl. 7. Trin. 3 Ann. B. R. Dockminique v. Davenant.——6 Mod. 198. S. C. accordingly; and the Court ſaid they would turn all ſuch Demurrers into Bars, tho' Eyre quoted Wimbiſh v. Willoughby in Plowd. a Precedent of a Demurrer in Abatement.——G. Hiſt. of C. B. 208. S. P. and cites S. C.

7. There can't be a *Demurrer in Abatement*; Per Holt Ch. J. 6 Mod. 195. Trin. 3 Ann. B. R. Anon.

S.P. Per Cur. tho' the Defendant admits the Writ and Count. Br. Actions ſur le Caſe, pl. 41. cites 11 H. 4. 45.——S. P. Per Cur. accordingly, tho' the Party admits it by pleading in Bar. Roll Rep. 176. pl. 13. Paſch. 13 Jac. B. R.

8. Where it *appears* to the Court *from the Writ itſelf*, that it ought to abate, the Court ex Officio ought to give Judgment againſt the Plaintiff, tho' the Defendant does *not plead in Abatement*. Arg. 10 Mod. 170.

*I do not obſerve this at 1 Roll Rep. 2. but ſee 2 Roll Rep. 272. 273. Hill. 20 Jac. B. R. in an Anonymous Caſe.

9. *But* if it does *not appear in the Writ* it is otherwiſe. Arg. 10 Mod. * 170. cites 1 Roll. Rep. 2.

(L. b) Where it is only in Delay, or Peremptory.

1. CIOnuſance *was demanded* by the Mayor and Bailiffs of Coventry, and they ſhew'd a Charter to this Purpoſe, that if the *Demandant in a Plea of Land counterpleads the Franchiſe, and* the *Tenant joins with the Claim* of the Franchiſe, and it is found againſt the Franchiſe, the Demandant ſhall recover the Land; but if it be found againſt the Demandant the Writ ſhall abate. Jenk. 18. pl. 32. cites 20 E. 3. and 35 H. 6. 54.

2. If a Man pleads a *Plea in Abatement of the Writ*, or of Avowry, which is *demurr'd to*, and *adjudged againſt him who pleads it*, it is not peremptory, but a Reſpondeas Ouſter. Quod nota. Br. Peremptory, pl. 6. cites 48 E. 3. 10.

3. *And* it ſeems *Iſſue* taken *upon Excommunication* is peremptory. Sid. 252. cites 3 H. 4. 3.

4. In *Præcipe* quod reddat, if the *Tenant pleads to the Writ*, and the *Demandant demurs*, and the Matter is adjourned to another Term, this is not peremptory for the Tenant, but ſhall be awarded that he anſwer over. Quod nota, Per Newton, Fulth. and Portington. Br. Peremptory, pl. 20. cites 22 H. 6. 55.

5. If a *Demurrer* is joined upon *Plea to the Juriſdiction*, to the *Perſon*, to the *Writ*, upon *View*, upon *Aid*, upon *Voucher*, upon *Eſſoign*, tho' adjourned to another Term, and adjudged againſt the Defendant, it is no more than a Reſpondeas Ouſter. If the Plea to the Writ upon *Iſſue join'd* be found for the Tenant or Defendant, the Writ ſhall abate. If it be to the Perſon, or Action or Juriſdiction, and is found for the Demandant or Plaintiff, he ſhall recover the thing in Demand. Jenk. 306. pl. 82. S. P. Br. Peremptory, pl. 1. cites 34 H. 6. 8.

6. Upon *Counterplea of View*, *Reſceit*, *Eſſoign*, or *Aid*, and found for the Tenant upon *Iſſue join'd*, the Writ ſhall not abate, but View, Reſceit, Eſſoign, Aid *only ſhall be awarded*. Upon Counterplea *of Voucher*, if found for the Tenant upon Iſſue join'd, Judgment ſhall be that Voucher *ſhall ſtand*, if for the Demandant that Demandant ſhall recover the Land. The Law intends greater Delay and Expence upon * Trial by Jury than upon Demurrers; and if upon any of theſe Pleas there be a Trial by Jury, and it be found for the Demandant, he ſhall recover the Land. Jenk. 306. pl. 82. * S. P. Br. Peremptory, pl. 1. cites 34 H. 6 8. and 50 E. 3. 20.

7. *Præcipe* quod reddat *of Rent of Diſſeiſin done to the Father of the Demandant*, the *Tenant pleaded to the Writ that the Demandant himſelf was ſeiſed*; to which the *Demandant ſaid that he was not ſeiſed*; to which the *Tenant ſaid, to this you ſhall not be received, for at another Time J. S. brought Treſpaſs againſt you, in which you juſtified, becauſe your Father was ſeiſed of this Rent, and made Title by Preſcription, and that he died ſeiſed, and you were ſeiſed, and for the Rent Arrear diſtrain'd upon which you were at Iſſue, which Plea is yet pending*; and ſo demanded Judgment if he ſhall be received to ſay that he was not ſeiſed &c. upon which the Demandant demurr'd; and upon long Argument it was adjudged no Eſtoppel, as appears 33 H. 6. 7. and 50. And it was adjourned and argued three Terms; and the Demandant prayed Seiſin of the Land, and that this Demurrer may be peremptory to the Tenant; and by Priſot and the beſt Opinion, becauſe *it is only to the Action of the Writ, and not in Bar of the Action, nor in Diſproof of the Title of the Demandant*; therefore *it is not peremptory by Demurrer, but a Reſpondeas Ouſter*. Br. Peremptory, pl. 1. cites 34 H. 6 8.

8. If *Plea in Abatement* of Writ *of Replevin* be *confeſs'd by the Plaintiff*, *or adjudged againſt him by Demurrer*, he ſhall have a new Replevin. But *contra upon Plea in Bar*; *or* if Plea *to the Writ be found againſt him by Jury upon* The Diverſity is where the Plaintiff *demurs on a*

Plea in Abatement, and where he goes to Iſſue upon it

upon the Iſſue, he ſhall not have a new Replevin; for it is peremptory. Note the Diverſity. Br. Peremptory, pl. 2. cites 34 H. 6. 37.

; for if they go to Iſſue upon ſuch Plea, and it is found againſt the Defendant, it is peremptory, and he ſhall loſe the Land &c. but upon Demurrer it is not peremptory, but only a Reſpondeas Ouſter. Per Williams J. Quod nota. Yelv. 112. Mich. 5 Jac. B. R. in Caſe of Thompſon v. Collier.——Brownl. 138. S. C. ſeems a Tranſlation from Yelv.——S. P. by Rol Ch. J. All. 65. Trin. 24 Car. B. R. in Caſe of Beaton v. Foreſt.——S. P. accordingly of a Plea to the Writ generally, in Caſe of Demurrer adjudged or found againſt the Defendant, that it ſhall only be a Reſpondeas Ouſter, and likewiſe that it is contra upon a Plea in Bar. But if the Plea be triable by Certificate of the Ordinary, and he certifies againſt the Defendant, the Judgment ſhall be a Reſpondeas Ouſter; Per Doderidge J. which Jones affirm'd. Lat. 178. Mich. 2 Car.——The Court agreed, that Plea in Abatement on Iſſue is peremptory, tho' the Prayer cannot be otherwiſe than Breve ceſſetur. Keb. 870. Paſch. 17 Car. 2. B. R. in pl 18——Vent. 22. Paſch. 21 Car. 2. B. R. Anon. accordingly, as to Judgment on Demurrer, and Iſſue found for the Defendant.——Per Haughton J. accordingly, as to Iſſue found againſt Defendant 2 Roll Rep. 38.——It is not peremptory upon Demurrer, becauſe the Party is not ſuppoſed to be conuſant of the Matter in Law. Sid. 252. pl. 22. in Caſe of Amcott v. Amcott.——Tho' it be pleaded after Imparlance, and Iſſue tender'd upon it, yet it is not peremptory upon a Demurrer; per Roll Ch. J. All. 65. in S. C.

In all Caſes when Iſſue is join'd upon a dilatory Plea, and tried by the Country, Judgment is peremptory; but otherwiſe in all Caſes tried by Demurrer, except in one only, and that is in Caſe of *Demurrer upon Evidence*, and there it is peremptory, becauſe no Reſpondeas Ouſter can be; for by this the Parties are at the End of their Pleading. Arg. Lev. 163. cites Long. 5 E. 4. 139. 2 E. 4. 10.

9. *And ſo* it ſeems it is of a Plea in Abatement which is pleaded *after the Darrain Contin'* becauſe it is after the Plea in Bar, and this tho' it be upon *Demurrer*. Sid. 252. cites Lo. 5 E. 4. 139. 2 E. 4. 10. Yelv. 112. F. Aide 122. Iſſue 114.

10. If a *dilatory Plea* be pleaded *to the Writ or to the Count*, or the like, and they *join Iſſue*, there always, if the *Iſſue paſſes againſt the Tenant or Defendant*, in Action Real or Perſonal, this *is peremptory* to the Tenant or Defendant, *and only dilatory on the Part of the Demandant* or Plaintiff. Br. Peremptory, pl. 44. cites 5 E. 4. 90.

11. The Defendant after *Imparlance pleaded Outlawry* in the Plaintiff, & Petit Judicium de Billa, and Judgment was Quod Reſpondeat Ouſter. Lat. 179. ſays the Court agreed this Caſe, the Record thereof being ſhewn, and was Paſch. 2 Jac. Rot. 331.

So though the Plea be adjorn'd and overruled in another Term.

12. *Upon Plea to* the Juriſdiction, to the Perſon, to the Writ, Aid-Prayer, View, Eſſoin, Voucher, and *Demurrer join'd*, to ſuch Plea or Prayer, if the Demurrer be *over-ruled*, it is but Reſpondeas Ouſter. Jenk. 306. pl. 80.

Jenk. 306. pl. 82.

13. When a Plea *concludes in Abatement*, it is not peremptory; but if a *Plea in Abatement is pleaded in Bar*, it is peremptory; per Roll Ch. J. All. 65. Trin. 24 Car. B. R. Beaton v. Forreſt.

Lev. 163. S. C. and Judgment affirm'd Niſi.—Raym. 118. S. C. argued, but adjornatur.—Keb 869. pl. 18. S. C. and Judgment affirm'd Niſi.

14. *Formedon in Remainder* was brought there *againſt an Infant*. The Infant by his Guardian *pleaded* that he was *in by Deſcent*, and pray'd that the Parol ſhould demur; and upon this *Iſſue was taken*, and *found for the Tenant* in the Formedon; and after ſeveral Arguments in C. B. Judgment Final was there given, viz. that the Demandant ſhould be barr'd. Writ of Error was brought in B. R. and after ſeveral Arguments the Judgment was affirm'd; and the Reaſon why upon *Iſſue taken upon Matter in Fact* Judgment Final ſhall be given, is becauſe the Matter in Fact is *ſuppoſed to be in the Conuſance of the Party*; and if he will give ſuch Trouble and Charge to the Party, in ſuch Caſe 'tis Reaſon that he ſhall be barr'd, and ſo are Lo. 5 E. 4. 90. b. and other Books. Sid. 252. pl. 22 Paſch. 17 Car. 2. B. R. Amcott v. Amcott.

15. In a *Scire Facias* to repeal a Patent, the *Matter appearing ſufficient, and not denied* by any Plea of the Defendant, *but* he having *confeſs'd* the ſame *by his demurring in Abatement*, a Judgment peremptory ought to be given, and not a Reſpondeas Ouſter; by the Judges attending in Domo Proce-

Procerum; and that ſo it was done in the Caſe, 17 E. 3. 59. b. 3 Lev. 223. Trin. 1 Jac. 2. The King v. Sir Oliver Butler.

16. In *Scire Facias* on a Judgment in Waſte *for the Damages recover'd*, the *Defendant demurr'd partly in Abatement, and partly in Bar.* The Court gave Judgment in Chief. Cited by the Judges attending in Domo Procerum, in Caſe of the King v. Sir Oliver Butler, Trin. 1 Jac. 2. 3 Lev. 223. as lately adjudg'd in a Scire Facias, per Hale Ch. J. and the whole Court, in the Caſe of Cole v. Green.

17. If *Matter of Fact* is pleaded in Abatement *triable per Pais*, the Plaintiff may conclude his Replication in Bar, becauſe Final Judgment is to be given after a Verdict in that Caſe; per Holt Ch. J. Carth. 433. Mich. 9 W. 3. B. R. in Caſe of Bonner v. Hill.

18. In Treſpaſs againſt A. B. and C. they pleaded as to Part Not Guilty, and to the Reſidue other Action pending againſt B. and C. but ſaid nothing as to A. Judgment was given *Quod recuperet Damna* againſt them, and not Quod reſpondeant ulterius, becauſe *the Plea commenced and alſo concluded in Bar.* Lutw. 41. 42. Hill. 13 W. 3. Wallis v. Savil. 2 Lutw. 1532. S. C. but S. P. does not appear.

19. Upon a Reſpondeas Ouſter, if the *Defendant pleads the General Iſſue*, the Plaintiff ſhall *ſign Judgment, if Defendant's Attorney on Re-delivering back a Copy of the Iſſue will not pay for it.* And it ſeems the old Courſe was to deliver in a Copy of the whole Record, viz. the Declaration Plea in Abatement &c. and Iſſue; but the Court made a *Rule* for the future, that a Copy of the Declaration and Iſſue ſhould only be paid for. 1 Salk. 4. pl. 11. Mich. 1 Ann. B. R.

20. If the Defendant *pleads Matter of Fact* in Abatement, *which the Plaintiff denies*, if the Matter of Fact be found for the Plaintiff, he ſhall have Final Judgment. Ld. Raym. Rep. 593. 594. Holt Ch. J. cites it as ſo held in B. R. in the Caſe of Biſſe v. Harcourt. S. P. per Cur. 6 Mod. 114. Hill. 2 Ann. B. R. Anon.

21. *And* Holt ſaid that in another Caſe afterwards, upon a Scire Facias, they held that if the Defendant pleads Matter of Fact in Abatement, and the Plaintiff replies and denies the Fact, he may pray Execution; but yet if *Judgment* be given *for the Plaintiff, upon Demurrer to the Replication*, it ſhall only be a Reſpondeas Ouſter. Ld. Raym. Rep. 594. Arg. in Caſe of Medina v. Stoughton. If the Defendant *pleads a Matter De-hors* in Abatement of the Writ, and the Plaintiff replies, and the Defendant *demurs to the Plaintiff's Replication*, this immediately refers the Replication to the Conſideration of the Court; and ſince, if he had then referr'd the Plaintiff's Writ to the Court, the Judgment would have been to anſwer over, therefore if he at the ſame time refers the Replication to the Court, to judge whether it is good or not, there is the ſame Judgment to anſwer over; *but if he had referr'd the Action itſelf to the Court to judge of the Legality thereof*, there that not being touching the preſent Writ depending in Court, but the Plaintiff's whole Demand, it was admitting the Truth of the Demand; becauſe Ex Facto jus oritur, the Court never pronouncing what was the Law till the Fact was firſt ſettled; and therefore the Defendant, referring the Legality of the Plaintiff's Demand to the Court, admits conſequently the Truth of it. G. Hiſt. of C. B. 44.

For more of Abatement in General, ſee **Addition, Amendment, Aſſiſe, Declaration, Jointenants, Traverſe, Writ,** and other Proper Titles.

* Abatement into Lands.

* Abate *is* both an Engliſh and French Word, and ſignifieth in his proper Senſe to diminiſh or take away; as where one by his Entry diminiſheth and taketh away the Freehold in Law deſcended to the Heir; and an Abatement is when a Man died ſeiſed of an Eſtate of Inheritance, and between the Death and the Entry of the Heir, an Eſtranger doth interpoſe himſelf and abate. Co. Litt. 277. a.

(A) Abatement, Intruſion &c. on a Dying Seiſed.

1. IN Writ of Intruſion upon Leaſe of his Anceſtor, he ought to ſhew Quod clamat eſſe jus & hæreditatem ſuam. Thel. Dig. 94. lib. 10. cap. 6. S. 14. cites Mich. 10 H. 6. 9.

For none can make Abatement but upon a Dying Seiſed in Fact; for *Dying Seiſed by Proteſtation is not good* to allege Abatement thereon. Br. Titles, pl. 14. cites 38 H. 6. 18.

2. Title is not good by *Donee in Tail, and Abatement alleg'd by him who gave to the Tenant, unleſs the Demandant alleges the Dying Seiſed of him upon whom the Abatement ſhall be made.* Br. Titles, pl. 14. cites 38 H. 6. 18.

3. Abatement *cannot be but after the Death of him who died ſeiſed in Fee*, and not *after the Death of the Tenant for Term of Life*; for this *is Intruſion*, and not Abatement, Per Littleton; but the Court did not anſwer to this but to the other things. Br. Traverſe per &c. pl. 163. cites 39 H. 6. 26. 27.

4. None is Abator but he who firſt enters by Tort upon a Deſcent; but yet Aſſiſe of Mortdanceſtor lies *againſt the Heir of Feoffee of the Abator, or againſt the twentieth Heir.* Br. Mortdanceſtor, pl. 61. cites 5 H. 7. 6.

For more of Abatement into Lands, See Traverſe, and other Proper Titles.

Abeyance.

(A) Abeyance. What it is; and the Reaſon thereof.

1. IN Abeyance ſignifies, That it is in Expectation; for when a Parſon dies, we ſay that the Freehold is in Abeyance, becauſe a Succeſſor is in Expectation to take it; and then it is *in Expectation* in *Remembrance*,

membrance, *Intendment*, *Conſideration*, or *Underſtanding of Law*, becauſe it is not in any Men then living; and a Right which is in Abeyance is ſaid to be in Nubibus. Co. Litt 342. b.

2. They are allow'd only out of Neceſſity, but the Law never allows it to the Act of the Party; and therefore if a Man makes a Leaſe for Years, the Remainder to the right Heirs of J. S. who is then living, the Remainder is utterly void; Per Hobart Ch. J. Hob. 153.——S. P. And the Law admits them only in Caſe of Neceſſity, as in Vacations of Biſhops, Parſons &c. or Remainders to right Heirs upon Freeholds. They are not allowed but where the original Creation of Eſtates, or where the Conſequence of Eſtates and Caſes do in Congruity require them; but for Eſtates that are of their own Nature in their Original perfect and intire, the Law does not permit them by the voluntary Act of the Party. Hob. 338.——They are not allowed but in particular Caſes; and it would be to make Fractions of Eſtates; neither could Livery of Seiſin be had in ſuch Caſes. Arg. 4 Mod. 280. in Caſe of the King and Queen v. Kemp.

3. Abeyance is a Fiction in Law, Per Dodderidge J. and is allowed only where it is neceſſary, and to avoid an Abſurdity or Inconvenience, and for the Benefit of a Stranger, and to preſerve his Right. Jo. 73. Paſch. 1 Car.

No Gifts ſhall make Things to *paſs in Abeyance*, but ſuch as are in Advantage of *Strangers*, and not in Advantage of the Donors themſelves, or their Heirs. Arg. Pl. C. 562. b.

(B) What Things may be, or ſhall be ſaid to be in Abeyance.

1. WHere a *Gift* is made *in Tail by Fine*, *Remainder to Tenant in Tail in Fee*, the *Tenant had Iſſue two Sons by diverſe Venters*, and *died*; the *Eldeſt enter'd*, *and died without Iſſue*, and his *Heir collateral enter'd*, and the *youngeſt Son brought Scire facias to execute the Remainder in Fee*, and had Execution; for the Fee was not executed in the eldeſt Son, by reaſon that he was ſeiſed in Tail, and the *Fee was in Abeyance*, and yet was in him to give Charge or Forfeit. Br. Executions, pl. 67. cites 24 E. 3. 30. 31.

2. Father and 2 Sons are; the Father levied *a Fine to N. who granted and render'd to the Father for Life*, the *Remainder to the eldeſt Son* and his Wife *in Tail*, the *Remainder to the right Heirs of the Father*; the *Father died*, and after the *Tenant in Tail and* his Wife *died without Iſſue*; the *youngeſt Son enter'd*, and the Lord avow'd upon him for a Relief, as Heir to his eldeſt Brother to the Remainder in Fee, and had Return by Award, notwithſtanding that the youngeſt Son would have been adjudged in as Purchaſor, by Name of the right Heir of his Father, becauſe by his Pretence the Fee and *the Tail* cannot be Simul & Semel, *in the eldeſt Son*. But Brooke ſays this ſeems to be contrary; for it *may be* in him, *the one in Poſſeſſion and the other in Abeyance*; and he may give it and forfeit it. Br. Done &c. pl. 9. cites 40 E. 3. 9.

3. If a Gift is made *to N. for Life*, the *Remainder to the right Heirs of J. who is alive*, the Remainder is in Suſpence or Abeyance during the Life of J. Br. Done &c, pl. 6. cites it as ſo ſaid in 40 E. 3. 9. Co. Litt. 342 b. S P. accordingly.

4. Biſhop, Dean, and Prebend have Fee. But contra of a *Parſon*; for there the Fee is in Abeyance. Br. Confirmation, pl. 17. cites 5 E. 4. 105.

Parſon has Fee-ſimple in Jure Eccleſiæ, Per 3 Juſtices out of 4.

5. A *Freehold* can be in Abeyance in no Caſe but only in the Caſe *of a * Parſon of a Church.* D. 71. pl. 43. Trin. 6 E. 6. in the Caſe of Withers v. Ilham.

Br. Faux Recov. pl. 51. cites 12 H. 8. ——* Becauſe the Care of Souls was only committed to him during Life; he was not capable of the Fee, and therefore the Fee was in Abeyance: So that there was this Difference between the Characters of the Prieſts and Biſhops, that the Biſhops ſucceeded in their own original Right, as the Succeſſors of Chriſt and his Apoſtles, the great Biſhops of Souls; and therefore what they took was to themſelves and Succeſſors; but the Prieſts were only the Subſtitutes of the Biſhops, and therefore could not take but during their Lives. The Parſon therefore, being only capable to take for Life, for he had no proper Succeſſor to himſelf, the next Parſon coming in from the Biſhop, and by his Inſtitution; and yet the Fee being out of the Patron, and not given to the Biſhop, but appropriated to the Uſe of that particular Church, it was ſaid to be in Abeyance; but to all beneficial Purpoſes, the Law allows him to ſuppoſe himſelf to have an Inheritance, tho' he has not properly any Succeſſor; and therefore the Parſon may bring an Action of Waſte, a Writ of Entry ad Communem Legem, in conſimili caſu, ad terminum qui præteriit, a Quod Permittat in the Debet, a Writ of Meſne, a Contra formam Feoffamenti; and ſhall receive Homage, becauſe theſe are for the Benefit of the Fee in Abeyance, the Defence of which the Law has committed to him; but the Law has provided him a Juris Utrum, and he ſhall not have a Writ of Right, ſince for the Reaſon above mentioned, he cannot claim it as his Right and Inheritance. Gilb. Treat. of Ten. 105, 106.

S. C. Pl. C. 227. by Name of Wyllion v. Lord Barkley.

6. *A. levied a Fine of a Manor* holden *in Capite*, with a Render back *to the Heirs of his Body*, Remainder *to King H. 7. and the Heirs of his Body*; and for Default thereof, *to the right Heirs of A.*——A. *died ſeiſed without Iſſue*, and King *H. 7. entred and died*; after which it deſcended to King Henry 8. and *E. 6.* who *dying without Iſſue, it reverted to B. as Couſin and Heir to A.* It was reſolved that B. who was an Infant, ſhould be in Ward to the Queen, by reaſon of the Tenure, becauſe the Tenure was revived on the Death of E. 6. and ſhould have eſcheated to her for Default of Heirs of A. and therefore the Fee-ſimple was in Conſideratione Legis. D. 102. pl. 82. Trin. 1 Mar. The Queen v. Lord Barkley.

7. By Hitcham Serjeant, in the Caſe of a *contingent Remainder of a Copyhold*, the Eſtate in the mean Time, before the Contingency happens, after the Admittance of the particular Eſtate, is in Abeyance, and not in the Lord; but Damport Serjeant thought that the Eſtate in Contingency is not in Abeyance upon the Admittance of the particular Eſtate, but *in the Lord*, as D. 9 Eliz. the Lord ſhall be occupant. Arg. Roll Rep. 318. in Caſe of Lane v. Pannel.

Pl. C. 560. b. Hill. 15 Eliz. in Walſingham's Caſe, Saunders

8. *Tenant in Tail grants all his Eſtate* to another; this works no Diſcontinuance *quoad his Iſſue*, but *quoad himſelf* the Reverſion is in Abeyance; for he ſhall have none left in him againſt his own Grant, ſo as he cannot afterwards have Action of Waſte. Co. Lit. 331. a.

Ch. B. in delivering the Opinion of the Court, ſaid they were all agreed that there was no ancient Book which warranted Littleton's Opinion; that by the Grant by Tenant in Tail of all his Eſtate, the Eſtate Tail ſhould be in Abeyance, is not Law; and it is all one as if he made Eſtate for his own Life. Reſolved that by Bargain and Sale to another and his Heirs, by Tenant in Tail in Reverſion of a Leaſe for Years, nothing paſs'd to the Bargainee, but an Eſtate deſcendible for the Life of the Tenant in Tail, according to Co. Litt. 329. S. 606. Saund. 260. 261. Paſch. 21 Car. 2. Took v. Glaſcock.—— If *Tenant in Tail* by Leaſe and Releaſe, or by Bargain and Sale, or by Covenant to ſtand ſeiſed, *conveys to B. and his Heirs*, the Eſtate Tail is not in Abeyance, but in B. and his Heirs; for the Law puts nothing in Abeyance but of Neceſſity, and it is not in the Tenant in Tail; for he can't bring Waſte &c. Per Holt Ch. J. in delivering the Opinion of this Court. 2 Salk. 620. pl. 2. Trin. 1 Ann. B. R. Machil v. Clerk.——7 Mod. 27. S. P. accordingly.——11 Mod. 19. 20. Machel v. Clerk, S. C. accordingly.——And all thoſe Books mention, that the Caſe in Saund. 260. and Litt. was denied to be Law, by Holt Ch. J. and ſo a Judgment in C. B. was affirm'd.

9. If *Tenant for Term of another's Life dies*, the Freehold is ſaid to be in Abeyance until the *Occupant enters.* Co. Litt. 342. b.

Deviſe of Land to B. for 21 Years,

10. *Leaſe for Life, Remainder to the right Heirs of J. S.* the Fee-ſimple is in Abeyance till J. S. dies. Co. Litt. 342. b.

Remainder *to C in Fee*, or a Deviſe for Years, Remainder *to the right Heirs of J. S.* is good, if J. S. die during the Term, becauſe the Franktenement in the mean Time is *in the Heir of the Deviſor*, and not in Abeyance. Noy 43. Payne v. Ferrall.——If a *Feoffment* in Fee is made *to the Uſe of A. and the Heirs of his Body*, Remainder in Fee to the *right Heirs of J. S.* who is then living, in ſuch Caſe the Fee-ſimple is

is not in Abeyance, nor in the Feoffee, but the Uſe of the Fee ſhall *reſult* to the Feoffor, and remain in him till the Contingency, viz. till the Death of T. S. ſhall happen; Per Holt Ch. J. Carth 262. Hill. 4 W. & M. in B. R. in Caſe of Davis v. Speed.

11. If a Parſon of a Church dieth now, the *Freehold of the Glebe* of the Parſonage is in none during the Time that the Parſonage is void, but in Abeyance, viz. in Conſideration, and in the Underſtanding of the Law, until another be made Parſon of the ſame Church, and immediately when another is made Parſon, the Freehold in Deed is in him as Succeſſor. Co. Litt. S. 647. *So it* is of a *Biſhop, Abbot, Dean, Archdeacon, Prebendary, Vicar*, and of every other ſole Corporation, or *Body Politick, Preſentative, elective or donative*, which Inheritances put in Abeyance, are by ſome called Hæreditates Jacentes, and ſome ſay, Que le ſee eſt en Abeiance. Co. Litt. 647. b.

12. The *Property of Goods* can't be in Abeyance, ſo that in Caſe of a Perſon dying, they muſt be in the Executor, Adminiſtrator, or Ordinary. Brownl. 132. Trin. 7 Jac. in Caſe of Hellam v. Ley.

13. 'Tis no good Rule that that which doth not paſs by the Livery doth remain in him who gives the Livery. As if *Tenant in Tail is attainted and Office found*, the Eſtate Tail is not in the King nor in the Perſon attainted, but is in Abeyance. Arg. Godb. 301. in Caſe of Shefield v. Ratcliff. Co. Litt. 345. a.

14. *Tenant in Tail* covenants to ſtand ſeiſed to the Uſe of himſelf for Life, *Remainder to A. in Tail.* Per Holt Ch. J. this produces no Alteration in the Eſtate Tail, becauſe the Eſtate in Remainder was *to commence after his Deceaſe.* 2 Salk. 619. 620. Trin. 1 Ann. B. R. Machel v. Clerk. 7 Mod. 27. S.C. and S.P. per Holt Ch. J. accordingly.—— And at this Time the Right of the Eſtate out of which it would iſſue is in another Perſon by Title Paramount, the Conveyance, &c. per Formam Doni. 7 Mod. 26. S. C.

15. *Deviſe to A. for Life*, and *if A. have Iſſue Male, then to ſuch Iſſue Male and his Heirs for ever*, and *if A. leaves no Iſſue Male*, then the Lands were deviſed *to B. in Fee.* This was held by the Maſter of the Rolls as the ſame was held before in the Houſe of Peers, by the Aſſiſtance of the Judges, to be a Contingent Remainder; but the Queſtion now being whether the Remainder in Fee was in Abeyance or did deſcend to the Teſtator's Heir at Law? His Honour thought it to be in Abeyance. And that it was much ſtronger than where A. deviſes *to A. for Life, Remainder to the Right Heirs of J. S.* becauſe in that Caſe J. S. might not die in the Life of A. and then the Teſtator's Heir would take, and ſo there might be ſomething ſaid why in that Caſe the *Reverſion ſhould deſcend until the Contingency, one Way or other, falls out*; but that here the Intention is expreſſed of giving the Inheritance from the Heir at Law in all Events, and that the Contingency ſhould be only betwixt the Iſſue Male of B. and the Deviſees over. But upon an Appeal Ld. C. Parker much expoſed the Notion, and ſaid that ſince the conſtruing the Fee to be in Abeyance would tend to deſtroy it, and ſince *nothing but Neceſſity in any Caſe ſhould occaſion the Fee-Simple to be in Abeyance*, and that where the Remainder was deviſed in Contingency, it was held that the Reverſion in Fee deſcended to the Heir at Law in the mean time; and ſo of whatſoever Eſtate was not diſpoſed of, his Lordſhip ſaid, he ſhould abide by that Opinion. Wms.'s Rep. 505. 511. 515. Mich. 1718. Carter v. Barnardiſton.

For more of Abeyance in General, See **Eſtates, Remainder, Uſes,** and other proper Titles.

Abjuring

Abjuring the Realm.

(A) In what Cafes, and How.

Abjuration of the Realm *was* the Party's *Oath before the Coroner* himſelf to depart the Realm for ever at the Time and Place ſet him; Going the direct Way thither; Tarrying there but one

1. ABjuration by the Courſe of the Common Law may be thus *deſcribed*, When a Man or a Woman had committed Felony, and the Offender for Safe-guard of his or her Life had fled to the Sanctuary of a Church or Church-yard, and there before the Coroner of that Place within 40 Days had confeſſed the Felony, and took an Oath for his or her perpetual Baniſhment out of the Realm into a foreign Country, chooſing rather, perdere Patriam quam Vitam. But that foreign Country into which he was to be exiled, muſt not be among Infidels. And this was the ancient Law of this Realm, which was, Prohibemus autem ne Chriſtiana fide tinctus quiſpiam a regno procul amandetur, neque ad eos qui nondum Chriſto fidem adjunxerunt, relegetur, ne eorum aliquando fiat animarum jactura, quos propria Chriſtus vita redemit. 3 Inſt. 115. cap. 51.

Flood and Ebb, if he can have Paſſage; and till he can ſo paſs going every Day into the Sea up to the Knees to aſſay if he may paſs over; and if he cannot paſs within 40 Days, then to put himſelf again into the Church as a Felon &c. And this Abjuration is an Attainder in itſelf (and that the ſtrongeſt that can be, being by his own Confeſſion) and a Forfeiture of his Land, and there is a Writ of Eſcheat of Land, for Felony, pro qua abjuravit regnum. And therefore he that is hanged upon Judgment againſt him, and becometh alive again, cannot abjure (but an Abjuration in that Caſe is an Eſcape) for one cannot have two Judgments for one Offence. Fin. of Law, 8vo 389. lib. 4. 33.——Same Points and another Part of the Oath was, that he would never return without Leave of the King &c. 2 Hawk. Pl. C. 52. cap. 2. S. 44.

2. A Man *abjured* the Realm and *was taken out of the Highway by Force*, and *put in Priſon*, *and* afterwards *eſcaped*, *and* then was *taken and arraign'd of it*, and becauſe *he did not endeavour to go to his Port when he was eſcaped*, therefore he was not reſtored to the Way, *but was hang'd*; for it was ſaid that his Life was not granted to him upon the Abjuration but upon Condition that he ſhould go to the Port aſſign'd him with Speed, and if he does not do ſo he ſhall be hang'd; but if he be taken out of the Way, he ſhall be reſtored if he prays it, if no Default be in him. Br. Corone, pl. 144. cites 7 H. 7. 7.

3. If a Man *abjures*, *and comes again* and takes to the Church, he *cannot abjure again*, by all the Juſtices, and if he does it is void; but Quære if he may be taken out within the 40 Days. Br. Corone, pl. 226. cites 11 H. 7. 4.

But if he will abjure within the 40 Days, the Coroner ſhall give him a Day certain to do it. And in the time of M. 1. ann.

4. A Man *took to the Church*, and the *Coroner* came to him and *demanded of him for what Cauſe he took to the Church*, who *ſaid that he would be adviſed by* 40 *Days before that he would declare his Cauſe*, and the Coroner drew him out immediately; but if he would have confeſſed Felony to him, he might have remain'd there by 40 Days before that he abjured; but a Sanctuary may hold him for Term of Life if there be no Statute to the contrary. Br. Corone, pl. 180. cites W. N.'s Readings, in the time of H. 7.

5. it was ſaid for Law, that a Man *cannot abjure for High Treaſon*. Quære of *Petit Treaſon*; for it appears in a Chronicle in the time of H. 6 that a *Feme who kill'd her Miſtreſs* abjured the Realm. Ibid.

5. Abju-

5. Abjuration *for Felony ſhall diſcharge all Felonies done before* the Abjuration. Br. Corone, pl. 182. cites W. N.'s Readings.

6. A Man can *not* abjure *for Petit Larceny*, but for ſuch Felonies for which he ſhall ſuffer Death. Br. Corone, pl. 182. cites W. N.'s Readings.

7. Such Abjuration as was at the Common Law, founded upon the Privilege of Sanctuary, is wholly taken away by the Stat. 21 Jac. [cap. 28. parag. 7.] And yet the Abjuration by Force of the Stat. of 35 Eliz. cap. 1. before Juſtices of Peace, or Juſtices of Aſſiſe, or by Force of an Act made at the ſame Parliament, cap. 2. before 2 Juſtices of Peace or the Coroner *by a Recuſant*, remaineth ſtill; becauſe ſuch Abjuration hath no Dependency upon any Sanctuary. 3 Inſt. 115. 116. cap. 51.

8. One that had abjured the Realm for the Death of a Man, being brought to the Bar was demanded what he could ſay, why Execution ſhould not be awarded. He *pleaded the King's Pardon*, *which* was diſallow'd, becauſe it *did not mention that he had abjured.* Keling. 23.

Abridgment.

(A) Abridgment of Plaint or Demand. In what Caſes or Actions.

1. IN *Dower of the third Part of a Manor*, and *after the View* the Demandant would have made her Demand of the third Part of two Carves of Land, and was not ſuffer'd to change her Demand; but it was agreed that ſhe might abridge her Demand. Thel. Dig. 76. lib. 8. cap. 28. S. 2. cites Hill. 7 E. 3. 301. and ſo agrees 7 Aſſ. 20. In Dower of the third Part of a Manor, it was adjudg'd that *after the View, and after Challenge* of the Party the Demandant may abridge her Demand by putting in a *Fore-priſe*, and this was done becauſe the Parcel Fore-priſed was in another Vill not named. Thel. Dig. 76. lib 8. cap. 28 S. 4 cites Paſch. 13 E. 3 Plaint 11.

In Dower againſt 4 of the *third Part of a Manor*, the Demandant abridg'd her Demand, and *demanded the third Part of four Parts of the ſame Manor* &c. becauſe one being in Ward the King held the fifth Part. Thel. Dig 76. lib. 8. cap 28. S. 14. cites Trin. 12 H. 4. Aid del Roy 47.

And it was ſaid there that in *Dower* a Man may abridge his *Demand of all that is in one of the Vills.* Thel. Dig. 76. lib. 8. cap. 28. S. 18. cites 36 H. 6. Plaint 7. and 5 H. 7. 7. 23. And that it is ſo agreed. Paſch. 21 E. 4. 28.

2. In *Dower* the *Demand was of the Moiety of Part of the Tenements, and of the third Part of the Reſidue in the ſame Vill* &c. And after Exception the Demandant was received to amend her Demand, and to ouſt all of which ſhe demanded the Moiety. Thel. Dig. 76. lib. 8. cap. 28. S. 21. cites Hill. 7 E. 3. 308. Dower 102.

3. Upon Writ of *Inquiry of Waſte* the *Sheriff return'd the Inquiſition* made *of all the Waſte, except of Waſte aſſign'd in a Garden*; but the Plaintiff was not received to abridge his Plaint of the Waſte aſſign'd in the Garden, but was compell'd to ſue Sicut Alias, and the Sheriff was amerc'd. Where the Writ is of *Waſte committed in Domibus & L*

cis, and the Plaintiff abridges all the Waſte amerc'd. Thel. Dig. 76. lib. 8. cap. 28. S. 6. cites Trin. 14 E. 3. Waſte 27.

ſuppoſed to be done *in Domibus*, the Writ ſhall abate. D. 272. Paſch. 10 Eliz. Burgavenny (Lord of) v. Plummer & others.

4. It was ſaid by Green that a Man may amend, abridge, or inlarge his Plaint *after Imparlance*. Thel. Dig. 76. lib. 8. cap. 28. S. 9. cites Paſch. 32 E. 3. Plaint 8. and 32 Aſſ. 5.

Ibid. pl 32. cites S.C.— Thel. Dig. 76. lib. 8. cap. 28. S. 10 cites Paſch. 39 E. 3. 13. 14 H. 6. 4. S. P.

5. Ward. Per Caund. becauſe there *is no certain Demand* in Writ of Ward, but Cuſtodiam terræ & Hæredis, therefore if the Plaintiff *declares of the Manor of D. and* 20 *Acres*, where *the* 20 *Acres are Parcel of the Manor* which is pleaded to the Writ, the Plaintiff may abridge his Demand. Br. Abridgment, pl. 10. cites 39 E. 3. 10.

As *in Dower de libero Tenemento in B.* the Demandant made her *Demand of the* 3*d Part of the Manors of C. and D.* and the *Tenant pleaded to the Writ* that 20 *Acres of Land, Parcel of the ſaid Manor of D. extended into P.* The Demandant cannot abridge her Demand of 20 Acres, becauſe the Manor is intire. *Contra* if the Demand was *of* 10 *Acres*; for this is a thing ſeveral; per Priſot, & non negatur. Quod nota Differentiam. Br. Abridgment, pl. 2. cites 33 H. 6. 4.

6. Where the Demand or Plaint is of a Manor, or of other *Thing intire*, there a Man cannot abridge his Demand or Plaint &c. Per Newton. Thel. Dig. 76. lib. 8. cap. 28. S. 15. cites Mich. 19 H. 6. 13. 33 H. 6. 4.

If a Man makes Plaint *of a Manor*, the Plaintiff cannot abridge his Plaint; for this is *intire*. Contra of Acres which are ſeverable. But per Needham J. if a Man demands 2 *Manors in one Vill*, he may abridge his Plaint in Aſſiſe of the one Manor; for the Writ ſtands true of the other Manor de libero Tenemento in the ſame Vill. Br. Abridgment, pl. 17. cites 4 E. 4. 33.

A Man cannot abridge his Plaint where it is of any *Thing intire*, or of *Parts of any thing intire*, as the Moiety of a Manor, or 3d Part &c. Thel. Dig 76. lib. 8. cap. 28. S. 18. cites 36 H. 6. Plaint 7. and 5 H. 7. 7. 23.

And where the Demand was there of *diverſe Manors*, the Demandant was received to abridge for one of the Manors. Thel. Dig. ut ſupra, cites 21 E. 4. 28.——It was agreed, Arguendo in Formedon, that a Man cannot abridge his Demand *nor* Plaint *of a Thing intire*, as *Manor*, *Moiety*, *3d Part*, and the like, which are intire; *nor unleſs where the Demand or Plaint may ſtand true after the Abridgment*, and therefore of *Acres* he may abridge his Demand. *But* of a Plaint or Demand *in D. and C.* a Man cannot abridge in D. For then the Demand is falſe in D. and C. but as to the Demand which is *intire*, it is remedied by the Statute 21 *H.* 8. 3. Br. Abridgment, pl. 28. cites 19 H. 6. 13.

S. P. For they cannot ſever in Attaint as to the Principal, becauſe their Plea

7. Note that in *Treſpaſs againſt* 2, who pleaded *Not Guilty*, which is a ſeveral Plea in itſelf, and were *found Guilty* to the Damage of 10 l. and the *one brought Attaint alone*; and per Cur. it *lies of the Principal but not of the Damages*, which are intire, by which he abridg'd his Demand of the Damages. Quod nota. Br. Abridgment, pl. 4. cites 34 H. 6. 12.

was ſeveral in itſelf, and the one may be found Guilty and the other not; but as to the Damages, thoſe are intire. Br. Abridgment, pl. 24. cites 35 H. 6. 19.

8. *So* upon ſuch a Recovery *in Conſpiracy*. Br. Abridgment, pl. 4. cites 34 H. 6. 30.

Thel. Dig. 76. lib. 8. cap. 28. S. 20. cites S. C.

9. *Where the Writ does not require any Defence*, as in *Dower*, *Aſſiſe*, *Per quæ Servitia*, and *Attaint*, the Plaintiff may abridge his Plaint or Demand. Br. Abridgment, pl. 4. cites 34 H. 6. 33. Per Forteſcue.

In Aſſiſe where the Plaint is of a Meſſuage and 4 Acres of Land, the Plaintiff may abridge his Plaint of the Meſſuage, becauſe the Jury hath View of the Land only.

10. In *Dower* &c. [The Writ was] *Rationabilem dotem* ſuam quæ ei contingit *de libero tenemento* &c. *in D. C. and E.* and the *Demand was of* 3 *Manors*, 30 *Houſes*, *and* 20 *s. Rent*, *with the Appurtenances*. And the Tenant pleaded to the Writ, becauſe the *Rent was Parcel of one of the Manors*, and therefore *twice demanded*. Per Brian, he may abridge his Demand of the one Manor, and of this the Writ ſhall abate; * for in all Caſes where the Writ is De libero Tenemento, he may abridge his Plaint or Demand thereof, wherefore the Writ ſhould abate, and in this Writ he may abridge his Demand in one Vill. Quod Littleton conceſſit. Br. Abridgment, pl. 18. cites 21 E. 4. 28.

D. 61. b. Paſch. 38 H 8. Pennington v. Morſe ——But where the Plaint was of 53 s. 4 d

4 d. Rent, and abridg'd to 20 s it was held by the Court to be Error; for that Rent being an intire Thing cannot be abridg'd. D. 65. b. Mich. 3 E. 6. in Caſe of Arundel (Earl of) v. Lord Windſor and others.

* S. P per June Ch. J. Br. Abridgment, pl. 12. cites 14 H. 6. 4. and in Writ of Ward the Writ is Cuſtod' terræ & Hæred'. In theſe and all the like Caſes the Demandant may abridge his Plaint or Demand, and the Reaſon is becauſe the *Writ remains good De libero Tenemento* notwithſtanding this. —— *But* in *Præcipe quod reddat*, where *Acres certain* are demanded, there he cannot abridge; for then he ſhall falſify his own Writ, and where Writ is *confeſs'd falſe in Part it ſhall abate in all.* Ibid.

11. *But* he cannot abridge his Plaint in a * Vill *in Aſſiſe*; for the Jury is ready to paſs, and the Jury which is put in Pannel for this Vill, cannot be put in Inqueſt after the Abridgment. *But it was agreed* that a Man may abridge his Demand in a Vill *in Writ of Dower, be it of a Manor or of Acres*, becauſe there he is to have the *View*, and the Writ may be taken of that which remains. Note a Difference. Br. Abridgment, pl. 18. cites 21 E. 4. 28.

* S. P. Br. Abridgment, pl. 12. cites 11 H. 6. 4. For then his Writ is falſe.

12. In *Writ of Right of Advowſon*, or Aſſiſe of a Manor, it is a good *Plea* to the Writ *that the Demandant is ſeiſed of the 5th Part of the Advowſon*, or of one Acre, Parcel of a Manor, and by this all the Writ ſhall abate; for there he cannot abridge his Demand, for it is of a Thing *intire*. Br. Abridgment, pl. 33. cites 5 H. 7. 7.

Abſence.

(A) What may be done in the Abſence of the Defendants.

1. A Man *cannot be attainted* in his Abſence. Br. Challenge, pl. 144. cites 41 Aſſ. 26.

2. A *Fine for a Battery* may be ſet, tho' the Offender be not preſent; but the Courſe is not to hear any thing moved in Mitigation of the Fine, unleſs the Party be preſent, and he was fin'd 500 Marks. Vent. 209. 210 Paſch. 24 Car. 2. B. R. How's Caſe.

3. H. and D. were *convicted and outlaw'd* of *Perjury*, and the *Exigent filed*, and it was moved that the Court would *pronounce Judgment* on the Defendant's ſeeing the Proſecutor could go no farther; but the Court ſaid they never knew any Judgment given for a *Corporal Puniſhment*. Even in the Caſe of an Outlawry in the Abſence of the Party, when a Man is outlaw'd for *Felony*, there is never any Award of Execution againſt him till he be brought to the Bar. And ſince in this Caſe a Corporal Puniſhment would be Part of the Sentence, they could not do it; and that, upon Search, Sir Samuel Aſhtree could find no ſuch Precedent. 12 Mod. 156. Mich. 9 W. 3. The King v. Harriſon & Duke.

S. C. 1 Salk. 400. pl. 4. by the Name of Duke's Caſe, and held accordingly by Holt Ch. J. and ſaid that a *Capias ad ſatisfaciendum Domino Regi pro Fine* is Common; but there never was a Writ to take a Man and put him in the Pillory. —— Skinn 684. pl. 4. The King v. Harris, S. C. per Cur. accordingly. —— S P. Arg. 10 Mod 342.

4. A

But Execution cannot be awarded but in the Preſence of the Party, *becauſe* there may poſſibly be a Miſtake of the Perſon, or ſome other Reaſon may have happen'd, ſubſequent to the Judgment, why Execution ſhould not be awarded; per Parker Ch. J. 10 Mod. 344. in Caſe of the Queen v. Simpſon.

4. A Court may, perhaps, in *Prudence*, not care to *give Judgment* in the Abſence of the Party; Per Parker Ch. J. but he ſaid he ſaw no Reaſon but that it may be done; and that he took it to be done in Mawgridge's Caſe. 10 Mod. 344. in Caſe of the Queen and Simpſon.

See the Caſe argued Ibid. 248. 341.

5. Upon the Statute 3 & 4 W. & M. cap. 10. againſt Deer-ſtealers, the Juſtices of Peace may convict the Offender in his Abſence, upon his Default to appear, he having been duly ſummoned. 10 Mod. 378. Hill. 3 Geo. 1. B. R. The Queen v. Simpſon.

6. Tho' the Office of a *Common Council-man* is in Law accounted a Freehold, yet he may be removed from it in his Abſence; Per Parker Ch. J. 10 Mod. 380.

7. *Judgments* irregularly obtained, may be *ſet aſide*, and *Attachments* may be *granted* &c. in the Abſence of the Parties. Indeed *Notice* muſt be given; but if the Party will not appear, the Court proceeds without Seeing or Hearing; Per Parker Ch. J. 10 Mod. 380. in Caſe of Queen v. Simpſon.

8. In *ſummary Proceedings* there is very often no Power given (as to J. of P.) to oblige the Party to appear; and where it is not given by the expreſs Words of an Act of Parliament, it cannot be given by *Implication*, unleſs it were *of abſolute Neceſſity to the doing Juſtice*; Per Parker Ch. J. 10 Mod. 381. in Caſe of Queen v. Simpſon.

(B) The Effect thereof. In reſpect of Nominees &c. and the Remedy.

A *Leaſe* was made *in Reverſion* to L. D. *for* 99 *Years, to commence after the Death*, or other, ſooner Determination of the Eſtates *of J. D. the Father, and J. D. the Son*, Leſſees in Poſſeſſion for the like Term, if they or either of them ſo long lived. In Ejectment *the Death of J. D. the Son was poſitively proved, but as to the Father, Proof was that he was reputed dead, and not heard of in* 15 *Years*. Holt Ch. J. was of Opinion that this Caſe is within this Statute, becauſe L. D. the Leſſor of the Plaintiff in Ejectment had a Term in Reverſion in the Lands, and ſo was a Reverſioner within the very Letter of the Statute; and the Defendant not being able to prove that J. D. the Father was alive at any Time within 7 Years laſt paſt, the Plaintiff had a Verdict. Carth. 246. Trin. 4 W. & M. at Exon Aſſiſe, Holman v. Exton. ——And Holt Ch. J. likewiſe held, that a *Remainderman was within the Equity of the Law.*

1. 19 *Car.* 2. *S.* 6. *Nominees for whoſe Lives Eſtates are granted, after ſeven Years Abſence, and no evident Proof be made of their being alive, in any Action commenced by the Leſſors or Reverſioners for Recovery of the Tenements, they ſhall be accounted as dead.*

2. 6 *Ann. cap.* 18. *Such Nominees, or Tenants of particular Eſtates, on Affidavit in Chancery by any Claimant to the Reverſion &c. that they have Cauſe to believe ſuch Perſons dead, ſhall be ordered to be produc'd, and if not produc'd, be taken to be dead; but if it appears afterwards, that ſuch Nominee or Tenant was alive, ſuch Tenant &c. may re-enter, and recover the meſne Profits.*

For more of Abſence in General See **Acceſſary, Beyond Sea, Condition, Feoffment,** and other Proper Titles.

Acceſſary.

(A) Acceſſary. Statutes relating to Acceſſaries.

1. *Weſtm.* 1 3 E. 1. cap. 14. *Forasmuch as it hath been uſed in ſome Counties, to outlaw Perſons being appealed of Commandment, Force, Aid, or Receipt, within the ſame Time that he which is appealed for the ſame Deed is outlawed,* The Preamble recites the *Miſchief*, that *before this Act* in ſome Countries it had been uſed to outlaw Acceſſaries within the ſame Time, that the Principal was outlaw'd. Here it is to be underſtood, that in thoſe Days *moſt Appeals of Death &c. were ſued by Bill in the County before the Coroner*, in which Bill the Appellant *did make a Diſtinction between the Principal and the Acceſſary*; and therefore *this Act is intended of Appeals commenced by Bill, for* in the Appeal *by original Writ, both* Principals and Acceſſaries *are generally charged alike*, without any Diſtinction, who be Principals and who be Acceſſaries, *until the Plaintiff makes his Count*, and therein he muſt diſtinguiſh them; but if *the Defendants* in ſuch an Appeal, where ſome are Principals, and ſome Acceſſaries, *makes Default*, the *Appellant before the Exigent ought to declare*, to the End it may be known *who be Principals, and who Acceſſaries*, and to take the Exigent only againſt the Principals, *and continue the Plea againſt the Acceſſaries until the Principals be attainted*; for if the Plaintiff ſhould pray an Exigent againſt them all, he is concluded afterward to charge any of them as Acceſſaries. 2 Inſt. 183.

This Act was made in *Affirmance of the Common Law*, and it *holds* not only in Appeal at the Suit of the Party, but *in Indictments alſo* at the Suit of the King; for it is an ancient and fundamental Maxim of the Common Law, Juri non eſt conſonum, quod aliquis acceſſorius in Curia Regis convincatur antequam aliquis de facto fuerit attinctus; yet if the *Acceſſary* will, he *may pray Proceſs againſt the Inqueſts before the Principal be attainted*; for Quilibet poteſt renunciare juri pro ſe introducto. 2 Inſt. 183.

It is provided and commanded by the King, that none be outlaw'd upon Appeal of Commandment, Force, Aid, or Receipt, Acceſſaries are divided into two Parts, viz. to Acceſſaries *before* the Fact, and to Acceſſaries *after the Fact*.

Again, *Acceſſaries before* the Fact are divided into 3 Branches; of *Commandment, Force, and Aid*; Acceſſaries *after* the Fact *is only by Receipt*.

Under this Word (*Commandment*) is underſtood all thoſe that *incite, procure, ſet on*, or *ſtir up* any other to do the Fact, *and are not preſent when the Fact is done*.

Force is a Word of Art, and properly *ſignifieth* the *furniſhing of a Weapon of Force to do the Fact*, and *by Force whereof the Fact is committed, and he that furniſheth it is not preſent when the Fact is done*; and as for theſe two Words, Commandment and Force, Bracton ſaith, *Ubi factum nullum, ibi fortia nulla, nec præceptum nocere debet*. And again, Vulnus, fortia & præceptum, generant unicum factum; non eſſet vulnus forte, ſi non adfuiſſet fortia; nec vulnus, nec fortia, niſi præceptum præceſſiſet: and *ſometimes, in a large Senſe, is taken for any that is acceſſary before the Fact*.

Under this Word (*Aid*) is comprehended all Perſons *counſelling, abetting, plotting, aſſenting, conſenting*, and *encouraging* to do the Act, and are *not preſent* when the Act is done; *for if* the Party commanding, furniſhing with Weapon, or aiding, be *preſent* when the Act isdone, then *he is Principal*. 2 Inſt. 182.

Until he that is appealed of the Deed be attainted; ſo that one like Law be uſed therein through the Realm. Nevertheleſs, he that will ſo appeal, ſhall not, by reaſon of this, intermit, or leave off to commence his Appeal at the next County againſt them, no more than againſt their Principals which be appealed of the Deed; but their Exigent ſhall remain until ſuch as be appealed of the Deed be attainted by Outlawry, or otherwiſe. If the *Principal wage Battle, and is ſlain in the Field*, yet he is not attainted; but the *Judgment muſt be, that he was vanquiſhed in the Field, Ideo conſideratum, quod ſuſp' per coll'*. &c. And this was agreed by the Juſtices; for *otherwiſe* in this Caſe the Lord ſhould have *no Eſcheat, nor* any *Outlawry* could be ſued by the Appellant *againſt the Acceſſary*. 2 Inſt. 183.

Tho' the Act ſays *Appellee* in the ſingular Number, yet in an *Appeal brought againſt* 2 *as Principals, and againſt another as acceſſary* to them, in this Caſe *both* of them *muſt be attainted before the Acceſſary be outlaw'd*; and *if one* of the Principals *be found Not guilty*, the *Acceſſary is diſcharged*, for the Plaintiff made him acceſſary to two, and therefore he cannot be found acceſſary to one. * *But where* there be *divers*

Principals,

Principals, the *Appellant may have his Appeal againſt any one* of them, and *make the Acceſſary neceſſary to him only*, if he will, *for the Felony is ſeveral* †; but the Appellant cannot have ſeveral Appeals of one Death. 2 Inſt. 183.

* Br. Corone, cites pl. 118. cites 40 Aſſ. 25. S. P. accordingly.

In one Caſe of Felony *all are Principals as well before as after, tho'* they be *abſent at the* doing of the Felony; but that is ſpecially provided by Statute of 5 H. 7. cap. 2. of *taking of Women againſt their Wills* &c. 2 Inſt. 183.

But if the *Principal pleads not directly to the Felony a Plea to bar the Plaintiff, as Autrefoits Attaint*, or *Unques accouple*, or the like; there the *Acceſſary ſhall not plead until that Plea be determined*; And *ſo* if the Principal plead a *Plea to the Writ*, the Acceſſary ſhall not be driven to anſwer until the Plea be determined. 2 Inſt. 184.

For further Explanation of this Act See the following Diviſions.

2. 3 & 4 *W. & M. cap.* 4. *S.* 4. *Perſons buying or receiving ſtolen Goods, knowing the ſame to be ſtolen, ſhall be deem'd Acceſſaries to the Felony, after the Felony committed, and puniſhed as ſuch.*

3. 11 & 12 *W.* 3. *cap.* 7. *S.* 9. *Perſons ſetting forth any Pirate, or aiding or aſſiſting, maintaining, procuring, commanding, counſelling, or adviſing the ſame, either on the Land or Sea, ſhall be adjudg'd Acceſſary to ſuch Piracy. And if any Perſons knowing another to have committed Piracy, ſhall on the Land or Sea receive, entertain, or conceal him, or receive or take into their Cuſtody any Ship, Veſſel, or Goods, which have been piratically taken, ſhall be adjudg'd Acceſſary to the Piracy; and all ſuch Acceſſaries ſhall be tried as the principal Pirates are, and ſuffer Pains of Death, and Loſs of Lands and Goods, in like manner.*

4. 5 *Ann. cap.* 31. *S.* 5. *If any Perſons ſhall receive or buy any Goods, knowing them to be ſtolen, or ſhall receive, harbour, or conceal any Burglars, Felons, or Thieves, knowing them to be ſo, they ſhall be deem'd Acceſſary to the Felony, and being convict by Teſtimony of one Witneſs, ſhall ſuffer and incur the Pains of Death as a Felon Convict.*

See Tit. Murder (O) and (O. 2)

(B) Who.

3 Inſt. 139. S. P. accordingly; for that he did not receive the Felon.

1. IF a Man *receives a Felon in Aid or Favour of the Felon* he is acceſſary, *but* if he aids him *by good Words or ſues for his Deliverance*, or ſends a Letter for his Deliverance, this is not Acceſſary. Br. Corone, pl. 103. cites 26 Aſſ. 47.

——A Vicar inſtructed an illiterate Approver in Priſon to read, whereby he eſcaped, yet the Vicar was adjudg'd not acceſſary to the Felony. 3 Inſt. 139. cap. 64. cites Mich. 7 R. 2. and 7 H. 4. 27.

2. Felons came to the Houſe of D. and M. his *Wife*; M. *knew* them to be *Felons* but D. did not, and both D. and M. *received and entertain'd them, but* M. *conſented not to the Felony.* Adjudg'd that this made not M. acceſſary. 3 Inſt. 108. cap. 47. cites Mich. 37 E. 3. Dey's Caſe.

Br. Corone, pl. 19. cites 7 H. 4. 27 & 25 S. C. & P.

3. It is agreed that he *who procures and is preſent* is Principal *tho' he did not Strike*, and if he be *abſent* he *is only acceſſary*. Br. Appeal, pl. 19. cites 7 H. 4. 27..

4. If diverſe commit any Murder or other Felony, *one* Man *may be both Principal and Acceſſary* to the other. 3 Inſt. 139. cap. 64. cites 7 H. 4. 27.

5. If a Man *receives a Felon knowing of the Felony*, and *takes* 40 *s. of him to ſuffer him to go, he is acceſſary* to the Felony. Br. Eſcape, pl. 43. cites 9 H. 4. 1.

6. In Appeal of Rape of his Feme, tho' two come and the *one does the Act*, the *other being preſent*, yet both are *Principals*. Br. Appeal, pl. 32. cites 11. 4. 13.

S. P. per Harpur J. of ſeveral coming together

7. *So* where *ſeveral come to do Felony, Robbery* &c. and one does the Act, the others are Principals. Ibid.

to do a Burglary or Murder &c. And Dyer and Weſton ſaid, that in thoſe things, in Reſpect

ſpect of the Medling with the Perſon of a Man, the Intent is adjudg'd according to the Event, and when the Fact is perpetrated it ſhall be adjudg'd the Intent of all from the Commencement, and ſo all are Principals; but yet it may be found that the one of them did it Ex Malitia præcogitata, and the other not. Mo. 53. 54. in pl. 155.

If ſeveral Perſons come into a Houſe together with an Intent to ſteal, if only one of them ſteals Goods, they are all equally Guilty. Per Kelyng Ch. J. Kelyng 47. at the Old Baily, 5 Apr. 1665.

8. If a *mortal Wound* be *given*, and the *Party languiſhes* for a Month, and *A. knowing thereof receives the Murderer*, or if Conſtables arreſt him and permit him to eſcape, and then the Perſon wounded dies, the Receivers are not acceſſory to the Felony, nor are the Conſtables Felons. 2 Ld. Raym. Rep. 827. cites 11 H. 4. 12. b.

9. If 20 *come to do a Felony*, and the *one only does the Act*, yet all are Principals by Reaſon of their Preſence. Br. Corone, pl. 187. cites 11 H. 4. 13.

10. *But* if any *procure* or command *and be not preſent*, thoſe are Acceſſaries only. Ibid.

11. The Lord cannot be Principal of the *Goods of his Villein*; for if he takes them ſecretly it is not Felony, for he *has a Title to take them*, and therefore it ſeems that he may be acceſſary. Br. Corone, pl. 215. cites 29 H. 6.

12. If *ſeveral are preſent for the ſame Purpoſe when a Man is kill'd*, and one kills him, yet all the others are Principals. Br. Corone, pl. 166. cites 21 E. 4. 70. 71.

13. They who *reſcue* a Felon out of Ward or Priſon are principal Felons, and not Acceſſaries, per Cur. Br. Corone, pl. 129. cites 1 H. 7. 6.

14. If a Man *be preſent at the Death of a Man, and moves another to ſtrike, which he does, and kills the Man*; by all the Juſtices of both Benches, he who moved is Principal and not Acceſſary, tho' he did not ſtrike; for the Wound of him who ſtruck is alſo the Wound of him who procured it, and it is only formal in Appeal, to ſay that every one is Principal who ſtruck him mortally. Br. Corone, pl. 140. cites 4 H. 7. 18. S. C. cited Pl. C. 100. a. and the Reporter ſays the Reader may ſee in the Reports of H. 4. the Law frequently adjudg'd accordingly, viz. that thoſe preſent and abetting to do the Fact are Principals as well as he that did it; and that it ſeems in the time of H. 4. the Law was changed and corrected in this Point.——2 Hawk. 312. cap. 29. S. 7. the Serjeant ſays he takes it to be ſettled at this Day, that all thoſe who aſſemble themſelves together with a felonious Intent, the Execution whereof cauſes either the Felony intended, or any other to be committed, or with an Intent to commit a Treſpaſs, the Execution whereof cauſes a Felony to be committed, and continue together abetting one another, till they have actually put their Deſign in Execution; and alſo all thoſe who are preſent when a Felony is committed, and abet the doing of it, as by holding the Party while another ſtrikes him, or by delivering a Weapon to him that ſtrikes, or by moving him to ſtrike, are Principals in the higheſt Degree, in Reſpect of ſuch Abetment, as much as the Perſon who does the Fact, which in Judgment of Law is as much the Act of them all as if they had all actually done it.

15. If 12 *come to commit* a Robbery, a Fray, Riot, or the like which are *unlawful Acts*, and *one of them enters into the Houſe and kills a Man, or does another unlawful Act*, *all* the others who came with him to do the unlawful Act *are Principals*. Br. Corone, pl. 171. cites 34. H. 8. If ſeveral combine to ſtand by one another in a Breach of Peace, with a general Reſolution to reſiſt all Oppoſers, and in the Execution of their Deſign a Murder is committed, all of the Company are equally Principals; tho' at the Time of the Fact ſome of them were at ſuch a Diſtance as to be out of View; alſo upon the ſame Reaſon it hath been adjudg'd, that where a Company of Rogues aſſault a Man in the Highway, who eſcapes from them, and then one of them rides from the reſt, in the ſame Highway, and robs another out of the View of his Companions, and then returns to them, they are all of them equally Principals. And the like hath been adjudg'd in Relation to all thoſe who accompany one another with an Intent to commit a Burglary, in the Execution whereof ſome ſtand to watch only in the adjacent Places, and the reſt actually break and enter the Houſe. 2 Hawk. Pl. C. 312. cap. 29. S. 8.

16. *So* in the Caſe of Fines Lord Dacres, one of his Company *kill'd a Man in Hunting in a Foreſt*, and the Ld. Dacres and other Hunters, as Mantel and others, were Principals, and *were all hanged*. Ibid.

17. *A.*

17. *A. being in Gaol for Felony*, R. an Attorney *adviſed his Friends to perſwade the Witneſſes not to appear to give Evidence againſt him*, and ſo they did. Reſolved that neither the Friends nor R. were Acceſſories to the Felony, but that it was a great Contempt and Miſpriſion, for which they might be fined and impriſon'd. 3 Inſt. 139. cites Mich. 11 & 12 Eliz Roberts's Caſe.

Ibid. The Reporter ſays, Nota an eſpecial Caſe, where the *Principal and Acceſſary* are *both abſent* at the Time of the Felony committed.——

18. V. *perſuaded J. S. to take a Potion*, which was mixt with Cantharides; and that thereby he would have Iſſue by his Feme. Accordingly V. drank the Potion, *which poiſon'd and kill'd him.* Reſolved that V. was a principal Murderer, tho' *not preſent at the drinking* the Poiſon; for otherwiſe he would be diſpuniſhable. And every Felon is either Principal or Acceſſary, and if there is no Principal there cannot be an Acceſſary; but if any one had procur'd V. to do it, ſuch Perſon had been Acceſſory before the Fact. 4 Rep. 44. a. b. pl. 10. Paſch. 33 Eliz. B. R. Vaux's Caſe.

S. C. cited, and S. P. Keyling 52. as to both Principal and Acceſſary being abſent at the Time of the Felony done.——2 Inſt. 183 S. P. and S. C. cited.——S. P. 3 Inſt. 138. cap. 64.——S. C. cited 2 Hawk. Pl. C. 313. cap. 29. S. 11. and ſays, that ſo likewiſe all thoſe ſeem to be Principals who were preſent when the Poiſon was infus'd, and privy to and conſenting to the Deſign.

19. A *Feme* cannot be Acceſſary *to her Husband*, tho' ſhe knows that he committed Larceny, and relieves him, and does not diſcover it. 3 Inſt. 108. cap. 47.

7 Mod. 129. S. C. and held accordingly by 3 Judges; but Holt Ch. J. contra, with their ſeveral Arguments. —11 Mod. 25. pl. 3.

20. Upon a Conviction of Deer-ſtealing, on the Statute 3 & 4 W. 3. cap. 10. the Queſtion was, Whether one *not preſent*, *but procuring*, *perſuading*, or adviſing the Perſon *to kill the Deer*, *and lending him Dogs or Guns for that Purpoſe*, *and Horſes* to carry away the ſaid Deer before the Fact committed, ſhall be ſaid to be abetting and aiding within that Statute. Three Judges held that it was, but Holt Ch. J. was of another Opinion. 2 Salk. 542. pl. 2. Hill. 1 Ann. B. R. The Queen v. Whiſtler.

S. C. adjudged the Defendant Guilty within the Statute, by 3 Juſtices contra Holt Ch. J. with their ſeveral Arguments.

21. One that is *aiding to a Felony*, *and preſent at the doing it*, is a principal Felon; but Aiders in Felony who are *abſent*, are only Acceſſaries; Per Powell J. and upon this, he ſaid, the Diſtinction is grounded, that one Sort are *Aiders therein*, *and* the other *thereunto*. 7 Mod. 32. Hill. 1 Ann. B. R. in Caſe of the Queen v. Whiſtler.

(C) In what Caſes.

1. IT was admitted by ſeveral, that there may be *Principal and Acceſſary in Præmunire*; *but* Candiſh ſaid, that *if* he who is called *Principal dies*, yet the *other ſhall anſwer*. Contra in Felony. But Finch ſaid it is more like to Treſpaſs than to Felony; for in Treſpaſs he who firſt comes ſhall anſwer, and if he be convict of Damages, and after another comes and pleads, and is convicted, he ſhall be charged of the firſt Damages; and if he be acquitted, yet the firſt ſhall be charged; and the Writ was, that ſuch Manutenentes, & Abettatores ipſum expulerunt; and after Finch awarded, that the Defendants who appeared ſhould anſwer. And ſo it *ſeems that all are Principals.* Br. Præmunire, pl. 4. cites 44 E. 3. 7.

2. Half.

2. Half. ſaid, that there may be Principal and Acceſſary *in Præmunire*. Br. Damages, pl. 46. cites 8 H. 4. 6.

3. Of *Treaſon* is no Acceſſary, and one cannot be Acceſſary Felonice to a Treaſon; quod nota. Br. Corone, pl. 134. cites 3 H. 7. 10. Per Huſſey Ch. J.

4. There is no Acceſſary in *Simony*, but all are Principals therein as well as in *Treſpaſs*. Cro. E. 789. pl. 30. Mich. 42 & 43 Eliz. C. B. in Caſe of Baker v. Rogers.

5. There is no Acceſſary in *Forgery*, but all are Principal. Reſolved. Mo. 666. pl. 913. Mich 44 & 45 Booth's Caſe.

6. In the *higheſt and loweſt Injuries* there can be no Acceſſary, but all are Principals; As in Treaſon, Petty Larceny, and Treſpaſs. 2 Inſt. 183.

There can be no Acceſſaries in *High Treaſon* or *Treſpaſs*; and it ſeems agreed that whatever will make a Man an Acceſſary before in Felony, will make him a Principal in High Treaſon and Treſpaſs, *as Battery*, *Riot*, *Rout*, *Forcible Entry*, *Forgery*, and *Petit Larceny*; and wherever one commands another to commit a Treſpaſs, and the Treſpaſs is done accordingly, he ſeems to be as guilty of it as if he had done it himſelf; and he may be tried and found Guilty before the Trial of the Perſon who did the Fact. 2 Hawk. Pl. C. 310. cap. 29. S. 2.

(D) Before or after.

1. PRincipal was found Guilty of Manſlaughter, but *Not guilty of the Murder*. The Court diſcharged all the Acceſſaries before the Fact, becauſe *to Manſlaughter none* can be *Acceſſary before the Fact*; but as to the Acceſſaries *after the Fact*, they ſhall anſwer as Acceſſaries to the Manſlaughter. Mo. 461. pl. 645. Hill. 39 Eliz. Gooſe's Caſe.

2. There can be *no Acceſſary before the Fact in Caſe of Manſlaughter*, becauſe this muſt be on a ſudden Affray; for if it be premeditated it is Murder. Reſolved Per tot. Cur. 4 Rep. 43. b. 44. a. pl. 9. Paſch. 39 Eliz. Goff v. Bibithes.

(E) Charg'd. How.

1. WHERE the *Servant* of a Man *procures a Man to kill his Maſter*, which he does, this is not Treaſon in the Servant, becauſe it is only Felony in the Principal; and where the Principal is only a Felon, the Acceſſary cannot be a Traitor. Br. Corone, pl. 118. cites 40 Aſſ. 25.

2. Two were indicted Quod ipſi talibus die & Anno *Will. Wane Felon. ſcient. Latronem Domini Regis, apud D. receptaverunt & certa Bona*, and declared who &c. *ipſius W. ad Valentiam* &c. *in Cuſtod. ſua exiſtent. Vi & & Armis ceperunt & aſportaverunt*. Per Cheiney, he ought to declare *what Felony was committed, and alſo that he knew them to be Felons, and received them*; for it ſhall be intended by thoſe Words, W. Wane ſcient. Felon. Domini Regis receptaverunt &c. that this Word (*ſcient.*) ſhall have *Relation to this Word receptaverunt*, which is the Verb, becauſe Adverbium determinat Verbum; for it ought to be *Sciens ipſos talem Feloniam feciſſe receptaverunt* &c. vel hujuſmodi; and the Priſoner was diſmiſs'd for the Inſufficiency of the Indictment. Br. Indictments, pl. 4. cites 7 H. 6. 42.

3. A Man was indicted of *counterfeiting Money traiterouſly*, and another was indicted, that he knowing thereof, *traiterouſly and felonioufly help'd, maintain'd, and comforted the Principal*, and the *Principal was attainted*. And per Brian J. in this Caſe, and of *burning of Houſes*, the Acceſſory may be Felon; becauſe thoſe Matters were Felonies at Common Law, and are made Treaſon by Statute, as *to write a Letter to burn a Houſe unleſs he ſends* 10 *l. by ſuch a Day*. And it was ſaid there, that it is certain that burning a Houſe felonioufly was Felony by the Common Law. And per Huſſey Ch. J. of Treaſon there is no Acceſſory, and one cannot be acceſſory felonioufly to a Treaſon. Quod nota. Br. Corone, pl. 134. cites 3 H. 7. 10.

(F) Forfeiture of what.

1. IF it be *found before the Coroner that* J. S. *Acceſſary to the Felony, fled* for the Felony, he ſhall forfeit all his Goods as well as if he was Principal and fled, viz. of all Acceſſaries at the Time of the Felony done; but contra of Acceſſary after the Felony; by the Juſtices of both Benches. Br. Corone, pl. 198. cites 4 H. 7. 18.

2. *And if the Principal be attainted, and the Acceſſary acquitted*, yet it ſhall be inquired if he fled for the Felony or not, as well as it ſhall be of the Principal if he was acquitted, by reaſon of the Forfeiture of his Goods. Ibid.

3. If the *Principal* be *erroneouſly attainted*, whether by Error in Proceſs, or becauſe the Principal, being out of the Realm &c. or in Priſon, is outlaw'd; yet it muſt ſtand good till 'tis reverſed, and it is a good Record till then; and in ſuch Caſe, if the Acceſſary be attainted and executed, and afterwards the Attainder of the Principal is reverſed, the Heir of the Acceſſary may either enter or have his Action; for by the Reverſal of the Attainder againſt the Principal, the Attainder againſt the Acceſſary is intirely defeated. 9 Rep. 119. a. b. per Cur. Trin. 10 Jac. in Ld. Sanchar's Caſe.

(G) Arraignment of Acceſſary. In what Caſes.

1. A Man was indicted as Acceſſary by his *Receipt of one A. who was a Clerk Attaint*, and pleaded Not Guilty; and the Court would not ſuffer him to be try'd; for it may be that the Clerk *may make his Purgation after that the Acceſſary is hang'd*. Br. Corone, pl. 83. cites 18 Aſſ. 13.

2. If Principal and Acceſſary are, and both are indicted, per Bank, it is a *good Plea for the Acceſſary to ſay that the Principal is dead*, and pray Mainpriſe for his Deliverance; for if the Principal be dead, *or hang'd for another Felony*, the Acceſſary is diſcharg'd. Quod non negatur. Br. Corone, pl. 86. cites 22 Aſſ. 40.

3. Where a Man is *acquitted ſe Defendendo*, it ſhall not be inquir'd of the Abettors; for he did the Fact. Br. Corone, pl. 89. cites 22 Aſſ. 77.

4 *Contra where the Party is acquitted that he did not do the Act*; there the

the Conſpirators ſhall be puniſh'd as Conſpirators. Contra where the Party did the Act. Ibid.

5. Where there is Principal and Acceſſary of the *Death* of a Man, and the *Principal is deliver'd to the Ordinary*, the Acceſſary ſhall not be hang'd. Per Juſticiarios. Br. Corone, pl. 101. cites 26 Aſſ. 27.

6. Principal and Acceſſary of Felony of the *Death* of a Man. The Acceſſary ſhall not be put to the Anſwer before that the Principal be attainted, by which he was let to Mainpriſe. Br. Corone, pl. 117. (bis) cites 40 Aſſ. 8.

7. Action upon the Statute de *Muliere abductâ cum bonis viri.* The *Defendant* was outlaw'd, and obtain'd Charter of Pardon, and there were Principal and Acceſſary, and the *Principal got the Pardon*, and by this the Acceſſary had no Advantage, but was awarded to anſwer. Quære Cauſam? It ſeems to me inaſmuch as all are Principals in this Caſe. Br. Corone, pl. 122. cites 42 Aſſ. 16.

8. *So upon ſuch Outlawry where the Indictment is* * *inſufficient*, yet the Acceſſary ſhall be put to anſwer; but the Judge ought to have Diſcretionem & Æquitatem inde. Br. Corone, pl. 174. (175) cites 2 R. 3. 21.

* The large Edition is (ſufficient) but the other Editions are as here.

9. If Principal and Acceſſary are, and the *Principal is outlaw'd by erroneous Proceſs*, the Acceſſary ſhall anſwer, and ſhall not reverſe the Outlawry by Plea; for the Record is in Force till it be revers'd; for it is not Void, but Error. Br. Corone, pl. 174. (175) cites 2 R. 3. 21. Per all the Juſtices of B. R.

S. C. cited per Cur. and held accordingly, 9 Rep. 68 b. Paſch. 9 Jac. in Mackally's Caſe.——S. C. cited, and S. P. reſolv'd, 9 Rep 119. a. b. Trin. 10 Jac. in Ld. Sanchar's Caſe.——2 Inſt. 184. S. P.——2 Hawk. Pl. C. 321. cap. 29. S. 40. ſays that it ſeems agreed that ſuch Attainder, while it ſtands unreverſed, is as ſufficient for this Purpoſe as if there had been no Error in it.

10. If a Man be *indicted, and acquitted by* Charter of *Pardon*, *Clergy*, *or forejuring the Realm*, or in any other manner, the Acceſſary ſhall not be arraign'd; for where the Life of the Principal is ſaved by the Law, the Acceſſary ſhall go quit; per Thirn. Quod nota. Br. Corone, pl. 18. cites 7 H. 4.

Principal and Acceſſary of *Murder*. The *Principal was arraign'd, and pleaded* Charter of *Pardon* of the King; and yet *it was not allow'd for the Acceſſary*; for this is no Acquittance, but is of the Grace of the King to pardon him, which proves much that he is Guilty, by which the Acceſſary was compell'd to plead Not Guilty, at which Brooke *wonders*; for the Principal is not nor cannot be attainted, and therefore it ſeems that the Acceſſary cannot be arraign'd. Br. Corone, pl. 70. cites 3 Aſſ. 14.——But ibid. pl. 71. a Man was *arraign'd of Felony*, and *took to his Clergy*, and was ſent to the Priſon of the Biſhop, and was *found Guilty* by Inqueſt of Office; and the Receiver, viz. Acceſſary, was not arraign'd, becauſe *it is poſſible that the Principal*, who has his Clergy, *may make his Purgation*. Cites 5 Aſſ. 5.——*But* ibid. 137. *Principal took to his Clergy*, and the Acceſſary was arraign'd and found Guilty. And per Townſend, if the *Principal has his Pardon*, by this the Acceſſary ſhall go quit; and all the Juſtices in Effect ſaid that it is the common Courſe to arraign the Acceſſary in ſuch Caſe, and if he be found Guilty he ſhall be * hang'd, and is not like to the Caſe of a Pardon. Cites 3 H. 7. 12.

* S. P. Br. Corone, pl. 184. cites 4 E. 6.——2 Inſt. 184. S. P.

11. *Attainder of the Principal at the Suit of the King*, upon the Indictment, is not ſufficient to put the Acceſſary to anſwer in Appeal *at the Suit of the Party*; for the Principal is not attainted at the Suit of the Party, but at the Suit of the King. Quod nota. Br. Corone, pl. 19. cites 7 H. 4. 27. & 25.——2 Inſt. 184. S. P.

2 Hawk Pl. C. 321. cap. 29 S. 39. ſays it is agreed that Attainder of the Principal at the Suit of the King no ways helps the Proceedings againſt the Acceſſary at the Suit of the Party, & ſice converſo.

11. Appeal *againſt* 4, 2 *as Principals, and* 2 *as Acceſſaries.* The *one Principal was outlaw'd*, and the *other came by Superſedeas upon Exigent*, and

and the *Plaintiff pray'd Exigent againſt the Acceſſaries*. R. Hull, the one Principal, is not yet attainted, and they are appeal'd as Acceſſaries to both, and therefore it is no Reaſon that Exigent ſhould iſſue againſt them till the other Principal be attainted. Contra if they were appeal'd as Acceſſary of him only who is outlaw'd. Per Gaſcoigne, the one Principal appear'd, and therefore if they had appear'd they ſhould anſwer; for there is a Diverſity when the Principal appears, and the Proceſs is determin'd againſt him, and when he makes Default; for upon Default of the Principal the Acceſſary ſhall not be compell'd to anſwer till the Principal be attainted; but when the Principal appears, he ſhall be arraign'd, and the Acceſſary alſo, and * one Inqueſt ſhall make an End of all; for if he be acquitted of being Acceſſary to him who appears, yet the ſame Inqueſt ſhall inquire whether he be Acceſſary to the other who is outlaw'd or not. Contra per Huſſ. and after the Parties agreed. Br. Appeal, pl. 22. cites † 7 H. 4. 36.

* Br. Corone, pl. 10. Brooke ſays the Practice is ſo now, tho' held otherwiſe in the 44 E. 3. 7. there cited.

† Br. Corone, pl. 20. cites S. C.

13. *Two* were *indicted of* the *Death* of a Man, the one as Principal, the other as Acceſſary; and the *Principal* was *found* that he did it *ſe defendendo*; by which the Acceſſary paſs'd quit, and was not arraigned. Br. Corone, pl. 33. cites 9 H. 4. 33.

S. P. For it is not Felony in the Principal; and this, as it ſeems, is to be underſtood that it is not Felony of Death. Br. Corone, pl. 80. cites 15 Aſſ. 7.

14. A Man was indicted as *Acceſſary of procuring one to kill J. S.* and becauſe *they had no Record againſt the Principal*, nor did not know if the Principal be acquitted or attainted, the Defendant went ſine Die, becauſe the *Juſtices had ſent to the Juſtices of Peace of the County where* &c. who *certified that they had no Indictment againſt the Principal*. Br. Corone, pl. 56. cites 9 E. 4. 48.

15. In *Appeal againſt Acceſſary*, the *Acceſſary appear'd*, and the *Principal not*; the *Acceſſary ſhall anſwer*, but *Proceſs ſhall ceaſe againſt the Jury* till the Principal comes, or be attainted. Br. Appeal, pl. 28. cites 9 H. 4. 1. 2.

Br. Conſpiracy, pl. 2. cites S. C.

16. Where the *Principal dies* or *gets* Charter of *Pardon before his Attainder*, the Acceſſary is acquitted, and ſhall not have Conſpiracy. Br. Corone, pl. 5. cites 33 H. 6. 1.

17. Where the *Principal confeſſes the Felony*, *and takes to his Clergy*, the Acceſſary ſhall be arraigned, notwithſtanding that no Judgment be given againſt the Principal. Br. Corone, pl. 157. cites 13 E. 4. 3.

S. C. cited Per Cur. 9 Rep. 119. b. Trin. 10 Jac. in Lord Sanchar's Caſe. —— 2 Hawk. Pl. C. 321. cap. 29. S. 42. ſays it ſeems to have been generally always agreed, that after the Principal is attainted, whether after a Conviction by Verdict or Outlawry &c. his Death or Pardon &c. ſubſequent, will no Way avail the Acceſſary, and cites this Caſe among others.

18. Two were indicted, the one as Principal, the other as Acceſſary, and the *Principal was outlaw'd*, and the *Acceſſary was taken*, *and pleaded Not guilty*, and was *found Guilty*, *and hang'd*; and after the *Principal revers'd the Outlawry*, and was arraigned upon the Indictment, and *found Not guilty*, and was diſmiſſed where the Acceſſary was attainted and hang'd before; and it ſhall be intended that the Acceſſary is not guilty where the Principal was acquitted. And ſo ſee where he reverſes the Outlawry, yet he ſhall be arraigned upon the Indictment. Quod nota. Br. Corone, pl. 164. [165] cites 18 E. 4. 9.

19. *Principal and Acceſſary* were *arraigned*, *and both found Guilty*, and the *Principal took to his Book before Judgment*. And by all the Juſtices and Serjeants, except Huſſey, the Acceſſary ſhall be diſmiſs'd. And by the Reporter, where the Principal confeſs'd, and took to his Book, it was adjudg'd that the Acceſſary ſhall not be arraigned, becauſe *Judgment was not given upon the Principal*. Br. Corone, pl. 131. cites 3 H. 7. 1.

20. If

20. If the *Principal is pardoned, or hath his Clergy*, the Acceſſary cannot be arraigned; for it is a Maxim, that Ubi factum nullum, ibi Fortia nulla; and Ubi non eſt Principalis non poteſt eſſe Acceſſarius; and none can be a Principal before he is adjudged ſo by Law, either *by Verdict, Confeſſion, or Outlawry*; and there being a Principal in Rei Veritate, is not ſufficient; and the accepting a Pardon, or praying his Clergy, is only an Argument of his Guilt, unleſs it be after Attainder; for then the Acceſſary may be arraigned, becauſe it appears judicially, that there was a Principal. Reſolved. 4 Rep. 33. b. pl. 8. Trin. 32 Eliz. Syer's Caſe. S P. accordingly, tho' it be after Conviction or Confeſſion; yet if it be before Judgment, the Acceſſary ſhall be diſcharg'd, becauſe the Principal never was attainted, viz. that no Judgment was given againſt him for the Felony. 2 Inſt. 184.

After the *Principal* had been tried and *attainted for a Burglary, and then pardoned* &c. and the Pardon allow'd, M. who was acceſſary after the Fact, was indicted for the ſame, and pray'd that ſhe might be diſcharg'd. But reſolved, that tho' where the Principal hath his Clergy, or is acquitted or pardoned before Judgment, the Acceſſary ſhall not be queſtioned; yet if the Principal is attainted, the Acceſſary muſt anſwer, tho' the Principal be pardon'd. Raym 477. Mich 34 Car. 2. Anon.

21. E. *convicted* for Horſe-ſtealing, *and reprieved after Judgment, was again indicted for ſtealing another Horſe before his Attainder*, and *J. S. was indicted as Acceſſary before* the Felony for procuring it. *E. did not plead his firſt Attainder*, as he might, *but confeſſed the 2d Indictment*, and was executed; the Acceſſary was found guilty, and had the ſame Judgment as the Principal; but his Execution was reſpited, there being ſome Doubt whether he ought to be arraigned as Acceſſary, ſince E. might have pleaded his former Attainder; and if ſo there had been no Principal in the 2d Felony, and by Conſequence no Acceſſary. But the Judges were very clear in Opinion, that *the Arraignment of the Acceſſary and the Conviction were good*, ſince the Principal did not take any Advantage by pleading his former Attainder. Poph. 107. Mich. 38 & 39 Eliz. Everet's Caſe.

22. In *Appeal of Murder againſt B. as Principal, and C. as Acceſſary before, and D. as Acceſſary after* the Fact, the *Principal was found guilty of Manſlaughter only, and had his Clergy*. Reſolved that the Acceſſary ſhall be diſcharg'd, for till Judgment it does not appear judicially that there was a Principal; and therefore they were all diſcharg'd. *So* if the *Principal* in his Arraignment had *confeſs'd the Felony*, and *before Judgment obtain'd his Pardon, or had his Clergy allow'd*, the Acceſſary is thereby diſcharged. 4 Rep. 43. b. 44. a. Paſch. 39 Eliz. Goff v. Bibithe & al'. Cro. E. 542. 545. pl. 4. Goff v. Byby, S. C. and all the Court held, that as to the Acceſſaries before the Fact, they ought to be diſcharg'd, it being found that there was not precedent Intent to kill; but that the Acceſſaries after ſhould anſwer; for every Appeal and Declaration therein includes as well Homicide as Murder, which the common Plea proves, viz. that he ſhould anſwer to the Felony and Murder Not guilty; but becauſe he had his Clergy after Conviction, and never was attainted, the Acceſſary was diſcharg'd.

23. If the Principal dies before Judgment, or upon his Arraignment *ſtands mute*, the Acceſſary is thereby diſcharged. 2 Inſt. 183.

24. If *one* was *indicted as Principal, and acquitted*, he *cannot after be indicted as Acceſſary before the Fact*; *but* notwithſtanding ſuch Acquittal, he may be indicted *as Acceſſary after the Fact*; and the Reaſon is, becauſe he that commands or adviſes a Robbery, Burglary, or Murder, to be committed, is Quodam modo guilty of the Fact; and therefore if he be found Not guilty of the Fact, being indicted as Principal, he cannot afterwards be tried as Acceſſary before the Fact, *becauſe* by the former Verdict he is *found not to be guilty of the Fact, which extends to all* Guilt *before the principal Fact committed*. But an Acceſſary after is not guilty in any Sort of committing the Fact, for it was done before he knew any thing of it; therefore if he be tried as Principal, and found Not guilty, he may after be indicted as *Acceſſary after*; for that *is an Offence ſubſequent to the committing of the Fact*, and is for receiving the Felons, or after the Fact done; which is an Offence of another Nature. So are the

Books 27 Aſſ. pl. 10. 8 H. 5. 6. 7. And ſo have the Precedents upon Examination always been at Newgate Seſſions. Kelyng. 26.

25. Where the *Principal* is not attainted, but diſcharg'd by being *burnt in the Hand* only, the *Acceſſary* to him *after the Fact ought to be diſcharg'd* without burning in the Hand, or being put to his Book, *altho'* he was *convicted* of the Offence, becauſe he ought not to be condemn'd but where the Principal is attainted; whereas in this Caſe he was only convicted; Per Berkley and Crooke J. being only in Court; and ſo revers'd a Judgment. Cro. C. 566. pl. 3. Hill. 15 Car. B. R. Stevens's Caſe.

(F) Pleadings by Acceſſary.

1. ACceſſary was *indicted of receiving of W. N. who was outlaw'd of Felony*; to which he *ſaid* upon his Arraignment, that *notwithſtanding the Indictment ſays that W. N. is outlaw'd of Felony, yet becauſe the Court is not aſcertain'd if he was outlaw'd in Fact, or not, he demanded Judgment if he ſhall be compell'd to anſwer*, by which he was ſpared upon Surety; and becauſe no Outlawry of it was found he went quit. Quod nota; for *Outlawry is Matter of Record, which cannot be properly found per Pais by Indictment*, but ought to appear of Record. Br. Corone, pl. 87. cites 22 Aſſ. 55.

2. It is a good Indictment, *that J. N. knowingly received W. and C. outlaw'd of Felony*, and there J. N. may plead *that No ſuch Record of Outlawry*, and pray Allowance, *and to the Felony Not Guilty*; for he ought to plead over to the Felony, per Bingham; to which Yelverton J. agreed that he ought to *plead over to the Felony*. Br. Corone, pl. 149. cites 8 E. 4. 3.

S. C. cited by Williams J. Bulſt. 74.

3. In *Appeal* of the Death of his Brother brought *againſt W. E. de M. as Principal, and E. as Acceſſary*, the Acceſſary pleaded *Nul tiel Perſona in rerum Natura as W. E.* at the time of the Writ brought, or at any time ſince; and the Truth was *his Name was T. E.* and not W. E. It was held, that if *there was* ſuch *another* Perſon as *W. E.* yet if he was *not of M. or* if he was *dead before the Writ brought*, that it is good. D. 348. b. pl. 14. Hill. 18 Eliz. Howel v. Forteſcue.

For more of Acceſſary in General, See Hale's Hiſt. of Pl. C. and 2 Hawk. Pl. C. and ſee Tit. Clergy, and other proper Titles.

Accord.

* Fol. 128.

(A) What Accord ſhall be a Bar of Actions.

1. AN Accord that whereas the Marriage of the Son of J. S. (one of the Parties) was worth 500 l. the other ſhould give but 400 l. with his Daughter. Per quod 100 l. was abated in Satisfaction of all Treſpaſſes, this is a good Bar. Dubitatur. 16 E. 4. 2.

2. In

2. In an Action it is no good Plea in Bar that it was accorded between him and the Plaintiff, that if he did his Endeavour so that he might make an Accord between the Plaintiff and J. S. for a Trespass which the Plaintiff had done to J. S. [then &c.] and alleges that he did his Endeavour, so that they were agreed; for this is not any Satisfaction. 15 H. Accord. 1. Fitzh. tit. Accord, pl. 1. cites S. C. —Pl. C. 5. 6. Arg. in Case of Reniger v. Fogassa S. P. and S. C. cited.

3. But 'tis a good Bar if he says, that he did his Endeavour per quod they did accord at his own Cost. 15 H. 6. Accord. 1. Fitzh. tit. Accord, pl. 1 cites S. C. —— Pl. C. 5. b. in Case of Reniger v Fogassa cites S. C.

4. In an Action upon the Stat. of Rich. 2. if the Defendant saith that after the Entry an Accord was made between them that the Plaintiff should re-enter into the Land, and that the Defendant should deliver the Evidences of the Plaintiff to the Plaintiff; this is not any Bar of the Action, for the Delivery of the Plaintiff's own Evidences cannot be any Satisfaction of the tortious Entry. 9 Edw. 4. 19 Curia. Fitzh. tit. Accord, pl. 3 cites S. C. —Br. Accord, pl. 1. cites S. C. and says the Defendant ought to say that the Plaintiff was seised of the Land at the Time of the Delivery of the Evidences; for otherwise they will be of no Advantage to the Plaintiff. —— Cro. E. 194. in pl. 8. cites S. C.

The Amends *ought not to be of a thing which is the Party's own*, as Re-delivery, or Restitution of his own proper Evidence. Per Manwood and Dyer. D. 356. pl. 39. in Case of Onely v. the Earl of Derby.

5. But otherwise it is if he says that the Accord was that he should deliver certain Evidences concerning the Land to the Plaintiff, and that he deliver'd them accordingly; this is a good Bar if he makes Title to the Evidences. 9 Edw. 4. 19. Br. Accord, pl. 1. cites S. C. —— Fitz. tit. Accord, pl. 3. cites S. C. —

Per tot. Cur. he ought to *shew what Evidences* in certain; for per Choke and Danby, if they were *the proper Evidences of the Plaintiff* it is *no Satisfaction*. Br. Accord, pl. 1. cites S. C.

6. But the Delivery of the Evidences must be after the Plaintiff's Entry into the Land, otherwise 'tis not any Advantage to him. 9 Ed. 4. 19. And so it ought to be pleaded; and per Choke, the Plaintiff may *traverse the Accord or the Delivery* at his Pleasure. Quod nota bene. Br. Accord, pl. 1. cites S. C. —— Br. Traverse per &c. pl. 126. cites S. C.

7 In an Action of Trespass for taking his Beasts, it is not any Plea that an Accord was that the Plaintiff should have the Beasts again, for this is not any Satisfaction. 9 Edw. 4. 19. S. C. cited 2 Roll. Rep. 69 Trin. 17 Jac. B. R. in Case of Covill and Geffery, and agreed by Doderidge and Haughton J. But Doderidge said that if it had been agreed in this Case of 9 E. 4. that the Defendant should carry the Goods [or drive the Cattle] to a certain Place, so as the doing it would be chargeable to him, then the Consideration would be good.

8. An Accord that each of them should be quit of Actions against the other is not good, because 'tis not any Satisfaction. * 76 Edw. 4. 8. b. 11 b. per Curiam, Hill. 1650. between † *Davies and Ockham*, adjudged, upon a Demurrer in an Action upon the Case for Words, and such Accord pleaded in Bar. Intratur Mich. 1650. Rot. 557. * Per tot. Cur. except Littleton. Br. Accord, pl. 6. —— S. P in *Debt*, the *Plaintiff and Defendant being indebted to each other*, the Defendant upon such Agreement offer'd to wage his Law, and Anderson and Periam J. doubted much if he might; for an Accord *without Satisfaction* is no Plea, and Debt cannot be discharg'd by Parol, but Rodes said that it is good by *Consent of the Parties*, and so said some Serjeants, and Fenner cited 11 R. 2. tit Bar. 242. where a Man had *Rent by Way of Retainer*; and Rodes cited 22 H. 6. and 37 H. 6. Payment by Way of Retainer. Goldsb. 80. pl. 17. Hill. 30 Eliz. Sanderson's Case

† In the Case of Davis v. Ockham, Sty. 245. the Defendant pleaded an Accord between him and the Plaintiff, that whereas the Plaintiff had done a Trespass against him, the one Trespass should be set against the other. The Plea was held not good, per tot. Cur And Judgment for the Plaintiff, Nisi.

9. But

And it is a good Plea in Treſpaſs, that the Plaintiff *accepted* of the

9. But it ſeems it is a good Accord that each give the other a Pot of Wine in Satisfaction of Actions. Contra 16 Edw. 4. 8. b. 11 b. Curia.

Defendant a Pottle of Wine in Satisfaction Br. Account, pl. 9. cites 34 H. 6. 43.

In like Caſe, the Defendant pleaded that it was agreed the Defendant *ſhould confeſs to the Plaintiff that he had done him Wrong and ſhould ask* * Fol. 129. *Forgiveneſs upon his Knees, and that then the Plaintiff ſhould releaſe all Actions for the ſaid Words, and the Defendant made the Submiſſion accordingly*; *whereupon the Plaintiff immediately releaſed and diſcharged him.* Judgment Si Actio. It was moved that asking Forgiveneſs is not ſufficient Conſideration, which Doderidge and Haughton J. agreed. 2 Roll Rep. 96. Trin. 17 Jac. B. R. Covill v. Geffery.——Nels. Abr. tit. Accord, pl. 7. ſays that the Plaintiff had Judgment, but it ſeems a Miſtake.

10. In an Action upon the Caſe for ſcandalous Words, if the Defendant pleads that after the Words ſpoken the Plaintiff ſued the Defendant in the Military Court before the Lord Marſhall, where it was order'd by the Court, with the Aſſent of the Plaintiff and Defendant, in Diſcharge of this Suit, and of all other Differences between them, that the Defendant ſhould make a Submiſſion in Writing, in a Place appointed, and before certain Perſons &c. and avers that he did it accordingly. Mich. 14 Car. B. R. between *Felop and Peggham*, adjudg'd upon a Demurrer. But nota, that the Plaintiff travers'd the ſaid Order, and the Defendant demurr'd. But the Court gave not (*) Judgment upon this, but becauſe this Order is not any Satisfaction as to the Damages, but in Point of Honour. Intratur Trin. 14 Car. Rot. 728.

S. P. Br. Accord, pl. 6. cites 16 E. 4. 8.——Accord *ought to be a Satisfaction in Fact*; and it is not ſufficient to ſay that he *offer'd* to him the Money &c. Br Accord, pl. 5. cites 5 E. 4. 7.——An Accord is not *Executory Ad Diem futurum*, but ought to be executed before the Action brought, and the Party at the Day appointed may refuſe to accept the Amends agreed upon. Per Manwood and Dyer. D. 359. pl. 39 cites 17 E. 4. 8.

11. An Accord is not any Bar of an Action unleſs it be executed, becauſe the Plaintiff hath not any Means to recover that which he ought to have by the Accord.

But if an Accord *is executed*, tho' it be *deceitfully*, as where it was to deliver good and merchandizable Wax, and he deliver'd corrupt and mixt Wax, which the *Plaintiff accepted*; this ſeem'd a good Bar, and that by the Plaintiff's own Acceptance, tho' it be not to the 100th Part of the Value, the Injury is diſpenſed with. D. 75. a. b. Mich. 6 E. 6 B. R. Andrew v. Boughes.

Tho' in Peyto's Caſe and formerly, it hath been held that an Accord cannot be pleaded unleſs it appears to be executed, yet of late it hath been held that *upon mutual Promiſes an Action lies*, and conſequently there being *equal Remedy on both Sides*, an Action (Accord) may be pleaded without Execution as well as an Arbitrement. Arg. to which the Court agreed. Raym. 450. Trin. 33 Car. 2. B. R. Caſe v. Barber.——2 Jo. 158. S. C. and S. P.——But in Trover for a Waſtcoat, the Defendant pleaded a Promiſe to pay 26 s. and that thereupon the Defendant agreed to diſcharge him &c. and laid mutual Promiſes to perform &c. Upon Demurrer it was inſiſted to be now ſettled that the Parties may have Actions upon mutual Promiſes; this Accord may be pleaded tho' not executed, becauſe each Party may have his Remedy, and cited the Caſe of Caſe v. Barber, Raym. 450. and 2 Jo. 158. ſed non allocatur. And the Court diſtinguiſh'd between Arbitrement and Accord, that Arbitrement be pleaded with mutual Promiſes of Performance, tho' the Plaintiff has not perform'd his Part, yet he ſhall maintain his Action; becauſe an Arbitrement is like a Judgment, and a Remedy lies upon it; but upon Accord no Remedy lies; and the Books are ſo numerous that an Accord ought to be executed, that it is now impoſſible to overthrow them all. But had it been a new Point it might be worthy Conſideration. And Judgment for the Plaintiff. Ld. Raym. Rep. 122 Mich. 8 W. 3. Allen v. Harris

* Br. Accord, pl. 3. cites S. C. accordingly. ——Fitzh. tit. Accord, pl. 4. cites S. C.

12. In an Action 'tis not any Plea that it was accorded between them that the Defendant ſhould give a certain Sum to the Plaintiff at a Day, which is not yet come, in Satisfaction, becauſe the Plaintiff has not any Remedy for it. * 9 H. 7. 11 b. Curia, D. 9 Edw. 6. 75. 26 D, 19 Eliz. 356. 39 16 Edw. 4 9. 17 Edw. 4. 3.

* Br. Accord, pl. 3. cites S. C.—Br. Treſpaſs,

13. So if an Accord be to do two Things, and he does one and not the other, yet this is not any Bar of the Action, becauſe the Plaintiff has not any Remedy for that which is not perform'd. * 9 H. 7. 11 b. Curia.

Curia. 10 H. 7. 23. Coke 5. 11 b. D. 19 Eliz. 356. 39 Coke 9. *Peyto* 76. b.

pl. 279. cites S. C.——In Treſpaſs upon 5 R. 2 the Defendant accorded that he ſhould *pay the Plaintiff 6 d. and give him Counſel when he required it*, and *ſaid that he had paid the 6 d.* But by Townſend J. you do *not ſay you have given Counſel*, and Concord ought to be executed, and it is not like * Arbitrement, on which Debt lies for the Sum awarded, which does not upon Accord. But the other Juſtices were in diverſe Opinions, becauſe *Requeſt ſhall be of the Counſel.* Br. Accord, pl. 7. cites 17 E. 4. 2. But Brooke ſaid, that the Law ſeem'd to be with Townſend.

Every Accord *muſt be full, perfect, and compleat*, for if *divers things* are to be perform'd by the Accord, the Performance of Part is not ſufficient; but *the Whole ought to be perform'd* Reſolv'd 9 Rep. 79. b. in Peytoe's Caſe. and ſays that with this agrees 17 E. 4. 2. b. 6 H. 7. 10. a. and Pl. C. 5. a.——S. P. per Manwood and Dyer. D. 356. pl. 39. Paſch. 19 Eliz in Caſe of Onely v. the Earl of Derby, cites 6 H. 7.

It is no Concord unleſs *all things are done*; per Doderidge J. 3 Bulſt. 325. cites 6 H. 7. 11.——Cro. C. 193. Simonds v. Mewdſworth.——Nor is it binding in Equity. Chanc. Caſes, 302. Mich. 29 Car. 2. Butcher v. Hinton.——Heath's Max. 59. cites S. C.

* S. P. Br. Accord, pl. 3. cites 6 H. 7. 10.——S. P. Accord, pl. 5. cites 5 E. 4. 7.

14. If an Accord be that the Defendant ſhall do a certain thing at a Day to come in Satisfaction of the Action, if he performs it at the Day, this is a good Bar of the Action, tho' it was executory at the time of the Accord made, inaſmuch as he hath accepted it in Satisfaction. 6 H. 7. 11 b.

But the Agreement only to do an Act at a Day to come is not good. But an Arbitrement to that Purpoſe is good. Br. Treſpaſs, pl. 79. cites 6 H. 7. 10.

15. * If by an Accord Monies are to be paid to the Plaintiff in Satisfaction of Treſpaſs, 'tis not any Plea in Bar of the Action that he tender'd it to the Plaintiff accordingly, and he refuſed it. 17 Edw. 4. 8. Curia. 16 Edw. 4. 8. b. Agreed.

If the Thing be *to be perform'd at a Day to come*, Tender and Refuſal is not ſufficient without actual Satisfaction and Acceptance. Reſolv'd. 9 Rep. 79. b. in Peytoe's Caſe.

In Treſpaſs for entring a Houſe, and continuing Poſſeſſion, the Defendant pleaded an Accord *to give a Judgment in the Sheriff's Court, and pay* 50 *s.* and that he gave the Judgment and tender'd the 50 *s.* but adjudg'd for the Plaintiff upon Demurrer. 2 Keb. 534. pl. 49. Trin. 21 Car. 2. B. R. Hall v. Seabright.——Sid. 428. pl. 13. S. C. but S. P. does not appear.——Mod. 14. pl. 41. S. C. but S. P. does not appear.——* Br. Accord, pl. 5. cites 5 E. 4. 7.

16. So it is no Plea that he is ready to pay the Money, but he ought to ſay that the Plaintiff is ſatisfied. 30 H. 6. 4.

Accord ought to ſound in Satisfaction. Roll Rep. 27. in a Nota at the End of the Caſe of Lane v. Mallory.——S. P. Pl. C. 5. b. Arg. in Caſe of Reniger v. Fogaſſa.——Cro. C. 193. pl. 3. Trin. 6 Car. B. R. Simonds v. Mewdſworth, S. P.

17. A. *leaſed to B. for Years, rendering* 10 *l Rent* a Year, *with Clauſe of Re-entry*, and afterwards it was *agreed by Parol* that *B. ſhould board A. for the Rent.* A. demanded the Rent, and enter'd, and B. re-enter'd. A. brought *Treſpaſs.* B. pleaded the Leaſe, and the Defendant [Plaintiff] pleaded the Re-entry, and the Plaintiff [Defendant] pleaded the Agreement by Parol, and a good Replication. Br. Accord, pl. 11. cites 47 E. 3. 24.

18. In Treſpaſs the Defendant pleaded Accord after the Treſpaſs, *that the Defendant ſhould give the Plaintiff 2 Partridges in Satisfaction* of the Treſpaſs, and he ſaid that he had given the 2 Partridges accordingly; and a good Plea, tho' he did *not ſay that he had given them in Satisfaction of the Treſpaſs* &c. Br. Accord, pl. 4. cites 4 E. 4. 45.

19. In all Caſes *where Arbitrement is a good Plea*, Accord with Satisfaction is a good Plea. 6 Rep. 44. a. cites 6 H. 7. 10. a.

20. In Waſte the Defendant pleaded Accord, *that he ſhould repair the Flood-gates of the Mill which he had made*, and no Plea; for *in Action perſonal or mixt*, Accord is no Plea, and this by Judgment. But Quære if it be a good Accord, inaſmuch as it ought to be *Satisfaction* to the

Plaintiff, which it *cannot be to do what is his proper Duty* to do. Br. Accord, pl. 13. cites 11 H. 7. 13. and says the same Case was argued again 13 H. 7. 20. but not adjudg'd; but that the best Opinion was there that it is no Plea.

21. In Trespass of *Goods taken*, the *Defendant said that he put them into his House, and because the Plaintiff owed him 20 l. it was accorded* between them *that the Defendant should keep them till paid*; Judgment &c. and the Court held the Plea good, quod nota, tho' *without shewing the Cause of the Debt.* Br. Accord, pl. 2. cites 21 H. 7. 13. & 14

S. P. resolv'd. 9 Rep 79 b. in Peytoe's Case.

22. By the Rule of the Common Law a *Right or Title*, which any one has *to any Land* or Tenements *of any Estate of Inheritance or Frankтenement*, cannot be barr'd by Acceptance of any manner of Collateral Satisfaction or Recompence. Resolv'd. 4 Rep. 1. Mich. 14 & 15 Eliz. Vernon's Case.

23. The Thing accorded to be given for Amends of any Tort or Injury *ought to be some Charge to the one Party, and Commodious* and profitable *to the other*; Per Mounson and Dyer. D. 356. pl. 39. Pasch. 19 Eliz. in Case of Onely v. the Earl of Derby.

24. The *Amends ought to be made in the Life of the Trespassor*, and not by his Executors or Heir; per Manwood and Dyer. D. 356. pl. 39. in Case of Onely v. the Earl of Derby.

In Debt upon a Bond where the Sum to be paid is certain, there a lesser Sum cannot be paid in Satisfaction of a greater.

25. *In Debt on Bond*, condition'd *to pay 11 l. on February the 12th*, the Defendant *pleaded an Accord the 8th of February*, that *if he paid 8 l. upon the said 12th of February he would accept it for the Payment of the 11 l.* and pleads a Tender at the Day, & Uncore Prist. But this being but a Concord, which is no Plea in Debt without Satisfaction, it was adjudg'd for the Plaintiff. Cro. E. 193. pl. 6. Mich. 32 & 33 Eliz. B. R. Tassal v. Shane.

Per Curiam obiter 4 Mod. 89. Pasch 4 W. & M. B. R.

26. In an *Indebitatus Assumpsit* for 50 s. the Defendant *pleaded a Concord*, after the Assumpsit, *to give the Plaintiff 15 s. Parcel of the 50 s. and the 35 s. Residue the Plaintiff should receive in Hats*, and *alleg'd the Payment of the 15 s. and that he was always ready to pay the Residue in Hats.* Adjudg'd for the Plaintiff; For it being a Concord *executory in Part*, it can be no Plea, because a Concord is always to be intirely executed, and not to be executory in any Part, and cited 6 H. 7. 9. Cro. E. 305. pl. 4. Mich. 35 & 36 Eliz. B. R. Rayne v. Orton.

But where Land is to be recover'd by Writ of Waste, it may peradventure be otherwise; Per Cur. Ibid. cites 11 & 13 H. 7. and 10 Eliz. 2. Dy. 277.

27. In *Waste* the Plaintiff *counts that B. infeoff'd C. in Fee to the Use of B. for Life, and after of E.* her Daughter *for Life*, and *that B. died*, and *E. took the Defendant to Husband, who did Waste*, and then *E. died*, and after her Death this Action was brought. The Defendant *pleaded* in Bar a Concord and Satisfaction, viz. *That C. the Feoffee gave and deliver'd him the Deed of Feoffment to Uses, which he deliver'd to the Plaintiff in Satisfaction of the Waste* &c. Resolv'd per tot. Cur. to be a good Bar, admitting the Action to lie; for *Damages only are to be recover'd*, and not the Place wasted; and in this Case the Deed did not belong to the Cesty que Use, but to the Feoffees by the Common Law, and the Statute does not transfer it to him. Cro. E. 356. pl. 15. Mich. 35 & 36 Eliz. C. B. Sacheverell v. Bagnoll.

See Waste, (B. a. 3) pl. 30. and the Notes there.

28. The Heir in Reversion brought *Covenant against Executor of Tenant for Life, for not repairing* &c. who pleaded that Testator died the 19th of March, and that after Testator's Death, viz. 22 Mar. *concordatum* &c. *fuit* between them, *that the Defendant should quietly quit the Possession*

ſeſſion to the Plaintiff, *and that in Conſideration thereof the Plaintiff ſhould diſcharge him of the Breach in not repairing; and that afterwards, viz. 25 Mar. he quietly quitted* &c. But adjudg'd for the Plaintiff, for Fenner held the Concord void, as not being any Recompence; the Executor having *no Intereſt, but only a Licence in Law*, to enter into the Houſe and carry away the Goods, and ſo the Agreement to quit not material. And Yelverton and Crook J. held the Plea not good, becauſe *the Time of quitting was uncertain*; and tho' the Defendant ſhew'd that he really did quit within 5 Days after, yet this will not aid the firſt Uncertainty, and *the Concord ſhould have fix'd a certain Time for the quitting*, if he would take Advantage of it. *And* by Williams J. the Time of quitting *being indefinite, the Defendant ſhould have ſhewn an immediate Execution thereof*, viz. *that he quitted inſtantly*. But all 3 beſides Fenner agreed, that if the Plea as to the Time of quitting had been certain, and been executed accordingly, it had been good; for tho' the *Action* be *grounded upon the Deed*, yet it is only to recover Damages. Yelv. 124. 125. Paſch. 6 Jac. B. R. Sanford v. Cutcliffe.

29. Where the Condition by Deed, by the *original Contract* of the Parties, *is to pay Money*, there by Accord between the Parties, *any other thing may be given in Satisfaction* of the Money; *but* if the *Condition is in* 200 *Quarters of Wheat, on Condition to pay* 20 *l.* an *Accord to give a Horſe or a Gold Ring in Satisfaction* thereof, is good; *but* if the Obligation be *in* 100 *Quarters of Wheat, to pay* 50 *Quarters*, he cannot give Money, or other thing in Satisfaction thereof, becauſe the Contract originally was not for Money, but for a *collateral thing*. 9 Rep. 79. a. Mich. 9 Jac. C. B. Per Cur. in Peytoe's Caſe.

30. In *Covenant* upon an Indenture, the Defendant pleaded a Concord, *that he ſhould pay the Plaintiff* 12 *l. in full* Satisfaction and *Diſcharge of the ſaid Covenant, and of all other* Covenants in the ſaid Indenture; and that he paid, and the Plaintiff accepted the ſame accordingly; but upon Iſſue thereupon, it was found for the Plaintiff, and Damages aſſeſs'd, and Judgment accordingly. 9 Rep. 60. Trin. 10 Jac. B. R. Bradſhaw's Caſe.

Cro. Jo. 304. pl. 6. Salmon v. Bradſhaw, S. C. accordingly.——When a *Covenant* is *broken*, the Action is not founded meerly on the Specialty, as if it were a Duty, but *favours of Treſpaſs*; and therefore an Accord is a good Plea to it, and ends in Damages. Agreed. All. 39. Hill. 23 Car. B. R. Arg. by Counſel and Court, in Caſe of Eeles v. Lambert.——As where the Covenant is brought for *Default of Reparations*, tho' the Action be founded on the Deed, yet it *is mixt with Tort* for which Damages ſhall be recover'd. 9 Rep. 79 b. ſays. that in this Caſe Accord with Satisfaction was adjudg'd a good Plea in Bar, Paſch. 3 Jac. in Caſe of Eden v. Blake.——Accord is a good Plea to a Covenant to pay a Sum certain. Per Cur. 2 Keb. 51. pl. 7. Trin. 18 Car. 2. B. R. in Caſe of Outram v. Rolſton.

31. In *Action for Words*, the Defendant pleaded that the Plaintiff had *agreed to accept 3 Jugs of Beer from him in Satisfaction*. The Plaintiff demurr'd, becauſe he did *not ſhew that the ſame was paid or tender'd by the Defendant*; and therefore the Plaintiff had Judgment. Sty. 452. Paſch. 1655. Trevanion v. Penhallow.

32. In Debt on *Bond for Performance of Covenants*, the Defendant pleaded, that it was agreed between the Plaintiff and him, that Defendant ſhould grant an Annuity out of certain Land for Life, in Diſcharge of the Bond; and that he had granted the ſame accordingly, and the Plaintiff accepted it in Diſcharge of the Bond &c. but adjudged for the Plaintiff; for it is but a Concord and verbal Agreement, which can never be a Diſcharge of a Specialty. Cro. J. 649. pl. 19. Mich. 20 Jac. B. R. Noyes v. Hopgood.

33. In Covenant, the Breach aſſign'd was in not paying 8 l. a Year, and not purchaſing Lands worth 100 l. the Defendant pleaded an Accord that he *had paid Part*, not ſaying how much, *and that for the reſt the Plaintiff was to enter and take the Profits of certain Lands*, and *tender'd an Iſſue that he had perform'd and paid*. Upon Demurrer it was objected for the

the Plaintiff, that Accord is no Plea, but Curia contra held that Accord is a good Plea to a Covenant to pay a Sum certain, or an Obligation when join'd with other things uncertain. But this Accord not mentioning what Part in certain he had paid, they conceiv'd it void. 2 Keb. 51. pl. 7. Trin. 18 Car. 2. B. R. Ontram v. Rolfton.

35. In an Indebitatus Aſſumpſit, the Defendant pleaded an Accord *to pay Money to a Stranger*, and *avers Part paid, and a ſpecial Promiſe for the reſt.* The Plaintiff demurr'd, becauſe not executed. It was objected, that there being ſufficient Remedy, it is well enough; and cited 7 E. 4. 24. and Pl. C. 5. Sed non allocatur; for tho' an Obligation for the Money be ſufficient, as being a Payment, yet a Promiſe is not, unleſs the Agreement was, that he promiſed to pay; and Judgment for the Plaintiff. 2 Keb. 332. pl. 50. Hill. 16 & 20 Car. 2. B. R. Bree v. Sayler.

Mod. 69. pl. 20. ſeems to be S. C. but does not mention the Attorney's Bill.——2 Keb 690. pl. 20. S. C. and tho' the Plea was, that he promis'd to pay the Attorney's Bill, becauſe on Refuſal the Party cannot compel the Releaſe; but this might be pleaded by way of Diſcharge, but not in Bar, unleſs he had averr'd he had paid the Bill.

36. In *Treſpaſs* &c. the Defendant pleaded an Accord between him and the Plaintiff, viz. *that he ſhould pay the Plaintiff* 3 *l. and ſhould undertake to pay the Attorney's Bill*, and *averr'd that he had paid the* 3 *l. and was always ready to pay the Attorney's Bill, but he never ſhew'd him any.* It was argued, that here the Accord is executed; for the 3 l. is paid, and the Agreement is not to pay, but to undertake Payment of the Attorney's Bill, which he has done; and that upon his undertaking, the Plaintiff or the Attorney may have a Remedy. But the Accord not being executed, Judgment was given for the Plaintiff. Raym. 203. Mich. 22 Car. 2. B. R. Cock v. Honeychurch.

yet Per Cur. this Promiſe, or any thing in Action, is no Accord, as to pay and releaſe,

37. In Indebitatus Aſſumpſit, Defendant pleaded an Accord *to pay* 10 *l. and deliver Silk Stockings, which was paid, and that he was ready to deliver the other; and that the Plaintiff accepted the Defendant's Promiſe* in Satisfaction. Upon Demurrer the Court held it no Plea, not only becauſe it is not executed, but becauſe there is only an Action given, and that is no Satisfaction, any more than one Bond againſt another; Judgment for the Plaintiff. 2 Keb. 851. pl. 104. Mich. 23 Car. 2. B. R. Brown v. Wade.

For after it is broken it is a Debt. Mod. 206. S. C.

38. *One Promiſe* may be pleaded in *Diſcharge of another* before Breach, but after Breach it cannot be diſcharged without a Releaſe in Writing. 2 Mod. 44. Trin. 27 Car. 2. C. B. Milward v. Ingram.

39. In Aſſumpſit for Wares ſold laid ſeveral Ways, the Defendant pleaded an Agreement *to pay* 9 *l. and ſuch Sum as Mr. Liveſay ſhould tax for Coſts, in Satisfaction of all Matters between the Parties*, and alleg'd mutual Aſſumpſit to perform it, and then ſhew'd the Taxation and Notice thereof, and Tender of the 9 l. and the Coſts, & Uncore Priſt. The Plaintiff demurr'd generally, and reſolved Per Cur. That *if Action be not given upon mutual Promiſe at the Time of the Aſſumpſit, ſuch Aſſumpſit is no Bar to the prior Action.* And Judgment for the Plaintiff Niſi. 2 Jo. 168. Mich. 33 Car. 2. B. R. Witham v. Taylor.

40. In *Debt againſt Executor upon a Bond* enter'd into by Teſtator 23d March 14 Car. 2. Defendant pleaded a Concord 30 *April*, 31 Car 2 *that Defendant ſhould give the Plaintiff new Security for this Debt, and another upon another Bond*; *and that he* being the Executor of the Obligor, and the Perſon with whom the Concord was made, *gave the Security* according to the Concord, *by a Bill ſeal'd by himſelf.* Upon Demurrer Judgment was given Per tot. Cur. for the Plaintiff; for one Bond given in Satisfaction of another is no Diſcharge, whether given upon Concord or not, and the Concord cannot mend the Matter; and yet here the new Bond binds him de Bonis Propriis, whereas by the firſt Bond he was only bound de Bonis Teſtatoris. 3 Lev. 55. 56. Mich. 33 Car. 2. C. B. Lobly v. Gildart.

41. In

41. In Covenant on an Indenture in which Defendant *covenanted to permit the Plaintiff to receive* 100*l. per Annum Rent, Part of which was to go in Satisfaction of a Debt, and the Reſidue to be paid to the Defendant*, and aſſign'd a *Breach in diſturbing him to receive the Rent.* The Defendant *pleaded an Accord* between them *that each ſhould deliver his Part of the Indenture to T. S. to be cancell'd, and that each ſhould be diſcharg'd of all Actions upon the ſaid Indenture*; and averr'd that he deliver'd his Part &c. and upon Demurrer this was adjudg'd ill, becauſe Accord is no Plea, unleſs executed on both Sides. 3 Lev. 189. Mich. 36 Car. 2. C. B. Ruſſell v. Ruſſell.

42. In *Covenant* the Breaches aſſign'd were, that the *Houſes* were *not in Repair*; that the *Locks were taken away*, the *Hedges broken* down, and the *Ditches not ſcour'd.* Defendant pleaded an *Accord, that he ſhould employ a Workman 3 or 4 Days about repairing the Houſe, which ſhould be a ſufficient Satisfaction; and that he had employed a Workman* &c. It was mov'd that this was no more than the Defendant was oblig'd to do; that it was an Anſwer only to the Repairs of the Houſe, and that the Satisfaction pleaded is uncertain, viz. to employ a Man for 3 or 4 Days. And Judgment was ſtay'd; but [afterwards as it ſeems] the Court held, that in Covenant where the *Damages are uncertain, and to be recover'd*, as in this Caſe, a leſſer Thing may be done in Satisfaction, and there Accord and Satisfaction is a good Plea. 4 Mod. 88. 89. Paſch. 4 W. & M. B. R. Adams v. Tapling.

(B) Pleadable. In what Actions.

1. *IN every Action where only Amends is demanded by Way of Damages,* Accord executed is a good Bar in Diſcharge of them. Per Cur. Cro. J. 100. pl. 29. in Caſe of Alden v. Blague, cites 3 H. 6. 37. 3 H. 4. 1. 47 E. 3. 12. D. 75 & 201. This Rule is conſonant to Law. See 9 Rep. 78. a. 6 Rep. 44 a, 2 Brownl. 131. Per Coke Ch. J.

2. In Action of *Debt upon a Leaſe for Years*, there is a certain Demand, and yet Accord is a good Plea. 9 Rep. 79. a. cites 47 E. 3. 24. a. b. and 10 H. 7. 24. a. and 2 R. 3. tit. Debt 100. 2 Brownl. 131. S P. by Warburton J.

3. In *Forger of falſe Deeds*, Concord was ruled to be a good Plea. Br. Accord, pl. 9. cites 19 H. 6. 22. In this and other Actions upon Statutes, Accord or Arbitrement is a good Plea. Heath's Max. 59.

4. In *Appeal of Mayhem*, Accord with Satisfaction is a good Plea; becauſe Damages only are to be recover'd. 6 Rep. 44. a. ſays this is to be collected upon the Book of 35 H. 6. 30. a. and that ſo is the General Rule in 6 E. 6. D. 75. Tho' the Writ is felonice, yet ſince it includes Treſpaſs, Accord is adjudg'd to be a good Plea. 9 Rep. 78. b. in Peytoe's Caſe, cites Trin. 26 H. 6. Rot. 27. in B R. —— 2 Hawk. Pl C. 159. cap. 23. S. 24. ſays it clearly ſeems to be admitted in ſome Books, and is ſaid to have been adjudg'd in a Roll, not printed, That notwithſtanding every ſuch Appeal muſt ſuppoſe the Fact to have been done feloniouſly, yet inaſmuch as at this Day it ſubjects not the Appellee to the Loſs of Member, but only to Damages &c. as an Action of Treſpaſs does, it may be well barr'd either by Arbitrement, or an Accord with Satisfaction executed.

5. In every *Action Perſonal*, Concord with Satisfaction is a good Plea. Cro E. 357. pl. 15. Mich. 35 & 36 Eliz. C. B. in Caſe of Sacheverell v. Bagnoll. But not in Real Actions, nor where the Action is mix'd as in Waſte. Heath's Max. 59. —— See Tit. Waſte (B. a. 3) pl. 30. and the Notes there.

S. P. For the Writ is not founded only upon the Record, but upon Matter in Fact alſo; for the Suppoſition of Falſity in the Oath is Matter in Fact. 6 Rep 44. a. cites 13 E. 4. 1. b. & 5 a b.——S. P. and Accord is a good Plea againſt Matter of Record, and Matter in Fact mixt with it, but not againſt mere Matter of Record. Br. Accord, pl. 9. cites 13 E. 4. 5. Per tot. Cur. except Laicon ——Br. Attaint, pl 118. cites S. C——Br. Attaint, pl. 9. cites 13 E. 4. 1. S. C. by the beſt Opinion.——See Attaint (O)

6. In *Attaint* Concord with Satisfaction is a good Plea, becauſe it is a Perſonal Action. Cro. E. 357. pl. 15. in Caſe of Sacheverell v. Bagnoll.

Noy 110. S. C. adjudg'd a good Bar, *tho' the Accord was Parol*, and pleaded in Diſcharge of a Matter in Deed, becauſe it is *for a Thing executory*, and is only a Bar pro Tempore, and not for a perpetual Bar of the ſaid Covenant.——6 Rep. 43. b. Blake's Caſe, S. C. accordingly; for there is a Diverſity when a Duty certain accrues by the Deed at the making the Writing, as by Covenant, Bill, or Bond to pay Money, there this certain Duty takes its Eſſence and Operation originally and only by the Deed, and therefore muſt be avoided by a Matter of as high a Nature, tho' the Duty be merely in the Perſonalty; but when no certain Duty accrues by the Deed, but a Tort or Default ſubſequent, in Conjunction with the Deed, gives an Action to recover Damages, (the which are only in the Perſonalty) Accord with Satisfaction is a good Plea for ſuch Tort or Default; as in the Principal Caſe the Covenant, at the making thereof, does not give the Plaintiff any Action, but the Tort or Default afterwards in not repairing, being join'd together with the Deed, gives Action for Damages, which being in the Perſonalty, the Plea is good.

7. *Covenant for not repairing* a Houſe. The Defendant pleaded in Bar an Accord, and Execution of it in Satisfaction of the Repairs. Reſolv'd a good Plea; for *it is not pleaded in Diſcharge of the Covenant, but of the Damages only*, which are demanded by reaſon of the Covenant being broken, *and the Covenant remains*, and the Plea ſounds only in Diſcharge of the Defendant, and is not like an Obligation which is a certain Duty, and there it is no Plea, tho' it be before or after the Day of Payment. Cro. J. 99. 100. pl. 29. Mich. 3 Jac. B. R. Alden v. Blague.

Brownl. 134. S. C. & S. P. cites 38 H. 6. Tit. Bar.

8. In all Actions which ſuppoſe the *Tenant* to be *Vi & Armis*, (where Capias and Exigent lies at the Common Law) there Accord is a good Plea for the Redemption of his Body from Impriſonment, ſo that Men may do their Buſineſs, which is for the Publick Good. Reſolved per tot. Cur. 9 Rep. 78. a. Mich. 9 Jac. C. B. Peytoe's Caſe.

Brownl. 133. Pats v. Chitty, S. C.—2 Brownl. 128. Peto v. Chitty, S. C. with the Arguments of the Judges, and adjudg'd accordingly.——Godb. 149. pl. 193. Peto v. Chitty, S. C. adjudg'd accordingly.

9. In *Ejectment* Accord with Satisfaction was pleaded in Bar, and reſolved per tot. Cur. to be a good Plea. 9 Rep. 77. b. 78. a. Mich. 9 Jac. C. B. Peytoe's Caſe.

10. In *Raviſhment of Ward* Accord is a good Plea, becauſe Proceſs of Outlawry lay in this Action at Common Law. 9 Rep. 78. b. ſays it was reſoved.

2 Brownl. 131. S. P. accordingly by Warburton J.

11. In *Detinue of Charters concerning Franktenement and Inheritance* of Land, the Charters themſelves ſhall be recover'd; and yet in ſuch Caſe an Accord is a good Plea, as is held in 7 E. 4. 23. b. and the ſame Law in *Detinue of a Horſe*, or other Goods Perſonal. 9 Rep. 78. b.

12. In *Quare ejecit infra Terminum*, Accord was reſolved to be a good Plea. 9 Rep. 80. a. Mich. 9 Jac. C. B. Peytoe's Caſe.

13. Where Accord ſhall be a good Plea in Bar of Treſpaſs, ſee Tit. Treſpaſs, (R. a) pl. 1. 2. and the Notes there.

(C) The

(C) The Form and Manner of Pleading.

1. IN Forger of Deeds, *Defendant ſaid* that *ſuch a Day, Year, and Place, he gave the Plaintiff a Bottle of Wine in Satisfaction* of the Treſpaſs; *to which he agreed*; Judgment if Action &c. and a good Plea, tho' he does *not ſay that any Accord was made for the Bottle* of Wine. Br. Accord, pl. 8. cites 19 H. 6. 29. Heath's Max. 60. cites S. C.—— 9 Rep. 80. S. C. cited by the Reporter in Nota of the Peytoe's Caſe.——Br. Barre, pl. 22. cites S. C.——9 Rep. 80. b. S. C. cited in a Reporter.

2. In Treſpaſs the Defendant *pleaded* Concord, *that he ſhould make to the Plaintiff certain Windows, and pay him* 10*s. by a Day, and that he paid to him the* 10*s. by the Day*, and *the Plaintiff ſaid that No ſuch Concord*, and found for the Plaintiff; and the Court would not give Judgment becauſe the Iſſue is not good, becauſe he did not perform the whole Concord by the Day, and Replication cannot make an ill Bar good as a Verdict may. Br. Accord, pl. 3. cites 6 H. 7. 10.

3. Debt *againſt Leſſee for Years of* 20 *Rent Arrear*. The Defendant *pleads Concord of* 10*l. paid* to the Plaintiff *for all Debts and Treſpaſſes*. The Juſtices at one Day were all of Opinion that it was no Plea, becauſe it was a *Matter in Fact*, and Defendant could not wage his Law againſt the Leaſe for Years; but at another Day Fineux, Keble, and Vaviſor held e contra; and after the Defendant pleaded Satisfaction by way of Arbitrement. Br. Accord, pl. 12. cites 10 H. 7. 4.

4. Debt on Bond *to pay* 40*l. at Michaelmas Eve*. Defendant *pleaded a Concord*, that *if he gave the Plaintiff a Hawk and* 20*l. at Michaelmas-Day the Obligation ſhould be void*, and ſaid that he *gave the Hawk and* 20*l. at Michaelmas-Day, and the Plaintiff accepted* it. This was held no Plea; for it appears that for Non-payment at the Day the Bond was forfeited, and ſo became ſingle, which cannot be diſcharg'd by ſuch a *naked Averment* in Fact of ſuch Acceptance, altho' the Agreement was before the Day; but Acceptance before the Day was a good Diſcharge. Cro. E. 46. pl. 2. Paſch. 28 Eliz. C. B. Anon.

5. In Debt on a *Bond for* 16*l. condition'd to pay* 8*l.* 10*s. at Michaelmas*. The Defendant *pleaded that before that Day he, at the Plaintiff's Requeſt, paid him* 5*l.* 2*s.* 2*d. which he accepted in full Satisfaction* of the Debt; but becauſe he pleaded the Payment of Part *generally*, whereas he ſhould have pleaded the Payment to have been in full Satisfaction of the whole Debt, the Plaintiff had Judgment. 5 Rep. 117. a. b. Trin. 44 Eliz. C. B. Pinnel's Caſe, alias Pinnel v. Cole. Mo. 677. pl. 923. Penny v. Core, S. C. that he pleaded Payment of 5 l. in Satisfaction of the 8 l. and the Court thought it a good Plea, becauſe accepted before the Day; and ſo if it had been at another Place; but Payment at the Day and Place cannot be, by Acceptance, Satisfaction of all of the ſame kind.——S. C. cited per Cur. and ſaid that where a Thing is pleaded by way of Concord it is iſſuable; but if the Concord is not executed by Giving and Receiving, it cannot be pleaded in Bar to the Action, and therefore that the beſt way of Pleading is, that the Thing *was given and received in full Satisfaction* &c. according to the Reſolution in Pinnel's Caſe, but both are traverſable. 5 Mod. 87. Mich. 7 W. 3. Young v. Rudd.

6. Debt was brought on a Bond. The Defendant *pleaded that after the making the Bond, and before it became payable, the Plaintiff was indebted to the Defendant in a Load of Lime, to be deliver'd upon Requeſt; and it was agreed* between them, *that if Defendant would diſcharge the Plaintiff of the ſaid Load of Lime*, that then in Conſideration thereof *the Plaintiff would diſcharge the Defendant of the Bond, and would accept the ſaid Load of Lime in Satisfaction of the Bond*; and alleg'd in Fact that he did diſcharge Cro. J. 254. pl. 9. S. C. accordingly. —Brownl. 109. S. C. ſeems to be taken from Yelv. —— Bulſt. 66.

Then

S. C. adjudg'd for the Plaintiff. * Payment of Money is no Plea in Diſcharge of a Bond; but in Diſcharge of Money to be paid by the Bond; per Haughton. Palm. 111.

Then and There the Plaintiff of the Lime, *which the Plaintiff accepted in Diſcharge of the Obligation, and then acquitted the Defendant of the ſaid Obligation*, and demanded Judgment of the Action. But upon Demurrer it was adjudg'd for the Plaintiff, becauſe the Defendant had *pleaded his Bar * in Diſcharge of the Obligation*, where he ought to have pleaded it in Diſcharge *of the Sum contain'd in the Obligation*; for it is not Debt ſimply by the Obligation, but the Breach of the Condition makes it to be a Debt; ſo that if the Condition is not diſcharg'd the Obligation remains in Force, and the Matter of the Bar is not pleaded in Diſcharge of the Condition, but of the Obligation, and therefore not good. Yelv. 192. Mich. 8 Jac. B. R. Neale v. Sheffield.

cites it as ſo pleaded 9 Rep. 77. b in Peytoe's Caſe.——If the Obligation be with Condition to pay a leſs Sum, and a Concord is pleaded in Diſcharge of the Condition of the Obligation, in Nature of a Releaſe, then the Concord is no Bar of the Obligation; per Haughton. 2 Roll Rep 188. in Caſe of Roberts, alias Rabbetts v. Stoker.

And becauſe Accord with Satisfaction was *pleaded in Satisfaction of the Entry, and not of the Covenant*, it was held a good Plea. Palm. 111. S. C. —— * Palm. 111. Trin 17 Jac. S. C. by Name of Robards v. Stoker.

7. A. Leſſor leaſed to B. for 3 Years, and *covenanted that B. ſhould quietly enjoy* during his Term, *and to perform other Covenants in the Leaſe*. A. enter'd within the Time, by which that Covenant was broken. B. brought Action of Covenant. A. *pleaded Accord and Satisfaction in Performance, and full Satisfaction of all and ſingular Covenants* and Promiſes: At this Time of the Accord only one of the Covenants was broken. It was adjudg'd by all the Judges, that this Concord was a good *Bar as well of Covenants executory as executed* [as * well before the Breach as after, becauſe it is an Action merely Perſonal]; for the Damages are the Ground of the Action. 2 Roll Rep. 187. Trin. 18 Jac. Rabbets, alias, Robards v. Stoker.

So per Haughton, a *Promiſe cannot be releaſed by Parol*; but if Concord be pleaded in Satisfaction of the Promiſe, it is a good Bar of the Promiſe; for there is a Conſideration given for this Promiſe; *but if Concord be pleaded in Diſcharge of this Promiſe, in Nature of a Releaſe*, then it is not good. 2 Roll 188. ut ſupra.

8. *But* per Haughton, Accord with Satisfaction *is no Plea in Diſcharge* of Covenant *without a Deed*, becauſe it enures as a Releaſe of Covenant, which cannot be without Deed; *but in Satisfaction and Performance of a Thing to be done*, Accord with Satisfaction is a good Plea without Deed, to which all the Court agreed. Palm. 111. Robards v. Stoker.

Palm. 111. ut ſupra.

9. *And* Doderidge J. held, that becauſe the Concord was a good Bar to this Covenant, which was broken before the Concord made, (tho' it was admitted to be No Bar for the other Covenants) yet the Plaintiff cannot have Judgment. This Caſe was adjudg'd upon Demurrer. 2 Roll Rep. 188. ut ſupra.

S. C. cited 5 Mod. 87. in Caſe of Young v. Rudd.

10 In Debt upon Bond, with *Condition that if Defendant ſhould make Compoſition with one E. for Lands &c.* then *he ſhould pay the Plaintiff* 30 *l.* The Defendant *pleads that he made no Compoſition.* The Plaintiff *replies that E. granted to the Defendant a Rent-Charge in Fee, in Satisfaction of his Title, which the Defendant accepted in Satisfaction &c. and ſo he made Compoſition.* The Defendant *proteſtando that E. non conceſſit* &c. *pro Placito that Defendant did not accept* it in Satisfaction &c. This was held a good Plea; for it is no Compoſition without Conſent, which depends upon the Acceptance, and the Grant is at the moſt but argumentative. Hob. 178. pl. 207. Earle v. Tuck.

But by way of Satisfaction he *may only ſay that he paid the*

11. The beſt and moſt ſecure way of pleading an Accord is to plead it *by way of Satisfaction*, and not by way of Accord; for if it be pleaded by way of Accord, the Defendant ought to plead a *preciſe Execution* thereof in the Whole, and if he fail in any Part his Plea is naught;

but

but by way of Satisfaction he need only ſay, that Defendant paid the Plaintiff ſo much in full Satisfaction of the ſame Action, the which the Plaintiff received; Judgment ſi Actio &c. 9 Rep. 80. b. at the End of Peytoe's Caſe, in a Nota of the Reporter.

Plaintiff ſuch a Sum in full Satisfaction, which the Plaintiff received, &c. Judgment ſi Actio. 9 Rep. 80. b. ut ſupra.

12. In Caſe upon Indeb. Aſſump. the Defendant pleaded an Accord *to do diverſe Things*, and *avers Performance of Part, and tender'd to perform the Reſidue, which the Plaintiff refuſed.* The Plaintiff demurr'd, and the Plea was held not good, and Judgment for the Plaintiff. 2 Jo. 6. Paſch. 23 Car. 2. C. B. Shepherd v. Lewis.

13. In Indeb. Aſſump. for Wares ſold, the Defendant pleaded that *poſt exhibitionem Billæ*, there was an Accord that the Defendant ſhould *pay* 20 *l. which he paid and the other received.* Upon Demurrer it was objected to be an ill Plea, being after the Bill exhibited, and *not ſaid Puis darreign Continuance.* Sed non allocatur; it being *pleaded in Bar the ſame Term of the Declaration deliver'd*, is well enough, and a good Bar, *without ſaying Actio non.* Sed adjornatur. 3 Keb. 782. pl. 27. Trin. 29 Car. 2. B. R. Browning v. Denham.

But where the Plea was that Poſt Exhibitionem Billæ, viz. the 12 Feb. (which was before the Bill was exhibited) an Accord was that Defendant ſhould pay on the ſaid 12 Feb. 20 l. which he had paid on the ſaid Day. The Court on a Demurrer held that tho' the Viz. is void, yet the Plea in Bar is ill; for the Accord could never be executed on a Day precedent to the making &c. 3 Keb. 786. pl. 39. Trin. 29 Car. 2. B. R. Browning v. Denham.

14. In Debt on Bond the Defendant pleaded that the Plaintiff *accepted a Feoffment, with Seiſin of ſuch Land, before the Day on which* the Money became due by the Condition *in Satisfaction of the Bond*; but becauſe it was not pleaded that he *gave* the Land *in Satisfaction &c.* Judgment was given for the Plaintiff. Comb. 199. Trin. 4 W. & M. in B. R. Higden v. Higden.

15. *Treſpaſs* Quare clauſum fregit &c. The Defendant pleads that the *Treſpaſs was done by him and Jane Rowland*; and that after the ſaid Treſpaſs it was accorded between the Plaintiff and the ſaid Jane, that the ſaid *Jane ſhall abate* 14 *s. due to the ſaid Jane from Edward, Father to the Plaintiff, in Satisfaction* of the ſaid Treſpaſs, and *avers that* the ſaid *Jane had abated* the ſaid 14 s. &c. And upon this the Plaintiff demurr'd, firſt, becauſe it is a Thing to be done for the *Benefit of a third Perſon*, and therefore the Accord not good. 2dly, becauſe he ſaid that ſhe *had abated* the ſaid 14 s. and *not ſhewn how.* As to the firſt Exception the Court was e contra; for it being in Diſadvantage of one of the Treſpaſſers, and made at the Requeſt of the Plaintiff, tho' it be to a third Perſon, it is well enough; but as to the ſecond Fault the Court held the Plea to be ill; for ſhe ought to have ſhewn how ſhe had abated the 14 s. as to ſay the Father of the Plaintiff owed her ſo much, and had paid her but ſo much, ſo that the 14 s. be deducted and abated out of it; and to plead that ſhe had *abated generally*, as it is pleaded here, *is uncertain* and ill, and adjudg'd according in the following Term. Skin. 391. pl. 28. Mich. 5 W. & M. B. R. Hillman v. Uncles.

16. A *Quantum Meruit* was brought *pro opere & ſervitio, and an Inſimul Computaſſet for* 5 *l. ſolvend. cum inde Requiſitus eſſet.* The Defendant pleaded that it was *agreed that the Defendant ſhould give and Plaintiff ſhould accept a Bill of* 5 *l. in Satisfaction* of what was due to him, *and that he did accept ſuch Bill* according to the Agreement. The Plaintiff reply'd *proteſtando that he made no ſuch Agreement*, proteſtando *etiam that no ſuch Bill was given, pro placito dicit that it was under Seal*; and upon Demurrer to this Replication it was held good. 5 Mod. 136. Mich. 7 W. 3. Taylor v. Baker.

5 Mod. 86. Young v. Rudd. S. C. and per Cur. where a thing is pleaded by way of Concord it is iſſuable; but if the Concord is not executed by giving and receiving, it cannot be pleaded in Bar to the Action; therefore the beſt way of Pleading it is by ſetting forth that the Thing was given and receiv'd in full Satisfaction, according to the Rule in Pinnel's Caſe; but both are traverſable; and Judgment for the Plaintiff.——Comb. 346. S. C. adjudg'd for the Plaintiff.——Carth. 347. S. C. adjudg'd for the Plaintiff.—12 Mod. 85. adjudg'd for the Plaintiff

17. In *Aſſumpſit* and *Quantum Meruit*, the Defendant *pleaded that he gave the Plaintiff a Beaver Hat in Satisfaction* of the Promiſe, *and the Plaintiff accepted it in Satisfaction.* The Plaintiff *proteſtando that he did not give it in Satisfaction, traverſes that he accepted it in Satisfaction.* Upon a Demurrer it was urged that this could not be pleaded in Satisfaction of the Promiſe, but ſhould have been of the Damages: 2dly, it was urged that this Traverſe was naught; for if the Gift in Satisfaction be admitted, his Acceptance will not be material. And per Holt Ch. J. *the Acceptance is material as well as the Gift*, and to plead a Gift without ſhewing that the other received it, would be naught, and * either is traverſable. Rookby J. ſaid that the Gift is neither admitted nor conſeſs'd in this Caſe by the Plaintiff, becauſe here is a Proteſtando to the Gift, ſo that it does not appear here was any Receipt at all. 2 Salk. 627. 628. Mich. 7 W. 3. B. R. Young v. Ruddle.

* S. P. per Roll Ch. J. but he ſaid it was more proper to join Iſſue upon the Payment. Sty. 239. Mich. 1650. Bois v. Cranfield.

18. *Money paid and accepted in Purſuance of a void Accord*, may be pleaded or taken as an Accord with Satisfaction; and Holt Ch. J. ſaid that this was all that was proved by Nichols's Caſe. 1 Salk. 71. Trin. 9 W. 3. in pl. 3.

* Cro. J. 100. Alden v. Blague. † See ſupra pl. 7.

19. In Covenant upon Indenture between the Plaintiff and Defendant, the Defendant *pleaded Bar by Accord in Satisfaction of the Covenant, before any Breach of Covenant.* Exception was taken to the Bar that the Concord &c. was pleaded to be in Satisfaction of the Covenant, which the Defendant in his Plea alleg'd were not broken at the Time of the Concord, and that this cannot be; for the Covenant's being *created by Deed cannot be diſcharg'd but by Deed*; *but* * Accord with Satisfaction is a *good Plea in Satisfaction and Diſcharge of Damages upon Covenant broken*, and Judgment given accordingly, contrary to the Opinion in 2 Roll Rep. 187. † **Rabbet and Stoker's Caſe.** Lutw. 358. 359. Trin. 12 W. 3. Snow v. Franklin.

20. Action upon the *Caſe for ſeveral Promiſes*; Defendant pleads that he *gave the Plaintiff ſuch a Quantity of* &c. And the Plaintiff accepted it *in full Satisfaction* of the ſaid Promiſes. Plaintiff demurs, and Defendant joins in Demurrer. It was inſiſted for the Plaintiff, that the Defendant's Plea was naught; becauſe *not ſaid that* the Defendant *gave it in Satisfaction*, and cited 5 Co. Rep. 117. per Cur. If the *Defendant gave it with one Intention, and* the *Plaintiff accepted it with another*, the Intention of the Donor muſt prevail; but the Queſtion here is, whether the Words (full Satisfaction) ſhall not as well relate to the Verb *give*, as the Verb *accept*; eſpecially becauſe of the Conjunction *et*, which ſeems to difference it from the Caſe mention'd. Adjurnatur. 10 Mod. 224. Paſch. 13 Ann. B. R. Timber v. Gardiner.

For more of Accord in General, See **Agreement**, and other Proper Titles.

Account.

(A) For what Thing it lies.

Fol. 116.

1. IF a Man delivers Money to another upon Condition that if the Defendant makes a Security of certain Land by a certain Day, that then he shall have the Money, and if not that he shall re-deliver it to the Deliverer; if he does not make the Security, the Deliverer may have a Writ of Account against him for the Money. 41 Edw. 3. 10. adjudged. S. C. cited D. 20. a. pl. 121. and admits that Account lies.—Ibid. 20. b. S. C. cited and S. P. admitted; but the Difference is, whether or no Debt lies as well as Account.——S. P. Br. Accompt, pl. 11. cites 41 E 3. 7.——S. P. F. N. B. 118. (G)

2. If Money is delivered to deliver over, if it is not delivered, Account lies. 41 E. 3. 31. 1 E. 5. 2. b 2 H. 4. 12. b. 20 H. 6. 35. Br. Account, pl. 24. cites S. C.——S. P. for he cannot have Detinue. Br. Accompt, pl. 43. cites 19 H 6. 5.——The Bailor may have Account to know what is done with the Money; for it might be that he, to whom it was to be paid, would not agree. 2 Roll. Rep. 441. per Doderige.

3. But if it be deliver'd over, no Account lies. 1 E. 5. 2. b. S. P. Br. Accompt, pl. 43. cites 19 H. 6. 5.

4. If I deliver Money to B. to deliver over to C. to my Use, and he gives it to C. Account lies against B. 2 H. 4. 12. b. See (D) pl. S. C.

5. If a Man acknowledges by Obligation that he hath received a Sum ad proficiendum & computandum, the Obligee may have an Account for it, if he will. 42 E. 3. 9. adjudged. Br. Dette, pl. 32. cites S. C.——D. 20. b. pl. 122. cites S. C.

6. If a Man delivers Money to you to pay to me, I shall have Account for this against you. 6 H. 4. 8. 41 E. 3. 10. 2 R. 2. Account 45. tho' he be but a Messenger. S. C. cited and S. P. admitted Arg. Roll Rep. 391. in pl. 11.——S. P. Br. Accompt, pl. 24. cites 2 H. 4. 12. —— He may have have Account or Debt. Per tot. Cur. Godb. 210. pl. 299. Mich. 11 Jac. C. B. Clarke's Case.

7. If a Man receives my Rent of my Tenant by my Command, Account lies against him for it. 6 H. 4. 8. See pl 12. and the Notes there.——So if a Man receives my Rent of my Tenants, without my Assent, yet I shall charge him by the Possession and by the Receipt, per Brian Ch. J. And so see that Never his Receiver to render Account, shall not serve in this Case for him. Br. Accompt, pl. 65. cites 4 H. 7. 6.——F. N. B. 118. (B) in the new Notes there (a) cites 4 H. 7. Brief 65.——S. P. F. N. B. 117. (A) in the new Notes there (e) cites 11 H 4. 65. per Thirn.——But if a Man *takes Rent as his own, as a Disseisor* &c. Debt lies, and not Account. See Clayt. Rep 117. pl. 206. Aug. 1647. Walker v. Portington.

8. If a Man acknowledges by Deed that he hath his Hands so much of the Money of J. S. due to him, Account lies for this by J. S. 11 H. 6. 39. Br. Dette, pl. 186. cites S. C. without being put to Action of Debt.

9. If the Bailee of Goods to deliver over wastes them, no Account lies against him, but Detinue. 20 H. 6. 16. b.

10. If the Bailee of Goods wastes them, as a Tun of Wine, Account lies. 20 H. 6. b.

11. If

D. 151. b. 152. a. pl. 5. by the Opinion of the Juſtices of both Benches. Anon.——Ibid. Marg. cites it as ſo adjudg'd Mich. 36 & 37 Eliz. B. R. Ld. Rich's Caſe.——Bulſt. 153. 154. Yelverton J. cited the Caſe of D. 151. but that D. 264. pl. 41. 9 Eliz. three Juſtices held that to a Suit for ſuch Legacy in the Spiritual Court a Prohibition did not lie, for that the Money was Aſſets in the Hands of the Executors, and no Remedy for a Legacy in the Temporal Court; but Yelverton and the whole Court, in the principal Caſe of Dins v. Dins, held that ſuch Legacy is not to be ſued for in the Spiritual Court, but by an Action of Account at the Common Law againſt the Executors.

11. If a Man deviſes by Writing that his Executors ſhall ſell his Land, and deviſes certain Legacies out of the Money to be received; if the Executor ſells, the Legatees may have Accounts, if he will not pay the Legacies. D. 4. 5. Mar. 152. 5.

*S. C. cited by Roll Ch. J. that † Rent alone lies not in Account, becauſe it is a certain thing, and alſo in the Realty; but if mixt with other things, an Account will lie. Sty 287. Trin. 1651. in Caſe of Lamond v. Ward, which was Error to reverſe a Judgment in an Inſimul computaverunt, and aſſign'd that the Action was brought againſt him for Rent as Tenant of the Land, and not as Receiver, and therefore Account did not lie; but Roll Ch. J. ſaid, it appears here that the Action is brought againſt the Defendant as Receiver, and if one *receives my Rents without my Conſent*, I may have either Debt or Account againſt him; and affirmed the Judgment.

12. No Account lies for Rent reſerved upon a Leaſe for Years. * 20 H. 6. 16.

† S. P. 2 Show. 82. in Caſe of ——— v. Sterne.

Arrearages of a Leaſe for Years, or at Will, does not lie in Account; for it *is a thing certain*, quod nota; for a thing uncertain lies in Account only. Br. Accompt, pl. 81. cites 10 H. 6. 20.

S. P. and ſo if they are loſt; for he ſhall have Detinue of the Goods waſted or loſt upon Bailment &c. Br. Accompt, pl. 4. cites 20 H. 6. 17.——Br. Detinue, pl. 8. citea 20 H. 6. 16.

13. If a Leſſee of Goods waſtes them, no Account lies againſt him for them. 20 H. 6. 16.

Br. Accompt, pl. 36. cites 21 E. 3. and 27. and 30. that Account lies againſt him for Waſte, and not Writ of Waſte.

14. If Tenant by Elegit of Land cuts down Trees, the Conuſor in Reverſion cannot have Writ of Account againſt him for Default of Privity of Bailment. 21 E. 3. 26. b. Contra 21 E. 3. 31. b.

2 Bulſt. 256. S. C. adjudged accordingly; for the Covenant does not take away his Action of Account.——Roll Rep. 52. pl. 24. S. C. adjudg'd accordingly, per Cur. viz. Crooke, Doderidge and Haughton.

15. If A. acknowledges by Deed, that he hath received 100 l. of B. to be adventured to the Weſt-Indies, and thence to England back again, and covenants to render a due Account thereof upon his Return, tho' B. may have a Writ of Covenant upon this Deed, yet he may alſo have a Writ of Account thereupon at his Election. Trin. 12 Jac. B. R. between *Hawkins and Parke*, adjudged.

Account does *not lie for a thing certain*, as if a Man *delivers* 10 *l. to Merchandize*, he ſhall not have Account of the 10 l. but of the Profits thereof he ſhall have Action of Account; for this is uncertain. Br. Accompt, pl. 35. cites 9 H. 5. 3. per Hill J.

16. If one *receives to my Uſe Money ſealed up in a Bag, as my Servant*, Account does not lie againſt him. F. N. B. 116. (Q) in the new Notes there (d) cites 29 E. 3. 20. 20 H. 6. 16. 6 H. 4. 8. 2 H. 4. 12. 13 H. 4. 1. 41 E. 3. 10. 22. 33 H. 6. 2. 6 E. 3. 12. F. Baily 4.

17. Account *as Bailiff of his Houſe*, holding his Courts, and adminiſtring certain Goods in the ſame, *and alſo was his Receiver* of his Money. *The Defendant ſaid that he was never his Bailiff of the Houſe, and as to the Money, that he was never his Receiver*, and as to the Goods, that the Plaintiff was indebted to him in 20 l. and aſſign'd the Goods to the Defendant in Satisfaction of the 20 l. And Per tot. Cur. where he pleads Never his Bailiff, he ſhall not plead over to the Goods in the Manor or Houſe; for this ſhall come in upon the Account after, if the Plea paſſes againſt the Defendant, quod nota; by which Iſſue was only Ne unques ſon Bailiff and

and Ne unques ſon Receiver. Quære of the Aſſignment above. Br. Accompt, pl. 34. cites 14 H. 4. 20.

18. If 40 *l. is deliver'd to render Account*, Account lies well; *But* if it is deliver'd *to Re-bail when the Defendant is required*, Account does not lie, but *Detinue*, per Martin, quod Curia conceſſit. Ar. Accompt, pl. 51. tites 4 H. 6. 2.

19. If I *bail certain Money to one to keep till after my Death, and then diſpoſe for my Soul*, my Executors ſhall not have Account againſt him after my Death; for he himſelf as to this Sum is my Executor, per Needham. Quære if he himſelf cannot have Account of it in his Life; for in his Life he may change his Will. Br. Accompt, pl. 70. cites 8 E. 4. 5.

20. He who *takes the Profits as Guardian in Socage of his own Tort* ſhall Account thereof, per Pigot. Quære. Br. Accompt, pl. 76. cites 22 E. 4. 5. Account does not lie againſt him who *enters in the Land of one* of full Age, or an Infant not Tenant in Socage. F. N. B. 217. (A) in the new Notes there (e) cites 13 E. 3. 35. Dy. 277.———But in the King's Caſe he ſhall be charged as Bailiff, if he has no Title. Ibid. cites 33 H. 6. 3. per Priſot. 4 H. 7. 6.

21. Account againſt J. N. *Bailiff of his Park of D. having the Care &c. of* 100 *Deer, as well Male as Female*, and the Defendant demurr'd. Per Fiſher, Account does not lie of a Park; for it is only the Incloſure within the Pales, not of the Deer; for the Plaintiff has no Property of them; which Vaviſor agreed. But contra per Keble, Rede, Wood, Fineux and Brian. Br. Accompt, pl. 94. cites 10 H. 7. 6. * A Park is more than the Incloſure, for it is alſo the Land incloſed; for the Licenſe to make a Park is Concedimus &c. that he may incloſe 100 Acres of Land in D. and that thereof he may make a Park; Per Keble, quod Cur. conceſſit; and that in Treſpaſs Quare Clauſum fregit, & cepit Damas without ſaying ſuas, his, and without any Value alleged, before the Statute of Weſt. 1. the Damages were aſſeſſed more high for the Deer, quod tot Cur. Conceſſ. wherefore Action of Account lies of a Park, and this by Reaſon of the Deer. And ſo ſee that *Guardian who cannot ſell ſhall Account.* Br. Accompt, pl. 94. cites 10 H. 7. 6.———*And* Wood ſaid that Treſpaſs lies *of wild Beaſts taken in my Land*, and ſhall not ſay Damas ſuas, but that Damas cepit; and therefore Treſpaſs and Account thereof lies. Br. Accompt, pl. 94. cites 10 H. 7. 6.

22. Account lies *of Herons and Hawks building Neſts* in the Park, and of Fiſh and Conies, and by Magna Charta the Guardian ſhall ſuſtain Houſes, Parks, &c. Br. Accompt, pl. 94. cites 10 H. 7. 6. per Keble.

23. Account lies againſt Guardian of a *Dove-houſe*. Br. Accompt, pl. 94. cites 10 H. 7. 6. per Rede.

24. *So* of *Wreck and Stray*, tho' the Bailiff does not ſeiſe it; for he *ſhall Account of all that he received and might have received.* Br. Accompt, pl. 94. cites 10 H. 7. 6.

25. *So of Toll, and* of the Profits of *a Common Pound.* Br. Accompt, pl. 94. cites 10 H. 7. 6.

26. *So* per Fineux of *Guardian of an Hoſpital or Rectory*, and that Guardian *can't ſell the Deer*, contra of a Bailiff. Br. Accompt, pl. 94. cites 10 H. 7. 6.

27. If a Man *deliver Goods or Money beyond Sea, to deliver him again in England, at a certain Place*, he ſhall have an Account for thoſe Goods, &c. F. N. B. 11. (G).

28. In Account *by A. and B. the Plaintiffs declared that C. had deliver'd* 100 *l. to E. the Defendant, by the Hands of D. for the Relief of M.* The Defendant *pleaded Ne unques Receiver to render Account*, upon which they were at Iſſue; and Judgment was given that the Defendant ſhould Account. 3 Le. 149. pl. 199. Mich. 29 Eliz. C. B. Cocket v. Robſton. Cro. E. 82. pl. 1. Robert v. Andrews S. C. and that it was adjudg'd upon Special Verdict, that E. ſhall be ſaid to be Receiver of the 100 l. by the Hands of D. prout &c. and that he ſhall account for the ſame. And it being moved in Error that it was found that E. received the 100 l. for their Relief, and not to Account, the Court held clearly, that when E. received the Money in that Manner, he received it to their Uſe, and is accountable, if he did not expend it; and that it is as if he had received it to their Uſe by expreſs Words.

29. If a *Sheriff levies Money on an Execution, and does not anſwer it to the Plaintiff*, Account will lie. Hob. 206. pl. 260. Trin. 15 Jac. in Caſe of Speake v. Richards.

30. Account does not lie for any *Sum certain*. 2 Brownl. 76. Anon.

31. It ſeems admitted that Account does not lie *againſt ſuch* Perſon *as enters and occupies Copyhold Lands*, and takes the Profits *as Guardian*. See Cro. C. 229. pl. 7. Mich. 7 Car. B. R. Hughs v. Harris.

Show. 71. Mich. 1 W & M. S. C. the Plea was over-ruled; and Judgment for the Plaintiff. — Comb. 149. S. C. Holt Ch. J. ſaid it would be inconvenient

32. In Aſſumpſit, the Plaintiff declared that he intending to go beyond Sea, *deliver'd a Box and Goods to the Defendant which he promiſed to diſpoſe of, and to give an Account thereof* at his Return; the Defendant *pleaded* in Abatement, *that he was Bailiff ad Merchandizandum* the ſaid Goods, and that he ought to bring Account, and not an Aſſumpſit. But it was held, the Action being grounded upon an *expreſs Promiſe*, an Aſſumpſit lies as well as Account. And per Holt, where-ever one *acts as Bailiff* he promiſes to render an Account. 1 Salk. 9. pl. 1. Hill. 2 W. & M. in B. R. Wilkin v. Wilkin.

to permit an Aſſumpſit by reaſon of the Trouble and Length of Accounts; but Dolben J. held that Caſe lies, becauſe Account is a tedious and troubleſome Action. Adjornatur. ——— Carth. 89. S. C. and by three Juſtices the Action will lie; but Holt Ch. J. doubted, and told the Plaintiff he would not permit him to give all the Account in Evidence or to enter into the Particulars thereof, but that he ſhould direct his Proof only as to Damages ſuſtain'd for not accounting according to the Promiſe; for he would not ravel into the Account in ſuch Actions. Note the Trial was to be before him at the Sittings, and a Rule was made that Defendant anſwer over.

33. Indebitatus Aſſumpſit for Money received ad computandum, after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that where the *Defendant receives Money to a Special Purpoſe, as to Merchandize or Account*, there it can never be demanded as a Duty till he has neglected or refuſed to apply it according to the Truſt on which he received it, and that the Declaration muſt ſhew a Miſapplication or Breach of the Truſt. But per Cur. it is cured by the Verdict, for now it ſhall be intended that Proof was made to the Jury that the Defendant refuſed to Account, or had done ſome what elſe that render'd him an abſolute Debtor. 1 Salk. 9. pl. 2. Trin. 5 Ann. B. R. Poulter v. Cornwall.

(B) Againſt whom it lies, *in Reſpect of his Perſon.*

Account lies not againſt an Infant. Br. Account, pl. 82. cites the Regiſter, fol. 135. ——— F. N. B. 118. (D) S. P. accordingly. ——— * Br. Accompt, pl. 38. cites S. C. that the Defendant ſaid he was within Age at the time of the Receipt ſuppoſed, and born at D. and pray'd Pais there, and yet Pais was where the Receipt is ſuppoſed. Brooke ſays, and ſo ſee a good Plea by Non-age.

1. A Writ of Account does not lie againſt a Man upon a Receipt by him when he was within Age. * 21 E. 3. 8. admitted by Iſſue. 16 E. 3. Account 52.

2. The ſame Law of an Account as Bailiff of a Manor. 17 E. 2. Account 121. admitted by Iſſue.

Br. Accompt, pl. 43. cites 19 H. 6. 5. S. P. ——— S. P. 7. Br. Coverture, pl. 24. cites S. C.

3. An Infant ſhall not be compelled to Account, becauſe he is not of Diſcretion to Account. 19 H. 6. 7. b. 16 E. 3. Account 52. 17 E. 2. Account 121.

4. A Feme Sole, as well as a Man, shall be compelled to Account in a Writ of Account, as receptrix denariorum. 16 H. 6. 4. b. adjudged. Br. Accompt, pl 43 cites S. C. —— F. N. B 118. (D) S. P. accordingly. —— Br. Accompt, pl 82 Contra, cites the Register 135. but Brooke says the contrary seems to be Law. —— Account lies against Baron and Feme eo quod Mulier dum sola fuit was receptrix denar' vel Balliva &c. and the Baron and Feme shall account for the Feme, by divers Serjeants; but Danby contra, therefore quære. Br. Accompt, pl. 68. cites 4 E. 4. 25 —— In such Action the Writ was *de tempore quo prædicta Catherina fuit Receptrix Denariorum ipsius J. without saying Dum sola fuit*, but those Words were in the Count. See D. 202 a. pl 69. Trin. 5 Eliz. no Exception was taken thereto, but the Defendants pleaded other Matter. Clare v. Bartue & Ux.

5. So she shall be sued by Writ of Account as Bailiff, for she may well intend the Duty of a Bailiff. 19 H. 6. 5. b. accordingly.

6. A Writ of Account lies against a Priest. 19 H. 6. 5. b. It lies against a Chaplain. Br. Accompt, pl. 43. cites S. C. —— F. N. B. 118 (D) accordingly, and cites S. C. and 5 E. 4. 40. but says that 15 E. 4. 16. is contra. —— Br. Account, pl. 82. cites the Register, fol. 135. contra, but Brooke says, that it seems it lies against a Chaplain.

7. If a Monk is my Bailiff of my Manor, and after he is made an Abbot, he may be charged in an Account, because he was my Bailiff when he was a Monk. 20 E. 3. Account 78.

8. A *Bailiff* shall not have Account *against his Master for a Surplus* on Account. F. N. B. 116. (Q) in the New Notes there (c) cites 41 E. 3. Account 33. Quære.

(C) In what Cases it lies. For *Want of Privity* of Bailment or Receipt. [*By Jointenants, Joint-Executors, &c.*]

1. If there are 2 Jointenants for Years of a Parsonage, and one receives Money of certain Men for Offerings, arising from Corn and other Things to the common Profit of them both, the other shall have a Writ of Account against him, for he received the one Moiety to his use, and to his Receiver. 39 E. 3. 27. b. Br. Accompt, pl. 58. cites S. C. but is mis-printed at the Beginning (Recover) for (Receive) —— Thel. Dig. lib 2. cap. 2. S. 33. cites S. C. accordingly. —— See E. pl. 3. contra.

2. [But] if there are 2 Jointenants in Fee of Land, and the one takes all the Profits to his own Use, the other shall not have an Action against him for want of Privity. Contra 39 E. 3. 28. Br. Accompt, pl. 58. cites S. C per Thorp J. that the other shall have Account for otherwise he should be without Remedy; for he cannot have Assise. —— But per Wich. and Kirton, if 2 *Tenants in Common* are [of Land] and *one takes all the Profits*, the other shall not have Account, but Assise. And Brooke says, that the Reason seems to be that there is no Privity between them. *But* where 2 *Coparceners* are he thinks that one shall have Action against the other. Ibid.

Of *cutting of Wood which is in Common* pro indiviso, Account lies by one against the other; per Hank. Br. Accompt, pl. 20. cites 47 E. 3. 22.

If *one Jointenant takes* all the Profits or *all the Rent* &c. the other has no Remedy; for there is a Privity and Trust between Join-tenants, and it was his Folly to join himself in Estate with such Person as would break the Trust. 2 Rep. 68. a. per Popham. Arg. in Tooker's Case. —— Cro. E. 803. pl. 1. S. P. per Popham in S. C. and that as to the Profits of the Land, the one may damnify the other, and gives for Reason as above, that *there is Quasi a Privity between them &c.* —— In such Case either between Jointenants or Tenants in common, no Action of Account lies *against one Tenant in common or Jointenant who takes the whole Profits*; for in Action of Account *he must charge him either as Guardian, Bailiff, or Receiver*, which he cannot do in this Case, unless his *Companion constitutes him as his Bailiff*, and then Action of Account lies against him. And therefore all those Books which affirm that an Action of Account lies for Tenant in common, or Jointenant against another, must be intended when the one makes the

the other his Bailiff; for otherwiſe Never his Bailiff to render an Accompt is a good Plea. Co. Litt. 200. b.——Ibid. 172. a. (f) S. P.

Br Accompt, pl 58. cites S. C. per Kirton, that the other

3. [So] if 2 have a Ward in common, and one takes all the Profit, the other ſhall not have a Writ of Account againſt him. Contra 39 E. 3. 28.

ſhall have Account againſt him, and count that he was his Receiver to their common Uſe.——S. P. by Tank. and agreed by Finch, Br. Accompt, pl. 20. cites 47 E. 3. 22. and there in Treſpaſs it was held by Hamon, that if 2 have an Ox in common, and the one ſells the whole, the other ſhall have Writ of Account.——The other ſhall have Account againſt him. F. N. B. 118. (I) cites Paſch. 45 E. 3.——Ibid. in Marg. cites 43 E. 3. 21. and 45 E. 3. 20.——Ibid. in the New Notes there (f) ſays, viz. where he was his Bailiff, and cites 21 E. 3. 60. Account 66. 14 E. 3. Account 70. 30 E. 1. Account 127. 31 E. 1. Account 126.

It was held that where 2 *bring Writ of Ward of the Body*, and the *one is ſummon'd and ſever'd*, and the *other recovers*, that he who was ſever'd ſhall have Writ of Account againſt the other of the Profits. Thel. Dig. 26. lib. 2. cap. 2. S. 2. cites Trin. 45 E. 3. 10. and ſays ſee 47 E. 3. 22. accordingly. And that cutting of Wood, which is held Pro indiviſo, Action of Account has been maintain'd.

S. P. Per Winch, which Brook ſays ſeems to be Law; for they

4. If there are 2 Executors, and the one receives all the Debts of the Teſtator, the other ſhall not have a Writ of Account againſt him, becauſe he hath Power to diſpoſe of the whole, and there is no Privity of Receipt between them. 39 E. 3. 28.

have nothing to their own Uſe, but the Ordinary ſhall compel them to account, as appears elſewhere Br. Account, pl. 58. cites S. C.——S. P. accordingly, Thel. Dig. lib. 1. cap. 18. pl. 5. cites Hill. 13 E. 3. Executors 91. but that Herle J. Trin. 19 E. 2. Executors 117. ſaid, that the one ſhall have Account againſt the other; but Thel. ſays the Law is not ſo, as appears Trin. 11 H. 4. fol. 79. and 6 H. 4. 3.

Account as his Receiver, the *Defendant ſaid that J. S. made him and the Plaintiff his Executors*, and died, and *N. by whoſe Hands the Receipt is ſuppoſed, was indebted to the Teſtator*, and *he as Executor received it*; and demanded Judgment if the other Executor ſhall have Action; and it was held no Plea; for the *Declaration is of* the Plaintiff's Money, and the *Plea is of the Executor's Money*; by which the Defendant *ſaid that he received it as the Teſtator's Money, abſque hoc* that he received the Money of the Plaintiff to render Account, and the other e contra. Br. Account, pl. 30. cites 11 H. 4. 79.—F. N. B. 118. (I) in the new Notes there (f) cites S. C. and 13 H. 4. 1.

5. Where 2 *Jointenants* are *of a Manor*, and the *one takes upon him to be Bailiff to the other of the Moiety, and to render Account* &c. then he who makes the other Bailiff ſhall have Writ of Account againſt his Jointenant, otherwiſe not. Thel. Dig. 26. lib. 2. cap. 2. S. 32. cites Mich. 21 E. 3. 60. Mich. 8 E. 2. Account 115. and 122. Trin. 17 E. 2. where it was held, that the one ſhould not have Writ of Account againſt the other, notwithſtanding that he took &c. and ſays, See 10 H. 7. 16.

6. Account *as Receiver*, and *counted that* he bailed to him 2 Tuns of Wine to ſell for him, he ſhall not plead that the Wines were the Plaintiff's and another's; for if two are jointly poſſeſs'd, and the one bails Goods to merchandize, and to render Account, he alone ſhall have Account; quod nota. Br. Account, pl. 14. cites 43 E. 3. 21.

S. P. Per Dyer. Dal. 99. pl. 30.——3 Le. 24. pl. 50. S. P. by Dyer.——*But* if he *enters to his own Uſe*, there it ſeems that Account does not lie; for there Never his Receiver to render Account is a good Plea. And ſo ſaid Moile, and the Law is with him. Br. Account, pl. 8. cites 33 H. 6. 2. and the Law is with him. Br. Account, pl. 8. cites 33 H. 6. 2. and 2 M. 1. accordingly.

7. Where a *Man takes upon him of his own Head* to be my Bailiff, Action of Account lies. Br. Account, pl. 8. cites 33 H. 6. 2.

8. *Leſſee for Years deviſed his Term to B. for his own Life*, Remainder over *to C.* and *made B. his Executor*, and died; *B. enter'd*, and made his Will, and died; *B.'s Executor enter'd*, and took the Profits for a Year, and *C. brought* an Action of *Account* againſt B.'s Executor, as Bailiff &c. But all the Juſtices held, that it did not lie for Want of Privity, and becauſe he never was in Poſſeſſion of the Land, nor had taken any Profit thereof. D. 277. b. pl. 59 Trin. 10 Eliz.

9. To

9. To maintain an Action of Account, there muſt be either *a Privity in Deed by the Conſent of the Party*; or againſt a *Diſſeiſor*, or other Wrong-doer, no Account does lie, *or a Privity in Law* ex proviſione Legis made by the Law, as againſt a Guardian &c. Co. Litt. 172. a. (g)

For the Diſſeiſin is meerly a Tort; Per Manwood. Dal. 99. pl. 30.——And Ibid. Per Dyer, an Abator or Diſſeiſor cannot be charged in Account, becauſe they pretend to be Owners.——Ow. 36. S. P by Dyer.———And it was agreed, That if a Diſſeiſor appoints another to receive the Rents, the Diſſeiſee cannot have Account againſt ſuch a Receiver. 3 Le. 24. pl. 50. in Caſe of Tottenham v. Beddingfield.——Dal. 99. pl 30. S. C. and S. P. agreed.

So if there be *Leſſee for Years of a Rectory*, and a Stranger not having any Intereſt, nor claiming any Title in them, carries away *Tithes ſever'd*, and ſells them, the Leſſee ſhall not have Account againſt him; for Torts are always done without Privity, and here the Tithes, as ſoon as ſever'd, *were immediately in the Leſſee*, and conſequently the Taker was a Wrong-doer, and Account lies not againſt him; Per Manwood and Dyer againſt Harper. 3 Le. 24. pl. 5. Mich. 15 Eliz. Tottenham v. Bedingfield.—Dal. 99. pl. 30. S. C. Per Manwood and Dyer accordingly, but Harper e contra.——Ow. 35. and 83. S. C. accordingly.

10. It was holden clear upon the Evidence, that if 2 *Men buy Corn jointly*, Barly or the like, the one ſhall not have Account againſt his Fellow for the Diſpoſal thereof. Clayt. 50. pl. 87. Summer Aſſiſe 13 Car. coram Berkley J. Dent's Caſe.

11. By 4 & 5 *Ann. cap.* 16. *S.* 27. *Actions of Account are maintainable by one Jointenant and Tenant in Common, his Executors, and Adminiſtrators, againſt the other as Bailiff, for receiving more than his Share, and againſt the Executor and Adminiſtrator of ſuch.*

(D) *Againſt whom* it lies.

1. NO Man is bound to account, unleſs by Act of the Law, as Guardian in Socage, or by his own Act, as of his own Will, where he is Bailiff or Receiver. 2 H. 4. 12. b.

There be but 3 *Kinds* of Writs of Accompt, viz. againſt one as *Guardian*; the 2d againſt one *as Bailiff*; and the 3d *as Receiver*; for a Man ſhall not be charged in an Accompt as * *Surveyor, Comptroller, Apprentice, Reve*, or *Heyward*. Co. Litt. 172. a. (g)——S. P. by Dyer, Ow. 36. 14. Mich. 15 Eliz.———And Dal. 99. pl. 30.———S. P. and ſo of a Meſſenger, unleſs they are as Bailiffs or Receivers. 2 Inſt. 379. 380.

* F. N. B. B. 119. (c) S. P.

2. It lies not againſt Executors upon a Receipt by their Teſtator. 48 E. 3. 2.

F. N. B. 117. (C) S. P. — But if the *Bailiff's Executors* do *account* with J. S. *of their own free Will*, J. S. ſhall have *Debt* on the Arrears or Balance of ſuch Account. F. N. B. 117. (C) in the new Notes there (b) ſays, See Account againſt them as Executors. 2 H. 4. 13.

An Action of Debt was brought *againſt an Adminiſtrator for* 20*l. received by his Inteſtate, to lay out on the Plaintiff's Adventure* for French Prunes at Roan, by the Plaintiff. And it was adjudged that the Action did well lie, and not in Account. Trin. 28 H. 8. D. 20. Core v. Woodye.— *But Adminiſtrator of an Apprentice*, who was ſent by his Maſter as a *Factor in the Weſt-Indies*, was decreed to account. Fin. R. 125. Mich. 26 Car. 2. Lee v. Bowler

That it lies for the King, See Prerogative (P)——Tho' the King has Prerogative to charge the Executors of an Accountant, yet he ought to charge them only where the Teſtator was chargeable in Law, in one of the 3 Caſes, viz. as Guardian in Socage, Bailiff, or Receiver. 11 Rep. 89. b. in Caſe of the Earl of Devonſhire.

3. If the King grants the Land of a Ward to another, and a Stranger enters upon his Poſſeſſion, and levies the Profits of the Land, the Grantee may have Account againſt him. 11 H. 4. 65.

4. If a Man ſeiſes Land as Guardian in Chivalry, where the Heir holds of him in Socage, he ſhall have a Writ of Account againſt him for the Profits. 49 E. 10. * 10 H. 6. 7.

* Br. Account, pl. 80. cites S. C.— S. P. For he that ſeiſes in ſuch Manner ſhall be only Bailiff to the Infant. F. N. B. 118. (B) in the new Notes there

there (a) cites 28 Aff. 13. and 24 Aff. 10. and that the Heir ſhall have Account againſt him as Guardian in Socage, cites 10 H. 6. 2. Per Cott. 41 E. 3. Account 35. 32 E. 3. Account 59.— So if a Man *ſeiſes an Infant as Guardian in Socage*, and *is not Prochein Amy*, yet Action of Account lies againſt him. Br. Account, pl. 8. cites 33 H. 6. 2.

In Account againſt a Bailiff and Receiver, it is a good Plea to the Writ to ſay that he was Guardian in Socage of the Tenements &c. Thel. Dig. 173. lib. 11. cap. 53. S. 13. cites Paſch. 32 E. 3. Account 60.

Account was brought *againſt a Lord by the Tenant, as Occupier* of the Land which the Tenant, now Plaintiff, held of the Defendant *in Socage*; and the *Defendant ſaid that the Anceſtor held of him in Chivalry*, by which he took it for Ward, Judgment &c. And ſo ſee that *Account is admitted to lie againſt Occupier of the Land without Privity*; therefore *Quare if the Defendant might have ſaid here that never his Bailiff or Receiver to render Account*; and if Account lies againſt Pernor of a Rent by Diſſeiſin. Br. Account, pl. 22. cites 49 E. 3. 10.

5. If A. ſeiſes B. for his Ward in Chivalry, and C. by the Command of A. receives the Rents from the Tenants of B. to the Uſe of the * Fol. 118. Plaintiff, * tho' he was not of Right in Ward to A. yet he ſhall not have any Account againſt C. for the Rents received by him, becauſe there is not any Privity between them, inaſmuch as he received them as Servant to A. Dubitatur. Paſch. 11 Jac. B. R. Morley's Caſe.

S. P. Per Hank quod non contradicitur; for he does not

6. If I deliver Money to B. to deliver to C. to my Uſe, if B. gives it to C. no Account lies againſt C. for he is not privy to the Uſe, but it lies againſt B. 2 H. 4. 12. b.

receive for me, nor to my Uſe. Br. Account, pl. 24. cites S. C. Brooke ſays, That from hence it ſeems, that a Diſſeiſor or Pernor by Tort, who receives to his own Uſe, ſhall never be charged to account; for the general Iſſue Ne unques ſon Receiver is true.

But Ibid. ſays, Account lies

7. If a *Feme Guardian in Socage takes Husband*, Account lies againſt both. F. N. B. 118. (B) in the new Notes there (a) cites 18 E. 3. 55.

againſt the Baron alone for the Profit taken after the Coverture; but for thoſe taken before it lies againſt both, cites 8 E. 2 Brief 847.

8. Tho' the *Power of Guardian in Socage is gone by the Infant's taking a Husband*, yet they ſhall have Account againſt the Guardian, if he continues after. F. N. B. 118. (B) in the new Notes there (a) cites 10 R. 2. Account 132. but that Litt. 27. is contra. 4 E. 3. Account 107. 12 H. 7. 26. 6 E. 2. Account 20. 29 E. 3. 5. contra.

9. In *Debt upon Recovery of Damages*, it is a good *Plea that the Sheriff has levied the Money by Fieri Facias* ſued thereof by the Plaintiff within the Year, by the beſt Opinion; and if he *has not deliver'd them to the Court nor the Party*, the Plaintiff may have Action of Account againſt the Sheriff, as it ſeems there. Br. Dette, pl. 63. cites 11 H. 4. 58.

S. P. For then the Diſſeiſee

10. Account lies not againſt a *Diſſeiſor*. F. N. B. 118. (B) in the new Notes there (a) cites 33 H. 6. 2. 2 H. 4. 12.

ſhall avoid Deſcents for his Pleaſure, and alſo the Defendant *was never his Receiver to render Account*; for this cannot be without Privity in Law or in Deed, as by Aſſignment, or as Guardian &c. or by Pretence of the Defendant to the Uſe of the Plaintiff, and *not where the Defendant claims to his own Uſe*; for there the Plea is true, Never his Receiver or Bailiff to Account &c. Br. Accompt, pl. 89. cites 2 M. 1.

One that *enter'd without a Title* into Houſes,

11. *He who takes the Profits de ſon Tort demeſne*, ſhall account thereof; Per Pigot. Quære. Br. Accompt, pl. 76. cites 22 E. 4. 5.

was decreed to account for the *Rent*. Fin Rep. 285. Hill. 29 Car. 2. Liſter v. Liſter.

12. *Guardian who cannot fell* ſhall account. Br. Account, pl. 94. cites 10 H. 7. 6.

13. If a Man claims *to be Guardian of an Infant, and is not Guardian*, and enters and occupies, Action of *Waſte lies, and therefore Action of Account*, as it ſeems; and *contra where he enters as Treſpaſſor*. Note a Difference. Br. Account, pl. 93.

14. If

14. If a Man *holds* certain *Lands* of me, *by the Service of being my Bailiff of my Manor*, I ſhall have Account againſt him, tho' he never took the Profits, becauſe he is my Bailiff by his Tenure; per Fitzh. F. N. B. 116. (Q) in the new Notes there (c) cites 18 H. 8. 5.

15. If one *enters into Lands claiming by Deviſe*, where, in Truth, *the Land devis'd is intail'd*, he ſhall not be charg'd in Account &c. Adjudg'd Le. 266. pl. 357. 20 Eliz. C. B. Anon. One enter'd by Colour of a Deviſe, and occupied for the Space of 20 Years; after which it was adjudg'd that the Will was void, whereupon the Perſon whoſe Right it was brought Account, and adjudg'd that the Action lay not. Dal. 99. pl. 30. cited per Manwood, as the Caſe of Moneux ——S. C. cited Ow. 84 ——S. C. cited by Manwood J. 3 Le. 24.

16. If I *retain one to go about my Buſineſs*, he is not accountable; per Anderſon. But per Windham, if I *deliver to him Money to diſburſe in ſuch Buſineſs*, he is accountable, which Anderſon granted; but ſaid that this is not in reſpect of the Retainer, but as he was Receiver; and if he expends more than he hath receiv'd, he does it without Warrant, and no Allowance ſhall be made him. Le. 219. pl. 301. Mich. 32 & 33 Eliz. C. B. in Caſe of Gawton v. Ld. Dacres.

17. *Rents* taken *by Colour of a Title that is avoided*, the Receiver ſhall be accountable as *Bailiff*. Chan. Caſes 126. Paſch. 21 Car. 2. Hele v. Stowell.

18. If *Money* be *deliver'd* to A. by B. *to be kept without any Conſideration* or Reward for ſo doing, if A. be *robb'd*, he is diſcharg'd, and B. ſhall bear the Loſs, contrary to Co. Litt. 123. 88. b. per Pemberton Ch. J. 2 Show. 172. Mich. 33 Car. 2. B. R. King v. Sheriff of Hertford.

19. 4 & 5 *Ann. cap.* 16. *S.* 27. *Actions of Account may be maintain'd againſt the Executors and Adminiſtrators of every Guardian*, * *Bailiff*, *and Receiver*; *and the Auditors appointed by the Court ſhall adminiſter an Oath, and examine the Parties, and for their Pains have ſuch Allowance as the Court ſhall adjudge reaſonable, to be paid by the Party on whoſe Side the Ballance ſhall be.* * See Tit. Ley-Gager (H) pl. 17. Page v. Barns.

(E) *Againſt whom* it lies, *and by whom.*

1. If one Executor receives a Debt of the Teſtator, the other cannot have Account againſt him. 11 H. 4. 79. See (C) pl. 4.

2. If two Merchants have Goods in common, the one ſhall not have Account againſt the other. 11 H. 4. 79. If two joint Merchants occupy their Stock, Goods, and Merchandizes in common, to their common Profit, one of them *naming himſelf a Merchant ſhall have an Account againſt the other, naming him a Merchant*, and ſhall charge him as Receptor Denariorium ipſius B. ex quacunque cauſa & contractu ad communem utilitatem ipſorum A. & B. provenien' ſicut per legem mercatoriam rationabiliter monſtrare poterit. Co. Litt. 172. a. —— F. N. B. 117. (D) S. P. accordingly. And Ibid. (E) ſays that the Executor of one Merchant ſhall have ſuch Writ againſt the other Merchant, but not againſt his Executors.

Where 2 *Tenants in common of Goods* are, and the *one* of them *bails the Goods to the other to merchandize ad communem utilitatem* eorundem, he who bails ſhall have Writ of Account againſt the other. Thel. Dig. 27. lib. 2. cap. 3. S. 13. cites Hill. 10 H. 7. 16.

3. If one receives Money to the common Profit of himſelf and J. S. J. S. ſhall not have a Writ of Account againſt him. See 14 E. 3. Account 70. Contra 20 E. 1. Itinere Cornubiæ, Account 27. See (C) pl. 1. If 10 *l. be paid to W. N. to my Uſe*, I may have Action of Account againſt W. N. of it; per Wang. & Billing. Quod non negatur. Br. Accompt, pl. 61. cites 36 H. 6. 10. and Lib. Ent. 53. that he may have Action of Debt; but

but Brooke makes a Quære thereof.——Godb. 210. in Clark's Case, it is held that he may have Debt or Account at his Election.

4. If a General Receiver of J. S. throughout England, makes J. D. his Deputy Receiver in one County, and the Deputy receives several Things by Force thereof, and the General Receiver makes up his Account thereof with J. S. he may after have a Writ of Account against his Deputy for the said Things, tho' before the Account was made by the General Receiver the Deputy was in a manner Receiver to J. S. 11 R. 2. Account 48.

5. So a Sheriff may have an Account against his Deputy; for he himself is accountable over to the King. 11 R. 2. Account 48.

And the immediate Bailiff shall have Account against his Deputy.

6. If a *Receiver or Bailiff makes a Deputy*, yet the Action of *Account shall be brought against the Receiver or Bailiff* themselves, and *not against their Deputies*; for the Deputies receive the same to their Masters Uses. F. N. B. 119. (B)

Note, he surmised that he had accounted F. N. B. 119. (B) in the new Notes there (b) cites 4 E. 3. 17. & 8. 11 R. 2. Account.—Tho' in the Case of the *King* he may have an Account against a *Clerk of a Surveyor of the Ordnance*, for Money deliver'd by the Surveyor to the Clerk, notwithstanding a Want of Privity; yet it is otherwise in the Case of a *common Person*; for if any Receiver makes one his Deputy, the Principal shall not have Account against such Deputy. 4 Le. 32. pl. 89. 33 Eliz. in the Exchequer. The Queen v. Painter.

7. *Two purchased a Manor for Life*, and *one of them took upon him to be Bailiff to the other.* No Account lies. F. N. B. 117. (D) Marg. cites 8 E. 2. Account 115. and 21 E. 3. Account 66. 30 E. 1. Account 127.

8. Account lies against an *Abbot*, notwithstanding the *Receipt was by his Predecessor.* F. N. B. 117. (F) Marg. cites 20 E. 3. Account 78.

S. P. Thel. Dig. lib. 1. cap. 17. pl. 9. cites Hill. 31 E. 3. Accompt 57.

9. *Successor*, Prior or Abbot, or Master of an Hospital, shall have Account against the Predecessor's Bailiff or Receiver. F. N. B. 117. (F)——F. N. B. 117. (C) in the new Notes there (a) cites S. C. and Accompt 124. But that it is contra of an *Heir*, and cites 19 E. 3. Account 56.

10. A *Bailiff* shall *not* have an Account *against his Master for a Surplus on Account.* F. N. B. 116. (Q) in the new Notes there (c) cites 41 E. 3. Account 33. Quære.

12. Account as *Receiver of Money of D. and S.* The *Defendant said as to the Receipt in D. that the Plaintiff's Father had Land there, and infeoff'd the Defendant* of it *till the Plaintiff came to full Age, and the Receipts were during the Nonage*; Judgment if Actio &c. And *as to the Receipt in S. of* 18*l. by the Hands of B.* he *said that B. gave the* 18*l. to him, absque hoc that he received it to his Use*; and it was held no Plea, but shall plead the usual Issue, that he was not Receiver &c. by the Hands of the said B. and so he did. Quod nota. Br. Account, pl. 24. cites 2 H. 4. 12.

But if he will account where he need not, he shall be charg'd of the Goods of the Deceased.

13. Action of Account does not lie against *Executor.* Br. Account, pl. 25. cites 2 H. 4. 13. Br. Dette, pl. 52. cites S. C.——S. P. by a common Person. Br. Accompt, pl. 85. cites Littleton, Tit. Socage. But the *King* may have Account against Executors.

F. N. B. 118. (H) S. P.—— If 2 *are jointly possess'd of Goods*, and *one* of them *delivers the Goods for Merchandize*, he only shall bring the Action. Brown. 25. Anon.——See Cro. J. 410. pl. 10. Mich. 14 Jan. B. R. Hackwell v. Eustman.

14. In Detinue, if 2 *have Goods in common*, and *the one bails the Goods to N. to render Account*, he alone shall have the Action; per Tremaile. Quod non negatur. But where 2 bail, both shall have the Action. Br. Accompt, pl. 32. cites 12 H. 4. 18.

15. Note

15. Note in Treſpaſs, per Priſot, that the *King* may bring Action of Account *againſt one*, as Bailiff, *who occupied of his own Head.* Br. Accompt, pl. 8. cites 33 H. 6. 2. *So where a Man occupies my Manor of his own Head*, I ſhall have Action of Account againſt him; contra per Moyle. Ibid.

16. The *Pariſhioners* ſhall *not* have Action of Account *againſt the Church-wardens, but* they may make other Wardens, and the *new Wardens* ſhall have Account againſt the firſt Wardens; per Needham; Quod non negatur. Br. Accompt, pl. 71. cites 8 E. 4. 6. Church-wardens ſhall have Action of Account againſt their Predeceſſors. Thel. Dig. lib. 2. cap. 23. pl. 3.

17. The *Pariſh-prieſt* ſhall not be *charg'd for the Offerings* offer'd by a Writ of Account, if it be not otherwiſe agreed betwixt them &c. For the Clerk holds the Veſſel in which they are put. F. N. B. 119. (E) cites 6 E. 6. pl. 7.

18. If a Man have Cauſe to have an Account *againſt one as Bailiff or Receiver*, if he dies his *Executors* ſhall have the Action. F. N. B. 117. (C)

19. If the *Husband* has *received the Profits of the Wife's Lands, and dies*, the Wife ſhall not have a Writ of Account of the Profits, nor of the Rents, during the Coverture, againſt the Husband's Executors. F. N. B. 119. (A) [*But*] F. N. B. 119. (A) in the new Notes there (a) ſays ſee 11 R. 2. Account 49. that for Rent iſſuing out of a Freehold *by* one [*a Stranger*] during the Coverture, the *Feme ſhall have Account, and not the Husband's Executors.* Contra of other Receipts.

20. Two are *Parceners of Merchandizes in one Ship*, and *one* of them *appoints a Factor of all* the Merchandizes. It was mov'd, and not denied by the Juſtices, that both of them *may have ſeveral Writs* of Account againſt him, *or* they may *join in one Writ of Account*, if they pleaſe. But the Reporter ſays Quære of that. Godb. 90. pl. 101. Mich. 28 & 29 Eliz. B. R. Anon.

(E. 2) Where ſeveral muſt join.

1. WHERE there are 2 *Jointenants of a Manor*, they ought to join in Account *againſt the Bailiff* of the Manor, notwithſtanding the Bailiff was *made by one* of them. Thel. Dig. 26. lib. 2. cap. 2. S. 18. cites Mich. 13 E. 2. and Hill. 15 E. 2. Accompt 118. 119. But it is *otherwiſe* where two *Tenants in common* are of a Manor, and the *one makes Bailiff for himſelf alone*, who adminiſters for him alone. Thel. Dig. 26. lib. 2. cap. 2. S. 18 cites 30 E. 1. Itin. Cornub. Accompt 127. and ſays ſee Trin. 39 E. 3. Fol. 19. where in Account againſt a *common Bailiff*, he *ſaid that the Manor was leaſed to the Plaintiff, and another who is dead, and made 2 his Executors not named*, Judgment &c.

2. It was awarded that where 2 *have Wines in common*, and the *one* of them *bails the Wines to a Stranger to ſell*, the Bailor alone ſhall have Action of Account againſt the Bailee. Thel. Dig. 26. lib. 2. cap. 2. S. 20. cites Trin. 43 E. 3. 21. and ſays ſee Trin. 31 E. 1. Accompt 126. and 12 H. 4. 18.

3. Where one was *Receiver to a Feme ſole*, and after *ſhe took Baron*, and *they aſſign'd Auditors*, it was the clear Opinion of the Court, that they might join in Writ of Debt of Arrearages of Account. Thel. Dig. 30. lib. 2. cap. 5. S. 24. cites Mich. 16 E. 4. 8.

(F) How it ſhall be brought. *By what Name*, as Bailiff.

1. NONE ſhall be charg'd in Account but as Guardian in Socage, Bailiff, or Receiver. Co. 11. *Earl of Devon* 89. b.

Br. Accompt, pl. 17. cites S. C. per Finch.—Br Accompt, pl. 18. cites S. C.—

2. If a Man delivers Goods to another to ſell, and he ſells them accordingly, and receives the Money, the Bailor ought to charge him as Bailiff, and not as Receiver. 46 E. 3. b. 9. For he ought to be allow'd for his Coſts. 43 E. 3. 21. b. 13 R. 2. Account 50. Quære 4 H. 6. 27.

F. N. B. 116. (Q) in the new Notes there (c) S. P. [but ſeems to be miſprinted] cites 41 E. 3. 21. 46 E. 3. 9. 4 H. 6. 27.——Account as *Receiver*, and *counted that he bail'd to him* 2 Tuns of Wine to ſell for him, and *he received of J.* 10 *s. and of W.* 10 *s. and of another the reſt, and did not ſhew by whoſe Hands* &c. And per Cur. he ought to ſhew by whoſe Hands in Account as Receiver, and *if he cannot put it in certain, he may bring Writ of Account againſt him as his Bailiff*, and Count of the Bailment of the Stuff to Merchandize. Quod nota. And per Cur. if the Sum of the Receipt be 13 s. or other Sum under 40 s. yet the *Action does not lie before the Sheriff*; quod nota; and the Reaſon ſeems to be, *becauſe a Sheriff cannot aſſign Auditors.* Br. Account, pl. 14 cites 43 E. 3. 21.

Account as *againſt Receiver, and counted of Receipt by diverſe Hands of diverſe Sums.* Rolfe demanded Judgment of the Writ; for the *Plaintiff was poſſeſs'd of* 12 *Truels of Woad, and bail'd them to the Defendant to ſell, and to render Account* of the Money ariſing therefrom, *ſaving to the Defendant reaſonable Coſts for his Labour, and Coſts* of it; *by which he ſold to the Perſons compriſed in the Count, and for the Sums in the Count*, in which Caſe he ought to have Action of Account againſt him as Bailiff, and not as againſt Receiver; & adjornatur. But Brooke ſays it ſeems that the Law is with Rolfe; for it *does not lie as againſt Receiver, but where the Sums are aſcertain'd at the Time of the conſtituting of him to be Receiver.*——Br. Accompt, pl. 53. cites 4 H. 6. 27.——*But* where *Stuff is bail'd to ſell, and to render Account*, there it is not certain till they are ſold, and that he has received; and alſo in *Account as Bailiff*, he ſhall have certain *Allowances* for his Labour, *which is not allowable in Account againſt Receiver.* Ibid.

Br. Accompt, pl. 17. cites S. C. per Finch.

3. If a Man hath a Taverner to ſell his Goods, he ought to charge him as Bailiff. 46 E. 3. 3. b.

Br. Accompt, pl. 56. cites S. C. but S. P. does not appear.——F. N. B 116. (P) S. P.

4. If a Man makes another Bailiff of his Manor, he ought to be charg'd as Bailiff, and not as Receiver, becauſe he ought to approve. 9 E. 4. 40. b.

S. P. Br. Accompt, pl. 56. cites S C——F. N. B. 116. (P) S. P.

5. If a Man makes another Receiver of all the Rents of his Tenants, the Writ ſhall be againſt him as Receiver, and not as Bailiff; for he cannot approve. 9 E. 4. 40. b.

S. P. Br. Accompt, pl. 56. cites S C.—— The Plaintiff counted that the Defendant was

6. If a Man alleges a Special Preſcription that a Bailiff ought to be found for him, as that there is a Borough within his Manor, within which he hath Part of the Market, and a Court of Piepowders &c. and that the Defendant is Bailiff thereof, and received the Profits &c. Tho' it appears that he ought to do nothing but collect the Fee-Farms, Iſſues, Fines, and Amerciaments, the which are certain, yet

yet because he is named Bailiff, he ought to be named according to the Name that he had by Prescription. 9 E. 4. 40. b. *Bailiff of his Borough in* R. from

Mich. such a Year, for one whole Year &c. *and had Power of leasing the Tenements Parcel of the said Borough, and collecting the Rents &c. due to the Plaintiff, ratione Burgi illius* &c. The Defendant *pleaded that* at the Time &c. *he was Receiver* &c. *absque hoc that he was Bailiff.* At the Nisi Prius was given in Evidence a *Custom time out of mind*, within the Borough, *to choose* one of the Tenants at the Borough Court to be *Portreve*, to collect the Rents ratione Tenuræ suæ, when his Turn should come, who used to account before the Auditors of the Plaintiff and his Predecessor, to have Allowance &c. and that the *Defendant was elected* such a Day at such a Court to be Portreve ratione Tenuræ, viz. to collect the Rents &c. for that Year &c. The whole Court held that the Evidence did not maintain the Action as Bailiff, the *Count being General as Bailiff of the Plaintiff*, whereas the *Evidence charges him specially ratione Tenuræ*, so that the *Count should have been special* according to the Matter; whereupon the Plaintiff purchased a new Writ against the Defendant as Bailiff, and counted Specially. Kelw. 75. b. 76. a. pl. 23. Mich. 21 H. 7. The Abbot of Bukefast v. Horsfwill.

7. If a Man makes another Bailiff of his Hundred, he shall be charg'd by the Name of Bailiff, because he hath the Name, and may approve, as to see that all Things are presented &c. 9 E. 4. 40. b. S. P. Br. Accompt, pl. 56. cites S. C. per Littleton.

8. If a Man leases his Manor rendring Rent, and after makes a Bailiff of the said Manor, and he receives the Rent, yet he shall not be charg'd as Bailiff, but as Receiver. Mich. 3 Jac. B. R. between *Cage and Peacock.* Agreed.

9. A Receiver that never takes upon him to be a Bailiff, cannot be charg'd as Bailiff, because then he may be twice charg'd. 21 E. 3. 60. 41 E. 3. Account 34. Admitted by Issue, and also in Account as Bailiff he shall have Allowance of his Costs and Expences, which he shall not be allow'd where he is charg'd as Receiver. Co. Litt. 172. See (H) pl. 3. the Same Cases.—— In Account by Merchant against Factor, as Receptor Bonorum & Merchandizorum ad Compotum inde reddendum, and so *declared of diverse Goods in particular*, but *says not by whose Hands*; and Judgment for the Plaintiff by Default, quod computet. Then the Defendant pleaded an insufficient Plea before the Auditors, whereupon the Plaintiff demurr'd, and had Judgment, and Writ to inquire of Damages. It was mov'd in Arrest of Judgment, that the Declaration was ill, because he charges him as Receiver, and says not by whose Hands; and that in this Case he ought not to be charg'd as Receiver, but as Bailiff, he being to merchandize with the Goods, and so to have his Expences, Allowances and Factorage, and Judgment in Account as Receiver is no Bar in Account as Factor. But adjudg'd for the Plaintiff; tho' Hale said he ought to be charg'd as Bailiff; but this ought to be by Demurrer upon the Declaration, which is now pass'd by the Judgment Quod computet. 2 Lev. 126. Hill. 26 & 27 Car. 2. B. R. Burdet v. Thrule.——3 Keb. 387. pl. 78. S. C. says the Defendant should have demurr'd to the Declaration, and Judgment for the Plaintiff.——Ibid. 435. pl. 41. S. C. says that the being charg'd as Receiver, and not as Bailiff, should have been excepted to before the Auditors, or on Plea of Ne unques Receptor, or have demurr'd specially, and this being after 2d Judgment, and Error depending, the Exception comes too late; and Judgment for the Plaintiff —— Mr. Danvers in a Note on this Plea, says that this must be specially pleaded, and so he supposes this Case in 2 Lev. 126. must be intended, tho' said the Advantage must be taken by Demurrer to the Declaration.

10. A Man may be charg'd as Bailiff and Receiver of several Things in one Action. 43 E. 3. 1. b. 27 E. 3. 79. 44 E. 3. Account 31. 44 E. 3. 1. 41 E. 3. Account 34. 32 E. 3. Account 6. Br. Accompt, pl. 15. cites S. C. but S. P. does not appear.

If a Man *makes one his Bailiff &c. and also his Receiver*, then he shall have Account against him as Bailiff, and also as Receiver. F. N. B. 116 (F)

Account of Receipts of a Manor in Rye, which is one of the *Cinque Ports*, and the Receipt *as Bailiff* was *in the Castle of Rye*, where *every Castle is of the County and of the Guildable*, tho' it be in the Franchise; and *for this Part he counted against him as Bailiff, and of the rest as Receiver of the Money*; and therefore for this Part the Court was ousted of the Jurisdiction, and had Jurisdiction of the Rest. Br. Jurisdiction, pl. 94. cites 49 E. 3. 24.

Account was brought against S. as Bailiff and Receiver *of the Manor of D.* but shew'd only that he was Bailiff thereof, and found for the Plaintiff. It was mov'd that the Declaration was not good, because he *shews no Charge against him as Receiver.* Sed non allocatur, it being more for the Defendant's Benefit, and therefore adjudg'd for the Plaintiff. Cro. C. 240. pl. 25. Mich. 7 Car. B. R. Wells v. Some.

11. If a Man *enters into my Land to my Use, and receives the Profits* thereof, I shall have an Account against him as Bailiff. F. N. B. 117. (A)

12. If

12. If the *Father occupies the Land of an Infant, which the Infant has purchaſed, or hath by Purchaſe*, the Infant ſhall have an Account againſt him as Bailiff of his Lands, and this Writ of Account may be ſued as well in the County as in the Common Pleas. F. N. B. 117. (B)

13. If the Defendant is charged as *Bailiff of Goods ad merchandizandum*, he *ſhall anſwer for the Increaſe, and be puniſh'd for Negligence*; *but if* he is charged *as Receiver ad Computandum*, he ſhall *anſwer* for the Increaſe and be puniſh'd for Negligence; but if he is charg'd as Receiver ad Computandum he ſhall anſwer *only for the Money or Thing deliver'd.* Godb. 55. pl. 69. Mich. 28 & 29 Eliz. B. R. by Egerton Solicitor General, in Caſe of Gomerſall v. Gomerſall.

(G) By what Name.

1. A Surveyor of a Manor **cannot be charged as Bailiff** where there is another that is above him, and hath the Care **and Adminiſtration of the Whole.** 12 E. 3. Account 75.

F. N. B. 116. (P) in the New Notes there (b) cites S. C. and ſays, ſee 9 E. 4. 40. 9 E. 3. 37.

2. **If a Man makes another Bailiff** of his Woods to expoſe them to ſale **he may be charged** as Bailiff **tho' he does not ſell them.** 34 E. 3. Account 131.

Ibid. cites 8 E. 3. 46. F. N. B. 119. (D) 7 H. 4. 14. b.

3. An Apprentice **by the Name of Apprentice is not chargeable in Account.** Co. 11. *Earl of Devon* 89. b. ——— S. P. per Fenner J. Goldsb. 161. pl. 94 Hill. 43 Eliz. Anon. ——— S. P. F. N. B. 119. (D) in Marg. cites 6 E. 3. 3 Account 102. and 8 E. 3. Account 94. Account as Receiver, the Defendant ſaid that he was his Apprentice; and no Plea, but he was forced to anſwer to the Receipt.

4. *Ballivus Domus* ſhall be charged for Goods delivered to him as Bailiff in Account. F. N. B. 116. (P) in the New Notes there (b) cites 2 R. 2. Account 46.

The Maſter ſhall have a Writ of Account *againſt a Servant* who is ſent to receive * Money &c. *if he be Receiver.* F. N. B. 119. (D)

5. Account is maintainable againſt a *Servant*. Per Fenner J. Goldsb. 161. pl. 94. Hill. 43 Eliz. Anon.

* If they are not in a Bag ſealed. Ibid. in the New Notes there (d) cites 29 E. 3. 20. 8 E. 3. 261.

But per Powel J. a Church-warden muſt be charged as Receiver. 11 Mod. 187. S. C.

6 *Churchwardens* are more than bare Receivers, and are in all Reſpects Bailiffs, and therefore ſhall be allow'd their Expences and Surpluſage in Caſe their Expences out-ballanced, &c. Per Cur. clearly. 10 Mod. 23. Paſch. 10 Ann. B. R. Biſhop and Eagle.

(H) How it ſhall be brought. By what Name he ſhall be charged as Receiver.

1. If J. S. is obliged to me with Condition for the Payment **of a ſmall Sum, and** I deliver this to another to receive **what he can of J. S. if the** Bailee delivers the Obligation to J. S. without Receipt of any Money from him, **I cannot charge the Bailee as Receiver, for he did not receive any Money, and alſo I cannot ſet forth a certain Sum** as

as I ought in such Action, and therefore I am put to my Writ of Detinue. 2 R. 2. Account 46.

2. If a Man receives the Rent due from my Lessee for Life, or my Tenants, an Account lies against him as Receiver. 11 R. 2. Account 49. 6 R. 2. Account 47. per Brough, and Belknap is not contrary thereto.

3. A Bailiff cannot be charged as Receiver, because if he be charged as Bailiff, he shall upon his Account have Allowance of his Charges and Expences, of which he shall not have Allowance where he is charged as Receiver, and also because there is so material a Difference between a Bailiff and a Receiver, that he cannot plead when he is charged as Bailiff that at another time he was charged as Receiver; and therefore if this Writ to charge a Bailiff as Receiver should be allowed, he should be twice charged for the same thing. 21 E. 3. 60. 41 E. 3. Account 34. admitted per Issue.

See (F) pl. 9. S. C. and the Notes there.—A Man shall not have Writ of Account against one as Receiver, where he ought to sue the Writ against him as Bailiff or Guardian in Socage. Thel. Dig. 51. lib. 6. cap. 4. S. 6. cites Pasch. 18 E. 4. 2. 4 and says see Trin 4 H. 6. 26.

4. If B. is indebted to A. in 200l. and A. appoints C. to enquire and Receive of B. the 200l. and B. also appoints C. to borrow it, and to pay it * to A. and after C. borrows it of a Stranger for B. to pay to A. and he appoints his Wife to pay it to A. and after B. gives Bond for the Money to the Stranger; in this Case A. may have a Writ of Account against C. as his Receiver by the Hands of B. for C. was a Servant as well to A. as to B. and he received it as the Money of B. to pay over to A. tho' it does not appear that the Stranger paid it to C. to the Intent to pay it over to A. Hob. Rep. between *Harrington and Deane*, adjudged upon a Special Verdict, 10 Jac. b. For inasmuch as C. was appointed by A. to receive the Money of B. and he received it by the Appointment for A. it was the Money of A. and the Property in him, and B. cannot charge him in an Account for it.

Mo. 862. pl. 1184. Hill. * Fol. 120. 12 Jac. S. C. adjudg'd accordingly.—Brownl. 26. S. C. adjudg'd for the Plaintiff.—Hob. 36. pl. 40 S. C. and says that tho' the Books of 1 E. 5. and other Books are, that if A. deliver Money over to B to deliver and pay over to C. that in this Case B. is answerable to 2 Actions of Account conditionally, as the Books are; yet as this Case is, B. could never have had an Action of Account against C. for his Money, because he had put himself out of the Property of it by appointing C. to pay it over unto A. for his Debt, and A. had accepted it and made it his Satisfaction by appointing C. to receive it by the Hands of B. and C. had received it to that Intent, and in Execution of all Parts of that Agreement, and so all Parties were bound by it.

5. The Account of *Guardian in Socage* is only for the Issues of the Land; for if he receives other Monies, he shall be charged as Receiver. F. N. B. 118. (B) in the New Notes there (a) cites 32 E. 3. Account 60.

5. Account *against a Feme sole ut Receptrix*, and the Writ awarded good. So, *ut Balliva*; quod nota; and if it be not good Form, yet when it passes the Chancery, it is good. Br. Faux Latin, pl. 32. cites 19 H. 4. 5.

6. A Man shall have a Writ of Account against one as Bailiff or Receiver, where he was not his Bailiff or Receiver; for if a Man *receives Money for my Use*, I shall have an Account against him as Receiver; or if a Man *delivers Money unto another to deliver over unto me*, I shall have an Account against him as my Receiver. F. N. B. 116. (Q)

8. An Account against a *Receiver*, *is* when one receives Money to the Use of another to render an Account, but upon his Account he *shall not be allowed his Expences* and Charges; and therefore a Man *cannot charge a Bailiff as a Receiver*, because then the Bailiff should lose his Expences and Charges. Co. Litt. 172. a. (c)

9. After Judgment quod Computet, a 2d Judgment was given against the Defendant; and it was mov'd in Arrest, that the *Action* was brought

againſt the Defendant as Receiver of Goods ad Merchandizandum, and that it ſhould be as Bailiff of Goods, and a Receiver of Money; and that ſo are all the Precedents, and material; for a Bailiff ſhall have his Charges allow'd, but not a Receiver. But it was anſwer'd, that it is well enough, and cited Fitzh. Account 47. and Roll Abr. 125. 575. and that this is out of the Reaſon of the Difference, becauſe a Receiver ad Merchandizandum ſhall have his Charges; and ſo is Co. Ent. 42. and ſo it is but Matter of Form; ad quod Curia inclinavit. Sed adjornatur. Freem. Rep. 378. pl 493. Mich. 1672. Bradenend v. Greene.

10. In Account by one Tenant in Common againſt another, as Bailiff, and alſo as Receiver of ſo much Profits of the Lands held in Common, and for ſo much Money by the Defendant received to the Plaintiff's Uſe. The Defendant demurr'd, it not being alleg'd by whoſe Hands he receiv'd it. But it was urg'd, that this Exception was taken away by 4 & 5 Ann. cap. 16. which gives Account to one Tenant in Common againſt another; ſo that it appearing by the Declaration, that they are Tenants in Common, it is ſufficient, without ſaying by whoſe Hands the Profits were received. Sed non allocatur; for by the Statute the one cannot charge the other but as Bailiff; for by the Common Law Account lay not for the one againſt his Companion, but where expreſs Authority was given to take his Part, and then he was chargeable as Bailiff; but now by this Statute he may be charg'd. If he receives his Companion's Share, tho' without his Privity, yet he ought to be charg'd as Bailiff by the expreſs Words of the Statute, and cannot be charg'd as Receiver; and therefore as the Declaaation charges him as Bailiff, and alſo as Receiver, it ought to be ſhewn by whoſe Hands, as at Common Law; and Judgment for the Defendant. Comyns's Rep. 272. pl. 150. Mich. 4 Geo. 1. C. B. Walker v. Holyday.

(I) How it ſhall be brought. By other Hands. What ſhall be ſaid *other Hands*.

1. IF the Defendant **received by the Hands of his Wife, this is by another's Hand.** 43 E. 3. 33.

S. P. Br. Baron and Feme, pl. 51. cites 15 E. 4. 16. Nor this ſhall not ouſt the Defendant of his Law.

2. But **if the Defendant received by the Hands of the** Wife of the Plaintiff, **this is not by another's Hand, but by the Plaintiff himſelf.** 43 E. 3. 33.

See (K) pl. 2. S. C. and the Note.

3. So **if he received by the Hand of the** Commoigne **of the Plaintiff.** 47 E. 3. 16.

D. 183. b. pl. 60. Paſch. 2 Eliz. S. P. Anon.

4. **If Executor brings Account of a Receipt by the** Hands of his Teſtator, **this is by another's Hand.** 43 E. 3. 33.

5. **A Man may count of a Receipt by the Hands of the** Wife of the Defendant. 15 E. 4. 16.

If the Receipt be alleged by the Hands of a Feme, and does not name her the Feme of the Plaintiff, this is good. Br. Account, pl. 19. cites S. C.——The Baron cannot ſuppoſe the Receipt to be by the Hands of his own Feme; for they are one Perſon in Law; and therefore there the Defendant may have his Law. Br. Account, pl. 49. cites 15 E. 4. 15.

6. **A Man may count of a Receipt by the Hands of the Wife** of the Plaintiff. * 47 E. 3. 16. 13 H. 4. 8.

* See (K) pl. 1. S. C.

7. So

7. So he may count of a Receipt by the Hands of the Commoigne of the Plaintiff. 47 E. 3. 16. 13 H. 4. 8. Br. Account, pl. 19. cites S. C.——S. P. Br. Account, pl. 49. cites 15 E. 4 15.

8. So he may count of a Receipt by the Hands of the Wife, or Commoigne of a Stranger. 47 E. 3. 16. If the Receipt be alleged by the Feme of another Man, and does not name her the Feme of her Baron, it is ill Per Cur. Br. Account, pl. 19. cites S. C. but Brooke says the Case is ill reported.

9. In Account, a Man may count of a Receipt by the Hands of 2 Strangers. 43 E. 3. 33.

10. But he cannot count of a Receipt by the Hands of the Plaintiff himself, and a Stranger; for this requires two Issues. 43 E. 3. 33.

11. So for the same Reason he cannot count of a Receipt by the Defendant himself and a Stranger. 43 E. 3. 33.

12. A. *deliver'd* 100 *l. to B. to deliver to C. for the Relief of D. and E.* In Account brought by D. and E. against C. to whom B. deliver'd the 100 l. the *Writ and Count was of a Delivery by the Hands of B.* After Judgment for the Plaintiff, it was *assign'd for Error, that the Delivery ought to have been alleged to be by the Hands of A.* for that B. deliver'd it as his Servant, and it may be said the Delivery of the Master, and the Receipt, ought to be supposed by the Hands of the Master. But it was answer'd by Coke, that this differs from a Contract made by a Servant, which shall be said the Contract of the Master, and he only charg'd for it; for here the *Plaintiffs convey only a Possession, and not any Interest by the Hands of B. and so may count of a Receipt by his Hands*, Cro. Eliz. 82, 83. pl. 1. Hill. 30 Eliz. B. R. Robsert v. Andrews. 3 Le. 149. pl. 199 Cocket v. Robston, S. C. and Judgment to account, but S. P. as to the special Manner of declaring nothing appears.——2 Le. 118. pl. 160. S. C. and it was assign'd for Error, that the Writ ought to be more special; but Judgment was affirm'd.——3 Le. 230. pl. 311. S. C. in almost the very same Words.

13. In Account as Receptor Denariorum the Defendant *demurr'd* specially, because it is *not said by whose Hands*. And per Curiam, it is ill. 3 Keb. 425. pl. 26. Hill. 26 Car. 2. B. R. Jaggard v. Fripp.

(K) By what *Name*. [*Count. How.*]

1. If he counts of a Receipt by the Hands of A. S. if she be the Wife of a Stranger, he ought to allege that she is the Wife of him. Otherwise it is if she be Wife to the Plaintiff. 47 E. 3. 16. Br. Account, pl. 19. cites S. C.——A Receipt made by the Husband by the Hands of his Wife is his own Receipt, and the Writ and the Count shall suppose that he himself did receive &c. without saying by the Hands of the Wife. F. N. B. 118. (F)——And Ibid. in the new Notes (c) It is said that the Count shall not abate but when it supposes a Receipt by the Hands of the Commoigne, or Feme of the Plaintiff or Defendant, but it shall *not oust the Defendant of his Law*. But it seems the Count is good, supposing the Receipt immediate in such Case, cites 13 H. 4. 8. 2 H. 5. 2. 10 E. 4 6. 15 E. 4. 16. 4 E. 3. pl. 45. 5 E. 3. pl. 6. contra.

2. The same Law if he declares of one who is Commoigne to a Stranger, and where to the Plaintiff. 47 E. 3. 16. But vide Brook Account 19. where he says that this is ill reported; and that it seems it ought to be alleged in both Cases. Br. Account, pl. 19. cites S. C.——A Man shall have an Account *against* a Prior upon a Receipt had *by his Commoign, but* there the *Writ supposes that he himself did receive* the Money &c. and shall not say by the Hands of his Commoign. F. N. B. 118. (F)

3. If

3. If a *Prior or Husband receives Money of a Stranger*, then the *Count ſhall be that he received by the Hands of the Stranger* &c. but the *Writ ſhall be general*, Tempore quo fuit receptor denar', without ſaying by whoſe Hands; but he ſhall ſhew that in the Count or Declaration. F. N. B. 118. (F)

(K. 2) Joint-Bailiffs. Charged or Diſcharged. How. And Pleadings.

S. P. Br. Account, pl. 10. cites S. C. *And* per Thorpe, *if one be awarded to account, and will not* account, he ſhall be condemned in all the Receipts.——And where one is outlaw'd, and the other accounts, and the one *ſues Charter of Pardon*, and comes *and prays Allowance, becauſe the Plaintiff had his Account of the other*, and to go quit. Quære thereof without Execution; for it is not admitted in that Point. But *it ſeems that he ſhall go quit*; for the Plaintiff demanded only an Account, and he has the Account of the one; for *Plene computavit* is a good Plea in Account; therefore it ſeems that where the Plaintiff had had Account, he ſhall never have Account of it again. And in Debt by 2, if the Plaintiff has Execution or Payment by the one, he ſhall not have Action againſt the other. And ſee 2 H. 4. 16 where 2 were warn'd in Detinue, and the one made Default, the Default of him ſhall not prejudice the other by way of Defence, contra ex parte querent' for there the Default of the one is the Nonſuit of both. But Per Thorp and Finch, becauſe they were awarded to account in Common, therefore the *Charge ſhall fall upon them in Common*. Quære Ibid. cites 41 E. 3. 3. 9.——S. C. cited Arg. 2 Le. 76. pl. 100. And ſee there the ſame Point debated in the Exchequer Chamber.

1. IF two are Joint-Bailiffs, the Receipt of one is the Receipt of the other; and if *one dies the other ſhall be charg'd of all*, and *a Diſcharge to one is* a Diſcharge *to both*; and if *one accounts after the Proceſs determin'd againſt the other, and is charg'd* upon the Account, *this ſhall charge the other* when he comes. Br. Charge, pl. 49. cites 41 E. 3. 3.

See 2 Le. 75. pl. 100. 13 Eliz. in Error, in the Exchequer, S. C. and the Argument.

2. Where 2 are accountable, an *Account made by the one* is not good; for both the Accountants ſhall make but one Account; and therefore the Account of the one cannot be good; cited by Coke as the Caſe of **Gore v. Dawbeney**, in the Exchequer Chamber, upon a Writ of Error. Le. 234. in pl. 316.

3. In Account againſt 2 as Receivers, it was mov'd that one of them could not *plead Ne unques ſon Receiver*, but ought to ſay Ne unques ſon Receiver abſque hoc that he and his Companion were Receivers; but Clench and Suit J. held, that it was *well without Traverſe*. Godb. 43. pl. 50. Mich. 28 & 29 Eliz. B. R. Anon.

4. In Account againſt 2, *one confeſs'd the Action*, and *the other pleaded Ne unques Receiver* &c. Judgment was preſently given againſt him that confeſs'd the Action, and Iſſue join'd upon the other was *found againſt the Defendant*. It was mov'd that *one of the Defendants was dead*, and ſo the whole Bill ſhould abate, tho' it was after Judgment; but Gawdy conceiv'd it ſhould abate only againſt him that was dead. Adjornatur. Cro. E. 701. pl. 17. Mich. 41 & 42 Eliz. B. R. Hogobert v. Hokely and Spike.

Ibid. The Reporter adds a Quære as to this Opinion of the Court, ſince the Declaration charges them jointly; ſo that

5. Account was brought againſt 2 jointly *by Bill in B. R.* (and not by Original) *one pleaded Ne unques ſon Baily*, and *found againſt him*; the *other made Default*, and *Judgment againſt him by Default*. The *firſt is found by Auditors ſo much in Arrears*; and the Court being moved for final Judgment againſt him for ſo much as found, they were in Doubt what to do; for no Auditors ought to be aſſign'd to him that appear'd, the Suit being joint againſt both, and *no Outlawry can be againſt the other who did not appear* (*the Suit being by Bill*, and not by Original) but only an Alias Capias in infinitum; and the Book of 43 [41] E. 3. [3] is of Suit

Suit Original. But afterwards the Court was satisfied that *he who appear'd being condemn'd in a Sum certain before Auditors, comes too late now to be reliev'd.* Sid. 159. pl. 12. Mich. 15 Car. 2. B. R. Davis v. Isaac & Martin. when the other comes in, if it be found that he ought not to account, it

seems that both shall be discharg'd; and so he says it seems to him, if the other had a Release. Quære.

(L) What Pleas shall be in Bar of the Account.

1. IN Account against one as Bailiff, it is a good Plea in Bar that he was never his Bailiff. 21 E. 3. 60. So in Account the Defendant

pleaded that he was not *Receiver of the Predecessor*; and admitted good. F. N. B. 117. (F) Marg. cites 4 E. 3. 8. 14 H. 4. Account 124. 4 E. 2. 17. Account 97. 31 E. 3. Account 57. 25 E. 3. 45.

2. In Account against a Bailiff of his House, and counts that he had the Care of certain Goods, it is not any Plea in Bar that the Plaintiff sold to him the Goods, without saying that he was not his Bailiff; for if he was his Bailiff, he ought to account for the House, and the Count had been good without alleging these Particulars. 49 E. 3. 7. Br. Account, pl. 21. cites S. C. ——— Godb. 57. Arg. cites S. C. and 14 H. 4. and says these

Cases were not rul'd; that in the one Case the Plea was of a Gift of the Goods, and in the other of a Sale, and demanded Judgment of the Action, and said that it is no good Answer; for they are Pleas only before the Auditors, and not in Action of Account.—2 Bulst. 195. accordingly.

3. But it is a good Plea in Bar of all, to say that he never was the Bailiff of his House. 14 H. 4. 21. Br. Account, pl. 34. cites S. C. but S. P. does not fully appear.

4. So in Account against a Bailiff of a Manor, and that he had the Administration of certain Oxen there, Never his Bailiff of the Manor is a good Plea in Bar of all. 14 H. 4. 21. Br. Account, pl. 34. cites S. C. but S. P. does not fully appear.

5. In Account against a Bailiff, it is a good Plea that he was Servant to the Plaintiff to drive his Plough, and had his Cattle for the drawing of his Plough, absque hoc that he was his Bailiff in other manner, because he is not accountable for this Occupation. 7 H. 4. 14. b. Br. Account, pl. 29. cites S. C. accordingly; but if the Beasts perish by his Default,

Action on the Case lies, as of Goods impair'd for Default of good Keeping.——Br. Action sur Case, pl. 34. cites S. C. accordingly, as of Goods carried away for Default of well Keeping.

6. In Account against a Bailiff, it is a good Plea in Bar that the Plaintiff leas'd to him for Life &c. the Thing of which he is supposed Bailiff. 29 E. 3. 47. S P. with a Traverse that he was his Bailiff.

Br. Account, pl. 21. cites 49 E. 3. 7.

7. It is no Plea in Bar of an Account that the Plaintiff was indebted to the Defendant in the same Sum, and that the Plaintiff granted that the Defendant should retain it in Satisfaction of his Debt, for he confesses the Receipt, and so once accountable. * 12 H. 4. 18. 14 H. 4. 20. b. * Br. Accompt, pl. 31. cites S. C.

8. So it is no Plea that he deliver'd the Money to a Stranger by the Command of the Plaintiff. * 12 H. 4. 18. † 19 H. 6. 5. b. * Br. Accompt, pl. 31. cites

S. C ——— † S. P. for there he was once accountable. Br. Accompt, pl. 43 cites S. C. ——— It seems it.

it is no Plea in Bar of the Account, but it ſhall be allow'd him on his Account before Auditors. See 1 E. 3. 1. cited by Coke Ch. J. and agreed to per tot. Cur. as to Money disburs'd by Command of the Plaintiff. 2 Bulſt. 277. Arg. in Caſe of the Earl of Suffolk v. Floyd.

See tit. Churchwardens (A. 2) S. C. — Vent. 88. Trin 22 Car. 2. B. R. Tarleur and Kens v. Parker S. P. as to a Bell deliver'd to the Bell-founder, who kept it until he ſhould be paid. The

9. In an Account by the Churchwardens of a Pariſh againſt their Predeceſſors, Wardens, to render an Account of a Bell received, and of certain Stones, it is not any Plea in Bar that they took the Bell (being ruinous) by the Conſent of the Pariſhioners, and carried it to a Bell-founders, and that it was agreed that he ſhould have 4 l. for the caſting thereof, and ſhould retain the Bell till Satisfaction of the 4 l. whereof he is not yet ſatisfied, and that they took the Stones, and with part of them repaired a ruinous Window of the Church, and the Reſidue they retain'd to themſelves by Agreement between them and the Pariſhioners, in Satisfaction of their Expences, in the Reparation of the ſaid Windows; For they were once accountable, tho' it was before theſe Wardens were made, and then this Plea is only in Diſcharge before Auditors. Mich. 37. 38 Eliz. B. R. between *Mathold and Winn* adjudged.

Plaintiff demurr'd, for that this Plea is no Bar of the Account, but a good Diſcharge before Auditors. It was anſwer'd on the other Side that the Matter pleaded ſhew'd that the Defendant never was accountable, and therefore it might be in Bar. But the Caſe here of Mathold and Winne being cited as adjudg'd to the contrary, the Court now was of the ſame Opinion. —— Mod. 65. pl. 11. Taylor v. Route S. C. and it was inſiſted, that *wherever the* Matter or *Cauſe of the Account is taken off, the Plea is good in Bar*, but the *Action was brought for taking away Bona Eccleſiæ and not Bona Parochianorum* as it ought to have been, and therefore the Court *order'd* to amend all and *to plead de Novo.* —— Keb. 675. 704.

Br. Account, pl. 31. cites S. C. but S. P. does not appear.

10. But if the Defendant does not by his Plea confeſs himſelf ever accountable, this will be a good Plea in Bar. 12 H. 4. 18.

* Br. Account, pl. 31. cites S. C. and P. for there he was never accountable. —— A Gift after the Receipt is a good Plea per Brian, which Vaviſor denied; for the contrary thereof was adjudg'd 27 H. 6. and affirm'd in Writ of Error, quod nota. Br. Accompt, pl. 75 cites 21 E. 4. 66. —— See (N) pl. 13.

11. It is a good Plea that the Plaintiff gave him the Money, and ſo he received it as his own proper Money. 30 H. 6. 6. * 12 H. 4. 18.

Br. Account, pl. 34. cites S. C. but S P. does not appear.

12. So in Account for Goods it is a good Plea that he aſſign'd to him the Goods in Satisfaction of a Debt due to him by the Plaintiff, for the Aſſignment was made upon the firſt Delivery, and ſo he was never accountable for them. 14 H. 4. 20. b.

13. So in Account as Receiver by the Hands of A. it is a good Plea that A. owed the Money to the Plaintiff, and the Plaintiff was indebted in ſo much to him, and the Plaintiff aſſign'd to him the ſaid Sum in Payment of his Debt, and ſo he received it of A. and not to render Account. 16 E. 3. Account 53.

14. In Account *againſt a Feme* as Receptor' denar' &c. She *ſaid that by all this time ſhe was Covert* with ſuch a one &c. And held a good Plea to the Action. Thel. Dig. 119. lib. 11. cap. 2 S. 2. cites Hill. 6 E. 3. 244. but ſays ſee 18 H. 6. 3. where it was *replied that ſhe was Executrix to another at this time.*

15. Account as Receiver by another Hand. Paſton, you have a *Deed witneſſed of the Receipt*; Judgment ſi Actio without ſhewing the Deed. And per Rolf, this Matter *and a Gift goes in Diſcharge of the Account.* Per Babb. if the Defendant ſhall not have this Plea he ſhall be doubly charged; for at another time he ſhall have other Action upon the Deed, as in Debt upon ſimple Contract, it is a good Plea that he has thereof an Obligation; for the one determines the other, and becauſe Paſton had accepted the Count good before, he was compell'd to anſwer over, by which he pleaded the ſame Matter in Bar, and demanded Judgment ſi Actio; quære Cauſam. Br. Accompt, pl. 60. cites 1 H. 6. 7.

16. *Debt*

16. *Debt upon Arrearages of Account*; the *Defendant ſaid, that ſuch a Day, a Month after the Account, the Auditors committed him to Priſon, and ſo he was in Execution.* And no Plea unleſs he had *ſaid, that the Auditors committed him* to Priſon *immediately*; for after, viz. if it be the ſame Inſtant, their Power is determined; and from hence it ſeems that if he had been committed immediately, it had been good Execution, and ſo good Bar of Account. Br. Execution, pl. 135. cites 27 H. 6. 8.

17 In *Account* the *Defendant ſaid that the Plaintiff aſſign'd to him two Auditors before whom he accounted at D. in another County*, and the *Plaintiff ſaid that after the Aſſignment, and before the Account, he diſcharged the Auditors at S. in this County where the Action is brought*, and a good Replication. Br. Replication, pl. 53. cites 18 E. 4. 26. Br. Confeſſ. and Avoid. pl. 51 cites S. C. accordingly.

18. In *Account*, the *Defendant ſaid that they were bailed to him to deliver over to J. S. which he had done*; Judgment &c. The *Plaintiff ſaid, that after the Delivery to the Defendant, and before the Delivery over, he commanded him to bail it to him*; and a good Replication, by the beſt Opinion; for by the Delivery to the Defendant J. S. has no Property in it, and therefore the Plaintiff may countermand it, and yet by this Delivery to Defendant J. S. may have Action of Account, if it be not countermanded. Br. Replication, pl. 65. cites 1 E. 5. 2.

19. In Account brought *by a Feme, it was pleaded that ſhe was Covert* with ſuch a one *at the time of the Receipt* &c. and ſhe *replied, that then ſhe was Executrix of the Teſtament of ſuch a one*, and that the Money belong'd to her Teſtator. And the Opinion of Brian was againſt the Plaintiff. Thel. Dig. 120. lib. 11. cap. 2. S. 15. cites Hill. 2 H. 7. 15.

20. In Account *againſt Defendant as Bailiff of his Manor, and that he had Adminiſtration of Goods* &c. Tho' it be *found that he was not Bailiff* of the Manor, *but that he had the Adminiſtration of the Goods*; yet the Opinion of the Court was that ſhe ſhall account for the Goods; for he can have no other Writ, and *ſuppoſing in the Writ that the Defendant is his Baily, are only Words of Form*; for he cannot have a Writ De tempore quo fuit Receptor Bonorum, and therefore in this Caſe, tho' it be found that he is not his Bailiff, yet he ſhall account of the Goods. And tho' the contrary of this was adjudg'd Hill. 49 E. 3. 14. and Mich. 14. H. 4. 14. yet 20 R. 3. [E. 4] pl. the Opinion of Catesby is with this Book, and ſo the Opinion is at this Day that the firſt Plea does not go to the whole; for if he had the Care of my Goods, as Wine to ſell and the like, I cannot have other Writ. And the like Matter is 6 H. 7. 7. and 2 R. 3. 3. Kelw. 114. a. b. pl. 51. Caſus incerti Temporis, Anon

21. *Judgment in Account as Receiver* is no Bar in *Account as Bailiff.* Arg. 2 Lev. 126. cites Co. Litt. 172. a. Roll. Abr. Account (F) pl. 9. (B) pl. 2. 4 H. 6. 27. a. 43 E. 3. 4. b. 46 E. 3.

22. In Accompt the Defendant pleaded in Bar, *that upon Receipt of the Money he gave the Plaintiff a Bill under his Hand for it*, and no good Plea, becauſe it is only Evidence of the Account. D. 20. b. pl. 122. cites it as adjudg'd 1 H. 6. 7.

23. If an *Infant ſues his Guardian for Money*, and recovers, and the *Guardian brings the Money into Court*, and depoſites it there, this is a good Diſcharge againſt the Infant, and he ſhall not anſwer the Suit again in an Account. Agreed per Cur. Godb. 214. pl. 306. Mich. 11 Jac. C. B.

24. Quantum Meruit for 40 s. and Indebitatus Aſſumpſit for 40 s. likewiſe, the Defendant acknowledg'd the Promiſes; but ſays that the Plaintiff and he accounted together for ſeveral Sums of Money, and that thereon Defendant was indebted to Plaintiff in 30 s. and that Plaintiff in Conſideration that Defendant promiſed to pay him the 30 s. *diſcharg'd* him of all Demands. Upon Demurrer the Court held That if two Men, being mutually indebted, do account together, and one is found in Arrear ſo much, and there be *an expreſs Agreement to pay the Sum found to be in Arrear*, 2 Mod. 43. S. C —— Freem. Rep. 195. pl. 202. S. C. and North Ch. J. ſaid that he always took the Law to be

that a Promise might be discharg'd by Parol before it was broke, but not afterwards, because then the Plaintiff is intitled to an Action. But the Reporter says that Mr. Townsend told him that Judgment was afterwards given for the Defendant, by reason of the Account.——S. C. cited 12 Mod. 534. and Ibid. 538. Holt Ch. J. said that if there be 2 *Dealers*, and *without coming to an Account* they *agree to be clear against each other*, it would not be well without coming to an Account; and that as to the Case cited out of the Mod. Rep. that it was the first of this Kind, and by his Consent it should be the last.

rear, and each to stand discharg'd of all other Demands, that this is a good Discharge in Law, and the Parties cannot resort to the original Contracts. But per North Ch. J. if there be *but one Debt between them*, entring into Account for that will not determine the Contract. Mod. 205. Trin. 27 Car. 2. C. B. Milword v. Ingram.

(M) What Pleas bar an Account. And what not.

* The Case of Speaks v. Hungerford.—So he cannot give a Release in Evidence upon such Issue. Brownl. 24. Willoughby v. Small.

1. IF A. delivers Money to B. to deliver over to C. ex dono, or ex commodato, and after A. brings Account against B. if he pleads Never his Receiver &c. he cannot give in Evidence the Delivery over; for he ought to plead it Specially. Mich. 13 Jac. B. * D. 3 Eliz. 196. 43.

S. P. by Roll Ch. J. Sty. 355. Mich. 1652. in Case of Baynton v. Cheek Arg. * Br. Accompt, pl. 47. cites S. C.—Br. Traverse per &c. pl. 296. cites S. C.

2. It is a good Plea, That it was deliver'd to deliver over, to whom he hath deliver'd it accordingly, because he was never accountable for it but conditionally, scilicet, if he did not deliver it over. D. 3 Eliz. 196. 43. * 22 H. 6. 49. Per Curiam. 1 E. 5. 2. b. 21 H. 7. 34. 21 E. 4. 55. b. † 41 E. 3. 31. ‡ 21 E. 4. 67. || 19 H. 6. 5. b. Adjudg'd. ** 9 E. 4. 15. b. Per Curiam. H. 7 Jac. B. per Curiam. Contra 14 E. 3. Account 68.

† Br. Accompt, pl. 12. cites S. C. That it was held a good Plea in Discharge upon the Action, but not in Bar, by the best Opinion.

‡ Br Accompt, pl. 75. cites S. C. per Brian, That it is a good Plea without traversing; For he has confess'd himself accountable conditionally, which Choke, Nele, and Vavisor denied; for the contrary has oftentimes been adjudg'd.

|| Br. Accompt, pl. 43. cites S. C. and he shall not be compell'd to Account, and to plead it in Discharge of the Account, because he was never accountable as here; but where he delivers it to one to render Account, and after commands him to deliver it, or Part thereof, to J. N. which he does, there it is no Plea in Bar; for there he was once accountable. Contra above.

** Br. Accompt, pl. 54. cites S. C.

†† Br. Traverse per Sans &c. pl. 125. cites S. C.

3. So it is a good Plea in Bar that it was deliver'd to him to get the King's Patent for the Plaintiff. of the Custom of certain Goods, which he had done before the Writ purchased; for he was not accountable but conditionally. 30 H. 6. 5. b.

4. In an Account against another as Receiver by the Hands of J. S. it is no good Plea in Bar that he was the Plaintiff's Servant, and received the Money of J. S. to deliver to the Plaintiff, the which he did accordingly. 29 E. 3. 20.

S. P. 2 Bulst. 31. pl. 36. Arg. accordingly; but said that it is a good Plea in Discharge of Account before Auditors for that Matter after the Bailment, and not upon the Bailment.—See (L) pl 8. and the Note there.

5. If a Man delivers Money to another to deliver to him again, and after he commands the Bailee to deliver it to a Stranger, and he does it accordingly, yet this Matter shall not be any Bar in an Account. 1 E. 5. 2. b. because he was accountable at first. H. 7 Jac. B.

6. In

6. In a Writ of Account as Receiver by the Hands of J. S. it is not any Plea in Bar that he received it of J. S to deliver to the Plaintiff, to whom he had deliver'd it accordingly; for this is but a Payment. * 9 E. 4. 16. b. per Choke. Contra 2 R. 2. Account 45. * Br. Accompt, pl. 54. cites S. C. but S. P does not appear.

7. In Account as Receiver, it is a good Plea in Bar that it was deliver'd to him to carry to London to a Banker to make Exchange, and to receive Bills of Exchange, and to send them to the Plaintiff, which he had done accordingly &c. For this is tantamount that he never was his Receiver to render an Account; for this was deliver'd to him to exchange, and not to render Account. 5 H. 5. 5. Curia.

8. [So] In Account as Receiver, it is a good Plea that he accounted before Auditors assign'd by the Plaintiff. 30 E. 3. 1. b. Issue thereupon 5 b. Adjudged 29 E. 3. 28. 26 E. 3. 76. F. N. B. 117. (D) in the new Notes there (d) S. P. For the Action of Account is gone. Cites 7 H. 4. 14. and 34 H. 6. 43.

9. So it is in Account as Bailiff. 30 E. 3. 1. b.

10. In Account as Receiver, it is a good Bar that he hath accounted before to the Plaintiff himself; for thereupon he may have an Action of Debt. * 45 E. 3. 14. b. 7 H. 4. 14. b. 30 E. 3. 5. b. Adjudg'd 39 E. 3. 5. b. 34 H. 6. 44. Curia. † 21 E. 4. 66. b. 16 E. 3. Account 52 contra. 22 E. 3. 13. b. adjudged. * Br. Accompt, pl. 16. S. C.—— † Br. Accompt, pl. 75. cites S. C.— S. P. per Cur. and yet a Man cannot be his own Judge. Br. Accompt, pl. 9. cites 34 H. 6. 43.

It was awarded a good Plea; for by the Account before any Auditors, or before the Plaintiff himself, the Action is alter'd into another Nature; for he may have Debt upon the Arrearages, and the Account is determin'd for ever. Br. Accompt, pl. 28. cites 7 H. 4. 14.—S. C. cited, and other of the Cases here mention'd; and also 4 E. 4. 6. Arg. Saund 49. That if the Defendant of his own Gree *accounts before the Plaintiff himself*, the Account shall be good; and Ibid. 50. the same was agreed to by the Court.

The Plea to the Account was *That he had accounted before the Plaintiff in Cumberland* &c. which was objected to be a Foreign Plea, and therefore was refused, and Judgment was mark'd; quod computet. It was moved that the Plea was good, and cited the Cases of 45 E. 3. 24. and 34 H. 6. 23. and thereupon praying an Allowance. Doderidge said that here is no Mischief, because it is a good Plea before Auditors that he accounted at another Time before the Plaintiff himself; whereupon by Crew, Doderidge, and Jones the Judgment was rul'd to stand. Lat. 59. Pasch. 1 Car. Hopton v. Offal.

In Account it is a good *Plea that the Defendant fully accounted before the Plaintiff himself at B.* so to say that he fully accounted to the Plaintiff, or before the Plaintiff, by the Opinion there. Br. Accompt, pl. 67. cites 4 E. 4. 6.

11. In an Account against a Husband, it is a good Plea in Bar for him to say that his Wife was a common Taverner, and that the Plaintiff deliver'd the Tuns of Wine (for which the Account is now brought) to his Wife to sell for him, without the Assent and Agreement of the Husband, and she sold them accordingly, and deliver'd the Money to the Plaintiff; it seems it is intended that she was not a Taverner by the Assent of her Husband. 13 R. 2. Account 50.

12. In Account against a Man as Receiver, it is a good Plea that he was within Age at the Time of the Receipt. 21 E. 3. 8. Admitted by Issue. 16 E. 3. Account 52.

13. In an Account against another, as Bailiff of his Manor, it is a good Bar of the Account, that the Plaintiff was a Disseisor, and the Disseisee hath re-enter'd. 21 H. 7. 34. Per Brudnel. Br. Account, pl. 59. cites 21 H. 4 36. S. C.

14. *Account in N. and B.* Clayn said *B. is a Franchise*, Judgment of the Writ; for the Bailiffs may demand Conusance of Plea; but if they do not demand it, the Defendant cannot plead it. Br. Brief, pl. 477. cites 39 E. 3. 17.

15. In *Account for Malt*, the Defendant *pleaded that the Plaintiff had formerly brought Trover and Conversion for this and other Malt* against him, and that he was *found Guilty as to Part, and Not guilty as to other Part, and Damages assess'd.* Adjudg'd that this was no Bar; for it might well be, that he did not convert the Malt as the first Action suppos'd, and

yet he ought to account as this Action ſuppoſes. Mo. 463. pl. 653. Hill. 36 Eliz. Mortimer v. Wingate.

(N) What ſhall be a good Plea in Bar.

See (M) pl. 1. and the Notes there. ——If a Man is my *Receiver* by other Hands, and *I releaſe to him all Manner of my Receipts*, it is a good Bar; for the Receipt by other Hands is my own proper Receipt. Br Account, pl. 77. cites 10 E 3. 7.

But if A. be accountable to B and B. releaſes to him all his Duties, this is no Bar in an Action of Account; for Duties extend to Things certain, and what ſhall fall out upon the Account is uncertain; and albeit the Latin Word is Debita, yet Duties do extend to all Things due that are certain, and therefore diſcharges Judgments in perſonal Actions and Executions alſo. Co. Litt. 291. a.

1. IN an Account it is a good Plea in Bar of the Account, that the Plaintiff hath releaſed to him all Actions. 22 H. 6. 55. b. agreed 14 E. 3. Account 73. 33 E. 3. Account 130.

2. So it is a good Plea in Bar, that the Plaintiff hath releaſed to him all the Advantage and Profit that he might have by the Account. 9 E. 4. 46. ſaid by Moyle to have been adjudged.

But it is not a good Plea before Auditors.——See (O) pl. 29. Taylor v. Page.——*Debt upon Account*, the Plaintiff *counted before Auditors*, the *Defendant pleaded Arbitrement*; and becauſe in this Caſe before Auditors Wager of Law does not lie [the Plea was held not good.] Contra upon other Account, for the Action is now in manner of Record; and yet the Stat. of Weſt. 2. 11. does not give; but that if they be found in Arrears they ſhall be committed to Ward irrepleviable; therefore for Inſufficiency of the Plea the Plaintiff recover'd his Debt. Quod nota. Br. Account, pl. 52. cites 4 H. 6. 17.

In Account of a Receipt by other Hands, *Arbitrement that the Defendant ſhall pay ſuch a Sum in Satisfaction of all Receipts, by which he had paid at ſuch a Place*, is a good Plea by the beſt Opinion; and yet the Defendant in Receipt by other Hands cannot wage his Law. Quod nota. Br. Account, pl. 46. cites 22 H. 6. 39.

3. So it is a good Plea in Bar, that they have ſubmitted to the Award of J. S. who awarded that the Defendant ſhould be acquitted againſt the Plaintiff. 22 H. 6. 55. b. for this is as ſtrong as a Releaſe.

Br. Account, pl. 48. cites S. C. that it is a good Bar, and not only in Diſcharge of Account Per Cur.

4. So it is a good Plea in Bar, that after the Receipt of the Sum of which the Account is demanded by the Mediation of their Friends, it was agreed between them that the Defendant ſhould make an Obligation of 100 l. for the 100 l. received, and the Profit to ariſe from the ſaid 100 l. which Obligation of 100 l. he made and deliver'd accordingly to the Plaintiff; for the Acceptance of the Obligation deſtroys the Duty, and ſo the Sum in Demand is as ſtrongly thereby releaſed, as by a Releaſe of all Actions. 22 H. 6. 55 q. Curia.

4. But it is no good Plea, that it was agreed that he ſhould make an Obligation of 100 l. for the 100 l. received, which he did accordingly, becauſe the Accord is not that the Obligation ſhall be made for the 100 l. and the Profit to ariſe from it; for the accepting the Obligation, is not a Diſcharge of the Profit ariſing as well as of the Principal, but he is accountable for the Profit. 22 H. 6. 55. b. Per Newton.

6. So it is no good Plea in Bar of an Account, that the Plaintiff accepted a Statute Merchant from him of the ſame Sum in Demand, in Satisfaction of the ſaid Sum, and a Tun of Wine in Satisfaction of the Damages; for here 'tis expreſs'd that the Statute ſhall not be a Diſcharge of all. 39 E. 3. 4. b. 23. admitted; for there 'tis pleaded before Auditors.

7. 'Tis

7. 'Tis a good Plea in Bar, that the Plaintiff granted by Indenture, that if the Defendant did ſuch a Day acknowledge a Statute Merchant to the Plaintiff, that the Writ of Account ſhould be taken as null &c. and that he acknowleged the Statute to him &c. accordingly; for thereby the Account is releaſed. 20 E. 3. Account 79. agreed.

8. But if he ſays he did acknowlege the Statute, the Plaintiff being abſent, and that he did deliver it to the Clerk of the Recognizances, and after carried it away with him, this is no good Plea; for the Plaintiff is not ſure of the Statute till Delivery thereof to him. 20 E. 3. Account 79. adjudged.

9. If the Defendant pleads the Plaintiff's Acquittance of the Sum demanded, this is not any Plea in Bar of the Account; for by this Plea he acknowledges that there was a Duty once, and a Diſcharge ſubſequent by Payment. 22 H. 6. 55. b. 21 H. 7. 34. 14 E. 3. Account 74. admitted, for this is pleaded before Auditors. Contra 21 E. 3. 47. 27 E. 3. 79. b. In Account the Defendant pleaded Acquittance in Bar. Per Fineux, if one be once charged to account, and has a Matter in Diſcharge of later Time, this goes in Diſcharge of the Account; but if a Man bails Goods to bail over, which he does, this is in Bar &c. Br. Account, pl. 59. cites 21 H. 7. 36.

10. So in an Account of 100 l. it is no good Bar that he deliver'd to the Plaintiff 20 Woollen Cloaths, in full Satisfaction of the 100 l. and 2 Ton of Wine, in Satisfaction of the Profit, of the ſaid 100 l. which Things the Plaintiff accepted in Satisfaction of the 100 l. and the Profits thereof; for this is but a Payment. 22 H. 6. 55. b. This Plea is in Diſcharge of the Account upon the Account, and not in Bar; for the Judges are Judges of the Action, and not of the Account, but the Auditors are Judges of the Account. Br. Account, pl. 48. cites S. C. Per Newt. and Aſhton.

11. So in an Account for 100 l. it is no good Plea in Bar that ſuch a Day &c. he put the Money into a Bag tied up, and offered it to the Plaintiff, and he agreeing to the Offer, did will and grant that he ſhould retain the ſaid Money as his own proper Money, in Satisfaction of ſuch a Sum, in * which he was indebted to the Defendant; and therefore he took the Bag with the Money, in Satisfaction as before &c. for this is but a Payment. † 28 H. 6. 7. adjudged Per Curiam, but a Writ of Error was brought. ‡ 12 H. 4. 18. * Br. Account, pl. 7. cites S. C. — † Br. Account, pl. 31. cites S. C. ‡ Fol. 124.

12. So in Account for certain Tin received, it is no Plea in Bar that he ſold the Tin to J. S. and took an Obligation for it in the Name of the Plaintiff; for it is only in Diſcharge. D. 28 H. 8. 29. 193. S. C. cited by Williams J. Bulſt. 103. — In Account the Plaintiff declar'd that he *deliver'd* the Defendant *ſo much Cloth to ſell at B. in Spain.* The Defendant *pleaded that he ſold the ſame* at B. in Spain, in November, *for* 40 *l.* Engliſh, *to be paid in May next*; *and alleg'd the Cuſtom of Merchants, that if any Merchant had Goods in that Kingdom to be ſold to another Merchant, and he ſells them to be paid at a Day to come, and this done before a publick Notary, and thereby a Bill ſign'd to him, and in his Name who ſold the Goods*; *and if ſuch Seller delivers to the Owner of the Goods ſuch Bill, this ſhall be a Diſcharge to him* of the Goods; and aver'd that he ſold to a Spaniſh Merchant, and took a Bill accordingly, and at London offer'd that Bill to the Plaintiff, who refuſed it. The Plaintiff demurr'd, and adjudg'd for him by Hobart and Winch being only preſent. Win. 52. Mich. 20 Jac. C. B Dodderidge v. Anthony. — And Ibid. Hobart Ch. J. ſaid, that the Cuſtom as alleged is too large: but *if he had alleged that ſuch Bill taken by the Factor ſhall be as good and effectual to the Maſter as if it had been taken in his own Name*, this had been good.

13. So it is not any Plea in Bar of the Account that after the Receipt of the Money the Plaintiff gave him the Money; for he acknowledges himſelf once accountable. (It ſeems if this Gift had been by Deed, it would amount to a Releaſe of the Duty, and then it ſhould be a good Plea, but without Deed it cannot be any Releaſe, and therefore it is no good Bar.) 21 E. 4. 67. Adjudged. See (L) pl. 11. — In Account the Defendant pleaded that after his Receipt of the Goods, for which the Action of Account is brought, and which Receipt made him liable to render an Account,

count, the Plaintiff made a Gift of the ſaid Goods to the Defendant. This was adjudg'd no Bar; but a good Plea before Auditors. Adjudg'd and affirm'd in Error, Jenk 136. pl. 79.——A. bails Goods to B. to bail to C. who does ſo. This is a good Bar in Account brought by A. againſt B. For here originally was no Account to be render'd; but in the principal Caſe, before the Gift, the Defendant was accountable. Jenk 136. pl. 79.

In Account *againſt the Defendant as Receiver of his Money by the Hands of a Stranger*, the Defendant *pleaded in Bar a Gift of the Money to him afterwards by the Plaintiff*. It was admitted to be a good Plea before Auditors; but the Queſtion was if it was ſo in Bar of the Account. And Warburton J. being only preſent, held it good in Bar; for by the Gift it is his own Money, and therefore may plead it in Bar. Win. 9. Paſch. 19 Jac. Harrington v. Harrington.

See (M) pl. 7

14. **So it is no Plea in Bar** that after the Receipt the Plaintiff commanded him to carry the Money to London to a Banker, to make Exchange **thereof**, and to receive Bills of Exchange to ſend them to the Plaintiff, the which he had done accordingly **&c. For this is only in** Diſcharge **of the Account.** 5 H. 5. 5.

Br. Accompt, pl. 55 cites S. C.——Account from the Time that he was Receiver of Money &c.

15. **It is no good Plea in Bar of the Account** that he was robb'd **of the Money by certain Felons; for if this ſhould excuſe him, it ought to be pleaded before the Auditors.** 9 E. 4. 40. b. **Curia.**

16. **So it is no Plea** that he received it to carry, and was robb'd of that and other his Goods. **Contra** 22 E. 3. **Account** 111.

Per Cat the *Receipt was upon Condition that if the Defendant came ſafe with the Money to the Camp at Northampton, that then he ſhall Account, and otherwiſe not*; and *ſaid that he was robb'd* of the Money *before he came to the Camp* &c. *abſque hoc that he was his Receiver in any other manner*. Per Littleton, This is in Diſcharge, and not in Bar; but it was held a good Plea in Bar. Quod nota, quære if he ſhall take the Abſque hoc. It ſeems that he ſhall. Br. Accompt, pl. 69. cites 5 E. 4. 4.

Debt upon *Bond to account* for Money. Defendant *pleaded that he did Account*. The Plaintiff *replied that ſuch a Day the Defendant received* 26 *l. for which he has not accounted*. The Defendant *rejoin'd that he accounted* thus, *viz. that certain Thieves broke open his Counting-Houſe, and ſtole the Money, whereof he gave the Plaintiff Notice*. And the Court held this an Account, and no Departure. 2 Lev. 5. Paſch. 23 Car. 2. B. R. Vere v. Smith.——Vent. 121. S. C. adjudg'd for the Plaintiff.——2 Keb. 761. pl. 30. S. C. and held accordingly per Cur.——Ibid. 779. pl. 8. ſays that Judgment was for the Plaintiff, Niſi the Robbery be tried. But Ibid. 780. pl. 52. ſays that the Rule for Trial of the Matter being diſobey'd, the Court gave the Plaintiff Leave to diſcontinue, the Robbery being a good Bar.——S. C. cited, and allow'd for Law. 6 Mod. 139. Paſch. 3 Ann. B. R.

17. *Plene Computavit* is a good Plea in Account, therefore it ſeems that where the Plaintiff had had Account, he ſhall never have Account of it again. Br. Accompt, pl 10. cites 41 E. 3. 3. 9.

18. *Payment to the Plaintiff or a Stranger* is a Plea in Diſcharge, and yet may be pleaded in Bar. Raym. 57. Arg. cites Raſt. Ent. 16. 19 H. 6. 5.

19. Account *of the Receipt of* 100 *Marks, to render Account at P. in London*; he *ſhall not plead that the Plaintiff deliver'd to him the* 100 *Marks at S. in the County of E. to deliver to J. S. which he has done, without traverſing the Receipt in London*; but it is a good Plea that he received the 100 Marks in London to deliver to J. S. which he has done without Traverſe. Note a Difference per tot. Cur. For if he has not deliver'd it over, he is accountable. Br. Accompt, pl. 47. cites 22 H. 6. 49.

20. The Defendant in Account as *Receiver ſaid that at another Time, in* Writ of *Account of the ſame Receipt, he was adjudg'd to Account at the Suit of the ſame Plaintiff* &c. And per Danby and Moyle, it is no Plea; for if he *has not taken Execution*, he may have a new Action. Contra per Litt. & Choke; for the Nature of the Action is chang'd by the Judgment from Matter in Fact to Matter of Record. Quære. Br. Accompt, pl. 57. cites 9 E. 4. 50.

(O) What shall be a good Discharge [or Plea] *before Auditors.*

1. IT is a good Discharge before Auditors for a Factor to say that in a Tempest, because the Ship was surcharg'd, the Goods were flung into the Sea. Dubitatur 41 E. 3. 4. Br. Accompt, pl. 10. cites S. C.

2. It is no good Discharge before Auditors that he was robb'd of the Goods by certain Felons. Dubitatur 9 E. 4. 40. b. Br Accompt, pl. 55. cites S. C.——

S P. held by Popham to be a good Plea; but Gawdy e contra. Mo. 462. pl. 650. Hill. 39 Eliz. Woodliff's Case.——Ow. 57. Hill. 38 Eliz. Anon. S. C. Gawdy held it no Plea in Bar, because he has confess'd himself accountable by the Receipt; nor any Plea before Auditors. But Popham held it a good Plea before Auditors.

3. It is a good Discharge before Auditors that he was robb'd of the Goods, without his Default, or Negligence. Co. Litt. 89. 4 Rep. 84. a. it was said by the

Court, Arg. in Southcot's Case, that in Account it is a good Plea before Auditers that he was robb'd, as appears by 12 E. 3. Account 111. 41 E. 3. 3. & 9 E. 4. 40. and if the Factor did his best to save them, he shall be discharg'd.——See (N) pl. 15. 16.

4. It is a good Discharge before Auditors in Account, as Receiver of 10 l. if he tenders the 10 l. and swears upon a Book that after the Time that the Money was deliver'd to him, that he found nothing that he durst to buy for fear of Loss; for he is not bound to buy so as to lose, for he himself shall bear the Loss, and not the Plaintiff. 46 E. 3. Account 40. Br. Accompt, pl. 66. cites S. C.

5. (It seems a Receiver is not bound to buy and sell, and therefore it seems it is intended that he was a Receiver to Merchandize.)

6. And in this Case the Plaintiff shall not be received to aver contrary to his Oath. 46 E. 3. Account 40. Br Accompt, pl. 66. cites S. C.

7. If Goods and Merchandizes are shipp'd in a Ship to be sold in Barbary, and deliver'd into the Custody of a Bailiff, ad Merchandizandum & Vendendum according to his Discretion, and thereupon he goes with the Ship and Merchandizes to Algiers in Barbary, and there desires Leave to trade; but before he can obtain it, the said Town surprizes them with Ships of War, upon Pretence of Damages received by them, and the English before; upon which, for the Redemption of the Ship and Merchandizes in the same Ship, by Composition between the Merchants of the said Ship and the said Town, he and all the other Merchants were compell'd to pay so much &c. and so the Average upon all the Goods in the said Ship did amount unto * 671 per Cent. for their Redemption, and according to this Rate the Average for the said Goods amounted to so much &c. for which he prays Allowance, this is a good Discharge before Auditors, because this was done for the Preservation of the Residue. Mich. 9 Car. B. R. between *Brown and Robinson*, per Curiam. But Judgment was given against the Defendant for another Matter. Intratur, Mich. 8 Rot. 186. * Fol. 125.

8. If a Bailiff of a Manor pays the Relief of his Master to the Lord to whom it is due, he shall be allow'd this upon his Account, tho' he had no Warrant from his Master so to do, because this is a casual thing of common Course. 41 Edw. 3. Account 33. Curia. F. N. B. 116. (Q) in the new Notes there (c) S. P. accordingly.

9. But if a Bailiff pays a thing that is not casual of common Course without Warrant from his Lord, he shall not have Allowance thereof upon his Account. 41 Edw. 3. Account 33. Curia.

Brownl. 25. in a Nota there accordingly. See pl. 20.

10. If a Factor buys certain Things for 20 l. which are not worth 12 d. tho' he did as well as he could, yet he shall not be allowed for so much upon his Account. 41 Edw. 3. 9. b. † 46 Edw. 3. Account 40.

* So of a Bailiff. Br Accompt, pl. 10. cites S. C. per Finch. ——— Ibid. pl. 66. cites S. C. that if a Bailiff merchandizes and loses, if he does as well as he can he shall not bear the Loss but the Lord, as it is said by some, but contra of Receiver.

11. It is a good Discharge before Auditors that he acknowledged a Statute Merchant to the Plaintiff, in which he was bound to the Plaintiff in a certain Sum, which is as much as the Plaintiff demands, and that he gave another thing in Satisfaction of the Profit thereof. 30 Edw. 3. 4. b. 23 adjudged.

12. If a Man receives Money of J. S. to deliver to J. D. as a Messenger, in an Account against the Bailee, he shall be discharged before Auditors by Tender in Court of the principal Sum; for he is not to account for the Profit thereof in the mean time, tho' he hath detain'd it for a long time, for he did not receive the Money to merchandize but only to deliver over. 2 Rich. 2. Account 45. For he had no Warrant to merchandise with it to gain or lose.

13. So if my Bailiff of my Manor receives the Rents of my Tenants, and retains them for 2 or 3 Years, yet in a Writ of Account he is he is not to account for the Profit coming therefrom in the mean time, for he had not any Warrant to merchandize with them, or to gain or lose. 2 Rich. 2. Account 45.

In some Cases in an Action of Accompt against one as Receptor denariorum, he shall have *Allowance of* his *Expences and Charges*, and also shall *accompt for the Profit he received or might reasonably receive*; and this was provided by Law in Favour of Merchants, and for Advancement of Trade and Traffick. Co. Litt. 172 a.

14. So in an Account as Receiver where he is not to merchandize, he is not to account before Auditors for the Profit after the Receipt.

15. But otherwise where the Receipt was to merchandize, for there he hath a Warrant to gain or lose. 2 Rich. 2. Account 45. 6 Rich. 2. Account 47.

Account lies against him for what he has or might have gain'd by the Occupation. Per Luke J. D. 21. b. pl. 130.

16. So tho' the Receiver retains the Money in his Hands without any Imployment, if he might have imploy'd it for Profit. 2 Rich. 2. Account 45.

* Br. Accompt, pl. 66. cites S. C.

17. But he shall be discharged of the Profit in this Case by his Oath that he could not find any thing to buy by which he might gain. 2 Rich. 2. Account 45 * 46 Edw. 3. Account 40.

Br. Accompt, pl. 66. cites S. C.

18. And the Plaintiff shall not be received to aver contrary to his Oath. 46 Edw. 3. Account 40.

19. In Account as Bailiff Curam habens & Administrationem de quibusdam bonis & Merchandiis, scilicet Cloves ad merchandizandum & proficuum inde faciendum & compotum inde reddendum, he ought to render an Account before Auditors of the Profits made thereof. Mich. 9 Car. B. R. between *Brown and Robinson*, adjudged upon a Demurrer, where it appear'd by the Plea of the Defendant that he had made Profit thereof by Sale, and yet he had accounted but according to the Value at the Receipt thereof. Intratur. Mich. 8 Car. B. R. Rot. 186.

If I deliver Goods to one of the Value of 10 l. to traffick with for my Use, and he sells them for 10 l. I have no Remedy; but if my Bailiff buys a Thing for 10 l. which is not worth it, he shall not be allow'd. Brownl. 25. in a Nota.

20. In Account for Merchandize the Defendant shall be charg'd if he might have gain'd more in such or such a Thing &c. 6 Rich. 2. Account 47.

21. So

21. So my Bailiff shall be charg'd, if he sells a Quarter of Corn for 40 d. when he might have sold it for half a Mark. 6 Rich. 2. Account 47.

22. If a Man delivers Money to another to deliver over to J. S. and he does it accordingly, and after Bailor brings a Writ of Account against him, and he pleads Never his Receiver &c. and this is found against him, because he cannot give this Special Matter in Evidence, inasmuch as he was once accountable conditionally if he did not deliver it over, he shall not after be received to plead this Matter in Discharge before Auditors, because this Plea proves him not to be accountable, which is found and adjudg'd against him. D. 3 Eliz. 196. b. 43. Agreed by several. The Case of Speake v. Hungerford. --In Account against D. for Receipt of 18 l. by the Hands of A. to the Plaintiff's Use, Issue was join'd upon *Ne unques* Receivor Per *Manus* &c. and *found for the Plaintiff*; and the Defendant *pleaded* before Auditors, *that by the Appointment of A. he had paid the Money to J. M. for the Debt of the Plaintiff.* Adjudged an ill Plea, and *contrary to the first Issue*; wherein it was said that he Never was Receiver &c. Hutt. 133. Hughes v. Drinkwater.

23. In an Account, if the Plaintiff declares of a Receipt of 1000 Dollars Monetæ Venetiæ, the Value of each Dollar being 4 s. Monetæ Angliæ quæ in toto se attingunt ad Valorem to so much &c. to which the Defendant pleads Never his Receiver to render Account, upon which they are at Issue, and it is found for the Plaintiff, by which the Defendant is judged to account, the Defendant is not bound to render an Account of the Dollars as they are valued in the Declaration according to the Value there shewn, but he may shew before the Auditors of what Value they were at the Time of the Receipt, and according to this he shall account. Trin. 36 Eliz. B. R. between *Beecher and Smith*, Per Curiam.

24. He cannot allege a Discharge by Matter done beyond Sea, which is not triable here. 41 E. 3. 4. *As* in Account Defendant *said that he bought Jewels in Breteigne for* 400 *l. and* in Breteigne *shew'd them to the Plaintiff, and put them into a Box, and delivered the Plaintiff the Key* of the Box lock'd *in Breteigne, and after delivered to the Plaintiff in A. in England the Box*; and the *Plaintiff said that these which he bail'd to him at A. was worth but* 40 *l.* and after the Plaintiff recover'd 400 l. except 40 l. The Reason seems to be, because the *Buying and Delivery at B. beyond Sea, is not triable here.* Br. Account, pl. 10. cites 41 E. 3. 3. 9.

25. It is no Plea in Bar, *that he bail'd the Money to J. N. by the Plaintiff's Command, but* a good Plea *in Discharge* before Auditors. Br. Account, pl. 31. cites 12 H. 4. 18. Fitzh. Tit. Account, pl. 21. cites S. C. and S. P. by Hull, quod Curia concessit.

26. Account against a Receiver of 20 l. he *said that after the Receipt he married the Sister of the Plaintiff, for which he should have* 20 *l. and the Plaintiff granted to him that he should retain this in full Payment*, Judgment si Actio, and no Plea in Bar of the Account, but it is a good Plea in Discharge of the Account before Auditors. Br. Account, pl. 31. cites 12 H. 4. 18.

27. The *Defendant acknowleged the Receipt, and Auditors were assign'd, and the Plaintiff did not come*, and the *Auditors certified it* to the Court; wherefore they awarded that the Defendant should go quit, for as to this Account he is discharged; but first the *Justices demanded him, and he came not*; and further they awarded that the Warden of the Fleet should permit him to go at large. Br. Account, pl. 45. cites 21 H. 6. 26.

28. Account against W. as Bailiff, who *pleaded Never his Bailiff.* After Verdict, and *Judgment quod computet* upon the Account, the *Defendant shew'd a Discharge*, and so to Issue again, and a *Verdict for the Plaintiff*; and there being a *Demurrer to Part*, the *Defendant shew'd that his*

his Feme had Title of Dower, and enter'd firſt, and enjoy'd as Guardian in Socage; and ſo prayed Allowances of the third Part. It was inſiſted, that tho' Bailiff on Account ſhall have Action for Surpluſage, yet the Receiver or Guardian in Socage ſhall not; and that here the Defendant is charg'd as Bailiff. And per Cur. accordingly, and that this Matter *ſhould have been pleaded*, and it ſhall not be allow'd upon Account; for he has *paſs'd the Advantage* of it. Palm. 512. Hill. 3 Car. B. R. Briggs v. Wilſon.

Het. 114. Page v. Taylor, S. C. accordingly. And by Richardſon, *tho' the Arbitrement was made after the Action* brought,

29. In Account, the Defendant *pleaded Ne unques Receivor*, and found againſt him. Afterwards *before the Auditors he pleaded an Arbitrement for all Accounts, Actions* &c. *and that he was awarded to pay* 10 *l.* only, in Diſcharge of all Accounts, Debts &c. which he paid accordingly. But adjudged for the Plaintiff; for *this* Arbitrement before the Action *ſhould have been pleaded in Bar of the Action*, which is *now too late* to do before the Auditors. Cro. Car. 116. pl. 10. Trin. 4 Car. C. B. Taylor v. Page.

it cannot be pleaded before the Auditors, but he ought to have his Audita Querela.

30. An *Accord with Satisfaction* may be pleaded in Bar of Account, but not in Diſcharge before Auditors; Per Crooke J. to which the Court ſeem'd to agree. Het. 114.

S. C. cited Sty. 410. 411.

31. *B. depoſited* 200 *l. betted on a Horſe-race in the Hands of C. to be delivered to the Winner*, as by Articles between the Parties. C. deliver'd the 200 l. to the other Party, ſuppoſing he had *won* the Wager; whereupon B. brings Account againſt C. as his Receiver. C. as to 100 l. pleaded Ne unques Receiver; whereupon he was adjudg'd to account before Auditors, where he *pleaded* in Diſcharge, *that he had deliver'd the Money to the other that won the Wager.* The Plaintiff *replied that there was foul Play* &c. *and ſo he ought not to have deliver'd the Money.* Roll Ch. J. held the Plea not good; for he *being adjudged to account, implies that the Money was fairly won by the Plaintiff*; and Jerman and Nicholas J. agreed that Judgment ought to be for the Plaintiff. Sty. 353. Mich. 1652. Boynton v. Cheek.

But after Account againſt the Defendant as Receiver, and Judgment quod computet, he *pleaded* before the Auditors, *that he received the Money* of the Plaintiff *to deliver over, which he had accordingly done*; Per Roll Ch. J. if he had pleaded that he had paid it over *by the Conſent of the Plaintiff*, it had been good before the Auditors, and it is a good Plea in Bar if the Money be paid accordingly. Styl. 430. Hill. 1654. Kirk v. Lucas.

32. After Judgment quod computet the Defendant *pleaded* before the Auditors, *that he had delivered over Part of the Money*; upon Demurrer it was inſiſted that this Plea is contrary to the Verdict on the firſt Judgment. And per Roll Ch. J. The Books generally are, that this Plea is in Bar of the Account; but here the Plea of Delivery over has made it a Plea in Bar, and it would be miſchievous to plead it now; for then the ſame Iſſue would be *tried twice*, and ſo there may be contrary Verdicts. Judgment for the Plaintiff. Styl. 410. Hill. 1654. Pendarvis v. St. Aubin.

32. In Account, as Receiver of 20 l. the Defendant *pleaded that Plaintiff delivered it to him to pay over to ſuch Perſons as Sir G. M. ſhould think fit, who awarded it to be delivered over to one H.* &c. *abſque hoc that he was their Receiver*, aliter vel alio Modo. It was found for the Plaintiff, and *Judgment quod computet.* Before the Auditors he *pleaded the Act of Oblivion*; upon which the Plaintiff demurr'd, and the Court ſeem'd to think that the Plea was good enough. Raym. 57. Mich. 14 Car. 2. B. R. Southcot v. Rider.

33. In Account againſt a Bailiff for a *Pearl Necklace*, Defendant pleaded Ne unques Bailiff, and before Auditors pleaded in Diſcharge that he *delivered it over by Appointment to a Goldſmith, on Agreement to ſell or deliver.* Plaintiff replied Non deliberavit. Defendant demurr'd, and well, if the Delivery over had not been alleg'd to be by Agreement; but as it is, the

Demurrer

Demurrer was held frivolous. The Plaintiff alſo *travers'd the Delivery by Appointment*; but the Court held the Appointment not traverſable, the Bailiff having original Power to agree; but the Court ordered an Amendment by Conſent. Keb. 491. pl. 39. Paſch. 15 Car. 2. B. R. Vanganhell v. Brownwick.

35. In Account *Judgment* was given *Quod computet*, then the Defendant *pleaded before Auditors, that the Goods* for which he was to account *were Bona peritura; and* tho' he took Care in keeping them, yet they were much worſe, and that they *remained in his Hands for Want of Buyers, and being likely to be ſtill worſe, he ſold them upon Credit to a Perſon beyond Sea.* Upon Demurrer the Plaintiff had Judgment; for where a Merchant delivers Goods to his Factor ad Merchandizandum, he cannot ſell them upon Credit, unleſs he hath a particular Commiſſion ſo to do. 2 Mod. 100. Trin. 28 Car. 2. C.B. Anon.

34. No Plea which would have been a *good Plea in Bar of the Action*, ſhall be pleaded before Auditors. Agreed. Arg. 10 Mod. 22. Paſch. 10 Ann. B. R. in Caſe of Biſhop v. Eagle.

(P) What will be a good Diſcharge *without Deed.*

1. IF a Bailiff does a Thing that belongs to him as Bailiff, as to pay Rents, or ſuch Things, which are due of Right from the Manor, he ſhall aver this without Writing. 42 Edw. 3. 6. b. 25. Br. Account, pl. 26. cites S. C.

2. So it ſeems he may aver a Payment by Command, which of Right does not belong to him as Bailiff, as that he by Command paid 6l. for the Maintenance of the Plaintiff's Brother. 42 E. 3. 6. b. 25. Br. Accompt, pl. 26. cites S. C and ſays that of a Thing which does not touch his Bailywick, it is not reaſonable that he ſhould have the Averment without Warranty, by which &c. & adjornatur.——Fitzh. Tit. Account, pl. 27. cites S. C. and S. P. by Finch.

3. So if a Man appoints a Stranger or his Servant to receive Money in his Name, and he receives and pays it over by his Command, he may aver this without Deed; for the Stranger is his Servant for the Time. 42 Edw. 3. 24. Fitzh. Tit. Account, pl. 27. cites S. C. and S. P. by Finch.

4. It is a good Diſcharge that the Plaintiff was indebted to him in the ſame Sum, and granted that the Defendant ſhould retain it in Satisfaction of his Debt, without Deed. 12 H. 4. 18. Fitzh. Tit. Account, pl. 21. cites S. C. and that after the Defendant was awarded to Account &c.—— Br. Account, pl. 31. cites S. C. [but in neither of theſe Caſes is any mention of a Deed.]

5. So it is a good Diſcharge that he deliver'd the Money to a Stranger by the Plaintiff's Command. 12 H. 4. 18. Br. Accompt, pl. 31. cites S. C.

6. The Accountant being charg'd as Bailiff of a Manor may aver without ſhewing a Deed or Acquittance, that as to a certain Sum of Money he paid it by the Plaintiff's Command to T. the Plaintiff's Receiver of the ſame Manor; for he cannot oblige him to give a Tallie or Acquittance. 13 Rich. 2. Account 51. adjudg'd.

7. So ſuch Bailiff may, without ſhewing a Letter, Tally, &c. aver that he paid a certain Sum to the Plaintiff himſelf; for he cannot conſtrain his Lord to give Acquittance. 13 R. 2. Account 51. adjudg'd. S. P. Br. Accompt, pl. 13. cites 41 E. 3. 25.—Payment to *the Plaintiff himſelf* was averr'd without ſhewing Deed, and good. Br. Monſtrans, pl. 148. cites 42 E. 3. 25.

8. But in Account against a Bailiff the Defendant can not aver a Delivery over to another &c. without Writing or Tally. 6 Rich. 2. Account 47. per Belknap. (It seems as if this is intended of a voluntary Delivery upon a Bargain between them, without the Command of the Plaintiff.

S. P. Br. Count, pl. 2. cites S. C. but it was not adjudg'd. * It seems misprinted for (adjudg'd.)

9. Account as Receiver of 40 l. by other Hands. The Defendant *said that the Plaintiff had a Deed of the same Receipt; Judgment if without shewing the Deed* &c. as in Debt upon Contract. The Defendant said that he had Specialty. Judgment &c. But the principal Case was not * admitted, therefore quære. Br. Accompt, pl. 2. cites 2 H. 6. 9.

See (K. 2)— These Pleas seem not to answer the Division.

(Q.) Discharge *before Auditors. Who* ought to plead * it.

* This Word (it) seems to be put in by Mistake, and makes the Title not to agree with the Matter of the Pleas, which might be, viz. *Several Accountants, where one shall account alone. And where the Account by one shall affect the other.*

1. If 2 in a Writ of Account are adjudg'd to account, and one is after outlaw'd in the Suit, and the other appears, he shall account alone. † 41 Edw. 3. 3.

Fitzh. Tit. Account, pl. 23. cites S. Case.——Br. Accompt, pl. 10. cites S. C.——Br. Responder, pl. 5. cites S. C. because the Process is determin'd against the other.——S. P. Thel. Dig. lib. 12. cap. 2. S. 19. cites Pasch. 13 E. 3. Brief 263. and says that so it is by way of Plea, and cites Mich. 31 E. 3. Brief 344.——Brownl. 25. in a Nota, S. P. and same Reason, as in Br. Responder.

Br. Accompt, pl. 10. cites S. C.—— Br. Responder, pl. 5. cites S. C.

2. So if he who is outlaw'd be dead. 41 Edw. 3. 3. So if after 2 are adjudg'd to account one dies, the other shall account alone. 41 Edw. 3. 3.

For the Receipt of the one is the Receipt of the other.——Brownl. 25. S. P. in a Nota.

Br. Accompt, pl. 10. cites 41 E. 3. 3. & 9.—— Fitzh. Accompt, pl. 23. cites Hill. 41 E. 3. 3.

3. When 2 are adjudg'd to account, and one is outlaw'd, and [the other] accounts, if he discharges himself upon the Account, this shall be a Discharge to the other when he sues a Scire Facias upon a Charter of Pardon, and if he be charg'd by the Account, this shall be a Charge upon the other, because they were adjudg'd to account jointly. 41 Edw. 3. 13. b.

(R) Account. Inforc'd. How.

The *Mischief before* this Statute was,

1. *Statute of Marlb. 52 H. 3. cap. 23.* Enacts, That *if * Bailiffs withdraw themselves*, as it appears by the Letter thereof, that the last Process in an Action of Accompt was Distress infinite, and the Accomptants seeking Subterfuges did withdraw themselves and become Vagrant, flying to secret Places, sometimes in Foreign Counties, and had no Lands or Tenements whereby they might be distrain'd, so as the Lords were in a manner remediless.

But this Act gives to the Lord a Writ of Accompt, founded upon this Statute, which of the Words of the Writ is call'd a *Monstravit de Compoto*, and begins thus, Monstravit nobis A. quod cum B. Balivus suus &c. and is mention'd in the Register, Fleta, and other ancient Books and Records, and *lies in any County where the Accomptant may be found.* 2 Inst. 143.—— But this Writ ought not to be granted but upon Oath to be made in Chancery. 2 Inst. 144.

* This

* This Statute *extends* not only to Bailiffs according to the Letter, but *to Gardeins in Socage, Receivers and other Accomptants*; but the Statute of Weſt. 2. cap. 11. extends only to Bailiffs and Receivers, and not to a Gardein in Socage; for a Capias lies againſt him by this Statute, but no Exigent by the Stat. of Weſtm. 2. 2 Inſt. 143.

And where ſome have ſuppoſed that the Statute of Weſt. 2. which gives Proceſs of Utlagary in an Action of Accompt, hath taken away either the Effect or the Uſe of this Act, the contrary appears in ſeveral Caſes in our Books. 2 Inſt. 144.

And have no Lands &c. whereby they may be diſtrain'd, they ſhall be attach'd by their Bodies, ſo that the Sheriff ſhall make them come to make their Accompt.

If the Accomptants have *any Lands* or Tenements, whereby they might be diſtrain'd, *tho'* it be *not to the Value of the Account*, yet it ſuffices to exempt them out of this Statute, *but* they muſt have Lands and Tenements *for Term of Life at the leaſt*, and ſo is this Act to be underſtood.

For where after this Statute, and after the ſaid Statute of W. 2. cap. 11. viz. in 4 E. 2. one brought a Writ of Monſtravit de Compoto upon this ſtatute, and counted that he was his Receiver of 100 l. &c in which Action 4 Points were reſolved, 1ſt That our Statute extends to a Receiver as well as to a Bailiff. 2dly, That if the Accountant has any Lands or Tenements, though they be not ſufficient to render the Account, yet he is exempted out of the Statute. 3dly, by theſe Words (Lands and Tenements) is intended an Eſtate of Freehold; and therefore, where it was there found that the Accountant had a Houſe of the yearly Value of 6 s. in the Right of his Wife, who had the Inheritance thereof, but for that it was the *Freehold of his Wife*, and not his Freehold, it *was adjudg'd no Sufficiency within the Statute.* 4thly, It was reſolved that if the Husband had *Iſſue by his Wife*, ſo as ſhe had a Frankteneement for his Life, he had been exempted out of the Statute. And the like Caſe was in 6 E. 2. in Caſe of a Receiver, and many other Authorities and Records there be to that Effect, whereby it appears that both this Act hath ſtill its Effect, and that it was in Uſe after the Stat. of W. 2 cap. 11. and herewith agrees Fleta, who wrote ſoon after the Stat. of Weſt. 2. and that Stat. does confirm this Act, & ſi diffugerit, & gratis compotum reddere noluerit, ſicut in aliis Statutis alibi continetur; by which Words this Stat. is meant. 2 Inſt. 144 ——— Thel. Dig. lib. 12 cap. 60. cites Paſch. 4 E. 2. Briefe 791. ——— And Ibid. cites 6 E. 2. Briefe 806. That if he has no Tenements in the County where the Writ is brought, yet the Writ is good, notwithſtanding that he has Tenements in another County.

But if any ſue out this Writ of Monſtravit de compoto, and *attaches the Accountant's Body where he has Lands and Tenements*, contrary to this Act, in Deceptionem Curiæ contra formam Statuti &c. the Party grieved ſhall have a Writ for his Relief, which appears in the Regiſter. 2 Inſt. 144.

*Weſt. 2. 13 Ed. 1. cap. 11. Concerning Servants, Bailiffs, Chamberlains, and all * Receivers, which are accountable:*

* Receivers were anciently call'd Chamberlains, becauſe they were wont to keep the Money received in Chambers ſpecially provided for that Purpoſe, yet cannot be charg'd *as Chamberlain* in an Account, but as Bailiff or Receiver. 2 Inſt. 380.

When the Maſters of ſuch Servants do aſſign them Auditors to take their Accounts,

An *Account taken before one Auditor*, is not within the Purview of this Statute; for it is in Nature of a Commiſſion, and a Commiſſion being made to two or more cannot be executed by one alone. 2 Inſt. 380.

In *Debt* the Plaintiff *counted that the Defendant aſſign'd Auditors* to him *A. B. and C. B. and that the Plaintiff accounted as Bailiff of his Manor, by which he accounted before them; and it was found that the Plaintiff was not in Arrears, and that the Defendant was in Surpluſage 10 l.* Newton ſaid that nothing was owing to him, and that he was ready to make by his Law; and by the Opinion of the Court the Defendant may have his Law, tho' it be before *Auditors*; for they *are Judges of the Bailiff, and not of the Lord*; for the *Statute is that if the Accountant be in Arrears*, he ſhall not have his Law; ſo that the Statute is all upon the Accountant, and nothing upon the Lord Br. Ley Gager, pl. 62. cites 14 H. 6. 24.

Debt againſt the Lord by Receiver of the Surpluſage, where he has paid more than he received, upon Account before Auditors, the Defendant tender'd his Law. Per Davers J. The Law lies; for the Statute of W. 2. which ouſts the Law, is only for the Lord, and not for the Accountant; and yet by him the Defendant cannot wage his Law, becauſe the *Plaintiff was compell'd to account*; but Priſot was clear that the Law lies, but the Defendant dar'd not demur. Br. Ley Gager, pl. 65. cites 38 H. 6. 6.

By this Act the *Auditors are Judges of Record*, and therefore by Conſequence *in an Action of Debt for the Arrearages* of an Account before 2 or more Auditors, the *Defendant ſhall not wage his Law.* 2 Inſt. 380.

And by the ſame Conſequence of Reaſon, if the *Lord* be *found in Surpluſage* upon the Account determined by the Auditors as an Incident to their Authority in an Action of Debt brought by the Bailiff for this Surpluſage, the Lord *ſhall not wage his Law*, becauſe by Force of this Act (they being Judges of Record) no Wager of Law can be allowed againſt their Record. And ſo was it adjudged in the Exchequer Chamber, as it is reported in 20 H. 6. 8. but if the Account be made before one Auditor, this is out of the Statute. 2 Inſt. 380.

It

It has been several Times rul'd in B. R. and also in C. B. that a common Bailiff cannot wage his Law, but that it is *otherwise of a Receiver*; Per Walmsley J. to which the other Justices assented. D. 183. b. Marg. pl. 60. cites Mich. 42 & 43 Eliz. Sheffield v. Barnsfield.

And tho' in Debt upon Arrears of Account before Auditors, they may *commit the Bailiff to Gaol*, if he be in Arrears, *but not the Lord for his Surplusage*; for the Statute does not so extend. Br. Ley Gager, pl. 7. cites 20 H. 6. 16.——S. P. As to the Lord. 2 Inst. 380.

In an Action of Account against a Receiver for 13 s. 4 d. or any other *Sum under* 40 *s.* the *Sheriff* in his County-Court *shall not hold Plea* of it; because he cannot assign Auditors, who (as has been said) are Judges of Record, and the County-Court is no Court of Record. 2 Inst. 380.

By these Words, if the *Lord* be found in *Surplusage*, it is within their Authority, and therefore Parcel of their Record; and so in that Case no Wager of Law lies. 2 Inst. 380.

And they be found in Arrearages upon the Account, all things [*being*] *allow'd which ought to be allow'd,*

But albeit the *Auditors* do *disallow a just Demand*, yet shall he take no Averment or Advantage upon these Words against the Record of the Judgment of the Auditors; for Judicium pro veritate accipitur, & nemo potest contra recordum verificare per Patriam; but *he has Remedy* after by this Act, *by* a Writ of *Ex parte talis* for his Relief. 2 Inst. 380.

Note, at the Common Law the Process in Account was Summons, Attachment, and Distress infinite, by the Statute of Marlbridge a Writ of Monstravit de compoto was given; and here by this Branch the Body may be arrested; and after by this Act Process of Outlawry is given in Account, so as after the Account determin'd the Body of the Defendant may be arrested &c. 2 Inst. 380. 381.

Their Bodies shall be arrested,

The Power of the Auditors is to commit him to the next Gaol upon the Account ended, and the Party found in Arrears is to be committed to the next Gaol *immediately*, and not by any mean Space. Br. Account, pl. 6. cites 27 H. 6 8.——S. P. For note the Words in Effect be Super compotum suum &c. arrestentur & liberentur. 2 Inst. 381.

The Lord cannot commit the Defendant to Ward, as the Auditors may by the Statute; for they have this Power only by the Statute; but upon Account at Common Law before himself, the Lord might have Debt of the Arrears. Br. Account, pl. 16. cites 45 E. 3. 14 & 28.

This is intended of the *next Gaol*, *tho'* it be *not in the same County*, for the Statute is in Nature of a Commission; and therefore this Word (next) must be pursued. 2 Inst. 381.

And by the Testimony of the Auditors they shall be sent unto the next Gaol of the King in those Parts, and shall be received of the Sheriff or Gaoler,

The Auditors must make a *Warrant in Writing under their Seals* to the Sheriff, upon the special Matter; and thereupon the Sheriff ought to receive the Accountant in Execution. 2 Inst. 381.

If Need require; but this the Gaoler could not have done by the Common Law, as by all our ancient Authors it appears. 2 Inst. 381.

And imprisoned in Iron under safe Custody, and shall remain in the same Prison at their own Cost, till they have satisfied their Master fully of the Arrearages.

By this Clause it appears, that he, that is so imprisoned, *must live of his own*. 2 Inst. 381.

A *Guardian in Socage* cannot be committed to Prison by Force of this Act; for he is in Loco Parentis, and this Act begins with the Word (Servants) which is to be applied to Bailiffs, Chamberlains, and Receivers, and extends to all of them; and therefore Guardian in Socage being no Servant, nor the Heir Lord or Master, he is not by this Act to be imprison'd. 2 Inst. 380.

By this Clause is the Writ of *Ex parte talis* given to the Accountant, *if the Auditors* assign'd by the Lord either *charge him de receptis quæ non recepit, vel non allocando ei expensas* aut liberationes rationabiles, and *this Writ is in Nature of a Commission to the Barons of the Exchequer* for that they are the *Sovereign Auditors of England* to hear and audit the Account, & quod fiat Justitia partibus. 2 Inst. 381.

Nevertheless, if any Person so committed complain that the Auditors have grieved him unjustly, charging him with more than he received, or not allowing him Expences or reasonable Disbursements,

But this Writ *lies not but where the Account is taken before Auditors assign'd by the Lord*; for if there be a Writ of Account brought, and the Court assigns Auditors, there lies no Writ of Ex parte talis: for in that Case he ought to shew his Grief to the Justices, and they ought to do him Justice, and the Writ of Ex parte talis is grounded upon this Act, where the Lord assigns Auditors. 2 Inst. 381.

And

And find Friends that will take him to Mainprize, to bring him before the Barons of the Exchequer, he shall be delivered. And the Sheriff shall give Knowledge unto his Master, that he be before the Barons at a certain Day, with the Rolls and Tallies, by which he made his Account, and in the Presence of the Barons, or such Auditors as they shall assign, the Account shall be rehears'd, and Justice done to the Parties, so that if he be found in Arrearages he shall be committed to the Fleet.

The Writ in the Register, and F. N. B. 129. (F) is *Coram Thesaurario & Baronibus, nostris de Scaccario*; but it ought to be *Coram Baronibus* de Scaccario, according to this Act; and that the rather because the Barons are the sovereign Auditors of England; and herewith agrees Fleta. 2 Inst. 381.

Upon *Sureties found* he shall be at large to follow his Writ of Ex parte talis before the Barons; but if it be found that he was in Arrearages, he shall be in Execution again. 2 Inst. 381.

And if he flie he shall be distrained to come before the Justices to make his Account, if he have whereof to be distrained; and when he comes to the Court, Auditors shall be assign'd, before whom, if he be found in Arrearages, and cannot pay the Arrearages forthwith, he shall be committed. And if it be * *testified by the Sheriff that he is not found, he shall be called from County to County until he be outlawed; and such a Prisoner shall not be repleviable.*

See Marlbridge, whereby the Writ de Monstravit de Compoto is given. 2 Inst. 381.

* Here is *Process of Outlawry* given in Account. 2 Inst. 381.

For further Explanation of this Statute See the several Divisions of this Head.

(S) Auditors assign'd by the Party. How. And their Power.

1. IF I make J. S. my *Auditor generally to take Accounts of all my Bailiffs and Receivers*, he is not a sufficient Auditor *without a Patent*; for when a Man is made an Auditor generally, he is an Officer, and an Officer cannot be without a Deed; Per Periam J. and not denied by any. Le. 219. pl. 301. Mich. 32 & 33 Eliz. in C. B. in Case of Gawton v. Lord Dacres.

2. *But* if a *Bailiff or Receiver* be *accountable to me*, it is as clear on the other Side, that *I may appoint* one to be my *Auditor to* take the Account of him *pro hac Vice by Word*; Per Periam J. which Anderson granted, and not denied by any. Le. 219. pl. 301. in Case of Gawton v. Lord Dacres.

3. *But if he afterwards takes an Account of any by* Force or *Colour of the said Warrant without my Commandment*, he is not a sufficient Auditor to such Intent, either to take the Account, or to assess the Arrearages, if the Accountant be found in Arrear, or to make Allowance if he be found in Surplusage; Per Periam J. and not denied by any. Le. 219. pl. 301. in Case of Gawton v. Lord Dacres.

(T) Allowance by Auditors. Of what.

1. IN *Receipt of Money* there is no *Costs* to be allowed &c. Br. Account, pl. 18. cites * 46 E. 3. 9.

* S. C cited, and adjudg'd that no Allowance shall be made a Receiver for Surplusage. 2 Bulst. 2-8. Mich 12 Jac. B. R. Earl of Suffolk v. Floyd.—And Roll Rep. 87. in S. C——S. P. Br Account, pl 53 cites 4 H. 6 27. *But in Account as Bailiff* he shall have certain *Allowances* for his Labour.

Br. Dette, pl. 52. cites S. C.—— Br. Executors, pl. 40. cites S. C.

2. If an *Executrix* will account of the Receipts of the Teſtator, ſhe *ſhall be charged* by Action of Debt *upon the Arrears of Account of the Goods of the deceaſed*; and yet Action of Account does not lie againſt Executrix; and the Reaſon ſeems to be becauſe ſhe took upon her Notice of Account. Br. Account, pl. 25. cites 2 H. 4. 13.

Br. Executor, pl. 159. cites S. C.

3. In Debt, *Executor aſſigned Auditors, who found an Over-payment in the Teſtator by* 12 *l.* by which the *Bailiff brought Debt againſt the Executor*, and recover'd by Award; for tho' the Statute of Weſtminſter 2. does not give them Power to commit the Lord to Priſon as well as the Bailiff, yet by the Statute the Auditors are made Judges of Record; and therefore the Executor charged per Judicium. Quod nota, and the Writ was Detinet only. Br. Dette, pl. 182. cites 10 H. 6. 24.

Br. Bailiff, pl. 26. cites S. C.

4. If a *Bailiff pays Rent iſſuing out of the Manor &c. which touch the Manor* of which he is Bailiff, he ſhall have thereof Allowance; & e contra if he pays the *Debts of the Lord*. Br. Account, pl. 88. cites 4 H. 7. 14. Per Keble.

5. *Bailiff of Land* ſhall have Allowance on his Account, but not Bailiff *of Goods*. D. 183. b. Marg. pl. 60. Mich. 42 & 43 Eliz. Sheffield v. Barnsfield.

6. If one *becomes my Bailiff of his own Wrong* without my Appointment, he is accountable to me, but I am not compellable to make him any Allowance for his Expences about my Buſineſs; and if I aſſign him an Auditor he cannot make Allowance of ſuch Expences. Per Periam J. Le. 219. pl. 301. Mich. 32 & 33 Eliz. C. B. in Caſe of Gawton v. Ld. Dacres.

7. The Plaintiff declared that he was *Bailiff* to the Defendant *of certain Manors, Receiver of certain Monies*, and ſo retain'd, *ad diverſa negotia procurandum:* And upon Account the Allowance was made unto him for his *Board-Wages, and other Expences in riding circa Negotia.* And by Anderſon theſe Allowances ſhall not bind the Defendant; for as Bailiff of a Manor, no Expences ſhall be allowed unto him, but thoſe which the Bailiff has expended within the Manor. Le. 219. pl. 301. in Caſe of Gawton v. Lord Dacres.

8. If I *retain one* to follow my Buſineſs and *give him Money* to diſburſe in ſuch Buſineſs, if he *expends more than he received* he does it without Warrant, and no Allowance ſhall be made him. Per Anderſon and Windham J. Le. 219. in Caſe of Gawton v. Lord Dacres.

Ibid. The Reporter adds a Nota, that by the Iſſue it was *found that* 30 *l. of the ſaid* 204 *l. was not paid by his Command*, and the Defendant pray'd that he might be ſatisfied out of the 600 l. Surpluſage; but adjudg'd that it ſhould not, but that the Plaintiff ſhould recover 30 l. more, and that the Surpluſage is nothing to the Purpoſe.—— 2 Bulſt 207. S.C. adjudg'd accordingly. And Coke Ch. J. cited 1 E. 5. 1. That if one be charg'd in an Action of Account as Receiver, and he pleads that he received it, and afterwards by his Command diſburſed the ſame for him, he ſhall not plead this in Bar of the Account, but it ſhall be allow'd him on his Account before Auditors, and ſaid that this is very clear; and the whole Court agreed with him herein, and that the Defendant in the principal Caſe can have no Allowance for what he had *diſburſed of his own Head*, more than he received.

9. In Account, the Plaintiff charged the Defendant as *Receiver of* 204 *l. pur Account render.* Before Auditors the Defendant *ſhew'd that he had diſburſed the* 204 *l. to divers Perſons in particular, by the Command of the Plaintiff himſelf, and likewiſe* 600 *l. more*, and ſo prays Allowance of this Surpluſage. But per Cur. he ſhall not be allow'd the Surpluſage becauſe he is charged as Receiver and not as Bailiff. And Coke Ch. J. cited 46 E. 3. that a Receiver ſhall not have any Recompence *for his Travel*, but a Bailiff ſhall. Roll Rep. 87. pl. 38. Mich. 12 Jac. B. R. Suffolk (Earl of) v. Floyd.

Ibid. 387. pl. 78. Burdett v. Threele S. C. ſays that the Defendant ſhould have confeſs'd what was allow'd and pleaded to the reſt, and not plead a General Iſſue.

10. In Account the *Defendant confeſſed the Charge, but alleged an Allowance of a Halfpenny expended.* The Plaintiff demurr'd; it was objected that the Demurrer was ill, and the Defendant *ſhould have pray'd Judgment de Reſiduo*; to which the Court inclined. 3 Keb. 362. pl. 40. Mich. 26 Car. 2. B. R. Hemſell v. Thrale.

11. The

11. The *Rule* generally taken *that a Bailiff ſhall be allow'd Expences and Surqluſage* in an Action of Account, *but not a Receiver* holds true only of a *bare Receiver*, and as to him the Reaſon is evident; but *where the Nature of the Thing ſhews that the Receiver muſt be put to Trouble and Expence* the Rule is falſe. 10 Mod. 23. in Caſe of Biſhop v. Eagle.

(U) Proceſs and Pleadings before, or after Judgment to Account.

1. THE Defendant was awarded to Account and *Capias ad Computandum awarded*, and the *Defendant was taken by another Suit*, by which the *Plaintiff in Writ of Account pray'd that he remain for his Execution*, and the *Defendant ſaid that the Plaintiff after the Award was non-ſuited in the Writ of Account*; and it was held that he * cannot be non-ſuited after Judgment, for *the Award to Account is a Judgment*, but becauſe it was after the Year and Day he was awarded to ſue *Scire facias*, and not to have him in Execution immediately. Quod nota. Br. Accompt, pl. 37. cites 21 E. 3. 7. * See pl. 13.

2. In Account, the Defendant pleaded *Acquittance*, which was *found falſe by Verdict*, by which the Defendant was adjudged to account, and *Capias ad Computandum* iſſued, and the *Plaintiff died*, his *Executor brought Scire facias* againſt the Defendant to Account. Per Hill, the Writ does not lie if he has not accounted, for otherwiſe by the Death of the Plaintiff *the Original ſhall abate*; for in Writ of Account there is not other Execution, but that the Defendant ſhall pay the Arrears, and therefore the Writ was abated. Br. Accompt, pl. 40. cites 27 E. 3. 32. And ſo Brooke ſays it ſeems by this Book, that where Judgment is given to Account, there *if the Defendant does not Account* in Fact by Force of the Judgment *in the Life of the Plaintiff*, the Executor ſhall not have Execution. Ibid. —— But Br. Exigent, pl. 21. cites 14 H. 4. 1. that in Account it appear'd that upon *Judgment of Account* the *Plaintiff died before Account made*, the *Executors* had Scire Facias and Capias ad Computandum thereupon, and Exigent upon that; For *upon Capias after Judgment, Exigent ſhall iſſue upon the firſt Capias.* —— Br. Accompt, pl. 33. cites S. C. Brooke ſays, and ſo ſee that this Nature of Judgment ſhall ſerve, tho' the Defendant had not accounted in Fact in the Life-time of the Plaintiff, and notwithſtanding that two Judgments are in Account, and he died before the laſt Judgment. Quod nota.

3. The Defendant in Account of Receipt by other Hands found *Mainpriſe to be at the next Day*, and the Clerks ſaid that they ſhould be mainpriſed *from Day to Day till the Inqueſt was paſſed*, and this was their Courſe, and no other Courſe had been ſeen. And yet Wilby commanded to enter it as above notwithſtanding their Courſe, and ſo it was. Br. Accompt, pl. 50. cites 24 E. 3. 32. & 67.

4. Where a Man is *awarded to Account* this *is not peremptory to recover immediately*, but then he ſhall plead in Diſcharge of the Account before Auditors be the Plea in Bar of the Account tried by Verdict or Demurrer. Br. Peremptory, pl. 81. cites 29 E 3. and Fitzh. Accompt 128.

5. Account *againſt a Bailiff*, ſhall be brought *in the County where he was Bailiff*, but *againſt a Receiver* it may be *in any County*. F. N. B. 117. (C) in the New Notes there (c) cites 30 E. 3. 20.

6. No Capias or *Exigent* lies in Account *againſt a Guardian*. F. N. B. 118. (A) in the New Notes there (a) cites 17 E. 3. 50. but if the Defendant comes in by Capias he ſhall be put to anſwer; for it is only a Miſcontinuance. Cites 29 E. 3. 5.

7. A Writ appears in the Regiſter that if a Man be *found in Arrearages* upon his Account, and the Party *Plaintiff arreſts him in London* for theſe Arrearages, then he *may ſue a Writ* in Chancery directed unto the Sheriff, rehearſing the whole Matter, *commanding the Sheriff to detain* and keep in If the Defendant pleads in Bar, and it is found againſt

him, he shall be awarded to the Fleet, instanter. F. N. B. 118. (c) in the New Notes there (b) cites 39 E. 3. 35. but says, that if the Plaintiff there

in Prison him who is so arrested, untill he has satisfied and paid the Arrearages.

8. And it seems by the same Reason, that if a Man brings *Debt upon Arrearages of Account* before Auditors, and has the Party arrested, that *he shall have a Writ* out of the Chancery *unto the Sheriff, to keep him in Prison* until he has paid those Arrearages; *but* I conceive this Writ does *not* stand in Law, that he shall be kept in Prison *without answering unto the Suit commenced* against him. F. N. B. 118. (C)

leaves him without accounting, he may have a *Scire Facias against the Plaintiff*, and *if the Plaintiff does not come* at the Day, the *Defendant shall be dismiss'd*, and thereby the Plaintiff has lost the Advantage of the Judgment; and per Ansham, of the Writ also. 18 E. 2. Account 123. See 1 H. 7. 1. but if he will not account, the Plaintiff may pray Judgment according to the Account. Cites 14 E. 3. Account 109.

9. *He who is awarded to account, swears that he will account well and lawfully.* Br. Accompt, pl. 10. cites 41 E. 3. 3. 9. Per Belk.

10. In Account the Plaintiff *counted as against Receiver* &c. The *Defendant pleaded Fully accounted before* &c. and the other e contra. And *it was found that he had not accounted*, by which *Capias ad Computandum* was awarded, and *Exigent upon it*, and the *Sheriff return'd Reddidit se*, and the *Defendant pleaded Acquittance after the Judgment*; and the *Plaintiff said that Not his Deed*; and upon this it was agreed that the *Defendant should find Mainprise* in 40 l. And yet it may be that this is greater than the Sum of Account. And per Bryteine Clerk, if he fails he shall lose the Sum, which several denied. Br. Accompt, pl. 23. cites 50 E. 3. 11.

If the *Plaintiff* in Account *does not appear at the Nisi Prius*, he cannot be nonsuited, for Judgment to account was given before, but he *shall be barr'd by his Default.*

11. In Account the *Defendant came by Capias ad computandum*, and was awarded to account, and *Auditors were assign'd* to him, *and an Hour, at which Place and Hour the Plaintiff made Default*, and the *Auditors recorded it*; and Horton pray'd the Justices that *Nonsuit* might be awarded. Per Markham, this *cannot be*; for if he had appear'd he could not vary from his Declaration made before; but Horton said that if the Defendant alleges any Payment or Tally, or Assignment made by the Plaintiff, there the Plaintiff shall answer to it, which cannot be without his Presence; and after they *agreed to account at another Day*. Br. Account, pl. 27. cites 3 H. 4. 7.

Quære; for by him where the Defendant is taken by Capias ad computandum, and the Plaintiff makes Default, he shall be barr'd. Br. Account, pl. 45. cites 21 H. 6. 26. Per Brown.——See pl. 3.

In Account, the Defendant was *adjudged to account, and were at Issue before Auditors, and the Jury ready to pass*, and the *Plaintiff made Default*, this is a Nonsuit to all the Action; for tho' he be adjudg'd to account, it is *not such Judgment as determines the Action.* Br. Account, pl. 87. cites 1 H. 7. 8.——— Br. Account, pl. 63. cites S. C. by some for Law; but per Townsend, if a Man be awarded to account, and *Capias ad computandum issues*, and at the Day *he comes*, and the *Plaintiff makes Default*, he shall be nonsuited, and yet after he shall have Scire facias ad computandum, which will give Day to the Parties again. Br. Account, pl. 63. cites 1 H. 7. 8.———S. P. And he shall have the Scire facias upon the first Judgment. Br. Scire facias, pl. 237. cites 1 H. 6. [7] 1.——The Defendant was adjudged to account, and *a Capias* issued against him *ad computandum* before Auditors, at a Day certain; *he appear'd and enter'd into Account*, and the *Auditors assign'd them to appear at another Day*, at which Day the *Plaintiff did not proceed.* It was the Opinion of the Prothonotaries there can be *Nonsuit* in this Case, because it is after Judgment, but a *Discontinuance* only shall be enter'd, and his Sureties put fine Die; and if the Plaintiff will afterwards proceed upon the Account, he shall have a Scire facias upon this Record ad computandum. And the Justices awarded accordingly. Cro. E. 19. pl. 6. Pasch. 25 Eliz. C. B. Anon.

In Account the Plaintiff may be nonsuited before the 2d Judgment. Resolv'd. Cro. J. pl. 14. Mich. 12 Jac. B. R. ——S. P. Roll Rep. 85. pl. 33. Per Coke and Doderidge.———S. P. Arg. Cro. E. 636. Mich. 40 & 41 Eliz. B. R. cites 1 H. 7. 2.

12. And the Defendant pray'd to be *by Attorney*, and could not, but shall *find Mainprise.* Br. Account, pl. 27. cites 3 H. 4. 7.

13. In Account, the Defendant *pleaded Never his Receiver to render Account*, and *found against him*, and Capias ad computandum, and this continued till he was *outlaw'd*, and taken and *imprison'd for it in the Fleet*, and Auditors assign'd to him, *and they were at Issue*, and the *Auditors certified the*

the Record before the Juſtices, by which diverſe *Venire facias's* were awarded; and the *Defendant found Surety in* 200*l. to appear in Priſon every Day of the Plea; and that if the Iſſue ſhall be found againſt him, to render his Body to Priſon*; and Proceſs continued to the Niſi Prius, and there the Iſſue *found for the Plaintiff*, who prayed his Judgment, and further an Increaſe, becauſe he was his Receiver 27 Years paſt. And Markham caſt Writ of Error in Arreſt of Judgment. Per Browne, he ought to be demanded upon a Pain, and ſo he was, and appear'd, by which he was *awarded to the Fleet till he made Gree of* 18*l. found by the Jury, and* 20*l. over for Increaſe.* Br. Account, pl. 45. cites 21 H. 6. 26.

14. In Account the Defendant pleaded in Bar, which was found againſt him, by which he was awarded to account, and was *committed* to Ward *to the Fleet*; and after 2 Filazers of C. B. were aſſign'd him to be Auditors to hear his Account, and the Defendant *prayed to be by Mainpriſe*, and could not, *becauſe a Judgment is given againſt him, and his Body in Execution.* Br. Account, pl. 3. cites 9 H. 6. 29.

15. In Writ of Account the *Defendant was outlaw'd*, and ſued Charter of *Pardon*, and had *Scire facias againſt the Plaintiff, in which they were at Iſſue*, and had Niſi Prius, and the *Defendant found Bail to attend the Inqueſt*, and at the Day the *Defendant appear'd by Attorney*, and the Jury remain'd for Default of Jurors; and at the Day in Bank Thorp pray'd the Inqueſt by Default, and Writ to take the Defendant and his Mainpernors, becauſe he did not appear in proper Perſon, and becauſe the *Record of Niſi Prius made no Mention of the Sureties*, nor of the Mainpernors, ſo that for Default of full Record they can record nothing of it; therefore the Court held it for null; and becauſe the *Defendant appeared in Bank in Perſon, and the Inqueſt did not come*, he had *Day over by the firſt Mainpriſe.* Br. Account, pl. 45. cites 21 H. 6. 26.

16. If certain Perſons ought *to account unto a Corporation*, as if the King grant to the honeſt Men of the Town of N. a certain Sum out of Things which come to the ſame Town to be ſold, and there are Collectors to gather the ſame who do ſo, *the King may grant a Commiſſion to certain Perſons to inquire what Perſons have received ſuch Sums, and to hear and determine* the Matter, and to hear their Accounts thereupon, and *do in that Caſe as Auditors ſhall do, and* he ſhall *ſend a Writ unto the Sheriff to return a Jury* before the ſame Juſtices at the Day &c. which they appoint &c. to inquire thereof. F. N. B. 114. (C) See F. N. B. 119. (F) S. P.

17. In Account, after Judgment the Plaintiff ſued *Scire facias ad computandum, and the Sheriff return'd Nihil*, by which *Capias ad computandum was awarded*, becauſe it was after Judgment; and ſo ſee Capias lies upon Scire facias after Judgment, where Capias was the Proceſs in the Original. Br. Account, pl. 1. cites 19 H. 8. 6. S. P. Br. Exigent, pl. 1. cites 19 H. 8. 1.—Br. Proceſs, pl. 2. cites S. C. but adds, that by the Prothonotaries this is Covin.

18. After Judgment quod computet, if the Defendant be *taken upon a Capias ad computandum, and bail'd* pending the Action before the Auditors, *and makes Default* before them, Capias ad computandum de novo ſhall iſſue; Per tot. Cur. and affirm'd by the Prothonotaries. Le. 87. pl. 189. Mich. 29 & 30 Eliz. C. B. Anon.

19. If the Bailiff be found in Surpluſage in the Concluſion of the Account, the Auditor ought to enter *Allocatur ſuper determinationem Computi in Surpluſagiis, ſo much for ſuch and ſuch Expences allocatis allocandis upon the next Account.* But in this Caſe it appeared upon the Evidence, that the *Entry upon the Foot of the Account was, viz. And ſo he is in Surpluſage upon the Determination of this Account* 26*l.* But the *Auditor being examined ſaid*, that *it was not his Meaning to allow* unto him *ſo much, but only to find and expreſs the Certainty of the whole Account, and ſo refer the Allowance of it to the Defendant to whom he was Auditor.* And upon that the Court ſaid to

the Jury, if they believed the Auditor, that they ſhould find againſt the Plaintiff, for upon the Matter here is not any Account, and ſo no Allowance; for the Allowance, if it had been according to Law, ought to be enter'd before the Allocatur &c. and ſuch Allowance is as a Judgment; but here is not any Allowance, for the Auditor did refer the ſame to the Defendant. Le. 219. 220. pl. 301. Mich. 32 & 33 Eliz. C. B. in Caſe of Gawton v. Lord Dacres.

Win. 5. White v. Williams, Paſch. 19 Jac. ſays it was holden by Gawdy and Fenner only preſent, that the Judgment ought to be given which the Plaintiff had counted of; but Baron Altham e contra; for the Court may in Diſcretion give a leſs Sum.

20. Accompt againſt J. S. *as Bailiff for* 100*l.* the Defendant *pleads Never his Bailiff*, which was *found againſt him*, and thereupon he was adjudg'd to account before *Auditors*, who having *aſſign'd a Day* ad computandum, the *Defendant made Default*; whereupon it was adjudg'd quod querens recuperet valorem bonorum præd' (viz.) 92 l. 10 s. And this was aſſign'd for Error, there being *no Writ awarded to enquire of the Value* Sed per Curiam, where the Defendant makes Default the Court may order that the Plaintiff recover the Value as he had counted, but then the Judgment ought to be ſo, whereas here the 92 l. 10 s. is not as he counted. And here Day being given him to Account he not being preſent to take Conuſance thereof, and ſo is condemned by Default without Notice, and therefore the 2d Judgment was revers'd. Cro. E. 806. pl. 7. Hill. 43 Eliz. B. R. Williams v. White.

21. In Account the *2d Judgment was revers'd*, and *the firſt being without Error, was affirm'd*; it was ſaid that a *Capias ad computandum* ſhould iſſue out of this Court to bring the Defendant to account. Cro. E. 806. pl. 7. Hill. 43 Eliz. B. R. Williams v. White.

S. C. Godb. 258. pl. 356. S. C. by Name of Fox v. Medcalfe, and S. P. accordingly; for the firſt Judgment is only a Conveyance, and the Plaintiff has no Benefit till he be ſatisfied by the Award of the Auditors, becauſe upon the Award the final Judgment ſhall be given.——Cro. E. 636. pl. 32. S. P. Arg. cites 21 E. 3.——Roll Rep. 84. pl. 33. Wood v. Medcalfe, S. C. accordingly; but per Coke and Doderidge, if in Writ of Account the Defendant pleads in Bar, and the Bar is adjudg'd good, the Plaintiff in ſuch Caſe may have a Writ of Error immediately; for this Judgment is final till revers'd. And if in the principal Caſe both Judgments had been given, and Error brought, and the firſt is revers'd, the laſt is conſequently revers'd alſo; and ſo if the laſt Judgment be revers'd, the firſt Judgment alſo ſhall not ſtand by itſelf, but ſhall be revers'd alſo. Quod nota.

22. A *Writ of Error* will not lie *after the firſt and before the ſecond Judgment*, becauſe the firſt Judgment is but an Award, and no final Judgment till he has accounted before the Auditors; and the *firſt Judgment does not determine the Original*. Cro. J. 356. pl. 14. Mich. 12 Jac. B. R.

23. In an Action of Account the Defendant was adjudg'd to account, and Auditors were aſſign'd. The *Court was moved that they would order to join ſome Merchants to the Attornies on either Side*, to help them to manage the Account, becauſe the Attornies were not skilful in ſuch Buſineſſes. Roll Ch. J. ſaid we can make no Rule for this, but you *may by Conſent adviſe with Merchants to aſſiſt* you in drawing up the Accounts. Styl. 388. Mich. 1653. Franklin's Caſe.

24. In Action of Account there was a *Demurrer*, and Exception taken *becauſe he had not ſhewn the Particulars* of what was diſpoſed of by the Sale; for it is not good for a Factor to ſay, I have received ſo much for your Goods, but he ought to ſhew the Particulars; but Glyn Ch. J. ſaid the Court ought not to intermeddle with their Accounts, becauſe the *Auditors are Officers appointed by Statute, who ought to refuſe or confirm* them; and he knew not by what Advice they had demurr'd in Account. Hern ſaid that 2 Clerks of this Court are the Auditors, but if there be a Demurrer upon the Pleadings, it ought to be tried by the Court. And it was agreed to wave the Demurrer by Conſent, and leave the Matter to the Auditors. 2 Sid. 89. Trin. 1658. in B. R. Leger v. Amory.

25. If

25. If one *comes in by Habeas Corpus only to account*, he ſhall not put in *Special Bail*, and if he does, it is erroneous. Keb 230. pl. 46. Hill. 13 Car. 2. B. R. Towes v. Lewis. And though Special Bail be in the inferior Court, yet in B. R he put in Bail only to be in Cuſtodia; but after Judgment quod computet a Capias iſſues, and when taken he muſt put in Special Bail, viz. 2 Mainpernors to anſwer the Condemnation; but ſhall not on the firſt Appearance put in Special Bail to anſwer the Condemnation; per Twiſden & Cur. Keb. 255. pl. 26. Paſch. 14 Car. 2. B. R. Towes v. Lewis.

26. After Judgment quod computet, the *Defendant came in on a Capias*, and was committed to the Marſhal, *and bail'd*. The Bail are anſwerable for the Account, the *firſt Bail* being only for Appearance; but yet *ſhall not be diſcharg'd till the Party renders himſelf on the firſt Judgment*, tho' a Capias had not iſſued before the Bail can be charg'd, and yet the Court would only order the Bail to be filed, and leave the Party to his Remedy according to the Condition of the Bail-Bond. Keb. 89. pl. 96. Trin. 13 Car. 2. B. R. Towes v. Lewis.

27. The *Bail enter'd into Recognizance, that if Judgment be quod computet the Defendant ſhall appear*, and if he makes Default the Plaintiff ſhall have Execution againſt Body, Lands, and Goods of the Bail. The *Court aſſign'd a Day for his Appearance after Judgment quod computet*, but *he made Default*, and they not rendring his Body to Priſon, the Plaintiff had Judgment Niſi. Keb. 176. pl. 140. Mich. 13 Car. 2. B. R. Towes v. Lewis.

28. In Accompt the Defendant moved for a farther Day to give his Accompt, the Matter being referr'd to Auditors. Per Twiſden, The *Auditors muſt give farther Day*. And per Keeling, *They are Judges whether the Delay is wilful or not*; and if they find the Parties negligent, they muſt certify to the Court that they will not account. Mod. 42. pl. 94. Hill. 21 & 22 Car. 2. B. R. Williams v. Lee. S. P. and held that the Auditors are Judges by the Statute, and the *Court refuſed to intermeddle*. Sty. 464. Mich. 1655. Le Gay's Caſe.

29. By 4 *Annæ, cap.* 16. *S.* 27. which gives Actions of Account againſt Executors and Adminiſtrators of Guardians &c. and Jointenants &c. Enacts that the *Auditors appointed by the Court ſhall adminiſter an Oath, and examine the Parties, and for their Pains ſhall have ſuch Allowance as the Court ſhall adjudge reaſonable, to be paid by the Party on whoſe Side the Balance ſhall be.*

(W) Declaration.

1. WRIT of Account was maintain'd by one, *ſuppoſing that the Defendant was Receiver of the Money of the Plaintiff and the Defendant of every manner of Contract to their common Profit* ariſing &c. Thel. Dig. 27. lib. 2. cap. 3. S. 12. cites 30 E. 1 Itin. Cornub.

2. Account as *Receiver*, and *counted that* he bailed to him 2 Tuns of Wine to ſell for him, and *he received of J.* 10 *s. and of W.* 10 *s. and of another the reſt, and did not ſhew by whoſe Hands* &c. and per Cur. he ought to ſhew by whoſe Hands in Account as Receiver, and *if he cannot put it in certain he may bring Writ of Account againſt him as his Bailiff*, and count of the Bailment of the Stuff to merchandize; quod nota. And per Cur. if the Sum of the Receipt be 13 s. or other Sum under 40 s. yet the Account does not lie before the Sheriff; quod nota. And the Reaſon ſeems to be *becauſe a Sheriff cannot aſſign Auditors*. Br. Accompt, pl. 14. cites 43 E. 3. 21. In Account *as Receiver* of 10 *l. by the Hands of J. and K. and* 18 *l. by the Hands of Perſons unknown*, and of the firſt Matter the Writ ſtood, and of the reſt the Defendant was diſcharg'd, becauſe it was uncertain Br. Brief, pl. 472 cites 46 E 3 3

In

In an Accompt *againſt the Receiver*, the Plaintiff muſt *declare by whoſe Hands* the Defendant receiv'd the Money, which he ſhall *not* do in the Caſe *of a Bailiff*. Co. Litt. 172. a.

The Writ ſhall be *general*, *De tempore quo ſuit Receptor denariorum*, *without ſaying by whoſe Hands*; but that muſt be ſhewn in the Count; but it is not ſo if againſt a *Bailiff*. F. N. B. 118. (F)

3. In Account he counted *that he bail'd to him* certain Pots and Pails of Silver *to ſell* &c. and he ſold them in Fairs and Markets, and *received of J. ſo much* &c. *and by the Hands of another unknown a great Sum* &c. and of that which was put in certain the Defendant was compell'd to anſwer, and of the reſt, which is uncertain, not. Quod nota. And ſo the Count good in Part, and in Part not. Br. Accompt, pl. 17. cites 46 E. 3. 3.

4. In Account the Plaintiff counted that the Defendant was his Bailiff of his Manor of D. in M. and *had Care and Adminiſtration of certain Goods* and Chattels, *viz. Oxen*, *Beaſts*, *and other Things*; and it was pleaded to the *Count*, becauſe he *did not ſhew of How many Oxen* &c. & non allocatur, but the Count awarded *good*. Br. Accompt, pl. 5. cites 27 H. 6. 1.

S. P. Thel. Dig. lib. 1. cap. 17. pl. 9. cites Hill. 31 E. 3. Account 57.

5. Account by an *Abbot* of Receipt of 100 l. of the Predeceſſor &c. by the Hands of D. to render Account, and did *not ſay of the Goods of the Houſe and Church*; For an Abbot cannot otherwiſe have Property but to the Uſe of the Houſe, and therefore this is implied, and D. by whoſe Hands &c. was a Monk of the ſame Houſe, and yet good. Br. Accompt, pl. 49. cites 15 E. 4. 15.

6. In Account the Plaintiff *declar'd of Damages*, and well; and yet he he ſhall not recover any Damages. Br. Accompt, pl. 64. cites 2 H. 7. 13.

And the Court ſaid it would be very miſchievous if one Tenant in common might not have Account, without the other's joining, which perhaps the other would not do, and here is *no Repugnancy* in the Count; and Judgment for the Plaintiff. Roll Rep. 411. pl. 10. S. C

7. In Accompt *by Executor of A. againſt the Defendant as Bailiff of A. ex quacunque cauſa & contractu ad communem utilitatem of the ſaid A. and one W. P. of certain Merchandizes of the ſaid A.* &c. Tho' the Demand was againſt the Defendant as General Bailiff of one, when by the Plaintiff's own Shewing he was Bailiff ex quacunque cauſa ad communem utilitatem of 2, and that he ſhould have join'd the other in the Action, yet it was held good. Cro. J. 410. pl. 10. Mich. 14 Jac. B. R. Hackwell v. Euſtman.

8. In Account againſt Defendant as *Receiver of Money*, *as Money of the Plaintiff*, it was objected that it was only Recital; and the Court held it ill. 3 Keb. 425. pl. 26. Hill. 26 Car. 2. B. R. Jaggard v. Frip.

9. The Declaration was *as Receiver between 1658 and 1673*, *without any certain Time*; but per Cur. this is well enough, and to ſay viz. ſuch a Day, would be immaterial, and not traverſable. 3 Keb. 425. pl. 26. Hill. 26 Car. 2. B. R. Jaggard v. Frip.

10. Account was brought againſt Defendant *as Receiver*, *and ſays not by whoſe Hands*; beſides he ſhould have charg'd him as *Bailiff*. This would have been ill upon Demurrer upon the Declaration, but is cured by Judgment *quod computet* by Default. 2 Lev. 126. Hill. 26 & 27 Car. 2. B. R. Burdet v. Thrule.

11. Account was brought by a preſent Church-warden againſt a former, *as Receiver per Manus Parochianorum*. This was held imperfect and uncertain, and they ſhould have ſet forth the particular Receipts of the particular Perſons. See 11 Mod. 187. Biſhop v. Eagle.

12. Where the Condition of a Bond is to give a true Account upon Requeſt, and the *Party* who is to give the Account makes up his Account, and *makes a right Charge upon himſelf*, *but puts more in his Diſcharge*

charge than he ought, the Plaintiff *cannot aſſign the Non-payment* of the Charge as a Breach, becauſe until the Account is agreed upon, on both Sides, it is no Account. *But* the Breach muſt be aſſign'd *on the not giving a true Account*, and then all the other Matters will follow in Evidence. L. P. R. 32. Anon.

(X) Pleadings. In Abatement of the Writ.

1. IN Account the Writ was *de tempore quo fuit Ballivus ſuus manerii de N.* and by his *Count demanded Account but of 6 Beaſts only*, yet adjudg'd a good Writ and Count. Thel. Dig. 83. lib. 9. cap. 5. S. 10. cites Mich. 4 E. 2. Accompt 113.

Note the Writ and Count *a tempore quo fuit Ballivus Manerii de S. & habuit Adminiſtrationem bonorum* &c if it be *found quod habuit Adminiſtrationem bonorum, alſo' he be not Ballivus Manerii*, the Plaintiff ſhall recover becauſe there is no other Writ. F. N. B. 116. (P) in the New Notes there (b) cites Kelw. 114.

2. In Account againſt a Receiver, the Writ was *Receptor denariorum*, and the *Count was that he received* 100 *Florins*, *Price each* 4 *s.* &c. and adjudg'd good. Thel. Dig. 83. lib. 9. cap. 5. S. 14. cites Mich. 6 E. 3. 281.

3. In Account againſt a Bailiff, if the Defendant *pleads as to Parcel that he was Leſſee for Years, and not Bailiff* &c. it ſhall not abate the Writ but only for this Parcel. Thel. Dig. 237. lib. 16. cap. 10. S. 44. cites Paſch. 18 E. 3. 16.

4. In Account, if the *Count* be *of Receipt, Parcel by the Hands of the Plaintiff, and Parcel by another Hand*, and the Plaintiff *confeſſes that the Defendant has not received any thing by another Hand*, all ſhall abate. Thel. Dig. 220. lib. 16. cap. 4. S. 12. cites Paſch. 28 E. 3. 91.

5. In Account *againſt one as Bailiff and Receiver*, the Defendant *pleaded as to that for which he is ſued as Bailiff, that he was his Guardian in Socage, and not Bailiff*; Judgment of the Writ; but it was held that all the Writ ſhall not abate for this Plea, but it ſhall ſtand for the Receipt. Thel. Dig. 236. lib. 16. cap. 10. S. 22. cites Paſch. 32 E. 3. Accompt 60. and ſays ſee 46 E. 3. 3. accordingly.

Account againſt *Receiver*, who *ſaid that he was Bailiff of his Manor*, therefore ought to be impleaded as Bailiff, and not as Receiver, Judgment of the Writ. *And* per Litt in Account as Receiver, it is a good *Plea that he was his Guardian in Socage*, Judgment of the Writ; for *otherwiſe he ſhall be doubly charg'd*, and ſo it was held by all the Juſtices. Br. Account, pl. 74. cites 18 E. 4. 3.

6. In Account *againſt a Bailiff and Receiver of* 10 *s.* the *Defendant confeſs'd that he was Bailiff and Receiver of* 8 *s.* and the *Plaintiff confeſs'd that he received only* 8 *s.* yet the Writ ſhall not abate; but Auditors were aſſign'd. Thel. Dig. 237. lib. 16. cap. 10. S. 27. cites Trin. 41 E. 3. Br. 543. Quære.

7. Account *as Bailiff and Receiver in K.* The *Defendant ſaid that there are 2 K.'s* in the ſame County, and none without Addition, * & non allocatur. Contra in Account as Bailiff. 21 H. 6. 23. And the Plaintiff counted in K. of Skirk, by which the Defendant pleaded it to the Count, not warranted by the Writ, & non allocatur. Br. Account, pl. 15. cites 44 E. 3. 1.

* S. P. *contra* in Account *againſt Bailiff of his Manor.* Br. Brief, pl. 66. cites S. C.——

Accouut *as Bailiff of his Manor of the Vills of K. H. and B. and alſo* that he was his *Receiver of his Money in the County of E.* Port. demanded Judgment of Writ; for *there are in the ſame County 2 Vills of K. viz. Over-K. and Nether-K. and no* Vill of K. *without Addition* only, priſt; and the other would not maintain the Writ by which the *Writ was abated in toto*, and not for the Parcel in K only; quod nota. Br. Accompt,

compt, pl. 44. cites 21 H. 6. 21. —— S. P. Br. Additions, pl. 33. cites S. C. Br. Brief, pl. 183. cites S. C.

8. Account againſt a Feme as *Receptrix denar'* of the Plaintiff, by the Hands of J. N. who demanded Judgment of the Writ; for Receptrix is not Form; and upon good Argument the Writ was awarded good; and notwithſtanding that it was not the Form, yet when it paſſes the Chancery they ſhall hold Plea in Bank thereupon. Br. Accompt, pl. 43. cites 19 H. 6. 5.

9. In Account *againſt Defendant as Bailiff*, he *pleaded that he is Guardian in Socage* to the Plaintiff, he being under 14, *and ſhew'd that the Plaintiff's Father was ſeiſed of Bl. Acre in Fee*, and ſo he as Guardian &c. and concluded *Judgment ſi Actio.* The Plaintiff *replied that his Father died ſeiſed of a Copyhold in Fee, which is the ſame Land* &c. but did *not ſhew that it was Socage* Land, *nor of whom it was held*, and therefore was mov'd not to be good, to which Coke Ch. J. agreed. Roll Rep. 104. pl. 44. Mich. 12 Jac. B. R. Anon.

10. And it was inſiſted that the Defendant being charg'd as Bailiff, and he pleading that he is Guardian in Socage, and concluding Judgment ſi Actio, is not good; for *the Plea being to the Writ*, he *ſhould have concluded Judgment of the Writ*, and that ſo is 49 E. 3. 9. 10. Quod fuit conceſſum per Coke. Roll Rep. 104. S. C.

11. In Account the *Death* of any of the Parties *before the 2d Judgment* ſhall abate the Writ. Cro. J. 356. pl. 14. Mich. 12 Jac. B. R. Reſolved.

See (L) (M) (N)

(Y) Pleadings. Where one is charg'd as Bailiff or or Receiver.

When the Plaintiff charges the Defendant as Receiver from ſuch a Time to ſuch a Time, he muſt anſwer that preciſely, or otherwiſe Judgment will be given for the Plaintiff. Raym. 57. Mich. 15 Car. 2. B. R. Southcot v. Rider.

1. IN a Writ which ſuppoſes that *de Tempore quo fuit Receptor denariorum*, the Defendant ſhall not ſay that he hath accounted from ſuch a Time to ſuch a Time, but ought to *ſhew for what Things he hath accounted.* Contra where the Writ is *a Tempore quo fuit Ballivus.* F. N. B. 117. (D) Marg. in a Note cites 3 E. 3. Account 61.

S. P. Br. Accompt, pl. 72. cites 10 E. 4. 8. Per Chocke, which was agreed.

2. Account, and counted *of a Receipt by the Hands of J. N.* The *Defendant ſaid* that *Never his Receiver by the ſame Hand*, Priſt &c. and a good Iſſue, tho' it may be intended that he received by the Hands of W. S. but if it was by the Hands of the Plaintiff, then he ſhall wage his Law, and contra here, and therefore he ſhall have *Traverſe to the Hands of J. N.* Nota, by Award. Br. Accompt, pl. 50. cites 24 E. 3. 32. & 67.

3. Account of Receipt by the Hands of J. N. *Never his Receiver by the Hands of J. N.* priſt, is a good Iſſue, and not pregnant. Br. Negative, pl. 27. cites 29 E. 3. 35. 36.

4. In Action of Account the *Defendant ſaid Quod plene computavit before A. and B.* and the others e contra; and *it was found that he accounted before B. only*, and yet the Plaintiff was barr'd, for *the Effect is if the Defendant has accounted or not*, and it is not traverſable before what Perſons he accounted. Br. Traverſe per &c. pl. 371. cites 30 E. 3. 5. and Fitzh. Judgment 141.

5. Account *againſt J. S. one of the Companions of Mayl-ball*, and *counts that he was his Receiver*, it is no Plea Per Mombray, that he is not of the

the Company of the Mayl-ball, becauſe it is of his own Receipt, and not by the Companion, and yet the Surplus ſhall not abate the Writ, as it ſeems there. Br. Nugation, pl. 12. cites 38 E. 3. 34.

6. Account againſt the Defendant, *as Receiver* for 7 Years *to merchandize, and that in that Time he received* 10 *l. by the Hands of A. B.* The *Defendant ſaid that Fully accounted before ſuch Auditors ſuch a Day, which was the 5th Year of the* 7 *Years*, and the *Plaintiff travers'd it*, and *found with the Plaintiff*, and he pray'd Judgment, and was compell'd to replead, becauſe he could not fully account 2 Years before the End of the 7 Years, for he *ſhall account as well of the Increaſe as of the Sum*, which cannot be within the 7 Years. Quod nota. Br. Account, pl. 41. cites 7 H. 6. 5.

7. In Account, the Plaintiff *counted that he was his Receiver of* 20 *l. by the Hands of J. C. from Eaſter till Michaelmas* Rolſe demanded Judgment of the Count; for *J. C.* by whoſe Hands &c. *died at Whitſuntide, which is before Michaelmas.* Et non allocatur; for it may be that he received all the 20 l. after Eaſter, and before Whitſuntide. Quod nota, the Count awarded good. Br. Account, pl. 42. cites 8 H. 6. 32.

8. Account as Receiver, the *Defendant ſaid that he deliver'd it to him to deliver over to J. S. which he has done*, and a good Plea *without traverſing the Receipt*; for he confeſſes a Receipt accountable, in caſe that he had not deliver'd it over. Br. Traverſe per &c. pl. 296. cites 22 H. 6. 49. Account againſt A. as *Receiver*, who *ſaid that he received it to deliver over to J. N. which he had done*, Judgment &c. The *Plaintiff ſaid, that after the Receipt and before the Bailment he required him to re-bail to him.* And by the beſt Opinion this is a good Replication, and the Bar is a good Bar of Account, as well as in Diſcharge of the Account before Auditors, if he delivers it over; for then he is not accountable to the Bailor; and ſo he was never accountable but conditionally. And J. N. may have Account againſt the Defendant by the firſt Delivery to the Defendant. Br. Accompt, pl. 33. cites 1 E. 5. 2.

9. In Account, the Plaintiff counted that the Defendant was his Bailiff of his Manor of D. in M. and was his Receiver of his Monies, viz. ſo much by the Hands of ſuch a one, and ſo much of another by 4 Years; by which the *Defendant ſaid, that as to ſo much of the Money before ſuch a Day he had fully accounted before the Plaintiff himſelf*, and *as to the reſt Never his Receiver to render Account*; and becauſe he did *not ſhew of how much of the Money he accounted*, therefore ill; by which he *ſaid that he received ſo much before ſuch Day, of which he has fully accounted &c. and to the reſt Never his Receiver*, ut ante. Br. Account, pl. 5. cites 27 H. 6. 1.

10. Account as Receiver, the *Defendant ſaid that he accounted before the Plaintiff himſelf for the ſame Sum the 1ſt Day of April*, abſque hoc *that he was his Receiver after*; and no Plea Per Cur. for it does not go but for this Time only, and not for the Time before, or it may be that he received ſuch a Sum diverſe Times before, and ſo he *ought to traverſe before and after.* Br. Traverſe per &c. pl. 309. cites 21 E. 4. 66. Br. Account, pl. 75. cites S. C.

11. Account of *Goods delivered to merchandize*, the *Defendant ſaid that at another Time the Plaintiff brought Writ of Detinue of the ſame Goods, and counted upon a Bailment to re-bail; and the Defendant waged his Law, and made his Law, by which the Plaintiff was barr'd*; Judgment ſi Actio, and a good Bar Per Brian; for if it be bail'd to re-bail, it can't be to merchandize, therefore *the one is contrary to the other.* And contra Catesby; for by him it is a good Eſtoppel, but no Bar. Quære inde. Br. Account, pl. 84. cites 2 R. 3. 14.

12. Debt by the Dean of P. upon Obligation, upon Condition that whereas the *Defendant was Receiver* of all the Rents of the Dean and Chapter of L. *if he render Account* to the Dean and Chapter *annually during his Office*, that then &c. and *ſaid that the Dean made A. Receiver of two Tenements in L. Parcel* &c. and ſo diſcharg'd him, Judgment &c.

And

And per Townſend and Brian J. this is no Plea, becauſe he *does not anſwer to the Reſidue of the Receipts*; for the Condition is for the Advantage of the Obligor, and therefore a *Diſcharge of Parcel* is not a Diſcharge of the whole. Contra where it is in Advantage of the Obligee, therefore he ought to perform the reſt. Br. Conditions, pl. 128. cites 4 H. 7. 6.

13. If a Defendant be *charged as Receiver by Indenture*, he ſhall not be admitted to *plead that he was not Receiver*. Brownl. 25. in Caſe of Willoughby v. Small.

(A. a) Pleadings. Suppoſal of the Writ travers'd.

Br. Traverſe per &c. pl. 125. cites S. C.

1. ACcount againſt *Receiver*, who *ſaid that he receiv'd to deliver to W. N. which he has done, abſque hoc that he was his Receiver to render Account*; And per Jenney, Chocke and Moyle, his Traverſe is *repugnant*; for if he does not deliver it over, then he is accountable, for the firſt Matter is a good Bar without the Traverſe. Quod nota. *But* if he ſays *abſque hoc that he was his Receiver in other Manner*, it is a good Traverſe; quod fuit conceſſum. Br. Account, pl. 54. cites 9 E. 4. 15.

2. In Account *againſt Guardian in Socage*, it is no *Plea that the Anceſtor held of him in Chivalry*, without ſaying *abſque hoc* that he held in Socage. Br. Account, pl. 80. cites 10 H. 6. 7.

3. Where an Account was brought *againſt one, ſuppoſing the Receipt of* 200 *Marks by the Hands of J. P. and R. C. the* Defendant (*as to* 100 *Marks*) *pleaded that he received it by the Hands of J. P. tantum, without that, that he received it by the Hands of J. P. and R. C.* and *as to the other* 100 *Marks, he received them from the Hands of R. C. only, without that that he received by the Hands of J. P. and R. C.* and there it was doubted whether it be good or not. Godb. 43. pl. 50. Mich. 28, 29 Eliz. B. R. cites 10 E. 4. 8. Fitzh. Account 14.

4. If an Account be brought *againſt* 2, and *one pleads that he was his ſole Receiver, and has accounted before ſuch an Auditor*, if the Plaintiff *replies unto his Bar*, he ſhall abate his Writ, becauſe the Receipt is ſuppoſed to be a joint Receipt; and it is not like a Præcipe quod reddat againſt 2. Godb. 43. pl. 50. Mich. 28 & 29 Eliz. B. R. cites Fitzh. Account 14.

5. Account againſt *one as Guardian in Socage* to the Plaintiff for ſuch a Manor held of C. in Socage, and that the Defendant *received the Profits till 14 Years of Age of the Plaintiff*. The Defendant *ſaid that the Land was held of the ſaid C. in Chivalry, and not in Socage*; Priſt. And after becauſe he did not juſtify the Action he amended his Plea, and *ſaid that the Land was held of C. in Chivalry, and he as Servant, and by his Command ſeiſed the Ward* of the Land and Body, abſque hoc that it was held in Socage, upon which they were at Iſſue; but by ſeveral the firſt Plea was ſufficient. Br. Account, pl. 76. cites 22 E. 4. 5.

6. *Two* were *charged in* Accompt *as Receivers, one of* them *pleaded that he never was Receiver*, without traverſing that he and his Companion were Receivers; and Clench and Suit J. held it well without Traverſe. Godb. 43. pl. 50. Mich. 28 & 29 Eliz. B. R. Anon.

2 Le. 194. pl. 245. S. C. in totidem Verbis.

7. In Account againſt the Defendant *as Bailiff of his Shop, curam habens & Adminiſtrationem bonorum*; the Defendant *anſwer'd as to the Goods but ſaid nothing to the Shop*; this being moved in Arreſt of Judgment, the better Opinion was that he ought to have anſwer'd to all. Godb. 55. pl. 69. Mich 28 & 29 Eliz. Gomerſall v. Gomerſall.

Yelv. 171. S. C. adjudg'd accordingly.

8. Caſe for that upon an Account between them, the Defendant was found in Arrear, and promiſed to pay &c. The Defendant pleaded and *confeſſed*

confeſſed the Account, and that he was found in Arrear accordingly, but that he gave Bond to the Plaintiff for the ſame, abſque hoc that they afterwards accounted, prout &c. The Court held that the Account which was the Ground of the Promiſe was well traverſable; and Judgment for the Defendant. Cro. J. 234. pl. 4. Hill. 7 Jac. B. R. Dalby v. Cooke. Bulſt. 16. Dalby v. Cooke S. C. and Judgment accordingly per tot. Cur.

9. Debt upon *Bond*, condition'd *that H. as Receiver, ſhould account and pay to the Plaintiff* &c. *all Rents which he ſhould collect* &c. The Defendant H. *pleaded Performance generally*; the Plaintiff *replied that he had received* 7000 *l. which he had not paid.* The Defendant *rejoin'd, that* bene & verum eſt *he had received* 500 *l. and no more, whereof he had given a true Account* to the Plaintiff, *and paid* 30 *l.* the Balance; and upon Demurrer to the Rejoinder, it was objected, that becauſe the Condition was in *ſeveral Parts of it in the Disjunctive*, the Plea of Performance generally was not good; and that Defendant *ſhould have poſitively alleged he had received* 500 *l. and given a true Account thereof, abſque hoc, that he received* 7000 *l.* or *any more* than 500 l. And adjudg'd accordingly for the Plaintiff. Lutw. 579. Hill. 9 W. 3. Duke of Bolton v. Clarke.

(B. a) Actions after Account made, and Pleadings.

1. IN Debt upon Arrears of Account, the *Defendant tender'd his Law, and pray'd that the Plaintiff be examined*, by which he was examined, and *it was found that it lies in Account*, and the *Defendant ſaid* that *he accounted for Rent due upon Arrears of a Leaſe abſque hoc, that he made other Account*, and a good Plea. Br. Dette, pl. 181. cites 10 H. 6. 20.

2. In *Debt upon Arrears of Account before Auditors*, the *Defendant pleaded Payment in another County*; Judgment ſi Actio. And per Forteſcue and Paſton this is no Plea without *concluding, And ſo Nihil debet.* Br. Dette, pl. 11. cites 20 H. 6. 16.

3. In Debt upon Arrears of Account, the *Defendant ſaid that Nihil debet Modo & Forma*, and *gave in Evidence that no ſuch Account was.* And Newton ſaid for Law to the Jury, that this is a good Iſſue and good Evidence. Br. Dette, pl. 14. cites 20 H. 6. 24.

4. Debt upon Arrears of Account, the *Defendant ſaid that after he had accounted before Auditors, they a Month after committed him to ward for the ſame Arrears, and ſo in Execution*; Judgment &c. And per Judicium no Plea; for the Power of the Auditors is to commit him to the next Gaol upon the Account finiſh'd, and the Party found in Arrears is to be committed to the next Gaol immediately, and not by any mean Space; and ſo by Judgment the Plaintiff recover'd his Debt and his Damages; quod nota; Br. Accompt, pl. 6. cites 27 H. 6. 8.

5. In Debt, the Plaintiff *counted that the Defendant aſſign'd to him Auditors A. and B. before whom he accounted from the time that he was Receiver* of the Money, *viz. by the Hands of T. and S. before which Auditors the Defendant was found in Surpluſage* in the Sum in Demand. Per Moyle J. for *Bailiff of a Manor* who is in Surpluſage, ſuch Action lies clearly; for he is to do things of Expences, and to pay and receive, and to have Allowances. And the ſame Law where he is his *Receiver to merchandize*, which is ſometimes in Gain and ſometimes in Loſs; *but* of a *Receiver of a certain Sum to render Account*, there he is not bound to do any Labour, Expences nor Coſts, and therefore there he *ſhall not have ſuch Action of Surpluſage*; for this is his Folly; which Priſot agreed. Br. Accompt, pl. 92. cites 38 H. 6. 5. Br. Dette, pl. 130. cites S. C. but there it is, that Debt lies for Bailiff or Receiver againſt the Lord of a Surpluſage upon Account before Auditors, where he has paid more for the Lord than he has received.——But 2 Bulſt. 277. 278 it was adjudg'd contra to what is above,

above, and according to Br. Accompt, pl. 62. Mich. 12 Jac. B. R. Suffolk (Earl) v. Floyd.——Roll. R. 87. S. C.

6. *And* where a Man is *Receiver of* 100 *l. per Ann. by diverſe Hands*, and is in Surpluſage, there he *ſhall have Debt againſt the Lord.* And *contra* where he is *Receiver to receive a certain Sum, and not retain'd as a Receiver in his Service*, note a Difference by which the Defendant paſſed over and pleaded Nihil debet. Br. Accompt, pl. 62. cites 38 H. 6. 5.

7. In Debt *by a Mayor and Commonalty againſt an Executor* upon Arrearages of Accounr, he need not *ſhew* in the Count *that he was Mayor at the time of the Auditors aſſign'd.* Thel. Dig. 87. lib. 9. cap. 7. S. 20. cites 12 E. 4. 10.

8. If *Debt* is brought *upon Arrearages of Accompt found before Auditors*, it is not a good Plea to ſay that he *gave a Bond to the Plaintiff for the ſame Duty*, becauſe the Debt was not changed by the Obligation. D. 51. pl. 14. Mich. 33 H. 8.

9. In Debt for Arrears on Accompt, the Defendant pleaded *that before the Accompt the Plaintiff of his own Wrong impriſoned him, and then aſſign'd Auditors to him in Priſon*, and ſo the Accompt was made *by Dureſs.* It was holden a good Plea by the Juſtices of both Benches. 4 Le. 91. pl. 188. Paſch. 25 Eliz. the Earl of Northumberland's Caſe.

It lies of *Rent and a Legacy.* Cro. J. 602. Bard v. Bard.

10. An Action upon an Inſimul Computaſſet doth not lie *for Rent (alone)* due and in Arrear, for the Rent demandable is certain; but if the Rent be behind, and there are (alſo) other things mix'd with it, for which the Action is brought, then an Action upon an Inſimul Computaſſet may be brought for both of them together, becauſe it is uncertain upon the whole Matter what is due to the Plaintiff. L. P. R. 30. cites Trin. 1651. B. S.

11. Note, at this Day the common *Declaration* upon an Inſimul Comp. is to ſay that the Plaintiff and Defendant ſuch a Day, Year and Place, *inſimul inter ſe computaverunt de diverſis denariorum ſummis per ipſum* the Defendant *eidem* the Plaintiff *præantea ibidem debit' & inſolut. exiſten. & ſuper compoto illo idem* the Defendant *adtunc & ibidem inventus fuit in Arreragiis erga eundem*, the Plaintiff in ſo much *predictoque defendente ſic in Arreragiis invent. exiſten. adtunc & ibidem conſideratione inde ſuper ſe aſſumpſit* &c. L. P. R. 118.

12. The Plaintiff muſt in his Declaration lay *the very Day of the Account, and* Sum agreed *upon* by both Parties to be due, otherwiſe the Plaintiff will be nonſuited. L. P. R. 118.

(C. a) Account in Equity. In what Caſes, and againſt whom.

1. A *Creditor of a Delinquent in the Time of the Great Rebellion, purchas'd the Delinquent's Eſtate of the Truſtees under the then Government* for Sale thereof; and upon the ſaid Purchaſe the Debts due from the Delinquent to the ſaid Purchaſer were allow'd him, and he paid the Reſidue only. The Delinquent, after the Reſtoration, brought a Bill againſt the Purchaſer's Executor for an Account. The Defendant offered to account, if Plaintiff would pay the Debt and the Purchaſe-money. The Lord Keeper declar'd, that if Defendant's Counſel had not offer'd it, he would not have order'd an Account, all *Monies received by the Profits* being *pardon'd by the Act of Oblivion.* Chanc. Caſes 172. Trin. 22 Car. 2. Stowel v. Long.

2. Account

2. Account by a *first Mortgagee binds* the After-mortgagees, tho' neither of them are Parties to it, unleſs there is Fraud or Colluſion. 2 Chanc. Caſes 32. Trin. 32 Car. 2. Anon.

S. P. accordingly, if the Fraud and Colluſion charg'd in the Bill be anſwer'd, and the Bill not ſpecifying any Particulars as it ought, it ſhall be ſufficient if the Fraud and Colluſion be denied; Per Ld. Chancellor. 2 Chanc. Caſes 299. Trin. 29 Car. 2. Needler v. Dibble.

3. If one in his Anſwer ſwears that what he received he *received as a menial Servant, and hath paid it over to his Maſter*, he ſhall not be put to account again, but he ought to diſcloſe this Matter in his Anſwer. Vern. 136 pl. 127. Hill. 1682. Anon.

But where on a Bill for an Account and Diſcovery of *Money received by Defendant on the Behalf of one who became Bankrupt*, he pleaded that he received it only as a menial Servant to the Bankrupt, and had accounted for it to him already, *and that the Commiſſioners had already examined him on Interrogatories*, the Plea was over ruled. Vern. 95. pl. 81. Mich. 1682. Wagſtaffe v. Bedford ——2 Vent. 358. Anon. S. P accordingly, and S.C. —— Abr. Equ. Caſes 6. pl. 5. cites S C. but ſays Quære whether there were not Circumſtances of Fraud in this Caſe, or a Combination between the Bankrupt and Servant.—— And on Exceptions to a Maſter's Report reporting the Defendant's Anſwer inſufficient, Lord K. North declared that it was ſufficient for a Servant *or Apprentice*, in Anſwer to a Bill for an Account, to ſay in general, That whatever he received was by him received and laid out again by his Maſter's Order. Vern. 208. pl. 204. Mich. 1683. Potts v. Potts.

4. Three *Part-owners of a Ship. One refus'd to fit her out* to Sea, and *the others do it* without his Conſent. The *Ship is loſt* in the Voyage. Per Cur. The Loſs ſhall be equally born by all 3; for *he that did not conſent* would have been equally intitled to a 3d Part of the Freight, and *ſhould have had an Account* here of the 3d Part *of the Profits of the Voyage*. Vern. 297. pl. 291. Hill. 1684. Strelly v. Winſon.

5. T. having *lent* Sir D. T. *ſeveral Sums* of Money, *amounting to* 600 *l. Sir D. T. by Indenture bargains and ſells a 16th Part in a Ship, and by a* Defeazance it was *declar'd that this Aſſignment was* made to the Intent *that the Plaintiff out of the Earnings of the Ship, ſhould pay himſelf the Sum of* 600 *l. and after* ſuch Payment *ſhould account to Sir D. T. of the Earnings*; but there was *no Covenant* in the Deſeazance *to pay the Money*. Afterwards *the Ship was loſt*, and the Plaintiff brings a Bill againſt the Executrix of Sir D. T. to have Satisfaction for this Debt due from the Teſtator. The Defendant by her Anſwer denies Aſſets præter to ſatisfy Judgments and Debts by Specialty. Decreed that the Defendant account for the Eſtate of the Teſtator, and the Plaintiff to account for what Money he had received out of the Earnings of the 16th Part of the Ship, and to be *allowed what Sums he expended in fitting out the Ship*, tho' ſhe happened to be caſt away in the 2d Voyage. MS. Rep. Mich. 12 Ann. in Canc. Tyrrell v. Lady Thomas.

6. Where there was *no Truſt nor Infant* in the Caſe, *nor any Entry* made by the Perſon intitled to the Rents and Profits *in the Life-time of the Perſon taking them*, the Court refuſed to decree an Account of them. 2 Vern. 724. pl. 640. Mich. 1716. Hutton v. Simpſon.

7. If *ſeveral Executors are ſued in Equity*, and *one admits Aſſets*, this ſhall not prevent the Creditor Plaintiff from ſuing the others, who may have poſſeſs'd themſelves of Part of the Eſtate, and ought to be reſponſible, and the other who admitted Aſſets, might yet not have any, nor any Eſtate of his own; Per the Maſter of the Rolls; and therefore ordered all the Executors to account for what they reſpectively have in their Hands of the Teſtatrix's perſonal Eſtate, or the Produce thereof. 2 Wms's Rep. 145. Trin. 1723. Norton v. Turvill.

8. *Two Perſons* agreed for the *Purchaſe* of an *Eſtate in Moieties* between them, which Eſtate was *ſubject to ſeveral Incumbrances*, which were *to be diſcharg'd out of the Purchaſe-money*; *one* of them *had Abatements made to him* by ſome of Incumbrancers, of ſeveral Sums due for Intereſt, and other-

otherwiſe, which they, in Conſideration of Services and Friendſhip, agreed ſhould be *to his own Uſe*; yet on a Bill brought for an Account of the Rents and Profits, the Court would not allow him the Benefit of theſe Abatements, excluſive of the other, but held that he muſt account for them, the Purchaſe being made for their equal Benefit, and on a *mutual Truſt* between them. Abr. Equ. Caſes 7. Trin. 1728. at the Rolls. Carter v. Horne.

9. After an *Attorney's Bill* had been *tax'd by the Prothonotary* of the Court of C. B. upon an Account, he ſhall be *allow'd to ſue in Equity for a new Account* there upon a *Suggeſtion that he was allow'd* on the Account by the Prothonotary *leſs than he ought to have been*. Comyns's Rep. 612. pl. 263. Hill. 11 Geo. 2. in the Exchequer. Osbaldiſton v. Croſs, Croger and Chancy.

(D. a) Account. In Equity. When, and from what Time. And how.

Quære if this is not a Nota of the Reporter; but ſee Ibid. 339 S. P by Hale Ch. J. who aſſiſted the Ld Keeper. —Account lies not againſt *Conuſee of a Statute extended*, until ſuch Time as he has *levied the Money according to the Extent*, and not according to the true Value of the Land, tho' the Land be *extended only at* 10 *Marks where it is worth* 100 *Marks*. See 2 Roll. Statutes (T) pl. 2. where he denies the contrary, which is given as a Reaſon of denying a Re-extent by Fitzherbert in his Abridgment, Tit. Extent, pl. 18.

1. THE *Conuſee of a Statute* ſhall not account according to the true, but according to the extended Value, and alſo for the whole Statute; and if the Conuſee is ſatisfied by the extended Value the Conuſor ſhall recover; or if the Conuſor will pay down the reſt of the Money which is behind, with Damages, he ſhall alſo recover; but if the Conuſor will ſue the Conuſee in a Court of Equity, then he ſhall bring him to account for what he hath received of the Profits above the extended Value. 2 Vent. 338. Trin. 22 Car. 2. in Canc. in Caſe of Marſh v. Dee.

Fin. Rep. 36. Mich. 1673. S. C. but S. P. does not appear.

2. *Gratuities given by a Steward* to be allow'd on the Party's Examination, that he gave them without other Proof of Payment, and he not to be examined to the Particulars, nor to whom given, and cites the Marquis of Wincheſter and Withers's Caſe 3 Chanc. Rep. 72. Mich. 1671. Tredcroft v. White.

3. A. *extended Lands in* 1 *Car.* and held the ſame in Extent. *A Bill was exhibited to redeem*, and being not redeem'd, the Bill *diſmiſs'd in* 16 *Car.* 1. Afterwards A. *by Virtue of the ſaid Diſmiſſion, ſold the ſaid Premiſes to the Defendant.* Afterwards J. S. bought the Equity of Redemption, and ſues now to redeem. Whereupon the Court, notwithſtanding the Diſmiſſion and Length of Time, order'd an *Account from the Time of the Purchaſe*, but no Account from any Time before, but the Profits to go againſt the Intereſt to that Time. 2 Chanc. Rep. 392. 2 Jac. 2. Cloberry v. Lymonds [alias Simonds.]

4. Lands were *extended* on a Judgment 100 *Years ago*, and had exchang'd Hands 5 or 6 Times. The Queſtion was, whether the Defendant ſhould account *for more than the extended Value?* It went off, upon a Propoſal to allow Defendant what he paid, and that he account only for what he received in his own Time. Vern. 468. pl. 451. Trin. 1687. Poole v. Guiſe.

5. An

5. An old *Aunt liv'd with a Niece, who received the Aunt's Money for her, and the Aunt immediately put it out to Intereſt.* The *Aunt died inteſtate.* The *Niece and J. S. were next of Kin.* J. S. brought a Bill of Diſcovery againſt the Niece, to ſet forth what Monies ſhe had received. She ſets forth ſeveral Sums received, and when; and that Inteſtate immediately put them out again at Intereſt to A. B. C. D. and E. F. and ſet forth other Sums which ſhe had received and paid over to the Aunt. The Cauſe was heard without Proof on either Side, and an Account decreed. The Maſter of the Rolls ſaid, that he look'd on the Defendant in this Caſe to have acted *only in the Nature of a Servant, who* by the Juſtice of this Court *may*, on a Bill brought againſt him by his Maſter's Executors, *diſcharge as well as charge himſelf by his Anſwer, yet as* the *Defendant might*, in this Caſe, *have prov'd his Anſwer*, as appears by the Anſwer itſelf, and had not ſo done, he referr'd it back to the Maſter, and each Side to make what Proofs they could. And he declared, that if the Anſwer was *diſproved* as to the Sums put out at Intereſt, he ſhould give no Credit to it as to the other Particulars, *elſe* inclin'd it ſhould be *a Diſcharge* too, *as well as a Charge.* Trin. 1702. Abr. Equ. Caſes 10. Bayly v. Hill.

6. Lands were *limited by Marriage-Settlement*, upon Failure of Iſſue Male, *to Daughters and their Heirs, until* the next Remainderman ſhould pay them 3000 *l.* The Daughters, being four only, *enter'd.* On a Bill by *Creditors by Judgment* to be let into a Satisfaction ſubject to the Charge of 3000 l. and in Exoneration thereof to have an Account of the Rents and Profits it was inſiſted for the Daughters to retain without Account till paid 3000 l. at one intire Payment; but Maſter of the Rolls decreed the Daughters to account, and the Rents and Profits to be applied in the firſt place to pay the Intereſt of the 3000 l. and then to ſink the Principal as in the Caſe of a common Mortgage. But upon Appeal the Decree was affirm'd with this Alteration, that the *Principal* ſhould *not be ſunk by ſmall Payments*; but when a *Third Part* was raiſed, *beyond all Intereſt due* at ſuch Time, it ſhould go to *ſink the Principal*, and ſo again when another Third was raiſed &c. 2 Vern. 523. pl. 473. Mich. 1705. Blagrave v. Clunn & Ux' & al'. 2 Vern. 578. pl. 521. Hill. 1706. S. C. heard before Ld. Keeper Cooper, who decreed as mention'd.

7. On a Bill to have an Account of the Rents and Profits of Lands &c. Harcourt C. ſaid, that when a Perſon has been *ejected at Law*, and the other Party has been *in Poſſeſſion above* 20 *Years*, and no Account demanded, or Bill filed in that Time, the *Statute* 21 *Jac.* 1. *of Limitations*, will bar an Account in this Court, as well as an Action of Treſpaſs for the mean Profits at Law; for Jus Poſſeſſionis is gone by the Statute of Limitations, and conſequently the mean Profits, and if once the Statute begins to attach, Incapacity, as Coverture &c. will not aid it. The Statute of Limitations does not extend to a Truſt, but in this Caſe the Defendant coming in by a Recovery at Law, and the 20 Years elapſed before the Bill filed, the Bill muſt be diſmiſs'd quoad the Account of Rents and Profits. MS. Rep. 19. Trin. 13 Ann. in Canc. Nevarre v. Rutton.

8. A *Feme ſole, ſeiſed of Lands* in Fee *ſubject to a Mortgage*, marries A. About 10 *Years after the Marriage A. pays off the Mortgage, and has it aſſign'd over to B. in Truſt for himſelf*, and *lays out a conſiderable Sum of Money in Improvements* upon the Eſtate; and having Iſſue 2 Daughters by his Wife, makes his Will, and *deviſes theſe Lands to his youngeſt Daughter*, and dies; his *Wife ſurvives, and holds the Lands for her Life*; and after her Death the *eldeſt Daughter* and her Husband *brings a Bill againſt her Siſter and Co-heir, to redeem a Moiety of theſe Lands* &c. The great Queſtion was upon what Terms, and in what manner the Plaintiff ſhould redeem; for if the Account was to be taken as between Mortgagor and Mortgagee in Poſſeſſion, then the Deviſee muſt account for the Profits received by the Deviſor, and be allowed for Repairs and laſting Improvements;

provements; but if in this Case the Devisor should be judg'd in Possession by Right of his Wife, and not by Virtue of the Mortgage, then the Devisee was not to account for the Profits, nor have an Allowance for Repairs and Improvements, but only to have Interest allow'd from the Death of the Father; for then it would be the common Case of Tenant for Life, of Lands in Mortgage, who is obliged to keep down the growing Interest during the Continuance of his Estate, and shall not have any Allowance for the Improvements. Cooper C. decreed that there should be no Allowance for Improvements by the Husband, before he took an Assignment of the Mortgage; but from the Time of the Assignment the Devisee should have an Allowance of the two Thirds of the lasting Improvements, but nothing for the other Third, because he received the Benefit of the Improvements during his Life, according to the usual Proportion between an Estate for Life and the Reversion in Fee; and that no Interest should be allow'd during the Life of the Devisor; for Tenant for Life is bound to keep down the Interest during his Estate; per Cur. MS. Rep. 24. Pasch. 1 Geo. Canc. Newling v. Abbot.

9. *Bona fide* possessio facit fructus percepros & consumptos esse suos; but such Purchaser or *Possessor* shall account after a Lis Pendens against him, and there ought to be a *Retrospect from the Beginning of the Suit.* MS. Tab. Feb. 15. 1721. Walker & Macpherston.

10. Account directed after 33 *Years* Acquiescence. MS. Tab. Feb. 17. 1724. Ld. Kingsland v. Lady Tyrconnel.

(D. a) Account open'd.

1. ACCOUNT was stated between *Mortgagor* and the Heir of the Mortgagee *under Hand and Seal.* After several Meetings and Examinations it was suggested, that on Sealing 'twas *agreed* between the Parties, that if there was any *Mistake* it *should be rectify'd.* Defendant denied the Agreement, and pleaded the Account stated, and set forth the several Meetings in order to it, and that it was perused by the Plaintiff and a Friend before it was seal'd, and by him approved, and he consented to it; but it appearing to the Court on the Hearing, that the Account was made up of *Interest upon Interest*, they set it aside, and order'd them to account ab Origine. N. Ch. R. 100. 16 Car. 2. Prowde v. Combes.

Chan. Cases, 55. Trin. 16 Car. 2. Combs v. Baud, S. C. accordingly. —3 Chan. Rep. 18. S. C. in the same Words of Chan. Cases, 55. —2 Freem. Rep. 183. pl. 253. S. C.

That Account stated is a good Plea; but if there be any Agreement to rectify Mistakes, it shall not conclude, tho' under Hand and Seal.

2. *Cesty que Trust borrows* 500 l. *of the Administratrix of his Trustee*, and makes a *Mortgage* to her for that, and also for 2000 l charg'd by her as due to her Intestate from the Trust Estate, and thereupon she deliver'd *up all her Husband's Accounts* to Cesty que Trust, who examin'd and approved them; and the Trustee having given Authority to a Servant of Trustee's to receive the Rents &c. the same was agreed to be allow'd to the Administratrix; but at the Execution of the Mortgage she agreed to allow what could be made appear her Husband had received more. The Court referr'd it to a Master &c. to look into the Proofs, and if found that Plaintiff had surcharg'd the Defendant with any Receipts of her Intestate, not compriz'd in the Accounts produced, she should be at Liberty to discharge herself, and to have all just Allowances, and to produce the Books of Accounts, and the Plaintiff on Oath to produce Acquittances

quittances &c. and if any Thing found to be coming to the Plaintiff, the ſame to be allow'd out of the Mortgage-Money. Fin. Rep. 5. Mich. 25 Car. 2. Bedell v. Bedell.

3. An Account between *Partners in Trade*, after the Death of one of them, ſhall be taken only from the Time the ſame was laſt balanced. Fin. Rep. 190. Beak v. Beak.

4. After an *Account ſtated* between A. and B. and the Balance being 300 l. due to B. and by Deed reciting the Debt due on the Account. *A. covenanted to pay B. the* 300 *l. and then B. died.* A. *afterwards finding that his Servant had paid* 200 *l. to B.* and that it was ſo *enter'd in his Account-Book, which he had not with him when he made up the Account*, brought his Bill to be reliev'd againſt B.'s Executor. The Executor pleaded the Account ſtated, and the Balance ſecur'd by Writing under Hand and Seal, and that he being only an Executor knew not how to account, and believed that B. upon the Account made, deliver'd up his Notes and Vouchers, and that no ſtated Account could ſtand in Court if this or that Particular ſhould be queſtion'd. The Plea was over-ruled, but to proceed no further than Anſwer without Leave of the Court. Chan. Caſes, 262. Trin. 27 Car. 2. Wright v. Coxon.

5. *Factor's* Account was *ſettled by one Factory, and confirm'd by a ſuperior Factory*; and after Exceptions to it by the Eaſt-India Company here, *confirm'd again* by the ſuperior Factory, with which *the Company comply'd* by paying ſome Bills of Exchange, and delivering ſome Goods to Defendant, yet he was forced to account again; tho' he inſiſted that ſome Vouchers were taken forcibly from him by the King of the Country; For per Ld. Chancellor, it is a National Cauſe and Concern, and nothing ſhould diſcharge the Factors in India but a *Releaſe* or Diſcharge *from the Eaſt-India Company itſelf*, elſe their Agents, by mutual Connivance, may ruin the Company. 2 Chan. Caſes, 218. Paſch. 28 Car. 2. Eaſt-India Company v. Mainſton.

6. There ſhall be no examining into an Account ſtated, on a Suggeſtion of Fraud and Colluſion, but by *charging of Particulars*, if the Fraud and Colluſion be anſwer'd. Chan. Caſes, 299. Trin. 29 Car. 2. in Caſe of Needler v. Deeble.

7. An *Adminiſtrator authoriz'd A. to call B. a Debtor to account* for what he had in his Hands of the Inteſtate's. B. thereupon accounted with A. and *A. gave B. a Releaſe.* On a Bill by the Adminiſtrator for a new Account, B. pleaded the Releaſe, and ſaid he knew of no other Monies or Goods of the Inteſtate more than what he gave an Account of, and the Court denied any further Account. Fin. Rep. 311. Trin. 29 Car. 2. Martin v. Sambrook.

8. An Account was ſtated *between* C. and D. *Partners*, and on the Balance C. was Debtor 160 l. and *gave a Note of his Hand for Payment* to D. *who at the ſame time promiſed to rectify any Miſtake.* On a Bill by C. for a new Account, D. pleaded the Account ſtated, and the Note, and a Judgment thereupon, and denied the Promiſe. A new Account was decreed concerning the Stock and Trade, and for the Payments and Receipts, and that each produce the Books of Account on Oath, and what ſhall appear due ſhall be paid with Intereſt at the Time and Place the Maſter ſhall appoint. Fin. Rep. 431. Mich. 31 Car. 2. Chandler v. Dorſet.

9. If one prefers a *Bill generally for an Account*, an *Account ſtated* is a good Plea; but if in his Bill he ſets forth that there was an Account, and that there was a Miſtake, and *ſets forth a particular Miſtake*, there the Account ſtated is no good Plea; per Hutchins & al'. 2 Freem. Rep. 62, pl. 69. Mich. 1680. Anon.

10. The Party gives in an Account of Debtor and Creditor, and ſets down ſo much received and ſo much paid, which being taken as true, a *Releaſe*

Releaſe is given. Ld. Keeper North thought it reaſonable to relieve againſt ſuch a Releaſe, and let them in to *diſprove the Articles* of the Account; and ſaid in this Caſe, that a Releaſe obtain'd as ſoon as ever the Heir came of Age by the *Guardian*, ſhould never by him be thought a Trick, but that it was the proper Time; but Finch ſaid it had been otherwiſe held. Skin. 148. Mich. 35 Car. 2. in Canc. Anon.

11. *A Man being about to marry an Infant*, made an Account before Marriage with the Guardian; the Man gave Bond to the Guardian, that after Marriage, on Payment of the Sum ſtated, he would releaſe all Accounts to him; the Marriage was had, and the Money paid; the Husband ſued for an Account, the Guardian pleaded the Matter as above. Per North K. The Husband accepted of no Money but what was due to him, and the *Account made when he had no Title*, viz. before his Marriage, and there is no Releaſe made, as there was in the like Caſe by Baſſet, which bound Baſſet and the Plaintiff greatly favour'd in the Accounts, and the Marriage was but one Year ſince, and the Plaintiff's *Purſuit is freſh*, therefore anſwer the Bill. 2 Chanc. Caſes 157. Mich. 35 Car. 2. Osborne v. Chapman.

12. The Husband convey'd an *Equity of Redemption in Jointure on his Wife, and became Bankrupt.* The *Aſſignees ſtate an Account with the Mortgagee.* The Jointreſs brought a Bill for Relief againſt this Account alleging that it was not fairly ſtated, but that by Combination with the Mortgagee they allow'd more than was really due on the Mortgage; but Lord K. North ſaid, the Account ſtated by the Aſſignees is as concluſive as if ſtated by the Husband, they ſtanding in his Place, and the Bill is not right in charging a general Fraud, but particular Errors ought to have been aſſign'd; however he gave the Plaintiff leave to amend. Vern. 179. pl. 172. Trin. 1683. Knight v. Bampfield.

13. Plea of an Account of an *Orphan's Eſtate before the Aldermen of London*, was diſallow'd, and a Surcharge allow'd to be made thereon by Lord Chancellor. 2 Chanc. Caſes 170. Hill. 1 Jac. 2. Newdigate v. Johnſon.

14. A. is *Tenant for Life of a Truſt, Remainder to his Sons.* The Truſt was for Payment of Debts and Legacies. A. *before a Son born*, gets a Decree againſt the Truſtees to account, which they did. This Account ſhall ſtand without being unravell'd, all Perſons being Parties that then could be made Parties. 2 Vern. 526. pl. 475. Mich. 1705. Leonard v. Earl of Suſſex.

15. A. and B. were intitled to a perſonal Eſtate by the Statute of Diſtributions, and an *Account* thereof was *ſtated* between them. Afterwards A. by *Bill demands a Diſcovery of particular Items ſuppos'd not to be compriz'd* in it, and yet at the ſame Time allows the Account to be fairly taken. The Defendant pleaded the ſtated Account in Bar. And it was inſiſted for him, that *either the Items muſt be denied in particular, by falſifying them, or ſaying they were not allow'd, or elſe a Surcharge muſt be brought in*; but that here neither of theſe Ways is taken, ſo that the Plaintiff would unravel the Account, without pointing out one Error in it. Ld Chancellor allow'd the Plea, and ſaid this muſt not be not ſuffer'd. Barnard. Rep. in B. R. [but this was a Caſe in Chancery] Mich. 3 Geo. 2. Bourke v. Bridgeman.

16. An *Account* was *made with Officers of the Crown for the Building of Blenheim Houſe*, order'd to be built for the Duke of Marlborough at the Publick Expence, but *afterwards the Charge* (upon the Duke's falling into ſome Diſgrace) *being caſt upon the Duke himſelf*, the Account was opened at the Suit of the Dutcheſs of Marlborough a Subject notwithſtanding it was inſiſted that it would be a great Hardſhip upon the Workmen to come to a new Account before the Maſter in Chancery for ſo great a Sum as this Building has coſt, and to produce Vouchers for every Particular after ſuch a Length of Time; beſides that *ſeveral* of the preſent *Defendants*

dants were the Widows and Children &c. of the deceaſed Workmen ; ſo that it would be almoſt impoſſible for them to produce Vouchers for Work done by thoſe whom they repreſent, after ſo *long Acquieſcence* under a ſtated Account, by relying whereupon they might be negligent of ſuch Vouchers, and might probably have loſt great Part of them. 9 Mod. 23. Trin. 9 Geo. The Dutcheſs of Marlborough v. Sir John Vanbrook.

17. Where a *young Man juſt come of Age was fraudulently drawn in by his Truſtee to ſign an Account which he had never examined*, the Account was decreed to be open'd. See Caſes in Equity in Ld King's Time. 34. 35. Trin. 11 Geo. 1. Weſtern v. Cartwright.

(E. a) After a former Account made with Strangers.

1. AFter an *Account* was *decreed to one as Heir*, he ſued for a *new Account as Adminiſtrator*, and it was decreed him ; As where a Leaſe was made in Truſt to raiſe Money for ſeveral Uſes, and the Surplus to go to the Heir of the Leſſor. A. as Heir was intitled, and brought his Bill by Guardian for an Account of the Profits, and dies. B. his Brother by Guardian reviv'd the Suit. The Account was ſettled, and the Surplus decreed to be paid him, being then about 19 Years old, and was paid accordingly. Afterwards B. being 21, brought an original Bill, without taking Notice of the former Suit. The Defendants plead the Decree, and Payment, but it was over-rul'd. 3 Chanc. Rep. 77. 24 Car. 2. Strickland v. Lock. N. Chanc. Rep. 149. Strickland v. Laske, S. C. accordingly.

2. An Adminiſtration was repeal'd, and granted to another ; the *1ſt Adminiſtrator accounts with the 2d*, in the Prerogative Court, and deliver'd him all Books of Accounts &c. relating to the Inteſtate's Eſtate ; he is thereby diſcharg'd from any further Account ; and ſo a Bill againſt the 1ſt Adminiſtrator, brought by a Creditor of the Inteſtate, was diſmiſs'd. Fin. Rep. 123. Mich. 26 Car. 2. Parker v. Dee. 2 Chanc. Caſes 200. S. C. but S. P. does not appear. —An Account of a perſonal Eſtate was taken in the Spiritual Court, and Diſtribution decreed there, yet Chancery decreed an Account of the whole Eſtate. 2 Vern. 47. pl. 45. Paſch. 1688. Biſſell v. Axtell.

3. Land is *mortgag'd* to A. and then to B. then to C. If A. ſues to redeem, and try his Debt by *Decree*, they ſhall all be bound by the Account which A. made in his Suit, and pay and contribute to the Charges of Suit, if made without Fraud or *Colluſion*. 2 Chanc. Caſes 32. Trin. 32 Car. 2. Anon.

4. Second Mortgagee accounts with firſt Mortgagee and Mortgagor what was due to the firſt, and paid him off, and took Aſſignment of the Mortgage ; one that got *Judgment in Debt intervening*, may oblige the ſecond Mortgagee to account again. 2 Chanc. Caſes 123. Mich. 34 Car. 2. Brent v. Engliſh.

5. J. S. *bequeath'd* 600 *l. to A.* 700 *l. to B. and* 700 *l. to C.—B. ſued the Executor*, who pleaded the Legacies to A. and C. in Abatement ; and that the *Will directed, that if the Eſtate fell ſhort each ſhould abate proportionably, but if it improv'd*, then *each Legacy to be proportionably increas'd* ; and therefore A. and C. ſhould be made Parties ; for the Account made with B. will not conclude A. and C. and ſo he ſhould be put to 2 Accounts, and double Proof and Charge. Ld Chancellor order'd him to anſwer without Coſts. 2 Chanc. Caſes 124. Mich. 32 Car. 2. Haycock v. Haycock.

(F. a) Bar of Account or Demand in Equity. What is.

1. A Bill was brought for an Account of *Goods taken in Execution*, and *ſuppos'd to be ſold at an Under-value.* The Defendant *pleads that before he bought the Goods of the Sheriff they were offer'd to be ſold to the Plaintiff at the Price himſelf paid for them, and* that *after he had bought them he offer'd them to the Plaintiff for the ſame Money* which he paid for them; but that he had ſince, by Virtue of the Bill of Sale which he had from the Sheriff, diſpos'd of them to other Perſons; and the Plea was allow'd. Fin. Chanc. Rep. 111. Hill. 25 Car. 2. Dean v. Gavell & al'.

Jekil Maſter of the Rolls ſaid, That this Caſe is not rightly reported in Vern. 452. and that in the Regiſter-book of Paſch. 1687. pag. 491. thete is this Entry, (viz.) The Lord Chancellor, on reading and examining Witneſſes viva voce, declared that the Papers there called Wynne's Accounts, were thro' the Careleſſneſs of the Defendant embezill'd; and therefore confirmed the Maſter's Report, which had not made the Defendant any Allowance for Diet &c. by reaſon of ſuch Embezlement. Wms's Rep. 681. Mich. 1734. in Caſe of Cowper v. Earl Cowper.

2. An Account of a perſonal Eſtate being decreed, the Defendant endeavour'd to charge the Plaintiff with a great Debt, as due to the Eſtate; but upon Proof made that the Defendant had *open'd a Bundle of Papers relating to that Demand*, which had by the Inteſtate, who was Father in Law of both Plaintiff and Defendant, been *ſeal'd up*, and left with Defendant to be ſafely kept, he being told they were Matters of Concern, the Defendant's Demand was for that Reaſon *diſallow'd* Per Jefferies C. who at the ſame Time declar'd himſelf ſatisfied, that all the Papers were produc'd. Vern. 452. Paſch. 1687. Wardour v. Berisford.

Jekil Maſter of the Rolls ſtates this Caſe out of the Regiſter-books thus, (viz.) the Defendant was the Plaintiff's Steward, and the Bill was brought for an Account. Defendant pleaded that the Plaintiff had impriſon'd him, and upon Promiſe of his Liberty had got a Trunk in which were all his Vouchers, inſiſting that tho' he kept the Key, yet it was eaſy to be opened, and that it was to be preſum'd it had been ſo; and it was impoſſible for him to prove what the Plaintiff had taken out, or to account without his Vouchers. This Plea was argued, and ordered to ſtand for an Anſwer. Afterwards, by an interlocutory Order, the Trunk was directed to be delivered to the Uſher of the Court; and upon hearing the Cauſe, the then Lords Commiſſioners decreed the Defendant to account, and ordered the Trunk to be brought before the Maſter, who was to open it in the Preſence of both Parties, and they to have Copies of the Papers found in it, as they ſhould think fit; but the *Court would not preſume material Papers, or even a Suppreſſion of any ſuch*, tho' it ſhould ſeem that the Trunk was got from the Plaintiff in a very unwarrantable Manner; and only took the beſt Care they could, that the Papers, wherever they were, ſhould be produced. 2 Wms's Rep. 681. 682.

3. *Detinue of Charters* and Evidences of the Stewards by the Maſter, during the Detainer, is a good Plea at Law in Bar of an Account; and ſo it is in Equity. But to ſay that the Plaintiff *did once ſeize* his Charters, is not a good Plea. 2 Vern. 33. Per Cur. Hill. 1688. Counteſs of Plymouth v. Bladen.

For more of Account in general See **Debt, Diſcount, Guardian, Incumbrances, Mortgage, Own Oath, Truſt,** and other Proper Titles.

Ac etiam Billæ.

1. 13 *Car.* 2. *Seſſ.* 2. *cap.* 2. NONE *arreſted by Proceſs out of the B. R. or C. B. in which Proceſs the true Cauſe of Action is not expreſſed, and for which the Defendant is bailable by* 23 *H.* 6. *cap.* 10. *ſhall be forced to enter into Bond with Sureties for Appearance in any Sum exceeding* 40 *l.*

This Act was the Foundation of Ac etiam Billæ in Writs. L. P. R. 13.

2. In an Indebitatus Aſſumpſit, the *Declaration and Recovery was for more than the Ac etiam*, and tho' it was *offer'd to level it with the Ac etiam by entring a Remitt' on the Record for the reſt*, yet it was denied on Debate; cited by Holt Ch. J. 6 Mod. 266. as a Caſe in Pemberton's time, in which himſelf was Counſel, Thompſon v. Collins.

3. In Error of a Judgment in C. B. againſt a Sheriff for an Eſcape, the firſt Proceſs was alleged to be an original Writ Quare Clauſum fregit, and was affirm'd to be for Recovery of a Debt by Judgment. And the Return being (Nihil habet per quod attachiari poteſt) a Capias was awarded ad reſpondend' the Plaintiff in Placito prædicto Ac etiam in Placito Debiti ſuper Demand' ſecundum Conſuetudinem Curiæ de Banco, and that upon this Proceſs the Defendant in the ſaid Action was permitted to go at large, whereby the Plaintiff has loſt his Debt. The Matter of the Proceſs (Ac etiam) annex'd to the Capias was aſſign'd for Error, but allow'd to be good; And the Judgment affirm'd per tot. Cur. 2 Jo. 217. Trin. 34 Car. 2. B. R. Atkins v. Jay.

4. An Ac etiam Billæ ought not to be made out againſt any *Peer* or *Peereſs*, or any *Executor*, or *Adminiſtrator*, or upon a *Penal Statute*, or for any *Debt* or *Aſſumpſit under* 10 *l.* nor in Action of *Account* Render, nor in any Action of *Covenant or Trover*, unleſs the Damages are 10 l. or more; nor in any Action of *Treſpaſs*, or for *Battery*, *Wounding* or *Impriſonment*, unleſs there be an Order of Court for it, or a Warrant under the Hand of one of the Judges of the Court, out of which the Writ Iſſues for that Purpoſe. L. P. R. 13.

5. In Caſe for *inveigling away* his Son, who was alſo *his Servant* (the Defendant being a Seafaring-Man) an Ac etiam Billæ of fifty Pounds was order'd on Motion and Affidavit. Cumb. 311. Paſch. 1 W. M. in B. R. Anon.

6. The Plaintiff laid his Ac etiam *for* 300 *l.* and then *ſwears only* that the Defendant owed him above 10 *l.* juſt to bring him within the Rule for Special Bail. The Court order'd him to take *common Bail for his Fraud.* Cumb. 265. Trin. 6 W. & M. B. R. Anon.

7. In an Action of Treſpaſs, Aſſault and Battery, by Bill of Middleſex with an Ac etiam for 40 l. and recover'd 100 l. the Court held the Bail ſhould not be liable for more than the Ac etiam, for that is the Meaſure and Ground of his Undertaking. 1 Salk. 102. pl. 16. Mich. 3 Ann. B. R. Genbaldo v. Cognoni.

6 Mod. 266. S. C. Bail is liable *to anſwer* only what is expreſſed in the Ac etiam Bill. 2 Ch. R. 55. 22 Car. 2. in Canc. Boulter v. Cheſter.—And Holt Ch. J. held that he was not liable at all; for his Recognizance is to anſwer the Condemnation, and ſince that cannot be, he is bound to nothing. 1 Salk. 102. ut ſupra.

8. Defendant in a Scuffle *bit off the Fore-finger* of an Attorney's Right-hand, and in Treſpaſs with an Ac etiam by a Judge's Warrant, the Bail was not held to juſtify themſelves to a Sum ſuitable to the Ac etiam, the Defendant being poor. 6 Mod. 230. Mich. 3 Ann. B. R. Cockcroft v. Smith.

6 Mod. 265. 11. Mod. 43. 52. Lord Raym. 177. S. C. but not S. P.

9. It

9. It was moved for a Special Ac etiam in Trefpafs *for lying with the Plaintiff's Wife*, which was granted; and held the Defendant to 50 l. bail. N. B. *Affidavits* were produced of the *indecent Liberty* they took together. 11 Mod. 275. pl. 24. Hill. 8 Ann. B. R. Anon.

10. An Action with an Ac etiam Billæ was *brought in a great Sum* to hold the Defendant to Special Bail *where nothing was due*, as appear'd on being fummon'd before a Judge to fhew his Caufe of Action; the Court held this not to be fuch a Contempt as to grant an Attachment againft the Plaintiff, but directed that *if the Defendant was damnified he might bring his Action*. 8 Mod. 227. Hill. 10 Geo. the King v. Pepper.

For more of Ac etiam Billæ in General, See Bail, and other proper Titles.

Acquittance.

(A) In what Cafes Payment may be refufed without an *Acquittance given.

*An Acquittance in Law *ought to be a Deed fealed*, tho' in common Practice it is otherwife. 3 Salk. 298. pl. 2. Anon.—— If fign'd only and not feal'd, it is *only an Evidence* or Proof of Payment, and no pleadable Acquittance, becaufe it is No Deed, fo as it nothing differs from Proof by Witneffes, only that it is not mortal as they are. Wentw. Off. of Executors 217.

1. THE Obligor is not bound to pay without Acquittance *upon a fingle Obligation*. Br. Obligation, pl. 10. cites † 41 E. 3. 25. per Thorp.

† Br. Faits, pl. 8. cites S. C.——Br. Conditions, pl. 21. cites S. C.

Br. Faits, pl. 8. cites S. C.—— Br. Conditions, pl. 21. cites S. C.

2. *Contra* upon an Obligation *with Condition*; for there he may aver Payment; Note the Difference. Ibid.

3. Audita Querela upon *Defeafance by Indenture to make certain Payments*, and that then the Eftate fhall be void, and *avers the Payment without fhewing the Acquittance in Writing*; and good per Cur. becaufe the Covenants were compriſed in the Indenture, for then the Matter may be averr'd. Br. Monſtrans, pl. 151. cites 46 E. 3. 33.

4. Audita Querela. It is in a Manner agreed that where a Man is *obliged to difcharge another* [*of an*] *Annuity* or Annual Rent of 10*l.* per Ann. granted by him to W. S. it is fufficient to fay that he hath difcharged him of it by Annual Payment to the Grantee to this time. And per Needham and Priſot, it is a good Difcharge tho' it was paid without Acquittance; for *it may be intended an Annuity with Clauſe of Diſtreſs*; and Payment without Acquittance is a good Plea of this, becaufe the Land is charged with Diſtreſs; and there it was agreed if the Party pays by Diſtreſs or without Diſtreſs it is fufficient. *But* if it be an Annuity *without Clauſe of Diſtreſs*, which

which charges the Perſon, there Payment is no Plea, but *ſhall ſhew an Acquittance.* Qnod nota Diverſity, and per Needham and Priſot, it may be intended with Clauſe of Diſtreſs; but per Davers and Moile, it ſhall not be intended but only Annuity which charges the Perſon, if it be not ſhewn that it was with Clauſe of Diſtreſs. Br. Bar, pl. 46. cites 37 H. * 4. 18.

* This ſhould be 37 H. 6. 18 b.

5. If a Man ſhews to the King's Collector an *Exchequer Tally* for Payment of any Sum of Money which the King owes him, he ought to offer a ſufficient Acquittance to the Collector. Br. Faits, pl. 44. 37 H. 6. 15.

Br. Dette, pl. 120. cites S. C.——

6. A Man may plead Payment of the *Sum contain'd in the Indorſement*, without Acquittance; per Skrene. Quod non negatur. Br. Conditions, pl. 41. cites 12 H. 4. 23.

Br. Taile de Exchequer, pl. 3.

7. If one is bound in a *Statute-Merchant or* * *Bond* for Payment of Money, he is not bound to pay it unleſs the Conuſee or Obligee will deliver a Releaſe or Acquittance. Quod non negatur. Br. Faits, pl. 77. cites 22 E. 4. 6.

Br. Conſcience &c. pl. 23. cites S. C. and it is better here to make him pay the Sum twice than to alter the Trial of the Law; for in ſuch Caſe Matter of Record may be defeated by 2 Witneſſes; per Huſſey & Fairfax; to which the Chancellor agreed as to the Statute, becauſe it is a Matter of *Record*; but differ'd from them as to the Bond, becauſe that is only a Matter in Fact.—— Br. Obligation, pl 62. cites S. C.

* Br. Faits, pl. 105. cites 1 R. 3. and Fitzh. Verdict, 13.

8. It was ſaid that *in Debt upon an Obligation*, it is a good Plea that the Defendant has been *always ready* to pay &c. *if he could have Acquittance.* Br. Tout Temps &c. pl. 39. cites 1 R. 3.

9. Where the *King grants by Patent to J. S.* 40 *l. per Ann.* and granted to him *a Liberate currant to receive* 40 *l. per Ann. of the Clerk of the Hamper*, there the Clerk is Debtor by *ſhewing of the Liberate* to the Clerk, if he has Aſſets, and this notwithſtanding that the Liberate be *that he receive ſo much rendring Acquittance*, and he does not deliver Acquittance, which is not Reaſon as it ſeems. Br. Taile d'Exchequer, pl. 4. cites 2 H. 7. 8.

Br. Dette, pl. 136. cites S. C.

10. J. M. brought Action of *Debt againſt M. E. late Wife of J. E. late Guardian of the Hamper, upon Patent granted to the Plaintiff* by the King *of a certain Sum, and had Liberate deliver'd to the ſaid J. E. commanding him to make Payment, receiving Acquittance; and that ſuch a Day, Year, and Place the Plaintiff offer'd Acquittance, and demanded the Sum* of J. E. and requir'd Payment, at which Day J. E had Aſſets in his Hands; and the *Defendant ſaid that the Teſtator was ready to pay, in Caſe the Plaintiff had given Acquittance.* And by Townſend, Catesby, Hody, and Huſſey Ch. J. the Plaintiff is not bound to offer Acquittance. But the Defendant ought upon Payment to demand it, and that *never was Iſſue taken upon the Offer of the Acquittance*; and Sulyard, Farcfax, and Brian Ch. J. of C. B. e contra, and that the Plaintiff ought to offer Acquittance; for the Patent is to pay receiving Acquittance. Br. Taile d'Exchequer, pl. 7. cites 2 H. 7. 8.

11. If *Leſſee for Years grants all his Eſtate*, and Intereſt to A. rendring Rent by Indenture, and for Default a Re-entry, and the Grantor *demands the Rent*, and A. demands an Acquittance, but the Leſſee for Years refuſes; in ſuch Caſe A. may * refuſe to pay ſuch Rent; for the Rent is to be paid in this Nature without any Acquittance. But contrary if Leſſee for Years had *leaſed Parcel of his Eſtate* rendring Rent with Clauſe of *Re-entry* &c. 4 Le. 209. pl. 338. Mich. 18 Eliz. B. R.

* 'Tis ſo in the Report, but ſeems miſprinted, and that the Word (not) ſhould be inſerted to make the Reaſon congruous.

12. In Caſe of a Grant of a *bare Annuity*, where the Grantee has no Remedy by Diſtreſs, there muſt be an Acquittance under Seal; otherwiſe

In Caſe of a *ſingle Bill*, or *Rent-ſeck*,

where no Diſtreſs can be taken, or other Penalty

wiſe it is not of ſo high a Nature as the Grant; per Hale Ch. B. Hard. 333. in Wilſon's Caſe.

incurr'd, Payment need not be made without an Acquittance. Went. Off. Ex. 218.

13. In Mich. 11 Nov. 1738. it was ſaid at the Rolls, per the Maſter of the Rolls, and agreed by ſeveral of the Counſel, that in no Caſe Payment may be refuſed, unleſs an Acquittance be given.

(B) *Plea of Payment without an Acquittance. Good.*

1. IN Debt the Defendant *ſaid that he had perform'd the Conditions of the Obligation, and the Plaintiff deliver'd to him the Obligation in lieu of Acquittance, and after retook it with Force and Arms*, Judgment ſi Actio; and a good Plea, and the Plaintiff was compell'd to anſwer to it. Br. Dette, pl. 34. cites 43 E. 3. 23. Contrarium Lex per Judicium Anno 1 H. 7. 14. For Matter in Writing *ſhall not be anſwer'd by Matter in Fact*. Br. Dette, pl. 34.

2. It was ſaid that in Writ of Annuity *upon Preſcription, or* upon *Grant by Deed*, a Man ſhall not plead Riens Arrear without Acquittance. Quod nota. Et mirum of Preſcription. Br. Annuity, pl. 9. cites 44 E. 3. 18.

Br. Debt, pl. 38. cites S. C.

3. In Debt upon Indenture of a Leaſe for Years, the Defendant may allege Payment by Averment without Writing, and well. Br. Faits, pl. 13. cites 45 E. 3. 4.

4. *Debt upon an Obligation of* 40 l. The *Defendant ſaid that the Plaintiff had received* 10 *l. Part* of the 40 l. *pending the Writ, and ſhew'd Acquittance of it*, Judgment of the Writ; and per Priſot, Aſhton, and the beſt Opinion, This is a *good Plea to the Writ, and is not only to the Action for Part*. But per Moyle, he ought to plead it without Acquittance, if he ſhall have it to the Writ; for *with the Acquittance it goes in Bar of this Parcel*, and it had been a good Plea to the Writ to have *ſaid that he received Part &c. pending the Writ, without ſhewing Acquittance*, becauſe it is to the Writ. Contrary in Bar. But by all others except him, it is no Plea to the Writ, viz. Receipt of Parcel without ſhewing thereof Acquittance; and the Reaſon wherefore it is a good Plea, viz. *Receipt of Parcel* to the Writ, is, becauſe he *has falſify'd his own Writ*. Et adjornatur &c. Br. Brief, pl. 256. [260] cites 39 H. 6. 43.

5. *Debt upon an Obligation of* 40 *l.* The *Defendant pleaded Receipt of* 10 *l.* by the Plaintiff *after the laſt Continuance*, Judgment of the Writ; and it was held by Danby Ch. J. that it is a good Plea to the Writ *without Acquittance or other Specialty*, notwithſtanding that the Action be upon Specialty; but e contra it is, if it be pleaded in Bar; nevertheleſs the Juſtices did not agree in it, therefore quære. Br. Bar, pl. 78. cites 5 E. 4. 138. & 140. by 4 Juſtices the Plea is not good, and by 3 e contra.

6. In Debt it was ſaid that where the *King delivers a Liberate Currant to W. S. to receive* 50 *l. per Ann.* of the Clerk of the Hanaper, *rendring Acquittance*, that in this Caſe *it is not traverſable if the ſaid W. S. offer'd Acquittance* or not; for it is only formal, and not traverſable; *As* in Præcipe quod reddat, and the *Delivery of a Prohibition to the Party in Attachment upon a Prohibition*, thoſe are formal, and not traverſable. Br. Traverſe per &c. pl. 174. cites 2 H. 7. 8.

7. In

7. In Debt the *Defendant pleaded Acquittance*; the *Plaintiff ſaid that the Acquittance was for another* 10 *l.* abſque hoc *that it was for this* 10 *l.* and a good Plea. Br. Traverſe per &c. pl. 318. cites 3 H. 7. 15.

8. Debt *upon Indenture of Covenants, where the Defendant had covenanted to do ſeveral Things, and the Plaintiff likewiſe to do ſeveral other Things* ad quas quidem conventiones perimplendas *uterque obligatur alteri in* 100 *l.* and the one broke the Covenant, by which the other brought Debt; and the *Defendant pleaded Payment* of 10 l. at D. which was all to which he was bound, Judgment ſi Actio; and no Plea Per Cur. becauſe he does not ſhew Deed thereof; whereas the Plaintiff declar'd upon the Indenture, which is made. And yet contra in pleading of Payment of Rent reſerv'd upon a Leaſe for Years made by Indenture; for there he may levy it by Diſtreſs, and therefore Averment may come in Ure. But contra where all ariſes by Specialty where it lies in Payment. Br. Dette, pl. 173. cites 25 H. 8. Br. N. C. 15. b. 25 H. 8., pl. 72.

9. One *by Indenture was bound to pay* a Sum of Money, and in an Action of Debt thereupon the Defendant *pleaded Payment*; and without Acquittance Per Montague, this is no good Plea; for this Indenture is like a ſimple Obligation, Payment whereof is no Plea without Acquittance. But it is otherwiſe if the Obligation be with Conſent. D. 25. b. pl. 160. Hill. 28 H. 8. Anon.

10. If an *Annuity iſſues out of Land*, and a Writ of Annuity is brought, Payment is * [no] Plea; otherwiſe it is not. Arg. D. 51. pl. 15. Mich. 33 H. 8. * This ſeems miſprinted, and that the Word (no) ſhould be inſerted, and then it agrees with the Caſe of 22 E. 4. 51. a. cited in the Marg. of D. and ſo is the Abridgment of S. C. by Br. Tit. Annuity, pl. 41. that where the Perſon is charg'd by Writ of Annuity, Payment is no Plea without Specialty; but contrary in Avowry.——And ſee Raym. 21. Lev. 43. and Sid. 44. pl. 1.

11. The Wife dum ſola had *recover'd* 26 *l. Damages, and had Execution, and was yet poſſeſs'd of the ſaid Money*, and that Judgment was revers'd in Error, and Reſtitution awarded; and afterwards ſhe married the Defendant, and thereupon the Plaintiff brought *Sci. fac. to have Reſtitution.* The Defendant *pleaded that after the Reverſal, and before this Writ brought, he paid the ſaid* 26 *l. to the Plaintiff.* The Queſtion was, Whether Payment was good without Acquittance. Barkley J. held it was, becauſe the Certainty of the Damages appear not of Record, and it may be that they were without Proceſs &c. ſo as the Execution appears not of Record; but the other 3 Juſtices contra, becauſe the Sci. fac. ſhews the Recovery to be for 26 l. and that Plaintiff had Execution for ſo much; therefore the Judgment being revers'd, and he demanding Reſtitution of 26 l. only, Payment is not good without Acquittance. Jo. 326. pl. 8. Mich. 9 Car. B. R. Harris v. Harris.

12. In *Audita Querela to avoid Execution of a Judgment*, it was ſurmis'd that after the Judgment he had paid the intire Sum. Popham thought ſuch Surmiſe not ſufficient to avoid a Judgment upon a bare Payment, without Writing or other Matter of Evidence; but Tanfield Serjeant cited **Hawkins v. Mallins**, where it was held a good Surmiſe, becauſe it *is not only a Suit in Law but in Equity alſo*, and is as a Commiſſion to examine the Cauſe; for it is not Reaſon that if the Money be ſatisfied he ſhould lie in Execution. And ſo held all the Court (beſides Popham;) whereupon he was let to Bail. Cro. J. 29. pl. 7. Paſch. 2 Jac. B. R. Ognel v. Randol.

13. In *Debt on a ſingle Bill* the Defendant after Imparlance *pleaded Payment of Part Puis darrein Continuance & Petit quod Billa caſſetur* &c. The *Plaintiff denied the Payment.* The Defendant demurr'd. It was reſolv'd by Roll Ch. J. that the Plea was inſufficient, tho' pleaded in Abatement only, becauſe there ought to be an Acquittance; which is contro-

controverted in the old Books, where a Difference has been taken between ſuch a Plea pleaded in Bar, and when pleaded in Abatement; and cited L. 5 E. 4. 139. 15 H. 7. 10. e. 3 H. 7. 3. g. 7 E. 4. 15. e. But Roll ſaid, if he had had an Acquittance he might have pleaded it in Bar or Abatement, at his Election. All. 65. Trin. 24 Car. B. R. Beaton v. Foreſt.

3 Le. 3. pl. 6. S.C. reſolv'd accordingly. — Bendl. 37. pl. 70. S. C. adjudg'd accordingly.

14. J. S. *made A. and B. Executors, and will'd that B. ſhould pay to A. all ſuch Debts as B. ow'd J. S. before B. ſhould meddle with any thing by his Will*, and take any Advantage thereof for Diſcharge of the ſaid Debt. B. died, and in Debt againſt his Adminiſtrator ſhe *pleaded that B. in his Life-time had paid* A. all ſuch Debt as he owed the Teſtator at his Death, *but* becauſe ſhe *pleaded not any Acquittance*, Judgment was given for the Plaintiff, Payment being no Plea without Specialty. Mo. 11. 12. pl. 44. Mich. 1 W. & M. Stapleton v. Trewlock.

15. In Debt on a *ſingle Bill* Payment is no Plea without a Specialty. See Tit. Payment (N)

For more of Acquittance in general See Payment (N) Account (P) and other Proper Titles.

Act.

(A) Where an Act may enure ſeveral Ways, how it ſhall be taken.

As where a Feme ſole grants a Reverſion to which a Rent was incident, and afterwards marries the Grantee, to whom the Tenant pays the Rent, this is no Attornment; for it is indifferent whether he pays the Rent to him as Grantee, or in Right of his Wife. Dy. 302. Tibbot's Caſe, who recover'd Rents of ſeveral Tenants as Bailiff, and then they are granted to him, and after the Grant they are paid to him, this is no Attornment; for they may be paid to him as he is Bailiff, as well as he is Grantee. But if the Leſſee do ſurrender to him in the Reverſion, then it is a good Attornment, for a Surrender cannot be to any but to him that hath the Reverſion. Arg. Bridgm. 55.

1. EVery Act that does enure *to another Act by Implication* ought to be ſuch as of Neceſſity muſt enure to the other Act, which cannot be taken to be otherwiſe. Arg. Bridgm. 55.

As 14 H. 7. if Tenant for Life does ſurrender to the Grantee of the Reverſion, this is firſt an Attornment implied by the Law; for otherwiſe the Surrender can take no Effect. And 5 Rep. fol. 15. if a Parſon makes a Leaſe to the Patron, who grants over the Leaſe, this does imply a Confirmation of the Leaſe; for otherwiſe the Grant of the Patron ſhall be avoided. Arg Bridgm. 83.

2. When the *Law implies any Act out of the Act of the Party*, the Act of the Party muſt be ſuch as neceſſarily makes ſuch a Thing to be implied by the Law, and that to be ſo neceſſary as that the Act of the Party cannot be, unleſs the Act to be implied be alſo implied to be done. Arg. Bridgm. 82. 83. in Caſe of Robinſon v. Greaves.

3. *But* when the Act of the Parties may be *without any ſuch Implication*, and the Matter to be implied reſts indifferent, then it is otherwiſe. Ibid.

4. Where

4. Where a *corporal Act has 2 Effects*, the one *proper and natural*, and the other *improper and legal*, the Act shall never enure to the improper Effect without Declaration; as when a Man may revoke a Deed by Gift of a Ring &c. here, if a Ring is given, the proper Effect is the Alteration of the Property of the Ring; but the improper Effect is the Revocation of the Uses, which it cannot enure to without a Declaration for what Purpose it was given. So of Hunting or Hawking in Land, it gains no Possession &c. Per Whitlock J. Lat. 106. Hill. 1 Car. in Case of Warner v. Hardwin. Palm. 433. S. P. Per Whitlock J. in Case of Hardwin v. Warner.

For more of Act in general See other Proper Titles.

* Actions [Qui tam &c.]

* Actio nihil aliud est quam jus prosequendi in judicio, quod alicui debetur. 2 Inst. 40. cites Bract lib. 3. cap. 1. fol. 98.

(A) Tam pro Domino Rege quam pro seipso.

1. THO. Holyneux sued tam pro Rege quam pro seipso against Hugh Berewicke, for that whereas he was indicted and arraigned of Felony before the Defendant, unde protulit Cartam Regis pardonationis, quam Defendens noluit allocare, dicendo quod the King's Writ nihil sibi valeret, and then imprison'd him, and threatned to hang him nisi submitteret Henrico Duci Lancastriæ, and become bound in a Statute Merchant to the said Duke in 320 l. whereupon the Defendant submitted himself, and is pardon'd. Hill. 27 E. 3. B. R. Rot. 42.

2. If A. recovers against B. in Debt, and thereupon outlaws him, and afterwards upon a Capias Utlagatum the Defendant is taken, and rescued by a Stranger, A. shall have an Action upon the Case tam pro Domino Rege quam pro seipso against the Stranger. Mich. 11 Jac. between *Lane and Stamshaul* Adjudged. So if the Sheriff *suffers him to escape*, the Debt not being satisfied, an Action lies Tam Quam; for suffering one outlaw'd to escape, is in Contempt to the Queen, as well as in Prejudice to the Plaintiff. Cro. E. 877. pl. 3. Pasch. 45 Eliz. B. R. Eden v Loyd.

3. *Attachment upon Prohibition upon the Statute of Præmunire* was brought by the King and his Incumbent, for that the Defendant had brought *Bulls of Excommunication from Rome*. Br. Joinder in Action &c. pl. 29. cites 21 E. 3. 40. Br. Damages, pl. 65. cites S. C. —— Br. Præmunire, pl. —. cites S. C.

4. Trespass was brought by the King and by J. N. his Chaplain, for a *Trespass done in the Palace of Westminster*, in Presence of the King and of his Justices, and in Contempt of the King, and *contrary to* his *Protection*, to the Damage of the Plaintiff. And so see that the King and a Br Prerogative, pl. 48. cites S. C. —Thel. Dig. 28. lib. 2.

cap. 4. (bis) S. 1. cites 27 E. 3. 83.

Subject join'd in Action; but it seems that the Chaplain sued pro Rege & seipso. Br. Joinder in Action, pl. 57. cites 27 Ass. 49.

—So a Writ of Trespass was maintain'd for the King, and a Collector of 15th for the King, of *Assault and Battery*, and Menace &c. done *to the Collector in collecting the King's Money*. Thel. Dig. 28. lib. 2. cap. 4. (bis) S. 2. cites 27 Ass. 11.

So a Writ of *Trespass* and Contempt was brought in B. R. *for the King and an Escheator* of the King, *against a common Hostler, because the Chamber* of the Escheator, in travelling towards London in the Business of the King, *was broke open in the Hostery, and his Goods taken* and carry'd away. Thel. Dig. lib. 2. cap. 4. (bis) S. 5. cites 42 Ass. 17.

5. A Bill was also maintain'd for the King and the Party in B. R. where the Defendant had a Præcipe quod reddat pending against the Party now Plaintiff with the King, and had *made an Assault and Battery*, and Menace *to the Party in coming to the Court with his Evidences and Charters, to answer to the Defendant* &c. in Despite of the King &c. Thel. Dig. 28. lib. 2. cap. 4 (bis) S. 3. cites 30 Ass. 14.

6. One *Brabson and his Feme sued an Assise* at Winchester *against one R.* which *R. carried away the Feme* of the Plaintiff *before the Doors of the Castle* (which was of her Assent) with him, and the Baron would have taken his Feme, and R. would not suffer him, but *laid his Hands upon the Baron and rescued the Feme* &c. upon which the Baron sued a Bill for the King and for himself against R. before the same Justices, of this Assault *in the Presence of the Justices, in Disturbance of his Suit*, and the carrying away the Feme &c. in Despite of the King and his Justices &c. and this Bill was maintain'd. Thel. Dig. 28. lib. 2. cap. 4. (bis) S. 4. cites 39 Ass. 1.

7. Action Tam quam was brought *upon the Statute of Winton*, Amends not being made by the Hundred, nor the Robbers taken, and Issue being found for the Plaintiff, he had his Judgment. Bendl. 122. pl. 157. Hill. 4 Eliz. Hooker v. Bond & al'.

Dal. 66. pl. 30.

8. In a *Decies tantum* the Writ shall be in the Tam quam; per Dyer. Mo. 64. in pl. 175. Trin. 6 Eliz.

Dal. 66. pl. 30.

9. In an Action on the Case for *suing in the Admiralty for a Thing done at Land*, the Action shall be in the Tam quam; Per Dyer, who said it was lately held so; For in this and the Case above the Action was upon a Contempt, and not for a Duty. Mo. 64. pl. 175. cites Powtel's Case.

10. Action Tam quam was brought for *taking Toll of an Inhabitant of a Town discharg'd*, as supposed by Tenure in ancient Demesne; and the Action being brought by the Pars gravata, the Question was whether it was well brought. See 2 Le. 190. pl. 240. Trin. 28 Eliz. B. R. Leicester (Town's Case.)

11. 31 *Eliz. cap.* 5. *S.* 1. Enacts, That *no Person at any Time before order'd by any of the Queen's Courts for any Misdemeanor, not to pursue any Penal Statute, shall sue upon the same, unless he be the Party griev'd.*

S. 3. *Provided that this Act shall not restrain such Officers as have lawfully used to exhibit Informations.*

But where an Action Tam quam was brought upon the *Statute of* 6. *of Tithes*, it was affirm'd to be good; for the *King is to have a Fine.*

12. In Debt upon the Statute of 2 E. 6. for *not setting forth Tithes*, the Action was brought Tam quam. Exception was taken, because the King cannot have any Benefit thereof, and that the Statute gives it only to the Parties grieved. The Court held this a material Exception, and E. order'd Judgment to be stay'd. Cro. E. 621. pl. 11. Mich. 40 & 41 Eliz. B. R. Johns v. Carne. Het. 121. Mich. 4 Car. C. B. Luvered v. Owen.

13. When any *Statute prohibits any thing* &c. if any impleads another [contrary to such Statute] *tho' it be in a legal Course of proceeding*, yet the *Party grieved shall have Action* upon the Statute against him that sues contrary

trary to such Statute, *tho' the Words of the Statute do not give any Action to the Party*; for this is a thing consequent to, and imply'd in every thing prohibited by any Statute. 10 Rep. 75. b. in the Case of the Marshalsea.

14. Where a *Statute prohibits* a Thing, but adds *no Penalty*, Action lies for doing against the Prohibition of that Statute; but such Action must be brought Tam pro Rege quam pro seipso, because in such Case the King is to have a Fine. Cro. J. 134. pl. 6. Mich. 4 Jac. B. R. in Case of Lady Waterhouse v. Bawde.

But per Holt Ch. J. where a certain Penalty is given by a Statute to the Party grieved, he needs not join the King; for it is like a private Act, only for his Benefit. 3 Salk. 7. Anon.

15. B. was taken in *Execution by a Cap. Utlag.* at the Suit of A. and the *Sheriff suffer'd him to escape*; upon which A. brought an Action on the *Case against the Sheriff*, and declar'd Tam pro &c. Quam pro &c. and set forth as before, and Plaintiff had a Verdict. Exception was taken because the Action was Tam quam; for it should have been in the Name of A. only; but it was answer'd, that being taken by Cap. Utlag. the permitting the Escape is a *Contempt to the King*, and that it is the usual Action in such Case, tho' the Party shall have all * the Damages; and it was adjudg'd accordingly. Roll Rep. 78. Mich. 12 Jac. B. R. Barret v. Winscomb.

Cro. J. 360. pl. 22. S. C. accordingly. —S. P. Pasch. 44 Eliz. Cro. E. 877. Eden v. Lord.—*And* tho' it be good, being brought in the Tam quam, yet *Debt lies for the Party only, without naming the King* on an Escape of one condemn'd in Debt, and outlaw'd after Judgment, and who was removed into the King's Bench by Habeas Corpus from Glocester, tho' it was objected that he never was taken in Execution, and that he escap'd after 2 Years Imprisonment, and that the Action for suffering an outlaw'd Person to escape should be brought in the Tam quam; For it was held that he may bring his Action of Debt *for what he hath lost*. And it was certified by the Prothonotary, that the *Precedents are both ways*; and so adjudged for the Plaintiff. Cro. J. 619 620. (bis) pl. 5. Mich. 19 Jac. B. R. Moor v. Sir Geo. Reynolds.——Bridgm. 6. S. C says it was objected, that the Declaration was insufficient, because it was not tam quam, it being a Contempt to the King; but a Precedent being shewn between the King and Molineux, where the Declaration was for the Party only, and all the Prothonotaries certifying that the great part of Precedents in C. B. for the Party only, it was adjudged good either way. —— S P. was adjudged in C. B. accordingly, and afterwards affirmed in B. R. and upon Appeal to the House of Lords affirmed there likewise, and chiefly upon the Authority of the Case of Moore and Reynolds, as the Reporter says. Wms's. Rep. 685. 693. Hill. 1720, Throgmorton v. Church.

* S. P. by 3 Judges; but Popham said that this is *de Gratia* & *non de Jure* Yelv. 19 Mich. 44 & 45 Eliz. B. R. Jennings v. Hatley. ——Cro. E. 909. Jennings v. Harley, S. C.——And Coke held that in an Action *upon the Statute de Scandalis Magnatum*, tho' it be brought in the Tam quam, yet the Party shall have all the Damages found, and that the King is join'd for Honour and Conformity. Roll Rep. 78. ut sup.

16. Action Tam quam lies against a *Sheriff*, who *having a Capias Utlagatum against J. S.* deliver'd to him, and seeing J. S. *refused to execute it*, tho' requir'd, but suffer'd him to go at large, *and return'd Non est inventus*, in Deceit of the King and Prejudice of the Party. Adjudg'd and affirm'd in Error. Cro. J. 532. pl. 16. Pasch. 17 Jac. B. R. Parkhurst v. Powell.

Hob. 209. pl. 264. S. C. but the point of the Tam quam does not appear. ——Noy. 22. Parkinson v. Powell S. C. says the Sheriff was often in Company of the said J. S. afterwards within his Bailywick, and yet he return'd Non est inventus, but does not mention the Action being Tam quam.——Brownl. 12. S. C. but the Tam quam does not appear.——Jenk. 332. pl. 64. says the King and Party may well join, but in this Case the King may be omitted.——S. C. cited Arg. Wms.'s Rep. 691.

17. If an Action be brought upon the Statute *de Scandalis Magnatum*, it may be in the Tam quam; per Hutton. Het. 122. Arg. in Case of Luvered v. Owen.

S. P. For the King is prejudiced by the Act, which is the Ground of the Action; per Holt Ch. J. 3 Salk. 7. Anon.

18. In Action *upon* 14 & 15 *H.* 8. *cap.* 5. Exception was taken that the College cannot join with the King in Debt, and that neither the Patent nor

nor the Statute which confirms it gives an Action of Debt; ſo that in this Caſe it ſhould have been an Information Tam pro Domino Rege quam pro ſeipſo; but the Court held that *Debt lies as well as Information*, as well as on 2 E. 6. cap. 13. which gives no Action, and Judgment for the Plaintiff. 3 Keb. 672. pl. 40. Trin. 28 Car. 2. B. R. The College of Phyſicians v. Needham.

19. It lies for *indicting* a Man *in a foreign Country*. Per Holt Ch. J. 3 Salk. 7. Anon.

20. But in ſome Caſes, as upon the Stat. of *Hue* and *Cry*, and the Stat. for not appearing as Witneſs, being ſerved with a *Subpœna*, the Party may either bring *Debt* or *Caſe*. If he bring *Debt*, he muſt ſue without the King, for the Debt is not due to him but to the Party griev'd; but if he bring an Action on the Caſe, he muſt ſue in the Tam quam, for the Action is founded on the *Tort* only, and that is to the King as well as to the Party, per Holt Ch. J. 3 Salk. 7. Anon.

(A. 2) Tried where, and by whom. And how.

1. A *Siſe* againſt B. and J.—*J. pleaded Villeinage*, and the *Writ by this abated where the Plea was falſe*, and made by Conſpiracy of B. and others; and therefore the *Plaintiff* in the Aſſiſe *immediately brought Bill of Conſpiracy thereof before the Juſtices of Aſſiſe, becauſe they conſpired to make J. plead the falſe Plea where J. before was frank*, and the Bill was Qui tam pro Domino Rege quam pro parte; and the Defendant was compell'd to plead, who ſaid Not guilty, and was found Guilty ad damnum 20 l. for the Delay, and was committed to the keeping of the Sheriff. Br. Bille, pl. 19. cites 26 Aſſ. 62.

2. 18 *Eliz. 5. Furies not compell'd to appear at Weſtminſter.*

Juſtices of Aſſiſe, and Juſtices of Peace in their Quarter-Seſſions, are impower'd to hear and determine all Offences againſt this Act.

Provided that it ſhall be lawful for any Perſon grieved by Maintenance, Champerty, buying of Titles, or Embracery, to proſecute their Suits as heretofore.

Nor ſhall this Statute reſtrain any Perſon, Body Politick or Corporate, to whom any Forfeiture, Penalty, or Suit is ſpecially given by any Statute (and not generally to any Perſon that will ſue) but ſuch Perſon &c. to whom any ſuch is ſpecially given, may proſecute as heretofore.

Nor to extend to Officers of Record.

But tho' this Statute reſtrains Common Informers to bring their Action only in the proper

3. 31 *Eliz. cap. 5. S. 2.* Enacts, That *in any Declaration or Information to be exhibited, the Offence againſt any penal Statute ſhall not be laid to be done in any other County but where the Matter was in Truth done; and every Defendant in ſuch Action or Information, may traverſe that the Offence was committed in the County; which being tried for the Defendant, or if the Plaintiff be therein nonſuited, the Plaintiff ſhall be barr'd.*

County where the Offence was done, yet it extends not to the Party grieved; for he is not a Common Informer. Cro. E. 645. pl. 53. Mich. 40 & 41 Eliz. B. R. Allen v. Strear. —Debt upon the Statute of Embracery was brought in the County of C. the Defendant pleaded Non debet, and it was found that the Embracery was in the County of B. The whole Court held that the Bill ought to abate by this Statute, the ſame being in the Negative; and when it appears to the Court that the Action is brought againſt the Form thereof the Bill ought to be abated, tho' the *Defendant took no Advantage thereof by Plea.* And adjudg'd accordingly. Cro. E. 735. pl. 3. Hill. 42 Eliz. B. R. Pomfreit v. Brownſall.—But in an Information for tranſporting raw Hides, the Fact was laid to be done in Middleſex, whereas it was done in Devon, the Defendant pleaded Not guilty; and Judgment being given for the Plaintiff. the ſame was affirm'd by Opinion of the Judges, becauſe the Matter in Fact did not appear to

to the Court by the Plea; so that when he pleaded, without excepting or pleading to the Information, the Judges cannot take Conusance of the Truth of the Matter in Fact; so that tho' the Words of the Statute are negative, yet they shall be construed reasonably, viz. if the Matter be not pleaded, the Defendant cannot take Advantage of it; and this appears by the Words of the Statute. 2 And 1So. pl. 103. Mich 44 & 45 Eliz. before the Lord Chancellor and Treasurer in the Exchequer Chamber, Bankes v. Hudson. —But see Statute 21 Jac. 4. S. 2.

S. 3. Provided that this Act shal not extend to any such Officer as has used to exhibit Informations.

S. 4. And provided that this Act shall not extend to the laying any Offence concerning Champerty, buying of Titles, or Extortion, or for defrauding the Queen of any Custom &c. or for Usury, or for any Offence in any Statute against ingrossing, regrating, or forestalling, where the Penalty shall be to the Value of 20 l.

S. 7. All Suits upon any Statute for using of any unlawful Game, or for not using of any lawful Game, or for not having Bows and Arrows according to Law, or for using any Art or Mystery in which the Party has not been brought up, shall be sued in the Quarter-Sessions, or Assises of the same County, where the Offence shall be committed, or in the Fleet. The Statute of 5 Eliz. cap. 4. does not give the *Leet* Power to proceed against Persons using Trades not having been Apprentices; Agreed Per Cur. notwithstanding it was urg'd that the Statute 31 Eliz. cap 5. which wills, that Informations and Actions upon penal Statutes shall be brought in the proper Counties, and names Assises, Sessions, Leets. But to this the Court, upon reading the last Words of the said Statute answer'd, that this is intended of other Offences there, whereof Leet had Conusance before, as of Butts, and Bows and Arrows &c. And the Court directed that such Aliens as us'd Trades, not having been Apprentices, should be presented at *Sessions*, or in this Court of *B. R.* Sid. 289. pl. 4. Trin. 18 Car. 2. B.R. Amy v. Bennet.

4. Information on a Statute does not lie in a *Court of Piepowders*, nor before *Justices of Peace*, nor in the *Courts of Towns Corporate*, but only in the Courts of Record at Westminster, notwithstanding the general Words, That in *all the King's* * *Courts of Record &c.* Mo. 421. pl. 581. Mich. 37 & 38 Eliz. C. B. Anon.

* These Words in the Statute of 4 & 5 P. & M. intend the *Courts of Record at Westminster only*, and so a Recovery had in Ludlow Court on a Plaint upon that Statute, for using a Trade, not having been Apprentice for 7 Years; and therefore the Judgment was revers'd. Mo. 599. pl. 827. Intratur Hill. 38 Eliz. Gregory v. Blashfeild. ———6 Rep. 19. b. S. C. by the Name of Gregorie's Case, accordingly.

Information in Bury, upon the Statute 5 Eliz. cap. 4. for using a Trade, not being an Apprentice to it for 7 Years. The Plaintiff had Judgment, and it was afterwards assign'd for Error, that Informations upon penal Statutes ought to be brought in one of the Courts at Westminster, and not elsewhere, unless it is otherwise expresly provided by some Statute. And of that Opinion were Gawdy and Fenner, the other Justices being absent; and revers'd the Judgment. Cro. E. 737. pl. 7. Hill. 42 Eliz. B. R. Barnaby v. Goodale.——But see now the Statute of 21 Jac. 1. cap 4. ——*So* in an Information for exercising a Trade contrary to this Statute, Judgment was given in the Court of Guildhall before the Mayor of London. Error was brought, and Error assign'd was, because the Information was brought in London, whereas this being a penal Law, it ought not to have been sued but in the King's Courts at Westminster, where the King's Attorney is to acknowlege or deny; and therefore not suable there. The Judgment was revers'd Cro. J. 538. pl. 5. Trin. 17 Jac. B. R. Miller v. Regem.

5. Where a *Statute limits Suits by an Informer Qui tam to other Courts*, yet any one may, by Construction of Law, exhibit an Information in the *Exchequer for the whole Penalty for the Use of the King.* 2 Hawk. Pl. C. 268. cap. 26. S. 25. S.P. agreed. 2 And. 128. pl. 73. Hill. 35 Eliz. Agard v. Tandish.

6 Information upon the Statute of 5 Eliz. because he used the Trade of a *Spurrier* in London, not having been Apprentice in that Trade by the Space of 7 Years. After Verdict Exception was taken, because by the Statute of 31 Eliz. the Information ought to have been brought *before the Justices of Peace where the Offence was committed, and* can *not* be brought here, nor *in other of the King's Courts.* And of that Opinion were Fenner, Yelverton and Williams; but they would advise, because S.C. cited Cro. J. 179. Trin 5 Jac. in Case of Shopie v. Taylor, and the Precedent shewn between

Dran and Dragg, Pasch. 3 Jac. it was a common Case, and concern'd in any Informations. Cro. J. 85. pl. 9. Mich. 3 Jac. B. R. Kenn v. Drake.

Ror. 150. for using the Trade within the Parish of St. Clements, and it was adjudg'd that it well lay; but it was said that there was not any Question in that Case, because the Offence being in Middlesex, and B. R. sitting in Middlesex, they had the Power of the Sessions intended within the Statute; but the Court held it to be all one, wherefore it was adjudg'd accordingly.——By the Statute of 31 *Eliz. cap.* 5. it is enacted, that *Offences against the Statute of* 5 *Eliz. shall be inquired of only in the Sessions of Peace, Assises, or Leets within the County* where the Offences are committed, *& non alibi extra Comitat'*; so as this Information upon this Statute, in this Court, is not maintainable; and of this Point the Barons were in Doubt. But it was afterwards resolved, upon Consideration of the Statute, that the Information well lay; for the Intent of the Statute was, that for such Offences Men should not be drawn out of the County where the Offence was committed; and altho' the Statute mentions that the Suit shall be for them in such Courts there named, yet it is not in the Negative, (and *Not in any other Court)* but *not in any other County*; and this being a Suit for the King, and in this Court proper for him, this Information is well maintainable, and so it was adjudg'd Note the principal Case was afterwards affirm'd in a Writ of Error. Cro. J. 178. 179. pl. 17. Trin. 5 Jac. in the Exchequer, Shoyle v. Taylor.—— In an Information for using the Trade of a *Baker*, it was insisted that by the Statute 31 Eliz it ought to be sued and try'd in the same County at the Quarter-Sessions or Assise, and not in any wise out of the County; and of such Opinion was the Court. Hob. 327. pl. 399 Trin. 18 Jac. Nevil v. Yarwood.——It is sufficient if it be laid in the proper County. Mo. 886. pl. 1245. Hill. 14 Jac Davison v. Baker.—— In an Information for using the Trade of a *Brewer*, and an Exception was taken, That by 31 Eliz. cap. 5. it ought to be brought *at the Quarter-Sessions*. But per Astry, it was lately adjudg'd in this Court, that it was *well brought here*; and the Court over-ruled the Exception. Comb. 62. Mich. 3 Jac. 2. B. R. The King v. Gibbs.

If a *Penal Law* gives Liberty to sue for the Penalty by *Information, Debt, Plaint* &c. *in any Court of Record*, resolv'd that this is in any of the Courts at *Westminster*, therefore on those Laws, (viz. Penal Laws) Information may be sued at Westminster, and is not restrain'd by 21 Jac. 4. For no Information by common Informer may be brought before Justices of Peace, Justices of Assise, or Justices of Oyer and Terminer. Jo. 193. pl. 3. Mich. 4 Car. B. R.

7. 21 *Jac.* 1. *cap.* 4. *S.* 1. Enacts, That *Offences against any Penal Statute, for which any common Informer may ground any popular Action &c. before Justices of Assise, Nisi Prius, or Gaol-Delivery, Justices of Oyer and Terminer, or Justices of Peace in Quarter-Sessions, shall be sued by way of Action &c. before the Justices of Assise, Nisi Prius, Oyer and Terminer, and Gaol-Delivery, or before the Justices of Peace of every County, City, Borough, or Town Corporate, and Liberty wherein such Offences shall be committed; and the like Process in every popular Action shall be had as in an Action of Trespass, Vi & Armis; and all Informations &c. either by the Attorney-General, or by any Officer, common Informer, or other Person, in any Courts at Westminster, for the Offences aforesaid, shall be void.*

S. 2. *In all Informations &c. in any Suit, either by the King or any other, for any Offence against any Penal Statute, the Offence shall be laid in the County where such Offence was committed; and if the Defendant pleads that he owes nothing, or that he is Not Guilty, and the Plaintiff or Informer shall not both prove the Offence, and that the same Offence was committed in that County, the Defendant shall be found Not Guilty.*

S. 5. *This Act shall not extend to any Information or Action against Popish Recusants, or against those that shall not frequent the Church, and hear Divine Service, nor for Maintenance, Champerty, or buying of Titles; nor for defrauding the King of any Custom, or for transporting of Gold, Silver, Ordnance, Powder, Shot, Munition, Wool, Wool-fells, or Leather.*

If any Penal Law gives *Power to Justices of Peace*, of Assise, or of Oyer and Terminer, *to hear and determine Offence against the Statute*, and says no more, this is by way of *Indictment, and not by Information*, Bill, or Plaint, unless this was *specially named*. Ibid.

Tho' a Special Clause be *to sue* upon the Statute *by Bill, Plaint, Debt, or Information* against Offenders against any Statute, yet if he be indicted for this before Justices of Assise, Oyer and Terminer, or Peace, in this Case the *Indictment may be removed to B. R.* and there tried by Nisi Prius. Ibid.

Upon Penal Law *in Middlesex* an Information may be brought in B. R. tho' Justices of Peace &c. have Power to hold Plea by Information &c. Jo. 193. pl. 3. The Resolution upon 21 Jac. 4. of Penal Laws.

The Statute 21 Jac. 1. cap. 4. *extends* only to Acts made before that Act, and *not to subsequent Acts of Parliament*; per Holt Ch. J. who said that himself and 9 other of the Judges were of that Opinion. 5 Mod. 425. Mich. 10 W. 3. Anon.——S. P. 1 Salk 373. pl. 14. Resolv'd by the Opinion of 11 Judges, Hill. 10 W. 3. B. R. Hicks's Case.——12 Mod. 223. the King v. Hall, S. P. by Holt Ch. J. in delivering the Opinion of 10 of the Judges who met at Serjeant's Inn, and seems to be S. C. with 5 Mod.—And per Holt, Rookby, and Turton, if a subsequent Act be made that gives a popular Action, you must in Debt lay it in the proper County, and tho' the Party go out of the County, you may proceed against him by Outlawry.

8. An

8. An Information Qui tam &c. was brought *before Juſtices of Aſſiſe for Non-Reſidence*, upon the Statute 21 H. 8. but becauſe the Statute gives it only in the King's Courts, where there may be Eſſoign, Wager of Law, or Protection, it was reſolved, upon Conference with the other Juſtices, that it lay not before them, notwithſtanding 21 Jac. cap. 4. appoints that Informations taken by Inqueſt before Juſtices of Aſſiſe, or of Oyer and Terminer, ſhall be determinable there; and Judgment for Defendant. Cro. C. 146. pl. 26. Mich. 4 Car. B. R. Green v. Guy.

An Information Qui tam *upon the Statute of Non-Reſidence, taken at the Aſſiſes*, being remov'd into the Court of B. R. it was moved to quaſh it for want of Juriſdiction; but the Court denied the Motion, and cited 1 Sid. 152. for the *Difference* between *Informations Qui tam* and *ex Officio*. The Ch. J. likewiſe cited Paſch. 10 Ann. B R. the **Queen v. Potter**, to the ſame Purpoſe, where Ld. Parker ſaid that *Informations Qui tam are in nature of Civil Actions*, and that *the Informer has an Intereſt*. Paſch. 11 Geo. 2. B. R. Garland v. Burton.

9. In an Action on this Statute for uſing the Trade of a Draper, after Judgment for the Plaintiff, Exception was taken becauſe it was brought in B. R. and not in the County where &c. To which it was anſwer'd, that tho' the original *Proceſs iſſued out of this Court*, yet the *Trial thereupon was in the County* where the Offence was done, and that the Remedy intended by the Statute is made uſe of by the Trial in the County where the Offence was done. Roll Ch. J. told them he directed them to ſearch for Precedents, which they had not done; but he conceived the Statute not ſatisfied, which ſays that the Party ſhall not be compell'd to appear out of the County, whereas here he is compell'd, and that this is not help'd by the Verdict; to which the Court agreed. Sty. 223. Trin. 1650. B. R. Nayler v. Aſh.

S. C cited Keb. 584. pl. 46. Mich. 15 Car. 2. B. R. in the Caſe of **Fryer v. Brook**, in which Caſe the Offence was alleg'd to be at Newcaſtle, but the Action on the 5 Eliz. was brought originally in B. R. which Matter being moved in Arreſt of Judgment, the Court agreed that any Cauſe of Action for Offence in Middleſex might be laid in B.R. but doubted as to this Caſe; & adjornatur.

Debt Qui tam &c. upon the Statute 5 Eliz. &c. for exerciſing the Trade of a Grocer, not being Apprentice to it, after a Verdict for the Plaintiff it was mov'd that Debt would not lie in the Court of B.R. becauſe it is enacted by the Statute 21 *Jac. cap.* 4. That *Actions Popular ſhould be brought before Juſtices of Aſſiſe &c. or of the Peace in their General Quarter Seſſions, and not elſewhere*; by which negative Words the Juriſdiction of the Courts at Weſtminſter is taken away; but adjudged that ſince the Stat. 5 Eliz. gives a Remedy by Action of Debt, Indictment, or Information, and ſince Actions of Debt cannot be brought before Juſtices of Aſſiſe or of the Peace, therefore that Statute doth not extend to Actions of Debt. Vent. 8. Hill. 20 & 21 Car. 2. B. R. Barnes v. Hughes. ——— Sid. 400. pl. 7. S. C. And per Cur. the Statute of 21 Jac. was to ouſt the Courts of Weſtminſter of ſuch Actions or Informations as might be ſued elſewhere, viz. before Juſtices of Aſſiſe or of the Peace &c. as Informations or Indictments; but ſuch Actions as cannot be commenc'd there, the Statute intended not to take away, as it muſt do, if they cannot be ſued elſewhere than is directed by the Statute; and Originals in Debt never were returnable before Juſtices of Aſſiſe &c. and Judgment for the Plaintiff. —— Lev. 249. S. C. adjudg'd accordingly. ——— In ſuch a Caſe the Court ſeemed to incline, that tho' an *Information* cannot be brought here, but *muſt be in the County*, according to the Statute, *yet* becauſe an Action of *Debt cannot be brought before the Juſtices of Oyer and Terminer, nor of the Peace*, therefore that ſeemed not to be within the Statute; and ſo that it had been formerly adjudg'd between **Hughs and Barnes**. Sed adviſare vult. Freem Rep. 377, 378. pl. 491. Mich. 1674. Nicholls v. Cotterell. —— 2 Lev. 204. cites Nichols and Cochinell, S. C. as adjudg'd in Time of Hale Ch. J. that the Action muſt be brought in the broper County; and thereupon in the principal Caſe there of **Clappe v. Edgecombe**, on the S. P. Mich. 29 Car. 2. B. R. the Court ordered it to be put into the Paper. ——— S. C. of Clappe v. Edgecombe cited by the Reporter Lev. 249, 250. ſays the Court there were of Opinion contrary to the Caſe of Barns v. Hughs. ——— S. P. and S. C. cited, but notwithſtanding that Caſe the Court ſaid they would hear Arguments. Vent. 364. Paſch. 34 Car. 2. B. R. Curtis v. Inman. ——— 5 Mod. 225 cites the Caſe of Nichols v. Cockeril, as adjudg'd Paſch. 27 Car. 2. in B. R. for if Debt will lie here by a common Informer upon a penal Law, the Statute of King James the Firſt will be wholly avoided. ——— But Trin. 29 Car 2. an Action of Debt on this Statute, for exerciſing a Trade in London, not having been Apprentice 7 Years, was *laid in London, and brought in C. B.* and *tried at the Niſi Prius*, and the Defendant had a Verdict; and now the Plaintiff, to prevent Payment of Coſts, objected that this Action would not lie in any of the King's Courts at Weſtminſter upon this Statute, becauſe by the Statutes 31 Eliz and 21 Jac. all Informations upon penal Statutes muſt be brought before Juſtices of Peace in the County where the Fact was committed. But the Court were clear of Opinion, that the Courts of Weſtminſter-Hall have a concurrent Juriſdiction with the Juſtices; and ſaid it had been often ſo reſolved. 2 Mod. 246. Foreſt qui tam &c. v. Wire. ——— And Paſch. 1681. in Debt upon the ſame Statute for exerciſing the Trade of a Baker, it was reſolved Per Cur. That *ſuch Actions as do not lie before Juſtices in the County may be brought here*; for the Deſign of thoſe Statutes was not ſo much that Actions ſhould be begun in the County as that they ſhould be tried there. Freem. Rep. 534. pl. 721. Denton v. Wilſon. ——— So where Debt upon the ſame Statute *for uſing a Trade in Briſtol*, was *brought in C B. and tried by Niſi Prius*

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in Briſtol, it was mov'd that the Action ſhould have been brought at the Aſſiſes at Briſtol in the proper County, by the Statute 21 Jac. But per Cur. Debt cannot be brought before Juſtices of Aſſiſe, therefore the *Statute extends not to Actions of Debt*; and afterwards, upon Conference with the Juſtices of B. R. Judgment was given abſolutely for the Plaintiff. 3 Lev. 71. Mich. 33 Car. 2. C. B. Raynor qui tam v. Fuler.——And 4 Mod. 158, 159. Mich. 4 W. & M. in B. R. The King and Queen v. Hicks, is, That *Debt will lie* upon the Statute 5 Eliz. cap. 4. in Middleſex, *tho' the Offence was done in Cumberland*, becauſe the Statute of 21 Jac. did not intend to deprive the Courts of Weſtminſter of ſuch Actions, but only of thoſe which might be brought before Juſtices of Aſſiſe or of the Peace. *Informations* may be brought before them at well as in B. R. but Debt cannot.——— But Mich. 10 W. 3. Holt delivered the Opinion of Ten of the Judges, who met at Serjeant's-Inn upon ſome Queſtions upon Stat. 21 Jac. cap. 4. That Action of * *Debt lies not on the 5 Eliz. cap. 4. or any penal Statute by a Common Informer in a foretgn County*, but is taken away by the Statute of 21 Jac. but if the *Fact was committed in the County where B. R. ſits*, then it may be brought in B.R. but not otherwiſe; and denied the Caſe of Barnes and Hughs, 1 Sid. 400. 1 Vent. 8. to be Law. 12 Mod. 223. The King v. Gall.———Carth 465. S.C. which was an Information by the Attorney General on the 5 & 6 E. 6. cap. 14 for ſelling Cattle alive, within 5 Weeks after buying them, the Court, on reading the Statute and 21 Jac. held, that it being clear the Defendant might have proſecuted at Seſſions Indictment on the Statute of E. 6. this Caſe was reſtrained by the expreſs Words of 21 Jac. it being an Information by the Attorney-General; and that it had been always rul'd that 21 Jac. gives no new Juriſdiction to Juſtices of Peace, or of Oyer and Terminer &c. where they had none before, and ſo extends not to penal Laws, which can be proſecuted only in the Superior Courts at Weſtminſter; and the Opinions in the Books, that Debt on a penal Law will ſtill lie in the Superior Courts, are founded on this Reaſon, becauſe no ſuch Action can be commenc'd before the Seſſions, or Niſi Prius, or Oyer and Terminer; and the Information was quaſh'd.——1 Salk. 372. pl. 13. S.C.

* 5 Mod. 425. S. P. accordingly, and ſeems to be S.C.———S. P. reſolved by the Opinion of 11 Judges. 1 Salk. 373. pl. 14. Hill. 10 W. 3. B. R. Hicks's Caſe.

Comb. 350. Newman v. Lun, S. C. Holt Ch. J. ſaid it was adjudg'd in Caſe of Barns v. Hughes, that Debt lies in this Court, and was ſo adjudg'd ſince in the Exchequer; that indeed Ld. Hale adjudg'd it otherwiſe in Nichols's Caſe; but Holt ſaid it is not yet ſettled. Et adjornatur.———Nelſ. Abr. 258. Tit. Arreſt, pl. 4. cites 5 Mod. 225. that the Plaintiff had Judgment, [but it is not ſo there.]———See pl. 9. and the Notes.

10. In Debt by a common Informer, on the 23 H. 6. cap. 10. *againſt a Bailiff for taking 5 s. 6 d. on an Arreſt* on a Bond. After Verdict for the Plaintiff it was moved, that by the Statute 21 Jac. cap. 4. it ſhould have been brought in the County where the Taking was, whereas the Taking was in Buckinghamſhire, and the Action was brought in London. Adjornatur. 5 Mod. 225. Trin. 8 W. 3. Newnham v. Lun.

(A. 3) At what Time brought, and what the Proſecutor muſt do to bring Action.

1. 37 E. 3. 18. *DIRECTS that Informers ſhall find* Sureties. *No Informations &c. ſhall be received or filed, unleſs the Informer make Oath that the Offence was committed in the ſame County, and within a Year before the Suit commenced.*

2. 31 *Eliz. cap. 5. S. 5. All Actions, Suits, Indictments, or Informations on Penal Statutes, where the Forfeiture is limited to the Queen only, ſhall be commenced within 2 Years after the Offence, and not after. And all Actions &c. brought for any Forfeiture upon any Penal Statute made, or to be made, (except the Statute of Tillage) the Benefit whereof is or ſhall be limited to the Queen, and to any other that ſhall proſecute, ſhall be brought within one Year next after the Offence committed; and in Default of ſuch Purſuit, the ſame ſhall be brought for the Queen within 2 Years after that Year ended.*

S. 2. *Provided that where a ſhorter Time is limited by any Penal Statute, the Proſecution muſt be within that Time.*

An *Information* upon the Statute 27

3. Where the Plaintiff is *Pars gravata* he is *not reſtrain'd to a Year* after the Offence committed, but ſuch Reſtraint extends only to com-

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mon Informers; per Cur. 3 Le. 237. pl. 326. Mich. 32 & 33 Eliz. in the Exchequer. Broughton v. Prince.

Eliz. of fraudulent Conveyances by

the Party grieved, tho' *brought after the Year*, is good, and not within the Stat. 31 Eliz. 5. For that is to be intended of common Informers. Noy 71. Anon. cites it to have been so agreed in one Holden's Case.

4. 21 *Jac.* 1. *cap.* 4. *S.* 3. Enacts, That *no Officer shall receive any Information &c. upon Penal Statutes, until the Informer hath first taken Oath before some of the Judges of that Court, that the Offence was not committed in any other County than where, by the said Information, the same is supposed to have been, and that he believes the Offence was committed within a Year before the Information within the same County.*

An Information for using the Trade of an Ironmonger, not being an Apprentice, was found for

the Plaintiff. Error was brought because it does not appear that the Fact was done within a Year before the Information, which by the Statute of 21 Jac. the Informer was to be sworn to, before his Information was received: Sed non allocatur; for it is no Parcel of the Record, but it is only a Direction to the Officers that none shall be received, unless he be first sworn. Cro. C. 316. pl. 8. Trin. 9 Car. B. R. Anon.

So in an Information against the Defendant for &c. the Defendant *pleads* that the *Informer did not swear his Information*; and resolved to be no Plea; for altho' the Officer be punishable for taking it without Oath, secundum Stat. 21 Jac. yet the Information is well enough without it. Freem. Rep. 376. pl. 487. Mich. 1674. Garrett v. Baskervill.——3 Keb. 363. pl. 44. Garter v. Baskervill, S. C.

5. An Action on the Statute of 14 and 15 H. 8. cap. 5. against *practising Physick in London without Licence*, was brought for 20 Months, and Exception was taken that it was not within 31 Eliz. cap. 5. S. 5. but the Court held that this was intended of Popular Actions, and not *where Parties have Interest*, as in this Case, but for Perjuries, Forgeries &c. and Judgment for the Plaintiff. 3 Keb. 672. pl. 40. Trin. 28 Car. 2. B. R. The College of Physicians v. Needham.

6. In Debt on the Statute 23 H. 8. [23 H. 6. cap. 15.] *by a Stranger for a false Return of a Parliament-man*, the *Declaration was above a Year after the Bill*, but the *Latitat was taken out within the Year*. Eyre J. held that such Informer is not within the Statute 31 Eliz. which extends only where the Informer and the King, or the King only, is to have the Penalty; and that the Latitat brought within the Year is a sufficient Commencement of the Suit within the Year, and that the Latitat here is as an Original. Gregory J. agreed to both Points; but Dolben J. doubted its being within the 31 Eliz. the Penalty being given severally to the King and severally to the Informer. Holt Ch. J. doubted if it should be taken as a joint Penalty for the Whole; and held that the Latitat is no Commencement of the Suit within the Year, within the 31 Eliz. it being a Penal Statute; that here the Party might have sued by Original, and so at no Prejudice, and that the Trespass in this Case shall be accounted from the Time of the Offence to the Time of Filing the Bill; but Judgment was given for the Plaintiff by the Opinion of the other 3 Justices. Comb. 194. Trin. 4 W. & M. in B. R. Cullisford v. Blandford.

Show. 353. Calliford v. Blawford, S. C. accordingly, says the Action was brought on the Clause which *gives the Penalty of 40 l. to the King, and 40 l. more to the Person chosen and not return'd, or to any other Person as in Default of such Person chosen*

will sue, 40 l. the Party grieved to bring his Action within 3 Months after the Commencement of the Parliament, and if he do not, then any other to have the Action. And that Eyre J. held, that in this Case the King has nothing of the Penalty, and that the Informer here is not within 31 Eliz. but comes in by Default of the Party grieved; that a common Informer within the Statute is only where he is to have but Part of the Penalty. Where the *Party* is *to have the whole Penalty*, the 31 Eliz. limits no Time, no more than it does to the Party grieved, and so is not a common Informer within the Statute. Gregory J. agreed, but Dolben J. doubted as to this Point. Holt Ch. J. admitted, that if the King were to have nothing, this Informer would be out of 31 Eliz. but he thought that the King here was to have a Part.——Carth. 232. S. C. accordingly; and Holt Ch. J. held that where the Penalty is given to the Party alone, and none to the King, it is clearly out of the Statute 31 Eliz. The Plaintiff had Judgment, but afterwards a Writ of Error was brought.——12 Mod. 27. S. C. accordingly.——4 Mod. 129. S. C. adjudg'd for the Plaintiff; and Eyre and Gregory J. held that in this Case by the Party grieved not suing within the 3 Months, the Informer now stands in his Place.——S. C. cited by Nevil and Powell J. that in Error brought in the Exchequer-Chamber, it was resolved by the Majority of Judges then present, that where the Informer is to have the whole Penalty, the 31 Eliz. does not extend to it, because it is not within the Words of the Act, and Penal Acts are not extendible by Equity

But says that Treby Ch. J and Powell Jun. J. were of Opinion contrary to that Judgment; For if the Informer should be bound when the Queen is join'd with him, he should much more be so when he sues by himself. Ld. Raym Rep. 78. Pasch. 8 W. 3. in Case of Chance v. Adams. And the Reporter adds a Nota, that Treby Ch. J. Rokeby J. and Powell Bar. held, that for the said Reason the Judgment in the Case of Culliford and Blandford ought to be revers'd; but Nevill and Powell Justices of C. B. and Lechmere and Nevill Barons, held the contrary.

7. 4 & 5 *W. & M.* 18. *Informer to enter into a Recognizance of* 20 *l. to prosecute &c.*

3 Salk. 351. pl. 5. S. C. accordingly.

8. Upon View of 5 Eliz. 4. where a Moiety of the Penalty goes to the Informer, a *Prosecution* upon that Statute *must be within* a Year by the Informer; but where it is purely at the Suit of the Queen, she has two Years, and where the Penalty is distributed as Moiety to the Queen and Moiety to the Informer, and no Prosecution within a Year, the Queen has another Year, and shall have all the Forfeiture; Per Cur. 6 Mod. 220. The Queen v. Franklyn.

(A. 4) Writ and Count. How.

Thel. Dig. 118. lib. 10. cap. 28. S. 11. cites S. C.

1. DEBT of 40 s. the *Writ was general, and the Count was special, and declared all the Statute of Assises of piked Shoes* &c. *that no Shoemaker shall make with Pike of more Length than 2 Inches, upon Pain of 20 s. viz. 6 s. 8 d. to the Plaintiff who sues, 6 s. 8 d to the Warden of the Craft,* and 6 *s. 8 d. to the King*; and counted that the Defendant had made 3 Pair of Shoes with Pike which pass'd this Length, whereof Action accrued of 40 s. &c. and the Count was challenged, inasmuch as it ought to be *Qui tam pro Domino Rege quam pro Gardianis illius artis* &c. *& pro seipso sequitur*, and not in his Name only; and the same Law in Decies tantum, and the like where a Sheriff occupies his Office above a Year. And by 3 or 4 Justices, the Count is good, and the Writ also, but per Danby Ch J. the most sure Way is to say as the Exception is taken. Br. Action Popular, pl 5. cites 5 E. 4. 117 & 118.

Br. Action sur le Statute, pl. 4. cites S. C. accordingly; and says that he need not rehearse the Statute in the Writ; but that if he does it is never the worse. ——— Thel. Dig. 118. lib. 10. cap. 28. S. 13. cites S. C. ——— 2 Hawk. Pl C 267. cap. 26. S. 21. S. P. accordingly.

2. Note, that Writ of Debt upon *the Statute of Farms against a Priest*, the Writ shall not be Quod reddat to the Plaintiff the Sum, but shall be Quod reddat tam Nobis quam Parti; and otherwise it shall abate. Br. Faux Latin, pl. 1. cites 27 H. 8. 23.

S. C. cited by Dyer Ch. J. who took a Difference where an Action is *founded upon a Contempt*, or upon *a Penalty*; for in *Decies tantum* the Writ shall be in the Tam quam; and that so it

3. A. brought an Action against B. *for suing, together with C. in the Court of Admiralty for a thing done upon the Land* upon the Statutes of R. 2. and H. 4. and the Writ was, Ad respondendum tam pro Domino Regi &c. quam A. reciting the Statutes; and in the Conclusion of the Recital he said *Quod talis Prosecutor in Curia Admiral' incurr' pœnam erga Dominum Regem & Reginam nunc* 10 *l.* and counted accordingly against B. only, with a *Simul cum prædicto C. prosecutus est & implacitavit, viz. singulariter.* B. demurr'd upon the Writ and Count, 1st. Because the Action was brought by the King and the Party jointly. 2dly, Because it was against B. only, where B. Simul-cum C. impleaded him. In this Case was produced the Precedent of the Lord Riche's Case of Swanton v. Gillet, alias Willet, where two were sued in the Admiralty, and one only brought Action without shewing the Death of his Companion, and it

it was Qui tam pro Rege quam pro ſeipſo &c. See D. 159. b. pl. 37. 38. Paſch. 4 & 5 P. & M. Pointell's Caſe. was in this Caſe for ſuing in the Admiralty, for that in thoſe Caſes the Action was upon a Contempt, and not for a Duty; but that in Action upon the *Statute of Apparel*, as the principal Caſe there was, the Action was given upon a Duty accruing by *Forfeiture*, and the Statute made it ſeveral, viz. one Part to the Queen and the other to him that would ſue; and therefore he thought that in that Caſe the Writ ought not to be ad reſpondendum tam nobis quam to the Party. Brown J. to the ſame Purpoſe, but Walſh and Weſton J denied it. Mo. 63. 64. pl. 175. Trin. 6 Eliz. Anon.——Dal. 66. pl. 30. S. C.

4. If an Information contains *ſeveral Offences* againſt a Statute, and *ſome* of them be *well laid*, and *others defective*, the Informer may have Judgment for ſo much as is well laid. See Cro. J. 104. pl. 40. Mich. 3 Jac. B. R. Woody's Caſe.

5. The Plaintiff in an Information *demanded the Moiety for himſelf, but ſaid nothing of the King's Moiety.* Exception was taken thereto, but diſallow'd; for all the Precedents are ſo, and the Informer put firſt to pray his own Moiety. Jo. 156. 157. pl. 1. Paſch. 3 Car. B. R. Bedoe v. Alpe.

6. In Debt on a penal Statute the Writ was *Præcipe L. quod reddat nobis & S. qui tam pro nobis quam pro ſeipſo ſequitur* &c. The Defendant pleaded *Quod ipſe non debet præfato S. qui tam &c. nec aliquem inde Denarium in forma qua &c.* It was objected, That the Writ and Declaration was not anſwer'd; for that the Plea ſhould have been as the Demand is, viz. Quod ipſe non debet dicto Domino Regi & præfato S. qui tam &c. which the Court regarded the rather, becauſe the Statute of Jeofails excepts penal Statutes. Hob. 327. 328. pl. 401. Scot v. Lawes. In * Action Qui tam *againſt a Juſtice of Peace on the Act againſt Conventicles*, which gives 100l. Forfeiture, one Moiety to the King, and one to the Informer, the Count was Unde Actio accrevit for 100l. to the King and himſelf. The Defendant pleaded Non Debet the ſaid 100l. to the Informer, nec aliquam inde Parcellam & de hoc ponit ſe ſuper Patriam & prædictus R. (the Informer) ſimiliter. It was moved that the Iſſue is misjoin'd, it being only between the Informer and the Defendant; and ſo the Plea is Non debet to the Informer, without mentioning the King. And the Court was clearly of that Opinion, and that a Repleader ought to be awarded. Vent. 122. Paſch. 23 Car. 2. B. R. Reynell v. Heale

[* This in the State of the Caſe is mention'd as an Information, but is afterwards expreſsly ſaid to have been an Action Qui tam.] —2 Keb. 788. pl. 22. S. C. and calls it an Action, and that a Repleader was awarded.——2 Hawk. Pl. C. 266. cap. 26. S. 20. ſays it ſeems to be ſettled at this Day that it is in Election of him that brings an Action on a Penal Statute, which gives one Moiety of the Forfeiture to the King, and another to the Informer, either to have a Writ againſt the Defendant Quod reddat Domino Regi & A. B. Qui tam &c. quas ei debet, or to have it Quod reddat A. B. Qui tam &c. quas ei debet; and that whether the Writ be in the one Form or the other, it is well purſued by a Declaration in the Name of the Plaintiff only.

R. ſummonitus fuit ad reſpondend' S. qui tam pro Domino Rege &c. *quod reddat dicto Domini Regi & S. qui tam &c. 10l.* and *declares of ſelling 2 Horſes in Smithfield not toll'd, contrary to 31 Eliz.* by which he forfeits 2 ſeveral Sums of 5 l. per quod Actio accrevit dicto Domino Regi & S. qui tam &c. vel eorum alteri. The Defendant pleaded *Non debet prædicto S. qui tam &c the ſaid 10l. or any Part thereof.* The Jury found that he owes the 10l. It was moved that here was no Iſſue, or not well join'd, the Demand being of 10 l. due to the King and S. qui tam &c. and the Iſſue is Non debet to S only. But it was anſwer'd, that the Summons ad reſpondend' is to S. qui tam &c. only, and that the De placito quod reddat might have been ſo too, and cites Co. Ent. 363. b. Rall. Ent. 430. (bis) and 207. b. where the Summons is ad reſpondend' Regi & parti qui tam &c. and ſo the Entries are in ſeveral Forms, and all good; that the Debt is intire to the King and the Party, ſo that if he owes to the Party he muſt neceſſarily owe to the King, and it being found that he owes to the Party, he conſequently owes to the King too, and the Plea is Non debet the Debt, or any Part of it; and as to the Iſſue it ariſes upon his own Default, and therefore ſhall not take Advantage thereof; and if it be a Diſcontinuance it is cured by the Statute of 32 H 8. by the Verdict; whereupon the Plaintiff had Judgment. 3 Lev. 374 Mich. 5 W. & M. in C. B. Sedgewick qui tam &c. v. Richardſon.

8. In Debt on a penal Statute for 120 l. for Abſence from Church, the Declaration was *Per quod Actio accrevit eidem Domino Regi & L. F. qui tam &c. ad habendum* the ſaid 120l. the Defendant demurr'd Pro eo quod Declaratio ipſius L. minus ſufficiens &c. ad ipſum L. qui tam &c. verſus ipſum T. (the Defendant) manutenendum &c. unde petit Judicium. And that the ſaid L. qui tam &c. ab actione ſua prædicta &c. præcludatur. L. join'd in Demurrer. Per Cur. This is meerly the Suit of the Party; for tho' the Writ be *Quod reddat Domino Regi and the Informer*, yet it is pre-

preſum'd for himſelf, he being as the original Party only; for the Statute appoints, that no Protection or Wager of Law ſhall be therein; and the Pleading here ſhews that the Plaintiff L. F. ſhall maintain his Action; and that the Declaration is not ſufficient to compel him to anſwer the Informer, and mentions nothing of the King. And the Replication and joining in Demurrer is only by the Informer, viz. that it is not ſufficient to bar him of his Action. Cro. C. 10. 11. pl. 1, Trin. 1 Car. C. B. Farington's Caſe.

S. C. D. 150. b. Marg. pl. 37.—Being an original Writ, it is moſt frequently brought ſo, tho' ſometimes the other Way. And the Court conceived it to be good both Ways. Cro. C. 256 pl 1. S. C. in B. R. —2 Hawk. Pl. C. 266. cap. 26. S. 20. ſays, it ſeems to be doubtful whether there be any Neceſſity that either the Writ or Count, in any ſuch Action, do expreſs that it is brought by or for the King, as well as the Party; and that there is a Precedent (Raſt. Ent. 427. pl. 3.) of ſuch Action brought in the King's Name by A. B. qui pro ſeipſo in hac parte ſequitur; but that it ſeems agreed that every Information muſt be in this Form, viz. That the Informer tam pro Domino Rege quam pro ſeipſo ſequitur, even where it is brought on a Statute which gives one 3d Part of the Penalty to a 3d Perſon.

9. Debt was brought upon the *Statute* 14 *H.* 8. 5. for practiſing Phyſick in London contrary to that Act, and the Writ was *Quod reddat Domino Regi & Præſidenti Collegii & Com. ſalcultat. Medicor' London qui tam pro Domino Rege quam pro ſeipſo ſequitur* 60 *l. quas eis debet*; and the Declaration was in the Name of the ſaid Preſident Qui tam pro Domino Rege quam pro ſeipſo ſequitur &c. It was among other Things aſſign'd for Error, that the *Writ was in the Name of the King and the Preſident, and the Declaration was in the Name of the Informer alſo.* But Per tot. Cur. the Writ and Declaration are good; and tho' ſome Precedents are, that upon a penal Law the Writ was to anſwer the Informer *Qui tam pro ſeipſo quam pro Domino Rege ſequitur*, yet they thought the more proper and better Way for the Writ was to anſwer to the King and the Informer; for the *Debt is given to them by Moieties*; and therefore it is not ſo proper to demand all for the Informer, but for the King, and the Informer to have *Judgment ſeveral for Moieties*; and ſo is Partridge and Crocker's Caſe in the Commentaries; and affirm'd Judgment in C. B. Jo. 261. 262. Trin. 8 Car. B. R. College of Phyſicians v. Butler.

* If a Statute be that one ſhall forfeit 5 l. to the King, and 5 l. to the Party that will ſue, theſe are clearly ſeveral Duties, and thereupon ſeveral Actions lie; Per Brown J. Mo. 64. pl. 175. Trin. 6 Eliz.

S. C. and that Informations are always ſo.

9. When it is *by Information* it ſhall be, *that the Informer informs for the King and himſelf.* Jo. 262. in S. C.

Cro. C. 256. and cites Pl. C. 77. New Book of Entries 160. Old Book of Entries 143. 373.

10. Where a *Statute gives one third Part to the Poor*, and Debt is brought *Qui tam*, and *demands the Penalty for the King and the Informer, but ſays nothing of the third Part to the Poor*, yet it is well enough; for it being an Action of Debt the Poor cannot ſue, but their Part ſhall be ſever'd in the Judgment; but *in an Information* it may be Pro Domino Rege, pro ſeipſo & pro Pauperibus. Sed adjornatur. 2 Keb. 820. pl. 30. Mich. 23 Car. 2. B.R. Dickinſon v. Clare.

11. Debt upon the Statute for not coming to Church, and concludes *Per quod actio accrevit eidem Domino Regi & quer' ad exigend' & habend'*. The Exception after Judgment was taken, that it ought to have been only *Actio accrevit eidem the Plaintiff, qui tam* &c. and not exigend' & habend' for the King and himſelf. Sed non allocatur; for upon Search of Precedents the Court were all of Opinion, that it was good either Way. 2 Mod. 100. Trin. 28 Car. 2. in C. B. Anon.

Skin. 83. pl. 25. S. C. and S. P. accordingly.—2 Show. 247. pl. 247. S. C. & S. P.

12. An Action Qui tam was brought on a penal Statute, which gave the Forfeiture thus, viz. *One 3d Part to the King, one to the Informer*, and *one to the Poor* of the Pariſh where the Offence was committed. The Declaration laid the Offence in the City of Briſtol generally, without ſaying in what Pariſh; and upon Exception taken the Court held it ill, and

Judg-

Judgment quod querens nil capiat. 2 Jo. 226. Mich. 34 Car. 2. B. R. Powell v. Weekes.

13. In Debt brought on the Statute for selling Wine without Licence, the Declaration was *Quod cum he sold* &c. contra formam Statuti, without reciting the Statute. Adjudg'd well enough, it being in an Action of Debt; but it would be otherwise in an Information; Per tot Cur. Show. 337. Hill. 3 W. & M. Mallack qui tam &c. v. Sparing. Carth. 216. S. C. adjudged accordingly.

14. The Conclusion of Action Qui tam was *Et inde producit sectam* generally, without saying *Tam pro Domna Regina quam pro seipso*. But resolv'd that this must be so understood, and Precedents being both Ways, the Judgment was a Respondeas Ouster. 10 Mod. 253. Trin. 13 Ann. B. R. Walter and Laughton.

(A. 5) Proceedings in such Actions, and Informations.

1. INformation was made, that where *none shall ship Wool to any Place but to Calice* there *had the Defendant shipp'd to D.* by which he pray'd the 3d Part of the Forfeiture, according to the Statute; and the best Opinion there was, that *where a Penalty is given to the Party who sues* &c. *by penal Statute*, there *if no Action be given to him, he shall have Information in the Exchequer, and shall recover his Part.* Br. Surmise, pl. 25. cites 37 H. 6. 4.

2. Nota, That the *King cannot be nonsuit.* Br. Nonsuit, pl. 68. cites 25 H. 8. but says it appears in the Book of Entries, that *an Informer* qui tam, or Plaintiff in a popular Action *may* be nonsuit. S. P. Br. Prerogative, pl. 116. cites the Book of Entries.

3. 18 *Eliz.* 5. *A* special Note *shall be made* of the Day and Year of exhibiting the Information, *and the same shall be taken to be of Record from that Time, and not before; and until then no Process shall be indors'd; and upon the Process shall be indors'd as well the Informer's Name as the Statute upon which the Information is brought, upon Pain of* 40*s. to be paid by the Clerk making out Process in other Manner, to be divided between the Crown and the Party grieved,*

Every Informer upon a penal Statute shall exhibit his Suit in proper Person, and prosecute the same by himself or his Attorney by Information or original Action only, without using a Deputy.

4. 29 *Eliz.* 5. *An Appearance to be accepted in a Prosecution on a penal Statute.*

5. Note, an *Action* upon 5 *Eliz. cap.* 14. was brought for *forging of* an Obligation; and upon Not guilty it is found for the Defendant. And upon the Motion of Hitchman it was order'd by the Court, that Judgment should be staid, because the Action is *brought only in the Name of the Party*, and not Tam quam pro Dom. Rege &c. Noy 134. Anon.

6. When an Action is brought on a *penal Statute*, where *Part is* given *to the King, and Part to the Party* prosecuting, there upon the joining of *Issue*, and in the *Venire facias* it must be said Qui tam pro Domino Rege &c. and it is the common Course to enter the Party Qui tam pro &c. but when the King is only named (as an Offence against the King and the Party) and the *King is not to have any Part of the Sum recover'd*, but only to have a Fine, there neither in the Issue nor in the Ven. fac. is any Mention of Qui tam &c. Cro. Car. 336. Mich. 9 Car. B. R. and so a Judgment in C. B. was affirmed. Anon.

7. A *Writ of Error* lies in the Exchequer, upon a Judgment in an Action of Debt Tam quam, notwithstanding the Words in the Statute of

27 Eliz. 8. Raym. 275. Paſch. 31 Car. 2. in the Exchequer, Scot v. Knapton.

8. An Information filed *without Recognizance* enter'd into by the Party is ill, but the Court cannnot take it off the File. 12 Mod. 154. Mich. 9 W. 3. The King v. Lambert.

9. When a *Statute* gives a Penalty to be recover'd before Juſtices of Peace, and *preſcribes no Method*, it ought to be by Bill; Per Holt Ch. J. 2 Salk. 606. pl. 4. Mich. 2 Ann. B. R. Anon.

10. In an Action Qui tam the *Plaintiff not* being *to be found*, the Defendant *mov'd that Proceedings ſhould be ſtay'd till the Plaintiff would give Security to pay Coſts in caſe* &c. But the Court would not, but granted a Rule to ſhew Cauſe why Proceedings ſhould not ſtay till the Plaintiff came home; and Lee Ch. J. cited a Caſe of **Olden v. Laurence**, Hill. 9 Geo. 2. in an Action qui tam for ſelling Cattle, where the Court granted ſuch a Rule till the Plaintiff could be found, but denied the Motion as to giving Security. Mich. 13 Geo. 2. B. R. Jaques qui tam v. Goſton.

(A. 6) Pleadings in Actions on Statutes.

1. INformation upon the *Statute of Liveries*, that *A. B.* ſuch a Day, Year, and Place, *gave to C. D. a Piece of Cloth to make a Gown, and he there the ſame Day and Year received it, and made thereof a Gown, and uſed it.* Mordaunt ſaid there are ſeveral Statutes of Liveries, and *you have not counted upon which Statute* the Information is made, and yet well Per Cur. for the beſt ſhall be taken for the King. Mordant ſaid, You *have not rehears'd the Statute in the Information*; as in Waſte againſt Tenant for Term of Life, or Termor, he ſhall rehearſe the Statute. Contra againſt Tenant in Dower, or Guardian in Chivalry; for Prohibition lies againſt them by the Common Law; for thoſe Statutes are made by the Law. Contra of Leaſe for Life and Years. Et non allocatur; for at the Common Law Debt did not lie againſt Adminiſtrators, but it lies now by Statute, and yet the Statute is not rehears'd &c. and Formedon nor Quod ei deforceat do not rehearſe the Statute; for ſpecial Form of Writ is given by the Statute. Fairfax ſaid it is material to *allege the Place where the Gown was wore*; but Conisby ſaid it ſhall be *intended* in the Place *where it was received*; as in Treſpaſs of Goods Quod cepit & aſportavit both ſhall be intended in the Place where the firſt Taking was alleged. And ſo in Treſpaſs of Aſſault at D. & ipſum verberavit & Male tractavit, all ſhall be intended in the firſt Place; and yet it may be that it was at divers Places, and others econtra; for thoſe ſhall be intended at one and the ſame Place and Time; but the Receipt may be in one Place and the wearing in another Place; as where a Man ſells a Thing with Warranty, all ſhall be intended in one and the ſame Place; for if the Warranty was made after the buying, it is void. Et adjornatur. Br. Surmiſe, pl. 27. cites 5 H. 7. 17.

Br. Dette, pl. 124. cites S. C.— *Not guilty* is a good Plea in an Action Tam quam; per Curiam. Carth. 219.

2. In Debt for *taking of a Savage contra formam Statuti*, the Defendant may plead *Nihil Debet per Patriam*; Per Tremail and Fineux, notwithſtanding that it be founded upon a Statute; for *it is not only upon the Statute, but upon the Statute, and upon Matter in Fact.* Br. Iſſues Joines, pl. 23. cites 21 H. 7. 14.

3. And in *Maintenance* the Defendant may plead *Non manutenuit* or *Not guilty.* Br. Iſſues Joines, pl. 23. cites 21 H. 7. 14.

4. And

4. And in *Forger* de Faits he may say, that *Ne forga pas, or Not Guilty*, and yet they are founded upon Statute. Br. Issues Joines, pl. 23. cites 21 H. 7. 14. Mich. 5 W. & M. in B. R. Leonard qui tam &c. v. Beech.

5. *But* in *Debt upon Escape against the Warden of the Fleet*, or in Debt upon recovery of Damages it is no Plea as it is said, Quære; For they were in Doubt of the Issue, and Rede contra, and that it is no Plea. Br. Issues Joines, pl. 23. cites 21 H. 7. 14.

6. Where *Information* is put *in the Exchequer upon a penal Statute*, and the *Defendant makes bar and traverses the Plea*, there the *King cannot waive such Issue* tendered *and traverse the former Matter* of the Plea, though he may upon Traverse of Office and the like, where the King is sole Party and intitled by Matter of Record; For upon the Information no Office is found before, and also a Subject is Party with the King for Recovery of the Moiety &c. per Whorwood Attorney General. Br. Prerogative, pl. 116. cites 38 H. 8.

7. 21 *Jac.* 1. *cap.* 4. *S.* 4. Enacts, that *if any Information shall be brought for any Offence against any penal Law, either by the King, or by any other, or on the Behalf of the King and any other, it shall be lawful for such Defendants to plead the General Issue, and to give special Matter in Evidence.* In Action Qui tam for selling Wines by Fraud, after general Issue the Party waived that, and *pleaded* 31 *Eliz. cap.* 5. *that being on a penal Law, it must be in a Year* because this being Debt, and not an Information, he could not take the General Issue; but per Hales Ch. J. since 21 Jac. cap. 4. this may be given in Evidence as well in Debt as in Information, which the Court agreed Ex motione Winnington to accept the Plea, and the Parties agreed to accept General Issue, this being for new Stores without Account; but in Action for the Duty it is not within the Statute on Nil debet, and in Information for Seisure Non importata fuerunt, contra Form' Stat' is not the General Issue as in other Informations it is, or Nil debet at Pleasure, and both Statutes extend to all penal Laws. 2 Keb. 859. pl. 11. Hill. 23 & 24 Car. 2. B. R. Burleigh v. Child.

8. Information Qui tam &c. *against a Justice of Peace for* 100 *l. for neglecting upon Complaint to suppress a Conventicle*; the Defendant *pleaded Non debet* &c. *to the Informer, & de hoc ponit se super Patriam, & prædict'* (*the Informer*) *similiter*; and the Informer had a Verdict; but it was moved, that the Issue was not well joined, because it was between the Informer and Defendant, *without mentioning the King*, whereas the Act gives a Moiety of the Forfeiture to the King, and the Court was clearly of the same Opinion. Vent. 122. Pasch. 23 Car. 2. B. R. Reynell v. Hele.

9. An Action, Qui tam &c. was brought in the Court of B. R. the Defendant pleaded in Abatement, *that he is an Attorney in the Court of C. B. and ought not to be sued out of that Court.* Upon a Demurrer the Court inclined, that the Plea was a good Plea; For although the King may bring his Action in what Court he pleases, yet the Action Qui tam is a popular Action, and brought by the Informer Qui tam, and therefore they inclined to allow the Plea. Hill. 6 W. B. R. L. P. R. 7. Debt Qui tam against an Attorney of C. B. for exercising the Office of *Under-Sheriff longer than one Year*; he pleads his *Privilege*, and it was allowed without making Defence. Cumb 319. Hill. 6 W. 3. B. K. Kirkham v. Wheeler.——In Action of Debt on a penal Statute an Attorney may have his Privilege, but not in an Information. Skin. 549. pl. 10. Trin. 6 W. & M. B. R. Baker v. Duncomb.

(A. 7) Qui tam &c. Bar or Discharge. What.

1. WHERE the King *pardons the Party pending the Suit*, this is good against the King for his part, *but it is not good against the* *But if* the King pardons him *be-*

fore Seisure or Suit taken, there this shall serve against him and all Parties; note the Diversity. Ibid. ——Br. Surmise, pl. 25. cites S. C. ——*Before Action brought* the King *may pardon the Penalty*, but *contra after the Action* brought; For then the Party is intitled to his proper Debt. Br. Charters de Pardon, pl. 38. cites 1 H. 7. 3.——Br. Releases, pl. 41. cites S. C. accordingly, and says, Quod Nota. Br. Actions popular, pl. 4. cites S. C. ——Hard. 199. Arg. cites S. C.

the Party for his Part in Decies tantum &c. which are Popular. Br. Charters de Pardon, pl. 24. cites 37 H. 6. 4.

2. If the *Party in Decies tantum releases* to them *all Actions*, yet a Stranger who brings Decies tantum shall not be barred by his Release, but if the King pardons it, there all Parties shall be barr'd. Br. Action Popular, pl. 7. cites 5 E. 4. 2, 3.

The Words of this Statute being General, the

3. 4 *H.* 7. *cap.* 20. Recovery *in Action popular* by Covin *shall be* no Bar *in an Action sued for the same Thing Bona Fide.*

Party may aver the Covin generally; per Molineux J. Pl. C. 49. b. 50. a.

The Plaintiff *Bona Fide in such Action* may aver *that the Recovery was had by* Covin, *or that the said other Plaintiff was barr'd by Covin. And if the Covin be found, the Plaintiff Bona Fide shall have Recovery and Execution.*

No Release *of a common Person made to the Defendant shall discharge an Action Popular.*

Provided, that no Collusion *is in this Case averrable where the Point of the same Action, or the Collusion itself, hath been* tried by Verdict.

Le. 119. pl. 161. S. C. rul'd accordingly.—— S. C. cited by the Reporter 11 Rep. 65. b. in Dr. Foster's Case, as adjudged accordingly. Trin. 31 Eliz. B. R. Stretton v. Taylor; and that if the Att. Gen. pleads a special Plea, though the Use is for the Attorney General to reply alone, yet if he will not reply or prosecute for the King, the Informer may for his part; For by commencing the Suit he has made the popular Action his own private Action, which neither the King nor any other can release as to his Interest, and the Condemnation or Acquittal of the Party at his Suit, is a Bar to all Persons, and also to the King; and yet the King in all these Cases may, before any Action commenc'd, pardon and release it, and this shall be a Bar to all Persons; and this Difference was granted, and denied by none. Cro. E. 138. pl. 13. S. C. ruled accordingly.——S. C. cited Cro. E. 583. per Cur. as rul'd that the Informer may proceed notwithstanding a Non vult Prosequi entered; and so where the Queen will pardon &c. For it is only for her own part.——S. P. Arg. Hard. 199. cites 1 H. 7. 3. 37 H. 6. 4. 2 R. 3. 12. 5 E. 4. 3.

4. In Information on the Statute of Usury Qui tam &c. The *Queen's Attorney entered a Non vult Prosequi*, which was pleaded in Bar against the Informer for all; But per tot. Cur. such Entry *is no Bar to the Party*, and said, that Anderson and Manwood upon Conference were of the same Opinion; For since the Law gives the Party the Moiety, the Queen cannot discharge it. Cro. E. 138. pl. 13. Trin. 31 Eliz. B. R. Stretton v. Taylor.

Le. 119. pl. 161. S. C. & S. P. ruled accordingly.

5. The *Nonsuit of the Queen* was insisted by Popham Att. Gen. to be a Bar to the Party in a Qui tam; but Wray and Gawdy denied it. Cro. E. 138. in pl. 13. Trin. 31 Eliz.

S. P. Mo. 541. pl. 715. Mich. 39 & 40 Eliz. A-non.——S. P. For the

7. Information on a penal Statute Qui tam &c. Before any Plea pleaded the *Informer died*. The Court held, that the Attorney General might proceed for the Queen. Cro. E. 583. pl. 10. Mich. 39 & 40 Eliz. B. R. Hammon v. Griffith.

Information by the Party shall serve for the King after his Death, 11 Rep. 66. a. in Dr. Foster's Case, cited by the Reporter as adjudg'd, Mich. 39 & 40 Eliz.——By such Death the Information does not fall to the Ground; per Coke Ch. J. 2 Bulst. 262. Trin. 12 Jac.——The Action abates as to the Plaintiff's Interest, though the King may proceed for his. 3 Keb. 804. Mich. 29 Car. 2. B. R. Clappon v. Edgecombe.——If the Informer dies there is an End of the Suit, and the King is not intitled till Recovery had, and Prosecutors Qui tam &c. are look'd on as common Informers. 3 Salk. 282. pl. 7. Trin. 7 W. 3. Kirkham v. Wheely.——12 Mod. 74. S. C. & S. P. that there is an End of the Suit and the King is intitled to a Recovery.——Comb. 319. S. C. but S. P. does not appear.

——Where

—Where the King is interested Qui tam &c. and the Informer dies, the Attorney General may proceed. Arg. 12 Mod. 267.

8. In an Action of Debt Tam quam against a Justice of Peace for 100 l. Penalty, upon the Statute against Conventicles, for refusing to disturb, having Notice; he pleaded *Outlawry to the Informer*. It was held, that this was a good Plea to bar him, so that he could not proceed; but notwithstanding it was held, that *the King might proceed for his Share*. Freem. Rep. 235. pl. 246. Mich. 1677. Justice Bale's Case. Though such a Person be disabled to sue for himself, yet he may sue for the King. 2 Mod. 267. 268. Mich. 29. Car. 2. C. B. per Cur. in Case of Atkins v. Bayles, S. C.

(A. 8) Punishment of Informers, and Costs. In what Cases.

1. 38 *E.* 3. 9. *INformer promoting a* false Suggestion, *shall be imprison'd till he satisfy the Party grieved his Damages, and also make a Fine to the King.*

2. 4 *H.* 7. *cap.* 20. *In every Action Popular, wherein the Defendant shall be attainted of Covin in suffering a Recovery to be had against him by another Plaintiff in Action Popular, he shall have Imprisonment of* 2 *Years by Capias and Outlawry, and that as well at the Suit of the King as of every other.*

3. 18 *Eliz.* 5. *S.* 3. *No Informer to compound with the Defendant but after Answer, and not then without the Consent of the Court, and if the Informer shall willingly delay his Suit, discontinue, be nonsuited, or a Verdict or Judgment pass against him, he shall pay the Defendant his Costs, for which the Court may award Execution.*

S. 4. *Every Informer offending against this Statute shall be set in the Pillory* 2 *Hours in the next Market-Town, and be disabled to prosecute upon any Penal Statute, and forfeit* 10 *l. to be divided between the Crown and the Party grieved, to be recover'd in the Courts at Westminster.*

4. In Information by the Party griev'd, upon 27 Eliz. cap. 4. which gives one Moiety to the King and the other to the Party griev'd, the Party was nonsuit. The Court held that he shall not pay Costs and Damages by the Statute of 18 Eliz. For that, as the Title thereof implies, is to redress Disorders in common Informers, and so is the Preamble; and the Words of the Clause of Costs and Damages are (every such Informer,) and extends only to Popular Actions. 2 Le. 116. pl. 156. Pasch. 30 Eliz. B. R. Doghead's Case.

5. Information upon the Statute 21 H. 8. cap. 13. against two Persons, (viz.) against one for Non-Residence, and against the other for taking the Farm. One of them pleaded Sickness, and that by Advice of Physicians he removed into a better Air. The other pleaded that he took the Farm for the Maintenance of himself and Family. These were both good Pleas; and the Informer not proceeding, but having brought this Information only for Vexation, and to make the Defendants compound with him, they exhibited another Information against him upon the Stat. 18 Eliz. cap. 5. and moved the Court, that because the Informer was a mean Person he might give Bail to answer the Costs, but it was denied; but made a Rule that the Defendants should not answer the Information before the Informer appear'd in Person. 2 Bulst. 18. Mich. 10 Jac. Martin's and Gunnystone's Case.

6. In an Information upon the Statute 35 Eliz. against Inmates, the Defendant was found Guilty; but because that Statute was discontinued by the 43 Eliz. the Court awarded that eat inde sine Die. Hobart and Hutton J. Die Hob. 250. pl. 328. Mich. 15 Jac.

b. Deane, S. C. but the Point of Costs does not appear.

Hutton held that the Defendant was intitled to Costs. Winch doubted of this Special Case, the Matter being found for the Informer; but he agreed, if it were upon Judgment upon Demurrer, or Special Verdict, Costs should be given. Warburton J. held that no Costs should be in this Case; for he is not capable to sue where the Statute is discontinued, and so if the Venue be mis-awarded; and he said he had conferr'd with the Ld. Ch. Baron, who also held that No Costs should be in this Case; and so the Matter rests. Hutt. 35. 36. Pie's Case.

5 Mod. 355. S. C.—— Lutw. 201.

7. No *Costs* are given in Actions Popular, be the Penalty certain or uncertain. 1 Salk. 206. pl. 4. Trin. 9 W. 3. B. R. Shore v. Madisten.

S. P. and adds, but where a certain Penalty is given to the *Party griev'd*, there he shall have his Costs and Damages. 5 W. & M. Sedgwick v. Richardson.——*Costs on a Penal Statute*, besides the Penalty. Cumb. 224. Mich. 5 W. & M. in B. R. Company of Cutlers v. Hursley.

8. 4 & 5 *W. & M.* 18. *Informer shall pay Costs if he delay the Prosecution, a Verdict pass against him.*

9. Defendant having been acquitted upon an Information, moved for Costs, and had them; and the *Difference* is where the *Judge*, who tries the Cause, *certifies probable Cause* of Prosecution, and where not. 12 Mod. 604. Mich. 13 W. 3. Dom. Rex v. Emmery.

(A. 9) What shall be said a Popular Action.

1. DECIES *tantum* is a Popular Action. Br. Decies tantum, pl. 12. cites 21 H. 6. 52.

2. Note per Littleton, Arg. in the End of a Case, that the King and the Party griev'd may have *Præmunire*; and from hence it seems that this Action *is not popular* for all; for *none shall have it but the King or the Party griev'd.* Br. Action Pop. pl. 9. cites 7 E. 4. 2.

3. Action *on the* 13 *Eliz.* 5. is not a Popular Action, but *extends only to the Party griev'd.* 2 Le. 9. 19 Eliz. C. B. per Dyer & Manwood, in Case of Creswell v. Cook.

4. Actions upon the Statute *de Scandalis Magnatum*, have always been brought Tam pro Domino Rege quam pro seipso. See 4 Rep. 13. Trin. 20 Eliz. B. R. Actions of Slander.

5. An *Action given to the Party griev'd* is not a Popular Action; Per Ive, Secondary of the Crown-Office. 2 Le. 116. pl. 154. Pasch. 30 Eliz.

(A. 10) Proceedings in General.

1. WHERE the King shall have Fine, the Party shall be satisfied before the King; as in Action Popular, where the one Moiety is to the King, and the other to the Party. Br. Execution, pl. 149. cites 39 Ass. 18.

2. If a Man brings Bill *Quod reddat T. 40 l. quas Domino Regi & prædicto T. debet upon the Statute* 23 H. 6. cap. 10. and the *Jury pass against the Defendant falsly*, Attaint lies for the Defendant; For the *King is not merely*

merely Party; for the *Party may discontinue or release without the King*, notwithstanding that the King shall recover the Moiety; and therefore the Attaint was demanded. Quod nota. And so it is admitted that *if the King was merely Party*, Attaint does not lie. Br. Attaint, pl. 130. cites 20 H. 7. 5.

3. 18 *Eliz. cap. 5. S. 3. Prohibits the Informer to compound with the Defendant before Answer, or after Answer without Consent of the Court.*

3. Error of a Judgment in Coventry, in an Information upon the Statute of 5 *Eliz. for exercising* the *Trade* of an Ironmonger, *not being Apprentice*. After Verdict and Judgment there for the Plaintiff, it was assign'd for Error, because Informers cannot sue upon that Statute to have the Moiety; for by the express Words in the Statute, *the Forfeiture is given to the Corporation*, for the Benefit of the Corporation *for Relief of the Poor, and for other Uses of the Corporation.* Sed non allocatur; for tho' that Statute gives one Moiety to the Informer, and the other to the King, except in Corporate Towns to whom such Forfeitures are granted, it is to be understood, and so hath been always expounded, that in that Case *the Forfeiture given to the King belongs to the Corporation, and the Informer is to have his Part still*; whereupon Judgment was affirm'd. Cro. C. 316. Trin. 9 Car. B. R. Anon.

4. It was adjudg'd that the King has no Privilege in an Action Qui tam pro Domino Rege &c. and that the *Prosecutor may pray a Tales without the Consent of the Attorney-General*, and he may be nonsuit. 3 Salk. 7. Anon.

5. The King is *Creditor pœnæ*, and all Fines for Offences *belong* to him. 3 Salk. 285. Dr. Greenvelt's Case.

6. Arbitrators cannot *award* a Qui tam *to be dropp'd*, because the *Poor of the Parish* who are interested in the Suit, are not Parties to the Submission; Per Raymond Ch. J. Gibb. 271. in Case of Phillips v. Knightley. Per Probyn J. the Plaintiff might drop the Qui tam; and this had made an End of the Matter, and by this the Defendant would have been indemnified. Ibid. 272.

7. In an Action Qui tam upon the Statute of the 19 of Anne against Gaming, the Plaintiff had a Verdict, but, *compounding* with the Defendant, would not proceed to Judgment; upon which it was *mov'd on the Behalf of the Poor* of the Parish, who are intitled to a Share of the Penalty, for a Rule *to bring in the Postea.* The Court agreed it was a scandalous Practice, and made a Rule to shew Cause. At another Day the Plaintiff was order'd to leave the Postea in Court, and enter up Judgment as soon as possible. Hill. 11 Geo. 2. B. R. French v. Wiltshire.

(B) For Fire.

1. **If my Fire** by Misfortune burns the Goods of another Man, **he shall have an Action upon the Case against me.** 2 H. 4. 18. Contra, if by Misfortune without Negligence. Br. Action sur le Case, pl. 30. cites S. C.

2. **If Fire** suddenly breaks out in my House, I not knowing of it, and burns my Goods, and also the House of my Neighbour, **my Neighbour shall have an Action upon the Case against me.** 42 Ass. 9. Admitted. But it seems it was adjudg'd there that the Action did not lie, because it was Vi & Armis.

3. If

S. P. Br. Action ſur le Caſe, pl. 30. cites S. C.

3. If my Servant puts a Candle, or other Fire in a Placeee in my Houſe, and it falls, and burns all my Houſe, and the Houſe of my Neighbour, an Action upon the Caſe lies by him againſt me. 2 H. 4. 18. The ſame Law is if my Guest does it. 2 H. 4. 18.

S. P. Br. Action ſur le Caſe, pl. 30. cites S. C.

4. The ſame Law is of him that enters my Houſe with my Leave. 2 H. 4. 18.

——If J. S. *my Friend* comes and lies in my Houſe, and ſets my Neighbour's Houſe on Fire, the Action lies againſt me. Brownl. 197. in Caſe of Crogate v. Morris. Obiter.

S. P. Br. Action ſur le Caſe, pl. 30. cites S.C.

5. The ſame Law is of him that enters my Houſe with my Knowledge. 2 H. 4. 18.

S P. Br. Action ſur le Caſe, pl. 30. cites S. C.—If a *Stranger ſets Fire to my Houſe, and it burns my Neighbour's*, no Action lies againſt me

6. But if a Stranger againſt my Will puts Fire in my Houſe, by which the Houſe of my Neighbour is burnt, no Action lies againſt me. 2 H. 4. 18. b.

; Per Holt Ch. J. to which all the other Juſtices agreed. Ld Raym. Rep. 264. Mich. 9 W. 3.

Fol. 2.

7. An Action upon the Caſe does not lie againſt Baron and Feme for negligent keeping their Fire in their Houſe, by which the Houſe of the Plaintiff was burnt, becauſe this Action lies upon the general Cuſtom of the Realm againſt the Maſter of the Family, and not againſt a Servant or a Feme Covert who is in Nature of a Servant. Mich. 1 Car. Regis at Reading, between *Skelly and Burr*, Per Curiam.

8. J. S. with a Gun ſtood at the Door of his Houſe, and *ſhot at a Fowl, and thereby fir'd his own Houſe and the Houſe of his Neighbour*, who brought an Action on the Caſe generally, and did *not declare upon the Cuſtom of the Realm* for negligently keeping his Fire. Per tot. Cur. the Action lies; for the Injury is the ſame, tho' this Miſchance was not by common Negligence but by Miſadventure; and if he had counted upon the Cuſtom of the Realm, as 2 H. 4. the Action had not been well brought, yet Conſuetudo Regni eſt Communis Lex. Cro. E. 10. pl. 5. Mich. 24 & 25 Eliz. C. B. Anon.

Comb. 459. S. C. adjornatur.—— Carth. 425. S. C. for burning the Plaintiff's Furze in another Field; and ſeveral Caſes were cited,

9. Caſe on the Cuſtom of the Realm Quare negligenter cuſtodivit Ignem ſuum in Clauſo ſuo; ſo that the Plaintiff's Corn in a certain Cloſe of his was burnt. It was objected that the Cuſtom extends only to Fire in his Houſe, or Curtelage, which are in his Power. Sed non allocatur; for the Fire in his Field is his Fire, as well as that in his Houſe, and he made it, and muſt ſee it does no Harm, and anſwer for it if it does. But if a ſudden Storm had riſen, which he could not ſtop, he ſhould have ſhew'd it in Evidence. 1 Salk. 13. pl. 4. Mich. 9 W. 3. B. R. Tuber-vill v. Stamp.

which are in the Margin of that Book, to ſhew where in Declarations *Fire* was *not alleged to be in an Houſe, but generally at ſuch a Place*; and the Court being of this Opinion, Judgment was given for the Plaintiff.——Skin. 681. S. C. mentions it to be for burning a Cloſe of Heath of the Plaintiff's, and Judgment for the Plaintiff.——12 Mod. 151 S. C. of a Cloſe of Heath; Turton J. thought this not actionable, as it is laid; but by the other 3 Judgment was given for the Plaintiff.—— Ld Raym. Rep. 264. S. C. and Turton J. ſaid that theſe Actions, grounded on the common Cuſtom of the Realm, had been extended very far; and therefore he thought the Plaintiff might have Action on the Caſe for the ſpecial Damage, but not grounded upon the general Cuſtom of the Realm; but the other 3 Juſtices gave Judgment for the Plaintiff. And there is a Note there, that Mr. Northey for the Plaintiff cited ſeveral old Books there mention'd [and the ſame is in the Marg. in Carth.] where the Declaration was general in ſuch a Pariſh, without ſpecifying a particular Houſe or Ground; but Holt Ch. J. anſwer'd that that was an antiquated Entry.——Comyns's Rep. 32. S. C adjudg'd accordingly.

10. 6 *Ann.* 31. *No Action ſhall be maintain'd or proſecuted againſt any Perſon in whoſe Houſe or Chamber any Fire ſhall* accidentally *begin, or any Recompence be made by him for any Damage occaſion'd thereby. And if any Action ſhall be brought for any thing done in Purſuance of this Act, the Defendant*

fendant may plead the General Iſſue, and give this Act in Evidence; and if the Plaintiff be nonſuit &c the Defendant ſhall have treble Coſts.

Provided this Act do not make void any Agreement made between Landlord and Tenant.

(B. 2) For Fire. Who ſhall have it.

1. LESSEE *for Life leaſed for Years*; Leſſee for Years burnt the Houſe. It was held by Fenner and Clench, (abſentibus aliis) that Action on the Caſe lies for the Leſſee for Life, becauſe he is chargeable over. Cro. E. 461. (bis) pl. 12. Paſch. 38 Eliz. B. R. Jeremy v. Lowgar.

2. *Leſſee* for Years *makes Aſſignment*, Aſſignee burns the Houſe by Negligence. Leſſee cannot have Action; otherwiſe againſt an *Under-Leſſee for Part of his Term* he may, becauſe he is anſwerable over to him that has the Inheritance. 1 Salk. 13. pl. 3. Mich. 8 W. 3. B. R. Hicks v. Dowling. 12 Mod. 100. S. C. held accordingly.—— Ld. Raym. Rep. 99. S. C. reſolved accordingly.

(B. 3) For Fire. Againſt whom it lies.

1. IF *Tenant at Will* negligently burns the Houſe, it is Waſte. Quære. Br. Waſte, pl. 52. cites 48 E. 3. 25. But this Caſe is denied in the Counteſs of Shrewsbury's Caſe, 5 Rep. 13. b. Mich. 42 & 43 Eliz. B. R. and adjudg'd that Action on the Caſe lay not againſt Tenant at Will; for at Common Law no Remedy lay for Waſte, either voluntary or permiſſive, againſt Leſſee for Life or Years; for he came in by the Act of the Leſſor, and it was his Folly not to reſtrain him by Covenant &c. And for the ſame Reaſon Tenant at Will ſhall not be puniſh'd for permiſſive Waſte.——Cro. E. 777. pl. 10 and 784 pl. 22. The Counteſs of Shrewsbury v. Crompton, S. C. adjudg'd accordingly.

Leſſee for a Week, and *ſo from Week to Week, Quamdiu partibus placeret* of a Stable, by Negligence ſix Weeks after, fir'd the Stable and others adjoining. After 3 Weeks he was only Tenant at Will, and no Action for Negligence lies againſt *Tenant at Will*. 3 Lev. 359. Paſch. 5 W. & M. in C B. Panton v. Iſham.——1 Salk. 19 pl. 9. Paſch. 13 W. 3. B. R. S. C. but S. P. does not appear.——No Action for Leſſor againſt Leſſee at Will lies for the Stable burnt by his Negligence, and held at Will, if the *Fire had ceaſed there*; but if it burns his *next Neighbour's* he ſhall have Action, becauſe he is a Stranger, and could not make him covenant to be careful; per Cur. 1 Salk. 19. pl. 9. Paſch. 13 W. 3. B. R. Panton v. Iſham.

There is a *Diverſity* where a Man is Leſſee at Will *to a Tenant in Fee*, no Action lies; but where he is *Leſſee at Will to a Leſſee for Years*, it lies. Agreed. 1 Salk. 19. Panton v. Iſham.——Same Difference agreed, Carth. 203. Hill. 3 W. & M. B. R. in Caſe of Cudlip v. Rundle; and cites to that Purpoſe Cro. E. 461. 5 Rep. 13. Cro. C. 187. Hern Pleader 161. 1 Jo. 224.

2. Leſſor has *Election* to bring his Action againſt his Leſſee for Years, or the Leſſee at Will of his Lenee for Years. Agreed per Cur. 1 Salk. 19. pl. 9. Paſch. 13 W. 3. B. R. Pantam v. Iſham.

(B. 4) Pleadings &c.

1. TRespaſs for *burning the Houſe of the Plaintiff.* The *Defendant pleaded Not Guilty*, and *was found by Verdict that the Fire was kindled ſuddenly in the Houſe of the Defendant, he not knowing, and burnt his Goods, and alſo the Houſe of the Plaintiff*; by which it was awarded that the Plaintiff take nothing by his Writ, and the Plaintiff in Miſericordia; and ſo ſee Verdict at large. Br. Verdict, pl. 50. cites 42 Aſſ. 9.

2. Iſſue was taken, that the Plaintiff's Houſe *was not burnt by the Fire of the Defendant*, and no Exception of Pregnancy. Br. Negative, pl. 8. cites 2 H. 4. 18.

* Br. Property, pl. 31. cites S. C.

3. In Caſe for not well keeping his Fire, by which he burnt the Houſes of the Defendant and of the Plaintiff. The Count was *according to the Cuſtom of the Kingdom of England, that he ought ſo to keep his Fire* &c. And Exception taken of this Cuſtom, becauſe *it is not declar'd where it was uſed*; & non allocatur, becauſe *the Cuſtom of the Kingdom is the Common Law of the Kingdom.* And other Exception taken to the Words * *per ignem ſuum*; for a Man cannot have Property in Fire; & non allocatur. Br. Action ſur le Caſe, pl. 30. cites 2 H. 4. 18. But Brooke ſays this Opinion is condemn'd.

4. Treſpaſs of his *Houſe burnt, in Default of good keeping of the Fire* of the Defendant; to which he *ſaid that the Houſe was not burnt in Default of good keeping of his Fire, Modo & Forma*; and it was found for the Plaintiff. Moyle ſaid that to Judgment you ought not to go; for this implies 2 Sentences, the one that the Houſe was not burnt, and the other that it was not in Default of the Defendant; and it was adjourn'd to be adviſed. Quære. Br. Negative, pl. 3. cites 28 H. 6. 7.

5. Caſe for negligent keeping his Fire, *per quod his Barn was burnt, & diverſa Bona were loſt*, viz. ſuch a Thing and ſuch a Thing, without ſhewing other Particulars; and this was mov'd in Arreſt of Judgment. Sed non allocatur; for by Windham J. the Diverſa Bona is ſufficient, quod Curia conceſſit, the Subſtance being the Burning the Houſe, and the Viz. but an Explanation, in which Miſtakes hurt not. Judgment for the Plaintiff. Keb. 825. pl. 118. Mich. 16 Car. 2. B. R. Prior v. Tuſts.

6. Caſe &c. for negligently keeping his Fire, ſo that the Plaintiff's *Houſe was burnt*, (viz.) *in parietibus, in partitionibus, & in ornamentis* &c. Upon Demurrer it was objected that it was too general and uncertain; for Damages could not be given for Walls and Ornaments; but it was anſwer'd that the Action had been well brought without the (Viz.) For the enumerating the Particulars was only to aggravate the Damages, which being to be recover'd in this Action, may be divided, and given only for what is well laid in the Declaration. 5 Mod. 181. Hill. 7 W. 3. Littleton v. Cole.

1 Salk. 13. pl. 3. S. C. but S. P. does not appear.—— 12 Mod. 100. S. C. but not S. P.

7. If Leſſee for 3 Years leaſes for 2, he may have the Action, and it is *not neceſſary he ſhould have* ſuch *Reſiduary Intereſt in him when he brings the Action*; but it is enough that he had ſuch Intereſt when the Houſe was burnt; and he *ought to ſhew* in his Declaration, *that he had an Intereſt in him then to come, when the Houſe was burnt.* Ld. Raym. Rep. 99. Mich. 8 W. 3. Hicks v. Downing.

8. In Caſe for burning a Houſe of Goods, *the particular Goods ought to be mention'd.* Per Holt Ch. J. 2 Ld. Raym. Rep. Hill. 2 Ann Obiter.

(C) Againſt

(C) Againſt a Carrier.

See Tit. Maſter and Servant (B) pl. 10. in the Notes; and Maſter of a Ship (B) pl. 12. Morſe v. Sluce.

1. * IF a Man delivers Goods to a common Carrier to carry to a certain Place, if he loſes them, an Action upon the Caſe lies againſt him; for by the common Cuſtom of the Realm he ought to carry them ſafely.

*See (L) pl. 4.

2. (So) If a Man delivers Goods to a common Hoy-man, who is a common Carrier of Goods, to carry them to a certain Place, and gives him according to the Cuſtom for the Carriage of them, and after by Default of good Keeping of them they are loſt, an Action upon the Caſe lies againſt him; for by the common Cuſtom of the Realm, he ought to keep and carry them ſafely. Mich. 12 Jac. B. between *Keeling and Rich* adjudged. Hob. Rep. 25. b. the ſame Caſe.

Hob. 17. pl. 30. Rich v. Kneeland S. C. adjudg'd for the Plaintiff, and now affirm'd on Error in the Exchequer Chambers; and it was reſolv'd that tho' it was laid as a Cuſtom of the Realm, yet indeed it is the Common Law. —— Cro. J. 330. pl. 9. S. C. adjudg'd, and affirm'd in Error that the Action lies againſt a common Bargeman without a Special Promiſe.

3. [And] if a Man delivers Goods to ſuch common Hoyman to carry to a Place, and after delivers them (being of good Value) to another to keep ſafely in the Boat, and does not diſcharge the Hoyman, and after they are loſt through Negligence, an Action upon the Caſe lies againſt him. Mich. 12 Jac. B. between *Keeling and Rich* adjudg'd. Hob. Rep. 25. b. the ſame Caſe.

Hob. 18. pl. 17. S. C. ſays, Nota he pleads no Diſcharge of the Carrying; and alſo the Defendant by Demurrer in Law confeſſes that there was no Diſcharge of the Carrying —— Cro. J. 330. pl. 9. S. C. ſays the Defendant confeſs'd the Receipt, and ſaid he was a common Bargeman; but that he fearing to carry it, deliver'd it to J. D. to carry, and that he gave Notice thereof to the Plaintiff, and he agreed thereto, and diſcharg'd him of the Carriage. The Plaintiff travers'd the Diſcharging him, and adjudg'd for the Plaintiff; for the Delivery by his Aſſent is not material; but the only Matter traverſable is the Diſcharge, which is iſſuable and found for the Plaintiff; And the Judgment affirm'd on Error brought.

4. If a Man delivers Goods to a common Carrier to carry, and the Carrier is robb'd of them, yet he ſhall be charged for them, becauſe he hath Hire for them, and ſo implicitly takes upon himſelf the ſafe Delivery of the Goods to him delivered, and therefore he ſhall anſwer the Value of them if he be robbed. Hill. 36 Eliz. B. R. Rot. between *Woodleiſe and Curties* reſolved.

Mo. 462. pl. 650. in Woodlife's Caſe, S. C. and by Gawdy J. the being robb'd of the Goods is no Plea for a Carrier, tho' it is for a Factor &c. per Popham, and cites 9 E. 4. 40. the Caſe of a Carrier, 3 H. 7. 4. 2 E. 4. 15. 6 H. 7. 12. 10 H. 7. 26 40 E. 3. 6.—S. P. by Gawdy J. Ow. 57. in S. C. and admitted by Popham; for Carriers are paid for their Carriage, and take upon them ſafely to carry and deliver the Things received.—— He is liable in reſpect of his Reward, and not of the Hundreds being anſwerable over to him; for the Hundred is liable by the Statute of Wincheſter, but he was ſo at the Common Law; Per Holt Ch. J. 1 Salk. 143. in Caſe of Lane v. Cotton.

Tho' one may think it a hard Caſe, that a poor Carrier that is robb'd on the Road, without any manner of Default in him, ſhould be anſwerable for all the Goods he takes, yet the *Inconvenience* would be far more intolerable if it were not ſo; for it would be in his Power to *combine with Robbers*, or to *pretend a Robbery*, or ſome other Accident, without a Poſſibility of Remedy to the Party; and the Law will not expoſe him to ſo great a Temptation, but he muſt be honeſt at his Peril; Per Holt Ch. J. 12 Mod. 482. in Caſe of Lane v. Sir Robert Cotton.—— 1 Salk. 143. Per Holt Ch. J. S. P. in S. C.

(C. 2) Who

(C. 2) Who is chargeable as ſuch, and what he is obliged to do.

Show. 104. S. C. & S. P. by Holt Ch. J. cites Palm. 523.

1. THE *very taking of the Goods* is a general Conſideration tho' he be not a Common Carrier. And the Acceptance of the Goods makes him liable; Per Holt Ch. J. Show. 104. Mich. 1 W. & M. in Caſe of Boſon v. Sandford.

——Skin. 279. S. C. & S. P. by Holt; and cited Palm. 523. by Hyde Ch. J. Paſch. 4 Car. B. R in Caſe of Symonds v. Darknoll.

Skin. 279. S. C. & P.— 2 Show 327. Jackſon v. Rogers S. P.

2. A common Carrier is as much *bound to carry* Goods as an Inn-keeper is to lodge a Gueſt. Per Holt Ch. J. Show. 104. Mich. 1 W. & M. in Caſe of Boſon v. Sandford.

—— Per Holt Ch. J. 1 Salk. 18. S. P. their Undertaking is in Proportion to their Power and Convenience, cites D. 158.——A Carrier *refuſing to carry* Goods when he has a Convenience, his Waggon not being full, is liable to an Action on the Caſe. Per Holt Ch. J. who ſaid he had known ſuch Action brought, and a Recovery upon it, and never diſputed. Ld. Raym. Rep. 654.—— S. P. per Holt Ch. J. tho' he ſaid the Caſes are not reported. 12 Mod. 484.——2 Show. 327. pl. 334. Mich. 35 Car. 2. B. R. per Ld. Jefferyes. Jackſon v. Rogers

But he may *refuſe to admit Goods into his Warehouſe before he is ready to take his Journey*. Per Holt Ch. J. Ld. Raym. Rep. 652. Paſch. 13 W. 3.——S. P. per Holt Ch. J. 12. Mod. 481.

3. A *common Hackney Coachman* is a common Carrier becauſe he carries for Hire. 2 Show. 127. pl. 127. Trin. 32 Car. 2. B. R. Lovet v. Hobbs.

4. Action lies againſt a common Carrier for *refuſing to carry Money*, if he does not aſſign a particular Reaſon for it. Per Cur. 12 Mod. 3. in a Note there, Mich. 2 W. & M.

5. A. took a *Hackney Coach* and deliver'd the Coachman his Goods to be carried with him, but in the Paſſage the Goods were loſt. Holt Ch. J. at a Trial at Guildhall, held that if the *Paſſenger pays the Hackney Coachman for the Carriage of the Goods* he may charge him for them, but not otherwiſe. Comyns's Rep. 25. Hill. 8 W. 3. Upſhare v. Aidee.

But by the Cuſtom and Uſage of Stage-Coaches, every Paſſenger uſes to *pay for the Carriage of Goods above ſuch Weight* in ſuch Caſe the Coachman ſhall be charg'd for the Loſs of Goods beyond ſuch Weight; Per Holt Ch. J. Comyn's Rep. 25. Hill. 8 W. 3. at Guildhall, in the Caſe of Upſhare v. Aidee.

6. So where A. took a Place in a Stage-Coach for ſuch a Town, and in the Journey the Defendant, by Negligence, loſt the Plaintiff's Trunk; upon Not Guilty, the Evidence was that the *Plaintiff gave the Trunk to the Man that drove the Coach, who promiſed to take Care of it*, but loſt it; Holt Ch. J. at Niſi Prius, held that the Maſter was not chargeable, and that a Stage-Coachman is not within the Cuſtom as a Carrier is unleſs the *Maſter takes a diſtinct Price for the Carriage of the Goods as well as of the Perſons*. 1 Salk. 282 pl. 11. Mich. 10 W. 3. Middleton v. Fowler.

7. A. *undertaking* in his Return from London *to carry* back ſuch Goods in his Waggon into the Country as he could get *for a reaſonable Price* is a Common Carrier. 1 Salk. 249. pl. 5. Hill. 8 Ann. C. B. Gisburn v. Hurſt.

(C. 3) Charge-

(C. 3) Carrier. Chargeable *or Excuſable.* In what Caſes. See Tit. Neceſſity (A) pl. 12.

1. A *Box of Jewels* was deliver'd to a Ferryman, who not knowing what was in it, and *being in a Tempeſt, threw it overboard* into the Sea; Reſolved he ſhould anſwer for it. Cited All. 93. by Roll Ch. J. as Bearcroft's Caſe.

2. A. *delivers a Box to a Carrier's Porter appointed to take in Goods*, and *told him that there was a Book and Tobacco in the Box*, and in Truth *there was* 100 *l. beſides.* The *Carrier is robb'd.* Roll Ch. J. directed that he muſt anſwer for the Money; for A. need not tell him all the Particulars in the Box; but it muſt come on the Carrier's Part to make a Special Acceptance. But in Regard of the intended Cheat to the Carrier, he told the Jury they might conſider him in Damages; but the *Jury gave* 97 *l. Damages*, abating 3 l. only for Carriage, Quod durum videbatur Circumſtantibus. All. 93. Mich. 24 Car. B. R. Kenrig v. Eggleſton. Hale Ch. J. Vent. 238. Hill. 24 & 25 Car. 2. B. R. cited a like Point then lately reſolv'd accordingly. But if the Carrier had told the Owner, That it was a dangerous Time, and if there was Money in it he durſt not take Charge of it, and the Owner had anſwer'd as before, this Matter would have excuſed the Carrier.

3. *Delivery* of Goods *to the Porter* is a Delivery to the Carrier, and if Parcels of Goods deliver'd to the Porter are *loſt* an Action lies againſt the Maſter. 2 Mod. 309. Trin. 30 Car. 2. C. B. Staples v. Alden. He muſt anſwer for all *Neglects* of thoſe under him, tho' he ſhould expreſsly caution againſt it. Per Holt Ch. J. in Caſe of Lane v. Cotton. 1 Salk. 18.

4. There needs no *particular Agreement for Hire* to render a common Carrier liable; becauſe when there is none, a Carrier may have a *Quantum Meruit* for it. Agreed. 2 Show. 129. Mich. 32 Car. 2. B. R. Lovet v. Hobbs. 2 Show. 81. Baſtard v. Baſtard.

5. Four hundred and fifty Pounds was deliver'd to a Carrier ſeal'd up in a Bag, and *was told it was* 200 *l.* if he is *robb'd* he ſhall *anſwer only for* 200 *l.* Carth. 485. Paſch. 11 W. 3. B. R. Tyly v. Morrice.——A like Verdict was given on the like Point at the ſame time in Caſe of Fiſher v. Morrice. Note; the Caſe of Kenrigg and Eggleſtone, All. 93. was cited as an Authority for the Plaintiffs; ſed non allocatur. For the Court held their Caſe different from the preſent. Carth. 486 Tyly v. Morrice.

6. The Law charges a Common Carrier, Common Hoyman, * Maſter of a Ship &c. intruſted to carry Goods, *againſt all Events but Acts of God, and of the Enemies of the King*; for tho' the Force be never ſo great, as if an irreſiſtable Multitude of People ſhould rob him, nevertheleſs he is chargeable; otherwiſe theſe Carriers might undo all that deal with them, by combining with Thieves &c. and yet in ſo clandeſtine Manner as not to be diſcover'd; And the Law, as to this Point, is founded upon this Reaſon; Per Holt Ch. J. 2 Ld Raym. Rep. 918. Trin. 2 Ann. Arg. in Caſe of Coggs v. Bernard. S. P But if a Bailiff or Factor carries Goods, and is robb'd, he is not liable to the Owner, tho' he has a Premium, becauſe it is only a particular Office and a private Truſt; Per Holt Ch. J. 3 Salk. 11. in S. C.

* See Tit. Maſter of a Ship (B) pl. 12

(C. 4) Chargeable. In what Actions &c.

S. P. Obiter. 8 Mod. 76. Paſch. 8 Geo. 1.

1. A BOX is bail'd to a Carrier to carry to Exon, who carries it to another Place, and *breaks open the Box and runs away with the Goods*, it is Felony; for by ſo doing the Truſt of the Bailment is determined. Jenk. 132. pl. 69.

S. P. But it lies againſt him for an *actual Wrong*, as if he breaks it to take out Goods, or ſell it. 2 Salk. 655. Per Trevor Ch. J.—Per Hale Ch. J. Vent. 223. Owen v. Lewyn.

2. If a Carrier *loſes Goods* committed to him, a general Action of *Trover* does not lie againſt him; Per Hale Ch. Vent. 223. Mich. 24 Car. 2. B. R. in Caſe of Owen v. Lewyn.

In Trover of 4 Butts of Oil, the Defendant took upon him for Wages to carry this Oil from the Waterſide to Wakefield, and he did deliver them there; but the Owner could not come by them but were imbezzled. It was holden that this Action of Trover doth not lie againſt the Carrier, but he ſhall be put to a ſpecial Action upon this Caſe. Clayt. 104. pl. 174.

3. If Goods are *ſtolen or gotten away by a Cheat* from a common Carrier, it is no Converſion, and Trover will not lie againſt him, but an Action on the Caſe upon the common Cuſtom of the Realm; but in Trover Evidence muſt be of ſome *Act of his own*; for his bare Delivery over by a Token is no Converſion. But Trover lies againſt the Bailee; and Demand after the Goods deliver'd over is no Converſion by the Carrier; Per Hale Ch. J. and Wild; but it was ſaid by Twiſden, and affirm'd by the Bar, as common in Circuits, to have Trover againſt the Carrier; And ruled that the Trial proceed. 3 Keb. 422. pl. 18. Hill. 26 Car. 2. B. R. Starkie v. Hart.

(C. 5) Carrier. What Actions he may have.

1. CArrier is accountable for the Goods, and he may have *Trover* or *Treſpaſs* at his Election; Per Cur. Mod. 31. Hill. 21 & 22 Car. 2. B. R. Arg. in Caſe of Wilbraham v. Snow.

Ibid. 129. pl. 107. Trin. 32 Car. 2. B. R.

2. Where there is no particular Agreement for Price, a Carrier may have a *Quantum meruit* for his Hire. 2 Show. 81. pl. 67. Mich. 31 Car. 2. B. R. Baſtard v. Baſtard.

S. P. agreed in the Caſe of Lovett v. Hobbs of a common Carrier.

(C. 6) Carrier. Pleadings.

1. IN Aſſumpſit for that the Defendant *promis'd to carry* certain *Apples* for the Plaintiff by Boat *from Greenwich in Kent to London*; and the *Boat* in which they were, *by a* great and violent *Tempeſt was ſunk* in the River of Thames, ſo as the ſaid Apples periſh'd &c. It was holden to be no Plea in Diſcharge of the Aſſumpſit, by which the Plaintiff had ſubjected himſelf to all Adventures. 4 Le. 31. pl. 86. Trin. 26 Eliz. B. R. Taylor's Caſe.

2. If

2. If one delivers Goods to a common Carrier to be delivered at S. in Conſideration whereof the *Plaintiff undertakes to content him Rationabiliter for the Carriage, and the Carrier promiſes to deliver them ſafely.* Held that the Conſideration that he would Rationabiliter content him, is ſufficient, tho' no Sum certain was mentioned. And adjudged that an Action lay upon that Promiſe, but not becauſe he was a common Carrier. Cro. J. 262. pl. 26. Mich. 8 Jac. B. A. Rogers v. Head.

In Caſe againſt a Carrier for loſing a Box by Negligence, *no particular Sum was mentioned to be paid*, or promiſed *for Hire*, but only *Pro Mercede rationabili*, and held good; for perhaps there was no particular Agreement, and then the Carrier might have a Quantum meruit for his Hire, and is chargeable in either Caſe. 2 Show. 81. pl. 67. Mich. 31 Car. 2. B. R. Baſtard v. Baſtard.——Sid. 36. pl. 5. Paſch. 13 Car. 2. C. B. S. P. Per tot. Cur. adjudg'd accordingly.

3. A *Carrier covenanted to carry Goods* of the Plaintiff *from D. to London, he paying him for the Carriage.* And in Covenant for not carrying the Goods, he did *not ſhew that he had paid, but that Paratus fuit ſolvere*, and well; for by the common Cuſtom of the Realm he ought not to pay before they are carried; or otherwiſe he will pay for nothing. 2 Roll Rep. 466. Mich. 2 Jac. B. R. Seabright v. Beale.

4. In Caſe &c. the Plaintiff (a Merchant) ſets forth, That by the common Law every Lighterman ought to govern his Lighter that the Merchant's Goods therein be not damaged; that the *Plaintiff was a Merchant, and the Defendant a Lighterman*, who carried the Plaintiff's Goods from &c. to &c for Hire, (viz.) for ſo much Money; and that he had ſo negligently governed his Lighter, that the Goods were damnified. After a Verdict, Exception was taken that it was *not averr'd that he was a Common Lighterman*; beſides, he did *not ſet forth How his Goods were ſpoil'd*; but both theſe were over-ruled. Palm. 523. Paſch. 4 Car. B. R. Simonds v. Darknall.

5. In Caſe for that he *delivered to* the Defendant (being *a Water-carrier*) *Goods in York to carry* them *from Hull to London*, and that the Goods were loſt. It was mov'd in Arreſt of Judgment, that the Agreement ſet forth was to carry the Goods from Hull to London; ſo that the Defendant did not undertake to carry them from York to London. But adjudged that he ſhall be *charged upon the general Receipt at York*, according to **Southcot**'s Caſe, *tho' nothing was ſaid of the Carriage to Hull.* Sid. 36. pl. 5. Paſch. 13 Car. 2. C. B. Nicholls v. More.

6. Aſſumpſit by a Carrier, upon a *Promiſe to pay ſo much for carrying Goods from York to London*; if the *Plaintiff* in his Declaration *avers Performance*, and doth *not ſhew in what Pariſh and Ward he brought the Goods*, it is ill upon a Demurrer. Cited Per Cur. to have been ſo adjudged. Sid. 178. pl. 10. Hill. 15 & 16 Car. 2. B. R. Anon.

7. Tho' in Action ſur Caſe againſt a Carrier, the Declaration may be good *without Recital of the Cuſtom of the Realm*, as Hobart ſaid, yet the better Way is to recite it. Sid. 245. pl. 5. Paſch. 17 Car. 2. B. R. Matthews v. Hopkins.

Reſolved in the Exchequer Chamber, that tho' it was laid as a Cuſtom, yet indeed it is the Common Law. Hob. 18. pl. 30. in Caſe of Rich v. Kneeland.——It is uſual to declare Secundum Legem & Conſuetudinem Angliæ; for it is not a Cuſtom confined to a particular Place, but is extenſive to all the King's People. Arg. 3 Mod 227.

8. Action againſt a Carrier was brought *in London for loſing Goods there, which were delivered to him at Beverley in Yorkſhire, to re-deliver at London.* Defendant pleaded that he was robb'd of the ſaid Goods at Lincoln, abſque hoc that he loſt them in London. The Court held the Declaration good, and the Plea naught in Subſtance; but if it had been good, the Traverſe had been ill, becauſe the Juſtification was not local, tho' Scroggs J. was of a contrary Opinion. Judgment for the Plaintiff. 2 Mod. 270. Mich. 29 Car. 2. C. B. Barker v. Warren.

9. In

2 Vent, 78. Mich. 1 W. & M. in C. B Chamberlain v. Cook, S. C. accordingly.

9. In Case against a Carrier for Goods lost, the Count was *for 4 Silver Cups & uno Poculo argenteo*, without saying Uno Alio Poculo &c. and adjudg'd good; for if it be Aliud the Damages shall be intended to be given for it, and if it be Idem and not Aliud, then it is only Tautology, and in that Case the Damages may be rightly given. 3 Salk. 19. Anon.

10. One may turn an Action against a common Carrier into a *Special Assumpsit*, (which the Law implies in respect of his Hire) viz. *That in Consideration of a Sum to be paid, he undertook to carry &c.* Per Holt Ch. J. Comb. 334. Trin. 7 W. 3. B. R. Anon.

11. Case for that the Defendant being a common Carrier, and using to carry Goods pro Mercede between Worcester and Litchfield, the *Plaintiff deliver'd him a Guinea, to carry and deliver to her Son T.* and that the Defendant, in Consideration of so much for Carriage, *promised* to carry it safely, and deliver it when requir'd, which was not done, tho' by the Plaintiff often requir'd, and that Defendant refused to deliver it to the Plaintiff &c. It was moved in Arrest of Judgment, that no Breach of Promise is set forth, there being no Request to pay to T. to whom the Money is to be deliver'd, and so no Cause of Action; and tho' the Plaintiff might have countermanded the Gift any Time before an Action brought by T. and consequently might have had an Action for it against the Defendant, yet that Action must not have been Case, but Trover or Detinue; and therefore here is no Foundation for this Special Action, without shewing a Request to deliver it to T. Sed per Cur. It being *said generally that she requested the Defendant to deliver*, tho' *not said to whom*, and it being after Verdict, they held it well, and gave Judgment for the Plaintiff. Holt ægroto. 11 Mod. 273. pl. 20. Hill. 1709. 8 Ann. B. R. Lewkner v. Plant.

12. Whether *Non Assumpsit* be a good Plea to an Action brought against a common Carrier, the Court doubted, because the Foundation of this Custom is upon a supposed Promise to deliver the Goods safely. 8 Mod. 178. Trin. 9 Geo. Harison v. Green.

(D) Against an Hostler [Innkeeper.] *Who* shall be said *an Host chargeable.*

Br. Action sur le Case, pl. 41. cites 11 H. 4. 45. S. P.

1. He must be a common Inn-keeper that may be charg'd for Goods stole in his House. Pasch. 3 Hen. 4. B. R. Rot. 28. Adjudg'd.

S. P. 8 Rep. 32. a. in Calye's Case. ——See (G. 2) Mason v. Grafton. ——By the Law of the Land a common Inn-keeper is bound to warrant the Goods of his Guest. D. 266. b. Marg. pl. 9. cites H. 3 H. 4. Rot. 16. Midd'. and Pasch. 9 H. 4. Rot. 69. Midd' Action for 2 Horses; and Mich. 13 H. 4. Rot. 6. Surr. Will. Cowper v. Robert de Croydon, Hostler, for one Horse.

For if the Defendant will keep an Inn, he ought at his Peril to keep safely his Guests Goods, and if he be sick his Servants ought carefully to look to them, and he cannot disable himself in this Case any more than in Debt on an Obligation. Cro E. 622 S. C.

2. If an Inn-keeper be so distemper'd that he is non sanæ Memoriæ, and a Guest knowing thereof inns there, where his Goods are stole, an Action upon the Case lies against the Inn-keeper; for he cannot disable himself by saying he was then Non sanæ Memoriæ. Mich. 40, 41 Eliz. B. R. between *Cross and Andrews.* Adjudg'd, but not enter'd.

3. If

3. If an Inn comes to an Infant, and he keeps it, and his Gueſts are robb'd, yet no Action lies againſt the Infant. Mich. 40, 41 Eliz. B. R. in *Croſs and Andrew's* Caſe. Agreed. S. P. cited by Holt Ch. J. as adjudg'd accordingly. Carth. 161.

4. If a Man that is not a common Hoſt be aſſign'd per Hoſpitatorem Domini Regis, to receive another Man as a Gueſt, he is bound to take Charge of the Goods of his Gueſt. Mich. 3 Hen. 4. Rot. 28. Adjudg'd. See (E) pl. 5 and the Note there.

5. *Houſes at Epſom*, where they *take in Lodgers and Boarders* coming to drink the Waters there during the Seaſon, and *dreſs Victuals, and ſell them Ale and Beer*, and *entertain the Horſes at* 8 *d. a Day, but ſell to no other* Perſons, is not an Inn or an Ale-houſe. 12 Mod. 254. Mich. 10 W. 3. Parker v. Flint.

6. A *Sign is not eſſential to an Inn*, but is an Evidence of it; per Holt Ch. J. 12 Mod. 255. Mich. 10 W. 3.

(E) Againſt an Hoſt. *Who* ſhall be ſaid *a Gueſt to have an Action.*

1. If my Goods are ſtole in an Inn, and I am a Gueſt there, but my Goods were deliver'd to the Hoſtler upon another Account, I ſhall have no Action againſt the Hoſtler. Mich. 40, 41 Eliz. B. R. between *Bemon and Watſon.* Cro. E. 625. pl. 19. Mich. 40 & 41 Eliz. B. R. S. C. but S. P. does not appear.

2. If a Man comes to an Inn with a Hamper, in which he hath certain Goods, (ſcilicet, Hats as the Caſe was) and departs leaving it with the Hoſt, and 2 Days after comes again, whereas in the Time of his Abſence this was ſtole, he ſhall not have any Action againſt the Hoſt, becauſe he was not a Gueſt at the Time of the Stealing, and the Hoſt had no Benefit by the keeping thereof, and therefore ſhall not be charg'd for the Loſs thereof in his Abſence. Mich. 5 Jac. B. R. between *Felly and Clarke*, adjudg'd. And Juſtice Williams ſaid, that it was ſo adjudg'd at Hertford Term, which intratur Paſch. 4 Jac. Rot. 454. Cro. J. 188. pl. 12. S. C. ſays he told the Inn-keeper that he would return in 2 or 3 Days, and ſo he did. The Juſtices were of Opinion, that the Inn-keeper was not chargeable as a common Hoſtler for the Goods ſtolen during ſuch Time, unleſs he makes a Special Promiſe for the ſafe-keeping of them; and the Action ought to be grounded thereupon; but it being a new Caſe, and Fleming Ch. J. being abſent, adjornatur. ——— Noy 126. S. C. ſays that the Morning he departed he told his Hoſteſs he would return within 2 Days, and would leave his Hamper there, in which were many Hats, and his *Hoſt promiſed they ſhould be ſafe*; that he return'd accordingly, but the Hats were ſtole; and adjudg'd that Querens nil capiat per Billam, becauſe he was not a Gueſt at the Time of the Stealing, and the Hoſt had no Profit by the Goods being there. ——— S. C. cited Arg. Poph. 179. and in 2 Brownl. 255. and in Lat. 127. but by different Names, and in neither of thoſe Books is the Point in Noy of the Hoſt's Promiſe mention'd.

3. But if a Man comes to an Inn with a Horſe which he rides, and leaves it with the Hoſt, and departs from the Inn for ſeveral Days, and in his Abſence the Horſe is ſtole, yet the Hoſt ſhall be charg'd for it, becauſe he had a Benefit by the Continuance of the Horſe with him, inaſmuch as he is to be paid for it; and ſo the Owner is a ſufficient Noy 126. S. C. & S. P. accordingly. —Cro. J. 188. pl. 12. S. C. & S. P.—Mo 877. pl.

1229. cites S. C & S. P. as adjudg'd accordingly.——S. P. but otherwiſe if he had left a Trunk or a dead Thing. 1 Salk. 388. pl. 2. Mich. 3 Ann. B R. York v. Grindſtone.

Gueſt to have the Action. Mich. 5 Jac. B. R. in the ſaid Caſe of *Jelly and Clarke*, it was ſo agreed per Curiam.

8 Rep. 32. b. in the 2d Reſolution in Calye's Caſe, S. P. accordingly; For the Writ is Ad Hoſpitandos Homines &c. tranſeuntes in eiſdem hoſpitantes &c.——2 Brownl. 254. S. P. by Coke Ch. J.

4. If an Hoſt invites one to Supper, and the Night being far ſpent, invites him to ſtay there all Night, if he is after robb'd, yet the Hoſt ſhall not be charg'd for it; for this Gueſt was not any Traveller. 25 Eliz. *Carr's Caſe*, adjudg'd. Cited Paſch. 7 Jac.

The Caſe of Baruſholby v. Wilkins, D. 158. b. Marg. pl. 12. and cites the Record.——See (D) pl. 4.

5. [So] If an Hoſt be aſſign'd per Hoſpitatorem Domini Regis to entertain J. S. as a Gueſt, he is not bound to warrant J. S.'s Goods; for he is not a Traveller that is lodg'd for his Money within the Intent of the Law. Paſch. 3 H. 4. Rot. 28. adjudg'd. But there it ſeems that the Hoſt was not a common Hoſt.

Poph. 127. Trin. 15 Jac. S. C. but S. P. does not appear.—— Roll Rep. 449. pl. 11. S. C. but S. P. does not appear.——3 Bulſt. 269. S. C. but S. P. does not appear.

6. If a Man takes my Horſe, and rides him to an Inn, where he is ſtole, I ſhall not have an Action againſt the Hoſt, tho' I am the Owner, becauſe I am not his Gueſt. Trin. 15 Jac. B. R. between *Robinſon and Walter*; per Cro. & Dod. & Houghe. but Mount. e contra.

Poph. 127. S. C. but S. P. does not appear. —— Roll Rep. 449. S. C. but S. P. does not appear.—— 3 Bulſt. 269. S. C. but S. P. does not appear.——So if the Servant has Money of his Maſter's in a Bag in the Inn, which is ſtolen by Default of the Inn-keeper and his Servant; adjudg'd that Action lies for the Maſter; and ſaid that it had been ſo reſolv'd before. Cro. J. 224. pl. 4. Trin. 7 Jac. B. R. Beedle v. Morris.——Yelv. 162. S. C. accordingly; for no one can have Satisfaction but he that has the Loſs, and that is the Maſter; and whether he were Servant or not to the Plaintiff at the time of lodging in the Inn is not material; for if he was his Friend, by whom he ſent the Money, and is robb'd in the Inn, the very Owner ſhall have the Action; Per tot. Cur. And Judgment accordingly. —— S. C. cited D. 158. b. Marg. pl. 52.——S. C. cited Lat. 127.——Poph. 179. cites S. C.——S. P. adjudg'd for the Plaintiff. Lat. 126. Trin. 1 Car. Drope v. Thaire.——Poph. 178. S. C. adjudg'd accordingly.—— Noy. 79. S. C. adjudg'd.——Dal. S. pl. 1. Mich. 7 E. 6. cites H. 4. S. P.—— 3 Bulſt. 271. S. P. by Mountague Ch J.

7. But if my Servant upon my Buſineſs comes to an Inn, and rides upon my Horſe, and he is there ſtole, I may have an Action againſt the Hoſt, becauſe the abſolute Property is in me. Trin. 15 Jac. B. R. between *Robinſon and Waller*, per Mount. Cro. & Dod.

8. Whitfield J. held, that *Soldiers billetted*, tho' they had been in the Inn 14 *Days*, were Gueſts; and denied Caley's Caſe 8 Rep. which ties the Abode of a Gueſt to 3 *Days*, and that if the Abode is longer it ſhall be ſaid a *Commorancy*; for he ſaid the Time may be longer, as a Lawyer at the Aſſiſes, a Gentleman at a Horſe-race &c. Clayt. 97. pl. 164. 1641. Harland's Caſe.

9. If an *Attorney hires a Chamber in an Inn for a whole Term*, the Hoſtler is not chargeable with any Robbery in it, becauſe the Party is quaſi a Leſſee. Mo. 877. pl. 1229. cited by Warburton J. as reſolved.

S. C. cited Arg. Poph. 179.—S. C. cited Arg. Lat. 127.—S. C. cited Cro. J. 189.

10. One *left Goods* in an Inn, and *went abroad* about his Buſineſs, *and return'd the ſame Day*, the Hoſtler ſhall anſwer for the Goods, if ſtolen in the mean Time; but if the Owner does *not return within 3 or 4 Days*, it is otherwiſe. Mo. 877. pl. 1229. cited by Warburton J. as 1 Jac. Sir Edwin Sands's Caſe.

11. If

11. If a Paſſenger *lodges 3 Days together* in an Inn, the Hoſtler is not anſwerable for his Goods, if they are ſtolen out of his Chamber; Per Doderidge J. Lat. 88. Paſch. 1 Car. in Gulielm's Caſe. But Ibid. 127. Trin 1 Car. Doderidge ſaid, that if *Cloathiers come to London to ſell their Cloth, and ſtay a Week or more*, and *ſo of ſuch as come to Term* here, yet in theſe Caſes they ſhall have an Action againſt the Hoſt, he being a Common Inn-keeper. To which Jones agreed; but otherwiſe if he ſtays a Quarter of a Year, or boards there; but if he *ſtays half a Year without* ſuch *Agreement for Board* &c. he is within the Cuſtom.——Poph. 179. S. P. by Jones and Doderidge J. agreed.——S. P. ſaid, and not denied. Het. 39. 50.——It was ſaid at Bar, and not denied, that the Declaration ſhould ſay *Tranſiens hoſpitavit*; for if he boards or ſojourns for a certain Space in an Inn, the Action does not lie. Het. 49. Grimſton's Caſe.

12. An Inn *in London* is an Inn; and if a Gueſt be robb'd in ſuch an Inn, he ſhall have Remedy as if he was paſſing thro' the Country. Poph. 179. Paſch. 2 Car. B. R. Drope v. Thaire.

13. If one comes to an Inn, and *makes a previous Contract for Lodging for a ſet Time, and does not eat or drink there*, he is no Gueſt, but a Lodger, and ſo not under the Inn-keeper's Protection; but if he eats and drinks there, it is otherwiſe; or if he pays for his Diet there, tho' he does not take it there; Per Holt Ch. J. 12 Mod. 255. Mich. 10 W. 3. Arg. in the Caſe of Parker v. Flint.

(E. 2) Where one, in reſpect of Intereſt, tho' not the very Gueſt, ſhall have an Action againſt the Hoſtler.

1. IF a *common Carrier has a Pack* of Goods of J. S. *to carry to D.* and it is *ſtole from him in a common Hoſtry*, J. S. ſhall have Action againſt the Hoſtler for the Pack, and not the Carrier; for they are not the Carrier's Goods; Per Brown and Portman, and Hales accorded. Dal. 8. 9. pl. 1. Mich. 7 E. 6. Anon. Quære, and ſee (I) pl. 1.

2. If one *ſends Money by his Friend, who is robb'd in an Inn*, the very Owner ſhall have the Action; Per tot. Cur. Yelv. 262. Mich. 7 Jac. Arg.

3. If a *Stranger takes another's Horſe, and ſets him up in an Inn, and he is ſtolen* away, the Party may have his Remedy againſt the Inn-keeper; Per Mountague Ch. J. 3 Bulſt. 271. Mich. 14 Jac.

(F) Againſt an Hoſtler.

1. IF an Hoſt refuſes a Gueſt, upon Pretence that his Houſe is full of Gueſts, if this be falſe, an Action upon the Caſe lies. Paſch. 4. 5. Ph. & Ma. Dyer 158. 32. S. P. by Ley Ch. J. and Doderidge and Chamberlaine J. 2 Roll. Rep. 345.—S.P. Per Cur. Palm. 367. & 374.—Br. Action ſur le Caſe, pl. 76. cites 39 H. 6. 18. So of a *Victualler who will not ſell me Victuals*; and yet in Debt for theſe Victuals the Defendant may wage his Law. Per Moile J. Per Priſot it is true; for the Victualler or Hoſtler is not bound to ſell you his Victuals, unleſs he will, nor the Hoſtler to lodge you againſt his Will. Quære thereof; for then it ſeems by his Reaſon, that Action upon the Caſe does not lie. Quære; for it ſeems that *if an Hoſtler will not lodge a Man*, the *Conſtable, upon Complaint, ſhall compel him.* And Per Danby, an Hoſtler *is not bound to give Meat to his Gueſt's Horſe till he be * paid* beforehand; for he is not bound to truſt him. ——S. C. cited 9 Rep. 87. b.——Note by all the Juſtices, that if a common Hoſtler *will not lodge me*, I ſhall not have an Action, but *complain to the Ruler of the Vill*, and he ſhall take Direction upon it. Br. Action ſur le Caſe,

Caſe, pl. 92. cites 5 E. 4. 2.—Dalt. Juſt. cap. 7. S. 8. makes a Quære how the Officer ſhall compel him; and ſays it ſeems that all the Officer can do is either to cauſe ſuch Alehouſe keeper to be ſuppreſs'd, or to preſent ſuch Offence at the Aſſiſes or Seſſions of the Peace, that ſo ſuch Offender may be thereupon indicted; and ſays that at a Lent Aſſiſes 1622, Ley Ch. J. delivered it in his Charge, that an Inn-keeper or Alehouſe-keeper offending herein might be *indicted, fined, and impriſoned* for the ſame, or elſe that the Party griev'd might have an Action upon the Caſe againſt the Inn-keeper or Alehouſe-keeper refuſing to lodge him.——Hawk. Pl C. 225. cap. 78. S. 2. S. P. and cites S. C.

If an Inn-keeper *takes down his Sign*, but ſtill keeps an Hoſtry, Caſe lies for denying to lodge a Traveller for his Money; but otherwiſe if he takes down his Sign, and gives over keeping an Inn. Godb. 346. in pl. 440. Trin. 21 Jac. B. R. by Dodderidge J.——S. P. by Ley Ch. J. and Dodderidge and Chamberlaine J. 2 Roll Rep. 345. 346. in S. C.——Palm. 374. S. P. in S. C. by Dodderidge.

2. If a Traveller comes to an Hoſtler to lodge, and the Hoſt aſſigns him a Chamber to put his Goods in, and after the Gueſt is there robb'd of his Goods, he ſhall have an Action upon the Caſe againſt the Hoſt. * 42 Aſſ. 17. adjudged. And there ſaid to be adjudged in the Council. Co. 8. *Calye's* Caſe 32.

* Br. Action ſur le Caſe, pl. 86. cites S. C.

3. If a Man comes to a common Hoſtler to lodge, and deſires that his Horſe be put to Paſture, and the Hoſt puts him to Paſture accordingly, where the Horſe is ſtole, the Hoſt ſhall not be charged, * becauſe the Hoſt is not bound by the Law to anſwer for any thing which is out of his Inn, but only for thoſe things which are within his Inn. Co. 8. *Calye* 32. b. Reſolved Hill. 37 Eliz. B. R. between *Dale and Gibſon* agreed; but there ſaid that before it had been held contra Per Curiam. Paſch. 40 Eliz. B. R. between † *Moſley and Foſſet* Per Curiam.

* Fol. 4.

S P. ruled accordingly 4 Le. 96. pl. 196. Windham v. Mead.—2 Brownl. 255. S. P. by Foſter J.

† Mo. 543. pl. 720. Hill. 40 Eliz. S. C. but S. P. does not clearly appear.

4. But if the Owner does not require the Hoſt to put his Horſe to Graſs, but the Hoſt does it of his own Head, he ſhall anſwer for it, if the Horſe be ſtole. Co. 8. *Calye* 32. b.

S. P. rul'd accordingly 4 Le. 96 pl. 196. Windham v. Mead.—2 Brownl. 255. S. P. by Foſter J.

5. [But] if the Hoſt, upon Command of the Gueſt, puts the Horſe to Graſs, and the Horſe by the voluntary and wilful Negligence of the Hoſt is ſtole; as if the Hoſt voluntarily leaves open the Gates of the Ground, by which means the Horſe ſtrays out, and ſo is ſtole or loſt, an Action upon the Caſe lies againſt the Hoſt. Paſch. 40 Eliz. B. R. between *Moſley and Foſſet*. Per Poph.

Mo. 543. pl. 720. S. C. but S. P. does not clearly appear; but there the Caſe is, that the Defendant took the Horſe to Graſs at 2s. per Week, and was to keep him ſafe, and re-deliver him when required; and ſhew'd that he kept it ſo negligently that it was taken away by Perſons unknown. Upon Demurrer Popham and Fenner held, that the Action lay not without alleging a Requeſt to re-deliver; and likewiſe that the Horſe was eloign'd, dead, or loſt; but Gawdy and Clench e contra, the Action being founded on the Negligence, and ſpecial Aſſumpſit to keep him ſafe. But all agreed, that without ſuch ſpecial Aſſumpſit the Action would not lie.

6. If one brings a Bag or Cheſt of *Evidences* or *Obligations*, *Deeds*, or other Specialties, and they are loſt by Default of the Hoſtler, the Hoſtler ſhall anſwer for them. 8 Rep. 33. a. Paſch. 26 Eliz. B. R. in the 5th Reſolution in Caley's Caſe.

7. An Inn-keeper is not compellible *to receive the Horſe of* any, if his *Maſter* is *not lodg'd there*. 2 Brownl. 254. Per Coke Ch. J. Paſch. 7 Jac.

8. If an Hoſtler keeps a *Horſe* left with him at Livery ſo negligently that he *is taken out of his Stable, and rid a long Journey, and damaged*, an Action lies; So if he keeps him ſo negligently, that he is *beat or abus'd, or wanted reaſonable Provender in his Inn*. 6 Mod. 224. 225. Mich. 3 Ann. B. R. Per tot. Cur. Obiter.

(G) Againſt

(G) Againſt an Hoſtler. Collateral Matter to *excuſe* the Hoſtler.

1. **If an Hoſt** refuſes a **Gueſt** becauſe his Houſe is full of **Gueſts, and the** Party ſays that he will ſhift among the other Gueſts, **and there he is robb'd, the Hoſt ſhall not be charg'd.** 4. 5 Ph. & Ma. Dyer 158. 32.

Ibid. in the Caſe of White v. an Hoſtler of Tunbridge. — Bendl. 60. pl. 103. S. by the Name of **Bird v. Bird** accordingly, by all the Juſtices of C. B.—And. 29. pl. 69. S. C. accordingly; and by And. and Bendl. it appears that the Plaintiff went to a Bed in the Inn by Sufferance of another Perſon, but without the Aſſent of the Hoſtler or his Servants.

2. **If an Hoſt** tells a Gueſt that he muſt go abroad, **and ſo he cannot be attendant to him; and thereupon the Gueſt** takes up his Lodging there at his Peril, **if his Goods are ſtole, the Hoſt ſhall not be charged.** 11 Hen. 4. 45.

S. P. Br. Action ſur le Caſe, pl. 41. cites S. C. And the Hoſtler pleaded that he told the Plaintiff that he could not take upon him the Charge of the Goods, becauſe he muſt go early in the Morning to the Sheriff upon a Writ of Inquiry &c. and that thereupon the Plaintiff ask'd him to deliver the Key of his Chamber and Stable, which the Defendant did accordingly, and went his Way &c. The Court agreed that the Delivery of the Key was nothing to the Purpoſe; but per Hill, when the Defendant notified that he could not attend, and thereupon the Plaintiff took up his Lodging there at his Peril, the Defendant was diſcharg'd. And Per Cur. None ſhall be compell'd to anſwer as Hoſtler but a common Hoſtler. And becauſe the Plaintiff *had not counted that the Defendant was a common Hoſtler, nor does it appear of Record*, therefore the Plaintiff took nothing by his Writ. Quod nota. And tho' the Defendant admitted ſuch Writ, and counted, yet if the Court perceive it they will not permit it, by which Judgment was ut ſupra.

3. **If an Hoſt** takes in a Gueſt, and goes abroad **of his own Head** without Proceſs of Law, **yet he muſt anſwer for the Goods of his Gueſt, for he ought to have a Servant to take Care of them in his Abſence.** 11 Hen. 4. 45.

4. So **it ſeems it would be, if he was at another Place** by Action of Law; **for his Servants ought to have the Care in the mean Time. Contra** 11 H. 4. 45.

5. Action upon the Caſe againſt an Hoſtler, becauſe he *carried away his* * *Goods* in his Hoſtry, which were imbezzled by ill People for Default of good Keeping &c. and the *Defendant ſaid that he did not deliver the Goods to him, and* alſo *that he had the* * *Key of his Chamber*. Et non allocatur, but Judgment for the Plaintiff, and *Elegit* awarded *of the Land, which he had the Day of the Judgment*, and not the Day of the Writ; and he pray'd *Capias ad Satisfac.* which was denied, as where Hue and Cry is made; for he did no Wrong, *but Laches*. Br. Action ſur le Caſe, pl. 15. cites 42 E. 3. 11.

* It is no Excuſe for an Hoſtler to ſay, that *he delivered to the Gueſt the Key of the Chamber in which the Gueſt lodg'd, and that the Gueſt left the Door of the Chamber open*; for he ought to keep the Goods of his Gueſts there in Safety. 8 Rep. 33. a. Paſch. 26 Eliz. B. R. in the 4th Reſolution in Caley's Caſe. And ſays that with this Reſolution agrees 22 H. 6. 21. b. 11 H. 4. 45. a. b. 42 E. 3. 11. a.

6. Where a *Man is lodg'd in the Chamber with me by my good Will, and not by the Hoſtler*, and he robs me, the Hoſtler ſhall not be charged. Contra if he was lodged there by the Hoſtler. Br. Action ſur le Caſe, pl 58. cites 22 H. 6. 21. Per tot. Cur.

S. P. For it is the Gueſt's Fault to have ſuch a Companion or Servant. 8 Rep. 33. a. in the 4th Reſolution in Calye's Caſe, cites S. C.

7. *And if my own Servant who comes with me robs me in the Hoftery*, the Hoftler ſhall not be charged. Quod nota. Br. Action ſur le Caſe, pl. 58. cites 22 H. 6. 21. Per tot. Cur.

8. A *Clothier came to an Inn with a Waggon of Wool* to lodge there, and at his Entry the *Hoſtler told him, that if he would have him to take Charge of his Waggon, he ſhould draw it into the Inner-Court, or otherwiſe he would not anſwer for it.* The Clothier did not do ſo, and the Wool was ſtolen. In Action brought againſt the Hoſtler, he was diſcharg'd by this ſpecial Matter. Mo. 159. in pl. 299. cited by Periam as adjudg'd in 7 & 8 Eliz.

S. C. cited 8 Rep. 33. a. in Caley's Caſe.

9. In Action againſt an Hoſtler for Goods loſt, he ſaid in Excuſe that he *bid the Plaintiff put his Goods in ſuch a Chamber, and lock them up there, and then he would warrant them, but not otherwiſe*; but that the Gueſt let them lie in an Outer-court at large, where they were ſtole. Upon Demurrer the Opinion of the Court was againſt the Plaintiff. D. 266. b. pl. 9. Mich. 9 & 10 Eliz. Saunders v. Spencer.

10. In Caſe againſt an Hoſtler for Goods ſtolen, the Defendant *pleaded an Agreement between them, that the Defendant ſhould not be charg'd for any Goods brought by the Gueſt, except ſuch as he deliver'd to the Hoſtler or his Wife*; and ſaid that he did not deliver the Goods ſtolen either to him or his Wife, and ſo not chargeable. And the Court held this a good Plea in Bar. Mo. 158. pl. 299. Hill. 26 Eliz. Brand v. Glaſſe.

11. If an Inn-keeper *demands of his Gueſt* to tell him *what Goods or Money he has brought, whereof he ſhall be charg'd, and the Gueſt ſays he has none, or leſs than he really has*, the Hoſtler ſhall not be chargeable if the Goods are ſtolen; Per Anderſon, but Windham and Periam e contra. Mo. 158. pl. 299. Hill. 26 Eliz.

12. Tho' the Gueſt *does not deliver his Goods to the Hoſtler to keep, nor acquaints him of them*, yet if they are ſtolen, the Hoſtler ſhall be charg'd. 8 Rep. 33. a. Paſch. 26 Eliz. B. R. in the 4th Reſolution in Calye's Caſe; and ſays that with this accords 42 E. 3. 11. a.

11. The *not knowing by whom the Goods were ſtole* is no Excuſe for the Hoſtler but that he ſhall be charged. 8 Rep. 33. a. in Calye's Caſe cites 22 H. 6. 38. 8 R. 2. tit. Hoſtler 7.

(G. 2) Actions againſt an Inn-keeper. Writ and Declaration.

1. WRIT of *Treſpaſs Vi & Armis* was maintain'd againſt an Hoſtler for one who loſt his Goods in Default of his Hoſt. Thel. Dig. 114. cap. 24. S. 14. cites Mich. 8 R. 2. Hoſtler 7. And ſays the Form of the Regiſter fol. 105. is to ſuppoſe *Quod Malefactores quandam Cameram in qua &c. in Defectu Def. Vi & Armis noctanter fregerunt* &c.

Br. Count, pl. 81. cites S. C.—Br. Office del &c. pl. 12 & 22 (bis) cites S. C.

2. In Caſe againſt an Hoſtler for not ſafely keeping the Goods of his Gueſt &c. the *Writ may be J. N. Yeoman* or the like, but in the *Declaration* he *ſhall be* named *common Hoſtler*; And otherwiſe the Writ does not lie. Br. General Brief, pl. 16. cites 11 H. 4. 45.

—Thel. Dig. 51. lib. 6. cap. 5. S. 2. cites S. C.—Br. Action ſur le Caſe, pl. 58. cites 22 H. 6. 21. where the Writ was Labourer but the Count was Hoſtler.—Thel. Dig. 51. lib. 6. cap. 5. S. 2. cites 21 H. 6. 24. S. C. That one may have Writ againſt one who is a common Hoſtler, without naming him Hoſtler in the Writ.—The Writ need not mention that the Defendant keeps a *Common Inn*; for the Words of the Writ in the Regiſter are Infra Hoſpitium ejuſdem B. but it is to be ſo intended in the Writ; for the Recital of the Writ is, Hoſpitatores qui communia Hoſpitia tenent &c. and the one Part ought to agree with the other. And the Plaintiff ought to count that he holds Commune Hoſpitium. And ſo the Books of 22 H. 6. 21. 11 H. 4. 45. a. b. 10 Eliz. D 266. &c. are well reconciled. 8 Rep 32. a. b. Paſch. 26 Eliz. B. R. in the 1ſt Reſolution in Caley's Caſe.

In

In Case for Goods ſtolen out of the Inn, it was mov'd after Verdict, that it was *not alleged to be in Communi Hoſpitio*. (Quære if both in the Writ and Declaration) yet becauſe the Declaration laid it as the Cuſtom for common Inns, and then ſaid that he Hoſpitatus in Hoſpitio &c. it was adjudg'd for the Plaintiff; for it ſhall be intended. And it is Domus, and not Hoſpitium, if it be not Commune. Hob. 245. pl. 307. Maſon v. Grafton.

3. If one declares of *Goods carried away* out of an Inn, he need *not count who carried them away*. Br. Toll, pl. 2. cites 9 H. 6. 45.

4. Treſpaſs upon the Caſe againſt W. H. Labourer, inaſmuch as according to the Law and Cuſtom of the Realm, an Hoſtler who holds common Hoſteries ought to keep the Goods of them who are lodg'd in their Hoſteries, ſo that no Damage ſhall come to them by Perſons unknown, and that certain Goods, and ſhew'd what of the Plaintiff's were carried out of the Houſe of the Defendant by Perſons unknown; and the Writ was awarded good according to the Law and Cuſtom of the Realm; for the Cuſtom of the Realm is the Common Law, and *where it is the Common Law, there he need not rehearſe the Cuſtom. Contra* where it is *private Cuſtom*, and not the Common Law. And the *Writ nor the* * *Count did not rehearſe that the Houſe of the Defendant was a Common Hoſtery*, but they paſſed over &c. And the Writ was that 100 s. of the Plaintiff *in Hoſpitio defendentis Hoſpitati receperunt* &c. which Word (*Hoſpitati*) per Aſcu, has Relation to the Perſon of the Plaintiff and not to the Goods; for the Perſon may be lodg'd there, and the 100 s. in another Houſe, where the Writ ſhould be 100 s. *ipſius quer' ibidem invent' cepit* &c. And yet the Writ was awarded good. Br. Action ſur le Caſe, pl. 58. cites 22 H. 6. 21.

* In the Marg. of pl. 16. it is ſaid that the Count was Hoſtler; but I do not obſerve it ſo here.

5. Plaintiff declared upon the common Cuſtom of the Realm, that Inn-keepers *ought to keep the Goods of their Gueſts and all other Goods brought into their Inns ſafely &c.* After Verdict for the Plaintiff, it was moved that there is no ſuch Cuſtom that the Goods of others ſhould be ſafely kept unleſs they were Gueſts; ſed non allocatur; for the Cuſtom is ſufficiently alleged to maintain the Action. Cro. J. 224. pl. 4. Trin. 7 Jac. B. R. Beedle v. Morris.

Yelv. 162. S. C. but S. P. does not appear. —Lat. 127. cites S. C. & S. P. and ſays, that ſo is the Precedent in Lord Coke's Entries, fol. 345. ita quod Damnum non eveniat Hoſpitibus nec aliquibus aliis &c —— Poph. 179. cites S. C. and S. P. and ſays it was alſo reſolv'd that the Maſter who brought the Action ought to conclude that *Pro Defectu &c.* and apply the Cuſtom to himſelf as being Maſter.

6. If a Servant be robb'd in an Inn, the Maſter may have an Action may have an Action againſt the common Hoſtler, and need *not ſhew that the Servant was in his Journey*; for he may be at the End of it, as at London about his Buſineſs. Noy. 79. Trin. 1 Car. B. R. Drope v. Thaire.

Poph. 179. S. C. & S. P.—Lat. 127. S. C. & S. P.

7. And there it is ſaid by Jones and Doderidge J. that *Miſ-recital of the Cuſtom* is not material, becauſe it is the Common Law. And Judgment for the Plaintiff. Lat. 127. Trin. 1 Car. B. R. Drope v. Thaire.

8. In Caſe by a Carrier for Goods loſt out of an Inn, the Count was of *certain Packs full of Linnen Cloth and other Goods*. After Verdict it was moved that it did not appear what ſort of Cloth it was, nor of what Value, and ſo uncertain. But Roll Ch. J. held the Declaration good enough, eſpecially after a Verdict. Sty. 370. Paſch. 1653. Herbert v. Lane.

9. An Inn-keeper was *indicted for not receiving one taken ill with the Small Pox*, and it was quaſh'd for *not ſaying he was a Traveller*. 12 Mod. 445. Hill. 12 W. 3. the King v. Luellin.

10. In Caſe againſt an Inn-keeper for damaging a *Horſe left* with him *at Livery*, it *need not be ſhewn* in the Declaration *that the Defendant agreed to maintain and keep the Horſe for a Præmium*; for ſince it appears by the Declaration that the Horſe was deliver'd to the Defendant himſelf to be kept &c. for a reaſonable Price to be paid to him by the Plaintiff, one cannot intend but that the Defendant agreed to it. 2 Ld. Raym. 796. Mich. 1 Ann. Stanian v. Davis.

1 Salk. 404. pl. 1. S. C. but S. P. does not appear.—— 6 Mod. 224. S. C. but S. P. does not appear

(G. 3) Plea by Hoſtler in Actions. Good or not.

1. THE *Eſcheator* of North. *brought Action* upon the Caſe *for the King and for himſelf*, that whereas he was travelling towards London in the King's Buſineſs, he came to H. and *was lodg'd in the Houſe of W. who deliver'd him a Chamber* to put in his Stuff, and put in ſo much &c. ann ſhew'd what, which was carried away wrongfully, and to the Damage of 20 l. and W. came and *ſaid that Not damnified by his Default*; And no Plea, becauſe it was not denied but that the Defendant is a common Hoſtler, and that the Plaintiff was lodg'd with him, during which time he ought to be protected by the Hoſtler, by which the Plaintiff recover'd his Principal and 40 s. Damages by Award, which ſeems to be Coſts, becauſe he anſwer'd for himſelf, his Servants, his Chambers, and his Stables; And the *Plaintiff pray'd Capias ad Satisfaciend'* becauſe the Defendant came by Capias. Per Knivet, you ſhall not have it, for he *is not charged of his own Act, but by the Law*; by which they *pray'd Elegit of the Land which he had when he firſt in came to anſwer*, which was the other Term, and could not have it, but Day of the Plea pleaded. Br. Action ſur le Caſe, pl. 86. cites 42 Aſſ. 17.

2. Treſpaſs againſt an Hoſtler by Cuſtom of the Realm, where he counted *that his Servant was lodg'd there, and 3 of the Horſes of the Plaintiff were ſtole* &c. The Defendant pleaded *that he was not a common Hoſtler, nor the Servant of the Plaintiff was not lodg'd there, but by Prayer.* Priſt, and the other e contra. Br. Action ſur le Caſe, pl. 28. cites 2 H. 4. 7.

Br. Action ſur le Caſe, pl. 58. cites S. C.

3. Treſpaſs upon the Caſe againſt an Hoſtler, for Goods of the Plaintiff taken out of the Hoſtery, who *ſaid that he deliver'd the Key of the Chamber to the Plaintiff, and he brought A. B. and C. D. with him, who carried away the Goods.* The *Plaintiff ſaid that the ſaid A. B. and C. D. whom he brought into the Chamber, did not carry away* &c. Per Newton, This is Negative pregnant, viz. that *they did not take the Goods, and* another *that he did not bring them into the Chamber*; therefore ſhall ſay that he did not bring them [into the Chamber] &c. or that they did not carry away his Goods. Quod nota. Br. Negativa, pl. 22. cites 22 H. 6. 21.

Br. Action ſur le Caſe, pl. 58. cites S. C.

4. *And* it is ſaid there, that *to ſay that the Goods were not carried away in Default of the Defendant*, is a good Plea. Br. Negativa, pl. 22. cites 22 H. 6. 21.

S. P. Br. Action ſur le Caſe, pl. 59. cites S. C.

5. Treſpaſs upon the Caſe againſt a common Hoſtler, and counted accordingly. The *Defendant ſaid that they were not taken in Default of him nor of his Servants*; and it was held negative *pregnant*, by which he *ſaid that the Plaintiff himſelf lodg'd a Perſon unknown with him in his Chamber in the Hoſtry, who carried away the Goods*; *abſque hoc that they were carried away in Default of him or his Servants*; and yet held *pregnant*, by which he waved it, and *ſaid that the Goods were not carried away out of his Houſe Modo & Forma, prout* &c. & ſic ad Patriam. Br. Negativa, pl. 24. cites 22 H. 6. 38.

(G. 4)

(G. 4) Againſt an Hoſtler. Judgment &c.

1. IN *Treſpaſs* upon the Caſe againſt an Hoſtler, for ill keeping of the Goods in his Hoſtery, the Plaintiff recover'd, and pray'd Ca. Sa. and was denied; for it *is not a Tort* in the Defendant, *but Laches*. Br. Execution, pl. 16. cites 42 E. 3. 11. Br. Exigent, pl. 12. cites S. C.—— Br. S. P. becauſe *he is not charged by a tortious Act, but* by his *Negligence and by the Law*. Ibid. pl. 127. cites S. C.—— S. P. Ibid. pl. 87. per Knivet, cites 42 Aſſ. 17.——Br. Elegit, pl. 17. cites S. C.

2. In Caſe againſt an Inn-keeper for Goods loſt, the Plaintiff had Judgment; and it was aſſign'd for Error that the Judgment ought to have been Quod capiatur, and not *in Miſericordia*, according to the Precedents Hill. 9 H. 7. Rot. 310. the old Book of Entries 377. which is a Capias; for this Action comprizes in itſelf a Contempt contra Legem &c. Sed non allocatur; for it is not ſuch Contempt for which the King ſhall have a Fine, as it is in Actions which are contra Pacem. Cro. J. 224. pl. 4. Trin. 7 Jac. B. R. Beedle v. Morris. Yelv. 162. S. C. but S. P. does not appear.

(G. 5) Remedy for Hoſtler againſt his Gueſt.

1. A Man was arraign'd of Felony, and it was found that he was a Lodger in the Houſe of J. N. and went to his Bed, and *aroſe in the Night, and took a Carpet and two Sheets out of the Chamber, and put* them *into the Hall to the Intent to ſteal them*, and went to the Stable to inquire for his Horſe, and the Hoſtler took him, and it was adjudg'd Felony. Br. Corone, pl. 107. cites 27 Aſſ. 39. A Gueſt may be guilty of *Felony* by taking away Goods; for 'tis the Inn-keeper's Poſſeſſion, and the Party hath the bare Uſe of them. Arg. Show. 54. cites 27 Aſſiſe, pl. 34.——1 Salk. 388. S. P. in pl. 1.

2. Tho' an Inn-keeper in London may, after long keeping, have the *Horſe apprais'd* and ſell him, yet when he has in ſuch Caſe had him apprais'd, *he cannot juſtify the taking him to himſelf at the Price he was apprais'd at*. Barnard. Rep. in B. R. 301. ſays it was ſo held by the Judge at Lent-Aſſiſes, Hill. 3 Geo. 2. 1729.

See Tit. Inn and Inn-keepers (B)

(H) For keeping a Dog accuſtom'd to bite. [And how the Action ſhall be brought.]

1. IT is a good Writ and Declaration to ſay Quod defendens quendam Canem ad Mordendum oves conſuetum ſcienter retinuit, without ſaying Quod retinuit quendam Canem ſciens Canem prædictum ad Mordendum oves conſuetum; for this is Tantamount; for the Word Scienter goes to all the precedent Matter, and the Regiſter III. is accordingly, And it is no *Plea that the Defendant did not know* that he uſed to bite, but

he ſhall *anſwer that he did not bite* the Sheep, *or* that *it was not His Dog.* Quare inde. Br. Action ſur le Caſe, pl. 11. cites 28 H. 6 7.—

accordingly, and the old Book of Entries, Treſpaſs du Chien 2. and this is the conſtant Courſe of B. and within a Year laſt paſt adjudg'd good there, as was remember'd by Juſtice Wallet. Mich. 17 Car. B. R. between *Cokeram and Davies.* Adjudg'd per Curiam, this being moved in Arreſt of Judgment, Intratur Trin. 16 Car. Rot. And the Court ſaid that the * Sciens is not traverſable, but ought to be proved in Evidence; and ſo in this Caſe, otherwiſe the Action does not lie.

Br. Negative, pl. 3. cites S. C.——Br. Traverſe per &c. pl. 20. cites S. C.——Cro. C. 487. pl. 12. Mich. 13 Car. B R. Kinion v. Davis, S. P. and ſeems to be S. C. but ſays that upon reading the Declaration all the Court held (abſente Brampſton) that it was not good; whereupon Rule was given that the Judgment be revers'd Niſi &c.—In Caſe the Count was that the *Defendant a certain Bitch accuſtom'd to bite Men, did knowingly retain and keep &c.* It was held by all the Court, that the *Knowingly* ought to be referr'd to the Biting, or elſe it would be Surpluſage and idle; for one cannot be ſaid to have a Dog or Bitch if he does not know it, and the (Knowingly) here is not traverſable. And by all the Court Judgment was given for the Plaintiff; and they thought the Caſe of 28 H 6. 7. is expreſs in the Point, and the Record of the Caſe of Cockeram and Davis was produced in Court, expreſs in the Point that Judgment ſhould be for the Plaintiff; and that as to the Caſe in Cro. C. of Kinion v. Davis, they ſaid it was not upon any Debate, and the Rule for Judgment was Niſi; and that it was the Plaintiff's Negligence not to make any Defence in ſo good a Cauſe. 2 Sid. 127. Hill. 1658. B R. Cropper v. Matthews.

* S. P. For it is no direct Allegation, but muſt be proved in Evidence on the General Iſſue; per Cur. 4 Rep. 18. b. in pl. 14. Arg. [And ſee there (d) many Caſes referr'd to in the Margin.]

2. If my Dog kills your Sheep, and I *freſhly after tender you the Dog*, you are without Remedy. F. N. B. 89. (B) in the new Notes there (b) cites 7 E. 3. Barr 290.

And in Action on the Caſe for ſuch Killing, the Plaintiff was compell'd by Anderſon Ch. J. to *prove in Evidence that the Dog had uſed to kill Sheep.*

3. If a Man has a Dog that *kills Sheep*, the *Maſter* of the Dog *being ignorant of ſuch Quality*, the Maſter ſhall not be puniſh'd for this Killing; but if he has Notice of ſuch Quality, it is otherwiſe. D. 25. b. pl. 162. per Fitzherbert & Shelly J. Agreed Hill. 28 H. 8. Anon.

Ibid. Marg. cites 24 Eliz. Dogge v Cook.——Ibid. Marg. cites Ex Libro Magiſtri Noy a Caſe, Paſch. 19 E. 3. B. R. Rot. 10. Cronet v. Morgan, S. P.

Note, to maintain Action for the biting of Defendant's Dog, it muſt be proved that he *knew his Dog* to be *uſed to bite*; but one Inſtance is ſufficient in that Caſe. 12 Mod. 555. Trin. 13 W. 3. Anon.

4. If a Man's Dog *runs at Sheep and kills them*, and it is not with his Conſent, there no Action will lie; but otherwiſe if *with his Conſent.* Het. 171. Trin. 7 Car. C. B. Baker v. Webberley.

S. C. cited Arg. Lord Raym. Rep. 607.

5. Action upon the Caſe, for that he kept a Maſtiff, *ſciens that he was Aſſuetus ad Mordendum porcos*, which Maſtiff *bit the Plaintiff's Sow great with Pig, ſo as ſhe died* of the Biting. It was ſaid the Declaration was not good; for that Ad Mordendum porcos aſſuetus is not good; for it is proper for a Dog only to hunt, and not to kill Swine. Reſolved the Action did well lie; for it is not lawful to keep Dogs to bite and kill Swine. Adjudg'd for the Plaintiff. Cro. C. 254. pl. 5. Paſch. 8 Car. B. R. Boulton v. Banks.

6. If one *keeps a Dog accuſtom'd to bite Sheep* &c. and he *knows it*, and notwithſtanding he keeps the Dog ſtill, and *afterwards the Dog bites a Horſe*, this ſhall be actionable, notwithſtanding that the *Precedents are all of the ſame Species*; becauſe the Owner, after Notice of the firſt Miſchief, ought to have deſtroy'd or hinder'd him from doing any more Hurt; per Powell J. Ld. Raym. Rep. 110. Mich. 8 W. 3. Arg. in Caſe of Jenkins v. Turner.

* Ld. Raym. Rep. 606. Mich. 12 W. 3. S. C. but nothing

7. In Caſe the Count was, That the Defendant *quendam Canem Moloſſum* * [Anglice, a Mongrel Maſtiff] *valde ferocem, and did let him go unmuzzled in the publick Street &c. ſo that pro defectu Curæ of the Defendant, the Plaintiff was bit* and worried as he was peaceably going about his Buſineſs

Buſineſs in ſuch a Street. And another Count was, That Defendant *knew the Dog ad Mordendum aſſuetus.* The Defendant demurr'd to the firſt Count, and pleaded Not Guilty to the 2d. Gould J. thought that this being a Mongrel, and laid to be Valde Ferox, this muſt be an innate and not an accidental Fierceneſs, and to maintain this Iſſue they muſt give a natural Fierceneſs in Evidence. Holt Ch. J. held, that if it had been *ſaid that the Defendant knew the Dog to be ferox*, he ſhould think it well enough; that the Law takes notice that a Dog is not of a fierce Nature, but rather the contrary; and the Preſumption is againſt the Plaintiff, it not being imaginable that a Man would keep a fierce Dog in his Family wittingly. And Judgment for the Defendant by Holt and Turton, Gould mutante Opinionem ſuam. 12 Mod. 332. Mich. 11 W. 3. Maſon v. Keeling.

mention'd of ſuch 2d Count; and Holt Ch. J. and Turton J. held the Declaration ill, for want of ſhewing that Defendant knew the Dog was fierce; for there is great *Difference between Horſes and Oxen*, in which a Man has a valuable Property, and which are not ſo familiar to Mankind, *and Dogs*; The Owner ought to confine the former, and take all reaſonable Caution that they do no Miſchief, otherwiſe an Action lies againſt him; but otherwiſe it is of Dogs, before he has Notice of ſome miſchievous Quality. But Gould J. thought the Declaration good, becauſe the averring the Dog was fierce made the Owner liable. But adjornatur; and afterwards the Parties agreed, and no Judgment was given.

8. If A. *has a Dog uſed to bite &c.* and he knows it, *and he gives it to B. who is conuſant of this Quality*, if the Dog bites, an Action will lie againſt B. otherwiſe if B. had not been conuſant of this Quality; Per Holt Ch. J. Ld. Raym. Rep. 608. Mich. 12 W. 3. Arg. in the Caſe of Maſon v. Keeling.

(H. 2) Actions for Miſchief by Beaſts, or other Creatures. And who ſhall anſwer the ſame.

1. IF a Man has an unruly *Horſe* in his Stable, and leaves open the Stable-Door, whereby the Horſe gets forth and does Miſchief, an Action lies againſt the Maſter; per Wild J. Vent. 295. Trin. 28 Car. 2. B. R.

2. If one has kept a *tame Fox*, which gets looſe and grows wild, he that kept him before ſhall not anſwer for the Damage he doth after he hath loſt him, and he hath reſum'd his wild Nature; per Twiſden J. Vent. 295. in Caſe of Mitchel v. Alleſtree.

3. Treſpaſs Quare Vi & Armis clauſum fregit, & equum ſuum cuſtodivit tam negligenter ut *equus fregit clauſum & momordit equas querentis*, per quod they were ſpoil'd and died. Verdict pro querente, and Judgment was ſtaid becauſe he did *not ſay ſcienter* cuſtodivit equum. Freem. Rep. 534. pl. 722. Paſch. 1681. C. B. Sketchet v. Eltham.

4. The Plaintiff declared that the Defendant kept a *Bull* that *uſed to run at Men*; but did *not ſay ſciens or ſcienter* &c. This was held naught after a Verdict; for the Action lies not, unleſs the Maſter knows of this Quality; and he cannot intend it was proved at the Trial, for the Plaintiff need not prove more than is in his Declaration. 2 Salk. 662. pl. 1. Paſch. 8 W. 3. C. B. Buxendin v. Sharp.

3 Salk. 12. S. C.—— S. C. cited Arg. Ld. Raym. Rep. 109. & ibid. 110. by Powell J. accordingly.——Lutw. 90. Bayntine v. Sharp, S. C. held accordingly, and ſo Judgment was arreſted.

5. The Plaintiff declar'd that the Defendant kept a *Boar ad Mordend. Animalia conſuet'*, *and knew of this Habit*, and that the Boar did bite &c. This

3 Salk. 13. S. C. accordingly. ——

Ld. Raym. Rep. 109 S.C. the Action was for biting a Mare of the Plaintiff's, of which Bite ſhe died; and Judgment was given for the Plaintiff.

This was held good after Verdict, tho' it was objected that theſe Animals may be Frogs or Mice &c. For we muſt intend there was Proof of biting ſuch Animals as will ſupport the Action, otherwiſe the Judge and Jury would not have concurr'd in this Verdict, whereby the Plaintiff recovers Damages; and as to another Objection, viz. That the Defendant cannot know what Animals he is to defend againſt, it was anſwer'd that no Evidence can be given of killing any Animals but what he has Knowledge of. 2 Salk. 662. pl. 2. Mich. 8 W. 3. C. B. Jenkins v. Turner.

Powel J. ſaid the Fact was that the Boar had bit a Child before, of which the Defendant had Notice, and afterwards bit the Plaintiff's Mare, and that it ſeems the Plaintiff ſhould have ſhewn particularly what Miſchief the Boar had done before, and that upon a Demurrer it would have been ill for want thereof; but this now is aided by Verdict. At the End of this Report it is ſaid, Note, Tho' this Caſe was ſeveral times argued, yet Treby Ch. J. did not give his Opinion, the Judgment being given by Powel J. in his Abſence.——12 Mod. 335. Mich. 11 W. 3. Holt Ch. J. ſaid he did not doubt, but if it were generally laid that the *Dog was uſed to bite Animalia, and the Defendant knew it*, it will be enough to charge him for biting Sheep &c. And by Animalia ſhall not be intended Frogs or Mice, but ſuch in which the Plaintiff has Property.

6. There is a *Difference* between Beaſts that are *feræ naturæ*, as Lions and Tygers, which a Man muſt always keep up at his Peril, and Beaſts that are *manſuetæ naturæ*, and break thro' the Tameneſs of their Nature, ſuch as Oxen and Horſes: In the latter Caſe an Action lies, if the Owner has had Notice of the Quality of the Beaſt; but in the former Caſe an Action lies without ſuch Notice. 2 Ld. Raym. 1583. Per Ld. Ch. J. Mich. 4 Geo. 2. B. R. in delivering the Opinion of the Court.

See Executors (Q) † There is a *Trover in Fact*, and a Trover *in Law*. When the Goods (*) Fol. 5. are bail'd over, this is a Trover in Law; but when one has Goods

(I) Upon a † Trover and Converſion. Who ſhall have a Trover and Converſion.

1. If a † common Carrier has Goods deliver'd to him to carry to a certain Place, and a Stranger takes them out of his Poſſeſſion, and converts them to his own uſe, an Action of Trover and Converſion lies for the Carrier (*) againſt him; for he had a Special Property in the Goods, and is to make Satisfaction for them to the Owner. Trin. 15 Car. at Guild-hall, upon Evidence in ſuch Action ruled per Brampt. Ch. J. between ‡ *Goodwin and Richardſon*, upon a Trial there, upon Not Guilty pleaded.

per Inventionem, this is a Trover in Fact; per Coke Ch. J. 2 Bulſt. 313. Hill. 12 Jac. Arg.

† He may have *Trover or Treſpaſs* at his Election; per Cur. Mod. 31. in pl. 75. Mich. 21 & 22 Car. 2. B. R. Arg.

‡ S. C. cited Lev. 282.

2. If a *Feme Covert bails Goods to a Man, and after ſhe takes him to Baron*, and he dies, the Feme ſhall not have Action of Bailment; for the Bailment was diſcharg'd by the Intermarriage; but ſhe may declare upon a Trover. Quod nota. Per Fineux. Br. Bailment, pl. 6. cites 21 H. 7. 29.

Cro. E. 819. Baſſet v. Maynard, Paſch. 43 Eliz. B. R. pl. 3 S. C. adjudg'd accordingly.

3. A. *ſold* 100 *Load of Wood to B. to be taken of his Trees at the Aſſignment of A.* Afterwards *A. ſells to C.* 100 *Load to be taken at his Pleaſure.* B. aſſigns his Intereſt to D. The *Vendor aſſigns Trees, C. takes them away*, and D. recover'd in an Action of Trover. Noy 32. Baſſet v. Baynard.——Mo. 691. pl. 955. Maynard v. Baſſet, S. C. adjudg'd accordingly in B. R. and

and affirm'd in the Exchequer Chamber.——5 Rep. 24. b. Sir Tho. Palmer's S. C. adjudg'd in B. R. accordingly.

4. A *Sheriff took Goods in Execution, and the Defendant took them away* from him, he may have Trover for them. See Tit. Sheriff (Y) pl. 2.

5. Where *Goods* are *bail'd to A. to deliver over to B.* if *A.* afterwards *refuſes to deliver them* over, and converts them to his own Uſe, he is liable to an Action of Trover not only by him who firſt delivered them, but alſo by him to whom they were to be delivered; for tho' he never had the Poſſeſſion of the Goods, yet the Converſion of them is a Wrong done to him; and therefore an Action of Trover brought by him is well brought; Per Cur. and Judgment accordingly. Bulſt. Mich. 8 Jac. Flewellin v. Rave.

6. If a *Leſſee of a Manor ſeiſes a Heriot without Right* to it, and the *Lord of the Manor* brings Trover and Converſion for it, yet if *the Property does not appertain to the Lord*, he cannot maintain the Action; for the Defendant had the *firſt Poſſeſſion*. Winch 46. 57. Glouceſter (Biſhop) v. Wood.

7. A. *Lord of a Manor made a Leaſe to P. of all Coal-mines open, or to be found* in his ſaid Manor *for* 99 *Years* rendring Rent, and died. B. his Son and *Heir entred upon a Copyhold held by J. N. for Life, and there opened a new Pit*, and digged Coals, and converted them to his own Uſe; whereupon P. brought Trover. And Per Cur. neither P. nor the Leſſee of the Coal-mines, nor both together, could enter on the Copyhold during the Life of the Copyholder, without being Treſpaſſers; but *when once the Coals are digged*, be it by whom it will, *they belong to the Leſſee* of the Coal-mines, and he may have an Action of Trover for them. Jo. 243. Trin. 7 Car. B. R. Player v. Roberts.

8. A. was *Tenant for Life, without Impeachment of Waſte, excepting voluntary* Waſte, the *Reverſion to B.*——*B. ſold Timber-trees* growing on the Land to W. *A. cut them* down, *and ſold them* to S. Whether W. the Bargainee of B. can have Trover againſt the Vendee of A. who was ſtill living, was the Queſtion. It was argued he could not; for tho' B. the Reverſioner had a general Property in them, yet he has no Authority to ſell during the Life of A. the Tenant for Life; and if ſo, his Bargainee has no Intereſt to maintain Trover. Cro. Car. 274. pl. 11. Mich. 8 Car. B. R. Waller v. Sands. See 4 Rep. 62. &c. Herlakenden's Caſe.

9. *Meer Poſſeſſion* ſuffices to maintain Trover; Per Cur. Het. 167. Paſch. 7 Car. C. B. in Caſe of Green v. Brooker and Greenſtead. Poſſeſſion without Property is good Cauſe to maintain an Action in general, viz. Treſpaſs, but not Trover; for many Pleas will ſerve in Treſpaſs which will not ſerve in Trover; Per Doderidge J. 2 Bulſt. 135. Mich. 11 Jac.—*Executor* may bring Trover without an actual Poſſeſſion, and that by Reaſon of the Property. See Lat. 214. Mich. 30 Car. Hudſon v. Hudſon.

10. The *Commiſſioners of Bankrupts* may have Action of Trover, if they did actally ſeiſe any Goods of the Bankrupt, as they might by Law; Per Twiſden J. Mod. 31. Hill. 21 & 22 Car. 2. Arg. S. P. accordingly by Twiſden J. 2 Keb. 589. in pl. 5.

11. Trover *by Aſſignees of Commiſſioners of Bankrupts*; but afterwards the Plaintiff was nonſuited, becauſe he could not prove that the Party was a Bankrupt before an Execution executed at the Suit of another for thoſe Goods. 2 Lev. 113. Mich. 26 Car. 2. B. R. Nelthorp v. Dorrington. Trover by the *Aſſignee of Commiſſioners of Bankrupts* againſt the Defendant, who pretends to have ſeiſed the Goods for Rent. Before Holt Ch. J. at the Sitting in Middleſex. Comb. 453. Trin. 9 W. 3. B. R. Meggot v. Watſon ——Note, The Commiſſion muſt be ſhew'd, and the Aſſignee muſt prove an Act of Bankruptcy as well as the Aſſignment by the Commiſſioners; and Prima facie it ſhall be intenced that the Aſſignment was executed at the Time it bears Date. Comb. 455. ut ſupra.

11. *Three Jointenants* were *of Goods*; *two of them brought Trover*; and becauſe the Defendant *pleaded Not guilty* recover'd Damages for 2 Parts; but the Defendant might have pleaded in Abatement of the Writ for ſo much. 2 Lev. 113. Mich. 26 Car. 2. B. R. Nelthorp v. Dorrington.

12. *One Part-owner of a Ship* may have Trover for the whole Ship. Per Holt Ch. J. Comb. 367. ſaid it was ſo adjudged in Lord Hale's Time, upon a Writ of Error of a Judgment at Cheſter, which was revers'd, and a new Judgment given for the Plaintiff for that very Reaſon. And in the principal Caſe Trover being brought by the ſurviving Part-owner for a Ship which had been ſeiſed by Order of King Charles 2. Holt Ch. J. ſaid the Order was illegal, and the Subject muſt take Care how he executes it at his Peril. And the Jury found for the Plaintiff, and gave him above 2600 l. Damages. Paſch. 8 W. 3. B. R. Dockwray v. Dickenſon.

13. *A. finds Goods* of B. and refuſes to deliver them to him, his Remedy is Trover; and if *C. happens to get them*, A. may maintain Trover againſt him, but he ſhall have but one Satisfaction; but after A. has recover'd againſt C. B. may maintain Trover againſt A. Per Holt Ch. J. 12 Mod. 602. Anon.

(K) [*Trover and Converſion.*] For what Things it lies.

* Godb. 210. pl. 299. Mich. 11 Jac. Clark's Caſe, S. C. and S. P. agreed therein.—See Roll Rep. 59. pl. 1. and 126. pl. 9. S. C.—2 Bulſt. 306. S. C.—Mo. 841. pl. 1136. S. C. where the Count was of Money in a Bag; but in arguing the Caſe it was ſaid Roll Rep. 59. that Monies in or out of a Bag are all one, and that Trover and Converſion will lie for Money out of a Bag, quod fuit conceſſum; per Haughton & Coke, who ſaid that it is common Experience.

1. TROVER and Converſion lies of Money, though it is not in a Bag, becauſe the Thing itſelf is not to be recover'd, but Damages for it. Mich. 3 Jac. B. R. ſaid to have been often adjudg'd. Mich. 12 Jac. B. R. *Iſaac and Clerk*, Hill. 13 Jac. B. R. between * *Wood and Dr. Sutcliff* adjudg'd, and admitted upon a Writ of Error, Hill. 9 Jac. B. per Curiam. Trin. 17 Jac. between *Sir Thomas Temple and Sims*, for 100 l. of Money number'd in a Bag.

Roll Rep. 293. pl. 8. S. C. & S. P. admitted.———3 Bulſt. 150. S. C. & S. P. ſeems to be admitted. —Cro. J. 439. pl. 12. S. C. but S. P. does not appear.——Ow. 131. Hall v. Wood, S. P. not adjudg'd, but ſaid by Warburton, that if the Money were loſt in the View of a 3d Perſon, upon ſuch Trover the Action will lie, becauſe there it may be proved that it was the Plaintiff's Money, and Walmſley agreed.———Cro. E. 841. pl. 19. Trin. 43 Eliz. B. R. Hall v Dean & Wood, S. C. adjudg'd for the Plaintiff.———S. P. Rolf Rep. 132. cites Paſch. 24 Eliz. in the Exchequer. Wilkins's Caſe.——— S. P. held accordingly, Cro. E. 818. 819. pl. 12. Paſch. 43 Eliz. B. R. Draycot v. Piot.——Cro. E. 870. pl. 6. S. P. agreed.——It was ruled by Roll Ch. J. that Trover lies for Money deliver'd by the Plaintiff himſelf to the Defendant to keep, tho' not in Bags; both which Points he ſaid had been doubted and reſolved. All. 91. Mich. 24 Car. B. R Davis v. Dyos.——Error of a Judgment in Trover for 190 l. in Pecuniis numeratis, was aſſign'd that Trover would not lie for *Money out of Bags*; but all the Juſtices and Barons agreed, that it being found by a Jury that he converted the Plaintiff's Money, the Plaintiff had good Cauſe of Action, and affirm'd the Judgment; and ſaid it lies as well out of a Bag as of Corn, which cannot be known. Cro. C. 89. pl. 11. Mich. 3 Car. C. B. Kinaſton v. Moore.

See Tit. Maſter and Servant, (M. 2) pl. 4. Holyday v. Hix.——See Tit. Money, (B) pl. 5, S. C.

2. [So] Trover and Converſion lies of 40 l. of Money number'd in a Box, without ſaying that the Box was ſeal'd or lock'd, as the uſe is in Replevin. Hill. 15 Car. B. R. between *Weſtbury and Wakefield*, adjudg'd in a Writ of Error upon a Judgment in Briſtol, and the firſt Judgment affirm'd accordingly. Intr. Tr. 15 Car. Rot. 501.

3 Trover

3. Trover and Conversion lies of an Obligation. P. 14 Car. B. R. between *Siddowne and Miller*. Adjudg'd per Curiam in a Writ of Error. Contra by 3 Judges. Cro. E. 723. pl. 54. Mich. 41 & 42 Eliz. C. B. Watson v. Smith.——But S. P. admitted that the Action lies. Cro. J. 637. pl. 7. Pasch. 20 Jac. B. R. Upchard v. Tatam.——— S. P. admitted accordingly. Cro. C. 262. pl. 8. Trin. 8 Car. B. R. Wilson v. Chambers.——Goldsb. 89. 90. pl. 19. Pasch. 30 Eliz. S. P. admitted accordingly.——See 2 Bulst. 313. per Coke Ch. J. Arg.———Trover *de scripto suo Obligatorio per quod obligatus fuit cuidam J. S.* and held good on Motion in Arrest of Judgment; for it might be given to the Plaintiff, and it shall be so intended, and then it was Scriptum suum; and there is no Absurdity, tho' it was made by him to another, this being a Description only of the Deed. 2 Salk. 654. pl. 1. Mich. 9 W. 3. C. B. Arnold v Jeffreyson.———Ld. Raym Rep. 275. S. C. accordingly, and that any Stranger may maintain Trover for a Bond upon a Special Property by Bailment, as well as the Obligee himself.

4 No Trover and Conversion lies of a Hawk, without alleging it to be reclaim'd, because it is feræ naturæ, whereof he had no Property. Tr. 15 Car. B. R. between *Sir Martin Lister and Hone*, per Curiam agreed; but the Court doubted whether it was not good after a Verdict for the Plaintiff, by which it was found that he was possess'd of it as of his proper Goods, as is alleg'd in the Declaration; and note this was a Ramage-Hawk, and it is alleg'd that he lost it out of his Possession, and so the Property gone. Cro. C. 545. pl. 10. S. C. Jones and Berkley inclin'd that the Declaration was not good; but Jones J. conceived it good enough, because it is aided by the Allegation that he was possess'd of it ut de Bonis propriis, and that the Defendant knowing it to be his Hawk converted her &c. and that it differ'd from Sir Richard Fines's Case, in D. 306. cited; for there, tho' the Exception was taken to the Count that it was expresly alleg'd that the Hawk was reclaim'd, yet it does not appear but that the Count there was held good enough; but because the Defendant's Plea in that Case was held good, it was adjudg'd against the Plaintiff, not for the Insufficiency of the Count, but upon Demurrer upon the Plea in Bar, which was held sufficient. Afterwards the principal Case was moved again, but the Court being always divided in Opinion, the Plaintiff for Expedition consented that Judgment be enter'd against him, and brought a new Action.—Mar. 12. pl. 32. S. C. says that all the Justices, except the Ch. J who was absent, did agree very strongly that Judgment should be staid, and so it was.——Cro. C. 19. pl. 11. Mich. 1 Car. C. B. the Case of Fines v. Spencer, was cited per Cur. and distinguish'd that Case, being a Trover and Conversion from an Action of Trespass for striking and killing his Hawk, which last he only can have who has the Possession; whereas the former lies not but of a Hawk reclaim'd, and which may be known by her Varvels, Bells, or some other Mark, whereby Notice can be taken of her Owner.

3 Lev. 336. cites the Case of Lister v. Home.

5. Trover and Conversion lies of a Spaniel-Dog; for he is reclaim'd. Between *Pells and Leman*, adjudg'd in B. upon a Demurrer. See Hob. Rep. Case 363. between *Pelles and Leman*, and a Writ of Error brought in B. R. where no Opinion was given in it; but it was reversed for another Reason, viz. for want of an Original. Intr. Tr. 14 Car. B. R. Rot. 217.

6. A Wager was laid about the Quantity of Yards in a Velvet Cloak, and the Stakes were depolited in the Hands of J. S. The Winner brought Trover against J. S. for the Money, and Judgment nisi for the Plaintiff. Cro. E. 870. pl. 6. Hill. 44 Eliz. B. R. Ledesham v. Lubram.

7. The *Feme lost* 40 *l. of her Husband's Money at Cards*; the Baron shall recover this again in an Action of Trover against the Gamester. Sid. 122. cites it as adjudg'd Trin. 6 Jac. Rot. 1717. Rey v. Stephens.

8. It lies for *a Parrot*, because it is Merchandize, and valuable. Cro. J. 262. Mich. 8 Jac. B. R. in pl. 25.

9. It lies for 100 *Musk-cats*, and 60 *Monkeys*, tho' not shewn that they were tame, or reclaimed, for they are Merchandize, and valuable. And adjudged for the Plaintiff. Cro. J. 262. pl. 25. Mich. 8 Jac. B. R. Grymes v. Shack. Bulst. 95. S. C. accordingly.—— S. C. cited 3 Lev. 336.

9. It lies *pro uno fulcro lecti*, for that may be understood of all the Furniture of a Bed. 10 Rep. 130. Mich. 11 Jac. B. R. Osborn's Case. Jenk. 270. pl. 87.—— S. C. cited Arg Hard. 41.

10. In Trover and Converſion of a *Wine Licence*, it was objected that a *Record* cannot be converted. Sed non allocatur; for the *Word Letters Patents here ſignify the Exemplification* of them under the Broad Seal; and ſo it is intended in common Parlance. Hard. 111. pl. 3. Paſch. 1658. in the Exchequer, Jones v. Winkworth.

12. Trover lies *for an Eſtray without an actual Seiſure*; Per Twiſden J. 2 Keb. 589. in pl. 5. Hill 21 & 22 Car. 2.

3 Keb. 785. 35. S. C. ſays it was in Trover for 10 Negroes and a half, and Judgment for the Plaintiff, Niſi &c.——Freem. Rep. 452. pl. 616. Trin. 167[illegible]. Anon. ſeems to be S. C. and ſays it was held per Cur. that tho' by the Law with us, a Man cannot have an abſolute Property in the Body of another, yet the *Cuſtom of India concerning Buying and Selling being found*, a Trover and Converſion would lie well enough.—Ld. Raym. Rep. 147. cites it as adjudg'd that Trover will lie for a Negroe Boy, Hill. 5 W. & M. Gelly v. Cleve——5 Lev 336. 337. Arg. ſays it has been adjudg'd accordingly.——And 5 Mod. 187. Arg. cites it accordingly.—But by Holt Ch. J. contra. Ld. Raym. Rep. 147. Hill. 8 & 9 W. 3. in Caſe of Chamberlain v. Harvey, Arg.—— It does not lie. 2 Salk. 666. pl. 2. Mich. 4 Ann. B. R. Smith v. Gould.——See Tit. Negroe (A)

13. Trover will lie *for a Negro*; for they are bought and ſold as Merchandize; and Judgment niſi &c. 2 Lev. 201. Trin. 29 Car. 2. B. R. Butts v. Penny.

18. If *Goods* are *condemned and proclaim'd by the Court as forfeited*, the Property is alter'd ſo as no Action of Treſpaſs or Trover, will lie by the Proprietor againſt the Perſon that ſeizes them. Raym. 336. Mich. 31 Car. 2. in the Exchequer Ekins v. Smith.

19. As an Encouragement to the Building *of Ships*, being of that univerſal Advantage to the Publick in point of Trade and Commerce, to contrive and veſt the Owners Propriety in them, both by the Common Laws of this Realm, and the Maritime Laws, it is provided that in Caſe a Ship be taken away, or the Owners diſpoſſeſt, they may maintain an Action of *Trover and Converſion for* an 8th, a 16th, or any other *Part* or Share of the ſame. 2 Molloy 220. cap. 1.

20. If a *Ship* be *taken away*, or the Owners diſpoſſeſt, they may maintain an Action of Trover and Converſion for an *eighth or ſixteenth Part* of the ſame, as well by the Common Laws of this Kingdom as the Law Marine, and they *need not join with the reſt* of their Owners. 2 Molloy 226. cap. 1.

21. It was ruled at a Trial at Niſi Prius by Holt Ch. J. Paſch. 6 W. & M. that where *A. purchaſed the Intereſt of a Leaſe for Years*, and the *Writings where left in the Hands of B. an Attorney*, *to draw an Aſſignment* of it; *B. drew it, and it was ſealed*, but *B. refuſed to deliver it until A paid for it*, upon which A. brought Trover againſt B. for the Deed. That the Action well lay, becauſe B. might have an Action for what he deſerved, but he cannot detain for it. Lord Raym. Rep. 738. Anon.

22. Trover was brought of 500 *Pieces of Ends of Deal Boards*. It was objected that this was of uncertain Signification; but per Powel, this being a particular Term of Art among the Houſe and Shop-Joiners, and generally underſtood by Workmen, is a proper Denomination for all ſhort Pieces; and adjudg'd good. 11 Mod. 66. pl. 6. Mich. 4 Ann. B. R. Knight v. Barker.

23. Trover was brought for *S. S. Stock* transferr'd to the Defendant by one that perſonated the Plaintiff, and the Ch. J. directed the Jury to find for the Plaintiff. 8 Mod. 9. Mich. 7 Geo. 1. at Niſi Prius in C. B. Monk v. Graham.

24. In Trover *for a certain Quantity of Barley*, it appear'd upon the Plaintiff's own Evidence, that the Barley was *deliver'd* by the Plaintiff to the Defendant *to be made into Malt*; upon which Judge Page declared that Trover would not lie for the Barley, becauſe it was deliver'd for another Purpoſe, viz. to be made into Malt; and that it would not lie for the Malt, becauſe it did not appear that any Tender was made of the Money

due for making the Barley into Malt. Accordingly the Plaintiff was nonſuited. Barnard. Rep. in B. R. 471. Hill. 4 Geo. 2. Lent Aſſiſes. Adams v. Hutton.

(L) In what Caſes it lies. What ſhall be ſaid a Converſion.

1. If a Man takes my Horſe and rides him, and after redelivers him to me, yet I may have this Action againſt him, for this is a Converſion, and the Re-delivery is not any Bar of the Action, but ſhall be only a Mitigation of Damages. Trin. 38 El. B. C. per Curiam, in the *Counteſs of Rutland's* Caſe. S. P. and upon Special Demurrer Judgment was for the Plaintiff Niſi, becauſe it amounts only to the General Iſſue. 2 Keb. 405 pl. 20. Mich. 20 Car. 2. B. R. Denny v. Terry.——S. C. Ibid. pl. 437. pl. 86. and Judgment for the Plaintiff, Niſi &c.

If one comes into my Cloſe, and *takes my Horſe and rides him*, it is a Converſion. Per Holt Ch. J. 6 Mod. 212. Trin. 3 Ann. Arg.

2. If a Man finds my Goods, and knows them to be my Goods, and he refuſes and denies to deliver them to me this is a Converſion in Law. Mich. 38 & 39 El. B. R. between *Eaſton and Newman*, per Curiam, which intratur Hill. 37 El. B. R. Rot. 460. for the Denial makes him a Treſpaſſer ab initio, for this ſhews his Intention to have been ſo ab initio. Cro. E. 495. pl. 13 S. C. all the Juſtices abſente Popham held it was a Converſion by the Denial only; but it being afterwards moved again, Popham held it to be No Converſion. Et adjornatur.——Goldsb. 152. pl. 79. Eaſt v. Newman S. C. adjornatur.——S. C. cited by Doderidge J. and grounded his Opinion in the principal Caſe there upon it. 2 Bulſt. 310. Hill. 12 Jac. ——S. C. cited Roll Rep. 131. And it was ſaid at the Bar, and by Coke Ch. J. that they had the Report of the Caſe in which the Court was divided; but it was afterwards adjudg'd as alleg'd. And Coke ſaid the Reaſon of the 2 who held the Denier a Converſion, was its making him a Treſpaſſer ab Initio, which he ſaid could not be Law it being only *Non Feaſance*, and they came to them before by lawful Trover.——S. C. cited by Doderidge J. Mo. 841. pl. 1136.

If one finds my Goods, and *refuſes to deliver them* to me, an Action on the Caſe lies againſt him, tho he converts them not to his own Uſe. Per Roll Ch. J. Sti. 353. Mich. 1652. Anon.

If he *refuſes to deliver them to the Owner, till he knows him to be the Owner*, it is no Converſion, if he keeps them for him. Per Coke Ch. J. 2 Bulſt. 312. in Caſe of Iſaac v. Clerk cites 2 R. 3. 15.

3. If I deliver Goods or Money to another, and afterwards he denies to render them to me upon my Demand of them, yet this is not any Converſion, but only Evidence of a Converſion, inaſmuch as he came to them by my own Delivery. H. 12 Jac. B. R. between *Iſaac and Clark* dubitatur. Mo. 841. pl. 1136. S. C. the Money was deliver'd as a Pledge for the Re-delivery of Goods taken in Execution on certain Conditions, which were not perform'd, nor the Goods re-deliver'd; and it was agreed by all, that when Money is deliver'd as a Pledge, it is a Special Bailment, and Denial in ſuch Caſe is no Converſion. —— Godb. 210. pl 299. S. C. but S. P. does not appear.——— Roll Rep. 59. S. C. adjornatur. 126. S. C argu'd by the Court, but differ'd in Opinion as to this Point. ——2 Bulſt. 306. S. C. and S. P. debated before by the Court, and adjudg'd that the Plaintiff had no juſt Cauſe of Action.——S. C. cited 2 Mod. 245.

If I *deliver my Goods* to B. *to keep*, and I requeſt them, and B. denies the Delivery of them, an Action of Trover lies, but not without a Denial. Brownl. 12. Hill. 9 Jac. Anon.

Harris ſaid that it was the common Experience, that the *Detainment* of Goods from an Owner *after Requeſt*, is allow'd for a ſufficient Evidence to maintain a Converſion. And per Hobart Ch. J. tho' legally it were not a Converſion; yet in that Caſe it was reaſonable to allow it for an Evidence to prove a Converſion. Becauſe if you have Goods of mine lawfully by Finding or Bailment, yet when I require them of you, you can no longer lawfully hold them; and therefore when you ſtill detain them from me, it argues, that you claim them as your own, and ſo uſe them. Hob. 187. pl. 266. Mich. 11 Jac. in Caſe of Agar v. Liſle.——Hutt. 10. S. C. but if it be found ſpecially, it ſhall not be adjudged a Converſion.

Tho' *a Demand and Denial* be Evidence of a Converſion, and ſufficient Inducement to a Jury to find a Converſion, yet that of itſelf is not a Converſion. 2 Show. 179. pl. 176. Hill. 33 & 34 Car. 2. B. R. Brook v. Miller.

But per Holt Ch. J. the very Denial of Goods to him that Right has, is an actual Converſion, and not only an Evidence of it, as has been holden; for what is a Converſion but *aſſuming upon one's ſelf the Property and Right of diſpoſing another's Goods*; and he that takes on himſelf to detain another's Goods from him without Cauſe, takes on himſelf the Right of diſpoſing of them; ſo the *taking and carrying away another's Goods* is a Converſion. 6 Mod. 212. Trin. 3 Ann. B. R. in Caſe of Baldwin v Cole.

Fol. 6. See (C) pl. 1.——S. P. by Hale Ch. J. and Wild J. For it is no Converſion where the Goods are ſtolen, or *got away by a Cheat*; but Evidence muſt be of ſome Act of his own; for his bare Delivery over by a Token is no Converſion, but Trover lies againſt the Bailee, and Demand after the Goods deliver'd over is no Converſion. But Twiſden J. ſaid and affirm'd at the Bar, as common in Circuits, to have Trover againſt the Carrier. 3 Keb. 422. pl. 18. Hill. 26 Car. 2. B. R. Stukie v. Hart.

4. If I deliver Goods to a common Carrier to carry to ſuch a Place, and after the Goods are ſtole from the Carrier, this is no Converſion in the Carrier ſo as to charge him in a Trover and Converſion, but an Action upon the Caſe lies againſt him as a Carrier upon the Cuſtom of the Realm, to carry Goods ſafely and to deliver them as he is appointed. Mich. 14 Car. B. R. between *George and Wiburn*, per Curiam, in Arreſt of Judgment.

Trover does not lie *againſt a common Carrier for Negligence*, as for *loſing a Box*; *but* it does *for an actual Wrong*, as if he breaks it open to take out the Goods, or ſell them; per Cur. 7 W. 3. B. R. For if the Thing appears to have been really loſt by Negligence, a Denial is no Evidence of a Converſion; but if that does not appear, or if the Carrier had it in his Cuſtody when he denied to deliver it, that is good Evidence of a Converſion; per Trevor Ch. J. 2 Salk. 655. pl. 4. Trin. 3 Ann. at Niſi Prius at Guildhall.

If *Goods* are *deliver'd to a Carrier*, and he does not deliver them according to the Direction given him, upon Demand of the Goods from him, and Refuſal by him to deliver them, *Trover* lies againſt him; *or* an Action upon the *Caſe* lies againſt him *upon the Cuſtom*. *But if* the Goods be *deliver'd to a Servant* of the Carrier, *or to his Warehouſe-keeper*, and they are not deliver'd &c. an Action of Trover does not lie againſt the Carrier &c. without an actual Converſion by him. Ruled by Holt Ch. J. upon a Trial at Niſi Prius at Hertford, 4 Aug. 1 Ann. 2 Ld. Raym. Rep. 792. Tayler v.

5. If the King's Purveyor takes Beds, and appoints the King's Servants to lie in them, this is not any Converſion. Mich. 13 Jac. B. per Warberton. An Action of Trover lies when a Man finds Goods. 7 H. 6. 22.

* Jo. 443. pl. 4. S. C. ſays that Rule was given to ſtay Judgment. Mar. 60. pl. 94. S. C. adjornatur.——Mar. 82. pl. 134. Paſch. 17 Car. ſeems to be S. C. ſays the Jury found the Feme Not Guilty; and that the Court held that this naughty Plea [Count] is made good by the Verdict.

6. An Action of Trover and Converſion for Goods lies againſt Baron and Feme, ſuppoſing by the Declaration that they converted them to the Uſe of the Baron; for the Feme may be a Treſpaſſer and may convert Goods to the uſe of her Baron, or to the uſe of a Stranger, though ſhe cannot convert them to her own Uſe, ſhe being a Feme Covert. Mich. 13 Car. B. R. between *Granger and Meader*, adjudged; this being moved in Arreſt of Judgment. But in an Action of Trover and Converſion againſt Baron and Feme, if the Declaration be that they converted to their own Uſe, this is not Good, becauſe the Feme cannot convert Goods to her own uſe, Mich. 13 Car. B. R. in the Caſe of *Granger and Meader*, agreed per Curiam Mich. 15 Car. B. R. between * *Hodges and Sampſon*, adjudged upon good Advice in Arreſt of Judgment, after they had given Judgment once e contra; Intr' Hill. 14 Rot. 714. P. 1649. between † *Gallop and his Wife, and Hole*; adjudged in a Writ of Error upon a Judgment in B. where the Converſion was ſuppoſed by Baron and Feme and another Perſon to their own Uſe, but is now reverſed, per Curiam; Intr' Paſch. 23 Car. B. R. Rot. 25.

† Sty. 115. Trin. 24 Car. S. C. and the Judgment in C. B. reverſed Niſi &c.——Ibid. 126. Trin. 24 Car. Gallop v. Chaſe, S. C. The Caſe was moved again, and Judgment reverſed.

Cro. C. 494. pl. 2 Perry v. Diggs, Hill. 13 Car. B. R. and the Judg-

7. In Trover and Converſion againſt Baron and Feme, ſuppoſing that the Feme converted to the Uſe of herſelf and Husband, this is not good; becauſe the Feme cannot convert to her own Uſe, Hill. 14 Car. B. R. between *Diggs and Perry*, adjudg'd in a Writ of Error upon a Judgment in Marleborrow, but reverſed for this Cauſe; Intr' Trin.

Trin. 13 Car. Rot. 402. the Feme being found Guilty by Verdict; and so it was adjudged, Trin. 17 Car. B. R. between * *Remes and Humfry*, Rot. 1202. ment in Marlebo-rough re-verſed ac-cordingly.—

* Cro. C. 254. pl. 5. Paſch. 8 Car. B. R. Rhemes v. Humphreys, S. C. adjudg'd for the Defendants. —See Tit. Baron and Feme, (U) pl. 1. S. C. and the Notes there.

Trover *againſt Huſband and Wife*, and declared of a Converſion by the Wife during the Coverture; and Per Cur. the Action is well brought; for by Jones J. tho' ſhe cannot make a Contract for Goods during her Coverture, yet ſhe may convert them. Noy 79. Newman v. Cheyney.—Lat. 126. Paſch. 2 Car. S. C. accordingly by 3 Juſtices, but Crew Ch. J. ſpoke doubtfully.

8. Where a Man *finds my Goods* he is *chargeable to me into whoſeſoever Hands to Goods ſhall come after*. Brooke makes a *Quære*; for he ſays, it ſeems that if he *impairs or Bails them over* he ſhall be charged; but if he *loſes them caſually* he ſhall not be charged after. Br. Detinue de biens, pl. 40. cites 12 E. 4. 8. If *A. takes Goods from* me, and theſe *afterwards come* to the Hands of *B. by buying* or otherwiſe, and he converts them to his Uſe, B. ſhall not be charged to me without a *new Demand made* of them unto him, *and a Detention afterwards*. Clayt. 57. 58 pl. 99. before Berkley J. in Holdworth's Caſe.

He that finds Goods muſt anſwer for them to him that has the Property, and if he delivers them over to any one but the right Owner, he ſhall be charged for them; per Coke Ch. J. 2 Bulſt. 312. in Caſe of Iſaac v. Clerk, cites 2 R. 3. 15.

If *A. takes Goods from J. S. and B. takes them from A.* J. S. may have Treſpaſs or Trover againſt either A. or B. at his Election; tho' the Opinion in Cro. is, that J. ſhall not have Treſpaſs againſt B. Sid. 438. pl. 3. Hill. 21 & 22 Car. B. R. in a Nota there.

9 An Action of Trover and Converſion was brought for Oats &c. and the Caſe upon Proof was, that certain *Treſpaſſors had taken theſe Oats from the Plaintiff, and brought them to the Mill to make into Oatmeal*; and the Plaintiff came to the Miller before any thing done, and *demanded the Oats as his, and forbad him to proceed* to make them into Oatmeal; *but the Miller did proceed* for all that, and made it into Oatmeal; and the Judge directed this to be a Converſion in the Miller, and directed the Jury accordingly, tho' it was urged by the Counſel of the Defendant, that a Miller was a publick Officer, and did but his Duty in this Caſe. Clayt. 57. pl. 99. before Berkley J. 1638. Holdſworth's Caſe.

10. To prove the Converſion it was offer'd, that the Plaintiff did *demand Satisfaction for* the Corn; and 'twas ruled good Evidence, the Demand being to the *Party himſelf*, who took this Corn, tho' the Corn itſelf was not demanded, but Satisfaction. Clayt. 122. pl. 114. before Germin J. 1647. Rookby's Caſe.

11. A. puts Beaſts to agiſt with B. and after the Time expired A. demands his Cattle of B. and cannot have them delivered. It was holden here in this Action, which was Trover, and Converſion brought by A. that this Action doth not lie, becauſe the Defendant came to them by the Plaintiff's own Delivery. Clayt. 127. pl. 227. before Germin J. 1647. Walker's Caſe. In Trover of 5 Kine, a ſpecial Verdict was found, That one *B.* was *poſſeſs'd of* thoſe 5 *Kine*, and *put them to Paſturage with the Defendant*, and *agreed to pay* him 12 d. for every Cow *weekly, as long as they remained* with him at Paſture; and that afterwards *B. ſold them to the Plaintiff*, and he required them of the *Defendant*, who *refuſed to deliver them to the Plaintiff, unleſs he would pay* for the Paſturage of them for the Time that they had been with him, *which amounted to* 10 *l. Afterwards one F. paying him the* ſaid 10 *l. by the Appointment of B. he delivered the Beaſts to F.* Jones and Croke (abſentibus cæteris Juſticiariis) conceived, that this Denial upon Demand, and Delivery of them to F. was a Converſion, and that he may not detain the Cattle againſt the Buyer, until the 10 l. be paid, but muſt have his Action againſt B. who put them to Paſturage. Cro. C. 271. pl. 7. Mich. 8 Car. B. R. Chapman v. Allen.——*And* it is *not like to* the Caſes of an *Inn-keeper or Taylor*; they may retain the Horſe or Garment delivered them, until they be ſatisfied; but not when one receives Horſes or Kine, or other Cattle, to Paſturage, paying for them a weekly Sum, unleſs there be ſuch an Agreement betwixt them. Whereupon Rule was given that Judgment ſhould be enter'd for the Plaintiff. Cro. Car. 271. Chapman v. Allen.

12. In Trover and Converſion of Butter, the Count was that it was impair'd by negligent Keeping; but Per tot. Cur. if a Man comes to S. P. and S. C. Cro.

Goods

E. 219. pl. 6. *So* if he of Purpose misuseth it; as if one *finds Paper, and puts it into the Water &c.* but for negligent Keeping no Law punisheth him.——Ow. 141. Mosgrave v. Agden, S. C. accordingly.—— If one *finds a Horse, and gives him no Sustenance*, no Action on the Case lies; Per tot. Cur. Cro. E. 219. pl. 6.——*But* per Coke Ch. J. if a Man finds Goods, an Action on the Case lies for his ill and *negligent Keeping* of them, but no Trover or Conversion, because it is but a Non-feasance; Per Coke Ch. J. 2 Bulst. 312. Hill. 12 Jac. B. R. Isaac v. Clerk.

Goods by Trover, he is not bound to keep them so safely as he who comes to them by Bailment. Per Walmsley, if a Man finds my *Garments*, and suffers them *to be eaten with Moths* by the negligent keeping of them, no Action lies; but if he *weareth them*, it is otherwise, for the wearing is a Conversion. 1 Le. 224. pl. 305. Mich. 32 & 33 Eliz. C. B. Mulgrave v. Ogdem, or Walgrave v. Ogden.

Cro. E. 824. pl. 25. Pasch. 43 Eliz. C. B. the Court divided.

13. Trover. The Defendant's *Bailiff seised* the Plaintiff's *Beasts for an Heriot, whereas there was none due*; whereunto the Defendant agreed, and converted them. It was argued, that it was in the Plaintiff's Election, whether he will admit himself to be out of Possession, or not; for he might have had a Replevin, if he would; and that in this Action the Trover is not traversable, but the Conversion. And resolved he had Election to bring *Trover, or Trespass*, at his Pleasure. And by 3 Justices against Daniel adjudged for the Plaintiff. Cro. J. 50. pl. 21. Mich. 2 Jac. C. B. Bishop v. Montague (Viscountess.)

Mo. 757. pl. 1045 Adyn v. Ayre, S. C. adjudged the Sale was good.—— Yelv. 44. contra, says it was adjudged by Popham, Fenner, and Yelverton (Gawdy being absent) that the Sale was not good.——2 Saund. 47. pl. 5. cites S. C. and says it was adjudged as reported in Mo. and Cro. J. contrary to the Report in Yelverton; and the Roll of it is in Pasch. 44 Eliz. Rot. 318.

14. Trover against a *Sheriff*, who seised the Plaintiff's *Goods by a Fi. fa. to the Value of the Debt, and paid Part* of it; and *the Goods not* being *sold, nor the Writ return'd, he was discharg'd of his Office, and then sold the Residue without a Writ of Venditioni exponas.* Adjudged that the Sale was good; and Judgment for the Defendant. Cro. J. 73. pl. 2. Trin. 3 Jac. B. R. Ayre v. Aden.

If the *Sheriff upon an Extent for the King against A. seises the Goods of B.* B. cannot have Trover against the Sheriff, because by the Seisure the Property vested in the King. Ruled by Holt Ch. J. at the Summer-Assises at Warwick 1699. 11 W. 3. Ld. Raym. Rep. 736. The King v. Woodward.

Noy 137. S. C. accordingly.—— Bulst. 29. S. C. accordingly.—— Yelv. 178. S. C. accordingly.

15. A *Hat-band set with Pearls and Diamonds was pawn'd*, and the Money lent was tender'd. Upon Refusal to deliver it, Trover lies, tho' Pawnee had the Possession by lawful Delivery, and not by Trover. Cro. J. 244. pl. 2. Trin 8 Jac. B. R. Ratcliff v. Davis.

16. *Intermeddling with Goods, which is not justifiable*, is a Conversion. Yelv. 194. Mich. 8 Jac. B. R. in Case of Gomersale v. Medgate.

Hutt. 10. S. C. and S. P. accordingly.—— If a Distress for Rent be lawfully taken, it is no Conversion at all; but otherwise it is if not lawfully taken; Per Cur. Yelv. 10. Mich. 44 & 45 Eliz. B. R. in Salter's Case.——Cro. E. 901. pl. 5. Salter v. Butler. S. C.——Noy 46. S. C. and that *putting Beasts into a Pound overt* is no Conversion; for they are in the Custody of the Law.—So of *Driving Cattle by Virtue of a Replevin*; for at that Time they are in Custodia Legis, and the Law at such Time preserves them so, that no Property can be chang'd, and consequently there can be no Conversion; Per Cur. 2 Mod. 244. Trin. 29 Car. 2. C. B. in Case of Mires v. Solebay.

17. If a Man does a Thing which is *allowable by Law*, it is no Conversion, *as to distrain Cattle, or impound them*; but if he work them it is a Conversion. Brownl. 5. Mich. 11 Jac. Agar v. Lisle.

S. C. cited 2 Bulst. 310. by Doderige J. who said he a-

18. *T. had Timber in the Land of H.* and T. came to H. *and demanded to have* his Timber, and *H. denied it.* T. brought Trover; and it was ruled to be no Conversion, because *it was in an open Field*, and so appeared that there was no Conversion; cited by Haughton J. as Thimble-

thorpe's

thorpe's Caſe; and Coke Ch. J. and Doderidge J. ſaid it was rul'd to be no Evidence to prove a Converſion; and that the Jury was directed accordingly. Roll Rep. 60. Trin. 12 Jac. greed that Caſe; and that ſo it would be of a Sow of Lead demanded, and denied, if it be found lying there ſtill after the Denier, it ſhall be no Converſion; but where it is altogether uncertain, and cannot appear that he made any Converſion, but only a Denier, there it is good Evidence to the Jury, and Direction to the Court (if other Matter does not appear to the contrary) that this is a Converſion.———S. C. and S. P. cited Per Haughton. Roll Rep. 131. ——See pl. 3. and the Notes there.———S. P. cited accordingly Per Cur. Trin. 29 Car. 2. C. B. 2 Mod. 245.

16. There is no Converſion of a *Bond*, unleſs it be *cancell'd*, or the like, and without that the receiving the Money is not Evidence; for the Obligor may be forc'd to pay it again. But the proper Action is *Detinue*. Roll Rep. 132. Hill. 12 Jac. B. R. in Iſack and Clerk's Caſe.

19. If a Stranger enters my Cloſe, and *cuts my Trees, and carries them away*, I may have Trover, altho' that after the cutting, and before the carrying away, I could not claim them, and there was *no actual Poſſeſſion in me*. Noy 125 Sir James Skidnes v. Huſon.

20. It lies for Goods found and converted, *tho' they come afterwards to the Hands of the Perſon who loſt them*. Sty. 261. Paſch. 1651. B. R. Gower's Caſe.

22. Adjudged that where in Trover and Converſion an *actual Taking* is given in Evidence, it is good enough, *without* proving a *Demand and Refuſal*; As taking my Hat off my Head is an actual Converſion. But if it came by Trover, there muſt be an actual Demand &c. Sid. 264. pl. 15. Trin. 17 Car. 2. B. R. in Bruen and Roe's Caſe

23. A *Servant* ſhall not be charg'd in Trover for taking Goods by the Command of his Maſter. 2 Mod. 242. Trin. 29 Car. 2. C. B. Mires v. Solebay.

22. *Denial by an Inn-keeper to deliver a Horſe* in his Hands, is no Converſion, nor Evidence of a Converſion, unleſs the *Plaintiff tenders* in particular *what the Horſe has eat out*, and the Jury is to judge if it be ſufficient. 2 Show. 161. pl. 148. Paſch. 33 Car. 2. B. R. Anon.

23. A *Bank-bill* was *payable to A. or Bearer. A. gave it to B. B loſt it. C. found it, and aſſign'd it over to D. for valuable Conſideration. D. went to the Bank, and got a new Bill in his own Name.* A. brought Trover againſt D. for the former Bill; and ruled by Holt Ch. J. at Guildhall, 1698. that an Action did not lie againſt D. becauſe he had it for valuable Conſideration. Ex Relatione m'ri Daly. Ld. Raym. Rep. 738. Anon.

24. A *Captain contracted with Seamen* to go a Voyage, and after he had *got them on board he would not pay them* according to Agreement; upon which they *demanded their Goods*, which he refuſed, if they did not *ſtay till he had ſearch'd for them, which he refuſed to do then*; and this was held good Evidence of a Converſion. 12 Mod. 344. Mich. 11 W. 3. Anon.

25. An Executor ſeveral Years before had left Goods in the Houſe by Conſent of the Heir, who uſed them after; and within 6 Years of the Action brought the Executor demands the Goods, and the Heir refuſed to let him have them; whereupon *Trover* was brought, and the Statute of *Limitations* pleaded. Per Cur. The *Uſer with Conſent, before the Demand*, was no Converſion or Evidence of it; and the Demand being within 6 Years, the *Refuſal* which enſued it, and is the only Evidence of a Converſion in the Caſe, was within 6 Years; and if a Trover be before 6 Years, and a Converſion after, the Statute cannot be pleaded. 7 Mod. 99. Mich. 1 Ann. B. R. Mountague v. Sandwich.

28. In Trover at Niſi Prius, upon Evidence the Caſe was this: A *Carpenter ſent his Servant to work for Hire to the Queen's Yard*, and having

been there ſome time, when he would go no more, the *Surveyor of the Work would not let him have his Tools, pretending a Uſage* to detain Tools, to enforce Workmen to continue till the Queen's Work was done; and a Demand and Refuſal being proved at one Time, and a Tender and Refuſal after, per Holt Ch. J. if the Plaintiff had received them upon the Tender, notwithſtanding the Action would have lain upon the former Converſion, and the having of the Goods after would go only in Mitigation of Damages; and he made no Account of the pretended Uſage. 6 Mod. 212. Trin. 3 Ann. B. R. Baldwin v. Cole.

29. *And* Holt Ch. J. compar'd it to the Doctrine among the Army, That if a *Trooper brings his Horſe into the Service*, the Property thereof was immediately alter'd and veſted in the Queen, which he had already condemn'd. 6 Mod. 212. Trin. 3 Ann. B. R. in Caſe of Baldwin v. Cole.

(L. 2) Againſt whom.

1. ACTION of Trover will lie by the *Aſſignee of one Partner, a Bankrupt, againſt the other*; which was ruled at the Trial, and agreed now. 2 Keb. 750. pl. 3. Paſch. 23 Car. 2. B. R. Thomas v. Day.

2. Trover does not lie *for a Bank-Bill payable to A. or Bearer, and loſt by him, againſt one that afterwards comes to it for a valuable Conſideration.* Ruled by Holt Ch. J. at Guildhall, 1698. Ld. Raym. Rep. 738. Anon.

2 Salk. 441. pl. 2. S. C. 3. It was ruled by Holt Ch. J. at Guildhall, Mich. 10 W. 3. That if A. being a *Pawnbroker, employs B. his Servant in* the Way *of his Trade*, and *B. upon a Pawn of Goods lends Money to C. and C. tenders the Money to B. at the Day, and demands the Goods.* B. ſays that the Goods are ſold; Trover will lie for C. againſt A. Ld. Raym. Rep. 738. Mich. 10 W. 3. before Holt Ch. J. at Guildhall. Jones v. Hart.

4. Trover was brought *againſt the Book-keeper of a Carrier, for Goods deliver'd to her in order to be ſent by the Waggon to London.* It was inſiſted that the Action, being founded on a Tort, was well brought againſt her; but on the other Side it was ſaid, that it ſhould have been brought againſt the Carrier himſelf, and the Judge was of that Opinion; and accordingly the Plaintiff was nonſuited. 2 Barnard. Rep. in B. R. 234. Hill. 6 Geo. 2. 1732. Bury Aſſiſes. Harvey v. Syliard.

(L. 3) Writ and Declaration good in General.

1. IN Trover *for a Hawk*, it was objected that the Plaintiff ought to have ſet forth that the Hawk was tame and reclaim'd; but he having declar'd *that he was poſſeſs'd &c. ut de Bonis ſuis propriis*, it was held well enough. D. 306. b. pl. 66. Mich. 13 & 14 Eliz. Fines's Caſe.

2. In

2. In Trover and Converſion the Want of alleging a *Place of Converſion* (which is a Thing material) being alleg'd in Arreſt of Judgment, the Bill was abated Cro. E. 78. pl. 39. Mich. 29 & 30 Eliz. B. R. Hubbard's Caſe. S. P. and ſo of the *Time of Converſion*, the Want whereof being alleg'd, the Bill was abated. Cro E. 97. 98. in pl. 15. cites it as adjudg'd in Leak's Caſe.——Goldsb. 90. pl. 19. Paſch. 30 Eliz. cites Staynſham's Caſe in Trover of an Obligation. It was found that he had broken the Seals, and becauſe he did not ſhew the Time and Place of the Converſion he could never get Judgment; and in the principal Caſe the Juſtices were of the ſame Opinion, only Anderſon ſeem'd to doubt.

3. The *Place of* the *Trover was alleg'd, but not of* the *Converſion*; but after Verdict Judgment was arreſted for that Reaſon. Roll Rep. 132. cited by Crooke as Mich. 26 & 27 Eliz. B. R. Matthew v. Stranſon. And the Place of Converſion muſt be found by the Jury for the Maintenance of the Action 2 Bulſ. 313. S. C. cited by Coke Ch. J.——D. 121. Marg. pl. 14. cites Mich. 37 & 38 Eliz. C. B. as adjudg'd upon long Argument that in Trover the Converſion is not traverſable, and therefore need not allege Time or Place of Converſion, but may count that Primo Die Maii he was poſſeſſed of the ſaid Goods and loſt them caſually, and that afterwards they came to the Hands of the Defendant, and he converted them. And ſays that ſo it was adjudg'd Mich. 22 Jac. B. R. and Trin. 15 Jac. B. R. Rot. 199

The alleging a *Place of Converſion is material*, and the Want thereof being alleg'd in Arreſt of Judgment, the Bill was abated Cro. E. 78. pl. 39 Mich. 29 & 30 Eliz. B. R. Hubbard's Caſe.

But in Trover no other *Place* is to be *expreſs'd* in the Declaration, but only that Place *where the Goods came to the Defendant's Hands*; per tot. Cur. clearly. Bulſt. 206. Paſch. 10 Jac. Atkyns v. Wheeler.

4. In Trover the Plaintiff ſhew'd that he was *poſſeſs'd, and afterwards, viz. tali Die loſt them*, and they came to the Hands of the Defendant, where in Truth the Poſtea, viz. tali Die, was before the Time of the Poſſeſſion. The Viz. is void, and the Declaration good. Lat. 201. cites Hill. 43 Eliz. Drake v. Young. Poph. 201. cites S. P. accordingly, 15 Jac. B. R. Deſmond v. Johnſon.—Palm. 508. S. C. cited accordingly.——Cro. J. 428. pl. 3. S. C. adjudg'd accordingly for the Plaintiff. Teſmond v. Johnſon.

5. In Trover of Goods, the Declaration was that he *was poſſeſs'd of ſuch Goods*, ſhewing what they were in Specie, *cum aliis Implementis ad Valentiam 3 l. and of other Parcels cum aliis Neceſſariis; as alſo de ſuibus*, ſetting not forth their Number, and Damages were intirely aſſeſs'd for all; but becauſe of this Uncertainty the Declaration was holden by the Court not to be good, and it was adjudg'd for the Defendant. Cro. E. 817. pl. 7. Paſch. 43 Eliz. B. R. Wood v. Smith.

8. Action upon the Caſe, that he *delivered certain Wools to the Defendant to keep, and* that *he converted them* to his own Uſe. Exception was taken, becauſe he *ſays not that he loſt them*; and that the Converſion doth not take away the Property, but he may have Detinue. But Per Cur. the Converſion takes away the Property, and it is an Offence for which the Action lies; Per Gawdy and Fenner J. cæteris abſentibus, and adjudg'd for the Plaintiff. Cro. E. 781. pl. 17. Mich. 42 & 43 Eliz. B. R. Gumbleton v. Grafton. Mo. 623. pl. 852. S. C. but S. P. does not appear.

7. In Trover, the Plaintiff as Adminiſtrator, declared *of a Portal with Hinges, and of a Hand-mill, a brewing Lead, and a* Wath-fat. It was objected that theſe Things appear to be fixed to the Freehold. Sed non allocatur; for the Plaintiff having declared that he was poſſeſs'd of them ut de Bonis ſuis Propriis, it ſhall be intended they were ſever'd from the Freehold, the Defendant not having ſhewn the contrary. Cro. J. 129. pl. 2. Mich. 4 Jac. B. R. Wood v. Smith.

8. Error of a Judgment in Trover *de* 300 *Todis Lanæ*, becauſe Todæ is no Latin Word; but Judgment was given for the Plaintiff, and that Judgment affirm'd; for it is a fram'd Word to ſhew the Meaning of the Parties, and in the Regiſter there is *Pipa Vini*, & *Barrella Cervisiæ*. Cro. J. 307. Mich. 10 Jac. B. R. Cliſon v. Proctor.

9. One

9. One may count upon a *Devenerunt ad Manus generally*, or ſpecially *per inventionem*, but the latter is the better, viz. per inventionem; and this is the moſt certain and the better Count; Per Coke Ch. J. 2 Bulſt. 313. Hill 12 Jac.

10. Trover and Converſion was brought againſt A. and B. A. pleads Not guilty, and that Iſſue is found againſt A. B. pleads, and traverſes abſque hoc, that he and A. converted &c. and that Iſſue is found for B. againſt the Plaintiff; yet it ſeemed to the Court that the Plaintiff ſhall have Judgment againſt A. upon the firſt Verdict; for although that the Declaration be, that they converted &c. yet that ſhall be intended jointly and ſeverally. And ſo the Opinion of the Court was againſt A. Noy 144. Gee v. Long.

11. In Trover the *Value of every particular Parcel ought to be ſhewn*, becauſe the Judgment is conditional to recover the Thing itſelf, and if not, then Damage in Lieu thereof. By Ley Ch. J. and Doderidge J. 2 Roll Rep. 447. Trin. 21 Jac. B. R. Goodwin v. Harwood.

He needs not ſhew the Day, becauſe it is loſt and the Defendant has eſloin'd it, and he is not to recover the Debt but Damages. Adjudg'd. Cro J. 637. pl. 7. Paſch.

12. In Trover and Converſion of a *Bond*, which Defendant being required ſuch a Day to deliver, he refuſed, and converted it to his own Uſe. Exception was taken, becauſe *no Date* of the Bond *was mentioned*, *nor the Day and Place of the Converſion* alleged. Sed non allocatur; for it being loſt, he did not perhaps know the certain Date of it; and if he ſhould recite a Date, and miſrecite it, it might be a Failer of his Suit; and the denying to deliver it upon Requeſt, is a Converſion, and the Aſſignment of the Place were not material, and the Day, Year, and Place are thereby alleg'd, and is ſufficient; and ſo a Judgment in C. B. affirm'd. Cro. C. 262. pl. 8. Trin. 8 Car. B. R. Wilſon v. Chambers.

20 Jac B. R. Upchard v. Tatam.

13. Trover &c. the Writ was, *that ſuch a Day at A. in Com. S. he was poſſeſſed of the Goods, and loſt them, and the Defendant found and converted them*; and in the Declaration he *ſhew'd the Trover and Converſion to be apud A. prædict'*. Exception was taken to the Writ, becauſe the Place of Converſion was not ſet forth. But adjudged by 2 Juſtices only in Court, that ſince the Poſſeſſion was ſuppoſed to be at A. the Loſs, Trover, and Converſion being *all join'd with a Copulative*, all ſhall be intended at one Place. Cro. Car. 525. pl. 3. Hill. 10 Car. B. R. White v. Haulie.

14. In Trover and Converſion of *Letters Patents* of a Wine Licence, Exception after Verdict was taken in Arreſt of Judgment, that the Plaintiff *did not allege that he was poſſeſs'd of them ut de Bonis Propriis*. Sed non allocatur, after a Verdict. Beſides the Declaration does mention, that the Defendant *knowing them to appertain to the Plaintiff, converted them*; which implies as much. And Judgment niſi &c. Hardr. 111. Paſch. 1658. in the Exchequer, Jones v. Winkworth.

15. In Trover *for a Sword* the Plaintiff *declar'd that he was poſſeſs'd ut de Bonis Propriis, and that Defendant cepit eadem Bona.* The Defendant demurr'd. Twiſden inclin'd that it was ill, as in Forgery of Falſe Deeds, and counts but of one; but Curia contra, and Judgment for the Plaintiff Niſi &c. 2 Keb. 188. pl. 20. Paſch. 19 Car. 2. C. B. Bird v. Watſon.

16. In Trover the Plaintiff declared that he was poſſeſs'd *de Bonis & Catallis* ſequen' ut de Bonis & Catallis ſuis propriis, viz. *de uno ſcripto Obligatorio, & de una Warrantia* &c. The Defendant pleaded in Abatement that the Bond and Warrant were not Chattels; and upon a Demurrer it was inſiſted, that by a Gift of all his Goods and Chattels, a Bond would paſs. And to this Opinion the Court inclined. 4 Mod. 156. Mich. 4 W. & M. in B. R. Cook v. Baſinger.

17. Error

17. Error out of C. B. *on Trover againſt ten*, wherein the Plaintiff declared of a Finding by ten, and a *Converſion by nine*, and Judgment againſt all ten; Per Cur. The Converſion is the Giſt of the Action; for if a Man find Goods, it is lawful for him to take them, wherefore it muſt be certainly Error; but if you can get it amended in the Common Pleas, we will get it amended here. 12 Mod. 101. Mich. 8 W. 3. B. R. Fuller v. Smith.

18. In Trover the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the *Converſion was laid on a Day certain in Michaelmas Term, and the Declaration was general, as of that very Term, without a Day certain*; as Memorandum, that on ſuch a Day &c. and therefore it muſt relate to the firſt Day of that Term; and if ſo, then this Action was brought before the Plaintiff had any Cauſe of Action, becauſe it was brought as the firſt Day of the Term; and the Converſion, which is the Foundation of the Action, was laid in the Declaration to be after the Term began; but Per Holt Ch. J. it is well enough, if the *Bill was filed after the Cauſe of Action accrued*; for there was no Action depending till that very Time, and the filing the Bill was on a Day certain. 3 Salk. 9. Sawen v. Hulbert.

(L. 4) Declaration good. In Reſpect of the Certainty therein of Things.

1. TRover and Converſion of *ten Cheſts and Coffers, without ſhewing How many Cheſts and How many Coffers.* Exception was taken for the Uncertainty; but Gawdy and Fenner J. cæteris abſentibus, held them all one; but if they ſhould be ſaid to be *diſtinct Things*, it would be ill. Cro. E. 818. pl. 12. Paſch. 43 Eliz. B. R. Draycot v. Piot.

2. Trover of ſuch and ſuch Goods (ſpecifying them) *cum aliis Implementis ad Valentiam* 3 *l.* without ſhewing what they were, and of other Parcels (ſpecifying them particularly) *cum aliis Neceſſariis*, but ſays not what; and that he was poſſeſs'd *de ſuibus*, without mentioning their Number. The Court held it ill for the Uncertainty Pro Implementis & Neceſſariis; and gave Judgment for the Defendant. Cro. E. 817. pl. 7. Paſch. 43 Eliz. B. R. Wood v. Smith.

So in Trover inter alia de duobus albis Nodis & *aliis parvis Taniolis*; after Verdict Judgment was ſtaid for the Uncertainty; it not appearing what or how many they were. 2 Lev. 85. Paſch. 25 Car. 2. B. R. Miller v. Green.

So in Trover of ſeveral particular Goods, & *aliis Utenſiliis* Anglice Implements; After Verdict and intire Damages, Judgment was ſtaid for the Uncertainty of aliis Utenſiliis, quot, quanta vel qualia they are. 3 Lev. 18. Paſch. 33 Car. 2. C. B. Blackhouſe v. Moore.

3. Trover *de una Parcella Piſcium Anglice Lings*, but becauſe he did not allege *what Parcel*, it was held to be ill. Cro. E. 865. pl. 46. Mich. 43 & 44 Eliz. in Cam. Scacc. Gramvell v. Rhobotham.

Trover *for ſix Parcels of Pewter Porringers.* It was objected that the Word Parcel is uncertain, and that it conſiſts of many Things in Number, and ſo 6 Parcels cannot be applied to 6 Porringers; but had it been 6 Pieces it had been better, tho' that is alſo uncertain. Roll Ch. J inclin'd it was well enough; for tho' the Words are not ſo proper, yet the Deſcription is good enough. And Judgment for the Plaintiff, Niſi &c. Sty. 199. Mich. 1649. Graves v. Drake.

Trover *of 20 Pieces ſive Parcellis Lieni* was held well enough, and Piece or Parcel are ſynonimous. Keb. 508. pl. 75. Paſch 15 Car 2. B. R. Shepherd v. Loyd.——But Trover *of a Parcel of Wares* is uncertain, tho' *Parcel of Cloth* is well enough; per Cur. Sid. 508. pl 75. Paſch. 15 Car. 2 B R. in Caſe of Shepherd v. Loyd, Arg.

Trover for *6 Parcels of Lead* was held good, notwithſtanding the Uncertainty, and the Plaintiff had Judgment. Vent. 106. Arg. cites it as 21 Car. 1. B. R Green v. Green.——But the Court held this to be a ſtrange Caſe. Vent. 106.——S. C. cited Freem. Rep. 442. in pl. 598. as held naught.

Trover *de quadam Parcella Fili* is certain enough; per Cur. Lev. 303. Mich. 22 Car. 2. B R. Arg. ——But where it was *de quadam Parcella Lintea*, and Verdict for the Plaintiff, Judgment was ſtaid for the Uncertainty. 2 Lev. 176. Mich. 28 Car. 2. B. R. Hicks v. Pendarvis.——Freem. Rep. 442 pl. 598. S. C. accordingly.

Trover of a *Parcel of Pack-cloths, Wrappers, and Cloths*, was held certain enough; for the Word (Parcel) in this Caſe only expreſſes one certain Thing, and not ſeveral Things at large, in which Caſe it would not be good; as a *Parcel of Barley*, and a Parcel *of Culme*, has been held good, and a Judgment in C. B. was affirm'd. Barnard. Rep. in B R. 65. Trin. 2 Geo. 2. Botamley v. Harriſon.

Cro. E. 819. pl. 14. Paſch. 43 Eliz. B.R. Baſſet v. Maynard S.C. but S P. does not appear. ——— Noy. 32. S.C. but S. P. does not appear.— 5 Rep. 24. b. 25. a. S. C. in B. R. but S. P. does not appear.

4. In Trover, the Plaintiff declared that he was *poſſeſſed of* 3000 *Cords of Wood*, but did *not ſay Ut de Bonis ſuis proprius, and that* afterwards the *Defendant cordas ligni præd' cepit* &c. *without ſaying any particular Quantity, or Prædictas cordas ligni*; *Nor* did he allege that the Defendant *Vi & Armis cepit*; After Judgment for the Plaintiff in B R. the ſaid Omiſſions were aſſign'd for Error, but the Judgment was affirm'd in the Exchequer Chamber, for it ſhall be intended all the Cords of Wood before mention'd; and likewiſe that theſe were his proper Goods. And that in an Action on the Caſe for a Trover, the Plaintiff need not allege the taking to be Vi & Armis. Moor 691. pl. 955. Hill. 36 Eliz. B. R. Maynard v. Baſſet.

S. C. cited by Twiſden J. 3 Keb. 694. pl 26. ——Sty. 25. Hill. 23 Car.

5. Trover of a *Library of Books* was held good, without expreſſing what they were; for the ſetting them down particularly would make the Record too prolix. Vent. 114. cites 7 Jac. Emery's Caſe.

Anon. S. P. held good, tho' not mention'd of what Language or on what Subject; for Books are not Things of different Species, be they of what Language or Subject they will.——Trover of *Books in a Study*, without ſaying How many, is good enough by the Addition of the Study. Sid. 98. per Cur. obiter.——Agreed per Cur. that it will lie for a Library of Books. 7 Mod. 142. Hill. 1 Ann. B. R.——Sty. 358. in Caſe of Heath v. Udal, Arg. cites Trin. 10 Car. Bedingfield's Caſe, S P. adjudg'd good; and Roll Ch. J. admitted it to be ſo.——2 Keb. 765. pl. 41. S. P. per Cur. Arg. but Trover *de diverſis Libris* is ill.

Palm. 393. S. C. in totidem Verbis.—— Lat. 216. Jermin cited Mich. 18 Jac. S. P.

6. The Count was *De tribus ponderibus Lanæ ad Valentiam* 80 *s.* After Verdict it was mov'd that Pondus ſignifies any manner of Weight; and of that Opinion were Doderidge and Haughton J. (abſentibus aliis) but if he had ſaid *Anglice* 3 *Weight of Wool*, this is certain; and Judgment ſtaid till the Plaintiff moves. 2 Roll Rep. 369. Mich. 21 Jac. B. R. Lawrence v. Turner.

and that the Plaintiff could not have Judgment, and that he was of Counſel in that Caſe.——S. C. cited as held naught, becauſe it was without an Anglice. Arg. Sty 214. in the Caſe of Ernely v. Aſhop, Trin. 1650. B. R. where the Count was De ducentibus ponderibus, Anglice Weight, Medicamenti Anglice Drugs, and Judgment for the Plaintiff, and that Judgment affirm'd.——S. P. but the Anglice of Ponderibus being wanting, the Judgment was revers'd, Niſi &c. Sty. 247. Hill. 1650. Powell v. Hopkins.

So Trover *de duobus Ponderibus Caſei, Anglice* 2 *Weighs of Cheeſe*, has been held good. Cited Vent. 211.

Trover *de decem Ponderibus*, Anglice *Weights*. Per Cur. In Trover, if the Jury can underſtand it, it will be well enough; for Damages only are to be recover'd therein; ſecus in Detinue, where the Thing itſelf is to be recover'd. 12 Mod. 3. Mich. 2 W. & M. B. R. Hook v. Galloway.

Jo. 443. pl. 4. S. C. but S. P. does not appear.

7. It will not lie for 2 *Sheaves of Corn*, becauſe of the Uncertainty, for want of ſhewing what Corn it was. March. 60. pl. 94. Mich. 15 Car. Hodges v. Simpſon.

8. Trover *of Stockings*, without ſaying of what Sort, is good; for were they Silk, or Woollen, or Worſted, they were but Stockings. Adjudg'd. Sty. 25. Paſch. 23 Car. B. R. Anon.

9. It

9. If there *are no proper Words to expreſs it by*, but it *is ſo deſcrib'd that the Jury may know what is meant by it*, it is well enough; per Roll Ch. J. Lat. 136. Mich. 24 Car. B. R.

10. It lies De decem Arboribus, tho' Exception was taken that Arbor is properly a Tree growing. Styl. 235. Mich. 1650. B. R. Popham v. White. S. C. cited that Trover of Trees cannot be now intended ſuch as are growing. Keb. 508. pl. 75. per Cur.

11. Trover of 20 *Beaſts, viz. Steers, Runts, and Heifers*, without ſaying what Number of each. Roll Ch. J. inclin'd that it was certain enough, and the Number may be averr'd, and the Cattle are all of one Kind. The Court would adviſe; but afterwards order'd Judgment. Niſi &c. Sty. 264. Paſch. 1651. B. R. Sawyer v. Ruſſel. S. C. cited accordingly by Twiſden J. Vent. 317. —Trover *de decem Juvencis, Anglice Bullocks and Heifers*, without ſaying how many of one and of the other; Judgment was given for the Plaintiff in C. B. but reverſed in B. R. Vent. 317. Mich. 29 Car. 2. B. R. Davis v. Price.——3 Keb. 693. pl. 22. Mich. 28 Car. 2. B. R. Price v. Davis, S. C. that Juvenca is a proper Word for Both, and the Anglice void; but that it was agreed that Trover of ſo many *Ovibus Matricibus & Vervicibus* is ill, for not diſtinguiſhing. And ibid. 694. pl. 26. Wild J. cites the laſt Point as Trin. 24 Car. 2. Rot. 462. ——S. C. cited Vent. 317.——S. P. per Cur. 3 Keb. 253. Mich. 25 Car. 2. B. R. in pl. 83. accordingly. ——S. C. cited 2 Sid. 174. 175. as held inſufficient. Trin. 1649. Stanton v. Lubcott.

12. Trover of a *Beam, Scales, and Weights*, was adjudg'd inſufficient, becauſe it did not appear what Weights; per Nicholas J. 2 Sid. 172. cites it as Mich. 1652. Webb v. Wayſtone. Ibid. Newdigate Ch. J. admits the S. C. to be ſo adjudg'd; but ſays it was upon another Reaſon, and that he himſelf was Counſel in it.——Sty. 360. Hill. 1652. Webb v. Waſhborn, S. C. but no Judgment.——S. P. ſaid to be not good, becauſe there may be more or leſs of the Weights uſed with the Scales, and therefore all together are uncertain as to the Quantities or Weights of them. G. Hiſt. of C. B. 99.

13. Trover *of* 3 *Packs of Linnen-Cloth, and other Goods*, was held certain enough. 2 Sid. 175. cited by Newdigate Ch. J. as Paſch. 1653. B. R. Harbott v. Lane.

14. Trover for 2 *Pieces of Cloth*, without ſaying whether Linnen or Woollen; this was alleg'd for Error, but over-ruled, and Judgment affirm'd Niſi &c. Sty. 419. Trin. 1654. B. R. Iles v. Windſor. *But* Trover *of* 7 *Pieces of Linnen Cloth*, without ſaying How many Yards, is uncertain and ill. 2 Show. 423. pl. 396. Paſch. 1 Jac. 2. B. R. Haws v. Randall.

15. Trover *of* 6 *Tons* was held void for Uncertainty; for the Word ſignifies ſeveral Things, but it is not certain what it ſignifies here; and Judgment that Nil capiat per Billam. Sty. 482. Trin. 1655. Clark v. Fitz-Williams. So of Tubs of Water, or *of Beer*, without ſhewing *how much they contain*, the Court inclin'd that it was uncertain, tho' it ſhall be underſtood for the Tub and the Beer. But they all held that Trover will lie *for a Caſe or Tub*, becauſe it is an individual Thing. 7 Mod. 142. Hill. 1 Ann. B. R. in Caſe of Blainfield v. Marſh.——1 Salk. 285. pl. 17. S. C. but S. P. does not appear.

16. In Trover and Converſion of *Letters Patents*, it was objected that the *Date of them is not ſpecified*; ſed non allocatur; becauſe there is ſufficient Certainty without it; beſides the Date is upon Record. Hardr. 111. Paſch. 1658. in the Exchequer. Jones v. Winckworth.

17. Trover for 4 *Curtains and Vallens* was adjudg'd good, and ſhall be intended Curtains and Vallens for a Bed; per Newdigate & Hill; but Nicholas e contra. 2 Sid. 174. Hill. 1659. B. R. Fecke v. Ward. Trover for *decem paribus Tegulorum & Velorum, Anglice Curtains and Valence*, was objected to be uncertain; but it was anſwer'd, that it ſhall be intended 10 Pair of Curtains and 10 Pair of Valence, and ſuch as uſually are Part of the Furniture of a Bed; and that in ſuch artificial Things it is ſufficient Deſcription to name them by the uſual Names, without ſhewing

ing the Quantity of Yards, or what Stuff they are made of; and 3 Juſtices being of that Opinion, they gave Judgment for the Plaintiff; tho' Twiſden J. held totis Viribus e contra, by reaſon of the Caſe of Webb v. Waſhborn, where he ſaid that Trover of 4 Pair of Hangings was adjudg'd uncertain. 2 Saund. 74. Paſch. 22 Car. 2. Tailor v. Wells.——Mod. 46. pl. 101. S. C adjudg'd accordingly.—— Sid. 445. pl. 3. S. C adjudg'd accordingly.——2 Keb. 623. pl. 18. S. C. ſays the Court agreed it to be uncertain according to Webb and Waſhborn's Caſe; but adjornatur.——Ibid. 640. pl 68. S. C. adjudg'd for the Plaintiff.

18. Trover for 2 *Pair of Pot-hooks &c. and Hangers.* After a Verdict for the Plaintiff, it was mov'd that Hangers was an equivocal Word; and tho' it was anſwered, that becauſe the Poot-hooks preceded the Hangers, it could not be intended any other than ſuch on which Pot-hooks generally hang, yet the Court held it too uncertain; for the Word does not immediately follow the Word Pot-hooks, but there are divers other mentioned between; and therefore Judgment was ſtaid. Raym. 2. Mich. 12 Car. 2. B. R. Seaman v. Barns.

Lev. 99. S. C. but S. P. does not appear. Keb. 353. 421. 428. 488. S. C. but S. P. does not appear.

19. Trover for the *Planks of a Granary*, without mentioning any certain Number of them, was held certain enough, by Reaſon of the Words (of the Granary) otherwiſe had it been of Planks generally. Sid. 98. pl. 28. Mich. 14 Car. 2. B. R. Maihu v. Flower.

S. C. cited Sid 263. Trin. 17 Car. 2. in pl. 13.—— S. C. cited Per Cur. 3 Keb. 253. Mich. 25 Car. 2. B. R. in pl. 83.

20. Trover for a *Billiard-table, Port, Sticks, and Balls*, cited Raym. 2. to have been adjudged good, becauſe the Port, Sticks, and Balls, ſhall be intended Things appurtenant to the Table.

21. Trover was brought *of Haynes or Harneſſes*, without ſaying what Number, or whether for Oxen or Horſes. This was mov'd in Arreſt of Judgment, but the Court gave Judgment for the Plaintiff. 2 Keb. 647. pl. 85. Paſch. 22 Car. 2. B. R. Faynt v. Waterman.

Mod. 289. pl. 36. Trin. 29 Car. 2. S. C. accordingly, by Rainsford and Moreton only in Court.——2 Keb. 703. pl. 59. Mich. 22 Car. 2. S. C. adjudg'd for the Plaintiff.

22 Trover *de tribus Struibus Fœni*, Anglice, *Ricks of Hay.* After Verdict it was mov'd, that *Struibus* is uncertain, and that it ought to be ſo many *Cart-loads*. But the Court held it certain enough, and gave Judgment for the Plaintiff. Lev. 301. Mich. 22 Car. 2. C. B. Weſt v. Davis.

2 Keb. 753. pl. 15. 765. pl. 41. Elſique v. Acton, S. C. accordingly.

23. Trover of *divers Garments* was held not good, becauſe not expreſs'd what Kind of Garments. Sid. 114. Paſch. 23 Car. 2. B. R. Elpick v. Acton.

Trover *of* 14 *Glaſs-Bottles and Meaſures* was mov'd to be uncertain. Sed non allocatur; and Judgment for the Plaintiff. 2 Keb. 681. pl. 71. Trin. 22 Car. 2. B. R. Kenion v. Wells.

24. Trover *de Viginti Menſuris*, without an Anglice, or ſaying what Meaſures, was held ill, and Judgment was ſtay'd. 2 Lev. 11. Trin. 23 Car. 2. in the Exchequer, Coleman v. Bard.

Vent. 211. Dioniſe v. Curtis, S. C. held good with the Anglice, and to be underſtood by the Subject-matter, tho' objected that Centena ſignifies a Hundred in a County

25. It was mov'd in Arreſt of Judgment, that the Count was *de* 32 *Centenis Udæ Plumbi, Anglice Lead-ore.* Sed non allocatur; and Judgment for the Plaintiff. 3 Keb. 14. pl. 21. Paſch. 24 Car. 2. B. R. Dennis & Turbell, and Curtis.

26. Trover was brought *of a Pair of Boots and Spurs*, without ſaying How many Spurs. And Per Curiam, it is well enough; for it ſhall be intended Spurs belonging to thoſe Boots, which is a Pair. Freem. Rep. 357. pl. 452. Mich. 1673. Hancock v. Hodges. 3 Keb. 253. pl. 83. S. C. and held good.

27. Trover *of Bottles*, without ſaying how many, was held uncertain, and Judgment ſtaid after Verdict. 2 Lev. 176. Mich. 28 Car. 2. B. R. Hicks v. Pendarvis.

28. Trover and Converſion, among other Things, *de uno Symbolo, Anglice a Cornelian Ring*, *de uno Pari Vittarum, Anglice a Suit of Knots*; and moved in Arreſt of Judgment, after a Verdict for the Plaintiff, that the Declaration was ill for Uncertainty; for a Suit of Knots may be 3 Yards, or 30 &c. but after ſeveral Times being ſpoken to, the Plaintiff had Judgment. Skin. 142. Mich. 35 Car. 2. B. R. Parkhurſt and Sheerton. Ibid. cites Sid. 445. Stile 360. 361. 370. and the Difference is between Trover and Replevin; for in Replevin this would be naught; and Mod. Rep. 290.

29. Trover *de uno Vaſe*, Anglice *Veſſel*, *Vini Hiſpanici*, but did *not ſet forth of what Wood the Veſſel was* made, and ſo no Meaſure for the Damages. But non allocatur; for it is intended to be made of ſuch Wood as Wine-veſſels uſually are. 2 Vent 67. Trin. 1 W. & M. in C. B. Bliſſe v. Froſt.

30. Trover *de una Amphora Saporis*. Exception was taken, that Saporis ſignifies Savour, whereof no Action lies. But the Court held that they would intend the Damages given for the Amphora, and nothing for the Saporis. 3 Lev. 336. Mich. 4 W. & M. in C. B. Chambers v. Warkhouſe.

31. Trover *of Whelps* was objected to be uncertain, and may be intended Whelps of Dogs, Bears, &c. ſo that it appears not what Kind they are of; and that no Property lies of them. But the Court ſaid they would intend them to be Dog's Whelps, and Trover has been maintain'd of a Dog; and gave Judgment for the Plaintiff. 3 Lev. 336. Mich. 4 W. & M. in C. B. Chambers v. Warkhouſe. 3 Salk. 135. pl. 40 S. C. accordingly.

32. Trover for 20 *Ounces of Cloves and Mace*. After Judgment by Default, and Writ of Inquiry &c. Holt Ch. J. doubted if good, without ſaying how much Cloves, and how much Mace, or that it was ſo many Ounces mingled, but ſaid that theſe were Uncertainties; yet if another Action ſhould be brought for the ſame Things, a Recovery in this Action would be a good Plea in Bar; and the Court gave Judgment for the Plaintiff. 2 Salk. 654. pl. 3. Paſch. 12 W. 3. B. R. Hartford v. Jones. Ld Raym. Rep. 588 S. C. and Holt Ch. J. ſaid, if there had been a Verdict in this Caſe, Judgment would be according; but this Caſe is after Judgment by Default; and Judgment was given for the Plaintiff, becauſe the Court *eſteem'd theſe to be Things mix'd.*——S. C. cited Per Cur. Barnard. Rep. in B. R. 65. Trin. 2 Geo. 2.

34. There is a great *Difference* where the thing for which the Action is brought is *one intire aggregate Body, tho' conſiſting of different Parts*, there the Count in Trover will be good of 2 Things without ſhewing How much of the one and How much of the other, or what the Things are. Per Holt Ch. J. Ld. Raym. Rep. 538. Trin. 12 W. 3. in Caſe of Hartford v. Jones. And therefore Trover *for a Ship cum Armamentis* was held good; whereas if the Action had been *for the Guns and Rigging ſeverally*, they ought to ſhew what and How much. Per Holt Ch. J. Ld. Raym. Rep. 588. cites Trin. 23 Car. 2. B. R. Boroughs v. Hall.

So Trover *of a Ship cum Virgis & Remis*, not ſhewing the Number is good; but if it *de Vergis* alone, it is ill. 3 Keb. 507. pl. 55. cites it as agreed in B. R.

So Trover for *Ship and Sails* is good, becauſe the Sails go to make up the aggregate Body; but if for Sails only, without ſpecifying the Number and Quality, it is ill. G. Hiſt. of C. B. 98. 99

35. The true *Reaſon why Certainty is ſo much required* is, becauſe a Recovery in this Action may be pleaded in Bar if another Action ſhould be brought for the ſame Cauſe. Per Holt Ch. J. Ld. Raym. Rep. 518. Trin. 12 W. 3.

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If Trover is brought *for a Box with Writings and Charters or Veſtments* it is good, becauſe the Trover is for the Trunk and for the Detention of the Goods thereon, which are withheld by the Detention of the Trunk, but not for the Value of the Goods; and therefore anciently they allow'd it only for a Trunk lock'd, but now they admit it tho' the Trunk be not lock'd, becauſe the Detaining is ſtill the ſame. G. Hiſt. of C. B. 99.

36. Trover will lie for *a Trunk of Linnen.* Agreed per Cur. 7 Mod. 142. Hill. 1 Ann. B. R. obiter.

1 Salk. 285. pl. 1. S. C. but S. P does not appear.

37. Trover of *a Caſe of Spirits* and of 50 *Gallons of Hot Waters*, is certain enough; and Judgment for the Plaintiff. 7 Mod. 141. Hill. 1 Ann. B. R. Blainfield v. March.

(L. 5) Trover. Plea.

1. ACtion upon the Caſe, that the Plaintiff was poſſeſſed of ſuch Goods ut de propriis, and he loſt them and the Defendant found them, and he converted them to his proper Uſe. The *Defendant ſaid that the Plaintiff pledged them to him for* 10 *l. by which he detain'd them* for the ſaid 10l. prout ei bene licuit *abſque hoc that he converted them* to his proper Uſe, prout &c. And a good Plea by ſome, but by others he ſhall plead Not Guilty, and give this Matter in Evidence for the Detainer. Br. Action ſur le Caſe, pl. 113. cites 4 E. 6.

And. 20. pl. 41. S. C. adjudg'd accordingly. — D. 121. pl. 14. &c. S. C. but no Judgment appears there to be given. — 2 And. 101. S. C. cited as adjudg'd for the Plaintiff.

2. In Trover, the Plaintiff *declared that he was poſſeſſed of a Chain of Gold, and being ſo poſſeſſed he loſt the ſame, and it came to the Hands of the Defendant*, who knowing it to be the Plaintiff's Chain, and intending to defraud him of it, *ſold it, and converted the Money to her own Uſe*; the Defendant *pleaded that ſhe did not ſell it Modo & Forma* &c. *and demanded Judgment Si Actio* &c. Upon Demurrer, the Opinion was that it was no Plea, and that it *ought to have concluded to the Country*, and not to have averr'd his Plea and demand Judgment; becauſe this Plea is no Bar but a General Iſſue. Bendl. 41. pl. 73. Hill. 1 & 2 P. & M. Mounteagle (Ld.) v. Worceſter (Counteſs of).

3. Action upon the Caſe, inaſmuch as the *Defendant found the Goods of the Plaintiff, and deliver'd them to Perſons unknown*, there *Non liberavit Modo & Forma is no Plea without ſaying Not Guilty*, where the *Thing reſts in Feaſance*. Br. Action ſur le Caſe, pl. 109. cites 3 M. 1. & 33 H. 8.

4. *And* if the Action was that *Whereas the Plaintiff was poſſeſs'd* &c. *ut de bonis Propriis*, and the *Defendant found them and converted them* to his own Uſe, it is no *Plea that the Plaintiff was not poſſeſs'd ut de Propriis*, but *ſhall ſay Not Guilty* of the Miſdemeanor, *and give in Evidence that they were not the Plaintiff's Goods*; and nevertheleſs it is true that Not Guilty as to him. Br. Action ſur le Caſe, pl. 109. cites 3 M. 1. & 33 H. 8.

5. In Trover and Converſion to his own Uſe per venditionem quibuſdam Hominibus ignotis; the Defendant *pleaded that the Goods were bailed to him to bail over to J. S. to whom he did deliver them abſque hoc that he did convert* them to his own Uſe *per Venditionem Hominibus ignotis*. It was moved that the Sale is not traverſable, quod Wray conceſſit; For the Converſion to his own Uſe is the Cauſe and Ground of the Action, and not the ſelling the Goods &c. 2 Le. 13. pl. 22. 19 Eliz. B. R. Anon.

4 Le. 4 pl. 14. Strangden v. Bur-

6. In Trover of Goods *brought in J.* the Defendant *pleaded that the Goods came to his Hands in D. in the ſame County, and that the Plaintiff gave*

gave to him all Goods which came to his Hands in D. Abſque hoc that he is Guilty of any Trover or Converſion in J. This was ruled to be a good Manner of Pleading, by Reaſon of the *Special Juſtification*. But where a Juſtification is *General* the County is not traverſable at this Day. Godb. 137. pl. 163. Mich. 27 & 28 Eliz. B. R. Strangden v. Barnell. net S. C. in totidem Verbis. Ibid. 106. pl. 217. S. C. in totidem Verbis.

7. In Trover, the Defendant pleaded a Sale in Market-overt; and upon Iſſue, found for the Plaintiff, tho' he did *not ſet forth any Place of the Converſion*, yet becauſe the Defendant had pleaded collateral Matter, and not the direct Iſſue, the Plaintiff had his Judgment by the Statute of Jeofails. Golds. 54 pl. 7. Trin. 29 Eliz. Anon.

8. In Trover and Converſion, the *Converſion is traverſable*; ſaid by Coke to have been adjudg'd; for it is the Subſtance of the Action, and the Tort ſuppoſed in him, and ſo may well be traverſed; for if one finds Goods but does not convert them, No Action lies; As where in Trover and Converſion of Goods the Defendant ſaid, he *took them Damage Feaſant and impounded them, abſque hoc that he converted them* to his own Uſe. Cro. E. 97. pl. 15. Paſch. 30 Eliz. B. R. Straſham's Caſe.

9. *Outlawry* was held by ſome to be a good Bar in Trover. 3 Le. 205. pl. 261. Trin. 30 Eliz. B. R. Markham v. Pitt. S. C. cited 2 Vent. 282. Arg. becauſe it lies all in Damages.

10. In Trover of Corn, the Defendant *pleaded that* before the Converſion *he was ſeiſed of certain Lands on which the Corn grew, and he ſever'd it, and afterwards caſually loſt it, and* that *it came to the Hands of the Plaintiff, who caſually loſt the ſame, and it came to the Hands of Defendant, and ſo he converted it* &c. And upon Demurrer, it was inſiſted that the Plea was not good, for the Plaintiff declares of a Trover of his Goods Ut de bonis ſuis propriis, and the Defendant pleads that he took his own Goods, which is no Anſwer to the Plaintiff; beſides, the Plea is that before the Time of the Converſion the Defendant was ſeiſed &c. and that after the Corn was ſever'd, but *not ſaid that he was ſeiſed at the Time of the Severance*; and ſo it might be that he had ſever'd the Corn of the Plaintiff. And this was held a material Exception; And Judgment for the Plaintiff. Le. 178. pl. 251. Trin. 31 Eliz. Ward and Blunt's Caſe. Cro. E. 146. pl. 9. S. C. and it was objected that the Plea amounted only to the General Iſſue, and that if it be a Plea he ought to traverſe the being the Goods of the Plaintiff, the Plaintiff having counted that they were his proper Goods, which he ought to anſwer to; and Judgment for the Plaintiff.

11. The Plaintiff declared that himſelf was poſſeſſed of certain Goods, which by Trover came to the Hands of the Defendant, who converted them to his own Uſe. The Defendant pleaded *that before the Trover ſuppoſed one A. was poſſeſs'd of the ſaid Goods as of his own proper Goods, and ſold them to the Defendant without any Notice that the Goods were the Plaintiff's.* Plaintiff demurr'd. Anderſon held the Plea not good; for the Plaintiff may bring his Action againſt the Finder or any other that gets the Goods after by Sale, Gift or Trover. Some thought that the Defendant having the Goods by Sale might traverſe the Finding; but ſee 27 H 6. 13. a. e contra. And Windham J. held that the Defendant might traverſe the Property of the Goods in the Plaintiff; and cites 12 E. 4. 11 Le. 189. pl. 267. Mich. 31 & 32 Eliz. C. B. Galliard v. Archer. The Plaintiff *declared on a Converſion of his own Goods*; the Defendant *juſtified for that the Property* of the Goods was *in C. and he before any Notice that they were the Goods of the Plaintiff, ſold them to the Defendant*; this is no good Title to juſtify the Converſion *without a Traverſe*; unleſs he had ſhew'd that he had bought the Goods in a Market overt. Le. 221. pl. 304. Mich. 32 & 33 Eliz. C. B. Vandrink v. Archer.

12. Trover *of 6 Oxen in London, and there converted.* The Defendant *pleaded that he ſeiſed them in the Manor of D. in Eſſex, as Goods waiv'd there*, and ſo juſtified, *abſque hoc that he was guilty in London.* The Court held it no Plea, it amounting only to the General Iſſue, containing no Matter In Trover and Converſion *of a Gelding at T. in the*

County of W. the Defendant pleaded Matter local to make the Place material. Cro. E. 174. pl. 5. Hill. 32 Eliz. B. R. Bullock v. Smith.

that N. was ſeiſed of the Manor of H. in the County of M. *where he &c. had Waifs and Strays, and that the ſaid Gelding was waived there; and he as Bailiff ſeiſed it, abſque hoc that he is Guilty in the County of W. &c* Upon Demurrer the Court held the Traverſe good, becauſe it was a local Juſtification; and it is not lawful to bring an Action in a foreign County. Noy 109. Trin. 2 Jac. C. B Court v. Blackman.

In Trover and Converſion of certain *Oaks in Exceſter*, the *Defendant conveyed a Property to the Marquis of W. before the Converſion ſuppoſed &c. and juſtified, that by his Command he took them at R. in Devon, and travers'd the Converſion at Exceſter.* Upon a Demurrer the Plea was adjudged ill, becauſe this Juſtification is not local, but this Matter might have been given in Evidence at Exceſter. Roll Rep. 396. pl. 20. Trin. 14 Jac. B. R. Buſh v. Luthborough.

D. 121. a. Marg. pl. 14. cites Hill 33 Eliz. S. P. —— *So* if a Man *finds my Horſe, and*

13. In Trover of Goods, it is no Plea that the Defendant *was always ready to deliver them to the Plaintiff, and yet is*; for the Goods are not in Demand, but Damages only for the Converſion, and ſo is only a Plea by Argument, and not a good Argument neither; and Judgment was given for the Plaintiff. Le. 221. pl. 304. Mich. 32 & 33 Eliz. C. B. Vandrink v. Archer.

rides him, and then delivers the Horſe to me, and I bring Trover and Converſion, it is no Plea that you have deliver'd the Horſe to me before the Action brought; for you ought to anſwer to the Converſion; Per Popham. Goldsb. 155. pl. 83. Hill. 44 Eliz. Anon. —— The abuſing the Horſe is a Converſion to his own Uſe; and therefore the Action will lie, notwithſtanding he is ready to deliver him; Per Windham J. Le. 225.

14. In Trover in London, the Defendant *pleaded that long before the Converſion* ſuppos'd, *J. S. was poſſeſs'd of theſe Goods as his own, at B. in Norfolk; and that he before the Converſion ſuppos'd caſually loſt them, and they came to the Hands of P. by Trover, who gave them to the Plaintiff, who loſt them in London; and the Defendant found them, and afterward did convert them to his own Uſe by the Command of the ſaid J. S.* as it was lawful for him to do. And it was mov'd that this is no Plea; for it amounts to the General Iſſue. But all the Juſtices held it a good Plea, for it confeſſeth the Poſſeſſion and Property in the Plaintiff againſt all but the lawful Owner. Cro. E. 262. pl. 50. Mich. 33 & 34 Eliz. C. B. Rookwood v. Feaſar.

15. Trover *of* 300 *Sheep*, 1 Dec. 36 Eliz. the Defendant *pleaded he was Sheriff* of the County of L. and that J. S. recover'd againſt the Plaintiff 100 l. *and a Fieri facias was deliver'd to him* 1 Oct. 35 Eliz. *by Virtue whereof* the 20th Oct. 35 Eliz. *he took the Sheep, and* 22 Oct. 35 Eliz. *ſold* 104 of them for 40 l. Parcel of the 100 l. *and the* 192 *Reſidue remained in his Hands pro defectu Emptorum*, which is the ſame Converſion. *The Plea* is not good. 1ſt. Becauſe he *doth not* by his Plea *confeſs any Converſion.* 2dly, Becauſe he juſtifies that Converſion in October 35 Eliz. but *meets not with the Plaintiff in the Time.* And 3dly, Becauſe he *makes no Juſtification for the Sheep.* Judgment was appointed to be entred for the Plaintiff, but was afterwards ſtay'd for the Equity of the Matter. Cro. E. 433. pl. 43. Mich. 37 & 38 Eliz. B. R. Aſcue v. Sanderſon.

16. In Trover of Goods the Defendant *juſtified* the taking *Damage feaſant, abſque hoc that he converted them aliter vel alio modo.* Adjudged that this Plea is not good, becauſe he doth not confeſs any Converſion; and the Plea amounts to Not guilty. Cro. Eliz. 435. pl. 48. Mich. 37 & 38 Eliz. B. R. Dee v. Bacon.

In Trover the Defendant pleaded *that J. S. was poſſeſs'd of the ſaid Goods, and*

17. In Trover *for* 9 *Oxen*, the Defendant *juſtified by a Sale in a Market overt*, and adjudged good, *without alleging any Poſſeſſion or Property in the Seller, or that Toll was paid*; for that ought to come on the other Side, to avoid the Sale. Cro. Eliz. 485. pl. 1. Mich. 38 & 39 Eliz. B. R. Comyns v. Boyer.

ſold them to him in Market overt. The Queſtion was, if this was a good Plea, becauſe it amounts to Not guilty.

guilty. Curia advisare vult. Godb. 267. pl. 369. Hill. 15 Jac. B. R. Biffe v. Tyler. ——Roll Rep. 273. pl. 48. S. C. Crooke, Doderidge, and Haughton, seemed to think the Plea good.

18. In Trover of Trees, the Defendant *pleaded that the Queen was seised in Fee of the Manor of D. where* the Trees were growing, and *granted it to the Defendant in Tail*, whereby he was seised; and that J. S. cut the Trees, and granted them to the Defendant, who lost them; and that the Defendant found them, and converted them. The Plaintiff *replied De Injuria sua propria*; but held ill, where the Defendant makes Justification by claiming an Interest in the Freehold to himself; but where one claims not an Interest, but justifies by the Command of others, it is otherwise. Cro. E. 539. pl. 2. Hill. 39 Eliz. B. R. Canterbury (Archbishop) v. Kemp.

19. Trover *for a Horse, and selling him, and converting the Money to his own Use*, the Defendant *confess'd that it was the Plaintiff's Horse, and that J. C. found and deliver'd him to the Defendant, to re-deliver upon Request, which he did before the Action brought, absque hoc that he sold him, and converted the Money* to his own Use. Adjudged that this Traverse was ill, because *the Converſion of the Money* to his own Use *was a superfluous* Allegation, and the Defendant having by his Traverse made such superfluous Matter Parcel of the Issue, it is therefore ill. Cro. E. 554. 555. pl. 9 Pasch. 39 Eliz. B. R. Kynersly v. Barnard. S. C. cited D. 221 a. Marg. pl. 14 that the Defendant pleaded he distrain'd him Damage feasant, absque hoc that he sold him, and adjudg'd no Plea, but ought to have pleaded the general Issue.

29. In Trover of Goods the Defendant *justified as a Servant to the Sheriff of Middlesex, because the Plaintiff had stolen* those Goods, *and carried them to D. in the County of Middlesex, at which Place the Defendant seised them ut Bona Waviata.* It was adjudg'd for the Plaintiff; for he *ought to have alleged that a Felony was committed, and that the Goods were waived by the Felon*, which is not done. Cro. E. 611. pl. 18. Pasch. 40 Eliz. in C. B. Davies's Case.

21. Trover against the Defendant for *taking an Ox*; the Defendant *pleaded that the same Plaintiff, and another, now dead, brought Trespass against one W. for taking the same Ox, who justified* the taking *in the Right of the now Defendant for an Heriot* due to him &c. and *that upon a Demurrer* to the Plea *in that Action of Trespass, the Defendant W. had Judgment, which* Judgment *the now Defendant pleaded in Bar to this Action of Trover.* Upon a Demurrer Walmsley and Kingsmill held the Bar good, because upon the first Judgment on Demurrer the Property of the Ox was admitted in the Defendant, in whose Right the Justification was; and therefore the Plaintiff shall not have this Action without new Cause; and tho' he be a Stranger to the Record by which the Plaintiffs were barr'd, yet he is privy to the Trespass, and so may well plead it, and take Advantage thereof. And to this the other Justices agreed, supposing it to be for one and the same Cause; but Anderson and Glanvill thought it no Bar, a Bar in a wrong Action being no Bar in a right one; and here these Actions are of several Natures, and a Bar in the one cannot be a Bar in the other. Walmsley agreed that a Bar in Trespass on Not guilty pleaded, is no Bar to a new Action, because it appears not; but the Verdict was upon the Misprisal of the Nature of the Action; and so upon Demurrer. Et adjornatur. And afterwards the Matter was ended by Arbitrement. Cro. E. 997. pl. 24. Pasch. 41 Eliz. C. B. Ferrers v. Arden.

22. In Trover the Plaintiff declared, that 8 Mail 4 Jac. he was possess'd in such a Ward in London, of such and such Goods; and that 1 Oct. 5 Jac. they came to the Defendant's Hands, who knowing them to be the Plaintiff's Goods converted them &c. The *Defendant pleaded that before the Plaintiff had any thing &c. W. D. was possess'd* of the said Goods,

as of his proper Goods, and on such a Day Anno 4 Jac. *for a valuable Consideration gave them to Defendant, who 1 Maii Anno 5. lost them, and that 2 Maii Anno 5. they came to the Hands of W. D. again at London, who on the same Day gave them to the Plaintiff,* by which he was possess'd, and lost them &c. and the Defendant found and converted them. The Bar was adjudg'd not good, because it neither traverseth, nor confesseth and avoideth the Plaintiff's Title, but gives only Colour of Possession without Right or Property, and this upon a defeasible Gift by W. D. Yelv. 173. Hill. 7 Jac. B. R. Priestly v. White.

Yelv. 194. Gomersale v. Medgate, S. C. adjudg'd accordingly; for the Distress is but in Nature of a Pledge to be safely kept; and therefore the Defendant confessing *an Intermeddling with the Goods, which is not justifiable,* this *is a Conversion.*

22. In Trover for Goods, the Defendant *pleaded that he took them as Bailiff of the King for Distresses upon a Plaint in Curia Maneriі, and sold them.* And it was thereupon demurr'd, and adjudg'd ill; for upon a Distringas the Cattle shall not be sold, especially in a Court Baron, altho' it were in the King's Court. Cro J. 255. pl. 13. Mich. 8 Jac. B. R. Gomersale v. Wayts.

2 Bulst. 250. cites S. C. and S. P. and that where the Conversion is confess'd and justified, there needs no Traverse.

24. In Trover and Conversion of 2 Tun of Wine, the Defendant *pleaded that the King was seised* in the Right of the Crown *of the Prisage of all Wines* imported &c. *and* being so seised, *granted to Sir T. Waller the Office of Chief Butler* &c. for Life, *who by himself or his Deputy had used to take for the Use of the King 2 Tun* of Wine out of every Vessel bringing in 20 Tun &c. *and so justifies the taking for the Use of the King.* Upon Demurrer it was *objected, that the Defendant did not traverse the Conversion supposed by the Plaintiff*; for this is a Conversion by the Defendant himself, and he justifies a Conversion to the Use of the King, which is another Conversion than what he is charg'd with. But resolved per tot. Cur. that he need not traverse the Conversion, nor plead otherwise than he has done, because the Intermeddling supposed by the Plaintiff is confess'd by the Defendant to be to the Use of the King, which is Matter in Law upon the Plea in Bar whereof the Court is to adjudge, and Matter in Law shall never be travers'd; and if the Seisure should be adjudg'd unlawful, then he himself is guilty of the Conversion, by having confess'd, in Point of Judgment, a Possession of the Goods, and an intermeddling with them. Yelv. 198. Hill. 8 Jac. B. R. Kenicot v. Bogan.

And the S. P. was adjudg'd accordingly, Mich. 11 Jac. Bulst. 134. 135. Holman v. Karwithy.

25. In Trover, the Defendant by his Plea in Bar *intitled himself to the Goods by a Sale to him by &c.* but *made no Answer to the Property and Possession alleged to be in the Plaintiff,* viz. *that he was possess'd of them as of his own proper Goods*; and for that Cause only it was adjudg'd against the Defendant in the Exchequer Chamber, by all the Judges. 2 Bulst. 135. cited in the Case of Holman v. Karwithy, as the Case of White v. Price.

26. Trover *of a Horse.* Defendant *pleaded that he was a common Hostler, and took the Horse to Livery to Rack and Manger, and that the Horse died in his Custody*; this Plea was adjudg'd ill, because it amounts only to the General Issue. Roll Rep. 22. pl. 29. Pasch. 12 Jac. B. R. Whitaker v. Collet.

2 Bulst. 201. S. C. accordingly, and tho' the Defendant justified at D. where the Trover and Conversion was laid at L. and did not traverse the Trover at L. yet that was held only an Inducement to the Action; for he shews that he has not converted the Plaintiff's Goods, but his own proper Goods, he having convey'd to himself a Property, and Judgment for the Defendant.

27. In Trover the Defendant *justified as Bell-man by Force of a Custom*; and good, because it *is more than the General Issue.* Roll Rep. 44. pl. 12. Trin. 12 Jac. B. R. Hill v. Hawkes.

28. Trover was brought *in D.* The Defendant *pleaded the Custom of London, that by Sale of Goods in a Shop there the Property is alter'd,* and that

that he bought thoſe Goods in a Shop there, by Force whereof he converted them at D. It was objected that this amounted only to the General Iſſue, quod fuit conceſſum, per Coke and Doderidge. Roll Rep. 397. pl. 22. Trin. 14 Jac. B. R. Row v. Tompſon.

29. In Trover and Converſion *of ſo many Hogſheads of Cyder in London*, the Defendant *pleaded Bailment* of them to him, *to deliver over to J. S. in the County of Oxford &c. abſque hoc that he converted them at London, and alibi extra Com' Oxon.* This Plea in Effect amounts only to the General Iſſue, and therefore not good, and Judgment for the Plaintiff. 3 Bulſt. 209. Trin. 14 Jac. Philips v. Weekes. Roll Rep. 395. pl. 19. S.C. adjudg'd for the Plaintiff.

30. Trover *of* 100 *Sheep*, and counted that 25 Mar. 19 Jac. he was poſſeſs'd of and loſt them; and that 30th April the ſame Year they came to the Defendant's Hands, who then converted them. The Defendant *as to* 11 *of them pleaded Not Guilty*, and *as to the reſt that Plaintiff had before brought Treſpaſs againſt the Defendant and one J. S. for taking and carrying away* 100 *Sheep, and declared of taking ſo many* 14 *April* 19 *Jac. They pleaded a Recovery in Debt by the Defendant againſt E. H. and that the ſaid E. H. was then poſſeſs'd of the ſaid* 89 *Sheep, and that by Virtue of a Fi. Fa. they were ſold to him, whereupon he took them into his Poſſeſſion, and found for the Plaintiff, and Damages aſſeſs'd to* 2 *d. and Judgment thereupon, and* 6 *l. Coſts, and averr'd the Taking and Driving, for which the Recovery was had, and the Converſion in this Action was all one &c.* Reſolved by 3 Juſtices that the Plaintiff recover; for the Damages of 2 d. for the 89 Sheep being ſo ſmall, the Court ſhall intend it to be only for the Taking and Driving, and that the Plaintiff had them again, and not in lieu of the Value of them; for if it ſhould be taken for the Value of them, then the Plaintiff ſhould loſe his Property in them, and the Law will rather intend thoſe Damages given only for the Taking and Driving, and that the Plaintiff had them again, and loſt them after, and that the Defendant found and after converted them; and that the firſt Action was for the firſt Taking and Chaſing, and the 2d for the Converſion, ſo as both may ſtand together, which is confeſs'd by the Demurrer; and that the Damages were given for the firſt Taking &c. and not for the Converſion, and therefore the Plaintiff ſhould recover. But Yelverton contra, that Cepit & Abduxit implies the Defendant's having them, and ouſting the Plaintiff of his Poſſeſſion; and tho' the Damages are ſmall, they ſhall be intended given for the Sheep, and ſo he cannot have Action for converting them afterwards. But adjudg'd for the Plaintiff. Cro. C. 35. 36. pl. 9. Paſch. 2 Car. C. B. Lacon v. Bernard. Hutt. 81. Laicon v. Bernard S. C. adjudg'd for the Plaintiff, that the 2 d. cannot be intended for the Value of the Sheep, and when a Treſpaſs is done, the Plaintiff may retake his Goods and yet have Treſpaſs for the taking them, and every taking, viz Abduxit imports a Chaſing, and no one will ſay, that by Recovery in Treſpaſs, when the Plaintiff has his Goods, the Defendant ſhall thereby have the Property; tho' if Plaintiff recovers the Value, he thereby waves the Property, and cites 2 R. 3. 14. 4 H. 7. 5. 6 H. 7. 8. But Yelverton J. at firſt hæſitavit, tho' he afterwards agreed.——S. C. cited by Roll Ch J. Sty. 202. Hill. 1649. and ſaid it is hard to maintain this Caſe; for Cepit & Abduxit intends that the Owner has not the Sheep again; but otherwiſe it would be, if the Action had been for the driving of them only.——See Winch's Ent. 99.——S. C. cited Arg. 3 Mod. 1. 2.——S. C. cited 2 Show. 211. 212.

31. In Trover *of* 2 *Loads of Vetches* &c. the Defendant *juſtified by the Command of H. to whom Part of the Land belong'd on which the Vetches did grow, and the other Part to B. in Right of his Wife* &c. The Plaintiff demurr'd becauſe he juſtified by the Command of 2 generally, and he cannot juſtify upon the Land of one by the Command of the other, but ſhould allege ſeveral Commands. But Doderidge and Whitlock, only preſent, held it well enough, that tho' it was a joint Command, yet the Parties having ſeveral Intereſts, it ſhall be taken as ſeveral Commands, reddendo ſingula ſingulis; but becauſe the Defendant did *not ſhew particularly on whoſe Lands the Vetches grew*, but only that Part did grow on the Land of the one, and Part on the Land of the other, the Plea was adjudg'd not good, becauſe it was uncertain. Poph. 208. Hill. 2 Car. B. R. Sparrow v. Sherwood.

Trover

32. Trover of *divers Loads of Corn.* The Defendant pleaded, and *intitled himself to them as Tithes sever'd.* The Plaintiff demurr'd, for that the Plea amounted only to the General Iſſue; and tho' it was anſwer'd that it concerns Matters in the Realty, viz. Tythes, and Title is pleaded, and as it were confeſſes the Plaintiff's Poſſeſſion, and as a General Bar in Treſpaſs, and Colour given, yet non allocatur; for this Action comprehends Title in it, and a Plea amounting only to the General Iſſue is not allowable, it being ſpecially ſhewn for Cauſe of Demurrer. Adjudg'd for the Plaintiff without Argument. Cro. C. 157. Paſch. 4 Car. B. R. Lynner v. Wood.

There is *no Plea* in Trover *but a Releaſe, or Not Guilty*, every Special Plea in Juſtification being but Tantamount; per Twiſden J. Keb. 305. pl. 16. Trin. 14 Car. 2. B. R. in Caſe of Devon v Coridon.——S. P. by the Ch. J. ſaid to have been often held. 2 Barnard. Rep. in B. R. Paſch. 7 Geo. 2. Anon. ——Holt Ch. J. ſaid he never knew but one Special Plea in Trover good, and that is in Yelv. 198. 2 Salk. 654. pl. 2. Mich. 10 W. 3. B. R. in Caſe of Hartfield v. Jones.

33. In all Actions of Trover *of Goods, every Plea Special with Colour amounts only to the General Iſſue*; but it is *otherwiſe* if it concerns *Title of Land.* Lat. 185. obiter, and affirm'd by Jones J.

34. In Trover brought by Executor, the Defendant *pleaded that the Teſtator died inteſtate, and* that *Adminiſtration was committed to A. who ſold the Goods to the Defendant*; to which the Plaintiff demurr'd, as amounting but to the General Iſſue, and ſo was the Opinion of the Court. Keb. 318. pl. 44. Trin. 14 Car. 2. B. R. Tarling v. Dealton.

2 Mod. 318. Putt v. Roſter, S. C. ſays the Juſtification in the firſt Action was for a Heriot, and that Defendants had Judgment upon a Demurrer.—

35. In Trover for certain Goods, Defendant *pleads that the Plaintiff before brought Treſpaſs Vi & Armis for the ſame Goods, and* upon Not guilty pleaded, a *Verdict and Judgment for the Defendants* &c. Upon Demurrer it was adjudg'd by 3 Juſtices, Dolben hæſitante, that this is no good Plea, becauſe Trover will in many Caſes lie where Treſpaſs will not, and here it may very well be preſum'd that the *Plaintiffs in the firſt Action only miſtook their Action*; for they brought Treſpaſs where their Evidence would not prove a wrongful Taking, but only a Demand and Denial; and Verdict paſſing againſt them in that Action, they were forced to begin in this new Action of Trover. Raym. 472. Mich. 34 Car. 2. B. R. Putt &c. v. Rawſterne &c.

3 Mod. 1. S. C. adjudg'd accordingly.——2 Show. 211. pl. 219. S. C. adjudg'd accordingly, Dolben hæſitante. Pemberton Ch. J. ſaid he agreed, that when the original Action is a tortious Converſion, there either Treſpaſs or Trover will lie, and ſuch Matter being diſclos'd, a Verdict for the Defendant in the one will be a Bar to the other.——Skin. 48. pl. 2. S. C. by the Name of Foot v. Raſtall, adjornatur. And Ibid. 57. S. C. mentions nothing of Dolben's Doubting, but ſays the Court was of Opinion that it was no Bar; for the Plaintiff's Property is not barr'd by the Judgment for the Defendant, but that he may ſeiſe them if he can get at them; ſo that the Property not being barr'd, the Plaintiff's Demand and the Defendant's Denial of them is a Converſion, tho' not ſuch as the Court will judge a Converſion, yet ſuch as the Jury always judges to be ſo, and the Court directs them ſo to do. Judgment Niſi.——Pollexf. 634. S. C.——S. C. cited 2 Vent. 169. 170.——S. C. cited Show. 146.——2 Mod. 318. Putt v. Roſter, ſeems a Miſtake in entring a Caſe cited, as if it was the Principal Caſe; for which ſee Ferrars's Caſe, ſupra pl. 21.

Show. 146. Hill. 1 W & M. in C. B. the S. C. and upon Demurrer, the whole Court were clear of Opinion it was a good Bar upon the Authority of Ferrars's Caſe, which ſee

36. In Trover for certain Goods, the Defendants *plead that the Plaintiff had before brought Treſpaſs Vi & Armis* &c. *againſt the ſame Defendants, for taking and carrying away the ſame Goods.* And upon Not guilty there was a Special Verdict, which the Defendants in their Plea ſet forth verbatim, *and that the Court then gave Judgment that the Plaintiff nil capiat* &c. and that the Defendants eant inde ſine Die, and avers the Goods in both Declarations to be the ſame, and the Taking and Carrying away &c. ſuppoſed in the ſaid Action, and the Coming to the Hands of the Defendant &c. in this Declaration, and the Cauſe of Action, to be the ſame &c. The Court held this a good Plea; but took the Caſe of Putt v. Royſton as a Caſe of the ſame Nature; for tho' the Iſſue was general, yet in regard of the Averments, which in every ſuch Plea

must

must be, it appears to the Court that the Matter was the same, as well as here it does upon the Special Verdict; and were it not the same, so as the Plaintiff was barr'd to the former by mistaking the Nature of his Action, the Averment might be travers'd; and therefore, by reason of that Case, and the Importunity of the Plaintiff, Leave was given to speak further to the Case the next Term. 2 Vent. 169. 170. Pasch. 2 W. & M. in C. B. Lechmere v. Toplady. [supra pl. 21.] and that notwithstanding the Case of Putt v. Royston, adjudg'd contra in B. R. which Case

Pollexfen Ch. J. said he never was satisfied with, and as he remember'd a Writ of Error was brought, and the Judgment question'd; but afterwards agreed that he saw no Difference between a General and a Special Verdict. However they all thought the Judgment in the one a Bar to the other, because the Actions were of the same Nature; and Judgment for the Defendant.

37. In Trover the Defendant pleaded *that the Goods were cast away, and he saved and detain'd them till he was paid for his Pains* in the Salvage. Upon Demurrer Holt Ch. J. held that he might detain; for Salvage is allow'd by all Nations; but the Plea is naught; for if the Detainer be lawful, he *does not confess a Conversion*; and the Rule was in the principal Case to waive this Plea, and to plead Not Guilty. 2 Salk. 654. pl. 2. Mich. 10 W. 3. B. R. Hartford v Jones. Ld. Raym. Rep. 393. S. C. accordingly.

38. A *former Recovery in an Indebitatus Assumpsit* may be pleaded in Bar of an Action of Trover brought for the same Thing; as it would have been a good Plea in Bar, that the Defendant sold the Thing for which the Trover is brought, and paid [the Money] to the Plaintiff in Satisfaction; but it may be a Doubt if this Recovery can be pleaded before Execution. 2 Ld. Raym. Rep. 1217. Per Holt Ch. J. Mich. 4 Annæ.

(M) Upon an Assumpsit. What Words [or Act] will make an Assumpsit.

1. If there be a Communication between the Fathers of A. and B. as to a Marriage between the said A. and the Daughter of B. and B. tunc & ibidem, affirm'd and publish'd to the Father of A. quod daret ei qui maritaret, his said Daughter, by his Consent 100 l. and after A. marries the Daughter of B. by his Consent, yet this Affirmance and Publication of B. shall not raise any Promise whereupon an Action upon an Assumpsit may be brought; because these Words do not include any Promise. Trin. 3 Jac. B. R. between *Week and Tibolt*, per Curiam. Noy 11. S. C. accordingly; and it was not averr'd to whom the Words were spoke; and it is not reasonable that the Defendant should be bound

by such general Words spoke to excite Suitors.——See (Z) pl. 2. S. C.

2. By the Custom of London, if any Merchant commorant at Middleburrough, and trafficking between Middleburrough and London, directs any Bill of Exchange to any Merchant commorant in London, and trafficking between London and Middleburrough, to be paid to any Merchant or other Person, and the Merchant to whom it is directed subscribes it, this shall be an Assumpsit in Law, upon which an Action upon the Case lies. Mich. 10 Jac. B. R. between *Hoft and Tayler*, admitted. Cro. J. 306. pl. 3. Mafke v. Taylor, S. C. It was alleg'd that the Defendant accepted thereof secundum usum Mercatorum;

but it was moved in Arrest of Judgment, because the Defendant was not averr'd to be a Merchant at the Time of the Bill accepted. [No Judgment.]——See Tit. Bills of Exchange.

Drawing a Bill is an actual Promiſe. 1 Salk. 128. pl. 10. Mich. 11 W. 3. B. R. Starky v. Cheeſman.——Carth. 510. S. C. & S. P. accordingly.———Ld. Raym. Rep. 538. 539. S. C. & S. P. accordingly.

But if A. delivers a Book or Charter to B. but there is no expreſs Promiſe to deliver it back again, an Aſſumpſit will not lie. Clayt. 33. pl. 57. Per Berkley J. Aug. 11 Car. Evans v. Yeoman.

3. If A. *delivers an Obligation to B. to re-bail to A.*——A. ſhall have an Action on the Caſe, without an expreſs Aſſumpſit; per Anderſon. Le. 297. pl. 406. Hill. 28 & 29 Eliz. and ſaid it was uſual and frequent in the King's Bench.

4. Every *Contract Executory implies an Aſſumpſit* to pay Money at the Day agreed or immediately, if no time be limited; but it is not ſo of an Indeb. Aſſ. becauſe the Cauſe does not appear. Said by Popham to be the Opinion of all the Juſtices of England. Mo. 667. pl. 916. Mich. 40 & 41 Eliz. Morgan v. Slade.

5. The Plaintiff declared that *T. was indebted to him, and appointed J. S. the Defendant, to whom he deliver'd 50 l. to pay it to the Plaintiff in Part of the ſaid Debt*, whereupon the *Plaintiff came to J. S. and demanded the 50 l. who anſwer'd that he was buſy then, but if he would come ſuch a Day he would pay him.* The Plaintiff came at the Day, but J. S. refuſed to pay him. Per Popham Ch. J. when T. deliver'd the Money to J. S. to deliver to the Plaintiff, an Agreement is included thereby to deliver it to him, which will charge him in Aſſumpſit to him that ought to have the Money; And Tanfield agreed, that when there is any precedent Matter which cauſed the Delivery, as here it was by a Debt, the Delivery is not countermandable; but here is another Conſideration beſides the Debt, viz. the Coming to the Defendant's Houſe to fetch the Money; to which Yelverton agreed; whereupon it was adjudg'd for the Plaintiff. D. 272. a. Marg. pl. 31. cites Paſch. 5 Jac. B. R. Gilbert v. Ruddeard.

6. Where-ever one *Acts as Bailiff* he promiſes to render Accout. Per Holt Ch. J. 1 Salk. 9. pl. 1. Hill. 2 W. & M. B. R. in Caſe of Wilkin v. Wilkin.

7. If 2 Men ſubmit to the *Award* of a 3d Perſon, they two do alſo thereby promiſe expreſsly to abide by the Determination; for *agreeing to refer is a Promiſe* in itſelf. 6 Mod. 35. Mich. 2 Ann. B. R. per Holt Ch. J. in Caſe of Squire v. Grevell.

But ſee 2 Saund. 66.—Holt ſaid it was a *metaphyſical Notion*; for the Law makes no Promiſe but where there is a Promiſe of the Party. Ld. Raym. Rep. 538. Hill. 11 W. 3 in Caſe of Starke v. Cheeſeman.———But ſee 5 Mod. 13 Mich. 6 W. & M. where Holt Ch. J. ſaid, that Holding a Wager is a Promiſe in Law to deliver it if won.

8. There is no ſuch thing as a *Contract* or Promiſe *in Law*, tho' there is ſuch Expreſſion in ſome of the Books. Per Holt and Powel. 6 Mod. 250. Mich. 3 Ann. B. R. in Caſe of Bourkmire v. Darnell.

9. An *Officer* (as Regiſter in Chancery &c.) *receives his Fee for doing the Duty of his Office* (as to make Entries &c.) and neglects the doing it, ſuch Acceptance of his Fee amounts by Implication of Law to a Promiſe and Agreement, and if the Party or Suitor pay Coſts for Irregularity an Action lies; except where ſuch Officer is an Officer in the Chancery (as in the Principal Caſe) the Court of Chancery will not ſuffer this Matter to be examined by any other Court, but will determine it itſelf, as in all like Caſes in a ſummary Way; Arg. and ſo held by Ld. C. King. 2 Wms.'s Rep. (657) Mich. 1731. James v. Philips.

(N) In

(N) In what Cases an Action upon the Case lies, where where Debt lies. What shall be an Assumpsit in Law to have an Action.

1. If a Man Accounts, and upon the Account is found in Arrear to a certain Sum, and presently in Consideratione inde, assumes to pay the Debt at a Day; an Action upon the Case lies for this after the Day, for the Assumpsit commences with the Certainty of the Debt. 14 Jac. * *Janson against Colomore*, 11 Jac. *Jesson and Brier* adjudged. Trin. 12 Jac. B. R. this was so adjudged also. * Roll Rep. 399 pl. 21. S.C. adjudg'd for the Plaintiff But by Doderidge J. (and Crooke seem'd of the same Opinion) if the Action had been brought merely on a Contract, and not upon such a Finding in Arrearages, there an Indeb. Ass. generally had not been good.——3 Bulst. 208. S. C. adjudg'd that the Consideratione inde is good without shewing any Consideration of Forbearance, because it was not an original Debt but is reduced unto a Debt by the finding him so much in Arrears.——Mo. 854 pl. 1169. adjudg'd. Colimore v. Janson S. C.—— See (Q) pl. 17. S. C.

2. If a Man delivers Money to B. to my Use, I may have an Action upon the Case against B. for this Money, because I may have an Action of Debt against him. Trin. 14 Jac. B. R. *Beckingham and Lambert against Vaughan*, adjudged. Mo. 854. pl 1168. Babington v. Lambert S. C. adjudg'd for the Plaintiff.——Roll Rep. 391. pl. 11. S. C. adjudg'd for the Plaintiff.——See (M. c) pl. 9. S. C.—— See (U) pl. 51. and (Z) pl. 5. 7. 13.

3. If two submit themselves to the Award of J. S. and he awards a collateral Matter to be done, and not any Money to be given, no Action upon the Case lies for not performing thereof, nor any Action of Debt, inasmuch as there is not any Money [awarded.] Mich. 10 Jac. B. between *Penruddock and the Lord Montegle*. Resolved per Curiam. Award upon Parol Submission was, that Defendant should pay 50 l. and upon Payment thereof the Plaintiff should deliver the Defendant certain Writings and make a Release to him. After Verdict Judgment was stay'd and given for the Defendant, because the Award is void, the Defendant having no Remedy for the Writings and Release; for it implies not a Promise to perform it. Lev. 113. Mich. 15 Car. 2. B. R. Tilford v. French.—— Keb. 599. 600. pl. 72. S. C. and by Hide and the Court, the mutual Submission is no Promise in itself, but only an Evidence of it.——Ibid. 655. pl. 124. S. C. the Court held that no Action of Debt or Action on the Case would lie, but only an Action on the Case upon mutual Assumpsit; and by Consent a Nil capiat per Billam was awarded against the Plaintiff. —— Sid. 160. pl. 14. S. C. and it was said, that when Manwood Ch. B. made Parol Awards, wherein he awarded Money to be paid on the one Part and a Release to be made (as here) on the other Part, he awarded further, that if the Release be not made by such a Day, then the Party that should make it should pay so much Money; and his Reason was, that tho' there was no Remedy upon the Parol Award for the Release, yet there was for the Money. And it was said by Twisden J. and agreed, that if the Plaintiff in the Principal Case had *brought Debt for the Money Generally without shewing the Award of both Parts* it had been good, and the Plaintiff would have his Judgment, and that it had been so adjudg'd.

4. Indebitatus Assumpsit lies for a *Fine pro licentia Concordandi*, tho' it was objected that this Action would not lie, because it was a real Fine given by Law, and no Contract between the Parties; but Per Gawdy J. the Action lies, because it is not any casual Profit; and therefore Debt lies for it, *tho' it be an Inheritance.* And Wray thought this Action lay, because he did not see that there was *any other Remedy.* 2 Le. 179. pl. 219. Trin. 30 Eliz. B. R. Lord North's Case. S. C. cited by Powel J. 2 Vent. 175.

5. Assumpsit, in Consideration that the Plaintiff *Venderet & Deliberaret to D. his Factor*, at the Instance of Defendant, 200 Hog-Lambs *to the Use of Defendant*, that Defendant would pay so much Money as should be agreed between the Plaintiff and D. After Judgment for the Plaintiff, S.C cited 2 Ld. Raym. Rep. 842

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it was assign'd for Error, that the Contract was the Contract of the Defendant himself, so that the Action should have been Debt, and not Assumpsit. But all the Justices e contra; for the Count was that he sold to D. to the Use of B. the Defendant, whereas the Use is only a Confidence, which gives no Property to the Defendant in Law; so that Debt lay not against the Defendant but Assumpsit. Mo. 701. pl. 975. Hill. 36 Eliz. in the Exchequer-Chamber, Hinson v. Burridge.

6. Assumpsit, *in Consideration the Plaintiff would* sell and *deliver* to the Defendant *Pannos lineos pro Funeralibus of a Clerk, he promis'd to pay him* for them *cum inde requisitus esset*; and alleg'd he sold and delivered divers Cloths to him, viz. 31 Yards of black Cloth for 19 l. and so recited other Parcels, amounting to 160 l. Upon Non Assumpsit found for the Plaintiff, Error was brought in the Exchequer Chamber, and the Judgment revers'd, because Debt properly lay, and not Assumpsit, *this Matter proving a perfect Sale and Contract*. Mo. 711. pl. 697. Trin. 40 Eliz. Rot. 280. B. R. Maybard v. Kester.

4 Rep. 94. a. b. S. C. & S. P. resolv'd; for such Contract imports an Assumpsit; when one agrees to pay Money or to deliver any thing, this includes a Promise to pay or deliver it, and therefore when one sells Goods and agrees to deliver them at a Day to come, and the other in Consideration thereof agrees to pay so much at such a Day, both Parties may have Action of Debt or Assumpsit; for the mutual Executory Agreement of both Parties import as well a reciprocal Action upon the Case as of Debt, and with this accords the Judgment in Read and Norwood's Case, Pl. C. 128 —— Yelv. 20. Slade v. Morley, S.C. —— Mod. 163. pl. 1. Vaughan Ch. J. calls this a strange Judgment.

7. Action upon the Case upon Assumpsit lies *upon every Contract executory*, as well as an Action of Debt. Adjudg'd. Mo. 667. pl. 916. Mich. 40 & 41 Eliz. Morgan v. Slade

It is an Error to think, that every *Contract which obliges one to pay Money* does raise a Debt; as if A. promise C. to pay him a Debt due to C. from B. and it be for good Consideration, A. is thereby bound to pay it, but yet it is not a Debt upon him; and if he after had come, and in Consideration that I am bound to pay you the Debt of B I promise to pay you, an Indebitatus would not lie thereupon; Per Holt Ch. J. 6 Mod. 129. Pasch. 3 Ann. B. R. in Case of Queen v. Lane.

Yelv. 70. Vales v. Egles S. C. held accordingly.

8. Assumpsit, for that the *Plaintiff and Defendant accounted together for Monies received by the Defendant*, who was *found in Arrears* 10 *l. and in Consideratione inde promis'd to pay* it the 19th March following &c. It was assign'd for Error, that here is no Consideration; for the being found in Arrears is not any Cause to make a special Promise, nor is any thing done on the Plaintiff's Part whereon this Promise should be grounded, viz. Forbearing the Suit &c. Sed non allocatur; for *the Debt itself*, without other special Cause, *is sufficient* to ground the Action. Cro. J. 69. pl. 11. Pasch. 3 Jac. B. R. Egles v. Vale.

9. It lies for Monies received by him of a Coal-meter as Lord Mayor, which was due to the Chamberlain; and adjudg'd that if I *pay Money* in Satisfaction of a Duty, and as a Duty, and *he to whom it is paid has no Title to receive it*, and so the Duty is not satisfied, he to whom it is paid is indebted to me, and I shall maintain Action. 2 Sid. 4. Mich. 1647. B. R. Bonnel v. Foulk.

Had the Sale been alleged to the Daughter, the Court would not intend it a Debt in the Father, but now being for the Daughter, it shall be intended they were sold to the Father. Keb. 439. pl. 29. S. C. adjudged.

10. Indebitatus Assumpsit *for Physick, Wares &c. provided and deliver'd for the Daughter of Defendant at his Request*, adjudg'd for the Plaintiff, for it is for Wares &c. deliver'd (*for*) not (*to*) the Daughter; and so being after Verdict, shall be intended deliver'd to the Defendant for the Daughter. And Debt lies for this; As if the Father desires one to find Physick for his Daughter, Debt lies against the Father, and so an Indebitatus Assumpsit. Raym. 67. Hill. 14 & 15 Car. 2. B. R. Stonehouse v. Bodvil.

11. An Agreement was *to pay 5 s. per Combe for Corn, or as much as the Plaintiff should sell any of his other Corn for at the next Market*. It was found

found that the Plaintiff ſold his other Corn at the next Market at C. for 5 s. 4 d. per Combe. The Plaintiff had Judgment; for after the Agreement aſcertain'd by Sale at the next Market, the Plaintiff has Election to bring a general Indebitatus Aſſumpſit, or a ſpecial Action on the Caſe; but before ſuch Certainty it muſt be ſpecial. 2 Keb. 240. pl. 17. Trin. 19 Car. 2. B. R. Beckingham v. Scott.

12. Indebitatus Aſſumpſit was brought by the Plaintiff *pro naulo*. Upon Non Aſſumpſit the Plaintiff had Judgment; and it was aſſign'd for Error, that Freight was uſually contracted by a Charter-party; and if ſo, a general Indebitatus Aſſumpſit would not lie for a Debt by Specialty. But Judgment was affirm'd; for it doth *not appear that there was any Deed* in the Caſe, and it ſhall not be intended that there was. Vent. 100. Mich. 22 Car. 2. B. R. Prior v. Shears.

13. If A. *ſells a Horſe to B. for* 10 *l. and there being divers other Dealings between them, they come to an Account upon the whole*, and B. is found in Arrear 5 l. A. may bring his Inſimul Computaſſet, for he can never recover upon an Indebitatus Aſſumpſit; Per tot. Cur. 2 Mod. 44. Trin. 27 Car. 2. C. B.

14. A. promis'd B. that *in Conſideration he would marry his Kinſwoman he would give her* 100 *l.* Adjudg'd that an Indebitatus Aſſumpſit will not lie; for it is not a Debt but a collateral Promiſe. Vent. 268. Paſch. 27 Car. 2. B. R. Anon.

15. Exception was taken, that an Indebitatus Aſſumpſit lies not *on Sale of Copyhold Lands*. Sed non allocatur, it lying as well as on a Bargain and Sale of [other] Land. Contra *on Aſſignment of a Judgment* &c. 3 Keb. 625. pl. 7. Paſch. 28 Car. 2. B. R. Danwood v. Godſchall.

16. In Indebitatus Aſſumpſit for *Scavage Duty*, Plaintiff declared *upon the Cuſtom of London*, that all Perſons expoſing foreign Goods to Sale, which had been enter'd at the Cuſtom-houſe, ſhall pay ſo much for ſhewing them. It was mov'd in Arreſt of Judgment, that there ought to be a Contract either expreſs or implied, to maintain an Aſſumpſit, and therefore it would not lie for this Duty; and that the Cuſtoms of the City being confirmed by Parliament, this is a Duty by Record. Sed non allocatur; for there are Multitudes of Precedents in ſuch like Caſes. Vent. 298. Mich. 28 Car. 2. B. R. London City v. Goree.

2 Lev. 142. Trin. 27 Car. 2. B. R. the S. C. but S. P. does not appear. —2 Lev. 174. Trin. 28 Car. 2. B. R. the S. C. re-

ſolv'd that the Action lies without expreſs Promiſe; and Judgment for the Plaintiff.——S. C. cited 2 Lev. 252. Per Cur. as adjudg'd ——S. C. cited Show. 35. Arg.

So where an Indebitatus Aſſumpſit was brought *for* 20 *l. forfeited by the Conſtitutions* and Ordinances *of a Company* in London, *for not ſerving in the Office of Steward* of the Company, *according to a By law* for that Purpoſe made and declar'd, on a Promiſe to pay it. And Judgment for the Plaintiff. 2 Lev. 252. Paſch. 31 Car. 2. B. R. London Barber-Surgeons v. Pelſon.

17 Indebitatus Aſſumpſit, for that the Defendant being indebted to him in a certain Sum *for Wares ſold and delivered to a Stranger at the Defendant's Requeſt*, the *Defendant did promiſe to pay* &c. After a Verdict for the Plaintiff, it was mov'd that this was only a collateral Promiſe, and that an Indebitatus Aſſumpſit would not lie; for the Debt was from Plaintiff him to whom the Goods were ſold Wilde and Jones held that the Action lay, but Rainsford Ch. J. contra. But the Plaintiff had Judgment. Vent. 311. Trin. 29 Car. 2. B. R. Kent v. Derby.

3 Keb. 756. pl. 38. Kent v. D'aubeny, S. C. Judgment for the Niſi &c.—— 2 Vent. 36. Trin. 33 Car. 2. C. B. Roger v.

Roger, S. P. and it was mov'd in Arreſt, that ſuch Promiſe being collateral, did not make a Debt, but ſhould have been brought as an Action on the Caſe; and thereupon Judgment was ſtay'd.

18. An Indebitatus Aſſumpſit will lie *for Meat and Drink for a Baſtard Child*; Per Pemberton Ch. J. 2 Show. 184. pl. 186. Hill. 33 & 34 Car. 2. B. R. Anon.

18. It was ſaid to be Lord Hale's Opinion, that where there was *common Charity, and a Charge*, it would lie, and undoubtedly a ſpecial Promiſe

miſe would reach it; but then that would be within the Statute of Frauds &c. as a collateral Promiſe. 2 Show. 184. pl. 180. Hill. 33 & 34 Car. 2. B. R. Anon.

18. Indebitatus Aſſumpſit lies not againſt a Man where he has received Money of the Plaintiff *to lay out to a particular Purpoſe*, and he has laid out Part thereof accordingly; for then he ought to be called to Account for the ſame by Action of *Account*; but if none were laid out, there an *Indebitatus Aſſumpſit* lies to recover back the Money again. So if it were expended to another Purpoſe; for there the Sum is certain, and may be demanded as a Debt. 2 Show. 301. pl. 304. Paſch. 35 Car. 2. B. R. Per Jones J. at a Trial. Hartup v. Wardlove.

19. A. promiſes B. that when *A. receives* 100*l. which C. owes A. that he will pay B.* 20 *l.* Indebitatus Aſſumpſit lies not. Otherwiſe if the Money had been *originally the Money of B.* Skin. 196. pl. 11. Trin. 36 Car. 2. C. B. Anon.

3 Mod. 239. Per 3 Juſt. contra Holt, S. C. — Carth. 90.

20. Indebitatus Aſſumpſit lies for a *cuſtomary Fine ſuper Mortem Domini.* Show. 35. Per 3 J. contra Holt Ch. J. Trin. 1 W. & M. Shuttleworth v. Garret.

S. C.—7 Mod. 12. Holt Ch. J. ſaid he never could be reconciled to this Opinion.—For it was to leave Matter of Law to a Jury; Per Holt Ch. J. 12 Mod. 324.

21. Indebitatus Aſſumpſit lies *upon a perſonal Contract* for a Sum in groſs, as *Pro rebus Venditis*; Per Holt Ch. J. Show. 36. Trin. 1 W. & M.

Carth. 95. S. C. adjudg'd accordingly.

22. Indebitatus Aſſumpſit lies for *Fees for being knighted.* Show. 78. Mich. 1 W. & M. in B. R. Duppa v. Gerard.

——Comb. 163. S. C. adjudg'd accordingly; and Holt Ch. J. ſaid that it was ſo adjudg'd lately in C. B.——The Reporter adds a Nota, that it was alleg'd that Gerard was made a Knight voluntarily.

25. Indebitatus Aſſumpſit lies for Money *paid by Miſtake*, on an Account or *Deceit*; but not for Money paid *knowingly on illegal Conſideration*, as an uſurious Bond. 1 Salk. 22. pl. 2. Hill. 5 W. 3. at Niſi Prius in London, coram Treby Ch. J. Tomkins v. Bernett.

* It lies not for Money won at Play on a Wager; per Holt Ch. J. who ſaid it had been held ſo, tho'

26. Indebitatus Aſſumpſit will lie *in no Caſe but where Debt lies*, therefore it lies not on a *Wager*, nor upon a *mutual Aſſumpſit*, nor againſt the *Acceptor of a Bill of Exchange*; for his Acceptance is but a Collateral Engagement: But it lies againſt the *Drawer* himſelf; for he was really a Debtor by the Receipt of the Money. 1 Salk. 23. pl. 3. Hill. 8 W. 3. B. R. Hard's Caſe.

contrary to the Caſe of Egleſton v. Lewin. 5 Mod. 13. Mich. 6 W. & M. Walker v. Walker.—Comb. 303. S. C. & S P. held accordingly by Holt Ch. J.——12 Mod. 69. S. C. and the Court inclin'd ſtrongly to that Opinion.——See Tit. Gaming (C) pl. 4. and the Notes.

Comb. 473. S. C. accordingly. — Carth. 446. S. C. and the ſame Diverſity taken by Holt Ch. J. and Judgment was arreſted.

27. Indebitatus Aſſumpſit lies not on *Collateral Engagements.* See the Caſe above; and 1 Salk. 23. **Butcher v. Andrews**, which was an Indebitatus Aſſumpſit againſt the Father, *for Money lent the Son at the Father's Requeſt*, and ſo Judgment was arreſted; for this was a Collateral Promiſe. But per Holt Ch. J. had it been *for ſo much Money paid by the Plaintiff at the Requeſt of the Defendant the Father to the Son*, it might have been good; for then it would be the Father's Debt, and not the Son's. Carth. 446. Paſch. 10 W. 3. B. R. S. C.

21. Payment of Money *due to the Wife as Executrix*, is not Evidence to maintain Action for Money received to the Husband's Uſe 1 Salk. 282. pl. 10. Paſch. 8 W. 3. B. R. Anon.

29. Holt

29. Holt Ch. J. ſaid, that Keyling would allow an Indebitatus againſt a *Receiver or Factor*, but Hale would not; and that by his Conſent it ſhould go as far as it had gone, but not a Step farther. 12 Mod. 324. Mich. 11 W. 3. B. R. in Caſe of Huſſey v. Fiddal.

30. Indeb. Aſſump. *for a Fine impos'd by a Corporation*, for not holding the Office of Sheriff in the City of York. It was objected that the Action does not lie; for no Privity or Aſſent can be implied when a Fine is impos'd on a Man againſt his Will, nor is there any precedent Conſideration; neither do they ſhew any Right to this Fine, nor who impos'd &c. Holt Ch. J. thought it time to have theſe Actions redreſs'd, and that it was hard that Cuſtoms, By-Laws, and Rights to impoſe Fines ſhould be left to a Jury. Et adjornatur. 5 Mod. 444. Trin. 11 W. 3. York (City) v. Toun. Ld. Raym. Rep. 502. S. C. but Rokeby J. ſeem'd of Opinion that the Action would lie. Et adjornatur.—The Reporter adds that a Day or two after Holt repeated this Caſe to Treby Ch. J. as a new Attempt to extend Indebitatus Aſſumpſits, which had been too much encourag'd already; and that Treby ſeem'd to be of the ſame Opinion with Holt.

31. Indeb. Aſſump. by an *Under-Officer againſt his Colonel for his Pay*; and here Proof was admitted of the Hand of a Perſon proved beyond Sea; and per Holt Ch. J. if one *receives Money to the Uſe of another*, an Indeb. is a proper Remedy for it; but if in this Caſe there were any *legal Deduction* to be made by the Colonel, the Remedy had been *Account*; for where one receives Money, and has no way to diſcharge himſelf of it but Payment over, an Indeb. will lie. 12 Mod. 521. Paſch. 13 W. 3. Key v. Gordon.

32. A *Goldſmith's Bill for* 450*l. payable to A.* was *brought to the Bank by G. who deſir'd M. the Caſhier to give him a Specie Bank-Note, payable to A. for the ſaid Bill.* M. refus'd, unleſs A. would promiſe to pay the 450*l.* to the Bank in caſe S. the Goldſmith did not; which A. agreeing to, *M. gave G. a Bank-Bill for that Sum.* G. gave the Bank-Note to C. for a Debt he ow'd him, and C. received the Money at the Bank. S. refuſed to pay his Bill. Holt Ch. J. held, that the Plaintiffs might have a Special Action, but not a General Indeb. Aſſump. For this was not Money lent, nor laid out for Defendant's Uſe, but it was a Buying of the Bill of S. with a Warranty of it from the Defendant; and the Plaintiffs were nonſuit. 2 Ld. Raym. Rep. 753. Hill. 1 Ann. The Bank of England v. Glover.

33 Indeb. Aſſump. for that the Defendant was *indebted* to him in 20*l. for nouriſhing E. L. an Infant*, by the Plaintiff, *at the Requeſt of the Defendant*, he promiſed to pay. It was objected that this will not raiſe a Debt, and ſo Indeb Aſſump. will not lie. But per tot. Cur. contra, and Judgment for the Plaintiff. 2 Ld. Raym. Rep. 841. 842. Mich. 1 Ann. B. R. Hart v. Langfitt. 7 Mod. 148. Hart v. Longfield, S. C. adjudg'd accordingly.

34. Indeb. Aſſump. *for Meat, Drink, and Lodging found for a 3d Perſon*; and moved in Arreſt of Judgment that it would not lie, but a Special Action upon the Caſe; but per Cur. *it lies* againſt him *upon the Contract*, and the Plaintiff had Judgment. 6 Mod. 77. Mich. 2 Ann. B. R. Jordan v. Tomkins. 2 Ld. Raym. Rep. 982. S. C. accordingly.—*As if A. deſires B. to cure the Horſe of C. and* that *he* (*A.*) *will pay him* ſo much, an Indebitatus will lie againſt A. and only againſt him. Ibid.

35. Plaintiff can maintain no Action here *on a Judgment in France*, but an Indebitatus Aſſumpſit, or an Inſimul Computaſſet &c. For the Debt is to be conſider'd here only as a Debt by ſimple Contract. 2 Vern. 540 pl. 484. Hill. 1705. Duplein v. De Roven.

36. Where *Money is over-paid*, this Action will lie for *the Surplus*. Arg. 11 Mod. 147. pl. 5. Hill. 6 Ann. B. R. in Caſe of Aſher v. Wallis.

37. Indeb.

37. Indeb. Aſſump. lies *by a Prothonotary againſt an Attorney*, for Fees for Work done for Defendant as Attorney. Holt's Rep. 20. Trin. 5 Ann. Spearman v. Moreland.

But per Parker Ch J. an *expreſs Promiſe to pay Intereſt* will ſupport an Action. 10 Mod. 312. Paſch. 1 Geo. 1. B. R. Stafford and Forcer.

38. An Action for the *Intereſt of Money* as well as the Principal, vitiates the Whole. Arg 10 Mod. 312. cites 2 Roll Rep. 47. a.

39. An Indebitatus Aſſumpſit will not lie *on a Special Agreement*, till *the Terms of it are perform'd*; but when that is done, it raiſes a Duty for which a General Indebitatus Aſſumpſit will lie. Gibb. 303. pl. 7. Trin. 5 Geo. 2. B. R. per 3 Juſtices, contra Holt Ch. J. Gordon v. Martin.

(N. 2) For Monies received to a Man's Uſe.

S. C. cited 2 Show. 52—*So* Indebitatus Aſſumpſit was brought *for the Fees and Profits of an Office of a Stewardſhip of a Court Leet and Court Baron againſt a Stranger* that took the Fees and Profits thereof, and adjudg'd that the Action lies. But Scroggs Ch. J. who deliver'd the Opinion of the Court ſaid, if ſuch Action were brought againſt one *claiming a Right* they were agreed it would by no Means lie if now it were an original Caſe, but becauſe Judgments have been upon it, and that upon ſolemn Arguments they were willing to go the ſame way, eſpecially there being no great Inconvenience in it ſince the Title muſt be given in Evidence, and on that Account they judg'd the Action did well lie 2 Show. 21. pl. 14. Mich. 30 Car. 2. B R. Howard v. Wood.——2 Lev. 245 S. C. and the Court thought that had this been the firſt Caſe of the Kind it would be hard to maintain it, but ſaid that it had been maintain'd 2 or 3 Times before; and cited a Caſe between Bradſhaw and Porter of Gray's-Inn, *for Money received by one as Judge of the Sheriff's Court of London* to have been ſo adjudg'd; ſo that it would now be hard to adjudge the contrary; but upon Importunity adjornatur.——2 Jo. 126. Hill. 31 & 32 Car. 2. B. R. the S. C. accordingly, and reſolv'd per tot. Cur. that in reſpect of the former Judgments the Action lies; and Judgment was given for the Plaintiff.——Freem. Rep. 473. pl. 648. S. C. argued, but adjornatur.——Ibid 478. pl. 656. S. C. ſays the Ch. J. inclin'd againſt it; for he ſaid a Man may as well bring an Indebitatus Aſſumpſit where another takes Money by Force from his Perſon, or where he takes away my Horſe &c. but the other 3 Juſtices inclined to allow it. Curia adviſare vult.——S. C. cited Show. 35.

1. THE *King granted the Office of Comptroller of the Cuſtoms &c. to S. and T. durante beneplacito. T. dies.* Afterwards the King granted the ſaid Office to A. and B. and yet S. under Pretence of Survivorſhip exerciſed the ſaid Office, and received the Profits thereof. A. and B. brought an Indebitatus Aſſumpſit for 200 l. had and received to their Uſe. And the Court gave Judgment for the Plaintiff. 2 Mod. 360. Trin. 29 Car. 2 in the Exchequer, Arris v. Stukely.

And therefore it will lie for *Rent received by one who pretends a Title*, becauſe in ſuch Caſe an Account will lie. 2 Mod. 263.——2 Sid. 4 Mich. 1675. B. R. the S P. Per Cur. Arg.

2. *Wherever an Account will lie, an Indebitatus Aſſumpſit will lie*; Per Cur. 2 Mod. 263. Trin. 29 Car. 2.

3. If a Man pays Money in Part of Satisfaction, and *afterwards the whole Value of the Goods is recover'd againſt him at Law*, the Money ſo paid on that Account becomes Money receiv'd for the Uſe of him that paid it, and he may recover it in an Action at Law; Per North K. Vern. 176. pl. 169. Trin. 1683. Barebone v. Brent.

If a Man *pays Money upon a Policy of Aſſurance, ſuppoſing a Loſs where there was not any* Loſs, that in ſuch Caſe this ſhall be Money received to the Uſe of the Payer, becauſe

4. Indebitatus Aſſumpſit by J. S. for *Money received* to the Uſe of J. S. named in a *Policy* for Money *paid by W. R.* as a Premium on a void Policy, and held good; Per Holt Ch. J. Show. 136. Paſch. 2 W. & M. Martin v. Sitwell.

cause here the Money was paid *upon a Mistake*; the same Law if it was upon a *Fraud in the Receiver*; Per Holt Ch. J. Skin. 411. 412. pl. 7. Hill. 5 W. & M. Tomkins v. Barnet.

5. If *Money* be *paid by an Order of Sessions* for Costs, on Removal of a poor Man, and that Order is afterwards *revers'd in B. R.* an Indebitatus Assumpsit will not lie for the Money against those who received it. Ld. Raym. Rep. 742. says it was so held by Tracy J. at Lent Assises 1700. at Chelmsford. Mead v. Death and Pollard.

But where Money was paid *in Pursuance of a void Authority, as where the Court ordering it was deemed illegal*, an Indebitatus Assumpsit will lie for it; *as where N. had a Donative*, which he gave to D. and afterwards he *remov'd D. and put in J. S.* D. cited N in the Time of James 2. before *the High Commissioners*, and there N had *Sentence against him, to restore D. and to pay him all the Arrears* that he had received. N *paid it accordingly*. And after the Revolution N. brought Indebitatus Assumpsit against D. for his Money, as received to his Use. Ld Raym. Rep. 742. Ex relatione m'ri Place, says it was so resolv'd 4 & 5 W. & M. by Treby Ch. J. at Nisi Prius in Middlesex, Sir Richard Newdigate v. Davy.

6. Where one *pays Money on a Mistake in an Account, or under, or by, a meer Deceit*, it is reasonable he should have his Money again; *but* where one pays Money *knowingly, on an illegal Consideration*, the Party that receives it ought to be punish'd for his Offence, and he that pays it is Particeps Criminis; and there is no Reason he should have it again; for he parted with it freely, & Volenti non fit Injuria. By Treby Ch. J. at Nisi Prius in London. 1 Salk. 22. pl. 2. Hill. 5 W. 3. agreed, in Case of Tomkins v. Bernet.

7. A. put his Son Apprentice to B. the Defendant, and *gave* him 30 *l. to teach him the Trade of a Goldsmith, and make him free of London*; but the *Defendant himself being a Foreigner*, the Son was bound also to a Freeman for that End; but *by the Custom* of London *he cannot have his Freedom without actual Service with* such *Freeman*. It was ruled by Holt, that an Indebitatus lieth not for A. for the 30 l. the Defendant hath cheated the Plaintiff of his Money, and the Plaintiff hath no Remedy, unless by special Action of the Case for not making him a Freeman. Comb. 341. Trin. 7 W. 3. B. R. Dewberry v. Chapman.

8. Indebitatus Assumpsit for Money *had and received by the Defendant for the Plaintiff to the Use of the Defendant*. The Plaintiff had a Verdict, and upon a Motion in Arrest of Judgment, the Court held that those Words (to the Use of the Defendant) shall be rejected, because they are insensible and repugnant; and then the Promise is for Money had and received by the Defendant for the Plaintiff. 1 Salk. 24. pl. 7. Pasch. 13 W. 3. Palmer v. Stavely.

12 Mod. 510. S. C. adjudged Nisi for the Plaintiff.—Ld. Raym. Rep. 669. S. C. adjudg'd for the Plaintiff Nisi &c.———Comyns's Rep. 115. pl. 79. S. C. And Per Cur. after a Verdict for the Plaintiff the Words (ad usum Defendentis) shall be rejected, because a Verdict could not have been found for the Plaintiff, if Evidence had not been given that the Monies had been received for his Use; besides, the Declaration further says that the Money was received for the Plaintiff.

9. If *A. gives Money to B. to pay to C. upon C.'s giving Writings &c. and C. will not do it*, an Indebitatus Assumpsit will lie for A. against B. for so much Money received to his Use; and many such Actions have been maintained for Earnests in Bargains, when the Bargainor would not perform; and for *Præmiums for Insurance when the Ship* &c. *did not go the Voyage*. But it has been held it would not be for Money paid upon *usurious Contract*, because there it was not intended it should be repaid, or any Thing done for it; Per Holt Ch. J. 6 Mod. 161. Pasch. 3 Ann. B. R. in Case of Holmes v. Hall.

11. A *Trooper brought his own Horse into the Troop*, and in crossing the Sea *the Horse was kill'd in a Storm* together with several others. The *Queen allow'd* 15 *l.* per Horse *for every Horse* that was *lost to remount the Troopers*, and accordingly several Horses were bought and sent over to the Defendant to supply the Lois in his Troop, but *before the Horses get over, the*

Trooper (the Plaintiff) was broke, and ſo never remounted. In Action for Money received to the Plaintiff's Uſe, Holt Ch. J. at the Sittings in Middleſex, held that this Evidence maintain'd the Action; for tho' the Captain did not actually receive the 15 l. in Money, yet he received a Satisfaction which was Monies-worth, and the Plaintiff cannot bring Trover becauſe he cannot claim any one of the Horſes in Particular, no one having ever been deliver'd to him But at the Counſel's Requeſt it was made a Caſe for his further Conſideration. 2 Ld. Raym. 1007. Hill. 2 Ann. Norris v. Napper.

Holt's Rep. 36. S. C. by the Name of Aſſer v. Wilks.—S P. And A. being viſibly a Husband, the Tenant was diſcharg'd, at leaſt the Recovery againſt A. in this Action would diſcharge the Tenant; for this would be a Satisfaction to the Leſſor. 1 Salk. 28. Haſſar v. Wallis, S. C.—S. P. Agreed Per Holt Ch. J. Arg. but ſaid it was Hard. 12 Mod. 324.

10. A Man *having a Wife* in England, goes to Jamaica, and there *marries a rich Woman*, and lets her Lands, reſerving Rent to himſelf, and received the ſame divers Years: But after ſome Time they both coming into England, ſhe perceived he had *another Wife living*; and thereupon brings an Indebitatus Aſſumpſit againſt him for the ſaid Rents, as ſo much Money received by him to her Uſe. And at the Trial at the Guild-hall, London, this Point was ſaved to be argued by Counſel, Whether an Indebitatus Aſſumpſit would lie in this Caſe. And by the whole Court it was agreed, That an Indebitatus Aſſumpſit would well lie; but Holt Ch. J. ſaid, That Trover would not lie in this Caſe, becauſe ſhe was never poſſeſs'd of the Money; and when ſhe married the Defendant, ſhe conſented that he ſhould manage her Eſtate; and Judgment for the Plaintiff. 11 Mod. 146, 147. pl. 3. Hill. 6 Ann. B. R. Aſher v. Wallis.

S. P. Per Holt Ch. J. Holt's Rep. 37. cites 2 Sid. 4.—Holt Ch. J. cited S. P. adjudg'd per Wadham Windham J. Holt's Rep. 25. pl. 1.—S. P. cited accordingly by Holt Ch. J. Show. 157.

12. Indebitatus Aſſumpſit for Money received by the Defendant to the Plaintiff's Uſe. Upon Evidence the Caſe came out thus, The *Plaintiff and another laid a Wager*; the *Defendant held Stakes*; the Plaintiff brought *Evidence that he had won* the Wager. Blencowe, that tried the Cauſe, being of Opinion that the Plaintiff had miſtaken his Action, becauſe this Money could not at the time of the Action brought, be ſaid to be Money received to the Plaintiff's Uſe, ſince the Defendant was not to pay the Money until the Wager was proved to be won, the Plaintiff was Nonſuit. The Plaintiff now moved to ſet aſide his own Nonſuit; becauſe occaſion'd by the Judges miſtaking the Law. Per Cur. Action was well brought; for upon the Wager won, the Money was actually the Plaintiff's, tho' he could not receive it before the Fact was made appear. Sed adjournatur. 10 Mod. 315. Paſch. 1 Geo. 1 B. R. Temple v. Welds.

Indebitatus Aſſumpſit brought *againſt a Stakeholder* for Monies had and received for Plaintiff's Uſe. The Judge of Aſſiſe, who tried the Cauſe, was of Opinion that the Action would not lie; and therefore nonſuited the Plaintiff upon the opening his Caſe, without hearing any Evidence. Plaintiff, upon Affidavits of this Matter moved the Court to ſet aſide the Nonſuit; but the Court refuſed to make any Rule. It was alleged from the Bar, that the Court of B. R. had made a Rule in the like Caſe, but no ſuch was produced. Barnes's Notes in C. B. 222. Mich. 7 Geo. 2. Love v. Day.

(O) Upon an Aſſumpſit in Nature of Debt. It lies not where the Thing is Real.

Indebitatus Aſſumpſit *for Rent reſerved on a Leaſe for*

1. IF a Man leaſes for Years rendring Rent, he cannot have an Action upon the Caſe upon Aſſumpſit for this Rent, during the Term, becauſe it ſavours of the Realty. Mich. 15 Jac. B. R. between *Neck and Gabb*, Per Curiam admitted, Mich. 12 Jac. B. between

tween *White and Short*, admitted Per Curiam. Mich. 17 Jac. B. R. Per Curiam.

2. So the Lessor cannot have an Action upon the Case for the Rent after the Term ended, because it savours of the Realty. Mich. 15 Jac. B. R. between *Neck and Gubb*, agreed per totam Curiam, Mich. 12 Jac. B. between *White and Short*, Per Curiam.

Years. After a Verdict for the Plaintiff, upon Non Assumpsit it was adjudg'd that this Action did not lie for Rent, but an Action of Debt. Allen 29. Mich 23 Car. B R. Munday v. Bailey.—Sty. 53. Anon. seems to be S. C. and Judgment against the Plaintiff Nisi &c.

3. [But] if a Man brings an Action upon the Case, and declares that in Consideration that he promised to make a Lease for two Years to the Defendant, and to repair the Land during the Term, the Defendant promis'd pro inde to pay him 20s. at every Quarter &c. and avers that he made the Lease accordingly, and repair'd the Land during the Term, but that the Defendant had not paid to him the several Sums at the said Quarters, this Action is well maintainable, tho' the Term is not ended; for it cannot appear upon this Declaration that this was a Rent, but only a Sum in gross; for no Rent was reserv'd upon the making of the Lease, and the Assumpsit is not to pay it out of the Land, but as a Sum in gross. Mich. 15 Jac. B. R. between *Neck and Gubb* adjudged, this Matter being moved in Arrest of Judgment; but Houghton gave this Reason, because the Lessor promis'd to repair the Land as well as to lease it.

4. But if the Declaration be, that the Plaintiff agreed with the Defendant that he should hold certain Lands for certain Years; and that the Defendant proinde did promise to pay to him 20s. at every Quarter &c. and for a certain Sum Arrear, at certain Quarters after the Term ended, he brought his Action. This Action is not maintainable; for it appears apparently upon the whole Matter to be a Rent, inasmuch as he promised to pay it proinde, at the same time that the other leased to him the Land, Mich. 12 Jac. B. between *White and Short*, adjudg'd in Arrest of Judgment. Contra Mich. 3 Car. B. R. between Sir *Miles Hubbard and Boxell*, adjudg'd; this being moved in Arrest of Judgment, the which Intratur Trin. 3 Car. Rot. 1267.

If the Lessee *promised at the Time the Lease was made* to pay the Rent, an Action lies upon this Promise; but in the Action brought, this Promise *must be expressly averr'd to be so*;

per Roll Ch. J. Sty. 400. Hill. 1653. Anon.

5. * If Rent upon a Lease for Years be Arrear, and after the Lessee promises the Lessor to pay the Rent, without Consideration of Forbearance, or other Consideration, no Action lies upon this Promise, because he may have an Action of Debt upon the real Contract. Mich. 17 Jac. between † *Harrington and Green*, per Curiam, resolved Hill. 8 Car. B. R. Between *Mantel and Bret*, in a Writ of Error upon a Judgment in Canterbury held, quod vide Hub. Rep. 397. [But there is No such Page.]

* Fol. 8. Hob. 284. pl. 366. Green v. Harrington, S. C. The Court would be advised. —Hutt. 34.

S.C. and the Court were of Opinion that no Action lies; and said that this was ruled in Albanie's Case of Lincoln's-Inn, in B. R.——Brownl. 14. S. C. and Judgment was given against the Plaintiff.——S. C. of Albany cited by Warburton J. by the Name of Ablaine's Case of Lincoln's-Inn, as adjudg'd accordingly. Win. 15. Trin. 19 Jac.

A Feme sole seised of a *Rent-Charge for Life*, took Husband. The Rent was Arrear. The Wife died. The *Tertenant*, in Consideration that the Rent was behind &c. *promised to pay it.* An Action on the Case on Assumpsit was brought for the Rent, and adjudg'd per tot. Cur. that it lies, because the Husband here *had Remedy by the Statute of* 32 *H.* 8. and then the Consideration is sufficient. Le. 293. pl. 401. Mich. 26 & 27 Eliz. B. R. Anon

An *Indebitatus Assumpsit* will not lie for *Arrears of Rent*, where *there is no other Promise*; but it must be an Action of Debt. By the Justices. Cro E. 242. pl. 5. Trin. 33 Eliz. B. R. Read v. Johnson.—Le. 155. pl. 217. Trin. 32 Eliz. C. B. the S. C. accordingly.——S. P. Mo. 340. pl. 460. Mich. 34 & 35 Eliz. B. R. held accordingly, by all the Justices except Gawdy.——In the Case of Slack v. Bowsal, S. P. of Promise to pay Rent Arrear, appears, but tho' Exceptions were taken to the Pleadings, no Exception

ception was taken to this Point, and so the Plaintiff had Judgment, which being observed there in a Note of the Reporter, he says that in such Case this Action lies not without some other Special Promise

If a Man makes a Lease for Years rendring Rent, and the Lessee promises to pay the Rent, an Assumpsit will lie, if the *Promise was made at the same Time with the Lease*; for that must be expressly averr'd; per Roll. Sty. 400. Mich 1653. Anon.

There is a *Diversity* between a *general Enjoyment of Land without Contract*, and *Enjoyment upon such actual Contract or Assumpsit*; for if he did not actually promise to pay if he enjoys, there Action on the Case will not lie; but the Plaintiff shall have Remedy upon the Reservation by Debt only; per Cur. And it was said that this Difference had been often adjudg'd good. Sid. 279. pl. 6. Pasch. 18 Car. 2. B. R. in Case of How v. Notton.

Where an Obligation is forfeited, no Action lies on a Promise to

6. The same Law is of a Promise of Payment of Money upon an Obligation, without a new Consideration, as for Forbearance or such like, by which he might have an Action upon the Collateral Promise. Mich. 17 Jac. B. per Curiam.

pay the Money, because the Debt is due upon the Obligation. Agreed per Cur. Hutt. 35.——But Cro. E. 240. pl. 12. Trin. 33 Eliz. B. R. says it was agreed by all the Justices, that if one be bound in an Obligation, and afterwards promises to pay the Money, Assumpsit lies upon this Promise. Ashbrooke v. Snape.—— It will not lie for that Money, unless there is a Collateral Promise. Brownl. 14—— Le. 293. pl. 401. S. P. Arg.——Cro. J. 668. in pl. 5. S. P. admitted there in a Note of the Reporter. ——S. P. per Cur. Cro. J. 598. Mich. 18 Jac. B. R. in pl. 21.

In Case of *Rent*, or Debt by Specialty, Assumpsit will not lie, unless it be *for Forbearance of the Payment after it is due*; per Holt Ch. J. 12 Mod. 511. Pasch. 13 W. 3.

The Plaintiff leas'd Land to the Defendant for a Year, and in Consideration thereof the Defendant *promised to pay pro firma terræ prædicta, at the End of the Year* 20 l. All the Court (absente Popham) held that Assumpsit lies; for it is not a Rent, but a Sum in Gross; and Judgment for the Plaintiff; but afterwards the Judgment was reversed. Cro. E. 786. pl. 25. Mich. 42 & 43 Eliz. Symcock v. Payn.——S. C. cited Win. 15. to have been reversed in the Exchequer-Chamber, and that it was there said to be a Rent, so that Debt lies, and not an Action on the Case.

7. In an Action upon the Case upon a Promise, if the Plaintiff declares that the Defendant, 22 Martii 6 Car. in Consideration that the Plaintiff, at the Request of the Defendant, would permit the Defendant to have and enjoy certain Lands &c. from the 25 of March after for one Year, the Defendant, in Consideration thereof, did assume to pay to the Plaintiff 5 l. at Michaelmas after, and avers that the Defendant did enjoy it for one Year, yet the Defendant had not paid the 5 l. according to his Promise; in this Case the Action lies; for tho' this be an Agreement, and may amount to a Lease, yet when an express Promise is laid, the Action lies; and it may be shewn in Evidence, that this was reserved upon a Lease upon Non Assumpsit pleaded P. 9 Car. B. R. between *Potter and Fletcher*, adjudg'd upon a Demurrer. Intratur Hill. 8 Car. Rot. 42.

In *Case*, upon a Promise to pay 10 l. in Consideration that the Plaintiff had licensed and *permitted the Defendant to enjoy such Lands*, it was moved in Arrest of Judgment that the License and Permission here amount to a Demise, and therefore Debt ought to have been brought, and not Case. Per Hale Ch. B. This License and Permission does *amount to a Lease*, upon which an Action upon the Case does not lie without express Promise; but upon an express Promise to pay Rent, Case will well lie; and so it has been adjudg'd; for it may be the Promise was the Ground of the Lease and Reservation. And here we are after a Verdict which has found the Promise, so that we are to presume there was an express Promise to pay so much Money, in Consideration that the Plaintiff would admit him to enjoy the Land. Sed adjornatur. Hard. 366 Pasch. 16 Car 2. in the Exchequer. Sir John Trevor v. Roberts.

In an Action upon the Case, in Consideration the Plaintiff *permitteret the Defendant to occupy and enjoy Lands until a future Day, to pay* 15 *l.* It was moved in Arrest of Judgment that this is a Lease, and not a bare Promise, and the Defendant had been nonsuited twice upon this Point. Sed non allocatur; for it shall now be *intended an actual Promise*, and therefore tho' Indeb. will not lie on such Permission, yet on an actual Promise Assumpsit will; so Judgment for the Plaintiff, Nisi. 3 Keb. 357. pl. 26. Mich. 26 Car. 2. B. R. Stroud v. Hopkins.

8. In an Action upon the Case upon a Promise, if the Plaintiff declares that J. S. was possess'd of Land &c. and by Indenture demised it to the Defendant from 25 of March for five Years, rendring 22 l. Rent per Annum at the four usual Feasts; and after the End of the five Years, he [J. S.] being dead, and the Plaintiff his Executor, viz. 1 May after the End of the Lease, which was at Lady-Day before, there

there was a Discourse between the Plaintiff and Defendant as to the enjoying it for a Year longer, from Lady Day before; and thereupon, in Consideration that the Plaintiff would deduct, and defalk to the Defendant 5 l. 10 s. of the Rent of 22 l. for a Quarter of a Year for the Premisses, and would agree with the Defendant that the Defendant should have the Premisses for a Year from the Lady-Day before, as in the said Indenture was express'd, the Defendant did promise to pay (deducting & defalking 5 l. 10 s. of the said Rent of 22 l.) the Residue of the said Rent of 22 l. This Action upon the Case lies, tho' this is call'd a Rent, and the Residue of the said Rent of 22 l. and refers to the Indenture; for this is an express Promise, and if it was only a Promise in Law upon the Agreement, this might be shewn in Evidence. Pasch. 9 Car. B. R. between *Rowncevall and Lane*, adjudg'd; this being moved by myself in Arrest of Judgment, after Verdict for the Plaintiff.

9. In an Action upon the Case, if the Plaintiff declares that whereas the Defendant was indebted to him in 9 l. 10 s. for Rent of certain Land, the Defendant in Consideration thereof did promise to pay it; in this Case the Action does not lie, because it appears that this is for Rent, and there was no other Promise than what the real Contract amounted to upon the making of the Lease, and it does not appear whether the Rent was for Life in Fee, or for Years; so that it might be in Fee, or for Life, for which no Action of Debt lies. Hill. 9 Car. B. R. between * *Bret and Read*, adjudg'd per Curiam; this being moved in Arrest of Judgment after a Verdict for the Plaintiff. Intr. Trin. 9 Car. Rot. 644. Hub. Rep. Case 365. between † *Green and Harrington*.

* Jo. 329. pl. 1. S. C. adjudg'd per Cur. that upon a real Contract, as Lease for Years, Action on the Case does not lie; but if there be a *Special Assumpsit* for the Rent, it seems otherwise.——Cro. C. 343. pl. 7. S. C. and per tot. Cur. the Action does not lie upon the general Promise; but if he had alleg'd that in Consideration he should *forbear the Payment till such a Day, or upon such special Consideration*, then the Action would lie; and adjudg'd for the Defendant ——Where there is an *Assumpsit in Fact besides the Personal Contract upon the Lease*, Action upon the Case on such Assumpsit is maintainable; per Jones & Berkley J. Jo. 365. Mich. 9 Car. B. R. in pl. 1.

† See pl. 5.

10. In an Action upon the Case, if the Plaintiff declares that the 25 Martii, in Consideration that the Plaintiff, at the Instance and Request of the Defendant, dimitteret to the Defendant certain Lands for three Years then next ensuing, and for the yearly Rent of 25 l. per Ann. to be paid at Michaelmas and Lady-Day by equal Portions. The Defendant did assume and promise to pay the said (*) yearly Rent during the Term at the said Feasts for the said Land, and avers in Fact that he afterwards, viz. the said 25 Martii, did demise the said Land to the Defendant in Forma prædicta, and that the Defendant did enjoy the said Land for all the said Term, and yet the Defendant had not paid the said 25 l. yearly at the said Feasts for the said Lands, amounting in toto to 75 l. for which he brought his Action; to which the Defendant pleads, that before this Lease was made one W. L. was seised of the Premisses in Fee, and derives an Estate for Life from him to A. who married with the Plaintiff; and that the Plaintiff being seised in the Right of A. his Wife for Life, surrender'd to him in the Reversion before the Action brought; and thereupon the Plaintiff traverses the Surrender, and this found by the Jury against the Defendant; and tho' it was moved in Arrest of Judgment that the Action did not lie, because it is grounded upon a real Contract, yet it was adjudg'd that the Action did lie, because it appears upon the whole Declaration, that it was intended by the Parties that a Lease should be made, and a Rent reserved, and for the better Security of the Payment thereof according to the Reservation, that the Lessor

Cro. C. 414 pl. 2. S. C. The Defendant *pleaded a Surrender* (*) Fol. 9. of the said Lands *before any of the Feasts for which the Breach was assign'd*, and that the Plaintiff accepted thereof; but upon Issue it was found for the Plaintiff; and upon Motion that the Action lies not, it being grounded upon a Personal Promise in a

Real Contract, which Real Contract being executed, the Aſſumpſit being merely Perſonal, is determin'd; and the Rent being Real, this Action lies not for the Non-payment thereof.

Leſſor ſhould have his Remedy for it by Action of Debt upon the Reſervation, or Action upon this Collateral Promiſe at his Election; and this being the original Intent, the making of this Leaſe, though real, will not take away this Collateral Promiſe, as a Man may covenant to accept a Leaſe under a certain Rent, and to pay the Rent according to the Reſervation, for they are two Things; and ſo here the Promiſe of Payment is a thing collateral to the Reſervation, the which will continue tho' the Leſſee aſſigns over, and the Leſſor accepts the Rent from the Aſſignee being collateral. Mich. 11 Car. B. R. between *Acton and Symons*, per tot. Curiam, præter Crook, adjudg'd; this being moved in Arreſt of Judgment, I myſelf being de Concilio Querentis, Intrat. Mich. 10 Car. Rot. 83.

But 3 Juſtices conceived the Action lies, becauſe it is a collateral and *alſ Inde Promiſe*; but if it had been an *implied* Promiſe, (*as upon a Sale of Goods &c.*) then this Action would not lie; but here is an expreſs and direct Promiſe alleg'd, which is in a manner confeſs'd by the Defendant by his Plea in Bar, and therefore the Action lies; but Crooke J. doubted thereof, becauſe it is a Perſonal Contract, which is determin'd by the making the Leaſe; for it is in vain to have an Aſſumpſit where he may bring Debt on the Leaſe, and thereby recover Debt and Damages for the Forbearance; becauſe Ley Gager lies not in this Action, and then there is no Cauſe to have it.—— Jo 364. pl 1. S. C. accordingly, and that Judgment was given for the Plaintiff; but Crooke continued ſtrongly in his former Opinion.——S. C. cited Arg. 3 Mod. 73.

On an *Account made between Landlord and Tenant*, it appear'd that 40*l. was in Arrear*, which the *Tenant promiſed to pay*. The *Landlord brought Action on the Caſe on this Promiſe*, and had a Verdict.

11. In an Action upon the Caſe, if the Plaintiff declares that he and the Defendant accounted together for the Arrears of a certain Rent, reſerved upon a Leaſe of certain Land, and upon this Account the Defendant was found in Arrear 10*l.* and thereupon did promiſe to pay it, and for Non-payment the Action is brought, this Action lies; for this lies in Account, and upon the Account this is made a perſonal Debt, and a Man may make an expreſs Promiſe for Payment of a Rent, and yet ſhall have an Action of Debt for the Rent alſo. Paſch. 14 Car. B. R. between *Luther and Mulyn*, per Curiam; though it was ſaid that it had been adjudg'd contra twice in B. in the ſame Term, and it had been adjudg'd in B. R. e contra afterwards, ſcil. that the Action does not lie.

On Motion in Arreſt of Judgment, the Court ſaid that Caſe lies not for Rent alone due upon a Real Contract, but for Rent with other Things it lies; but ſtay'd Judgment, no new Conſideration appearing to ground this Promiſe upon, but only the old *Conſideration of Law for Payment of the Rent*, on which Caſe lies not, becauſe it is in the Realty. Sty 131. Mich. 24 Car. B. R. Ayre v. Sils.

12. A. was poſſeſs'd of a *Leaſe for Years of Land* on which a Rent was reſerved, (the Inheritance whereof was in the Plaintiff's Wife.) B. the Defendant, *in Conſideration* the *Plaintiff would procure A. to aſſign* the Leaſe to him, promiſed to pay the Rent to the Plaintiff for the Reſidue of the Term. It was objected that in this Caſe the Action did not lie, becauſe the Plaintiff might have a higher Remedy for the Rent, either by Action of Debt, or by Diſtreſs; but adjudg'd that the Action lay, becauſe *by this Promiſe an Action is given to the Husband alone in his own Right*, whereas the Rent in its Nature is due to him in Right of his Wife, and to be paid for the Land; but upon this Aſſumpſit is payable to the Perſon of the Husband. Le. 43. pl. 55. Mich. 28 & 29 Eliz. C. B. Carter's Caſe.

13. Aſſumpſit, in Conſideration that the Defendant *might have and enjoy quietly ſuch a Park for* 3 *Years*, he promiſed to pay 100*l.* Adjudg'd that the Action well lay, becauſe it *was but in Nature of Rent*. Cro. C. 343. pl. 7. cited Arg. as 17 Jac. Sir George Manſell's Caſe; and the Court ſaid that the Caſe cited may be good Law; for it is a Special Promiſe to permit him to enjoy.

14. Aſſumpſit

14. Assumpsit, for that the Plaintiff had let *to the Defendant a Warehouse* in the Parish of D. the *Defendant promised to pay him, every Week he occupied it*, 8 *s.* and alleg'd he occupied it 27 Weeks. The whole Court agreed that for Rent reserved upon a Lease, Assumption lies not; but *this is not a Lease, but a Promise* that as long as he permitted him to occupy the Warehouse he would pay for it; so that the Action lies, and Judgment for the Plaintiff. Cro. J. 598. pl. 21. Mich. 18 Jac. B. R. Dartnoll v. Morgan.

15. Assumpsit, in Consideration the Plaintiff would *permit* the Defendant *to enjoy such Lands, to pay him Quantum Meruit*; and counted that he permitted him to enjoy 3 Years, and that it was worth 10 l. per Ann. After Verdict for the Plaintiff it was moved in Arrest of Judgment, first, That it does *not appear that Plaintiff had Title* to the Land. 2dly, If he has, Debt lies, and not this Action. But Curia contra in both, and gave Judgment for the Plaintiff. Lev. 179. Pasch. 18 Car. 2. B. R. Grubham How v. Norton. Sid. 279. pl. 6. S. C. but does not state it on a Promise to pay Quantum Meruit, but that he promis'd to pay so much, [viz. a certain Rent]——2 Keb. 8. S. C. according to Lev. and held that an actual Promise in such Case is sufficient Cause of Action; and Judgment for the Plaintiff, Nisi &c.

16. A. promised B. that *if B. would permit A. to enjoy a House as J. S.* (the former Tenant, under whom A. pretended Title to it) *did, to become his Tenant as J. S. was, and to pay the Arrears.* This is an express Promise, and Assumpsit lies upon it to pay the growing Rent. Lev. 204. Hill. 18 & 19 Car. 2. B. R. Chapman v. Southwick. Sid 323. pl. 1. S. C. and Judgment for the Plaintiff.—2 Keb 182. pl. 10. S. C. adjudg'd for the Plaintiff, Nisi &c. ——If one grants his Land for a Year, and the other agrees to pay so much for it, this is a Sum in Gross, for which an Indebitatus lies. Show. 36. said, in Trin. 1 W. & M.

17. In Action sur le Case, on Promise by the Defendant *to pay Rent*, in Consideration that the Plaintiff would demise a House to him, and for Rent Arrear the Plaintiff brought this Action; to which the Defendant demurr'd, because he may distrain, or have Debt. But per Cur. This being an *express* and mutual *Promise*, an Action well lieth; contra of a *Promise in Law* on the implied Contract; and Judgment pro Plaintiff. 2 Keb. 291. pl. 72. Mich. 19 Car. 2. B. R. Freeman v. Bowman. S. P. as to the Difference between a Special Promise and a Promise in Law. Sty. 463. Mich. 1655. B. R. Lance v. Blackmore.

18. Indeb. Assump. *for Tithes sold.* Baldwin moved in Arrest of Judgment that this Sounds in the Realty, and so an Action of the Case will not lie. But per Curiam, it is well enough; for this shall *not be intended a Lease* of Tithes, *but a Sale of Tithes.* Freem. Rep. 234. pl. 242. Mich. 1677. Anon.

19. Assumpsit, in Consideration the Defendant had *surrender'd a Copyhold* Estate to the Plaintiff, *and* that the *Plaintiff would permit him to enjoy it from* 10 *Aug. &c. to the 1st of May* following, *he promised to pay* to the Plaintiff 50 l. The Defendant demurr'd, for that this is a Term, and a Rent, for which Debt lies, and not Assumpsit. But adjudged Per tot. Cur. after Time taken to consider of it, That the Action lies; for this shall be intended an express Promise, and not a Promise in Law, arising upon the Contract; and if Non Assumpsit had been pleaded, instead of demurring to it, the Plaintiff must have proved an express Promise; which being collateral, and quasi a special Agreement to pay the Rent, and of the same Effect as an express Covenant in Deed. 3 Lev. 150. Trin. 34 Car. 2. C. B. Johnson v. May. 3 Mod. 75. Mason v. Beldham, S. C. adjudg'd for the Plaintiff.

20. In Action sur *Case*, in which the Plaintiff declared, that in *Consideration* that he would *permit Defendant to occupy Land of the Plaintiff's* for one Year, that *he would give* him for it *as much as it was worth.* Per Cur. 3 Mod. 75. Mason v. Beldham, S. C. adjudg'd for the Plaintiff.

Cur. Where a Thing favours of the Realty, As where a Thing in certain is reserv'd, the Law will not permit an Action *quite personal* to be brought, but will restrain the Person to his proper Action, without confounding of them; but here, if this Action does not lie, the Party shall be without Remedy, which the Law will not permit, for an Action of *Debt does not lie, because it is uncertain, and so there can be no Distress, because there is no Rent*; wherefore this Action is well brought; and Judgment was granted for the Plaintiff, una Voce. Skin. 238. 242. Mich. 1 Jac. 2. B. R. Mason and Welland.

6 Mod. 265. Strong v. Courtney, S. C. accordingly; and the Court said the Verdict did not cure the Want of Consideration; but otherwise it had been *if it had appear'd that the Rent had been assign'd to C.* 2 Ld. Raym. Rep. 1217. S. C. accordingly.

21. In a special Assumpsit the Plaintiff declared, That *whereas D. had a Rent-charge* issuing *out of the Defendant's Lands*, the Defendant, *in Consideration he would save him harmless from all Molestation by D. promis'd to pay* the Plaintiff so much. Upon Non Assumpsit pleaded the Plaintiff had a Verdict, but Judgment was arrested, because the Rent-charge was granted to D. and not to the Plaintiff, and that there was *no Room to imagine an Assignment, or that the Rent did not continue in D.* and if so, then the Defendant was to pay the Plaintiff for not doing that which he had no Right to do, which is *Nudum Pactum*, and no Consideration. 1 Salk. 364. pl. 4. Mich. 4 Ann. B. R. Courtney v. Strong.

(P) Upon an Assumpsit. In what Case it lies.

* Br. Action sur le Case, pl. 72. cites S. C. by Fineux Ch. J. — † Br. Action sur le Case, pl. 7. cites S. C.—Br. Contract, pl. 5. cites S. C.—‡ S. P. Br. Action sur Case, pl. 69. cites S. C. that Action on the Case lies; Per June Ch. J. and Paston J.——S. P. Br. Action sur le Case, pl. 26. cites 2 H. 4. 3 & 4. But contra at another Day and in the Time of H. 7. upon Assumpsit.—S. P. Br. Act on sur le Case, pl. 40. cites 11 H. 4. 33. And Brooke says it seems to be good Law at this Day; for *the Action* upon the Case which shall be brought upon Assumpsit, *shall be* brought, *that for such a Sum of Money to him paid* &c. *the Defendant promised* &c. and in this Case there is supposed no Sum of Money; therefore it is *Nudum Pactum* &c.——But Ibid. pl. 31. cites 3 H. 4. 3. contra, That of *Covenant by Parol*, Action upon the Case lies for the Non-feasance.——So Ibid. pl. 69 cites 14 H. 6. 11.—So Br. Discent, pl. 2. cites 20 H. 6. 34. if he *has not Specialty* to have Action of Covenant.——Br. Action sur le Case, pl. 10. cites S. C.

1. **If one promise** to build a Mill **or House for me**, within a certain Time, **if he does not do it, no Action lies for it**, unless a Consideration be alleged **for it**; **otherwise** it sounds merely in Covenant, **and is Nudum Pactum.** 2 H. 4. 34. 11 H. 4. 33. 19 H. 6. 49. 20 H. 6. 34. **Contra** 14 H. 7. **Action lies le Case** 45. * 21 H. 7. 41. **Contra** † 3 H. 6. 36. ‡ 14 H. 6. 18. b.

Keilw. 50. a. pl. 4. Pasch. 18 H. 7. Anon. S. P. without mentioning any thing of a Consideration; and says that it sounds only in Covenant.——Keilw. 78. in pl. 25. Mich. 21 H. 7. that if I had paid the Workman 20 l. for doing his Work, I may have Action on the Case, tho' it sounds only in Covenant, and that without Payment of Money there is no Remedy; Per Frowike Ch. J. in pl. 25.

2. **If a Carpenter promises** to repair my House before a certain Day, **if he does not do it, by which my House falls, I shall have an Action upon the Case.** 19 H. 6. 49. b.

S. P. Br. Action sur le Case, pl. 69. cites 14 H. 6. 18.——Of *Covenant not done*, a Man shall not have Action upon the Case, but of Covenant *ill done* Action upon the Case lies, Per Martin; but Per Babb. and Cockein, 'tis all one; and *if there be no Specialty* Action upon the Case lies in the one Case and the other clearly; and so it is used at this Day in B. R. and in London. Br. Action sur le Case, pl. 7. cites 3 H. 6. 36 ——Kelw. 78. Mich. 21 H. 7. in pl. 26. S. P. accordingly, by Frowike Ch. J.

3. **If a Carpenter undertakes** to build a House **for me**, if he does it ill, **an Action upon the Case lies against him.**

4. If

4. If there be a Bargain between two, that the one shall marry the Daughter of the other, and that the other shall infeoff him and the Daughter, if he marries his Daughter to another, no Action upon the Case lies for Want of Consideration. 7 H. 6. 1.

5. If a Farrier takes upon him to cure my Horse that is gravelled in his Feet, and after ita negligenter & improvide heals the said Horse that he dies, an Action upon the Case lies upon this Matter, without alleging any Consideration; for his Negligence is the Cause of the Action, and not the Assumpsit. Trin. 39 Eliz. B. R. between Powtuary and Walton. Fol. 10. See (P. b) pl. 16. S. C.

6. If I retain a Man of the Law to be of my Counsel at Guildhall in London such a Day, at which Day he does not come, by which my Cause is lost, I shall have a Writ of Disceit against him. 20 H. 6. 34. b. S. P. Br. Action sur le Case, pl. 69 cites 14 H. 6. 18.

Per Paston.——See (P. b) pl. 11. S. C.

7. If a Man of the Law for a certain Sum promises to be of the Counsel of another, and to obtain such a Manor, for him, if he voluntarily breaks his Assumpsit, viz. by discovering his Counsel to another, by which he does not obtain the Manor, this Action lies against him. 11 H. 6. 18. 24. 55. S. P. Br. Action sur le Case, pl. 108. cites 11 H. 6. 18. And *contra if he shews his Evidence to him, and does not retain him*, and he discovers ut supra. And if he does his Endeavour, and cannot purchase, then Action upon the Case does not lie.——See (P. b) pl. 9. S. C.

Assumpsit &c in which the Plaintiff declared, That in Consideration &c. he (the Defendant) *promised to purchase such Lands at the best Rate he could*, and assign'd the Breach that he had not purchas'd the Lands. Upon a Demurrer to this Declaration, it was held *an absolute Promise*; but Foster Ch. J. e contra. The Plaintiff had Judgment. Lev. 3. Mich. 12 Car. 2. B. R. Day v. Webb.

8. The Law would be the same, if he had done his Endeavours to obtain it, because he had expresly bound himself to obtain it. 11 H. 6. 18. 56. S. P. Br. Action sur le Case, pl. 108. cites 11 H. 6. 18.

9. If a Man bargains and sells Lands for a certain Sum, and promises to procure certain Men to release to him, if he does not perform it, an Action upon the Case lies against him. 14 H. 6. 18. b. S. P. Br. Action sur le Case, pl. 69. cites S. C. accordingly, by June Ch. J. and Paston J.

10. [But] if a Man sells Lands to another for a certain Sum, and promises to infeoff him of the Land within a certain Time, if he does not infeoff him, but infeoffs another, an Action upon the Case lies against him for the Disceit. 20 H. 6. 34. Br. Disceit, pl. 2. cites S. C. it seems by the Argument that Action upon the Case will lie upon this Assumpsit, if he *has not Specialty* to have Action of Covenant.——Br. Action sur Case, pl. 10. cites S. C. but says this Case is not adjudged.

11. So if in this Case the Vendor infeoffs a Stranger, and after disseises him, and infeoffs the Vendee, and the Disseisee enters upon him, he shall have Disceit against him. 20 H. 6. 34. b. S. P. Br. Action sur le Case, pl. 10. cites S. C. but

Brook says that the Case is not adjudged.——Br. Disceit, pl. 2. cites S. C.

12. So if he had taken back an Estate Tail from the Feoffee, and had enfeoffed the Vendee, yet he should have had a Writ of Deceit. 20 H. 6. 34. b.

Br. Action sur le Case, pl. 10. cites S. C. that Deceit lies and not Action upon the Case.

13. So if after the Bargain he had acknowledged a Statute, and after enfeoffed the Bargainee, the Bargainee should have had a Writ of Deceit against him. 20 H. 6. 35.

Br. Action sur le Case, pl. 10. cites S. C. that Deceit lies against him, but not an Action on the Case. But Brooke says that this Case is not adjudg'd. —— Br. Deceit, pl. 2. cites S. C —— See (G. c) pl. 14.

14. So if he had granted a Rent-Charge out of the Land before the Feoffment. Contra 20 H. 6. 34. b.

15. [So] If a Man Sells certain Lands for a certain Sum, and promises to enfeoff him, if he does not enfeoff him, tho' he does not enfeoff any other but keeps it himself, yet Deceit lies against him. 21 H. 7. 41. per Fineux. Contra 20 H. 6. 34.

16. If a Man be retain'd with me of my Counsel to buy the Manor of D. from J. S. and he falsely purchases the Manor to himself, an Action upon Case lies against him. 16 H. 6. Action sur le Case 44.

Br. Action sur le Case, pl. 28. cites S. C.

17. If a Man for a certain Sum undertakes to labour for me with J. [to get] a Lease for Years of certain Lands, and he labours with J. for a Lease for himself, an Action upon the Case lies against him for this Deceit. 3 H. 7. 14. Curia.

S. P. Br Action sur le Case, pl. 78. cites S. C. and see here that he did not count *that for such a Sum of Money the Defendant promised* &c. For it seems that if he took the Pack-Horse into the Boat de son tort demesne and surcharged, by which the Pack-Horse perish'd, Action upon the *Case lies*; and also the Ferry Wages is certain. —— See (Z. b) pl. 11. S C.

18. If a Man undertakes to carry my Pack-Horse over the River Humber safely, but he surcharges his Boat with other Goods, by which Means my Pack-Horse perishes; I shall have an Action upon the Case, tho' this Sounds in Covenant. 22 Ass. 41. adjudged.

19. If a Man sells certain Cocks of Hay in a certain Meadow to another for a certain Sum, and the Vendee promises to carry them away by a certain time, and notwithstanding the Vendee suffers the Cock not carried away to lie there to rot the Soil of the Vendor, so that he loses the Profit of his Herbage for a time, he may have an Action upon the Case against the Vendee. 13 H. 4. Action sur le Case 48. Admitted by Issue.

Fol. 11.

See Covenant (A) pl. 3. S C.

20. If a Man for a good Consideration promises by his Deed not to do a certain thing, no Action upon the Case lies upon this Promise, but a Writ of Covenant. Mich. 16 Jac. B. R. between *Bemish and Hildersly*, adjudged.

Cro. J. 505. pl. 17. Bennus v. Guildley S. C. adjudg'd per tot. Cur. for the Defendant.

21. If A recovers a Debt against B. and B. pays him the Condemnation, whereupon A. releases all Actions, Executions &c. to B. by his Deed, and by the same Deed promises that he will withdraw and discharge all Writs of Execution against B. upon the said Judgment; yet no Action upon the Case lies upon this Promise, because it is made by Deed, and so he ought to have a Writ of Covenant. Mich. 16 Jac. B. R. between *Bemish and Hildersley*, adjudged.

22. A Promise against a Promise will maintain an Action upon the Case, As in Consideration that *you give me* 10 *l. such a Day, I promise to give you* 10 *l such a Day after.* 4 Le. 3. pl. 9. 31 Eliz. B. R. Strangborough v. Warner.

23. If one is *bound in an Obligation and afterwards promises to pay the Money*, Assumpsit lies upon this Promise. Cro. E. 240. pl. 12. Trin. 33 Eliz. B. R. Ashbrooke v. Snape.

24 A.

24. A. promised B. the *Moiety of the Gain of a Voyage* to be taken by A.'s Ship, and B. promised A. in Consideration thereof to be at the Charge of the Moiety of the Losses. Assumpsit lies for A. against B. on this Promise; and Judgment for the Plaintiff. Bulst. 202. Pasch. 10 Jac. Dockley v. Bury.

25. Where *express Promise* is, Assumpsit lies as well as *Account*. 1 Salk. 9. pl. 1. Hill. 2 W. & M. B. R. Wilken v. Wilken.

(Q) Consideration. What shall be a good Consideration. Consideration executed. [At what Time the Promise must be made to make it good.]

1. A Consideration altogether past is not good. If a Man disburses several Sums of Money about my Business without my Request, and after I say to him in Consideration that he has disbursed the said Sums for him [me,] I promise to pay to him 20 l. this is not a good Consideration, because it was executed before. Pasch. 11 Jac. B. R. between *West and West*.

2. If the Servant of A. be arrested in London for a Trespass, and J. S. who knows A. bails him, and after A. promises him for his Friendship to save him harmless of Damage and Costs &c. and after J. S. is charged, yet this is not a good Consideration of an Assumpsit, because the Bailing, which was the Consideration, was past and executed before. Dyer, 10 Eliz. 272. D. 272. a. pl. 31. Pasch. 10 Eliz. Hunt v. Bate. —— S. C. cited by Periam J. 2 Le. 225. in pl. 286 —— Ow. 144. cites S. C. tho' the Page there is misprinted. —— S. C. cited 2 Bulst. 73. —— Cro. C. 409. pl. 2. cites S. C. —— S. C. cited Godb. 32. in pl. 40. —— S. C. cited 2 Le. 225. in pl. 286.

3. But otherwise it is if the Master had requested him before to be bail for his Servant, and the Bailing had been after. Dyer, 10 Eliz. 272. See pl. 2 —— S. C. & S. P. cited Yelv. 41. —— For it being done at the Master's Request, the Continuance of the Benefit will make the Consideration good, and so the Case in 10 Eliz. D. 272. imports. Per Jones and Crooke J. Cro C. 409. Trin. 11 Car. B. R. in pl. 2. —— S C cited Palm. 442. —— Hob 106. in pl. 129. says it was agreed that a *mere voluntary Courtesy* will not have a Consideration to uphold an Assumpsit. But if that Courtesy were *moved by a Suit or Request of the Party that gives the Assumpsit*, it will bind; for the Promise, tho' it follows, is not naked but couples itself with the Suit before and the Merits of the Party procured by that Suit, which is the Difference. Pasch. 10 Eliz. D. 272. taken in the Case of Hunt v. Bates.

4. If A. comes to B. and intreats him to be bound in an Obligation for one of his Friends, and B. is contented at his Request to be bound, and becomes bound accordingly; and after B. comes to A. and says to him, I was content at your Request to be bound to such a one &c. I hope you will save me harmless, and A. says that he will, this is a good Consideration to maintain an Action, tho' he was bound before, inasmuch as it was at his Request. *Worthington*'s Case cited Pasch. 42 Eliz. B. R. to be adjudged. Cro. E. 42. pl. 1. Sidnam v. Worthington, Mich. 27 & 28 Eliz. C. B. S. C. and on the first Motion Windham and Anderson held that the Action did not lie; but afterwards all the Court held it a good Consideration by Reason of the Request precedent; and the Plaintiff had Judgment. —— 2 Le. 224. pl. 286. Sidenham v. Worlington S. C. adjudg'd accordingly —— Godb. 31. pl. 40. S. C. accordingly, and after good Deliberation adjudg'd for the Plaintiff. —— S. C. cited Ow. 144.

5. But

Mo. 866. pl. 1197. Lampleigh v. Braithwait S.C held by Nichols, Winch and Hobart, that the Action well lies.——Hob. 105. pl. 129. S. C. adjudg'd for the Plaintiff. Brownl. 7. S. C. adjudg'd for the Plaintiff.

5. But where a Man requests another to do a thing, there after the thing is performed it will be a good Consideration that he has done the thing upon his Request, [therefore] he promised &c. Trin. 14 Jac. *Braithwait's Case and Lamp*, my Reports.

See pl. 5. and the References there.

6. As if a Man requests another to labour for his Pardon &c. and after he does his Endeavour, if the other says in Consideration that he has labour'd for his Pardon at his own Costs, he promises to pay him so much &c. this is a good Consideration. Trin. 14 Jac. *Braithwait's* Case adjudged.

S.P. adjudg'd, but revers'd in Error in the Exchequer-Chamber. D. 272. Marg. pl. 32. cites Hill. 2 Jac. B. R. Rot. 511. Sandhill v. Jenny.——Adjudg'd a good Consideration, there having been a Communication of the Marriage, at the Request of the Defendant; for the Father's natural Affection continues, and her Advancement is sufficient Cause of the Promise. Cro. E. 59. pl. 1. Trin. 29 Eliz. B. R. Marsh v. Kavenford.——2 Le. 111. pl. 146. Marsh v. Rainsford, S. C. says, that upon the Communication the Plaintiff and Defendant could not agree on the Days of Payment; After which the Plaintiff stole away the Daughter, and married her without the Defendant's Knowledge; but afterwards he agreed to it, and in Consideration of the said Marriage promis'd to give him 100 l. and Judgment for the Plaintiff.——S. C. cited D. 272. b. Marg. pl. 32. as adjudg'd for the Plaintiff.

7. If A. in Consideration that B. has married his Daughter at his Request, promised to pay him 20 l. this is a good Consideration. Dyer, 10 Eliz. 272.

* Fol. 12.

8. If A. in Consideration that B. had bargained and sold to him certain Tuns of Strong Beer, at the Request of A. assumed and promised to B. to pay to him 4 l. for every Tun upon Delivery of 30 Tuns of Strong Beer; this is a good Consideration, though past, because the Sale was at the Request of him who made the Promise. Mich. 12 Jac. (*) in the Exchequer-Chamber between *Field and Dale* adjudged. Quod vide Mich. 12 Jac. B.

All this was done upon one and the same Day, and so was but one intire Agreement, and the Promise goes to the whole. 2 Bulst. 73. S. C.

9. If A. seised of a Shop, bargains with B. to lease it to him for 5 Years, rendring 40 s. Rent; and 12 d. of both Sides is given for the Performance of this Agreement; and after in Consideration that A. will make the Lease according to the said Promise, B. promises to pay him 30 l. whereupon A. leases the Shop accordingly, this is a good Consideration to have Action for the 30 l. though there was a perfect Bargain before this Promise made, inasmuch as the Lease was not made according to the Promise [Bargain] before this Promise was made. Pasch. 11. B. R. between *Jones and Clark*, adjudged.

Roll Rep. 381. pl. 2. S. C. adjudg'd accordingly.—3 Bulst. 187. S. C. adjudg'd for the Plaintiff.

10. If J [one] requests a Man to board another for one Year, as he had boarded him before, to which the other agrees. And before the Year ended, he that made the Request promises in Consideration that he will board him throughout the Year, he will pay him for the whole; if he boards him accordingly, this is a good Consideration for the Board of the whole Year, though Part of the Consideration be passed; for perhaps he would not have boarded him throughout the Year, if it had not been for the Promise. My Rep. 14 Jac. *Cotton against Westcot.*

S. P. by Doderidge J. quod fuit concessum, by Coke Ch. J. accordingly,

11. If J become Bail for J. S. at the Request of J. D. if before the Action determined, J. D. promises, in Consideration thereof, to discharge [him] this is good. My Rep. 14 Jac.

because the Action was continuing. 2 Roll Rep. 382. in pl. 2.——3 Bulst. 187. S. P. by Coke and Doderidge in S. C.

12. If

12. If the Son contracts with B. for 20 Weigh of Cheese for 20 l. whereof 10 l. was paid before-hand, and the Residue [was to be paid] at Michaelmas next, and after the Son comes to B. for the Cheese, which he refuses to deliver, and after the Father of the Son comes to [B.] and requests him to deliver it to his Son, and promises him that if his Son does not pay the said 10 l. at the Day, that he himself will, whereupon B. delivers the Cheese; B. may have an Action upon the Case, upon this Assumpsit, against the Father, if the Son does not pay the Money; for this is a good Consideration. Mich. 41 & 42 Eliz. B. R. between *Sherwood and Woodward.* Cro. E. 700. pl. 15. S. C. it was objected that to deliver that which he sold, is no more than the Law appoints, the Property whereof is in the Son by the Sale. But Gawdy and Fenner held it a good Consideration, as it is an Ease to the Bargainee to have them without Suit, which perhaps he could not otherwise have had; and tho' the Bargainee may take them in this Case, yet the Bargainor is not bound to deliver them. And there is a new Act done by him upon this Agreement, and it is an Ease to the Vendee; And that 12 H. 7. is that to deliver Goods at another Place is a good Accord; wherefore, cæteris Justiciariis absentibus they judg'd it for the Plaintiff.

13. If A. in Consideration that B. had sold to him such a Day such a Thing adtunc & ibidem promised to pay him 10 l. this Consideration is good; and continued [is all one as if it was made] at the time of the Promise. Pasch. 8 Jac. *Andrew's* Case.

14. If a Man be indebted to another for Goods sold, & postea eodem die, promises in Consideration thereof to pay it at a Day to come, this is a good Consideration to make an Assumpsit; for the Continuance of the Debt is a Consideration continuing. My Rep. 14 Jac. *Hodge and Vavisor.* Roll Rep. 413. pl. 1. S. C. and agreed that it is a good Consideration; and Houghton said, that the usual way of declaring is in this Manner, and is good; and Judgment was given for the Plaintiff. —— 3 Bulst 222. S. C. and Judgment for the Plaintiff accordingly. —— but Roll. Rep 413. the Reporter makes a Quære of this Case, because it seems there is no Consideration of a new Promise, inasmuch as no Forbearance is promised; for it has been held that a Consideration to forbear per paululum temporis is not good, because he may sue him notwithstanding, and consequently he may do the same in this Case; and in this Case it lies not as upon a future Contract, the Contract being executed before, and this does not make a new Contract.

15. So if he makes such Assumpsit at a Day after the Contract made, and before Payment; for the * Continuance of the Debt is a good Consideration continuing. My Rep. 14 Jac. *Hodge and Vavisor,* adjudged.

* See pl. 21.

16. So if the Defendant 30 Junii was indebted to the Plaintiff in 20 l. for Money lent by the Plaintiff to him; and the Defendant being so indebted afterwards, scil. the 30 July after promises to pay it at a Day to come; this is good; for this is a Consideration continuing. Mich. 15 Car. B. R. between *Barton and Shurly,* adjudged in a Writ of Error. Intrat' Hill. 14 Rot. 913.

17. If A. and B. account together, and B. is found 9 l. in Arrears, upon which B. in Consideration thereof promises to pay it at a Day; this is a good Consideration not executed before, inasmuch as it is made upon the Account, and the Debt is uncertain before the Account, inasmuch as Allowances ought to be made. Mich. 11 Jac. B. R. between *Fesson and Brier,* per Curiam adjudged. Trin. 12 Jac. B. R. also per Curiam, 14 Jac. B. R. between * *Janson and Colemore.* See (N) pl. 1. and the Notes there.

11. If A. in Consideration that B. had, at his Request, solicited several Suits for him, and had done divers Businesses for him, assumes and promises to convey to him his Manor of D. or to give him as much as the * Manor is worth, this is a good Consideration, though past'd, because it was done at his Request. Mich. 10 Car. B. between *Henne* Plaintiff, and *Rolph* and others, Executors of one Smith Defendants adjudged, this being moved in Arrest of Judgment,

* Fol 13.

† See Tit. Bar (B) pl. 1. S. C.

Mich. 22 Car. between * *Leach and Bromsel*, Per Curiam, in Consideration that before, at the Request of the Defendant, ille habuisset Magnam Curiam de negotiis Defendentis in Lege & preservasset Defendentem a multis periculis &c.

19. In an Action upon a Promise, if the Plaintiff declares, that whereas 60 l. was given to him for a Legacy, and that all this, except 7 l. was paid to him by the Defendant, who was Executor in the Right of his Wife, and so bound to pay it, and that 23d September the Plaintiff, at the Request of the Defendant, releas'd the said 7 l. and after 28th September, the Defendant, in Consideration of the said Release, promised to pay the said 7 l. at the Death of his Wife, if [she] does not pay it, though the Release, which was the Consideration, was passed, viz. 5 Days before the Promise was made, yet inasmuch as this was made at the Request of the Defendant, this is a good Consideration. Dubitatur. Trin. 11 Car. B. R. between *Townsend and Hunt*. Intratur Hill. 10 Car. Rot. 774. But Mich. 11 Car. the Case was argued at Bar and Bench, & per totam Curiam adjudged that the Action lies; for the Request made the Act, which was done to be meritorious, and to deserve a good Turn of the other Part; and then Croke said that 28 Eliz. in * *Rainsford's Case*, B. R. and in 44 Eliz. B. R. in † *Rigg's Case*, this was adjudged accordingly, and affirmed on a Writ of Error Mich. 14 Car. B. R. between *Keene and Pearson*, adjudged in Consideration that the Plaintiff, upon an Agreement before made, concerning the melting of certain Bells &c. and casting them at the Request of the Defendant, had made certain Molds to make them, the Defendant did promise to pay him for the making of them, and for his Labour and Expences about them, this is a good Promise, though upon a Consideration past, because it was done at the Request of the Defendant. Adjudged, this being moved in Arrest of Judgment. Intratur Trin. 14 Car. Rot. 506.

* Cro. C. 408. pl. 2. S. C. accordingly, and adjudged for the Plaintiff. —Jo. 365. pl. 2. S. C. adjudg'd accordingly. — † This seems to be the Case of Marsh and Ravenford, Cro. E. 59. pl. 1. Trin. 29 Eliz. argued by Egerton Solicitor General, and Foster, that the Consideration was not good; but adjudged for the Plaintiff. —2 Le. 111. pl. 146. Trin. 30 Eliz. B. R.

March v. Rainsford, S. C. adjudg'd for the Plaintiff. ——See pl. 7.

‡ See pl. 41. Riggs v. Bullingham, S. C.

This Plea is the S. C. as the latter Part of pl. 19. next above.

23. If A. in Consideration that B. according to an Agreement before made between A. and B. touching the casting de novo of certain Bells of the Church of S. had before, at the Request and Instance of A. and Costs of B. made certain Moulds for this Purpose, promises B. to pay him for the said Moulds, and for his Pains in making them when he should be required, this is a good Consideration for B. to maintain an Action against A. for though the Consideration be past, yet inasmuch as it was done at the Request of A. the Action lies, for the Consideration continues. Pasch. 15 Car. B. R. between *Pearson and Keene*. Adjudged Per Curiam, this being moved in Arrest of Judgment. Intratur Trin. 14 Car. B. R. Rot. 506.

21. In an Action upon the Case upon a Promise, if the Plaintiff declares, that whereas the Defendant was indebted to him for divers Sums of Money at several Times ante tunc accommodat' to him by A. S. adtunc & adhuc his Wife, & adtunc due and unpaid, the Defendant did promise to become bound with a Surety in an Obligation, for the Payment thereof at a certain Time, this is a good Consideration, though past, because the Debt is a * continuing Consideration, and therefore good without any other Consideration of Forbearance to prosecute any Suit for it, or any other new Consideration. Trin. 1650. between *Cogdon and Ham*. Adjudged Per Curiam. Intratur Hill 1649. Rot. 170.

* See pl. 15.

21. The Count was, that *in Consideration J. S. had granted a Term to J. D. and that afterwards, at the Request of J. S. the said J. D. did make an Estate to W. for 4 Years, J. S. did promise* &c. After Verdict it was mov'd,

mov'd, that this was no Conſideration, and a *Difference* taken where the *Promiſe was upon the Grant, and* where *after*; that if it was before the Conſideration it was good, but if afterwards it was not good. And adjudg'd Quod querens nil capiat &c. Godb. 13. pl. 19. Paſch. 24 Eliz. B. R. Anon.

23. If *one ſerves me for a Year, and has nothing for his Service*, and afterwards, *at the End of the Year, I promiſe him, for his good and faithful Service ended*, 20 *l.* he may maintain an Action on ſuch Promiſe; for it is a good Conſideration; Per Rhodes J. 2 Le. 225. Paſch. 27 Eliz. C. B. in pl. 285. and to this all the Juſtices agreed.

S. P. Per Rhodes J. Cro. E. 42. in pl. 1. S. C.——S. P. Per Rhodes J. and Periam J. agreed to the Difference; and it was not denied by the other Juſtices.

24. *But if* a Servant *has Wages* given him, and his Maſter ex abundanti promiſes him 10 l. more after his Service ended, he ſhall not maintain an Action for the 10 l. upon the ſaid Promiſe; Per Rhodes J. and this Difference was agreed by all the Juſtices. 2 Le. 225. Paſch. 27 Eliz. in pl. 286.

25. Leſſee for Years, Reverſion to one M. the *Leſſee* having ſpent Money, and *being at Charges in Ejectment brought againſt him, in Defence* of the Title, acquainted M. with it, and deſired him to contribute towards his Charges, or to make him ſome other Recompence; whereupon M. *promiſed*, that for the Conſideration aforeſaid, he *would grant him ſuch a Leaſe*, at the Expiration of his Term, as he now has; which he afterwards refuſing to do, the Plaintiff brought an Action of Aſſumpſit &c. but adjudged that it would not lie, becauſe the Conſideration was *executed* before the Promiſe made. Mo. 220. pl. 357. Mich. 27 & 28 Eliz. Moor v. Williams.

And. 137. pl. 187. Moon v. Williams, S. C. in an Ejectment brought by M. againſt the Leſſee, the Court adjudg'd it for the Plaintiff, becauſe very clear that it is only a Promiſe, and no Leaſe.

26. *Marriage* is always a preſent Conſideration, Per Anderſon, to which Windham agreed. 2 Le. 224. 225. Paſch. 27 Eliz. C. B. in pl. 286.

S. P. accordingly, Godb. 31. in pl. 40. S. C.——An Aſſumpſit, in Conſideration that you have married my Daughter, to give you 40 l. is good; for the Affection and Conſideration always continues, Per Walmſley. Cro. E. 741. Hill 42 Eliz. C. B. in pl. 16.——S. P. And ſo of his Couſin; Per Barkley J. Cro. C. 409. Trin. 11 Car. B. R. in pl. 2.

27. Note a Diverſity, in *Aſſumpſit* it is not neceſſary that the *Contract* be *Eodem inſtante*, but it is enough if there be *ſufficient Inducement to the Promiſe*; and tho' it is *precedent* it is not material. But in *Debt* it is requiſite that *Benefit comes to the Party*, otherwiſe Debt lies not for Want of Quid pro Quo. D. 271. b. pl. 29. Marg. cites it as adjudg'd 29 & 30 Eliz. C. B. Sydenham v. Worthington.

28. Aſſumpſit, *for that the Defendant leaſed Lands to the Plaintiff rendring Rent, and after ſome Years of the Term expired, promiſed*, that *in Conſideration the Plaintiff had occupied* the Land, *and paid his Rent, to ſave him harmleſs againſt all Perſons for the Occupation for the Time paſt and to come*; and that afterwards H. diſtrain'd the Plaintiff's Cattle on the Land. It was objected, that the Payment of the Rent could be no Conſideration, becauſe he occupied the Land for it, and alſo the Conſideration was paſt. But the Plaintiff had Judgment to recover his Damages. Le. 102. pl. 134. Paſch. 30 Eliz. B. R. Pearle v. Edwards.

Before the Time of the Promiſe the Plaintiff's Beaſts were taken Damage feaſant. Adjudg'd for the Plaintiff; for the Conſideration that he was in Poſſeſſion, and had paid his Rent, and was to pay his Rent, is ſufficient to cauſe the other to defend his Poſſeſſion for the Time paſt and to come. Cro. E. 94. pl. 5 S. C. by the Name of Pearle v. Unger.

29. If

S. P. ſaid by Popham, Daniel, and Coke, to have been adjudg'd accordingly in the Exchequer.

29. If one comes to a *Serjeant at Law* for his Counſel, and the Serjeant *adviſes* him, and *afterwards the Client, in Conſideration of ſuch Counſel, promiſes to pay him* 20 l. an Action lies for it; Per Wray Ch. J. and ſo Popham ſaid it had been adjudg'd in the Exchequer. 2 Le. 111. pl. 146. Trin. 30 Eliz. B. R. Obiter.

Cro. E. 59. pl. 1.

30. If a *Phyſician*, who is my Friend, *hearing that my Son is ſick, goes to him in my Abſence*, and helps *and recovers him, and I* being inform'd thereof, *promiſe him, in Conſideration as above, to give him* 20 *l.* an Action will lie for the Money. 2 Le. 111. pl. 146. cited by Popham 30 Eliz. as lately adjudged in Caſe of Style v. Smith.

31. Aſſumpſit, *in Conſideration he had bought of the Defendant* 3 *Parcels of Land upon the* 10*th of December*, the *Defendant afterwards, viz.* 19*th December, promiſed to make him ſuch ſufficient Aſſurance* thereof before ſuch a Day. It was mov'd after Verdict, that the Conſideration was executed; but adjudged for the Plaintiff, for the Aſſurance was the Subſtance of the Sale. Cro. E. 138. pl. 21. Trin. 31 Eliz. B. R. Warcop v. Morſe.

3 Le. 236. pl. 236. S. C. that the Goods were deliver'd to the Plaintiff's Wife to keep till the next Court; this was held no Conſideration, ſuch Delivery being againſt Law, and alſo the Conſideration was a thing executed before the Promiſe; and Judgment againſt the Plaintiff.

32. A Precept iſſued to a Bailiff to *attach Goods* of J. S. which he did, and *delivered them to the then Plaintiff*, to deliver at the next Court, and B. the *Defendant*, in Conſideration thereof, *aſſum'd to ſave him harmleſs.* This Conſideration was a Thing executed before the Promiſe, and ſo not good. See 3 Le. 326. pl. 325. Mich. 32 & 33 Eliz. B. R. Mead v. Bigot.

But where the Conſideration was that *the Plaintiff, by the Defendant's Appointment, and for his Debt, had ſhortly before paid to R. S.* 60 *l.* the Defendant promiſed to repay it on Requeſt &c. Judgment was ſtaid, becauſe the Payment being a Conſideration paſt, was not ſufficient. Cro. E. 741. pl. 16. Hill. 42 Eliz. C. B. Barker v. Hallifax.——2 Barnard. Rep in B. R. 141. The Ch. J. ſaid he could not agree this Caſe to be Law. See 49 or 50. the Reaſons thereof.

34. Aſſumpſit, in Conſideration *that N. the Plaintiff had paid for B. the Defendant, and at his Requeſt*, 10 *l.* at ſuch a Day, (which was *a Year before*) he promiſed to repay it, cum inde requiſitus effet. It was objected that this Conſideration was for a Thing paſt, and therefore not good. Sed non allocatur; for the Payment being laid to be at his Requeſt the Conſideration continues, and ſo is the common Courſe. Cro. E. 282. pl. 3. Trin. 34 Eliz. B. R. Beaucamp v. Neggin.

35. Aſſumpſit, in *Conſideration that the Plaintiff had ſubmitted himſelf to the Award of J. S.* the *Defendant, adtunc & ibidem, promiſed to pay the Plaintiff* 10 *l.* The Defendant demurr'd, becauſe the Conſideration was executed; but adjudg'd for the Plaintiff, becauſe *adtunc & ibidem* make the Submiſſion intendible at the Time of the Promiſe. Mo. 367. pl. 505. Mich. 36 & 37 Eliz. Sheffield v. Rice.

36. Aſſumpſit &c. in *Conſideration the Plaintiff had deliver'd to the Defendant* 20 *Sheep, he promiſed to pay him* 5 *l. at the Time of his Marriage*, and alleg'd in Fact that he was married &c. The whole Court held, that becauſe the Conſideration was in the Preter Tenſe, (Deliberaſſet) and ſo the Conſideration paſt, it is no Cauſe of Action; and therefore Judgment was ſtay'd. Cro. Eliz. 442. pl. 5. Mich. 37 & 38 Eliz. C. B. Jeremy v. Goochman.

37. Aſſumpſit, in Conſideration *that he had given certain Money*, is ill, becauſe it might be that he had given it before the Promiſe. Palm. 560. Arg. cites Trin. 37 Eliz. Baggott's Caſe.

38. Aſſumpſit,

38. Assumpsit, in Consideration that he, at the Defendant's Request, by Deed *dedit & concessit to the Defendant the next Avoidance of the Church of D. the Defendant promised to pay the Plaintiff* 100 *l.* Resolved, that the Grant being at his Request it was a sufficient Consideration, though it was divers Years past, especially it being to the Defendant himself; otherwise peradventure if it had been to a Stranger. Cro. E. 715. pl. 38. Mich. 41 & 42 Eliz. B. R. Riggs v. Bullingham. S. C. cited by Jones and Crooke J. Cro. C. 429. Trin. 11 Car. B. R. in pl. 2.

39. A. *put his Son to board with* J. S. *the Plaintiff for* 3 *Years, at* 8 *l. a Year, and died within the Year.* M. his *Widow, in Consideration of Natural Affection to her Son, and* in Consideration *that the Son should continue during the Residue of the* 3 *Years with the Plaintiff, promised to pay him* 6 *l.* 13 *s.* 4 *d. for the Boarding the Son for the Time past, and* 8 *l. for every Year after* of his Continuance with the Plaintiff. The Court agreed that Natural Affection of itself is not sufficient to ground an Assumpsit, without an express Quid pro quo; but that is good here, because it is not only in Consideration of Affection, but that her Son should afterwards continue at his Table, which is good as well for the Money due before, as for what should afterwards become due. Cro. E. 755. 756. pl. 20. Pasch. 42 Eliz. C. B. Brett v. J. S.

40. The Defendant, in Consideration *that the Plaintiff had lent him* 30 *l. before at his Request, promised to lend the Plaintiff* 30 *l. for a Year, or give him* 40 *s.* But this being a Consideration past and executed, it was adjudg'd for the Defendant. Cro. E. 885. pl. 25. Pasch. 44 Eliz. C. B. Dogget v. Voyell. Ow. 144. Dogget v. Dowell, S. C. adjudg'd accordingly by all the Justices, præter Warburton. ——— Mo. 643. pl. 886. Dogget v. Vowell, S. C. adjudg'd accordingly; but in the State of the Case there, it is not said that the Loan was at the Defendant's Request. ——— S. C. cited Palm. 560. ——— 2 Bulst. 73. S. C. cited.

40. Assumpsit, *for that the Defendant requested the Plaintiff to give his Credit for one R. to F. for* 2 *Tun of Wine, Value* 50 *l.* and the *Plaintiff gave Bond to F. of* 100 *l. for the Payment thereof*; upon which he was sued, *and forced to pay* 70 *l.* at such a Day; *in Consideration whereof the Defendant promised to pay the* 70 *l. such a Day* &c. It was objected that this was upon a Consideration past, and so not good; but because R. had Credit given him by F. at the Defendant's Request, upon the Plaintiff's undertaking, and the Plaintiff was damnified by reason thereof, the Court held the Consideration to be sufficient, and not past, and gave Judgment for the Plaintiff. Cro. J. 18. pl. 3. Mich. 1 Jac. B. R. Bosden v. Sir John Thynn. Yelv. 40. S. C. and *tho' the original Request was only to give Credit for* 50 *l. yet when R. would take no Security but by Bond of* 100 *l. for Payment of the* 50 *l. and all this is signified afterwards to the Defendant, and agreed to by him, and promises to pay the* 70 *l.* this shall charge him; because it has its Essence and Commencement from the first Request made by the Defendant; and Judgment for the Plaintiff by 3 Justices; but Yelverton contra clearly.

41. A. sold a Horse to B. for 5 l. and C. the Defendant being present said that in Consideration of the Sale, if B. did not pay him, he would see him paid. It was mov'd in Arrest of Judgment, that it was *not expressly alleg'd that the Sale was made at C.'s Request, and this Promise is laid to be after the Sale made*, and therefore per tot. Cur. Judgment was given against the Plaintiff. Bulst. 120. Pasch. 9 Jac. Thorner v. Field.

42. An *Exchange* was made between two of so much French Money for so much English, in Consideration whereof one promised the other to pay him so much. In Action upon this Promise it was ruled, that the Consideration was good; but because the *Promise was made after the Exchange was past* and executed, the Judgment was reversed in the Exchequer-Chamber. 2 Bulst. 73. Pasch. 11 Jac. cites it Arg. as the Case of Feak v. Cotton.

43. *Gale requeſted Clobery to deliver to J. S. 600 l. Worth of Wine*, which he deliver'd accordingly. Afterwards Clare [*Gale*] *promiſed* Gale [*Clobery*] *in Conſideration that he at his Requeſt had deliver'd ſo much to J. S. that he would pay him if J. S. did not.* J. S. paid only 300 l. And adjudg'd by all the Juſtices of England, that Action lies by G. [Cl.] againſt Cl. [G.] Palm. 442. cites it as the Caſe of **Gale v. Clobery**, in Error. [But it ſeems much miſprinted, and it ſhould be as in the Crotchets, or otherwiſe it muſt be that Clare was a 4th Perſon, and promiſed Clobery in Conſideration of his delivering the Wine at Gale's Requeſt, and that Action lay againſt Clare.]

44. In Aſſumpſit *by a Servant*, ſhe counted that having ſerved the Defendant and his Wife faithfully, he after his Wife's Death, *in Conſideration of the Service done to him and his Wife, promiſed to pay her* 13 *s.* 4 *d.* It was objected that the Conſideration is not good, becauſe it is not alleg'd that ſhe at his Requeſt ſerved him, and alſo that the Promiſe was after the Service perform'd; but Judgment was for the Plaintiff. Hutt. 84. Mich. 2 Car. Franklin v. Bradell.

45. Aſſumpſit &c. The Plaintiff declar'd that on ſuch a Day &c. he *ſold ſo much Barley to the Defendant, Part whereof he deliver'd immediately, and the reſt by Agreement he was to deliver afterwards, and afterwards on the ſame Day the Defendant promiſed to pay* ſo much by ſuch a Day. It was objected that the Promiſe was after the Sale, and ſo being made upon a Conſideration executed, it is not good; but per Cur. it is good enough, being made on the ſame Day, and no Diviſion ſhall be made thereof in this Caſe. Lat. 150. Trin. 2 Car. Howlet's Caſe.

46. Caſe, for that *in Conſideration the Father would ſurrender a Copyhold to the Defendant, he promiſed to give to M. and S. his* 2 *Daughters*, 20 *l. a-piece. M. alone brought Action for* 20 *l.* It was moved in Arreſt of Judgment, that the Plaintiff had declar'd upon a joint Promiſe which concern'd both, and the Action was brought by M. alone, whereas S. ought to be join'd; but adjudg'd that they had diſtinct Intereſts, and by Conſequence the Action is well brought by one of them. Sty. 461. Mich. 1655. Thomas's Caſe.

47. In Aſſumpſit the Plaintiff declar'd, that whereas the Plaintiff at his own Charges *had buried the Defendant's Child, the Defendant promiſed to pay him his Charges*; and tho' no Requeſt was laid, Judgment was given for the Plaintiff. Raym. 260. cited by Mountague Ch. B. and Atkins B. as a Caſe in 1656. in B. R. Church v. Church.

48. In *Caſe* the Plaintiff *counted*, that *for* ſuch *Conſideration* (which was not executory, but) *executed, the Defendant aſſum'd* &c. The Defendant *traverſed the Conſideration executed.* Upon Demurrer it was agreed per Cur. that a Conſideration executed cannot be traverſed, and Judgment was given for the Plaintiff, none coming for the Defendant. Roll Rep. 401. pl. 29. Trin. 14 Jac. B. R. Harris v. Ewer.

49. The Count was *for Work and Labour done for the Defendant*, but did *not ſay that it was done at the Defendant's Requeſt.* The Plaintiff had Judgment by Nil dicit; but upon Error brought, this Matter was aſſign'd; but adjornatur. 2 Barnard. Rep. in B. R. pl. 55. Mich. 5 Geo. 2. Hayes v. Warren.

Ibid. 71. S. C. argu'd again, and the Ch. J. and Page J. obſerv'd that the preſent Action is not *for Goods ſold and deliver'd*, which would have been a much more favourable Caſe for the Plaintiff, becauſe by Acceptance of the Goods there ſeems to be an Agreement to pay for them; but here the Defendant might be no ways privy to the Work at the Time of doing it, and therefore thought the Plaintiff could hardly recover; ſed adjornatur.——Ibid. 140. Paſch. 5 Geo. 2. S. C. argued again, and the Court declar'd they took the Rule of Law to be, That no paſt Conſideration is ſufficient to ſupport a ſubſequent Promiſe, unleſs there was either a Requeſt of the Party expreſs or implied at the Time of performing the Conſideration. Some Acts, they ſaid, were of ſuch a Nature as that the Law would imply a Requeſt, as the being * Bail for one, curing one's Child of a ſudden Sickneſs, performing the Part of a Servant &c. and therefore in thoſe Caſes they did allow that a ſubſequent Promiſe might be well founded upon ſuch paſt Conſideration. They did agree likewiſe, that where there was an expreſs Requeſt at the Time of the paſt Conſideration's being perform'd, that might in all Caſes be ſufficient

sufficient to support a subsequent Promise. And therefore the Ch. J. said, he could not agree the Case cited out of † 3 Cro. 741. to be Law; but in the present Case the Act done by the Defendant was by no means of such a Nature as to be sufficient for the Law to create a Request upon it; and therefore an express Request was necessary to have been laid. They said then that they thought there was by no means an express Request laid in this Case, and however this Declaration might be sufficient after a Verdict by the Common Law, they were of Opinion that this was by no means so strong a Case upon a Judgment by Nil dicit. They said likewise that they thought this Consideration must be a past one, as laid in the Declaration, by reason of the Word (Postea.) Accordingly they reversed the Judgment, unless Cause.

* See pl. 11.

† Barker v. Hallifax. See pl. 24.

(R) Upon an Assumpsit. In what Cases Action lies upon a *Collateral Promise*.

1. AN Action upon the Case lies against the Executor, upon a Promise in Nature of a Debt. Mich. 4 Jac. B. R. between *Sir Moyle* * *Finch and Richardson.* Resolved per Curiam, Pasch. 8 Jac. in the Exchequer-Chamber, between *Meane and Peacher.* Mich. 11 Jac. B. R. between † *Cock and Thoroughgood*, per Curiam. * Cro. J. 47. pl. 16. Mich. 2 Jac. B. R. Fisher v. Richardson, S. P. adjudg'd, and seems to be S. C.——Yelv. 55. Fish v. Richardson, seems to be S. C.

† See Tit. Court, (C) pl. 6. S. C.

2. [So] An Action upon the Case lies against an Executor or Administrator, as well upon a Collateral Promise as where the Promise is for a Debt. Hill. 14 Jac. B. R. * *Small and Boyer*, adjudg'd. My Rep. 14 Jac. † *Beresford and Goodrouse*, adjudg'd. Pasch. 16 Car. B. between ‡ *Bidwell and Cotton*, per Curiam. Pasch. 15 Car. B. R. between *Mason and Thursby*, adjudg'd. Contra Mich. 4 Jac. B. R. *Sir Moyle* ** *Finch and Richardson.* Contra Hob. Rep. 278. * This was an Action brought against Executor on an Assumpsit of the Testator, That if he married his Daughter, he promised to give so much with her as he had given to any one of his Daughters. The Plaintiff counted that he had given so much to one, and so much to another of his Daughters, and that the Marriage was had in his Life-time, and requested Payment. The Court was clear of Opinion that the Action well lies. 3 Bulst. 248. Mich. 14 Jac. S. C.

† This likewise was upon a Promise to give so much in Marriage with a Cousin, and the Plaintiff in Action brought by him against the Executor, averr'd that he married her in the Life of the Testator; and adjudg'd for the Plaintiff Roll Rep. 433. pl. 29. Mich. 14 Jac. S. C.——Cro. J. 404. pl. 3. Trin. 14 Jac. S. C. adjudg'd for the Plaintiff; and upon Error brought this Judgment was affirm'd.—— 3 Bulst. 235. S. C. adjudg'd for the Plaintiff.—— See Tit. Condition, (A. d) pl. 3. S. C

‡ Hob. 216. pl. 279. Bidwell v. Catton, agreed that on a Promise by Testator to do a Collateral Act, as to build a House &c. an Assumpsit will not lie against the Executor.

** See pl. 1.

3. As if a Man promises another, in Consideration that he will marry his Daughter, to give him as much as he hath given or should give with any of his other Daughters, if after he gives such a Sum with another of his Daughters, and dies, an Action upon this Assumpsit lies against the Administrator, notwithstanding it be collateral. Hill. 14 Jac. B. R. per Curiam, for Costs after Nonsuit of the Plaintiff. But Mich. 15 Jac. it was adjudg'd.

4. So if the Promise be in Consideration [&c.] to leave so much to him at his Death, as he should leave to his Wife, or any of his Children. My Rep. 13 Jac. *Saunders and Easterby*, adjudg'd; and Hill. 14 Jac. affirm'd in the Exchequer. Roll Rep. 193. pl. 35 S. C. adjornatur.—— Ibid. 266. pl. 39 S. C. adjudg'd; and says that the Judgment was affirmed in the Exchequer Chamber, tho' it was objected that it

it was a collateral Promise; and therefore not maintainable against the Executor. But the Court held that there was no Difference between a collateral Promise and another Promise.——Cro. J. 417. pl. 7. S. C. in the Exchequer Chamber, and says that all the Justices and Barons (besides Tanfield Ch. B. who doubted thereof) held that the Action well lies against the Executor, as well for this collateral Promise as for a Debt. But Tanfield said, that it had often been adjudg'd, that upon such a collateral Promise the Executor is not chargeable. [At the End of the Report there is a] Note [added, that] Hoxwell Clerk of the Errors said, that once they were all of an Opinion to reverse the said Judgment.——Roll Rep. 433. pl. 29. Arg. Mich 14 Jac. cites S. C. and says it was adjudg'd in B. R that the Action lay against the Executors, but in Error in the Exchequer it was the Opinion of all the Court, that it does not lie against the Executor; but it is not yet revers'd.——2 Bulst. 236. Arg. cites S. C. and says, that a Certificate of the Clerks was shew'd, that the Opinion of the Judges in the Exchequer Chamber was contrary to the Judgment given in B. R. but that the same Judgment was not revers'd. Cro. J. 405 pl. 3. cites S. C. and says that no Judgment was given in the Exchequer Chamber, because the Party died. ——Jenk. 336 pl. 80. S. C. says it was adjudg'd and affirm'd in Error, but that this Judgment is against former Opinions for a collateral Promise not broke in the Life of the Testator.

Roll Rep. 355. pl. 7. Pasch. 14 Jac. S. C. but S. P. does not appear.

5. So **if the Promise be in Consideration of Marriage**, to pay so much at the Marriage, and so much for the Marriage-Dinner, and so much at his Death. **My Rep. 14 Jac.** *Berisford and Goodrouse*, **adjudged.**

——S. C. & S. P. Ibid 433. pl. 29 adjudg'd.——Cro. J. 404. pl. 3. Berisford v. Woodroff, S. C. but S. P. does not appear as to the Marriage-Dinner, or Payment at his Death.——3 Bulst. 235. S. C. as to the Marriage-Portion, adjudg'd accordingly.

6. **If A. buys Goods of B. and because B. distrusts the Payment of A. J. S. promises that if A. does not pay him at such a Day, he himself will pay it. J. S. dies, and the Money is not paid at the Day; the Executors of J. S. may be charg'd in an Action upon the Promise, tho it be collateral. Hill. 38 Eliz. between** *Saymond and Gent*, **adjudg'd.**

Hob. 216 pl. 279. S. C. adjudg'd accordingly.—See (U) pl. 6. S. C. not S. P.

7. **In an Action upon the Case** against an Executor, **if he declares that whereas** he had sued **an Action against** B. the Testator **of the Defendant**, B. in Consideration that the Defendant would forbear to prosecute **the said Writ further against him**, did promise to pay 50 l. to the Plaintiff, **the Action lies against the Executor upon his Promise, because this** is not collateral, **for that an Action of Debt would have lain against the Testator upon this Promise. Hob. Rep. 278. between** *Bedwell and Cotton*, **adjudg'd.**

It was said by Serjeant Goodfellow, Freem. Rep. 125. that if a *Stranger promised, in Consideration a Creditor would forbear the Executor, that he would pay*, it ought to appear in such Case that the Executor had Assets. But the Reporter says Quære.

8. If an *Executor promises to pay* a Debt when he *has not Assets*, no Action on the Case lies against him upon such Promise; but contrary if he has Assets. Note, it was so said by the Justices. 3 Le. 67. pl. 101. Hill. 19 Eliz. B. R. in Case of Hodgson v. Maynard.

——Assumpsit, *in Consideration the Testator was indebted to him, the Executor promised to pay.* Resolved it was no good Consideration, without *Averment of Assets, or that he was commencing a Suit* &c. for if this Action would lie, it would charge him out of his own Estate. Freem. Rep. 409. pl. 537. Trin. 1675. Browne's Case

See Freem. Rep. 125. pl. 147. Mich. 1673. Porter v. Bille.

9. But it was held that if an *Heir has nothing by Descent*, an Action on the Case will not lie against him upon such a Promise. 3 Le. 67. pl. 101. Hill. 19 Eliz. in Case of Hodgson v. Maynard.

Goldsb. 94. pl. 9. S. C. and per Cur. the Words of the Declaration being in Consideratione Præmissorum, is to be

10. Assumpsit, upon a *Promise made to the Feme dum sola*, on a Communication between J. B. the Plaintiff's Father and the Defendant, Cousin of R. the Plaintiff, and the said Feme when sole, of a Marriage between the Plaintiffs; and that the said J. B. promised the Feme, if the Marriage did take Effect, he would assure to them such Lands; and the Defendant then promised her that if J. B. did not perform his Promise, he would give her 100 l. After Verdict for the Plaintiff it was moved, that the Consideration was not sufficient; for that the Feme was a mere

Stranger

Stranger to the Defendant. But adjudg'd for the Plaintiff, and affirm'd in Error. Cro. E. 63. pl. 9. Mich. 29 & 30 Eliz. Brown v. Garborough.

intended in Conſideration of the Marriage, as well as of the Refuſal of the Father.

11. The Plaintiff declar'd that the Defendant, *in Conſideration that the Plaintiff's Father had employ'd his Service about the Buſineſs of the Defendant's Teſtator, to the Teſtator's great Profit, and in Conſideration of Love and Affection that the Teſtator bore to the Plaintiff, promiſed to give him* 100 *l.* Per Cur. The Conſideration here was paſt and executed before the Promiſe made, and nothing is done by the Son. Judgment againſt the Plaintiff. 2 Le. 30. pl. 35. Trin. 30 Eliz. B. R. Harford v. Gardiner.

12. Aſſumpſit, *in Conſideration that the Plaintiff gave to J. S.* 3 *s. for every Hog well maſted.* The *Defendant promiſed they ſhould be well fatted, and re-deliver'd*; and ſays that he deliver'd 150 Hogs to J. S. but 50 of them were not re-deliver'd. Wray and Clench held, that the Promiſe being at the Time of the Communication it was a good Conſideration, though the Defendant had no Benefit by the Promiſe; but Gawdy e contra. Cro. E. 137. pl. 11. Trin. 31 Eliz. B. R. Kirkby v. Cole. Le. 186. pl. 261. Kirby v. Eccles, S. C. held accordingly, and reported in much the ſame Words.

13. Aſſumpſit, for that *the Son being indebted by Obligation to the Plaintiff, the Father, in Conſideration that he would give him a longer Day, promis'd to pay* the Money. This was held a good Conſideration, and the Plaintiff had Judgment. Cro. E. 283. pl. 5. Trin. 34 Eliz. B. R. But it is added, Nota, This Judgment was revers'd in the Exchequer Chamber, for that it was no Conſideration. Trin. 37 Eliz. Pyers v. Turner.

14. The Plaintiff declares, that one L. was indebted in ſuch a Sum, and for the Payment thereof hath delivered to the Plaintiff diverſe Goods of the ſaid L. The Defendant, in Conſideration that the Plaintiff would deliver to the Defendant the ſaid Goods, promiſes to pay the Plaintiff the Money due from L. And Exception was taken to the Declaration, for that the Certainty of the Goods were not expreſs'd, and for that the Conſideration was but collateral. Another Exception, for that the Plaintiff might grant the Goods over; but the Court held the contrary; and Judgment for the Plaintiff. Brownl. 3. Mich. 6 Jac. Rot. 308. Morſe v. Canham.

15. An Executor brought an Action upon the Caſe *againſt an Executor*, upon a *Promiſe made by the Teſtator* of the Defendant *to pay a Debt owing by him.* Adjudged the Action was maintainable, becauſe the Teſtator in that Action could not wage his Law. Reſolved that the Plaintiff needs not aver that the Defendant had Aſſets to pay Legacies. Cro. J. 293. pl. 13. Mich. 9 Jac. in the Exchequer Chamber. And Judgment given in B. R. was affirm'd. Legatt v. Pinchon. 9 Rep. 86. b. Pinchon's Caſe, S. C. and Judgment affirm'd accordingly.—2 Brownl. 137. Punchon v Legate, S. C. adjudg'd, and affirm'd in Error accordingly.——Jenk. 290. pl. 28. S. C.——S. C. cited by the Ch. J. as adjudg'd. 10 Rep. 77. a. b.——See Palm. 522. Paſch. 4 Car. B. R. Spade v. Barker.

16. The Defendant ſaid to the Plaintiff, *Marry Jane S. and I will give you* 100 *l.* It was objected that this is no Conſideration, becauſe the *Defendant has no Benefit* by it; but by Coke Ch. J. tho' he has no Benefit, *yet* if the *Plaintiff has Prejudice*, it is good; and perhaps the Plaintiff might have married another with a greater Portion. Judgment for the Plaintiff. Roll Rep. 61. pl. 4. Mich. 12 Jac. B. R. Freeman v. Freeman.

17. The Defendant, in Conſideration that M. *would take the Plaintiff to Husband, promis'd to make a Jointure of ſuch Land upon her for her Life.* Per tot. Cur. this is a good Conſideration to raiſe the Promiſe. 2 Bulſt. 269. Mich. 12 Jac. Freeman v. Freeman. Roll Rep. 61. S. P. by Coke Ch. J. in S. C.

18. A. the *Husband was indebted to H.* in 8 l. 10 s. *for Beer, and died.* H. demanded the Money of M. the *Widow*, who *in Conſideration that H. would ſerve her with Beer, promis'd Payment* of the 8 l. 10 s. and for the reſt of the Beer at ſuch a Day. H. did deliver Beer to her &c. The whole Court held this a good Aſſumpſit and Conſideration; for they ſaid the Forbearance would be a good Conſideration of itſelf. Godb. 202. pl. 290. Mich. 11 Jac. C. B. Hatch v. Capel.

S. C. cited Arg Show. 299.

19. An Aſſumpſit *to the Servant for the Maſter*, is good to the Maſter; Per Dodderidge J. Godb. 261. Trin. 21 Jac. in pl. 453.

20. In Caſe *againſt an Executor*, the Count was *of a Promiſe by Teſtator to deliver certain Goods in his Poſſeſſion to the Plaintiff upon Requeſt.* It was objected, that the Teſtator's Promiſe was, that himſelf would deliver the Goods, and not that his Executor ſhould, and that he would do it on Requeſt; but no Requeſt appears to have been made to the Teſtator. But Per Roll Ch. J. an Executor may be charg'd on a collateral Promiſe, if there was a *Breach* of it *in Teſtator's Life-time*, and the Requeſt here is good, and goes to all And Judgment for the Plaintiff, Niſi &c. Sty. 158. Mich. 1649. Chriſtopher v. How.

Raym. 211. Daviſon v. Hanſlop, S. C. adjudg'd for the Plaintiff; for being alleg'd that he was adtunc Receptor it ſhall be intended after a Verdict, that he had Effects.——S. C. cited Freem. Rep. 464. in pl. 635.

21. F. indebted to the *Plaintiff*, *appointed the Defendant*, *who was then his Receiver*, *to pay* it *out of his Rents due at Martin-mas next.* The *Defendant promiſed*, *that if the Plaintiff would give him Time he would pay it within a Month after Martin-maſs.* It was moved in Arreſt of Judgment, that it did not appear that the Defendant had received any Rent due at Martin-maſs, and that the Appointment was to pay it out of the Rents due at that Time. But the Court held, that after Promiſe to pay it upon Forbearance, it ſhall be intended; and gave Judgment for the Plaintiff. 2 Lev. 20. Mich. 23 Car. 2. B. R. Daviſon v. Hellop.

3 Keb. 336. pl. 41. Trin. 26 Car 2. B. R. Smith v. Hawes, S. C. and Judgment for the Defendant, Niſi.——3 Keb. 417. pl. 8. Hill. 26 Car. 2. B. R. S. C. and becauſe it was after Verdict, Judgment in C. B. was affirm'd in Error.

22. The Defendant being an *Executor*, *in Conſideration the Plaintiff would account with him*, *promis'd to pay him what ſhould be found owing* to him from the Teſtator. This was held a good Conſideration, tho' he had no Aſſets, becauſe here was *an Act done*, viz. accounting at the Plaintiff's [Defendant's] Requeſt. Freem. Rep. 464. in pl. 635. cites Trin. 24 Car. 2. Smith v. Hawkins.

3 Keb. 710. pl. 48. Day v. Garely, S. C. adjudg'd againſt the Plaintiff.

23. Defendant being *Executor* to a Debtor of the Plaintiff, *promis'd that if he took upon him the Adminiſtration*, *he would pay him his Debt*; this was held no Conſideration. Freem. Rep. 434. Mich. 1676. B. R. Day v. Cawdry.

1 Salk. 27. pl. 15. S.C.—6 Mod. 248. S. C. ſays, that upon Conference with the other Judges, they had great Debate, and there was great Variety of Opinions; and many thought it out of the Statute, becauſe the Horſe was let out wholly upon the Credit of the Defendant; but the Judges of B. R. were unanimouſly agreed that it was within the Statute; for it is an Undertaking for the Act, and to make good the Default of another.

24. The Plaintiff counted, That *in Conſideration he*, *at the Requeſt of the Defendant*, *would let a certain Gelding of his to Hire to J. S. he*, the Defendant, *did undertake that the ſaid J. S. ſhould re-deliver him to the Plaintiff*; and that he let him his Gelding accordingly, but that J. S. never did re-deliver the ſame. Adjudg'd that this was a collateral Undertaking for the Act of another; and therefore void by the Statute of Frauds, by its not being in Writing, as the Statute requires. 3 Salk. 15. Mich. 3 Ann. Bourkmire v. Darnell.

(S) What

(S) What shall be a good Assumpsit for *Default of Certainty*. [And Pleadings.]

1. If a Man promises another, in Consideration that he will assign to him a certain Term to pay him 10 l. this is a good Assumpsit, tho' the Time of the Assignment and the Payment be not appointed; for the 10 l. shall be paid in a convenient Time after the Assignment, which also must be made in convenient Time; and he shall not have Time during his Life. Mich. 14 Jac. at Serjeant's-Inn, between *Barnard* * *and Simon* adjudged, and the Judgment affirmed contra to the Opinion of Altham. (U) pl. 39. S. C. but S. P. does not appear. * Fol. 15.

2. If A. be indebted to B. for certain Things to him sold, and C. comes to B. and promises him, that if A. would not pay him the Money, that then he himself would pay it, an Action upon the Case lies for B. against C. upon this Promise, if A. does not pay the Money within a convenient Time; for so shall the Promise be taken, viz. if A. does not pay it in a convenient Time, that then he will pay it. Mich. 42 & 43 Eliz. B. R. between *Sadler and Hawkes* adjudged; and that the Declaration so generally laid was good also. See (U) pl. 49. S. C.

3. If a Man declares upon a Promise against an Administrator, that the Testator was indebted to him in 10 l. by Obligation, and died, and the Defendant being his Administrator in Consideratione præmissorum, and that the Plaintiff would spare him till such a certain Time after, he would pay him the Debt; and avers that he spar'd him till the Time, and the Defendant had not paid him &c. tho' he did not say that he would spare him the Debt, or to sue him, yet it shall be so intended; and therefore the Consideration is good. Hill. 22 Jac. B. R. between *Gardiner, and Fenner* and his Wife, Administrators of one Baud, Per Curiam. 2 Roll Rep. 488. Gardiner v. S. C. but states it as indebted for Joiner's Work; and held that the Sparing shall be intended Secundum subjectam Materiam, and cannot be otherwise intended than of the Debt. Another Exception was that he averr'd that he spar'd, but did not shew How; sed non allocatur, because a Negative; and by Doderidge J. Issue shall not be taken whether he spar'd or not, but the Defendant must shew how he has su'd.

4. In an Action upon the Case upon a Promise by A. against B. if the Plaintiff declares, that in Consideration that he sold and delivered to the Defendant a Steer for 53 s. 4 d. the Defendant super se Assumpsit, and to the said B. faithfully promis'd to pay the said 53 s. 4 d. upon Request, tho' by the Words B. assumes and promises to himself, and not to the Plaintiff, yet this is a good Promise to the Plaintiff. Hill. 8 Car. B. R. between *Lodyman and Saunders*, Per Curiam. Adjudged in a Writ of Error, this being moved for Error. Intratur Pasch. 8 Car. B. R. Rot. 245. and the Judgment given in B. affirmed. So where the Declaration was, that the Defendant was indebted to him in so much, which the aforesaid A. (who was the Plaintiff) promis'd to pay; and so it is that the Plaintiff assum'd to pay the Plaintiff. The Court said, that it being after Verdict, they would amend the Name, he having well declared that the Defendant was indebted to him. Sid. 306. pl. 15. Mich. 18 Car. 2. B. R. Bedford v. Uffington.

5. If A. promises B. in Consideration B. will permit him to have certain Sheep at Foldage in certain Land, that he will pay to B. as much as he should deserve, and avers that he deserved so much, this is not good to have as much as he should deserve for such Things, because it is but in Nature of a Trespass, and not like a Taylor, or such S. P. for depasturing of Sheep seems to be admitted, that Action lies.

Exceptions being taken to the Pleadings only. 2 Roll Rep 435. Trin. 21 Jac. B. R.

such like. Trin. 10 Car. B. R. between *Mutton and Boughton.* Adjudged Per Curiam, in a Writ of Error upon a Judgment in an inferior Court in the Town of Northampton; and the Judgment there given revers'd accordingly; which seems not to be Law.

King v. Stephens. ——S. P. admitted Hob. 5. in pl. 9.

6. If A. is indebted to B. in 10 l. and thereupon C. promises B. in Consideration that he will forbear A. till such a Day, if A. does not pay him the said Day he himself will pay him the same Day, this is a good Promise, upon which B. may have an Action against C. for tho' A. had the whole Day to pay it, and so impossible for C. to pay it the same Day, if he did not pay it, yet the Substance of the Promise is to pay, and the Time limited being impossible, is void, and then it ought to be paid upon Request. Mich. 10 Car. B. R. between *Rowlandson and Simpson.* Adjudged Per Curiam, in a Writ of Error upon a Judgment in Durham, and the Judgment affirm'd accordingly. Intratur Hill. 9 Car. Rot. 201.

7. If the Plaintiff declares that the Defendant, in *Consideration that he was indebted to the Plaintiff in divers Sums of Money, promised to pay him* 100 *l.* it is not good for the Uncertainty; per Wray. 2 Le. 30. Trin. 30 Eliz. B. R. in pl. 35.

8. Assumpsit, to pay *so much as would content him*, and held good. Le. 123. pl. 167. Pasch. 30 Eliz. B. R. Dellaby v. Hassels.

Noy 65. Feerby v. Lorkings, S. C. that Beamond and Walmsley held that it ought to be a Lease for Life; but Anderson e contra.

9. Assumpsit &c. *in Consideration the Plaintiff would make the Defendant a Lease of such Lands, he promised to pay* 20 *l.* and alleg'd in Facto, that *he* had *made him a Lease for 5 Years.* It was moved in Arrest of Judgment, that the Plaintiff had not perform'd the Consideration; for he being to make a Lease &c. it shall be intended a Lease for Life, which he had not made; but per Cur. the Promise being general to make a Lease, it *may as well be intended a Lease at Will as for Life*, which Lease he might determine as soon as he made it, and it is no Consideration to ground an Action upon; and Judgment was stay'd. Cro. Eliz. 566. pl. 30. Pasch. 39 Eliz. C. B. Fereby v. Lurkin.

Bulst. 91. Brickendell's Case, S. C. adjudg'd accordingly.

10. Assumpsit; whereas the Plaintiff was *in Treaty* with the Defendant *to buy 2 fat Oxen, and promised to pay* for them *infra breve tempus* 17 *l.* The Defendant thereupon promised to deliver them to him, and *alleg'd that within* 14 *Days he paid him* 9 *l. and was ready to have paid the Residue, and that the Defendant deliver'd him one of the Oxen, but would not deliver the other.* The whole Court held the Promise to pay infra breve tempus uncertain, and no Consideration at all; and the Defendant is not bound to keep his Oxen for him, and his offering to pay within 14 Days is not material; and Judgment for the Defendant. Cro. J. 250. Mich. 8 Jac. B. R. Toulhurst v. Brickenden.

2 Roll Rep. 104. Anon. S. C. resolv'd accordingly. And Per Mountague Ch. J. if a *Citizen of London promises* his Daughter's Husband to give her a *Child's Portion*, it is good; for by the Custom of London the Evidence between the Wife and the Children is certain enough, and known how much every Child shall have.

10. Assumpsit, *in Consideration the Plaintiff would marry his Daughter, he promis'd to give her a Child's Part, and as much at his Death as to any of his Children, excepting his eldest Son*; and shew'd that a younger Son had 100 l. Resolv'd that the Promise of a Child's Part was uncertain, but it being as much as to any of his Children, and then shewing his younger Son had 100 l. this was certain enough. And Judgment for the Plaintiff. Poph. 148. Trin. 17 Jac. B. R. Silvester's Case.

12. The Defendant, in Consideration that Plaintiff would marry his Daughter, *promised to pay him* 20 *French Pieces* towards the Wedding-Dinner. The Plaintiff counted that the 20 French Pieces amounted to 6 l.

61. English Money. Exception was taken that this is not 20 French Crowns; for there may be other Pieces. Sed non allocatur; for French Crowns are the common Coin of France, and known here, and it shall be intended according to our usual Speech. Cro. C. 194 pl. 5. Trin. 6 Car. B. R. Poynter v. Poynter.

12. The Defendant promised the Plaintiff *to give her* 100 *l. on the Day of her Marriage, and Interest for it in the mean Time.* After a Verdict it was objected, that it is uncertain what was meant by the Word (*Interest*) It is true some Statutes mention Interest, but none approve it; but Per tot. Cur. the Plaintiff had Judgment. 2 Sid. 116. Mich. 1658. B. R. Cook v. Oliver.

13. Assumpsit &c. *in Consideration of* 20 *s.* the *Defendant promis'd to pay the Plaintiff* 20 *l. if Cha. Stuart should be King of England within* 12 *Months* next following (he being then in Exile.) It was moved, that here was no Consideration, because at the Time of the Promise Cha. Stuart was King of England. But the Court held the Consideration good; for the Words are to be taken according to the Subject Matter, the King being at that Time out of Possession; and the Promise must be intended to pay &c. if he be in Possession within the 12 Months. 1 Lev. 33. Pasch. 13 Car. 2. B. R. Andrews v. Herne. Keb. 56. pl. 17. and 65. pl. 34. Walcot v. Tappin, S. P. exactly.

15. Plaintiff declared of a *Communication* between the Plaintiff and Defendant, *concerning the Bark of certain Wood; and that* thereupon *it was agreed, that the Defendant should give to the Plaintiff* 2 *s. per Seame* for all the Bark of such Woods as the Plaintiffs should cut, *and that* thereupon *the Defendant promis'd to have ready such a Day Articles purporting the Agreement, and an Obligation for Performance* thereof, *without saying in what Sum* &c. The Declaration is not good for that Reason, and a certain Sum cannot be intended, because the Number of Seams are altogether uncertain; but the Justices held, that this being after Verdict upon General Issue was cur'd, but if it had been upon Demurrer or special Issue, it had been naught. Sid. 270. pl. 25. Trin. 17 Car. 2. B. R. Please v. Palfry. Keb. 776. pl. 15. Mich. 16 Car. 2. B. R. Palfry v. Plees, S. C. says the Court held that the Defendant ought to have given a Bond, and the Sum may be réduc'd to a Certainty, according to the Value of the Book [Bark] and should not have pleaded Non Assumpsit.

(T) What will be a good Consideration to maintain an Action [*against Law.*] [*And what shall be said against Law.*]

1. If the Consideration of an Assumpsit to the Attorney of the Plaintiff in an Action after Judgment, when his Warrant of Attorney is determined, be that he shall acknowledge Satisfaction of the Judgment, this is not sufficient to maintain an Action upon the Case, because it is against Law for him to acknowlege Satisfaction after the Warrant determined, without the Consent of the Plaintiff himself. By Rep. 14 Jac. *Payn against Chute.* Roll Rep. 365. pl. 19. S. C. but not adjudg'd. ——See Tit. Attorney (M) pl. 4. 5. S. C. and the Notes there.

2. If a Man for Money given promises to serve certain Process, this is not a good Consideration, because it is against Law; for it is Extortion. By Rep. 13 Jac. * *Sherly against Parker.* Adjudged, for this is Extortion in the Sheriff to take it; and therefore unlawful Roll Rep. 313. pl. 24. Sherley v. Parker, S. C. adjudg'd ac-

cordingly; for by Coke Ch. J. it is in the Giver of it. Contra Hil. 10 Jac. B. between *Boothby and Alport.*

contrary to the Statute of W. 1. [3 E. 1. cap. 26.] for the Sheriff to take Money for serving Process; and by Dodderidge, if it be unlawful in the Sheriff to take the Money, it is unlawful in the Plaintiff to give it to him.——S. C. cited Co. Litt. 368. b.

Cro. J. 103. pl. 38. S. C. and by Warburton J. the giving of 6 d. is no sufficient Consideration, being join'd with the other which is unlawful.

3. If an Executor sues Execution by Elegit, and B. a Stranger, as a Friend to the Executor, in Consideration that the Sheriff would execute the said Elegit forthwith, and of 6 d. to him paid by the Sheriff, promises to pay him 60 l. upon which the Sheriff executes the Writ; yet no Action lies, because the Consideration is against the Law; for the Sheriff ought to do his Duty without Reward, and this 60 l. is not any Discharge of the Fees due to the Sheriff by the Statute, being given by a Stranger, and not expressed for them. Mich. 3 Jac. B. between *Bridge and Cage.* Adjudged.

Wherefore it was adjudg'd for the Defendant —— Noy 111. S. C. and Judgment that the Plaintiff Nil capiat per Breve by the Statute 32 [23] H. 6. which avoids it.

Le. 132. pl. 180. Trin. 30 Eliz. B. R. Palmer v. Smalbrooke, S. C. adjudg'd for the Plaintiff.—— 3 Le. 227. pl. 305. Hill. 31 Eliz. B. R. in the S. C. in totidem Verbis.——Ow. 97. S. C. by the Name of Babridgecourt v. Smallbrooke, adjudg'd for the Plaintiff.——Cro. E. 178. pl. 9. S. C. Pasch. 32 Eliz. B. R. adjudg'd for the Plaintiff.——Cro. E. 271. pl. 2. [14] Hill. 34 Eliz. in the Exchequer-Chamber, S. C. and the Judgment was affirm'd.

4. If a Man brings a Capias, which he has against A. to the Sheriff, and prays him that he will make J. S. his Special Bailiff, and promises him, if he will make him his Special Bailiff, that if J. S. [A.] escapes from the Bailiff, that he will bring no Action for the Escape against him, this is an Assumpsit upon which an Action lies, if he brings any Action for the Escape against the Sheriff. Pasch. 32 Eliz. B. R. between *Paumer and Smalbrooke*, adjudg'd; and 34 Eliz. the same Case affirm'd in a Writ of Error; and there in 32 Eliz. said that it was so adjudg'd Trin. 32 Eliz. B. R. between *Shoolbrooke and Selman.*

Noy 76. Bagshaw v. Salter, S. C. that it is void by the 43 [23] H. 6. and Judgment accordingly.—— Jo. 65. pl. 1. Badow v. Salter, S. C. adjudg'd accordingly; for a Promise to the Sheriff or his Officers to give what was not a due Fee was Extortion.——Lat. 54. Batho v. Salter, S. C. adjudg'd for the Plaintiff.——*But* an Assumpsit made *to a Stranger to go and help the Sheriff* to make Execution, is good, and an Assumpsit lies. Noy 76. cites it as vouch'd and agreed in one Audley's Case.——Lat. 56. S. P. agreed by Jones and Doderidge J. but Crew Ch. J. doubted.

5. If A. be outlaw'd at the Suit of B. upon a Process for Debt, and promises, in Consideration that C. a Stranger, will arrest A. upon a Capias Utlagatum upon this Outlawry, that he will pay him 40 s. this is no good Consideration to have an Action, though he shews in his Declaration that he was after made a Special Bailiff to the Sheriff to arrest him thereupon, by a Warrant to him directed; for this is Extortion, and the Sheriff might by such means extort from the Subject great Fees for the doing his Duty. Mich. 22 Jac. B. R. between *Faldoe and Salter*, per Curiam, in Arrest; and after Pasch. 1 Car. this being moved again, it was adjudg'd per totam Curiam against the Plaintiff, because the Bailiff is the Officer of the Sheriff and his Servant. This is enter'd, Trin. 22 Jac. B. R. Rot.

† S. P. so being *for a certain Time*, but not to use a Trade *generally*, is not good.

6. If A. keeps a Mercer's Shop in a Town, and B. comes there, and will set up Shop, and takes all the braided Ware of A. at a certain Price, and in Consideration thereof A. promises B. not to keep any Mercer's Shop after within the said Town, this is a good Consideration to maintain an Action upon the Case, if he after keeps a Shop there; for the Restraint of his Trade is but in † one Place, and every Man

Man may for a Consideration sell the Liberty that the Law gives him; but otherwise it is where the Restraint is by Compulsion, as by By-Laws, (as it seems * it was 2 H. 5.) Mich. 18 Jac. B. R. between ‡ *Follyffe and Broad*, adjudg'd per Curiam, contra to the Opinion of Haughton. Mich. 19 Jac. This Judgment was affirm'd upon a Writ of Error in the Exchequer-Chamber. Trin. 24 Car. B. R. between ** *Gosse and Pragnel*, adjudg'd in a Writ of Error upon a Judgment in Bank, where it was so adjudg'd also, where the Promise was in Consideration of a Marriage of the Plaintiff with the Daughter of the Defendant, who made the Promise. Intratur Pasch. 24 Car. Rot. 217.

2 Bulst. 150. Mich. 11 (*) Fol. 9. Jac. Rogers v. Parry. —Cro. J. 326. S. C. but not S. P. —S. C. cited by Ld. Ch. J. Parker, who said that he had

caused the Roll to be search'd, and the Case is wrong reported in Bulst. 136. For that the Resolution of the Judges was not grounded upon its being a particular Restraint, but upon *its being a particular Restraint with a Consideration*, and that the Stress lies on those Words, though as they stand in the Book they do not seem material. Wms.'s Rep. 186. Hill. 1711. B. R. Mitchel v. Reynolds.

‡ S. C. adjudg'd; but if the Restraint had been general, or upon a Coersion, or without a Consideration, it would be otherwise. Noy 98. by the Name of Jelliet v. Broad ——Affirm'd in Error by all the Justices, except Tanfield, who said nothing against it. Jo. 13. S. C.——Affirm'd in the Exchequer by all the Justices, Mich. 19 Jac. Cro. J. 597. S. C.——S. C. adjudg'd by all the Justices, but Haughton contra. 2 Roll 203. Jollie v. Broad.

Master takes Obligation of an *Apprentice not to exercise his Craft within the same Town in 4 Years.* Action lies not for using the Craft within the 4 Years. Mo. 115. pl. 259. Pasch. 20 Eliz. Anon —— S. P. Mich. 43 & 44 Eliz. C. B. Ow. 143. Claygate v. Batchelor.——S. P. as to using his Trade in the same Place, and the Bond adjudg'd void; but a *Difference* taken between a *Bond and a Promise.* Mar. 191. Pasch. 18 Car. B. R. Barrow v. Wood.——Same Difference taken Mich. 1 Jac. 2. C. B. 3 Lev. 241. Clerk v. the Taylors of Exeter.——S. P. Mich. 29 Eliz. Mo. 242. pl. 379. Anon. —— 3 Le. 217. pl. 288. Mich. 30 Eliz. S. C. by Name of the Blacksmiths Case.

** A General Restraint makes the Bond void; and so as to a particular Place, unless there be a *Consideration*; but a Consideration will make it good. Allen. 67. Trin. 24 Car. B. R. Prugnell v. Gosse —— And cites it as adjudg'd in Froward's Case.——S. P. by Roll Ch. J. Sty. 111. Trin. 24 Car. Pragnell v. Goff.

S. P. Mar. 77. Trin. 16 Car. C. B. but if one be bound *that he will not use his Trade*, it is no good Bond. Anon.—— See Tit. Trade (F) per totum.

7. If A. and B. play at Tables, and thereupon in Consideration the Plaintiff promises to give his Mare to the Defendant, if he wins five Games at Tables, the Defendant promises to pay 5 l. to the Plaintiff if he wins five Games, this is a good Consideration, by reason of the Hazard, though this is no lawful Game for every Person. Mich. 9 Car. B. R. between *Sutton and Jones*, per Curiam. Intratur Mich. 9 Rot.

8. In an Action upon the Case, if the Plaintiff declares that whereas he, at the Request of the Defendant, solicited and prosecuted a Suit in B. R. in Trespass, in which the Defendant was Plaintiff against B. the Defendant promised to pay the now Plaintiff 100 l. this is a good Consideration, and not against the Law; for it is lawful for a Man to be a Solicitor upon a Special Retainer, if it be not for Maintenance. Hob. Rep. 93. between *Worthington and Garston*, Mich. 22 & 23 Eliz. Rot. 378. Hob. 67. pl. 73. S. C. agreed per Cur. (absente Wray.)

9. If A. makes a Lease to B. and the Lessee covenants to pay Quit-Rents, and to repair, and B. together with C. at the Request of B. enter into an Obligation of 1000 l. jointly and severally, to A. for the Performance of the Covenant, and after the Quit-Rents are behind, and the House is not repair'd, whereupon A. arrests C. upon the Obligation, and thereupon C. pays all the Arrears, scil. 33 l. and promises to repair the House before a certain Day after, and in Consideration thereof A. promises to C. to sue B. upon the said Obligation, and to pay to him so much as he should recover upon the said Obligation, or should have by Composition with B. and after sues B. and compounds for 34 l. an Action upon the Case lies for C. against A. upon this Promise; Palm. 168. S. C. adjornatur.—— Ibid. 189. S. C. held by 3 Judges, (absente Doderidge,) to be a good Consideration and Promise to maintain an Assump-

fit; and Judgment was given for the Plaintiff.

muse; for it is not Maintenance in C. for all that he did and paid ought to have been perform'd by B. himself, who was the Principal. Trin. 19 Jac. B. R. between *Morris and Badger*, adjudg'd; this being moved in Arrest of Judgment.

S. C. cited Het. 129. in Case of Wilson v. Peck, S. P. —Cro. C. 159. 160. pl. 8. Pasch. 5 Car. B. R.

10. If A. promises B. an Attorney of B. that in Consideration that he will solicit a Suit which J. S. has in Chancery, that he will give him 3 s. 4 d. every Term, this Consideration is not against Law; for an Attorney in one Court may be a particular Solicitor in another Court; but not a general one. Mich. 12 Jac. between *Leach and Penton*, per Curiam.

Thursby v. Warren. All the Court conceived that an Attorney may very well be a Solicitor for his Client in other Courts, as well as in the Court where he is Attorney, and a Promise to pay him for it is lawful. But if a Person of superior Rank should do it, it would be Maintenance.—Jo. 208. pl. 3. Trin. 4 Car. B. R. S. C. adjudg'd.—Mar. 75. pl. 123. Pasch. 15 Car. S. P. cited per Cur. to have been adjudg'd in B. R. in one Kelway's Case.

11. If A. solicits a Suit for B. in Chancery at his Request, and after they reckon instinul, and upon the reckoning the Fees of the Solicitor, and the Money laid out by him comes to 6 l. and upon this B. says, in Consideration that A. will sue for him a Latitat out of the King's-Bench against J. S. he promises to pay him the said 6 l. though it should be admitted the Ground is ill, viz. that the 6 l. was not due, because this Solicitation is against Law and Maintenance, yet it seems the suing the Latitat will be a good Consideration. Mich. 13 Jac. B. Dubitatur, between *Leach and Penton.*

Assumpsit, for that *H.* the Conusor *acknowledg'd a Recognizance of* 1000 l. *to him, and afterwards infeoff'd the Defendant of his Lands, who in Consideration the Plaintiff would assign the Recognizance to him, promised to pay* &c.

12. If A. be obliged to B. in an Obligation for 40 l. upon Condition for the Payment of 20 l. and A. essoigns [eloigns] himself, so that B. knows not how to come at his Debt; whereupon C. a Stranger, in Consideration of certain Herrings given to him by B. and that B. should assign the said Obligation to C. with a Letter of Attorney to put it in Suit, promises to pay the said 20 l. this is a good Consideration to have an Action; tho' it was objected that the buying of Debts is against Law; but if that be void, yet the giving of the Herrings is * a Consideration. Mich. 7 Car. B. R. between *Michael and Carden*, adjudg'd; this being moved in Arrest of Judgment.

It was moved in Arrest of Judgment, that a Consideration to assign a Recognizance over is unlawful, and Maintenance, and so not good. Resolved per tot. Cur. that an Assignment of a Debt or a Recognizance to a Stranger, is a void Consideration; but an Assignment of it to the Tertenant, by way of Discharge of his Land, is clearly lawful. Cro. Eliz. 551. pl. 2. Pasch. 39 Eliz. B. R. Barrow v. Gray.

Assumpsit, to give so much Money *in Consideration the other would assign to him a Judgment obtain'd against J. S. in the Marshal's Court.* It was mov'd that this is a Chose in Action not assignable, and if it was, 'tis Maintenance; but per Curiam, 'tis a good Consideration, and it is common for one to give another a Letter of Attorney to sue Execution in the Name of him who gave it. Sid. 212. pl. 11. Trin. 16 Car. 2. Loder v. Cheslyn.——Keb. 744. pl. 35. Leader v. Chesselin, S. C. and Judgment for the Plaintiff, Nisi; *altho' it was a Judgment by Nil dicit*, which is but an Award.

See Tit. Simony, (A) pl. 6. S. C. and the Notes there.

13. If A. being a Clerk, promises B. in Consideration that B. will procure him to be Rector of a Donative Church, with Cure of the Souls of the Gift of the King, (as the Case was) to pay to B. 10 l. this is not a good Consideration to maintain an Action; for it is Simony, and against the Law of God and Man. Mich. 9 Car. B. R. between *Mackaller and Toddrick*, per Curiam, in a Writ of Error upon a Judgment in the Court of the Tower of London, upon this Promise, which was to procure him to be Rector of the Tower, which is a Donative with Cure of Souls of the King's Gift. Intratur Trin. 9 Car. Rot. 714. Pasch. 10 Car. This was to

so resolved again by all the Court, and the Judgment given in the Tower reversed accordingly.

14. If a Man promises to pay Use for the Forbearance of Money, according to the Rate of 10 l. for the 100 l. per Annum, though this is not made void by any Statute, yet it is void by the Common Law, and not any good Consideration to maintain an Action. Mich. 22 Jac. B. R. in the Case of *Oliver and Olive*, agreed per Doderidge & Whitlock. See Tit. Usury (B) —In the Case of Gibson v. Ferrers, Win. 114. 120. 121.

Hill. 22 Jac. C. B. it was agreed by Counsel of both Sides, that Contracts and Obligations for Payment of Interest for Forbearance of the Money, is good.——It is no unlawful Consideration to pay Interest, not being more than is permitted. Cro. C. 273. pl. 9. Mich. 8 Car. B. R. in Case of Harris v. Richards.

15. If A. promises B. in Consideration of a Marriage between A. and C. the Daughter of B. that he will pay to A. [B.] 100 l. at a Time after, and in the mean time to pay according to the Rate of 8 l. for the Interest thereof, this is a good Consideration, especially it being upon a Marriage, and not for Money lent. Trin. 10 Car. B. R. between *Chaplyn and Displine*, adjudg'd in a Writ of Error upon a Judgment in B. and the first Judgment affirm'd. Intratur Pasch. 10 Car. B. R. Rot. 202. and then cited Pasch. 5 Car. Rot. 134. B. R. between *Norton and Hinchly*, adjudg'd accordingly.

16. If A. surrenders a Copyhold to B. upon Condition that if he pays 80 l. to B. at a certain Day, then the Surrender shall be void, and after it is agreed between them that A. shall not pay the Money, but shall forfeit it, and in Consideration thereof B. promises to pay to A. at a certain Day 60 l. or 6 l. per Annum from the said Day, for Use and Interest of the said 60 l. till it be paid. In an Action upon the Case upon this Promise, this is a good Consideration; for this 6 l. shall be taken to be Interesse damnorum, and not Lucri, and only limited as a Penalty for Non-payment of the 60 l. as a Nomine pœnæ in an Obligation with Condition. Mich. 22 Jac. B. R. between *Oliver and Oliver*, adjudg'd; this being moved in Arrest of Judgment, the which Intratur Trin. 21 Jac. See Tit. Usury (B) pl. 2. S. C. and the Notes there.

17. The Plaintiffs *declared that they were Proprietors of* certain *Goods in Possession of one A. against whom J. S. the Defendant had commenced a feign'd Suit in the Ecclesiastical Court, in the Name of one C. with Intent to get the Goods into his Possession; and promised the Plaintiffs that if they would suffer him to recover the Goods by the said Suit, he would render them a true Account* of the Goods; and shew'd that J. S. did recover the Goods by Sufferance of the Plaintiffs. This was an unlawful Suit for J. S. so to sue in the Names of others, and therefore it cannot be a good Consideration; and awarded Quod querens nil capiat &c. Le. 179. pl. 255. Trin. 31 Eliz. B. R. Fish and Brown v. Sadler.

18. K. having a House adjoining to a Prison, and to which the Gaolers used to send their Prisoners to be safely kept, *in Consideration that they committed a Prisoner to him to keep, by which he might make Profit by uttering his Meat and Drink* as he used to do, *promised to keep him safely, and to save the Gaolers from all Escapes*, whereupon they committed the Prisoner to him &c. It was held that the Uttering his Meat &c. was a good Consideration. Cro. E. 123. pl. 2. Hill. 31 Eliz. B. R. Barkley v. Kempstow.

19. Assumpsit. Whereas the *Plaintiff claimed to have a Title to certain Lands in D. in Consideration that the Plaintiff assum'd to assign his Right* and Interest *to the Defendant, he promised to pay him* 40 *l.* It was urg'd that this was an unlawful Consideration, and against the Statute of 32

H. 8. cap. 9. for it appears not that the Plaintiff was in Poſſeſſion by the Space of a Year before, and ſo could not aſſign, nor that the Defendant was in Poſſeſſion ſo as to take by Releaſe; but the Exception was diſallowed, becauſe it ſtands indifferent whether he was in Poſſeſſion, or not. The Plaintiff had Judgment. Cro. E. pl. 23. Mich. 31 & 32 Eliz. B. R. Dobbins's Caſe.

20. Aſſumpſit &c. for that *Defendant being arreſted at the Plaintiff's Suit, in Conſideration that the Plaintiff would permit him to go at large, and would give Authority to the Bailiff to that Purpoſe, he promiſed to appear at the Return of the Proceſs, or would give the Plaintiff* 10 *l.* It was moved in Arreſt of Judgment, that the Promiſe was void, being contrary to the Statute of 23 H. 6. but Gawdy and Clench held it good, being made to the Plaintiff, who had Authority to diſpenſe with his Appearance; but if it had been made to the Sheriff himſelf, or any other to his Uſe, it had been within the Equity of the Statute. Cro. Eliz. 190. pl. 1. Mich. 32 & 33 Eliz. B. R. Milward v. Clark.

3 Le. 236. pl. 325. S. C. accordingly; and afterwards Judgment was given againſt the Plaintiff.

21. Aſſumpſit, *for that a Precept was awarded to a Bailiff to attach the Goods of S. and he attached him by two Quarters of Corn, and deliver'd them to the then Plaintiff, to deliver them at the next Court, and the Defendant aſſumed to ſave him harmleſs.* It was the Opinion of the Court, that the Conſideration was void, and againſt Law; for Attachment cannot be of Corn out of Sacks, but if it might, it ought to be kept by the Bailiff, and not delivered out of his Hands. Cro. E. 230. pl. 20. Paſch. 33 Eliz. B. R. Mead v. Bigot.

So where A. the Plaintiff declar'd, that B. the Father of C. the Defendant was indebted to A. for Malt, and that C. *in Conſideration that A. would bring two Witneſſes before a Juſtice of Peace, who ſhould depoſe on Oath that B. was ſo indebted to A. promis'd Payment*, and avers that he brought two Witneſſes who did ſwear &c. Vaughan Ch. J. was againſt countenancing theſe extrajudicial Oaths; but Windham and Atkins thought it not a profane Oath, nor within the Statute of King James, becauſe it tended to the determining of a Controverſy; and accordingly the Plaintiff had Judgment. Mod. 166. pl. 4. Mich. 25 Car. 2. C. B. Amie v. Andrews.——Freem. Rep. 133. pl. 155. S. C. accordingly, and Judgment for the Plaintiff. ——So of a Promiſe by Defendant to pay the Money, if the Plaintiff would take an Oath that it was due to him; and the Plaintiff averr'd that he ſwore it *before a Maſter in Chancery*; and adjudg'd for the Plaintiff. Raym. 153. Paſch. 18 Car. 2. B R. Bretton v. Prettiman.——Sid. 283. pl. 17. Brett v. Prettiman, S. C. accordingly.——2 Keb. 26. pl. 55. S C. adjornatur.——Ibid. 44. pl. 91. S.C. and held it a good Conſideration, be it before a Maſter in Chancery, or *before any Man living*, this *being intended of a ſolemn Oath*; and Judgment for the Plaintiff.——So where the Conſideration was, that B. would procure C. to make Oath before a Maſter in Chancery, it is a good Conſideration; and Judgment for the Plaintiff. 2 Sid. 123. Mich. 1658. B. R. Perkins v. Binke.——So if it was to be *before a Judge of Aſſiſe*. Ibid. cited by Newdigate J. as the Caſe of Kirket v. Frankmer.

Yelv. 19. Jennings v. Hatley, S. C. adjudg'd accordingly.

23. Aſſumpſit &c. *for that B. being outlaw'd, after a Judgment againſt him by the Plaintiff*, the *Defendant*, in *Conſideration the Plaintiff would forbear to proceed upon the Capias Utlagatum, promiſed that if the ſaid B. did not pay the Debt he would.* After Verdict, it was mov'd that the Conſideration was againſt Law, becauſe the Proceſs was at the Suit of the King; but Gawdy, Fenner, and Yelverton held the Conſideration good; for the Proceſs is at the Suit of the Party as well as of the King; but Popham e contra. Judgment for the Plaintiff Niſi &c. Cro. Eliz. 909. pl. 21. Mich. 44 & 45 Eliz. B. R. Jennings v. Harley.

Godb. 250. pl. 346.

24. H. was *in Execution* at the Suit of D.—*B. came to M. the Gaoler*, and promis'd him, that *in Conſideration he would permit H. to go at large, that*

that H. should pay the Debt into Court by a certain Day, to satisfy D. and that he would *save the Gaoler harmless.* M. brought Assumpsit. But per tot. Cur. the Promise is void, because the Consideration is against Law. Yelv. 197. Hill. 8 Jac. B. R. Martyn v. Blithman. Pasch. 12 Jac. B. R. Blithman v. Martin, S. C. but there it is,

that the Assumpsit was to the Plaintiff the Gaoler, to give him 20 l. if he would *deliver A in Execution for Debt*, and alleges he did deliver A. the *Debt not being satisfied.* It was held an illegal Consideration, and void, and that Plaintiff should not have Judgment.——2 Bulst. 213. Pasch. 12 Jac. S. C. accordingly; and per tot. Cur. the Consideration is void.

25. If an *Informer* takes upon him to *compound* contrary to the Statute of 18 *Eliz.* 5. tho' it be *prohibited*, yet the Promise is good; and tho' he can't withdraw the Suit, yet he may forbear Prosecution; Per Montague Ch. J. 2 Roll Rep. 103. Trin. 17 Jac. B. R. in Case of Brand v. Cox.

26. The Plaintiff and Defendant were both *Suitors to the Sheriff of Middlesex to obtain the Office of Under-sheriff* for such a Year. The Defendant, *in Consideration the Plaintiff would desist his Suit, promis'd* the Plaintiff, that *if he obtain'd the said Office, to pay* to the Plaintiff 20 *l. for a Gelding deliver'd him by the Plaintiff.* All the Court held the Consideration to be good and valuable; and adjudg'd for the Plaintiff in C. B. and that Judgment affirm'd. Cro. J. 612. pl. 7. Hill. 18 Jac. B. R. Parker v. Brown.

27. A *Promise was* made *to* the Plaintiff, *an Inn-keeper*, that *in Consideration he would keep one B.* (whom the Defendant pretended to be *arrested on a Commission of Rebellion*) *for one Night, in his Inn, as a Prisoner, he would save the Plaintiff harmless.* Afterwards B brought an Action of False Imprisonment against the Plaintiff, and recover'd against him, but Defendant refus'd to save him harmless. After Verdict, it was mov'd in Arrest of Judgment, that it was not shewn that B. was lawfully arrested. But whether lawfully or not, the Illegality thereof not appearing to the Plaintiff, Judgment was enter'd for him. Win. 48. Mich. 20 Jac. C. B. Battersea's Case. Hutt. 55. S. C. accordingly, by the Name of Fletcher v. Parcot.—Win. 49. in S. C. Hobart Ch. J. said, it may be there is a *Difference between a*

publick Officer and a private Man; for if the Sheriff arrest a Man unlawfully, and promises as before, this is a good Assumpsit; but perchance otherwise of a private Man, as here; but in the principal Case the Defendant had pleaded *Non Assumpsit*, and this *implies a lawful Imprisonment*; for otherwise the Defendant might have given the unlawful Imprisonment in Evidence.

28. If I *request another to enter into B.'s Land, and in my Name to drive out the Beasts, and impound them, and promise to save him harmless*, this is a good Assumpsit, and yet the Act is tortious; Per Hobart, Hutton, and Winch. Win. 49. Mich. 20 Jac. C. B. in Battersey's Case. But by Hutton, *where the Act appears in itself to be unlawful*,

there it is otherwise; *as if I request you to beat another, and promise to save you harmless*, this Assumpsit is not good; for the Act appears in itself to be unlawful; but otherwise it is as in our Case, when the Act stands indifferent.——Hutt. 56. S. P. & S. C. by Name of Fletcher v. Harcot.

Assumpsit, *in Consideration the Plaintiff would give the Defendant* 20 *s. he promised to give the Plaintiff* 40 *s. if he did not beat T. S. out of such a Close*, and alleg'd that he gave the Defendant the 20 s. Upon Non-Assumpsit pleaded the Plaintiff had a Verdict; but it was staid, because the Consideration and Agreement was unlawful and void. 2 Lev. 174. Trin. 28 Car. 2. B. R. Allen v. Rescous.——Freem. Rep. 433. pl. 584. Anon. seems to be S. C. and Judgment arrested accordingly.

29. Assumpsit, for that the *Defendant having a Sci. fa. against the Goods of J. L. and delivered it to the Sheriff, and affirm'd to the Plaintiff that the Cloth in the Shop of C. L. were the Goods of J. L. and liable to this Execution, and* required the Plaintiff to execute the Writ, and *if he would seise the said Cloth, he promised, when required, to give Bond to the Sheriff in any reasonable Sum, to indemnify both him and the Plaintiff* for entering and seizing the said Goods. It was objected, that this Promise was grounded upon a Consideration very unlawful, (viz.) *to save* a Man *harmless for taking* another Man's *Goods in Execution.* But the Court held the Con-

Consideration good, and that the Defendant requiring the Sheriff to execute the Writ, it was reasonable he should indemnify him; and a Promise to give a Bond in a reasonable Penalty, without mentioning any certain Sum, is good. Cro. J. 652. pl. 21. Mich. 20 Jac. B. R. Arundell v. Gardner.

30. There is a Diversity where one assumes to do a *Thing unlawful, which cannot by any Means become lawful, as to kill a Man*, or to burn a House &c. and where it is to do a *Thing unlawful, which in Time may be made lawful*; as where it is to make a *Feoffment of the Land of a Stranger*, or of an Alien, or a Corporation &c. In these Cases he is bound to make them, and therefore at his Peril must obtain lawful Liberty to make them; Per Walter Ch. B. Litt. Rep. 86. Trin. 4 Car. in the Exchequer, Howard v. Approbert.

31. Assumpsit &c. in which the Plaintiff declared that he is a *Bailiff*, and, having *arrested J. S. on a Warrant*, the *Defendant promis'd*, that *in Consideration the Plaintiff would permit the said J. S. to be in his House, he would deliver him to the Plaintiff the next Morning*. It was mov'd in Arrest of Judgment, that the Promise was against Law, and void; for leaving a Prisoner in another's House and Custody is an Escape. But Per Cur. they will not intend that the Plaintiff was absent from J. S. and Judgment for the Plaintiff. Sid. 132. pl. 4. Pasch. 15 Car. 2. B R. Benskin v. French.

Lev. 98. Benson v. French, S. C. accordingly, and the *Promise* being *laid to be made to the Bailiff ex Parte Querentis*, it shall be intended that she was left there by the Assent of the Plaintiff. And Judgment for the Plaintiff Nisi &c. ——Keb. 483. pl. 17. S. C. adjudged for the Plaintiff Nisi.——S. C. cited 2 Jo. 139. but varies the Point of it.

32. An *Attorney being employed to take out Execution on a Recognizance* against the Defendant, *he promised to pay him &c.* The Defendant demurr'd to the Declaration, for that the Consideration is void, as arising ex turpi Causa, it being contrary to his Trust, and Oath of an Attorney, to forbear when he is employed to sue. But Per Cur. it shall be *intended the Attorney had Authority from his Client* to forbear, or *to use such Means as he might think requisite* to get the Debt, and to forbear generally, without saying how long, is good; for it shall be taken to be perpetual Forbearance. Sid. 294. pl. 14. Trin. 18 Car. 2 B. R. Russel v. Haddock.

Lev. 188. S. C. but states it as of one made *Attorney by Deed of Assignment, to recover and receive the Debt to his own Use*, and not of an Attorney at Law; and the Court held that it shall be intended that this was assign'd to the Plaintiff in Satisfaction of a Debt, and gave Judgment for the Plaintiff.——2 Keb. 75. pl. 60. S. C. mentions that the Attorney was both Attorney on Record, and also Assignee by Letter of Attorney, and therefore the Consideration was held good enough; per Cur. præter Keeling Ch. J. who doubted. Adjornatur.—Afterwards Keeling Ch. J. conceived it a good Consideration, and Judgment for the Plaintiff. 2 Keb. 80. pl. 73. S. C.

33. A Question arising between A. the Defendant, a Custom-house Officer, and C. a Merchant, Plaintiff, What the Custom of Goods imported did amount to, and what Sum B. had paid; A. the Defendant, *in Consideration C. the Plaintiff would pay him* 100 *l.* (which in Truth was less than the Custom did amount unto) *promised that if B. had paid no more, C. should pay no more*; and averr'd that B. had paid no more, yet the Defendant had complain'd to the Commissioners, and the Plaintiff was compell'd to pay more. After a Verdict for the Plaintiff, *it was objected that* here was no Consideration; for C. was compellable to pay what is due; and *this Agreement amounted to no more than to cheat the King, as B. had done.* But Per Cur. Payment of what is due, without any Suit or Trouble, is a good Consideration; and the Acceptance of less than is due by the Officer, and Agreement that the Merchant shall pay no more, is a good Agreement between them; for *the Officer shall answer to the King for the Residue out of his own Pocket.* Lev. 128. Mich. 18 Car. 2. B. R. Johnson v. Astell.

Ibid. The Reporter makes a Quære of this Point. ——Keb. 155. pl. 36. S. C. and Per Cur. there is no Question but the Customer is chargeable; for the Plaintiff was not bound to deposit his Money beforehand; and if B. did cheat the King, yet A. is bound to answer all above what he paid. And Judgment for the Plaintiff Nisi.

34. A

34. A *Bailiff had taken J. S. in Execution* by a Ca. Sa. and the *Defendant, in Consideration he would permit J. S. to stay at the House of J. D.* in H. *till such a Day, promis'd to save him harmless from all Escapes.* It was insisted that the Consideration was illegal, because J. S. was in Execution; and thereupon the Court staid Judgment at the first, but on last Day of the Term gave Judgment for the Plaintiff, Hale Ch. J. saying that a long Vacation coming on he would delay the Judgment no longer, but directed that a Writ of Error be brought, if thought well of. 2 Lev. 17. Trin. 23 Car. 2. B. R. Freake v. Clarke.

35. C. an *Under-sheriff having seised Goods on an Elegit* sued out by the Plaintiff, *promised the Plaintiff, that in Consideration he would, at C.'s Request, sue out another Elegit, to procure the Goods to be found by Inquisition, and deliver them to any Person to be appointed by the Plaintiff.* The Court held the Promise not lawful; for, 1st. the Seisure upon the first Elegit, without an Inquisition, was not good; so that this Promise is to make good the Tort of the Defendant. 2dly, It is the Duty of the Sheriff to return an indifferent Jury, but this Promise engages him contrary to the Duty of his Office; and tho' one Part of the Promise is lawful, yet since that depended upon the other Part, which was illegal, the whole is naught. And Judgment for the Defendant. 2 Jo. 24. Mich. 24 Car. 2. C. B. Morris v. Chapman. Cart. 223. Forest v. Chapman, S. C. held accordingly. —Freem. Rep. 32. pl. 41. S. C. adjudg'd accordingly.

36. In Consideration the *Plaintiff would deliver the Defendant's Cattle out of Pound*, he promis'd to pay, or save him harmless. It was held that this Consideration was not unlawful, tho' the Cattle were duly impounded, because it was not a Malum in se. 2 Show. 329. pl. 338. Mich. 35 Car. 2. B. R. Well v. Thompson.

37. Assumpsit, in Consideration the *Officer would restore Goods taken on a Fi. Fa* to pay the Debt, is a good Consideration. 1 Salk. 28. pl. 17. Pasch. 5 Ann. B. R. Love's Case.

38. An *express Promise* to pay Interest, or *Money won at Play*, will support an Action; Per Parker Ch. J. 10 Mod. 312. Pasch. 1 Geo. 1. B. R.

(U) Upon an Assumpsit. Consideration. [*What is good.*]

1. IF an Infant takes up certain Commodities of a Mercer in London at a certain Price, and after for Non-payment of the Money he threatens to sue him, and the Mother of the Infant promises to pay him if he will not sue him, this is not any Consideration to maintain the Action, inasmuch as the Infant was not chargeable in Law for the Money. *Withipolle's Case*, adjudg'd; cited Pasch. 42 Eliz. B. R. Cro. E. 126. pl. 7. Hill. 31 Eliz. B. R. Stone v. Withipole, S. C. says the Infant was dead, and the Action was brought against his Executor for Velvet, and Money lent &c. to the Infant, and counted of a Promise by the Executor to pay, in Consideration of Forbearance; and that the Court was clear of Opinion that the Action did not lie; for the Contract of the Infant was merely void, and in Debt against him he might plead Nil debet.——Le. 113. pl. 155. Hill. 30 Eliz. S. C. adjudg'd against the Plaintiff. ——Lat 21. S. C and the Contract adjudg'd void, being for Things of Superfluity, and not of Necessity.——Ow. 94. S. C. states it that the Infant was bound in a Bond to pay the Money, and that the Executor promised Payment; but adjudg'd that the Plaintiff shall be barr'd.——Poph. 152. S. C. cited by Doderidge as a Promise made by the Infant himself, and the Action brought against the Infant, and the Assumpsit adjudg'd not good, because he was not liable at first, it not being shewn to be pro Necessario Vestitu, and it ought to be suitable to his Calling.——D. 272. a. Marg. pl. 31. cites Whitepoole's Case, S. C. that the Infant made a Contract, and at full Age promised, in Consideration the Plaintiff would forbear the Suit, to pay; and says it was adjudg'd that the Action lay against him.

Cro. E. 700. pl. 14. Morning v. Knop, S. C. and Fenner J. held it no Consideration; but Clench e contra; and the other Justices being absent, adjornatur.

2. So if an Infant enters into an Obligation to pay a certain Sum of Money, and after the Obligee brings Debt upon the Obligation, and procures a Latitat to arrest him, and the Obligor being now of full Age, and having Notice thereof, comes to the Obligee, and says to him, that if he would not arrest him he would pay him the Money, this is not any Consideration to maintain an Action, inasmuch as the Infant might have avoided the Obligation by Plea. Pasch. 42 Eliz. B. R. between *Monnings and Knoppe.*

Fol. 19.

3. If A. a Feme Covert, makes an Agreement with B. to pay him 100 l. in Marriage with C. her Daughter, and thereupon D. the Brother of A. promises B. in Consideration that he will marry C. the Daughter of A. that he will procure A. to perform the said Agreement with B. upon which B. marries C. this is a good Promise, upon which B. may bring an Action upon the Case against D. tho' the Agreement between A. and B. was not of Force, nor was binding between A. and B. A. being a Feme Covert; for this was an Agreement made, tho' not of Effect in Law. Pasch. 14 Car. B. R. between *Marjo and Farrant*, per Curiam, præter Barkley, who held the contra, because the Agreement was void. Adjudg'd in a Writ of Error upon a Judgment in Exeter, and the Judgment affirm'd accordingly. Intratur Pasch. 13 Car. Rot. 102.

Hob. 69. pl. 80. & 77. pl. 98. S. C. —Brownl. 11. S. C. but S. P. is not taken Notice of.

4. If an Infant delivers to B. 20 l. and in Consideration thereof B. promises to build him a House, this is no good Consideration; for tho' the 20 l. was deliver'd by the Hand of the Infant, yet this is voidable by him. Mich. 13 Jac. B. per Winch. But see the same Case, as it seems, for a Horse, Hob. Rep. 105. between *Auston and Gervas*, per Hob. because it was only voidable to be recover'd back by Action of Account.

Assumpsit, in Consideration the Plaintiff *would desist from his Suit in Chancery, which he intended against the Defendant for delivering up a Bond, of which the Defendant had own'd himself satisfied.* The *Defendant promised to deliver the Plaintiff the Obligation upon Request.* It was objected the Consideration was not good to stay a Suit in Chancery; but the Court held it good enough, and gave Judgment for the Plaintiff, and the Judgment was affirm'd in Error. Cro. E. 768. pl. 10 Trin. 42 Eliz. B. R. Dowdenay v. Bland.

5. If A. exhibits a Bill in Chancery against B. supposing thereby that he had deliver'd 300 l. to B. in Trust, whereupon B. in Consideration that A. would end all Suits against him in Chancery, promises to pay him 100 l. tho' A. has Remedy for it at Common Law by Writ of Account, yet this is a good Consideration so as to have an Action upon the Case upon the Assumpsit, because the Money was deliver'd in Trust, which is proper for the Chancery, and the Suit there is a Matter of Charge. Mich. 10 Jac. B. R. between *Sir J. Pooly and Gilbert*, adjudg'd.

Debarring one's self of a Remedy in Equity, is a good Consideration in Assumpsit. Vent. 40. 41. Trin. 21 Car 2. B. R. Wells v. Wells.——Lev. 273. S. C. adjudg'd accordingly —— It will scarce be allow'd that an equitable Interest will be a good Consideration to support an Action at Law; per Cur. 8 Mod. 41. Pasch. 7 Geo. in Case of Lock v. Wright.

Hob. 216. pl. 279. S. C. adjudg'd accordingly. —— Consideration that *mitteret prosequi* the Brother of Defendant, Defendant promises to pay, is good. Sid. 446. pl. 6. Pasch. 22 Car. 2. B. R. Buckley v. Turner.——Mod. 43. S. C. adjudg'd for the Plaintiff.

6. If A. sues a Writ of Privilege against B. and B. in Consideration that A. will, at the Request of B. forbear to prosecute the said Writ any further, promises 50 l. to A. this is a good Promise, tho' it be not averr'd that the Plaintiff had any good Cause of Action; for the Promise implies a Cause, inasmuch as B. desired a Stay. This also requires a Loss of the Writ, and a Delay of the Suit. Hob. Rep. c. 278. between *Bedwell and Cotton*, adjudg'd.

7. If

7. If A. has in his Custody 33 Cloaks of the Goods of J. S. the which 33 Cloaks he intends to retain in his Custody till J. S. pays him 14l. which he owes him; whereupon B. comes to A. and in Consideration he would deliver the 33 Cloaks to him, to do with them according to his Pleasure, he promises to pay to A. the said 14l. this is a good Consideration for A. to have an Action against B. though it was objected that it might be that A. had no Cause to retain the Cloaks, because A. is chargeable in Detinue by J. S. Pasch. 6 Car. B. R. between *Grimett and Powle*, adjudg'd, this being mov'd in Arrest. *A pawns Goods to B. redeemable such a Day, and after the Day* the Goods not being redeemed, *B. says he will sell them*; upon which *D. says, if he will stay the Sale* of them *for 3 Days, he will pay the Money, and have the Goods. B. stays the Sale* accordingly. In an Action against D. the Court held the Consideration good, and this Agreement with D. is in Nature of a Sale; for he might have Detinue for the Goods, if he had paid the Money. Roll Rep. 215. pl. 10. Trin. 13 Jac. B. R. Capper v. Dickenson ——; Bulst. [70. but wrong-pag'd] 68. Copper v. Dickenson, S. C. and the whole Court clear of Opinion that the Consideration is good. And Judgment for the Plaintiff.

8. If L. be indebted to M. and L. delivers to M certain Goods to the Value of 100 l. as in Pawn till he pays him the Debt, and after J. S. comes to M. and promises to pay him the Debt, in Consideration that he will deliver to him the said Pawn, whereupon he delivers it to him accordingly, this is a good Consideration to have an Action upon the Case against him. Mich. 7 Jac. B. between *Levett and Moys*, per Curiam. A. was *indebted to the Plaintiff for keeping a Horse.* The Defendant, *in Consideration the Plaintiff at his Request would deliver the Horse to him to the Use of A. promised to pay* the Debt. Per tot. Cur. The Consideration is good; for whereas he might have detain'd the Horse, he at the Defendant's Request deliver'd it to him to the Owner's Use, which is a Prejudice to the Plaintiff, and a Benefit to the Owner to whose Use it was deliver'd. Hutt. 101. Mich. 4 Car. Mackerney v. Ewrin.

9. If B. the Daughter of A. be Heir apparent to C. and D. promises to A. the Mother, in Consideration that she will consent and agree that the said B. her Daughter should marry his Son, that he would give to the said A. 100l. upon which A. consents, and the Marriage takes Effect, this is a good Consideration; for Nature gives the Power of Disposition to Parents, and in Nature their Children are bound to obey them. Pasch. 12 Jac. B. between *Greisly and Loudher*, adjudg'd. Hob. Rep. 15. the same Case. Mo. 857. pl. 1176. Gresley v. Luther, Hill. 11 Jac. S. C. adjudg'd for the Plaintiff by 3 Justices, but Winch e contra — Hob. 10. pl. 21. S. C. Winch J. his Reason was, that he thought the Marriage was no Advancement to the Man; for a Woman only is said in Law to be advanced in Marriage, and so is not the Man, and therefore she only shall have the Writ of Causa Matrimonii prælocuti. ——Brownl. 18. S. C. adjudg'd a good Consideration. ——Hutt. 39. S P. cited to have been adjudg'd.

10. If A. in Consideration that the Mother of C. at the Instance and Request of A. would permit her Son to serve him for such a Time, promises B. to pay her 10 l. &c. this is a good Consideration for B. to have an Action upon this Promise against A. though it does not appear that C. was within Age, or within the Government of B. or of what Age he was, viz. of the Age of 50 or more; for there is a Consideration of Nature and Respect that the Son owes to the Mother; and it is a good Consideration for her not to hinder her Son to serve; and this is done at the Request of A. Mich. 15 Car. B. R. between *Coppings and Foulove*, Per Curiam adjudged, this being moved in Arrest of Judgment. Intratur Trin. 15 Car. Rot. 223. Fol. 20. Case, *for that he had put one J. W. his Grandchild Clerk to the Defendant to serve him* &c. *and* that *the Defendant was to find him Meat, Drink*, &c. *and had given him* 30 l. &c. The *Defendant, in Consideration that the Plaintiff would give his Consent that the said J. W. should depart out of his Service; and if he should depart accordingly, promis'd to pay* the Plaintiff 15 l. And after Judgment for the Plaintiff in B R. it was assign'd for Error, that here was no Consideration, it being that the Plaintiff should give his Consent that J. W. should depart his

his Service, when he might have left his Service without any such Consent. But because his near Relation to the said J. W. and his Charge in placing him with the Defendant, shew such an Interest in him that his Consent might be an effectual Means to cause him to depart the Defendant's Service, the Judgment was affirm'd. Allen 78. Trin. 24 Car. B. R. Ward v. Prinn.

Tho' *natural Affection in itself* be sufficient to raise an Use, it *is not* a *sufficient* Ground *to raise an Assumpsit* upon, without an express Quid pro Quo. Cro. E. 756. pl. 16. Pasch. 42 Eliz. C. B. in Bret's Case.

Hardr. 74. Arg. cites Pet v. Bridgwater, S. C. and says it was moved in Arrest of Judgment, that there was no Consideration,

11. If A. is indebted to B. in 20 l. and thereupon B. makes a Letter of Attorney to C. to put it in Suit, and to recover the Debt to his own Use, and to release it at his Pleasure, and after A. in Consideration that C. will forbear to sue him for a certain Time, promises C. to pay the Debt, this is a good Consideration; for the Forbearance of the Suit whereof he had Power, is a meritorious Consideration. 1651. between *Pitt and Bridgwater*; Per Curiam, this being mov'd in a Writ of Error.

because what the Plaintiff does must be in another's Name, and the Debt remains due to another, who may sue in his own Name, notwithstanding the Letter of Attorney. And per Roll Ch. J. it appears that the Plaintiff had Power to discharge the Debt, which is for the Defendant's Advantage; and therefore held it a good Consideration; but said it would have been otherwise if the Plaintiff had not had such Authority.

Debt by A against B. on a Bond condition'd for Payment of 369 l. and Interest. A. obtained a Judgment, and afterwards made a Letter of Attorney to R. the Plaintiff, to receive the said principal Sum and Interest to his own Use; and in Default of Payment to prosecute &c. and thereupon the Plaintiff, intending to take out Execution against B in the Name of A. of which Intention the Plaintiff giving P. the now Defendant &c. Notice, he, the said Defendant, 7th June 1654, at London &c. *in Consideration that the Plaintiff would forbear to prosecute B. on the Bond &c. till the End of Michaelmas Term* ensuing, *promised them to pay* &c. Upon Non Assumpsit pleaded the Plaintiff had a Verdict; and it was objected, in Arrest of Judgment, that this was not a good Consideration; for *where the Plaintiff hath no Prejudice by Forbearance, nor the Defendant any Benefit*, there it is no good Consideration. Now in this Case the Plaintiff can have no Prejudice, because he is not the real Creditor, he having only a *Letter of Attorney* to prosecute in the Name of another, and his Forbearing might be no Benefit to the Defendant, because the Creditor himself might still sue the Defendant &c. But the Court held the Consideration good; and the Plaintiff had Judgment. Hard. 71. Mich. 1656. in the Exchequer, Reynolds v. Prosser.

Assumpsit, *B. owed A.* 20 *l.* and *C. owed B.* 30 *l B. assign'd the said Debt of* 30 *l. to A. in Satisfaction of the said Debt of* 20 *l. and made a Letter of Attorney to sue in his Name*, and *both of them acquainted C. with this Agreement. C. promis'd A. in Consideration he would forbear him till such a Day, to pay the Money.* Upon Non Assumpsit, this was held by 3 Justices only present, no good Consideration, because *the Letter of Attorney to A. was* only an Authority to sue, which is always *revocable* by B Judgment for the Defendant. Winch. 7. Pasch. 19 Jac. Potter v. Turner.——Palm. 185. S. C. and the Court agreed that the Assumpsit was not good, and Judgment against the Plaintiff.

12. [But] if A. be indebted to B. by Bill, and B. is indebted to C. and B. in Recompence of his Debt due to C. assigns the Bill of A. to him, and before the Day of Payment of the Money, A. comes to C. and promises him, that if he will forbear him the Payment of the Money for a Week, that then he will pay him, upon which C. forbears him, yet this is not any Consideration to maintain an Action upon this Promise, because notwithstanding the Assignment of the Bill, yet the Property of the Debt remained always in the Assignor. Pasch. 42 Eliz. B. R. between *Mowse and Edney*, Per Curiam.

Cro. J. 342. pl. 8. Malory v. Lane, S. C. and Judgment affirm'd accordingly.—Hob. 4. pl. 8. S. C. and Judgment affirm'd; for they were deliver'd with Intent to procure

13. If B. is indebted to A. and C. is indebted to B. by a Statute, and B. delivers the Statute of C. to A. for the Security of his Debt, but without any Assignment of the Statute, or Letter of Attorney to sue the Statute; and after B. dies, and D. pretending to be B.'s Executor, promises A. in Consideration that A. would deliver the said Statute to him, that he himself would pay the said Debt which was due to him by B. though it does not appear that C. [D.] can have any Benefit by this Statute, inasmuch as it does not appear that he is Executor, yet inasmuch as he pretends to be Executor, and the Statute was in the Power of A. so that he might have cancell'd it, this is a good Consideration to have an Action upon this Assumpsit. By Rep. Pasch. 12 Jac. in Camera Scaccarii, between *Lane and Sir Henry*

Henry Malory. Adjudged upon a Writ of Error. Vide the Same Case Pasch. 12 Jac. B. Hub. Rep. 6.

him Satisfaction, so as he might

cancel or compound for them; and this done at the Instance of D. and in Hope of his Promise A. did deliver them, and deprive himself of that Means, it is a sufficient Consideration.——Roll Rep. 26. pl. 4. S. C. and Judgment affirm'd.

S. P. of 2 *Obligations delivered by B. the Obligee to J. S. a Creditor, to sue the Bonds and to receive the Money*, and pay himself, *and return the Residue. B. the Obligee died*, and M. his *Widow, in Consideration J. S. the Plaintiff would deliver to him the said* 2 *Obligations, promised to pay* the Debt upon the first Payment of any Sums of those Bonds. It was mov'd that the Authority given by B. to sue the Bonds is determined by his Death, and that M. the Defendant is not alleged to be Executor, and so can have no Benefit from them; and if she was, then she receives no more than her own, and so no Consideration. And of that Opinion was Fenner; but Gawdy and Clench e contra, because by the Gift of them to J. S. the Interest in them is given to him, tho' the Debts themselves, being Choses en Action, pass not, and he had Authority to dispose of them; and the Delivery of them to M. and her Acceptance and Promise, on this Consideration, whether Executrix or not, is sufficient to bind her. And Judgment for the Plaintiff. Cro. E. 821. pl. 18. Pasch. 43 Eliz. B. R. Chadwick v. Sprite.

B. in *Consideration that A. will deliver to him a Recognizance, in which C. was bound to him to read over, assumes* and promises, *within six Days to re-deliver the same to A. or to pay him* 1000 *l. in Lieu thereof.* Per tot. Cur. The Consideration is good and sufficient. And Judgment for the Plaintiff. Le. 267. pl. 406. Hill. 28 & 29 Eliz. C. B. Fooly and Preston.

14. If there be a Communication between A. and B. of a Bargain for certain Cattle, and C. says to A. that if he sells any Cattle to B. for a certain Sum of Money to be paid at a Day to come, that if B. does not pay it, that then he himself will pay it; and thereupon the said A. sells certain Cattle to B. for 20 l. Part thereof to be paid presently, and the Residue at a Day to come; this is a good Consideration for A. to have an Action against C. if B. does not pay the Money at the Day, though all the Money was not to be paid at a Day to come. Hill. 43 Eliz. B. R. between *Turner and Phillips.*

Cro. E 807. pl. 9. Phillips v. Turner, S. C. adjudg'd, and affirm'd in Error by all the Justices, except Popham, who held e contra.

15. If S. and B. are bound in an Obligation to J. S. to pay a certain Debt for J. D and the Obligation being forfeited, B. says to S. that if he will pay all the Principal to J. S. he promises to repay him one Moiety, and thereupon S. pays all accordingly to J. S. S. may have an Action upon the Case upon this Promise against B. if he will not pay him the Moiety; for though he might have been charged for the whole Debt by the Obligee, yet the Payment thereof without Suit, and in Discharge of B. is a good Consideration to maintain the Action. Pasch. 14 Jac. B. R. between *Bagg and Slade.* Adjudg'd in a Writ of Error.

Roll Rep. 354. pl. 5. S. C. adjudg'd accordingly. —3 Bulst. 162. S. C. and the whole Court agreed the Consideration to be good; and affirm'd the Judgment.——Jenk. 324. pl. 27. S. C.

16. Upon a Communication of a Marriage between the Son of J. S. and the Daughter of J. D. J. S. offers 80 l. to the said Son, in Marriage with his Daughter, but the Son says he will not marry his Daughter unless he will give him 90 l. with her; upon which the Daughter of J. D. persuades her Father that he would give the 90 l. according to the Request of the Son, and she promises her Father, that if he will do so, that after the Marriage she will repay the 10 l. back to her Father. Whereupon J. D. pays the 90 l. and the Marriage takes Effect, yet no Action lies for the Father of the Wife against the Son and his Wife upon the said Promise; for the Consideration is not good, but the Promise was fraudulent and covinous, to defraud the Son of his Portion; and if this should be allowed, every Man might be cheated of his Wife's Portion. Mich. 42. 43 Eliz. B. R. *Collin's* Case adjudged.

Fol. 21. Ow. 63. Mich. 39 Eliz. Collins v. Wiles, S. C. and Gawdy and Fenner held that the Action would lie, but Popham held the Consideration void.—Mo. 468. pl. 668. Mich 39 & 40 Eliz. S. C. says that the Action was maintainable Ex Rigore, but for the Practice the Judgment was staid. And Popham said, that if the Defendants had pleaded the Covin between the Father

Father and the Daughter, it would destroy the Action. ——— Cro. E. 774. pl. 3 S. C. Mich. 42 & 43 Eliz. and held per tot. Cur. an insufficient and unlawful Consideration.

17. If A. and C. are bound jointly and severally to D. in an Obligation of 80 l. for the Payment of 47 l. and A. gives a Counterbond to C. to pay the Money to D. at the Day of Payment, but does not pay it, by which the principal Bond and Counterbond are forfeited, and thereupon D. sues C. and has Judgment against him upon the said Obligation of 80 l. and before the Judgment A. had paid to D. 7 l. Parcel of the said 47 l. principal Debt, and after the said Judgment, in Consideration of the Premises, and that the said A. at the Instance and Request of D. then pay to D. the said 47 l. principal Debt, the Defendant promises not to proceed in the said Suit against the said C. This is a good Consideration; So if he takes C. in Execution after upon the Judgment, an Action upon the Case lies, though A. had forfeited the said Obligation of 80 l. and so was bound by the Obligation to pay more than he did pay; for it is a good Consideration for D. to have Money in his Purse, it being before only a Chose in Action. Hill. 10 Car. in the Exchequer Chamber, between *Hubbard and Farrer*. Adjudged Per Curiam, in a Writ of Error upon a Judgment in B. R. and the Judgment affirm'd accordingly. Intratur Trin. 9 Car. Rot. 20.

18. If A. being indebted to B. in 10 l. makes C. his Executor, and dies, C. being only of the Age of 14 Years, and thereupon B. intends to procure Administration during the Minority of C. to be granted to him, and thereof gives Notice to E. the Wife of A. and Mother of C. and thereupon E. in Consideration that B. at the Request of E. will permit Letters of Administration during the Minority of C. to be granted to her, and that he would give Day to E. for the Payment of the said Debt till the Return of C. out of the Realm of Ireland into England, she does promise to pay B. upon Request, after the Return of the said C. out of Ireland into England, this is a good Consideration; for this Administration durante Minoritate differs from another Administration, in which the Ordinary is bound by the Statute under the Penalty of 10 l. to grant it to the Wife; but this is a good Consideration to prevent the Deration, for what Remedy could she have if the Ordinary would not grant it to her? and though C. might return after his full Age, when the said E. should not have Assets in her Hands, yet this is not material, inasmuch as she ought to pay it out of her own Goods, it being upon her own Promise. Pasch. 12 Car. B. R. between *Turton and Gardener* adjudged, this being moved in Arrest of Judgment. Intratur Hill. 11 Car. Rot.

(Z) pl. 12. S. C. ——— S. C. cited Sty. 298. and there Roll Ch. J. cites a like Point of a Promise to a Feme Covert, that if she would procure her Husband to levy a Fine of such Lands, he would give her a Riding-Suit: and that it was adjudg'd that the Baron and Feme could not join in an Action for this Breach of Promise.

19. If A. be seised in Fee of Land, and there being a Communication between A. and B. touching the Purchase of this Land by B. from A. and thereupon B. comes to C. the Wife of A. and promises her, in Consideration that she would not hinder the Bargain, that he would give her 10 l. or a Riding-Suit, the Husband and Wife may have an Action upon this Promise; for this is a good Consideration not to hinder the Bargain, to have the Aid of the Wife, and her good Will to the Bargain. Pasch. 11 Car. B. R. * between *Fawcett and Childers*. Adjudged Per Curiam, this being moved in Arrest of Judgment.

* Fol. 22.

A Promise by A. *to the eldest Son that if he will consent that his Father shall assure his Lands to A. he will give him* 10 *l.* If he *gives his Consent, tho' no Assurance be made*, he shall maintain an Action. And Judgment was given for the Plaintiff. Godb. 94. pl. 106. Mich. 28 & 29 Eliz. C. B. Fuller's Case.

20. If

20. If A. in Consideration that B. promised him to take him to be her Husband, promises to take B. to be his Wife, infra breve tempus after, and after A. marries another Woman, B. may have an Action upon the Case against A. upon this Promise; for this is a good Consideration, though it was objected that it was a Spiritual Consideration. Pasch. 14 Car. B. R. between *Stretch and Parker*. Adjudged per Curiam in a Writ of Error out of Alcester Court, and the first Judgment affirmed. Intratur Mich. 12 Car. Rot. 21.

It was moved that Promise of Marriage is a Matter Ecclesiastical, upon which no Action will lie. But the Court would not allow it to be argued, but gave Judgment for the Plaintiff. Lev. 147. Mich. 16 Car. 2. B. R. Cutter v. Hebden.—Sid. 180. pl. 18. Hebden v Rutter, S. C. and the Court held the Consideration good; for Marriage is a Preferment, and the Loss thereof is a temporal Loss. And that it was adjudg'd a good Consideration in the Time of Roll Ch. J. in Case of Baker v. Smith, Sty. 295. 304. [Mich. 1651.]——Keb. 754 pl. 53. S. C. but S. P. does not appear.——S. P. admitted to be a good Consideration. Keb. 866. pl. 11. Pasch. 17 Car. 2. B. R. in Case of Mills v. Middleton.

In Assumpsit the Plaintiff counted that *whereas the Plaintiff, at the Special Instance and Request of the Defendant did promise to marry him within a Fortnight, the Defendant did promise to marry her within a Fortnight*, and *avers that she obtulit se, and the Defendant refused*. Windham, Atkins, and Ellis J. held that the Action well lay; but Vaughan Ch. J. e contra. But by the Opinion of the 3 Justices the Plaintiff had Judgment. Freem. Rep. 95. pl. 109. Pasch. 167[illegible] Holden v. Dickeson.——Cart. 233. Pasch. 25 Car. 2. C. B. S. C. accordingly —— 3 Keb. 248. pl. 17. Dickson v. Holcroft S. C. adjudg'd accordingly.

21. If A. be indebted to B. in 200 l. and A. appoints B. to receive it from C. and for the better Satisfaction of B. A. delivers certain Bills of Exchange to one D. the Factor of B. for Payment thereof; and thereupon C. promises B. that in Consideration [D. would deliver] to him the said Bills of Exchange so delivered to D. the Factor of B. that he would pay the said 200 l. due by A. to B. this is a good Promise, for the Consideration is valuable; for though C. can do nothing with the Bills, being a Stranger to them, yet it may be some Advantage to him to have the Possession of them, and at least it may be some Prejudice to B. and therefore the Consideration is good. Trin. 15 Car. B. R. between *Paynter and Chamberlyn*, Per Curiam adjudged, this being moved in Arrest.

22. If B. in Consideration that A. at the special Instance and Request of B. would permit B. to have and hold a Messuage and Land, then in the Occupation of B. una cum proficuis & commoditatibus inde provenientibus to his own use, promises A. to pay to him 13 s. at Michaelmas after for Rent for the Premises, and also at the said Feast to deliver the Possession of the Premises to A. in as good Repair as it was at the Time of the Demise aforesaid; this is a good Consideration to maintain an Action, though it does not appear that A. had any Estate therein at the Time of the Promise, and though it appears that B. was then in Possession thereof. Pasch. 16 Car. B. R. between *Adas and Ayers* adjudged, this being moved in Arrest of Judgment. Intratur Hill. 15 Car. Rot. 343.

Assumpsit for that *in Consideration he and his Wife, at the Defendant's Request, would convey their Estate* in certain Lands to *C. L. Cousin and Heir of M. L. by such ways as the said L. C. should appoint*, the *Defendant promised to pay* &c. The Defendant *pleads that at that Time the Plaintiff's Wife, nor either of them, had any Estate in the Lands*; and upon a Demurrer all the Court held this a good Consideration, because the Agreement was for such an Estate as they had, which might be a right extinguishable by a Release, altho' they had no Estate. And affirm'd the Judgment. 2 Lev. 33. Hill. 23 & 24 Car. 2. B. R. Woolnough & Ux. v. Virdon.——2 Keb. 708. pl. 78. adjudg'd for the Plaintiff.

23. In an Action upon the Case, if the Plaintiff declares that A. the Baron of the Defendant was indebted to him, and died possess'd of divers Goods, the which Goods after his Death came to the Defendant Legitimo modo; and that the Defendant, in Consideration that the Plaintiff would forbear the said Debt for a certain Time, assumed and promised to pay the Debt, this is a good Consideration; for though there is not any sufficient Matter shewn, by which it may appear that the Defendant could have any Benefit by this Promise, yet

* Sty. 304. S. C. adjudg'd for the Plaintiff. Hardr 73. cites S. C. Arg. by the Name of Hummers v. Hunton,

but cites as adjudg'd that it was no Consideration, because she was not liable to any Suit; so that the Plaintiff had no Prejudice by such Forbearance. —— Raym. 32.

yet inasmuch as the Words are, that he will forbear the Debt, and not the Defendant; so that the Promise is to forbear all the World, and every Stranger that may be sued, viz. the Executor or Ordinary, this is a good Consideration; for it is a Prejudice to the Plaintiff, and a Benefit to a Stranger. Mich. 22 Jac. B. R. between *Hill and Baylie*, Per Curiam affirm'd, the which Intratur Hill. 21 Jac. Rot. 636. M. 1651. between * *Hume and Hinton* adjudged Per Curiam, this being moved in Arrest of Judgment. Intratur 1651. Rot. 1446. But in this Case it was not alleged that any Goods came to the Hands of the Defendant which were the Goods of the Debtor; and in this Case the Consideration was to stay for his Money till &c.

S. C. cited, Arg. by the Name of Hunce v. Hinton; and that it was adjudg'd for the Plaintiff.

Assumpsit against the *Executrix* of B for that B. being indebted to the Plaintiff, and she having proved *the Will*, and thereby *possessed herself of a Lease for Years, promised in Consideration the Plaintiff would not molest her, but give her Time till Michaelmas next to pay* the Debt. It was moved that it was not averr'd that she had Assets, but adjudg'd, that it being alleged she had the Term, it shall be intended she had it as Assets, and the Forbearance of Suit and her having Assets are the Cause of this Action. And adjudg'd for the Plaintiff Cro. J. 273. pl 1. Pasch. 9 Jac. B. R. Bond v. Baine.—9 Rep. 93. b. Banes's Case, alias, Banes v. Paine S. C. states it that *she promised to pay the Debt or otherwise to assign her Interest of the Lease*; Adjudg'd in B. R. for the Plaintiff, and affirm'd by all the Justices of C. B. and Barons of the Exchequer.—— Jenk. 290. pl 27. S. C.

Cro. E. 194. in pl. 8. S. P. cited to have been adjudg'd a * Fol. 23. good Consideration. Pasch. 23 Eliz. Coke v. Hewett. —Le. 238. pl. 317.

24. If A. be bound in an Obligation of 60 l. to B. upon Condition for Payment of 30 l. at a Day to come, and after the Day of Payment, and the 30 l. not being paid, in Consideration that A. would pay the 30 l. * to B. in Satisfaction of the Obligation, B. promises that he will accept it in Satisfaction, and that he will deliver up the Obligation, if B. does not deliver up the Obligation to A. he may have an Action upon the Case upon this Promise; for tho' legally, after the Obligation forfeited, 30 l. can be no Satisfaction of 60 l. yet to have the Money in his Hands without Suit is a good Consideration to maintain this Action upon the Promise. Trin. 15 Car. B. R. between *Rawlins and Lockey*, adjudg'd, this being moved in Arrest.

321. [bis] cites S. C. as adjudg'd accordingly, Pasch. 25 Eliz. in B. R. and both Books say that this was agreed to per tot. Cur.

Assumpsit &c. for that there being *a Controversy between the Plaintiff Lord of the Manor of L. and the Defendant claiming to hold by Copy certain Lands*, Parcel of the said Manor, both Parties *submitted to the Award of J. S.* The Defendant in Consideration that the *Plaintiff promised* him *that if the said J. S. should adjudge the Copy to be good, then he would suffer the Defendant to enjoy* the said Lands, and the said *Defendant promised* the Plaintiff *that if the said J. S should adjudge the Copy not to be sufficient*, that then *he would surrender and deliver up the Possession to the Plaintiff without Suit*, and assign'd the Breach; Per Gawdy, this is a good Consideration it being to avoid Suits at Law. And Judgment for the Plaintiff. Le. 103. pl. 137. Pasch. 30 Eliz. B. R. Cook v. Sangate.——4 Le. 31. pl. 85. S. C. in totidem Verbis.

Assumpsit, whereas the *Plaintiff was bound to pay the Defendant* 30 *l. May* 9. 1624. The *Defendant in Consideration the Plaintiff would pay him* the said 30 l. *the said 9 May promised him to deliver up the said Bond to be cancell'd*, and that he paid the Money the said Day, but the Defendant had not deliver'd up the Bond, but caused him to be arrested thereupon; the Defendant *pleaded Quod non solvit*, and found for the Plaintiff. It was moved that it was no sufficient Consideration; for Consideration ought to be Matter of Profit and Benefit to him to whom it is done, or Trouble to him who doth it. Resolved it was a good Consideration to have it paid without Suit or Trouble, and perhaps the not paying of it at the Time might be more prejudicial to the Plaintiff, than the Forfeiture would be of Advantage, if he should be forced to sue for it. Adjudg'd for the Plaintiff. Cro. C. pl. 5. Pasch. 1 Car. C. B. Flight v. Crasden.—— Hutt. 76. Flight v. Gresh S. C. and because it appears that by the Non-performance of this Promise the Plaintiff had Prejudice, and the Jury had found Quod solvit, the Plaintiff had Judgment.

* Cro. C. 241. pl. 2. Cooks v. Douze, Hill. 17 Car. S. C. adjudg'd that the

25. If A. be indebted to B. in 20 l. and B. says to A. that he will sue him for the Debt, whereupon A. says to him that if he will forbear him per paululum tempus, that he will pay him; this is no good Consideration of an Assumpsit, because he may sue him presently. Pasch. 6 Jac. B. between *Brian and Salter*, adjudg'd. Pasch. 8 Car. B. R. between * *Brooke and Dewse*, adjudg'd in a Writ of Error upon

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a Judgment given contra in the Cheap-Court at Winchester, and the Judgment there given reverſed. Paſch. 15 Car. B. R. between *Stiles and Rowland*, adjudg'd in a Writ of Error upon ſuch a Judgment in B. and this reverſed accordingly for this Error. Intratur Mich. 14 Car. Rot.

Conſideration was good, and Rule was given that the Judgment ſhould be affirm'd ——S. C. cited, and denied to be Law; per Cur. Sid. 45. Mich. 13 Car. 2. B. R. in pl. 3.

A like Exception was taken, and urg'd that Parvum tempus may be but Punctum temporis. Sed non allocatur, for the Defendant being indebted to the Plaintiff, the Debt in itſelf is a ſufficient Conſideration. Le. 61. pl. 80. Paſch. 29 Eliz. C. B. Gill v. Harwood. ——Goldsb. 48 pl. 6. Shortwood v. Gibbons, ſeems to be S. C. and S P. held accordingly, per tot. Cur. abſente Anderſon. ——3 Le. 200. pl 252. Eſtrange v. Owlet, Trin. 30 Eliz. B. R. ſays it was held that Forbearance per paululum tempus is a good Conſideration; but it ſeems imperfectly reported; and in Eſcrig's Caſe, 4 Le. 3. 31 Eliz. a certain Time of Forbearance is mention'd.

A Conſideration Quod paululum ceſſaret, was held not good; and tho' the Plaintiff alleg'd that he forbore for half a Year, this did not help the Caſe. Cro. E. 19 pl. 19. Paſch. 25 Eliz. C. B. Lutwich v. Huſſey.——Cro. E. 759. pl. 29. Paſch. 42 Eliz. C. B. it was ſaid per Cur. to have been adjudg'd that a Conſideration to forbear per paululum tempus is void, becauſe it is not certain, and paululum tempus is not temporis pars.

26. If A. promiſes B. that in Conſideration that he will forbear to ſue him for a certain Debt pro aliquo tempore that he will pay him, and avers that he forbore him for a Year, this is not a good Conſideration; for Aliquod tempus is full as little as Paululum tempus. Hill. 11 Car. B. R. between *Telſton and Clarke*, per Curiam there in a Writ of Error upon a Judgment in Shaftsbury, and the Judgment reverſed accordingly. Intratur Trin. 11 Car. Rot. 687.

Cro. C. 438. pl. 8. Tolſon v. Clerk, S. C. and the Judgment in C. B. was reverſed.—S. C. cited per Cur.

Sid. 45. pl. 3. Mich. 13 Car. 2. B. R.

27. If A. leaſes Lands to B. at Will, and A. in Conſideration that B. will ſurrender to him the ſaid Eſtate at Will, promiſes to B. that he will provide a Parſonage for J. S. this is no good Conſideration to maintain an Action, becauſe he might determine this Eſtate at Will at his Pleaſure. Mich. 8 Jac. B. between *Kent and Prat*, per Curiam, where it was put in the Declaration, that he was poſſeſs'd of a [Term,] without ſhewing what Term, and therefore the Court took it to be a Leaſe at Will.

Brownl. 6. S. C. but nothing ſaid by the Court; but in the Margin it is ſaid that Judgment was arreſted, becauſe the Conſideration was not valuable.

28. But in this Caſe, if it had been alleg'd that there was a Controverſy between A. and B. whether it was a Leaſe at Will, or for Years, and thereupon the Aſſumpſit had been made as before, this had been a good Conſideration. Mich. 8 Jac. B. per Coke.

29. If A. in Conſideration that B. will make an Eſtate at Will to him, ſuch as his Counſel ſhall deviſe, promiſes &c. this is no good Conſideration; for that he may preſently after the Eſtate made determine it. Mich. 12 Jac. B. between *Kelle and Tiſdale*, per Curiam.

Poph. 183. S. C. cited by the Name of Kebble's Caſe, as held accordingly.——

Noy 83. cites 19 Jac. Kebb's Caſe, S. P. and ſeems to be S. C.

30. In an Action upon the Caſe by A. againſt B. if the Plaintiff declares that they accounted inſimul, concerning &c. and upon this Account B. was found 10 l. in Arrear to the Plaintiff; and thereupon B. affirm'd that he had paid it to J. S. to the Uſe of the Plaintiff, and thereupon B. promiſed that if he does not prove in a ſhort time that he had paid it to J. S. to the Uſe of the Plaintiff, he would pay it to the Plaintiff, and avers that he had not proved it from the Time of the Promiſe to the Time of the Action brought, which was a Year, this is a good Conſideration;

Tit. Error, (K. c) pl. 1. S. C. but not S. P

sideration; for here he is found in Arrear 16 l. and the Law makes a Promise to pay it, and tho' here a further Time is given to him for his Advantage, and it should be admitted that this Time is no considerable Time, and therefore void, yet the Promise in Law stands good; but this Time is considerable, for the Time ought not to be too short, but that he may make his Proof within it; and here it was *Per unum annum*; for here by the Words (short Time) is to be intended a reasonable Time to make the Proof. Trin. 1649. between *Vigorous and Drake*, * adjudg'd, per Curiam, in a Writ of Error upon a Judgment in Exeter; but the Judgment was reversed for another Error. Intratur Hill. 16 Car. Rot. 696. B. R.

* Fol. 24.

31. If A. and B. at the Request of A. and for the proper Debt of A. are bound in an Obligation of 10 l. to C. and after A. makes D. his Executor, and dies; and after B. and D. at the Request of D. *More Anglico*, spend a Quarter of Lamb, Bread, and Ale to the Value of 5 s. in the House of J. S. and thereupon, there being a Discourse between them concerning the said Obligation, D. assumes and promises to B. in Consideration that B. would pay one Half of the Reckoning, for the said Quarter of Lamb, Bread, and Ale, that he would pay the said 10 l. due upon the said Obligation, and thereupon B. pays one Half of the Reckoning, B. may well maintain an Action against D. upon this Assumpsit; for it appears that he is Executor of A. who was the Principal in the Obligation; and also he invited B. to eat and drink this, for which the said 5 s. was to be paid; so that in Equity he ought to pay the Obligation, and Reckoning also; and tho' as to the Host both are liable to pay the Reckoning, unless the Host knows B. to be invited, yet when a Debt is due jointly by two, it is a good Consideration that if the other will pay one Moiety, he himself will discharge the other of an Obligation for 10 l. For tho' the Benefit be but small, yet it is a Benefit; for when it was joint both might be sued, and if one does not appear, but is outlaw'd, the other may be compell'd to pay all; and if the Judgment be against both, yet upon an Execution, one may be taken in Execution; and upon such a Reckoning, if one departs without Payment, the Host may compel the other to pay all before he departs, and so he has a Benefit by the Payment of a Moiety. Mich. 9 Car. B. R. between *Moore and Bray*, adjudg'd, this being moved in Arrest of Judgment. Intratur Trin. 9 Car. Rot. 1144.

Testator being indebted to J. S. the Defendant's *Executor promised that if he had Goods sufficient he would pay* it, and alleg'd that he had Goods sufficient. The Plaintiff had a Verdict,

32. If B. as Administrator to J. D. is indebted to A. in 20 l. and upon this, B. in Consideration that Administration is committed to him, and that he has Assets in his Hands, assumes and promises to pay the Debt as soon as any Debt due to the Intestate comes to his Hands to the Value of the Debt, and after such a Debt comes to his Hands, yet no Action lies upon this Promise; for here is no Consideration to maintain this Action, by which the Administrator should be charged of his own Goods; for here the Consideration is not to forbear to sue, or any other Consideration. Trin. 14 Car. B. R. between *Kitchinman and the Bishop of Ossory* in Ireland, in a Writ of Error upon a Judgment in Ireland, and the Judgment revers'd accordingly for this Error among others. Intratur Hill. 13 Car. Rot. 1141.

and Judgment, and that Judgment affirm'd in Error; for the Assumpsit was good, the Defendant having Assets, and being of his own Promise, shall be charg'd De Bonis propriis. Cro. E. 91. pl. 18. Hill. 30 Eliz. B. R. Trewinian v. Howell.——Le. 93. 94 pl. 121. S. C. adjudg'd; but mentions the Promise to be, that if the Plaintiff could prove that the Goods were deliver'd to the Testator, He would pay the Value of them &c.

Assumpsit &c for that *his Father gave him* 3 l.

33. If A. (to whom the Testator was indebted) comes to the Executor, and says that he intends to sue him for the Debt; whereupon the Executor promises in Consideration that the Plaintiff will forbear

bear him for a reasonable Time, he will pay him, and A. forbears to sue him for a reasonable Time, this is a good Consideration to charge the Defendant in an Action upon the Case, out of his own Estate, without Assets; for by this Promise it is intended as well to forbear to sue the Executor, as to forbear the Debt; and a Forbearance of Suit is a good Consideration without Assets, at the Time of the Promise. Mich. 14 Car. B. R. between *Johnson and Witchcott*, per Curiam, upon a Demurrer, where the Defendant pleaded that he had not Assets at the Promise made. Intratur Mich. 14 Rot. 588. The Word in Latin was Toleraret.

per Annum during his Life, and being about to sue for it, the Executor promised that in Consideration he would forbear, he would pay the Money; the Defendant pleaded that his Testator was indebted in several Sums ultra quod he had not Assets; but upon Demurrer it was adjudg'd, that it is *not material whether he had Assets or not*; for by the Promise he had caused the Plaintiff to desist, who at that Time might be prepared to prove Assets. Vent. 120. Pasch. 23 Car. 2. B R. Davis v. Wright.——2 Lev. 3. Davis v. Reyner S. C. adjudg'd for the Plaintiff; for *he is charged upon his own Promise* in Consideration of Forbearance; and Forbearance of a Suit for a Legacy is sufficient Consideration ——— 2 Keb. 744. pl. 52. S. C. adjornatur. ——Ibid. 758. pl. 23. S. C. adjudg'd for the Plaintiff; but *if it had appear'd by the Declaration that the Plaintiff had no Cause of Action, then the Forbearance would not be sufficient.*

34. In an Action upon the Case by A. against B. if the Plaintiff declares that * C. the Baron of B. was indebted to him in 10 l. and after his Death B. his Wife being big with Child, in Consideration that A. the Plaintiff would forbear to sue her as Administrator of C. till such a Day, B. promised to pay the Debt; and it is not said in the Declaration that B. was the Administrator of C. this is no good Consideration to have an Action upon the Case; for it does not appear that B. had any thing to do with it, or to be charged for the Debt more than a meer Stranger. Mich. 9 Car. B. R. between *Whitcher and Davis*, Per Curiam, adjudged in Arrest of Judgment after Verdict for the Plaintiff.

* Fol. 25.

The Plaintiff declared that the Defendant's *Husband, upon an Account* between them, *was indebted to the Plaintiff* in so much, *and promised to pay it, and died*; and that the Defendant being *his Widow*, and *having Notice thereof, and also that the Plaintiff intended to sue her*, came to the Plaintiff, and *promised that if he would not sue her until such a time*, then in Consideration thereof *she would pay* &c. It was moved in Arrest of Judgment that it is *not shewn that she was Executrix*, or any ways chargeable with this Debt of her Husband, and so no Ground to sue her. Peremptory Day was given the Defendant, at which Day the Reporter says he heard nothing more. Palm. 441. Trin. 2 Car. Goodwin v. Willoughby.——Lat. 141. S. C. in totidem Verbis.——Poph. 177. S.C. the Judges varied in Opinion, and so no Judgment.——Noy. 81. S.C. and Jermin pray'd Judgment for the Plaintiff, because the Defendant first made the Request to forbear. And Peremptory Day was given the Defendant to shew Cause &c.——Hardr. 73. Arg. cites S. C. that this Promise does not bind the Wife, unless she were Executrix or Administratrix, or chargeable with the Debt.

Case for that the Defendant's *Testator being indebted to the Plaintiff* in 35 l. *promised to pay it when thereunto required*, and that the said *Testator had made the Defendant Executor, and left sufficient Assets, and in Consideration the said Debt was not paid, and that the Plaintiff had given him Time till Lady-day next to pay it, he promised to pay* &c. The Plaintiff had a Verdict and Judgment in B. R. but revers'd on Error in the Exchequer Chamber, because the Consideration was insufficient; for the Defendant is not bound by Law to pay the 35 l after the Death of the Testator, and the giving a longer Day to pay Money, which by Law he is not obliged to pay, is not a sufficient Consideration. Moor 702. pl. 977. Pasch. 37 Eliz Matthew v. Matthew.

35. In an Action upon the Case, if the Plaintiff declares that whereas he had delivered 100 l. to the Defendant, the Defendant did promise to repay to the Plaintiff, at a Day after, the same 100 l. with a Recompence for it, tho' if it should be intended that he should repay the same 100 l. in Specie, this could not be any Consideration for the Promise, because the Defendant could not have any Benefit thereby, yet it shall be intended to be the same in Value, and not in Specie, and therefore a good Consideration. Mich. 9 Car. B. R. between *Cruse and Berry*, adjudged, in a Writ of Error. Intratur Trin. 9 Rot. 1163.

The Count was of a Loan The Assumpsit was laid *to pay the 100 l. aforesaid upon Request*. It was objected that it might be demanded as soon as lent, and that it must be the same 100 l. in Specie; but per tot. Cur. e contra, and that it shall be intended the Sum aforesaid; and the rather in this Case, (as Popham said) because the Assumpsit is grounded

grounded on a Loan, which implies a Use of the Money by the Defendant, and consequently the same Money as was received cannot be repaid. Yelv. 50. Mich. 2 Jac. B. R. Game v. Harvie.

36. If A. and B. are bound in an Obligation of 10 l. to C. for the proper Debt of A. and after A. dies, and after E. being the Wife of A. promises B. in Consideration that B. will pay the 10 l. to C. that she will repay it to B. upon which B. pays it to C. no Action upon the Case lies against E. upon this Promise, because there is no Consideration for E. to make such Promise, and B. was before bound to pay it, and not E. Mich. 9 Car. between *Westbie and Cockaine* adjudged in the Exchequer Chamber in a Writ of Error, upon the Judgment given in B. R. revers'd accordingly. Intratur Trin. 7 Car. B. R. Rot. 347.

37. In an Action upon the Case upon an Assumpsit by A. against B. if the Plaintiff declares that whereas he, viz. A. and Eliz. his Wife, the Administratrix of C. recover'd by Judgment a certain Debt against J. S. and after the said Eliz. died, and after Administration of the Goods of C. unadministred was granted to the Plaintiff, and after the Plaintiff sued out an Elegit upon the said Judgment against J. S. and thereupon the Sheriff took an Inquisition, whereby it was found that he had divers Lands &c. subject to the Execution; and this Inquisition was reduced into Writing, whereupon there was a Colloquium between the Plaintiff and Defendant, concerning the Delivery of this Instrument, containing the said Inquisition, to the Defendant; and thereupon the Defendant did promise, in Consideration thereof, to deliver the said Instrument to the Plaintiff; upon which he delivered it to the Defendant, who, tho' requested, had not re-deliver'd it; this is a good Consideration, tho' it appears by the Inducement that the Plaintiff had not any Cause to have the Elegit, inasmuch as the Judgment was in the Right of his Wife, as Administratrix; so that the Husband, upon the new Administration, comes in Paramount the Judgment; yet inasmuch as the Action is grounded upon the Delivery and Re-delivery of the Instrument containing the Inquisition, this is a good Consideration to maintain the Action. Hill. 9 Car. B. R. between *Couche and Jefferys* adjudged, upon a Writ of Error upon a Judgment in Lancester, and the first Judgment affirm'd accordingly. Intratur Hill 7 Car. Rot. 993.

38. In an Action upon the Case upon a Promise, if the Plaintiff declares that whereas the Defendant, such a Day, had demised a Messuage to the Plaintiff for certain Years, in Consideration of 10 l. Rent per Annum to be paid by the Plaintiff, according to his Promise thereof made, the Defendant in Consideration thereof did then promise to dress the Meat * of the Plaintiff, after the Rate of 2 d. the Joint, from Time to Time during the Term, and to provide other Necessaries for him, this is a good Promise and a good Consideration; for the Acceptance of the Lease by the Plaintiff under the said Rent, was the Consideration of this Promise; for perhaps he would not have accepted this Lease under the said Rent, if it had not been for this Promise. Mich. 11 Car. B. R. between *Arundle and Rowden*, dubitatur, this being in Arrest of Judgment; but after, per Curiam, this is a good Consideration. But after Judgment was given against the Plaintiff for another Cause, and Fault in the Declaration.

* Fol. 26.

(S) pl. 1. S. C. but S. P. does not appear.

39. If A. makes a void Promise to B. and after a Stranger comes to B. and in Consideration that B. will relinquish the Promise made to him by A. he promises to pay him 10 l. this is not a good Consideration to charge him, because the first Promise was void. Mich. 14 Jac. upon a Writ of Error at Serjeants-Inn, between *Bernard and Simons*, put by Altham, and agreed per Curiam.

40. If

40. If a Man sues a Scire [Fieri] facias to have Execution, and says to the Sheriff, such are the Goods of the Party, shewing them to him; whereupon, in Consideration that the Sheriff will execute the Execution upon those Goods, he promises to save him harmless, this is not a good Assumpsit, because he ought to take Notice of them at his Peril. Mich. 14 Jac. B. R. in *Sutheman's* Case, held by Dod. & Nought.

41. If A. delivers an Execution to the Sheriff at his Suit against B. and in Consideration that the Sheriff, without any Fee, will execute it, he promises the Sheriff to pay to him a certain Sum, which is as much as the Sheriff is allowed to take by the Statute of 28 Eliz. Tho' it be admitted that the Sheriff cannot have any Remedy for his Fees, yet because it was lawful for the Sheriff to take his Fees, and he made the Execution at his Request, and this is for his Benefit, this is a good Consideration. Hill. 41 Eliz. B. R. between *Staunton and Suliard.* Cro E. 654. pl. 15. S. C. in the Exchequer Chamber; and the Judges were of Opinion to affirm the Judgment on this Point; but another Error being assign'd, it was revers'd on that other Point.——Mo. 468. pl. 669 Suliard v. Stamp, S. C. adjudg'd and affirm'd in the Exchequer Chamber.——Mo. 669. pl. 97. S. C. and Judgment affirm'd. But see in a Note at the End of the Case it is said that the Judgment was agreed to be revers'd by the Opinion of all the Justices, but was ended by Compromise.

42. If B. is obliged to A. in 200 l. and A. being indebted in so much to the King, assigns the Obligation to the King, and after B. in Consideration that A. will forbear to procure any Process against him for the said Debt till Hillary Term next following, assumes and promises to pay to A. 200 l. this is not a good Consideration to maintain an Action, because by the Assignment the Debt was made over to the King; and therefore the Forbearance by A. to procure Process is no Benefit or Ease to B. because it may be awarded against him for the King, notwithstanding the Promise. Hill. 41 Eliz. B. R. between *Bowes and Pawlet* adjudged, upon a Writ of Error. Cro. E. 653. pl. 14. S. C. accordingly, by all the Justices and Barons in the Exchequer Chamber, and so a Judgment in B. R. to the contrary was revers'd.

——Mo. 701. pl. 974. S. C. adjudg'd in B. R. and that Judgment revers'd accordingly in the Exchequer Chamber.

43. If A. promises B. in Consideration that he will not sue an Attachment out of Chancery upon a Decree, which is there made against him, that then he will pay him 20 l. (it seems it is intended that the Decree was at his Suit) this is a good Consideration to maintain an Action upon the Case; for thereby he shall avoid the Imprisonment of his Body, of which the Chancery had Power for the Contempt of the Decree. Hill. 42 Eliz. B. R. between * *Colston and Carre*, Per Curiam, præter Popham; and there was cited the Case of *Cowly and Windham*, to be adjudged in Point. * Cro. E. 847. pl. 1. Mich. 43 & 44 Eliz. B. R. Coulston v. Carr, S. C. held accordingly. Noy 38. Coolston v. Carre, S. C. but S. P. does not appear.

44. If A. be indebted in 20 l. to B. and dies, and his Executor, in Consideration that B. will forbear him for a reasonable Time, promises to pay him the Debt, this is a good Consideration to have an Action, with an Averment that he forbore him afterwards for a certain Time, viz. 8 Years. Pasch. 14 Jac. B. R. between * *Linghen and Broughton*, Per Curiam. Trin. 18 Jac. B. R. 1307. between † *Whitty and Browne* adjudged, in a Writ of Error upon a Judgment in Dartmouth. Mich. 15 Car. B. R. between ‡ *Johnson and Witchcott*, admitted upon a Demurrer. Intratur Mich. 14. Rot. 588. * Mo. 853. pl. 1167. Linghill v. Broughton, S. C. and per tot. Cur. the Court may judge of the Reasonableness of the Time, tho' not of the Meaning of Paululum Temporis; and 8 Years is a reasonable Time of Forbearance; and the Plaintiff had Judgment.——2 Bulst. 206. S. C. adjudg'd for the Plaintiff.——Roll. Rep. 379. pl. 38. S. C. adjudg'd for the Plaintiff.

* See pl. 58. S. C.——† See pl. 33. S. C.

Executor who had Goods of Teſtator being threatned by the Plaintiff to be ſued, in Conſideration *that he would be patient and quiet promiſed to pay.* The Court conceived the Conſideration well enough, in Regard (being patient) is intended for ever. And Keeling Ch. J ſaid this was a good Aſſumpſit, the Words amounting to it. 2 Keb. 77. pl. 65. Trin 18 Car. 2. B. R. Boylſton v. Ruſſel.

Fol. 27. Cro E. 455. pl. 3. S. C. and it being objected that the Conſideration is not ſufficient, for perhaps the

45. If A. be indebted to B. in 100*l.* and B. was about to commence a Suit for the Recovery of the Debt, and C. a Stranger comes to him, and ſays, That if he will forbear him he himſelf will pay it; this is a good Conſideration for this Aſſumpſit to B. if B. avers that he had abſtained and forbear to ſue A. and adhuc does abſtain and forbear, tho' no certain Time was appointed for the Forbearance; for it ſeems a perpetual Forbearance is intended, the which he hath performed. Mich. 37. 38 Eliz. B. R. between *Sackford and Phillips* adjudged.

Forbearance was only a Quarter of an Hour &c. and tho' it was alleg'd Quod abſtinuit & adhuc abſtinet, that will not help it; and of that Point ſome of the Juſtices doubted, but the greater Part held that it was not a ſufficient Conſideration. Sed adjornatur. And afterwards it was revers'd for this Cauſe.——Mo. 689. pl. 952. S. C. the Judgment was revers'd in the Exchequer Chamber, becauſe no certain Time was mention'd in the Promiſe to forbear. —— Ow. 109. S. C. in the Exchequer Chamber. Sed adjornatur.———Bulſt 92. S. C. cited Per Cur. Mich. 8 Jac. as adjudg'd in the Exchequer to be no Time, and void for Uncertainty.—S. C. Jenk. 301. pl. 71. S. C. adjudged and affirm'd in Error. Paululum temporis may be the next Inſtant.

A Promiſe to forbear to ſue is for all his Life-time, and not per Paululum tempus; Per Haughton J. Godb. 448. pl. 494. Trin. 21 Jac. B. R. in Caſe of Fiſher v. Warner.

The Plaintiff counts that *J. S. was indebted* to him *upon an Obligation, and he forfeited it, and dies*,

46. So if A. be indebted to B. and C. a Stranger ſays to him, That if he will forbear him for a little Time that he himſelf will pay him, this is a good Conſideration of an Aſſumpſit, averring a certain Time of Forbearance. Paſch. 41 Eliz. B. R. between *Scovell and Covell* cited to be adjudged Mich. 37. 38 Eliz. B. R.

and made the Defendant his *Executor*, and that the Plaintiff was forced to ſue the Obligation; and in Conſideration of the Premiſes the Defendant *aſſumed that if the Plaintiff would forbear him pro brevi tempore, that he would pay him.* And the Plaintiff Fidem adhibens &c. forbore 4 Years to ſue him, and ſaid that the Defendant had Aſſets. The Defendant ſaid abſque hoc that he had Aſſets. And upon that the Plaintiff demurr'd, and adjudg'd for him; for the alleging of Aſſets in the Count is Surpluſage. And now the Conſideration was ſufficient; for he had *counted he had forbore for 4 Years.* Het. 62. cites Paſch. 40 Eliz. Rot. 537. Palmer v. Rouſe.

Caſe &c. *for that the Defendant being indebted in 6 l. and his Son pro diverſis negotiis* &c. *in 63 l. to the Plaintiff, the Defendant in Conſideration Plaintiff would forbear to ſue for thoſe Debts for one Month promiſed to pay them*; It was adjudg'd per tot. Cur. that he ſhall be charged with the whole Debt of 69 l. for tho' he was not liable to his Son's Debt, nor was it reduced to any Certainty, yet when he promiſed to pay he ſhall be liable, the Forbearance being a Damage to the Plaintiff, tho' as to the Son's Debt it was no Benefit to the Defendant. Sid. 38. pl. 8. Paſch. 13 Car. 2. C. B. Beſt v. Jolly.

Aſſumpſit for that *B. owed the Plaintiff* 100*l. on Bond*, and the *Defendant, in Conſideration the Plaintiff would at his Requeſt forbear to ſue B. promiſed that if B. did not pay the Money he would.* Per Cur. where the Conſideration is ſuch as can be no Benefit to the Party it is not good; as where it is to *forbear for an Hour* &c. but where it is to forbear *generally, without limiting any Time*, there it ſhall be intended for a convenient Time, or altogether; Judgment for the Plaintiff. Hutt. 46. Mich. 19 Jac. May v. Sidley.———Cro. J. 683. pl. 1. Hill. 21 Jac. C. B. Mapes v. Sidney S. C. the Plaintiff ſhew'd that he forbore to ſue B. per magnum tempus, viz. from the Promiſe to ſuch a Day, which was a Year and a Half; and when the Date of the Writ does not appear, it ſhall be intended that he did forbear till the Day of the Writ.——Win. 22. Maps v. Sidley S. C. adjornatur.

Defendant promiſ'd that if Plaintiff would *forbear him per Paululum Tempus, he would pay him infra breve Tempus*,

47. [So] If A. is indebted to B. upon which B. arreſts him, and while he is under the Arreſt a Stranger comes to B. and ſays that if he will forbear A. for a little Time, he will pay him; whereupon B. ſuffers A. to go at large, this is a good Conſideration for an Aſſumpſit, though he arreſts A. within an Hour after; for the Deliverance from the preſent Danger is a good Conſideration. Paſch. 41 Eliz. B. R. in *Covell's Caſe*, per Popham.

and Plaintiff counted that he forbore him half a Year; this is no good Conſideration, for no one

can

can define what shall be Paululum Tempus. But Haughton said, that a Promise on good Consideration to pay infra breve Tempus, shall not be immediately; quod Ley Ch. J. concessit. 2 Roll Rep. 368. Mich. 21 Jac. B. R. Paulter v. Heaver.

48. [So] If J. S. makes W. and his Wife Executors, and afterwards several Suits and Controversies arise between them and T. for and concerning the Right of Executorship, in the Ecclesiastical Court, and T. in Consideration that the said W. at his Request had submitted to the Award of L. these Matters &c. promises that the said W. should not be troubled or molested for or concerning this Right of the said Executorship, this is a good Consideration, viz. the Submission to the Award, though he might immediately have revoked it. Pasch. 38 Eliz. B. R. between *Line and Neale*, adjudg'd, in a Writ of Error upon such a Judgment in B. Cro. E. 460. Neve v. Line, S. C. & per tot. Cur. it shall be intended a Submission, with an abiding to the Award, and so was the Intent of the Parties; and if he had revoked it the Defendant ought to have pleaded it, otherwise it shall not be intended. Wherefore Judgment was affirm'd.

49. If A. is indebted to B. and C. promises B. that if he will not pay him, that then he himself will, if A. does not pay it within a convenient Time, this will be a good Consideration for B. to have an Action against A. upon this Promise. Mich. 42, 43 Eliz. B. R. between *Sadler and Hawkes*, adjudg'd. (It must be intended that there was a Promise to forbear to sue A. in the mean time.) (S) pl. 2. S. C.

50. If A. contracts with B. for Money paid, to deliver to him a Pigg of Lead, and dies, and after C. his Administrator delivers Lead Ore to D. to make a Pigg of Lead thereof, to be deliver'd to B. in Satisfaction of the Pigg promised by the Testator, and after B. demands his Pigg of C. who says that he had deliver'd Ore to D. &c. and then D. being present, in Consideration thereof promises to deliver the Pig to B. at a certain Day after, this is a good Consideration. Mich. 18 Jac. B. R. between *Jackson and Frost*, adjudg'd, this being moved in Arrest of Judgment.

51. If A. delivers [Money] to B. to pay to C. and B. promises C. to pay it to him, yet A. [C.] can have no Action against B. upon this Assumpsit, because there is not any Consideration between them. Hill. 37 Eliz. between *Howlet and Hallet*, adjudg'd, per Curiam. *A. indebted to B. delivers Goods to C.* in Specie, amounting to the Value of the Debt, *to satisfy B. the said Debt*; B. requires Payment of C.——C. promises B. in Consideration of *Forbearance*, to pay such a Day. Adjudged for B. Yelv. 164. Mich. 7 Jac. B. R. Brand v. Lifley.

52. But if in this Case he had given Day to B. to pay it, this had been a good Consideration, upon which he might have an Action in the said Case; per Walmsly.

53. If a Man is bound in an Obligation of 40 l. for the Payment of 20 l. and the Obligee promises the Obligor that in Consideration that he will pay the Money without Suit, that after Payment he will deliver up the Obligation to him, this is a good Consideration to maintain an Action, * if the Obligee does not perform the Promise. Hill. 41 Eliz. B. R. 35. per Popham. Pasch. 14 Jac. B. R. per Coke. Assumpsit, *for that the Defendant J. B. was indebted to G. the Plaintiff by Obligation in 51. to be paid the 1st of November* following, *in Consideration that he, the 3d of November, at the Instance and Request of the Plaintiff, would pay him the said 51 without Suit, he promis'd to deliver him a Bond, in which, J. S. was indebted to him in 20 s. with a Letter of Attorney to sue for the Debt.* After Verdict and Judgment for the Plaintiff the Defendant brought Error, for that he did no more than the Law compell'd him to do, viz. to pay the Money which was due before; and that the Consideration was void, because it doth not appear that the Defendant could have any Benefit by it. As to the first Gawdy and Fenner (only in Court) conceived that there was no Consideration; but as to the 2d they differ'd, and were of Opinion to reverse the Judgment, but yet they would advise. Cro. E. 193. pl. 8. Mich 32 & 33 Eliz. B. R. Greenleaf v. Barker.——Le. 238. pl. 317. S. C. held accordingly.

54. If

Cro. E. 429. pl. 31. Reynolds v. Pinhowe, S. C. adjudg'd for the Plaintiff; for it is a Benefit to him to have it without Suit or Charge, and it may be that there was Error in the Record, so as the Party might have avoided it.——Mo. 412. pl. 564. Reynold v. Purchowe, S. C. adjudg'd good.

54. If A. recovers a Debt, and Damages to 7 l. against B. and after A. in Consideration of 4 l. paid him by B. assumes and promises that he will forbear further to prosecute his Suit, and that he will release it, and also that he and his Attorney will acknowledge Satisfaction of the Sum recover'd; though this 4 l. cannot be any Satisfaction of the 7 l. due by the Record, yet the Acceptance of the 4 l. is a good Consideration to raise this Assumpsit, whereby to compel him to discharge the 7 l. Mich. 37, 38 Eliz. B. R. between *Pinowe and Reynolds*, adjudg'd.

In Consideration that *I will make my Debt appear*, this is Trouble and Pains, and therefore a good Consideration, and Judgment for the Plaintiff. Raym. 32. Mich. 13 Car. 2. B. R. Travers v. Meers. —— Sid. 57. pl. 25. Travers's Case, S. C. adjudg'd for the Plaintiff.——Keb. 163. pl. 112. S. C. & S. P. agreed per Cur.

If *A* be *bound to B. by a Bill of* 1000 *l.* and *A. pays B.* 500 *l. in Discharge* of this Bill, *which B. accepts, and thereupon promises A to deliver up to him his said Bill*; tho' this 500 l. is no Satisfaction of the 1000 l. yet it is sufficient to make a good Promise, and upon a good Consideration, because he has paid paid the Money, viz. 500 l. and he has no Remedy for it again. Per Coke Ch. J. 3 Bulst. 162. Pasch. 14 Jac.

Goldsb. 156. pl. 85. S. C. adjudg'd accordingly.—Mo 710. pl. 992. Adams v Dixon, S. C. and upon Error brought in the Exchequer-Chamber, Judgment was reversed, because the Consideration was insufficient.—Cro. E. 538. pl. 74. Dixon v. Adams, S. C. and Judgment reversed by the whole Court, the Consideration not being sufficient; for D. had done no Act whereto the Law would not have compell'd him.

55. In Debt by A. against M. upon an Obligation, if D. is Bail for M. and after A. recovers, and then Process is continued till A. has Execution awarded against D. the Bail, and after A. in Consideration that D. will pay to him the Condemnation, assumes and promises to D. to discharge him of the said Execution, and further to assign over the said Obligation of M. the Principal, whereupon D. pays the Money to A. but A. will not assign over or deliver the Obligation to him; here is a good Consideration for D. to have an Action upon the Case upon this Assumpsit against A. For tho' the Money paid by D. to A. was due, and D. compellable to pay it by Force of the Execution awarded against him, yet there might be Charge, Labour, and Trouble to A. in the serving of the Execution for the getting of the Money; and then when D. gives this Money to A. without this Trouble or Charge, this is a good Consideration for an Assumpsit. Trin. 39 Eliz. B. R. between *Dixon and Adams*, adjudg'd.

Assumpsit against an Executor, *for that the Testator being indebted to the Plaintiff upon Simple Contract, and the Executor having sufficient Assets, promised that if the Plaintiff would forbear to sue him till such a Time he would pay the Debt.*

56. If a Man makes a Contract with J. S. and dies intestate, and his Administrator in Consideration of Forbearance &c. promises to pay it &c. this is a good Consideration, tho' the Administrator was not chargeable upon this Contract at Common Law; for he was chargeable in Conscience. Pasch. 5 Jac. B. R. between *Walker and Wittel*, per Curiam. Mich. 4 Jac. B. R. between *Richardson and Sir Moyle Finch*, per Curiam, because he is bound in Conscience to pay it.

Per tot. Cur. This is a good Consideration, and Judgment for the Plaintiff. Cro. J. 47. pl. 16. Mich. 2 Jac. B. R. Fisher v. Richardson.——Yelv. 55. Fish v. Richardson, S. C. accordingly; *but* if the *Heir promises*, upon Forbearance of Suit to pay such a Debt, yet no Assumpsit lies against him; for there is no Consideration, because the Heir is not liable to any Debt without Specialty.

Assumpsit was made by *Heir* to pay a Debt where it does *not* appear he was

57. If a Man [binds] himself and his Heirs in an Obligation and dies, and after the Obligee sues the Heir, who had no Assets descended to him, upon the Obligation, and the Heir says to him that if he will not sue him, that then he will pay him the Money, this is no Consideration so as to maintain an Action; because he was not charge-

able

able without Assets. *Lord Gray's* Case, adjudged, cited Pasch. 42 Eliz. B. R. 11. in Manning's and Knopp's Case. 42 *bound*; the Court doubted if good.

Otherwise of *Executor*, because he is liable without express Words. Sid. 148. pl. 13. Pasch. 17 Car. 2. B. R. Hunt v. Swain. —Lev. 165 S. C. the Plaintiff conceiving the Judgment of all the Court against him, pray'd Nil capiat per Billam, with Intent to commence de Novo.——Raym. 127. S. C adjornatur.

58. If in Action upon the Case the Plaintiff says that the Defendant was possess'd of divers Goods which were the Goods of her Husband in his Life, and converted them to her use, [and] Defendant did promise in Consideration the Plaintiff would forbear her for a certain Debt due by the Husband to the Plaintiff &c. that the Defendant would pay it, this is no good Consideration; for it may be that she had these Goods as Bona Paraphernalia, and so she is not chargeable with the Debt, inasmuch as he has not shewn what Goods they were. Trin. 18 Jac. B. R. Rot. 1307. between *Whittey and Braxne*, adjudged in a Writ of Error.

59. If A. promises B. in Consideration if J. S. shall win a Game at Butts of 21 up, that he will pay to B. 20 l. and if not, then B. promises to pay to A. 50 l. this is a good Consideration for A. to have an Action against B. for the mutual Consideration. Hill. 41 Eliz. B. R. between *Metcalfe and Ascue*, per Curiam. Trin. 2 Jac. B. *Dasset's* Case, per Curiam. Mo. 549. pl. 736. Medcalf's Case, S. C. and upon Nihil dicit Judgment pass'd for the Plaintiff, and the Justices argued the Declaration good, but Popham seemed the contrary upon Evidence to a Jury.——Mounson J. conceived such Consideration sufficient, the Counter-promise being reciprocal; for all the Communication ought to be taken together. But Manwood held, that tho' such reciprocal Promise between the Parties themselves at the Match is sufficient, because there is Consideration good enough to each, as the preparing of the Bows and Arrows, the riding or coming to the Place appointed to shoot, the Labour in Shooting, the Travel in going up and down between the Marks; but that for the Bettors by, there is not any Consideration, unless the Bettor gives Aim. 2 Le. 154. pl. 187. Mich. 20 Eliz. C. B. West v. Stowell.

60. If B. is indebted to A. in 20 l. and C. is indebted to B. in the like Sum, and C. promises A. in Consideration that he is content to accept the said Sum by the Hands of C. and to forbear it for four Days, that he will pay him the said Sum, this is a good Consideration for A. to maintain an Action upon the Case against C. Pasch. 41 Eliz. B. R. between Wilmot and Prigget. Fol. 29. S. P. but the Court held it no Consideration, because it is a collateral Thing, and A. did not say that he would discharge B. so that A. may sue B. notwithstanding; for whatever the Intention was, the Words do not make it appear to be so. And per Roll Ch. J. a Promise by R. to pay a Debt to S. which T. owes to S. is a Nudum Pactum. Sty. 249. Hill. 1650. B. R. Newcomen v. Leigh.———S C. cited Hardr. 73. Arg.——S. C. cited Vent. 9 as said to be adjudg'd. —— Sid. 396. cites S. C. and says that no Judgment was entered on the Roll; but Twisden J. affirm'd that there was a Rule for entering the Judgment, which he supposed not done, because the Parties, on hearing the Resolution of the Court, might agree the Matter between them.

B. owed 40 l. to A. the Plaintiff, and *the Defendant owed the like Sum to B. who appointed A. to receive it of the said D. who in Consideratione Præmissorum, and that the Plaintiff would forbear him for a Quarter of a Year, promised to pay* the Money. It was moved in Arrest of Judgment, that D. the Defendant was no Party to the Agreement between B. and the Plaintiff, so as to make him chargeable to the Plaintiff, and then the Forbearance is not material, and in the mean time he is suable by B. Sed non allocatur. For upon the whole Matter here it appears that the Defendant agreed to the Transfer of the Debt of B. to A. the Plaintiff, and that it was agreed he should be discharged against B. Vent. 153, 154. Mich. 23 Car. 2. B. R. Oble v. Dittlesfield.

61. If A. is indebted to B. in 20 l. and A. comes to C. and intreats him to pay the said 20 l. to B. and if he will, he promises to repay the said Sum to him again, whereupon C. assumes and promises to pay the said 20 l. to B. and after does not pay it, A. shall have an Action upon the Case upon this Promise against C. for this is a good Consideration; for tho' he shall not have Benefit by it, yet here was a mutual Assumpsit, and so he shall not have any Prejudice. Mich. 41 & 42 Eliz. B. R. between *Jones and Witchells*. Dubitatur. Mo. 574. pl. 791. Whitecalf v. Jones S. C. the Plaintiff promised B. to pay the Debt which A. owed him; and this was held a good Consideration, tho' he did *not allege that he had paid the Money*. Per tot Cur. in an Action brought by

by C. againſt A.— Cro. E. 103. pl. 22. Wiſhals v. Johns S. C. and the Action was brought by C. againſt A. and Judgment for the Plaintiff.——S. C. cited Cro E. 848. in pl. 1. by Name of Wichhall v. Johns. ——S. C. cited Noy. 38. by the Name of Withal v. Jones.

62. *A. was indebted to B.* and *B. to C. the Defendant*, and *C. in Conſideration that the Plaintiff would procure B. to make a Letter of Attorney to C. to ſue A. promiſed to pay the Plaintiff* 10 *l.* It was objected that this was no Conſideration; for the Defendant by this Letter of Attorney gets nothing but his Labour and Trouble; Sed non allocatur; for it is not ſo much the Profit which redounds to the Defendant as the Labour of the Plaintiff in procuring the Letter of Attorney, that is to be reſpected. 4 Le. 110. pl. 225. 19 Eliz. B. R. Webb's Caſe.

63. *Arbitrators being about to award that R. the Defendant ſhould deliver up to the Plaintiff two ſeveral Obligations to be cancell'd, wherein the Plaintiff was bound to the Defendant, he (the Defendant) in Conſideration that the Article ſhould be left out of the Award, promiſed that himſelf would deliver them up gratis* &c. but did not, and afterwards put the Bonds in Suit, whereupon the Plaintiff brought his Action and ſet forth this Matter, and that the ſaid Clauſe was omitted ad Specialem Inſtantiam ipſius Querentis; And Judgment was given for him. 3 Le. 105. Paſch. 26 Eliz. Brett v. Pegrim.

64. *A. being in Priſon at the Suit of B.* upon an Account, the *Gaoler ſuffers him to eſcape, and being at Liberty, promiſeth to B. that if he will permit him to be at large, and further, if he does ſuch an Act, he will pay to him* 10 *l.* which he doth not pay; whereupon B. brings Aſſumpſit againſt him, it was adjudged that the Action would not lie; for that both the Conſiderations ought to be proved, and A. was at large before. 4 Le 3. pl. 8. Hill. 26 Eliz. B. R. Rawſon v. Brown.

65. *R. was indebted to B. in* 14 *l.* and *A. was indebted to R. in* 50*l.*—*A. in Conſideration that R. allow'd him* 14 *l. and promiſed him to diſcharge him of ſo much Parcel of the ſaid* 50*l. promiſed to pay to the ſaid B. the Plaintiff, the ſaid* 14 *l.* Per tot. Cur. (Anderſon abſente) the Conſideration is good; for A. was diſcharged of ſo much againſt R. and R. might alſo plead Payment of the 14 l. by the Hands of the Defendant. Goldsb. 49. pl. 8. Paſch. 29 Eliz. Body's Caſe.

66. Aſſumpſit for *Rent* upon a Leaſe for Years behind, and demanded; the Defendant *promiſed* the Plaintiff, *that if he could ſhew him a Deed that the Rent was due, he would pay him* the Rent and Arrearages; the *Plaintiff ſhewed him the Indenture of Leaſe*, by which the Rent was due for 4 Years. It was mov'd in Arreſt, that the ſhewing of the Deed was no Conſideration. But it was adjudged for the Plaintiff; for when a Thing is to be done by the Plaintiff, be it never ſo ſmall, it is ſufficient Ground of an Action, and the ſhewing of the Deed is a Cauſe to avoid a Suit. Cro. E. 67. pl. 16. Mich. 29 & 30 Eliz. B. R. Sturbin v. Albany.

Cro. E. 150. pl. 22. Mich. 31. & 32 Eliz. B. R. the S. C. in Conſideration of the Payment of a Rent-Charge granted to the Plaintiff out of another's Land.——Le. 172. pl. 240. Shirley v. Albany S. C. on the ſame Point as Cro. E. 150. and Judgment for the Plaintiff.

67. Conſideration that *A. would not proceed to diſprove a Will* in the Prerogative Court &c. is good. Le. 118. pl. 159. Trin. 30 Eliz. B. R. Rivet v. Rivet.

68. *Love* or *Friendſhip* are not Conſiderations to ground Actions upon. 2 Le. 30. pl. 35. Trin. 30 Eliz. B. R. per Cur. in Caſe of Harford v. Gardiner.

Cro. E. 149. pl. 19. S. C. but S. P. does not appear.

69. Conſideration that *A.* Husband of the Executor, and (with whoſe Teſtator the Plaintiff was bound in a Bond and had paid the Money) *might enjoy the Goods of Teſtator*, he aſſumed to pay the Plaintiff &c. it is void; As if it had been that Defendant might enjoy his own Goods. Le. 173. pl. 241. Hill. 31 Eliz. B. R. Muſted v. Hoppers.

70. Aſſumpſit

70. Aſſumpſit. *The Father* having 3 Sons, *had an Intent to charge his Lands with 4 l. per Annum to each of his younger Sons* for their Lives, but the *eldeſt Son deſired him not to charge the Lands, and promiſed to pay them duly 4 l. per Annum*, to which the 2 younger *Sons being preſent agreed*; and he promiſed them to pay it. All the Court held clearly that it is a good Conſideration. Cro. E. 163. pl. 6. Mich. 31 & 32 Eliz. C. B. Rookwood's Caſe. Le. 192. pl. 275. Rookwood v. Rookwood, S. C. the whole Court held the Action did well lie.

71. Aſſumpſit, for that *Iſſue being joined in Ejectment between him and the now Defendant*, and *intended to be tried at the next Aſſiſes, in Conſideration that the* (*Defendant, now*) *Plaintiff, would forbear to inforce their Title, and make a ſlender Defence, he promiſed to pay* &c. Upon Non Aſſumpſit pleaded the Jury *found Quod Aſſumpſit, but that there were two Iſſues join'd* between the Parties, *and that the Defendants had not join'd, but that one had pleaded the general Iſſue, and the other a ſpecial Plea, on which Iſſue was joined, and the Promiſe was in Conſideration of making a ſlender Defence in both Iſſues.* But adjudg'd for the Plaintiff, becauſe the common Parlance is, that the Parties have join'd Iſſue, and is as proper where 2 Iſſues are joined as only one. Moor 351. pl. 471. Hill. 36 Eliz. Blackwell v. Eyre. Cro E. 337. pl. 1. The Declaration was, that Quidam exitus juncti fuit, but held that it ſhould refer to both Iſſues.

72. A. in Conſideration B. would ſell him 4 Cows for 10 l. promiſed *to pay the 10 l. at Eaſter* following, *and if he fail'd that he would pay him 100 l. when-required.* B. ſold him the Cows, but A. fail'd of Payment at Eaſter. B. brought Action for the 100 l. and recover'd; and on Error brought the Conſideration was held good, and the Judgment affirm'd. Cro. E. 747. pl. 28. Hill. 42 Eliz. Glaſcock v. Duffield.

73. Aſſumpſit, for that the *Defendant's Brother was indebted to the Plaintiff in 8 l.* and made M. his Wife Executrix, leaving Aſſets, and that *he intended to ſue the Executrix to recover the 8 l. Secundum debitum legis Curſum*, and the *Defendant, in Conſideration the Plaintiff would forbear the Executrix, promiſed to pay* &c. It was moved in Arreſt of Judgment, that this Debt ſhall be intended ſtrongeſt againſt the Plaintiff, to be a Debt upon a ſingle Contract, with which an Executrix is not chargeable, and to ſtay this Suit is not any Conſideration; and of this Opinion were all the Court. But *if he had declared that he intended to have brought an Aſſumpſit againſt her*, (as this Declaration does not warrant it, becauſe he intends to recover the Debt itſelf, which cannot be in Action on the Caſe) *or* that he intended *to ſue in Chancery for it*, (which cannot be intended here, becauſe of the Words Secundum debitum legis Curſum) then perhaps this Action would have lain; for the Conſideration of ſtaying the Suit is good; but as it is here it is not good. Judgment for the Defendant. Cro. E. 804. pl. 3. Hill. 43 Eliz. B. R. Peck v. Loveden.

74. Conſideration, *Quod conaretur procurare* J. S. to permit the Defendant to have the Poſſeſſion and Profit of ſuch an Houſe, is good. Yelv. 11. Mich. 44 & 45 Eliz. B. R. Gurnons v. Hodges. Cro. E. 906. pl. 13. Garnons v. Hodges, S. C. adjudg'd for the Plaintiff.

75. Conſideration that *Executor will take 150 l. for 200 l.* due to Teſtator, is good. Yelv. 10. Mich. 44 & 45 Eliz. B. R. Goring v. Goring.

76. *Promiſe* againſt *Promiſe* is a good Conſideration; per Cur. Yelv. 134. Trin. 6 Jac. B. R. Bettiſworth v. Campion. Hob. 88. pl. 117. S. P. adjudg'd for the Plaintiff; but the Reporter ſays, Note here the Promiſes muſt be at one Inſtant; for elſe they will be both Nuda pacta. Hill. 12 Jac. Nichols v. Raynbred.

77. *Defendant granted to the Plaintiff* 1000 *Trees, to be cut within 3 Years.* The *Plaintiff cut ſome*, and the *Defendant promiſed* him, *in caſe he*

he would cut no more within the 3 Years, he ſhould have Licence to cut the Reſidue after the 3 Years, whereupon the Defendant deſiſted. This is a good Conſideration; admitted by the Pleadings. Yelv. 195. Mich. 8 Jac. B. R. Tatam v. Perient.

78. Coke Ch. J. ſaid he had never ſeen it otherwiſe, but that when *one draws Money from another*, this ſhould be a good Conſideration to raiſe a Promiſe. 3 Bulſt. 162. Paſch. 14 Jac.

79. If the *Conſideration puts the other to Charge, tho' it be no ways profitable to the Promiſer*, yet this ſhall be a good Conſideration to raiſe a Promiſe; per Doderidge J. to which Coke Ch. J. agreed. 3 Bulſt. 162. Paſch. 14 Jac.

Cro. C. 70. pl. 4. S. C. adjudg'd for the Plaintiff; for the ſhewing the Accounts to her Friends was a Trouble to the Plaintiff, and more than he needed to have done.

80. Aſſumpſit againſt an Adminiſtratrix, on a Promiſe to pay a Debt of her Inteſtate's for Wares had of the Plaintiff, in Conſideration he would *let two ſurvey the Account*, is good. Het. 8. & 11. Paſch. 3 Car. C. B. Marſh v. Colepepper.

81. *B. was bound to the Plaintiff in 40 l. for Payment of 20 l.* R. the *Defendant was bound to H. by Obligation dated 5 Feb. 1721. in 100 l. for Payment of 55 l. on 5th Feb. following.* The ſaid Sums being due, and not paid, the *Defendant 1 Feb. 1624. in Conſideration the Plaintiff would forbear the 20 l. till 1627. and would compound with the ſaid H. for the 50 l. and Intereſt then due, and deliver the ſaid Bonds into his Hands, promiſed to pay him the ſaid 20 l. and 50 l. and all the Intereſt which he ſhould pay or compound for*; all which the Plaintiff had perform'd, and the Defendant had not paid him &c. It was objected that the Conſideration as to the 20 l. is not good; for that the Defendant had not any Benefit thereby, nor is it alleg'd that he gave Notice what he paid for the Compoſition. But it was reſolved, That it being *alleg'd that he paid ſo much, and requir'd it*, and it was not paid upon Requeſt, it was ſufficient; and Judgment for the Plaintiff, and affirm'd on Error. Cro. C. 272. pl. 9. Mich. 8 Car. B. R. Harris v. Richard.

82. Debtor pays a ſmall Part of a Debt, and deſires a General Releaſe, and promiſes in Conſideration thereof to pay the *Reſidue when God ſhould enable him*, and the Defendant did ſeveral Times after renew his Promiſe to the Plaintiff. Afterwards a great Eſtate fell to the Defendant. Quære if a good Conſideration here? Mar. 151. 152. pl. 220. Hill. 17 Car. C. B. Moſſe v. Brown.

83. The Count was, that whereas he, *at the Inſtance and Requeſt of the Defendant, had taken Pains to reconcile Differences betwixt the Defendant and J. S. and others, the Defendant promiſed to pay to the Plaintiff* 100 *l.* at a certain Day. It was objected that this was no more than a voluntary Curteſy; but Glyn Ch. J. held e contra; for this was undertaken at the Inſtance of the Plaintiff [Defendant,] and here was a continued Conſideration, tho' the Pains taken were paſt; and Judgment, Niſi &c. Sty. 465. Mich. 1655. B. R. Hardreſs v. Prowd.

Keb. 9. pl. 20. S. C. adjornatur.

84. The Defendant, in Conſideration of 5 s. promiſed to pay 40 s. if he *ever play'd a Game call'd Even or Odd* for Money or Wine. This is a good Conſideration. Raym. 13. Paſch. 13 Car. 2. B. R. Johnſon v. Samworth.

The Promiſer muſt have Benefit, and the other ſuſtain ſome Loſs; Per Cur Godb. 203. Mich. 11 Jac. C. B. in pl. 290.——Jenk. 324. pl. 37. [but the original French is obſcure.]——Comyns's Rep. 99. Paſch. 13 W. 3. in Caſe of Thorpe v. Thorpe, ſays that it is ſufficient to maintain an Aſſumpſit, if the Conſideration was a Benefit to him that was the Defendant, or be of any Trouble or Prejudice to the Plaintiff——S. P. 7 Mod. 13. Paſch. 1 Anna, B. R. in Sir George Tuke's Caſe.

85. Every Promiſe ought to have a Conſideration; and that ought to be either *Benefit to him that makes it*, or *Diſadvantage to the Plaintiff*; Per Reeve J. Mar. 203. Paſch. 18 Car. in pl. 243.

86. Aſſumpſit

86. Assumpsit &c. *to pay for a Horse a Barley-corn a Nail, doubling it on every Nail*; and the Plaintiff averr'd that there were 32 Nails in the Horse's Shoes, and doubling it on every Nail, it came to 500 Quarters of Barley. On Non Assumpsit pleaded the Ch. Just. at the Trial directed the Jury to give the Value of the Horse, which was 8 l. in Damages; and so they did. 1 Lev. 111. Mich. 15 Car. 2. B. R. James v. Morgan.

87. Assumpsit, for that he *was possess'd of several Tickets for Seamen's Wages, and had an Order from the Treasurer of the Navy for paying them*; and that the Defendant being *an Under-Officer, promised that if the Plaintiff would not trouble the Treasurer in procuring another Order, he would pay* &c. It was moved in Arrest of Judgment, that the Plaintiff had not shewed any Title to the Tickets, as that he was Executor or Administrator &c. or by an Assignment &c. but per Twisden J. (absentibus aliis) it is good enough, after a Verdict especially, since he declared he had an Order from the Treasurer to receive the Money, which he could not have granted, unless he had a Title to it. Judgment for the Plaintiff. Sid. 392. pl. 25. Mich. 20 Car. 2. Bolton v. Fenn. Lev. 257. Bolton v. Fenne, S. C. and Per Cur. after Verdict it shall be intended that Plaintiff had Interest either by Assignment or by Authority of the Seamen, to receive it; and the Intent of this Promise and Forbearance was only that the Plaintiff should go no more to the Treasurer for the Money, and thereby discover that the Defendant had not paid it according to his Order.——2 Keb 437. pl. 84. S. C. adjudg'd for the Plaintiff.

88. Assumpsit, for that W. R. *Defendant's Testator being indebted to A.* a Stranger, *who assign'd* the Debt *to B. the Plaintiff, and authoriz'd him to receive it. S. the Defendant, the Executor, promis'd* B. the Plaintiff *to pay it to him, in Consideration he would accept him for his Debtor.* Adjudg'd on Demurrer for the Defendant, there being no Consideration of Forbearance, but to accept him for his Debtor, which he is not, he being still Debtor to the first Creditor; and the Authority to receive is determined by the Death of W. R. the Testator, and differs from the Case of Russel v. Haddock, where he who had the Authority to receive the Debt forbore. Lev. 262. Hill. 20 & 21 Car. 2. B. R. Forth v. Stanton. Saund. 210. pl. 30. S. C. adjudg'd against the Plaintiff, and the Promise was only Nudum Pactum.—2 Keb. 465. pl. 50. S. C. Keeling Ch. J. observ'd that here is no Advantage to S. the Executor Defendant, nor Loss to the Plaintiff, because *A. may yet revoke*; so there is no Consideration. *Contra if it were to discharge A.* which the Court agreed. And Judgment for the Defendant.

89. Assumpsit to a *Vicar*, in Consideration of *Preaching*, is good. Sid. 409. pl. 2. Pasch. 21 Car. 2. B. R. Tailor v. Gay.

90. In Assumpsit *for that the Lord O. was indebted to him in 250 l. and that the Defendant had Money of the said Lord's sufficient in his Hands to pay the said Debt, and that it was mutually agreed between them that the Plaintiff should accept 200 l. in Satisfaction of his Debt, and that the Defendant would pay the Money on such a Day, and that in Consideration the one would perform his Part the other would perform his Part.* Upon Non Assumpsit the Plaintiff had a Verdict, but Judgment quod nil capiat, because this was no good Consideration. 2 Jo. 87. Mich. 29 Car. 2. B. R. Woodward v. Rigby. Freem. Rep. 464. pl. 635. Rigby v. Woodward, S. C. says that the Plaintiff had Judgment in B. R. and upon Error brought the Judges, una Voce, affirm'd the Judgment, and held the Consideration good; for North said, when an Agreement to abate 50 l. is pleaded, it shall be intended a compleat Agreement, and such a one as my Lord might have taken Advantage of.

91. *J. S. is indebted to A. in* 12 *l.* and *B. is indebted to J. S. in a like Sum*, and *B. promises A. that if A. at his Request, would procure an Order from J. S. in Writing to B. to pay the Money to A. which B. ow'd J. S. then B. will pay to A. the Money.* Per Cur. The procuring the Note at B.'s the Defendant's Request, by A. the Plaintiff, is a sufficient Consideration. 2 Vent. 71. Trin. 1 W. & M. in C. B. Bockenham v. Thacker.

92. *Where* the *doing a Thing will be a good Consideration*, a *Promise to do* that Thing will be so too; Per Holt Ch. J. 12 Mod. 459. Pasch. 13 W. 3. in Case of Thorp v. Thorp.

S. P. where the Note was given

93. *Parting with my Note* to the Defendant is a good Consideration. 7 Mod. 12. 13. Pasch. 1 Ann. B. R. Tuke's Case.

by J. S. to the Plaintiff for 50 l. and the Defendant, in Consideration of the Plaintiff's delivering it to him, promis'd to pay him 50 l. and tho' after Verdict it was moved that the Note was useless, and of no Value, because it does not appear to be for a Consideration, and that it is not a Gift, but a Delivery, yet Holt Ch. J. said the Delivery shall be intended absolute and indefinite; and it is Evidence of a Debt, and therefore the parting with it is a good Consideration; and tho' the Consideration of the Note was proved at the Trial, yet he thought it was not necessary. 1 Salk. 25. pl. 9. Pasch. 1 Ann. Meredith v. Short.——2 Ld. Raym. Rep. 759. Meredith v. Chute, S. C. adjudg'd accordingly.

2 Ld Raym. Rep. 909. S. C. argued seriatim by the Court. And Judgment for the Plaintiff.

92. If. A. *undertakes* to do a thing *without Hire*, as to take up Brandies out of one Cellar and to lay them down in another Cellar, no Action lies for the Non-feasance; but if he *enters on the doing it*, Action lies for a *Mis-feasance*, if it be through his own Neglect or *Mismanagement*, because it is a Deceit; but not if by meer Accident; Per Holt. 1 Salk. 26. pl. 12. Trin. 2 Annæ B. R. Coggs v. Bernard.

(U. 2) Consideration of Assumpsit. Good. Forbearance of * Suit.

* See (U) pl. 5. 6. 11. 15. 17. 24. 42. 43. 53. 57. 58.

1. THE Defendant was *indebted to the Plaintiff in* 10 *l. for so much lent*, and in Consideration that the Plaintiff would not sue him for the said 10 l. he *promised to deliver the Plaintiff* 10 *Quarters of Barley upon Request*. The Plaintiff shew'd that he did not sue &c. and that such a Day he required the Barley, but Defendant did not deliver it. Adjudg'd for the Plaintiff. See Mo. 685. pl. 947. Hill. 31 Eliz. Hog v. Block.

2 Le. 105. pl. 183. Toley v. Windham, S. C. and Judgment was given against the Plaintiff.

2. A Difference arising between the Plaintiff and the Defendant for the *Profits of* certain *Lands taken by Defendant's Father in his Life-time*, and the Plaintiff intending to exhibit a Bill in Equity against the Defendant, and a Subpœna being taken out, the Defendant promised that in Consideration the Plaintiff would forbear the Suit, *and if the Plaintiff could prove that* the *Defendant's Father had taken the Profits* &c. he would pay the same; and adjudg'd this was no good Consideration for an Assumpsit, it being *grounded on an unjust Suit*; for the Plaintiff *did not allege that the Father held the Land by Lease or otherwise, nor was the Defendant either Heir or Executor*, or *Administrator*, and so there was no Colour of Reason to charge him; and if it had been so alleg'd, yet no Cause to charge him for a Personal Tort. Cro. E. 206. pl. 43. Mich. 32 & 33 Eliz. C. B. Tooley v. Windham.

Lat. 151. Trin. 2 Car. S. C. And Per Cur. by the Words (that he would not sue him &c.) he has waiv'd the Benefit of the Bond, tho' the

3. Plaintiff declared that the Defendant was bound to him in 100 l. which he intended to sue him for, and the Defendant in Consideration that the Plaintiff would *defer the Payment and not sue him upon that Bond*, promised that he would him. It was objected that the Consideration is not good; for he may forbear, and defer for a Day only &c. But the Court held it good; for the *deferring shall be intended during all the Life of the Obligee*; and that if he sues him sooner upon that Bond, an Action on the Case lies; and that so it was ruled in one Barkenham's Case. But if it had been Quod deferret per paululum tempus, it had not been good without putting a certain Time. Noy 83. Cowlin v. Cook.

Promise does not take away the Force of it; for he may sue him notwithstanding, and then the Defendant

dant may ſue the Plaintiff upon his Promiſe; and the Words of not ſuing ſhall be intended for his Life, and cites Bracham's Caſe reſolved accordingly; but per Paninlum tempus is an ill Conſideration.—— Poph. 183. Brown v. Cowling, S. C. and that the Words Non implacitabit ſhall be taken indefinitely for Nunquam implacitabit; and therefore Judgment was affirm'd, for otherwiſe the Defendant ſhall both take Advantage of this Promiſe and of the Bond alſo; and here he hath, in a manner, forſaken the Benefit of his Bond, and betaken himſelf to the Benefit of this Aſſumpſit.

4. The Defendant, *in Conſideration the Plaintiff would relinquiſh a Suit* which he had *againſt a Stranger, promiſed to ſave the Plaintiff harmleſs of all Actions concerning ſuch a Leaſe.* Adjudged no good Conſideration, becauſe he may afterwards proſecute it again when he pleaſe. Mo. 539. pl. 707. Trin. 39 Eliz. B. R. Roſſe v. Moore. Cro. E. 561. pl. 18. S. C. ſays Judgment was given in B. R. for the Plaintiff;

but that afterwards it was revers'd in the Exchequer Chamber, becauſe it was no good Conſideration — S. C. cited in the Caſe of Dell v. Fereby.—Cro E. 868. pl. 2. Hill. 44 Eliz. B. R. which was in Aſſumpſit, that *in Conſideration the Plaintiff would ſtay from further Proſecution of a Suit* in N. the *Defendant promiſed to pay all his Charges and Expences laid out therein* &c. tho' it was objected, that tho' he did forbear to proſecute he may proſecute when he pleaſe; and therefore no good Conſideration. But the Court held the Conſideration good, eſpecially for the Charges expended, and denied the Law to be ſo in the Caſe before cited. Cro. E. 868. pl. 2. Hill. 44 Eliz. B. R. Dell v. Fereby.

5. An *erroneous Judgment was had againſt B.* and *B. in Conſideration that A. will forbear to take out Execution* thereupon *promiſes to pay* the Debt at ſuch a Day certain. It was moved that the Conſideration was not good, the Judgment being erroneous; Et adjornatur. But the Reporter conceives the Conſideration is good, notwithſtanding the Judgment is erroneous, becauſe it appears not to the Court but that the Judgment is good; Otherwiſe if the Judgment had been revers'd by Writ of Error before the Action brought on the Promiſe; for there it appears judicially to the Court, that it is erroneous. Godb. 349. pl. 444. Trin. 21 Jac. B. R. Kite v. Smith.

6. Caſe, for *that he and the Defendant diſcourſing of ſuch a one who died inteſtate, and was indebted to the Plaintiff, the Defendant ſaid, Forbear to ſue me till I come to London, and forbear his Debt, and I will pay it*; and averr'd that he did forbear. Upon a Demurrer, it was objected that it did not appear that the Defendant was chargeable for the Debt. But Hyde and Twiſden held the Declaration good, and all agreed, that if it had been (*Forbear the Delt*) *generally*, the Action well lay, tho' no Adminiſtration was committed, becauſe the Ordinary is liable. Curia adviſare vult. Sid. 242. pl. 4. Paſch. 17 Car. 2. B. R. Quick v. Copleſton. Lev. 161. S. C. the Diſcourſe was with the Inteſtate's Widow, as ſhe was on her Journey to London; and for Fear of being arreſted ſhe

made ſuch Promiſe; but it *not* being *ſhewn that ſhe was Executor or Adminiſtrator*, the Forbearance of her was agreed by the Court to be no Conſideration; but the Words ſubſequent (*Forbear till Michaelmas*) are diſtinct and general, not only to forbear her and all others, and are good Conſideration whether ſhe be liable or not. And Judgment for the Plaintiff.——Keb. 866. pl. 12. Weeks v. Copleſton, S. C.

7. Plaintiff *ſued a Capias ad Reſpondendum*, and after the Return thereof the Defendant, *in Conſideration the Plaintiff would forbear further Proſecution, promiſed to pay* &c. The Court held this a good Conſideration; and tho' the firſt Return be paſt, yet an Alias may be taken out; and Judgment for the Plaintiff. 2 Keb. 200. pl. 33. Paſch. 19 Car. 2. B. R. Gurdon v. Crane.

8. Caſe, for that *A. was indebted to him, and died Inteſtate, and* that *he intending to ſue the Defendant ut Adminiſtratorem*, and *giving him Notice thereof, he promiſed that if the Plaintiff would forbear to ſue him till he married ſuch a Woman, he would pay* him. It was objected in Arreſt of Judgment, that it did not appear by the Declaration that the Defendant was liable to be ſued, and ſo ill; but the other Juſtices, præter Twiſden, held that Judgment ſhall not be arreſted, but that the Declaration upon the (Ut) and upon the Notice, is good; and ſo the Plaintiff had Judgment, Niſi &c. Sid. 337. pl. 4. Trin. 19 Car. 2. B. R. Downes v. Beck. Lev. 222. S. C. adjornatur; but on a 2d Motion it was adjudg'd for the Plaintiff; for (Ut) is an Affirmative. —— 2 Keb. 253. pl. 31. S. C. adjudg'd accordingly.——Sty. 405 Hill. 1654. Roll Ch. J. ſaid that the Words (as Executor) is not an Affirmance

mance that he is ſo, and that ſuch a Caſe was ruled in the Exchequer; and in the Principal Caſe, Judgment was given for the Defendant, Niſi &c. Hayward v. Ducket.

In Conſideration to *forbear his Debt*, or *to ſue*, is good enough; for Per Cur it is to forbear generally, and that muſt be intended a Forbearance of all Perſons; but otherwiſe it had been if it had been to forbear the Defendant; and tho' the Promiſe was collateral, and no Debt due from the Defendant, yet the Promiſe being generally to pay, and not upon Requeſt, the Court held a Requeſt not neceſſary. And tho' the Plaintiff did not aver that the Defendant was Executor or Adminiſtrator to the Perſon that was the Debtor, and died before the Promiſe, nor that any Goods came to the Defendant's Hands, and ſo did not appear to be chargeable, yet the Court held the Conſideration good enough for the Reaſons before-mentioned. Freem Rep. 439. pl. 595. Mich. 1676. Anon.

9. A. promiſed, in Conſideration *B. would forbear to ſue C.* that *A. would pay him*, without ſaying How long. But Wylde J. ſaid, it had often been adjudg'd that where it is to forbear, *and no Time mention'd*, it muſt be intended during his Life; and Judgment for the Plaintiff. Freem. Rep. 66. pl. 79. Mich. 1672. C. B. Anon.

10. E. brought Action againſt G. for Monies due, whereupon H. promiſed E. that if he would forbear to ſue G. for the ſaid Debt, G. *ſhould not leave the Kingdom without paying the Plaintiff's Debt.* It was argued that this was not a Promiſe to pay the Debt in Default of the Principal, which is the Caſe provided againſt by the Statute, but a Collateral Promiſe on a Conſideration ariſing between the Plaintiff and the Defendant; For it is not brought for the Debt of G. but for the Damages ſuſtain'd, by H. the Defendant's ſuffering G. to leave the Kingdom without paying the Debt; and the Conſideration is that the Plaintiff waiv'd his Action againſt G. and conſequently the Coſts thereof. The Court held that if there is no certain Time of Forbearance, the Party is to forbear for ever; and inclin'd that there was a new Conſideration, ſo that it was not for the Debt of G. and conſequently not within the Statute of Frauds for want of a Note in Writing. Sed adjornatur. Gibb. 202. pl. 15. Hill. 4 Geo. 2. B. R. Elkins v. Heart.

(U. 3) Conſideration of Aſſumpſit. Good. Forbearance of * Debt.

* See (U) pl. 12. 18. 25. 26. 28. 30. 33. 44. 45. 46. 47.

1. CONſideration that the Plaintiff *would permit the Defendant to take out Letters of Adminiſtration to her Husband*, and give her *further Day* for the Payment, promiſed to pay &c. was held not good. Le. 240. pl. 323. Mich. 32 & 33 Eliz. in Error in the Exchequer, Filcocks v. Holt.

Mo. 685. pl. 946. Holt v. Filcock, S. C. and Judgment on Nil dicit. The Conſideration was held inſufficient, it not appearing that the Plaintiff had Adminiſtration committed to him before, or had enter'd any Cavear, or done any Act to hinder the Wife's adminiſtring; and as to the giving a further Day, the Defendant was not his Debtor at the Time, and ſo the Conſideration inſufficient, and Judgment reverſed.

2. Aſſumpſit, for that the *Defendant was poſſeſs'd of divers Goods of the Plaintiff's*, and *in Conſideration the Plaintiff would forbear the Goods, the Defendant promiſed to deliver them within 6 Months.* It was moved that there was no Conſideration for it is that he ſhould forbear, and doth not ſhew for what Time. But the Court held it good enough; it is a ſufficient Conſideration that he forbore, and when the Defendant ſaid he would deliver them within 6 Months, therein is imply'd that the other ſhould forbear 6 Months. Adjudg'd for the Plaintiff. Cro. E. 387. pl. 10. Paſch. 37 Eliz. B. R. May v. Alvares.

3. Aſſumpſit,

3. Aſſumpſit, that the *Teſtator was indebted to the Plaintiff upon Obligation of* 20 *l. and the Defendant having Aſſets, in Conſideration Quod daret diem ſolutionis pro uno anno, promiſed he* would pay it. It was holden a good Conſideration, and the Words ſhall be conſtru'd as deferring Day of Payment, and upon the Plaintiff's Promiſe to deliver the Bond to the Defendant. The Plaintiff had Judgment. Cro. E. 643. pl. 47. Mich. 40 & 41 Eliz. C. B. Chambers v. Leverſage.

4. *A and B. were bound jointly and ſeverally* to C. afterwards *C. releaſed to A.* In Diſcourſe between B. and C. as to this Debt, *B. in Conſideration that C. would forbear him the Payment of the Money due on the ſaid Bond till ſuch a Day, promiſed to pay it* &c. This is no Conſideration; for the Debt is intirely diſcharged. Per tot. Cur. (Bankes Ch. J. being abſent.) Mar. 202. pl. 243. Paſch. 18 Car. C. B. Hammond v. Roll.

5. A *General Forbearance* is a good Conſideration, be the Party liable or not. Cited per Cur. Lev. 161. as adjudg'd in the Caſe of Heriot v. Hinton.

6. In Aſſumpſit, the Plaintiff declared that in Conſideration he would *forbear till he or* [*and*] *they could ſend to Liverpool*, the Defendant promiſed to pay, and that he did forbear &c. The Court ſaid that Forbearance generally, or for a Convenient Time is a good Conſideration but * aliquo tempore, or paululum tempus, is not; but becauſe the Conſideration was to forbear *till he or they* ſhould ſend &c. and the Plaintiff declared, that he did forbear *till they (omitting* till *he* or [and] they) did ſend; and for that Cauſe the Judgment was arreſted. Sid. 49. pl. 3. Mich. 13 Car. 2. B. R. Tricket v. Mandlee. Keb. 114. pl. 17. Tricket v. Hanby S. C. ſays it was He (and) they. ——— Ibid. 180. pl. 148. S. C. and per Cur. theſe conjunctive Words muſt not be disjoin'd to be made He (or) they. ——— Ibid. 193. pl. 178. S. C. ſays the Court conceived the Averment well enough, Forſter abſente, and Judgment for the Plaintiff.

* But where the Conſideration was that the Plaintiff would forbear him Pro aliquo parvo tempore, *viz. for a Fortnight or thereabouts*, he promiſed to pay &c. This Conſideration is good by Reaſon of the Viz. for a time certain, and averring that he forbore for that time and longer; but without ſuch Viz. it would not be good. And Judgment for the Plaintiff. Bulſt. 41. Mich. 8 Jac. Baker v. Jacob.

(U. 4) Conſideration of Aſſumpſit. Good. Promiſe of one Perſon * for the Debt of another.

* See (U) pl. 14. 39. 49. 51. 52. 60. And ſee Tit. Parol.

1. THE Defendant promiſed the Plaintiff *that if he would accept the Defendant for his Pay-maſter for a Debt due to the Plaintiff by a Stranger, and would forbear the Defendant* 6 *Months, he would pay the Debt*; but adjudg'd no Conſideration becauſe the Plaintiff might ſue the Stranger notwithſtanding, and therefore *is at no Prejudice*. Hardr. 73. Arg. cites Hill. 1650. B. R. Lee v. Newcombe.

2. B. being indebted to A. in 20 l. the Plaintiff wrote a Letter to C. the Defendant to pay it. C. upon reading the Letter, ſaid to A. that * if he *would accept him for his Debtor he would pay him in a Fortnight*. It was moved in Arreſt that it was not ſhewn that C. was indebted to B. nor that A. would forbear the ſaid 20 l. for the Fortnight, or that he would forbear to ſue B. And Judgment was arreſted. Sid. 396. pl. 3. Hill. 20 & 21 Car. 2. B. R. Clipſam v. Morris. Vent. 9. S. C. and ſtates it that the Defendant, on View of the Note, in Conſideration that the Plaintiff would accept of his Promiſe for the Money, and ſtay a Fortnight for the ſame, he promiſed to pay; and that the Opinion of the Court was againſt the Plaintiff; but there it is ſaid, that if it had been *in Conſideration that the Plaintiff would accept of the Defendant for his Debtor*, that might have been good, becauſe

cauſe that is *an implied Diſcharge* of the other, whom if he had ſued, the Defendant might have had an Action.——Lev. 248. S. C. all the Court held it no Conſideration, and gave Judgment for the Defendant.——S. C. cited by Hale Ch. J. Vent. 154. and ſaid to be good Law; for there it did not appear that the Defendant was at all indebted to him that ſent the Note.

2 Keb. 543. pl. 6. & 557. pl. 50. S. C. adjudg'd for the Defendant.

3. M. was *indebted to A.* in 200 l. *and having an Annuity out of the Lands of C.* the Defendant, he agreed that C. ſhould pay ſo much Money to A. the Plaintiff, and *C. promiſed to pay* the ſame. The Court held that this is no Conſideration. Mod. 12. pl. 35. Mich. 21 Car. 2. B. R. Abbot v. Moore.

4. The Defendant's Son being indebted to the Plaintiff, the Defendant in Conſideration that the Plaintiff, at the Special Inſtance of the Defendant, would *forbear to arreſt his Son till after the 23d Oct. promiſed to pay on or before that Day*, is a good Conſideration; For the Defendant has to the laſt Inſtant of the 23d Oct. to pay the Money, and the next Inſtant for Forbearance, the Plaintiff has perform'd his Part; for he is not bound to forbear but only one Inſtant after the 23d Oct. And ſo the Action is well enough. Ld. Raym. Rep. 357, 358. Mich. 10 W. 3. Waters v. Glaſſop.

See Tit. Collateral. Tit. Parol.

See (U) pl. 31, 32. 34. 50. 56.—— See (R)

(U. 5) Conſideration of Aſſumpſit. Good. By Executor or Adminiſtrator.

1. THE Defendant in Conſideration *that he was Natural Son and Adminiſtrator to the Inteſtate, and that the Goods of his Father had come to his Hands, promiſed to pay* the Debt to the Plaintiff. It was found that no Goods came to the Defendant's Hands; And it was held that his being Adminiſtrator and Son of the Inteſtate, was no Conſideration to maintain the Action. Le. 94. Hill. 30 Eliz. in pl. 121. cites it as adjudg'd in B. R. Hudſon's Caſe.

Yelv. 184. S. C. adjudg'd againſt the Plaintiff; for by the Death of the Wife the Defendant has *only a naked Cuſtody of the Goods*, and without Employment or Converſion of them to his own Uſe after her Death, he is not chargeable either in the Eccleſiaſtical Court, or at Common Law.——Ow. 133. S. C. adjudg'd for the Defendant.——Bulſt. 44. S. C. adjudg'd for the Defendant.

2. Aſſumpſit, for that A. made his Will, and thereby bequeath'd a Legacy of 7 l. to the Plaintiff, and made his Wife *Executrix*, who afterwards *married the Defendant*, and had Goods of the Teſtator's in his Hands, *and in Conſideration the Plaintiff would forbear to ſue for the Legacy, he promiſed to pay it*, which he had not done. The Defendant pleaded that his Wife died before the Promiſe made to the Plaintiff; and holden a good Plea; for the Wife being dead he was not chargeable with the Legacy; and tho' it was alleg'd that he has Goods in his Hands, yet it is not ſhewn How, and he is thereby liable to the Executor or Adminiſtrator for them. Cro. J. 257. pl. 16. Mich. 8 Jac. B. R. Smith v. Johns.

3. J. S. being poſſeſs'd of Goods, made his Will, and the Plaintiff his Executor. The Defendant, in Conſideration *that the Plaintiff would forbear to join in the Probate of the Teſtament, and would releaſe Totalem Executionem of the Will, promiſed &c.* It was moved that one Executor's relinquiſhing to another is no Benefit, but a Truſt, and ſo no good Conſideration. Fleming Ch. J. and Williams J held that Totalem Executionem was all one as Totaliter. And per tot. Cur. This is a good Conſideration;

ſideration; and Judgment for the Plaintiff. Bulſt. 185. Paſch. 10 Jac. Wemſtone v. Webbe.

4. A *Surety paid the Money*, and the Principal being dead, his *Executor promiſed the Surety, if he would forbear to ſue for ſuch a Time, to pay the Money*. It was moved in Arreſt of Judgment, that this Conſideration is void; but per Curiam, the Action well lies againſt the Executor, becauſe he was liable in Equity. Sid. 89. pl. 7. Mich. 14 Car. 2. Scott v. Stevens. Lev. 71. Scott v. Stephenſon, S. C. adjudg'd for the Plaintiff, Niſi &c.—Keb. 346. pl. 29. S. C. and per Cur. this is good Cauſe of Suit. Sed adjornatur.

But ſee the Statute 29 Car. 2. cap. 3. S. 4. at Tit. Executors.——And ſee Tit. Parol (A)

(U. 6) Conſideration of Aſſumpſit. Good. Relating to Marriage and Portions.

See (U) pl. 9. 16. 20. ——See Tit. Frauds.—— See Tit. Marriage.—See Tit. Parol.

1. PLaintiff brought an Action upon a Promiſe, that *if he married M. with the Aſſent of her Father*, the Defendant would give him 20 l. Adjudg'd a good Conſideration by the Court. Het. 50. Mich. 3 Car. C. B. Jenkins's Caſe.

2. *Diſcharge of a Promiſe of Marriage* by a Woman to a Man, is a good Conſideration. Raym. 400. cites Mich. 1661. The Caſe of Baker v. Smith.

3. Aſſumpſit to a Woman, That *in Conſideration you will forbear to marry for 7 Years, I will marry you.* Freem. Rep. 66. pl. 78. Mich. 1672. Archer cited it as adjudg'd in C. B. in a Hertfordſhire Cauſe; and the Court agreed to it.

(U. 7) Conſideration of Aſſumpſit. Good. As to granting, releaſing &c. Intereſts in Lands &c.

See (U) pl. 22. 27. 28. 29.—— See Tit. Parol.—See Tit. Grants.

1. THE Law will not give ſuch *Conſtruction* to the Words of a Promiſe, Contract, or Aſſumpſit, but that all the Words ought to be wholly reſpected *according to the Letter*; as where the Promiſe was that in *Conſideration that the Plaintiff ſhould leaſe to the Defendant for Life, habendum after the Death of A. which cannot be good by way of Leaſe, but* ought to enure *by way of Grant of the Reverſion*; and if a Leaſe be ſo made, the Leaſe ſhall be in Poſſeſſion according to the Premiſſes, ſo as becauſe no Leaſe can be made according to the Words of the Conſideration, no Supply thereof ſhall be by any favourable Conſtruction; and ſo it was adjudg'd. Le. 275. 276. pl. 372. Paſch. 26 Eliz. B. R. Curriton v. Godbury.

2. S. being very ſick, and having ſeveral Children Infants, *B. in Conſideration that S. after his Death would commit the Education of his Children, and the Diſpoſition of his Goods, for their Education, during their Minority, to him, promiſed S. to procure certain cuſtomary Lands to be aſſured to one of his Children.* Whereupon S. appoints B. Overſeer of his Will, and that his Goods ſhould be under his Diſpoſition. S. dies, and thereby the Goods of S. to ſuch Value came to B.'s Hands, to his great Profit. B. does not procure ſuch Lands to be aſſured. Exception was taken in Arreſt

reſt of Judgment, that here is no ſufficient Conſideration; and the Court awarded that Querens nil capiat per Billam. 3 Le. 88. pl. 127. Mich. 26 Eliz. B. R. Smith v. Smith.

3. Aſſumpſit, in Conſideration the Plaintiff, at the Requeſt of the Defendant, would *yield up all his Intereſt in ſuch a Cloſe* to H. B. the Defendant promiſed to pay the ſaid Plaintiff 70l. and *alleg'd* that he did *deliver the Deed, containing a Leaſe* of the Cloſe to one W. J. to deliver, ſimul cum toto Statu ſuo, to the ſaid H. B. and that the ſaid W. J. for the Plaintiff, and by his Appointment, deliver'd and ſurrender'd &c. and H. B. accepted it, and tore off the Seal. Adjudg'd that this was not a good Conſideration, becauſe it was no good Surrender of his Intereſt; for it was *by Word only, and not by Deed.* Cro. E. 487. pl. 4. Mich. 38 & 39 Eliz. B. R. Sleigh v. Bateman.

4. In Conſideration the Plaintiff *would not join with his Uncle in the Defence of a Suit*, the Defendant *promiſed to give him* 10*l.* This is no good Conſideration, unleſs he *ſhews a Pretence of ſome Intereſt in the Land, or that he was Heir to his Uncle*, ſo as it might probably be an Advantage to him, that the Land ſhould not be recover'd by the Defendant; but as it is, it is all one as if he had ſaid it to a Stranger. Judgment againſt the Plaintiff. Freem. Rep. 21. pl. 25. Mich. 1671. C. B. Rutter's Caſe.

Ld. Raym. Rep. 662. S. C. adjudg'd for the Plaintiff.——12 Mod. 445 S. C. accordingly.

5. A *Releaſe of an Equity of Redemption*, is a good and valuable Conſideration for an Aſſumpſit; per Holt Ch. J. Comyns's Rep. 99. Paſch. 13 W. 3. B. R. in Caſe of Thorpe v. Thorpe.

6. A *Surrender of a Leaſe at Will &c.* is of a Thing apparently of no Value, and therefore makes no Conſideration. Comyns's Rep. 99. Paſch. 13 W. 3. B. R. in Caſe of Thorpe v. Thorpe.

(U. 8) Conſideration of Aſſumpſit. Good. Delivering up of Pledges, Securities, &c.

1. TWO Merchants being reciprocally indebted the one to the other, *agreed betwixt themſelves to deliver all their Bills and Bonds into the Hands of S. who promis'd not to deliver them to the Parties till all Accounts were ended between them*; but yet he deliver'd them to the one, and the other brought his Action; and it was adjudg'd maintainable, yet there was not any Conſideration; for he had no Benefit by keeping of them, nor was it material, for the Action was grounded upon the Promiſe and Deceit. Cro. E. 138. in pl. 20. and Le. 186. in pl. 261. cites it as a late Caſe, Smith v. Edmonds.

* Cro. E. 218. pl. 5. Hill. 33 Eliz. B. R. Bind v. Plain, S. C. and reſolved a good Conſideration; for by the Delivery the Defendant has the Benefit of

2. Plaintiff declared that *he had recovered againſt W. 20l. in the Court of S. and had a Lev. fa. to the Bailiff there, to make Execution* of the Goods of W. *and whereas he was ready ſo to do, the Defendant promiſed* the Plaintiff, that *in Conſideration he would deliver the Defendant the ſaid Goods, he within* 14 *Days after Michaelmas, would pay* the Plaintiff the 20 l. *or otherways re-deliver to the Plaintiff the ſaid Goods, if, in the mean Time, no other* makes Title to them, and proves them to be his own Goods, * [and averr'd that none made Title to them within that Time] a ſpecial *Verdict found* the Recovery and Aſſumpſit, but further, *that before the Recovery W. was poſſeſs'd of thoſe Goods as his own proper Goods, and* by Indenture *ſold them to R. his Brother for Money, with a Proviſo that W. notwithſtanding*

withſtanding ſhould have the Poſſeſſion for 4 Years not yet expired, he to pay to R. 20 s. a Year; and *that if the ſaid W. at the End of the 4 Years ſhould repay the ſaid Money, the Sale ſhould be void*; *and that the ſaid R. made Title to the ſaid Goods by Virtue of that Sale*, this is a good Promiſe, tho' W. had only a ſpecial Property in theſe Goods, and tho' they were not liable to the Execution; for the Plaintiff having the Poſſeſſion of the Goods, his Delivery of them to the Defendant is a good Conſideration. And Judgment was given for the Plaintiff. Le. 220. pl. 303. Mich. 32 & 33 Eliz. Byne v. Playne. the Uſe of them, and the Plaintiff has Loſs by his being chargeable to the Action of W. and the Conſideration is good, eſpecially as it is only for the Re-delivery of them, or Payment of ſuch a Sum; and adjudg'd for the Plaintiff, and Judgment affirm'd.——Cro. E. 301. pl. 16. S. C. is upon another Point.——Mo. 596. pl. 112. Plaine v. Bynd, S. C. but S. P. does not appear.

3. Aſſumpſit, for that the Defendant *in Conſideration of* ſuch *Cloaths delivered at ſuch a Place, promiſed to pay 8 l. and in Conſideration of a Debt upon Arrearages of Account, the Defendant being indebted in 18 l. he promiſed to pay it.* In Error it was held, that the Conſideration upon the ſecond Aſſumpſit was not ſufficient, but for the 1ſt the Judgment was affirm'd, and for the 2d revers'd. Cro. E. 537. pl. 71. Mich. 38 & 39 Eliz. in the Exchequer Chamber, Grimſton v. Reyner. The *Delivery of Goods* to the Defendant, if they were the Goods *of the Plaintiff, or of a Stranger*, was held a good Conſideration for an Aſſumpſit; but if they were the Goods of *the Defendant*, it was held no Conſideration, becauſe he did no more than by Law he was compellable to do. Freem. Rep. 212. pl. 218. Mich. 1676. B. B. ſays this Difference was taken by North Ch. J. Nemine Contradicente.

4. Aſſumpſit *for that he was to deliver* 20 Combs of *Barley to J. S. on ſuch a Day, and in Conſideratian he would deliver the ſame to the Defendant before the Day, the Defendant promiſed to deliver it to J. S. at the Day*; adjudg'd a good Conſideration; but upon Error brought in the Exchequer-Chamber, this Judgment was reverſed. Cro. E. 883. pl 19. Paſch. 44 Eliz. B. R. Riches v. Bridges. Yelv. 4. S. C. and that it was adjudg'd in B. R. a good Conſideration, becauſe the very Poſſeſſion of the Corn might be a Credit, and a good Countenance to the Defendant to be eſteem'd a rich Man in the Country, as in Caſe of Delivery of 1000 l. in Money, to deliver again upon Requeſt. But note, that this Judgment was revers'd in the Exchequer Chamber.——Yelv. 50. Mich. 2 Jac. B. R. it was ſaid by Gawdy and the whole Court, that this Reverſal was ill.——S. P. as to a Promiſe to re-deliver 4 broad Cloaths &c. adjudged no Conſideration. Yelv. 128. Paſch. 6 Jac. B. R. Pickas v. Guile.——1 Salk. 26. in pl. 12. Holt Ch. J. cited this laſt Caſe of Pickas v. Guile, and ſaid it was not Law, and that it was always grumbled at; and cited the Caſe in Cro. J. 667. [pl. 2. Trin. 21 Jac. B. R. * Wheatly v. Low] where Money was delivered to pay over Sine Mora, is contrary; for tho' the Party has no Benefit, yet if he takes the Truſt upon him he is bound to perform it.——2 Ld. Raym. Rep. 920. S. P. Trin. 2 Ann. by Holt Ch. J. Arg. accordingly

* Palm. 281. Paſch. 20 Jac. Loe's Caſe, S. C. adjudg'd for the Plaintiff.

5. If *Obligee*, after Forfeiture of the Bond, *tells the Obligor that if he pays part of the Money to A. to whom the Obligee is indebted, he promiſes that the Bond ſhall be deliver'd up to him*; And adjudg'd that Aſſumpſit lies. Palm. 169. cites Mich. 14 Jac. Harvey's Caſe. *A. had forfeited three Bills, in which he was indebted to the Defendant, and the Defendant, in Conſideration the Plaintiff would pay the 3 ſeveral Sums 3 Days after, promiſed that he would deliver them to the Plaintiff.* The Court were of Opinion that it was no ſufficient Conſideration. Hutt. 76. Paſch. 1 Car. cites it as reſolved in B. R. Greenwood v. Becket.

6. Aſſumpſit, the *Plaintiff was bound to J. S. in 40 l. for the Payment of 20 l.* and *the Bond being forfeited, he deliver'd 10 l. to the Defendant to pay it to J. S in part* of Payment, *without Delay*, in Conſideration whereof the *Defendant promiſed* &c. *but did not pay it.* It was moved to be no Conſideration, it not being alleged that he deliver'd it to the Defendant upon his Requeſt, and that the accepting it to deliver to another Sine Mora, cannot be any Benefit to the Defendant to charge him with this Promiſe. But per Cur. his accepting and promiſing to deliver it is Palm. 281. Loe's Caſe, S.C. reſolved per tot. Cur. that the Action well lies. And Judgment for the Plaintiff.

a good Consideration; And Judgment was for the Plaintiff, and that Judgment affirm'd in Error. Cro. J. 667. pl. 2. Trin. 21 Jac. B. R. Wheatley v. Low.

7. A. *obtain'd a Judgment, and upon Payment of part of the Money recover'd, promised to make a Release of the whole*; And adjudg'd that Assumpsit lies. Palm. 169. cites Trin. 27 Jac. Winowe v. Reynolds.

8. In Consideration that the *Plaintiff had promised to pay the Defendant* 10*l. at a Day, according to the Condition of a Bond*, the *Defendant promised to deliver the Obligation*; and adjudged a good Consideration. Cited by Harvey J. Hutt. 101. Mich. 4 Car.

9 The Declaration was that *the Defendant, in Consideration he was indebted to the Plaintiff in* 20*l. promised to deliver divers Cattle to J. S. to the Use of the Plaintiff.* Per Cur. Here is no Consideration expressed which can relate to the discharging the Debt, and so the Promise is but Nudum pactum, and the Plaintiff at Liberty to bring his Action for the Money. Sty. 330. Trin. 1652. B. R. Godwin v. Batkin.

(X) Upon an Assumpsit. At what Time it lies. [*Before all the Days are past.*]

Cro. E. 7-6. pl. 8. Foster v. Taylor, S. C. and 2 Justices held that the Action well lay, but the other Judges being absent they would advise.

1. IF A. promises B. that if he will marry his Daughter, he will give him 100 l. viz. 50 l. at such a Day, and 50 l. at another Day after; and because B. was indebted to C. in 100 l. A. at the Request of B. for the Consideration aforesaid, promised to pay the Money accordingly the said Days to C. and after the Marriage takes Effect, and A. does not pay to C. the 50 l. at the first Day, B. shall have an Action against him upon this Promise before the second Day. Hill. 43 Eliz. B. R. between *Taylor and Poston* adjudged.

——Cro. E. 80. pl. 8. Taylor v. Foster, S. C. adjudg'd accordingly for the Plaintiff; for tho' *in Debt on Bond, where the intire Debt is to be recovered*, the Action lies not till the last Day, yet it is not so *in Assumpsit or Covenant, where Damages only* are to be recovered; and tho' the 100 l. had been *to be paid to a Stranger*, and not to himself, the Action would well lie for the Plaintiff, because the Promise was to him.

2. If A. in Consideration that B. had bargain'd and sold to him certain Tuns of Strong Beer, at the Request of A. promises to pay to him 4 l. for every Tun super Deliberationem inde of 30 Tun of Strong Beer, an Action lies upon this Promise for so many Tun as he delivers, before the Delivery of all the 30 Tun. Mich. 12 Jac. in the Exchequer Chamber, between *Field and Deale* adjudged, quod vide Mich. 12 Jac.

Cro. C. 241. pl. 1. S. C. adjudg'd accordingly; but held it would have been otherwise, if an Action of Debt had been brought for it, the Contract or

3. If A. in Consideration that B. will marry his Daughter, promises to pay him 20 l. viz. 10 l. at Michaelmas, and 10 l. at Lady-day after, and after B. takes the Daughter of A. to his Wife, and A. does not pay the 10 l. at Michaelmas; tho' this be in Nature of a Debt, for which B. may have an Action of Debt, yet B. may have an Action upon the Case upon this Promise, for the Non-payment of the first 10 l. before Lady-day is come; for this is alleged in the Declaration as an express Promise, and in Law [they are as] two several Promises. Hill. 7 Car. B. R. between *Milles and Milles* adjudged, this being moved in Arrest of Judgment, and tho' Damages were given

given to 20 l. for it does not appear that it was given in respect of the second 10 l. Bill being intire. — S. P. Br.

Action sur le Case, pl. 108. cites it as agreed Trin. 5 Mar. that it is in Nature of a Covenant.——If a Man *assumes to pay 50 Quarters of Malt in 5 Years, every Year 10 Quarters*, an Assumpsit lies if he fails of Payment of any of them, and he shall recover Damages for All that is Arrear, and for all the Residue of the 5 Years; Per Jones and Berkley J. but Crooke J. doubted. Cro. C. 350. Hill. 9 Car. B. R. in pl. 13.——S. P. cited Per Cur. 4 Rep. 94. between Peck and Redman, 2 & 3 P. & M. Dyer 113. as adjudg'd, that Action on the Case lies, tho' Debt does not before all the Days are past; and that otherwise it would be against the Bargain and Intent of the Parties; for Peck provided it annually for his necessary Use.——D. 113. a. pl. 55. S. C. and S. P. admitted, but no Judgment appears.

Assumpsit &c. *in Consideration of a Marriage had between the Plaintiff's Son and the Defendant's Daughter, he promised to pay* to the Plaintiff 400 *Marks, in 7 Years next following, at certain Feasts, by equal Portions.* It was mov'd in Arrest, that it appeared that one of the 7 Years was to come when the Action was brought, and so he had no Cause of Action for all the Money promised; and therefore the Court abated the Writ. Bendl. 57. pl. 93. Trin. 4 & 5 P. & M. Joscelin v. Skelton.——Kelw. 208. b. 209. a. pl. 8. [10] S. C. in totidem Verbis.——3 Le. 4. pl. 11. S. C. in totidem Verbis.——Mo. 13. pl. 51. S. C. accordingly.——Cro. E. 118. pl. 5. Rhodes J. cited S. C. as adjudg'd, that at the End of every Year a several Action lies for the Proportion.

Where G. in Consideration of a Marriage of his Daughter with the Son of J. S. *promised* to give 700 l. and *to pay* 100 *l. a Year every Year until all the Sum be paid*; it was held clearly in this Court, that a several Action might be brought of every 100 l. but because the Action was brought for all the 700 l. before the 7 Years were out Judgment was given against him; for if a Man be bound in a Bond of 100 l. to pay 20 l. for so many Years, he shall not have an Action of Debt until the last Year expired. Ow. 42. cited by Rhodes as 30 Eliz. Gascoign's Case.

4. In an Action upon the Case, if the Plaintiff declares that the 26th of May 1629. at the City of Exeter, in Consideration that the Plaintiff had sold to the Defendant sex Pecias panni nigri, Anglice six Pieces of black Grogram, the Defendant promised to pay to him 47 s. for every Piece, amounting in the whole to 14 l. 2 s. ad Festas Pentecostes, Anglice vocat. Whitsontide-Fair then next following, and the Action is brought long after Whitsontide, and avers that the Defendant had not yet paid it, but does not aver that Whitsontide-Fair is not come; and therefore, after a Verdict upon Non Assumpsit pleaded, and Judgment in the City Court, it was revers'd in B. R. Hill 7 Car. between *Taylor and Lee.* Intratur Pasch. 7 Car. B. R. Rot. 158.

5. If A. promises B. for a certain Consideration &c. to pay * to B. 15 l. yearly, and every Year, during the Term of 4 Years then next ensuing, if J. S. a certain Messuage in D. should so long have and occupy, if J. S. occupies the Messuage for one or two Years of the said four Years, B. may have an Action upon the Case for the said several 15 l. due for them before the End of the other two Years; and tho' he does not occupy it for the last two Years, yet an Action lies for the first two Years; for this is to be paid yearly, and every Year; and therefore the Limitation, if so long he occupies it, refers to every Year, and not intirely to the four Year. Trin. 23 Car. B. R. between *Freer and Prentice* adjudged, in a Writ of Error upon such a Judgment given in B. this being assign'd for Error, and the first Judgment affirmed accordingly. Intratur Hill. 22 Car.

* Fol. 30.

All. 20. S. C. the Limitation being (if J. S. so long live) and adjudg'd for the Plaintiff, tho' it was not averr'd that J. S. liv'd so long; for the Action lies after the first Year, the Word (*Si*) *being a Limitation subsequent.*——So where, *in Consideration the Plaintiff promised the Defendant that he should enjoy such Lands from such a Day for 5 Years, he promised to pay 20 l. yearly, at such and such a Feast.* The *Defendant occupied the Land for a Year and an half*, and brought Action for 30 l. It was moved that the Promise and Consideration was intire; and therefore, without averring that the Deferdant had enjoyed the Land 5 Years Action does not lie But adjudg'd per tot. Cur. for the Plaintiff; for the Promise being that 20 l. shall be paid for every Year, several Actions lie for every Day of Payment; *but* if it had been that he should enjoy for 5 Years, and *in Consideration thereof should pay* 100 *l. in 5 Years, viz.* 20 *l. a Year*, Action lies not till all the Term is expired. Cro. E. 118. pl. 5. Mich. 30 & 31 Eliz. B. R. Hunt v. Sone ——2 Le. 107. pl. 132. Hill. 29 Eliz. C. B. the S. C. adjudg'd for the Plaintiff ——4 Le. 13. pl. 49. S. C. in totidem Verbis.——Ow. 42. Hunt's Case, alias, Hunt v. Torney, S. C. adjudged for the Plaintiff.

6. It

6. It was agreed in C. B. that if a Man, *for Marriage of his Daughter, promiſes to pay* 20*l. at Eaſter for* 4 *Years, and fails* 2 *Years*, the Plaintiff may have Action upon the Caſe upon the Aſſumpſit, for the Non-payment of the 2 Years, tho' the other 2 Years are not yet come; for *this is in Nature of a Covenant*. Br. Action ſur le Caſe, pl. 108. cites Trin. 5 M.

7. A *Judgment* was had *by A. againſt T. an Adminiſtrator, for a Debt of the Inteſtate. T. in Conſideration that A. would forbear to take out Execution till Octab. Mich. promiſed to pay the ſame at Michaelmas*, but did not pay it. *A. brought Action after Mich. and before Octab. Mich.* All the Court held the Conſideration well enough, and that the Suit after Mich. and before Octabis was ſo too, becauſe the *Aſſumpſit was not perform'd by the Non-payment at Mich.* But this was the greateſt Doubt. Cro. E. 758. pl. 29. Paſch. 42 Eliz. C. B. Tiſdale's Caſe.

2 Roll Rep. 47. Beckwith v. Pott, S. C. accordingly.— Jenk. 333. pl. 68. S. C. adjudg'd and affirm'd in Error.

8. Aſſumpſit, for that the *Defendant being indebted* to him *in* 4*l. promiſed to pay it by* 5*s. per Month.* The *Action was brought within* 4 *Months after the Promiſe*, and ſo before all the Money was due. It was held that the Action was well brought *before all the Days were paſt*; for the Action is grounded on a Promiſe, which is broken by every Non-payment, according to the Promiſe. Cro. J. 504. pl. 16. Mich. 16 Jac. B. R. Beckwith v. Nott.

Sid. 57. pl. 25. S. C. adjudg'd accordingly.— So where the Words were, *in Conſideration you will prove that I have beaten your Son, I will pay you* 5*l.* Action lies before any Proof made; and if he proves it in the Action he ſhall recover, cited Sid. 57. pl. 25. as adjudg'd 15 Jac. in Grinden's Caſe.——S. P. Palm. 160. Hill. 18 Jac. by Dodderidge and Chamberlaine J. clearly. But otherwiſe if he had ſaid, that *after you have proved that I ſtruck him, then I do aſſume to pay you* 5*l.*

9. In Action againſt a Stranger, on Promiſe to pay *upon Proof* made, may be brought before Proof made, and the Proof on the Trial will be ſufficient. Raym. 32. Mich. 13 Car. 2. B. R. Traverſe v. Meeres.

10. If a Man agrees to pay ſuch a Sum at 3 ſeveral Days, here he may not declare for this Sum till the Days are paſt; but when the Days are paſt, *a General Indebitatus Aſſumpſit* lies; per Holt Ch. J. Skin. 326. pl. 4. Mich. 4 W. & M. in B. R. Francam v. Foſter.

(Y) What ſhall be a good Aſſumpſit. Where *Part of the Conſideration* is *not good.*

See (U) pl. 43. S. C. and the Notes there.

1. IF **A. promiſes B. in Conſideration** that ſhe will not ſue an Attachment **out of Chancery** upon a Decree **which is there made** againſt him, and **in Conſideration that** ſhe will give to him all her Title and Right of Dower, **that** then he will pay to her 20*l.* **Tho' the ſecond Conſideration is void, becauſe it cannot be given to a Stranger, but only releaſed to the Tenant of the Land by way of Extinguiſhment, yet the Action upon the Caſe lies upon the other Conſideration, which is good.** Hill. 42 Eliz. B. R. between *Colſton and Carre*, **per Curiam.**

Cro. E. 50. pl. 1. Mich. 28 & 29 Eliz. S. C.

2. **If a Man, in Conſideration** of a Surrender, and of 10*l.* **paid**, promiſes to do **ſuch a Thing, tho'** the Surrender cannot be made, **ſo that this Conſideration is void, yet the Action is maintainable upon the**

the other Consideration. 36 Eliz. between *Capps and Goulding*, adjudg'd. Cited Hill. 42 Eliz. B. R. but S. P. does not appear.

Le. 296. pl. 405. Mich. 28 & 29 Eliz. S. C. but nothing mention'd there of the Consideration of a Surrender and 10s. But Coke, in his Argument for the Plaintiff, said that where 2 or many Considerations are put in the Declaration, tho' some are void, yet if one be good the Action well lies, and Damages shall be tax'd accordingly.——2 Le. 71. pl. 96. Golding's Case, S. C. & S. P. per Coke, Arg.

3. Where *divers Considerations are alleg'd* by the Plaintiff in Assumpsit, and *some are frivolous and void*, yet if any of them are good the Plaintiff shall recover; per Cur. and Judgment accordingly. Cro. E. 149. pl. 20. Mich. 31 & 32 Eliz. B. R. Bradburne v. Bradburne. S. P. Cro. J. 12. pl. 19. Trin. 4 Jac. 1. adjudg'd accordingly.

4. If *Part of a Consideration* is *good*, it suffices. Cro. E. 759. Pasch. 42 Eliz. C. B. in pl. 3. Crisp v. Gamiel.

(Z) Who shall have the Action. [*And Pleadings.*]

1. IF A. in Consideration that B. has trusted him for his Diet, promises to pay 10 l. at a Day, tho' he does not mention to whom he promises to pay it, yet this shall be intended to be to B. who had trusted him. Trin. 12 Jac. B. R. between * *Chappell and Woodham*, in Camera Scaccarii, adjudg'd; and that such a Declaration is good. Contra Pasch. 3 Jac. B. R. between † *Goldsmith and Preston*, per Curiam. * Roll. Rep. 58. pl. 58. S. C. and Judgment affirm'd per tot. Cur.—† (Y. b) pl. 1. S. C. but not S. P.——(Z. b) pl. 3. S. C. but not S. P.

2. If a Communication be between the Father of A. and B. for a Marriage between A. and the Daughter of B. and B. affirms and publishes to the Father of A. that he would give to any one who should marry his said Daughter with his Assent 100 l. and after A. marries the said Daughter, yet he shall have no Action upon this Assumpsit, because B. did not mention to whom he made the Promise. Trin. 3 Jac. B. R. between *Weeke and Tybold*, per Curiam. See (M) pl. 1. S. C. and the Note there.

3. If a Man promises to J. S. to pay his Daughter 40 l. at her Marriage; she marries; she and her Husband shall not have any Action upon this Promise, but the Father. Pasch. 5 Jac. B. R. between *Archdale and Barnard*, adjudg'd. Such Promise was made to the After-Husband's Father to pay him 10 l. and the Husband brought the Action, and it was agreed by Richardson and Yelverton, nullo contradicente, that the Action well lies for the same; and *the Party to whom the Benefit of the Promise accrues may bring the Action.* Hett. 30. Trin. 3 Car. C. B. Provender v. Wood.

4. If C. is indebted to A. and D. is indebted to N. in 20 l. and C. at the Request of D. pays the 20 l. for him to N. and appoints D. to pay so much over to A. for him, and D. in Consideration of the Premisses, promises to pay the 20 l. to A. A. cannot have an Action upon the Case upon this Promise against D. For he is a Stranger thereto, and there is no Consideration for any Assumpsit to him. Trin. 4 Jac. B. R. between *Riely and Dennet*, adjudg'd.

5. If A. and B. are bound in an Obligation to pay to C. 20 l. * when he comes to the Age of 21, and after A. makes B. his Executor, and dies, and B. having Assets assigns them to D. and in Consideration of this Assignment D. promises to C. to pay to him the 20 l. when he comes * Fol. 31.

comes to the Age of 21; C. when he comes to the Age of 21, ſhall have an Action upon the Caſe upon this Promiſe againſt D. though no Conſideration comes from C. For if a Man delivers Money to J. S. to pay over to B. in Satisfaction of a Debt due to him, this raiſes a Debt to B. and cannot be revoked, and ſo here. Paſch. 1649. between *Disborn and Denaby*, adjudg'd; this being moved in Arreſt of Judgment after Verdict upon Non-Aſſumpſit for the Plaintiff. Intratur Hill. 24 Car. Rot. 1010.

6. Upon a Communication of Marriage between the Daughter of A. and the Son of B. A. promiſes B. in Conſideration that B. will aſſure 40 l. a Year to his Son, and alſo convey a Jointure to the Daughter of A. that then A. will give to the Son of B. with his Daughter 100 l. in Marriage; in this Caſe the Father, to whom the Aſſumpſit was made, ſhall have the Action, and not the Son. Mich. 22 Car. B. R. between * *Bayfield and Collard*, adjudg'd; this being moved in Arreſt of Judgment, where the Caſe was the ſame in Effect with this. Intratur Trin. 22 Car. Rot. 673. Nork. where the Promiſe was made after Marriage, for a further Proviſion of Maintenance, that the Father ſhould give 50 l. to the Husband, and the other ſhould pay to the Wife 100 l. after the Death of her Husband, if he died in the Life of his Wife, and the Action was brought by the Adminiſtrator of the Father of the Wife after the Death of her Husband, living the Wife. Contra Mich. 40, 41 Eliz. B. R. between † *Hawes and Levett*, per Curiam. But there a Judgment is cited to the contrary.

* See Tit. Condition (A. d) pl. 25. Playfield v. Collard, S. C. but there it is ſtated as an Agreement after Marriage.—All. 1. Baſield v. Collard, S.C. A. died, and the Son of B. died, and Aſſumpſit was brought by the Adminiſtrator of A. and held that the Action lay for the Adminiſtrator; and agreed alſo that it might have been brought by the Daughter.——Sty. 6. Anon. S. P. and ſeems to be S. C. adjudg'd accordingly.——S. C. cited Arg. Hard. 42.

Where the intended Husband, in Conſideration of a Marriage with the Daughter of J. G. *promiſes J. G. to make a Jointure on his Daughter*, there as well the Daughter as the Father may bring the Action; per Brampton Ch. J. Mar. 73. Mich. 15 Car. in pl. 110.

† Mo. 550. pl. 740. Lever v. Leys, S C. Popham and Fenner held that the Son ſhould have the Action; but Clench e contra, abſente Gawdy.——Cro. E. 619. pl. 8. Levet v. Hawes, S. C. adjornatur.——Ibid 652. pl. 11. S. C. adjornatur; but ſays that it was afterwards adjudg'd for the Defendant.——S. C. cited Cro. E. 849. in pl. 3. ſays it was adjudg'd that the Action brought by the Father for Non-payment of the Money to the Son, was adjudg'd not to be maintainable.——Het. 176. S. C. by the Name of Hadves v. Levit, but not adjudg'd.

So if A. covenants with B. that C. a *Stranger* ſhall *pay to D. a Stranger*, D. has no Remedy to come at the Money, but the Covenantee ſhall have the Action of Covenant for Non-payment; per Coke Ch. J. Roll Rep. 197. pl. 38. Paſch 13 Jac. B. R. in Caſe of Quick & Harris v. Ludborough.

7. If A. delivers 20 l. to B. and in Conſideration thereof B. aſſumes and promiſes to A. to cauſe and procure J. S. to pay the ſaid Sum of 20 l. to J. D. a Stranger, upon a certain Day; if J. S. does not pay the ſaid Money to J. D. A. who deliver'd the Money, ſhall have an Action upon the Caſe againſt B. upon this Promiſe. Paſch. 11 Car. B. R. between *Oſmond and Croſſing*, adjudg'd upon a Demurrer; but this was not moved. Intratur Hill. 11 Car. Rot. 348.

But where a Man promis'd to one *to make Satisfaction of all Debts which he owed to another, who was then abſent*, he to whom the Satisfaction was to be made brought the Action on the Caſe, and good. Het. 177. cites 43 & 44 Eliz. Rixon v Horton.

But where Wages were due to A. from the Eaſt-India Company, *he orders B. to receive the Money, and pay it to C. to whom he is indebted*; *C. brings an Indebitatus Aſſumpſit againſt B.* At the Trial at Guildhall, Holt Ch. J. ſaid that the Action could not be maintain'd by C. whereupon the Plaintiff was nonſuited. 11 Mod. 241. pl. 16. Trin. 1709. 8 Ann. B. R. Clifford v. Berry.

8. If A. who is the Uncle of B. an Infant, delivers 12 l. to J. S. to educate B. the Infant, and in Conſideration thereof J. S. promiſes to educate B. and alſo at his full Age to pay to him, viz. B. the ſaid 12 l. B. when he comes to his full Age, may have an Action upon the Caſe againſt J. S. for the 12 l. if he does not pay it according to his Promiſe;

mise; for the use of the Money in the mean time was the Consideration of the Education, and the Money was to be paid to B. Pasch. 13 Car. B. R. between *Oldham and Bateman*, adjudg'd, per Curiam; this being moved in Arrest of Judgment.

9. If in an Action upon the Case by A. and B. against C. it be recited in the Declaration, that whereas certain particular Cattle belonging to A. and other particular Cattle belonging to B. were taken away by Persons unknown, and in Consideration of 10 l. given by A. and B. to C. C. assumed and promised to procure the said Cattle to be restored to A. and B. and because the Cattle were not restored they brought this Action; this Action is well brought jointly by A. and B. tho' the Cattle which belong'd to A. ought to be restor'd to him, and the other Cattle to B. and so the Thing to be perform'd is several, and not joint; yet inasmuch as the Contract is joint, and the Consideration joint, and it is not known how much the one gives, and how much the other, the Action is well brought jointly. Hill. 1649. between *Ivans and Raans*, Plaintiffs, against *Draper*, adjudg'd, this being moved in Arrest of Judgment. Intratur Trin. 1649. Rot. 1104.

Sty. 156. Mich. 1649. Vaux v. Steward. Roll Ch. J. held the Promise intire, and so the Action was well brought; but adjornatur. — Ibid. 157. S. C. Roll Ch. J. continued of the same Opinion; but upon a Case cited out of Yelverton to the contrary, the Court order'd the Case to be brought, and in the mean time they would advise.—Ibid 203. Vaux v. Draper, S. C. and Roll Ch. J. Nicholas, and Aske held the Consideration intire, and not to be divided; but Jerman J. e contra; and Judgment for the Plaintiff, Nisi &c.

10. If A. be in Execution at the Suit of B. and C. a Stranger comes to the Wife of B. in the Absence of B. and promises the Wife that if B. her Husband will discharge A. out of Execution, that he will pay the Debt * at such a Day to B. if A. does not pay it before; and after B. comes home, and his Wife acquaints him with the said Assumpsit, and he agrees thereto, and thereupon discharges A. out of Execution, this is a good Assumpsit, whereupon B. the Husband may have an Action, though the Husband gave no Command or Authority before to the Wife to make the Agreement; for the Agreement thereto after is sufficient. 27 H. 8. 24. adjudg'd. *Tatam's Case.*

S. C. cited Arg. Godb. * Fol. 32. 361. pl. 453. — S. C. cited All. 1. Mich 22 Car. B. R. per Cur.

11. If A. appoints B. an Attorney to sue out a Latitat against J. S. at his Suit for a Debt due to him by J. S. and to arrest him, and B. accordingly takes out a Latitat, and shews it to J. S. and his Intent to arrest him thereupon, upon which J. M. promises B. that if he will forbear to arrest J. S. he will pay the Debt at a certain time to A. whereupon B. forbears to arrest him, and after A. agrees thereto, and brings an Action upon the Case against J. D. [M.] upon his Promise; And it seems it lies, though the Attorney had no Authority to take his Promise before it was made, for the Agreement thereto after is sufficient. Contra between * *Jurdan and Jurdan*, adjudg'd upon a Demurrer.

* Cro. E. 369. pl. 7. Hill. 37 Eliz. B. R. Jordan v. Jordan, S. C. adjudg'd for the Defendant, because he declares of a Promise made to B. and not to himself.

12. If A. discourses with B. about his Sale of Land to B. and after B. assumes and promises to C. the Wife of A. in Consideration that she will not hinder the said A. her Husband to levy a Fine to him of the said Lands, to pay to C. 10 l. or to give her a Riding-Suit; if the Wife does not hinder the Husband, but he levies the Fine accordingly, the Husband and Wife may have an Action upon this Promise; for the Promise is laid in the Declaration to be made to the Wife, for they may join at the Election of the Husband. Pasch. 11 Car. B. R. between *Fawcett and Childers*, per Curiam adjudged, this being moved in Arrest of Judgment.

See (U) pl. 19. S. C.

13. If

Sti. 296. Starkey v. Mill S.C.—So in Assumpsit, for that one *deliver'd 10 l. to the Defendant to deliver to the Plaintiff*, and the *Defendant promised the Plaintiff to pay it unto him.*

13. If A. gives Goods to B. of the Value of 80 l. out of which he should pay to C. 20 l. if B. does not pay the 20 l. to C. C. may have an Action upon the Case against B. and declare that he was indebted to him in 20 l. for Goods of the Value of 80 l. are given to him by A. out of which he should pay 20 l. to C. for when Goods of the Value of 80 l. are given to B. by Agreement between him and A. that he should pay 20 l. to C. this becomes a Debt to C. as if A. deliver 20 l. to B. to pay over to C.—C. may have an Action of Debt or Account, or an Action upon the Case, upon a Promise for it against B. Mich. 1651. between *Starky and Myne*, adjudg'd per Curiam; this moved in Arrest of Judgment. Intratur Trin. 1651. Rot. 1701.

Ruled that Assumpsit does not lie. But Walmsley said, that if the Plaintiff had given a Day for Payment of it, it had been a good Consideration. Cro. E. 380. pl. 31. Hill. 37 Eliz. C. B. Howlet v. Osborn.

So where A. promised to B. that *in Consideration B. will make unto A. a Lease of such Lands*, that *A. will assign the same to B.'s Servant*, if A. will not make the Lease the Servant shall have the Action on the *Promise*, and not B. Arg. 2 Le. 205. pl. 255. cites it as 25 Eliz. Crew's Case.

14. A. *sold Land to B. at an Undervalue*, afterwards *J. S. the Uncle of A. at A.'s Request treated with B. for a Re-conveyance to A. and promised to give B. 50 l.* whereupon *B. promised to reconvey*; J. S. tender'd the 50 l. at the time appointed, but B. refused it. A. brought Action on the Promise, which Clench thought was ill; because the Promise was to J. S. and not to A. But Manwood Ch. B. and Chute, held that it shall be *intended the Agreement of A.* tho' made by J. S. And the Count sets forth that it was Ad Requisitionem of A. and order'd Judgment for the Plaintiff, Nisi &c. Sav. 23. pl. 57. Pasch. 24 Eliz. Sadler v. Paine.

S. C. cited as adjudg'd. Cro. E. 652. in pl. 11.

15. In Consideration of a *Marriage between A.'s Son and B.'s Daughter*, *A. promised to give 100 l. Stock to his Son, and B. promised to give 100 l. in Money.* B. paid the Money, but A. did not give the Stock. It was adjudg'd that the Action was maintainable by B. the Daughter's Father. Het. 176. cites it as the Case of Cardinal v. Lewis; and the Court said they would see that Record.

15. Assumpsit, whereas the *Defendant's Son had assaulted and beat the Plaintiff, of which he complain'd to a Justice of Peace, and required the Peace* &c. the Father, *in Consideration the Plaintiff would desist his Complaint against his Son, promised* the Plaintiff *that his Son should keep the Peace against the Plaintiff and W. R. the Plaintiff's Son; and yet the said Son had assaulted and wounded the said W. R. the Plaintiff's Son*, whereby he lost his Service. The Court held it no good Consideration, because the Battery of the Son is not any Ground of Action to the Father, unless he had shew'd he was his Servant, which he hath not done; and therefore it was adjudg'd for the Defendant. Cro. E. 849. pl. 3. Mich. 43 & 44 Eliz. B. R. and 881. pl. 13. Pasch. 44 Eliz. B. R. Rippon v. Norton.

16. A *Suit being commenced* the *Defendant promised the Plaintiff's Attorney on the Behalf of the Plaintiff, that he would pay* &c. in Consideration &c. Afterwards the *Plaintiff brought an Action* upon the Case, *and declared Specially*, as here, and not Generally, as of a Promise made to himself; And held good. And it was said it would be *good either Way.* Latch. 206. Trin. 3 Car. Legate's Case.

17. *A. sold a House to B.* and *in Consideration thereof B. promised to pay &c. to A. and C.* In an Action brought by A. and C. it was adjudg'd to be no good Consideration to C. Cited by Windham, Keb. 64. as 24 Car. 1. the Case of Evans v. Jampney.

18. The Count was that *A. desired B. to lend C. 40 l.* who lent it accordingly, and *A. repaid* to B. *the 40 l.* so lent, and then *A. brought an Action against*

against C. in his own Name for this Money; And the Judge held the Action did well lie, as lent by himself. Clayt. 133. pl. 240. before Thorpe J. 1649. Jackson v. Dickenson.

19. Case &c. the *Plaintiff* had *deliver'd the Goods of T. S. to the Defendant, who in Consideration of so much Money paid to him by the Plaintiff, promised to deliver them to T. S. the right Owner*, but did not; Adjudg'd, that either the Deliverer or the Owner might bring the Action, but they cannot join where the Consideration was not joint. Hardr. 321. Hill. 14 & 15 Car. 2 in the Exchequer, Bell v. Chaplin. As when in Consideration of 10 s. given by two Men, a Man assumes to do something to or for them severally, or to or for a Stranger. *But if the Consideration be several*; as for Example, in Consideration of 10 *s. paid by one, and* 10 *s. by another*, there they must sever in the Action. Ibid.

20. *If you will marry me I will pay your Children so much.* An Action being brought by the Children was adjudg'd not maintainable. 2 Lev. 211 cites Hill. 22 & 23 Car. 2. C. B. Novies (or Norris) v. Pine. Ibid. 212. Jones said he remembred this Case to be so adjudg'd; but Scroggs Ch. J. said he then was, and yet is, against the Opinion of that Judgment; and Jones J. said that he never was satisfied with it ——2 Jo. 103. S C. cited Arg. but it was said that Judgment of Nil capiat was not entred, and the Court here were of Opinion that it ought not.

21. Assumpsit, for that the Father of his Wife was seised of Lands since descended on the Defendant as Heir, and *the Father in his Life-time being about to fell* 1000*l. worth of Timber to raise a Portion for his* said *Daughter*, the said *Defendant promised the Father, that in Consideration he would forbear to fell the Timber he would pay the said Daughter* 1000 *l.* &c. It was moved in Arrest of Judgment, that the Father and not the Son in Law and his Wife, ought to have brought the Action. The Court said, it might be another Case if the Money had been to have been paid to a Stranger; but there is so near a Relation between Father and Child, and it is a Kind of Debt to the Child to be provided for, so that the Plaintiff is plainly concern'd; And per tot. Cur. Judgment for the Plaintiff. Vent. 318. Mich. 29 Car. 2. and 332. Mich. 30 Car. 2. B.R. Dutton v. Poole. 2 Lev. 210. S. C. adjudg'd accordingly in B. R. and says that Error was immediately brought, and that Trin. 31 Car. 2. the Judgment was affirm'd in the Exchequer Chamber.—Raym. 302. Trin. 31 Car. 2. in the Exchequer, S. C. and Judgment affirm'd.——2 Jo. 102. S. C. in B. R. and the Court held the Action well maintainable by the Plaintiff; for the Benefit belongs to the Daughter, and she may release it.—Freem Rep. 401. pl. 646. S. C. adjornatur.——3 Keb. 786. pl. 38. 814. pl. 34. 830. pl. 62. 836. pl. 71. B. R. the S. C. adjudg'd for the Plaintiff Nisi.

22. Custom that none shall *Trade in a Town* besides Persons free of the Gilda-Mercatoria there; Quære if valid in any Place except London? but if it is, the Action ought to be brought by *the Guild*. 1 Salk. 204. pl. 2. Pasch. 4 Annæ B. R. Mayor of Winton v. Wilks.

(Z. 2) What shall be said to be within the Promise.

1. A Promised his Daughter's Husband that he *would give her as good a Portion at his Death as to any of his Children.* Doderidge and Jones, thought that this Promise shall have no Retrospect to what A. had given to any Child before the Promise, but should extend only to what he should afterwards give; and Doderidge said that to make other Construction would be doing Violence to the Words, for then the Word (daret) should be taken for (dedisset). But Whitlock held that the Plain-

tiff ſhould have according to the beſt Gift in this Caſe, whether the ſame was before or after the Promiſe, and that the Intention is ſuch. Adjornatur. Poph. 183. Mich. 2 Car. B. R. Arnold v. Dickſon.

2. If one promiſes *to repay his Son's Tutor* in the Univerſity *all that he ſhall expend for his Son*, and afterwards the Son dies, the Father ſhall be obliged to repay the Tutor *Money expended* by him *for the Son's Funeral*; Per Jones J. to which Doderidge J. agreed expreſsly. Palm. 560. Trin. 4 Car. B. R. Arg.

Lev. 140. Keyme v. Goulſton, S. C. adjudg'd for the Plaintiff. ——Keb. 792. pl. 49. Came v. Gunſton, S. C. adjornatur.—— Ibid. 802. pl. 71. S. C. adjudg'd for the Plaintiff. Sty. 12. S. C. and Judgment ſtay'd.—S. C. cited and agreed per Cur. Sid. 226.

3. Aſſumpſit, *in Conſideration ſhe would put her Daughter to be inſtructed in Needlework. The Defendant promiſed to pay for a Year's Board*, and the Plaintiff averr'd that *ſhe did put her Daughter &c. for three Quarters of a Year.* It was mov'd in Arreſt of Judgment, that here is a Variance between the Promiſe and the Agreement; and that the Promiſer might imagine the Daughter could not be taught in leſs Time than a Year. But the Court held, that if there is any Variance in the Agreement, it is for the Advantage of the Defendant, (viz.) to pay leſs than he ought; for *the Meaning* of it *is, that he would pay for her Board not exceeding a Year*; and if the Daughter had been there but a Month, and then had died or run away, the Defendant would be chargeable for it within this Aſſumpſit. Sid. 225. pl. 19. Mich. 16 Car. 2. Game v. Gunſton.

5. An *Agreement* was made to *pay 2 s. for every Quire of Paper his Clerk ſhould copy out*; there can be no Apportionment for odd Sheets, and for that Reaſon a Judgment was revers'd. All. 9. Paſch. 23 Car. B. R. Needler v. Gueſt.

(Z. 3) Aſſumpſit. Declaration. How the Conſideration ought to be ſet forth.

1. CASE, for that one *B. was indebted to him in* 10 *l. for Work* &c. *and died inteſtate, and that Defendant adminiſtred*, and that the *Defendant did promiſe that if the Plaintiff would forbear till Michaelmas, he would pay him*, and ſhews that he did forbear the Debt &c. After Verdict, it was objected that the Conſideration was uncertain, becauſe the Plaintiff did *not ſet forth what ſhould be paid, nor to whom, but generally that the Defendant would pay him*; and that the Conſideration was that Parceret indefinitely. Sed non allocatur; for it ſhall be intended of the Debt, which is the Subjecta materia; and that it was alleg'd generally, that he forbore, and did not ſhew how. But by Dodderidge J. Iſſue ſhall not be taken whether he forbore, or not, but you ſhall ſhew how he ſued you. 2 Roll. Rep. 488. Hill. 22 Jac. B. R. Gardner's Caſe.

2. Aſſumpſit was, that *in Conſideration that the Plaintiff Daret diem ſolutionis, the Defendant ſuper ſe Aſſumpſit*; and becauſe he doth *not ſay in facto, that he had given Day*, it was adjudged that no ſufficient Conſideration was alleged; *but* if the Conſideration were *Quod cum indebitatus* &c. the ſame had been a good Conſideration without any more; for that implies a Conſideration in itſelf. Godb. 13. pl. 20. Paſch. 24 Eliz. B. R. Anon.

3. The Count was, *that W. the Defendant's Brother, on his Death-bed call'd the Defendant, whom he had made his Executor, and deſired him to pay the Plaintiff's Debt in two Month's Time; and that in Conſideration thereof he promis'd.* The Court held that there was no good Conſideration ſet forth;

forth; for it is *not said, that in Consideration that W. made the Defendant his Executor* &c. 3 Le. 129. pl. 181. Trin. 28 Eliz. C. B. Palmer v. Waddington.

4. The Count was, that in Consideration that *Quædam pars Domus &c. was in Decay, and that the Plaintiff would repair the same, Defendant promis'd to pay* &c. and declar'd that eandem partem Domus prædictæ reparavit. It was mov'd that Quædam Pars Domus was too general in the Count, and that he ought to have *shew'd specially what Part in certain*, as Hall, Chamber &c. Sed non allocatur. 2 Le. 53. pl. 72. Mich. 29 Eliz. Merry v. Lewis. 3 Le. 91. pl. 131. Pasch. 26 Eliz. C. B. the S. C. in totidem Verbis

5. Assumpsit, in *Consideration that at the Request of the Defendant he would deliver as many Quarters of Malt to J. S. to his Use as he would receive or have before 1st August, the Defendant promis'd to pay Tales denariorum summas &c. before the said 1st Day of August*, and *alleges he delivered so many Quarters, each of such Value.* Tho' he doth not promise any Sum certain, but Tales denariorum summas, without saying what, yet it was held good; for Per Wray, when the Plaintiff *shews the Value of every Quarter*, it is intended he should pay according to the Rate. And Judgment for the Plaintiff. Cro. E. 149. pl. 18. Mich. 31 & 32 Eliz. B. R. Royle v. Bagshaw.

6. Assumpsit, for that *in Consideration he by his Servant had delivered to the Defendant two Bills of* 300 *French Crowns, amounting to* 80 *l. to be received at Roan* in Normandy *to his Use*, the *Defendant promis'd to pay him* 61 *l.* It was moved that there is no Consideration; for it *appeareth not how he shall recover them*, if he be denied Payment, *nor that they were Bills made to the Plaintiff, nor what Benefit he may have by them.* But adjudged in C. B. to be a good Consideration, and well alleg'd; and the Court of B. R. held so too. Sed adjornatur. Cro. E. 155. pl. 37. Mich. 31 & 32 Eliz. Person v. Hickled. Upon moving this Matter again, it was assign'd further for Error, that it was *not all alleg'd for what the Money contained in the Bills was due, nor to whom*; and that it might be they were Bills made to the Defendant himself, and due to him, and so no Consideration. And Judgment was revers'd. Cro. E. 170. pl. 7. Hill. 32 Eliz. B. R. Penson v. Hickbed, S. C. ——4 Le. 99. pl. 203. S. C. adjornatur.

7. Assumpsit. The Plaintiff declares, that *in Consideration the Defendant should enjoy such Goods &c. he would pay* the Party 25 l. The Jury upon Non Assumpsit found, that he promised to pay, if he enjoyed such Goods &c. and it was adjudged for the Defendant, because the Plaintiff *declared of an absolute Promise*, and the Jury *found a conditional Promise.* Cro. E. 149. pl. 19. Mich. 31 & 32 Eliz. B. R. Mustard v. Hopper. Le. 173. pl. 241. S. C. the Judgment was stay'd.

8. The Count was, that in Consideration the Plaintiff *respectuaret the Defendant pro solutione Debiti prædicti per spatium Unius septimanæ tunc proxime sequentis* to pay the Debt to the said Plaintiff *modo sequenti, viz. one Moiety within one Week after, and the other Moiety at the End of the said Week*, and counted that he did forbear by the Space of a Week. It was objected that the Consideration was not sufficient, *without saying that he had forborn for a Week next following*, as laid in the Count. Sed non allocatur; for it shall be intended. It was also objected, that the Declaration is *repugnant*, by setting forth that the Consideration was the *forbearing for a Week, and that he promis'd to pay within a Week.* Sed non allocatur; for the Week in the Assumpsit shall be construed to be the Week after the Week in the Consideration. 2 Le. 112. pl. 149. Trin. 32 Eliz. B. R. Brown v. Ordinacre.

9. Assumpsit, for that the *Defendant was possess'd of divers Goods of the Plaintiff's, and in Consideration the Plaintiff would forbear the Goods the Defendant promis'd to deliver them within* 6 *Months.* It was said there was no Consideration; for he does *not shew what Goods they were*, and so uncertain. But Per Cur. there needs not any Certainty to be shewn of them; for he is not to recover the Goods in Specie, but Damages for them. And

adjudged

adjudged for the Plaintiff. Cro. E. 387. pl. 10. Paſch. 37 Eliz. B. R. May v. Alvarez.

Goldsb. 146. pl. 65. S. C. but S. P. does not appear.

10. J. S. was indebted to T. the Plaintiff in 100 l. and *in Conſideration that T. would abate* 10 *l. of the Debt, and forbear the* 90 *l. Reſidue till Michaelmas*, the Defendant *promis'd to pay the* 90 *l. then, if J. S. did not*; and alleg'd that he abated the 10 l. and forbore the 90 l. till Michaelmas. It was demurr'd, becauſe he did *not ſhew how he abated him the* 10 *l. ſo as the Court might take Conuſance whether it was a ſufficient Diſcharge*; and of that Opinion was the whole Court. Cro. E. 477. pl. 5. Trin. 38 Eliz. B. R. Thornton v. Kemp.

Mo. 539. pl. 707. S. C. but S. P. does not appear.

11. In Conſideration the Plaintiff would relinquiſh ſuch a Suit the Defendant promiſed &c. After Judgment for the Plaintiff, it was aſſign'd for Error, that the Plaintiff ought to have *averr'd that the Action, which he was to diſcharge, was actionable*, which not being done was held to be Error, and the Judgment revers'd in the Exchequer Chamber. Cro. E. 561. pl. 18. Paſch 39 Eliz. Roſs v. Moor.

12. Aſſumpſit, *in Conſideration he would permit the Defendant to enjoy ſuch Lands for a Year, he promiſed to give the Plaintiff* 10 *l. for that Year*; and alleges in Fact that the Defendant enjoy'd it by his Permiſſion, but becauſe it was *not ſhewed what Right or Title he had to the Land to licence the Defendant* to enjoy it, it was holden there was no good Conſideration or Cauſe of Action. Cro. E. pl. 28. Mich. 43 & 44 Eliz. C. B. Clerk v. Palladie.

13. Aſſumpſit againſt an Executor, *for that his Teſtator was indebted* 33 *l. to the Plaintiff, and in Conſideration the Plaintiff would forbear to ſue him till he the Defendant ſhould get Execution upon ſuch a Judgment, he promiſed to pay* the Money *upon Requeſt*. It was objected, that it did *not appear the Teſtator was indebted, or that the Defendant had Aſſets*. But adjudged that the Action is grounded upon the Promiſe of the Defendant, and it ſhall be intended that he was indebted, otherwiſe the Executor would not promiſe. Cro. J. 593. pl. 14. Mich. 18 Jac. B. R. Davis v. Warner.

Godb. 412. pl. 490. S. C. adjudg'd, that Plaintiff Nil capiat per Billam.

14. The Defendant *promiſed to give the Plaintiff* 40 *l. to cure him of the Pox*; *however, he promiſed to give him* 10 *l. for his Endeavour to cure him.* And in an Action brought for this 10 l. the *Plaintiff ſet forth that he endeavoured to cure him, but alleged no Place where.* Upon a Traverſe to the Endeavour, and Iſſue join'd, the Plaintiff had a Verdict; but the Judgment was arreſted. 2 Roll Rep. 312. Paſch. 21 Jac. B. R. Paine v. College.

S. C. cited Raym. 9. Arg.

15. The Plaintiff declared upon a *Promiſe to pay him ſuch Fees as ſhould be due to him as his Attorney in the proſecuting a Suit for him in C. B.* and ſuch Money as he ſhould lay out in ſoliciting a Suit for him in Chancery. Upon Non Aſſumpſit pleaded the Plaintiff had a Verdict, and upon Error brought the Error aſſign'd was, that the Plaintiff did *not ſhew particularly what Sums* of Money *he had laid out for the Defendant, nor to whom paid.* But adjudged that it was not neceſſary ſo to do; and that if he ſhould bring any other Action for his Fees, or Money laid out, the Defendant might plead this Recovery in Bar. Sty. 428. Trin. 1654. Banks v. Prat.

16. A. and B. agreed to *run a Horſe-race, and the Winner to have of the other* 200 *l.* The Count was, *whereas the Plaintiff had promiſed to perform on his Part, the Defendant had promiſed to perform on his.* This was adjudg'd to be good, and ſufficiently certain. Hard. 103. Paſch. 1657. in the Exchequer, Ernely v. Falkland (Ld)

17. In Conſideration the *Plaintiff would forbear to take his Courſe for the Monies the Defendant promiſed that he would pay them*, it was objected that the Words are uncertain, and that he ſhould have ſaid (his Courſe in Law,) and not generally (his Courſe.) But Roll Ch. J. held the Con-

Consideration certainly enough set forth, tho' the Latin be not very proper; and Judgment for the Plaintiff, Nisi &c. Sty. 264. Pasch. 1651. King v. Weeden.

18. Assumpsit, for that the *Plaintiff and H. were bargaining for an Horse*, and the *Defendant promised that if they agreed on the Price he would pay the Money*, and that he agreed for so much, but Defendant has not paid it. It was assign'd for Error, that here was no Consideration; for 'tis not that he should sell or deliver the Horse, so the Plaintiff hath no Loss, nor the Defendant any Benefit; but Judgment was affirm'd; for it shall be *intended after a Verdict, that upon this Promise the Horse was delivered*; and that the Promise was the Inducement thereto. 1 Lev. 103. Pasch. 15 Car. 2. B. R. Foster v. Holyman. Keb. 512. pl. 87. S. C. adjornatur. ——Ibid. 627. pl. 106. S. C. and Judgment affirm'd.

12. In Assumpsit the Plaintiff declar'd, that in Consideration *that he had done the Defendant multum & gratissimum Servitium*, he promis'd to pay the Plaintiff 10 l. and also in Consideration that he had done him *Multa Beneficia*, he promis'd &c. It was mov'd in Arrest of Judgment, That neither of these Considerations were sufficient, especially the last, because there *ought to have been some Service particularly express'd*. And the Court for that Reason held it merely void, and Judgment Quod Querens nil capiat &c. Vent. 27. Pasch. 21 Car. 2. B. R. Moor v. Lewis. Sid. 413. pl. 13. Cluffe v. Moor, S. C. and Judgment staid. —— See 2 Keb. 488. pl. 32. and 507. pl. 82. S. C.

20. Assumpsit, for that the Defendant *promis'd to give him so much pro opere suo facto*. It was moved in Arrest of Judgment, that here is nothing to found an Assumpsit upon; for (Opus factum) may be any neighbourly Kindness, and so the Declaration too general; but adjudg'd that *'tis the same as pro labore suo*, which hath been held good, and being *after a Verdict, it shall be intended that such Labour as implied a Consideration was given in Evidence*. Sid. 425. pl. 9. Mich. 21 Car. 2. Russel v. Collins. Mod. 8. pl. 26. S. C. adjudged for the Plaintiff. —Vent. 44. Rushden v. Collins, S. C. adjudg'd accordingly. — 2 Keb. 552. pl. 36. S. C. adjudg'd for the Plaintiff. And the Court said this is not like to the Words *pro multis Beneficiis*, which has been ruled ill and uncertain.

21. In Action *against an Heir on the Bond of his Ancestor, setting forth that the Defendant, in Consideration the Plaintiff would forbear to sue for such a Time, promis'd to pay* him; the Plaintiff ought to *shew that the Ancestor was bound*, or otherwise he cannot have Judgment; and it shall not be intended after a Verdict. Vent. 159. Mich. 23 Car. 2. B. R. Barber v. Fox. 2 Sand. 136. S. C. accordingly. —— See Tit. Heir (K. 2) pl. 13. and the Notes there.

22. Case &c. for that the *Plaintiff pretended a Title to certain Goods in the Possession of S. P. and claimed them to be his own, and intending to remove them, the Defendant, in Consideration that the Plaintiff would suffer them to continue there, promised to see them forth-coming*, and not imbezzled &c. It was objected that here was no good Consideration, because the Plaintiff did *not set forth any Property* in the Goods, but only that he pretended to, and claimed, them as his own. Sed non allocatur; for after a Verdict it shall be intended that he proved that they were his own. Vent. 211. Pasch. 24 Car. 2. B. R. Evans's Case.

23. In Assumpsit, the Error assign'd was, that it was *Pro opere & labore, without shewing what*. Sed non allocatur; for it is enough to shew that it was upon a Simple Contract upon which this Assumpsit can arise; and the Court will not intend it to be an illegal Consideration. 12 Mod. 50. Hill. 5 W. & M. Hibbord and Coulthrop. Skin. 409. pl. 4. Hebbert v. Corsthorp, S. C. Exception was overrul'd; for Opere & Labore is a Matter which is not Debt founded upon a Specialty. ——Carth. 276. S. C. and Judgment affirm'd.

(Z. 4) Declaration in Indebitatus Aſſumpſit. Not ſaying how much for each, or for what.

Noy 146. in S. C. ſays it was adjudg'd in Mich. 7 Jac. B. R. Jarrſt v. Ingram,

1. IN Caſe on an Indebitatus exiſtit of an Aſſumpſit, the Plaintiff demurr'd becauſe it was *not ſhewn how, and for what Things he was indebted.* And the Court were clearly of Opinion againſt the Plaintiff without Argument. Noy 146. Hill. 5 Jac. Tyrwhite v. Kinaſton.

that he ought to ſhew How he became indebted, viz. for Merchandizes, or for ready Money. ——An *Aſſumpſit* to pay a Sum *pro diverſis mercimoniis venditis*, is good, *without mentioning the particular Ware* in the Declaration; *but* an *Indebitatus Aſſumpſit* is *not* good, *without ſome* general or ſpecial *Conſideration mentioned* in the Declaration. Jenk. 196 pl. 3.

Error on a Judgment in Indebitatus Aſſumpſit for ſo much Money due and unpaid, and revers'd, becauſe not *ſaid upon what Account* Show. 347. Paſch. 4 W. & M. Porter v. James.— S. P. For if it is for *Rent, or by Specialty, or by Record*, a general Aſſumpſit lies not. But if it had been, that being indebted *for divers Wares ſold*, or the like Contract, it had been well enough. Cro. J. 206. pl. 2. Paſch. 6 Jac. B. R. affirm'd in Error in Cam. Scacc. Woodford v. Deacon.——The *Difference* is, where it is *the Ground of the Action*, and where it is *only Inducement to* the Action. In the laſt Caſe it is good without ſhewing How. Cro. J. 548. Auſtin v. Bewley.——Jenk. 330. pl. 59. S. C.———Cro. J. 213. Buckingham v. Coſterdine.——Cro. J. 642. Mayor v. Harre.

Yelv. 175. S.C. but S. P. does not appear.

2. Aſſumpſit, for that he was *indebted in* 40 *l. for diverſe Sums of Money to him lent, and for divers Wares before had, and for certain Sums of Money to A. ad Inſtantiam Defendentis paid for the Debt of the Defendant, he promis'd to pay* &c. It was mov'd that it *not* being *ſhewn How much he was indebted for each Cauſe*, is too general. Sed non allocatur; for that is not material, it being that he was indebted ſo much in toto. Cro. J. 245. pl. 3. Trin. 8 Jac. B. R. Rooke v. Rooke.

Jenk. 292. pl. 37. 9 Jac. S. C. adjudged for the Plaintiff, and affirm'd in Error.

3. Aſſumpſit *for that the Defendant was indebted to the Plaintiff in* 30 *l. the Defendant, in Conſideration that the Plaintiff had given Day to the Defendant for* 6 *Weeks, did aſſume to pay* &c. this is a good Deciaration, *without ſhewing for what the Defendant was indebted*; for the Debt is not in Queſtion. But *where the Debt in itſelf is the only Conſideration* of the Promiſe, *it muſt appear* to the Court; *but here the Forbearance makes the Conſideration*, and the Debt is allowed in the Promiſe being actual, and alſo found by Implication in the Verdict. Hob. 18. pl. 32. Mich. 9 Jac. Woollaſton v. Webb.

Hob. 88. pl. 118. Trin. 9 Jac. Brinſley v. Partridge, S. C. the Error aſſign'd was, becauſe it

4. A. and B. *account together for Reckonings between them, B. is found indebted* 100 *l. to A.* and *upon this B. aſſumes to pay it* to A. *at a certain Day*, and does not pay it; upon this A. brings an Aſſumpſit. The Defendant *pleads Non Aſſumpſit.* It is found for the Plaintiff; he has Judgment, and affirm'd in Error; for the Account confeſſes the Debt, and the Verdict alſo proves it. Jenk. 297. pl. 50.

was *not ſhewn for what the Money upon the ſaid Account was due*, whether for Money received or lent, or for Wares bought and ſold.

Aſſumpſit, for that *upon Inſimul computaverunt, the Defendant was found indebted to the Plaintiff in* 20 *l. and in Conſideration thereof promiſed to pay* &c. *without ſpecifying the particular Matters and Cauſes.* Per tot. Cur. in Regard the Account may be for divers Matters and Cauſes, and ſeveral Matters may be included therein which in pede compoti are reduced to a certain Sum, it is a ſufficient Ground to maintain Aſſumpſit thereupon; And Judgment for the Plaintiff. Cro C. 116. pl. 9. Trin. 4 Car. B. R. Homes v. Savil.——Het. 106. Trin. 4 Car. Holms v. Chenie, S. C. adjornatur.——— Ibid. 113. S. C. adjuaged for the Plaintiff.———Litt. Rep. 148. S. C. but adjornatur to ſearch Precedents.——— Palm. 441 442. Trin. 2 Car. Goodwin v. Willoughby, S. P.———Lat. 141. 142 S. C. & S. P.—Poph. 177. S. C. & S. P.———Noy 81. S. C. & S. P.

5. Debt will not lie upon a General Indeb. Aſſ. *without ſhewing the Particulars*, by Reaſon of the Inconvenience which might follow by forcing the Defendant to be ready to give Anſwer to the Plaintiff to the Generality,

Generality, and therefore the Action ſhould be ſpecial for the particular Things. Godb. 186. pl. 268. Paſch. 10 Jac. C. B. Gray's-Inn-Bakers v. Occould.

6. Aſſumpſit, for that the Defendant, in Conſideration he was indebted to the Plaintiff in 10 l. *for Agiſtment of Beaſts, and for Wheat and other Wares by him had and received*, promiſed to pay &c. After Judgment for the Plaintiff it was aſſign'd for Error, that *no certain Cauſe was aſſign'd of the Debt*; but Judgment was affirm'd; for tho' it be not ſufficient to ſay generally that he was indebted, becauſe it might be for Rents upon Leaſes, or Debts upon Specialties, yet this is certain enough; for as well the Wares as the Paſturing and Wheat are perſonal Things, for which Aſſumpſit may lie, and may be turn'd into Damages, and requires not ſo much Certainty as if it were an Action of Debt upon the very Contract. Hob. 5. Trin. 10 Jac. in the Exchequer-Chamber. Gardiner v. Bellingham.

Roll Rep. 24. pl. 1. Bellinger v. Gardiner, S. C. and Judgment affirm'd per omnes. But Tanfield ſaid that if the Declaration had been *pro diverſis aliis rebus*, he thought it would not be good. —— See Sid. 182. pl. 2. Paſch. 16 Car. 2. B R. Cooke v. Samburne.

7. Aſſumpſit, for *that J. S. being indebted to the Plaintiff, for which he purpoſed to ſue him.* The *Defendant, in Conſideration he would forbear for a reaſonable Time, promiſed to pay* the Debt *if J. S. did not*; here, tho' it is *not ſhew'd how J. S. came to be indebted to the Plaintiff, nor what certain Time he did forbear*, yet the Declaration was good; for by requeſting Forbearance he took Special Notice of the Debt what it was, and the Court ſhall determine what is a reaſonable Time, and the Plaintiff having forbore 8 Years is a reaſonable Time; and Judgment for the Plaintiff. 3 Bulſt. 206. Trin. 14 Jac. Lingen v. Broughton.

Roll Rep. 379. pl. 38. S. C. The Action was brought againſt Executor for a Debt due from his Teſtator, and he promiſed Payment if Plaintiff would forbear a reaſonable Time, and Judgment accordingly for the Plaintiff. —— Mo. 853. pl. 1167. S. C. adjudg'd for the Plaintiff.

8. Caſe, for that B. *Indebitatus fuit* to him in ſo much, and he had arreſted B. and in Conſideration the Plaintiff at C.'s Requeſt would diſcontinue this Suit, he would pay the Debt; but did *not ſhew the Cauſe of the Debt*. Coke Ch. J. thought it well enough in this Caſe, becauſe the *Action is grounded on a Collateral Promiſe*, and the Indeb. Exiſtit is *an Inducement only*; quod fuit conceſſum per Crooke. Roll Rep. 379. pl. 37. Paſch. 14 Jac. B. R. Thorne v. Fuller.

Cro. J. 396. pl. 2. Therne v. Fuller, S. C. & S. P. agreed by all the Juſtices, becauſe the Debt is collaterally due by another, tho' it is true that againſt the Party himſelf an Aſſumpſit lies not upon a General Allegation, quod Indeb. Aſſumpſit, without ſhewing How he was indebted, viz. for Wares ſold, or Money lent, or ſuch good Cauſe. —— Jenk. 337. pl. 82. S. C. & S. P.

9. In Aſſumpſit, for that the *Defendant was indebted to him in 20 l. in Conſideration whereof he promiſed to pay* &c. After Verdict and Judgment for the Plaintiff it was reverſed, Niſi &c. becauſe *the Cauſe of the Debt and Aſſumpſit were not ſhewn*; but it was urg'd that it might be otherwiſe if the promiſe had been to pay on a certain Day; for thereby it is agreed that there is ſuch a Debt and the Certainty of the Day of Payment is Conſideration ſufficient; to which Diverſity Chamberlaine agreed. Palm. 171. Paſch. 19 Jac. B. R. Barker v. Barker.

10. Aſſumpſit, *for that the Defendant was indebted to him* 40 *l. & ſic Indebitatus exiſtens in Conſideratione inde Aſſumpſit ſolvere upon Requeſt.* The Plaintiff did *not ſhew for what Cauſe he was indebted*, ſo as the Defendant knew not what to anſwer, and therefore the Declaration was holden not good, and it is not a Promiſe in Conſideration of Forbearance, or a Special Promiſe. Adjudg'd for the Defendant. Cro. J. 642. pl. 1. Mich. 20 Jac. B. R. Mayor v. Harre.

11. Aſſumpſit.

11. Aſſumpſit. *Quod cum indebitatus fuit to him in 15 l.* in Conſideration thereof the Defendant promiſed to pay it; It was moved that this general Indeb. Aſſ. is not good *without ſhewing for what Cauſe*; And it was agreed on the other Side that the Declaration had not been good if the Defendant had demurr'd to it; but having *pleaded Non Aſſumpſit*, and found againſt him, it ſhall be *intended that he aſſumed for ſuch a Debt as lies in Aſſumpſit*. But many Precedents being alleg'd on both Sides, it was order'd that they be ſearch'd; and mean time Curia adviſare vult. Cro. C. 6. pl. 2. Paſch. 1 Car. C. B. Holme v. Lucas.

12. Aſſumpſit, for that *in Conſideration the Defendant was indebted to him in 7 l. he promiſed to pay it.* Reſolved the Declaration was not good, becauſe he doth *not ſhew any Cauſe of the Debt*, viz. *by Bond, or otherwiſe*; and tho' it be found againſt the Defendant upon Non-Aſſumpſit, yet the Declaration being ill, the Verdict doth not help it. Adjudg'd for the Defendant. Cro. C. 31. pl. 2. Paſch. 2 Car. C. B. Foſter v. Smith.

* Lat. 219. Mich. 3 Car. Phuter v. Gunter, ſeems to be S. C.

13. If one *promiſes to pay a Debt in Conſideration of the Debt only*, there *the particular Cauſe of the Debt muſt be ſhewn*; but *otherwiſe* it is, *if the Plaintiff declares that the Defendant Indebitatus Aſſumpſit ſolvere, in Conſideration of Forbearance of Suit or Payment*, there the particular Debt need not be ſhewn, but it is good. Arg. And this Difference was agreed by Germin, and he cited * **Futter and Conie's Caſe.** Adjudg'd that Indebitatus Aſſumpſit ſolvere in Conſideration of Forbearance, is good; for there the Debt is only Inducement, and the Ground of the Action is the Forbearance. Palm. 561. Trin. 4 Car. B. R.

3 Keb. 575. pl. 9. Penſacks v. Fouks, S. C. adjudg'd for the Plaintiff, Niſi.

14. Aſſumpſit &c. for that the *Defendant was indebted to him in 20 l. pro præmio on a Policy of Aſſurance* &c. and upon a Demurrer to the Declaration it was objected, that the Plaintiff ought to *ſhew a certain Conſideration what the Præmium was, or how it became due.* Sed non allocatur; for it is as good as an Indebitatus Aſſumpſit pro quodam ſalario, which has been adjudg'd good. 2 Lev. 153. 27 Car. 2. B. R. Fowk v. Pinſack.

(Z. 5) Declaration in Indebitatus Aſſumpſit. Too General, &c.

Roll Rep. 379. pl. 37. S. C. but S. P. does not appear. —Jenk. 337. pl. 82. S. C. & S. P. accordingly.

1. BEing *indebted to the Plaintiff* in 32 l. *and arreſted* C. the *Defendant, in Conſideration that the Plaintiff at his Requeſt adtunc & ibidem, would deſiſt from further proſecuting the Suit againſt B. and would remit to him his Coſts, promiſed to pay that Sum at Michaelmas next, or then to give Security to pay the ſame in 6 Months*, and the Plaintiff had forborn to proſecute, and the Defendant had not paid it nor given Security; Exceptions taken to the Declaration becauſe the Conſideration, *aſſenſit & contentus fuit to forbear*, is no ſufficient Conſideration, for he may forbear one Day and proſecute the next, ſed non allocatur; for *it is an abſolute Forbearance of Proſecution that is implied in the Words.* It was adjudg'd for the Plaintiff, and that Judgment affirm'd. Cro. J. 396. pl. 2. Paſch. 14 Jac. B. R. Thorne v. Fuller.

2. Caſe for that the *Defendant was taken in Execution upon a Ca. Sa.* de debito & damnis unde convictus fuiſſet, *and promiſed the Plaintiff that if he would conſent that the Sheriff ſhould let him go at large he would pay* &c. and ſhews that he conſented &c. It was objected that the Declaration did *not ſhew in what Court or in what Action the Conviction was*; for it might be in ſuch a Court, or Action where a Ca. Sa. would not lie. But adjudg'd

adjudged for the Plaintiff; for by Doderidge, it is the *Conſent* to let him go at large which *is the Conſideration* of this Action, and the Conviction is only an Inducement to it; and Whitlock J. ſaid there was Difference between Debt and Action on the Caſe. 2 Roll Rep. 495. Hill. 22 Jac. B. R. Cole v. Routh.

3. Indebitatus Aſſumpſit *pro diverſis rebus & mercimoniis.* Adjudg'd that (Rebus) is well enough. Jud' pro quer.' Freem. Rep. 357. pl. 451. Mich. 1673. Okington v. Tompſon.

4. Indeb. Aſſumpſit for *Phyſick, Wares* &c. *provided and delivered for the Daughter of the Defendant, and at his Requeſt.* It was moved in Arreſt of Judgment that this was a collateral Promiſe and ſo no Debt, and conſequently the Declarion ſhould be Special; but adjudg'd well enough, the Phyſick being provided and deliver'd *for* and *not to* the Daughter, which after Verdict ſhall be intended to be deliver'd to the Father for his Daughter. Raym. 67. Hill. 14 & 15 Car. 2. B. R. Stonehouſe v. Bodville.

5. Indeb. Aſſ. *for Tithes without ſhewing a Special Contract* was held good *after Verdict* becauſe the Jury have found it, and a Special Contract ſhall be *intended.* Sid. 223. pl. 11. Mich. 16 Car. 2. B. R. Wright v. Berle. The Reporter ſays, Nota, the Declaration was for Tithes without ſaying Deliberat' or ſold, and yet it was held good, as Indebitatus pro Equo; for (pro) implies a Sale. Ibid.

6. In Action on the Caſe on Aſſumpſit a *General Indebitatus* is not good; as here it was laid for 20 l. in Conſideration *de Conſimili Summa antehinc debit. & inſolut'* &c. and Verdict for the Plaintiff; but Judgment arreſted, becauſe the Declaration *ſhews not How it was due*, and it might be by Specialty. And then Caſe lies not. Sid. 182. Paſch. 16 Car. 2. B. R. Cook v. Samburn. S. P. admitted Hob. 5. in Caſe of Gardiner v. Bellingham.

7. Indebitatus *for Goods* had from Plaintiff, *without ſaying ſold*, and that moved for Exception, but over-rul'd; for per Holt it would lie for Rent or Bond. 12 Mod. 308. Mich. 11 W. 3. Moiſy's Caſe. Indeb. Aſſ. for Goods *implies Vendit' & deliberat'.* Lev. 141. Mich. 16 Car. 2. B. R. Wright v. Beale.

8. Plaintiff declar'd for *Goods and Merchandizes to the Defendant per eundem the Plaintiff* before that Time *ſold and deliver'd &c.* and did *not ſay the Goods of the Plaintiff.* But the Court was of Opinion that the Word *Indebitatus* did *neceſſarily import* that they were the Goods of the Plaintiff. Arg. 10 Mod. 331. cites Trin. 12 Ann. B. R. Hicks & Cockum.

9. Plaintiff counted that the Defendant was *indebted to him* 10 *l. for the Uſe of a Coach-Horſe of the Plaintiff's, deliver'd by him to the Defendant.* It was objected that this Delivery did not neceſſarily import a Debt; for poſſibly the Defendant might be to pay nothing for the Uſe of him; but the Court were of Opinion, that ſuch a Delivery muſt be intended as did create a Debt. Arg. 10 Mod. 331. cites it as Trin. 1 Geo. Athorpe v. Jones.

See (N 2) (Z. 6) Declaration in Indebitatus Aſſumpſit for Money received to the Plaintiff's Uſe.

Roll Rep. 391. pl. 11. Beckingham and Lambert v. Vaughan S C. and S.P. accordingly by Coke and Haughton; and Judgment for the Plaintiff.

1. Aſſumpſit *in Conſideration the Defendant had received* 24 *l. of ſeveral Perſons to the Plaintiff's Uſe, he promiſed to pay it on ſuch a Day*; It was moved in Arreſt of Judgment that the Declaration was ill, becauſe it is *not expreſsly alleged of what Perſons* he received the Money; but adjudg'd good becauſe it is a Conſideration executed, and ſo not traverſable. Moor 854. pl. 1198. Trin. 14 Jac. B. R. Babington v. Lambert.

2 Keb. 615. pl. 63. S. C. and Judgment affirm'd.

2. Indeb. Aſſ. declared for 50 l. *received* of the Plaintiff *by the Hands of one T. B. by the Appointment and to the Uſe of the Defendant.* And becauſe it might be Money lent which Defendant received to his own Uſe, tho' he was to make good the Value to the Plaintiff, the Court will preſume (it being after Verdict) that it appear'd ſo to the Jury at the Trial. Mod. 42. Hill. 21 & 22 Car. 2. B. R. Noſworthy v. Wildman.

3. Indeb. Aſſ. was brought *by the Aſſignee of Commiſſioners of Bankrupts of one L. for Money received* to the Plaintiff's Uſe. It was held on the Trial that the Declaration ought to be *Special*, it having been received to the Bankrupt's Uſe. 2 Show. 238. pl. 236. Mich. 34 Car. 20. B. R. Middleton v. Whitehead.

(Z. 7) Declaration in Aſſumpſit. Quantum Meruit.

1. A Promiſed to pay for his Board ſo much as ſhould be reaſonable. The Plaintiff *alleg'd a Demand, but not of any Sum certain, nor gave any Notice*, yet it was good enough. Roll Rep. 286. in pl. 2. cited as adjudg'd in B. R. Murrey v. Egliſton.

2. One who profeſs'd Phyſick and Chirurgery brought an Action upon the Caſe, and declared upon a Promiſe of the Defendant to give him tantum quantum Mereret *for* his Labour and Counſel in and about the *Curing of him of a Fiſtula, and ſets forth the Particulars How and in what Manner, and When he cured him of* it, *and that he deſerved* 100 *l.* It was adjudg'd that the Declaration that Meruit 100 l. was good, and the Action did well lie for it. Cro. J. pl. 4. Paſch. 13 Jac. B. R. Shepherd v. Edwards.

3. In Caſe the Plaintiff counted *that at the Requeſt of the Defendant he had* &c. *and the Defendant promiſed to pay him for them quantum ea bona ſeparalia valerent*, and *averr'd that they were all worth ſo much* &c. *without ſhewing the Value of each particular Parcel*; And held well enough, becauſe Damages only are to be recover'd in this Action; but per Doderidge, it would be otherwiſe in Detinue. 2 Roll Rep. 96. Trin. 17 Jac. B. R. Sir John Sanders's Caſe.

4. Alſo the Plaintiff *ſhew'd that among other Things he made for the Defendant a Cloak lined with Velvet*, but did *not ſhew of what Stuff the Cloak was*, viz. whether a Cloth Cloke, or Velvet, or Silk &c. For it might be a Paper Cloak; Sed non allocatur. 2 Roll Rep. 99. Trin. 17 Jac. B. R. Sir John Sanders's Caſe.

5. Aſſumpſit

5. Aſſumpſit for that *Plaintiff was poſſeſſed of Lands in M. for diverſe Years, of the Leaſe of J. S. and that there was a Communication betwixt A. and W. the Defendant for his Eſtate and Intereſt, W. in Conſideration the Plaintiff would procure the ſaid J. S. to licence A. to aſſign his Leaſe and Intereſt to him promiſed to pay all his Charges, and ſo much as he deſerved for the obtaining thereof, not exceeding 44 s.* and alleged that he procured J. S. to grant the Licence, and that he deſerved 20 s. It was objected that the Promiſe was uncertain, to pay quantum Meruit, for it cannot appear what he deſerv'd; But the Court held it good and certain enough, and he ſhall make a Demand what he deſerv'd, and if he demands too much, the Jury ſhall abridge it according to their Diſcretion. Adjudg'd in C. B. and Judgment affirm'd. Cro. J. 618. pl. 3. Mich. 19 Jac. B. R. Hall v. Walland.

6. Caſe for that the Defendant being *a Coachman, did by careleſs driving his Coach break a Pipe of Wine of the Plaintiff's which lay in the Street, ſo that much Wine run out and was loſt, and the Defendant being arreſted for it promiſed that if he would forbear to ſue him he would pay him as much as he was damnified*; It was moved in Arreſt of Judgment, becauſe the Plaintiff had *not averr'd how much the Wine was worth which was ſpilt*, and ſo he could not tell what Satisfaction to make, neither did he allege that he required the Defendant to make Satisfaction; but per Glyn Ch. J. both Parties ſaw the Wine, and the Defendant is bound to take Notice of the Damage without being given by the Plaintiff, and the Jury have made it certain. And Judgment for the Plaintiff. Sty. 458. Trin. 1655. Fowke v. Preſcot.

7. Aſſumpſit, *for that the Plaintiff, at the Defendant's Requeſt, had mended ſuch a Boat, and divers other Boats for him, he promiſed to pay him for his Labour and Charges tantum quantum meruit*; and averr'd that he deſerved 30 l. It was mov'd in Arreſt of Judgment, becauſe he *alleged that he amended divers Boats, and ſhews not what*; ſo that by ſuch Uncertainty the Defendant could not know how much to pay. But reſolved that the Defendant might take Notice himſelf how many Boats he deſir'd to have repair'd. Cro. C. 573. pl. 14. Hill. 15 Car. B. R. Canway v. Aldwyn. S. C. cited Arg. Raym. 9. 10.

8. A Quantum Meruit ſetting forth that he had provided *Diverſa Veſtimenta & omnia Materialia adinde Spectant*' was held good without ſhewing the Certainty of the Things provided, for which he demands Recompence. 2 Saund. 373. Trin. 22 Car. 2. Tate v. Lewen. 2 Keb 810. pl. 9. Mich. 23 Car. 2. B. R. adjudg'd for the Plaintiff.

9. Quantum Meruit for Wares ſold, *alleging Notice of the Value, but did not ſay where*, to which the Defendant demurr'd; and per Cur. the Notice is not traverſable, for he that buyeth muſt know the Value, and may tender ſo much as he thinks it is, and to go on for the reſt; And Judgment for the Plaintiff in two Cauſes. 3 Keb. 610. pl. 63. Hill. 27 & 28 Car. 2. B. R. Lomax v. Boyl.

10. Aſſumpſit, for that *in Conſideration he had found the Defendant ſufficient Meat, Drink &c. for divers Months laſt paſt, he promiſed to pay him as much as he deſerved &c.* It was moved in Arreſt of Judgment, that the Declaration was ſhort and *uncertain as to the Time or Number of Months*; but adjudg'd that the Uncertainty as to the Time can do no more Hurt than the Uncertainty as to the Things which has been often adjudg'd not to vitiate; and that it is ſufficient to aver how much he deſerved. 2 Salk. 557. pl. 1. Mich. 12 W. 3. B. R. Snow v. Firebraſs. 12 Mod. 434. S. C. held it well; it being after Verdict. And Judgment for the Plaintiff.

11. When a Quantum meruit *and Indebitatus is brought for the ſame Thing*, you muſt aver the ſame Perſon to be different Perſons, and multiply that ſame Perſon as often as you multiply your Declaration; Per Holt Ch. J. 7 Mod. 149. Hill. 1 Ann. B. R. Hart v. Longfield.

(Z. 8) Assumpsit. Declaration. Averment of Performance of the Consideration.

1. J. S. the Plaintiff counted that *A. was indebted to him in* 303 *l.* and that B. the *Defendant, in Consideration that J. S. would take B.'s own Bond without Surety, and not sue it till Michaelmas, and forbear the Money in the mean Time, promis'd to pay it.* After Verdict an Exception was taken, that *the Consideration was not alleged to be performed on the Plaintiff's Part*; and the Court being of that Opinion Judgment was staid. Dal. 94. pl. 17. 15 Eliz. Rogers v. Snow.

Assumpsit, *for that he being authorized to put in Suit a Bond of* 1600 *l. given for his Appearance to the Coroner, had undertaken not to put the same in Suit; and whereas the Plaintiff had an Outlawry against A for* 400 *l. that if he would permit the Defendant to take the Benefit of that Outlawry, he would pay to the Plaintiff* 400 *l. and averr'd that he permitted the Defendant to take the Benefit of that Outlawry* &c. It was moved in Arrest of Judgment, that the Plaintiff had *averr'd the Performance only of one Consideration*, whereas two are set forth. But adjudged that the *Undertaking not to sue amounted to a Promise* not to sue, and so not necessary to aver the Performance, it being only *Promise against Promise*. Lev. 20. Hill. 12 & 13 Car. 2. B. R. Bennet v. Astell.

2. When in a Declaration in an Action on the Case, *two or more Considerations are laid*, and are *not collateral*, but pursuant; *As* if I owe you 100 l. and I say, That *in Consideration that I owe you* 100 *l. and in Consideration that you shall give me* 10 *l. I promise to pay unto you the said* 100 *l. which I owe you*; if you bring an Action upon the Case against me for the 100 l. and lay in your Declaration both Considerations, *altho' you do not pay me the* 10 *l. yet the Action lieth. But where the Considerations are* not pursuant, but *meerly collateral*, and do not depend the one upon the other; *As in Consideration that you are of my Council, and you shall ride with me to York, I promise to give you* 100 *l.* there both Considerations ought to be performed, or otherwise the Action doth not lie. 2 Le. 72. in pl. 96. cited Arg. by Egerton Solicitor-General, as a Difference taken by the Justices in 19 Eliz.

3. Assumpsit, for that the *Defendant was possess'd of a Lease for Years, the Reversion to the Queen, in Consideration of* 10 *l. by the Plaintiff to him in Hand paid, and* 10 *l. to be paid to him upon the procuring of a new Lease*, the Defendant *promised to surrender his Lease, and procure a new Lease to the Plaintiff before such a Time.* It was moved in Arrest of Judgment, because he doth *not say he was ready to pay the other* 10 *l. at the Time.* Sed non allocatur; for the Defendant was to procure the Lease first. And the Plaintiff had Judgment. Cro. E. 249. pl. 12. Mich. 33 & 34 Eliz. B. R. Lacy v. Lacy.

4. Assumpsit, for that the *Defendant was indebted to him in* 10 *l. and promised if the Plaintiff would forbear him one Week he would pay it*; and *saith he did forbear him one Week*, but doth *not say for one Week following.* This was assign'd for Error. Sed non allocatur, for it cannot be otherwise intended; and the Judgment was affirm'd. Cro. E. 272. pl. 3. Hill. 34 Eliz. in the Exchequer, Tenancy v. Brown.

5. Assumpsit, for that M. *Lessee for Life, the Reversion to the Defendant, had granted to the Plaintiff a Rent of* 10 *l. out of it; in Consideration that the Plaintiff promised to relinquish the Rent, the Defendant promised to pay him* 30 *l.* Upon Motion in Arrest of Judgment it was resolved that the Declaration was not good, because he *shewed not How he relinquished the Rent*, for it might be by Word, which is no Discharge of it. Cro. E. 292. pl. 4. Hill. 35 Eliz. B. R. Gregory v. Nevil.

6. Assumpsit, *in Consideration the Plaintiff, at the Defendant's Request, would surcease such a Suit, the Defendant promised to seal him a Bond, when required*;

required; and that he did surcease the Suit &c. but did *not allege that he surceased the Suit at the Defendant's Request, nor that the Request to seal was by the Plaintiff.* But Per Cur. as to the first it shall be intended, for it is for the Defendant's Benefit; and as to the second, it shall be intended that it was by the Plaintiff, or by his Servant for him, if the contrary be not shewn. Cro. E. 299. pl. 10. Pasch. 35 Eliz. C. B. Okes v. Kirby.

7. Assumpsit, *in Consideration the Plaintiff would be Bail for him, the Defendant did assume* &c. and *saith de facto that he became Bail, but* saith *not before whom*, it was holden by the Court a good Cause to stay Judgment. Cro. E. 352. pl. 8. Mich. 36 & 37 Eliz. C. B. Pipe's Case.

8. Where *Part of a Consideration is good, and Part is not good*, the Party ought to allege Performance of that which is material and valuable. But where a Consideration consists of 2 or 3 Parts, and *every Part is valuable*, there of Necessity he must shew Performance of every Part thereof; Per tot. Cur. Cro. E. 759. Pasch. 42 Eliz. C. B. in pl. 29.

9. Assumpsit, for that it was *agreed between the Plaintiff and one Z. that the said Z. should lease a certain House to one W. for 7 Years; and that W. during the said Term should repair the House with Tile and Glass only*; and that those and other Covenants should be put into the Deed, *and that the Plaintiffs should be bound in a Bond of 100 l. for Performance of Covenants*; but *a Covenant being put into the Deed that W. should be bound to all Manner of Reparations, W. refused to seal the same, and the Plaintiff refused to seal the Bond; and further shews that* in the said House there was *a great Wall*, Part whereof *was* ruinous, and *likely to fall during the said Term*; *and that the Defendant, in Consideration that the said W. would seal the said Indenture, and that the Plaintiffs would seal the said Bond, did assume to maintain the said Wall durante præd. termino* 7 Annorum &c. and *avers that the said W.* the said Indenture, *and the Plaintiff* the said Bond *did thereupon seal*; *and* in Fact says, *that the said Wall*, at such a Time during the said Term *did fall* &c. Exception was taken because it was *not expressly averr'd that Z. did demise the said House*; and if there was no Demise, it was not possible for the Defendant to repair it during the Term, it not appearing that there is any Term. And the whole Court held the Exception good; for *for any Thing that appears, the Indenture was sealed only on the Part of the Lessee*, and not on the Part of the Lessor; and then there is no Lease, and consequently no Covenants, and so no Breach. And Judgment for the Defendant. Yelv. 18. Mich. 44 & 45 Eliz. B. R. Soprani and Barnardi v. Skurro. Cro. J. 119. Scarro v. Saprany, Pasch. 4 Jac. in the Exchequer Chamber, S. C. but S. P. does not appear.

10. Assumpsit &c. for that *in Consideration of 10 s. paid, and 20 l. more to be paid such a Day and Place* &c. *and in Consideration the Plaintiff the same Day and Place would bring a sufficient Man to be bound to the Defendant for Payment, he promised that the Plaintiff should have such a Wood to his own Use*; *and alleg'd that he brought B.* Adjudg'd for the Defendant, because the Plaintiff ought first to *shew that B. was sufficient*, so that it might appear to the Court &c. *and also* should have alleged in Fact *not only that he brought B. to be bound, but that he was bound in Fact, or offered himself to be bound*; for perhaps the Plaintiff might bring him to be bound, and when he came to the Place he might refuse. Yelv. 49. Mich. 2 Jac. B. R. Allen v. Randall. In Assumpsit the Plaintiff declared, That *in Consideration he would become bound to the Defendant by Obligation, with sufficient Surety for the Payment of 11 l. at a Day, the Defendant assumed to deliver him an Horse*; and the Plaintiff avers, that he offered to be bound to the Defendant &c. and did *not say by Obligation, with sufficient Surety*. On Non Assumpsit the Plaintiff had a Verdict, but could not have Judgment; for he should have tender'd the Obligation seal'd, and have set down the Sum, that the Court might judge if it were sufficient for the 11 l. and the Surety should have been named. Hob. 69. pl. 80. Trin. 13 Jac. Austin v Jervoyse.——Hob. 77. pl. 98. S. C. adjudg'd against the Plaintiff, tho' it was expressly in the Consideration laid only that he should be bound for the Payment.——Brownl. 11. S. C. adjudged accordingly.——S. C. cited Vent. 99. in Case of Catterel v. Marshall.

Conſideration to *lend* 20 *l. in Gold*, if Plaintiff declares of Part being lent or paid in *Silver*, tho' the Subſtance is perform'd, yet not being perform'd according to the Letter, it is not good; Per tot. Cur. Yelv. 87. in Caſe of Dorrington v. Eaſt.

11. In Aſſumpſit the Conſideration was to *procure 6 l. to be lent for a Year.* The Plaintiff counted that he procured 3 l. at one Time, and 3 l. at another. This is no Performance, and the Count is not good. Yelv. 87. Paſch. 4 Jac. B. R. Dorrington v. Eaſt.

12. In an Aſſumpſit the Plaintiff declares, that *in Conſideration* that *he would ſeal and deliver a Releaſe to J. S. &c. the Defendant would pay* to *him 5 l.* and *avers that he had made the Releaſe &c. and by the Appointment of the Defendant had delivered it to B. to the Uſe of J. S.* And it was adjudg'd that he had not well purſued and performed the Conſideration. But otherwiſe if it had been *by the Appointment of J. S.* himſelf. Noy 18. Tanfield v. Green.

13. Aſſumpſit, for that his *Father was ſeiſed of the Manor* of D. *and* of divers *Lands &c. in D. in Fee, and in Conſideration that the Plaintiff, together with his Father, ſigillaret quandam Indenturam per quam his Father barganizaret &c. the ſaid Manor and Lands, the Defendant aſſumed to pay* &c. *and alleges that the Plaintiff ſuch a Day ſigillavit Indenturam præd'* &c. Judgment was given for the Plaintiff in C. B. but revers'd in B. R. becauſe Diverſa terras & tenementa in D. are uncertain, and comprehend not all his Lands in D. and therefore the Plaintiff *ought to have ſhew'd particularly what Lands were compriſed within the Indenture.* Yelv. 110. Mich. 5 Jac. Mordant (Ld.) v. Walden.

14. *Another Reaſon* of Reverſal was, that the Plaintiff had not laid the Performance of his Part certainly, becauſe *(Indenturam prædictam)* cannot be good; for (Prædictam) *muſt refer to ſome Certainty before*, whereas no Certainty is before; for (Quandam Indenturam) mention'd at firſt is uncertain, it being the ſame Thing as if he had ſaid (Unam Indenturam,) and then the (Prædictam) could not be good; but he *ſhould have ſhewn certainly that he had ſeal'd ſuch a certain Indenture per quam the Father and the Plaintiff, barganizaverunt &c. and ſo de verbo in verbum, as laid in the Premiſſes of the Declaration*; but if this had been a perfect Indenture in Date, Nomination of the Parties, and Limitation of the Land, it would have been well to have ſaid that he ſeal'd (Indenturam prædictam,) becauſe it appears by the Premiſſes to have been a true and perfect Deed in Facto, whereas here it is only a pretended Indenture. Yelv. 111. Mich. 5 Jac. B. R. Ld. Mordant v. Walden.

15. Aſſumpſit, in Conſideration the *Plaintiff had promiſed to marry the Defendant within a Fortnight, the Defendant promiſed to marry the Plaintiff within a Fortnight*, and ſhe *avers that ſhe was ſemper parata & obtulit ſe*; but does *not ſay within a Fortnight.* Per Curiam, it is well enough without ſaying Obtulit ſe at all, becauſe ſhe was Semper parata. And Wylde J. ſaid, the Man is Ducere Uxorem. Freem. Rep. 347. pl. 431. Mich. 1673. Holcroft v. Dickenſon.

16. W. bought a Quantity of Gum of D. and paid him for it; and at the ſame time D. affirm'd that he had another Quantity then upon the Sea, and to be in London in May next, and as good as the other, whereupon W. the Plaintiff promiſed D. the Defendant, that if it exceeded not 2000 Weight he would, in 4 Months after Delivery, pay for it ſo much; and D. in Conſideration thereof promiſed to deliver the ſame when it ſhould come to London, and that it ſhould be as good as the firſt. Upon Error brought in the Exchequer-Chamber, it was objected that the Declaration was not good, in *not averring that the Gum deliver'd was the ſame as was upon the Sea, nor that it came to the Port of London, nor that it did not exceed 2000 Weight*; for other Gum would not be within the Promiſe, and tho' it was ill, and not merchandizeable, that is not material, it not being within the Promiſe, and it was his Folly to accept of

of it, and ſhall not be aided by any Intendment; and all the Judges and Barons were of that Opinion, and reverſed the former Judgment. Cro. J. 235. pl. 6. Hill. 7 Jac. B. R. Weſton v. Dyke.

17. The Plaintiff *declar'd that he with his own Money bought for the Defendant, and at his Requeſt, ſeveral Wares for him, which were tranſported to Ireland, and the Defendant promiſed to repay him* &c. It was mov'd in Arreſt of Judgment, that the Plaintiff did *not aver that the Wares ſo bought came to the Uſe of the Defendant, neither* did he aver *that when they were deliver'd to the Defendant he promiſed then to pay* the Money; but per tot. Cur. the Plaintiff has juſt Cauſe of Action, and the Declaration is good, and Judgment was given for the Plaintiff. Bulſt. 169. Trin. 9 Jac. Moor v. Moor.

18. Aſſumpſit, *in Conſideration the Plaintiff would make a Leaſe to the Defendant of Lands for 21 Years, at the yearly Rent of 10l. the Defendant promiſed to give him a Horſe*; and ſhews *that he made* him *a Leaſe* of the Lands, but that he had not given him the Horſe, but *ſaid nothing of any Rent* reſerved upon this Leaſe; and this being moved in Arreſt of Judgment, the whole Court held clearly that by this Leaſe thus made, without any Rent reſerved, he hath not purſued the Contract, and ſo not intituled himſelf to the Action; and Judgment againſt the Plaintiff. 3 Bulſt. 35. Paſch. 13 Jac. Lea v. Adams.

19. Aſſumpſit, for that the *Defendant had committed a Felony, and* thereupon *requeſted the Plaintiff to do his Endeavour to procure a Pardon for him*, and *alleg'd that he endeavour'd by all the Means he could, and did many Days labour, and do his Endeavour* to that Purpoſe, viz. *in Riding and Journeying at his own Charge from London to R. where the King was, and ſo to and from Newmarket, to obtain a Pardon* &c. After Verdict it was moved, that nothing appears done but Riding up and down, and ſo the Declaration not good; and of that Opinion was Warburton J. but the other Judges held for the Plaintiff, and ſo he had Judgment; for the Iſſue found for the Plaintiff is a Proof that he did his Endeavour according to the Requeſt, and it was neither required or promiſed to obtain a Pardon; and he laid expreſsly in general, that he did his Endeavour to obtain it, viz. in Equitando &c. to obtain; and if upon the Trial he could have proved no Riding nor Journeying, yet any other effectual Endeavour, according to the Requeſt, would have ſerved. Hob. 105. pl. 129. Mich. 13 Jac. Lampleigh v. Brathwaite.

Mo. 866. pl. 1197. S. C. held accordingly by 3 Juſtices, and though he did *not allege that he moved the King, or preferr'd any Petition*, &c. yet it ſeems good enough, and the going at his own Coſts is a Charge and Endeavour.——

Brownl. 7. S. C. adjudg'd accordingly.

20. Aſſumpſit, for that the *Defendant having a Friend ſick in the Plaintiff's Houſe*, which was *an Inn, ſaid to the Plaintiff, Provide for him ſuch Neceſſaries as he ſhall want, and I will pay you*; and *avers that he provided Neceſſaries* for him amounting to 15 l. &c. It was moved in Arreſt, that he did *not ſhew what Neceſſaries* in particular; but the general Allegation was held good, and Judgment per tot. Cur. for the Plaintiff. 3 Bulſt. 31. Paſch. 13 Jac. Cripps v. Boynton.

Roll Rep. 173. pl. 6. Anon. ſeems to be S. C. adjudg'd for the Plaintiff.

21. Aſſumpſit, for that in Conſideration the Plaintiff would *deliver all the Corn in ſuch a Barn*, the Defendant did aſſume and promiſe &c. and *avers that he did deliver all the Corn in the Barn*; but does *not ſhew that there was any, or how much Corn there*, which the Court agreed he ſhould have done; but it ſeems it is aided by the Statute of Jeofails, there being Matter ſufficient, as Haughton ſaid; and Doderidge and Crooke ſaid, that this Iſſue of Non-Aſſumpſit admits that there was Corn there, and this is found by the Verdict for the Plaintiff; but they all ſaid that if the Defendant had demurr'd the Plea had not been good. It was adjudg'd for the Plaintiff, and afterwards affirm'd upon a Writ of Error. Roll Rep. 382. pl. 3. Trin. 14 Jac. B. R. White's Caſe.

S. C. cited Poph. 206. —S. C. cited 2 Show. 28. pl. 18. Mich. 30 Car. 2. B. R. in the Caſe of Pridiaux v. Rawlins, S. P. but upon the Caſe of Langden v. Stokes, Cro. C. 383. which was a later Authority, and directly contrary, the Court held it well enough, without ſhewing How, whether by Releaſe or otherwiſe, eſpecially being after a Verdict; but that perhaps it might have been otherwiſe upon a Demurrer to the Declaration; and Judgment was affirm'd ——2 Jo. 125 Hill. 31 & 32 Car. 2. B. R. the S. C. adjudg'd accordingly; for being after Verdict it ſhall be intended a ſufficient Diſcharge was prov'd, as was neceſſary upon the Iſſue of Non-Aſſumpſit.

22. O. was *indebted 10 l. to the Plaintiff for ſeveral Treſpaſſes*, which the Plaintiff at the Defendant's Requeſt was content to accept of; *and in Conſideration that the Plaintiff, at the Defendant's Requeſt, would diſcharge the ſaid O. of the ſaid Debt, and permit him to carry out of the Plaintiff's Houſe certain Goods of the ſaid O. he promiſed to pay the Plaintiff the 10 l. ſuch a Day*; and *alleg'd that he did acquit O. and ſuffer'd him to carry his Goods* &c. It was holden the Declaration was not good, becauſe *not ſhew'd How he acquitted him*; and though the Conſideration to permit him to carry away the Goods had been a ſufficient Conſideration in itſelf, and was well alleg'd, yet being join'd with another Conſideration which is good, if alleg'd to have been perform'd, but that not being done, makes the whole Declaration ill; and adjudg'd for the Defendant. Cro. J. 503. pl. 14. Mich. 16 Jac. B. R. Leneret v. Rivet.

3 Bulſt. 235. S. C. but S. P. does not appear. ——Roll Rep. 355. pl. 7. and 433. pl. 29.

23. Aſſumpſit, in Conſideration the Plaintiff would *marry his Couſin at his Requeſt, to give him 20 l.* and alleges in Facto, that ſuch a Day he married her, but did *not ſay that he married her * at the Defendant's Requeſt*; yet held good; for having alleg'd that he married her, it ſhall be intended at Defendant's Requeſt. Cro. J. 404. pl. 3. Trin. 14 Jac. B. R. Berisford v. Woodroff.

S. C. but S. P. does not appear.——7 Mod. 144. Hill. 4 Ann. S. C. and S. P. cited by Holt Ch. J. as held to be well in itſelf, without any Requeſt or Help of a Verdict.

Aſſumpſit, for that the Defendant *promis'd if the Plaintiff at the Inſtance of the Defendant would marry his Daughter, he would pay him 20 l.* and *avers that he married the Daughter, but* did *not ſay ad inſtantiam Defendentis.* But adjudged that he having married her, it ſhall be intended * ad inſtantiam Defendentis without ſuch Averment. Cro. C. 194. 195. pl. 5. Trin. 6 Car. B. R. Poynter v. Poynter. ——S. C. cited by Holt Ch. J. 7 Mod. 144.

A. was bound in a Bond *for J. S. who died inteſtate. B. took out Adminiſtration. M. the Widow of J. S. promis'd B. that if he would, at the Inſtance of the Plaintiff, relinquiſh the Adminiſtration, and ſuffer M. to adminiſter, ſhe would ſave B. harmleſs from the Bond.* In Caſe brought by B. he counted accordingly, and that he relinquiſh'd and ſuffer'd M. the Defendant to adminiſter, but that ſhe had not ſaved him harmleſs of the ſaid Bond. After Verdict it was mov'd that the Declaration was not good, becauſe it did *not ſhew that B. had relinquiſh'd the Adminiſtration * at the Inſtance of M.* the Defendant, *but generally that he had relinquiſh'd it*, which might be without the Inſtance of the Defendant; and ſo Judgment in C. B. was revers'd. Jo. 441. pl. 1. Mich. 15 Car. B. R. Leate's Caſe.——Mar. 55. pl. 86. S. C. by the Name of Clarke v. Spurden. Adjornatur.——S. C. cited 7 Mod. 143. Arg. and Ibid. 144. by Holt Ch. J. who cites the Conſideration to be, that the Plaintiff ſhould procure B. to renounce Adminiſtration; ſo that there *is an Act to be done by B. to intitle himſelf to an Action*; for if he does nothing, tho' the other renounces he has no Cauſe of Action; for the Agreement was not to do ſo; and ſo if the other renounc'd Adminiſtration generally, but if B. did procure him to do ſo.

24. Aſſumpſit, in Conſideration the Plaintiff *would go with the Defendant to ſell ſuch Timber, and to do other particular Acts, the Defendant promiſed* &c. The Plaintiff *alleges that he went with him, and help'd him to ſell the Timber, & quod ſemper paratus fuit apud C. to perform alia præmiſſa*, &c. It was the Opinion of the Court, that the Conſideration being futurely to be perform'd, ought to be preciſely alleg'd to be perform'd, otherwiſe Action will not lie, and the Allegation that Paratus fuit to perform it, is not ſufficient; eſpecially as Dodderidge ſaid, Paratus apud C. when the Acts were to be done at B. And adjudg'd for the Defendant. Cro. J. 583. pl. 3. Mich. 18 Jac. B. R. Pain v. Baſtwick.

25. Caſe, for that there *was a Diſcourſe of a Marriage between the Plaintiff and the Son of the Defendant* on ſuch a Day and Place; and that *the Defendant then promiſed, that if her Father would give the Son 120 l. in Marriage, and ſhe married him, he would ſettle 20 l. per Annum on her for a Jointure upon Requeſt*; and *avers that on ſuch a Day and Place he did marry*

marry her, and that her Father gave her 120*l. in Marriage*; (but did *not say* Postea, nor the Time *when he gave it*) It was mov'd in Arrest of Judgment, that there were 3 Things precedent to the settling the Jointure, (viz.) Marriage, Payment of the 120l. and the Request to settle the Jointure; and it is not sufficient to allege that the Money was given in Maritagio, because it is uncertain; for Money given before, or at the Time, or after the Marriage, may properly be said to be given in Maritagio, therefore he should have set forth the Time when the Money was given; for in this Case it was Parcel of the Contract, and for this Reason the Judgment was set aside. 2 Roll Rep. 488. Hill. 22 Jac. B. R. Willet v. Mold.

26. Assumpsit, *in Consideration the Plaintiff would accept of* 12*l. in Discharge of all Reckonings and Accounts betwixt the Plaintiff and T. E. and would seal and deliver a General Acquittance to the Use of the said T. E. as should be requir'd, the Defendant promised to procure T. E. when he return'd to N. to seal and deliver a General Acquittance to the Plaintiff*, and *alleges that he accepted of the* 12*l. and seal'd and deliver'd a General Acquittance to J. N. to the Use of T. E. and that T. E. return'd to N.* & licet sæpius requisitus, the Defendant had not procured T. E. to make the General Acquittance. It was moved in Arrest, that alleging the Delivery of a General Acquittance *without shewing any*, so as it may appear to the Court to be sufficient, was not good, and so the Consideration not sufficiently alleg'd to be perform'd; and also because it is said he deliver'd to *J. N.* the Acquittance to the Use of T. E. who *is a Stranger*, and perhaps will not deliver to T. E. and for these Reasons Crooke J. held the Declaration not good; but the other Justices e contra, and adjudg'd for the Plaintiff, it being after Verdict upon Non-Assumpsit, wherein he denied the Promise, but not the Performance of the Consideration. But Ld. Hobart said, if he had *demurr'd because he did not shew the Acquittance*, perhaps it might have been otherwise. Cro. C. 19. pl. 12. Mich. 1 Car. C. B. Farrer v. English. Win. 73. S. C. but S. P. does not appear.

27. Case, for that he was possess'd of such Goods in London, and that *in Consideration of* 2*s.* the *Defendant at London promised, that if the Plaintiff would deliver the Goods to him to carry them aboard such a Ship* &c. *and averr'd that he did deliver the Goods* to the Defendant, but that he had not carried them aboard; but did *not shew when or where he deliver'd the Goods* to the Defendant, but said only Deliberavit. Per Jones J. it is only an Inducement to the Promise, and ought not to be shew'd so precisely. Godb. 404. pl. 484. Pasch. 3 Car. B. R. Mole v. Carter.

28. Assumpsit, for that there *being a Controversy concerning Right of Common in a certain Place there inclosed by P.* and *who brought an Action of Trespass against H. one of the Tenants claiming Common, for entring the said Close*, the *Defendant, in Consideration of a Jugg of Beer, and that he would defend the said Suit in Maintenance of the Title to the Common, promised to pay* &c. *and shew'd that he pleaded Not Guilty to that Action* of Trespass, *and that the Jury found for him.* The Defendant pleaded that the now Plaintiff non defendit sectam, in Maintenance of the Common, which was found against him. It was moved for the Defendant, in Arrest of Judgment, that he *ought to have pleaded such a Plea by which the Title of the Common might have come in Question*; but by his pleading Not Guilty he had disclaim'd the Matter of the Common; and of that Opinion were the Court; but adjornatur. Het. 4. Pasch. 3 Car. C. B. Humbleton v. Buck. Hutt. 89. Trin. 3 Car. S. C. The Court gave Judgment for the Plaintiff; and Richardson Ch. J. who at first doubted, now curr'd, and said that he was fully satisfied.—Litt. Rep. 38. Hamblestone's Case, S. C. All the Court held that the Plaintiff had well perform'd the Consideration, *the Words not being general but particular, that he shall maintain the Title against P.* For the Promise was after the Action brought, and the Plaintiff [Defendant] is not to prescribe what he shall plead, but he shall defend the Suit. Then P. not being Owner of the Soil, as appears by the Evidence in B. R. but the King, *he cannot plead better than Not Guilty; because a Special Justification for the Common would admit P. as Owner of the Soil*; and so if his Pretence of Common should fail, he should be punish'd for a Tres-

pass where he ought not, P. being an Intruder upon the King; besides the Jury have found that it was in Maintenance of the Title of Common expressly; and Judgment was enter'd for the Plaintiff.

39. In Case the Plaintiff *declares that as he was a doing certain Business for the Defendant, the Defendant said to him, Do it, and I will repay you whatsoever you lay out.* And *shews that he had expended 4 l. but* does *not shew particularly circa quid*; And for that Cause it was held naught. Het. 122. Mich. 4 Car. C. B. Hutchinson v. Chester.

30. The Defendant did *promise that he would make such a Conveyance of certain Lands*, and *pleaded that he had made it, but did not shew* the Place *where it was made*; And the Court was clear of Opinion that he need not, for it shall be *intended upon the Land.* And so in Case of Performance of Covenants, it is not needful to shew the Place where &c. Mar. 22. pl. 51. Pasch. 13 Car. Vaughan v. Vaughan.

31. In Case on a Promise made *by C. to pay a Debt owing by J. S. if he would forbear to sue J. S. the Plaintiff averr'd Forbearance hitherto*; Exception was taken that he had *not alleged How long* he had forborn, so as it might appear to the Court, whether he had forborn a convenient time or not. But adjudg'd that the Consideration was good, and the Averment sufficient; for that it appears upon Record How long the Forbearance was, and therefore no Particular Averment necessary. Hardr. 5. pl. 5. Trin. 1655. in the Exchequer, Barnehurst v. Cobbot.

32. Assumpsit for that the Defendant, *in Consideration the Plaintiff would deliver certain Goods to the Defendants Son such as he should desire, promised to pay for them*, and *avers that he deliver'd certain Goods to the Son* &c. but did *not say that they were such Goods as the Son desired*; But adjudg'd that the Acceptance was an actual Delire, and that is more than a verbal one. Sty. 163. Mich. 1649. B. R. Johnson v. Abington.

33. Plaintiff counted that whereas he *at the Instance and Request of the Defendant had taken Pains to reconcile Differences betwixt the Defendant and J. S. and others, the Defendant promised to pay him* 100 *l.* at a certain Day. It was moved in Arrest of Judgment that he did *not shew what Pains* he had taken, and so it cannot be known whether his Pains were sufficient to ground the Promise upon. And further, that he does *not shew who those others were besides J. S.* whom he took Pains to reconcile Differences between. But these Exceptions were over-ruled without speaking to. Sty. 465. Mich. 1655. B. R. Hardress v. Prowd.

34. In Action upon the Case *in Consideration the Plaintiff would forbear* 100 *l. due by the Testator by* 12 *Months next following, the Defendant would pay* &c. The Plaintiff *avers that he did forbear a Tempore Assumptionis* 12 *Months*, which is well; Contra if it had been *usque* 12 *Months.* Judgment for the Plaintiff after Verdict. 1 Keb. 574. pl. 31. Mich. 15 Car. 2. B. R. Jackman v. Hatton.

35. Action upon the Case, that whereas the *Defendant's Father was bound to the Plaintiff in several Bonds, and he intended to sue the Defendant as Son and Heir*; he *in Consideration the Plaintiff would forbear to sue, and deliver those Bonds, the Defendant promised to pay.* It was moved in Arrest of Judgment, that the whole Consideration being * Executory, and in Nature of Condition Precedent, it is *not sufficient to say he did forbear and was ready to deliver up the Bonds* only, but that he did deliver them actually, or offer'd so to do, and the Defendant refused; which by Keeling, J. is ill, and not the whole that is in his Power to do, which the Court agreed. Judgment staid. 1 Keb. 872. pl. 21. Pasch. 17 Car. 2. B. R. Crewe v. Slowly.

* The *Plaintiff promised to build a House*, and the *Defendant promised to pay him* 80 *l. for his Labour*; Hale Ch. J. and Rainsford J. held that the Plaintiff *must aver that he had built the House or was hinder'd by the Defendant*, for in this Case the Word *pro* makes the Condition precedent; but Twisden J. contra. But adjornatur, and afterwards being moved again and Twisden J. retaining his former Opinion, the Court gave Judgment for the Plaintiff, by reason that Hale Ch. J and the other Justices then held that the Plaintiff having *declared that Paratus fuit & obtulit ad Performandum* &c was sufficient Averment

Averment after Verdict. 2 Saund. 350. Trin. 23 Car. 2. Peters v. Opie.——2 Lev. 23. Opy v. Peters S. C. adjudg'd accordingly for the Plaintiff per tot. Cur. it being after Verdict.——Vent. 1--. S. C. adjornatur.——Ibid. 214. S. C. adjudg'd accordingly by Reaſon of the Verdict.——2 Keb 811. pl. 12. S. C. adjornatur.——Ibid. 837. pl. 69. S. C.——3 Keb. 45. pl. 20. S. C. but no Judgment.——4 Mod. 189 cites S. C.

Aſſumpſit for that *in Conſideration he would uſe his Skill and Pains, and provide Medicines for and cure J. S. of the Phtiſick, the Defendant promiſed to pay what he deſerved*, and *ſaid another Promiſe at the ſame time, in Conſideration as aforeſaid, but ſomewhat varying from the firſt*, and *averr'd that he had beſtow'd his Pains and cured J. S. accordingly.* It was moved in Arreſt of Judgment, becauſe the Plaintiff had *made no Averment of the Cure upon the firſt Promiſe*, and entire Damages being given, it was ill for the whole. But the Court held; that ſince he had averr'd it on the ſecond Promiſe, ſo that it *appear'd on the Record that the Cure was done*, it aided the Omiſſion of it in the firſt, eſpecially after a Verdict. Vent. 44. Mich. 21 Car. 2. B. R. Lee v. Edwards.——Mod. 14. pl. 38. S. C. adjudg'd Niſi &c. but Twiſden J. ſaid, *if it had reſted on the firſt Promiſe it had been naught*, but now it lies on the whole Record, whether he had cured her or not——Sid. 428. pl. 15. S. C. and held good after Verdict, eſpecially in this Caſe; becauſe both the Promiſes were made on the ſame Day; But by Twiſden J. tho' the Promiſes had been ſuppoſed to be on ſeveral Days yet it would be aided by ſuch General Verdict.——Lev. 280. S. C. adjudg'd for the Plaintiff; for it ſhall be intended after Verdict, that it is the ſame Perſon, the ſame Malady, and the ſame Cure; And it is but the ſame Cauſe of Action laid ſeveral Ways, as is uſual in Aſſumpſits.——2 Keb. 559. pl. 55. S. C. adjornatur.——Ibid. 566. pl. 71. adjudg'd for the Plaintiff.

36. Where an Aſſumpſit is brought *on a Promiſe of Marriage, a Tender muſt be averr'd.* 2 Keb. 283. pl. 52. Mich. 19 Car. 2. B. R. Kingman v. Grenvill.

37. *A. was indebted to C. the Plaintiff, and being about to ſell Land to pay the Debt, B. the Defendant, in Conſideration that C. would forbear to ſue A. till he had ſold the Land, promiſed to pay.* The Plaintiff *averr'd that A. had ſold, but not that he did forbear*; And the Court held it ill; and thereupon the Plaintiff's Counſel pray'd a Nil capiat per Billam for Expedition. And it was granted. 2 Keb. 618. pl. 3. and 639. pl. 65. Paſch. 22 Car. 2. B. R. Friend v. Curtis.

38. Aſſumpſit &c. for that *he being ſued in B. R. retained the Defendant to be his Attorney, who in Conſideration of 30 s. paid to him, and that the Plaintiff would enter into a Bond with ſufficient Penalty to ſave the Defendant harmleſs, promiſed to get Bail filed for him* &c. and averr'd that he did give the Defendant a Bond with a great and ſufficient Penalty &c. Upon Non Aſſumpſit the Plaintiff had a Verdict and Judgment. It was aſſign'd for Error, that the Plaintiff did *not ſet forth of what Penalty the Bond was, that it might appear to the Court to be ſufficient.* The Court held that the Exception would have been good upon a Demurrer, but being after Verdict, and ſince the Oxford Act of Jeofails, the Plaintiff had Judgment. Vent. 99. Mich. 22 Car. 2. B. R. Catterel v. Marſhall.

Lev. 29-- S. C. ſtates it that the Bond was to be with ſufficient Sureties. The Court held that it ſhould be ſhewn what the Penalty was, and of what Sufficiency the Sureties were, in caſe the Bond had been for Payment of Money; but that in this Caſe it being to ſave againſt uncertain Damages and Coſts of Suit, ſo that the Court cannot judge of the Sufficiency, he need not ſhew it in the Declaration, but it ought to come upon the Evidence on Non Aſſumpſit; and the Court which tries the Cauſe ſhall judge of the Sufficiency of the Penalty and Sureties; and therefore affirm'd the Judgment.——Mod. 70. pl. 23. S. C. and Judgment affirm'd, it being after a Verdict. 2 Keb. 692. pl. 28. S. C. and Judgment affirm'd.

39. The Defendant was bound in an Obligation for Payment of Moneys, and Part thereof being ſaid not to be paid, the Defendant promiſed that *if he did not make it appear before J. S. that this Part was paid, he would pay it.* The Defendant pleaded that he made it appear to J. S. that the Part was paid. The Plaintiff demurr'd, and had Judgment in C. B. becauſe he did *not ſhew How he made it appear*; and in Error the Judgment was affirm'd in B. R. for the ſame Reaſon. 2 Lev. 125. Hill. 26 & 27 Car. 2. B. R. Wilſon v. Done.

Freem. Rep. 114. pl. 136. Wilſon v. Dove, S. C. adjudg'd in C. B. by 3 Juſt. but Atkins e contra; and Vaughan ſaid that if he had pleaded that he made it appear to J. S. and that he was ſatisfied with it, it might have been well enough.——3 Keb. 183. pl. 26. 293. pl. 8; 424. pl. 22. S. C.

40. Caſe for that the Defendant in Conſideration the Plaintiff would *forbear to ſue* him promiſed to pay &c. then he *avers that he did extunc totally*

A like Caſe was this Term,

where the Conſideration was as before, and the *Averment* was *that he forbore 7 Months*; and being moved in Arreſt of Judgment by Serjeant Baldwyn, becauſe it is not ſaid *hucuſque*, which implies that after the 7 Months he did forbear, it was notwithſtanding held good, it *being a reaſonable Time*; and the rather becauſe if the Action had been brought within the 7 Months, and the Plaintiff had averr'd that hucuſque he forbore, it had been good enough. Quære. 2 Mod. 24. Paſch. 27 Car. 2. C. B. in Edwards and Roberts's Caſe.

tally forbear, but did *not ſay hucuſque*. Sed per tot. Cur. it ſhall be intended a total Forbearance. 2 Mod. 24. Paſch. 27 Car. C. B. Edwards v. Robarts.

41. In Aſſumpſit *to ſurrender Copyhold Lands*, Exception was taken becauſe it was *not averr'd that the Plaintiff ſurrender'd them according to the Cuſtom of the Manor, nor ſhew'd the Surrender itſelf, that the Court might judge of the Validity thereof*, but becauſe it *was ſaid a Surrender according to the Agreement*, and Verdict on Non Aſſumpſit it is well enough. 3 Keb. 625. pl. 7. Paſch. 28 Car. 2. B. R. Danwood v. Godſcall.

42. Aſſumpſit *in Conſideration the Plaintiff would conſent and not hinder the Defendant to marry ſuch a Woman, he promiſed to pay the Plaintiff* 20 *l.* Upon a Demurrer, the Defendant had Judgment becauſe the Plaintiff did *not ſhew where or in what Place* he did conſent; for it is an Affirmative as well as a Negative, viz. to conſent and not to hinder. 2 Lev. 227. Trin. 30 Car. 2. Chapman v. Fothergile.

2 Show. 95. pl. 9. Kirby v. Towerſon, S. C. and the Queſtion was upon the Word (Poterat) it being uncertain; but becauſe he had laid a particular Act of Perſuaſion, it was held good, being after Verdict; and Judgment for the Plaintiff.——Mo. 595. pl. 808. Paſch. 35 Eliz. S. P. agreed to be *good enough in* Action on the *Caſe*, which is only Matter of the Conſideration which is not traverſable. *But otherwiſe* it is *in the Condition of an Obligation or Covenant*, where one binds himſelf to do his Furtherance, he ſhall there ſhew particularly How he had done his Furtherance.

43. Aſſumpſit to *pay* 20 *l. after ſuch a Marriage* had *between the Plaintiff's Nephew and the Defendant's Niece, in Conſideration that the Plaintiff, at the ſpecial Inſtance and Requeſt of the Defendant, would endeavour and labour to perſuade the Nephew to marry the Niece, did promiſe to pay* &c. *and averr'd that he Omnibus modis quibus poterat conatus fuit* &c. but did *not allege* in particular *How and in what Manner* he did his Endeavour &c. The whole Court ſeem'd to agree that the Declaration is good, but perſuaded the Plaintiff to go to a new Trial, becauſe the Damages given being 40 l. were too great for ſo ſmall a Matter. Raym. 400. Trin. 32 Car. 2. B. R. Aglionby v. Towerſon.

44. The Count was, that in Conſideration the *Plaintiff would deliver the Defendant's Cattle out of Pound*, he promis'd to pay him or ſave him harmleſs; and averr'd that *pro deliberatione inde an Action was brought againſt him, and a Recovery*, but did *not expreſsly aver that he had delivered the Cattle*. The Court held this not ſufficient, tho' after a Verdict; for it was the ſubſtantial Part and Ground of the Action. And Judgment was ſtay'd. 2 Show. 329. pl. 338. Mich. 35 Car. 2. B. R. Well v. Thompſon.

Show. 50. Jackſon v. Miles, S. C. adjudged for the Defendant.

45. Aſſumpſit, for that *in Conſideration the Plaintiff would deliver to the Defendant* &c. *he promiſed to pay* &c. and *averr'd that he did deliver* &c. but did *not ſay where*. And upon a Demurrer to the Declaration it was held ill, becauſe this being an executory Conſideration, it is traverſable. 1 Salk. 22. pl. 1. 1 W. & M. in C. B. Sexton v. Miles.

46. The Count was, that the Defendant, in Conſideration the Plaintiff, at the ſpecial Inſtance of the Defendant, would *forbear to arreſt his Son, aſſumed to pay him ſo much as the Son ſhould be indebted to the Plaintiff upon the Ballance of the Account to be ſtated between the Son and the Plaintiff*. The Plaintiff *averr'd that an Account was ſtated of all Debts owing by the Defendant's Son to the Plaintiff*; and that upon that Account the Son was found indebted to the Plaintiff in 20 l. and that he forbore to arreſt &c. It was objected that the Averment is only of an Account of Debts due by the Son to the Plaintiff, whereas if an Account had been ſtated of all Debts due on both Sides, the Plaintiff might have been found Debtor to the

the Son; and so the Plaintiff had not intitled himself to the Action. But Per Cur. it being after Verdict, they will not intend any thing due from the Son to the Plaintiff. And Judgment for the Plaintiff. Ld. Raym. Rep. 357. Mich. 10 W. 3. Waters v. Glassop.

47. Assumpsit, for that in Consideration the Defendant *would receive A. B. and C. into his House ut Hospites, and find them Meat, Drink, and all Necessaries, he promised to pay the Plaintiff as much as he deserved*; but did *not allege that he received them ut Hospites*, which is a special Receiving. It was objected that it ought to be precisely alleged, and that an exact Performance was necessary. But the Court held it sufficient; and if they had been received ut Hospites, it ought to be shewed by the Defendant, with a Traverse of their being received as such. And finding them Meat and Drink shall be intended a Guesting them till the contrary appears. 1 Salk. 25. pl. 10. Pasch. 1 Ann. B. R. Gould v. Johnson. 7 Mod. 143. Booth v. Johnson, S. C. accordingly, and so affirm'd a Judgment in C. B.

48. Where one Thing is to be the Consideration of the other, tho' there are mutual Promises, Performance must be *averr'd*; Per Holt Ch. J. 1 Salk. 112. pl. 1. Trin. 2 Ann. Colonel v. Briggs.

49. Plaintiff declared, that *in Consideration he, at the Instance of the Defendant, would buy for him tanta Pruna quanta in ea parte posset, and bring them to Billingsgate-Wharf, he promised to pay 8s. per Bushel; and shews that he bought* such a Quantity, *and brought them to the Wharf ready to be delivered to the Defendant, and tender'd them; and that the Defendant did not receive them.* After a Judgment for the Plaintiff in C. B. it was assign'd for Error that the Plaintiff did *not aver that the Quantity bought was all he had or could have bought.* But adjudged that he need not; for Prunes are *Bona peritura*, and to be sold immediately; and it was not their Intention that the Plaintiff should stay till he got together all he might have bought; besides, this is proper to be insisted on at the Trial; and Judgment affirm'd, especially it being after Verdict. 6 Mod. 302. Mich. 3 Ann. B. R. Scrimshaw v. Westly.

(Z. 9) Assumpsit. Declaration. Averment of Performance of the Consideration, where the Promises are Mutual.

1. IN Assumpsit, *if the Consideration be executory*, the *Declaration ought to contain the Time and Place where it was made, and* after it ought to be *averr'd in Facto, when it was perform'd or executed* accordingly; *But* if it be *by Way of a reciprocal Agreement*, then the Plaintiff may count that in Consideration that he promised to do a Thing for the Defendant, the Defendant hath promised to do another Thing for him; and there the *Declaration need not contain Time or Place* for the Consideration, or otherwise that it is performed and executed. But if, in the first Case, *where it is executory*, this is also [*there is*] *an Averment that it is executed*, there *if the Defendant pleads Non Assumpsit generally*, and does not plead the special Matter, *he cannot after take Exception* to that Count *for the Default aforesaid*, where he pleads specially to it. Agreed by all the Justices. 2 Brownl. 137. Mich. 9 Jac. C. B. Holcroft v. French.

2. Assumpsit, declaring that *in Consideration N. promised to deliver the Defendant* to his own Use *a Cow*, the *Defendant promised to deliver him 50s.* Adjudged for the Plaintiff in both Courts, that the Plaintiff need not aver the Delivery of the Cow, because it is Promise for Promise. Jenk. 296. pl. 47. S. C. says, the Writ ought to aver the

mutual Aſſumpſit.—Holt Ch. J.

Note here the Promiſes *muſt be at one Inſtant*; for elſe they will be both Nuda Pacta. Hob. 88. pl. 117. Hill. 12 Jac. Nichols v. Raynbred. ſaid he agreed this Caſe to be good Law; for there is a *poſitive Agreement* that one ſhall deliver a Cow to the other, and that the other ſhall give him ſo much Money; and therefore the Action lies for either Side, without Performance of his Promiſe. 12 Mod. 460. Paſch. 13 W. 3. in the Caſe of Thorp v. Thorp.——*But if* by the Agreement A. were to *deliver B. a Cow, and that for it B. were to deliver him a Horſe*, there the Delivery of the Cow would be a Condition precedent, and therefore ought to be performed before A. can bring his Action; and upon this Diverſity the Books are reconcileable; Per Holt Ch. J. 12 Mod. 460. in the Caſe of Thorp v. Thorp.

An Agreement was, that the Defendant ſhould pay ſo much Money 6 Months after the Bargain, the Plaintiff transferring Stock. The Plaintiff, at the ſame Time, gave a Note to the Defendant to transfer the Stock, the Defendant paying &c. And per Holt Ch. J. if either Party would ſue upon this Agreement, the Plaintiff for not paying, or the Defendant for not transferring, the one muſt aver and prove a Tranſfer or a Tender, and the other a Payment or a Tender, for transferring in the firſt Bargain was a Condition precedent; and tho' there be mutual Promiſes, yet if one Thing be the Conſideration of the other, there a Performance is neceſſary to be averr'd, unleſs a certain Day be appointed for Performance. 1 Salk. 112. 113. pl. 1. Trin. 2 Ann. Callonell v. Briggs.

3. Caſe, for that *in Conſideration the Plaintiff promiſed to pay* 100 *Ducats to the Defendant to go ſuch a Voyage before ſuch a Day, the Defendant promiſed to repay ſo many if he did not go* accordingly, and alleg'd *he did not go*; and for not repaying them the Action is brought, but did *not aver that he delivered the Ducats to the Defendant*, which was moved in Arreſt of Judgment to be the Conſideration of the Action. But Coke Ch. J. held it good, it being a Promiſe of both Parts, and that if he had not performed it the Defendant might have brought his Action. And Judgment for the Plaintiff. Roll Rep. 336. pl. 50. Hill. 13 Jac. B. R. The Spaniſh Ambaſſador v. Gifford.

4. But if a Man, *in Conſideration of a future Thing to be done by the Plaintiff aſſumes to do a Thing*, there in Action upon the Caſe he *ought to aver the Performance* of it, becauſe he has no Remedy for it; Per Coke Ch. J. Roll Rep. 336. Hill. 13 Jac. B R. in pl. 50.

5. Aſſumpſit, for that it was mutually agreed *that the Plaintiff ſhould before Lady-day convey to the Defendant* &c. all her Intereſt and Title to the real Eſtate of P. deceaſed; *and that in Conſideration thereof the Defendant ſhould before that Time pay to the Plaintiff* 25 *l.* &c. and then lays mutual Promiſes, viz. that in *Conſideration the Defendant had promiſed to perform the Agreement on her Part, the Plaintiff promiſed to perform* &c. *on her Part*. It was moved in Arreſt of Judgment, that the Plaintiff ought to have averr'd the Performance of his Part firſt, becauſe the Defendant's Part of the Agreement was promiſed to be performed in Conſideration of the Plaintiff's performing his Part. But it was anſwered, that the Defendant's Agreement depends not on the Plaintiff's performing any Act, but is, that in Conſideration the Plaintiff agreed to one Thing the Defendant agreed to do another Thing; and the Conſideration is no other than the reciprocal Promiſe of the one to the other, which is executory, and upon which the Parties have mutual Remedies; and it is a general Rule that *where the Defendant hath a Remedy for the Conſideration of a Promiſe, the Conſideration* in ſuch Caſe *needs not to be averr'd to be perform'd*. And Judgment afterwards for the Plaintiff. Hardr. 102. Paſch. 1657. Gibbons v. Prewd.

So where Plaintiff agreed to ſurrender Copyhold Lands to the Defendant, and that Defendant ſhould pay &c. and *in Conſideration the Plaintiff had aſſumed to perform the Agreement on his Part, the Defendant agreed to perform the Agreement on his Part*, the whole Court held that here being mutual Promiſes there needed no Averment of Performance, and therefore the Plaintiff in this Caſe having made an ill Averment where no Averment was neceſſary, it ſhall not hurt. Lev. 293. Trin. 22 Car. 2. B. R. Beany v. Turner.——S. P. becauſe it is the Counter-promiſe and not the Performance that raiſes the Conſideration. Per Cur. 4 Mod. 186. Paſch. 5 W. & M. in B. R. in Caſe of Knight v. Keech.

6. Where there is a Promiſe againſt a Promiſe, there *needs no Averment*; As where *A. agrees to take B.'s Son Apprentice*, and *B. agrees to give A. a Bond to pay* 40 *l.* this is a Promiſe againſt a Promiſe; and in an Action for not giving the Bond, the Plaintiff need not aver his having taken the Son Apprentice. Lev. 87. 88. Mich. 14 Car. 2. B. R. Anon.

7. Aſſumpſit,

7. Aſſumpſit, *for that he had purchaſed a Leaſe of Lands then in Poſſeſſion of the Defendant, who, in Conſideration that the Plaintiff had promiſed to pay him* 60 *l. promiſed the Plaintiff to deliver up the Leaſe upon the Payment of the Money, and alſo to deliver him Poſſeſſion of the Lands* 1 *April next*, and aſſigned for Breach that he had not delivered him the Poſſeſſion of the Lands on the ſaid 1 April. It was moved in Arreſt of Judgment, that tho' here was a Promiſe againſt a Promiſe, yet the Leaſe being to be delivered upon Payment of the Money, the Plaintiff ought to aver that he had paid it; for otherwiſe he is not to have the Leaſe deliver'd to him. And to this the Court agreed, but held that the delivering Poſſeſſion of the Land, is another Thing, and diſtinct, and to be done at another Time; and herein is the Breach alleg'd, and this ought to be done whether the Money be paid or not; but if the Breach had been for not delivering the Leaſe, then the Objection had been good; but the Breach being for not delivering Poſſeſſion of the Land, Judgment was given for the Plaintiff. Lev. 70. Mich. 14 Car. 2. B. R. Oliver v. Evans.

Keb. 333. pl. 1. Oliver v. Yeams, S. C. Judgment ſtay'd. ——Ibid. 342. pl. 15. Oliver v Eams, S. C. adjudg'd for the Plaintiff.

8. Caſe for *that the Defendant's Son having got the Plaintiff's Daughter with Child*, of which ſhe was deliver'd; *and that the Plaintiff intending to proſecute the Son, it was agreed between the Plaintiff and Defendant, that if the Plaintiff would promiſe to keep the Child for* 6 *Years and not proſecute the Son, then the Defendant would pay to the Plaintiff* 10 *l.* And ſo lays mutual Promiſes, and *aver'd, that he had maintain'd the Child* &c. *but that the Defendant had not paid the* 10 *l.* Upon Demurrer, it was objected that the Plaintiff did *not aver that he promiſed to maintain the Child for* 6 *Years*, which is a Condition that precedes the whole Agreement; but per Cur. the mutual Promiſe of the Plaintiff mention'd to be in Conſideratione &c. was ſufficient Averment to this Purpoſe, without other Averment. And the Plaintiff had Judgment. Lutw. 222. Hill. 36 & 37 Car. 2. Stinton v. Yates.

9. Promiſe againſt Promiſe gives mutual Remedies, and *Averment of Performance is not neceſſary.* Comb. 256. Paſch. 6 W. 3. C. B. Mansfield v. Stephens. Ld. Raym. Rep. 664, 665. Paſch. 13 W. 3.

S. P. by Holt Ch. Juſtice.

10. If *A. promiſes to deliver a Horſe*, and *B. promiſes* 20 *l.* the 20 l. is to be paid for the Horſe, and *the Delivery of the Horſe is to be preſum'd* purſuant to the Promiſe; for tho' an Aſſumpſit is founded upon the Promiſe, yet an Act to be done purſuant to ſuch Promiſe is the Ground of the Aſſumption; per Holt Ch. J. Comyns's Rep. 99. Paſch. 13 W. 3. B. R. in Caſe of Thorpe v. Thorpe.

11. Where it is a Condition precedent, the *doing it muſt be averr'd* to maintain an Action; Per Holt Ch. J. and cites Jo. * 318. where the Executor of A. brought an Action of the Caſe againſt B. declaring that in Conſideration A. in his Life-time did *promiſe to aſſure* certain *Lands to B. before Michaelmas next, B. promiſed to pay* him ſo much Money *for the Land*; ſo the Aſſurance was to be made before Michaelmas, and the Money was to be paid for the Land, and conſequently after Michaelmas; for A. had Time till Michaelmas to make the Aſſurance, and becauſe the Aſſurance was to have been made firſt, and the Money by the Agreement to be paid *for the Land*, tho' there were mutual Promiſes, yet it was adjudg'd the Action would lie for the Money, without making the Aſſurance firſt; and ſaid this Caſe, as 'tis there reported, is intricate, and requires Conſideration to make this Conſtruction upon it, but upon Examination 'tis a full Authority in Point. 12 Mod. 462. Paſch. 13 W. 3. Per Holt in delivering the Opinion of the Court, in Caſe of Thorpe v. Thorpe.

So A. agrees *to deliver B. a Hawk at Midſummer, for which he agrees to pay him a Horſe at Michaelmas*, there if a Hawk be not deliver'd at Midſummer, there ſhall be no Horſe deliver'd at Michaelmas, nor any Remedy for it; per Holt Ch. J. 12 Mod. 462. cites D 76. pl. † 3 ——[† But it is miſ-printed, and ſhould be pl 30.]

* This

* This is miſ-printed, and ſhould be Jo. 327. 328. Dike v. Ricks. ——Cro. C. 335. 336. S. C.

(Z. 10) Aſſumpſit. Declaration. What is a good ſetting forth of the Promiſe.

1. THE Writ is good, *that the Defendant, for a certain Sum agreed upon between them, promiſed without expreſſing what Sum.* Br. Action ſur le Caſe, pl. 108. cites it as agreed 11 H. 6. 55.

So where the Plaintiff declares that *in Conſideration of one Thing*, the Defendant aſſumed &c. and the *Jury find that the Promiſe was in Conſideration of that Thing and another Thing*, he hath fail'd of his Aſſumpſit.

2. Aſſumpſit, for that the Defendant *promiſed to do ſuch a Thing*, and upon Non-Aſſumpſit pleaded, it was *found that he promiſed to do that Thing and another.* It was reſolved againſt the Plaintiff. Cro. E. 79. pl. 42. Mich. 29 & 30 Eliz. B. R. King v. Robinſon.

Cro. E. 147. pl. 10. S. C. by Wray, Shute, and Clench accordingly; but Gawdy e contra, and cited the 32 H. 8. Br. Verdict 90.

3. In Action on the Caſe the *Plaintiff ought not to vary from his Caſe*; ſo that in the Caſe of the *Promiſe grounded on 2 Conſiderations*, and Plaintiff *declares on one only*, he ſhall never have Judgment; per Wray J. Le. 299. pl. 410. Hill. 31 Eliz. B. R. in Caſe of Simms v. Weſtcoate.

But Wray ſaid that Book was no Law, and the contrary had been adjudg'd in this Court. And the principal Caſe was Aſſumpſit &c. *in Conſideration the Plaintiff would marry the Defendant's Daughter, he promiſed to give him 20 l. and to procure him all the Corn growing on ſuch Lands, and to provide the Wedding-Dinner.* The Defendant confeſſed the Promiſe of 20 l. to the Plaintiff, ſo as he would procure a Leaſe of certain Lands for his Daughter's Life; and traverſed the other Promiſes. The Jury *found the Promiſe of 20 l. but nothing elſe*; ſo that the Jury have not found the ſame Promiſe. And afterwards Judgment was given againſt the Plaintiff. Le. 299. pl. 410. Hill. 31 Eliz. B. R. Simms v. Weſtcot.

4 Aſſumpſit, in Conſideration of Forbearance for a certain Time, *to pay the Debt* (being 10 l.) *at 2 ſeveral Days.* It was moved in Arreſt of Judgment, that it is *not declar'd by what Portions* the 10 l. ſhould be paid. But per tot. Cur. the Plaintiff had Judgment to recover. 3 Le. 235. pl. 322. Mich. 32 Eliz. B. R. Brewin v. Mansfield.

Het. 120. S. C. [tho' taken in as of Mich. 4 Car. C. B.] adjornatur.

5. Aſſumpſit, for that the Plaintiff, 1 *Nov* 31 *Eliz. deliver'd to the Defendant 3 Cloaths.* The *Defendant, in Conſideration thereof, promiſed to pay 30 l. one Moicty within a Year, the other Moiety within the ſecond Year* following. It was *found the Delivery was 1 Aug.* 31 *Eliz.* This is not the Aſſumpſit upon which the Plaintiff declar'd, and therefore adjudg'd for the Defendant. Cro. E. 660. pl. 6. Paſch. 41 Eliz. B. R. Mundy v. Martin.

Noy 38. S. C. mentions the Count as of a Promiſe to pay &c. without ſaying to whom &c. And that Judgment was given for the Plaintiff.

6. The Count was that *ſuper ſe Aſſumpſit*, but *ſays not to whom, nor* ſays *& eidem querenti fideliter promiſit*; yet the Promiſe being *to enter into a Bond to the Teſtator*, it was held as ſufficient as if it had been ſuper ſe Aſſumpſit prædicto the Teſtator; for it is tantamount: And ſays it was ſo reſolved in the Caſe of * **Michal v. Johns.** But if it had been *ſuper ſe Aſſumpſit to enter into a Bond of 20 l.* and ſhews not to whom, there perhaps all had been uncertain and void. Cro. E. 847. 848. Mich. 43 & 44 Eliz. B. R. Coulſton v. Carr.

——* See (U) pl. 61.

Noy 38. S. C. but S. P. does not appear.

7. The Count was that Defendant *aſſumpſit, that the Arrears of a certain Annuity ſhould be paid Modo & Forma ſequenti, viz. That he with two others*

others (hould be oblig'd &c. It was held a ſufficient Aſſumpſit to be oblig'd, tho' it came after the Viz. But Fenner e contra. Cro. E. 847. 848. pl. 1. Mich. 43 & 44 Eliz. B. R. Coulſton v. Carr.

8. Aſſumpſit, for that *in Conſideration he would marry the Defendant's Neice, he promiſed to give with her in Marriage, as before he had agreed to give with her in Marriage to J. S.* and *alleg'd that the Defendant had agreed* (but did *not ſay with whom) to give J. S.* 1000 *l.* if he would marry his ſaid Neice. This being moved in Arreſt of Judgment, Fenner and Yelverton held the Exception good, and that it is material and traverſable; but Gawdy and Popham e contra clearly; for that ſuch Agreement is but collateral, and only an Inducement to the Promiſe, which is the principal Cauſe of the Action; and if the Defendant would have pleaded in this Caſe, that he did not agree to give J. S. 1000 l. then the Plaintiff by his Replication might have made the Agreement certain as to the Perſon with whom it was made. Yelv. 17. Mich. 44 & 45 Eliz. B. R. Alſop v. Sytwell.

If J. S. in Conſideration of 1000 l. *agrees to pay all the Debts of J. D.* and J. S. declares that he agreed to pay all J. D.'s Debts, and that in Conſideration thereof the Defendant *promiſed to give him* 1000 *l.* this is good, *without ſaying with whom the Agreement was made, or what Debts particularly he has paid*, yet the Payment of the Debts is Matter traverſable; for if the Defendant alleges any Debt in Special not paid, the Plaintiff by way of Replication may make it certain; per Gawdy and Popham. Yelv. 17. 18. Mich. 44 & 45 Eliz. B. R. in Caſe of Alſop v. Sytwell

9. Aſſumpſit &c. in Conſideration the Plaintiff would marry the Daughter of the Defendant *ſuper ſe Aſſumpſit*, and did *not ſay the Defendant ſuper ſe Aſſumpſit*; and this was objected in Arreſt of Judgment; but it was inſiſted that it muſt neceſſarily be intended that the Defendant promiſed, becauſe Queritur verſus &c. and he is there named. But all the Court held it to be ill; for a Declaration ought to contain the Subſtance, or otherwiſe 'tis not good; and no Matter of Subſtance ſhall be ſupplied by Intendment, nor ſhall the Verdict help it; wherefore it was adjudg'd Quod querens nihil Capiat per Billam. Cro. E. 913. pl. 1. Hill. 45 Eliz. B. R. Law v. Sanders.

Noy 50. S. C. This was moved in Arreſt of Judgment, and it was ſtaid.—— S. C. cited 2 Ld. Raym. Rep. 899. Trin. 2 Ann. and Powell J. ſaid that the Declaration in this Caſe was adjudg'd ill, becauſe *there were* 3 *Perſons mention'd in the Count*, and then Non conſtat which of the 2 beſides the Plaintiff made the Promiſe, and therefore it is uncertain —— 5 Mod. Arg. cites S. C. and ſays the Defendant's Daughter was the laſt of the 3 named, and the Words Super ſe Aſſumpſit immediately following might relate to her, which was the Reaſon of the Judgment

In *Quantum meruit for ſeveral Horſes ſent by the Plaintiff to the Defendant at his Requeſt*, the *Court was that Super ſe Aſſumpſit.* Exception was taken for *not ſaying who promiſed*; ſed non allocatur; for it *muſt be intended the Defendant* promiſed; and Judgment pro Plaintiff, the *Debt being created by Law*; *but if* it were *collateral*, the Promiſe to and by whom muſt be poſitively averr'd. 2 Keb. 715. pl. 97. Mich. 22 Car. 2. B. R. Symball v. Cook.—— S. C. cited Lutw. 238. by Powell J. as a Caſe in Point with the principal Caſe there, which was adjudg'd for the Plaintiff. Trin. 13 W. 3 Remington v Taylor.

Aſſumpſit &c. for that the Defendant being indebted to him in 20 l. for Goods ſold, in Conſideration thereof *ſuper ſe Aſſumpſit*, and did *not ſay that the Defendant promiſed.* After a Judgment by Default adjudg'd for the Plaintiff, becauſe there is nobody elſe upon the Record to promiſe but the Defendant; but if there had been two Defendants, it might have been uncertain to whom to apply the Promiſe. 1 Salk. 26. pl. 13. Trin. 2 Ann. B. R Shore v. Brown.——3 Salk 17. S C. per Cur. accordingly. ——2 Ld. Raym. 899. Sheer v. Brown, S. C. and Judgment affirm'd by 5 Juſtices, abſente Holt.

10. In Aſſumpſit the Plaintiff counted of a Promiſe *to deliver* 20 *Fodders of Lead.* Exception was taken, becauſe it was *not ſaid to whom* the Lead ſhould be deliver'd. Sed non allocatur; for it ſhall be intended to be to him to whom the Promiſe was made, which was the Plaintiff. Cro. J. 287. pl. 3. Mich. 9 Jac. B. R. Somerſall v. Barnaby.

S. C. cited Arg. Hardr. 223. that if the Count does not expreſs to whom the Promiſe was made, it ſhall be intended to be to the Plaintiff.

11. Aſſumpſit, for that he *having ſold and deliver'd certain Wares to J. S. at the Requeſt of the Defendant, he promiſed that in Conſideration the Plaintiff would truſt the ſaid J. S. for the Wares, not exceeding* 100 *l. he*

would pay for the same *when required*; and the Plaintiff *alleg'd in Fact, that superinde fiduciam dedit to the said J. S. and deliver'd the Goods to him, which did not exceed* 100*l.* After Verdict for the Plaintiff it was objected, that the Words Fiduciam dedit superinde might mean as well before as after the Promise made, and by Intendment may be taken either way; besides he ought to have alleg'd that J. S. who was the principal Creditor, had not paid for the Wares; for if he had, then this Action would not lie against the Defendant; but adjudg'd that the Word *Superinde must relate to the Promise*, and that *if J. S. had paid the Money the Defendant ought to have shew'd it*; per tot. Cur. adjudg'd for the Plaintiff. 2 Bulst. 74. Hill. 11 Jac. Crask v. Johnson.

Poph. 181. Sharp v. Rust, S. C. adjudg'd for the Plaintiff. Mich. 2 Car. B. R.

12. Plaintiff counted that *if the Defendant would deliver certain Wares to the Defendant's Daughter he would pay* for them, but did *not say to whom* he would pay. But the Court held that this shall be intended of Payment to the Plaintiff. Noy. 83. Sharp v. Rolt.

——Lat. 151. S. C. and the Court held it well enough.——Ibid. 272. Sharp's Case, S. C. adjudg'd accordingly.——Cro. C. 77. pl. 8. Trin. 3 Car. in the Exchequer-Chamber, Rolte v. Sharp, S. C. and Judgment affirm'd.

A. promised B. *to deliver so many Load of &c. at such a Place.* It was moved in Arrest of Judgment, that the Assumpsit was to deliver, but does *not say to whom.* But Walter Ch. B. held this Exception not good; for when one promises another to pay or deliver any Thing, and says not to whom, *the Law will intend it*; and he remember'd a Case in 36 Eliz. where one promised to deliver 10 Quarters of Peas at such a House, and did not say to whom, yet it was adjudg'd good; for there, and so Here, he is to deliver it at his Peril at such a Place, tho' none be there to receive it; and if no Place be, then to the Person, tho' it be not said to whom it shall be deliver'd, and the Delivery at the Place mention'd indemnifies him; besides in the principal Case the Declaration is, that they were to be deliver'd at such a Place to the Use of the Plaintiff, which makes it much the stronger. Litt. Rep. 85 Trin. 4 Car. in the Exchequer. Howard v. Approbert.

13. Assumpsit for that the Defendant *in Consideration of a Marriage* &c. *inter alia, promised to pay* so much; after a Verdict for the Plaintiff, the Judgment was stay'd, because the whole *Promise being intire*, it *must be wholly set forth.* All. 5. Hill. 22 Car. B. R. Powell v. Waterhouse.

14. Case for that the Defendant *assumed to pay the Plaintiff* 84*l. out of the Freight of a Ship.* It was moved in Arrest of Judgment, because the Plaintiff had *not averr'd that there was any Money due for the Freight* of the Ship; Per Roll Ch. J. it is Parcel of the Promise that the Money should be paid out of the Freight, and that it ought to have been avow'd; and likewise the Plaintiff ought to have laid a Demand made of the Money to be paid out of the Freight. Sty. 220. Trin. 1650. B. R. Chace v. Lovering.

15. It did *not appear* by the Declaration *to whom the Assumpsit was made*, but it was only said *super se Assumpsit*; and this being moved in Arrest of Judgment, the Court ruled a Nil capiat per Billam. Sty. 255. Hill. 1650. B. R. Coleman v. Blunden.

Raym. 123. Buck v. Angel S. C. Twisden J. thought the Declaration not good;

16. Assumpsit for that *in Consideration quod procuravit* [*procuraret*] *J. S. to surrender such an House the Defendant would pay him* 10*l when he should be required*, but did *not say super se Assumpsit to pay*; After a Verdict for the Plaintiff the Judgment was set aside for this Reason. Sid. 246. pl. 8. Pasch. 17 Car. 2. B. R. Buckler v. Angell.

but Keeling thought it only Matter of Form; but Judgment was stay'd until &c.—— Keb. S. S. pl. 30. S. C. adjudg'd per Curiam præter Keeling.——Lev. 164. S. C. and the Judgment stay'd; for here was no Promise, and therefore Non Assumpsit was no Issue.———S. C. cited and S. P. where the Count was of Goods sold and deliver'd, and Judgment reversed in Error. 2 Ld. Raym. Rep. 1516. Hill. 1 Geo. 2. B. R. Lea v. Welsh.

17. Indeb. Ass. in an Inferior Court alleged that Defendant was indebted to him for Goods sold, and being so indebted, did assume Infra Jurisdictionem Curiæ. Hale Ch. J. thought it good enough, for the *Indebitatus is but the Inducement to the Action but the Assumpsit is the Ground of*

of it; For this is not an Action of Debt but Action on the Case, and the alleging the Indebitatus is only to shew that it is not a Debt upon a Judgment, nor an Obligation, nor a Rent; so that if he had said Indebitatus for Goods generally, it had been good enough. Twisden and the Practicers, affirm'd the Practice for 10 Years to be otherwise; But Hale and Wilde, never knew it so for many more Years; And Hale took a Difference, that if he had said *Wares sold at such a Place* he *should have said Infra Jurisdictionem Curiæ*; but if no Place appear, and the *Assumpsit* be *alleged Infra Jurisdictionem Curiæ*, it is well enough. Advisare volunt. Freem. Rep. 104. pl. 112. Mich. 1673. B. R. Anon.

18. Assumpsit &c. for that the *Defendant being excommunicated at the Prosecution of the Plaintiffs (Church-Wardens) for not paying a Tax towards the Repair of the Church, and in Consideration that the Bishop at the Instance and Request of the said Defendant would absolve him, he promised to pay the Money to the Plaintiffs* &c. It was moved in Arrest of Judgment, that here was no Consideration on the Part of the Plaintiffs to raise this Promise; But Judgment was given for them; For it cannot be intended but that the Bishop absolved him at their Request, and would not have done it but on Account of the Promise to pay the Money to them. Vent. 297. Trin. 28 Car. 2. B. R. Curtis & al' v. Collingwood. 2 Lev. 119. Corny and Curtis v. Collingwood S. C. but states it of the *Excommunication of the Defendant's Mother* and that the Defendant promised, and Judgment for the Plaintiffs.——Freem. Rep. 284. pl. 328. S. C. Exception was taken because it was *not alleged that they were Church-wardens at the Time of the Promise* made, whereby it might appear that they had a Right to demand the Money, and so they may be as mere Strangers. But had it been in Consideration that the Plaintiffs consentirent or would not obstruct it, or that the Bishop at their Instance would absolve, it would have been well enough; Per Twisden; Sed nunc dubitaverunt; and adjornatur. Afterwards Judgment was given for the Plaintiff.

19. In Indeb. Ass. the Words *in Consideratione inde* were *left out*; and held well enough, for it being well alleged that he was indebted, the Law raises the Promise, and they could not but intend it to be in Consideration of that Debt. 2 Show. 180. pl. 178. Hill. 33 & 34 Car. 2. B. R. Tyler v. Bendlowe.

20. Assumpsit, *quod cum the Defendant was indebted to him in 5 l. for Money lent, and promised to pay; Cumque etiam at the Request of the Defendant the Plaintiff found Horse-Meat for J. S. super se Assumpsit*; and says *not that the Defendant super se Assumpsit*. It was assign'd for Error that J. S. might as well be the Person promising as the Defendant; and the Promise is the Gist of the Action; and an Incertainty in that cannot be cured by Intendment after Verdict. Sed per Cur. it being *said positively at first, that the Defendant super se Assumpsit*, and then Cumque etiam &c. the *same Nominative shall go to all the Promises*; and by Reason of the Word (etiam) it cannot be intended of a Promise by *J. S.* for he *had not promised before*. Judgment after Verdict affirm'd. 2 Salk. 663. pl. 4. Mich. 8 W. 3. B. R. Roe v. Gatehouse. 5 Mod. 305. Gatehouse v. Row, S. C. and the Plaintiff had Judgment, it being after Verdict.—Plaintiff declar'd upon a Special Agreement between him and the Defendant, that the Plaintiff should convey to him an House &c. and that the Defendant should pay the Plaintiff 135 l. Then he lays mutual Promises, Cumque etiam, in Consideration that he (the Plaintiff) had by Lease and Release convey'd eidem Josepho (the Defendant) the said House, super se Assumpsit to pay the Money &c. It was moved in Arrest of Judgment that the Declaration was ill, because the Plaintiff did not set forth that the Defendant super se Assumpsit; but adjudg'd for the Plaintiff by 3 Justices; contra Blencow, that those Words Cumque etiam might be construed Moreover, and conjoin the 2d Promise to the Person rightly named in the first Promise; besides this was after a Verdict, which cures Want of Form; per Treby Ch. J. Lutw. 233. Hill. 9 W. 3. Stanhope v. Butler.

21. Plaintiff *counted that* the Defendant *the 6th of May* 1695, *in Consideration that* the *Plaintiff had provided him Diet for* 120 *Weeks tunc præterit' promised to pay him* 7 *s. per Week, and* that the Defendant *postea*, viz. *the* 6*th of May* 1695, *in Consideration that the Plaintiff had found him Diet for* the Space of 120 *Weeks then past, promised* to pay the Plaintiff *tantum*

quantum

quantum mereret for the ſaid Weeks; and moved in Arreſt of Judgment that the Defendant is *twice charged for the ſame thing*, the 120 Weeks in the Quantum Meruit being not ſaid to be others from thoſe in the Special Promiſe, as it is uſually ſaid in thoſe Caſes. But the Court held that tho' (aliis) be generally ſaid, yet ſeeing it did *not appear they were the ſame* (for there is no preciſe Time laid when theſe 120 Weeks were) they will not intend them ſo as to deſtroy a Promiſe otherwiſe well laid; and therefore the Plaintiff had Judgment. 12 Mod. 157. Mich. 9 W. 3. Weſt v. Cole.

1 Salk. 24 pl. 8 but S. P. does not appear.

22. In Debt, one never lays a Promiſe but only the Debt; but in Aſſumpſit there is a Contract in Law to pay what you received to another's Uſe; and tho' a Promiſe be laid ever ſo expreſs, yet if you do not *ſhew the Cauſe* of the Promiſe it will not bear an Aſſumpſit, tho' you give ever ſo juſt a Debt in Evidence; becauſe it may be Debt by Specialty, or a Rent, whereof Aſſumpſit does not lie, if it be not for Forbearance of the Payment after it is due. So it will not be enough to ſay, that the Defendant being indebted to you in ſo much Money, he *promiſed to pay* you, even after Verdict. Per Holt Ch. J. 12 Mod. 511. Paſch. 13 W. 3. B. R. in Caſe of Palmer v. Stavely.

(Z. 11) Aſſumpſit. Declaration. What is good ſetting forth of the Promiſe in a Quantum Meruit. And in what Caſes a Quantum Meruit lies.

1. IN *Indeb. Aſſ. & Quantum Meruit*, there was *Judgment by Default*, and a Writ of Inquiry and entire Damages given. Upon a Writ of Error in B. R. it was objected that one of the Promiſes was ill; for it was in Conſideration that the Plaintiff would let the Defendant have Meat, Drink &c. he promiſed to pay Quantum rationabiliter *valerent*, when it ſhould be *(valebant)* at the Time of the Promiſe; but the Judgment was affirm'd. 3 Mod. 190. Hill. 3 Jac. 2. B. R. Bowyer v. Lenthall.

2. The Conſideration may create a Debt tho' that Debt be not reduced to a certain Sum, as where the Plaintiff *found Meat and Drink* for the Defendant *at his Requeſt*. 2 Vent. 282. Hill. 2 & 3 W. & M. in C. B. Webb v. Moore.

3. Quantum meruit lies for ſerving as a Commiſſioner on a *Commiſſion to examine Witneſſes*. 1 Salk. 330. pl. 1. Mich. 3 W. & M. in B. R. Stockhold v. Collington.

4. The *very taking up Goods* implies a Contract to pay for them what they are worth. Cumb. 426. Trin. 9 W. 3. B. R. in a Note in Caſe of Hayward v. Davenport.

5. *Curate* being removeable at the Will of the Parſon, can't preſcribe for a *Penſion*, but his Remedy muſt be by Quantum meruit. 2 Salk. 506. Hill. 10 W. 3. B. R. Birch v. Wood.

6. Quantum meruit, *for that at the Defendant's Requeſt he had done ſuch and ſuch Services for him, the Defendant promiſ'd*, in Conſideration thereof, *to pay him Quantum meruerunt*, as much as he ſhould deſerve. It was moved in Arreſt of Judgment, that the Conſideration being paſt, it ſhould have been *Quantum merebatur*, or Meritus fuiſſet, Holt Ch. J. ask'd, if the preſent Tenſe of the Potential or Conjunctive Mood be the ſame with that of the Indicative, as in the Caſe of Quod recuperet, in all Judgments, which, if tranſlated muſt be made (do recover) why ſhall not the Præter-imperfect Tenſe of both Moods be the ſame? And if this had been mere-

merebatur, you had allow'd it good. And the Merit is not paid when the Work is done, but continues till Satisfaction. And the Plaintiff had Judgment. 7 Mod. 106. Mich. 1 Ann. B. R. Clerk v. Yewdall.

7. Assumpsit, for that the Defendant, *in Consideration the Plaintiff would provide him Meat and Drink, he promis'd to pay as much as the Plaintiff Habere meruit.* It was mov'd in Arrest of Judgment that Meruit should have been *Meruerit.* But Judgment for the Plaintiff; for Per Cur. they must take the Words of the Declaration to be the very Words of the Promise; and then the Court ought not to pursue a grammatical Sense, which makes the Promise void, but to construe it so as to make the Parties mean somewhat. 2 Salk. 558. pl. 3. Hill. 4 Ann. Moverly v. Ley.

2 Ld. Raym. Rep. 1223. S. C. adjudged for the Plaintiff. The Reporter says, The Question seems to him to be, whether the Plaintiff ought not to have pursued the Intent and Meaning of the Promise in his Declaration.

8. In *Case* the Plaintiff declares, that the *Defendant being indebted* to the Plaintiff *in* 10 *l. for Horse-meat*, in Consideration thereof *promised to pay* to the Plaintiff *as much as he should deserve.* After Verdict for the Plaintiff, it was moved in Arrest of Judgment, *that a Sum certain could not be a Consideration for an Uncertainty.* Suppose the Jury had given 11 l. 10 s. that could never be a good Consideration for more. But Per Cur. 'tis well enough, and the Plaintiff has *Election* to bring his Action upon either. 11 Mod. 134. pl. 15. Trin. 6 Ann. B. R. Squire v. Yendon.

(Z. 12) Assumpsit. Breach. How to be assign'd of the Promise.

1. Assumpsit, for that he was *indebted to J. S. in* 40 *s. the Defendant, in Consideration that he had delivered* 40 *s. to him, did promise to* pay it, and *discharge him against J. S.* and alleges that he had not discharg'd him, but *suffered him to be sued for the* 40 *s. by the Executor of J. S.* but doth *not allege that J. S. was dead.* After Judgment for the Plaintiff this was assign'd for Error; but the Court held it to be well enough, for that the Plaintiff directly alleged that he had not discharged him, and the other Matter is but Circumstance; and the Judgment affirm'd. Cro. E. 98. pl. 3. Pasch. 30 Eliz. B. R. Coke v. Barrow.

2. Assumpsit, *in Consideration the Defendant retain'd the Plaintiff to go to Paris upon his Occasions, the Defendant promis'd to give him so much as would content him.* In Assumpsit the Plaintiff alleg'd that he went thither, and was content to take 25 l. which he requested the Defendant to pay, but he refused. It was holden by the Court that the Action did well lie, though the Plaintiff *shewed not Time nor Place when he gave Notice of his Content*; for the Place is not material nor issuable. And adjudg'd for the Plaintiff. Cro. E. 132. pl. 8. Pasch. 31 Eliz. B. R. Debavoy v. Hassal.

Le. 123. pl. 167. Dellaby v. Hassels, S. C. adjudg'd accordingly.

3. Assumpsit, for that *in Consideration he had paid to the Defendant* 40 *l. for the Debt of J. M. his Son, the Defendant promised to deliver him all the Bonds* &c. *wherein the Son stood bound to him.* It was moved in Arrest of Judgment, that the Plaintiff had *not averr'd that the Defendant had Bonds in which the Son was bound to him.* Gawdy J. said that he need not allege what the Deeds were, because he is not to recover the Bonds &c. but Damages for detaining them. And the Plaintiff had Judgment. Cro. Eliz. 133. pl. 11. Pasch. 31 Eliz. B. R. Musket v. Cole.

Le. 123. pl. 168. S. C. by Gawdy accordingly, but no Mention of Judgment.

4. Aſſumpſit, in Conſideration the *Plaintiff had ſued the Defendant, and were at Iſſue, the Defendant, in Conſideration he would ſurceaſe his Suit, promiſed* him to aſſign him ſuch a Leaſe, and *to pay him his Coſts of Suit*; and alleg'd he had ſurceas'd his Suit, but that the Defendant had not aſſign'd his Leaſe, nor paid his Coſts of Suit. It was mov'd in Arreſt of Judgment, becauſe he did *not allege what Coſts he expended.* The Court held it not good for that Cauſe, if the Defendant had demurr'd upon it, but taking Iſſue upon it, he ſhall not now take Advantage of it. And ſo the Plaintiff had Judgment. Cro. E. 276. pl. 4. Paſch. 34 Eliz. B. R. Fox v. Goodſon.

Cro. E. 869. in pl. 2. cites S. C. as adjudg'd Trin. 32 Eliz. C. B.—— Aſſumpſit *for that he was bound in Obligation of* 300 *l. the Defendant promiſed to ſave him harmleſs; and although he was impleaded upon that Bond, and a Recovery had by due Courſe of Law, the Defendant had not ſaved him harmleſs.* The Defendant aſſigned for Error, becauſe it is *not alleged How he impleaded him, and recover'd*, but generally Implacitaſſet & recuperaſſet. Sed non allocatur, for that is ſufficient, *without ſhewing the Record.* Cro. J. 10. pl. 14. Paſch. 1 Jac. B. R. Foſter v. Clement.

5. Aſſumpſit, *in Conſideration that the Plaintiff would ſurceaſe his Suit* againſt the Defendant in Chancery, *he promiſed to ſave the Plaintiff harmleſs from all Actions* which might be brought againſt him, for or *concerning a Leaſe aſſigned by him to the Plaintiff*; and averr'd that he did forbear to proceed, and that a Stranger had brought an Action on the Caſe againſt him in B. R. ratione Dimiſſionis præd. and that the Defendant had not ſaved him harmleſs. After Verdict and Judgment for the Plaintiff, it was aſſign'd for Error becauſe the Plaintiff did *not ſet forth certainly what Action was brought againſt him, or that it was brought for a Matter in Eſſe at the Time of the Promiſe made.* And for theſe Reaſons the Judgment was revers'd. Moor 705. pl. 985. Morſe v. Roſſe.

6. Aſſumpſit, for that the *Defendant had diſtrained 6 Oxen of H. the Plaintiff for a Quit-rent due to the Bailiffs of B. The Defendant, in Conſideration that H. had paid the Money for the Redemption of the Cattle, aſſumed upon Requeſt, to ſhew to H. or to ſuch other Perſon or Perſons as he ſhould name, a ſufficient Record to charge the ſaid Lands with the ſaid Quit-rent*; and *alleges that he appointed B. to ſee the ſaid Record, and requeſted the Defendant to ſhew it to B. but that he had not ſhewed to the ſaid B. any ſufficient Record to charge his Lands.* It was moved in Arreſt of Judgment, that the Sufficiency of the ſaid Record will by this Means be referr'd to the Lay-Gents, whereas the Plaintiff might have pleaded that he did not ſhew any Record, and ſo the Jury might have inquired of it. Sed non allocatur; for tho' the Plaintiff might have laid the Breach generally, as that he ſhew'd not any Record, yet as it is laid it is good enough, it being moſt proper to lay the Breach as the Promiſe was. Yelv. 38. Mich. 1 Jac. Heyford v. Reeve.

But if the Communication had been as before, and then he had declar'd upon a Promiſe to deliver 15 Todd generally, *without ſaying* (*præd'*) and the Promiſe is found, the Plaintiff ſhall have Judgment; for *the Colloquium might be conditional, and the Promiſe abſolute*; per Popham. Yelv. 76 per Cur. in S. C.

7. Aſſumpſit, for that the *Defendant was poſſeſs'd of* 17 *Todd of Wool, and there was a Colloquium between them for* 15 *Todd of the ſaid* 17 *Todd, to be choſen by the Plaintiff* &c. The *Defendant, in Conſideration of* 6*l. to be paid at ſuch a Day &c. promiſed to deliver to the Plaintiff prædict.* 15 *Todd* of Wool; *and avers, that altho' he was ready to pay &c. yet the Defendant had not delivered* the ſaid 15 Todd &c. It was mov'd in Arreſt of Judgment, becauſe he doth *not ſhew that the Plaintiff had made any Election of the* 15 *Todd*, which is quaſi a Condition precedent, and an Act firſt to be performed by the Plaintiff, before the Defendant was obliged by his Promiſe to do any Thing; Quod fuit conceſſum per tot. Cur. And by Popham this is much inforced by the Word (*præd.*) which *cannot refer to any other Thing but to the Communication, by which the Plaintiff of his own ſhewing ought to make an Election*; and ſo it appears to be his own Default. Adjudg'd againſt the Plaintiff. Yelv. 76. Mich. 3 Jac. B. R. Rayney v. Alexander.

So

So if it appears the Defendant hath sold one of the Todds before Election, this had destroy'd the Election of the Plaintiff, and made the Promise absolute. *So if the Defendant would not suffer the Plaintiff to see the Wool*, that he might make his Election; for this will excuse the Act on the Part of the Plaintiff to be perform'd, and have been a Default in the Defendant; per Popham. Yelv. 76. Mich. 3 Jac. in Case of Raynay v. Alexander.

8. Assumpsit, for that the Defendant, *in Consideration the Plaintiff would marry his Cousin, promised he would give him* 100 *l.* and said he married her such a Day and Place. It was moved in Arrest of Judgment, because it was *not shewn that he had given the Defendant Notice of the Marriage*. But a Precedent in Point between **Morley and Hodges** in the Exchequer Chamber being shewn, where Judgment was affirm'd, the Court resolved it was good enough; for it is a necessary Intendment, that when after the Marriage he requested the Money, that Notice was given of the Marriage. Cro. J. 228. pl. 4. Mich. 7 Jac. B. R. Bradley v. Toder. Yelv. 168. Brenley v. Todd S. C. adjudg'd for the Plaintiff. —— Noy. 135. Brumley v. Todd S. C. adjudg'd for the Plaintiff.

9. Assumpsit, for that the *Defendant being indebted to the Plaintiff in* 40 *l. for Wares &c. promised to pay ante inceptionem proximi itineris of the Plaintiff to London*; and *alleged that on the* 23*d Day of February following incepit iter suum to London*, but did *not say Proximum*, for which Cause it was held ill; for the Duty grew upon the Commencement of his next Journey. And adjudged for the Defendant. Cro. J. 245. pl. 3. Trin. 8 Jac. B. R. Rook v. Rook. Yelv. 175. Rock v. Rock, S. C. adjudg'd accordingly.—S. C. cited 7 Mod. 145. by Holt Ch. J. who said it was against all Reason; for if it was the next, then by their own Confession the Action lay; but if it were not the next, then there was another Journey before, and then too the Action was well brought.——S. C. cited, and denied to be Law. 2 Ld Raym. Rep. 839. Mich. 1 Ann.

10. Assumpsit, *for that the Plaintiff suffer'd the Defendant to occupy a House, the Defendant promised to save the Plaintiff harmless, and also to pay* 2 *d. for every Farthing-worth of Damage the Plaintiff shall sustain* &c. *and declar'd that by Negligence of the Defendant the House was burnt down, and that he had not saved him harmless, nor paid the* 2 *d. for every Farthing-worth of Loss* &c. It was mov'd in Arrest of Judgment, because he did *not shew how many Farthings Damage he sustained*, and therefore Nil capiat per Billam was entred, Per tot. Cur. for the Court cannot intend but that the Jury have given Damages as well for the not saving harmless as for the Farthing-worths of the Loss. Yelv. 220. Pasch. 10 Jac. B. R. Coveney v. Wooden. 2 Bulst. 37. S. C. adjudg'd for the Plaintiff; Per tot. Cur. clearly. For by this Omission the Declaration is not good.

11. Plaintiff counted that *Defendant entered into a Statute not to assign over his Lease, which being forfeited by his assigning the Lease, he promised to pay the Plaintiff* 20 *l. in Consideration he would forbear to sue him*. It was mov'd that here was no Consideration, because it does *not appear that the Statute was forfeited, it not being shewn by what Conveyance he had assign'd*, but only in general that he had assign'd over without shewing How. But it was held good, and Judgment for the Plaintiff. 2 Bulst. 262. Mich. 12 Jac. Simpson v. Powell.

12. The Count was, that the Defendant being *indebted* to him *in* 100 *l.* in Consideration of Forbearance till such a Day, *promis'd to pay* 50 *l. at one Day, and* 50 *l. at another*, and *averr'd that he had not paid the* 100 *l. Modo & Forma*. It was mov'd in Arrest of Judgment, because he had *not averr'd the Non-payment of each* 50 *l. at the several Days severally*. But Coke Ch. J. thought it well enough after Verdict. And Judgment for the Plaintiff. Roll Rep. 404. pl. 32. Trin. 14 Jac. B. R. Pete v. Tongue.

12. Assumpsit, for that *in Consideration of a Sum of Money paid to the Defendant, he promised to take the Plaintiff's Son Apprentice for* 7 *Years, and to find him Meat, Drink, and Cloaths* &c. durante termino prædicto; and assigns the Breach in not finding him Meat &c. durante termino Apprenticii; but did *not aver* in his Declaration *that he put him Apprentice, or that the Defendant accepted him as Apprentice*; and this being moved in Arrest 3 Bulst. 221. Talkern v. Wright, S. C. adjudg'd for the Defendant clearly, tho' at first

they inclin'd to be of Opinion for the Plaintiff.

Arreſt of Judgment, the Declaration was held ill, and Judgment for the Defendant. Cro. J. 406. pl. 1. Mich. 14 Jac. Talkorn v. Wrigg.

13. Aſſumpſit, for that he *bargain'd with B. to ſell and deliver him* 150 *Stone of Wool for* 114 *l. to be paid at a Day to come, and that the Defendant in Conſideration he would deliver the ſaid Wool to B. became Fidejuſſor for the ſaid B. aſſumendo* &c. *to the Plaintiff to pay* &c. It was moved in Arreſt of Judgment, becauſe he *grounds his Declaration upon the Aſſumpſit*, whereas there is no Aſſumpſit but that he became Fidejuſſor; and then it *ought to have been ſhew'd that the Principal had not paid it, being demanded*, and ſo have alleg'd Default in him, *and afterwards a Demand of the Surety*; and of that Opinion were all the Court (abſente Mountague,) wherefore Judgment was for the Defendant. Cro. J. 500. pl. 9. Mich. 16 Jac. B. R. Batesby v. Brooksbeck.

S. C. cited Raym. 10.

14. In Aſſumpſit the Count was of a *Promiſe to pay at Lady-Day, vel circiter illud Tempus*; and alleg'd that it was not paid at the Day, nor within 40 Days after. Notwithſtanding the Uncertainty of Circiter, Judgment was given for the Plaintiff; becauſe it appear'd that the Money was not paid when the Suit was commenced. Noy 16. Taylor v. Charey.

15. The Defendant promiſed 1ſt of March *to deliver the Plaintiff* 20 *Quarters of Barley the next Seed-time, without ſhewing when the Seed-time was*; but the Action not being brought till half a Year after the Promiſe, and the Seed-time being between the Promiſe and the Action, Judgment was given for the Plaintiff. Godb. 350. pl. 445. Trin. 21 Jac. B. R. Totnam v. Hopkins.

Aſſumpſit, for that T. the *Teſtator, in Conſideration the Plaintiff would marry S. his Daughter, promiſed to give him in Marriage as much as he gave in Marriage with any other Daughter*; and *alleg'd* he married S. and *that T. had 3 Daughters, viz. E. A. and the ſaid S. and that T. gave in Marriage to J. S. who married A* 100 *l. and a Bond of* 100 *l. to pay him* 50 *l. more after his Deceaſe, if A. or any Iſſue of her Body were then living*; and aſſigns the Breach *that T. paid him only* 40 *l. in his Life-time, and that he required of the Defendant, who had Aſſets, the* 60 *l. and a Bond for the Payment of* 50 *more, and averr'd that A. had Iſſue alive.* It was moved in Arreſt of Judgment, that the Promiſe to give as much as to any other Daughter extends only to Money given, and not to the Bond. But if it did extend to the Bond, then it ought to have been averr'd that S. or ſome Iſſue of her Body was alive, and not that A. had Iſſue alive; and of this Opinion were all the Court, but chiefly for the 2d Point; but as to the firſt they differ'd, wherefore it was adjudg'd for the Defendant. Cro. C. 186. pl. 5. Paſch. 6 Car. B. R. Cule v. Thorn's Executors.

16. Aſſumpſit againſt an Executor, for that J. S. the *Teſtator promiſed the Plaintiff, who had married his Daughter, that he would give him as good a Portion as he ſhould give to any of his Children; and alleg'd that J. S. gave to ſuch a Daughter ſo much* &c. It was moved in Arreſt of Judgment, becauſe the Plaintiff did *not ſet forth the Time when J. S. gave ſo much to ſuch Child*, and it may be that he gave it before he made the Promiſe to the Plaintiff, and then the Promiſe Quod daret would not extend to it; per Whitlock J. this may be intended; but Jones and Doderidge e contra, that a Declaration ſhall not be taken by Intendment. Lat. 203. Mich. 2 Car. Almot v. Pickton.

Jo. 228. Puncher v. Kingſton, S. C. adjudg'd for the Plaintiff; and if ſhe had ſuch a Portion the Defendant might have pleaded it.

17. Aſſumpſit, for that *the Defendant having Diſcourſe with the Plaintiff, for the Marriage of one M. affirm'd that her Portion was* 600 *l. and in Conſideration he would marry her, and promiſe to ſettle ſuch Lands for her Jointure, promiſed the Plaintiff to pay him* 100 *l. & firmam faceret to him the ſaid Portion of* 600 *l.* and that he at his Requeſt married her, and that the Defendant had not paid, nec firmam faceret to him the ſaid 600 l. It was moved in Arreſt of Judgment, becauſe *not ſhew'd that he might not have the ſaid Portion, or that M. had not ſuch a Portion.* But the Court held the Declaration good; for it * purſues the Words of the Aſſumpſit in the Breach alleg'd, and theſe Words Tant amount, that he would warrant he ſhould have ſuch a Portion with his Wife. Adjudg'd for the Plaintiff. Cro. C. 202. pl. 5. Mich. 6 Car. B. R. Pilchard v. Kingſton.

* Aſſumpſit &c. upon a *Promiſe* made *to return certain Horſes by ſuch a Day in as good Plight as they were at the Lending, or to pay* 10 *l. for every Horſe*

Horſe ſo damnified; and the Breach aſſign'd was that *one of the Horſes was not return'd till after that Time, and the other not* return'd *at all*; and this was adjudg'd no good Aſſignment, becauſe it did *not purſue the whole Promiſe*, which was to return them by ſuch a Day, or pay 10 l. per Horſe; and ſo Judgment in the Marſhalſea was reverſed. Sid. 440. pl. 8. Hill. 21 Car. 2. B. R. Wright v. Johnſon.

18. In Aſſumpſit it was agreed per tot. Cur. that where there is a mutual Promiſe, viz. *A. promiſeth B. to do ſuch a Thing, and B. promiſeth A. in Conſideration thereof to do another Thing*; if *A. brings Action againſt B. and alleges a Breach in Non faciendo, and ſaith that he is ready to do that Thing which he promiſed, but that the other refuſed to accept of it*, the Breach is well laid, and the Action well lieth; for it was idle, and more than the Plaintiff was compell'd to do, to ſhew that Paratus eſt to do a Thing which he promiſed; ſo that if there were a Breach upon the Part of the Defendant, it is ſufficient; and if there was a Breach upon the Plaintiff's Part, the Defendant ought to bring his Action for it. And the *Difference* was taken by Bramſton, where the *Promiſe* is *conditional*, and where *abſolute*, as in our Caſe; and agreeing with this Difference, it was ſaid at the Bar and Bench, that it was adjudg'd. Mar. 75. pl. 114. Mich. 15 Car. Thorp's Caſe.

19. The Count was, that in Conſideration *of a Marriage to be had between the Plaintiff's Son and Defendant's Daughter, and of ſettling ſo much Land on him upon the Marriage, he promiſed, that within ſuch Time after the Marriage had, he and his Son ſhould be bound per Scriptum ſuum debita juris forma fiend' to the Plaintiff to pay* 3000 *l. for a Marriage-Portion.* It was moved in Arreſt of Judgment, that the *Breach aſſign'd is that they did not give Security per ſcriptum ſuum Obligatorium*, which agrees not with the Aſſumpſit; for they might give Security by a Judgment, which is not Scriptum ſuum, and yet it is Debita juris forma factum. Roll Ch. J. held, that for laying the Promiſe it is not neceſſary to purſue the very Words but the Subſtance of it, ſo as it may appear to the Court that there is Cauſe of Action, and that there is no Variance in the Subſtance, and that *the Promiſe will extend to a Judgment, Statute, or Recognizance*, but cannot be intended of a Parol Promiſe. And Judgment for the Plaintiff, Niſi &c. Sty. 143. Mich. 24 Car. B. R. Tracy v. Poole.

20. Aſſumpſit, *in Conſideration the Plaintiff would marry the Defendant's Siſter, he would give his Siſter* 300 *l. for her Marriage-Portion, on his Marriage with her.* It was objected that the Breach was not well aſſign'd; for the Plaintiff declared on a Promiſe made to him to give him 300 l. in Marriage with his Siſter, and the *Breach aſſign'd was in not paying the* 300 *l. to Him*, and ſo doth not anſwer the Promiſe; for if the Money be paid to the Wife, which for aught appears may be done, the Promiſe is not broken; but adjudg'd, that ſince the Husband is to give the Acquittance, the Money is to be paid to him, and the Verdict found that it was not paid, ſo the Plaintiff had Judgment, Niſi. Sty. 393. Mich. 1653. B. R. Bedwell v. Fenwick.

21. Aſſumpſit, for that the Defendant *promiſed, in Conſideration the Plaintiff would forbear to proteſt a Bill of Exchange drawn upon the Defendant, that he would pay the Money when he ſhould come next to London.* It was moved in Arreſt of Judgment, becauſe the Plaintiff did *not ſhew that he came to London*, but ſhew'd that he died at Plymouth, and came not to London; but adjudg'd 'tis not material; for the Payment of the Money was a Duty, and a good Conſideration, the Money to be paid being for Money received beyond Sea. Sty. 416. Hill. 1654. B. R. Pinchard v. Fowkes.

22. Caſe, for that *the Defendant, in Conſideration the Plaintiff would marry ſuch a Woman, did promiſe, that upon his Marriage with her, he would pay him* 50 *l. and alſo give him yearly one Firkin of Eggs, and a Flitch of Bacon during the Life of the Plaintiff.* The Plaintiff had a Judgment on Nil

dicit, and upon a Writ of Enquiry great Damages were found. It was moved in Arreſt of Judgment, 1. That it doth *not appear for what Breach the Action is brought*, whether for the not paying the 50 l. or the Eggs and Bacon; *nor* is it *averr'd in what Year the Defendant was to begin to pay the Eggs and Bacon.* But per Roll Ch. J. it ſhall be intended to begin within the Year next after the Marriage ſhall take Effect. *Nor* doth it *appear for how many Years the Eggs and Bacon were unpaid*; and the Promiſe was made Anno 1647. and the Writ of Enquiry was executed Anno 1653. But Roll Ch. J. over-ruled the Exceptions, and to the laſt anſwer'd *the Record is hucuſque*, and ſo it is certain enough, therefore let the Plaintiff have his Judgment, Niſi &c. Sty. 404. Hill. 1654. Greenling v. Bawdit.

23. If 2 *Breaches are aſſign'd*, and the *one is well aſſign'd and the other not*, yet the Action lies well enough; per Roll Ch. J. Sty. 412. Hill. 1654. in Caſe of Dorman v. Snagg.

24. In Aſſumpſit the Count was, that the Defendant's Teſtator, *in Conſideration the Plaintiff would marry M. promiſed to leave him half of his Eſtate at his Death*, and that he thereupon married her, *and yet he did not leave him half his Eſtate at his Death.* Exception was taken, that (Half of his Eſtate) might be intended both of Real and Perſonal, and of Eſtates in Reverſion as well as in Poſſeſſion, and that the Plaintiff only *ſays that Teſtator died worth* 3000 *l. in Poſſeſſion, and did not leave him half of that Eſtate*, whereas it may be that he left him Part of his Real Eſtate, or Eſtate in Reverſion, to the full Value of half his whole Eſtate. But Glyn Ch. J. diſallow'd the Exception, and gave Judgment for the Plaintiff. Sty. 463. Mich. 1655. B. R. Culliar v. Jermin.

25. The Defendant, *in Conſideration the Plaintiff would build ſuch an Iron Mill, promiſes to repay what he ſhould diſburſe, and alſo that if the Plaintiff would forbear his Monies he would pay him* 13 *l.* 8 *s. being the full of his Diſburſements, or cauſe the ſaid Sum to be paid when the ſaid Mill ſhould firſt knock.* The Plaintiff alleges that the Mill hath knock'd &c. Exception was taken, becauſe the Plaintiff *ſaid that the Defendant hath not paid him*, which is no Denial, but that the Defendant may have cauſed him to be paid. Sed non allocatur. 2 Sid. 33. Mich. 1657. B. R. Wood v. Rowd.

26. Caſe, upon a *Promiſe to re-deliver* to him *ſome Rings, or to pay him* 18 *l. in Money*, and *aſſign'd the Breach, that the Defendant had not re-deliver'd the Rings, but* did *not ſay that he had not paid the* 18 *l.* and this was held ill, tho' after a Verdict for the Plaintiff; for the 18 l. might be paid, and if ſo, then the Plaintiff has no Cauſe of Action. Hardr. 320. pl. 14. Mich. 14 Car. 2. in the Exchequer. Anon.

Keb. 669. pl. 62. S. C. adjudged for the Plaintiff.

27. Aſſumpſit, *in Conſideration of Money and ſo many Veſſels of Ale delivered by the Plaintiff to J. S. he the Defendant promiſed, that he would warrant to the Plaintiff all that J. S. owed for the ſame.* After Judgment in the Marſhalſea it was aſſigned for Error, that the Plaintiff had *laid the Breach for Non-payment* of the Money, whereas it ſhould be for not warranting. But the Court held that the firſt is well enough. Sid. 178. pl. 12. Hill. 15 & 16 Car. 2. B. R. Baxter v. Jackſon.

28. Aſſumpſit, for that *in Conſideration he would teach and preach to the People of ſuch a Pariſh, he would give the Plaintiff* 3 *l. per Annum*; and he ſets forth that he did teach and preach, and was Vicar there for 3 Years, and *aſſigned the Breach in Non-payment for 5 Years.* He alſo declar'd upon *another Agreement to give him* 40 *s. per Annum from the* 30*th of May for two Years, and aſſign'd the Breach of two Years ending on the* 31*ſt of May.* Upon a Demurrer the Plaintiff had Judgment; for tho' he was Vicar he was not bound to preach, and tho' the Agreement was for 2 Years, and the Breach aſſign'd was for 2 Years and a Day, it is good; for if the 2 Years ended on the 30th of May, they were ended on the 31ſt. Sid. 409. pl. 2. Paſch. 21 Car. 2. B. R. Tayler v. Gay.

29. Aſſumpſit

29. Aſſumpſit *againſt an Executor upon a Promiſe to pay him 50 s. when the Defendant ſhould have received Money*; and *avers that the Defendant hath received Money*, but hath not paid it. It was moved in Arreſt of Judgment, becauſe it doth *not appear How much Money the Defendant hath received*; and perhaps he hath not received ſo much as 50 s. And tho' the Promiſe is general, yet the Breach ought to be laid ſo as to be adequate to the Conſideration; and alſo becauſe it *was not ſhewn of whom, and when and where* he received the Money, becauſe it is traverſable. The Court agreed that there was good Cauſe to demur to the Declaration, but after a Verdict they would intend he had received 50 s. And for the other Exception they held, that the Benefit of it was waived by taking the General Iſſue. Mod. 169. Mich. 25 Car. 2. C. B. Anon.

30. Aſſumpſit &c. for that the Defendant, *in Conſideration the Plaintiff would deliver ſuch Goods into the Shop of T. S. as he ſhould require, he would ſee him paid.* It was moved in Arreſt of Judgment, that the Plaintiff had *not averr'd that T. S. had not paid for the Goods*; for the Promiſe which the Defendant made, to ſee that the Plaintiff ſhould be paid, is no more than that he would pay him if T. S. did not. But the Court reſolv'd that a Promiſe to pay, and to ſee him paid, is all one, and the Averment not neceſſary. Vent. 43. Mich. 21 Car. 2. B. R. Robinſon v. Pulford. 2 Keb. 563. pl. 66. Pulford v. Robinſon, S. C. And Per Cur. This is Evidence, and need not be averr'd; for the Defendant is here a Principal, and not a Surety. And Judgment for the Plaintiff.

31. Aſſumpſit, for that the *Defendant was poſſeſs'd of the 6th Part of a Ship, and* it was *agreed that he ſhould, by Writing, ſell his Intereſt to the Plaintiff for* 600 *l. and that the Plaintiff ſhould pay* 20 *l. in Hand, and the Reſidue upon executing the ſaid Writing; and that in Conſideration the Plaintiff had paid the* 20 *l. and aſſumed to perform the Agreement on his Part, the Defendant promiſed to perform it on his Part*, prædictus tamen the Defendant non performavit agreamentum ſuum &c. Reſolved that this being upon a mutual Promiſe, the Breach is well enough *aſſign'd in the Words of the Promiſe*, eſpecially after Verdict. And Judgment for the Plaintiff. 3 Lev. 319. Mich. 3 W. & M. in C. B. Keech v. Knight. 4 Mod. 188. Paſch. 5 W. & M. in B. R. Knight v. Keech, S. C. and the Judgment in C. B. was affirm'd.——Carth. 271. S. C. in B. R. it being urg'd that tho' the Promiſe is general, yet the Breach muſt be particularly ſhewn to intitle the Plaintiff to his Action, and to give the Defendant an Opportunity of making and applying his Defence. But Per Cur. This might be good Matter on a *Demurrer*, but the Plaintiff in the original Action was help'd by the *Verdict*; for it ſhall be intended that ſome particular Breach was given in Evidence to the Jury; otherwiſe the Plaintiff could not have got a Verdict.——Comb. 204. Knight v. Leach, S. C. in B. R. and Judgment affirm'd without Difficulty, it being after a Verdict.——Skin. 344. pl. 13. S. C. in B. R. and Judgment affirm'd.

32. A. in Conſideration of 70 l. paid by B. promiſed to *deliver 25 Quarters of Corn on or before the 18th January following, on board B.'s Ship in ſuch a Place.* B. alleged that he *brought his Ship* on the ſaid 18th Day of January to the ſaid Place, and Defendant did not deliver to him &c. Held the Declaration good enough, without ſaying that there was *no Delivery before the 18th*; for tho' B. had Election to do it before, yet not without the Plaintiff's *Concurrence*; for he muſt be there and accept, becauſe a *Tender in the mean Time* is not ſufficient to excuſe a Delivery on the 18th; for that being the ultimate Time appointed for the doing it, the one ought to be there to tender, and the other to accept. 12 Mod. 421. Mich. 12 W. 3. Hammond v. Oaden. 1 Salk. 140. pl. 6. Harman v. Owden, S. C. adjudg'd for the Plaintiff, being after a Verdict. And Holt Ch. J. held upon great Conſideration that this was good without the Verdict; for the Plaintiff was to bring the Barge, and the Defendant was to deliver the Corn into it, ſo as both Parties muſt concur; ſo that the laſt Day being the Time appointed when the one is to deliver and the other to accept, it ſhall not be intended that the Plaintiff was there ready with his Barge to receive the Corn before that Time, but it is clearly help'd by the Verdict; for if there had been an actual Delivery it might have been given in Evidence upon Non Aſſumpſit, and then the Jury could not have found for the Plaintiff.——Comyns's Rep. 89. pl. 59. S C. accordingly by Holt Ch. J. who delivered the Opinion of the Court.——Ld Raym. Rep. 620. S. C. and Holt Ch J. deliver'd the Opinion

tion of the Court, that the Plaintiff ought to have Judgment after Verdict. And Holt himſelf thought it would have been good without Verdict.

(A. a) What ſhall be a good Bar, or Diſcharge of an Aſſumpſit. And Pleading thereof.

Cro. J. 483. pl. 19. Hurford v. Pile, S. C. adjudg'd for the Plaintiff; for Haughton J. ſaid that a Man may diſcharge an Aſſumpſit *made to himſelf*, but *not* one made *by himſelf*.

1. IF J. S. is in Execution for 10 l. at the Suit of J. D. and J. N. comes to J. D. and promiſes him that if he will ſuffer J. S. to go at large, that he himſelf will ſee him ſatisfied, to which J. D. agrees; tho' J. N. afterwards, and before J. D. has done any Thing by Force of the Promiſe, comes to J. D. and forbids him to deliver him [out of Cuſtody] and that he will not ſtand to his Promiſe, but revokes it, yet this is not any Bar in an Action upon the Caſe upon the Promiſe. Paſch. 16 Jac. B. R. between *Harford and Pile*, Per Curiam upon a Demurrer.

An Aſſumpſit *before Action brought*, may be diſcharg'd by Parol, but not after Action brought. 4 Le. 106. pl. 219. 28 Eliz. B. R. Steward's Caſe.

2. In Caſe on Aſſumpſit the Defendant *pleaded that after the Promiſe the Plaintiff had diſcharged* him of it. Adjudged a good Plea. 2 Le. 214. pl. 270. Trin. 30 Eliz. B. R. Coniers v. Holland.

A Promiſe cannot be *releas'd by Parol*; but if *Concord* be pleaded in Satisfaction of the Promiſe, it is a good Bar, but it muſt not be pleaded in Diſcharge of it by Way of Releaſe; Per Haughton J. 2 Roll Rep. 188. Trin. 18 Jac. B. R.

Aſſumpſit &c. the Defendant pleaded that before any Breach the Plaintiff at ſuch a Place *exoneravit eum*. Upon Demurrer it was objected that he ought to ſhew How; but reſolv'd that this being a *verbal Promiſe, might be diſcharged by Word before any Breach*. And Judgment for the Defendant. Cro. C. 383. pl. 14. Mich. 10 Car. B. R. Langden v. Stokes.——S. C. cited 2 Show. 28. in pl. 18.

Aſſumpſit, for that *in Conſideration of ſo much Money he promiſed to deliver ſo many Livres* * [*Books*] *within a Fortnight* &c. The Defendant *pleaded that within that Fortnight*, (viz.) *on ſuch a Day, he delivered* 25 *Livres, and then the Plaintiff diſcharged him* (the Defendant) *to deliver any more till farther Order, and he had not given any farther Order*. Upon Demurrer this was adjudged a good Plea, becauſe a Promiſe, before it is broken, may be diſcharged by Parol. Raym. 42. Mich. 13 Car. 2. B. R. Cook v. Newcomb. ——* Keb. 158. Cook v. Newman, ſeems to be S. C. And Per Cur. the Plea is good.

3. If A. is bound *to make a new Pale, having the old for his Labour*, in ſuch Caſe if the *old is taken from him* he is not bound to make the new; Per Fenner J. Goldsb. 156. pl. 84 Hill. 43 Eliz. cites 9 E. 4. 20. 15 E. 4. 2. 3.

So if the Horſe had been ſick, and died without any Default or Negligence of the Defendant, he ſhall be diſcharg'd; For the Re-delivery becomes impoſſible by the Act of God. Jo. 179. pl. 2 by 3 Juſtices (abſente Dodderidge) Trin. 4 Car. B. R. Williams v. Loyd.——Palm. 548. Williams v. Hide, S. C. adjudg'd by 3 Juſtices for the Defendant; but Hide Ch. J. ſaid that if he had been ſtolen in Default of the Defendant it had been otherwiſe.

4. Plaintiff *lent his Horſe to the Defendant to ride to Y. who promiſed to re-deliver him ſuch a Day*; but in the mean Time J. S. who was *the real Proprietor Vi & Armis & contra Voluntatem* of the Defendant, took the Horſe from him. And by Fenner and Yelverton, this is a Diſcharge of the Promiſe, by Reaſon of the prior Property in J. S. and ſo is quaſi an Eviction of the Horſe out of the Poſſeſſion of the Defendant. Yelv. 22. Mich. 44 & 45 Eliz. B. R. Shelbury v. Scotford.

5. The *Acceptance of a Bond* is a Diſcharge of an Aſſumpſit upon a Contract; but if upon the Contract the Agreement was, that the Buyer ſhould

ſhould pay 13 l. in Hand, and give the Plaintiff Bond for the Reſidue; and in Conſideration that the Plaintiff would ſuffer the Buyer to have the Goods, and for 6 d. given in Earneſt J. S. aſſumes; ſo that the Bond is purſuant, and Part of the Contract and Agreement, and does not deſtroy it. And Judgment accordingly. Noy 140. Oldfield's Caſe.

6. Aſſumpſit to the *Husband of Executor*, in Conſideration of Forbearance, to put a Bond in Suit, to pay, is *determined* by the Death of the Wife Executor. Yelv. 84. Hill. 3 Jac. B. R. Lea v. Minne.

7. Defendant *promiſed that if the Plaintiff would marry his Niece he would give her* 200 *l.* and ſhews he did marry her &c. but upon the Evidence it appeared this *Marriage was* 4 *Years after ſuch Promiſe* made &c. *and in this Time many Diſcharges were* proved to have been *made by the Defendant to his ſaid Niece, that ſhe ſhould not marry the Plaintiff*; and if ſhe did he would give her nothing, and other Diſlikes, yet Direction was for the Plaintiff, becauſe it might be that upon the firſt Promiſe their Affections were ſet &c. and no juſt Exceptions were taken after this Promiſe made to revoke it. Clayt. 29. pl. 51. 10 Car. Bull v. Keighly.

The Reporter ſays it ſeems much Inconvenience may be in this; for if after 4 Years, why not after 10 or 20 Years, may ſuch Promiſe be made Uſe of, which would be hard &c. and note, the Iſſue was Non Aſſumpſit; and this admitted in Evidence, and cites 10 E. 4. 6. where it is holden that a Contract ſhall be taken out of Hand, or elſe it vaniſhes into nothing. Ibid.

10. In Caſe the Plaintiff *declared upon a Quantum Meruit for* 40 *s. and upon an Indeb. Aſſ. for* 40 *s.* the Defendant confeſſed the Promiſes but *pleaded that they accounted for ſeveral Sums, and that upon the Foot of the Account, he was found to be indebted to the Plaintiff in* 3 *s. and no more, and that the Plaintiff in Conſideration that the Defendant promiſed to pay the ſaid* 3 *s. diſcharged him of all Demands.* Upon Demurrer, the Defendant had Judgment; for per Cur. if 2 Perſons being mutually indebted to the other, and upon Account the one is found in Arrear ſo much, and there be an expreſs Agreement to pay what was the Balance, and each of them to ſtand diſcharged of all other Demands, this is a good Diſcharge in Law, and the Parties ſhall not reſort to their original Contract, and that a Promiſe might be diſcharged by Parol, but not after it is broken, for then it is a Debt. But North Ch. J. ſaid, that *if there was but one Debt betwixt them* their entring into an Account for that would not determine the Contract. Mod. 205, 208. pl. 36. Trin. 27 Car. 2. C. B. Milward v. Ingram.

2 Mod. 43. S. C. it was objected that it was *not ſaid that the Plaintiff promiſed, in Conſideration that the Defendant ad Inſtantiam of the Plaintiff had promiſed*; But Per Cur. tho' it was not ſaid ad Inſtantiam of the Plaintiff that he promiſed, *yet it was adtunc & ibidem*, and ſo ſhall be intended that the Defendant made the Promiſe at the Inſtance of the Plaintiff. And Judgment was given for the Defendant.——Freem. Rep. 195. pl. 200. S. C. the Reporter ſays he heard by Mr. Townſend that Judgment was given for the Defendant by Reaſon of the Account.——S. C. cited Arg. 12 Mod. 537. but Ibid. 538. Holt Ch. J. ſaid, that if there are 2 *Dealers*, and *without coming to an Account*, they *agree to be clear againſt one another*, it would not be well without coming to an Account; and that the Caſe quoted out of 1 Mod. and 2 Mod. was the firſt of this Kind, and by his Conſent ſhould be the laſt.

11. Caſe for that *in Conſideration he would deliver the Defendant a Horſe, he promiſed to deliver to the Plaintiff another Horſe or* 5 *l. upon Requeſt*; and avers that he did deliver the Horſe to the Defendant, and had requeſted him &c. The Defendant *pleaded that the Plaintiff had diſcharged him of this Promiſe before the Action brought, but ſays not How*; Upon Demurrer, it was admitted that if he had pleaded a Diſcharge before the Requeſt made, it had been good without ſhewing how he was diſcharged; but *after the Requeſt a verbal Diſcharge is not ſufficient*; and Judgment for the Plaintiff, Niſi. Mod. 262. pl. 14. Trin. 29 Car. 2. C. B. Edwards v. Weeks.

2 Mod. 259. S. C. it was objected that here was no Time agreed for Payment of the 5 l. and therefore it was due immediately on Requeſt; and not being paid the Promiſe is broke, and the Parol Diſcharge cannot be pleaded. And of that Opinion were all the Court. And Judgment for the Plaintiff Niſi &c.——Freem. Rep. 230. pl. 239. S. C. reſolved the Plea not good; and here the Cauſe of Action accrued at leaſt upon the Requeſt, and ſo he ſhould have pleaded the Diſcharge before the Requeſt.

12. A Debt due by Promiſe is not diſcharg'd *by Account*. 3 Lev. 237. Mich. 1 Jac. 2. C. B. Mayor &c. of Scarborough v. Butler.

13. *Payment after the Day in Satisfaction* of Money due on a Note, is no good Plea in an Indebitatus Aſſumpſit; but it is good by Way of Diſcharge. 4 Mod. 250. Mich. 5 W. & M. in B. R. Perry v. Odingſell.

14. Indebitatus Aſſumpſit *for ſeveral things due to the Plaintiff*, the Defendant *pleaded* in Bar *that he gave a Note of* 20 *l. to the Plaintiff in full Satisfaction of the Debt* &c. And upon a Demurrer to this Plea the Plaintiff had Judgment, becauſe a Note thus given is no Diſcharge of a Debt or Duty. 8 Mod. 290. Trin. 10 Geo. 1725. Springate v. Chadwicke.

(Aa. 2) Aſſumpſit. Plea. Good. And How to be pleaded in Aſſumpſit.

1. TReſpaſs upon the Caſe becauſe the *Defendant aſſumed at London to cure the Horſe of the Plaintiff* of a certain Malady, and *that he neglected it ſo much that the Horſe died*; the *Defendant ſaid that he aſſum'd to cure it at N. in the County of O. which he did accordingly*, Abſque hoc *that he aſſumed at London Modo & Forma* prout &c. Per Markham, he ought to traverſe the Negligence. But per tot. Cur. the Plea is good, and ſo it ſeems that he may traverſe the one or the other; but *quære* inde. Brooke ſays it ſeems that he may ſay that he cured the Horſe, and after he died of another Diſeaſe, abſque hoc that he died by the Negligence of the Defendant, Quære. Br. Traverſe per &c. pl. 77. cites 19 H. 6. 49.

2. Upon Aſſumpſit *to make a ſufficient Houſe*, and did not, he may *traverſe the Aſſumpſit, or ſay that he made the Houſe well and ſufficiently*. Br. ibid.

3. Treſpaſs upon the *Caſe Quod cum the Defendant had ſuch Goods of the Delivery of the Plaintiff, the ſaid Defendant for* 10 *s. &c. ſuper ſe Aſſumpſit*, and the ſame Plaintiff promiſit *ad ſalvo Cuſtodiend'* &c. *and did not do it* ad Dumnum &c. And per Fitz. and Shelly J. *non habuit ex Deliberatione is no Plea*. Br. Traverſe per &c. pl. 341. cites 26 H. 8.

4. In Action upon the *Caſe that the Defendant promiſed to pay* 10 *l. to the Plaintiff which he owed to him for a Horſe and a Cow*, the Defendant may plead *that he Aſſumpſit ſolvere* 10 *l. to the Plaintiff which he owed to him for a Horſe which he bought of him, which Sum he has paid to the Plaintiff abſque hoc that he Aſſumpſit ſolvere* 10 *l. quas debuit querenti pro uno equo & una vacca*, prout &c. or *abſque hoc quod debuit to the Plaintiff* 10 *l. pro equo & vacca*, prout &c. Br. Action ſur le Caſe, pl. 105. cites 33 H. 8.

5. In Aſſumpſit &c. *for Payment of Money*, the Defendant *pleaded that after the Promiſe it was agreed between the Plaintiff and him, that he with two other Perſons ſhould enter into a Bond to the Plaintiff for the Money which the Defendant had promiſed to pay, and that ſuch a Bond was made and deliver'd to one J. S. and gave Notice thereof to the Plaintiff's Servant, and which they were now ready to deliver to the Plaintiff* &c. Wray Ch. J. order'd that the Plaintiff ſhould releaſe the Bond and take Judgment upon the Promiſe, which was done accordingly. 2 Le. 181. pl. 223. Trin. 30 Eliz. B. R. Freeman v. Drew.

Aſſumpſit for that *ſuch a Day* 4 *Jac. upon an Account the Defendant was*

6. In Aſſumpſit &c. the Defendant and *pleaded that the Day before the Promiſe to pay the Money he became bound to the Plaintiff in a Bond to pay it*, and *averr'd it to be the ſame Debt, and that the Bond was made for the ſame Debt*. Per tot. Cur. the Plea is not good, for a Bond cannot deraign a Contract or an Aſſumpſit made afterwards. And the Truth was the Obligation

ligation was made after the Aſſumpſit, tho' the Plaintiff declared of its being made † before. And it was holden that the Defendant might plead the Special Matter that the Obligation was made after the Aſſumpſit abſque hoc that he Aſſumpſit &c. Le. 154. pl. 214. Trin. 32 Eliz. C. B. Jennings v. Winch. *found in Arrearages to ſuch a Sum, and promiſed to pay it*; the Defendant *pleads that ſuch a Day they accompted, and then he was found in Arrear ſuch a Sum as the Plaintiff ſuppoſed, and the ſame Day made an Obligation for the Payment of it, and traverſed, that at any other Day [* before or] after the Obligation they accounted* together; the Court held the Account, which was the Ground of the Action, was well traverſable; adjudg'd for the Defendant. Cro. J. 234. pl. 4. Hill. 7 Jac. B. R. Dalby v. Cook.

* Yelv. 171. S. C. adjudg'd for the Defendant. —— Bulſt. 19. Talby v. Cook S. C. adjudg'd accordingly.

† The Original is (after) but ſeems miſprinted.

7. In Aſſumpſit &c. in *Conſideration of Forbearance to ſue for a Debt till ſuch a Day*, the Defendant promiſed to pay the Money; the Defendant *pleaded that* he was indebted to the Plaintiff, prout in the Declaration, and for ſecuring thereof *he acknowledged a Statute upon which the Plaintiff took Execution and levied the Money, abſque hoc, that he was any how indebted to him either before or after the ſaid Day.* This Traverſe of the Debt was held ill, becauſe it was *the Promiſe* which was the Ground of the Action, and that *ought to have been traverſed, and not the Debt*; And Judgment for the Plaintiff. Le. 252. pl. 340. Trin. 33 Eliz. B. R. Smith v. Hitchcocks. Cro. E. 201. pl. 27. S. C. adjudg'd for the Plaintiff.

8. Aſſumpſit *to deliver to the Plaintiff in London certain Monies, when he delivers to the Defendant certain Broad Cloths there*; the Defendant *pleaded Non Aſſumpſit.* The Jury *found the Promiſe to deliver ſo many of Pheaſant Colour, and ſo many of other Colours.* The Court ſeem'd that the Special Matter is good Maintenance of the Declaration, and that the *Defendant ſhould have* ſaid by Way of Anſwer, that the Aſſumpſit was thus Special and have *traverſed the General Aſſumpſit* in the Declaration. Mo. 466. pl. 659. Paſch. 39 Eliz. Cheney v. Hawes.

9. A. *promiſed B. his Son to pay him* 10 *l. a Year if he married the Daughter of J. S.* and brought an Action on this Promiſe, and averr'd that he had married her. The Defendant *pleaded that the Promiſe was conditional* [viz.] *if J. S. gave* 1000 *l. with her* and he married her, then he promiſed, but that J. S. did not give her &c. *Abſque hoc that he promiſed Modo & Forma.* This is naught, becauſe it is only the General Iſſue on the Demurrer. 2 Roll. Rep. 350. Trin. 21 Jac. B. R. Barret v. Barret.

10. Aſſumpſit for that 20 Aug. 21 Jac. the *Defendant borrow'd of the Plaintiff* 15 *l. which he promiſed to pay upon Requeſt*, the Defendant *pleaded that before the ſaid 20th of Aug. he was indebted to him in the ſaid* 15 *l. and paid the ſame the 20th of June* 21 *Jac. to J. S. the Plaintiff's Factor to the Plaintiff's Uſe, abſque hoc, that he Poſtea Aſſumpſit Modo & Forma*; the Plaintiff *replied, that Poſtea Aſſumpſit Modo & forma.* It was moved in Arreſt, that the Allegation of Payment takes away the Conſideration, and therefore he ought to have traverſed the Payment and not the Aſſumpſit; for the Conſideration being taken away, the Aſſumpſit falls. Sed non allocatur. Becauſe the Payment is alleged to a Stranger to the Plaintiff's Uſe, and it is averr'd that he accepted of it, or that it was paid to the Servant by his Command; And the Iſſue being Poſtea Aſſumpſit it is intended that it was afterwards lent by the Plaintiff, wherefore it was adjudg'd for the Plaintiff. Cro. J. 699. pl. 2. Mich. 22 Jac. Holmes v. Toſtwood.

11. In *Caſe for diverſe Wares* and *Medicines of ſuch a Value, and ſhew'd them particularly*; the Defendant *pleads that he hath paid to the Plaintiff tot & tantas denariorum ſummas, as the ſaid Medicines were worth without* In *Aſſumpſit to pay the 24th of September*, the *ſhewing*

Defendant pleads Payment of Part after the Aſſumpſit, but did not ſay by whom, and an Agreement to pay the reſt on Demand, and that no Demand ever was, and that ſhe is yet ready to pay, preferend. to which the Plaintiff demurr'd; And per Curiam, the not ſaying *by whom*, is ill; but had it been *prefert hic in Curia*, it would be a good Bar; But Judgment for the Plaintiff. 3 Keb. 334. pl. 36. Trin. 26 Car. 2. B. R. Merrick v. Hannam.

ſhewing any Sum certain. This was held to be no good Plea. Judgment for the Plaintiff. Mar. 77. pl. 120. Trin. 16 Car. C. B. Anon.

12. Aſſumpſit for that the *Defendant in Conſideration of ſo much Wood ſold to him promiſed to pay to the Plaintiff ſo much Money, and alſo to carry away the Wood before ſuch a Day*; the Defendant *as to the Money pleaded Payment, and as to the Carriage of the Wood, Non Aſſumpſit.* Per Bramſton Ch. J. the Plea is not good, becauſe *it is but one intire Promiſe, and ſo cannot be apportion'd*; and therefore the Plaintiff might have demurr'd upon it. And the Jury having apportion'd it the Verdict is naught, and a Repleader was awarded. Mar. 100. pl. 172. Trin. 17 Car. B. R. Eaſt. v. Farmer.

13. In Aſſumpſit *to pay for certain Barrels of Beer deliver'd to the Defendant on ſuch a Day.* He *pleaded ſpecially Non Aſſumpſit, prout the Plaintiff had declar'd.* The *Plaintiff demurr'd* to this Plea, *becauſe by this Pleading the Plaintiff is tied up to a particular Day*, whereas he might give Evidence of any other Barrels of Beer deliver'd at any other Time before the Action brought. The Defendant was order'd to ſhew Cauſe why the Plaintiff ſhould not have Judgment on this Demurrer. Sty. 195. Hill. 1649. B. R. Cook v. Moor.

Sid. 66. pl. 41. S. C. but S. P. does not appear.—— Keb. 177. pl. 142. S. C. & S. P. adjornatur.—Ibid. 197. pl. 190. S. C. adjudg'd for the Plaintiff.

14. Where a *Promiſe* is *to do 2 Things, as to deliver a Deed upon Requeſt, and to pay 40 l. without ſaying on Requeſt*, and the Defendant *pleads the Statute of Limitations*, and that he did not promiſe within 6 Years before the Action brought, this Plea being *intire to both Parts* of the Declaration, and *being ill in Part*, viz. as to the Deed, *is ill in toto*; and adjudg'd for the Plaintiff for the Whole. Lev. 48. Mich. 13 Car. 2. B. R. Webb v. Martin.

Keb. 680. pl. 76. S. C. adjornatur. —Keb. 822. pl. 109. Richardſon v. Elliot, S. C. adjudg'd for the Defendant.

15. In Caſe the Plaintiff declared that he *had bought a Dog, call'd a Lurcher, of the Defendant, who promiſed that if the Dog return'd he would reſtore him to the Plaintiff toties quoties*; and *that the Dog return'd to the Defendant on ſuch a Day, and that on the Day after he refuſed to deliver it.* The Defendant *pleaded that on the ſame Day he did deliver it*; and upon Demurrer to this Plea the Defendant had Judgment *without traverſing*, the Juſtification being on the ſame Day; and it ſhall be intended that he continued in the Plaintiff's Poſſeſſion, without anſwering to the Toties quoties. Sid. 234. pl. 39. Mich. 16 Car. 2. B R. Elliot v. Richardſon.

16. *Not Guilty* is a good Plea, and Iſſue in Aſſumpſit; for it is Treſpaſs upon the Caſe; per Windham J. Lev. 142. Mich. 16 Car. 2. C. B. Elrington v. Doſhant.

17. In *Conſideration the Plaintiff, at the Defendant's Requeſt, would deliver him certain Parcels of Timber, the Defendant would build up 2 Rooms in ſuch a Houſe, and repair* &c. After Verdict in Special Action upon the Caſe for the Plaintiff, it was moved in Arreſt of Judgment that the Defendant hath Time during Life, unleſs Requeſt be made, and *the Requeſt is 10 Oct. and the Action is of Michaelmas Term*; ſo there is *no convenient Time given.* Sed per Curiam, The *Defendant ought to have pleaded it ſpecially, or demurr'd* for that Cauſe, becauſe it is not ſufficient. Judgment for the Plaintiff. 1 Keb. 866. pl. 13. Paſch. 17 Car. 2. B. R. Cambell v. Preſton.

18. In

18. In *Aſſumpſit againſt an Executor upon a Promiſe of his Teſtator*, he *pleaded Non Aſſumpſit*; and Judgment for the Plaintiff. It was aſſign'd for Error, that the Plea does *not ſhew by whom the Non Aſſumpſit was*, whether by the Teſtator or not, but per Cur. it ſhall be ſo intended, becauſe the Executor is not charged with the Promiſe; and Judgment affirm'd. Lev. 184. Trin. 18 Car. 2. B. R. Browning v. Litton. Sid. 292. pl. 10. S. C. and Judgment affirm'd accordingly. —2 Keb 67. 58. pl. 24. S. C. and Judgment affirm'd; and Twiſden ſaid, that in ſuch Actions where the Law makes the Promiſe, as in an Indebitatus, it is good without alleging who promiſed, or to whom.

In an Aſſumpſit *againſt an Adminiſtrator*, the Defendant *pleaded Quod ipſe Non Aſſumpſit*, inſtead of ſaying that the Inteſtate Non Aſſumpſit. After Verdict a Repleader was awarded, and no Coſts to either Party upon a Repleader. 2 Vent. 196. Trin. 2 W. & M. in C. B. Anon.

19. In an Action ſur le Caſe, in Conſideration the Plaintiff would ſerve the Teſtator of the Defendant, he promiſed to eſteem him as his Son, or [* and] uberrime providere for him; and ſheweth that he left a Service of 60 l. per Ann. and ſerved from ſuch a Day to ſuch a Day. The Defendant pleaded that the Plaintiff ſerved a leſs Time than is alleg'd in the Declaration, and had Diet and 8 l. per Ann. and then departed, abſque hoc that the Plaintiff ſerved ſo long as he alleg'd. Twiſden ſaid, that by the Traverſe the Plea is out of Doors, which the Court agreed; but had it been alleg'd that he ſerved him ſo long, and then departed, during which Time he had a Salary, abſque hoc that he ſerved longer, this were good, but not to involve the whole Time; and the Court inclin'd this Promiſe to ſerve muſt be intended only, that while he ſerved he ſhould be paid, not to ſerve during Life; but this being Matter of Damage, and the Demurrer ſpecial on the Traverſe, Judgment pro Plaintiff. 2 Keb. 525. 526. pl. 23. Trin. 21 Car. 2. B. R. Osborn v. Rogers. Saund. 267. S. C. adjudg'd for the Plaintiff.

20. Where the *Conſideration is paſt it is not traverſable* in Aſſumpſit, and therefore not neceſſary to lay a Place; but the Defendant ought to take Advantage at the Trial on Non Aſſumpſit, if there was no Conſideration. Comb. 163 Mich. 1 W. & M. in B. R. Lee v. Baſhpole. Show. 78. Breas v. Baſpoole, S. C. ſays it was agreed without much Debate.

21. In Quantum Meruit *by a Surgeon for curing a Wound*, the Defendant *pleaded a Tender of 2 Guineas, Value 45 s. which was ſufficient, abſque hoc that he deſerved more.* The Plaintiff demurr'd, becauſe the Traverſe made the Plea double, and was impertinent, and that no ſuch Value could be put upon Guineas, and the Plea was adjudg'd ill. 3 Lev. 440. Trin. 8 W. 3. C. B. Stephens v. Cooper.

22. In Aſſumpſit on *ſeveral Promiſes*, the Defendant pleaded Quod ipſe *performavit omnia ex parte ſua performanda.* Upon Demurrer it was ſaid that this Plea, if any thing, amounted to the General Iſſue; and adjudg'd per tot. Cur. for the Plaintiff. 2 Ld. Raym. Rep. 968. Trin. 2 Ann. Taylor v. Sea.

23. In Action on ſeveral Promiſes, the Defendant pleaded in Abatement that the *Promiſes were made* ſuch a Day, which was *after the Action brought*, and traverſed their being made before. Holt Ch. J. ſaid that this Matter might be given in Evidence on Non Aſſumpſit, and that if there had been any Fact to ſupport this Plea, the Defendant would have pleaded the General Iſſue; beſides the Matter of this Plea is *new Matter, out of the Compaſs of the Plaintiff's Action.* And the Defendant was order'd to anſwer over. 2 Ld. Raym. Rep. 1249. Paſch. 5 Ann. Facquire v. Kinaſton.

(A. a. 3) Aſſumpſit. Plea. Good. And How to be pleaded in Indebitatus Aſſumpſit.

1. IN Indebitatus Aſſumpſit the Defendant may ſafely plead *Non Debet*, as well as in Debt. Noy 146. cites Paſch. 28 Eliz. B. R. Wood v. Draper.

2. Where *Arbitrement* is no Plea in Debt, it is no Plea in Aſſumpſit upon the Debt. Agreed. All. 5. Mich. 22 Car. B. R. in Caſe of Fatrer v. Bates.

3. In *Indebitatus Aſſumpſit for Money lent* to the Defendant, the Defendant *pleaded that it was lent to the Defendant and J. S.* and *not to the Defendant ſole*; to which the Plaintiff demurr'd, becauſe it amounts but to the General Iſſue, which the Court agreed; and Judgment for the Plaintiff, Niſi. 3 Keb. 312. pl. 54. Paſch. 26 Car. 2. B. R. Ravenſcroft v. Fouk.

4. In an *Indebitatus Aſſumpſit* &c. the Defendant *pleaded an Agreement between him and J. B. his Son, that the Plaintiff ſhould deliver certain Cloaths in his Cuſtody to the Defendant, and ſhould accept the ſaid J. B. as her Debtor for 9 l. to be paid as ſoon as he received certain Pay from the King due to him, and to be in full Satisfaction* &c. and avers that the Plaintiff delivered the ſaid Cloths, and accepted J. B. her Debtor, and that he agreed to pay the ſame; and that as ſoon as he received the Pay, he was ready, and offered to pay the 9 l. but Plaintiff refus'd to receive it; and that J. B. is ſtill ready. But adjudged for the Plaintiff, becauſe no Conſideration appears for J. B.'s paying, but only the Agreement without any Conſideration; and admitting it would bind, yet by 29 Car. 2. the Plaintiff has no Remedy, unleſs it be in Writing; and tho' Plaintiff need not ſet forth ſuch Agreement to be in Writing, yet when ſuch Agreement is pleaded in Bar, he muſt plead it ſo as it may appear to the Court that an Action lies upon it; for he ſhall not take away the Plaintiff's preſent Action, and not give him another upon the Agreement pleaded. Raym. 450. Trin. 33 Car. 2. B. R. Caſe v. Barber.

Raym. 449. S. C. accordingly.

5. Plaintiff *declares upon an Indebitatus Aſſumpſit for* 100 *l. received to the Plaintiff's Uſe, and upon an Inſimul computaſſet for another* 100 *l. the ſame Day.* The Defendant *pleads that the ſaid ſeveral Sums of* 100 *l. are for one and the ſame Cauſe of Action for one Sum of* 100 *l only, and not for ſeveral Sums; and that after the Aſſumpſit he had paid* 30 *l. in Part of Payment, and then in full Satisfaction of the Reſidue of the Money demanded, he became bound to the Plaintiff in a Bond of* 120 *l.* conditioned *for Payment of* 65 *l. to the Plaintiff, at a Day not yet come*; which ſaid 30 l. and Bond the Plaintiff accepted &c. Upon Demurrer the whole Court held this a good Plea, and the Averment was only Surpluſage; and the other Matter is a full Anſwer to the whole, for the Plea ſays that the Obligation was given in full Satisfaction of the Reſidue of the Monies demanded, which extends to the whole. But the Demurrer was after waived on Payment of Coſts, and Iſſue taken on the Plea. 2 Jo. 158. 159. Trin. 33 Car. 2. B. R. Sheldon v. Clipſham.

6. Indebitatus Aſſumpſit, the Defendant pleaded *Quod ante exhibitionem Billæ*; the *Plaintiff became a Bankrupt*, whereby he became unable to diſcharge the Defendant, becauſe the ſaid Money from ſuch Times as he became a Bankrupt, was to ſuch Creditors as ſhould ſue out a Commiſſion. On Demurrer Judgment pro Quer. for this is no Plea. 12 Mod. 267. Hill. 11 W. 3. Harvey v. Williams.

7. Indebi-

7. Indebitatus Assumpsit for 40 *l. for Work done*, and Quantum meruit for the same, the Defendant pleads that there being *mutual Dealings* between the Plaintiff and him, they *came to an Account*; and that it did appear on the Account the Defendant *was in Arrear* to the Plaintiff *but 5 l. which he promised to pay him, in Consideration whereof the Plaintiff did discharge him of the said Debt* and Claim. To this Plea there was a Demurrer, it was held no good Plea, and Judgment for the Plaintiff. 12 Mod. 537. Trin. 13 W. 3. May v. King.

Ld Raym. Rep. 680. S. C. and Per Holt, this ought not to be pleaded specially, but amounts to the General Issue, and might have been given in Evidence upon it. At another Day the Plea was waived by Consent, and the Defendant pleaded to Issue.

(A. a. 4) Assumpsit. Request necessary in what Cases, and what amounts to a Request.

1. A *Pawn'd a Deed* of Lands to B.—T. *intending to purchase the Land, ask'd B. to deliver him the Deed, and he would give him 10 l. at what Time he would request it*, whether he bought the Land or not. B. deliver'd the Deed to T. Per tot. Cur. Tho' this be a Duty, yet it is not a Duty payable before Request, and the Request makes a Title to the Action. And by Clench the Request is traversable; and adjudg'd against the Plaintiff. 3 Le. 73. pl. 113. Mich. 21 Eliz. B. R. Banks v. Thwaits.

But where one who is *indebted promised to pay upon Request*, in an Action upon the Case upon that Promise, the Party needs to express the Assumpsit with the Request, it being *an old Debt*. But otherwise it is where there is such a Promise, without any Duty precedent. 4 Le. 2. pl. 6. 26 Eliz. Pultman's Case.

2. Assumpsit, *in Consideration the Plaintiff would marry the Defendant's Daughter, he promised to give the Plaintiff* 40 *l.* and alleged in Facto, that he did marry her &c. It was mov'd in Arrest of Judgment, that *neither Time nor Place was mentioned of any Request*. Sed non allocatur, because it is in Nature of a Debt, and 'tis not promised to be paid upon Request. But otherwise of a *Thing collateral*. Cro. E. 229. pl. 18. Pasch. 33 Eliz. B. R. Applethwait v. Nortley.

4 Le. 56. pl. 143. S. C. adjudg'd for the Plaintiff. — And tho' the Assumpsit was in Consideration that the Plaintiff would marry A. B. to pay the Plaintiff 20 l. *when required after the Marriage*, it being mov'd in Arrest of Judgment that no special Request was laid. Hobart and Winch held it well without it, but Warburton e contra. Brownl. 10. Hill. 14 Jac. Skipwash v. Skipwash.

3. *Bond* of 100 l. condition'd *to pay* 50 *l.* and *no Day limited*. Resolved upon Demurrer that it is payable presently upon Request, and he has no further Time to pay it; and the *purchasing of the Writ* is a Request in itself, and Obligee need not make a special Demand. And it is not like the Condition of a Bond *to make a Feoffment*; for that *is* * *collateral*, and the Obligor without Request shall have Time to make it during his Life, and shall have a *convenient Time after Request* to make it; but here it is *a Duty presently*, and Part of the greater Sum. And adjudg'd accordingly. Cro. E. 798. pl. 47. Mich. 42 & 43 Eliz. C. B. Nose v. Bacon.

In Case of *Collateral Matters, which are not Duties*, a Request is necessary and material, and must be alleg'd. Brownl. 15. Trin. 5 Jac. per Cur. in Case of Gore v. Colthorp.

* As to deliver an Obligation, or an Indenture upon Request, there he ought to shew a Request expressly, with the *Place and Time*; for it is issuable, and a Licet sæpius Requisitus is not sufficient. Noy 98. 18 Jac. in the Exchequer-Chamber, Murton v. Burtley.

4. In Action upon a *Promise to pay* the *Arrearages of Rent* upon an Infimul computavit, *when* he should be *thereunto requested*, a Request was not

not expreſsly alleged, and yet adjudged go od ; for the Arrearages are due before the Requeſt, and an Action of Debt lies for them ; And alſo the bringing of an Action is a Requeſt ſufficient; this was moved in Arreſt of Judgment, and yet Judgment was for the Plaintiff. Noy 98. 18 Jac. in the Exchequer Chamber, Murton v. Burtley.

* Poph. 209. S. C. the *Declaration was on the Sale of ſeveral Parcels of Tobacco*, viz. for one Parcel ſo much, for another ſo much &c.

5. Aſſumpſit *for 9 particular Sums, which in toto attingunt to 52 l.* (which was *more* * [*or leſs*] *than the ſeveral Sums did amount unto*;) and the Defendant licet ſæpius requiſit' fuiſſet did not pay the 52 l. Jones and Whitlock J. (only preſent) held that *that Summing up the Particulars was but Surpluſage* and that the Requeſt was not neceſſary ; but if it had, then the Declaration had not been good. Lat. 175. Mich. 2 Car. Riſley v. Hames.

Quæ in toto &c. And Jones and Whitlock, held the Declaration good ; for there is a particular Promiſe for every Parcel, and it was Surpluſage and the Officiouſneſs of the Clerk to ſum up the Particulars, and therefore Judgment was affirm'd.

In *Debt* upon a Note to this Effect, *I acknowlege myſelf indebted to A. 10 l. which I promiſe to pay upon Demand.*

6. In *Debt or Detinue* the very bringing the Action and Demand of the Writ is a Demand and Requeſt. Per Jones J. Godb. 403. pl. 483. Paſch. 3 Car. B. R.

It was mov'd in Arreſt of Judgment, that tho' upon a Note acknowledging a Debt a Demand need not be alleged, yet where it is *Part of the Agreement*, a Demand is neceſſary. But the Court held the contrary ; for it is a Debt in præſenti, and the laſt Words import no more than that I am ready to pay it at any Time, and ſhall not reſtrain the other Words, this *being no Debt ariſing upon the Performance of a certain Condition, but* plainly *precedent to the Demand*. Beſides, ſuppoſing the Demand neceſſary, the Action itſelf is perhaps a Demand. 10 Mod. 38. Mich. 10 Ann. B. R. Rumball v. Ball.

7. If one *ſells* a Horſe for Money *to be paid upon Requeſt*, and *no Requeſt is ſhewn*, he can never have Judgment, per Richardſon, which was not denied. Het. 148. Mich. 5 Car. C. B. in Moſſe's Caſe.

8. There is *no Difference* where a Man is to do a thing upon *Requeſt* and upon *reaſonable Requeſt* ; for in both Caſes there ought to be an expreſs Requeſt. Per tot. Cur. Cro. C. 299, 300. pl. 1. Paſch. 9 Car. B. R. in Caſe of Symms v. Smith.

Lev. 48. S.C. but there the Promiſe was to re deliver the Deed upon Requeſt, and in Conſideration of having deliver'd him another Deed, he promiſed to pay 40 l. and alleg'd that ſuch a Day after he made Requeſt, but the Defendant had not re-deliver'd the firſt Deed nor paid the 40 l. The Defendant pleaded the Statute of Limitations, and that he did not promiſe within 6 Years before the Action brought. The Plaintiff demurr'd, becauſe the Cauſe of Action as to the Deed did not ariſe upon the Promiſe but on the Refuſal after Requeſt, which was within 6 Years; and of that Opinion was the Court.

9. Caſe on a *Promiſe to re-deliver ſuch a Deed, and ſo much Money upon Requeſt*. The Plaintiff alleg'd not any Requeſt. Adjudg'd Per tot. Cur. upon Demurrer, that *where the Thing itſelf is to be recovered in the Action*, as the Deed is in this Caſe, there *the bringing the Action amounts to a Requeſt* ; *but* where 'tis *to recover Damages, there muſt be an actual Requeſt* made. Sid. 66. pl. 41. Mich. 13 Car. 2. B. R. Ward v. Martin.

Lev. 289. S. C. Per Cur. accordingly.

10. Promiſe to deliver ſuch a Thing *before ſuch a Day*, he is bound to do it without Requeſt. Per Cur. Vent. 72. Paſch. 22 Car. 2. B. R. Bernard v. Bernard

2 Mod. 199. Rands v. Tripp, S. C. in C. B. a new Trial was granted ; but ſays nothing of Judgment. —3 Keb.

11. Aſſumpſit in *Conſideration that he at the Defendant's Requeſt, would at his own Charges procure himſelf to be made a Knight, ſo that* his Wife *(the Defendant's Daughter) might be a Lady, promiſed to pay him 2000 l.* After Judgment for the Plaintiff, it was aſſign'd for Error that the Plaintiff did *not ſhew that he procured himſelf to be knighted at the Defendant's Requeſt*, which in this Caſe is Executory and part of the Conſideration ; but per Cur. the Requeſt ſhall be intended to be executed and made at the Time of the Promiſe, viz. that then he requeſted him to be made a Knight,

Knight, and promiſed to give him 2000 l. Judgment affirm'd per tot. Cur. 2 Lev. 198. Trin. 29 Car. 2. B R. Tripps v. Rand. 769. pl. 8. S C. and tho' it was not ſaid to be at the Defendant's Requeſt, yet the *Declaration being* that the Plaintiff *fidem adhibens promiſſioni & licet ſæpius requiſitus*, it is ſufficient after Verdict on Non Aſſumpſit, which muſt prove him knighted at the Defendant's Requeſt, the Requeſt being executed; and Judgment affirm'd.

12. Where there are *mutual Covenants* it is not requiſite to make Requeſt for Performance. 8 Mod. 173. Trin. 9 Geo. 1. Wilkinſon v. Meyer.

(A. a. 5) Aſſumpſit. Requeſt. When the Requeſt muſt be made.

1. Aſſumpſit for that the *Defendant upon a certain Conſideration promiſed to deliver to the Plaintiff* 40 *Quarters of Wheat between Sturbridge Fair and Chriſtmas, if the Plaintiff liked thereof at Sturbridge Fair; and ſhew'd that he liked thereof, and upon the laſt of November at ſuch a Place, required the Defendant to deliver them.* It was the Opinion of the Court in this Caſe for the Defendant; for his liking is to be at Sturbridge Fair, and here a Requeſt is alleged to be the laſt of November, which is long after and at another Place, and therefore not good; and Judgment for the Defendant. Cro. E. 249. pl. 13. Mich. 33 & 34 Eliz. B. R. Brable v. Hollywell.

2. Where a *Time certain* is limited for the *Payment* of any Thing, he never ſhall allege a Requeſt *before the Day*; but otherwiſe it is where it is uncertain. Cro. E. 455. pl. 3. Mich. 37 & 38 Eliz. in the Exchequer-Chamber, Philips v. Sackford. Ow. 109. S. C. and S. P. held accordingly in the Exchequer-Chamber.——Mo. 689. pl 952. S.C.——Aſſumpſit *in Conſideration the Plaintiff would forbear to fell ſuch Trees, the Defendant promiſed to pay him* 800 *l before Mich.* 1650, *upon Requeſt*, and *alleged a Requeſt at Mich.* 1660. It was inſiſted in Arreſt of Judgment, that this Requeſt ought to have been before Mich. 1650; but it was anſwer'd and not denied, that upon the Requeſt as laid in this Declaration, *a Requeſt at any other Time might be given in Evidence tho' it were ſeveral Years before*, and the Jury ſhall aſcertain the Damages. Sid. 268. pl. 19. Trin. 17 Car. 2. B. R. King v. Bray.

3. Aſſumpſit for that the *Defendant being indebted to him in* 15 *l. he promiſed to pay it by* 25 *s. the Quarter, and to enter into Bond upon Requeſt for the Payment of ſuch Sums, and allegeth a Requeſt to enter into Bond.* It was moved in Arreſt of Judgment, becauſe *the Requeſt was made after the End of the Quarter*; ſo that a Bond for Payment thereof, the Day of Payment being paſt, would be forfeited preſently; and for that Cauſe it was adjudg'd againſt the Plaintiff. Cro. J. 116. pl. 3. Paſch. 4 Jac. B. R. Gregory v. Wikes.

4. A. promiſes to pay 100 l. to B. 25 *March, Quando Requiſitus foret*, A. is not bound to pay this till the laſt Hour of the Day, and B. ought not to requeſt it before. Per Coke Ch. J. Roll Rep. 189. Paſch. 13 Jac. B. R. in pl. 23. But Roll makes a Quære.

5. Caſe by an Adminiſtrator, for that *upon an Account between the Inteſtate and the Defendant, he was found in Arrear of Rent* 40 *l. which being demanded he promiſed in Conſideration thereof to give Security to pay it by Parcels on certain Days, till all be paid quando requiſitus eſſet.* It was moved in Arreſt of Judgment that *the Requeſt refers to the Security to pay* the Money on ſeveral Days; and by the Declaration it *appears that it was not made till all the Days were paſt*, ſo that he could not perform it, and ſo

the Declaration not good; Quod fuit conceſſum per tot Cur. Roll Rep. 189. pl. 23. Paſch. 13 Jac. B. R. Hudſon v. Barton.

6. Caſe for that the *Defendant had requeſted him to lend the Defendant's Son 5 l. for 6 Months, and if the Son did not then pay the Money, the Defendant would repay it at the End of the Year after the lending, upon Requeſt*; and alleged that afterwards, and within the Year he requeſted the Defendant to pay it at the End of the Year which he did not do &c. It was moved in Arreſt of Judgment, that the Requeſt was not purſuant to the Agreement, which was that for Default of the Son (then, at the End of the Year upon Requeſt) ſo that by the Adverb (then) *the Requeſt was not to be made till after the End of the Year*; And this was agreed to by 3 Juſtices; for the Requeſt within the Year ſerves to no other Purpoſe than to admoniſh him to be ready againſt the Time; But Mountague Ch. J. e contra. 2 Roll Rep. 88. Paſch. 17 Jac. B. R. Pafford v. Webb.

(Z. a. 6) Aſſumpſit. Requeſt. By whom, and to whom, Requeſt muſt be made.

1. IF 3 *aſſume* to pay or give &c. upon Requeſt &c. and the *Requeſt is made to one* of them it is good. Ruled per Cur. Noy. 135. Brereton's Caſe.

2. The Count was of a Promiſe *by the Defendant that his Son ſhould pay &c. to the Plaintiff for his boarding with him when he ſhould be thereunto required*; but did *not ſhew that he required the Son to pay* the Money, which the Defendant promiſed ſhould be paid upon Requeſt, but only ſaid that the Defendant licet ſæpius requiſitus & non ſolvit. Per Roll Ch. J. this is a *Collateral Promiſe*, and therefore the Requeſt muſt be averr'd to be made to the Son. And Nil capiat per breve was order'd to be enter'd. Sty. 207. Hill. 1649. Williamſon v. Mead.

(A. a. 7) Aſſumpſit. Requeſt. Alleged. How the Requeſt muſt be made.

3 Le. 91. pl. 131. Paſch. 26 Eliz. C. B. S. C. in totidem Verbis; and Judgment was ſtay'd. — 2 Vent. 75. S. C. cited.

1. IN Conſideration that A. the Plaintiff *at the Requeſt of B the Defendant would repair a Houſe, B. promiſed to pay* &c. The Plaintiff *declared Quod reparavit* Generally, *without ſaying* that *at the Requeſt of the ſaid B.* he repair'd it, and that is not the Reparation intended by the Declaration, viz. Reparation at the Requeſt &c. but a Reparation of his own Head; and for that Cauſe Judgment was reverſed. 2 Le. 53. pl. 72. Mich. 29 Eliz. C. B. Merry v. Lewis.

Arg. — 7 Mod. 144. Holt Ch. J. upon this Caſe being cited, ſays, the Agreement muſt have been thus, viz. in Conſideration that A. at the Special Inſtance and Requeſt of B. would repair the Houſe for B. that then B. would pay him ſo much for it. And he declares that he did repair the Houſe, but not that he did it at B.'s Requeſt; and Holt ſays he needed not to do it; for the Agreement was not that he ſhould repair it when he ſhould requeſt him, but the Agreement was abſolute to repair a Houſe, and to that Agreement he was brought at the Requeſt of the Defendant.

2. In

2. In an Action on the Case upon *Assumpsit* to pay Money to the Plaintiff on Request, he *must allege* an actual Request, and at what *Place* and *Day* the Request was made. Le. 287. pl. 389. Pasch. 26 Eliz. B. R. Short v. Short.

In Assumpsit for that the Plaintiff had *expended diverse Sums* of Money for

the Defendant amounting to 25 l. the *Defendant promised to pay* him all the Sums he had expended for him &c. but did not licet sæpius requisitus, but because *the Day and Place of the Request was not alleged*, it was adjudg'd for the Defendant; for here was no Duty due. Cro. E 73. pl. 32. Mich. 29 & 30 Eliz. B. R. Morris v. Kirke.

3. A. brought Action on the *Case upon 5 several Assumpsits*, and counted licet sæpius requisitus &c. so as there was *but one licet sæpius to all the 5 Assumpsits*, whereas every several Assumpsit ought to have his several Demand; for one General Request for all is not sufficient. For it has been adjudg'd that if one is *indebted to J. S. in several Sums* of Money made [to be paid] upon Request or Demand, and J. S. goes to him, and says, *Pay me what you owe me*, this is not a sufficient Demand or Request. Le. 206. pl. 266. Pasch. 30 Eliz. B. R. Abbot's Case.

Assumpsit for that he *sold the Defendant Woolt for 20 l. to be paid at Lady-day*, and *that licet sæpius requisitus on such a Day, and at*

such a Place, the Defendant had not paid the Money, *and also that he sold him more Wool for 10 l. to be paid when required*, and alleged that licet sæpius requisit' the Defendant had not paid, *but without alleging Time and Place*. But adjudg'd good; for it shall refer to the Day and Place alleged in the first Request. Cro. Eliz. 240. pl. 13. Trin. 33 Eliz. B. R. Barnes v. May.

Case for that the Defendant *promised, in Consideration he would cure B. of a certain Disease, he would pay him what it should be worth, and for his Medicines.* He *declared likewise upon 2 other Promises*, the *one for curing the Wife of B.* de quadam putredine, *and the other for curing the Defendant himself*; and sets forth that he had cured them, and that he deserved so much for the several Cures, and so much for his Medicines, amounting in the whole to so much, and alleg'd that Licet ad hoc faciendum sæpe requisitus, he had not paid. It was moved in Arrest of Judgment, that there was *no Place shewed* where this Request was made. But adjudged not necessary; for *where the Thing is a Duty before any Request made, there the Request is only alleged to aggravate the Damages, and* is *not traversable*. But 'tis *otherwise where the Request makes the Duty itself*, as in Assumpsit to do such a Thing upon Request, there the Day of the Request ought to be alleged, because it is traversable. And that the Words (*ad hoc*) *refers to all the Particulars reddendo singula singulis*, as a particular Request. Palm. 389. Mich. 21 Jac. Manury v. Strong.——Roll Rep. 378. Manary v. Strange, S. C. but S. P. does not fully appear.——Ibid. 411. S. C. and S. P. that the Words (ad hoc) refer to all the Particulars.

In Assumpsit the Plaintiff declared *on several Promises*, and *laid only one Request for all*; and this being moved in Arrest of Judgment, Hutton and Yelverton thought it good and sufficient. Adjornatur. Het. 84 Pasch. 4 Car. C. B. Gammon v. Milbourne.——Ibid. 93. S. C. and the Court were of the same Opinion, that the Request shall be referr'd to all the particular Sums reddendo singula singulis.

4. Assumpsit for that *the Defendant was indebted to the Plaintiff 5 l. for Rent, and promised to pay it quandocunque requisitus*; and that he requested it such a Day, but the Defendant had not paid it; the Defendant *pleaded Payment*, and found against him. Tho' the Declaration did *not shew when the Rent was due, nor for what Term, nor upon what Contract*; yet because the Defendant had taken Notice thereof by pleading Payment and Issue thereupon, and found for the Plaintiff, it was adjudg'd for the Plaintiff. Cro. J. 668. pl. 5. Trin. 21 Jac. B. R. Slack v. Bowsal.

5. A. gave *Bond to B. to pay Money such a Day. A. tender'd the Money on the Day*, and *B. promised to deliver up the Bond upon Request, if he would pay the Money to T. S. his Servant.* Accordingly *A. paid the Money to the Servant*, but B. did not deliver up the Bond on Request; whereupon A. brought his Action. It was moved in Arrest of Judgment, that the Plaintiff had *set forth* the Promise and the Request, but *no Place where the Request was made.* Ley Ch. J. Jones and Whitlock held the Place not material, because *Issue was taken upon Not guilty*; but *if the Defendant had demurr'd*, he should have had Judgment. 2 Roll Rep. 476. Mich. 22 Jac. B. R. Methold v. Peck.

Win. 112. S. C. in C. B. adjudg'd accordingly.—Hutt. 73. S. C. the Court were of Opinion the Plaintiff should have Judgment, and that Non Assumpsit allows the Request. But a Note is added that this Judgment was reversed in B. R. because the Request being upon *collateral Matter*, which was *the Cause of the Action*, it is material.——Poph. 160. Pack v. Methold. adjudg'd for the Plaintiff in C. B. but in Error in B. R. the Opinion of the Court was strong that the Time and Place of the Request ought to have been alleged specially and certainly, because it is traversable, and Parcel of the Assumpsit.——Jo. 85. pl. 1. Mich. 1 Car. B. R. the S. C. and resolved per tot Car. that a special Request should have been alleged; and tho' Issue was taken upon

upon the Non Aſſumpſit, and not upon the Requeſt, yet this does not help it, becauſe the Requeſt is the Subſtance and Parcel of the Contract; and this being omitted, no Iſſue can make it good. And Judgment was revers'd.———3 Bulſt. 297. S. C. in B. R. and after ſome Difference in Opinion the whole Court reſolved, that by the Omiſſion of Time and Place the Judgment was erroneous; and therefore revers'd Nullo contradicente.——Lat. 93. Peck v. Cole, S. C. in B. R. but no Judgment

8. Aſſumpſit &c. in *Conſideration of a Ruff-band deliver'd* to him, he promiſed *to pay* 3 *l. at the Day of the Plaintiff's Marriage*; and alleg'd that he was married ſuch a Day, and that the Defendant poſtea &c. licet ſæpius requiſitus, had not paid it; and tho' *no Notice of the Marriage nor Day of the Requeſt was mention'd*, and tho' the Payment was to be made after that Day, and not before, yet 3 Juſtices held it well enough. Contra Crooke J. and Judgment for the Plaintiff. Cro. C. 34. pl. 8. Paſch. 2 Car. C. B. Crane v. Crampton.

7. Caſe, for that one *T. S. being indebted to the Plaintiff in* 12 *l. and* whereas *the Defendant (as he told the Plaintiff) was indebted to the ſaid T. S. in* 12 *l. the Defendant, in Conſideration the Plaintiff, at his Special Inſtance and Requeſt, would procure an Order from T. S. to the Defendant to pay the* 12 *l. to the Plaintiff, he promiſed to pay it*; and ſhews that he did procure an Order from T. S. requiring the Defendant, upon Sight thereof, to pay the Plaintiff 12 l. and that the Plaintiff ſhew'd the ſaid Order to the Defendant on ſuch a Day, and at ſuch a Place, and requeſted him to pay the Money, which he refuſed. Upon Demurrer it was objected that he did *not allege that he procur'd the Order at the Requeſt of the Defendant*; beſides the Promiſe was not for a Duty to the Plaintiff, but was *collateral*, and became due upon a Special Promiſe, therefore a Requeſt ſhould be alleg'd with Time and Place. Sed non allocatur; and per tot. Cur. Judgment for the Plaintiff; for *no other Requeſt ſhall be intended than what is included in the Agreement, (viz.) that the Plaintiff, at the Requeſt of the Defendant, did procure the Order*; otherwiſe if it had been to procure the Note when he ſhould be requir'd; but here no ſubſequent Requeſt was intended; but if a Requeſt had been neceſſary, 'tis here ſufficiently alleg'd, viz. that at ſuch Day and Place he ſhew'd the Note to the Defendant, and requir'd him to pay it, without ſaying adtunc & ibidem, he requir'd. 2 Vent. 71. 74. Mich. 1 W. & M. in C. B. Bokenham v. Thacker.

Skin. 347. pl. 16. S. C. adjudg'd accordingly; and by Holt Ch. J. by the Redelivery of the Horſe the eight Guineas became a Duty.——* 12 Mod. 44. is a ſhort Note of S. C. and ſays where *a certain Perſon is mention'd*, as if it were, viz. If J. S. pay ſo much Money &c. in ſuch Caſe Notice is not neceſſary; but if it be, If any body pay &c. there Notice muſt be, becauſe it is uncertain.

8. Aſſumpſit, for that the *Defendant ſold him a Gelding for* 8 *Guineas, and upon the Sale agreed, that in Conſideration the Plaintiff had paid him the* 8 *Guineas, he promiſed* the Plaintiff *that if he did not like the Gelding, and ſhould deliver it to B. to the Uſe of the Defendant, B. ſhould repay the* 8 *Guineas, and if he did not, then the Defendant would upon Requeſt*; and ſets forth that he did not like the Gelding, but deliver'd it to B. and requir'd him to pay the 8 Guineas, which he refuſed; and that the Defendant licet ſæpius requiſitus, had not paid. It was moved in Arreſt of Judgment, that the Promiſe to repay the 8 Guineas was collateral, and the Defendant himſelf was not the Debtor, becauſe he was no more than a Surety in Default of B. and therefore * Notice ſhould be given that B. had not paid, and a Special Requeſt ſhould be alleg'd to the Defendant, and all this Matter be laid in the Declaration, and not a Sæpius requiſitus only. But reſolved per tot. Cur. that this is *not a Collateral Promiſe*, but one intire Contract upon the Sale, and B. is only a Servant to receive the Horſe and pay the Money; by the not doing whereof the Defendant is the Debtor, and the Money is in his Hands, as received to the Plaintiff's Uſe; wherefore Judgment was given for the Plaintiff in C. B. and affirm'd in Error in B. R. 3 Lev. 363. Trin. 5 W. & M. Maſters v. Marriot.

(A. a. 8) Aſſumpſit. Requeſt. Specially alleg'd. In what Caſes it muſt be, and where.

1. ASSUMPSIT *againſt the Defendant as Executrix of G. W. in Conſideration that the Plaintiff would aſſure certain Lands to T. P. at the Inſtance of the ſaid G. W. he promiſed that if T. P. did not pay him yearly upon Requeſt* 10 *l. and* 10 *Loads of Faggots, that he would* pay them, and he did aſſure the Land &c. and that neither G. W. nor T. P. licet ſæpius requiſitus, did pay the 10 l. and the 10 Loads of Faggots. Adjudg'd for the Defendant; for ſince the Payment of the 10 l. was to be upon Requeſt, a Requeſt is material, otherwiſe the Defendant is not chargeable, *and the Time and Place of the Requeſt are to be expreſsly alleg'd.* Cro. E. 85. pl. 5. Hill. 30 Eliz. B. R. Davenly v. Wellbore.

2. If *Money is lent to be repaid when requir'd*, Licet ſæpius requiſitus is not ſufficient; but if the Plaintiff declares upon a *Cum Indebitatus fuiſſet the Defendant aſſum'd to pay*, there Licet ſæpius requiſitus is ſufficient; per Wray. 3 Le. 206. in pl. 266. Paſch. 30 Eliz. B. R.

3. Aſſumpſit, for that the Plaintiff *was poſſeſs'd of a Leaſe for Years, and B. poſſeſs'd of the Reverſion for Years, B. in Conſideration the Plaintiff would ſurrender his Eſtate and Term, and procure one T. to give him* 100 *l. for a Leaſe to be made by B. to the ſaid T.* he *promiſed to pay the Plaintiff* 30 *l. when requir'd*; and alleg'd the Performance on his Side by making the Surrender, (viz.) 20 April; and that on the ſame 20 April he procured T. to give the Teſtator 100 l. for a Leaſe &c. then and there made for 19 Years to come; but that B. licet ſæpius requiſitus, had not paid the 30 l. &c. A Motion was made of other Matter in Arreſt of Judgment, but it was enter'd for the Plaintiff. Poph. 30. Trin. 35 Eliz. Hughes v. Robotham. Cro. E. 302. pl. 1. S. C. adjudg'd for the Plaintiff.

4. *Where* a Debt is *the Ground of the Action*, and the *Law induces a Promiſe to pay*, there the Requeſt is neither Parcel of the Conſideration nor iſſuable; *otherwiſe where* the Action is *founded upon a Collateral Matter*, and not upon a Duty, there the Requeſt ought to be expreſsly alleg'd. Yelv. 66. Trin. 3 Jac. B. R. The Caſe of the Hoſtler. *As in* Aſſumpſit by an Inn-keeper, for that the Defendant brought his Horſe to

Livery, and agreed to pay 6 d. for a Day and Night, and that the Horſe had been kept by him for many Days and Nights; that the Money amounted to 20 l. and declared Licet ſæpius requiſitus &c. without alleging any Requeſt in Facto; and adjudg'd good.

So where a Commiſſion for examining Witneſſes was to be held at an Inn, and in Conſideration the Inn-keeper promiſed to find Horſe-Meat and Man's-Meat during the Time for the Defendant and his Company, the Defendant promiſed to pay him, when requir'd, ſo much as the ſame ſhould amount to, and that the ſame amounted to 5 l. but the Defendant, licet ſæpius requiſitus, hath not paid it. But per tot. Cur. a preciſe Requeſt ought to be alleg'd, and the very Time and Place expreſs'd, and the ſame Diverſity taken by them as above in the Caſe of Yelverton. [And ſo this Caſe is taken as a Collateral Promiſe, and not a mere Debt of the Defendant's, and ſo differs from that Caſe.] And therefore Judgment was ſtay'd. Cro. J. 185. pl. 1. Mich. 5 Jac. B. R. Selman v. King.

5. In Aſſumpſit *to ſave harmleſs when requir'd*, a Special Requeſt muſt be alleg'd, and a Licet ſæpius requiſitus is not ſufficient, nor will a Verdict aid it; but if the Promiſe had been *to pay a certain Sum of Money when requir'd*, it would be good without laying any Special Requeſt. 2 Bulſt. 229. Paſch. 12 Jac. Harriſon v. Mitford. If *one promiſes to ſave another harmleſs*, he ought to do it at his Peril, without any Requeſt. Sty. 141. Mich 24 Car. B. R. Smithſon v. Wells.

But where in Aſſumpſit, in Conſideration the Plaintiff would cut down and carry away certain Trees, *to ſave him harmleſs from all Damages* &c. which might happen to him by reaſon thereof, when he ſhould be required, the Defendant, licet ſæpius requiſitus, had not ſaved him harmleſs, but ſuffer'd him

him to be sued, which had cost him a great deal of Money. It was moved in Arrest of Judgment, because he did *not shew in what Court he was sued, nor what Money he had extended, nor how much damnified*, and therefore adjudged for the Defendant. Cro. C 585. pl 17. Mich. 10 Car. B. R. Palmer v. Knight.

If a *Collateral Thing* be to be done, there to say Sæpius requisitus is not sufficient; per Jones J. Godb. 403. Pasch. 3 Car. B. R. in pl. 483.——

6. Where the Plaintiff declares upon *Assumpsit to do a Collateral Thing upon Request*, the *Time and Place* of the doing it *ought to be alleg'd*, whereupon Issue may be taken; for there the Request, together with the not doing the Thing promised, gives the Cause of Action. *But* where the Promise is *founded upon a Debt*, as *for Wares bought* of the Plaintiff, he promised to pay 10 l. upon Request, there the Plaintiff need not allege the Request more precisely than in an Action of Debt, viz. Licet sæpius requisitus &c. Agreed by all the Judges, and that it had been often so adjudg'd, 2 Roll Rep. 62. Mich. 16 Jac. B. R. Hill v. Wood, or Wade.

S. P. Sid. 303. pl. 10. Mich. 18 Car. 2. B. R. Birks v. Trippet, which was in Assumpsit *for not paying Money awarded.* The Plaintiff demurr'd, because no Demand was alleg'd; and for that Reason adjudg'd for the Defendant.——Saund 32. S. C. The Assumpsit was founded on the Promise made at the Submission to pay so much if he did not perform his Part of the Award, cum ad inde requisitus &c. and adjudg'd for the Defendant.——2 Keb. 126. pl. 78. Berks v. Trippet, S. C. Judgment for the Plaintiff, Nisi

Case &c. upon a Special Promise, setting forth that *in Consideration the Plaintiff would permit the Defendant to collect and receive certain Tithes, he promised to pay him* 20 *s. per Ann.* It was objected that the Promise being to do a *Collateral Act*, and there being nothing due before the Promise made, the Plaintiff ought to have alleg'd a Special Request, to which the Court agreed; but they said that it is otherwise where the Thing is not to be done upon Request. Lutw. 229. 231. Mich. 3 Jac. 2. Coningsby v. Rodd.

2 Roll Rep. 65. S. C. and agreed per omnes, that the Request was material, and that if the Defendant had demurr'd, Judgment should be against the Plaintiff; but it was moved that the Verdict had supplied the Defect of the Count.

7. Assumpsit, in *Consideration he would buy such Lands* of the Defendant, the Defendant *promised to pay* the Plaintiff 9 *l. which J. S. owed to the Plaintiff*, when he should be thereunto requir'd; and that, licet sæpius requisitus, he had not paid it, but alleg'd neither Time or Place. Resolved, in regard it was *a* * *Stranger's Debt*, and was not due before Promise, or payable but upon Request, therefore a Special Request ought to be made, and Licet sæpius requisitus will not serve; and Judgment for the Defendant. Cro. J. 523. pl. 8. Hill. 16 Jac. B. R. Hill v. Wade.

* *A. sued B.* whereupon *C. promised A. that if he would forbear the Suit he would pay him* 200 *l. at Midsummer-Day, and another* 100 *l. at any Time after that Day, when he should be reasonably required.* Adjudged that in this Case the Request was issuable, and ought to have been specially alleg'd; for it *was no Duty before the Request, the Promise being made by a Stranger*; but where he, who is indebted, promises to pay upon Request, there Licet sæpius requisitus is sufficient. Lat. 209. Trin. 3 Car. Alcock v. Blofield.——Noy 95. S. C. agreed accordingly.

Assumpsit &c. in Consideration the *Plaintiff had deliver'd to the Defendant a Gelding, he promised to redeliver him, or to pay so much* &c. *upon Request*, and counted

8. Plaintiffs declar'd that whereas there *was a Suit in Chancery between them and other Copyholders of such a Manor against their Lord*, and that *W. their Clerk in the Suit, had disbursed* 14 *l. the Defendant*, being *a Copyholder of the same Manor, promised in Consideration the Plaintiffs would pay to W. the* 14 *l. he would pay to them* 40 *s. upon Request.* The Plaintiffs shew'd they had paid the 14 l. and that Defendant had not paid the 40 s. Licet postea sæpius requisitus. Hobart said that the * Request is Part of the Cause of Action, and ought to be set down precisely, and there ought to be a Promise broken, and such a Promise upon which an Issue may be taken. Win. 102. Mich. 22 Jac. C. B. Brown & Ware v. Barker.

Licet sæpius requisitus &c. After Verdict and Judgment in C. B. for the Plaintiff, it was assign'd for Error, that the Plaintiff did not allege any Special Request, and that it was Parcel of the Consideration; and for this Reason the Judgment was reversed. But *if a Request had been alleg'd, and no Place where it was made, it had been well enough on Non Assumpsit pleaded, and found for the Plaintiff.* But if the Request had been traversed it would be otherwise, because then no Visne appears for the Trial. Jo. 56. pl. 2 Mich. 22 Jac. C. B. Lowe v. Kirby.——2 Roll Rep. 483. [but it is wrong'd

pag'd.

pag'd, and ſhould be 486.] S. C. but ſeems not very clearly reported.——S. C. cited Jo. 86.——S. P. and ſeems to be the very S. C cited by the Name of James's Caſe. 3 Bulſt. 300. by Crew Ch. J. ——S. P. Godb. 403. And ſee (G) pl. 6.

9. If I *ſell a Horſe for* 10 *l. to be paid upon Requeſt*, there the Requeſt muſt be preciſely alleged, for it is *Parcel of the Contract*; and in an Action on the Caſe, and upon Debt, you muſt lay a Requeſt; Per Jones and Dodderidge J. Godb. 403.

10. When a Thing is to be done upon Requeſt, the *Performance muſt be when* the Perſon requires it; and 'tis no *Plea* that he was *ready* after the Promiſe made. 3 Mod. 295. Trin. 2 W. & M. in B. R. Harriſon v. Hayward.

10. Where a Special Requeſt in Aſſumpſit ſhould be alleg'd, and is not, it is fatal on Demurrer, but help'd after Verdict. 12 Mod. 44. Trin. 5 W. & M. Maſters v. Marriot.

12. The Defendant *borrowed Money for* the Uſe of *his Mother, and gave Bond to pay it on Demand, if his Mother would not*; and in an Action of Debt brought on this Bond, the Defendant after Oyer demurr'd, for that there was not any ſpecial Requeſt laid, as made of the Mother, and when and where; and that Licet ſæpius requiſita will not do. But Per Cur. Tho' where there is no Duty till a Demand it is ſo, yet *here was a Duty ab initio*, which the Law makes payable on Demand, and ſo there needs no Demand expreſsly to be laid. Judgment for the Plaintiff. 6 Mod. 200. Trin. 3 Ann. B. R. Harwood v. Turbervill.

(B. a) In what Caſes an Action lies for a Collateral Reſpect. [*Words ſpoke in Evidence in Courſe of Juſtice.*]

1. IF J. S. libels againſt J. D. in the Spiritual Court for a Defamation, and produces W. N. as a Witneſs to prove the Defendant guilty, and the Defendant makes an Allegation in Writing (as the Courſe there is) that the ſaid W. N. ought not to be received as a Witneſs, becauſe he is a perjured Man, and that he was perjured in ſuch a Cauſe, at ſuch an Aſſiſes in certain, which Allegation is falſe, yet W. N. ſhall not have Action upon the Caſe for this againſt J. D. becauſe the Spiritual Court had a Juriſdiction of the firſt Matter, and this Allegation is but according to the common Courſe of Juſtice there, where the Sentence is given upon the Proofs; and therefore if the Action would lie, every Man would be deterr'd from taking his lawful Exceptions to falſe Witneſſes. Trin. 15 Jac. B. R. between *Weſtover and Daubinet*, adjudged upon a Demurrer. Cro. J. 432. pl. 11. Weſton v. Dobniet S. C. accordingly; but otherwiſe it is if the Court has not Juriſdiction, or tho' the Court has Juriſdiction, yet if the ſaid Bill be falſe, and he publiſhes his Bill abroad, an Action lies. Adjudg'd for the Defendant.——See (C. a) pl. 8.

2. In an Action between two, where the Queſtion is upon Evidence to a Jury, if one of the Parties was a Bankrupt or not? if a Counſellor in giving Evidence for his Client, ſays expreſsly to a Juror, that he was a Bankrupt, where it is falſe; yet no Action lies againſt him, becauſe it is in the Courſe of Juſtice. Trin. 15 Jac. B. R. in the ſaid Caſe of *Weſtover*, agreed per Curiam; and it ſeems by *Hought. and Mount.* that ſuch an Action was brought againſt the ſame Mount. now Chief Juſtice, and that it was not maintainable. Cro. J. 432. pl. 11. in the Caſe above, Houghton J. cited it as Brook's Caſe. —— Cro. J. 90. pl. 18. Mich. 3 Jac. B. R. Brook v. Sir H. Mountague, Recorder of London, the Words were, *That he* (the Plaintiff) *was arraign'd and convicted of Felony* &c. See (M. b) pl. 1, 2, 3. and the Notes there.

3. In

3. In an Action brought for ſcandalous Words, the Defendant *juſtified that he ſpoke them as a Witneſs* upon his giving Evidence on his Oath. See 2 Roll Rep. 198. and Palm. 144. cites Hill. 37 Eliz. Broad's Caſe.

(C. a) Actions [*for Words ſpoke, or Things done*] in Courts of Juſtice.

* Godb. 240. pl. 333 S. C. reſolv'd that the Action lay, becauſe A. exhibited the Articles in Chancery, and did not purſue them there; for when he had ſworn the Articles there, he could not have a Supplicavit (as he had out of B. R.) to have the Good Behaviour there, and the Oath and Affidavit in Chancery remain as a Scandal upon Record, and becauſe he made the Articles in Chancery but a Colour for the Good Behaviour, and tho' B. R. might grant the Good Behaviour without any Articles preferr'd, yet when they firſt begin in another Court, they ought to follow the Cauſe there.——Brownl. 3. S. C. and the Court ſaid that if he had proſecuted in Chancery, tho' the Articles had been ſcandalous, yet no Action would have lain; for a Man ſhall not be puniſhed for miſtaking the Law, for he might be miſadviſed by Counſel.

1. IF A. exhibits falſe Articles to a Maſter in Chancery againſt B. whereupon B. is bound to his good Behaviour, B. ſhall have Action againſt A. for his Diſceit and Vexation. Paſch. 17 Jac. B. between *Allen* and his Wife Plaintiffs, and *Gomerſal* Defendant, adjudged per totam Curiam. Mich. 11 Jac. B. between * *Bradley and Jones* adjudged.

Cro. J. 601. pl. 26. Eyres v. Sedgewick, S. C. accordingly by 3 J. who deliver'd their Opinions ſeriatim that this Action lay not, becauſe for Miſdemeanor in Courts

2. If a Supplicavit iſſues out of Chancery to the Sheriff againſt J. S. and thereupon the Sheriff makes a Warrant to a Bailiff to take him &c. and after the Bailiff comes into Chancery, and there makes an Affidavit that he took him, and that he reſcued himſelf; whereupon J. S. is committed to the Fleet by the Lord Chancellor, though the Affidavit be falſe by which he is committed to the Fleet, and ſo to his great Damage; yet becauſe the Affidavit was made in a legal Courſe, though he was not compelled by Proceſs to make it, no Action upon the Caſe lies; for then every Man would be deterr'd from making Affidavits in ſuch Kind. Mich. 18 Jac. B. R. between *Aier and Redgwit* adjudged, in Arreſt of Judgment.

every Court where the Miſdemeanor is committed ſhall have the Examination thereof, and if they find Miſdemeanors, may puniſh them; but to puniſh upon an Action on the Caſe upon Pretence of a falſe Oath ſhall not be ſuffer'd, but it ought to be (as Dodderidge ſaid) puniſhed by Conviction upon Indictment or Suit in the Star-chamber; but Haughton J. contra. But adjudged for the Defendant.—— Palm. 142. S. C. ſays that all the four Juſtices held that the Action did not lie; and Judgment accordingly.— 2 Roll Rep. 195. S. C. adjornatur.——Ibid. 197. S. C. all the Court held accordingly; but it does not appear that Judgment was given.

Exhibiting a Bill to the Queen, charging the Plaintiff to have recovered againſt the Defendant 400 l. by Forgery, Perjury, and Cozening; and alſo that he had publiſhed the Matter of the ſaid Bill at Weſtminſter &c. The Court held that the exhibiting the Bill to the Queen is not actionable in itſelf; for ſhe is the Fountain of Juſtice, and all her Subjects may lawfully reſort to her to complain; but if they will afterwards divulge the Contents to the Diſgrace of the Perſon intended, it is actionable. Adjudged againſt the Plaintiff. 3 Le. 138. pl 187. Mich. 28 Eliz. C. B. Hare v. Meller.—Ibid. 163. pl. 213. Hill. 29 Eliz. C. B. the S. C. in totidem Verbis.

Jo. 431. pl. 5. Boulton v. Clapham, S. C. and Rule given by 3 J. that the Plaintiff Nil capiat per Billam. ——Mar. 20.

3. In an Action upon the Caſe by A. againſt B. if the Plaintiff declares that he took his Oath in the Court of B. R. againſt the Defendant, concerning certain Matters, to have him bound to his Good Behaviour; and thereupon the Defendant intending to ſcandalize the Plaintiff, did then falſely and maliciouſly ſay, in the hearing of the Juſtices and Officers of the Court, and others there being, There is not a Word true in that Affidavit, and I will prove it by 40 Witneſſes, this Action is not maintainable; for the Defendant by the ſaid

said Answer made a Defence of himself in the Court against the Charge and Accusation against him; and therefore it is justifiable, being in a judicial Way. Pasch. 15 Car. B. R. between *Moulton and Clapham* adjudged in Arrest of Judgment. Intratur Hill 14 Car. Rot. 459. pl. 45. S. C. and the Court was clear of Opinion that the Words would not bear an Action.

4. If A. recovers against A. [B.] Damages and Costs in C. B. or B. R. and sues out a Fieri facias to the Sheriff, who by Force thereof takes the Goods of B. to the Value, and so returns it, and the Goods remain in his Hands pro defectu emptorum; and after A. well knowing thereof, yet to the Intent to vex and double-charge B. sues out another Fieri facias, and delivers it to the same Sheriff to be executed, who thereupon levies the Money of other Goods of B. and pays it over to A. In this Case for this Wrong and Vexation, tho' it was in a legal Way, yet an Action upon the Case lies. Hob. Rep. Case 257. and 350. between *Waterer and Freeman* adjudged. Fol. 34. Hob. 205. pl. 259. Mich. 15 Jac. S. C. argued. Ibid. 266. pl. 352. S. C. adjudg'd for the Plaintiff.

Brownl. 12. Warter v. Freeman, S C. adjudg'd for the Plaintiff, tho' the Defendant alleged that Fieri facias was an Act in Law, and so no Cause of Action against him.——Noy 23. S. C. says the better Opinion was that the Action was well brought.

5. If A. sues B. in the Spiritual Court for Tithes, contrary to a Composition by him made, an Action upon the Case lies for it. Hob. Rep. in Case 251. cites Mich. 43 & 44 Eliz. B. R. between *Bray and Partridge*, for this Suit is Coram non judice. Cro. E. 836. pl. 8. S. C. but I do not observe S. P. —— Noy 23.

S. C. & S. P. and by Popham and Gawdy the Action lies.——Noy 37. S. C. but S. P. does not plainly appear.——S. C. cited Hob. 206. in Case of Waterer v. Freeman, that the Action lies.

6. So [But] if A. sues in the Spiritual Court for Tithe of Trees not titheable, no Action upon the Case lies. 4 Jac. between Dame *Waterhouse and Moodie*. Cro. J. 133. pl. 9. Waterhouse v. Bawde, S. C. Mich. 4 Jac. and becaufe this Action was brought by the Party only, and not Tam Quam, the Court all held, that tho' otherwife an Action might lie, yet for this Cauſe it was not well brought; and therefore it was adjudged for the Defendant. —— Hob. 206. in Case of Waterer v. Freeman, cites S. C. as that the Action lies.——S C. cited Noy 23. in Case of Brey v. Partridge, that the Action does not lie.

In the Margin of Hob. 206. is a Quære; for Moodie himself tells me [which seems to mean Hobart himself] that he suing for Tithes as a Farmer of the Parsonage of Woodchurch in Kent, such an Action upon the Case was brought; whereupon he demurr'd, and the Court disliked the Action, and so it rested without any farther Proceeding.——An Action lies not against one that sues for Tithes that are not payable; Per Hale Ch. B. Hardr. 196. Trin. 15 Car. 2.

7. So [But] if a Man charges another with Felony, or of Piracy, in a Bill in the Star-Chamber, whereof the Court has no Jurisdiction, an Action lies. Hob. Rep. Case 350. cites the Case of *Bulkly and Wood*. 4 Rep. 14. b. pl. 3. Mich. 33 & 34 Eliz. B. R. the S. C. and becaufe the ſaid Words were not examinable in the ſaid Court, the Action lay; and the ſame was afterwards reſolved accordingly in the Exchequer, tho' the Judgment was revers'd for miſpleading. ——Cro. E. 230. pl. 21. S. C adjornatur.——Ibid. 247. pl. 7. S. C. reſolved that the Action lay ——Mo. 705. pl. 986. ſays it was agreed by all, except Owen, in the Exchequer, that no Action lay; and therefore Judgment was revers'd.——2 And. 28. pl. 18. S. C. in the Exchequer-Chamber, and agreeable to the Report in Mo.——S. C. cited Hob. 267. that the Action lies.——2 Keb. 832. pl. 56. in the Caſe of Lake v. King, Mich. 23 Car. 2. B R. the Court ſaid, that notwithſtanding what is reported in 4 Rep. 14 b. in Buckley's Caſe, it was held that Want of Juriſdiction will not make a Libel; for it is only the Error of Counſel, and a Nil capiat per Billam was awarded Niſi.——Powell (John) J. ſaid, He had heard my Lord Hale ſay, that it was reſolved in Sir Richard Buckley's Caſe, that for putting Matters in a Bill of which the Court had no Cognizance, Action does not lie againſt the Plaintiff, tho' in 4 Rep. it is reported otherwiſe. 2 Lutw. 1571 ——S. P. admitted Noy 102. in Turvill's Caſe, which was, that H. *exhibited a Bill in the Star-Chamber for forging a Will, but upon the Hearing relinquiſhed the Forgery, and inſiſted on a Practice between them to draw the Party to make that Will.* The Bill was diſmiſs'd, and the Plaintiff fined 200 l. to the King, and ſeveral Damages to every of the Parties, becauſe they have not a Remedy for thoſe Slanders (being before a competent Judge) at the

Common Law. And it seems that this was the first Precedent for Damages for a scandalous Bill. [And see Tit. Libel (A) pl. 6. in the Notes.]

Hob. 266. 267. pl. 352. Per Hobart Ch. J. in Case of Waterer v. Freeman ——S. P. Cro. J. 134. pl. 6. Mich. 4 Jac. B. R. in Case of Lady Waterhouse v. Bawde.——Cro. J. 432. pl. 11. Trin. 15 Jac. B. R. Per tot. Cur. S. P. in Case of * Weston v. Dobniet.

* See (B. a) pl. 1. S. C.

8. If a Man brings an Action upon a false Surmise in a proper Court, no Action lies for it; for the Suit was legal, tho' the Cause thereof was not true, for which he shall pay Costs. Hob. Rep. Case 350.

D. 285. a. pl. 37. Trin. 11 Eliz. cites Mich. 13 H. 7. Lord Beauchamp v. Sir Richard Croft, by the better Opinion of the Court; for no Punishment was ever appointed for Suit at Law, tho' it be false, and for Vexation.——Kelw. 26. pl. 1. S. C——Hob. 266. pl. 352. cites it as a Case of 11 Eliz.

9. If a Man brings a Writ of Forgery against a Peer &c. and the Defendant is found not Guilty by the Jury, yet he shall not have a Scandalum Magnatum, and lay the Charge contained in the Action to be a Scandal. Hob. Rep. Case 350. cites 11 Eliz.

Hob. 266. pl. 352. cites S. C.

10. If A. causes B. to be imprisoned upon a Statute confess'd by him, tho' the Statute was defeasanced, and the Money paid according to the Defeasance, yet no Action of False Imprisonment lies against A. Hob. Rep. Case 350. cites 43 Ed. 3. 33.

By Hobart Ch. J. Hob. 267. pl. 352. in the Case of Waterer v. Freeman.——But See (H. c) pl. 4. 5.

11. If one sues me contrary to his Release, an Action lies. Hob. Rep. Case 350. Per Hob.

Per Hobart Ch. J. Hob. 267. pl. 352. ——S. P. by Hob.

12. If the Obligee sues the Obligor after the Money paid, tho' it be upon a single Obligation, an Action lies. Hob. Rep. Case 350. Per Hob.

Gawdy and Fenner e contra. Cro. E. 836. in pl. 8. Trin. 43 Eliz. B. R.

13. One was brought in by *Subpœna ad Testificandum*, and upon his Oath *declared Matter of Infamy* against the Plaintiff; if he swears falsely he may be punished for Perjury, but an Action lies not against him, because he comes in by Course of Justice. Cro. E. 230. in pl. 21. Arg. cites Mich. 8 & 9 Eliz. Stanley v. Curson.

3 Le. 123. pl. 176. Cutter v. Dixwell, S. C. held accordingly. ——4 Le. 35. pl. 96. S. C. in totidem Verbis.——S. C. cited Godb. 240. pl. 333.——So for exhibiting Articles to the Sessions for the like Purpose, tho' they are *false*, it is not actionable, because it is in a Course of Justice. Cro. E. 230. in pl. 21. Arg. cites 27 & 28 Eliz. B. R. Tuthill v. Osborne.

14. Action on the Case will not lie against one for *exhibiting Articles to a Justice of Peace*, containing Suggestions *for binding* the Party *to the Good Behaviour*; for should such Actions be permitted, none, tho' they had good Reason to complain, would venture to do it for Fear of Vexation. 4 Rep. 14. b. pl. 2. Mich. 27 & 28 Eliz. B. R. Cutler v. Dixon.

2 Roll. 328. Arg. cites S. C. accordingly.

15. Parishioner shall not have an Action upon the Case *against the Parson for suing him in the Spiritual Court for Tithes, without Cause*; for if it be without Cause, he will have Costs there. Palm. 381. cited Arg. as 43 Eliz. Cross v. Jackson.

16. An Action on the Case was brought *for suing in the Admiralty* Court, *for a Thing done on the Land*, and not on the Sea. 1 Brownl. 4. Mich. 11 Jac. Row. v. Alport.

17. Case for that the Defendant went to a Justice of Peace, and requested a Warrant against the Plaintiff for stealing his Ropes. The Justice said, Be advised, and look what you do; the Defendant replied, Sir,

Sir, *I will charge him with flat Felony for ſtealing my Ropes from my Shop*, Quorum quidem Verborum &c. Per tot. Cur. theſe Words *being ſpoke to a Juſtice of Peace when he came for his Warrant*, which was lawful, would not maintain an Action; for if they ſhould, no other would come to a Juſtice of Peace to make Complaint and inform him of any Felony. Hutt. 113. Mich. 8 Car. Ram. v. Langley.

18. Caſe for that the Plaintiff brought an Action againſt one L. and the Defendant being produced as a *Witneſs at the Trial, gave Evidence that the Plaintiff was a common Liar, and ſo recorded in the Star-Chamber, by Reaſon whereof the Jury, tho' they found for the Plaintiff, gave* him *but ſmall Damages* in that Action. It was moved in Arreſt of Judgment that the Action doth not lie, for if it did, every Witneſs might be charged upon ſuch a Suggeſtion; and for what appears the Evidence may be true; for it is *not averr'd that he is not a common Liar, or that he was not recorded for a common Liar in the Star-Chamber*; and for theſe Reaſons adjudg'd againſt the Plaintiff. Hutt. 11. Hill. 15 Jac. Harding v. Bodman. Brownl. 2. Harding v. Bulman, S. C. and the Court ſeem'd of Opinion that the Action would not lie.

19. If *in Treſpaſs the Defendant juſtified that the Plaintiff was a Bankrupt, whereby he had a Commiſſion upon the Statute, and thoſe Goods were deliver'd to him*, whereas the Plaintiff was not any Bankrupt, nor any Commiſſion iſſued; yet the Plaintiff for the *Words contain'd in the Plea* ſhall not maintain any Action. Per Houghton. Cro. J. 432. Trin. 15 Jac. B. R. in pl. 11.

20. In Trover and Converſion, Judgment was given againſt the Defendant and 140 l. Damages; the *Defendant* according to the Cuſtom in B. R. *render'd himſelf* to the Marſhal *in Diſcharge of his Bail*, whereby the Bail were diſcharged of their Recogniſance according to the Cuſtom of the Court; notwithſtanding which the *Plaintiff in the Action took out a Capias ad Satisfaciendum againſt the Bail*, to take them in Execution, and deliver'd the ſame to the Sheriff, whereupon the Plaintiff brought his Action upon the Caſe. It was moved in Arreſt of Judgment that this Action does not lie, becauſe it is the Act of the Court to award this Proceſs. But adjudg'd for the Plaintiff, and affirm'd in Error. Cro. J. 667. pl. 1. Trin. 21 Jac. B. R. Steer v. Scobel.

21. Preferring a *Bill in the Spiritual Court* againſt the Plaintiff *for Drunkenneſs*, it not actionable. Agreed per Cur. But they would not overrule it upon the Declaration only, but order'd the Defendant to demur. Mitt. 314. Mich. 5 Car. C. B. Eaton v. Sharman.

22. Plaintiff declared that the Defendant *endeavour'd to charge him at the Quarter-Seſſions to be the reputed Father of a Baſtard-Child*; but the whole Court were clear of Opinion that Action of the Caſe did not lie, becauſe it was an eccleſiaſtical Scandal, and ſo to be puniſh'd there; but if he had laid that he had *procured an Order there againſt him to be the reputed Father, and ſo to keep the Child*, the Action would lie, by Reaſon of the temporal Loſs. 2 Bulſt. 343. Mich. 6 Car. B. R. Bowber v. Panter.

23. A. *enter'd a Plaint in London* againſt B. and the *Sheriff attach'd the Goods of J. S. the Plaintiff, who declared that the Sheriff knew them to be the Plaintiff's Goods, and took them at the Houſe of a Stranger*. Per Cur. the Action well lies, inaſmuch as it is *found* that they were taken *ſcienter* to be the Plaintiff's. Sid. 183. pl. 3. Paſch. 16 Car. 2. B. R. Saunders v. Powell. Lev. 129. S. C. adjudg'd for the Plaintiff. And per Cur. tho' the Goods of the Plaintiff had been among B.'s Goods, and yet Action lies, and the Scienter is not material; for the Sheriff is at his Peril to levy the Goods of B. only.——Keb. 693. pl 10. S. C. and Judgment accordingly, Niſi &c.

24. An Action was brought *in an inferior Court againſt an Attorney of C. B.* and the Plaintiff knew him to be ſuch, yet per tot. Cur. no Action lies; for perhaps he may not inſiſt upon his Privilege, and if he does, he may plead it. Mod. 209. pl. 41. Hill. 27 & 28 Car. 2. C. B. Anon.

25. If

25. If one be *retain'd to ſue for a Debt as Attorney, which he knows to be releaſed, and to which himſelf was a Witneſs*, yet the Court held that an Action would not lie; becauſe what he does is only as Servant to another, and in the way of his Calling and Profeſſion. Mod. 209. Hill. 28 & 29 Car. 2. C. B. in pl. 41.

Skin. 131. pl. 6. S. C. adjudg'd accordingly.—Vent. 369. Hodſon v. Cooke.

26. Action on the Caſe for *ſuing in an inferior Court, without any Cauſe of Action within the Juriſdiction*, was held good; and Judgment for the Plaintiff. 2 Show. 328. pl. 335. Mich. 35 Car. 2. B. R. Hudſon v. Cooke.

S. C and tho' it was moved, that it was *not alleged that the Defendant knew that the Place where the Action aroſe was out of the Juriſdiction*, which it would be hard to put the Plaintiff to take Notice of, yet Jefferies Ch. J. Holloway and Walcot, held that the Plaintiff ought at his Peril to take Notice of the Place; but Withens J. e contra. And the Court ſaid, that it could not be aſſign'd for Error in Fact that the Cauſe aroſe out of the Juriſdiction, becauſe that is contrary to the Allegation of the Record; neither is the Officer puniſhable that executes Proceſs in ſuch Action, but an Action lies againſt the Party. And yet it was reſolved in the Exchequer, when Ld. Ch. J. Hale ſat there, Paſch. 18 Car. 2. in a Caſe of Cowper v. Cowper.——S. C of Cowper v. Cowper, cited 2 Show. 328. as held good, becauſe in inferior Courts they hold to Bail in all Actions.——2 Lutw. 1571. in the Appendix, Powell (John) J. in his Argument, cites the Caſe of Hudſon v. Cooke accordingly, and ibid. 1572. cites alſo the Caſe of Cowper v Cowper, Paſch. 18 Car. 2. in the Exchequer, and ſaid he had cauſed the Roll to be ſearch'd, and had ſeen the Record, that the Plaintiff declared that the Defendant, without any Cauſe of Action, by a Precept out of the Court of Southwark, laying great Damages, procured him to be arreſted and detain'd in Priſon for Want of Bail, ubi revera he had no Cauſe of Action within the Juriſdiction. Upon Not Guilty, it was found for the Plaintiff, and 40 l. Damages, but the Gift of the Action was the *laying great Damages, and cauſing him to be arreſted and detain'd in Priſon for Want of Bail*, for which an Action would lie, tho' the Court had Juriſdiction of the Cauſe; and therefore the Averment that he had no Cauſe of Action within the Juriſdiction, was immaterial to the Gift of the Action.——2 Show 374. pl. 360. Trin. 36 Car. 2. B. R. Anon. S. P.

(D. a) For Words: For what Words it lies, for *Matters whereof the Spiritual Court hath Conuſance.* [And Pleadings.]

Cro. J. 325. pl. 2. S. C. as to the Word (Whore-Maſter) being join'd with other Words, and a temporal Loſs alleged; and by Reaſon thereof the Words were held actionable; and Judgment for the Plaintiff.——2 Bulſt. 86. Matthew v. Craſſe S. C. according to Cro. J.——See Infra pl. 5. S. C.

1. IF one Man ſays to another, Thou art a * Whoremaſter, or to a Woman, Thou art a † Whore, no Action lies for this, becauſe this is meerly Spiritual, without any Temporal Loſs. Trin. 11 Jac. B. R. between *Mathew and Croze*, per Curiam.

Cro. J. 473. pl. 5. Barmand v.—S. C. it was moved that this Imagination to be divorced is not to any Purpoſe, it being but a cauſeleſs Fear; and of that Opinion was the Court; and Judgment for the Defendant——S. C. Poph. 140. by the Name of Bernard v. Beale accordingly.——2 Roll Rep. 24. Randal v. Bell S. C. accordingly; and it is not alleged that a Divorce did enſue.——Godb. 273. pl. 385. Anon. accordingly, and ſeems to be S. C.

2. If a Man ſays of another that is married, he hath had two Baſtards 36 Years agone, and he ſhould pay for keeping them, no Action lies for theſe Words, tho' he aver'd that by Force of theſe Words a Contention aroſe between him and his Wife, and he was in Danger to have been divorced; for here is not any Temporal Loſs, and the Offence was pardon'd by ſeveral General Pardons, this being 36 Years before. Paſch. 16 Jac. B. R. between *Randle and Beal*, adjudg'd in Arreſt of Judgment.

3. If

3. If a Man says of a Woman, That J. S. did beget her with Child, and she had a Child by him, by Force of the speaking of which Words she lost her Marriage with J. D. Tho' those Words are a Spiritual * Slander, yet the Loss of the Marriage is Temporal, and therefore the Action lies for them. Co. 4. 16. b. *Anne Davies v. Gardiner*, adjudg'd. Poph. 36. pl. 3. Mich. 34 & 35 Eliz. * Fol. 35. S. C. adjudg'd for the Plaintiff.

Because if the Feme had a Bastard, she was punishable by the Statute of 18 Eliz. 3. 4 Rep. 17. a. — Het. 161. S. C. cited.——2 Roll Rep. 433. S. C. cited.——S. C. cited Palm. 298. and says that one Reason of the Judgment is, that the Justices may punish her by the Statute; and says that tho' it is alleged there that she had lost her Marriage, yet this was not out of Necessity to make the Action to lie but for the Increase of Damages——It was said, Sid 397. pl. 4. Hill. 20 & 21 Car. 2. B. R. that Popham Ch. J. said that Ann Davis's Case was adjudg'd upon other Reasons than is reported in 4 Rep. 16, 17——And Vent. 4 Hill. 20 & 21 Car. 2. B. R. in Case of Barnes v Bruddel, the Reason of the Statute of 18 Eliz. cap. 3. alleged in that Case of Anne Davies, was said by Twisden J. to be of my Ld. Coke's putting in; for that Justice Jones affirm'd to him, that nothing was said thereof in the Case.——And in the Case of Tuckey v. Flower, Comb. 137. Mich. 1 W. & M. in B. R. Dolben J denied 4 Rep. 17. Ann Davies's Case to be Law.——And 6 Mod. 104. Hill. 2 Ann. B. R. in Case of Ogden v. Turner. Holt. Ch. J. denied the said Reason given in Anne Davies's Case.—— Lev. 261. Hill. 20 & 21 Car. 2. B. R. says that the Loss of Marriage was the sole Reason in Anne Davis's Case——S. C cited Arg. Comb. 392 Mich. 8 W. 3. and says that it seems to be only the Opinion of the Ld. Coke; and Holt Ch. J. said that it had often been denied. And that if the Case were new, perhaps we should think an Action lies without alleging Loss of Marriage, as well as for Words tending to the Discredit of a Tradesman; for it touches her in the most tender Part, and is a manifest Loss. And he said that for aught he knew, Marriage is the very End of her Creation.

4. So if a Man says of a Woman, That J. S. had the Use of her Body, by which she loses her Marriage, an Action lies. Pasch. 5 Jac. B. R. between *Dame Morrison and Cade*, adjudg'd. Cro. J. 162. pl. 17. S. C. with an Innuendo that he had Carnal Copulation with her; and adjudg'd for the Plaintiff, and afterwards affirm'd in Error.——Jenk. 316. pl. 7. S. C.——See (Z. a) pl. 7. S. C.

5. [So] If a Man says to J. S. another Man, Thou art a Whoremaster, for thou hast lain with Brown's Wife, and had'st to do with her against a Chest, by which he loses his Marriage with A. D. &c. J. S. shall have an Action for these Words; for there is not any Difference between a Man and a Woman as to this Matter; for a Man may have a Temporal Damage by the Loss of his Marriage as well as a Woman. Trin. 11 Jac. B. R. between *Mathew and Craze*, adjudg'd. Mich. 12 Jac. B. R. between * *Sell and Fairee*, per Curiam. Cro. J. 323. pl. 2 S. C. that by reason of the Allegation of his Loss of Marriage, the Action is maintainable; and Judgment for the Plaintiff——2 Bulst. 89. S. C. and Judgment for the Plaintiff.

* Roll Rep. 79. pl. 24. The Court agreed that a Man may have Action upon the Case for a Loss of Marriage by scandalous Words, as well as a Woman.——2 Bulst. 276. Sell v. Facy, S. C. upon the Manner of the Plaintiff's declaring——3 Bulst. 48. Trin. 13 Jac. Selly v. Facy, S. C. and Judgment for the Plaintiff; the Loss of a Wife being the same to a Man as the Loss of a Husband is to a Woman.

6. [So] If a Man says to a Woman, Thou art a Whore, I will marr thy Marriage, by which she loses her Marriage, an Action lies. Trin. 22 Jac. B. R. between *Tonson and Spring*, adjudg'd, this being moved in Arrest of Judgment. 2 Roll Rep. 433. Thompson v. Twenge, Trin. 21 Jac. B. R. viz. of Marriage, is not actionable.

seems to be S. C. Adjudg'd that *Thou art a Whore*, with a Supposal of Temporal Loss, is actionable; but Doderidge and Chamberlaine J. said that without Temporal Loss it is not actionable.

7. In an Action upon the Case, if the Plaintiff declares that she had several Suitors to marry her, and that the Defendant said of her, She is with Child, and hath taken Physick for it, by which she became in Disgrace, & perdidit consortium vicinorum suorum &c. tho' S. C. cited Sid. 397. pl. 4. Hill. 20 & 21 Car. 2. B. R. in Case

of Barnes v. Prudlin, and was there denied —— S. C. cited Vent. 4. in S. C. where the Words were, viz. *She was with Child by J. S. whereof she miscarried*; and notwithstanding the said Case of Medhurst v. Balaam, and also of Anne Davis's Case, there cited, the Opinion of the Court was, that such Action would not lie without alleging Special Damage, as to say that she lost her Marriage — Lev. 261. S. C. by the Name of Barnes v. Strud, and this Case of Medhurst v. Balaam, was denied to be Law. — Comb. 391. in Case of Byron v. Elms, Arg. cites S. C. as denied in several Books, which Case was thus, viz. the Plaintiff declared, that she being a young Woman, the Defendant, to hinder her Marriage, said, *What did you go to London for, but to drop your Slink?* She went to London last Winter to lie in, and to my Knowledge several People have lain with her; adjudg'd not actionable, because Fornication, which is the Crime here, is only a Spiritual Offence, and not here without a temporal Loss. 2 Salk. 693. pl. 2. Mich. 8 W. 3. B. R. Byron v. Elmes. ——— Comb. 391. S. C. Holt Ch. J. said, that if the Case were new, perhaps we should think an Action lies (without alleging Loss of Marriage) as well as for Words tending to the Discredit of Tradesman, for it toucheth her in the most tender Part, and is a manifest Loss. Marriage is the very End of her Creation for ought I know; if it were actionable, then there must be a Prohibition in such Case, for the Party must not be liable to ecclesiastical Censures and temporal Damages too. ——— 12 Mod. 396. S. C. adjudg'd for the Defendant.

it be not alleg'd that she lost any Marriage thereby, yet the Action lies. Mich. 21 Jac. B. R. between *Medhurst and Balaam*, adjudg'd, this being moved in Arrest of Judgment.

Words spoke of a Maid were, *She was with Child, and did take Physick to kill the Child*, and alleged that thereupon divers Suitors refused her. Adjudg'd for the Plaintiff, without any Reason alleged. Het. 18. Pasch. 3 Car. C. B Reading's Case

Cro. C. 269. pl. 3. Southold v. Daunston, S. C. adjudg'd for the Plaintiff, and that such Foreign Intendments shall not be taken.

8. If one Man says to another, Thou wast found in Bed with J. S.'s Wife, by the Reason of the speaking of which Words he loses his Marriage with A. S. &c. Tho' he might be in Bed with her without any Ill done, yet because this sounds in Scandal, and he has lost his Marriage thereby, the Action lies. Mich. 8 Car. B. R. between *Southall and Dawson*, adjudg'd, this being moved in Arrest of Judgment. Intratur Trin. 8 Car. Rot. 868.

Action was brought for these Words, *Sir John Lenthall lay with me, and had the Use of my Body by Force, and against my Will.* It seem'd to all the Justices that the Words are actionable; but Hutton doubted, because the Word (Force) is not so much as Ravishment. Litt. Rep. 337. Trin. 6 Car. C. B. Sir Edm. Lentall's Case.

9. In an Action upon the Case for Words, if the Plaintiff declares that the Defendant said of him, He had the Use of my Wife's Body by Force, by reason of which Words he was brought before certain Justices &c. and by them examin'd for a Rape by him committed upon the said Woman; by reason of which, for the Purgation of himself therefrom, he expended several Sums of Money. An Action lies upon this Declaration for the Temporal Damage which he had thereby. Mich. 9 Car. B. R. between *Harris and Smith*, adjudg'd per Cur. in a Writ of Error upon a Judgment in Southampton, and the first Judgment affirm'd accordingly. Intratur Hill. 9 Car. Rot. 73.

10. In an Action upon the Case, if the Plaintiff declares that there was a Communication of a Marriage between him and A. S. and the Defendant said of him, He had a Bastard-Child by Jennings's Wife of Northampton, by the speaking of which Words he himself refused to marry with A. S. where it ought to have been that A. S. refused to marry with him; after Not Guilty pleaded, and this found for the Plaintiff, it was moved in Arrest, Mich. 11 Car. B. R. between *Carter and Smith*; And per Cur. The Words would maintain the Action if the Loss of the Marriage had been well alleg'd, because it might be intended that he might have a Bastard by her before her Marriage with Jennings; and if she had Issue by him after her Marriage, tho' this be no Bastard in Law, yet such a Scandal might occasion the Loss of his Marriage. But per Cur. the Action does not lie, because it is not well alleg'd that A. S. refused to marry him, but

but that he himself refused to marry A. S. and so no Damage, and therefore the Postea was staid.

11. If a Man says to a Feme Covert, Thou bold Cullobine, Bastard-bearing Whore, thou didst throw thy Bastard into the Dock at Whitechappel, no Action lies for these Words, though it might be intended that she had a Bastard by the said Cullobine (who in Truth was her Husband) before her Marriage, inasmuch as there does not appear to be any Temporal Damage thereby, by the Loss of any Marriage; but only a Punishment by the Statute for having a Bastard, which is not a sufficient Cause to maintain the Action. Hill. 10 Car. B. R. between *Cullobine and his Wife*, Plaintiffs, *and Vinor*, Defendant, adjudg'd in Arrest of Judgment. Fol. 36. Jo. 356. pl. 6. Colabyn v. Viner, adjudg'd.

12. In an Action upon the Case, if the Plaintiff declares that whereas divers Persons conabantur & desiderabant to marry their Cousins and Friends to the Plaintiff, the Defendant (being a Woman) on Purpose scandalized the Plaintiff; and to hinder him in his Marriage with any Woman, preferr'd a scandalous Libel in the Spiritual Court against the Plaintiff, and thereby charged him that he, under Colour to be a Suitor to her in the way of Marriage, often resorted to her in the Night, and lay with her, and got a Child of her Body; and after publish'd and affirm'd the same Matter before several Persons falsely and malitiously, whereby the Plaintiff was so much scandalized, that all honest Persons having the Fear of God before them, Aliquam mulierem de filiabus aut consanguineis suis in legitimo Matrimonio cum querente copulari & jungi semper postea, & hucusque omnino recusaverunt & adhuc recusant; and upon Not Guilty pleaded, the Jury find a Special Verdict, scilicet, That the Defendant preferr'd the said famosum & scandalosum Libellum &c. and that she after, at the Sessions of the Peace, being examined who was the Father of the Child begotten of her Body, said and affirm'd that the Plaintiff was; and that she affirm'd this falso & injurioso of the Plaintiff; and that by reason thereof the Plaintiff was much scandalized in his Fame and Name; and that all honest Men, having the Fear of God before them, Aliquam mulierem de filiabus aut consanguineis suis in legitimo Matrimonio cum querente copulari & jungi semper postea hucusque recusaverunt & adhuc recusant. The Action in this Case does not lie upon this Special Verdict, because here does not appear to have been any malitious Prosecution, and here there is not alleg'd or found any Loss of any particular Marriage, or that there was any Communication of any particular Marriage; and this general Matter that all honest Persons refused, by reason thereof, to marry their Daughters or Relations to him, is too general. Mich. 11 Car. B. R. between *Norman and Simons*, per Curiam adjudg'd in the Exchequer-Chamber, and the Judgment given e contra in B. R. reversed accordingly.

13. In an Action upon the Case, if the Plaintiff declares that in London, by the Custom, a common Whore ought to be carted, and a Bason tingled before her; and that the Defendant spoke these Words of the Plaintiff, Thou art a Whore, and a common Whore, and art a Bawd to thy Mistress, and I will have a Bason tingled before thee, the Action well lies upon this Declaration for these Words. Trin. 15 Car. B. R. between *Hassel and Capcot*, adjudg'd good, this being moved in Arrest of Judgment that the Action does not lie. Customs of London (A) pl. 1. S. P.—Calling a Woman *living in the Borough of Southwark, Where*, is actionable, because she is liable to publick Carting by Prescription. But then she must take Care to lay the Prescription well. Sid. 97. pl. 26. Mich. 14 Car. 2. B. R. Roberts v. Herbert. ——Keb 418. pl. 131. Caus v. Roberts seems to be S. C.

14. [50] In an Action upon the Case, if the Plaintiff declares that in London there is a Custom that a Bawd ought to be carted, and the Defendant said these Words of the Plaintiff, She is a Bawd, and I will have her carted. Hill. 15 Car. B. R. between *Rily and Lewis*, per Jo. and Bark. adjudg'd that the Action lies; this being moved in Arrest of Judgment, no other Judge being then present.

Fol. 57. 15. In an Action upon the Case, if the Plaintiff declares that whereas he was a Parishioner of S. the Defendant being Vicar there, to the Intent to scandalize the Plaintiff, and to draw an ill Opinion of the Plaintiff among his Neighbours, so that they withdraw themselves from the Company of the Plaintiff, tanquam ab homine excommunicato, & nulla fide aut credentia digno, and injustly to exclude the Plaintiff out of the Church, and for a great Time to deprive him of all the Benefit of hearing Divine Service in the said Church; the Defendant in the Time of Divine Service in the Church, in the Hearing of the Parishioners, malitiously pronounced the Plaintiff excommunicated, prætextu cujusdam Instrumenti by him receiv'd from the Ordinary; whereas he had no such Instrument of Excommunication, nor was he excommunicated; and also at another Time to the Intent aforesaid, in the Time of Divine Service, in the Hearing of the Parishioners, malitiously pronounced the Plaintiff excommunicated; and further, refused to celebrate Divine Service till the Plaintiff departed out of the Church, upon which the Plaintiff was compell'd to go out of the Church; whereas the Plaintiff was not excommunicated; by which means the Plaintiff was scandalized, and hinder'd of hearing Divine Service for a long Time, and for the clearing of this Scandal, and his Innocency therein, diversos corporis sui grandes labores capere, & diversas ingentes denariorum summas erogare & exponere coactus fuit in extremam depauperationem & ignominiam maximam of the Plaintiff; this Action lies, tho' he does not shew that any Man avoided his Company, or forbore to trade or deal with him, or that he had any Temporal or Special Loss; for this is a great and malitious Scandal, tho' to his Soul, and tho' Spiritual. Mich. 16 Car. B. R. between *Barnabas and Traunter*, adjudged per Curiam, this being moved in Arrest of Judgment.

S. P. doubted by Vaughan Ch. J. unless there be a special Damage, any more than to say that one had no Title to his Land. 2 Vent. 28.

16. If one says of another that has Land by Descent, that he is a Bastard, an Action upon the Case lies; for this tends to his Disinheritance, and Disturbance by Suit. Mich. 3 Jac. B. R. per Curiam.

Thou art a Bastard, is actionable; and yet Bastardy is a spiritual Thing, and determinable there. Le. 131. Hill. 32 Eliz. in pl. 179. Arg. cites it as ruled in Case of Dorrington v. Dorrington.

If the Defendant pretends that the Plaintiff was Bastard, and *that he himself was the next Heir*, there no Action lies; and this the Defendant may shew by Way of Bar, if the Plaintiff omits it in his Count. 4 Rep. 17. a. in pl. 11. cites it as resolved Trin. 25 Eliz. B. R. Banister v. Banister.

17. But if one Man says of another that has Lands by Descent, that he is base born, no Action lies; for these Words, taken in mitiori Sensu, are not actionable. Mich. 3 Car. B. R. per Curiam.

S. P. resolved actionable; for it tends to his Disherison of the Land, which might descend to him from his Father. 4 Rep. 17. a. in pl. 11. cites Trin. 25 Eliz. B. R. Banister v. Banister. ——— S. P. by Wilde J. 2 Vent. 26. but Ibid. 28. Vaughan Ch. J. said he took it not to be actionable to call a Man Bastard while his Father is alive; and said that the Books are cross in it.

18. If a Man says to the Son and Heir apparent of J. S. that he is a Bastard, no Action lies; because he has not any Prejudice thereby as yet. Mich. 3 Jac. B. R. per Curiam.

19. If

19. If a Man says to a Woman, Thou hadst a Bastard, no Action lies, because it does not hereby appear that he intends that the Bastard was chargeable to the Parish; in which Case a corporal Punishment is to be inflicted by the Statute. Hill. 5 Car. B. R. between *Lightfoote and Piggot*. Rot. 423. per Curiam, this being moved in Arrest of Judgment, and the Plaintiff never had Judgment therein. Mich. 1650. between * *Winter and Barnard* adjudged. Intratur Hill. 1649. Rot. 666.

* Sty. 221. Trin. 1650. S. C and it was, that upon the Rumour that a Bastard Child was drowned, the Defendant said to the Plaintiff, *I do verily believe the Bastard-Child was thine; nay, it was thine.* Adjudged for the Plaintiff. It was objected that it did not appear that a Bastard-Child was drown'd; and if there was none, it ought to be shewed on the Defendant's Part.— To say of a Feme sole *she had a Bastard*, are Words actionable in themselves; Per Vaughan Ch. J. Freem. Rep. 80. pl. 99. Pasch. 1673. in Hicks's Case; but in the principal Case the Words being, that *she was brought to Bed of two Boys*, Curia advisare vult.——She was the Woman that had a base Child, and that it was at L. and a red-headed Boy. After Verdict without special Damage, not actionable Per Curiam, without alleging it was likely to be a Charge to the Parish. Keb 487. pl. 28. Pasch. 15 Car. 2. Bonithon v Kendall.——Holt Ch. J. said, that to say of a young Woman she had a Bastard, is a very great Scandal, and for which, if he could, he would encourage an Action; but that it is not actionable, because it is a spiritual Defamation punishable in the Spiritual Court. 6 Mod. 104. 105. Arg. Hill. 2 Ann.

20. [So] in an Action upon the Case for Words, the Plaintiff Thomas Brown declared, That one A. G. had a Bastard Son begotten of her Body, then living, [and] the Defendant knowing it, of his Malice to defame him, and to draw him in Danger of the Statute of 18 Eliz. having a Discourse of the Bastard, and of the Plaintiff, said of the Plaintiff, that Brown is the reputed Father of that Child, whereby he was very much prejudiced in his Buying and Selling, and put to great Expences in the clearing of himself in hac parte. The Action does not lie for these Words upon this Declaration, because it is not said by the Defendant that he was to be punished by the said Statute; for he was not to have any corporal Punishment, or to be imprisoned, unless the Bastard was some Charge to the Parish. Hill. 11 Car. B. R. between *Salter and Brown* adjudged, in a Writ of Error upon a Judgment for the Plaintiff in * B. where it was adjudged, as I have heard Per totam Curiam e contra for the Plaintiff there; but the said Judgment was now revers'd Per Curiam. Intratur Hill. 10 Car. Rot. 270. B. R.

Cro. C. 436. pl. 5. S. C. adjudg'd in C. B. for the Plaintiff; but upon Error brought all the Court (absente Bramston) were of Opinion that the Words were not actionable, unless he had alleg'd some temporal Loss, as Loss of Marriage, or that by this Means he should be chargeable for Maintenance of such Child, and to have further Punishment. And the Judgment in C. B. was revers'd.

* Fol. 38.

21. In an Action upon the Case, if the Plaintiff declares that he was Heir apparent to his Father, and B. his Brother, and that each of them had Land in Fee of the Value of 40l. per Annum, and that they intended either to suffer their said Land to descend to him, or to convey it to him; yet the Defendant intending to disinherit the Plaintiff, said to the Plaintiff, Thou art a Bastard; by Reason whereof his Father and Brother intended to disinherit him, and to convey their Lands to another. The Action lies upon this Declaration for the temporal Damage that may accrue to him thereby. Pasch. 13 Car. B. R. between *Humfrys and Stutfield* adjudged Per Curiam, this being moved in Arrest of Judgment.

Cro. C. 469. pl. 1. Humphrys v. Stanfield, S. C. held accordingly Per tot. Cur. —— Jo. 388. pl. 7. Pasch. 12 Car. B. R. Humphreys v. Stotvile, S. C. adjudged that Action lies.——Godb. 451. pl. 519. S. C. and says the Words were spoken in the Presence of the Father and Brother; and adjudged that the Words were actionable.——4 Rep. 17. a at the End of pl. 11. cites Trin. 25 Eliz. B. R. Banister v. Panister, resolved that where Defendant said of the Plaintiff (who was Son and Heir to his Father) that he was a Bastard, Action upon the Case lies, because it tends to his Disherison of the Land, which would descend to him from his Father.——S. C. cited Cro C. 469. by Jones J.

S. C. cited by Jones J. Cro. C. 469. pl. 1. in the same Case, by the Name of Vaughan v. Ellis.—Cro. J. 213. pl. 6. Mich. 6 Jac. in the Exchequer Chamber, S. C. of Vaughan v. Ellis, says the Plaintiff was the youngest Son, and his elder Brothers living; and that J. S. was to buy the Land, and offered him a Sum of Money for his Title; and by Reason of those Words refus'd to give him any thing. And the 2 Chief J. conceived, that tho' he has no present Title (as was objected) yet it appears he is by Possibility inheritable to those Lands; and being offered a Sum of Money for that Possibility to join in the Assurance, tho' he has no present Title to the Lands, yet by those Words he had a present Damage, and might receive Prejudice thereby in futuro, in case he were to claim any Land by Descent; and therefore affirm'd the Judgment.——Bastard is determinable by the Ordinary; but if he adds further Words to intitle himself to be Heir, or *shews some Possibility of being Heir*, this will make the same Words of calling him Bastard to be actionable; Per Fleming Ch. J. 2 Bulst. 90. Trin. 11 Jac.

22. In the said Case of Humfrys, it was said by Justice Jones, that it was adjudged in the Exchequer, and affirmed in a Writ of Error in the Exchequer Chamber, that where there was Grandfather, Father, and Son, and the Son brought an Action upon the Case, and declared that the Grandfather (whose Heir he is) intailed certain Lands upon himself, and the Heirs Males of his Body; and the Defendant intending to scandalize his Possibility that he had to inherit this Land, as Heir of the Body of his Grandfather, said that he was a Bastard. Tho' the Grandfather and Father were then living, yet the Action brought ut supra by the Son lay. But Justice Jones did not say in what Term or Year it was so adjudged.

Sty. 274. S. C. and it being objected that no special Loss or Damage was alleged; and cited the Case of Lightfoot v. Piggot, and Winter v. Barnard [supra, pl. 19.] whereupon Judgment was stay'd till moved on the other Side. But upon moving the Case of the other Side, page 277. it was insisted that if the Words were true, the Party is punishable by 7 Jac. with corporal Punishment; besides, the speaking these Words was after the Statute against Adultery, which makes the Words more actionable. And Judgment was given for the Plaintiff Nisi.

23. In an Action upon the Case for scandalous Words, if the Plaintiff declares that the Defendant said these Words of the Plaintiff, being a Feme sole, the of 1650, This is that Whore that my Man A. got a Bastard by, and withal spent all my Money; and being asked by another standing by, whether he were not mistaken, for the Maid hath been but a little above a Year in Town, the Defendant replied, The Queen hath been too long to my Costs; no Action lies for these Words, for to say that a Woman had a Bastard is no Cause of Action. Trin. 1651. between *Owen and Jevan* adjudged, this being moved in Arrest of Judgment after a Verdict for the Plaintiff.

2 Roll Rep. 43. S. C. adjudg'd that no Action lies; but it was agreed that if he had alleg'd Temporal Damages, as that he was in Communication of selling of the Advowson, and that by reason of these Words he could not sell it, to the Damage &c. this had given a good Cause of Action.——Cro. J. 484. pl. 3. Tasborough v. Day, S. C. says he counted that he was seised in Fee of the Advowson, and intended to sell it for Payment of his Debts, but that by the said Words he was hinder'd in the Sale of it; but because he did not shew that there was any Communication to sell it to any, nor that any, who intended to buy it, was thereby hinder'd in his Buying, and without some Special Cause shewn the Action lies not; and of that Opinion was all the Court, and gave Judgment for the Defendant.

24. If a Man says of another, He was the true Patron of the Advowson of S. but he hath lost that Patronage and Presentation by being a Simonist and Recusant, both which I will prove him to be, yet no Action lies; for by the Simony only the Loss of the Presentation pro hac vice comes by the Temporal Law only, and the Recusancy touches him only in his Religion; for it does not appear that he intended him to be a Recusant according to the Statute. Trin. 16 Jac. B. R. between Sir *John Tasburrough and* adjudged in Arrest.

25. All the Justices *refused to grant Consultation to the Spiritual Court in Case of Defamation.* But it does not appear there what Defamation it was; and the Reason seems to be *inasmuch as by this the Party is damnified, and to gain his Damages the Suit is only at the Common Law*; for the Spiritual

Spiritual Court can do no more but give Puniſhment for the Sin, and not Damages. Br. Action ſur le Caſe, pl. 115. cites the Regiſter 54.

26 Thou art a *Whore-monger*, Action lies; Per Mountague and Hales. Mo. 10. pl. 38. Mich. 4 E. 6.

27. Calling one *Adulterer* is not actionable, becauſe it is not puniſhable by the Common Law, but only by the Spiritual Law. Mo. 29. pl. 92. Trin. 3 Eliz. Anon.

28. *Thou art a Whore, and J. S. hath the Uſe of thy Body; the Cart is too good for thee.* Adjudged not actionable. Cro. E. 582. pl. 8. Mich. 39 & 40 Eliz. B. R. Pollard v. Armſhaw. Goldsb. 172. pl. 104 S C. held not actionable; for the Common Law cannot define who is a Whore.——Saying of a *married Woman*, that *ſhe is a Whore*; *ſhe is my Whore*, is actionable; Per Cur. 3 Mod. 120. Hill. 2 & 3 Jac. 2. B. R. Baldwin v. Flower.

28. Action for theſe Words; *Mrs. Anne Reſton* (the Plaintiff Innuendo) *hath had a Child. It is true; for ſhe was conveyed to B. and there ſhe laid her great Belly. It is as true that ſhe hath had a Child as that you ſit there; for ſhe was ſent away with Child, and if ſhe had not a Child ſhe hath made it away*; and alleged, that by Reaſon of theſe Words ſhe loſt her Marriage. The Defendant demurr'd; and thereupon adjudged for the Plaintiff. Cro. E. 639. pl. 40. Mich. 40 & 41 Eliz. R. R. Reſton v. Pomfreict.

30. Actions for Words ſpoken to the Plaintiff's Servant, viz. *Thy Miſtreſs is an arrant Whore, and would have lain with me 7 Years ſince; and I would not unleſs ſhe would go to the Hedge*; and alleged that ſhe was in Communication of Marriage with J. S. who was ſeiſed of Land worth 200 l. a Year. Adjudged not actionable, becauſe they are ſpiritual Slander and Defamation, and puniſhable there; but if the Words had been ſpoken to him who was in Communication of Marriage with her, ſo as his Purpoſe was to hinder the Marriage, the Words had been actionable. Cro. E. 787. pl. 27. Mich. 42 & 43 Eliz. B. R. Holwood v. Hopkins.

31. Action will lie for calling one *Baſtard*; Per Dyer and Walſh, but Brown e contra. And Dyer ſaid, That at Berwick Aſſiſes a Formedon in Deſcender was brought; and one ſaid that *his Father, by whom he claim'd, was a Baſtard*; and he brought Action on theſe Words, and recover'd. Ow. 32. Mich. 40 Eliz. Anon. Calling one *Baſtard* is actionable; cited by Chamberlain J. as adjudg'd 15 Jac. and tho' Error was brought and aſſign'd that the *Plaintiff did not claim any Inheritance, or to be Heir to any Perſon certain*, yet the Judgment was affirm'd. Godb. 327. in pl. 421.

Calling one Baſtard generally, without ſhewing ſome ſpecial Loſs, is not actionable. Per Doderidge J. 2 Roll Rep. 249. but ibid. 250. Chamberlaine J. contra, and cited a Caſe in *6 Eliz. Dyer, where one recover'd great Damage becauſe the Defendant had ſaid that *his Father was a Baſtard*, and cited 5 Jac. Nelſon v. Stokes, where the Plaintiff did not allege any Special Cauſe of Action, and yet recover'd; but one at the Bar, who was Counſel in the principal Caſe, ſaid he was Counſel in that Caſe, and that the Plaintiff averr'd a temporal Cauſe; but Chamberlaine J. denied it, and ſaid as before ——See (K. a) Nelſon v. Staffe.

* Dal. 63 pl. 23. 6 Eliz. S. P. and ſeems to be S.C.

32. Plaintiff declar'd, that he being in Treaty of Marriage, the Defendant ſaid of him, that *he had a Baſtard*; and that by Reaſon of thoſe Words the Marriage broke off, and ſo being damnified thereby, he brought this Action. It was *proved that the Marriage was broke off before the Words ſpoken.* This Verdict is found againſt the Plaintiff. 3 Bulſt. 76. cited by Coke Ch. J. as a Caſe tried before him.

33. Caſe &c. for theſe Words, *Thou art a Whore, a Baſtard bearing Whore, and T. H.'s Whore, thou didſt play the Whore with him at ſuch a Gate, and didſt forget your Gloves behind you; thou hadſt a Baſtard by him, which was ſent to Ireland.* It was moved that the Action would not lie, becauſe the Plaintiff did *not allege any temporal Loſs*, this being in its Nature a Spiritual Offence; but adjudg'd, that by the Statute 18 Eliz. and 7 Jac. the one appointing a Puniſhment for a Woman who hath a Baſtard, and the other appointing, that a Whore ſhall be ſent to Bridewell for a Year,

Year, had alter'd the Nature of the Offence, and given the temporal Courts Juriſdiction, and tho' ſhe is not puniſh'd by Virtue of theſe Statutes, it is ſufficient that ſhe is liable to be puniſh'd, and that was the Reaſon of the Judgment in Ann Davis's Caſe. It is true, in that Caſe the Loſs of Marriage was alleged, which is temporal, not as neceſſary to ſupport the Action, but to encreaſe the Damages. Palm. 298. Trin. 20 Jac. B. R. Vaughan v. Standiſh.

2 Roll Rep. 373. Taylor v. ... S. C. and Judgment arreſted accordingly.

34. *Do you mean to caſt away your Daughter on T. It is as true as any thing can be, that T. raviſh'd H.'s Wife.* Whereupon the Daughter refuſed to marry him. It ſeems the Words in themſelves are actionable; but Judgment was arreſted upon Exceptions to the Declaration. Palm. 385. Mich. 21 Jac. B.R. Taylor v. Tally.

——Lat. 218. Mich. 3 Car. Taylor v. Tolwin, S. C. and adds theſe Words, viz. *And you had better follow your Daughter to the Gallows than beſtow her on him.* The Court ſaid that the Action lay; and the Plaintiff had Judgment, Niſi &c. The Court inſiſted upon it, becauſe it is a Raviſhment of another's Wife, which (as they ſeem'd to incline) could be no other than Felony.

35. Words ſpoke of a Widow were *ſhe is a Whore, and her Children* (Innuendo thoſe ſhe had by her late Husband) *are F.'s Baſtards.* She alleg'd a Communication of Marriage. Per tot. Cur. Action lies; and Judgment for the Plaintiff. Cro. C. 322. pl. 4. Mich. 9 Car. B. R. Brian v. Cockman.

36. *She play'd the Whore for a White Smock*, not actionable; for nothing is charged but Incontinency. Cart. 55. Arg. cites it as ſo ruled in Caſe of Dracot v. Siblit.

37. Caſe &c. in which the Plaintiff declared that he was inducted &c. into a Parſonage in Ireland, and executed the Office of a Paſtor in that Church for 4 Years; the Defendant ſaid of him, *You are a Drunkard, a Whore-Maſter, a common Swearer, and a common Liar, and you have preach'd falſe Doctrine, and deſerves to be degraded*; after a Verdict, it was objected that the Words are not actionable, becauſe they impute no civil or temporal Damage to the Plaintiff, but adjudg'd actionable; for if true, he may be degraded, and ſo loſe his Freehold. All. 63. Paſch. 24 Car. B. R. Dodd v. Robinſon.

38. *She is L. R.'s Whore, and he knows her as well as her Husband*; not actionable. Sty. 352 Mich. 1652. B. R. Wall v. Bye.

39. *You are a Whore, and have play'd the Whore with ſo many Men you cannot number them*; adjudg'd by Jerman J. (abſente Roll) for the Plaintiff; for the Words ſhall be conſtrued to a common Intendment. Sty. 328. Paſch. 1652. Brian v. Twite.

She is a Whore, and I will prove her a Whore, and an arrant Whore. Roll Ch. J. held the Words too general, and but Words of Paſſion only; and Judgment againſt the Plaintiff, Niſi &c. Sty. 299. Mich. 1651. Freeman v. Childereſs.

40. *Thou art a Whore, and I will prove it*; was held by Roll Ch. J. not actionable, tho' ſpoke during the Act againſt Adultery; becauſe they are only Words of Heat and Choler; but if a *ſpecial Damage is laid*, as per quod Maritagium amiſit, or the like, they are actionable. Sty. 387. Mich. 1653. Dekin v. Turner.

41. The Plaintiff declared, that he was of good Fame &c. and that the Defendant to the Intent that he (the Plaintiff) might be puniſh'd by the *Statute of Fornication*, ſaid, He hath got M. N. with Child, and would lay it to my Son; adjudg'd, that the Words are actionable. 2 Sid. Mich. 1657. B. R. Marſton v. Dennis.

* S. P. per Cur. Hardr. 107. Mich. 1657. in the Exchequer.

42. *Thou art a Whore* is not actionable, but to ſay, Thou art a Whore, * *and haſt been carted*, are actionable; and ſo it is to ſay, Thou art a Whore, *and haſt been in Bridewell*, or, Thou art a Whore, † *and haſt emptied thy Cask in the Country*, or, Thou art a Whore, ‡ *and thy Plying-place*

Place is in Cheapside, where thou getteſt 40 *s. a Day.* Such Words are well actionable; Per Glyn Ch. J. For a Circumſtance added ought to be conſtrued with the precedent Sentence, and ſometimes Sentences conjoin'd are actionable, where ſeparatim they are not. 2 Sid. 34. Hill. 1657. B. R. in Caſe of Collwood v Chandler. —† *S. P.* per Cur. Hardr. 107. Mich. 1657. in the Exchequer. —‡ Adjudg'd for the Plaintiff; for by Roll Ch. J. the Words import more than the bare calling a Woman Whore. Sty. 394. Mich. 1653 Hicks v. Joyce.

45. *You are a Whore, and I can have a better Whore for a Groat, and you get your Living by your Tail.* Adjudg'd actionable ſince the [then] late Act [againſt Adultery.] For thoſe Acts imply a continued Courſe of Fornication and Adultery; and Judgment Niſi &c. Hardr. 107. Mich. 1657. in the Exchequer, Gardiner v. Parker. S. C. cited as adjudg'd not actionable; and ruled accordingly in the principal Caſe, for ſaying *You are a Whore, and a Jade, and a ſtrumpetly Whore, and I will prove you a common Whore.* Sty. 323. Paſch. 1652. B. R. Green v. How.

46. *B. did lie with J. P. as often and familiar as with his own Wife.* But there being no ſpecial Damnification aſſign'd, the Judgment was ſtay'd uſque &c. Keb. 19. pl. 53. Paſch. 13 Car. 2. B. R. Baſtard's Caſe.

47. *Thou art a Whore-Maſter, and haſt had to do with the Wife of J. S.* Not actionable. Keb. 119. pl. 26. Mich. 13 Car. 2. B. R. Whitcher's Caſe.

48. A. intending to marry M. the Defendant wrote a *Letter* to A. viz. *You ought not to marry M. for, before God, ſhe is my Wife, and therefore if you do, you will live in Adultery, and your Children will be Baſtards*; whereupon the Plaintiff loſt her Marriage; and alleged that it was wrote falſo & Malitioſe to hinder her Marriage. At firſt all the Court except Twiſden, held that the Action did not lie; but after the Cauſe had depended ſeveral Terms by Adjornment, the other Juſtices having changed their Opinions, gave Judgment for the Plaintiff, by Reaſon of the Words, falſo & Malitioſe. Sid. 79. pl. 5. Trin. 14 Car. 2. B. R. Shepherd v. Wakeman. Lev. 37. S. C. adjudg'd for the Plaintiff becauſe it was found to be falſe and malicious, and if ſuch Action would not lie, a mean and baſe Perſon may injure any Perſon of Honour and Fortune, by ſuch Pretence.

49. Saying of the Plaintiff, who held a Copyhold Dum ſola & caſta vixerit, with Intention to indanger the Loſs of her Copyhold, *Thou art a Whore, and I will throw thee out of thy Living*, is actionable, by Reaſon of the ſpecial Damage. Sid. 214. pl. 15. Trin. 16 Car. 2. B. R. Boys v. Boys. Lev. 134. S. C. held accordingly. —Keb. 758. pl. 62. S. C. held accordingly. —In ſuch Caſe the Incontinency ſhall be tried by the Common Law. 4 Rep. 17. a. Per Cur. Obiter. in pl. 11.

50. *She is with Child by T. S. whereof ſhe miſcarried*, by Reaſon whereof her Father turned her out of Doors; and that ſhe was brought within the Penalty of the Statute 18 Eliz. It was inſiſted for the Plaintiff, that ſince that Statute it is actionable to ſay that a Woman had a Baſtard; and ſo it was held in Anne Davis's Caſe. But the Court held that an Action would not lie without ſpecial Damage alleged, as that ſhe had loſt her Marriage. And Per Twiſden, the Statute was not mentioned in Anne Davis's Caſe, but that was put in by my Lord Coke himſelf, in the Report of that Caſe. 1 Vent. 4. Hill. 20 & 21 Car. 2. B. R. Barne v. Bruddle. Sid. 396. pl. 4. Barnes v. Prudlin, S. C. and the Plaintiff laid that ſhe loſt ſeveral Suitors &c. but there does not appear any Opinion of the Court. ——Lev. 261. Barnes v. Strudd, S. C. Judgment was ſtay'd, there being no Loſs of Marriage. But the Reporter ſays, Nota, in this Caſe Loſs of Marriage is laid alſo.——2 Keb. 451. pl. 21. S. C. Judgment ſtay'd.——All the 3 Reports above are, That her Father threatned to turn her out of Doors, but Vent. is that he actually did ſo.

51. *Thou art a Baſtard-bearing Whore, and hadſt a Baſtard by J. S.* The Court inclined that the Words were not actionable; and Judgment was ſtaid. 2 Keb. 577. pl. 102. Mich. 21 Car. 2. B. R. Hexill v. Oyden.

52. Words ſpoke of an Inn-keeper were, *I ſaw Cook lie with Sam. Collins's Wife*; and declared that by Reaſon thereof he loſt much Gain and Cuſtomers. Per Cur. the Words are actionable. 3 Keb. 242. pl. 59. Mich. 25 Car. 2. B. R. Collins v. Matthews.

53. *Thou art thy Maſter's Whore and Concubine, and he hath the Uſe of thy Body as commonly as I have of my Wife's*; not actionable without ſpecial Damage, they being of ſpiritual Cognizance. Freem. Rep. 274. pl. 302. Paſch. 1674. Potter v. Elliot.

2 Lev. 250. S. C. accordingly.

54. *Thou art a ſacrilegious Perſon, and committeſt Sacrilege every Day*; not actionable. Sid. 376. pl. 4. Mich. 20 Car. 2. B. R. Gawdy v. Smith.

55. *She is a Whore, and a common Whore, and N.'s Whore*; by which ſhe loſt her Marriage. The *Jury found* the ſpeaking the Words, but *that ſhe did not loſe her Marriage thereby.* All the Court held the Words not actionable, being only Scolding. And Judgment was arreſted. 2 Mod. 296. Paſch. 30 Car. 2. C. B. Osborn v. Wright.

56. Words ſpoke of the Plaintiff's Wife were, *I have lain with her, and pockified her*, held actionable. 2 Show. 312. pl. 325. Mich. 35 Car. 2. B. R. Neale v. Mallard.

Ibid. 28. Mich. 2 Jac. B. R. S. C. Withens J. ſaid, tho' it ſeems hard in Reaſon, yet the Authorities determin'd him that the Action lies not. Herbert ſaid he ſhould not follow Precedents againſt Reaſon; but Judgment was arreſted by the 3 Juſtices.——2 Show. 482. S. C. and Judgment accordingly.

31. *She is a common Whore, and J. S. lay with her in A. B.'s Barn*; and declar'd that ſhe loſt her Marriage. Herbert Ch. J. held, that tho' ſhe cannot allege any particular Suitors going off on that Account, yet the Scandal may prevent Addreſſes made to her; and ſo Reaſon ſeems to be againſt the Books cited e contra. Wythens accorded, & adjornatur. Comb. 26. Trin. 2 Jac. 2. B. R. Tuckey v. Flower.

58. *You are a Whore, and keep a Man to lie with you*, ſpoke of a married Woman; Judgment was ſtaid till &c. the Court ſeeming clear that the Words are not actionable. 2 Ld. Raym. Rep. 1004. Mich. 2 Ann. Gaſcoigne v. Ambler.

6 Mod. 148. S. C. and declared of the ſame Words ſpoke at one Time, and other Words ſpoke at another Time, viz. *Thou art a Whore, and hadſt a Baſtard by thy Father's Apprentice*, Quorum quidem aliorum verborum Propalatione &c. ſuch a one who courted her for a Wife, and was ready to marry her, fell off. After Verdict, and intire Damages, it was moved in Arreſt of Judgment, that the firſt Words were not actionable, the ſpecial Damages being tied up to the laſt Words by the Word (Aliorum.) Judgment was arreſted.

59. Action for theſe Words, *She is a Whore, and had a Baſtard by her Father's Apprentice.* Judgment was arreſted. The Court ſaid they could not overthrow ſo many Authorities. The Reaſon of the Law is, that Fornication is a ſpiritual Offence, and no Action lay at Common Law for what the Common Law took no Notice of, without ſpecial Damage. 2 Salk. 696. pl. 7. Paſch. 3 Ann. B. R. Graves v. Blanchett.

(D. a. 2) Words relating to Religion.

1. CAlling another *Heretick*, is not actionable, becauſe it belongs to the Eccleſiaſtical Juriſdiction; by Fitzherbert and Shelly. 27 H. 8. 14. a. b. pl. 4. Br. Action ſur le Caſe, pl. 2. cites S. C. becauſe thoſe of the Common Law cannot diſcuſs what Hereſy is.——S. C. cited 4 Rep. 17. a. in pl. 11. Arg.——3 Mod. 27. S. C. cited Arg.——S. P. Per Warburton J. 2 Brownl. 167.——But if a *Clergyman is to be preſented to a Benefice*, and one, to defeat him thereof, ſays to the Patron that he is a Heretick, *or Baſtard, or Excommunicated*, by Reaſon whereof the *Patron refuſes to preſent him*, (as he well may if the Imputations are true) *and he loſes his Preferment*, he ſhall have ſuch Action for ſuch Words tending to ſuch an End. 4 Rep. 17. a. Per Curiam Obiter, in pl. 3

He is a Heretick, and denies the Articles of the Chriſtian Faith. The Court inclin'd that they are not actionable at Common Law without ſpecial Damage alleged; but the Suit ought to be in the Eccleſiaſtical Court. Adjornatur. Freem. Rep. 277. pl. 311. Trin. 1678. B. R. Dudley v. Spencer.

2. *He hath ſaid many a Maſs to J. S.* &c. Anderſon thought no Action lay, but Periam J. e contra, becauſe the ſaying Maſs is Malum in ſe. Godb. 106. pl. 125. Mich. 28 & 29 Eliz. C. B. Anon.

3. To call one *Papiſt* no Action lies; but if one *calls the Archbiſhop of Canterbury ſo*, an Action will lie; for he is Governor of the Church; Per Wray Ch. J. Le. 336. in pl. 469. Trin. 32 Eliz. in B. R. S. P. 2 Brownl. 166. by Winch J.

4. *My Maſter hath put me away, becauſe I would not be a Papiſt; for he will keep no Servants but Papiſts.* The Plaintiff alleged that he is a Juſtice of Peace. Held not actionable. Cro. E. 308. pl. 14. Mich. 35 & 36 Eliz. B. R. Perepoint's Caſe. S. C. cited Arg. Roll Rep. 427. pl. 20.—— S. C. cited Arg. 3 Bulſt. 260.——A Juſtice of Peace ſtood for Parliament-man, and the Defendant ſaid to one of the Electors, *De not vote for him, for he is a Papiſt.* Adjudged the calling a Juſtice of Peace (Papiſt) is actionable; for by the Statutes he is intruſted to put the Laws againſt Papiſts in Execution. 3 Lev. 50. Mich. 33 Car. 2. C. B. Stawel v. Caune.

5. *He is a Papiſt, and hath gotten a Pardon from the Pope, and can help thee to one, if thou wilt*; held not actionable. Brownl. 12. Hill. 9 Jac. Ireland v. Smith. 2 Brownl. 166. S. C. held accordingly.

6. *He is a Papiſt and a Penſioner*, were ſpoke of a Juſtice of Peace and Deputy-Lieutenant. North Ch. J. and Windham held the Words (He is a Papiſt) actionable, but the other Juſtices doubted; & adjornatur. 2 Show. 140. pl. 117. Mich. 32 Car. 2 B. R. Cutler (Sir John) v. Friend. Freem. Rep. 530. pl. 714. Sir John Cutler's Caſe, S. C. ſays that 3 of the Judges inclin'd that ſince the Statute 3 Jac. which makes it Treaſon to be reconciled to the Pope, the Words are actionable.

7. Caſe &c. for theſe Words ſpoken of a Juſtice of Peace and Deputy-Lieutenant of the County of Warwick, viz. *I have heard that a Maid of Sir J. K.'s ſhould report that he being ſick, and ſhe looking thro' a Hole of the Door, where he then lay, ſaw a Prieſt (Innuendo a Popiſh Prieſt) give the Euchariſt and Extreme Unction to Sir J. K.* and that the Defendant, of his farther Malice &c. at another Day ſaid, *I have heard that a Maid-Servant, who then lived with Sir J. K. peep'd thro' a Cranny of a Door where Sir J. lay ſick, and ſaw a Popiſh Prieſt anoint him, (Extreme Unction Innuendo) and gave him the Sacrament of the Euchariſt.* It was moved in Arreſt of Judgment, that theſe Words did not amount to calling him Papiſt; for by the firſt Words it doth not appear that the Prieſt was a Popiſh Prieſt, unleſs by an Innuendo; and in the laſt Words the Extreme Unction is brought in by an Innuendo, which is not ſufficient. But af- 2 Show 305. pl. 311. S. C. adjornatur. —Skin. 98. pl. 13. Mar- riot v. Knightly, S. C. adjor- natur.—— Ibid. 111. pl. 3. S. C. argued.—— 2 Vent. 265. Arg. cites S. C. as ad- judged for

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the Plaintiff in C. B. and that Judgment affirmed in B. R.

ter another Argument it was resolved, that the Words taken all together are actionable, and explain one another; for a Priest who gave the Eucharist and Extreme Unction must be a Popish Priest, and he that receives it must be a Papist; and the Word (Anoint) being done to a sick Person, cannot be intended of any thing but Extreme Unction, which is never done, nor the Eucharist given, but to those who are fully conform'd Papists. 3 Lev. 68. Trin. 34 Car. 2. C. B. Sir John Knightly v. Marrow.

3 Mod. 26. S. C. and Judgment affirm'd — 3 Lev. 30. Mich. 33 Car. 2. C. B. adjudged for the Plaintiff. — Skin. 68. pl. 15. S. C. argued. — Ibid. 88. pl. 6. S. C. and the Judgment in C. B. was affirm'd una Voce in B. R. — 2 Show 250. pl. 257. S. C. in B. R. Judgment was affirm'd. — Freem. Rep. 280. pl. 319. Mich. 1681. C. B. Clarges v. Rowe, S. C. but no Judgment.

8. Case &c. for that he was a *Deputy-Lieutenant* for the County of M. and a *Privy-Counsellor in Ireland*, and stood for Burgess of Parliament at C. &c. and that the Defendant said of him, viz. *He is a Papist*. The Plaintiff had a Verdict and Judgment, and the Judgment affirm'd in Error; because by the Statutes 23 Eliz. and 3 Jac. and 25 Car. 2. Papists are exposed to several Penalties and Incapacities, a fortiori and as the Words spoken do relate to a Person thus qualified, and a Deputy-Lieutenant is an Office of great Trust, and tho' (Papist) was not actionable formerly, yet Times alter the Sense of Words, and this Word is now a Word of more Reproach. Raym. 482. Hill. 34 & 35 Car. 2. B. R. Row v. Clargis.

S. C. cited Arg. 2 Vent. 265. 266. and the Reporter says, Note these Words were spoke the Day that K. James came to the Crown, and the Time is supposed to have influenced the Opinion of the Court.

9. Words spoke of a *Merchant* were, *He is a Rogue, a Papist Dog, and a pitiful Fellow, and never a Rogue in Town has a Bonfire before his Door but he*; adjudg'd actionable. 3 Mod. 103. Pasch. 2 Jac. 2. B. R. Peak v. Meker.

Ibid. 266. the Reporter says, Note the Time these Words were spoken was taken Notice of, viz. between K. James the 2d's Desertion of the Kingdom, and the Proclaiming of the King and Queen, when to call a Man Papist would have exposed him to the Danger of the Rabble. — S. P. 2 Salk. 696. in pl. 9. — S. P. per Holt Ch. J. 6 Mod. 104.

10. If W. was a Member of Parliament 13 Car. 2. and M. said of him *He is a Papist; when he is at Home he goes to Church, but when he is at London he goes to Mass.* After several Arguments Judgment was given for the Plaintiff, principally for the Words (He went to Mass;) because by the Statute 23 Eliz. cap. 4. the Offender is to forfeit 100 l. and be imprison'd for a Year; so that the Words exposed him to a Corporal Punishment. 2 Vent. 265. Hill. 2 & 3 W. & M. in C. B. Walden v. Mitchell.

(E. a) Actions upon the Case for Words. [*Taking false Oath, or being perjur'd.* And Pleadings.]

Jo. 352. pl. 2. Golding v. Wennall, S. C. adjudg'd for the Plaintiff. — Cro E. 378. pl. 4. Robodham

1. IN an Action upon the Case, if the Plaintiff declares that he exhibited Articles in B. R. against the Defendant for his good Behaviour, and swore the said Articles to be true before Justice Whitlock, one of the Justices of the same Court; and the Defendant, to the Intent to slander the Plaintiff, said of him that he had taken a false Oath against him before Justice Whitlock, (Innuendo the said Oath taken upon the said Articles) tho' it is not averr'd that the Oath

Oath was taken of Record, yet the Action lies; for this shall be intended, the Articles being exhibited in Court, and sworn before a * Justice of the Court. Mich. 10 Car. B. R. between *Tolden and Wannel*, adjudg'd; this being moved in Arrest of Judgment. v. Venleck. * Fol. 39. seems to be S. C. held that this is charging the Plaintiff with Perjury; for it is an Oath taken in a Court of Record

Thou wast forsworn before my Lord Ch. J. in an Evidence, is actionable. Le. 127. in pl. 173. said Arg.

2. If a Man says of another, that he hath written a forg'd Will, wherein I will prove him false, forsworn, and perjur'd in a Will that he made of John Hunt, an Action lies for these Words; for it shall be intended that he meant he was perjur'd in his Oath taken touching the said Will. Hill. 12 Car. B. R. between *Cowley and Clough*, per Curiam adjudg'd; this being moved in Arrest of Judgment. To say that *A. is forsworn in B. R. or C. B.* there being *no Colloquium of any Cause there depending*, the Words are not actionable; for it may be in common Discourse; per Vaughan Ch. J. and Wylde J. Freem. Rep. 55. Mich. 1672 in pl. 70.

3. In an Action upon the Case, if the Plaintiff declares that there was a Writ of Inquiry of Damages between A. and B. in a Court of Canterbury, at the Sessions-House there, where he was sworn to give Evidence of what he knew; and after the Defendant said of him, He is a forsworn Rogue in taking an Oath in the Sessions-House, Action lies for these Words; tho' it was objected in Arrest of Judgment, that if one swears falsely before an Inquest of Office, this is not within the Statute of 5 Eliz. of Perjury. Mich. 13 Car. between *Pruer and Moadman*, adjudg'd. Intrat. Trin. 13 Car. Rot. 546. For tho' it be admitted that this is not within 5 Eliz. yet they all agreed that for such Forswearing at the Common Law he may be indicted, and therefore if it be out of the Statute, yet Action lies for this Slander. See (F. a) pl. 27. S. C.

4. The Plaintiff declar'd there was a Suit between J. and J. S. which was try'd by Nisi Prius, and the Plaintiff was produced and *sworn as a Witness* before the Judge, and that the Defendant spoke these Words of the Plaintiff to Strangers, viz. *I will prove him* (meaning the Plaintiff) *forsworn*, (Innuendo before the Judge) *and it shall cost me 20 l. but I will make his Ears afraid.* The Court of B. R. adjudg'd the Words actionable, and that Judgment was affirm'd in the Exchequer-Chamber. Cro. E. 730. Mich. 41 & 42 Eliz. Ireland v. Goodale.

(F. a) For Words. For what Words the Action lies. [*Perjur'd, and forsworn*, and Pleadings. *In respect of the Court where.*]

1. If one Man says of another, He is a Perjurer; he swore once for me, and the second Time hath perjur'd himself with J. S. (a Stranger) an Action lies for these Words. Mich. 9 Car. in the Exchequer-Chamber, in a Writ of Error adjudg'd; and the Judgment given in B. R. affirm'd, where the Words were spoke in Welch, and interpreted to be so in English.

2. If a Man says of J. S. I will prove J. S. forsworn, and that 10 Men can justify, and I could prove him perjur'd if I would, the Action does not lie for the first Words, but it lies for the last Words; for this is a great Slander to have it reputed to be in the Power of any Man to prove him perjur'd. Pasch. 5 Jac. B. R. between *Whitacre and Lovergden*, per Curiam.

Mo. 365. pl. 498. Woodlife v. Vaughan, S. C. adjudg'd actionable, notwithstanding the Disjunctive.

3. If a Man says to another, I did not know that Master Woodroofe was your Brother, he hath forsworn himself, and I will prove him perjur'd, or else I will bear his Charges; Action lies for these Words, tho' they were spoke conditionally to bear his Charges, if he did not prove him perjur'd. Mich. 37 & 38 Eliz. B. R. *Woodroofe's Case*, adjudg'd.

——Cro. E. 429. pl. 32. S. C. by the Name of Woodroff v. Vaughan, adjudg'd that the Words are actionable; and that it is as great a Slander as if he had said directly that he was perjur'd.——S. C. cited Poph. 210. Hill. 2 Car. Arg. in Case of King v. Merrick.

Ow. 62. S.C. adjudg'd in B. R. and the Judgment affirm'd in the Exchequer-Chamber.

4. If a Man says of another that he was perjur'd, and he would prove him so by 2 Witnesses, an Action lies for these Words, tho' he does not say in what Court he was perjur'd, or how. Trin. 39 Eliz. B. R. 30. between *Rayner and Grimston*, adjudg'd.

——Noy 61. Raynor v. Grivilton, S. C. accordingly.

S. P. agreed per Cur. Cro. E. 429. in Case of Woodroff v. Vaughan.

5. If a Man says of another he hath forsworn himself, no Action lies for these Words. Pasch. 40 Eliz. B. R. the last Case adjudg'd.

——Mo. 365. pl. 498. Mich 36 & 37 Eliz. in Case of Woodliffe v. Vaughan, S. P. accordingly, because it may be intended in Communication; but to say that he is perjur'd is actionable, because intendable of Record.——S. P. resolved 4 Rep. 15. b. Pasch. 27 Eliz. B. R. Stanhope v. Blith.

He had proved himself forsworn in the King's-Bench; no Action lies. Cro. E. 135. pl. 1. Arg. cites Trin. 31 Eliz. C. B. Samms v. Cowbolt.

Thou art a forsworn Baily, and wert forsworn this Day; not actionable, because he does not shew that he was forsworn in any Court. Cro. E. 788. pl. 29 Mich. 42 & 43 Eliz. C. B. Wyson v. Fenton.

Thou art forsworn, and I can prove thee forsworn when I will, were held actionable; and Judgment given for the Plaintiff. Bulst 40. Trin. 8 Jac. Smale v. Hammond.

He is a lying dissembling Fellow, and a mainsworn and forsworn Fellow; adjudg'd after divers Motions for the Plaintiff. Brownl. 4. Hill. 10 Jac. Morton v. Leedell.——Brownl. 9. S. C. accordingly.

The Defendant said, *Thou art a forsworn Knave*. The Plaintiff ask'd where; he answer'd *in Ilston Court*, (Innuendo a Court-Leet held there.) Adjudg'd actionable. Cro. E. 720. pl. 48. Mich 41 & 42 Eliz. C. B. Marshal v. Dean.

6. If one says to another, Thou wast perjur'd in a Court of Tottenham, Action lies; for this shall be intended a sufficient Court to hold Plea. Pasch. 40 Eliz. B. R. the which Intratur Mich. 39, 40 Eliz. Rot. 2173.

Thou wert forsworn in Carpenter's-Hall, is not actionable. Cro. E. 787. 788. pl. 28. Mich. 42 & 43 Eliz. C. B. Thaxbie v. Smith.

He was *forsworn in the Court of Whitchurch*, no Action lies. Cited Arg. Cro. E. 135. in Case of Brock v. Doughty, as Trin. 28 Eliz. Yerne v. Yeyt; but Gawdy said the Reason was because it was a base Court, of which B. R. will not take Cognizance.

7. If a Man says to another, Thou hast forsworn thy self in Leake-Court, no Action lies without shewing what Manner of Court this is, because it cannot be intended nor known whether this is such a Court that may compel one to swear, or not. Mich. 8 Jac. B. between *Law and Bennet* Per Curiam.

——S. C. cited Cro. E. 609. pl. 13. in Case of Shaw v. Thompson. —Cro. E. 720. pl. 48. Mich. 48 Eliz. in C. B. in the Case of Marshal v. Dean is a Nota, That this Case of Whitechurch-Court was shewn to the Court in Writing; and that the Opinion of the Court there was,

was, that the Action well lay; and the Defendant gave to the Plaintiff 3 l. and he releaſed his Suit, and no Judgment was given.——But Cro. C. 378. pl. 4. in Caſe of Robodham v. Venleck, the ſame Caſe is cited as if the Action did not lie.—— And Cro. J. 199. pl. 14. Mich. 5 Jac. B. R. Skinner v. Trobe, the Words were, Thou art forſworn in Collet Court; and did not ſhew that any Action was depending there, nor that it was a Court of Record; and reſolved that it lay not——Cro. J. 204. pl. 7. Hill. 5 Jac. B. R. Colome's Caſe, S. P.——S. P. as to *Bell Court*, and with Innuendo that it is a Court Baron held at Bell, Action lies; but not otherwiſe. Cro. E. 297. pl. 4. Paſch. 35 Eliz. B. R. Green v. Dancy.——S. P cited Hutt. 34. in Caſe of Adams v. Flemming as adjudg'd as to one's being alleg'd perjur'd in *Canterbury Court*, that no Action lies, becauſe they could not take Notice of any Court in Canterbury which has Power to adminiſter an Oath.

8. **If one Man ſays to another,** Thou art a forſworn Knave, and waſt indicted by 12 Men, and haſt compounded for it, **Action lies; for all being laid together, it appears that he** intended **a Perjury** in a Court of Record. **Mich. 1 Car. between** *Gilbertin and Rowe* **adjudged, this being moved in Arreſt of Judgment, the which Intratur Trin. 1 Car.** Fol. 40. 3 Bulſt. 304. Gilberd v. Rodd, S. C. The whole Court agreed the Words actionable, becauſe an Indictment is an Accuſation of Record, it being the King's Declaration, and the Voice of the Body of the Country; and the ſaying that he had compounded for this, is a Confeſſion of the Matter of the Indictment to be true; for Fatetur facinus qui Judicium fugit. And Judgment for the Plaintiff.

9. **If a Man ſays to another,** Thou art a forſworn Knave, and I will prove thee forſworn in the Eccleſiaſtical Court, **an Action lies for theſe Words; for the Eccleſiaſtical Court is a Court known. Paſch. 40 Eliz. B. R. between** *Shawe and Thompſon* **adjudged.** Cro. E. 609. pl. 12. adjudg'd for the Plaintiff; for it is a Court well known, and a judicial Court.——2 Roll Rep. 410. Mich. 21 Jac. B. R. Arg. in Caſe of Pole v. Carrel, cites S. C adjudg'd, becauſe it was Perjury before a Judge.

In Action for ſaying, *Thou haſt taken a falſe Oath in the Conſiſtory Court at Exeter*, it was argued that the Words (taking a falſe Oath) might intend the Perſon before whom the Oath is ſworn, and that the Statute 5 Eliz. extends not to Perjuries in the Spiritual Court, and ſo not puniſhable by the Common Law. Sed Curia contra, for as to the firſt the Plaintiff was a Woman, before whom no Oath can be taken; and as to the other, tho' it is not puniſhable by the Statute, yet it is a great Defamation, ſo that none will credit her, and the Statute does not hinder but it might be puniſhed in the Star-Chamber, as before. And Judgment for the Plaintiff. Cro. E. 185. pl. 4. Trin. 32 Eliz. B. R. Plaice v. How.—— Le. 131. pl. 179. S. C. by the Name of Pierce v. How, Wray at firſt held the Words not actionable; but afterwards chang'd his Opinion, and ſaid that theſe Words ought to be intended Actively and not Paſſively; and if ſo, the Defendant ought to have pleaded it. Judgment for the Plaintiff.

10. **Action lies for theſe Words,** He hath forſworn himſelf before the Council of the Marches of Wales, in the Suit I had againſt him there for Perjury. **Hob. Rep. Caſe 360. between** *Adams and Fleming* **adjudged, tho' it was objected that this Court could not take Notice of this Council &c.** Hob. 283. pl. 361. S. C. the Words are, He hath forſworn himſelf before the Council of the Marches, meaning his Majeſty's Council in the Marches of Wales, in the Suit I had againſt him there; *and I will ſue him for Perjury there.*—Brownl. 13. S. C. according to Hob. and has the ſame Objection, that this Court could not take Notice that they had Authority to hold Plea in Matters of Record; but ſays nothing as to Judgment being given. And the Margin is, viz. Judgment arreſted for Uncertainty in the Court, [which ſeems a Miſtake.] ——Hutt. 34. Mich. 16 Jac. S. C. according to the Note out of Hobart; and ſays the Court was of Opinion the Action well lies; for the Council of the Marches (without Innuendo) is ſufficient, becauſe there is no other Council of the Marches; and this Court was eſtabliſhed by Statute, and concerned the King, and thereof the Judges ought to take Notice. And Judgment for the Plaintiff.——2 Roll Rep. 471. Mich. 22 Jac. B. R. the ſame Point, Yates's Caſe.

11. **If one ſays to another,** Thou art a forſworn Man, I will teach thee the Price of an Oath, and will ſet thee on the Pillory, **Action on the Caſe lies; for this ſhall be intended ſuch a Forſwearing for which he ought to ſtand in the Pillory. Hill. 41 Eliz. B. R. Per Fenner.** See (Y. a) pl. 46. S. C. ——*He hath forſworn himſelf, and I'll teach him the Price of an Oath, for I will have his Ears cr.pt*, ſeem'd actionable; for tho' not ſaid where he forſwore himſelf,

himſelf, yet by the Circumſtance it appears it was in ſuch Place for which it was puniſhable. And the Plaintiff paid the Box for the Judgment. Het. 63. Mich. 3 Car. B. R. Williams v. Bickerton.

Cro. E. 836. pl. 8 S. C. but S P. does not appear. —— Noy 23. S. C. but S. P. does not appear.

12. If a Man ſays of another, He did forſwear me (Innuendo the Plaintiff) [out of] 40 l. worth of Tithes in Canterbury Court, no Action lies for theſe Words; for there are divers Courts in Canterbury, and it is not ſhewn in what Court, nor before what Judge, nor that the Judge had Authority to hold Plea of Tithes. Paſch. 43 Eliz. B. R. between *Bray and Partridge* adjudged.

—— Noy 37. S. C. but S P. does not appear. —— *He is a forſworn Man, and hath taken a falſe Oath in his Depoſition at Tiverton, where he waged his Law againſt me.* Adjudged for the Plaintiff. Cro. J. 204. pl. 7. Hill. 5 Jac. B. R. Colome's Caſe.

You are a forſworn Blade, and you are forſworn in your Anſwer, That the Land in ſuch a Place was purchas'd in my Daughter's Name. Actionable, tho' not alleged that the Cauſe was within the Juriſdiction of the Court, where the Anſwer was. And Judgment for the Plaintiff. 2 Show. 33. pl. 25. Paſch. 31 Car. 2. B. R. Goodwin v. Browne.

2 Bulſt. 150. Croford v. Bliſſe, S. C. adjudged clearly per tot. Cur. Coke Ch. J. ſaid, that if a Man will have Benefit by an Action for ſlanderous Words (as ſaying that he was perjured) he muſt ſhew certainly that it was in a Court, and in a Matter pertinent to the Iſſue; and if the Words were, that he *was forſworn dando Evidentiam ad Exitum*, it is good; and ſo if in a judicial Court forſworn, it amounts to Perjury; but if it is no Court, then it is Coram non Judice.

13. If a Man ſays of J. S. I had not been caſt in that Action but for the Oath of J. S. and he was forſworn; and I marvel that B. would marry his Daughter to ſuch a forſworn Man. In an Action upon the Caſe for theſe Words, if the Plaintiff avers that there was an Iſſue between him and A. and that ad Curiam Baronis de Geton ſoca Domini Regis tent. apud S. in Comitatu prædict. he was produced as a Witneſs, and ſworn about the Matter of the Iſſue; and after the Defendant having a Communication about this Iſſue, ſpoke the ſaid Words. No Action lies upon this Declaration, becauſe it is not alleged that S. is within the Soke of Geton; and ſo perhaps the Court was held out of their Juriſdiction, and alſo becauſe it is not alleged that he was ſworn about a Matter pertinent to the Iſſue. Mich. 11 Jac. B. R. between *Crawford and Briſe* adjudged.

3 Bulſt. 150. S. C. and Coke Ch. J. as to the Averment ſaid, that an * Innuendo ſhall never give a Cauſe of Action; and what is

14. If a Man ſays of another, He is a forſworn Knave; for he ſwore that the Wood was worth 40 s. when it was dear of 13 s. 4 d. No Action lies for theſe Words, tho' he avers that there was a Diſcourſe between them of a Matter at the Aſſize, in which the Plaintiff was ſworn as a Witneſs, becauſe he does not directly ſay that it was not worth 40 s. but that it was dear of 13 s. 4 d. Beſides, it does not appear that the Defendant intended this at the Aſſiſes. Hill. 13 Jac. B. R. between Stephen *Apthorpe and Cockerell* adjudged.

here alleged is only argumentative, and ſo not actionable. To which the Court all agreed, and Judgment againſt the Plaintiff. —— Roll Rep. 287. pl. 4. S. C. and Coke ſaid, that the Averment is the Invention and Innuendo of the Plaintiff, and not the Parlance of the Defendant. And Crooke ſaid, if a Buſhel of Wheat be ſold for 10 s. yet a Man may ſay, that it is dear at 3 s. 4 d. And Judgment againſt the Plaintiff. The Reporter adds a Quære as to both Points; for he ſays it ſeems they are hard.

* See (I. b) pl. 1.

See (I. b) pl. 9. S. C. — Cro. E. 609. pl. 13. S. C. accordingly.

15. If one ſays to another, That he was perjured in his Anſwer in the Star-Chamber, an Action upon the Caſe lies. Paſch. 40 Eliz. B. R. between *Corbet and Hill* adjudged.

Le. 127. pl. 173. in Caſe of Brooke v. Doughtie, cites Trin. 23 Eliz. Rot. 882. Foſter v. Thorne, where the Words were, *Thou waſt falſely forſworn in the Star-Chamber*, the Plaintiff had Judgment; for it ſhall be intended that the Plaintiff was Defendant or Deponent there; and yet the Words of the Declaration do not ſay (in the Court of the Star-Chamber.) —— S. C. cited Cro. E. 135. pl 1 in Caſe of Brooke v. Doughty.

16. If

16. If a Man says to another, Thou wast forsworn in thine Answer in Chancery, no Action lies. Hill. 41 Eliz. B. R. cited per Clerk, to be adjudged within a Year before passed. (It seems this is not Law.) See (F. b) pl. 2. 3.

17. If one says to another, Thou wast forsworn in the Court of Requests, an Action upon the Case lies. Between *Brooke and Doughty* adjudged, cites Hill. 41 Eliz. B. R. Le. 127. pl. 173. Trin. 30 Eliz. B. R. S. C. and with

these further Words, viz. *And I will make thee stand upon a Stage for it.* After Verdict for the Plaintiff it was mov'd that it is not said that he was there forsworn as Defendant or Witness; but Wray said, that there is a vehement Intendment that his Oath was in the Quality of a Defendant or Deponent, which Gawdy granted; and it cannot be intended but a Court of Justice, and before the Judges there Juridice, and the subsequent Words found so much, viz. I will make thee stand upon a Stage for it. And Judgment for the Plaintiff. ——S. C. Cro. Eliz. 135. pl. 1. says it was found that he spoke the first Words only.—Gawdy said the Court of Requests is a Court of Record, of which this Court shall take Conusance. And afterwards, by Consent of Wray, Judgment was given for the Plaintiff; but the Damages were abridged. ——See (Y. a) pl. 40. S. C.

18. If one says to another, Thou wert forsworn in the Chancery, an Action upon the Case lies; for this is a Court of Record. Pasch. * 8 Jac. between *Perie and Rock* agreed per Curiam. Hill. 8 Car. B. R. between *Shonke and Batten* adjudged, that Action lies for these Words, Thou wert forsworn upon Record in Chancery, Inasmuch do a Suit by Bill there, which the Plaintiff recited in his Declaration, it being moved in Arrest that it was not a Court of Record. See pl. 16. 20. * Fol. 41.

19. If one says to another, Thou wert forsworn in such a Court, which is only a Court Baron, no Action lies, because it is not a Court of Record. Pasch. 8 Jac. in the Exchequer, between *Perie and Rock* agreed per Curiam. But per Hobart Ch. J. if a Man is forsworn in a Court Baron before

the Steward, it is Perjury. Win. 3 Arg. ——*Thou art a forsworn Jack in the Court Baron of D. Thou hast forsworn me out of* 20 *s. Rent, and hast me on thy Side.* Adjudged actionable. Cro. E. 342. pl. 10. Mich. 36 & 37 Eliz. B. R. Baxter v. Shade.

Action for these Words, *Thou art a forsworn Jack in the Court of A. thou didst swear away* 20 *s. from B.* and avers that the Court of A. was a Court Baron. And the Plaintiff had Judgment, although it was not shewn between what Persons, or in what Action he was sworn. Cro. E. 348. pl. 22. Mich. 36 & 37 Eliz. B. R. Banks v. Stacy.

20. If a Man says of J. S. and another, They are proper Witnesses, they will swear any thing, they have forsworn themselves in Chancery, and the Lord Keeper committed them for it; an Action lies by J. S. tho' he does not say that he was forsworn in the Court of Chancery; and tho' it may be that this was in an Office belonging to the Court; but this shall not be intended. Mich. 8 Car. B. R. between *Jones and Ball* adjudged, this Matter being moved in Arrest of Judgment. Godb. 444. pl. 513. Jones v. Ballard, S.C. adjudg'd accordingly.

21. If a Man says of J. S. he gave 10 l. to B. for forswearing himself in Chancery, an Action upon the Case lies for these Words; for it shall be intended a Subornation. Mich. 9 Car. B. R. between *Ewer and* adjudged, this being moved in Arrest of Judgment; but there were other Words also which were not held material. *He is a Suborner of Perjury.* Adjudg'd actionable, tho' objected that no Person is alleged to be suborn'd; for Per Cur. it must be necessarily intended he did suborn some Person to commit Perjury, and the Words in themselves are very slanderous. Cro. E. 308. pl. 13. Mich. 35 & 36 Eliz. B. R. Guerdon v. Winterflood.

22. Upon an Issue between two, if A. holds of B. by Fealty and Suit of Court only, and at the Assises C. being produced as a Witness, takes his Oath that it is held of B. by Fealty and 5 s. Rent, and Suit of Court; and after C. having a Conference of Action was brought for these Words, *Thou art thrice per-*

jured in thy Answer in Chancery to my Bill, Innuendo a Bill exhibited there by the Defendant against the Plaintiff, and an Answer to that Bill. The Defendant demurr'd, because he alleged not any Perjury in any Particular. And, without Argument, it was adjudg'd for the Plaintiff. Cro. E. 907. pl. 17. Mich. 44 & 45 Eliz. B. R. Poultney v. Wilkinson.

this Issue, and of the Evidence so given, says to C. Thou wert forsworn in that Action at the Assises, Innuendo &c. and I will prove it; C. shall have an Action for these Words, all this Matter being alleged in the Declaration, tho' C. does not allege the Particular thing in which C. was forsworn; for it is alleged that he said the Words, having a Conference of this Issue, and of the Evidence so given. Pasch. 11 Jac. B. R. between Lane and Gibbons adjudged.

The Plaintiff was *produced as a Witness* at a Trial at Guild-Hall, and upon his Oath gave Evidence, the Defendant super hoc immediate, said, *Thou hast forsworn thyself* Innuendo in the said Oath It was adjudg'd that the Action lay upon these Circumstances. Cro. E. 293. pl. 6. Hill. 35 Eliz. B. R. Nedham v. Corsellis.

Mo. 867 pl. 1226. Pasch. 7 Jac. seems to be S. C. but the Word (seen) here, is * (*been*) there, as it seems it should be.

23. If one says to a Jury Man, Thou art a common Juryman, and hast * seen the Overthrow of 100 Men by thy false and subtle Means; an Action lies; for these Words (subtle and false Means) shall be intended of a common Juror, and this touches him in the Point of his Oath. Pasch. 17 Jac. B. R. Peter's Case adjudg'd.

Adjudg'd the Action well lies, with Averment that he had been sworn in Juries of Life and Death.——S. C. cited Godb. 242. pl. 336. in Brook's Case by Warburton J. as Hill. 6 Jac. but there the Words are (hast been *the Death* of 100 Men &c.) and that tho' the Words in themselves are not actionable, yet being spoke maliciously, will bear an Action.——S. C. cited Het 173. Trin. 7 Car. C. B. in Case of Hitcham v. Cook, as Hill. 6 Jac. C. B. Lonsman v. Peck, and the Words there agree with Godb.

Cro. C. 288. pl. 35. Drake v. Corderoy S. C. but because the Words in the Declaration were general, and not that he was forsworn in any Court, nor by Reason of his Oath taken at the Sessions it was objected that the Count was ill. And the Court held, that if there be any Doubt, it is upon the Declaration, which is uncertain, by not shewing that the Words intended a false Oath in a Court of Record. But the Defendant having justified, and shew'd that the Oath was made in the open Sessions, and that it was false, the Court held that this Confession clears the Question whereof he intended to speak; and so Judgment given in C. B. was affirm'd.——Jo. 307. pl. 19. S. C. the Uncertainty in the Declaration was made good by the Plea in Bar; and Judgment affirm'd.——See All. 7. Mich. 22 Car. B. R. Osborn v. Brooke S. P.——Ibid. cites the Case of Duke v. Corderoy by the Name of Tuke v. Condie.

24. If A. be charged at a Sessions of the Peace for divers Trespasses done to J. S. and [thereupon] J. N. a Constable, is produced to testify his Knowledge in the Matter, and he is sworn, and thereupon gives his Testimony; and upon this A. says (having Reference to the said Oath) that he is forsworn; tho' this Evidence was not given upon any Issue so that it may be Perjury within the Statute, yet if he was forsworn in such a Court of Record, this was an Offence at the Common Law, and therefore the Action lies. Mich. 8 Car. B. R. between *Duke and Corderoy*; adjudged in a Writ of Error upon a Judgment in Bank, and the Judgment affirm'd accordingly. Intratur Mich. 7 Car. Rot. 284.

See (F. b) pl. 3. S. C.—Cro. C. 321. pl. 3. Sir Rich. Snowde's Case S. C. adjudg'd accordingly.—See (Y. a)

25. In an Action upon the Case by A. against B. for Words, if the Plaintiff declares that one Christmas preferr'd a Bill in Chancery against him &c. (shewing the Effect of the Bill) and that he made a true Answer thereto upon his Oath there, according to the Course of the Court, and that after there being a Discourse between one D. and the Plaintiff at Da. touching certain Matters between them, the said B. and one F. came to the same Place, whereupon A. said to D. I will talk † no longer with you, now your 2 Affidavit-Men are come; upon which B. the Defendant said of the Plaintiff, he need not to say so, for * he was absolutely forsworn in his Answer to Christmas's Bill (Innuendo

* Fol. 42.

endo the said Bill and Answer) tho' he does not say that he was forsworn in a Point material, yet it is a Slander; and tho' there was † not any Discourse of this Suit, yet there shall not be intended any other Suit, nor any Suit in any Court, by Reason whereof the Action would not lie, without shewing of it by the Defendant. Mich. 9 Car. B. R. between *Sir Richard Strode and Strode Allen*, adjudged; this being moved in Arrest.

pl. 45. Michel v. Brown. —— † So tho' in Truth there was no such Suit, as where the Plaintiff declared that

the Husband being sued in the Sheriff's Court, and the Plaintiff *produced as a Witness* against him, a Verdict passed against him at the Trial, the Wife, having a Colloquium of that Trial, said of and to the Plaintiff, *Thou art a forsworn rascally Fellow, and I will prove thou tookest a false Oath against my Husband and me to Day*; after a Verdict for the Plaintiff, it was objected that the Words were not actionable, because it doth not appear that it was in a Court of Record, because the Words relate to a Suit in which the Wife was not a Party: But adjudg'd, that with such an Inducement of a Colloquium the Words are actionable. Hardr. 151. Pasch. 1659. in the Exchequer, Brumrigg v. Hanger & Ux'.

26. If a Man says of J. S. He hath forsworn himself in a Court of Record; Action lies for J. S. tho' he does not express in what Court he intends. Mich. 14 Car. B. R. *Hoskins and Chele*, adjudg'd per Curiam, in a Writ of Error upon a Judgment in B. where it was adjudg'd e contra; and this Judgment now reversed per Curiam. Intratur. Hill. 13 Car. Rot. 696.

Cro. C. 509. pl. 2. Ceely v. Hoskins S. C. the Words were Thou art forsworn in a Court of

Record, *and that I will prove*. Is was held that it shall be taken he spoke these Words maliciously, accusing him of Perjury, and for a false Oath taken judicially upon judicial Proceedings (and not in ordinary Discourse, as had been argued) in a Court of Record, and that it shall be understood according to the common Speech and usual Intendment. And Judgment was reversed.

M. forswore himself in every thing that he swore in this Cause; (discoursing of a Trial at Guildhall, in which the Plaintiff was a Witness.) The Plaintiff averr'd, he swore nothing but what was pertinent to the Issue. Resolv'd by Wyld and Archer, that the Action lies, it appearing by the Words to be in a Court of Record. Freem Rep. 17. pl. 17. Mich. 1671. C. B. Myan v. Okey.

27. If one Man says to another, that he was forsworn in a Court of Record (in such Matter and Manner as is not within the Statute of 4 Eliz. of Perjury) yet because he may be indicted for this at Common Law, an Action upon the Case lies, tho' it was urged that it was not Perjury within the Statute of 5 Eliz. the Oath being made upon a Writ of Inquiry of Damages of which the Court gave no Opinion, but that the Action lay, admitting that it is not within the Statute. Mich. 13 Car. B. R. between *Pruer and Meadman*, adjudg'd, this being moved in Arrest of Judgment. Intratur, Trin. 13 Car. Rot. 546.

See (E. a) pl. 3. S. C.

28. If one says of another, Thou art forsworn, and didst take a false Oath at the Assizes at Hereford against J. S. no Action lies for these Words without an Averment that this was at a Trial, or before the Court or Jury; for it might be at the Assizes in a private House, or other Place. Pasch. 15 Car. B. R. between *Prichard and Smith*, adjudged per Curiam in a Writ of Error upon a Judgment in Ludlow; and the 1st Judgment reversed for this Cause. Intratur, Pasch. 14 Car. Rot. 179.

Mar. 2. pl. 17. Smith's Case S. C. the Action will lie with Averment that he was sworn in the Cause, otherwise not.—— *He is falsely*

forsworn before the Justices of Assise between A. and B. Adjudg'd actionable. Het. 119. Mich. 4 Car. C. B. Keene v. Cox. —— But where an Action was brought for Words, and the Plaintiff declared, that the Defendant being indicted of a forcible Entry at the Sessions, and the Plaintiff produced as a Witness for the King, and swore nothing but was true; the Defendant after Discourse of the said Oath, said *He took a false Oath against me at the Sessions*, Innuendo the said Oath &c. It was moved that the Defendant might mean an extrajudicial Oath, and cited the Case of Pritchard, where it was adjudg'd that no Action lay; Sed non Allocatur; for in that Case no Colloquium was laid, which is alleged in this Case, and shews to what the Words spoke did relate. Vent. 195 Pasch 24 Car. 2. B. R. Wood v Coat.

29. If

All. 7. S. C. adjudg'd accordingly. — Thou *haſt forſworn thy ſelf at London, and there it appears upon Record*; it

29. If one Man ſays of J. S. he is forſworn, and his Oath is upon Record, an Action lies; for this is as much as if he had ſaid that his Oath is upon Record, and he is forſworn, for the Perjury is not of Record, but his Oath only, and ſo he intended that he was forſworn in the Matter which he ſwore of Record. Mich. 22 Car. B. R. between *Osborn and Brookes*, per Curiam. Intratur, Trin. 22 Car. Rot. 767.

was ruled upon Demurrer, that Action lies. Cro. E. 583. pl. 9. Mich 39 & 40 Eliz. B. R. Harriſon's Caſe.——In Action, the Plaintiff declared that a Communication being of him, the Defendant ſaid, *That perjured Knave* (Innuendo the Plaintiff) *ſtands perjur'd on Record at Guild-Hall, London, and I will prove it.* And at another Time, he ſaid to the Plaintiff himſelf, *Thou art a perjured Knave, and ſtandeſt perjured on Record, for denying thy own Hand, and I will prove it.* After Verdict for the Plaintiff, it was moved that it is not ſhewn in what Court the Plaintiff was perjured, there being 2 Courts there, one whereof is a Court of Record, and the other not. But the Court held clearly, that it muſt neceſſarily be intended to be in a Court of Record, it being Oppoſitum in Objecto, to ſay he ſtands perjured upon Record, if it was not in a Court of Record; and Judgment for the Plaintiff. 3 Bulſt. 283. Hill. 14 Jac. Mefflyne v. Farneden.

The Plaintiff appear'd before a Juſtice of Peace to give Evidence againſt another, and the Defendant to weaken his Teſtimony, ſpoke theſe Words, *Thou haſt been a contentious Man theſe 30 Years, and a Breeder of Strife, and haſt taken a falſe Oath againſt my Brother and Siſter in a Matter of Incontinency, and haſt taken 20 s. for it, and I will ſhew it on Record.* It was moved that it was not ſaid, that he was perjured in any Court of Record, but that he will ſhew it of Record. But adjudg'd actionable; the Speaking being laid to be falſo & Malitioſe. Style 335. Trin. 1652. B. R. Heard v. Read.

Thou art a falſe and forſworn Knave, and that I will prove; for thou forſworedſt thy ſelf againſt P. R. in the Hundred Court.

30. Upon a Diſcourſe between A. and B. of a Suit in a Hundred Court, in which A. was produced as a Witneſs, and ſworn, if B. ſays to A. Thou art a perjured Rogue, Action lies; for a Perjury in a Hundred Court, is within the expreſs Words of the Statute of 5 Eliz. P. 1653. between *Saintsbury and Alborne*, adjudged per Curiam; this being moved in Arreſt of Judgment. Intratur, Trin. 1653.

The Plaintiff had a Verdict; but becauſe it was not ſhewn that any Action was depending in the Hundred Court, between P. R. and any other in which the Plaintiff was a Witneſs, which might have induced the Word (forſworn) to be equivalent to the Word (perjured.) It was adjudg'd againſt the Plaintiff. Yelv. 27. Mich. 44 & 45 Eliz. B. R. Gore v. Morton.——Cro. E. 905. pl. 11. S. C. with an (Innuendo Stiverton Hundred Court;) but becauſe it did not appear that it was any Court of Record, nor any Court whereof the Juſtices here ſhould take Conuſance, the Action does not lie.

31. *You have procured a perjured Man to ſeek my Blood.* Cro. E. 342. in pl. 11. cited to have been ruled in Haſtings's Caſe, Paſch. 32 Eliz. not to be actionable; but Fenner ſaid the Caſe was not adjudg'd, but ended by Arbitrement.

3 Le. 151. pl. 203. Hill. 29 Eliz. C. B. S. C. accordingly.

32. *I will prove F. to be a perjured Knave*; All the Court held the Words actionable. Cro. E. 222. pl. 1. Paſch. 33 Eliz. B. R. Fermor v. Dorrington.

33. *He is forſworn and perjured in ſwearing at C. B. Bar, upon the Deeds which he then had in his Hand*, is actionable; and the Words ſhall not be conſtrued of his, forſworn upon the Deed; for the vulgar Senſe is, that Men do not uſe to ſwear but upon a Book. Ow. 13. Hill. 35 Eliz. B. R. Carter's Caſe.

Noy. 34. S.C. adjudg'd for the Plaintiff. ——Cro. E. 492. pl. 9.

34. *Thou art a forſworn Man*; *for thou wert forſwoon in the Leet*; Action lies, becauſe a Leet is a Court of Record. Per tot. Cur. Mo. 404. pl. 539. Paſch. 37 Eliz. Wild v. Copeman.

S. C. all the Juſtices held that Action lay for theſe Words.——S. C. cited Cro. E. 721. in pl. 48. —— So for ſaying, *Thou art a perjured Knave, for thou didſt ſwear this Day at the Leet, that I baked Bread in my Houſe, whereas I did not.* It was objected that Perjury cannot be in a Leet, whereof the Law takes any Notice; but per tot. Cur. the Words are actionable; for tho' it be not Perjury puniſhable by 5 Eliz. yet it is Diſcredit, for which Action lies; And adjudg'd for the Plaintiff. Cro. E. 709. pl 32. Mich. 41 & 42 Eliz. B. R. Spencer v. Shory.

35. *Thou*

35. *Thou art a forſworn Fellow; for by thy falſe Oath, thou haſt hang'd as true a Man as thy ſelf*, is actionable; Per tot. Cur. For by the laſt Words it cannot be intended but to be a falſe Oath, judicially taken in Evidence againſt a Priſoner. Cro. E. 572. pl. 13. Trin. 39 Eliz. C. B. Bate v. Rookwood. S. C. cited Arg. Godb. 345. in pl 434. ——*Thou art a falſe forſworn Knave, for thou didſt take a falſe Oath before a Judge of Aſſiſe, to hang a Man.* Adjudg'd for the Plaintiff. Brownl. 13. Anon.

36. *Thou haſt forſworn thyſelf at London, and there it appeareth upon Record.* Ruled actionable on Demurrer. Cro. E. 583. pl. 9. Mich. 39 & 40 Eliz. B. R. Harriſon's Caſe.

37. *You did moſt perjuredly preſent me at ſuch a Viſitation before ſuch an Ordinary*, not actionable; for per tot. Cur. it appears not that he was ſworn, nor what he ſwore, ſo as he might commit Perjury, nor that it was in any judicial Proceeding. Judgment for the Defendant. Cro. J. 120. pl. 1. Trin. 4 Jac. B. R. Sill v. Heath.

38. *Thou art a perjur'd Fellow; thou hadſt 10 l. to take a falſe Oath, and therefore thou art a forſworn Fellow.* Fenner and Williams held the Words actionable, but Yelverton e contra. Bulſt. 69. Mich. 8 Jac. Anon.

39. The Difference is, if one calls another a *perjur'd* Man theſe Words are actionable, and it ſhall be *intended in a Court of Juſtice*, and to have a neceſſary Reference to it; but for the Words *forſworn* Fellow no Action lies; but if theſe had a *Reference to a Judicial Court*, they are then held to be actionable; and this is the General Difference in Law touching theſe and the like Words Arg. 2 Bulſt. 150. Mich. 11 Jac. Croford v. Bliſſe.

40. *He is forſworn in C. B.* is actionable; per Hobart Ch. J. Hutt. 34. Mich. 15 Jac. S. P. Arg. Hutt. 44. accordingly; but ſays that to ſay *He hath forſworn himſelf at the Bar*, (Innuendo the Bar of C. B.) will not maintain an Action.——But if one ſays *He was forſworn at the C. B.'s Bar*, it is actionable; for it ſhall be intended that it was upon Examination in the Execution of Juſtice. Arg. Win. 3. Paſch. 19 Jac.

41. *You have cauſed this Boy to perjure himſelf.* Adjudg'd for the Plaintiff. Brownl. 2. Bridges v. Playdell.

42. *K. is a falſe forſworn Knave, and took a falſe Oath againſt me at a Commiſſion at W.* is not actionable; for per Hobart, the Words are altogether uncertain; for it does not appear what Authority the Commiſſioners had, nor in what manner he was forſworn. Win. 2. Paſch. 19 Jac. King v. Bowen. Hutt. 44. S. C. but nothing appears to be ſaid by the Court.

43. Caſe &c. for theſe Words, *She is a forſworn Whore, and a perjur'd Whore, and forſwore herſelf at Waterman's Hall, concerning the Servant of T. S.* It was moved in Arreſt of Judgment, that the Words are not actionable, becauſe the Charge is principally for Forſwearing; but the Ch. B. ſaid that the Words (perjur'd Whore) are in a diſtinct Clauſe by themſelves, without Reference to or Dependance on the reſt; and Judgment was given for the Plaintiff. Hard. 7. Trin. 1655. in the Exchequer. Wales v. Norton.

44. The Plaintiff declares of a Diſcourſe of a Will, for proving whereof the Plaintiff was ſworn, and the Defendant ſaid of him, *In ſwearing the Oath that Hartwell took in the Buſineſs, he did ſwear a falſe Oath.* Per Cur. the Words are actionable, by reaſon of the Colloquium. Freem. Rep. 55. pl. 70. Mich. 1672. Hartwell v. Cole.

(G. a) General Words.

See (R. a) pl. 1. * Cro. J. 114. pl. 13. S. C. accordingly.——

1. IF a Man says to another that he is a Thief, an Action upon the Case lies. Mich. 4 Jac. B. R. between * *Minors and Liford*, adjudg'd, 14 Car. B. R. between † *Coke and Brampton*, adjudg'd in a Writ of Error out of Ludlow. Intratur Pasch. 14 Car. Rot. 424. The Words were Thou art a forsworn Whore-Thief.

—Thief generally, without saying of what Nature specially, will bear an Action; per Wray Ch. J. but Gawdy J. e contra. Ow. 47. in Case of Mosse v. Read.

Action will lie for calling one *Thief* or *Traytor* generally; per Bromley, Portman, Brooke, and Stamford clearly; for he may be damag'd as much by those general Words, as if they had been spoken specially; but Brooke said that in ancient Time it was taken otherwise, but the Law now is taken as before, and this is the better Law. Dal. 17. pl. 7. 1 & 2 P. & M. Anon. The Reporter says Vide.—Br. Action sur le Case, pl. 2. S. P. cites 27 H. 8. 14. by Fitzherbert and Shelly clearly.———S. P. as to the Word (*Thief*,) and adjudg'd for the Plaintiff. 2 Bulst. 134. Mich. 11 Jac. Baily v. Maynard.—S. P. Cro. E. 563. pl. 23. Pasch. 39 Eliz. C. B.—S. P. Noy 55. in Case of Elwin v. Moore.

2. If there be a Discourse of the Wife of J. S. and then one says Who would say this of me but J. S.'s Wife, who is a Whore and a Thief, an Action upon the Case lies, without shewing what Words were said; for this is not material. Trin. 15 Jac. B. R. between *Griffith and Johnson*, adjudg'd.

Fol. 43. * Noy 124. S. C. accordingly, by the Name of Baylye v. Child.—— † Jo. 302. pl. 5. S. C. by the Name

3. If one says to another, I charge you with Felony, an Action upon the Case lies. Mich. 5 Jac. B. R. between * *Bacy and Child*, adjudg'd. Mich. 8 Car. B. R. between † *Smith and Hodgskins*, adjudg'd per Curiam upon a Demurrer. Intratur Pasch. 8 Car. Rot. 104. and then a Case was cited to have been Mich. 2 Car. between ‡ *King and Merrick*, B. R. an Action brought for these Words, I charge you with Felony, and I charge you Constable to apprehend and lay hold of him; and it was adjudg'd that the Action did not lie; but the Court now denied it.

of Smith v. Hogshead; and the Words were, *I charge the Plaintiff with flat Felony*, and held actionable.———Cro. C. 276. pl. 15. S. C. and tho' the Defendant pleaded that the Plaintiff assaulted him on the Highway near Highgate, and beat him, whereof he complain'd to the Constable, who refused to attach him unless Defendant would say that he charg'd him with Felony, which occasion'd his speaking the said Words, yet it was held that the Action lies; for it is a malitious Scandal to charge him with Felony, and he shews not what Felony was committed; and Judgment for the Plaintiff, Nisi.

‡ Lat. 175. Robert King's Case, seems to be S. C. The Words were, *I charge you King with Felony, and you Constable* (Innuendo one N. a Merchant of a Vill of Norfolk) *to take him*; and Judgment was given for the Defendant.———S. C. cited Arg. Cro. C. 277. in Case of Smith v. Hodgeskins, as adjudg'd in B. R. Mich. 2 Car. in Case of King v. Mellor, that the Words were not actionable, and shew'd a Copy of the Record; but Jones said he was Judge at that Time in this Court, and did not remember any such Case; but if it were adjudg'd, it was because the Words were not laid to be spoke of the Plaintiff.———Poph. 210. King v. Merrick, S. C. and Judgment Quod querens nil capiat &c. —[In the Case in Lat. and Poph. Jones is mention'd as one of the Judges in Court.]

The Words, viz. I charge thee with Felony, will not bear an Action, unless they are *spoke before an Officer*, or that he is *carried before a Constable &c.* Agreed by Doderidge, Haughton, and Chamberlaine J. 2 Roll Rep. 343. Trin. 21 Jac. B. R. in Case of Wheeler v. Appleton.

Case, for saying to a Constable of the Plaintiff, *Take him, and carry him away*; *for I lay flat Felony to him*; and for saying to the Plaintiff himself, *I will make you hold up your Hand at the Bar*; held clearly actionable, and Judgment, Nisi. Sty. 235. Mich. 1650. B. R. Paine v. Prestney. ———S. P. per Ley Ch. J. but if they were *spoke privately* to a Man, no Action lies for them or *in a Court which hath Conusance* of such Pleas, then the Action will lie; for the Party, by reason of such Words, may come into Trouble; but charging one with flat Felony, and charging the Constable with him, is not actionable, because it is in the ordinary Course of Justice. Godb. 340. Trin. 21 Jac. B. R. in pl. 434.

These Words are too general

4. If one Man says to another, Thou deservest to be hang'd, no Action lies for these Words. Trin. 4 Jac. B. R. between *Hake and Molton*,

Molton, adjudg'd; for this only expreſſes his Opinion and Judgment of him. and extravagant to ground an Action upon, it not being ſhewn what Act was done to deſerve hanging Yelv. 90. Heake v. Moulton, S C.——S C. cited 2 Mod 163. in Caſe of Townſend v. Hughes, Hill. 28 & 29 Car. 2. C. B by Atkins J. as not actionable, becauſe it was only his Opinion.——S. C. cited Arg. but Page and Probyn J. ſaid that they believed it never was determin'd, that to ſay of a Man that *He deſerved to be hang'd for robbing on the Highway*, would be actionable.

H. will come home again, if he eſcapes the Gallows; *for he hath deſerved to be hang'd*; adjudg'd not actionable; for they are too general, becauſe the Country People may intend he deſerved hanging, tho' he never committed any Felony. Cro. E. 470. (bis) pl. 30. Paſch. 39 Eliz. B. R. Halland v. Mabbs.

5. If a Man ſays to J. S. Thou art a ſcurvy bad Fellow, and haſt done that [for which] thou deſerveſt to be hang'd, no Action lies. Mich. 11 Car. B. R. between *Fiſher and Atkinſon*, adjudg'd per Cur. in Arreſt of Judgment, after a Verdict for the Plaintiff. *If you had had your Deſerts, you had been hang'd before now*; adjudg'd actionable; for it ſhall be intended that he committed an Offence, for which the Penalty of Death was due to him. Cro. E. 62. pl. 4. Mich. 29 & 30 Eliz. B. R. Donne's Caſe.——Ibid. Wray ſaid that where A. wrote the Name of B. upon a Wall, and drew a Gallows upon the Wall, and wrote further that *if this Man had his Deſerts he ſhould have been hang'd on theſe Gallows*, and adjudg'd actionable.

6. If one Man ſays to another, You are no true Subject to the King, no Action lies for theſe Words, becauſe they are too general; for perhaps it may be, becauſe he had not paid his Subſidies. Mich. 5 Jac. B. R. between *Smith and Turner*, adjudg'd. Yelv. 104. S. C. per tot Cur. the Action does not lie; but if it had appear'd by the Declaration, that the Words had been ſpoke upon any Diſcourſe of the Loyalty of the Plaintiff, then the Opinion was otherwiſe.——Cro. J. 202. pl. 1. S. C. and adds, *and that I will prove*; adjudg'd for the Defendant; for it may be intended that he was no true Subject, having been falſe in ſome Office, or being Accountant had not made a true Account, and being laid barely without Circumſtances, the Action lies not; and ſo the Court diſtinguiſh'd it from the Caſe of * Sir W. Walgrave v. Agas.

Thou art an untrue Man to the Queen, is not actionable if ſpoke of an ordinary Subject; but if ſpoke of one of the *Privy Council*, are actionable; per Wray Ch. J. Le. 336. Trin. 32 Eliz. B. R. in pl. 469.

* See (C. b) pl. 1. S. C.

7. If one Man ſays to another, Thou art a Rogue, and an arrant Rogue, and I will prove thee to be a Rogue, no Action lies. Mich. 41 & 42 Eliz. B. R. adjudg'd. S. P. but no Judgment. Brownl. 9. Paſch. 12 Jac. Whitepain v. Coke.——The ſaying to a Man that he is a *Villain*, or a *Rogue*, or a *Varlet*, *or the like*, will not maintain an Action; for they are uſual Words of Choler and Paſſion. 5 Rep. 15. b. in the Caſe of Stanhope v. Bliih, per Cur. Paſch. 27 Eliz. B. R.

8. If a Man ſays to another, You Rogue, you are a traitorly Rogue, you cheated your Father of all that ever he had; you are a branded Rogue, and hath held up your Hand at the Bar; you deſerved Hanging, and you ſhall be hanged, an Action lies; for it appears that he intended that he was branded according to the Statute [1 Jac. cap. 7.] Mich. 23 Car. B. R. between *Meake and Cubit* adjudged, this being moved in Arreſt of Judgment. Sty. 49. Mack v. Cubitt, S. C. adjudged for the Plaintiff. —— All. 35. Mark v. Cubit, S. C. there was a Verdict; for all the Words, except (Traitorly Rogue.) So the Queſtion was, whether (Branded Rogue) would maintain an Action; for it was clear that none of the other would, becauſe, as was inſiſted, the moſt that they import is, if he has been branded for a Rogue by 1 Jac. cap. 7. then his Puniſhment is paſt; and ſo the Words not actionable, becauſe they can be no Damage to him. But adjudged for the Plaintiff, becauſe, by that Statute, if a branded Rogue wanders again, it is Felony, and ſo the Words put him in a nearer Degree of Felony than he would be otherwiſe.

9. If one ſays to another, Thou art a Rogue, a Run-away Rogue, and didſt run away from Oxford, and thou art a Rogue of Record at Oxford, Sty. 220. Elſy v.

Action

Mawdit, S. C. the Court inclined that they were actionable.

Action lies for these Words; for he cannot be a Rogue of Record, if he be not convicted thereof upon Record, according to the Statute. Trin. 1650. between *Allesly and Mawdit* Per Curiam, this being moved in Arrest of Judgment. Intratur Pasch. 1650. Rot. 409.

But adjornatur.——— Ibid. 221. adjornatur—*Thou art a Rogue and a Vagabond.* All the Court held these Words not actionable. Cro. E. 843. pl. 23. Trin. 43 Eliz. C. B.. Robinson v. Meller.

D. 75. a. pl. 21. Mich. 6 E. 6. Burgis alias Bruges v. Warenford, S. C. adjudged accordingly.———*He keeps a Company of Thieves at his Mill, and I will not grind my Grist there as long as they are.* Adjudged not actionable. D. 75. a. Marg. pl. 21. cites Pasch. 5 Jac. B. R. Sir Wm. Wray's Case.

10. *There is a Nest of Thieves at Rippon, and Sir J. B. is the Master of them, and he is a Thief himself.* Adjudged for the Plaintiff. Dal. 9. pl. 7. Mich. 7 E. 6. B. R. Bridges's Case.

S. P. by Dyer and Walsh; for there are some Words which cannot be qualified, as Murderer, *Thief*, *Extortioner*, *False Knave*; and in such Case an Action will lie. But contrary where such Words are *spoken in a jesting Way*. Ow. 33. Trin. 7 Eliz. Winter v. Barnham.

11. *He is a Murderer* is actionable. Mo. 29. in pl. 92. Trin. 3 Eliz. Anon.

For the Common Law cannot discuss what shall be said Adultery. Br. Action sur le Case, pl. 2. cites 27 H. 8. 14. by Fitzherbert and Shelly clearly.

12. *He is an Adulterer* is not actionable, because it is not punishable at Common Law, but only the Spiritual Law. Mo. 29. pl. 92. Trin. 3 Eliz. Anon.

And. 12. pl. 27. S. C. accordingly.—Bendl. 155. pl. 216. S. C. accordingly, and the Pleadings.—Dantsley's Case, cited Het. 63. seems to be S. C——But Cro. E. 31. in pl. 6. Trin. 26 Eliz. B. R. The Court conceived that saying, Thou art a Knave, and a Pillory Knave, are not actionable.——*Thou art the falsest Knave in all England.* Dal. 89. in pl. 5. 15 Eliz. cited by Catlin as adjudg'd not actionable, in the Case of Yale v. Bostock.

13. *He is a false Knave, and worthy to stand upon the Pillory.* The Defendant justified, because the Plaintiff by his Attorney swore falsely that his Debt was a true Debt, and so caused 10 l. due to the Defendant to be attach'd according to the Custom of the City of London; and after, upon Issue joined between the Plaintiff and Defendant upon Nil debet, it was found for the Defendant; and thereupon the Defendant says he spoke those Words. And the Justification was held good. Mo. 77. pl. 210. Mich. 8 & 9 Eliz. Lucas v. Cotton.

Thou art a Knave, and a Pillory Knave; remember thou shouldst have been set on the Pillory. Adjudged for the Plaintiff, tho' not said he was set on the Pillory. Cro. E. 11. pl. 7. Mich. 24 & 25 Eliz. C. B. Browne v. Dawks.

Thou art a Knave, and a cheating Knave; not actionable, unless he shews that he was of such a Trade, and that he has special Loss by the Words. Sid. 48. pl. 8. Mich. 13 Car. 2. B. R. Welden v. Johnson.

He is a cheating Knave, he has cheated me with Brass-money. Resolved that to call a *Tradesman* a Cheat, an Action will lie, if he speaks of his Profession; but to speak it generally it will not. And adjudged for the Plaintiff, who was a *Broker*, and the Words spoke of his Profession. Raym. 62. Mich. 14 Car. 2. B. R. Davies v. Jones.———Keb. 393. pl. 107. S. C. adjudged for the Plaintiff, Nisi.

14. *Thou wast the Cause that J. S. did hang himself, and that R. N. did cut his own Throat, and thou beginnest with no Man but thou undoest him.* Not actionable. Dal. 89. pl. 5. 15 Eliz. Anon.

15. *If thou hadst Justice thou hadst stood on the Pillory.* Le. 127. in pl. 173. Arg. cites it as adjudged not actionable, in the Case of Rylie v. Trowgrood.

16. *A. is a Thief, and B. his Partaker.* The whole Court held the Words not actionable, because too general; for it may be that the Plaintiff

tiff is his Partaker in other Matters; but if the Words had been, that *B. knowing A. to be a Thief, was his Partaker*, there the Action would have lain. Judgment was given againſt the Plaintiff. 4 Le. 24. pl. 74. Paſch. 26 Eliz. Bluet v. Cooks.

17. To ſay *he is a Rogue*, or a *Varlet*, or the like, ſuch Words are not actionable. 4 Rep 15. b. Per Curiam in pl. 4. Paſch. 27 Eliz.

18. *He hath but one Manor, and that he got by Swearing and Forſwearing*, is not actionable, tho' Plaintiff counted that he was a *Juſtice of Peace, and Surveyor of the Dutchy of Lancaſter*, and had divers other Offices; for the Words are too general, and the Defendant does not charge the Plaintiff with Swearing or Forſwearing; for he might recover a Manor by Swearing and Forſwearing, and yet he not be procuring or aſſenting to it. 4 Rep. 15. a. b. pl. 4. Paſch. 27 Eliz. B. R. Stanhope v. Elith. S. C. cited 3 Le. 163. Per Cur. Hill. 29 Eliz. in pl. 213.—S. C. cited Per Cur. Cro. E. 603. Hill. 47 Eliz. C. B. in pl. 15.——See (Z. a) S. C.

19. *Thou ſhouldeſt have ſat on the Pillory if thou hadſt thy Deſerts*; the Court held it not actionable, becauſe too general. And Anderſon Ch. J. took a *Diverſity* between general Words infamous *ſpoke to a private Perſon*, and when *to a publick Officer or Magiſtrate*, that the private Perſon is not ſlander'd with particular Infamy, but the Magiſtrate may be by general Words. Mo. 243. pl. 383. Mich. 29 Eliz. Anon. *The Plaintiff hath deſerv'd his Ears to be nailed to the Pillory.* Adjudged actionable. Cro. E. 384. pl. 6. Paſch. 37 Eliz. B. R. Jenkinſon v. Mayne.

20. *Thou haſt forged my Hand*; Per Gawdy and Wray they are not actionable, becauſe too general, without ſhewing to what Writing. And adjudg'd accordingly. 3 Le. 231. pl. 313. Hill. 31 Eliz. B. R. Anon. *Thou haſt forged a Writing*; Per Wray and Gawdy, not actionable, becauſe uncertain; but if the Declaration be with an *Innuendo ſuch a Deed*, then it had been good enough. 3 Le. 231. pl. 313. Anon.——*Thou art a Forger*, not actionable, becauſe not ſaid to what Thing; Per Wray. Ibid.

21. *Thou art a Concealer of Felony, and it lieth in my Power to hang thee.* Adjudged actionable, tho' the Words are general, and ſhew not how. Bulſt. 148. Arg. cites Rewdam v. Tucker.

22. *Thy Credit hath been call'd in Queſtion, and a Jury being to paſs upon it, thou foiſtedſt in a Jury early in the Morning, and the Lands thou haſt are gotten by lewd Practices*; adjudg'd not actionable, the Words being too general. Cro E. 348. pl. 21. Mich. 36 & 37 Eliz. B. R. Nichols v. Badger.

23. *Thou art a common Filcher, Companion of Cut-throats &c.* All the Juſtices held theſe Words not actionable. Cro. E. 554. pl. 6. Paſch. 39 Eliz. B. R. Goodale v. Caſtle.

24. *Thou art a Corn-ſtealer*, adjudg'd actionable; for it ſhall be intended only of ſuch Corn as might be ſtoln, and not of Corn ſtanding. Cro. E. 583. pl. 23. Paſch. 39 Eliz. C. B. Anon.

25. *Thou art a Murderer, and a bloody Fellow, and I am afraid of thee.* Adjudged not actionable. Cro. E. 672. pl. 32. Paſch. 41 Eliz. C. B. Slade v. Allen.

26. *He is a Blood-ſucker, and not worthy to live in a Commonwealth, and his Child not born is bound to curſe him.* The Court held that no Action lies. Noy 64. Thimmelthorp's Caſe.

27. *You have bought a Roan ſtolen Horſe, knowing him to be ſtolen*; adjudg'd actionable. Godb. 157. pl. 212. Mich. 6 Jac. B. R. Briggs's Caſe.

27. *Thou art a Thief, Murderer, Villain, Blood-ſucker, Bankrupt*; adjudg'd actionable, and affirm'd in Error; for it is ſufficient if one of the Words will maintain an Action. Jenk. 301. pl. 70. Trin. 8 Jac. B. R. Luker's Caſe.

Keb. 50. pl. 6. S. C. adjornatur; but ibid. 56. pl. 16. the Court agreed that the Words are a direct Affirmation, and that what Seal ſoever it be it is Felony; and Judgment for the Plaintiff.

28. *N. who was Solomon Smith's Clerk, is a Knave, and a Rogue, and I will prove it, and he is in Newgate, and is to be hang'd for counterfeiting the King's Hand and Seal*; adjudg'd for the Plaintiff. Raym. 17. Trin. 13 Car. 2. B. R. Nuttal v. Page.

29. The Plaintiff married the Daughter of M. who intended to give him 100 l. and the Defendant ſaid to a 3d Perſon, *He is a Rogue and a cheating Knave, and he hath cheated his Mother-in-Law out of an Eſtate in Norfolk, and I will put him up at the High-Croſs for it*; and alleg'd that by thoſe Words he loſt his Mother's Good-will. The Plaintiff had a Verdict. Bridgman Ch. J. thought theſe Words would bear no Action in themſelves, and would carry no preſent Damages; and the Mother being alive, ſhe may yet give him the 100 l. and her Intention is revocable, theſe Words in themſelves being but Words of Courſe; but ſaid they would conſider of it, and ſet a Rule for conſequential Damages. Cart. 1. Mich. 16 Car. 2. C B. Harris v. Porter.

30. Caſe &c. for theſe Words, *He is a great Rogue, and deſerves to be hang'd as well as Gale, who was condemn'd to be hang'd at Newgate-Seſſions*, and of his further Malice *he bid T. S. ſteal what Goods he could, and he would receive them.* Adjudg'd not actionable; for the firſt Words only ſhew his Opinion, and perhaps he might not think that Gale deſerved Hanging, and the laſt Words were only bad Advice, but no Act done. 2 Jo. 157. Trin. 33 Car. 2. B. R. Buſh v. Smith.

Skin. 364. pl. 8. Somers v. Houſe, S. C. It was mov'd in Arreſt, that breaking open the Houſe was but a Treſpaſs, and making up the Breach might be repairing; but the Court ſeem'd e contra, and afterwards gave Judgment for the Plaintiff.

31. *You are a Rogue, and you broke open a Shop at Oxford, and your Grandfather Jones brought over 20 l. to make up the Breach*; adjudg'd for the Plaintiff. Comb. 232. Mich. 5 W. & M. in B. R. Somers v. Howe.

(H. a) Where they touch not Life nor Member.

Hutt. 14. S. C. but S. P. does not appear. —See (Z. a) pl. 14. S. C. —Action upon the Caſe lies for calling the Plaintiff *Thief*, and that he *ſtole 2 Sheep* of J. S. The *Defendant ſaid that the Plaintiff ſtole the ſame Sheep, by which he call'd him Thief, as well he might*; and good per Cur. *without expreſſing the Value*; for if they are not worth 12 d. ſo that 'tis only Petty Larceny, and no Felony of Death, yet it *is Felony in its Nature.* Br. Action ſur le Caſe, pl. 3. cites 27 H. 8. 22.

1. IF one Man ſays of another, That he has ſtolen a certain Thing [the ſtealing of] which is but Petty Larceny, yet an Action upon the Caſe lies; for this is a kind of Felony, and a great Slander, and he ought to be whipt for this by the Law. Contra Mich. 37 & 38 Eliz. B. R. between *Carter and Hunt*, per Curiam.

Thou haſt ſtolen Hay from Mr. Bell's Racks. Hobart ſaid that Judgment ſhall be given for the Plaintiff; for it has been lately adjudg'd in this Court, that where a Man was charg'd with Petty Larceny to ſteal under the Value of 12 d an Action will lie; for the Diſcredit is not in the Value, but in the taking with an felonious Intent. Win. 6. Paſch. 19 Jac. Wetherley v. Wells.

2. If

2. If A. says of B. He stole Corn out of my Barn, though it might be that the Corn might not be worth a Penny, yet the Action lies; for this is Felony, tho' not Capital. Hob. Rep. 249. Hob. 184. pl. 223. Hill 14 Jac. Male v. Kett, S. C

——Het. 172. Trin. Car. S. C. in the same Words, and seems to be copied from Hob.——Mo. 883. pl. 1240. Hill. 14 Jac. Anon. but seems to be S. C. and adjudg'd actionable.— Poph. 129. Mich. 15 Jac. B. R. May v. Kett, S. C. adjudg'd that the Action would lie; but if he had said that *he had stole his Corn* generally, it had not been actionable; for it might have been growing, and then it had been but a Trespass.——Brownl. 2 S. C. adjudg'd for the Plaintiff.

3. If one Man says to another, That he has the Great Pox, an Action upon the Case lies, because this is a great Slander and Disgrace, inasmuch as this comes by Fornication, and no Man will converse with him. Pasch. 15 Jac. between * *Milner and his Wife* v. *Reeves*. Hob. Rep. Case 290. between † *Crittal and Horner*, adjudg'd; the Words being, He hath caught the French Pox, and carried them home to his Wife; for the Slander is not ‡ by reason of the ill Means of getting it, but for the Odiousness of the Infection. * Cro. J. 430. pl. 9. Miller's Case, S. C. but see (Y. a) pl. 16. S. C. — † Hob. 219. pl. 291 ‡ Fol. 44.

S. C.——Brownl. 11. Pasch. 16 Jac. Cruttal v. Hosener, S. C. adjudg'd for the Plaintiff.

4. If one Man says to another, Thou art a leprous Knave, and a Leper, an Action upon the Case lies; for he ought not to come into the Society of Men if it be so, tho' this is a natural Infirmity. Hill. 4 Jac. B. R. between *Taylor and Perr*, adjudg'd. Cro. J. 144. pl. 3. S. C. by the Name of Taylor v. Perkins, adjudg'd

upon the first Motion without Argument.——Noy 117. S. C. adjudg'd.——S. C. cited Cro. J. 430. pl 3. in Miller's Case, by the Name of Taylor v. Bankes.——S. P. admitted, and S. C. cited in the Case of Crittal v. Horner. Hob. 219. pl. 291.

5. If one says of another, That he has the Falling-Sickness, no Action lies. Hill. 4 Jac. B. R. between *Taylor and Peer*. See pl. 4. S. C. but no such Point

appears in any of the Books there cited.——See (S. a) pl. 21. S. C.

6. If one says to another, Thou art a Bankrupt, no Action lies; if he be of no Trade, nor used to buy and sell. Trin. 2 Jac. B. See the Notes on pl. 1. —— S. P. but be-

cause the Declaration did not set forth that the Plaintiff was of any Mystery or Trade, it was held insufficient; and Judgment was stay'd. Goldsb. 84. pl. 5. Pasch. 30 Eliz. Anon.——— See (U. a) pl. 18.——See the Notes on pl. 1.

7. If one says of another, Thou art a common Barretor, and I will indict thee for it at the next Assises; no Action lies for these Words. Trin. 4 Jac. B. R. between *Hake and Molton*, adjudged. See (U. a) pl. 3. and see (S. a) pl. 15. —— Yelv. 90.

Heake v. Moulton, S. C. adjudg'd accordingly, tho' the Words there are, Thou art a common Barretor, *and deserveſt to be hanged*; for the Words (common Barretor) is not any Slander, the Offence being only fineable, and the Party to be bound to his good Behaviour, and sounds only in Disgrace.

It seemed to the Court, that for saying, *He is a common Barretor*, an Action does not lie; and therefore Judgment was stay'd. Cro. E. 171. pl. 11. Hill. 32 Eliz. B. R. Proud v. Howes.———See (S. a) pl. 31. and (U. a) pl. 3.——If spoke of one that is not an Attorney, it is not actionable. Agreed Per Cur. and Judgment staid. Keb. 569. pl. 19 Mich. 15 Car. 2. B. R. Ayer v. Steeply.

8. If one says of another, Thou art a Bawd, and dost keep a Bawdy-House, Action upon the Case lies; for this is inquirable in a Leet and punishable, and is a great Defamation. Hill. 4 Jac. B. R. between * *Turnam and Thorne*, per Curiam, 38 & 39 Eliz. B. R. Dame Bartlet's Case, adjudged, Mich. 10 Car. B. R. between *Arneſt and Nichols*, adjudged; this being moved in Arrest of Judgment. Intratur, Mich. 10 Car. 27 H. 8. 14 B. per Fitz. Noy 117. S. C. by Name of Thorne v. Durham, S. P. admitted, especially she having declared that she kept

a Victualling-house as her Trade———But Cro. E. 643. pl 44. Mich 40 & 41 Eliz C. B. Anon. it was ruled,

ruled, that for saying he keeps a Bawdy-house, Action does not lie, for by the Common Law he is not punishable, but by the *Custom of London*; and therefore he should have sued in the Spiritual Court.——Sri. 326. Pasch. 1652. Garland v. Yarrow, adjudg'd actionable.——*He is not worthy to bear an Office; for he keeps a Bawdy-house in London.* Adjudg'd actionable. Bulst. 138. Trin. 9 Jac. Simpson v. Brook.

Thou art a Whore, and a Bawd to thy Daughter, and keepest a Bawdy-house. Sty. 326. Arg. cites it as adjudged actionable. Hill. 3 Car. Elsey v. Harrison.

You are a Pimp and a Bawd, and fetch young Gentlewomen to Gentlemen. The Court thought the Words not actionable, because the Word (Bawd) is not actionable, without saying she keeps a Bawdy-house. Sid. 438 pl. 4. Hill. 21 & 22 Car. 2. B. R. Cavel v Birket.———Mod. 31. pl. 76. Gavel v. Perked, S. C. the Court were of Opinion, that taking the Words all together, they explain one another; and that it is such a Slander as if true she may be indicted for it, and is punishable at Common Law. And Judgment for the Plaintiff Nisi &c. ——Vent. 53. Gavell v. Burket, S. C. says the Court inclined that the Action would not lie; Sed adjornatur; but the Reporter cites Mod. that Judgment was given for the Plaintiff.

Action lies for calling Bawd, either at Common Law, or by the Spiritual Law. Br. Action sur le Case, pl. 2. cites 27 H. 8. 14.

9. But no Action lies for saying, Thou art a Bawd. Mich. 38. 39 Eliz. B. R. Per Curiam. Trin. 8 Car. B. R. between * *Hicks and Hollinghead*, Per Curiam, in a Writ of Error, but the Judgment affirmed for other Words. Hill. 15 Jac. B. R. between † Sir *Wm. Read and his Wife* Plaintiffs.

* Cro. C. 261. pl. 5. Trin. 8 Car. B. R. S. C. but Dubitatur as to the Word (Bawd.)

It was agreed, that to say a Woman is a Bawd, will not bear an Action; but to say *She keeps a Bawdy-House*, will. Mar. 212. pl. 249. Trin. 18 Car. Chambers v Ryley.———It was agreed that the Word (Bawd) is not actionable, and consequently calling one so by Circumlocution, is not as where the Words were, *Thou hast taken 5 s. of 2 Whores and 2 Rogues to help them to a clean Pair of Sheets, and I will have thee carted for it.* Sid. 241. pl. 2. Pasch. 17 Car. 2. B. R. Ward v. March.———See tit. Prohibition (N) pl. 13. and the Notes there.

† Cro. J. 462. pl. 9. S. C. the Words were, *Thou art a forsworn Whore, and an old Bawd*; and adjudg'd not actionable.

Thou art a Bawd, and a Pocky Bawd, and I will root thy Whores out of thy House. Twisden conceived the Words not actionable; but Curia e contra; and Judgment for the Plaintiff. Keb. 315. pl. 36. Trin. 14 Car. 2. B. R. Rogers v. Cocke.

Cro. C. 393. pl. 5. S. C. Judgment stay'd. —— S. C. cited Vent 53. in Case of Gavel v. Burket, as agreed, that no Action would lie for calling one Bawd or Pimp.—— Noy. 85.

10. If a Man says of T. S. who is a Soldier, He is a Pimp, in an Action brought for these Words, if the Plaintiff avers that in London, where the Words were spoken, and in Places adjoining thereto, a Pimp signifies as much as if he had said he was a common Bawd that solicited Women to Incontinency with Men, the Action lies for these Words upon this Declaration, because such common Bawd may be indicted for this Offence. Hill. 10 Car. B. R. between *Dimmock and Fawset*, per Cro. & Bark. contra Jones, that the Action lies; but it was adjourned. Intratur Mich. 10 Car. Rot. 148. But Pasch. 11 Car. this was moved again; and then the Court was divided, and no Precedents could be found of any Indictment for such an Offence, but only for keeping a Bawdy-house.

Lewes v. Whitton, says it was much debated, whether the Words, *Thou art a Pandar to J. S.* were actionable at Common Law; but it was agreed that a Suit might be brought for them in the Spiritual Court.

Roll Rep. 355. pl. 22. Louis v. Cook S. C. adjudged for the Plaintiff —Cro. J. 399. pl. 5. Pasch. 14 Jac. S. C. by the Name of Loyd v. Cook in the Exchequer Chamber, all the Justices and Barons held the Words not actionable; for to say, *Thou art a Witch*, has been often adjudged not actionable; and the adding, I have seen thy Imps and Spirits, is only Fancy, and not triable, and so no Cause of Slander. Wherefore Judg-

11. If a Man says that J. S. is a Witch, and I will prove him so; and I have seen him and his Imps and evil Spirits in the Night appear to me, and he did * bewitch my Child; an Action upon the Case lies for these Words, tho' he does not charge him to have done any Damage to any Person, by which he should be punishable within the Statute of Witches; for it is a great Defamation to be a Witch. By Reports, Mich. 13 Jac. B. R. between *Loars and Cook* adjudged.

ment was revers'd.———3 Bulſt. 74. Lowes v. J. S. adjudg'd in B. R. for the Plaintiff, but reverſed afterwards in the Exchequer-Chamber.

* Cro. J. is (unbewitch.) And Roll Rep. is (unwitch.)

12. If one ſays to another, Thou art a Witch, and didſt bewitch me, an Action lies. Contra Mich. 17 Jac. B. between *Hinch and Heale* adjudged. Brownl. 14. S. C held the Action would not lie. For he might bewitch him by fair Words, or fair Looks.

13. If a Man ſays to another, That ſhe ſacrificed one of her Children to the Devil, to the Intent to bewitch his Mother, an Action upon the Caſe lies; for Invocation of Spirits is puniſhable by the Statute of Witches. Paſch. 15 Jac. B. R. between *Lock and Lock*, adjudged. *Thou haſt ſacrificed thy Child to the Devil*; adjudg'd not actionable. Poph. 128.

Paſch. 15 Jac. B. R. Anon. ſeems to be S C.—See (Q. a) pl. 1. S.C.

14. If one ſays to another, that he is a Witch, or the ſon of a Witch, no Action lies for theſe Words (becauſe it lies not for the laſt, as it ſeems.) By Reports, 14 Jac. See tit. Prohibition (N) pl. 2. and the Notes there.

15. * If one ſays to another, that he is a Witch, no Action lies, becauſe it is a common Word of Paſſion. Hill. 15 Jac. B. * Fol. 45.

2 Le. 30 pl. 34. Trin 30 Eliz. B. R. in Caſe of Clark v Green Arg. cites the Caſe of Smith v. Morrice 30 Eliz. that the Word (Witch) is not actionable.———S. C. cited Godb. 341. in Caſe of Shotter v. Emmet.——Reſolved per tot. Cur. that the Word (Witch) is too general, and will not bear an Action. Palm. 29. Trin. 20 Jac. B. R. Anne Knight's Caſe.———See tit. Prohibition (N) pl. 2. in the Notes there S. C.

16. But if one Man ſays to another, Thou art a Witch, and an Inchanter, and thou didſt bewitch the Children of J. S. Action upon the Caſe lies; for he ſhews his Intention to be that he is a true Witch, and [that the Words were] not ſpoke in a Paſſion, and that he has done an Injury to a Man. Hill. 15 Jac. B. *Thou art a Witch and a Sorcerer*; reſolved that the Words are actionable; for

Gawdy ſaid, if he bewitches Men, ſo as they die, it is Felony; if he uſes Witchcraft in any other Manner he ſhall ſtand on the Pillory, ſo that it is a Slander in every Reſpect, and a good Cauſe of Action; and adjudg'd for the Plaintiff. Cro. E. 571. pl. 9. Trin. 39 Eliz. B. R. Rogers v. Gravat.——If the Words are only (Witch and Inchanter) no Action lies; but if it be added (and haſt bewitch'd J. S. &c.) tho' J. S. be not Dead, Action lies; for thereby the Defendant manifeſted his Intent to be of Witchcraft puniſhable by 32 H. 8. cap. 8. and 1 Jac. 12. Noy 22. Mich. 15 Jac. C. B. Stone v. Roberts.——Brownl. 2. S C accordingly.———Hutt. 13. S.C. adjudg'd for the Plaintiff, becauſe it is coupled with an Act done.——*You inchanted my Bull, and made him run mad about the Common*, is not actionable. Sid. 424 pl. 4. Mich. 21 Car. 2. B. R. Seamor v. Moor.———Lev. 276. Seamon v. More S. C. accordingly.

Thou art a Witch, an Inchanter, a Necromancer and a Sorcerer, and thereby waſt the Death of my Husband. Adjudg'd actionable. Cro. E. 312. pl. 2. Hill. 36 Eliz. B. R. Forteſcue v. Hext.

He is a Witch, and bewitch'd my Husband to Death; for he made his Picture in Wax, and roaſted it every Day by the Fire, until he roaſted my Husband to Death. It was objected that the Reaſon given ſhews it a vain Conceit, and ſo no Reaſon for calling him a Witch. But the Words were held very heinous, and adjudg'd actionable. Cro. E 312. pl. 2. Hill. 36 Eliz. B. R. Forteſcue v. Hext.

17. If one ſays of another, Thou art a Sorcerer and Inchanter, no Action lies; for Sorcery or Inchantment is only Cozenage, as Fortune-tellers &c. Mich. 7 Jac. between * *Bevies and Mutton*, adjudg'd, Trin. 24 Car. B. R. between † *Yates and Linden*, adjudg'd in Arreſt of Judgment, that no Action lies for theſe Words, She is a Sorcerer and a Witch, and can witch and unwitch; ſhe is a white Witch, and can witch and unwitch. Intratur Trin. 23. Rot. 302. *He liveth by charming Sorcery and Witchcraft*; held not actionable. 2 Le. 30. pl. 34 Trin 30 Eliz. B. R. Clark v. Green.——* 2 Brownl 256. Mich. 7 Jac C B ſeems to be S C. by the Name of Papn v. Mutton, and agreed by all the Juſtices that the Action does not lie.

† All.

† All. 3-. Hill. 23 Car. B. R. S. C. Judgment againſt the Plaintiff; becauſe ſhe is not accuſed of any Offence againſt the Statute.——Sty. 47. S. adjudg'd not actionable.

* See pl. 11. S.C. —— ‡ Cro. J. 150. pl. 11. Hill. 4 Jac. B R. Edwards v. Oufley S. C. *Thou art a Witch, and I will prove thee a Witch*; all the Court held that the Action well lies, eſpecially the Words being ſpoken ſince the Statute which makes every Witchcraft Felony; and and Judgment for the Plaintiff.——Noy. 22. in Caſe of Stone v. Roberts cites S. C. as adjudg'd actionable.——She is a Witch, held actionable. Cro. J. 639. pl. 1. Trin. 20 Jac. B. R. in Caſe of Hunn v. Porter.

18. If one ſays of another, Thou art a Witch, without more Words, no Action lies. Mich. B. R. between * *Lewis and Cock*, adjudged that the Action lies; but this was after reverſed in the Exchequer-Chamber in a Writ of Error. Contra Mich. 3 Jac. B. R. between ‡ *Edwards and Uſely*. adjudg'd.

2 Brownl. 206. in Caſe of Payn v. Mutton S.P. cited to have been adjudg'd.

19. If one ſays of another, he hath bewitch'd my Wear, and I can take no Fiſh, no Action lies. Mich. 7 Jac. B. ſaid to be adjudg'd.

Cro. C. 261. pl. 5. S.C. adds theſe Words, viz. (*by Witchcraft and Sorcery.*)

20. If a Man ſays of a Woman, Thou art a Bawd, and haſt bewitch'd me, an Action lies not for the Word Bawd, but for the other Words it lies. Trin. 8 Car. B. R. between *Hicks and Hollingſhead*, adjudg'd in a Writ of Error. Intratur, Hill. 7 Car. Rot. 765.

Jones and Crooke held that the Action well lies for the laſt Words (and haſt bewitch'd him) and they (cæteris abſentibus) made a Rule that Judgment be affirm'd.

Cro. C. 282. pl. 22. S. C. adjornatur. Ibid. 324. pl. 6. S. C. and all the Court ſeriatim deliver'd their Opinions, that Action lies not for calling one Witch, without alleging ſome Act done by her; but if it be ſaid that ſhe bewitch'd any Man, or any Thing, it well lies.——Jo 325. pl. 2. S. C. held that no Action lies.

21. If one ſays of another, She is a Witch, and a very ſtrong Witch, no Action lies. Mich. 8 Car. B. R. between *George and Harvy*, the Poſtea ſtaid in Arreſt of Judgment; and after, ſcilicet, Mich. 9 Car. this was adjudged againſt the Plaintiff per totam Curiam. And ſome of the Judges thought there no Puniſhment of Witchcraft was at the Common Law; and if he be not charged with any Act, it is not within the Statute of 1 Jac. and the Word (Strong) does not inforce the other Words.

Cro. J. 600. pl. 25. Martin v. Stradling, S. C. it was objected that it was inſenſible; for a Feme cannot have Milk of Cows, but it is her Husband's; and it may be intended it was the Milk in her Breaſts, and that being doubtful it is not actionable; Wherefore the Court would adviſe.

22. If A. ſays to B. Thou art a Witch; for thou didſt bewitch my Wife's Milk, Action lies, tho' he did not accuſe him of having done any Harm to the Milk. Mich. 18 Jac. B. R. between *Martin and Stodding* adjudged, this being moved in Arreſt of Judgment.

Cro. C. 141. pl. 17. Mich. 4 Car. B. R. Hughs v. Farrer, ſeems to be S. C. and all, beſides Whitlock J. conceived that the Action lies, and adjudg'd for the Plaintiff.——Jo. 197. pl 11 S. C. adjudg'd accordingly.

23. If A. ſays to B. Thou art a Witch, for thou didſt bewitch my Mother's Drink, and what wilt thou have more? and we will prove her [thee] one before we have done with her [thee] an Action lies. Mich. 4 Car. B. R. Intratur. Trin. 4 Rot. 1063. adjudged, this being moved in Arreſt of Judgment.

Cro. C. 320. pl. 1. S. C. by the Name of Broxon v Dager, Rule

24. If A. ſays to B. Thou art a Witch; I will make thee ſay God ſave my Mare, I was forced to have my Mare charm'd for thee, no Action lies for theſe Words, becauſe for the Word Witch no Action lies without more Words, and the other Words are not actionable; for

for it is not well known what is intended by the Words (I will make thee lay God save my Mare;) for in the Country, where the Words were spoken, it is usual for Men, when they pass by Cattle, to say God save them, otherwise they are taken for Witches; and for the other Words, (I was forced to have my Mare charm'd) this implies that he procured another to charm her to prevent the Witchcraft. Mich. 9 Car. B. R. between *Boxham and his Wife v. Dangers and his Wife*, Per Cur. in Arrest of Judgment. Intratur Trin. 9 Car. Rot. 1155. was given to stay Judgment usual &c.

25. If a Man says of A. S. She is a Witch, and is convicted at this Assizes (Innuendo Lincoln Assizes &c.) and J. S. was bound for her Appearance, an Action lies for these Words; for it shall be intended a Conviction for such Witchcraft, for which she might be indicted; for else * she could not be convicted thereof at the Assizes; and therefore a great Slander. Mich. 9 Car. B. R. between *Hill and Johnson* adjudged, this being moved in Arrest of Judgment. Intratur Hill. 8 Car. Rot. 1203. * Fol. 46.

26. If one says to another, Thou art a Witch, and a strong Witch, and hast bewitch'd me and my Aunt, and therefore I will not marry him, an Action lies; for this implies a Witchcraft to his Person, which is within the Statute, as well as if to his Goods; and it shall not be intended that he intends a bewitching by Love, as it was objected. Trin. 13 Car. B. R. between *Ceely and Hopkins*, by 3 Judges contra Croke, who inclined that the Action did not lie, this being in Arrest of Judgment. Intratur Pasch. 13 Car. Rot. 171. and after Mich. 13 Car. Judgment was given accordingly for the Plaintiff Per totam Curiam, Justice Croke mutata Opinione; and they said that the Procuration of unlawful Love is within the Statute also. Cro. C. 474. pl. 3. S. C. adjornatur. ——Ibid. 480. pl. 1. adjudg'd per tot. Cur. for the Plaintiff. Jo. 397. pl. 6. Seeley v. Hopkins, S. C. adjudg'd accordingly.—*She is a great Witch.* Judgment was stay'd. Sty. 11. Pasch. 23 Car. Hellena's Case.

27. If A. says, That B. made a Libel, which was made of A. in Writing, an Action upon the Case lies for A. against B. tho' the making of a Libel is not an Offence that concerns Life or Member, but only a Fine and Imprisonment in the Star-Chamber, or upon an Indictment at the Common Law. Mich. 13 Car. B. R. between *Sir William Russell and Ligon* adjudged and agreed. And the Question was only upon the Declaration, whether that was good, because it was not shewn what was the Effect of the Libel. But nota, that there it was put in the Declaration, that the Plaintiff Sir W. B. was a Justice of Peace. It was ended by Composition.

28. If one says of another, Thou art a Witch, and didst bewitch my Cattle, or my Mare, Action lies. Mich. 14 Car. B. R. between *Smith and Coker* adjudged Per Curiam, without Question, in two Actions. Intratur Trin. 14 Car. Rot. 1498 and 1499. S. C. Jo. 409. pl. 1. the Words were, that *thou and thy Wife did bewitch my Mare.* And adjudged for the Plaintiff.——Cro. C. 512. pl. 7. S. C. adjudged for the Plaintiff.

Thou didst bewitch my Cattle, or *my Child*; there, because an Act is supposed to be done, an Action will lie for the Words. Godb. 341. pl. 435. in Case of Shotter v. Emmet, cites Pasch. 44 Eliz. Lowe's Case.

She is a Witch, and by her Means I lost a Mare, Colt, and other Cattle, held actionable. 2 Roll Rep. 86. Pasch 17 Jac. B. R. Banes v. Murton.

Thou art a Witch, and didst bewitch my Child. The Words shall be taken in Mitiori sensu, as that Thou hast bewitch'd him with Pleasure. Godb. 341. pl. 435. cites Trin. 21 Jac. Mellon v. Hern.—— Sid. 53. pl. 18. Mich. 13 Car. 2. B. R. Twisden J. cited Adamson's Case, in which were taken all the Differences as to calling a Person Witch, and that it was held that to say Thou art a Witch is not actionable; but to say Thou art a Witch, and hast bewitch'd my Mother's Milk, Drink, Hoggs &c. Children, [is actionable.] But that to say Thou art a Witch, *and hast bewitch'd J. S.*) Quare if this be actionable, because he may be captivated with the Amiableness of the Person of the Plaintiff &c. And so, by some, the Difference is between saying that she has bewitch'd *a Thing which has Sense and a Thing which has none*

Hob 129. pl. 165. S. C. adjudged for the Plaintiff —Brownl. 8. Mich. 13 Jac. S. C. adjudg'd accordingly. ——Mo. 868. pl. 1204. S. C. adjudged accordingly, by reaſon of the Words, (Thou conferreſt with him;) for this is Felony by the Statute of 1 Jac.——S. P. by Coke Ch. J. 3 Bulſt. 4. Mich. 13 Jac. in Caſe of Lowes v. J. S.——*Thou doſt work by Necromancy, and doſt work by the Devil.* Adjudged actionable. Yelv. 150. Mich 6 Jac. B. R. Anon.

29 If one ſays to another, The Devil appears to thee every Night in the Likeneſs of a Black Horſe, and thou conferreſt with him; and whatſoever thou doſt ask he gives it thee; and that is the Reaſon thou haſt ſo much Money, an Action lies for theſe Words. Hob. Rep. 159. and 172. between *Marſhall and Steward* adjudged.

All. 20. Markham v Adamſon, S. C. adjudg'd that the Words did not import any Accuſation of any Offence within the Statute. —— Sty. 5. Hill. 21 Car. B. R. Nulls v. Cheney, S.P. held accordingly, and ſeems to be the S. C.

30. In an Action upon the Caſe, if the Plaintiff declares that the Defendant ſaid to the Plaintiff, in the Preſence of divers Perſons, I do count thee to be a Witch; and at another Day after, that the Defendant requeſted, and greatly deſired to have the Plaintiff ſearch'd; and thereupon the Plaintiff demanded of the Defendant, why he would have him ſearch'd; to which the Defendant anſwered, becauſe I do accuſe you to be a Witch, the Action does not lie upon this Declaration, becauſe partly it is not alleged that the laſt Words which were ſpoken at another Day, were ſpoken in the hearing of others; and then it ſhall be intended to be ſpoke at a private Conference between themſelves; and ſo theſe Words of no Force to maintain the Action, and if they were of Force, and well alleged, yet it cannot appear that he intended that he was ſuch a Witch, or had Teats, or had any Familiarity with the Devil, or had done any other Thing to draw him within the Compaſs of the Statute of 1 Jac. of Witches, but that he deſired to have him ſearched for his Satisfaction. Mich. 22 Car. B. R. between *Marchant and Adamſon* adjudged, upon great Debate, after a Verdict for the Plaintiff. Intratur Paſch. 22 Car.

Sty. 206. Mich. 1649. S. C. the Court being divided, it was adjorn'd for further Argument.

* Fol. 47.

31. If A. the Wife of B. ſays of C. a Feme-ſole, C. did bewitch my good Man, and ſhe is a Witch, and I will prove it, and thereupon C. brings an Action againſt A. and B. her Husband for theſe Words, and there was an Innuendo after the Words (my good Man) viz. Innuendo, the ſaid B. the Husband of A. now one of the Defendants; and though it was objected, that it is not certain who was intended by the Words, my good Man, yet this is a common Phraſe * in the Country for a Husband, whereof the Court is to take Notice. But it was adjudged upon this Reaſon, by all the Court, that this implied that ſhe bewitch'd a Man, and if one ſays of another, that he has bewitch'd a Man, without naming any Man, an Action lies, and here ſhe ſays that ſhe had bewitch'd a good Man, and if ſhe bewitch'd any Man it is Felony within the Statute 1 Jac. and therefore the Action lies in this Caſe. Trin. 1650. between *Adſton* Plaintiff v. *Hunter and Iſabel* his Wife Defendants, adjudged, this being moved in Arreſt of Judgment.

S P. per Cur. 4 Rep. 15. b. Paſch. 27 Eliz. in pl. 4. accordingly.

32. Action upon the Caſe for calling him *Villein*, the *Defendant ſaid* that the Plaintiff *is his Villein, without ſaying and not Frank*, where he pleads to the Perſon; but *contra* if he had pleaded it *in Bar*; for the Writ ſuppoſes that the Plaintiff is Frank, which *ſhall be anſwer'd in a Bar or a Negative*; contra to the Perſon. Br. Nonability, pl. 47. cites 15 E. 4. 32.

33. *Men cannot have their Cattle going upon the Common, but John Barber and his Children will kill them with Barber's Dogs.* Adjudg'd actionable in C. B. but reverſed in B. R. D. 118. b. pl. 79. Mich. 2 & 3 P. & M. Hawley v. Barber.

S. C. cited by Popham, pl. 7. Paſch. 35 Eliz. B. R. to have been adjudg'd actionable upon good

34. *Thou maintaineſt ſuch a Suit*, cited by Popham Ch. J. Cro. E. 297.

Delibera-

Deliberation, in Case of Sir Hen. Portman v. Stowell; for Maintenance is unlawful and odious. as adjudg'd actionable. Mo. 428. in pl. 597.

35. *Thou old Witch, thou old Whore, leave off thy witching, or else thou shalt be hang'd or burn'd, if I can do it.* Held not actionable. Hutt. 132. Hill. 12 Car. Souser v. Burton. *He is a Witch, and deserves to be hang'd as well as Arthur that was hang'd for a Witch.* The whole Court agreed that to say, Thou art a Witch, and deserves to be hang'd, is actionable, because the Words (and deserveth to be hang'd) explain what Manner of Witch he intends, and then whether Arthur was hang'd or not, is not material. Sid. 52. pl. 18. Mich. 13 Car. 2. B. R. Dacy v. Clinch.——Raym. 35. Dacy v. Linch. S. C. adjudg'd for the Plaintiff.——*You are a Witch, and I will swear it, and if you cross me too much, I will hang you for it.* The Words (I will hang you for it) shews what Witch he intends; and Judgment for the Plaintiff. Lev. 255. Mich. 20 Car. 2. B. R. Shagter v. Davis——Sid. 386. pl. 18. Slayter v. Davis S. C. accordingly.——*Thou art a Witch, and I will make thee suffer for a Witch.* Powell J. held that the Words should be taken in Mitiori sensu, and that the Word (suffer) is wholly uncertain, as to what Manner of Suffering was intended; but the other 3 Justices gave Judgment for the Plaintiff. 3 Lev. 394, 395. Pasch. 6 W. & M. in C. B. Stephens v. Corbin——Comb. 246. S. C. in B. R. says that Eyre J. conceived the Words actionable, but the other 3 Justices e contra.

36. *Thou art a Regrator, and didst regrate by selling at 12 s. when thou boughtest at 10 s.* held not actionable, it being not Malum in se, nor carrying a Scandal in it, nor importing any Crime that exposed to Loss of Life or Limb; Judgment for the Defendant. 2 Show. 32. pl. 24. Hill. 30 & 31 Car. 2. B. R. Scoble v. Lee.

37. N. B. It may be impertinent to add any thing more as to Witches or Witchcraft &c. since the Statute of 9 *Geo. 2. cap. 5. S.* 3. Enacts, That *no Prosecution shall be against any Person for Witchcraft, Sorcery, Inchantment, or Conjuration, or for charging another with such Offence.*

(I. a) For *Adjective* Words.

1. If a Man says of J. S. He is a base beggarly Bankrupt Knave, an Action lies; for this is all one as if he had said he is a base beggarly Knave, and a Bankrupt. Mich. 10 Car. B. R. between *Stile and Finch*, adjudg'd per Curiam; this being moved in Arrest, upon a Variance between the Writ and ..... and held per Curiam all one. Cro. C. 381. pl. 8. S. C. but S. P. does not appear.——*Thou art a Bankrupt-Knave*; the Court doubted if they were actionable or not. Cro. E. 843. pl. 23. Trin. 43 Eliz. C. B. Robinson v. Meller.

Thou art a Bankrupt-Rogue, and accounted a common Knave, not actionable, the Plaintiff being neither Merchant nor Tradesman. Cro. J. 424. pl. 7. Pasch. 15 Jac. B. R. Loyd v. Pearse.

2. If one says to another, who is a Trader, Thou art a Bankrupt Knave, an Action upon the Case lies against him. Pasch. 1 Jac. B. adjudg'd. Dubitatur &c. Pasch. 44 Eliz. B. R. between *Grey and Weston*. Pasch. 12 Jac. B. R. between * *Selby and Carrier*, adjudg'd. Mich. 7 Jac. B. Trin. 8 Car. in the Exchequer-Chamber, between *Beare and Rowe*, adjudg'd per totam Curiam, in a Writ of Error; for here Bankrupt is not an Adjective, but a Substantive, and Knave another Substantive. * Cro. J. 345. pl. 13. S. C. adjudg'd for the Plaintiff. —2 Bulst. 210. S. C. adjudg'd accordingly. — Roll Rep. 22. pl. 28. S. C. accordingly.——S. P. doubted Cro. E. 843. pl. 23. Trin. 43 Eliz. C. B. Robinson v. Meller.—— Cro. E. 911. pl. 23. Mich. 44 & 45 Eliz. B. R. Woolverston v. Meres, S. P. adjudg'd that the Action lay, he shewing that he was a Merchant; and affirm'd in a Writ of Error.——S. C. cited Roll Rep. 22. in Case of Selby and Carrier, as adjudg'd, and affirm'd in Error.

A Tanner brought Action for saying, *Thou art a Bankrupt-Knave*, held not actionable, but Quære. Brownl. 16. Mich. 14 Jac. York v. Cecil.

So of *He is a Bankrupt Slave*, tho' the Defendant justified for that the Plaintiff had been formerly a Bankrupt, because he does not allege that he still continues so. Cro. J. 578. pl. 7. Trin. 18 Jac. B. R. Upsheer v. Betts.

So of *Bankrupt-Rogue*, adjudg'd actionable. Godb. 151. pl. 196 Pasch. 5 Jac. C. B. Langley v. Colson. —— S. P. where the Words were spoke of a Shoemaker, adjudg'd actionable; for the Addition of Rogue is an Aggravation. Cro. C. 31. pl. 1. Pasch. 2 Car. C. B. Crumpe v. Barne.——Hutt. 124 125. Pasch. 10 Car. Dawe v. Palmer, S. P.——See (K. a) pl. 2.

You are a Bankrupt Skrub, held actionable; for the Word Bankrupt in itself is not an Adjective, and the joining it with Skrub does not make it such, but it shall be taken as if he had said You are a Skrub, and also a Bankrupt; and Judgment accordingly. Sty. 75. Hill. 23 Car. B. R. Wilson v. Crow.

So of *Traytor-Knave*, because here are 2 Nouns; otherwise if the Words are *a traiterous Knave*, there the Words are not actionable, because the Adjective Word has Reference to the Substantive; per Coke Ch. J. to which the whole Court agreed clearly. 2 Bulst. 210. in Case of Selby v. Carrier.

Thou art a Bankrupt-Knave, and a pocky Knave, and let them that stand by bear Witness, and I will prove it. Adjudg'd for the Plaintiff. Cro. E. 99. pl. 1. Trin. 30 Eliz. B. R. Inglebath v. Jones.

S. P. Cro. J. 345. pl. 13. in Case of Selby v. Carrier.——

3. If a Man says to a Merchant, Thou art a bankruptly Knave, no Action lies; for this is but as much as to say, Thou art a Bankrupt-like Knave, and is not actionable. Pasch. 5 Jac. B. between *and Perkins*, per Curiam. Contra Co. 4. 19.

Godb. 151. pl. 196. Pasch. 5 Jac C. B. in Case of Langley v. Colson, the Words were, Thou art a bankruptly Knave, *and canst not be trusted in London for a Groat*, adjudg'd not actionable. ——Sid. 103. pl. 10. Hill. 14 & 15 Car 2. B. R. in Case of Booth v. Seele, the Court admitted the Words bankruptly Knave to be actionable.——Lev 90. Booth v. Leach, S. C. It was said by Allen that the Words (bankruptly Knave) had been adjudg'd actionable.

See (B. b) pl. 2. S. C.

4. If one says to another, Thou art a murderous Quean, no Action lies for these Words, because the Words are adjectively spoken. Hill. 11 Jac. B. R. *Pett's Case*, adjudg'd.

Thou art a Sheep-stealer, adjudg'd actionable. 3 Bulst. 303. Mich. 1 Car. B R. Parret v. Parret.

5. If one says to another, Thou art a Steal-Sheep, and a Steal-Calf, and Partner with a Coiner, an Action lies for the Words Steal-Sheep and Steal-Calf, tho' they are adjectively spoken; for in Sense it is as much as to say Thou art a Stealer of Sheep, and a Stealer of Calves. Mich. 5 Jac. B. between *Aston and Goffe*, per Curiam.

——So of *Sheep-thief*, it was argued that these Words were well understood in the Country where spoken, and where they are laid to be spoken, viz. in Westmoreland, and adjudg'd actionable. 2 Bulst. 145. Mich. 11 Jac. Steeneman v. Richardson.

* Cro. C. 318. pl. 11. B. R. S. C. adjudg'd accordingly. —Jo. 326. pl. 7. Mich. 9 Car. B. R. adjudg'd for the Plaintiff per tot. Cur. ——All. 61. Pasch. 24 Car. B. R. in the Case of Chappel v. Goodhouse, S. C. cited by Roll Ch. J. as adjudg'd actionable.——See (H. b) pl. 11. S. C.

6. If a Man says of J. S. Where is that long-lock'd, Shag-hair'd murdering Rogue? and being ask'd what Person he intended thereby, he answers the said J. S. an Action lies for these Words, tho' they are Adjective Words. Trin. 9 Car. B. R. between * *Green and Lincoln*; this being moved in Arrest of Judgment upon such a Declaration, and staid; but Mich. 9 Car. Judgment was given for the Plaintiff per totam Curiam, præter Bark. who seem'd e contra. Intratur Hill. 8 Car. Rot. 1252. But it was said by Serjeant Hendon, that it was adjudg'd in B. this Term, that an Action lies for these Words, Thou art a murdering Knave, between † *Wilson and Minshawe*, which Intratur Pasch. 8 Car. B. Rot. 724. But there the Words were further, And if it had not been for me, thou hadst been hang'd.

† S. C. cited Cro. C. 318. pl. 11 as adjudg'd Hill. 7 Car. C. B. between Wilson and Meason.——S. P. cited by Henden as adjudg'd in C. B. Jo. 326. pl. 7.

See (I. a) pl. 4 S. C. —*He is a Rogue, a base*

7. If one says to another, Thou art a Coney-catching cheating Thief, an Action lies for these Words; for this is as much as if he had said Thou art a Thief, and a Coney-catcher, and Cheater. Hill. 9 Car. B. R.

B. R. between *Bedhead and Smith*, adjudg'd; this being moved in Arreſt of Judgment. Intratur Trin. 9 Car. B. R. Rot. 1248. *Rogue, a cozening Rogue, a Coney-catching Rogue, and a Cut purſe Rogue.* Judgment quod Querens nil capiat per Breve. Palm. 10. Mich. 17 Jac. B. R. Trevillian v. Betty.——Cro. J. 536 pl. 1. Betts v. Trevanian, S. C. It was argu'd that the firſt Words (He is a Rogue) are but Words of Spleen, and the ſubſequent Words rely upon the Words (Rogue,) and are but Additions and Adjectives to that Word; adjudg'd not actionable.——2 Roll Rep. 91. Brett v. Trevillian, S. C. but ſeems not very clear.

Cheating Knave, ſpoken of a Limeburner, or of any Man of any Trade or Profeſſion, in Reference to his Trade, is actionable; admitted. Lev. 115. Mich. 15 Car. 2. B. R. in Caſe of Terry v. Hooper.—— Raym. 87. S. P. by Windham and Twiſden J. in S. C.

8. If one ſays to another, Thou art a falſe, forſworn Whore-Thief, an Action lies for theſe Words. Mich. 14 Car. B. R. between *Coke and * Brampton*, adjudg'd in a Writ of Error upon a Judgment in Ludlow, and the firſt Judgment affirm'd accordingly. Intratur Trin. 14 Car. Rot. 1494. *Thou art a Thief, and* * Fol. 48. *a main-ſworn Thief*, Judgment was arreſted upon the Pleadings, ſo that whether the Action lay or not is not determin'd. Brownl. 6. Hill. 1 Jac. Smailes v. Belt.——S. C. cited by the Name of Small v. Bell, Hob. 126. in pl. 156.

Thou art a main-ſworn Lad, adjudg'd actionable. Hob. 126. pl. 156. Trin. 14 Jac. Slater v. Franks.

9. *G. is a cozening Knave, and ſo I have proved him before my Lord-Mayor, for ſelling me a Saphire for a Diamond*, the Action does not lie. Hutt. 13. cites 26 Eliz. in the Exchequer, Gittings v. Redſerve. And by Manwood, if A. ſays of B. *thou art a cozening Knave, and haſt cozen'd me of* 500 *l.* no Action lies, which the Court agreed. Ibid.

He is a cozening Knave; for he had me to Coventry, and there cozen'd me of 40 *s.* adjudg'd actionable; but the Judgment was reverſed in the Exchequer-Chamber. 3 Le. 171. pl. 222. Mich. 29 Eliz. B. R. Middlemore's Caſe.——S. P. cited Arg. Hutt. 52. as adjudg'd in Caſe of Middlemore v. Warlow. ——S. C. cited by Wray Ch. J. by the Name of Warker v. Middlemore, Cro. E. 95. pl. 7. and ſaid that Judgment was given for the Plaintiff in B. R. and that a Writ of Error was then pending thereof in the Exchequer-Chamber, but never was moved; for if it had, they would not have given Judgment. And the Reporter ſays Nota, Trin. 30. that Judgment was reverſed in the Exchequer-Chamber.—— S. P. accordingly, Mo. 261. pl. 410. Paſch. 30 Eliz. Gorge's Caſe.——Cro. E. 95. pl. 7. George's Caſe, S. C. accordingly.——Hntt. 14. George v. Whitlock, S. C. accordingly.——S. P. adjudg'd not actionable, and Judgment affirm'd in the Exchequer-Chamber, and it is ſaid that *our Law takes no Notice what a Cozener is.* Hutt. 14. Hill. 30 Eliz. B. R. Walcot v. Hind.

He was Suitor to a Widow in S. and cozen'd her of her Money, in procuring falſe Witneſſes to cozen her, adjudg'd not actionable. Ow. 47. Trin. 30 Eliz. Gilbert's Caſe.

He is a very bad Fellow; for he made J. S. drunk in the Night, and couzen'd him of 100 *Marks*; not actionable. Goldsb. 125. pl. 12. Hill. 43 Eliz. Somerſtaile's Caſe.

Thou art an arrant Knave; for thou haſt cozen'd all Coventry, ſpoke of a Merchant, and cited by Williams J. Bullt. 173. to have been adjudg'd not actionable.

And in the Principal Caſe there the Words were, *He hath couzen'd the Earl of H. of as much as he* (Innuendo the Plaintiff) *is worth*, not actionable, tho' the Plaintiff was High Sheriff of the County, and a Juſtice of Peace. Bulſt. 172. Trin. 9 Jac. Tut v. Kerton.

You are a cozening Knave, and did couzen me of 1200 *l. at one Time, and that was in making an Account in the Year* 1648. being ſpoke by Defendant who had been *Copartner* in Trade with the Plaintiff, adjudg'd actionable; and ſo by Roll Ch. J. it would, had the Copartnerſhip continued. Sty. 388. Mich. 1653. Townſend v. Barker.

Your Maſter is a cozening cheating Knave, and a Rogue to boot, and couzen'd and cheated all the Pariſh, (Innuendo the Pariſh of W.) *and all Perſons he deals with*, not actionable, and Judgment ſtay'd. Show. 181. Mich. 2 W. & M. Tamlin v. Hamlin.

He is a couzening Knave, and lives by Couzenage, adjudg'd not actionable, tho' ſpoke of a Knight, and one of the Gentlemen of his Majeſty's Privy-Chamber. Godb. 284. pl. 407. Mich. 15 Jac. B. R. Sir Wm. Bronker's Caſe.——Cro. J. 427. pl. 1. Sir Wm. Brunkard v. Segar, S. C. Mountague held that the Quality of the Perſon ought to be conſider'd; but the other Juſtices doubted, and will'd that Precedents be ſearch'd——S. C. cited per Cur. Cro. J. 619. (bis) Mich. 18 Jac. B. R. in pl. 9. that ſuch Words were not actionable.

10. *Rebellious and traiterous Knave.* It was inſiſted that Rebellious may be upon a Proclamation of Rebellion out of Chancery, or other Courts, and when Rebellious and Traiterous are coupled together, they are of the ſame Senſe. But per Cur. Action lies not for the Words (Rebellious Knave,) but (Traiterous) being join'd with it, Action lies; Judgment and *Traitorly Knave*, was held actionable, and ſo affirm'd a in C. B

Sid. 103. pl. 10. Hill. 14 & 15 Car. 2. and the Plaintiff had Judgment. Cro. E. 171. pl. 14. Hill. 32 Eliz. B. R. Ward v. Thorne.

B. R. Booth v. Seele.——Lev. 90. Booth v. Leach, S. C. *Traitorly Rogue*, the Court ſeem'd that the Words are actionable.—Keb. 439. pl. 28. S. C. adjornatur. Ibid. 469. pl. 77. Judgment for the Plaintiff, Niſi &c.

Thou art a thieving Rogue, was held actionable, becauſe it implies an Act done; And ſo for the Words, *Thou art a buggering Rogue, and I could hang thee.*

11. Adjective Words are actionable, when the *Adjective preſumes an Act committed*, and alſo when it *ſcandalizes one in his Office, or Function*, or in the *Trade by which he acquires his Living*; As if A. ſays that B. is a *perjur'd Knave*, there muſt be an Act done, or otherwiſe he cannot be perjur'd; ſo if he ſays of an Officer or Judge that he is a *corrupt Officer or Judge*, Action lies for both Cauſes; as, firſt, becauſe it implies an Act done; and 2dly, it is ſlanderous to him in reſpect of his Office; per Cur. 4 Rep. 19. a. Mich. 44 & 45 Eliz. B. R. in pl. 15.

Sid. 373. pl. 13. Trin. 20 Car. 2. B. R. Collier v. Burrel.—— 2 Keb. 377. pl. 36. Collier v. Bourn, S. C. accordingly.——The Court were of Opinion that the Words, (buggering Rogue) were actionable. All. 61. Paſch. 24 Car. B. R. Chapple v. Goodhouſe; Sed adjornatur. —— Per 3 Juſtices, Thieving Rogue, imports an Act, but, Thieviſh Rogue, only an Inclination, and therefore inclined that calling the Plaintiff, Thieving Rogue &c. was actionable; but Charleton e contra. Freem. Rep. 279. Paſch. 1681. C. B. Dorrel v. Grove.

* Cro J. 65, 66. pl. 5. Paſch. 3 Jac. S. P. ſeems admitted, Robins v. Hildredon. —— S. P. Arg. ſaid to have been adjudg'd.

12. *But where it does not imply an Act done*, but an Inclination only to an Act, which does not ſcandalize the Party in the Duty of any Office or Function, or in his Trade, there an Action does not lie; as by ſaying that he is a *ſeditious* or * *thieviſh Knave*, which do not import any Act done, but an Intent or Inclination only to it, which is not puniſhable by the Common Law. 4 Rep. 19. b. Mich. 44 & 45 Eliz. B. R. per Cur. in pl. 51.

2 Bulſt. 138—S. P. by Jones J. Lat. 47. Adams's Caſe.——S. P. per Cur. Sid. 373. Trin. 20 Car. 2. B. R. in pl. 3.——But to ſay, Thou art a *thieviſh Pirate*, is actionable; Per Jones J. Lat. 47.——Same Difference taken and agreed per tot. Cur. Ld. Raym. Rep. 236. Trin. 9 W. 3. C. B. in Caſe of Osborn v. Poole.

Cro. J. 120. pl. 1. S. C. adjudg'd for the Defendant per tot. Cur. becauſe it did not appear that he was ſworn, nor

13. Words ſpoken of a Church-warden were, viz. *Thou haſt perjuredly preſented me at the Viſitation.* Williams and Yelverton held, that becauſe the Words were adjectively ſpoke, and likewiſe not ſhewing what Thing he preſented, ſo as it might appear to the Court to be within his Charge, and preſentable by him, the Action did not lie; but Fenner ſaid nothing, & adjornatur. Cro. J. 80. pl. 3. Mich. 3 Jac. B. R. Stile v. Heath.

what he ſwore, ſo as he might commit Perjury; nor that it was in any Judicial Proceeding. Cro. J. 120. pl. 1. Trin. 4 Jac. B. R. Sill v. Heath.——Yelv. 72. S. C. per Fenner, Yelverton, and Williams, abſente Popham.

14. *Thou haſt thieviſhly taken my Money out of my Purſe.* Not actionable. Yelv. 72. Arg.

15. *Thou haſt dealt traitorouſly with J. S.* is not actionable. Arg. But Yelverton J. made it a Quære, if the Words were, *Thou haſt dealt traitorouſly with the King.* Yelv. 72. Mich. 3 Jac.

16. *Thou art a roguiſh Knave and a Thief.* Per Cur. Tho' this is ſpoke in the adjective Senſe, yet the Word (Thief) here is a diſtinct Word by itſelf, and ſcandalous. And Judgment for the Plaintiff. 2 Bulſt. 134. Mich. 11 Jac. Baily v. Maynard.

17. *Thou art N.'s Hackney*, (Innuendo) *Thou art a thieviſh Whore and a pocky Whore, and I will prove thee a pocky Whore.* Adjudged not actionable, becauſe ſpoken adjectively. 2 Roll Rep. 71. Hill. 16 Jac. B. R. Gulford's Caſe.

18. Action

18. Action lies for ſaying of a Merchant, *He is a broken Merchant*, it being all one as the calling him a Bankrupt. Agreed per tot. Cur. Jo. 321. pl. 5. Trin. 9 Car. B. R. in Caſe of Leycroft v. Dunkin. Cro. C. 51. pl. 14. S. P. in S. C.

19. *Thou art a perjured Prieſt.* Adjudg'd actionable; for the Words muſt mean that he was guilty of Perjury, for which he might be indicted. Sty. 6. Hill. 21 Car. Hogg v. Vaughan.

20. *Thou art a Baſtard-bearing Whore, and hadſt two Baſtards by a Butcher; and I will prove it.* It was objected that the Words were ſpoken of a Feme Covert, who cannot have a Baſtard. At another Time Roll Ch. J. agreed, that if ſhe were married at the Time of the Words ſpoken, ſhe could not have a Baſtard, but ask'd why they ſhould not be actionable; for the Words purport that ſhe was not married when ſhe had the Baſtards, and the Jury have found for the Plaintiff, and Judgment for her Niſi. Sty. 424. 425. Mich. 1654. Stevens v. Ask.

21. *You are a thieving Rogue, and get your Living by Filching and Stealing.* It was mov'd that the Words imply only an Inclination. Sed non allocatur; for they imply a Habit and a Trade of Thieving. And Judgment for the Plaintiff. 2 Keb. 440. pl. 94. Mich. 20 Car. 2. B. R. Hunt v. Merry-church. *Thou haſt no more than what thou haſt got by Cozening and Cheating*; Per Cur. not actionable, becauſe he did not aver that he was of any Trade, or that he had any Thing. 12 Mod. 307. Mich. 11 W. 3. Bromfield v. Snoke.

(K. a) *Interrogative* Words.

See (I. a) pl. 6.

1. IF one ſays to another, When wilt thou bring home the 9 ſtoln Sheep which thou ſtoleſt from J. S.? an Action lies for theſe Words. Mich. 37 & 38 Eliz. B. R. between *Hunt and Thimblethorp* adjudged. Mo. 418. pl. 573. S. C. adjudged accordingly. ——*Have you brought home the* 40 *l you ſtole?* Adjudged for the Plaintiff, and affirm'd in a Writ of Error. Cro. J. 568. pl. 5. Paſch. 18 Jac. B. R. May v. Gybbons. ——2 Roll Rep. 165. Mayott v. Gibbons, S. C. adjudged for the Plaintiff. ——Palm. 66. Gibbon v. Magot, S. C.

2. *Where is that Bankrupt Knave? Where is that Pillory Knave?* (Innuendo the Plaintiff) and averr'd he was a Merchant. Adjudg'd actionable. Cro. E. 26. pl. 7. Paſch. 26 Eliz. C. B. Griffith v. Moriſon.

3. *What art thou? a Bankrupt, and waſt a Bankrupt.* The Court held that the Anſwer to the Interrogation is a direct Affirmative, but they would adviſe &c. Cro. E. 273. pl. 1. Paſch. 35 Eliz. B. R. Jordan v. Lyſter.

4. *Did you not hear that C. is guilty of Treaſon &c.* Reſolv'd that this is tantamount to a ſcandalous Publication. 12 Rep. 134. Mich. 10 Jac. in the Earl of Northampton's Caſe.

5. *Hath that Baſtard B. N. cauſed you to be arreſted? Is that all the Spight that Baſtard can do you?* Reſolved that theſe Words are ſpoken affirmatively, and not by Way of Interrogation; and having loſt his Marriage by Reaſon thereof, a Judgment given in C. B. for the Plaintiff was affirm'd. Cro. J. 422. pl. 3. Paſch. 15 Jac. B. R. Nelſon v. Staff.

6. *Did not you ſteal* 40 *l.?* Per Dodderidge J. theſe Words are not actionable; for this is nothing more than an Interrogation. 2 Roll Rep. 166. Trin. 18 Jac. B. R. in Caſe of Mayott v. Gibbons.

7. *Haſt thou been at London to manage the Money thou ſtoleſt from me?* Barkley and Jones (the other Juſtices being abſent) held the Words actionable;

tionable; for the firſt Words are the Words of Interrogation, and the ſubſequent Words, viz. The Money thou ſtoleſt from me, is a poſitive Affirmation. Mar. 58. pl. 90. Mich. 15 Car. Anon.

8. *Thou are no Thief?* Theſe Words, with an Averment that they imply an Affirmative will bear an Action. Per Barkley J. Mar. 8. Paſch. 15 Car. in pl. 18.

9. *Th. thou Rogue, Wilt thou murder my Siſter, as thou didſt thy Wife,* (Innuendo A. then dead.) Adjudg'd actionable; for the Scandal is the greater if ſhe be not dead; and being ficta & falſa, they ſhall be intended ſcandaloſa. Keb. 359. pl. 52. Mich. 14 Car. 2. B. R. Brown v. Charlton.

(L. a) Words *in the Preter Tenſe.*

Sty. 22. 23. Paſch. 23 Car. S. C. Roll Ch. J. held it not actionable; but Bacon J. contra. Curia adviſare vult.——Sty. 210. Paſch. 1649. S. C. Judgment quod querens nil capiat per Billam.

1. IF a Man ſays of J. S. a Juſtice of Peace, J.S. was a debauch'd Man, and * was not fit to be a Juſtice of Peace, **no Action lies for theſe Words; becauſe it might be that he was ſuch a debauch'd Perſon in time paſt, and was not then worthy to be a Juſtice of Peace. Paſch. 1650. B. R. between** *Hamond and Kingſmill,* **adjudg'd per Curiam in Arreſt of Judgment, Intratur. Hill. 22 Car. Rot. 735.**

* The Word in Sty. 22. & 210. is (*is* not fit &c.)——S. C. cited Lev. 52. as adjudg'd not actionable, and there the Words are, *He is a debauch'd Man, and unfit to be a Juſtice.*

Noy 157. Smith's Caſe, *Thou haſt had the French Pox,* not actionable.

2. **If one ſays to another,** Thou art a baſe Fellow, and haſt the French Pox, **no Action lies; for peradventure he had the Pox, but is now cured of it, and ſo no one will avoid his Company. Paſch. 6 Jac. between** *Allen and Smith* **adjudged.**

And Coke Ch. J. took this *Difference* of ſuch a Slander de Tempore præterito, *when it touches the Mind,* and when it *touches the Body.* If it be a Scandal to the Mind and the Affections, as Perjury, Felony &c. there the Mind that remains is ſlander'd; but if it be of an accidental Infirmity or Diſeaſe of the Body, it is otherwiſe; for none now will forbear his Company, tho' he had the Plague in Times paſt.——S. P. held not actionable. All. 31. Mich. 23 Car. B. R. in Caſe of Dutton v. Eaton.——See (Y. a) pl. 24. S. C.

3. *I will prove that E. had been a Bankrupt, and had agreed with his Creditors for a Noble in the Pound.* Theſe Words are actionable, being ſpoken of a Merchant. D. 72. Marg. pl. 6. cites it as adjudg'd Hill. 3 Jac. B. R. Rot. 855. Edmonds v. Whetſtone.

4. *Thou waſt perjured, and haſt much to anſwer for before God.* It was objected that it is in the Time paſt, and is extenuated by the ſubſequent Words, quaſi diceret, altho' not anſwerable before Men, yet [he was] before God; Sed non allocatur. And adjudg'd for the Plaintiff. Cro. C. 199. pl. 12. Trin. 6 Car. B. R. Smart. v. Eaſdale.

Jo. 321. pl. 5. S. C. and it being found that the Plaintiff was damnified by reaſon of the Words, Judgment was given by 3 Juſtices for the Plaintiff, Richardſon contra.——Hutt. 125. in Caſe of Dawe v. Palmer, cites Dunkin v. Leycroft S. C. as adjudg'd and affirm'd in the Exchequer Chamber.

5. *Thou cameſt a broken Merchant from Hamburg,* (Innuendo at his Return from Hamburgh into England) *and that I will juſtify.* It was objected that the Plaintiff having ſhewn in his Count that he came over about 8 Years ſince, he might become a rich Perſon and of good Credit ſince that Time, and ſo no Action; and of that Opinion was Richardſon Ch. J. for that Slander ought not to be taken by Intendment; but the Plaintiff having charged that the Words were ſpoken malitiouſly and to impair him in his Credit, it was adjudg'd by the other 3 Juſtices for the Plaintiff. Cro. C. 317. pl. 14. Trin. 9 Car. B. R. Leycroft v. Dunker.

5. Caſe

6. Case by Husband and Wife, for saying of her, viz. *She is a Strumpet and a Bawd, and kept a Bawdy-House*; It was moved in Arrest of Judgment that the last Words only are actionable, and those are of the Time past, and so may be intended that she kept a Bawdy-House before the General Pardon; but per Cur. the Scandal remains, and it shall not be so intended, unless it appears plainly to be so spoken and intended. 2 Lev. 233. Mich. 30 Car. 2. B. R. Newton v. Masters.

The Words are actionable; for if she did formerly keep a Bawdy-House, she is still punishable for it. Freem. Rep. 278. pl. 312. (bis) Mich. 1678. Anon. seems to be S. C.

(M. a) *Conditional* Words.

1. IF a Man says, if J. S. might have his Will, he would kill the King, an Action upon the Case lies for these Words, tho' he refers it to the Will of J. S. for it is a great Offence to have such a Will. By Report, 14 Jac. between Sir J. Sydnam and Mayo. Cro. J. 407. pl. 4. Sir John Sydenham v. Man S. C. and the whole Court held the Words actionable.——Ibid. 408 in a Note at the End it is said that Error was brought, and the Judgment was affirm'd Mich. 16 Jac.——Hob. 180. pl 217. Sydenham v. May S. C. says that Pasch. 16 Jac. the Court inclined that the Words were actionable.——S. C. 3 Bulst. 260. adjudg'd that the Words are actionable ——Roll Rep. 417. pl. 20. S. C. adjudg'd for the Plaintiff.——See (O. a) pl. 1. and tit. Trial (K. g. 2) pl. 15.

(N. a) *Disjunctive* Words.

1. IF A. says of B. to C. the Brother of B. Sirrah, thy Brother B. was whipt about Taunton-Castle, for stealing of Sheep, or else was burnt in the Hand or Shoulder, whereas he never did any such Felony, B. shall have Action for these Words; for tho' peradventure if he had said that he was whipt about Taunton-Castle for stealing of Sheep, or else was burnt in the Hand, without more, it should be intended that he meant that he was burnt in the Hand for stealing of Sheep, and so the Action should lie; yet when he adds the last Words, or Shoulder, this makes the Words uncertain; for he could not be burnt in the Shoulder for stealing of Sheep, and then to say a Man stole Sheep, or was burnt in the Shoulder this implies no Certainty; for to say that he spoke some Words that will bear an Action, or other Words that will bear an Action, an Action does not lie. Mich. 8. Car. B. R. between *Churly and Hill*, adjudg'd in Arrest of Judgment against the Plaintiff, I my self being de Concilio Querentis. Intratur Trin. 8 Rot. Cro. C. 283. pl. 25. Stirley v. Hill, S. C. adjudg'd for the Defendant.—— Jo. 308. pl. 21. S. C. adjudg'd accordingly.—

2. But after he brought a new Action, for saying that he was whipt about Taunton-Castle for stealing of Sheep, and Mich. 9 Car. adjudged in B. R. that the Action lies, this being moved in Arrest of Judgment. See (P. a) pl. 9. S. C. and S. P.— S. P. does not appear either in Cro. C. 283. or Jo. 308. S. C.

3. *Thou hast stole my Mare, or was consenting to it.* It was held by Fenner and Clench that no Action lies; for he may consent tacendo and yet be faultless. Noy 172. Anon.

4. *She*

4. *She had a Child, and either she or somebody else made it away.* Adjudg'd not actionable by 3 Justices, contra Bridgman Ch. J. Cart. 55. Hill. 17 & 18 Car. 2. C. B. Falkner v. Cooper.

5. J. S. is killed, and one says *A. or B. killed J. S.* A. may bring an Action, and so may B. and there must be an Averment that neither did it, per Bridgman Ch. J. Cart 56. Hill. 17 & 18 Car. 2. C. B. in Case of Falkner v. Cooper.

(O. a) For what Words it lies, in Respect of the *Uncertainty of the Time.* In *futuro.*

See (M. a) pl. 1. S. C.

1. IF one says of another, If he might have his Will he would do such a Thing, which is a Matter actionable, Action lies, tho' they are spoke in futuro, because they prevent Occasionem Ruinæ. 9 Rep. Reports, 14 Jac, Sir *J. Sydnam and Mayo* adjudged, and so it was resolved per tot. Curiam, Pasch. 16 Jac. in a Writ of Error upon this in the Exchequer-Chamber.

S. P. D. 72. b. pl. 6. Mich. 6 E. 6. cites Kempe's Case; and says he heard that Judgment was given for the Plaintiff.——S. C. cited Yelv. 160. in Case of Staverton v. Relfe, Mich. 7 Jac. by Williams J.—S. P. Per Cur. Arg. Roll Rep. 427. pl. 20.—— S. C. cited by Haughton J. 3 Bulst. 262.

2. So if a Man says of a Merchant, That he will be a Bankrupt within 2 Days, an Action lies, though the Words are spoken in futuro. 9 Reports 14 Jac.

J. S. will be a Bankrupt. Henden Serjeant said these Words are not actionable; but if the Words are, *J. S. will be a Bankrupt within 3 Days*, it is otherwise. 2 Roll Rep. 433. in Case of Thompson v. Twenge.

S. P. or if he says, *He will lie in Wait to rob J. S. within 2 Days*, Action lies; Per Dodderidge J. Roll Rep. 427. in Case of Sidnam v. Mayo.——3 Bulst. 261. by Dodderidge J. in S. C. accordingly.

3. So if a Man says, That he will rob J. S. within 2 Days, an Action lies. 9 Reports. 14 Jac. Per Dod.

But to say, *I will make him break*, is not actionable; Per Dodderipge and Jones J. Lat. 114. Pasch. 2 Car. in Hill's Case.

4. *He will break shortly*, is actionable; Per Dodderidge and Jones J. Lat. 114. Pasch. 2 Car. in Hill's Case.

Judgment was arrested, because the Words were not actionable, and especially as they are here alleged to be *spoken by Baron and Feme* [Meant by the Word (we) in Sid.] Keb. 124. pl. 36. S. C. by the Name of Daniel v. Turpin.

4. *Thou art a forsworn Fellow, and we will prove thee so, and thou canst take no Benefit of the Law.* Adjudged not actionable, because it is in the future Tense. Sid. 48. pl. 9. Mich. 13 Car. 2. B. R. Daniel's Case.

(P. a) For

(P. a) For what Words it lies in Reſpect of the *Uncertainty*. Where there are *not direct affirmative* Words. [*And what ſhall amount to an Affirmation.*]

1. IF one ſays of another, I think in my Conſcience, if he might have his Will he would kill the King, or ſuch ſcandalous Matter, an Action lies, though he does not ſay them preciſely, but refuſes them to his Conſcience, and to the Will of another. My Reports. 14 Jac. Sir *J. Sydnam and Mayo* adjudged. And ſo it was reſolved per totam Curiam at Serjeant's-Inn, in a Writ of Error. Paſch. 16 Jac. B. R. in the ſame Caſe. Vide Same Caſe, Hob. Rep. 243. See (M. a) pl. 1. S. C. (O. a) pl. 1. S. C. Hob. 180. pl. 217. S. C. the Court inclined that they would bear an Action. ——See Tit. Trial (K. g. 2) pl. 15. S. C. and the Notes there.

2. If a Man ſays of J. S. he is in Warwick Gaol for ſtealing of a Mare, and other Beaſts, no Action lies for theſe Words, becauſe they do not directly affirm that he hath ſtole the Cattle, as if he had ſaid he ſtole them, and was in Gaol for it; but they only are reported of his Impriſonment, and of the ſuppoſed Reaſon thereof. Hob. Rep. 239. between *Steward and Biſhop* adjudged. Hob. 177. pl. 200. Trin. 14 Jac. S. C. accordingly, Per tot. Cur. ſeriatim. —— Brownl. 16. S. C. adjudg'd accordingly.——Noy 24. S. C. accordingly.——Hutt. 2. S. C. adjudged accordingly —— S. C. cited Palm. 68 69 in Caſe of Brown v. Audley, and the Court agreed to it.——S. C. cited by the Name of Steward v. Butler. 2 Sid. 16.——Lev. 82. in Caſe of Crawford v. Middleton, cites S. C. and ſays the Court queſtioned the Caſe of Steward and Biſhop, whether it be Law or no.

He was in Priſon in a Gaol for ſtealing P.'s Beaſts. Adjudged for the Plaintiff; for by Fenner a Man cannot be impriſoned for Stealing, if he did not ſteal. Goldsb. 130. pl. 26 Hill. 43 Eliz. Parloir's Caſe.—— Mo. 401. pl. 531. Paſch. 37 Eliz. Barler's Caſe, S. C. ſays it was doubted if Action lies, becauſe he did not ſay he had ſtole the Beaſts.——Mo. 866. pl. 1196 Anon. S. P.——He was in N. Goal *for a Robbery committed upon A. B.* Adjudged for the Plaintiff Cro. J. 247. pl. 6. Trin. 8 Jac. B. R. Heynes v. Sprott.——Bulſt. 40. Anon. ſeems to be S. C. but the Court differing in Opinion, ordered to ſearch for Precedents.——S. C. cited in Caſe of Kamelford v. Tuke. 2 Roll Rep. 104.——Thou haſt been in Gaol *for ſtealing of a Pan*, is actionable. Cro. J. 154. pl. 3. Paſch. 5 Jac. B. R. Showel v. Haman.

3. If a Man ſays of B. he was taken for ſtealing of two Horſes, and I have ſuſpected him theſe 4 Years, in an Action upon the Caſe for theſe Words, tho' B. avers that he has been at all Times free from any Suſpicion of Felony, yet the Action does not lie, becauſe this is not any Affirmative that he ſtole the Horſes; for a true and good Man may be ſuſpected and taken for ſtealing of Horſes, as a Man may be impriſoned or indicted for the Stealing of Things, and yet may be free from the Felony. Paſch. 16 Car. B. R. between *Curſon and Wood* adjudged Per Curiam, in Arreſt of Judgment; but quære if he had averr'd that he never was taken for the ſtealing of any Horſes. *I have ſerved thee with the Queen's Letter, for ſtealing of Goods out of my Mother's Houſe.* Upon Not guilty pleaded, and found for the Plaintiff, it was adjudged that the Action did not lie; for the Defendant doth not ſay expreſsly that he had ſtolen the Goods, but that he had ſerved him &c. which may be, tho' he did not ſteal them; ſo it is only a Charge by Implication. Cro. E. 234 pl. 6. Paſch. 33 Eliz. C. B. Atkinſon v. Atkinſon.

Thou waſt arraigned for ſtealing a Horſe. Arg. Palm. 68. Mich. 17 Jac. B. R. cited as adjudged not actionable; to which the Court agreed.

4. If A. ſays of B. Thou art a baſe Rogue, and a dogged Rogue, and I will make thee an Example and Precedent for a perjured Rogue, Action lies for theſe Words; for they are Affirmative, with an Aſſeveration. Paſch. 16 Car. B. R. between *Daniel and Rookes*, Per Curiam adjudged, this being moved in Arreſt of Judgment.

Sty. 199. Hobſon v. Hudſon, S. C. adjornatur.—Ibid. 219. S. C. Jerman J. doubted; but Judgment was given for the Plaintiff.

5. If A. ſays of B. ſhe went to the Spaw to be cured of the French Pox, an Action lies; for none go to be cured of a Diſeaſe which he has not; and therefore this is an implied Affirmative that ſhe had this Diſeaſe; for this is ſtronger than to ſay ſhe was laid for the Pox. Trin. 1650. between *Hobſon and Judſon* adjudged Per Curiam, this being moved in Arreſt of Judgment.

——*He hath been in F's Tub*, (Innuendo the Tub of one Fowler a Surgeon, in which Tub no Perſon had been but thoſe which were laid of the Pox) *I will not ſay of the Pox, but he lay in the Tub at the Time that L.'s Wife was laid of the Pox.* Adjudg'd not actionable. Goldsb. 135. pl. 34 Hill. 43 Eliz. Bury v. Chappel.

6. If a Man ſays, I do accuſe J. S. of poiſoning his Aunt, Action upon the Caſe lies; for this is an Affirmative that he had poiſoned his Aunt. Trin. 39 Eliz. Per Fenner.

Fol. 50. *I will prove thee a perjured Knave*;

7. So if one ſays to another, I will prove you have poiſoned my Aunt, Action upon the Caſe lies; for this is a more vehement Affirmative that he had poiſoned her, than to ſay that he had poiſoned her. Trin. 39 Eliz. B. R. Per Poph.

Per tot. Cur. This is a vehement Affirmative, and imports not only that Perjury was committed, but that the Defendant would openly traduce the Plaintiff by it, in ſuch Manner that it ſhould be openly prov'd Yelv. 160. Mich. 7 Jac. B. R. Staverton v Relfe.

I will prove *that he hath ſtolen my Books*, is actionable; for they imply an Affirmative, and are as much as if he had ſaid that he had ſtolen his Books. Mar. 19. pl. 4. Paſch. 15 Car. pl. 44. Anon.——S. P. Per Cur. Arg. in Caſe of Bury v. Wright. Yelv. Paſch. 6 Jac.

I will bring him before a Juſtice of Peace; for I will prove that he hath ſtolen &c. Per Cur. tho' the firſt Words are not actionable, the laſt are. Mar. 20. in pl. 44. Paſch. 15 Car. Anon.

I *will prove thee a Thief, and a Plotter of Thievery; and I will prove it by thine own Son, or elſe I will ſend him to the Devil.* Reſolved not actionable, and ſo revers'd a Judgment in B. R. Cro. J. 214. pl. 11. Mich. 6 Jac. B. R. Frank v. Alſop.

I doubt not to prove but he hath ſpoken Treaſon. Adjudged actionable. Win. 123. 124. Hill. 22 Jac. C. B. Hitcham v. Brook.——Hutt. 75. S. C. Paſch. 1 Car. Reſolved by all that the Plaintiff ſhall have his Judgment.

For my Ground A. Hext ſeeks my Life, and if I could find J. S. I do not doubt but within 2 Days to arreſt Hext for Suſpicion of Felony. Adjudged the firſt Words not actionable; but for the laſt Words Action lies, becauſe for Suſpicion of Felony he ſhall be impriſoned, and his Life drawn in Queſtion. 4 Rep. 15. b. pl. 5. Paſch. 27 Eliz. B. R. Hext v. Yeomans.

I have indicted B. of Perjury, and I doubt not but to prove him a perjured Perſon to all Intents and Purpoſes. Judgment was arreſted; for otherwiſe no Man can proſecute Perjury, nor inquire for Evidence to prove it, without Danger of an Action. Sid. 220. pl. 7. Mich. 16 Car. 2. B. R. Bull v. May.——Keb. 797. pl. 63. S. C. the Parties agreed to begin de novo, and diſcontinue by Conſent.

I will arreſt J. S. for Felony, and after prove Mr. Heale Acceſſory. Cited as adjudged that Action lies. Mo. 428. in pl. 597.

See (E. b) pl. 7. S. C.—Cro. E. 569. pl. 3. S. C. adjudged for the Plaintiff; for his Credit is impeach'd, tho' he never did any ſuch Fact.

8. So if one ſays of another, I will call him in Queſtion for poiſoning his own Aunt; and I make no Queſtion but to prove he hath poiſoned his Aunt, Action upon the Caſe lies; for this is a direct Affirmative that he hath poiſoned his Aunt, and more vehement than the other before, inaſmuch as he ſays, I make no Queſtion but to prove it. Trin. 39 Eliz. B. R. between *Webb and Poore* adjudged.

——Noy 63. S. C. adjudged accordingly.

9. If A. ſays of B. He was whipt about Taunton-Caſtle for Stealing of Sheep, tho' this is not a direct Affirmative that he ſtole the Sheep, yet it is a direct Allegation that he was whipt for Stealing of Sheep, which is a great Slander. Mich. 9 Car. B. R. between *Churly and Hill* adjudged, this being moved in Arreſt of Judgment.

11. If A. ſays to B. the Wife of C. Wherefore will your Husband hang J. S.? To which B. anſwers, For coming in the Night, and breaking our Houſe, and ſtealing our Goods, J. S. ſhall have an Action for theſe Words againſt B. and C. her Husband; for tho' the Words are ſpoke by Way of Anſwer to a Queſtion, yet this is a direct Affirmative

firmative. Pasch. 11 Car. B. R. between *Haywood and Nayler* adjudged in a Writ of Error, and the Judgment given in B. affirm'd accordingly. Intratur Hill. 11 Car. Rot. 527.

11. If A. says of B. and C. We will have them stand upon the Pillory, and have their Ears for Perjury, and Subornation of Perjury, Action lies; for this is a direct Affirmative that he was perjured, and guilty of Subornation of Perjury. Trin. 15 Car. B. R. between *Pell and Fellow*, and another Action between *Pell and Chapman*, adjudged in a Writ of Error, and the first Judgment affirm'd. Intratur Pasch. 15 Car. B. R. Rot. 162. 163.

12. *That Thief A. hath stolen away my Goods, and deliver'd them to Bacon.* An Action was brought by Bacon for these Words, but because the Words do not charge him with having any Notice of the Stealing, so that he is not touch'd as Accessory, he took nothing by his Writ. Dal. 41. pl. 21. 4 Eliz. Bacon's Case.

13. The Defendant hearing that his Father's *Barns were burnt*, said *I cannot imagine who should do it but the Lord Sturton*, this is actionable. Mo. 142. in pl. 283. Arg. cites 5 Eliz. Ld. Sturton v. Chafin.

14. *H. is infected of the Robbery and Murder lately committed, and doth smell of the Murder.* The Plaintiff having set forth that a certain Robbery and Murder was lately committed, he had Judgment after long Deliberation and Argument; and this was by reason of the Word (infected,) contrary to the Opinion of Catlyn. D. 317. b. pl. 8. Mich. 13 & 14 Eliz. Hawley v. Sidenham.

Dal. 41. pl. 27. S. C. argued.—— Ibid. 103. pl. 41. but I do not observe any Opinion of the Court.

——D. 317. b. Marg. cites Mich. 40 & 41 Eliz. C. B. that Anderson and Owen, in the Argument of Grimston's Case, held this Case not to be Law.——S. C. cited Arg. Mo. 142. in pl. 283. by the Name of Hawley v. Simbart.——S. C. cited by the Reporter, D. 72. b. pl. 6. at the End of Kempe's Case, as actionable.——S. C. cited Arg. 3 Bulst. 249. in the Case of Lewknor v. Godnam.——S. C. cited Godb. 90. pl. 100. per Clench J. Mich. 28 & 29 Eliz. as actionable.——S. C. cited in the Case of Meredith v. Bonell, Arg. Hutt. 58.——Cart. 214. in Case of Annison v. Blofield, cites S. C. as actionable.—— S. P. cited and admitted per Cur. Goldsb. 138. pl. 42. Hill. 43 Eliz. in Redfrein's Case, where the Words were, *I was robb'd, and you was privy thereto, and had Part of my Money*, adjudg'd for the Plaintiff.——S. C. cited 3 Bulst. 249.

15. Saying that the *Plaintiff caused the Defendant to be arrested with forg'd Writs*, are actionable; for the Word (caused) extends as well to the Forgery as to the Arrest, and so amounts to the Slander of Forgery. 4 Le. 181. pl. 279. Mich. 26 Eliz. C. B. Hungerford v. Watts.

16. *Thou wast coop'd up for forging of Writs*, adjudg'd not actionable. Cro. C. 268. pl. 2. Arg. in Case of Halley v. Stanton, cites 31 Eliz. Noel's Case.

S. C. cited by Periam accordingly. Cro. E. 234. in pl. 6.

17. *She is as very a Thief as any* (Or *she is a worse Thief than any*) *that robbeth by the Highway Side.* Per Cur. clearly, the Words in both Cases are actionable. Cro. E. 224. pl. 8. Pasch. 33 Eliz. B. R. Ratcliff (Lady) v. Shubley.

4 Le. 121. pl. 245. Ratcliffe v. Shirley, S. C. held accordingly.

18. *You never thought well of me since G. did steal my Lamb*, adjudg'd actionable, tho' objected that it was not a direct Affirmance that G. did steal it. Cro. E. 289. pl. 7. Mich. 34 & 35 Eliz. B. R. Graves's Case.

You might have known your own Sheep, and not have stolen mine. Fleming and Yelverton held the Words actionable, but Williams and Crooke contra. No Judgment. Yelv. 144. Mich. 6 Jac. B. R. Thompson v. Knott.

I dealt not so unkindly by you when you stole a Sack of Corn, is actionable. 2 Mod. 58. Mich. 27 Car. 2. C. B. Cooper v. Hawkwell.

19. Defendant

19. Defendant ſaid *Thou art a forſworn Fellow*; the Plaintiff ſaid, *Will you ſay that I am perjur'd*; the Defendant ſaid *Yes, if you will have it*; adjudg'd not actionable. Cro. E. 297. pl. 6. Paſch. 35 Eliz. B. R. Levermore v. Martin.

Goldsb. 186. pl. 127. S. C. but varying a little in Words, tho' not in the Meaning, adjudg'd for the Plaintiff.

20. *Many an honeſter Man hath been hang'd, and a Robbery hath been committed, and I think he was at it, and I think he is an Horſe-ſtealer.* The Court held this a great Slander, unleſs the Defendant ſhews good Cauſe of his Thinking; and Judgment for the Plaintiff. Cro. E. 348. pl. 20 Mich. 36 & 37 Eliz. B. R. Stich v. Wiſdome.

——Ow. 18. Wiſdome's Caſe, S. C. adjudg'd for the Plaintiff.

4 Rep. 16. pl. 8. S. C. adjudg'd not actionable; and ſays that every one who has a Bill of Perjury there againſt him, is detected.

21. *Thou wert detected of Perjury in the Star-Chamber.* It was held, on Motion, not actionable; for an honeſt Man may be detected, but not convicted, and ſo no Slander; ſed adjornatur. Cro. E. 371. pl. 12. Hill. 37 Eliz. B. R. Weaver v. Cardan.

——S. C. cited 2 Roll Rep. 142. and per Curiam, detected of Perjury is very uncertain; for a Man may be arrelled for a Crime, and yet not be guilty of it.——S. C. cited Cro C. 268.

22. *He ſhould have been hang'd for a Rape, but it coſt him all the Money in his Purſe.* Adjudg'd actionable. Cro. E. 589. pl. 26. Mich. 39 & 40 Eliz. B. R. Redfern v. Todd.

23. *Go follow Suit againſt W.* (Innuendo the Plaintiff) *for ſtealing thy 2 Kine, and hang him, or I will hang thee.* Theſe Words import as much as if he had felonioufly ſtole them, otherwiſe he could not hang him; and therefore it was adjudg'd by Fenner and Yelverton (only in Court) for the Plaintiff. Cro. E. 904. pl. 9. Mich. 44 & 45 Eliz. B. R. Willymote v. Wetton.

But if D. asks B. concerning a Robbery, and he anſwers that *he believes the Robbery was done by C. and fears it is too true*, an Action will lie. Yelv. 113, 114. ſaid Arguend.

24. D. *ask'd B. why the Plaintiff did not come to Church. B. anſwer'd, It is no Marvel* ſhe comes not to Church; *for it is thought ſhe is with Child, and I fear it is true*, by which ſhe loſes her Marriage with the ſaid D. not actionable; for it does *not appear* that B. knew of any Marriage to be between C. and D. nor *that the Words were ſpoke malitiouſly*, and B. had no Intention to ſlander C. For the Words aroſe upon the Queſtion of D. and the Anſwer does not impart any direct Slander; for her Honeſty was not in Queſtion, but her Abſence from Church, and he affirm'd nothing preciſely, but only tells his Thoughts and Fears, which looks as if he rather wiſh'd that there was no ſuch Cauſe. Adjudg'd per Curiam, præter Fenner. Yelv. 114. Mich. 5 Jac. B. R. Brinsby v. Balgy.

Yelv. 126. Paſch. 6 Jac. B. R. Bury v. Wright, S. C. not actionable.

25. *Bear Witneſs, he hath ſtolen my &c.* Adjudg'd not actionable, it not being alleg'd expreſsly that he ſtole his Cloth. Arg. Palm. 68. To which the Court agreed. Cited as Trin. 7 Jac. B. R. Birch. v. Writts.

26. *It would be proved by many vehement Preſumptions, that the Plaintiff was a Plotter and Contriver of the Death of one P. becauſe he would not ſell him his Land*, is not actionable; for it affirms nothing but uncertain Preſumptions, whereas Words of Slander ought to be affirmative. Yelv. 153. Paſch. 7 Jac. B. R. Weblin v. Mayer.

A. was murder'd, and the Plaintiff knocked

27. *Thou doſt lead a Life in Manner of a Rogue, I doubt not but to ſee thee hang'd for ſtriking Mr. Sydman's Man, who was murder'd*; theſe Words are not actionable, for they are not poſitive for the Murder of Mr. Sydman's Servant, he might be beaten by the Plaintiff, and murder'd by another,

other, Actions of Slander do not lie upon Inferences. Jenk. 302. pl. 72. *him on the Head.* Mo. 428. at the End of pl. 597. says this was adjudg'd good Cause of Action.

28. A. said to B. *My Sheep were feloniously stole away. B. replies, I know who took them, it was J. S.* (the Plaintiff.) Crooke J. ask'd if these Words are not scandalous? Doderidge held them not actionable, because *nothing is said of the Felony.* Crooke said that this is a direct Answer to the Complaint of B. But Doderidge and Haughton held clearly that such Words are not actionable, they being a Scandal by Inference only. 3 Bulst. 83. Mich. 13 Jac. in Case of Helly v. Hender, S. P.

29. *If thou hadst had thy Right thou hadst been hang'd for breaking P.'s House,* is actionable. Brownl. 3. Harris v. Adams. Plaintiff declared that he had been arraign'd of robbing the Defendant before the Justices of Peace of N. and acquitted, and the Defendant said of him, *if Mr. H. and one A.* (Justices of Peace of the said County of N.) *had done Justice, R.* (the Plaintiff) *had been hang'd for robbing me.* These Words are Quasi a precise Affirmative that he was the Party that robb'd him; and adjudg'd for the Plaintiff. Cro. E. 786. pl. 24. Mich. 42 & 43 Eliz. C. B. Royal v. Peckham. —3 Bulst. 260. Arg. cites Royal and Virtue's Case as not actionable because conditional Words

Thou and thy Father had been hang'd for coining of Money, if you had had your Desert, long since; adjudg'd actionable, because it is a Condition which binds an Affirmation. Palm. 68. Mich. 17 Jac. B. R. Brown v. Audley.

30. *S. did steal a Mare, or else G. is forsworn*; adjudg'd not actionable, tho' the Plaintiff in his Declaration averr'd that G. never swore any such Matter; for it is not a direct Slander, and his Life or Name cannot be drawn in Question upon this Matter, and so can be no Loss to him. Cro J. 532. pl. 10. Pasch. 17 Jac. B. R. Sparham v. Pye.

31. *As sure as you believe that God rules the World, and the King rules the Kingdom, so sure did W. steal such Goods.* Win. 124. Arg. cites it as adjudg'd in Whorewood's Case.

32. *I do not know but J. S. is a Bankrupt*; cited Sid. 434. pl. 27. as adjudg'd actionable 5 Car.

33. *If I list I can prove him perjured,* not actionable; for there is no Affirmative that he was perjured, but a thing which is arbitrary, and says not that he would do it; Judgment for the Defendant. Hutt. 127. Hill. 11 Car. Davis's Case.

34 *O. says I am a perjured Rogue*; *He is a perjured Rogue as well as I.* It was moved that the Words are not positive, but relative only to the Defendant, and it is not averr'd that the Defendant is a perjured Rogue. But per Cur. the Words (as well as I) by which he confesses himself to be a perjured Rogue, supply the want of an Averment; and Judgment for the Plaintiff. Lev. 65. Pasch. 14 Car. B. R. Orton v. Fuller. Raym. 51. S. C. adds, *For he and F. swore for one another.* —— Keb. 293. pl. 16. S. C. adjornatur. —— Ibid. 302. pl. 9. S. C. adjudg'd for the Plaintiff.

35. *You P. you will lie with a Cow again as you did; if you had your Deserts you deserve to be hang'd*; is actionable, and a great Scandal. Sid. 220. pl. 6. Mich. 16 Car. B. R. Poturite v. Barrel. Keb 7-6. pl. 12. Dolewright v. Barwell S. C.

36. *J. W. was question'd for stealing a Grey Mare with a Snip in her Ear, and Hue and Cry went out after him, and he durst not shew his Face hereabouts*; Roll Ch. J. held the Words actionable, but Nichols J. doubted, and Ask J. said nothing. Sty. 159. Mich. 1649. Gray v. Walye. Judgment for the Plaintiff.

37. Case for charging him with Felony, and accusing him before a Justice of Peace thus, *He came to my Door and set a Pistol to my Breast and demanded Money of me, and I for Safeguard of my Life, gave him what Money he desired.* Per Roll Ch. J. if the Words found to charge him with Felony the Action will lie, and we cannot conceive otherwise but that

he would have robb'd the Party; 2 others agreed with Roll, but Jerman differ'd. Judgment for the Plaintiff, Nisi &c. Sty. 350. Mich. 1652. Neve v. Crosse.

38. *I hold it not fit this Girl should live with her Aunt, she keeping a Bawdy-House.* No Judgment was given, because the Defendant offer'd to bring the Monies given in Damages, viz. 100 l. into Court, and so to go to a new Trial. 2 Sid. 15. 33. Mich. 1657. Hobson v. Blackwell.

Vent. 276. S.C. held actionable, or else there might be sly Ways to defame any Man and evade an Action.

39. *I know what I am, and I know what Snell is; I never bugger'd a Mare*; adjudg'd for the Plaintiff; for this by Implication is a Charge of Buggery upon the Plaintiff, which the Standers-by well understood to be so. 2 Lev. 150. Mich. 27 Car. 2. B. R. Snell v. Webbling.

——3 Keb. 546. pl. 46. S. C. adjudg'd for the Plaintiff.

S. C. cited 2 Ld. Raym. 1185. Trin. 4 Ann. and Holt Ch. J. agreed it was a Case in Point with the principal Case thereof, Speed v. Parry.

40. *You may well spend Money at Law, for you can coin Money out of Half-pence and Farthings*; this was held to import an Act done, because by a bare Power he could never be able to spend Money at Law, cited 2 Salk. 697. in pl. 10. by Powell J. as Trin. 12 W. 3. C. B. Horne v. Powell.

You are a Rascal and a Villain, you have forgot since you lived in Black-Bull-Yard, there you could procure broad Money for Gold, and clip it when you had so done, and then the Shears could go. Per Cur. where the Matter imputed is confined to a particular Place, as here (you could in such a Place) they must be understood to imply an Act done; for the Power is the same in all Places; and so actionable. 2 Salk. 697. pl. 10. Trin. 4 Ann. B. R. Speed v. Perry.——2 Ld. Raym. 1185. S. C. the Court all along inclined for the Plaintiff, but took time to consider, and afterwards gave Judgment for him.

41. *You are a great Rogue and Rascal, as great a Rogue as your Master, who is a Rogue, for that your Master and Dame stole Ruggs and Quilts*; the Plaintiff made proper Averments, and the Words held actionable; and Judgment for the Plaintiff. Comyns's Rep. 267. Mich. 4 Geo. 1. C. B. Apton v. Pinfold.

42. *I will have him transported for Perjury and Forgery.* Special Damages were found, and Judgment given for the Plaintiff in C. B. and that Judgment (the Ch. J. being absent) affirm'd in B. R. 2 Barnard. Rep. in B. R. 101. Hill. 5 Geo. 2. Floyd v. Jones.

(Q. a) For what Words it lies. In what Cases where there is but an *Intention only.*

See (H. a) pl. 13. S. C. —S. P. as to the first Part of the Words, and seems to be S. C. Poph. 128. Anon.

1. If one Man says to another, That he sacrificed or gave one of his Children to the Devil, to the Intent to bewitch the Mother of the Speaker, tho' here was only an Intent to do Ill, and no Act of Witchery done, yet because there is an ill Act, scilicet, the sacrificing and the giving of an Infant, join'd with an ill Intention of Witchery, Action upon the Case lies; for Invocation or Conference with Spirits is punishable by the Statute of 1 Jac. Pasch. 15 Jac. B. R. between *Lock and Lock*, adjudg'd, this Matter being moved in Arrest of Judgment.

He lay in Wait in the Highway, intending to murder me. Wray held these Words actionable. Cro. E. 6. Trin. 24 Eliz. C. B. in pl. 1.———Cro. J. 108. S. P. cited as in Stroughton's Case.———Godb. 43. in pl. 51. cites S. P. as in Ramsey's Case.

2. If one says of another, That he lay in Wait at Shooter's-Hill to rob him, Action upon the Case lies, because there is an ill Act done, scilicet, the lying in Wait. Pasch. 15 Jac. B. R. in *Lock and Lock's Case*, agreed per Mount. & Hought.

Thou

Thou art a Knave, and haſt laid in Wait to kill me, and thou haſt hir'd one W. to kill me. Coke Ch. J. and Houghton held theſe Words not actionable, becauſe here was only an Intention to do it, but no Act laid to be done, and a bare Intent is not puniſhable by the Law; and ruled Quod querens nil capiat &c. 2 Bulſt. 286. Paſch. 12 Jac. Murrey's Caſe.——Win. 98. S. P. cited by Baron Snig, Hill 8 Jac. as adjudg'd in B. R. and affirm'd in the Exchequer that ſame Term.——Cro. E. 618. pl. 3. Mich. 40 & 41 Eliz. B. R. cites S. P. adjudg'd actionable in this Court.——S. P. per Wray Ch. J. that Action lies, tho' no Robbery nor Aſſault was committed. Mo. 186. pl. 332. Mich. 26 Eliz.

He hath laid in Wait to rob, and was one of them that would have robb'd me, adjudg'd actionable. Mo. 409. pl. 555. Trin. 37 Eliz. Weeks v. Taylor.——Cro. E. 249. pl. 24. S. P. per Cur. Arg. in Weekes's Caſe.

3. If a Man ſays of A. That he and J. S. knowing that B. a Goldſmith carried Plate, they lay in Wait, and attempted to rob him, but B. raiſed the Country upon them, ſo that they were compell'd to fly both upon one Horſe, an Action lies for A. For though this was not Felony, yet was it a great Offence, and ſlander'd him as much as if he had charg'd him with Felony. Mich. 4 Car. B. R. between *Lewkenor and Burchly*, adjudg'd; this being moved in Arreſt of Judgment. Cro. C. 140. pl. 15. Lewknor v. Cruſhley, S. C. accordingly; for he charges him not only with the Intention, but with a Fact which is as near Felony as may be, and is ſuch an Offence as is more than an Intent only, and more than Riot, and for which Fine and Impriſonment are due.——Jo. 195. pl. 6. S. C. adjudg'd accordingly.

4. If one ſays to another, That he keepeth Men to rob me, no Action lies, becauſe there is only a naked Intention, without any Act. Paſch. 15 Jac. B. R. in *Lock's Caſe*, put per Hought' to have been lately adjudg'd. * Fol. 51. This ſeems to intend the Caſe of Sir Herbert Crofts v. Brown, the Words there being the ſame; and per tot. Cur. the Words are not actionable.

He keepeth Thieves to rob my Maſter, adjudg'd actionable. Palm. 278. Hill 19 Jac. B. R. Bennet's Caſe.——Cro. J. 629. pl. 1. Bennet v. Tabram, S. C. where the Words are, *Thou art a Maintainer of Thieves to ſteal my Maſter's Goods* It was objected that he did not ſay, that he maintain'd them in the Felony, nor knew them to be Thieves; ſed non allocatur; for the Words are to be taken in the moſt ſlanderous Part as he ſpoke them; and adjudg'd for the Plaintiff.

5. If one ſays to another, Thou haſt procur'd J. S. to come Thirty Miles to commit Perjury againſt his Father before the Lord Biſhop of Wincheſter, and haſt given him 10l. for his Pains, no Action lies for theſe Words; for he does not ſay that J. S. committed the Perjury, and then the Hiring without the Committing of Perjury is not any Offence. Paſch. 3 Jac. B. R. between *Harris and Dixon*, adjudg'd. Cro. J. 158. pl. 10. Paſch. 5 Jac. B. R. S. C. and though the ſame Objection was made, and alſo that it was not alleg'd that the Biſhop of Wincheſter was ſuch a Perſon, before whom Perjury might be committed; yet the Court held it a great Imputation, and that it ſhall be intended in the worſt Part; and ſo adjudg'd for the Plaintiff.——Yelv. 72. Mich. 3 Jac. S. C. and the Words there are (procur'd *and ſuborn'd*,) but the Objection is ſaid there to be allow'd by Fenner, Yelverton, and Williams, Popham being abſent.

A. did hire a Man to rob me. Per Haughton J. theſe Words would be actionable; to which Coke Ch. J. agreed, becauſe an Act was done. 3 Bulſt. 167. 168. Paſch. 14 Jac.

He procur'd one to murder J. S. Action lies, tho' no Murder was committed. Adjudg'd, and affirm'd in Error Mo. 186. pl. 332. Mich. 26 Eliz. Anon.

Thou haſt given J. S. 9l. for forſwearing himſelf in Chancery, and haſt hir'd him to forge a Bond. Adjudg'd actionable, tho' he never was ſworn in Chancery; and the ſame as to the other Words of forging the Bond. Cro. C. 337. pl. 23. Mich. 9 Car. B. R. Anon.

6. If a Man ſays to B. I charge you in the Queen's Majeſty's Name to aid me, for I am ſet upon to be robb'd; and I charge you to go with me to Bonaventure Tibbal's Houſe to apprehend him; for old Tibbals (Innuendo dictum Anthonium) hath been a Setter on of them (Innuendo the ſaid Bonaventure and another) often times to rob me, Action upon the Caſe lies for Anthony Tibbals for theſe Words. Mich. 40 & 41 Eliz. B. R. between *Tibbals and Brooke*, adjudg'd; for tho' he was not Cro. E. 618. pl. 3. Theobald v. Brooke, S. C. where the Words are, *Bring me to the Conſtable's*

House; for I am robb'd this Night; **not robb'd by them, yet the Action lies for the Slander of setting on of others to rob him.**

and bring me to B. T.'s House to arrest him; for old Theobalds (Innuendo the Plaintiff) *setteth his Sons to rob me* (Innuendo dictum B. & quendam Johannem filium ipsius Anthonii) *from time to time*; adjudg'd actionable. But upon Error brought it was assign'd, That it is not precisely affirm'd of the Plaintiff, but it is said *Old Theobalds*; and he does *not name the Plaintiff*, and an *Innuendo will not serve*; whereupon Judgment was reversed.

He sent his Man A. to kill me. The Court was divided as to its being actionable or not. Mo. 63. pl. 174. Trin. 6 Eliz. Bray v. Andrews.——Dal. 66. pl. 29. S. C. in the same Words.

You set on Folks to murder J. S. Wilde conceived the Words actionable, Fine and Imprisonment being due, without averring J. S. to be dead. Judgment for the Plaintiff. Keb. 253. pl. 22. Pasch. 13 Car. 2. B. R. West v. Phillips.

Cro. E. 710. pl. 33. S. C. by the Name of Leversage v. Smith, adjudg'd actionable;

7. **If one says of another,** He would have robb'd me if J. S. would have consented to it; and he persuaded J. S. to go with him, and said unto him that he should have Money enough, **Action upon the Case lies for these Words. Mich. 41 & 42 Eliz. B. R.** *Leversett's Case*, **adjudg'd.**

for the Words are of great Discredit and Slander.

W. assaulted me and others to have robb'd us, but we were too strong for them, and escaped; adjudg'd actionable. Cro. E. 349. pl. 24. Mich. 36 & 37 Eliz. B. R. Weeks's Case.——Mo. 409. pl. 555. Weekes v. Taylor, S. C. *He laid in Wait to rob me, and was one of them that would have robb'd me*, held actionable, tho' he was not robb'd.——S. C. cited by Jones, Cro. C 140. in pl. 15. where the Words are, *Nine Persons set upon me to have robb'd me, and you* (Innuendo W. the Plaintiff) *was one of them*; and that the Words were adjudg'd actionable.

Aid me to Stoner, for I have Felony to lay to his Charge; for he would have robb'd me. It was objected, that tho' perhaps the Words (I have Felony to lay to his Charge) are of themselves actionable, yet the next Words (for he would have robb'd me) prove no Felony, but extenuate the first Words, and shew what he intended; and that to say (one would have robb'd me) is not actionable without shewing some Overt-Act put in Ure, which is Felony, or Cause to bind one to their good Behaviour; for tho' he had an Intent, perhaps he repented of it, and did no evil Act. And Lea cited a Case adjudg'd 27 & 28 Eliz. **Tettul v. Osborne,** that the Words *Thou wouldst have murder'd me*, are not actionable; and for this Cause the Court inclin'd that an Action did not lie. Cro. E. 250. pl. 16. Stoner v. Audley.

Thou wouldst have taken my Purse from me on the Highway, is not actionable; per Coke Ch. J. Godb. 202. pl. 289. Trin. 10 Jac. C. B. Anon.

S. C. cited by Coke and Haughton, by the Name of Dr. Pott's Case, as adjudg'd not actionable. 2. Bulst. 206.

8. **If one says to another,** Thou wouldst have kill'd me, **no Action lies, because he charges him only with an Intention. Hill. 11 Jac. B. R.** *Pott's Case*, **adjudg'd.**

She went about to kill me, actionable; for if true, she should be bound to her good Behaviour. 3 Le. 231. pl. 313. cites the Case of Warner v. Cropwell.

He sought to murder me, and I can prove it, adjudg'd actionable. Cro. E. 308. pl. 12. Mich. 35 & 36 Eliz. B. R. Preston v. Pindar.

Lane. 98. S. C. in the Exchequer; but says it was adjudg'd that for the Words *She would have cut her Husbands Throat*, no Action would lie.

9. **If one says of another,** She would have cut her Husband's Throat, and did attempt to do it, **Action lies for the Attempt; for this is a great Scandal, and good Cause for the Husband to be divorced. Hill. 8 Jac. in the Exchequer,** *Scott v. Hilliers*, **per Curiam.**

S. P. *And the House was not burnt.* Adjudg'd not actionable. Godb. 43.

10. *E. did wrap Gunpowder in a Piece of Tow, and laid it under my Window, and put Fire to it, minding to burn my House.* By such Words the Plaintiff's good Name is impair'd, and he had Judgment. Cro. E. 6. pl. 1. Trin. 24 Eliz. C. B. Edward's Case.

cited in pl. 51.——Certain Colliers having been burnt feloniously in a House, and some Persons executed for the Murder, the Defendant said *Thou didst bring Faggots a Mile and a half to the burning of the Colliers*, adjudg'd actionable. Hutt. 122. Pasch. 9 Car. Glasier v. Heliar.

If a Mansion-House be burnt feloniously, and one says *You brought Fire to set in the Thatch of the House which is burnt*, it is actionable. Hutt. 123. Pasch. 9 Car. in Case of Glasier v. Heliar.

11. *My*

11. *My Lady C. offer'd 2 s. to a Woman with Child to get her a Drink to kill her Child, becauſe it was gotten by J. S. Sir T. C.s Butler.* Adjudg'd actionable; for the Words impair the Lady's Credit, and, if true, might be bound to her good Behaviour; tho' it was not ſaid that ſhe did give Money, or that any Hurt was done, but that ſhe offer'd &c. Cro. E. 49. pl. 4. Trin. 28 Eliz. B. R. Sir T. Cockaine & Ux. v. Witnam. S. C. cited 4 Rep. 16. b. in pl. 10. —S. C. cited Mo. 419 pl. 574. by the Name of Lady Coſſin's Caſe.——3 Bulſt. 167. Arg. cites Lady Cockaine's Caſe.——2 Bulſt. 206. S. C. cited by Coke and Haughton, and ſaid it was an odious Fact; but if this Caſe was now to come in Queſtion, they ſhould be very well adviſed of it.——S. C. cited Godb. 43. in pl. 51. as adjudg'd that the Words were not actionable.

12. *T. and one G. agreed to have hir'd a Man to kill me, and that G. ſhould ſhew me to the Man hir'd to kill me.* Adjudg'd by Wray and Fenner for the Plaintiff, againſt the Opinion of Gawdy. Cro. E. 191. pl. 3. Mich. 32 & 33 Eliz. B. R. Tibbot v. Haynes. S. C. cited 4 Rep. 16. b. in pl. 10.

13. *He is a Brabler, and a Quarreller; for he gave his Champion Counſel to make a Deed of Gift of his Goods to kill me, and then to fly out of the Country, but God preſerved me.* Adjudg'd not actionable; for the Purpoſe or Intent of a Man, without Act done, is not puniſhable by the Law; and tho' for ſuch Conſpiracy he may be puniſh'd in the Star-Chamber, yet that is by the abſolute Power of the Court, and not by the ordinary Courſe of the Law. 4 Rep. 16. b. pl. 10. Trin. 40 Eliz. C. B. Eaton v. Allen. Cro. E. 684. pl. 17. S. C. ſays all the Judges, præter Glanvile, held the Words not actionable; and Judgment for the Defendant.

——Cro. C. 140. in Caſe of Lewknor v. Cruchley, Arg. cites S. C. as adjudg'd not actionable.

14 *P.* (Innuendo the Plaintiff) *ſent a Letter to my Maſter, and therein will'd him to poiſon his Wife.* All the Juſtices and Barons reſolved the Words actionable, and ſo affirm'd a Judgment in B. R. Cro. E. 747. pl. 27. Hill. 42 Eliz. in the Exchequer-Chamber. Paſſie v. Mondford. *Mrs. P. wrote a Letter to J. S. to poiſon her Huſband*, adjudg'd for the Plaintiff, and Judgment affirm'd in the Exchequer Chamber. Cited by Williams J. Bulſt. 201. as Mrs. Paſfield's Caſe, and ſeems to be S. C.——S. C. cited in Caſe of Dean v. Eaton, by Williams J. Bulſt. 201. as adjudg'd actionable, where the Caſe was, that *A. placed a Woman in B.'s Houſe, with an Intent to poiſon B.* It was obj. cted that no Act was laid here to have been done, but an Intention only; but adjudg'd actionable. Paſch. 10 Jac. Dean v. Eaton.

15. *I am in Danger of my Life, my Blood is ſought, and I was like to have been murdered. I was at Sir John Harpur's Houſe, and J. H.* (Innuendo the Plaintiff's Son) *drew me forth to ſee a Gelding in the Stable, and then J. B. drew his Dagger at me twice, and thruſt me through the Breeches twice with his Rapier, to have killed me. All this was done by the Inſtigation of Sir J. H. and I can prove it.* Adjudged by 3 J. againſt 2, that Action lies, it being alleged that Sir J. H. is a Juſtice of Peace; ſo that ſuch Inſtigation being againſt his Oath, is a great Miſdemeanor, for which he is fineable, and to be put out of the Commiſſion. Cro. J. 56. pl. 1. Hill. 2 Jac. B. R. Sir J. Harper v. Beamond. Yelv. 57. S. C. and the three Juſtices held, that the Words ſhall not be taken divideldy, but all together as they were ſpoke; As if he had ſaid Sir J. H. *procured B. to caſt his Dagger at me to kill me*; and then there is no Queſtion but the Words are actionable. Quod fuit conceſſum ab omnibus, And Judgment accordingly againſt the Defendant.

16. *He aſſaulted my Wife with an Intent to raviſh her.* Glyn Ch. J. inclined that the Action lay. 2 Sid. 76. Paſch. 1658. B. R. Langly v. Clark. Ibid. 100. Trin. 1658. B. R. the S. C. adjudged actionable.——2 Mod. 51. Arg. S. C. cited as adjudged for the Plaintiff, after a long Debate.—— *He pull'd 3 Women off from their Horſes, with Intent to raviſh them*, this is actionable. 2 Sid 100. Per Glyn Ch. J.

17. There being a Colloquium of beſetting a Houſe, in order to rob it, the Defendant ſaid, *It was T. M.* (the Plaintiff) *and J. D. that were about to rob E. C's Houſe.* Atkins J. held the Words actionable; for the charging the Plaintiff with ſomething done, tho' the Thing be not abſolutely effected, it is more than a bare Intention, and then actionable; but Archer and Vaughan (Wylde abſente) gave Judgment for the Defendant; but they agreed, that if the Words had implied any Act done, they would be actionable; As to *lie in Wait to kill a Man*, there the Lying in Wait is indictable; but per Vaughan, *Going with an Intent to ly in Wait* is not ſufficient, but it muſt be ſuch a Kind of Act for which a Man is indictable. Freem. Rep. 46. pl. 56 Trin. 1672. in C. B. Mayne v. Diggle.

2 Jo. 84. S. C. and the Court agreed that the firſt Words would not maintain the Action, becauſe they import an Intention only, without any Act done by the Plaintiff. And upon the laſt Words Judgment was ſtay'd till moved by the Plaintiff.——2 Lev. 205. S. C. adjudged per tot Cur. viz. Rainsford, Twiſden, and Jones for the Plaintiff, and that the firſt Words alone had been actionable, and are made worſe by the ſecond, be the Robbery intended to be done by the Plaintiff himſelf, or by any other by his Procurement, which ſhall be intended.—3 Keb. 841. pl. 5. S. C. adjudged that the Words are actionable, taking them all together.

18. *He would have given D. Money to have robb'd C.'s Houſe, and he did rob the Houſe.* The Court ſaid the Words might be conſtrued, That the Plaintiff offered D. Money, and that D. refuſing it, the Plaintiff robb'd the Houſe himſelf. Vent. 323. Mich. 29 Car. 2. B. R. Frowd v. Frowd.

19. Words which *charge Men with evil Inclinations and Principles*, will be actionable; as where it was ſaid of the Plaintiff that *he is a Jacobite, and is for bringing in the Prince of Wales and Popery, to the deſtroying our Nation.* 2 Ld. Raym. Rep. 812. Mich. 1 Ann. in Caſe of How v. Prinne.

(R. a) In what Caſes the ſubſequent Words ſhall be *Explanatory* of the former.

Thou art a Rogue and a Thief. The Court held, That for the Word Thief an Action is maintainable, unleſs it be coupled with other Words, which prove it to be no Felony intended. And Judgment for the Plaintiff. Cro. E. 857. pl. 23. Mich. 43 & 44 Eliz. C. B. Robins v. Franks.

1. **IF one ſays to another,** Thou art a Thief, **or ſuch like Words as will bear an Action,** and haſt ſtolen my Trees, **Action lies; for the laſt Words are by Way of Addition, and not given as a Reaſon of the firſt. Mich. 4 Jac. B. R. between** * *Minors and Lydford.* **Hob. Rep. 106. there cites a Judgment in B. R. 7 Jac. accordingly. Contra Mich. 13 Jac. B. between** † *Coote and Gilbert* **adjudged. See the ſame Caſe Hob. Rep. 106.**

* Cro. J. 114. pl. 13. Minors v. Leeford, S. C. and by Tanfield, tho' the ſtealing the Trees is not Felony, yet the Action lies for calling him Thief generally; and the Addition of (and thou haſt ſtolen) is another diſtinct Sentence by itſelf, and not the Reaſon of the former Speech, nor any Diminution thereof, but an Addition thereto; and cited 7 Eliz. C. B. Stanley's Caſe accordingly, and ſo he conceived here; and of that Opinion were Fenner and Williams, but Yelverton doubted thereof; and (abſente Popham) it was adjudged for the Plaintiff.——S. C. cited Hob. 331. pl. 410.

† Hob. 77. pl. 100. S. C. where the ſame Words were adjudged not actionable; for the Word (and) is to be underſtood to be but a verifying and making good of the general Word (Thief;) and then (Trees) ſhall be rather underſtood Trees ſtanding than fell'd; and the Law ſtrains not to hurt but to heal; and diſapproved a ſtronger Caſe cited to have been adjudged actionable in 7 Jac.——Brownl. 2. Cowte v. Gilbert, Hill. 10 Jac. S. C. adjudged not actionable.——Godb. 241. pl. 335. Mich. 11 Jac. C. B. Colt v. Gilbert, adjudged that the Action lies; for the latter Words do not extenuate the former.

Thou

Thou art a thievish Knave, and hast stolen my Wood. Adjudged not actionable, by 3 J. contra 2; and by the 3 J. tho' the Words had been, *Thou art a Thief* &c. yet it would not be actionable; and they held that the Word (and) is all one as if he had said (for.) Cro. J. 65. pl. 5. Pasch. 2 Jac. B. R. Robins v Hildredon.

Thou art a thievish Rogue, *and hast stolen Bars of Iron out of other Men's Windows.* Adjudged not actionable; for stealing Bars of Iron Parcel of the Freehold is not any Felony, and it shall not be intended Bars lying in the Windows; for it shall be taken in the best Sense for the Defendant. Cro. J. 204. pl. 9. Hill. 5 Jac. B. R. Powell v. Hutchins.

He is an *arrant Thief, and hath stolen divers Apple-trees out of J. S.'s Garden*, is actionable; otherwise if he had said, *For he hath stolen &c.* for then it should not be Felony to steal Trees; and (for) shews the Reason of calling him Thief, which the Word (and) does not. 2 Brownl. 280. Mich. 7 Jac. C. B. Ayre's Case.

She is a *Thief, and has stolen my Wood, and I will send her to Bridewell.* The Court held the first Words actionable, but whether coupled with the other they were actionable, the Court was divided, viz. Bacon against the Action, and Roll Ch. J. for it. Sty. 24. Pasch. 23 Car. Drake v Whitacre.—Ibid. 27. S. C. by the Name of Whitacre v. Hillwell; and Bacon J. said that the last Words explained the former, that he meant not the Fact charg'd upon the Plaintiff to be felonious, for that cutting Wood standing is to be punish'd with Whipping, and so the Party may be sent to Bridewell for that Offence; but Roll Ch. J. held them cumulative, and not interpretative, and so actionable; and that where there are express precedent Words to make one a Thief, there ought to be violent Words subsequent to give them another Interpretation, and not Words which may be taken by Implication, as they are in this Case. Adjornatur. All. 11. S. C. accordingly.

2. **But if one says of another,** Thou art a Thief, for thou hast stolen my Trees, **no Action lies, for the last Words are explanatory, and given for a Reason of the first. Mich. 4 Jac. B. R. between** *Minors and Lydford* **agreed.** Godb. 241. pl. 335. Colt v. Gilbert, S. P. accordingly. ——The Distinction between the Word (and) and the Word (for) is cited by Tanfield J. Cro. J. 114. in Case of Minors v. Leeford, to have been agreed 7 Eliz. C. B. in Stanley's Case.——S. P. agreed, in Case of Harbart v. Angel, Mich. 8 Car. Hutt. 113.——Same Distinction Noy 135. Ayres v. Oswell.—— 2 Brownl. 280. Mich. 7 Jac. in C. B. Ayre's Case, S. C. accordingly.——S. P. and same Distinction taken. Cro. J. 231. pl. 11. Mich. 7 Jac. B. R. S. C. Gyer v. Ormsted.——S. P. and same Distinction taken, and adjudged for the Plaintiff. 2 Bulst. 141. Mich. 11 Jac. Painter v. Warn.

He is a Thief, for he hath stolen Corn from Mr. Key (Quendam Richardum Key innuendo) Adjudged for the Plaintiff. Cro. J. 673. pl. 7. Mich. 21 Jac. and the Judgment affirmed in Error in B. R. Smith v. Ward.

Thou art as arrant a Thief as any is in England; for thou hast broken up J. S.'s Chest, and taken away 40 *l.* Held that the first Words, without an Averment, will not maintain an Action, and the last Words import no Felony; for the breaking the Chest, and taking the Money, may be upon a Pretence of Title, and in Mid-day, and upon Pretence of Title; and Judgment for the Defendant. Cro. J. 687. pl. 2. Trin. 22 Jac. B. R. Foster v. Browning. ——Hutt. 72. Potter v. Brown, S. C. adjudged accordingly; for the latter Words are ambiguous, and admit of a double Interpretation, and so the better shall be taken.——Win. 70. 89. S. C. and Judgment was arrested.

Thou art a *Thief, and has broke my Chest.* Roll Ch. J. said, that notwithstanding Lord Hobart's Opinion he held the Words actionable, and the Word (and) is cumulative, and aggravates the former Words, and not barely explanatory; and the subsequent Words are violent, and may very well stand with the former, therefore let the Plaintiff take his Judgment. Sty. 115. Trin. 24 Car. Wainwright v. Whitley.

Tho' it was formerly held that there was a Difference between (*and*) and (*for*) yet of late it has been taken otherwise; for they both are explanatory, and mean both the same Thing; Per Powell J. 2 Ld. Raym. Rep. 959. Trin. 2 Ann. in Case of Baker v. Pierce.——2 Salk. 696. in pl. 9. S. C. & S. P.——6 Mod. 23. 24. S. C. & S. P. by Holt Ch. J.

3 **If one says to another,** Thou art a Thief, for thou takest my Beasts by reason of an Execution, and I will hang thee, **no Action lies, because all the Words together are not actionable, and the last Words are explanatory of the first. Mich. 7 Jac. B.** *Wilk's* **Case held.** *Thou art a Thief; for thou hast taken away my Corn*, is not actionable, for the Taking may be lawful; but if the Words had been, *For thou hast stolen my Corn*, Action lies; for it shall be intended Corn thrash'd, and not in the Sheafs; Per Hobart Ch. J. Cro. J. 688. pl. 2. Trin. 21 Jac. C. B. in the Case of Foster v. Browning.——So where the additional Words were, *For thou hast broken up J. S.'s Chest, and taken away* 40 *l.* Adjudged for the Defendant; for the Words do not import any Felony committed; for the Money may be taken, and the Chest broke open, upon Pretence of Title, and in the Mid-day, and Presence of divers, and so no Felony. Cro. J. 687. Foster v. Browning.

4. If

Hard. 7. in pl. 8. cites Mich. 9 Car. B. R. the S. C. as adjudg'd not action-able, becauſe the Word (Thief) is qualified, and refers only to Cheating and Couzening, which is not Felony; and the main of the Charge is Cheating.

Fol. 52.

4. **If one ſays to another,** Thou art a Coney-catching and a cheating Thief, and didſt cheat the Company of 20 Nobles, (*Innuendo* the Company of Watermen of Newcaſtle upon Tyne) **Action lies for theſe Words**; for the laſt Words are not explanatory of the firſt Words, but cumulative. *Dubitatur* Mich. 9 Car. B. R. between *Rebead and Smith.* * *Intratur* Trin. 9 Rot. 1248. but Hill. 9 Car. Judgment in this Caſe was given for the Plaintiff.

All. 31. S. C. adjudged for the Plaintiff. —Sty 66. S. C. by the Name of Carver v. Pierce, but there the Words are (for thou haſt ſtolen &c.) But Ibid. 73. S. C. the Words are as here, viz. (and haſt &c.) And adjudged for the Plaintiff.

5. **If a Man ſays to J. S.** Thou art a Thief, and haſt ſtole my Dung, Action lies; for theſe Words (and haſt ſtole my Dung) do not take away the Force of the Word (Thief;) for Dung may be a Chattel, and may be ſtole, and ſo a Felony may be committed thereof. Mich. 23 Car. B. R. between *Terworth and Pearce* adjudged, this being moved in Arreſt of Judgment after a Verdict for the Plaintiff.

Hob. 331. pl. 410. S. C. —Jo. 11. pl. 11. Mich. 18 Jac. C. B. S. C. adjudged againſt the Plaintiff,—Poph. 152. Trin. 17 Jac. C B. Gilbert de Hopton's Caſe, S. C. adjudged that the Action lies; for the Word (and) ſhall be taken as the Word (for.)——Win. 3 Goddard v. Gilbert, adjornatur. And Ibid. 10. S. C. adjudged, Quod querens nil capiat per Billam.——S. C. cited per Bacon J. and denied the Difference between (and) and (for) upon the Authority of that Caſe; but Roll Ch. J. ſaid that Caſe had been often denied to be Law. All. 31.—Hutt. 13. S. P. cited as adjudged accordingly 19 Eliz. Arrow's Caſe.

6. **If one ſays to another,** Thou art a Thief, and haſt ſtole 20 Load of my Furze, Action lies; for the laſt Words ſhall be taken cumulative, and alſo the Words rather imply that they were Furze cut rather than growing, inaſmuch as he ſays 20 Load. Contra Hob. Rep. Caſe 406. between *Clarke and Gilbert.*

Cro. J. 39. pl. 2. Kellam v. Manesby, S. C. adjudged actionable; for ſtealing Corn ſhall be intended reap'd Corn, in the worſt Senſe.——S. C. cited Hob. 331. pl. 410. by the Name of Kelham's Caſe; and ſays the Court denied the Words to be actionable, unleſs there were ſome further Words of Explanation, as Corn in my Barn, or the like; for otherwiſe in Words meerly indifferent, the more eaſy Senſe, and fartheſt from the more heinous Charge, ſhall be taken; Per Hobart Ch. J.——Sty. 24 25. cites S P. as adjudged, in the Caſe of Ayre v. Higgins, to be actionable; and Roll Ch. J. ſaid it was a ſtrong Caſe. —— S. P. cited by Bacon J. to have been adjudged. Sty. 73.

He is a Thief, and I will prove him to be a Thief; for he hath ſtolen my Corn. Adjudged by Lev and Dodderidge for the Plaintiff. 2 Roll Rep. 440. Trin. 21 Jac. B. R. Smith v. Shortred.——S. P. by Doderidge and Jones J. Lat. 176. Mich. 2 Car.

He is a Thief; for he hath ſtolen my Sheaf of Corn. Adjudged actionable, becauſe it was Corn lying on the Ground, and the Party had a ſpecial Property; and ſo it is Felony. Bulſt. 173. Trin. 9 Jac. Petty v. Waight.

7. **If one Man ſays to another,** Thou art a Thief, and haſt ſtolen my Corn, Action lies; for the laſt Words abridge not the Force of the firſt Words. 2 Jac. B. R. between *Kelham and Maudi* adjudged. Contra Hob. Rep. Caſe 406.

Sty. 231. Bynion v. Trotter, S. C. and Roll Ch. J. ſaid the Turnips ſhall be intended pull'd

8. **If one ſays of another,** He is a Thief, and haſt ſtolen my Turnips ſeveral Nights, and my Graſs, though the laſt Words may imply that the Turnips and Graſs were growing when he ſtole them, yet it may be otherwiſe; and this is ſpoken cumulative; for he had called him Thief abſolutely, and has added further, that he ſtole his Turnips and Graſs, which is for Aggravation thereof, and not by Way of Explanation; for we cannot pervert the Words, and alter the ordinary

dinary Conſtruction of them, as where the Words imply an Aggravation, to interpret them to extend to an Explanation, which was contrary to the Intent of the Defendant, for any Thing appearing to us. Mich. 1650. between *Bonyon and Trotter* adjudged, this being moved in Arreſt of Judgment. Intratur Trin. 1650. Rot.

up, and the Graſs mow'd; and Judgment for the Plaintiff nifi Cauſa.

9. *Thou wouldeſt have ſtolen my Cloak if J. S. had not come in the Way; and thou art a Thief, and I will prove it.* The whole Court held, That the laſt Words ſhould be taken and conſtrued in Abſtracto by themſelves, as in groſs, and not to be dependent on the former Words. And adjudged for the Plaintiff. 4 Le. 181. pl. 278. Trin. 29 Eliz. C. B. Anon.

Goldsb. 56 pl. 11. Norman's Caſe; but there the Words are, *Thou wouldeſt have ſtolen a Piece of Cloth, or elſe thou wouldeſt have delivered it to my Wife's Daughter, and thou art a Thief, and an arrant Thief, and I will prove it.* Adjudged by 5 Juſtices (abſente Anderſon) for the ſame Reaſon; but Rhodes ſaid it would be otherwiſe if the Words had been, *and therefore thou art a Thief.*

10. Saying of a *Surgeon*, that *he did poiſon the Wound of his Patient*, it is not actionable; for it might be in order to cure it. Het. 175. Arg. cites Suego's Caſe in the Book of Entries; but adds, that ſaying he did poiſon the Wound of his Patient *to get Money*, it is actionable. Het. 175. cites 33 & 34 Eliz. C. B.

11. If A. ſays *B. hath broken my Houſe I will hang him for it*; this will not maintain an Action; Per Popham Ch. J. Cro. E. 834. Trin. 43 Eliz. B. R. in pl. 4.

So, *Thou haſt broken my Shop and taken my Goods* (innuendo that he had robb'd him of them) not actionable; cited Cro. E. 192 in pl. 5. as adjudg'd in the Caſe of George v. Parker. —— Noy 57. cites S. C as adjudg'd accordingly.

12. *Thou haſt cut my Purſe, and I will charge thee with Felony*, adjudg'd not actionable, it not being ſaid (feloniouſly.) Cro. E. 890. pl. 5. Trin. 44 Eliz. B. R. Latham v. Humphrey.

Thou haſt taken my Money, and I will carry thee before a Juſtice [and] lay Felony to thy Charge, are actionable; per Coke Ch. J. Godb. 202 pl. 289. Trin. 10 Jac. C. B. Anon.

13. *Thou art a lewd Fellow, for thou haſt drawn ſuch a Man to Perjury.* Adjudg'd in B. R. and affirm'd in Error that the Words are actionable; for by all the Juſtices and Barons, it is all one as if he had ſaid, Thou haſt ſuborn'd a Man to perjure himſelf. Cro. E. 899. pl. 44 & 45 Eliz. Clark v. Penkeven.

Thou art not ſo honeſt a Man as thou takeſt thyſelf to be; for thou haſt drawn J. S. to Perjury. Cro. E. 906. pl. 14. Dag v. Penkeven ſeems to be S. C. and adjudg'd accordingly.

14. *Thou art a perjured Knave, and that will be proved by a Stake that ſtandeth between the Ground of J. S. and J. D.* Adjudg'd not actionable; for tho' the firſt Words are actionable by themſelves, yet the ſubſequent Words qualify them; for the Word (and) is the ſame as (for) and ſo the Perjury charged is referr'd to the Proof of a thing inſenſible, viz. a Stake. Yelv. 34. Paſch. 1 Jac. B. R. Lewis v. Acton.

Yelv. 10 Mich. 44 & 45 Eliz. B. R. Brecheley v. Atkins S. C. the Court divided. —— Mo. 666 pl. 912. Bridge v. Atkins S. C adjudg'd not actionable, and this particular Addition corrects the Generality of the Words before —— 4 Rep. 18. b. pl. 5. Brittridge's Caſe S. C. adjudg'd not actionable —— But ibid. 19. b. at the End of the Caſe, it was ſaid that the Truth of the Caſe was that in an Action between Martin and Wright the State of the Controverſy was, whether the ſaid Stake ſtood upon the Land of the one or the other, or whether it was indifferent as a Boundary between them, and in this Action the Plaintiff depoſed as a Witneſs, and as the Defendant pretended, had perjur'd himſelf in his Depoſition; And it was ſaid that if the Plaintiff's Counſel had diſcloſed this Matter in the Count, the ſaid Words would have maintain'd the Action; and for want of ſhewing this ſpecial Matter, it was adjudg'd againſt the Plaintiff. —— Brownl. 7. cites S. C. and ſays one Judge was for the Plaintiff, and one for the Defendant.

15. F. said *N. is a Felon.* A. said to F. Take Heed what you say. *Why* (replied F.) *Is not he a Felon that knew of a Murder and concealed it? He* (Innuendo N.) *knew of the Murder of L. and did not reveal it till long after it was openly known.* Adjudg'd for the Plaintiff, becauſe the firſt Words are actionable and the ſubſequent Words enlarge the Slander; for tho' concealing Felony is only finable &c. yet it is a great Imputation. Judgment for the Plaintiff, per tot. Cur. præter Yelverton. Yelv. 154. Paſch. 7 Jac. B. R. Newlyn v. Faſſet.

If *Words that are not actionable are joined with Words that are actionable, but ſpoke at different Times, and under different Colloquiums*, one Part ſhall not be taken to explain the other ſpoke at one time by what is ſaid after. Warner.

16. There is a *Diverſity* between Words *utter'd Continuata Voce*, and *at ſeveral times*, As to ſay, Thou art a Felon, for that thou ſtoleſt my Apples off my Trees, are not actionable; for the Reaſon of the ſpeaking inſtantly annex'd qualifies the precedent Words; but if a Man ſays, Thou art a Thief, and a Stander by ſays, Beware what you ſay, and the other replies, I will juſtify he is a Thief, for he ſtole my Evidence; this is Inepta Ratio of the firſt Words, not voluntarily proceeding from the Party, but as it were urg'd by the other, and therefore *pronounced too late to qualify the firſt Words.* Yelv. 154. Paſch. 7 Jac. B. R. per Cur. in Caſe of Newlyn v. Faſſet.

Arg. And Holt Ch. J. ſaid it would be hard to explain Words 11 Mod. 256. pl. 9. Mich. 8 Ann. B. R. in Caſe of Stebbing v.

17. *J. S. is a Traytor, for he robb'd a Man by the Highway.* Yelverton J. ſaid theſe Words were not actionable; becauſe the Reaſon does not concur nor depend upon the firſt Words; but Fleming Ch. J. e contra; for both the Words are ſlanderous, and tho' the Reaſon of the Parlance depends not on the Word (Traitor) yet it ſhall be conſtrued only as the greater Malice, becauſe he charges him with 2 ſeveral Matters which deſerve Death. Yelv. 154. in Caſe of Newlyn v. Faſſet, and the Reporter ſays the laſt ſeems good Law.

18. *Thou haſt ſtolen my Goods, and I will have thy Neck*, is actionable. 2 Brownl. 280. Mich. 7 Jac. C. B. Fleming v. Jales.

Roll Rep. 104. Kamelford v. Tuke S. C. and Mountague held the Words actionable, to which Haughton J. agreed, and that the laſt Words maintain the Action, but the firſt will not; for coining Money may be done lawfully; but Doderidge contra. Mountague order'd Judgment to be enter'd for the Plaintiff, unleſs Crooke J. on his coming, ſhould be againſt his Opinion.——The Reporter makes a Quære if coining of Money ſhall be taken in Meliori ſenſu, for if ſo, why then ſhould he be ſent to Gaol for it. Ibid.

19. *Thou was in L. Gaol for coining*; the Plaintiff anſwer'd him, *If I was there I anſwer'd it well enough*; the Defendant replied, *Yes, you were burnt in the Hand for it.* Reſolv'd that thoſe are malicious Words, and ſhew an Intent to accuſe him of being impriſon'd for coining, and the ſubſequent Words exaggerate and diminiſh not the former; and therefore adjudg'd actionable. Gro. J. 536. pl. 2. Trin. 17 Jac. B. R. Gainford v. Tuke.

20. *Thou haſt pick'd my Pocket and taken away* 10 *s.* not actionable; for he did not ſay that he had *ſtolen* 10 *s.* But if he had only ſaid, Thou haſt pick'd my Pocket, it would have been actionable. Godb. 287. in pl. 413. Arg. cites it as adjudg'd in C. B. Humfries's Caſe.

2 Roll Rep. 153. Arg. cites S. C.

21. *He received Goods that were ſtolen, and will be hang'd for them.* Adjudg'd not actionable, it not being ſaid that *Scienter recepit.* Palm. 67. Mich. 17 Jac. B. R. Arg. cites the Caſe of Ratcliff v. Long.

Thou haſt raviſh'd a Woman twice, and I will make thee ſtand in a white Sheet.

22. *Thou perjured Beaſt, I will make thee ſtand upon a Scaffold in the Star-Chamber.* Adjudg'd actionable; for the laſt Words do not mitigate the former, but ſhew what the Intent was in theſe Words. Cro. J. 613. pl. 1. Paſch. 19 Jac. B. R. Benſon v. Hall.

It was argued not to be actionable, becauſe the laſt Words expound the former. Et adjornatur.

jornatur Cro J. 666. pl. 2. Paſch. 21 Jac. B. R. Ridges v. Milles.———Godb. 287. pl. 413. Bridges v. Mills S. C. adjornatur. But the Opinion of the Court ſeem'd to be that the Action would lie for the Words.

23. *He is a Thief, he ſtole my Corn and never made me Satisfaction*; 3 Juſtices held that an Action will lie, but Hobart e contra; And per Jones J. the Word (Thief) will maintain it, and the laſt Words ſhall not extenuate it. And Judgment abſolute was given for the Plaintiff. Jo. 43. pl. 1. Mich. 21 Jac. C. B. Arys v. Higgyns. 2 Roll Rep. 380. Ayrye v. Higgens S. C. and tho' Hobart ſaid he was not ſatisfied, yet he conſented that Judgment be enter'd for the Plaintiff.———Hutt. 65. S. C. ſays nothing of any Judgment given, but that they all agreed that that which qualifies or extenuates Words ought to be full, and not ambiguous.

24. *He is a Thief, for he hath ſtolen my Evidence*, or my *Lead off my Houſe*, no Action lies. Cro. J. 674. pl. 7. Mich. 21 Jac. C. B. Arg. and agreed by the Court to be good Law; for in thoſe Caſes it is not ſhewn that any Felony was committed, and the Words do not import any. *You did rob me and took away my Evidences and a Subpœna*, not actionable; cited by Coke. Godb. 89 in pl. 99. as adjudg'd, Osborne v. Frittell.

You have ſtole the Shutters of my Window; held not actionable, becauſe the Shutters are Parcel of the Houſe; but if he had ſaid, *You are a Thief; for you have ſtolen the Shutters off my Window*, it ſeems they are actionable, becauſe the precedent Words ſhew that he intended ſuch Shutters which were not Parcel of the Houſe. Sid. 104 pl. 12. Hill. 14 & 15 Car. 2. B. R. Hall v. Hammond.———Keb. 449. pl. 36. S. C. the Court inclined the Words not actionable; Sed adjornatur.

25. Thou art a *Thief, and haſt couſen'd my Couſin B. of his Land.* Crawley and Vernon J. held the former Words extenuated by the ſubſequent Words; but Heath Ch. J. and Hutton e contra, and that (and) and (for) in this Caſe have one Effect, and declare what Thief he intended, and upon Conference with the Judges, all agreed that the ſubſequent Words explain'd his Intent, viz. the Robbery and Couzening of the Land. Judgment againſt the Plaintiff. Hutt. 113. Mich. 8 Car. Harbert v. Angell.

26. *He hath ſtolen a Tree, formerly cut down, which is Felony, and I will cauſe him to be indicted for Felony*; adjudg'd, and affirm'd in Error, that the Words are actionable; for (formerly cut down) is to be intended a long Diſtance of Time, eſpecially when he adds (which is Felony, and I will indict him of Felony.) Cro. C. 572. pl. 11. Hill. 15 Car. B. R. Bryon v. Wilkes.

27. *He got Mary Nabb with Child, and the Child is his, and I have tried it with a Sieve and a Pair of Sheers.* Roll Ch. J. held the firſt Words poſitive ſcandalous Words, and the ſubſequent not material; but if they are, then they are in Confirmation of the former; for it ſeems he put Confidence in the Sieve and Sheers, and that made him ſpeak the Words, and it matters not whether his Confidence be true or falſe; and Judgment for the Plaintiff. Sty. 379. Trin. 1653. Sherecroft v. Weekes. S. C. cited Keb. 137. in pl. 66. by Twiſden J. as adjudg'd actionable.

28. *Thou haſt ſtolen our Bees* (Innuendo a Stock of Bees,) *they are hid under the old Woman's Hemp-ſeck, and thou art a Thief.* It was inſiſted that after Verdict they ſhall be intended ſuch Bees of which Felony may be committed; and Judgment was given for the Plaintiff, Niſi &c. Raym. 33. Mich. 13 Car. 2. B. R. Tibbs v. Smith. Keb. 136. pl. 66. Sic v. Smith, S. C. Windham conceived that if it were impoſſible for the former Words to ſupport the latter, the Words will not be actionable; but contra where they may ſupport the latter Words; and it was adjudg'd for the Plaintiff.

29. *I will indict R. at the next Seſſions, and he ſhall loſe his Eſtate, and it ſhall go hard with him for his Life; but his Eſtate he ſhall ſurely loſe for marking my Sheep.* It was inſiſted that theſe Words tantamount to Felony; but by Windham J. the latter Words mitigate all, and therefore Judgment was ſtay'd until &c. Raym. 12. Paſch. 13 Car. 2. B. R. Rawlins v. Hill. Keb. 17. pl. 47. S. C. adjudg'd not actionable.

30. *Thou*

2 Keb. 494. pl. 46. Gamble v. Jenney, S. C. adjudg'd accordingly for the Plaintiff.

30. *Thou art a Rogue, and receivedſt ſtolen Mutton of Beſs Gamble, and ſhe ſtole it, and thou was Partner with her, and hadſt Part of it.* It was moved in Arreſt of Judgment, that the Plaintiff was not charged with any Crime, but Beſſe Gamble; but adjudg'd for the Plaintiff, becauſe here the Partnerſhip relates to the other Words, and ſo muſt mean Partners in Theft. Sid. 413. pl. 12. Paſch. 21 Car. 2. B. R. Gamble v. Dana.

31. *He is a great Rogue, and kill'd a Man on Ship-board, and if he had not given Money to have taken himſelf off, he had ſuffer'd for it*; actionable by reaſon of the laſt Words, which ſhew that he intended a felonious Killing. Judgment for the Plaintiff. Freem. Rep. 278. pl. 313. Trin. 1679. B. R. Banfield v. Lincoln.

32. The Plaintiff alleg'd a Diſcourſe between W. and the Defendant, concerning the Plaintiff and a Baſtard of hers, and that W. ſaid, *I hope ſhe did not murder her Child*; to which the Defendant anſwer'd, *but ſhe did, and Blood requires Blood*, (Innuendo that ſhe had murder'd her Baſtard.) Adjudg'd actionable, and the Judgment affirm'd. 2 Jo. 211. Trin. 34 Car. 2. B. R. Nailor v. Clarke.

2 Jo. 235. Trin. 36 Car. 2. C. B. Walker v. Peaver, S. C. adjudged for the Plaintiff.

33. *Thou art a Clipper, and ſhalt be hang'd for it*, adjudg'd actionable; for it ſhall not be intended Clipper of Cloth, but of ſuch a Thing for which he ought to be hang'd, and that is only of Money. 3 Lev. 166. Mich. 35 Car. 2. C. B. Walter v. Beaver.

——— *So* Thou art a Clipper, *and thy Neck ſhall pay for it*, adjudg'd actionable; for by the ſubſequent Words it cannot be intended other Clipper than of Money. 3 Lev. 166. Mich. 35 Car. 2. C. B. Naden v. Micocke. ——— 2 Jo. 235. Trin. 36 Car. 2. C. B. Moyden v. Mycocke, S. C. adjudg'd actionable by 3 Juſtices, Windham diſſentiente. ——— Skin. 183. pl. 1. Naben v. Miecock, S. C. and 3 Juſtices held the Words actionable. ——— S. C. cited 3 Lev. 395.

Thou art a Clipper and Coiner. The Court held the Words actionable, in regard of the ſtrong Intendment, and ſuch Words are underſtood by thoſe that hear them to mean clipping and coining of Money. 2 Vent. 172. Paſch. 2 W. & M. in C B. Anon.

Thou art a Coiner of falſe Money, and I have Money to ſhew which thou coinedſt. It was objected that it did not ſay Money current in England, otherwiſe it is only Miſpriſion of Treaſon; but adjudged for the Plaintiff, abſentibus Popham & Gawdy. Cro. E. 629. pl. 24. Mich. 40 & 41 Eliz. B. R. Blake v. Stanley.

34. *You are a Break-Lock, and a Pick-Lock, and keep Pick-Locks in your Houſe, and I will arraign you, and have you whipp'd, and ſwing for it.* It was urg'd that the laſt Words import Felony. Judgment for the Plaintiff. Comb. 52. Trin. 3 Jac. 2. B. R. Peat v. Parry.

(S. a) For Words *in Diſgrace of a Profeſſion.*

The Pleas under this Diviſion are not confin'd ſtrictly to a Profeſſion, but contain other Matters.

Cro. C. 459. pl. 4. Webb v. Nicholls, S. C. adjudg'd for the Plaintiff in B. and that Judgment affirm'd in B. R.

1. IN an Action upon the Caſe, if the Plaintiff declares that whereas he was an Attorney de B. for ſeveral Years before, and whereas he was retain'd ſuch a Day by one Helmes, to proſecute a Suit for him againſt J. S. in B. the Defendant præmiſſorum non ignarus, yet of his Malice to ſlander him, having a Communication with the ſaid Helmes concerning the Plaintiff, ſaid theſe Words of the Plaintiff, You may be aſham'd to employ that Knave, (naming him) for you will receive Diſgrace and Shame by it; for he is a Knave, and a proclaim'd Knave in open Market, by which he loſt ſeveral Clients &c. Action lies for theſe Words; for it appears upon the whole Matter,

ter, that this is ſpoke of him in his Profeſſion of an Attorney, inaſmuch as it is alleg'd that the Defendant was not ignorant of the Employment of the Plaintiff by the ſaid Holmes, and the Words that he ſhould not employ him &c. Paſch. 12 Car. B. R. between *Nichols and Dr. Webbe*, adjudg'd in a Writ of Error upon a Judgment in B. and a Judgment given in B. affirm'd, per Curiam. Trin. 11 Car. Rot. 372. B. R.

2. [So] If A. having Communication of B. an Attorney, and of his ſaid Office of an Attorney, ſays before the Clients of B. that B. is a baſe Rogue and Knave, and maintains his Wife and Children by his Knavery and cheating Tricks, Action lies for theſe Words. Mich. 14 Car. B. R. between *Shaw and Wakeman*, per Curiam, adjudged in a Writ of Error upon a Judgment * in Bath. and the Judgment affirm'd accordingly. Intratur Trin. 12 Car. Rot. 125.

Cro C. 515. pl. 15. Anon. ſeems to be S. C. adjudg'd, and * Fol. 55 affirm'd in Error; for the Words touch him in his Profeſſion.

An Attorney of C. B recover'd, in Action on the Caſe on theſe Words, *He is the falſeſt Knave in England, and by God's Blood he will cut thy Throat.* Mo. 61. pl. 171. Trin. 6 Eliz. Anon.——Dal 63. pl. 22. S. C. in the ſame Words.——S C cited Het. 140. as adjudg'd in the Caſe of Diſtrey v. Dorrel, in C. B. and that the Words ſhall be underſtood (falſe, as an Attorney.)

3. In an Action upon the Caſe, if the Plaintiff declares that he was an Attorney of B. R. and a Filizer there, and retain'd to ſolicite Cauſes in the Exchequer, C. B. and Spiritual Court, for one Jones, and was to receive 15 l. of him for Proſecution thereof; and that the Defendant having a Diſcourſe of the Plaintiff, and of the ſaid 15 l. and of the ſaid Suits, ſaid of the Plaintiff He is a couzening cheating Knave, and Mr. Jones hath left with me 15 l. but I will not deliver it him, but I will ſee the laying it out; for he is a couzening Knave; an Action upon the Caſe lies for theſe Words, for this diſgraces him in his Profeſſion; for it is lawful for an Attorney to proſecute Suits in other Courts as a Solicitor, he being retain'd to do ſo. Trin. 16 Car. B. R. between *Eveleigh and Parker*, adjudg'd per Curiam, this being moved in Arreſt of Judgment.

Thou haſt couzen'd Mr. W. of his Fee, and I will ſue thee for it in the Star-Chamber, for that thou didſt not come for W. Adjudg'd for the Plaintiff, an Attorney. Brownl. 3. Trin. 11 Jac. Stephens v. Battyn.——S C. cited 2 Roll Rep. 72. 73.

The Plaintiff declared that he was an Attorney, and that there being a Colloquium concerning his Office, the Defendant ſaid *He is a Couzener, and hath couzen'd me of* 20 *s.* is actionable; and Judgment for the Plaintiff. Het. 122. Mich 4 Car. C. B. Litman v. Weſt.

He (meaning the Plaintiff) *is a Couzener, and couzen'd his Clients in the Sheriff's-Court at London, and was for that Cauſe diſcharged of that Court*, were ſpoke of an Attorney of C. B and the Court held the Words were ſcandalous Words, and touch'd him in his Profeſſion; and ſo a Judgment in C. B. was affirm'd. Cro. C 261. pl. 6. Trin. 8 Car B. R. Mead v. Perkins.

Words of an Attorney, *He is a baſe, cheating, couzening Knave, and hath cheated me as never any Man was cheated.* The Queſtion was, whether an Action would lie for theſe Words; for if he had not ſhewn that he was an Attorney, an Action would not have lain; and if it is laid barely without any Circumſtance, it doth not appear that it toucheth him in his Profeſſion, and therefore the Court would adviſe. Cro. C. 510. pl. 4. Mich. 14 Car. B. R. Jefferies v. Payhem.

But then was vouch'd a Caſe about 2 Years paſt of one *Pain*, an Attorney of B. R. v. where it was ſurmiſed that he proſecuted a Cauſe in a Court of Requeſts &c. and that ſuch Words were ſpoke of him in the Proſecution of the ſaid Suit; and the Court was of Opinion, upon my Motion for Pain, that the Action did not lie, and gave a peremptory Rule accordingly for Judgment againſt the Plaintiff; but now the Court retracted this Opinion; and after, this ſame Term, Pain moved for Judgment in this Cauſe alſo; but it was adjourn'd; but after Judgment was given for the Plaintiff.

This Plea is not mark'd in Roll with any Number.

4. If A. ſays of an Attorney, having Communication with the Attorney concerning 20 s. due to J. S. in full Diſcharge of a Judgment obtain'd by the ſaid J. S. againſt the ſaid A. in Treſpaſs, You

are a ſherking Attorney; and at another Time ſays of him, He is a cheating Attorney, and he may be thrown over the Bar, an Action lies. Hill. 18 Car. Rot. .... B. R. between *Bird and Woodcoke*, adjudg'd, this being moved in Arreſt of Judgment.

Hob. 8. pl. 18. S. C. The Court were at firſt divided, but afterwards they gave Judgment for the Plaintiff.—Brownl. 6. S. C.—

5. If A. has Parlance with B. touching C. an Attorney, who before was retain'd by B. to be his Attorney, and A. ſays to B. Your Attorney (Innuendo the ſaid C.) is a bribing Knave, and hath taken 20 l. of you to cozen me, theſe general Words will maintain an Action, and the laſt Words do not extenuate them; for if any one has any Intermeddling in Caſe of Juſtice, be he Judge, Officer, or Attorney, if he receives any undue Reward for any Thing contrary to Juſtice, this is a Bribe. Hob. Rep. 13. between *Hardly and Ellis*, adjudg'd.

Mo 855. pl. 1173. Mich. 11 Jac. S. C. and after ſeveral Arguments adjudged actionable.——Win. 39. S. C. cited Arg. as adjudged not actionable; but Winch interrupted him, and ſaid it was adjudged the contrary.—S. C. cited as actionable, Het. 173.

He (Innuendo the Plaintiff) *took corruptly 5 Marks of B. T. being againſt his own Client, for putting off and delaying an Aſſiſe againſt him.* It was moved, that the Declaration did not expreſsly allege that he was an Attorney at the Time of ſpeaking the Words, but laid it that he had been an Attorney. The Court held the Words actionable; but it is ſaid in Marg. that Judgment was arreſted on the Exception. Brownl. 1. Smayles v. Smith.

Hob. 117. pl. 145. S. C.— Mo. 867. pl. 1200. Paſch. 14 Jac. C. B. Cox's Caſe, S. C. adjudged actionable.— Brownl. 15.

6. If a Man ſays of an Attorney, Thou art a common Maintainer of Suits, and a Champertor, and I will have thee thrown over the Bar next Term, Action lies for theſe Words, Thou art a Champertor; for this is againſt his Office and the Statute; but no Action lies for the other Words, Thou art a Maintainer of Suits; for this is lawful for him to do, and juſtifiable, and the other Words of throwing over the Bar are of an uncertain Senſe. Hob. Rep. 163. between *Box and Barnaby* adjudged.

S. C. adjudged for the Plaintiff, by reaſon of the Word Champertor only.——S. C. cited Per Hobart Ch. J. Win. 40.

Cro. E. 602. pl. 15. S. C. and the Words there are, *Thou art a cozening Knave, and getteſt thy Living by Extortion, and didſt cozen one P. in a Bill of Coſts of* 10 *l.*

7. If a Man ſays of an Attorney, He is an Extortioner, and one J. S. told me, That he had cozened him in a Bill of Coſts of 10 l. Action lies for theſe Words; for it is againſt the Oath of an Attorney to commit a Falſity. Hill. 40 Eliz. B. between *Stanley and Boſwell* adjudged.

All the Court held, that for the Words (Thou art a cozening Knave) no Action lies, for they are too general; and for the Words (Thou getteſt thy Living by Extortion) no Action lies, for he may do ſo, and be no Extortioner; but the laſt Words touch'd him in his Profeſſion, and were adjudged actionable for the Reaſon above.

All. 13. Trin. 22 * Fol. 54. Car. B. R. S. C. and becauſe no Colloquium was laid of his Profeſſion, Bacon J. was of Opinion againſt the Plaintiff, but Roll Ch. J. e contra, becauſe the ſubſequent Words declare, that the Word (Knave) was intended of him in his Profeſſion, and therefore needed no Colloquium of his Profeſſion; and afterwards Bacon J. having chang'd his Opinion, Judgment, with his Aſſent, was given for the Plaintiff.

8. If one ſays to an Attorney, You are a Knave; you were an Attorney for my Mother againſt my Husband, and ſet her on to ſue him, and made him ſpend 1000 l. and ſuch Knaves, as you are, have * made my Husband ſpend almoſt all his Eſtate, Action lies for theſe Words; for this diſgraces him in his Office of an Attorney. Paſch. 23 Car. B. R. between *Hilton and Playters* adjudged Per Curiam, in a Writ of Error upon a Judgment in B. and the Judgment affirm'd accordingly. Intratur Hill. 21 Car. Rot. 30.

9. If

9. If a Man says of an Attorney, He keepeth many Markets, and stirreth up Men to Suits, and promiseth if he do not recover in their Cause he will take no Charges; and he once promised me, that if he did not recover in a Cause for me he would take no Charges of me; yet afterwards he prosecuted a Suit, and obtained Judgment, and got Charges of me for that Cause; and that I can prove. Now there are such Articles against him, that if he were worth 3000l. he would not be left worth one Groat. Action lies for these Words, because for an Attorney to stir up Men to Suits, is not lawful, but is a Badge of a Barretor; and to contract beforehand not to take Charges if he does not recover, is a Badge of Maintenance, and not lawful. Mich. 1649. between *Smith and Andrews* adjudged, in a Writ of Error upon a Judgment in B. and the Judgment affirmed accordingly. Intratur Trin. 1649. Note, the Action was also brought for other Words mentioned in the Declaration to be spoke at another Time, of which no Question was but that they were actionable; but the only Question was upon the Words here before mentioned. Sty. 183. S. C. adjudged for the Plaintiff in C. B. and affirm'd in B. R.—(I. b) pl. 7. S.C. but S P. does not appear.—(K. b) pl. 7. S. C. but S P. does not appear.

10. If a Man says to a Doctor of Physick, Thou art a Quacksalver, an Action upon the Case lies; for it is well known what is intended thereby, and it is a great Disgrace to him. Mich. 5 Car. between *Allen and Eaton* adjudged, this being moved in Arrest of Judgment, where the Plaintiff was Physician to the King; and the Defendant said, He is not the King's Physician but a Quacksalver.

11. If a Man says to a Doctor of Physick, Thou art a drunken Fool, and an Ass; thou never wast a Scholar, thou art not worthy to speak to a Scholar; this I will prove and justify. Action lies for these Words, tho' there was no Discourse of his Profession before; for he cannot be a good Physician if he be not a Scholar in other Matters. Mich. 8 Car. B. R. between *Cawdry and Chickly*, this being moved in Arrest of Judgment. And after Trin. 9 Car. Judgment was given Per Curiam for the Plaintiff. Cro. C. 270. pl. 5. Cawdry v. Highley, alias Tythey, S. C. Richardson at first was of Opinion the Words were not actionable, but he would advise; and afterwards Trin. 9 Car. it was adjudged for the Plaintiff.—Godb. 441. pl 529. Cawdry v. Tetley, S. C. held actionable by Crooke and Jones J.

12. If a Man says of a Doctor of Physick, He is an Emperick and Mountebank, and a base Fellow, Action lies, without any Averment of the Signification of the Words; for these are Terms of Disgrace well known, and in Disgrace of his Profession. Pasch. 12 Car. B. R. between *Dr. Goddart and Haselfoot* adjudged, this being moved in Arrest. Intratur Trin. 11 Car.

13. If A. having Communication with B. about his Attorney, says to him, Your Attorney is a bribing Knave, and hath taken 20l. of you to cozen me, an Action lies for the Attorney, because this disgraces him in his Profession; for it is a Scandal to him to give any Bribe to any. Pasch. 12 Jac. B. Trin. 12 Jac. B. between *Yardley and Ellett*, Per Curiam adjudged. See pl. 5. S. C. and the Notes there.

14. If a Man says to an utter Barrister, Thou art no Lawyer, thou canst not make a Lease, thou hast that Degree without Desert; they are Fools that come to thee for Law. Action lies. Mich. 13 Jac. B. between *Banks and Allen*. *You a Counsellor? a Fool, an Ass, a Hangman, a Counsellor at Law, a Fool in the Profession.* Adjudged actionable. Poph. 207. Per Jones J. Trin. 2 Car. B. R. Cary's Case.

15. If a Man says to an Attorney, Thou art a common Barretor, a Judas, and a Promoter, Action lies for these Words; for to be a common Barretor is a great Disgrace to an Attorney. Trin. 6 Car. B. R. Cro. C. 192. pl. 1. Taylor v. Starkey, S. C. it was

objected that there was no Colloquium of the Plaintiff as Attorney. But all the Court conceived the Action well lies, and Words are to be construed Secundum Conditionem Personarum of whom they are spoken. Whereupon the Judgment was affirm'd.——Hutt. 104. Trin. 5 Car. S. C. and the Ch. J. seemed to be of Opinion that the Words are no more than if he had said, That he was a common Brabler or Quarreller; but it was afterwards strongly urg'd by Serjeant Hitcham that the Words are actionable; [and I do not observe that any thing more was spoken by the Court, the rest of the Report seeming to be only the Argument of the Serjeant]——Her. 139. S C Richardson doubted, and questioned whether the Words should have Relation to him as Attorney, but Hutton and Harvey thought the Words as well applicable to his Profession as if it had been found that there was a Colloquium of him as Attorney, it being laid that he was such, and that he lived by that Profession, and that the Defendant maliciously to hinder him in his Profession spoke those Words. Adjornatur.——Ibid 143. S.C. adjudged for the Plaintiff.

You have paid the Judas with your Client, was said by Hutton and Harvey, and agreed by Richardson to be actionable without Doubt. Her. 141. in the Case of Starkey v Taylor.

Fol. 55.

Cro. C. 382. pl. 11. Peard v. Johns, S. C. adjudged for the Plaintiff.

16. In an Action upon the Case for Words, if the Plaintiff declares that he is an utter Barrister of the Middle-Temple, and a Practiser of the Common Law for several Years, and the Defendant of Purpose to defame him, maliciously said of him to J. S. his Father in Law, Did Mr. Pearce, the Plaintiff, marry your Daughter? To which J. S. said, Yes; to which the Defendant replied, He is a Dunce, and will get nothing by the Law; to which J. S. answered, Other Men have a better Opinion of him; to which the Defendant replied, He was never accounted otherwise in the House. The Action lies upon this Declaration; for a Man may be heavy, and not so ready as others are, and yet a good Lawyer. But here, it appears, upon the whole Matter, that it was spoke maliciously, and he said that he would not get any thing by the Law, which disgraced him in his Profession. Mich. 10 Car. B. R. between *Peares and Jones* adjudged, this being moved in Arrest of Judgment, after a Verdict for the Plaintiff. Intratur 10 Car. Rot. 411.

——*He is a paltry Lawyer, and has as much Law as a Jackanapes*, being spoken of a Counsellor at Law, and Steward to J. S of his Manors, was adjudged actionable, the Words being scandalous, and touching him in his Profession. Cro. E. 342 pl. 9. Mich. 36 & 37 Eliz. B. R. Palmer v. Bowyer. ——Goldsb. 126. pl. 17. S. C. adjudged for the Plaintiff.——Ow. 17. Palmer's Case, S. C. but there the Words are, *I marvel you will have such a paltry Fellow for your Steward; for he hath as much* Law as a Jackanapes. The Plaintiff shew'd, that by Reason of such Words he was displaced of his Office. Judgment for the Plaintiff. But if he had said, That *he had no more Law than J. S.* it is not actionable, tho' J. S. be no Lawyer.— S C cited Mo. 409. pl. 553. as adjudged actionable.——Win. 40. S. C. cited by Hobart Ch. J. as adjudged actionable.—— S. C. cited as actionable. Godb 411. pl. 509. but that an Action would not have laid, if he had said *No more Wit* than &c.——Mar. 59. pl. 93. S. P. cited by Berkley as adjudged not actionable; but if he had said, that He hath no more Law than a Monkey, the Words would be actionable.

Cro. C. 382. pl. 11. Peard v. Johns, S. C. but S. P. does not appear.

17. If a Man says of a Counsellor of Law in the North, Thou art a Dassa-down-dilly, an Action lies, with an Averment that the Words signify that he is an Ambodexter. Mich. 10 Car. B. R. in *Peare's* Case, said to have been adjudged in Scaccario, and agreed per Curiam.

——S. P. cited by Tanfield J. to have been adjudg'd in Preston's Case, Noy 98.— S. P. cited by Richardson, Het. 127. as adjudged actionable, because the Word being spoken in the North, it signifies there an Ambodexter.——Dal. 97. in pl. 27. cites Neverel's Case, S. P.——S. P. in a Nota of the Reporter. Mo. 409. in pl 553.——S. P. cited as adjudged actionable. Cart. 214.

Thou art an Ambodexter, being spoke of an Attorney, was adjudged actionable, because it slanders him in his Profession, and is as if he had said that he was corrupt in his Office. Godb. 214. pl. 304. Mich. 11 Jac. C. B. Anon.

B. is a good Attorney, but that he will play on both Sides, is actionable. Brownl. 5. Pasch. 13 Jac. Brown v. Hook.

You are a paltry Lawyer, and use to play on both Hands, being spoke of a Counsellor, were held not actionable; but there being other Words added, viz. *He is a Furtherer and Maintainer of Felonies*, are actionable, tho' it was insisted he was no Justice of Peace nor Publick Officer. Cro. J. 267. 268. pl. 30. Mich. 8 Jac. Rich v. Holt.

18. If a Man says to an Attorney, Thou sayest thou art an Attorney, but I think thou art but an Attorney's Clerk; and if thou be, I will have thee pick'd over the Bar next Term. No Action lies for these Words, because it is uncertain whether he intends that he himself will pick him over, or the Court. Pasch. 7 Jac. B. *Tootman's* Case adjudged. 2 Brownl. 253. Trotman's Case, S. C. it seems the Words are not actionable.—

Is M. your Attorney? He is the foolishest and simplest Attorney towards the Law, and if he does not overthrow your Cause I will give you my Ears; he is a Fool and an Ass. These Words are actionable, being spoke of an Attorney; for it is a great Slander, and touches him in his Place. And he had Judgment, tho' the Court upon the first Motion conceived the Words not actionable. —Cro. E. 589. pl. 25. Mich. 39 & 40 Eliz. B. R. Martyn v. Burlings ——Goldsb. 128. pl 21. S. C. accordingly, and adjudged for the Plaintiff. And Popham said that to say an Attorney *will overthrow his Client's Cause*, is an actionable Slander.

19. If a Man says to an Attorney, That he is a common Maintainer of Suits, no Action upon the Case lies, because it is not any Discredit; for it is his Profession to maintain Suits. Hill. 14 Jac. B. between *Boxe and* Saying of an Attorney, That *he is a common Stirrer up of Suits, and a*

Disturber of the Peace, and so a Mover of unjust Actions, without Doubt is actionable. Said by Counsel. Arg. Het. 140. Trin. 5 Car. C. B.

He sets People together by the Ears, and we shall have him indicted for a common Barretor. The Words being spoke of an Attorney, are actionable, notwithstanding Box and Barnaby's Case. And Judgment for the Plaintiff. Cart. 214. Pasch. 22 Car. 2. C. B. Annison v. Blosfield.

20. If a Man says to an Attorney, That he is a common Champertor, Action upon the Case lies; for this is to have Part of the Thing in Demand pending the Writ, which is not lawful for an Attorney to do, and so a Disgrace to his Profession. Hill. 14 Jac. B. between *Boxe and* adjudged. See supra, pl 6. S. C.

21. If a Man says of an Attorney, that he has the Falling Sickness, an Action lies, because this disables him in his Profession, for by Reason thereof he cannot follow the Duty of his Profession. Hill. 4 Jac. in * *Taylor and Perr's* Case held. Noy. 117. Taylor v. Perkins S.C. but S. P. does not appear. ——

Cro. J. 144. S. C. but S. P. does not appear.——— * See (H. a) pl. 4. S.C. but not exactly S. P.

22. If a Man says to a Counsellor, Thou a Barrester? Thou a Barretor? Thou called to the Bar? Thou wert put from the Bar. Action upon the Case lies, though the Words are not certain; nor is it said that he is a common Barretor in his Profession. Pasch. 8 Jac. in the Exchequer-Chamber adjudg'd. See the same Case among the Reports de Pasch. 8 Jac. B. between *Bestley and Dison.* Noy. 98. S. C. by the Name of Preston's Case, adjudged for the Plaintiff, and affirm'd

in Error.—— 13 Rep. 71. Dison v. Bestney S.C. and with these further Words, viz, *and thou dares't shew thy self there, Thou study the Law? Thou hast as much Wit as a Daw.* Adjudg'd in B. R. for the Plaintiff, and affirm'd in Error in the Exchequer-Chamber.

23. If a Man says to J. S. an Attorney, He is an Extortioner, and one P. told me that he had cozen'd him in a Bill of 10 l. an Action lies for these Words; for it is against the Oath of an Attorney to commit a Falsity. Hill. 40 Eliz. B. between *Stanley and Boswell*, adjudged. See Supra pl. 7. S. C. and the Notes there.

24. If a Man says to a common Smith, Thou art a Rogue, and a cozening Rogue, and in one Tire of Wheels which thou didst send to J. S. thou didst cozen him of a Noble, no Action lies for these Words; for it may be intended (and the Words in themselves import that they intended) that he had cozen'd J. S. in the Price only, and not in the ill making of the Wheels; and for saying to such Men of See (U. a) pl. 24.

Trade who sell * Things that they cozen in the Price is no Disgrace, for every Trader cozens in the Price when he sells for more than the thing is worth, and here it is not said that the Smith made this Tire of Wheels, and if he did not make it, it can be no Disgrace of his Trade. Pasch. 16 Jac. B. between *Ticknell and Snelling*, per Cur.

* Fol. 56.

Poph. 139. S. C. by the Name of Powell's Case, and Mountague Ch. J said that all the Words besides the Words (*corrupted knave*) are idle, but these Words impeach him in his Office; for it has Reference to that, and therefore is actionable; and Judgment was given accordingly. —— 2 Roll Rep. 23. Powell v. Cole S. C it was objected that it is not shewn that there was any Colloquium between the Defendant and the Party that the Words were spoke of the Offices which the Plaintiff had, or of his Exercise of them, and so it is as if spoke of a private Person. Sed non allocatur, but Judgment was given for the Plaintiff.

25. If a Man says to an utter Barrister, who is a Town-Clerk of the Town, and a Steward of the Town-Court, Thou art a precisian Knave, a puritan Knave, a bribing Knave, a baggage Knave, a dissembling Knave, a corrupt Knave, and I will prove it &c. and thou hast not carried thy self as thou oughtest, and I will make thee know that thou hast wronged me in the Court of Plymouth (where he was, before and at the time of the speaking, Town-Clerk and Steward, as he avers in the Declaration) and thou hast not performed thy Office according to Law; Action lies for these Words, for it appears by the last Words that he was corrupt in Regard of his Misdemeanour in his Court and Office. Pasch. 16 Jac. B. R. between *Powell and Cowe* adjudged, this being moved in Arrest of Judgment.

Cro. J. 65. pl. 4. S. C. and Williams J. held the Words not actionable, but the other 4 e contra, and Judgment for the Plaintiff. —— Yelv. 62. S. C. says that Fenner and Williams held the Words not actionable, but the other 3 e contra, and Judgment for the Plaintiff. ——

26. If there be a Matter depending in Chancery between A. and B. and thereupon a Commission is directed to G. M. who is a Justice of Peace, and others to examine Witnesses therein, and also to hear and determine the same Cause, and G. M. and the others Act in the Execution of this Commission, and afterwards A. says of G. M. Sir G. Moore (which was his Name at large) is a corrupt Man, and hath taken Bribes of B. innuendo, Bribes for Favour to be done to B. in the Execution of this Commission; and at another time he says, B. hath set Sir G. Moore on Horseback with Bribes, whereby to defraud Equity and good Conscience. Tho' it doth not appear that the Commission was returned, yet it is alleged that he dealt in the Execution thereof, in which he might act corruptly, and tho' he was not any Judge nor Officer sworn in this Commission, but elected by one Party, and so might be partial to this Party, and take a Reward for his Pains, yet the Action upon the Case lies for these Words, inasmuch as by this Commission of Oyer and Terminer the King intrusts him, corrupt Dealing therein, and in the Examination of Witnesses, as in taking of Bribes, is punishable. Pasch. 3 Jac. B. R. between *Sir George Moore and Forster*, adjudged.

So saying to an *Arbitrator* by him that chose him, that he *has taken Bribes of the other Party so that he is fallen from hearing any thing of his Side*, is a Slander punishable, for by the Common Law such Corruption in Matters of Reference may be punish'd by Indictment. By Popham, Gawdy and Yelverton. Yelv. 62. Pasch. 3 Jac. B. R. in Case of Moore v. Foster.

See (D. a) pl. 24. S. C. and the Notes there.

27. If a Man says of a Justice of Peace, He was the true Patron of Advowson of S. but he hath lost that Patronage and Presentation by being a Simonist and Recusant, both which I will prove him to be, yet no Action lies for these Words, for tho' the Recusancy, which is the most material Word, be a good Cause to depose him from his Office, yet this does not touch him in the Male-Administration of his Office, nor in his Oath nor Allegiance, and it is not certain what Recusant he intends, for perhaps he intends a Recusant according to 1 Eliz. Trin. 16 Jac. B. R. between *Sir John Tasborrough* Plaintiff, *and* adjudged.

28. If

28. If a Man says of a Steward of a Court Baron and Leet, He hath put a Presentment into the Jury's Verdict against me of 3 s. 4 d for suing of P. W. out of the Court contrary to a Pain, without the Consent of the Jury, Action lies for these Words; for this Deceit disgraces him in his Profession. Mich. 4 Jac. B. R. between *Carr and Read*, per Curiam præter Popham. See (Y. a) pl. 7. S. C.

29. If a Man says of a Justice of Peace and Judge of the Court of the Marches of Wales, He is a Blood-Sucker, and seeketh after Blood, † if a Man will give him a Couple of Capons or half a Score of Weathers he will * take them, yet no Action lies, because the Words cannot have any ill Sense. Mich. 37 & 38 Eliz. B. R. between *Sir Christopher Hillard and Constable*, adjudged. † *But if any Man &c.* * Fol. 57. Mo. 418. pl. 574. S. C. adjudg'd not actionable; because a Man may thirst after Blood in Case of Justice.——Cro. E. 306. pl. 5. S. C. *But if any Man will give him a Bribe, as Sheep &c.* the Court was of Opinion that the last Words not being found, no Action lay for the first; for it cannot be intended what Blood he suck'd, and by Advice of the greater Part of the Justices of England, it was adjudg'd for the Defendant.——Ibid. 433. pl. 41. Mich. 37 & 38 Eliz. B. R. S C. and as to the Words, *He is a Blood-sucker and seeketh others Blood*, Gawdy and Fenner held those Words not actionable; but Popham and Clench e contra. But this being moved at Serjeants-Inn, before all the Justices of England there assembled, the greater Part of them resolved that the Action lay not, and Judgment was enter'd (with Consent of Popham and Clench) for the Defendant.

30. If a Man says to a Justice of Peace, Thou art a Blood-Sucker, and art not worthy to live in a Commonwealth, the Child not born will curse thee, no Action lies for these Words. Mich. 38 & 39 Eliz. B. R. between *Pinchback and Warwick*, adjudged upon a special Verdict cites Mich. 37 & 38 Eliz. B. R. S. P. held accordingly, Noy. 64. Thimmelthorp's Case, and the Words being the very same, it seems to be S. C.——2 Mod 163. S. C. cited Hill. 28 & 29 Car. 2 C. B. by Atkins J. in Case of Townsend v. Hughs, that the Words were not held actionable, because they neither relate to his Office, nor fix any Crime upon him.

31. If a Man indicts a Justice of Peace for a common Barretor, and he upon this is found Not guilty, and afterwards the Indictor calls the said Justice, common Barretor, Action upon the Case lies against him; because this discredits him in his Offices. Pasch. 38 Eliz. B. R. between *Poole and Benbricke*, adjudged. S. P. per Curiam, obiter. Hob. 140 pl. 191. Hill. 14 Jac. in Case of Thornton and Jebson.——*So* if the Words had been spoken *of a publick Officer, or an Attorney or the like.* Hob 140. per Cur. in Case of Thornton v. Jebson, obiter.——See (U. a) pl. 3. S. C. ——See (H. a) pl. 7.——See supra pl. 15.

32. If a Man says of a Justice of Peace, He hath taken Money of a Thief that was brought before him for stealing of Sheep, to deliver him and keep him from the Gaol; Action upon the Case lies for these Words. Trin. 38 Eliz. B. R. *Cotton's* Case adjudged. Mo. 695. pl. 965. S. C. by Name of Barker v. Cotton, adjudg'd in B. R. and Judgment affirm'd in the Exchequer-Chamber.

33. If a Man says of a Justice of Peace, He is a corrupt Man, he is a Vermin in the Commonwealth &c. Action upon the Case lies. Mich. 42 & 43 Eliz. B. R. between the Bishop of *Coventry and Litchfield and Worthy* dubitatur. Mo. 141. pl. 283. Pasch. 25 Eliz. Broughton's Case, *He is a Vermin in the Commonwealth, a false and corrupt Man, an Hypocrite in the Church of God, a Dissembler; he hath used many corrupt Practices to work his Will; he procured my Register to be indicted of Extortion; he willingly and wilfully hath boulster'd up one G. a lewd Man, convicted of many Offences, and knowing him to be an evil Man, maintaineth him against me, without Law, Conscience, or Honesty.* These Words were wrote in a Letter of the Plaintiff, a Justice of Peace, by the Bishop of L. and C. to the Earl of Leicester. All the Court held the Words actionable, tho' wrote in a Letter to a Stranger; otherwise if in a Letter to the Party himself; and tho' some of the Words are not actionable, yet the Damages were well given.——And. 119. pl. 168. Boughton's Case, S. C. all the Court held that some of the Words were not actionable by themselves, yet some held that all of them together would bear an Action, several of them touching him as

as a Juſtice of Peace, in doing Things corruptly and injuriouſly. And afterwards, upon a Conference with all the Juſtices met at Serjeant's-Inn, all (except 2) agreed the Action lay for the Reaſon before, and that Judgment ought to be given, notwithſtanding ſome of the Words divided are not actionable, and notwithſtanding the Damages were tax'd generally.——S. C. cited Cro. E. 192. pl. 5. as adjudg'd actionable upon the Words (He is a Vermin in the Commonwealth, and a corrupt Man.)

Thou dealeſt corruptly, being ſpoke of a Juſtice of Peace, Action lies; per Anderſon. Cro. E. 258. in pl. 18. Mich. 36 & 37 Eliz. C. B.

Cro. J. 308. pl. 6. S. C. adjudg'd for the Plaintiff, becauſe it touch'd him in his Place, in charging him of procuring one to take a falſe Oath before himſelf.

34. If at a Quarter-Seſſions J. S. makes Information upon Oath againſt J. D. of a Miſdemeanour, whereupon the Juſtices bind him to his good Behaviour, and after J. D. ſays to one of the ſaid Juſtices, by your Means I had Wrong at the Seſſions, and there you cauſed J. S. to ſwear that which was untrue againſt me, the ſaid Juſtice ſhall have an Action upon the Caſe againſt him for theſe Words, becauſe a Juſtice ought not to procure any Man to make a falſe Oath, and ſo it is againſt his Office. Mich. 10 Jac. B. between Sir *Walter Chetwin and Meeſon*, adjudg'd.

——Yelv. 220. S. C. adjudg'd accordingly.

Caſe &c. for theſe Words ſpoken of a Juſtice of Peace, *He makes uſe of the King's Commiſſion to worry me out of my Eſtate*, and held actionable. 3 Mod. 71. Mich. 1 Jac. 2. B. R. Newton v. Stubbs.

Palm. 67. S. C. adjudg'd for the Plaintiff —— 2 Roll Rep. 153. S. C. ſays the Opinion of the Court was that the Action lies; but Judgment was arreſted, becauſe the Defendant [who was a Miniſter, as Palm. 68. ſays] offer'd to make publick Submiſſion to the Plaintiff at the Aſſiſes.

35. If a Man ſays of a Commiſſioner upon a Commiſſion return'd by him into Chancery, He hath put out ſome Depoſitions that were taken, and added others that were not, Action lies; for this diſgraces him in his Reputation ſo as not to be a Commiſſioner again, and ſubjects him to a Fine in the Star-Chamber. Hill. 17 Jac. B. R. between Sir *Nicholas Parker and Large*, per Curiam.

Where the Plaintiff was a Commiſſioner of the Exchequer to take Examinations of Witneſſes, the Defendant ſaid of him, *He hath return'd Witneſſes that never were examined*, it was adjudg'd actionable. Palm. 67. Arg. cites 31 Eliz. Thoroughgood v. Fiſh.——Cro. E. 623. pl. 17. Mich. 40 & 41 Eliz. B. R. Fiſh v. Thorowgood, S. C. that He *hath return'd, as the Depoſitions of Witneſſes* into the Exchequer, *the Examination of Perſons who never were ſworn*; and reſolved to be actionable, and Judgment for the Plaintiff.—— S. C. cited Palm. 67. Arg. as adjudg'd actionable.——S. C. cited 2 Roll Rep. 153. Arg. but Haughton J. ſaid he believed the Caſe was not ſo adjudg'd.

Cro. J. 557. pl. 3. S. C. adjudg'd in C. B. and Judgment affirm'd, and all the Court held that it is good enough, without any Innuendo.—Palm. 69. S. C. and Judgment affirm'd.

36. If there be a Diſcourſe between C. and D. of M. F. and C. ſays to B. [D.] Mr. Deceiver hath deceived and cozen'd the King, and I have him in Queſtion for it, and I doubt not but to prove it againſt him, M. F. ſhall have an Action, averring that he was the King's Receiver of the Court of Wards, and that the Words were ſpoken of him; for it appears by the Nick-name given to him, ſcilicet, Deceiver, that he intends the Deceit to have been in his Office of Receiver, and by the other Words alſo. Hill. 17 Jac. B. R. between *Sir Miles Fleetwood and Auditor Curl*, adjudg'd in a Writ of Error upon a Judgment in B. where it was ſo adjudg'd alſo per Curiam. See the Caſe adjudg'd Trin. 17 Jac. B.

And Doderidge J. ſaid that if the Defendant had ſaid to the Auditor *Mr. Frauditor*, inſtead of *Mr. Auditor*, an Action would well lie.——2 Roll Rep. 148. Curle v. Fleetwood, S. C. and Judgment affirm'd.——Hob. 267. pl. 352. Hill. 16 Jac. S. C. adjudg'd in C. B.——Godb. 341. in pl. 435. S. C. cited as adjudg'd actionable, becauſe it was in his Calling by which he got his Living.——Mar. 82. in pl. 135. S. C. cited.

He diſcover'd all my Counſel to my Adverſary. The Plaintiff re-

37. If a Man ſays of a Counſellor of Law, Go you to him to be of your Counſel? He will deceive you; he was of Counſel with me, and reveal'd the Secrets of my Cauſe, Action lies for theſe Words; for it appears by all the Words that he intended a Slander by the revealing

revealing of that which he ought not. Trin. 13 Eliz. B. R. Rot. 114. between *Snag and Grey*, adjudg'd, this being moved in Arreſt. cover'd. Dal 97. in pl 2. cites 11 Eliz.

Snagge's Caſe.—If one ſays to a Counſellor, *Thou didſt diſcloſe my Counſel*, an Action lies; per Anderſon. Cro. E. 358. in pl. 18. Mich. 36 & 37 Eliz. C. B

So of a Counſellor or Attorney, *Thou didſt deliver my Evidence to my Adverſary*, an Action lies; per Beamond. Ibid.

Saying of a Lawyer, *He did reveal the Secrets of my Cauſe*, is not actionable; for he ought to reveal it to a Judge; but ſaying *Go not to him, he did reveal the Secrets of my Cauſe*, is actionable. Het. 174. Arg.

He hath dealt falſely with me being his Client, and hath join'd with my Adverſary. Per Cur. the Words are clearly actionable; but it being objected that the Plaintiff was ſequeſter'd, and did not practiſe at the Time of bringing the Action, Roll Ch. J. ſaid that the Plaintiff ought to *aver that he is a Practicer*; for he may be a Barriſter, and not practiſe; but as to this the Court would adviſe. Sty. 231. Mich. 1650. Gibs v. Price.

38. If a Man ſays of a Juſtice of Peace, I have often been with him for Juſtice, but could never have Juſtice at his Hands, but always Injuſtice, Action lies. Mich. 3 Car. between *Sir John Iſam and York*, adjudg'd, this being moved in Arreſt of Judgment. Cro. C. 14. pl. 5. S. C. The Court held that it could not be ſpoken of him as a private Perſon, or for any private Occaſion, but as he was a Juſtice of Peace; and ſo gave Judgment for him.

39. In an Action upon the Caſe by a Juſtice of Peace, if he declares that he was a Juſtice of Peace, and that one J. S. was brought before him to be examin'd touching the ſtealing of a Lamb, whereupon he was examin'd accordingly; and after the Defendant ſpoke theſe Words of him falſely and maliciouſly, He did of his own Head put into J. S.'s Examination that he had confeſs'd he had ſtolen the Lamb, Action lies for theſe Words; for this diſgraces him in his Office of a Juſtice of Peace; for theſe Words imply that he put it in his Examination without the Confeſſion of J. S. For if he put it in of his own Head, this could not be upon Confeſſion of the Party; for this is as much as to ſay he deviſed it of himſelf. Paſch. 1650. between *Hammond and Kingſmill*, adjudg'd per Curiam, this being moved in Arreſt of Judgment. Intratur Hill. 22 Car. B. R. Rot. 735. Fol. 58. Sty. 22. Paſch. 23 Car. S. C. adjudg'd actionable.—Sty. 210. Paſch. 1649. S. C. adjudg'd accordingly. *Thou haſt forg'd a Recognizance taken before F. and others*, adjudg'd actionable; for (forged) ſhall be intended (*falſely certified*,) and (taken) ſhall be intended for (*acknowledged*) And the Plaintiff being a Juſtice of Peace, who had Authority to take Recognizances, it is a great Slander to him; and he had Judgment. Cro. E. 883. pl. 16. Paſch. 44 Eliz. B. R. Chichely v. Barker.

40. Words ſpoken of a *Chirurgeon* were, That he was not a good Subject; for *he hath poiſon'd the Wound of A. for Gain of Money.* Agreed to be actionable. And. 268. pl. 277. Mich. 33 & 34 Eliz. Anon.

See pl. 1. 2. 3. 4. 5. 6. 7. 8. 9. 13. 15. 16. 19. 20. 21. 23.

(S. a. 2) Words ſpoken of an Attorney.

Dal. 63. pl. 22. S. C. accordingly.

1. *HE is the falſeſt Knave in England, and he will cut your Throat*, being ſpoke of an Attorney, with an Oath as to cutting the Throat, was held actionable. Mo. 61. pl. 171. Trin. 6 Eliz. Anon.

S. C. cited by Hobart Ch. J. Hob. 9. in pl. 18. —S. C. cited by Hobart Ch. J. Win. 40, 41.

2. *You are well known to be a corrupt Man, and to deal corruptly*, being ſpoke of a ſworn Attorney, are actionable, becauſe it touches him in his Oath, and alſo in the Duty of his Profeſſion, whereby he acquires his Living. 4 Rep. 16. pl. 6. Mich. 27 & 28 Eliz. B. R. Birchley's Caſe.

——*But if the preceding Parlance had been that the Plaintiff was an Uſurer, or was an Executor, and would not perform the Teſtament &c.* and thereupon the Defendant had ſaid the ſame Words, they would not be actionable. 4 Rep. 16. a. pl. 6. Mich. 27 & 28 Eliz. B. R. in Birchley's Caſe.

3. *He deſerves to have his Ears nail'd to the Pillory*, is actionable, being ſpoke of an Attorney. Mo. 401. pl. 529. Paſch. 37 Eliz. Jenkinſon v. Wray.

Cro. E. 914. pl. 3. S. C. by the Name of King v. Shore, adjudg'd and affirm'd in Error accordingly.

4. *Thou art a paultry Fellow, thy Credit is fallen; for thou dealeſt on both Sides, and doſt deceive many that truſt thee.* Adjudg'd and affirm'd in Error to be actionable, being ſpoke of an Attorney; for tho' an Attorney may deal on both Sides as an Arbitrator, yet all the Words being coupled together muſt refer to his Calling, and cannot be taken but in Malam partem. Yelv. 32. Hill. 45 Eliz. B. R. Shire v. King.

——Noy 11. S. P. adjudg'd for the Plaintiff, Niſi. Thompſon's Caſe.

5. Saying of an Attorney that *He ſuppreſs'd a Will*, is actionable; for it is a Defamation to him in a Thing concerning and belonging to his Profeſſion; but to ſay ſo of a Tradeſman it is otherwiſe, becauſe ſuch Words do not extend to his Trade or Profeſſion; per Mountague Ch. J. and Judgment accordingly as to the Tradeſman. Palm. 21. Mich. 17 Jac. in Caſe of Godfrey v. Owen.

* It ſeems that the Word (an) ſhould be (no.)

6. *Thou haſt made falſe Writings between J. S. and his Brother*, Arg. Win. 39. cites it as adjudg'd that * an Action lies. Hill. 17 Jac. B. R. **Elliot v. Brown.** But ibid. 40. Hobart Ch. J. ſaid he agreed the Caſe of Elliot v. Brown, that to ſay he made falſe Writings, no Action will lie; for it is no Scandal to him in his Profeſſion, becauſe it does not appertain to an Attorney to make Writings, no more than to an Apothecary to give Phyſick.

7. *Is W. your Attorney? Take heed and follow him well; for elſe he will make you throw your Purſe over your Boſom*, actionable; for it is a Scandal to him in his Profeſſion, and is as if he had ſaid he will make you ſpend all your Money; per Winch J. Win. 41. cites it as adjudg'd in B. R. Wingate's Caſe.

To ſay of an Attorney, that *He is a falſe Attorney*, an Action lies; per Richardſon. Het. 141. Trin. 5 Car. B. R. in Caſe of Starkey v. Taylor.

8. *Thou art a falſe Knave, a cozening Knave, and haſt gotten all that thou haſt by Cozenage, and thou haſt cozen'd all thoſe that have dealt with thee.* Theſe Words ſpoken of an *Attorney* are ſlanderous, and touch him in his Profeſſion, and therefore adjudg'd that the Action well lay. Cro. J. 586. pl. 8. Mich. 18 Jac. B. R. Jenkins v. Smith.

Win. 90. 91. Arg. cites it

9. *G. is a Forger of Writings, and deſerves to loſe his Ears*, being ſpoke of an Attorney, is not actionable; and becauſe he did not ſay Deeds,

Deeds, Judgment was arreſted. Win. 90. Trin. 22 Jac. C. B. Godſel's Caſe. as adjudg'd in the Caſe of Brown

v. Ellis, That for ſaying an Attorney had forg'd Writings, no Action lies, becauſe too general; and beſides it doth not at all appertain to him to make Writings.

10. *Thou art a Knave of Record, and a forgering Knave*, was ſpoke of an Attorney, but no Communication of him as ſuch. The Parties agreed, and ſo the Court did not ſpeak to the Queſtion, whether actionable or not. Lat. 20. Paſch. 2 Car. Dawburn v. Martin. Poph. 177. Dabborne v. Martin, S. C. but no Opinion.—Palm. 441. which Crew Ch. J. ſaid was not Senſe; and ſays the Opinion was that it would ſcarce bear an Action.

Daubney v. Martin, S. C. but there inſtead of (forgering Knave) it is (Forgery Knave,)

He is a forging Knave. The Plaintiff counted that he was an Attorney of C. B. and the Court held the Words actionable. Brownl. 16. Smails v. Moor.——Het. 140. Arg. cites Small v. Moon, S. C. 14 Jac. C. B. adjudg'd actionable.

I never forg'd any Man's Hand, but you are a forging Rogue, being ſpoke of an Attorney, is actionable, tho' no Colloquium was alleg'd of his Profeſſion; for it is a great Defamation, and the Words import that he forg'd another's Hand; for the Antitheſis by common Intendment amounts to a Charge that the Plaintiff did what he denied of himſelf, and thoſe Words ſpoke of another import Scandal and Defamation of him; per tot. Cur. And the Plaintiff had his Judgment. Comyns's Rep. 262. pl. 144. Paſch. 3 Geo. 1. Anon.

11. *Go tell your Lawyer that he is a baſe Raſcal, and that I will make him loſe his Ears, and teach him, or any Lawyer of them all, how they dare to ſerve a Writ on me*, being ſpoke of an Attorney, were adjudged actionable, becauſe they diſgrace him in his Profeſſion. Lat. 220. Mich. 3 Car. Trowbridge v. Hard. Ley's Rep. 70. S. C. by the Name of Roberts v. Lord, adjudg'd accordingly.—

If the Defendant in this Caſe had ſaid that *he would have his Ears*, this might be intended by Violence; Per the Chief J. Lat. 220. in the S. C.——S. C. cited by Twiſden J. Vent. 117. and ſaid it was as much as to call him Knave-Attorney.

12. *He hath cheated me of a great deal of Money* &c. being ſpoke of an Attorney generally, without Speech of his Office, are not actionable; for he may have cheated at Dice, or in a Bargain &c. And tho' the Words were laid to be ſpoke upon a Conference of a Bill of Coſts laid out by him, yet it not being ſaid laid out by him as Attorney, Action does not lie; Per Richardſon. And the whole Court ſeemed to be of the ſame Opinion. Sed adjornatur. Het. 169. Trin. 7 Car. C. B. Gee v. Egan.

13. Saying of an Attorney, that *he is a cheating Knave*, is not actionable, if it was not upon ſpeaking of him as an Attorney. Het. 167. Paſch. 7 Car. C. B. Alleſton v. Moor. *But* if he had ſaid *he cheats his Clients*, it would be actionable. Het. 167. Per Cur. in Caſe of Alleſton v. Moor.

14. A Lawyer [but not ſaid whether Barriſter or Attorney] was *Competitor to be choſe Steward* of a Corporation, and they being aſſembled to make an Election, one of the Corporation ſaid to his Brethren, *He is an ignorant Man, and not fit for the Place*; by which he was refuſed. The Court ſeemed to incline that the Words were actionable, but gave no Judgment. Mar. 146. pl. 217. Trin. 17 Car. C. B. Sanderſon v. Ruddes.

15. *He hath no more Law than Mr. C.'s Bull*, being ſpoke of an Attorney, the Court inclined that they were actionable, and that the Plaintiff ſhould have Judgment, tho' it was objected that the Plaintiff had not declared that C. had a Bull. Sid. 327. pl. 8. Paſch. 19 Car. 2. B. R. Baker v. Morſue. So to ſay that he has no more Law *than a Gooſe*, has been adjudged actionable. Sid. 127. pl. 8. ſo ſaid per Cur. in the S. C.—— There is a Quære added, as to ſaying He hath no more Law *than the Man in the Moon* Ibid. —— 2 Keb. 202. pl. 35. S. C. adjudged for the Plaintiff by 3 Juſt. contra Keeling Ch. J. for if C. had no Bull, the Scandal is the greater.

16. *Thou*

Vent. 98. Jones v. Powell, S. C. the Court inclined that the Words were not actionable; for the Declaration might be ſo written, that he might not be able to read it ——— Raym. 196. S. C. that the Words were ſpoke in Auditu quamplurimorum. Adjudged for the Plaintiff, and the Judgment affirm'd. —— Mod 272. pl. 23. Trin. 29 Car. 2. B. R. the S. C. and the Court held the Words actionable, tho' there had been no ſpecial Damages; for they ſpeak him to be ignorant in his Profeſſion, and the Court would not intend that he had a Diſtemper in his Eyes &c. and Judgment for the Plaintiff. ——2 Keb 710. pl. 84. Mich. 22 Car. 2. B. R. the S. C. and per Cur. the *Colloquium* being *of his Skill*, the Words are actionable. And Judgment for the Plaintiff.

16. *Thou canſt not read a Declaration*, being ſpoke to an Attorney, in Diſcourſe of him and his Profeſſion, by Means whereof he loſt S. his Client. Twiſden J. at firſt held the Action lay not for Want of an *Averment* that he could read a Declaration, but afterwards it being *found to be falſe*, Judgment for the Plaintiff in C. B. was affirm'd. Lev. 297. Mich. 22 Car. 2. B. R. Powell v. Jones.

17. To ſay, *He arreſteth without taking out Writs* &c. is actionable, without any Colloquium, becauſe they neceſſarily relate to his Employment; Per Cur. Freem. Rep. 277. pl. 309. Mich. 1675. B. R. in Caſe of Bell v. Thatcher.

Calling an Attorney *Knave*, adjudg'd actionable in C B. and that Judgment affirm'd in B. R. cited Sty. 17. as Trin. 12. Car. Nicholas v. Webb.——*He is a Knave and would have cheated me of 4 l.* is not actionable by *general Averment that thereby he loſt his Clients without ſpecial Colloquium of his Profeſſion*, or ſaying, He is a *knaviſh Attorney*, or ſuch Words as touch his Profeſſion; and Judgment was ſtay'd. 2 Keb. 84. Trin. 18 Car. 2. B. R. Rod. v. Binks.

18. *He is a Knave in his Practice*, is actionable without any Colloquium, becauſe they neceſſarily relate to his Employment. Freem. Rep. 277. pl. 309. Mich. 1675. B. R. Per Cur. in the Caſe of Bell v. Thatcher.

(S. a. 3) Words ſpoke of Clergymen.

1. IF a Clergyman is to be preſented to a Benefice, and one to defeat him thereof, ſays to the Patron, *He is a Heretick*, or a *Baſtard*, or he is *Excommunicated*, by Means whereof the Patron refuſes to preſent him, and he *loſes his Preferment*, he ſhall have Action for ſuch Scandal, tending to ſuch an End. Per Cur. 4 Rep. 17. a. pl. 11. Trin. 15 Eliz. in Caſe of Davis v. Gardiner.

2. *Thou haſt made a ſeditious Sermon, and moved the People to Sedition this Day*, being ſpoken of a Clergyman, adjudg'd actionable. 4 Rep. 19. a. Per Cur. cites Paſch. 24 Eliz. B. R. Phillips v. Badby.

3. *He hath had two Wives*, being ſpoke of a Clergyman, was adjudged againſt the Plaintiff. Cro. E. 94. pl. 4. Paſch. 30 Eliz. B. R. Nicholſon v. Lyne.

Cro. E. 502. pl. 23. Mich. 38 & 38 Eliz. B. R. S. C. adjudged accordingly.

4. *He is a lewd Adulterer, and hath had two Children by the Wife of J. S. and I will cauſe him to be deprived for it*, being ſpoken of a Clergyman, is puniſhable in the Spiritual Court, but not actionable. Adjudg'd. Noy 64. Parret v. Carpenter.

5. *He is an Adulterer, Whoremaſter, Drunkard, Swearer, and a Preacher of falſe Doctrine*, were ſpoken of a Clergyman. It was objected that it does not appear that the Plaintiff is a beneficed Man, and ſo cannot be puniſhed for preaching falſe Doctrine. Judgment was ſtay'd till the Plaintiff ſhould move. Sty. 49. Mich. 23 Car. B. R. Anon.

Sid. 376 pl. 3. Dumewick v. Pain, S. C.

6. *He has a Baſtard on the other Side the River, and it is ſo indubitable, that I fear not to divulge it; and if I am troubled for it I can juſtify it*, being ſpoken of a Clergyman who was agreed to be retain'd Chaplain to the Duke

Duke of Ormond, by which he loſt his Chaplainſhip. Adjudged for the Plaintiff. Lev. 248. Mich. 20 Car. 2. B. R. Payne v. Beaumorris. mentions only the firſt Words, and S. C. accordingly.

held actionable in reſpect of the ſpecial Declaration. ——2 Keb. 400. Humoriſt v. Pain,

(S. a. 4) Words ſpoke of Counſellors.

See pl. 14. 16. 17. 22. 25. 37.

1. AT a Court of Survey held by H. a *Counſellor*, Steward of a Manor lately purchas'd of the Queen, he produced the Letters Patents, and thereupon ſaid, I aſſure you the Fee-ſimple of the Manor is in the Patentees; and then deſired the Tenants to bring their Copies and Leaſes &c. Whereupon G. ſaid the Tenants ought to be better inform'd. Upon which ſome of the Tenants ſaid, They hop'd that H. was ſufficient Warrant, he having affirm'd that the Fee-ſimple was in the Patentees; G. replied, *No, Friends, I know well a great Number of People in this Country, truſting to his Warrants, have been thereby undone.* Adjudged for the Plaintiff, and affirm'd in Error in the Exchequer Chamber. 2 And. 40. pl. 26. Hole v. Gyddy. Mo. 695. pl. 964. Giddye v. Heale. Trin. 33 Eliz. S. C. adjudg'd in B. R. and affirm'd in the Exchequer-Chamber by all the Juſtices. —— And 269. S. C. cited per Cur. that cited by Serjeant Richardſon 2 Roll Rep. 145, 146. as adjudg'd actionable in B. R. but ſaid that the Judgment was reverſed in the Exchequer-Chamber, becauſe the Word (Warrant) was * uncertain.——S. C. cited Palm. 64, 95. as adjudg'd in B. R. but reverſed in the Exchequer-Chamber, becauſe it might be intended Warrants made by him as Juſtice of Peace.——S. C. cited Win. 39. Arg. as adjudg'd and reverſed accordingly, becauſe the Word (Warrants) is general, and may be applied to other things; but Winch interrupted him, and ſaid, it was not reverſed for Error.

Judgment was given for the Plaintiff, and by the Opinion of other Judges.——S. C.

* The Original is (certain) but miſprinted.

2. *He will give vexatious and ill Counſel, and ſtir up a Suit, and then he will milk your Purſe, and fill his own large Pockets.* Theſe Words were wrote in a Letter of a Counſellor to his Client (a Counteſs;) and the Count ſet forth that he loſt the ſaid Counteſs, and other Clients. Adjudg'd by 3 Juſtices againſt Vaughan, that the Action lay. 2 Vent. 28. Mich. 23 Car. 2. C B. King v. Lake. Freem. Rep. 14. pl. 14. S. C. but there the Words are, *He adviſes you to a vexatious Suit, and he will make you pay double and treble Fees, is a griping Lawyer, and he will milk &c.* adjudg'd accordingly.

To ſay that he is a griping Lawyer, and will milk your Purſe, is actionable; per Tyrrel J. Ibid. 15.

3. *He gives bad Counſel*, being ſpoke of a Counſellor, is actionable; per Cur. Arg. Freem. Rep. 15. in Caſe of King v. Lake.

4. *He will ſpin out your Cauſe, do not go to him*, being ſpoke of a Counſellor, is actionable; per Wild J. Freem. Rep. 15. Arg. in Caſe of King v. Lake.

5. *He never gives his Advice but he conſults with others*, being ſpoke of a Lawyer, is actionable; per North. Freem. Rep. 279. Trin. 1680. in pl. 314.

(S. a. 5) Words ſpoke of a Midwife.

1. *MANY have periſh'd for want of her Skill*, being ſpoken of a Midwife, is actionable; and Judgment for the Plaintiff; for ſhe has a profitable Gain by that Function, and ſo thoſe Words may be prejudicial. Cro. C. 211. pl. 2. Paſch. 7 Car. B. R. Flower's Caſe.

2 Keb. 489. pl. 36. Wharton v. Clover, S. C. adjudged for the Plaintiff.

2. *She is an ignorant Woman, and of ſmall Practice, and very unfortunate in her Way; there are few that ſhe goes to, but lie deſperately ill, or die under her Hands*, being ſpoke of a Midwife, the Action was held maintainable. Vent. 21. Paſch. 21 Car. B. R. Wharton v. Brook.

3. *Thou art no Midwife, but a Nurſe, and if I had not pull'd thee from Mrs. J. S. thou hadſt kill'd her and her Child*; actionable, becauſe they diſparage her in her Profeſſion. Freem. Rep. 277. pl. 310. Paſch. 1676. B. R. Whitehead v. Founes.

4. *She layeth no Woman, but Dr. Chamberlain or his Lady does her Work*, and declar'd that by reaſon thereof ſhe loſt her Employment, and particularly of ſuch a Perſon. Adjudg'd actionable. Freem. Rep. 278. pl. 314. Trin. 1680. Gyles v. Biſhop.

(S. a. 6) Words ſpoke of School-Maſters &c.

1. IF one ſays of a School-maſter, that *he has no Knowledge in Grammar, or in the Latin Tongue, nor knows how to educate his Scholars in the Latin Tongue*, and he thereby loſes his Scholars, an Action lies; per Crooke J. 2 Roll Rep. 72. Hill. 16 Jac. B. R.

2. *Put not your Son to him; for he will come away as very a Dunce as he went*, being ſpoke of a School-maſter, is actionable; per Yelverton J. Arg. Het. 71. Mich. 3 Car. C. B.

3. *She is a Whore, and J. S. kept her as his Whore*, being ſpoken of a School-miſtreſs who taught Children to write and read, by which ſhe got her Livelyhood, was cited by Twiſden J. Vent. 21. Paſch. 21 Car. 2. B. R. to have been adjudg'd not actionable, without laying Special Damage.

2 Show. 18. pl. 11. Wetherhead v. Brookborne, S. C. adjornatur. —Freem. Rep. 277. pl. 312. Witherley v. Hermitage, S. C.

4. Words ſpoke of a *Dancing-miſtreſs*, viz. *She is as much a Man as I am, ſhe is an Hermaphrodite*, by which ſhe loſt divers Scholars, but did not mention any in particular. After a Verdict for the Plaintiff Judgment was ſtay'd, that the Words are not actionable; for it is no Scandal to her Profeſſion to ſay ſhe is an Hermaphrodite; for young Women are more commonly taught by Men to dance than by Women, and here is no Special Damages laid, and the Words are not actionable in themſelves. 2 Lev. 233. Mich. 30 Car. 2. B. R. Wetherhead v. Armitage.

The Words are, *She is as much a Man as I am, and got J. S. with Child*, and that by reaſon thereof ſhe loſt her Scholars; but becauſe ſhe did *not lay in particular what Scholars* ſhe had loſt, the Court would adviſe.

(T. a) For Words in *Disgrace of an Office.*

1. If a Man says of a Church-warden, having Communication of his said Office, and [the Plaintiff] averring in his Declaration that he was Church-warden, and had received several Sums of Money to the use of the Parish, by Force of his said Office, Thou art a cheating Knave, and hast cheated the Parish of 40 l. Action lies; for this is a great Slander of him, this being an Office of Trust, tho' he be not sworn, yet he is a Temporal Officer as well as a Spiritual; for he is named in several Statutes, as in the Statute of the Poor. Trin. 1652. between *Strode and Holmes*, adjudg'd, this being moved in Arrest of Judgment. Intratur Hill. 1651. Rot. 999. Sty. 338. S. C. and Judgment for the Plaintiff, Nisi, and said that Officers who have no Benefit by their Offices have more Need to be repair'd if they be scandalized in the Execution of them.——The Plaintiff counted that he was Constable and Church-warden of A. and as such had expended divers Sums of Money for the Use of the Inhabitants &c. and the Defendant said, *Thou hast beguiled and deceived that Town* (innuendo the Inhabitants of A.) *upon thy Accounts 4 l. and it is no Marvel thou growest rich, when thou deceivest the Town*; adjudged for the Defendant, the Words being too general. Cro. J. 339. pl. 4. Pasch. 12 Jac. B. R. Hutton v. Bech.——S. P. and seems to be S. C. adjudg'd accordingly, 2 Bulst. 218. Pasch. 12 Jac. Hopton v. Baker.

In Action for Words, the Plaintiff counted that he was Steward of the Courts of the Ld. A. and a Parishoner of G. and had been Church-warden there, and had received 100 l. by Reason of his Office, and render'd thereof a true Account; but the Defendant, to disgrace him, having Discourse with K. of the Offices which the Plaintiff had born in the said Parish, and of the Money received, said, *Thy Brother-in-law Charles Willis, is a notorious Lyar, and a Cozener, and hath deceived and cozen'd the Parish of G. of 500 l. and he will teach thee to cozen me of my House.* The Court thought the Words too general, and gave Judgment Quod querens nihil capiat per breve. Cro. J. 619. (bis) pl. 9 Mich. 18 Jac. B. R. Willis v. Shepherd ——Words spoke of a Church-warden were, *W. is a Knave, and has cheated the Parish of 20 l.* a Colloquium was laid of the Office of Church-warden. Bridgman Ch. J. said that to say, He hath cheated me, are Words of Passion; but if applied to a Man in his Office (and Church-wardenship is a temporal Office) the Action will lie, and so it was adjudg'd. Cart. 1. Mich. 16 Car. 2. C. B. Woodruff v. Weoley.

Thou dost make Lowns, (viz. Taxes or Assessments) thy self, and makest 5 Quarters in the Year, and dost cheat and cozen the Parish. The Words must be intended to be spoken of him in Relation to his Office; for that is implied by his making of Lowns, and his couzening the Parish. Sty. 394. Mich. 1653. B. R. Townsend v. Barker.

2 If a Man says of a Minister, who is instituted and inducted into a Benefice, he preacheth Lies in the Pulpit, an Action lies; for a Lie is a false Thing against his own Knowledge, and this is good Cause of Deprivation, by which he may have a Temporal Damage. Hill. 1652. between *Drake and Drake*; Judgment upon a Demurrer upon the Declaration. Sty. 363. S. C. The Court inclined the Words were actionable, and Judgment, Nisi &c.

3. If one calls an *Escheator*, *Coroner*, *Sheriff*, *Attorney*, or such as are *Officers of Record*, *Extortioner*, Action lies; but if one calls a *Bailiff*, or *Steward of a Base Court*, who are not Officers of Record, Extortioner, no Action lies; because Extortion cannot be but in such as are Officers of Record. Dal. 45. pl. 35. 4 Eliz. Anon. *But* if one calls another, be he who he will, *Extortioner*, it is actionable, because Extortion is punishable in any Man, but so is not Bribery, unless he be an Officer of Record; per Dyer. Dal. 43. pl. 26. 4 Eliz. Anon.

Action does not lie for calling one Extortioner, without Averment that the Plaintiff was an Officer Mo. 182. pl. 324. Trin. 26 Eliz. Per Wray Ch. J. in Lynsey's Case.

4. *He has taken Bribes or Rewards*, being spoke of an Officer of a Court of Record, is actionable; but if of a Servant or Officer to another common Person, it is otherwise. Dal. 43. pl. 26. Per Dyer, 4 Eliz. Anon. *He hath taken 40 s. for a Bribe*; adjudg'd actionable, being spoken of a *Town-Clerk*. Godb. 157. pl. 211. Mich. 6 Jac. B. R. Lee v. Swan ——Yelv. 142. Nile v. Swanton S. C. adjudg'd

adjudg'd accordingly: for the Plaintiff has shewn himself to be an Officer of Trust, both as Town-Clerk and Keeper of the Court, at the Time of speaking of the Words, so that they cannot be construed but in slandering him in his Office: for he cannot take a Bribe by any other Colour. So if they had been spoke of a Justice of Peace or a *Clerk of Assise*.

5. As an Officer of the Court was receiving his Fee, the Defendant call'd him *Cut-throat*. Arg. Mo. 142. in pl. 283. cites it to have been adjudged actionable, 6 Eliz.

* Le. 336. in pl. 449. cites it as adjudged not actionable in Kinsey's Case, S. C.

6. *Thou dost serve false Warrants, and deceivest the People*, being spoken of a *Bailiff* [* or a Franchise] were adjudged not actionable; for it is not averr'd that he made false Warrants, or knew they were false. Cro. E. 192. in pl. 5 Arg. cites it as adjudged in Kinsey's Case. And this Case was agreed by the Counsel of the other Side, who was of Counsel in that Case.

Godb. 88. pl. 99. Mich. 28 & 29 Eliz. B. R. Eglinton v. Aunsell, S. C. but the Word (*for*) is there (*and*) and says, the better Opinion of the Court was that the Words were not actionable; but Clench, Gawdy, and Suite J. were of Opinion that if the Words had been *Cozening Coroner*, they had been actionable.——S. C. cited with the Word (for) and that it was held not actionable.——Cro. J. 42[illegible]. in pl. 1. S. P. cited as adjudged for the Plaintiff; and that a Precedent was shewn of one Holberk's Case Coroner of Warwick.

7. *Thou art a cozening Knave, Coroner; for thou hast cozened me of my Land.* The Plaintiff could not have Judgment; for he was not particularly charg'd in respect of his Office. 3 Le. 171. in pl. 222. Mich. 29 Eliz. B. R. cites it as Egerton's Case.

8. The Defendant said of the *Master of the Mint, He hath not made the Money as good and fine as the Standard by an Halfpenny in the Ounce, and so he hath saved* 4000 *l.* It was argu'd that these Words were not actionable. Sed adjornatur. Le. 88. pl. 111. Mich. 29 & 30 Eliz. Martin v. Stedd.

9. Saying of a *Deputy of Clarencieux King of Arms*, whom he had appointed to sit in the Counties of Devon and Somerset, that *he came and sat by Force of a forged Commission, and he is a Scrivener and no Herald.* Adjudged actionable; for they touch him in his Profession, in saying that he is a Scrivener, and no Herald. Cro. E. 328. 329. pl. 2. Trin. 36 Eliz. B. R. Brooke v. Clarke.

10. *Before the Plaintiff came to Service of the Merchant Taylors he dwelt in Shrewsbury, and set the Town together by the Ears; and as long as he was there they were never in Quiet, but afterwards they liv'd quietly; and he being Clerk of the Merchant Taylors, was of Consent and Counsel with W. G. to deliver the Books of the Corporation which he had in his Keeping, to the Intent that thereby some of the Lands of the same Corporation might be found conceal'd.* Adjudged actionable; for these Words touch him in his Office and Credit; and his Office is an Office of Trust. Cro. E. 358. pl. 18. Mich. 36 & 37 Eliz. C. B. Wright v. Moorhouse.

11. *Thou art as cozening a Fellow as any is in the Country; the last Time thou wast Under-sheriff, as now thou art, thou didst serve an Execution for a Neighbour of mine, and didst keep the Money in thy Hands.* Adjudged not actionable; for as to the last Words, it is not express'd how long he kept the Money, and it might be only till the Return of the Writ, or by the Plaintiff's Assent. Cro. E. 854. pl. 14. Trin. 43 & 44 Eliz. B. R. Geeve v. Copshill.

12. Words, viz. The Plaintiff *is not worthy the Office of a Constable; for he and his Company, the last Time he was Constable, stole five of my Swine, and eat them.* Adjudged actionable. Cro. E. 861. pl. 34. Mich. 43 & 44 Eliz. B. R. Taylor v. How.

Noy 133. S. C. but S. P. does not appear.

13. *Thou art a Healer of Felony, and hast shewn such Favour to a Horse-stealer in the Time of thy Constableship, that thereby both the Horse and Thief were conveyed away; and it lies in my Power to hang thee.* Adjudged for the Plaintiff; and tho' it be not laid expressly that the Plaintiff was Constable

ſtable at the Time of ſpeaking the Words, it is not material; for tho' he be out of his Office, he ought not to be ſlander'd with any thing in his Office. Yelv. 153. Paſch. 7 Jac. B. R. Pridham v. Tucker.

14. *He* (Innuendo the Plaintiff) *hath cozened the Earl of H. of as much as he* (Innuendo the Plaintiff) *was worth*, being ſpoken of one who was *High-Sheriff of the County, and Juſtice of Peace*; but held clearly by Yelverton, Crooke, Fenner, and Williams J. that the Words are not actionable. And Judgment againſt the Plaintiff. Bulſt. 172. Trin. 9 Jac. Tut v. Kerton.

15. Saying to a *Conſtable, Thou art a bribing Knave, and haſt cozened the Pariſh of W. in Rates to 30 l.* Het. 36. Mich. 3 Car. C. B. Thomas's Caſe; but it is not ſaid whether actionable or not.

16. *The Mayor of Tiverton has cozen'd the Town and County*, is not actionable. Jo. 308. pl. 22. Mich. 8 Car. B. R. Tiverton (Mayor's) Caſe.

17. One ſaid to a *Town-Clerk* of Southampton, *Thou haſt made many falſe Certificates to the Mayor and Burgeſſes in that Court, and the more thou ſtirreſt in it the more it will ſtink.* Adjudged not actionable, becauſe no Colloquium is alleged of his Office of Town-Clerk, nor does he count that the making Certificates belongs to his Office, but only that he had the Cuſtody of them. And the Caſe being mov'd again the next Term the Judgment was affirm'd. Hutt. 123. Paſch. 9 Car. Smith v. Cornelius. *You make falſe Records, and juſtify them for true*, being ſpoke of a *Clerk of the Peace* of the County of Glouceſter, was held not actionable; for they might be falſe for Miſwriting, or otherwiſe; cited Cro. E. 192. in pl. 5. Arg. and the Counſel of the other Side agreed this Caſe (in which he was of Counſel;) for they ſhall be intended in a good ſenſe, and could not be intended that they counterfeited Warrants or Records.

18. *He is a baſe cozening Caſe; he is a Cheater, and has cozen'd his Maſter*, was ſpoke of a Deputy-Clerk to an Arch-deacon's Regiſter, who received the Fees and Profits of the Office to render Account. All the Court (abſente Bramſton) held that it ſhall not be intended but the Words were ſpoke concerning the Execution of the Office, where the Communication was concerning the Office. And adjudged for the Plaintiff. Cro. C. 563. pl. 8. Mich. 15 Car. B. R. Reignald's Caſe.

19. *Thou haſt received Money of the King to buy new Saddles, and haſt cozen'd the King and bought old Saddles for the Troopers.* Bramſton Ch. J. and Heath J. held the Words actionable; for it is not material what Imployment he hath under the King, if he may loſe his Imployment or Truſt thereby. And it is not material whether the Imployment be for Life or Years &c. Mar. 82. pl. 135. Paſch. 17 Car. B. R. Sir Richard Greenfield's Caſe.

20. An *Aſſignee of one who is Deputy only at Will of the Bailiwick of Middleſex to the Ld. Treaſurer*, is not ſuch an Officer as may have an Action againſt one for ſaying of him, *Thou art a Cozener.* Noy. 74. Dobſon v. Dugdale.

21. *You have cozen'd the State of 25000 l and I will prove it, for you have received 25000 l. of the Office, and not compounded for it, and have foiſted in Words in the Order for your Compoſition*, are actionable, being ſpoke of an Officer. Style 436. Trin. 1654. B. R. Henley v. Sir Edward Baynton.

22. *He hath broken up Letters, and taken out Bills of Exchange*, being ſpoke of one retain'd by the Under Poſt-Maſter to carry about Poſt Letters, of which he made a Profit; and whereby he loſt the Imployment; adjudg'd not actionable, and ſo a Judgment given in C. B. reverſed. Vent. 275. Mich. 27 Car. 2. B. R. Bell v. Thatcher. Freem. Rep. 276. pl. 309. S. C. and the Words held not actionable, becauſe no Colloquium was laid to be of his Imployment at the Time of ſpeaking the Words ——— Venr. 276. S. C. ſays that what Hale Ch. J. principally went upon in reverſing the Judgment, was the *Quality of the Employment*;

ment; for by maintaining ſuch Actions, one muſt not ſpeak diſparagingly of a Man's Cook or Groom, but an Action would be brought.

Caſe &c. in which the Plaintiff declared that he was Chancellor to the Biſhop, and

23. Words ſpoken of a Doctor of the Civil Law, who was alſo a Juſtice of Peace, and Chancellor of the Biſhoprick of Norwich, were, viz. *He is not fit to be a Chancellor or a Juſtice of Peace; He is a Knave, a Raſcal and a Villain, he is not fit to practice, he ought to have his Gown pulled over his Ears*; adjudg'd actionable. 2 Lutw. 1288. Trin. 5 W. 3. Pepper v. Gay.

ſtood for Parliament Man, and that the Defendant ſaid, *There goes your rare Chancellor to ſuborn Witneſſes to ſwear againſt the Parſon*; Powis and Gould J. held the Words actionable; But Holt Ch. J. and Powell e contra, not actionable; for the firſt Words are only a Deſcription of his Perſon, and thoſe which follow do not relate to his Office; to ſay a Man is forſworn, is not actionable, and ſuborning is not a Crime in itſelf, but as it relates to Perjury; for there can be no Subornation but where there is Perjury. 2 Salk. 696. pl. 8. Trin. 3 Annæ B. R. Walmeſley v. Ruſſel.——6 Mod. 200 S. C. argued by the Court, Seriatim.

(T. a. 2) For Words ſpoke of Judges.

Poph. 35 S.C. and S. P. but moved in Arreſt of Judgment upon Award of the Tales, the Defendant being Alien.

1. A Judge of the Admiralty Court brought Action againſt the Defendant, againſt whom Sentence was given in that Court, and counted that the Defendant ſaid, that *the ſaid Sentence given by the Plaintiff* (Innuendo ſententiam prædictam) *was corruptly given*. Adjudg'd actionable, and that the Words muſt be intended of the Judge that gave the Sentence, and ſo it was preciſely alleged in the Declaration. Cro. E. 305. pl. 3. Mich. 35 & 36 Eliz. B. R. Cæſar and Curſeney.

2. *My Ld. Chief Baron cannot hear of one Ear*; there having been a Colloquium of his Adminiſtration of Juſtice, it was adjudg'd actionable. Otherwiſe if there had been no Diſcourſe of his Juſtice. Cited Het. 167. in Caſe of Alleſton v. Moor.

3. *Your Maſter's Witneſſes* (in ſuch a Cauſe) *were perjured, and your Maſter is the Maintainer and Upholder of them.* Rainsford and Turner held the Words not actionable, they not relating to his Office; and it was not ſaid that he upheld their Perjury but only their Perſons; But Hale Ch. B. e contra; for if true they are a Scandal to his Office, and (upholding) here can have no other Meaning than abetting them in their Perjury; but Judgment was arreſted. Hardr. 501. Mich. 20 Car. 2. in the Exchequer, Pugh v. Owen.

(T. a. 3) For Words ſpoke of Juſtices of Peace.

See (S. a) 27. 28. 29. 31. 32. 33. 38. 39.

S. C. cited Yelv. 21. by Yelverton J. ſays it was not alleged expreſsly

1. *YOU do openly maintain and countenance the worſt People againſt God's Laws and the Queen's*; held not actionable, tho' ſpoke of a Juſtice of Peace, the Words being too General. Cro. E. 297. pl. 7. Paſch. 35 Eliz. B. R. Butler v. Paynter.

that Butler was a Juſtice of the Peace at the time of the ſpeaking the Words.——Palm. 69. cites S. C. as adjudg'd that the Action lies.——Palm 566. S. C. cited by Crooke J. who ſaid he was of Counſel in that Caſe, and it was reſolv'd it ought to be averr'd that he was a Juſtice at the time of the ſpeaking; but if it appears that the Words were ſpoke after he was a Juſtice, as if he alleges that he was a Juſtice of Peace, and that afterwards the Words were ſpoke, it is good without ſaying that the Plaintiff was a Juſtice

Juſtice of Peace at the time of ſpeaking; for tho' it might be that the Commiſſion was determined, being only at the King's Will, yet it ſhall not be intended after a Verdict.

2. One indicted of Felony, to which he pleaded Not guilty, ſaid of the Plaintiff a Juſtice of Peace, *He did ſeek my Life, and offer'd 10 s. to the Under-Sheriff to impanel a ſpecial Jury that might find me guilty of the Felony*; adjudg'd actionable. Cro. E. 313. pl. 3. Hill. 36 Eliz. B. R. Bleverhaſſet v. Baſpoole.

3. *One W. being arreſted as acceſſory of Felony for ſtealing his own Goods, Mr. Stafford* (the Plaintiff) *knowing of this, diſcharged the ſaid W. by an Agreement of 3 l. to which Mr. S. was Party, whereof 30 s. was to be paid to Mr. S. and was paid to his Man by his Appointment.* Adjudg'd actionable, the Words being ſpoken of a Juſtice of Peace, and the Judgment affirm'd in the Exchequer-Chamber. Mo. 704. pl. 981. Trin. 36 Eliz. Stafford v. Powler. 2 And. 47. pl. 35. Stafford's Caſe S. C. adjudg'd and affirm'd; for the Words are in Effect no other than he is acceſſory to the Felony, and the Words (ſtealing of his own Goods) does not alter the Caſe; for a Man may be acceſſory to the ſtealing his own Goods.——Cro. E. 536. pl. 71. Mich. 38 & 39 Eliz. in the Exchequer-Chamber S. C and Judgment affirm'd by all the Juſtices and Barons beſides Walmſley.

4. *Thou art a falſe Juſtice*, is actionable; per Anderſon. Cro. E. 358. Mich. 36 & 37 Eliz. in pl. 18. *Thou doſt not adminiſter true Juſtice*, is actionable, being ſpoke to a Juſtice of Peace; Per Anderſon. Cro. E. 358. in pl. 18. Mich. 36 & 37 Eliz. C. B.

Sir W. M. is an Half-ear'd Juſtice, he will hear but of one Side; adjudg'd actionable. Cro. C. 223. pl. 10. Trin. 7 Car. B. R. Sir William Maſham v. Bridges.

5. *Thou art a lewd Juſtice*, is actionable; per Anderſon. Cro. E. 358. in pl. 18. Mich. 36 & 37 Eliz. C. B.

6. The Father being a Juſtice of Peace, brought an Action againſt his Son for ſaying to him, *My Brother has ſtole a Black Mare, and you was privy to it, and ſent her away to the Fens to my Brother's Houſe*; it was moved that Privity does not make one acceſſory to a Felony; but the Plaintiff being a Juſtice of Peace, the Words were ſlanderous, charging him with ſmothering Felony, he being privy to it; and Judgment for him. Mo. 401. pl. 528. Paſch. 37 Eliz. Laſſels v. Laſſels. Goldsb. 132. pl. 28. S. C. ſays Clench and Gawdy ſeem'd the Action maintainable; Fenner e contra.

7. Words ſpoke in open Seſſions were, viz. *You have perverted Juſtice, and to your Shame and Diſhonour I will prove it*, were adjudg'd actionable. Mo. 409. pl. 554. Trin. 37 Eliz. Ld. Delaware v. Pawlet.

8. *Mr. S. covereth and hideth Felonies, and is not worthy to be a Juſtice of Peace*, adjudg'd actionable; for it is againſt his Oath and Office, and good Cauſe to put him out of the Commiſſion, and he may be indicted and fin'd for it. 4 Rep 16. a. pl. 7. Mich. 44 & 45 Eliz. C. B. Stutley v. Bulhead. *He is a Maintainer of Felons*, are actionable, tho' not alleg'd that he knew them to be Felons, or that he was a Juſtice of Peace. Cro. J. 268. cited by Tanfield Ch. B. as adjudg'd in Sir Henry Lea's Caſe to be actionable; and ſays, A multo fortiori, when one ſays *He is a Smotherer and Maintainer of Felonies*, which cannot be without Conuſance of them; and adjudg'd actionable. Cro. J. 267. pl. 30. Mich. 8 Jac. Rich v. Holt.

9. Words ſpoken of a Juſtice of Peace, who had been Sheriff of the County, and for 7 Years before was Deputy-Lieutenant there, viz. *Your Maſter* (Innuendo the Plaintiff) *is a baſe raſcally Villain, and is neither Nobleman, Knight, nor Gentleman, but a moſt villainous Raſcal, and by unjuſt Means doth moſt villainouſly take other Men's Rights from them, and keeps a Company of Thieves and Traytors to do Miſchief, and giveth them nothing for their Labour but baſe Blue Liveries, and this all the Country reports, and other Good he doth not any.* Adjudg'd not actionable. Cro. J. 58. pl. 4. Hill. 2 Jac. B. R. Hollis v. Briſcow. Yelv. 64. S. C. adjudg'd accordingly; but mentions nothing of the Plaintiff's Qualifications.

10. *Mr.*

Het. 173. Arg. cites S. C. as adjudg'd.

10. *Mr. K. is a Basket-Juſtice, and a partial Juſtice; I will give him 5l. a Year for his Gifts for Juſtice-Matters.* Fenner and Williams only in Court, held the Words (partial Juſtice) actionable, but none of the other Words; and that (partial) touches him in his Office, and is Quaſi a Corruption. Cro. J. 90. pl. 17. Mich. 3 Jac. B. R. Kemp v. Houſegood.

Het. 173. Arg. in Caſe of Hitcham v. Caſon, cites Denſon's Caſe, that it is actionable; for it is a Misbehaviour in a Juſtice of Peace to do ſo.

11. *You are a ſweet Juſtice; you ſent your Warrant for J. S. to be brought before you for Suſpicion of Felony, and afterwards ſent J. D. to him to give him Warning thereof, that he might abſent himſelf.* All the Court held the Words actionable; for it touches him in his Office to give ſuch ſecret Warning; and adjudg'd for the Plaintiff. Cro. J. 143. pl. 1. Hill. 4 Jac. B. R. Burton v. Tokin.

S. P. Arg. Noy 33. that he ought to allege he was a Juſtice at the Time the Words were ſpoken.

12. *When thou waſt a Juſtice, thou waſt a bribing Juſtice*, being ſpoke of one who had been a Juſtice of Peace, but was put out of Commiſſion, is actionable; for tho' it refers to a Thing paſt, yet it defames him for ever in other People's Opinions, and makes him accounted unworthy to bear Office afterwards; per Cur. Yelv. 153. 154. Paſch. 7 Jac. B. R. obiter.

Bulſt. 36. Haſtings v. Beamount, S. C. adjudg'd accordingly, by the clear Opinion of the Court. ——Jenk. 317. pl. 9. S. C. accordingly.

13. *He* (præfatum Querentem innuendo) *for Malice and Spleen did many times wreſt the Law, and pervert Juſtice, to ſerve his own Turn*, being ſpoken of a Juſtice of Peace, is actionable. Theſe Words ſhall be intended ſpoken of him in the worſt Part, and in Scandal of him in his Office; and adjudg'd for the Plaintiff, and that Judgment affirm'd in Error. Cro. J. 240. pl. 6. Paſch. 8 Jac. B. R. Sir T. Beamond v. Haſtings.

Poph. 180. S. C. accordingly; but no Judgment in either Book.

15. *He had 2 Servants proſecuted about 5 or 6 Years ſince for ſtealing Sheep, and he deſired me not to proſecute them.* Theſe Words were ſpoke of a Juſtice of Peace. It ſeems that the Words are actionable, but not in this Caſe, becauſe it is *not averr'd that he was a Juſtice of* Peace *of the ſame County where the Words were ſpoke*, it not being againſt his Office to endeavour to ſtay Proceedings againſt the Parties, if it be in another County where he has nothing to do. Lat. 49. Trin. 2 Car. Button's Caſe.

Sid. 432. pl. 24. Kirle v. Oſgood, S. C. adjudg'd for the Plaintiff. —Mod. 22. pl. 60. S. C. adjudg'd accordingly.——Vent. 50. S. C. adjudg'd accordingly; for the calling him (forſworn Juſtice) ſhews he intended Perjury relating to his Office, to which an Oath is annex'd.—— 2 Keb. 548. pl. 21. S. C. adjornatur.——But Ibid. 579. pl. 108. adjudg'd for the Plaintiff.

16. *He is a forſworn Juſtice, and not fit to ſit upon a Bench.* It was moved that there was no Colloquium of his Office; but per Cur. there need not; for it appears by the Words themſelves that they were ſpoke of him in reſpect of his Office. Lev. 280. Mich. 21 Car. 2. B. R. Carn v. Oſgood.

17. *He is not worth a Groat, and he is gone to the Dogs.* It was inſiſted that the Statute of H. 6. requires that a Juſtice of Peace ſhall have 40 l. a Year; but ſuch Words were held not actionable, unleſs the Perſon of whom ſpoken lives by Buying and Selling. Vent. 258. Paſch. 26 Car. 2. B. R. Anon.

18. Plaintiff declar'd that he was a Juſtice of Peace, and that there was a Rebellion in the Weſt by the Duke of Monmouth &c. that Search was

was made for the Defendant, being ſuſpected to be in that Rebellion; and that thereupon the Defendant ſaid of the Plaintiff, *John Prowſe is a Knave, and a buſy Knave, for ſearching after me and other honeſt Men of my Sort, and I will make him give me Satisfaction for plundering me.* It was moved in Arreſt of Judgment, that here was no Colloquium laid of his Office, or that the Words were ſpoken relating to his Office, therefore an Action would not lie, tho' an Information might. The Court was divided, and ſo the Plaintiff had his Judgment. 3 Mod. 163. Hill. 3 Jac. 2. B R. Prowſe v. Wilcox.

19. *He is a Raſcal, a Villain, and a Liar.* Per Cur. The Words Raſcal and Villain being ſpoke of a Juſtice of Peace, where *a Colloquium was laid of his Office*, import a Scandal; for tho' thoſe are Words of an incertain Signification, yet they import a mean and baſe Behaviour in the Man; that the Word Liar is as much as to ſay the Juſtice of Peace acts unfairly in his Office, ſo taken altogether they are ſcandalous Words; and the Plaintiff had Judgment. 8 Mod. 271. Trin. 10 Geo. 1725. Aſhton v. Blagrave. 2 Ld. Raym. Rep. 1369. Mich. 11 Geo. S. C. where the Words are, *He is a raſcally Villain, and is neither Nobleman, Knight, nor Gentleman, but a moſt villainous Raſcal; and by unjuſt Means doth moſt villainouſly take other Men's Rights from them, and keeps a Company of Thieves and Traytors to do Miſchief*; and the Court held it all one as if he had ſaid he was a Villain in the Execution of his Office, a Raſcal in the Execution of his Office, and ſo of Liar; and gave Judgment for the Plaintiff.

20. *You robb'd the Poor, and are worſe than a Highwayman.* 2dly, *You Villain, you have robb'd the Poor, and are worſe than a Highwayman.* 3dly, *You Villain, you have robb'd the Poor.* 4thly, *You are worſe than a Highwayman.* The Court thought there was not much Difficulty in this Caſe, and obſerved that tho' the Plaintiff was ſaid to be a Juſtice of Peace, yet *no Special Damage was laid*; and ſaid that the Office of a Juſtice of Peace is not ſo conſiderable, but that many People chuſe to decline it; that *(Villain)* alone has never been held actionable, tho' indeed in Scandalum Magnatum the Rules are very different; that *(Robbing)* is a Word of an incertain Signification, and is here render'd more ſo by the Words annex'd, viz. *(the Poor;)* What Poor? And when? So that the Verdict being general, if one Set are bad, Judgment muſt be arreſted for the Whole; and the Words *(worſe than a Highwayman)* are very uncertain, and Judgment muſt be arreſted. Rep. of Caſes of Pract. in C. B. 160. Mich. 13 Geo. 2. Palmer v. Edwards.

(U. a) For what Words *in Diſgrace of a Trade, &c.*

1. IN an Action upon the Caſe, if the Plaintiff declares that he was for ſeveral Years before a Brewer, and got his Living by brewing of Beer, and ſelling it to his Cuſtomers, and he brew'd wholeſome Beer, and that the Defendant having a Diſcourſe with his Cuſtomers about his Trade, and of his Beer brew'd by him, to the Intent to diſcredit him and his Beer as well to his Cuſtomers as to his Neighbours, with whom he had before traded, ſaid theſe Words of the Plaintiff and his Beer, I will give my Mare a Peck of Malt, and lead her to the Water, and let her drink, and ſhe ſhall piſs as good Beer as any Tom Fenn (who was the Plaintiff) brews; by the ſpeaking of which Words he was eſteem'd among his Cuſtomers and Neighbours to brew and ſell unwholeſome Beer, and they afterwards refuſed to buy Beer of him, and to have any Dealing with him in Jo. 444. pl. 5. S. C. and Judgment ſtay'd; for the Words in themſelves cannot be any Scandal.—Mar. 59. pl. 93. Dickes v. Fenne, S. C. adjornatur. But it being ſaid Arg. that if

one says of a Brewer, that *he brews naughty Beer*, without saying more; the Words are actionable without any Special Damage alleg'd; the whole Court (absente Crooke) e contra, held that the Words of themselves were not actionable, without alleging Special Damage, as the Loss of his Custom &c. which is not here; and therefore not actionable.

his said Trade; no Action lies for these Words; without shewing some particular Damage thereby, As that some particular Persons abstain'd from buying of Beer of him, or such like particular Loss; for these Words shall be taken to have been spoken in Merriment and Jest; for it is impossible to be true in the Understanding of any Man, and it may be understood that he intended that he brew'd small Beer, and not unwholsome Beer. Mich. 15 Car. B. R. between *Fenn and Dixe*, adjudg'd * per totam Curiam, in Arrest of Judgment after a Verdict for the Plaintiff. Intratur Hill. 15 Car. Rot. 838.

* Fol. 59.

Thou didst open my Pack, and put in wet Wool, being spoken *of a Shifter and Dresser of Wool*, is actionable, it being in Deceipt of Trade; per Doderidge & Whitlock J. Lat. 188. Trin. 2 Car. Dean v. Steel.—— S. C. cited D. 72. b. Marg. pl. 6.——Godb. 435. pl 498. S. C. but S. P. does not appear.

2 If A. brings an Action against B. and declares that he was a Merchant &c. and the Defendant, to disgrace him in his Trade, said these Words of the Plaintiff, Thou art a deaf Dog, a dumb Dog, a beggarly Rascal, and thou art a cheating Merchant, tho' the last Words only, scilicet, Thou art a cheating Merchant, are actionable, if any are, and these found but as familiar Words of Heat; yet if the Defendant justifies, that whereas he had bought a Pipe of Canary Wine of the Plaintiff, and left it in the Possession of the Plaintiff, the Plaintiff secretly took out a certain Quantity thereof, and put in a like Quantity of that which was not so good, and therefore he spoke the Words, and therefore this is found against him, this shews that he really intended a Cheat in his Trade, and therefore the Action lies; for it appears by all the Words themselves that he spoke them in Anger, and to scandalize him. Trin. 17 Car. B. R. between *Lambell and Hancock*, adjudg'd, this being moved in Arrest of Judgment.

Words spoke of a *Fuller* were, that he *stopt Holes made in Fulling with Flocks.* Lat. 188. cited by Doderidge J. as adjudg'd not actionable.

* Hob. 140. pl. 191. Hill. 14 Jac. S. C. but no Judgment or any thing said per Cur. as to this Point.

3. If a Man says of a * common Carrier, (who is of good Reputation) that he is a common Barretor, no Action lies; for this Disgrace does not any way reflect upon him in his Trade. Hob. Rep. 189. between *Thornton and Jobson.* But if a Man says of a Justice of Peace, or publick Officer, or of an †Attorney, that he is a common Barretor, Action lies. Hob. Rep. 189.

——Brownl. 11. Thornton v. Jepson, S. C. the Words being spoke of a Currier [Carrier]; but says the Words [Action] would not like for a Man of that Profession.——See (S. a) pl. 30. S. C.——Hob. 140. pl. 191. S. P. per Cur. accordingly, obiter in S. C.

He has made false Letters, he has cozen'd my Husband of 11 *l. and gave me a false and forg'd Acquittance*, being spoken of a *Carrier* to his Wife, but without any Colloquium of his being a Carrier, adjudg'd not actionable. Lev. 112. Mich. 15 Car. 2. B. R. Mills v. Monday.

† See (S. a) pl. 15. S. P.

4. If a Man says of a Weaver that us'd to weave for divers Customers, He is a Rogue and a Villain, and he taketh the Goods of his Customers, and pawneth them, and he is not a Man to be trusted, Action lies; for this disgraces him in his Trade. Hill. 1650. between *Delaporte and Cook* adjudged, this being moved in Arrest, where the Words were spoken in French, but this was the Interpretation in English. Intratur Hill. 1649. Rot. 1459.

Jo. 395. pl. 1. S. C. adjudg'd accordingly upon the

5. In Action upon the Case, if the Plaintiff declares that he was retained as the Servant and Bailiff to J. S. and lived in the House with him, and that the Defendant spoke these Words of him, You are a cozening Knave, and you did cozen your Master of a Bushel of Bar-

ley

ley (Innuendo the Barley of J. S. in the Charge and Truſt of the Plaintiff before put and committed) an Action lies for theſe Words. Mich. 13 Car. B. R. between *Sam and Bigg* adjudged, this being moved in Arreſt of Judgment.

first Words, no Mention being there of the Barley.——All the

Court (abſente Brampſton) held, That true it is generally an Action will not ly for calling one cozening Knave, yet where they are ſpoken of one who is a Servant and Accountant, and whoſe Credit and Maintenance depends upon his faithful Dealing, and he by diſgraceful Words is deprived of his Livelihood and Means of Maintenance, there is good Reaſon it ſhould bear an Action, that he might have Recompence for his Loſs of Credit, and Means &c. Cro. C. 480. 481. pl. 3. Mich. 13 Car. B. R. S. C.

If a Bailiff is intruſted with buying and ſelling Corn, and has greater Wages in reſpect thereof, and another ſays of him, *He hath deceived his Maſter, by Buying and Selling by falſe Meaſure to his Loſs and Damage*, this is actionable; for it diſcredits him in his Means of Living, and may occaſion his loſing his preſent Service, and to be refus'd by others; Per Hobart Ch J. Hob. 76. in pl. 95.——But Win 40. Hobart Ch J cites the Caſe of Brad v. Hay, in B. R. that the Plaintiff declared he was Bailiff to J. S. and had the buying and ſelling his Corn; and that Defendant ſaid of him, That he *ſold by falſe Meaſures*. And adjudg'd that no Action lies; for it is not a Scandal to him in his publick Profeſſion.

The Plaintiff declares, That he was *Bailiff or Servant* to Mr. Gawdy; and the Defendant ſaid, *Mr. Farrer deſired Mr. Gawdy to ſee farther how Raynolds did get his Means; and that he was become a Broker, and did not know but that he now and then threw in a Load of Corn; and that his Wife was as chargeable as a Lady, and if he kept him he would never let a Foot of Land.* Reſolved per Curiam, that they are not actionable; but if he had declared that he had been his Bailiff certainly, and had alleged a ſpecial Damage, it had been good; and the ſaying Mr. Farrer ſaid the Words, whereas he ſaid them not (which was averr'd by the Plaintiff) would not excuſe him any more than if he had ſpoke them himſelf. Judgment arreſted. Freem. Rep. 275. pl. 304. Paſch. 1674. Raynold v. Blanchett.

6. In an Action upon the Caſe, if the Plaintiff declares that he us'd the Art of a Scrivener for 8 Years before, and received the Money of the King's Subjects; and that the Defendant ſpoke theſe Words of him, He is a broken Runaway, and dares not ſhew his Face, Action lies for theſe Words; for tho' it was objected that before 21 Jac. of Bankrupts a Scrivener was not within the Statute of Bankrupts; and here it does not appear by his Declaration that he ſo received Money as to make him a Bankrupt within the Statute. But Per Curiam adjudged that the Action lies; for tho' it is not within the Statute, yet the Action lies at the Common Law, becauſe theſe Words diſgrace him in the Trade of a Scrivener. Mich. 13 Car. B. R. between *Beſt and Loit*, Per Curiam, Trin. 13 Car. 690.

Words ſpoke of a *Carpenter* were, that *he is broken and run away*. He declar'd that he was a Carpenter, and Freeman of London, and got much Money by buying Timber and Materials, and building Houſes; and that Defendant, in Diſcourſe of him and his Trade, ſpoke thoſe Words. The Plaintiff had a Verdict. The Court were divided in Opinion whether Action lies or not, and ſo the Plaintiff had his Judgment upon his general Rule for Judgment, there being no Rule made to ſtay it; but otherwiſe had it been on Demurrer or ſpecial Verdict, then it would be adjourn'd to the Exchequer Chamber. 3 Mod. 155. Hill. 3 Jac. 2. B. R. Chapman v. Lamphire.——Comb. 74. S.C. accordingly.

7. If A. keeps a Stable in London, and uſes to receive Horſes at Livery, and J. S. ſays to him, Thou buyeſt nothing but ſtinking rotten Hay to poiſon Mens Horſes, no Action lies by A. for theſe Words, becauſe he is not any Inn-keeper, and ſo it is not any Trade allowed in Law. *Paſch. 14 Car. between *Jones and Joice* Per Curiam, in Arreſt of Judgment, ſtaid.

Words ſaid of an Inn-keeper were, *Go not to ſuch an Inn; for he is ſo poor that you can have no good Entertainment.* Action lies. Hutt. 125. Paſch. 10 Car. Per Cur. Obiter.

* Fol. 60.

Caſe &c. in which the Plaintiff declared that he is Keeper of a Livery-Stable, and of the Bell-Savage Inn, and that the Defendant had other Livery-Stables in the ſame Yard; and that a Stranger coming with a Waggon into the Yard, and inquiring of the Defendant which was Bell-Savage Inn, the Defendant replied, *This is Bell-Savage Inn; deal not with Southam* (the Plaintiff) *for he is broke, and there is neither Entertainment for Man nor Horſe.* After a Verdict for the Plaintiff, and great Damages, the Judgment was affirm'd after much Debate. Raym. 231. Mich. 25 Car. 2. B. R. Southam v. Allen.

See (L. b) pl. 4. S. C. —— Mar. 1. 2. pl. 3. Anon. S. C. the Court was clear of Opinion that an Action lies, and that the Averment ought to be, That in this (and so shew it specially) the Plaintiff was damnified.

8. If a Man says of A. to his Master, who is a Shoemaker (A. being his Journeyman, and the Foreman of his Shop, and us'd to cut Leather to make Shoes, and to sell Goods for his Master) it is no Matter who hath him; for I warrant whosoever hath him he will cut him out of Doors, with an Averment that in London (where the Words were spoken) these Words tantamount, as if he had said, That he would undo his Master, Action lies; for it is a Scandal to him in his Trade. Pasch. 15 Car. B. R. between *Ellis and Hunt* adjudged Per Curiam, it being moved in Arrest that the Action did not lie. There were other Words to which the Court gave no Regard. Intratur Hill. 14 Car. Rot. 1218.

9. In an Action upon the Case, if the Plaintiff declares that whereas he was a Servant to J. S. and as a Journeyman to him sold several Goods for his Master truly, and that he got his Living by his said Service; and that the Defendant having Communication of his Selling, said to the Plaintiff, Thou hast cozened me of 5 l. in a Piece of Stuff, and hast cozened me of 600 l. or 700 l. more; thou hast maintained thy self and others with my Money; and thou didst take 4 l. or 5 l. out of the Box. Action lies upon this Declaration; for these Words tend to disgrace him in his Profession. Mich. 15 Car. B. R. between *Phillips and Ellaker*, Per Curiam adjudged, after a Motion in Arrest of Judgment. But quære how this disgraces him in his Trade, inasmuch as this is no Prejudice to the Master, if his Servant cozens another in a Piece of Stuff, and it does not appear what Sor he intended.

S. P. adjudg'd Nisi &c. Sty. 388. Mich. 1653. B. R. Townsend v. Barker. —— *He is a base cheating Knave, and had cheated his Father by returning 20 l. for Waves*, was held by Berkley and Crooke (cæteris absentibus) to be actionable, being spoke of a *Merchant*. And Judgment for the Plaintiff. Cro. C. 552. pl. 6. Trin. 15 Car. B. R. Arundel v. Mare.

10. In an Action upon the Case, if the Plaintiff declares that he was a Merchant &c. and the Defendant to the Intent to defame him in his Trade, having a Discourse of his Trade, and of a Partownership between the Plaintiff and J. S. before had in a certain Ship called B. spoke these scandalous Words of the Plaintiff, He is a base cheating Knave, and he hath cheated J. S. (the said J. S. Innuendo) and I will prove it; for he received of C. in Partnership 20 l. and gave an Account unto J. S. (prad. J. S. Innuendo) but of 5 l. received of the said C. ubi revera, he gave a true Account of all Things between the Plaintiff and the said J. S. touching the said Partnership. The Action well lies upon this Declaration, for this disgraces him in his Trade; for it disgraces him in his Partnership, which is one Part of his Trade, as a Merchant. Trin. 15 Car. B. R. between *Arundel and Masy* adjudged Per Curiam, this Matter being moved in Arrest of Judgment.

Hill is a broken Rascal, and hath broken twice already, and I will make him break the 3d Time; but because the Plaintiff only said that he was a lawful Subject, and

11. In an Action upon the Case for scandalous Words, if the Plaintiff declares that whereas for divers Years before suit verus & fidelis emptor & venditor Merchandizarum & Mercimoniorum & diversa Mercimonia, Merchandizas & res per viam barganizationis & venditionis emerit & vendiderit & hujusmodi emptione & venditione per totum tempus prædictum usus fuit, and thereby hath maintained himself and his Family; the Defendant said these Words of him He is a broken Bankrupt, and a declined Man, not able to pay his Debts, and therefore is run the Country. Tho' he does not allege that he us'd any certain Trade, viz. of a Merchant, or other certain Trade, yet the Action lies; for such a Man who uses to buy and sell, and live thereby, is within the Statute of Bankrupts, tho' he is not of any cer-

certain Trade. Pasch. 16 Car. B. R. between *Boyer and Shale* adjudged Per Curiam, tho' I moved this in Arrest of Judgment. Intratur Hill. 15 Car. Rot. 109.

that he got his Living by Buying and Selling, but did not say that he was a Tradesman, Judgment was arrested Per tot. Cur. And Doderidge said it might be intended of Burstness of Belly, and that (I will make him break) will not bear an Action; nor to say (he hath broken twice) because many that have been Bankrupts may now be sufficient; to which Jones agreed; but Doderidge and Jones said, that to say *He will break shortly*, will bear an Action, but not to say *I will make him break*. Crew inclined to the whole, and Day was given to shew Cause why Judgment should not be arrested. Lat. 114. Pasch. 2 Car. Hill's Case.——S. C. cited D. 72. b. pl. 6. Marg.——Noy 77. Marshall v. Allen, the very same Words, and seems to be S. C. adjornatur.——D. 72. b. Marg. pl. 6. cites S. C. and says Judgment was arrested, because he did not count that he was a Tradesman.——S. C. cited Arg. Sty. 429. but Roll Ch. J. said he did not agree that Case.——S. C. cited 2 Ld. Raym. Rep 1480.

Thou art a Cozener and a Bankrupt, and hast an Occupation to deceive Men by, was spoke of a *Gentleman* who had 100 l. a Year Land to live upon; and therefore, tho' he *used to buy and sell Iron*, yet because he was *not a Merchant, nor did live by his Trade*, the better Opinion of the Court was, that the Words were not actionable. And so adjudged. Godb. 40. pl. 45. Hill. 28 Eliz. B. R. Anon.——S. C. cited Arg 3 Mod. 112.

Case &c. in which the Plaintiff declared, that he for 7 Years last past had lawfully *used the Art of Buying and Selling*, and had gained great Profit thereby for the Support of himself and Family; and that the Defendant False & Malitiose said of him (the Plaintiff) *he is a Runagate, and worse than a Rogue; and if he had his Deserts he had been hang'd*, whereby he lost his Custom; but he did not allege any special Damage. After a Verdict for the Plaintiff the Judgment was stay'd, because Runagate had not the same Sense as Bankrupt, and here the Plaintiff did not set forth what Trade he us'd, it might be of a Tinker or Pedlar who are Rogues by the Statute Eliz. so the Words not actionable. But the Reporter makes a Quære, by reason of the Words, Thou deserveſt to be hanged. 2 Lev. 214. Mich. 29 Car. 2. in the Exchequer, Cockaine v. Hopkins.

In Case &c. the Plaintiff declared, that by buying and selling Wares uberrimam sibi & familæ acquisivit vivendi sustentationem (without mentioning any certain Trade) and that the Defendant said to him, and of him, *Thou art a pitiful, beggarly, broken Fellow*. After a Verdict for the Plaintiff, it was objected that the Plaintiff did not allege that he was of any Trade. Sed non allocatur; and the Plaintiff had Judgment. 2 Jo. 140. Hill. 32 & 33 Car. 2 B. R. Peacock v. Leech.——2 Show. 153. pl. 136. Hill. 32 & 33 Car. 2. B. R. Anon. same Objection made and over-ruled as here, and seems to be S. C. only the Words there are, viz. *He is a Bankrupt, and has been so these several Months*. And adjudged for the Plaintiff.

12. If a Man says of a Tradesman, Thou art a base beggarly Fellow, *and had it not been for my Help he had not had a Bit of Bread to put in his Head; and I have exactly cast up his Estate; he is not able to pay above 2 s. 6 d. in the Pound to his Creditors of their Debts, an Action lies; for this discredits him in his Trade, without averring any particular Damage. Pasch. 1651. adjudged between *Smith and Rookes*, this being moved in Arrest of Judgment. Intratur Pasch. 1651. Rot. 311.

* Fol. 61. Sty. 273. Rooke v. Smith, S. C. but there the Words are, *Thou art a poor Fellow, and art not able to pay 2 s. in the Pound, and art not able to pay thy Debts*. And Roll Ch. J. said that it was not necessary for the Plaintiff to aver that he was able to pay his Debts. And Judgment for the Plaintiff Nisi.

13. If a Man says of a Grocer, or other Tradesman, You are a base, beggarly Knave, and you are not able to pay your Debts; and avers, that according to the Phrase and understanding of the Place where the Words were spoken, these Words were understood that he was a Bankrupt, Action lies for these Words, it being found for the Plaintiff, by which the Averment is found true. Pasch. 11 Car. B. R. between *Jackson and Lewes* adjudged, this being moved in Arrest.

Cro. C. 472. pl. 5. Pasch. 13 Car. B. R. Anon. but seems to be S. C. adjudg'd accordingly.—Sty. 217. S. C. cited by Roll Ch. J. as the Case of Jackson v. Hewes, the Words being spoken of a *Grasier*.

He is a beggarly Fellow, and not worth a Groat, and not able to pay his Debts; and he goes abroad with his Men double-arm'd for Fear of the Bailiffs. The Court thought the Words actionable, being spoke of a Merchant. Sid. 424 pl. 7. Mich. 21 Car. 2. B. R. Drake v. Hill.——Lev. 276. S. C. but the Words there are, *He is fled and gone, and I shall lose my Money*; and at another Day, *He is a beggarly Fellow, and not worth a Groat, and not able to pay his Debts*. The Court held the last Words as actionable as the first, but upon the Importunity of Serjeant Maynard, who moved it, they stayed the Judg-

ment for a Fortnight.——Raym. 184. S. C. but the Words there are, *He is broke, and gone for Virginia. I have ill Fortune; for he is fail'd, and I have loſt my Monies. He is a beggarly Fellow, and not able &c.* [as in Sid.] And Judgment was given for the Plaintiff ——2 Keb. 549. pl. 25. S. C. Judgment for the Plaintiff Niſi, the Words altogether amounting to as much as calling him Bankrupt.———To ſay of a Merchant, *He is not worth a Groat*, is not actionable, becauſe he may be an honeſt Man notwithſtanding; Per Keeling Ch. J. Raym. 184. in the Caſe of Drake v. Hill.

He is a pitiful Fellow, and not able to pay his Debts, being ſpoke of a *Merchant*, was adjudged actionable, without any ſpecial Signification or ſpecial Damage. And per Holt Ch. J. it is not material whether the Words import a Bankruptcy, but the true Reaſon is becauſe it imports a Scandal to a Tradingman, and there *needs no Averment that he was no pitiful Fellow, and was able to pay his Debts.* Comb. 292. Mich. 6 W. & M. in B. R. Hooker v. Tucker.——Carth. 330 Cook v. Tucker, S. C. and the Plaintiff ſetting forth that the Defendant having Communication of him, and his Trade and Family, ſaid the Words. And the Court held the Words actionable.

Saying to a Millener, *Thou art a beggarly Fellow, and not worth a Farthing.* Plaintiff alleged, that by Reaſon of theſe Words A. his former Cuſtomer, left him. Held that the Averment ſignifies nothing; for it alters not the Nature of the Words. And Judgment for the Plaintiff per tot. Cur. 12 Mod. 591. Mich. 13 W. 3. Simpſon v. Barlow.

(H. a) pl. 8. S. C.—— Noy 117. Thorne v. Durham, ſeems to be

14. If a Man ſays to an Alehouſe-keeper, Thou art a Bawd, and doſt keep a Bawdy-houſe, Action lies for theſe Words; for by this Report he will loſe his Cuſtom, and forfeit his Recognizance. Hill. 4 Jac. B. R. between *Turnam and Thorne* adjudged.

S. C. and held accordingly; but ſays it was ſpoke of one that kept a *Victualling-houſe.*———So of one that keeps an *Inn or a Tabling-houſe*; for by this her Houſe is ſlander'd. Cro. E. 582. in pl. 8. Per Cur. Mich. 39 & 40 Eliz. B. R.——S. P. accordingly, Goldsb. 172. pl. 104.

See (Y. a) pl. 18. 22. S. C.—— S. C. cited Cro. J. 430. pl. 9. in

15. If a Man ſays to an Inn-keeper, Thou art rotted with the Pox, Action upon the Caſe lies; for this cannot be intended of the natural Pox, for no Rottenneſs comes of that. Hill. 41 Eliz. B. R. between Davis and Taylor.

Miller's Caſe, where the Words are, He is *laid of the Pox.*——Ibid. cites 33 Eliz. Backſter's Caſe, S. P.——Cro. J. 144. pl. 3. Hill. 4 Jac. B. R. in Caſe of Taylor v. Perkins, S. P. admitted.——Cro. E. 648. pl. 2. S. C. adjudg'd accordingly, by Fenner J. only in Court.——*E. had the French Pox, and hath ſet it in the Houſe* (meaning the Plaintiff's Houſe, who was an Inn-keeper) *and W. S. and his Wife* (meaning the Plaintiff and his Wife) *have it, and all you.* Adjudged actionable.

Words ſpoken of an *Inn-keeper*, viz. *Colonel E. had the French Pox, and hath ſet it in the Houſe, and Smith and his Wife have it.* It was objected that the Words (hath ſet the French Pox in the Houſe) is inſenſible. But adjudged actionable. Sty. 112. Smith v. Hobſon.

S. C. cited, and the Plaintiff alleged Quod per multos Annos jam retroactos artem Merchandizandi exercuit & uſus fuit.

16. If a Man has been a Merchant, and us'd the Trade of a Merchant for ſeveral Years paſt, tho' he does not uſe it now, and another calls him Bankrupt, an Action upon the Caſe lies; for tho' he does not uſe it at the Time of the ſpeaking of the Words, yet he remains a Merchant, and may uſe the Trade at his Pleaſure. Trin. 39 Eliz. B. R. between *Gardner and Hopwood* adjudged, upon ſuch a Declaration.

And Judgment given for the Plaintiff. Yelv. 159.———Win. 17. Arg. cites 5 Jac. C. B. Atkinſon's Caſe, where the Declaration was the ſame, and that it was adjudged ill, becauſe he did not allege that he exercis'd Merchandize at the Time of the ſpeaking; and he ſaid the Cauſe of the Judgment was enter'd on the Roll, and he could ſhew the ſame to the Court; and Hobart deſired to ſee it, for he doubted much of the Law of it; to which Winch and Hutton agreed.

Cro. E. 541. pl. 5. S. C. adjudg'd accordingly.— *I believe all is not well with V. there are many*

17. J. S. being a Merchant, if J. D. demands of D. whether J. S. owes him any thing; to which D. anſwers Yes; upon which J. D. ſays, You were beſt to call for it in, and to take Heed how you truſt him, no Action lies for J. S. for theſe Words; for he only gives the other good and found Counſel. Trin. 39 Eliz. B. R. between *Vanſpicke and Clayton* adjudged.

Merchants that have lately fail'd, and I expect no otherwiſe of V. being ſpoke of a *Merchant*, was adjudg'd actionable. Raym. 207. Mich. 22 Car. 2. B. R. Vivian v. Willet.——2 Keb. 718. pl. 110. Vinian v. Willet, S. C. adjudg'd accordingly.

Words

Words ſpoken of a Citizen and Pewterer were, *He is gone, and hides himſelf for Debt, and for aught I know he is a Bankrupt. Have a Care, and do not truſt him; for he will run away, and pay you nothing.* It was moved that the latter Words were not actionable; and therefore Damages being given for both, no Judgment ſhould be given. But the Court held that both the Words taken together are actionable; and Judgment Niſi &c. Sty. 142. Mich. 24 Car. B. R. Jones v. Jacob.

18. If a Man ſays of a Merchant, That he is a Bankrupt, Action lies. Mich. 7 Jac. B. between *Long and Long* adjudged. To call one *Bankrupt* generally, no Action will lie upon it, but *to call a Merchant ſo* is actionable; Per Wray Ch. J. Le. 336. Trin. 31 Eliz. B. R. in pl. 469.

He is a Bankrupt Knave is actionable, being ſpoke of a common *Baker*. Hutt. 49. Trin. 20 Jac. Hawkins v. Cutts.

Thou art a Bankrupt, being ſpoke of one that *ſold Wool*, adjudg'd actionable. Noy 158. Courtney v. Thompſon —Her. 171. Waters v. Thompſon, Trin. 2 Car. C. B. S P. and ſeems to be S C.

He is gone, and hides himſelf for Debt, and for aught I know is a Bankrupt. Judgment for the Plaintiff Niſi. Sty. 142. Mich. 24 Car. B. R. Jones v. Jacob. Vent. 60. Twiſden J. ſaid he knew theſe Words held actionable.

19. If a Man was a Merchant, and after leaves off Merchandizing for 2 or 3 Years, and another calls him Bankrupt, an Action lies; for he may exerciſe his Trade again when he will. Mich. 7 Jac. B. between *Long and Long*. Paſch. 44 Eliz. B. R. between *Gray and Weſton*. Trin. 39 Eliz. B. R. between * *Gardiner and Hopwood*, adjudg'd. * See pl. 16. S. C. and the Notes there.

20. If a Man ſays to J. S. of a Merchant of the Staple, who uſed to buy and ſell Wool, Buy no more Wool for him, for he will never pay for it, he is not worth a Penny; an Action lies for theſe Words. Paſch. 11 Car. in the Exchequer-Chamber, in a Writ of Error upon a Judgment in B. R. adjudged, and the firſt Judgment affirmed. Intratur Paſch. 12 Car. B. R. Rot. 424. *Truſt him not, for he is not worth one Groat*, is actionable, being ſpoke of a Merchant. Hutt. 125.

Paſch. 10 Car. per Curiam obiter.——*So* truſt him not, *for he owes me* 100 *l.* and is not worth one Groat. Adjudg'd actionable, being ſpoke of *a Fuller*. Hutt. 124. Paſch. 10 Car. Dawe v. Palmer.

21. If a Man ſays to a Mercer, Thou art a Cuckold, and a cuckoldly Raſcal; thou doſt owe more than thou art worth, and thou art not able to pay all thy Debts; Action lies for theſe Words; alleging that he uſed before to buy ſeveral Commodities upon Truſt, without ready Money, but that after, by Reaſon of theſe Words, he could not buy without ready Money. Paſch. 1650. between *Vicary and Barons*, adjudg'd, this being moved in Arreſt of Judgment. Sty. 213. S. C. adjornatur. —— Ibid. 217. S. C. held actionable by 3 Juſt. contra Ask. J. who doubted, and Roll Ch. J. order'd that the Plaintiff have his Judgment Niſi &c.——*He is not worth a Groat, he is* 100 *l. worſe than Nought*, being ſpoke of a Merchant, is tantamount to the calling him Bankrupt, and therefore adjudg'd for the Plaintiff. Cro. C. 265. pl. 14. Trin. 8 Car. B. R. Goodyear v. Biſhop.

You are a Beggar and a bankruptly Fellow, and if every one had his own, you are not worth a Groat, being ſpoke of a *Farmer*, and it appearing that by Reaſon thereof his Landlord had given him Warning to quit his Farm, tho' the Words generally conſider'd are not actionable, yet Roll Ch. J. order'd Cauſe to be ſhewn why the Plaintiff ſhould not have his Judgment. Sty. 426. Mich. 1654. Roungs v. Woodward.

Thou art a pitiful idle Raſcal, and not worth a Groat, actionable being ſpoke of *a Weaver*, and alleged that he got his Living by buying and ſelling, for it amounts to calling him Bankrupt; and Judgment for the Plaintiff. 2 Show. 295. pl. 293. Paſch. 35 Car. 2. B R. Garret v Shelſon.——S. C. cited per Cur. as held actionable. Carth. 330. Mich. 6 W. & M. in B. R.

The Defendant diſcourſing with a Creditor of a *Sugar-Baker &c.* to whom he owed 10 l. ſaid, *I will not give you* 2 *s. in the Pound for your Debt, he* (innuendo the Plaintiff) *is a pitiful Fellow, and owes* 40 *l. more than he is worth*, held actionable. Freem. Rep. 18. pl. 18. Mich. 1671. Brown. v. Robinſon.

22. If a Man ſays of a Mercer, He hath deceived me in a Reckoning, and his Debt-Book which he keepeth in his Shop is a falſe Debt-Book, * and I will make him aſhamed of his Calling, no Action lies for theſe Words; for the Words ſhall be taken in mitiori ſenſu, and then the Debt-Book may be kept by the Servant (as for the moſt Godb. 241. pl. 336. * Fol. 62. Brook's Caſe

Part

S. C. Hobart Ch. J. and Nichols J. held the Words not actionable, but Warburton Juſtice doubted; and afterwards adjudg'd not actionable, to which Warburton at length ſeem'd to agree.——Brownl. 4. S. C. Hobart and Nichols held the Words not actionable; but Warburton e contra.——Mo. 409. pl. 553. S. C. but the Words there are, *He is a falſe Man, and I will prove it; and he keepeth a falſe Debt-Book; for he hath charged me with a Piece of three pil'd Velvet which I never had*; adjudg'd not actionable, without ſaying it by Way of diſſuading his Cuſtomers or others that they ſhould not deal with or truſt him.——Cro. E. 403. pl. 12. Brook v. Watſon S. C. and the Words were much the ſame as in Mo. and Popham ſaid the Defendant ſpake only of a Grievance to himſelf by that falſe Entry, and not in general Words to diſcredit the Plaintiff; but if he had ſaid, *Take Heed how you deal with him, for he keepeth a falſe Book*, peradventure an Action would lie, becauſe he drew other Cuſtomers from him; therefore it was adjudg'd for the Defendant.—— Palm. 65. cites S. C. accordingly.——S. C. cited by Hobart Ch. J. Win. 40.

You are a cheating Fellow, and keep a falſe Book, and I will prove it, not actionable, it not being averr'd that at the Time of the ſpeaking the Words there was any Communication of the Plaintiff's Trade, or of his Dealing by buying or ſelling, and ſo cannot touch him in his Trade; And the keeping a *falſe Book* does not imply that he kept a *falſe Debt-Book*. 2 Saund. 307. Paſch. 23 Car. 2. Todd v. Haſtings.—— Vent. 117. S. C. and the Want of a Colloquium of the Plaintiff's Trade was objected, ſed non allocatur; for the Words muſt be intended of a Debt-Book which Shopkeepers keep; and to ſay ſuch a one keeps a falſe Book, is a great Slander to him in his Trade

There being Diſcourſe of the Plaintiff's Trade, the Defendant ſaid, *He was a cheating Knave, and kept a falſe Debt-Book, with which he cheated the Country*; the Court reſolved that the Words laid together are actionable; for Tradeſmen's Books are of much Regard, and ſometimes given in Evidence. Vent. 263. Mich. 26 Car. 2. B. R. Crawfoot v Dale.

Hob. 76. pl. 95. S. C. adds, *And I will prove it, and thou haſt changed my Barley*. Adjudged not actionable. But if Plaintiff had been a *common Badger*, and charg'd with ſelling by falſe Meaſure, it would have born an Action. And Hobart Ch. J. held, that if a Gentleman's Bailiff be charg'd with Buying and Selling by falſe Meaſure, in Deceit of his Office, to the Loſs or Damage of his Maſter, this is actionable; for it diſcredits him in his Means of Living. But in the preſent Caſe it appears not that the Words were ſpoke of any Sale while he was Bailiff, nor of his Maſter's Corn, nor to his Maſter's Damage.—— Brownl. 4. S. C. adjudged actionable.

23. If A. is Bailiff to 2 Men, and for 3 Years before the Action brought had uſed to ſell their Barley, and another ſays to A. Thou art a cozening Knave, for thou haſt cozen'd me in falſe Meaſure in my Barley (innuendo certain Barley &c.) the Country is bound to curſe thee for ſelling falſe Meaſure in my Barley, no Action lies for theſe Words, becauſe it does not appear that he lived by the ſelling of Barley, whereby this ſhould impair his Livelihood. Mich. 13 Jac. B. between *Bray and Hayns*, per Curiam adjudged.

24. If a Man ſays of a Smith, Thou art a Rogue, and a cozening Rogue, and in one Tire of Wheels ſent George Bell, thou didſt cozen him of a Noble, and that I will prove, no Action lies for theſe Words, becauſe it may be intended that he cozen'd him in the Price, which is not any Slander to his Trade, for he does not ſay that he made falſe Ware &c. Paſch. 16 Jac. B. between Digner and Sucling.

Jo. 366. pl. 4. S. C. accordingly; for it does not appear by the Words that the Cheating was in any thing relating to his Trade.——Cro. C. 417. pl. 5. S. C. adjudged accordingly per tot. Cur. who delivered their Opinions ſeriatim.——S. C. cited, and Judgment accordingly, where the Words were, *You are a cheating old Rogue, and have cheated the Fatherleſs and Widow*. Not actionable, being ſpoke of a Tradeſman, there being no Colloquium laid of his Trade; and therefore Judgment arreſted. 2 Ld. Raym. Rep. 1417. Paſch. 12 Geo. B. R. Ludwell v. Hole.——But where there was a Colloquium of a Timber-Merchant in his Way of Trade, and the Defendant ſaid of him, *He is a Rogue and a Villain; he has cheated me of* 14 *l.* the Words were held actionable, and Judgment for the Plaintiff. 2 Barnard. Rep. in B. R. Trin. 5 Geo. 2. Smith v Jones.

25. If one ſays of another who is a Tradeſman, ſcilicet, that uſes the Trade of buying and ſelling of Crewel in a Shop that he keeps, Thou art a cheating cozening Fellow, and thou haſt cozen'd my Huſband of 500 l. there not being any Communication of his Trade before, no Action lies; for this of itſelf is not actionable, without an Averment of a Diſcourſe of his Trade, to which it may be referr'd. Mich. 11 Jac. B. R. between *Needler and Symnel*, per Curiam adjudged in Arreſt of Judgment after a Verdict for the Plaintiff.

26. If

26. If a Man says of the Wife of a Butcher of London, that used to sell in the Shop of her Husband, She is a cozening Woman, the did cozen one of her Neighbours (innuendo quendam D. D.) of 40 l. no Action lies for these Words, because this does not disgrace her in her Trade, inasmuch as there was not any precedent Speech of her Trade, so that it may be intended that he spoke thereof. Mich. 13 Jac. B. between *Sammon and Ball*, adjudged. Hutt. 14. anon. S. P. accordingly, and seems to be S. C. — *A cheating Knave and Rogue.* These Words were spoken of a *Mercer*, but there being *no Colloquium laid*, but only of the Man, and not *of his Trade*, Judgment was stay'd. Lev. 250. Mich. 20 Car. 2. B. R. Smedley v. Heath. ——— Raym. 169. Smedley v. Heap. S. C. accordingly. —— 2 Keb. 404. pl. 15. S. C. accordingly.

Words spoken of a *Merchant* were, *Thou art a cheating Rogue, and hast cheated me of* 20 *l.* After Verdict Judgment was stay'd; for per Cur. the Words are not actionable *without Averment or Colloquium of his Trade.* 2 Keb. 91. pl. 10. Mich. 18 Car. 2. B. R. Combe v. Peters.

27. If a Man says to a Goldsmith, Thou art a cozening Knave, and soldest me a Chain of Copper for Gold; Action lies for these Words. Hill. 32 Eliz. B. R. *Peck's* Case, adjudged, cites Mich. 13 Jac. B. *For thou soldest &c. and he is a cozening Knave upon Record.*

Wray and Gawdy conceived the Words not actionable, unless it had been alleged that he is a Goldsmith, and got his Living by buying and selling of Chains, and such Wares, and then peradventure the Action would lie; but not here. Cro. E. 171. pl. 12. Hill. 32 Eliz. B. R. Ryle's Case seems to be S. C.

28. In an Action upon the Case for Words, if the Plaintiff declares that he had used the Trade of a Brewer for several Years, and had brewed wholsome Beer and sold to his Customers, by which he had obtain'd great Profit to himself, and that the Defendant to the Intent to discredit him with his Customers, upon a Colloquium of and concerning the said Occupation and Art of the Plaintiff, maliciously spoke these false Words of him, Lee's Beer is unwholsome, (innuendo the Beer of the Plaintiff made for his Customers in his said Trade) by which he is discredited, and has received Damage in the selling of his Beer in his Trade, as he ought before any Action lies for these Words, and upon this Declaration, tho' he does not charge him with any Deceit, for Beer may be unwholsome for want of good Brewing, or for other Neglect of his Servants; and tho' it does not appear that the Defendant spoke these Words of Beer that he sold to his Customers, yet upon this Declaration (tho' the Innuendo will not help it) it shall be intended such Beer as he sold to his Customers, having a Discourse of his Trade; and Brewers are punishable for selling of unwholsome Beer by the Statute; and it is alleged that he had Damage by speaking of these Words, and therefore this Action lies. Mich. 9 Car. B. R. between *Lee and Stradwich*, adjudged, it * being moved in Arrest of Judgment by myself. Intratur Trin. 9 Car. Rot. 1097. See supra pl. 1. and the Notes there the like Point —— *N. puts Lime in his Ale, and kill'd E. C. and the poor Man lost his Life and his Eyes by drinking N.'s Ale.* It was objected that the Words are not actionable, because a Victualler ought not to sell Ale, neither has he alleged any *special Damage.* * Fol. 63.

mage. The Court inclined that the Words were actionable. Freem. Rep. 25. pl. 33. Hill. 1671. Nuton's Case.

39. If A. had used to keep at Board several Children, by which Means he got his Living, and another says to him, you have starved Hospital Children, and you kept a Kinsman of your Wife's and starved him to Death (innuendo A. B. that he kept at Board;) you kept one of J. S.'s Children, and starved it to Death; (innuendo W. S. whom he kept at Board) by Reason of which Words People forbore to put their Children to him to Board, so that he lost his Livelihood, an Action lies for these Words upon the Declaration, because he disgraces him in his Trade of Living. Trin. 13 Car. B. R. between If one says of a Merchant, *Put not your Son to him, for he will starve him to Death*, the Words are actionable; for it comes

within the Compaſs of the Diſgrace of his Profeſſion.

Harriſon and Eldrington, adjudged per Curiam, this being moved in Arreſt of Judgment. Per Yelverton J. Het. 71.

30. In an Action upon the Caſe, if the Plaintiff declares that whereas he was a Leather-Seller, and uſed to ſell Shamoys-Skins to J. S. his Cuſtomer, and avers that Shamoys-Skins were of a greater Price than Lamb-Skins, and that the Defendant having Parlance of the Plaintiff, ſaid to J. S. of the Plaintiff, He hath cozen'd you, and hath ſold you Lamb-Skins inſtead of Shamoys-Skins, do not go to him for he will cozen you, the Action lies upon this Declaration, becauſe he ſlanders him in his Trade, and to his Cuſtomer. Mich. 10 Car. B. R. between *Fairebank and Malſon*, adjudged per Curiam upon a Demurrer. Intratur 10 Car. Rot. 1339.

To ſay of a *Silk-Dyer*, That he *puts in Duſt in his* [* *Fat* or] *Silk*, is actionable, becauſe it makes it more ponderous &c. cited by Doderidge J. Lat. 188. Trin. 2 Car. in Caſe of Dean v. Steel. * S. C. cited D. 72. b. Marg. pl. 6. —† 1 Salk. 16. pl. 7. Trin. 11 W. 3. B. R. it was ſaid by Holt Ch. J. and Rokeby J. that this Caſe had often been denied, and is not Law; for the Damage muſt be ſpecially ſhewn, where the Words in themſelves are not actionable.

31. In an Action upon the Caſe, if the Plaintiff declares that whereas he, at ſeveral Times for 25 Years laſt paſt, had ſow'd Woad-ſeed, and had uſed to weed it, and after to grind it, and per totum idem tempus had uſed to ſell the Woad to his Cuſtomers, and the Cuſtomers had uſed to take a Say of the Woad before they bought it; and farther ſhews that if any Man puts black Mould among the Woad, this makes the Woad of leſs Value; and that the Defendant was formerly his Servant for 8 Years, and that the Defendant to the Intent to diſgrace him in his Trade, ſaid of the Plaintiff, He did uſe to make me, when I dwelt with him, to take black Mould out of Hillocks, and to mix it among the Woad, and afterwards ſold it for Woad. The Action well lies for theſe Words upon this Declaration, with an Averment, that by reaſon of thoſe Words he loſt his Cuſtomers, and great Benefit thereby, tho' he does not ſhew in his Declaration that he had any Cuſtomers in particular by Name; for this is not neceſſary, inaſmuch as they may be many; and it is not like an Action for Loſs of Marriage, but like an Action brought by a Counſellor for Words, by which he loſt his Clients in general. Old Entries 22. Paſch. 11 Car. B. R. between † *Jeſſon and Hayes* adjudged, this being moved in Arreſt of Judgment. Intratur Hill. 10 Car.

S. P. and ſeems to be S. C. Cro. J. 424. pl. 6. Lewis v. Coke adjudg'd actionable; for there is a violent Intendment that he committed Treaſon to the State here and not to a foreign State, and the Treaſon is triable here; and the Addition, That (thou haſt run away from thy Captain) does not detract from the firſt Words, nor are they material to the Action.

32. If one Man ſays of another, He did Treaſon in the Low Countries, and did run away from his Captain, an Action upon the Caſe lies for the firſt Words, ſcilicet, he did Treaſon in the Low-Countries, becauſe he is triable here by the Statute of 35 H. 8. of a Treaſon committed beyond Sea, and his Life is drawn in Queſtion. Paſch. 15 Jac. B. R. adjudged, this Matter being ſpoke to in Arreſt of Judgment.

33. If one Man ſays to another, Thou haſt deſerved to be hanged as well as any Man in Worceſterſhire; for when thou waſt retain'd to ſerve thy Prince thou didſt run away from thy Captain, no Action lies for theſe Words, becauſe it does not appear that he had ſaid that he was preſt to ſerve, and had received preſt Money; for otherwiſe it is not Felony. Hill. 38 Eliz. B. R. adjudg'd.

34. *He is a Caterpillar; for he lives by robbing his Gueſts*, being ſpoken of an *Inn-keeper*, was adjudg'd not actionable clearly by all the Juſtices; for it is as if he had ſaid that *he lives by Powling and Pilling*, which is incident to this Trade. Mo. 179. pl. 319. Paſch. 26 Eliz. B. R. Anon.

But if he had ſaid of an Inn-keeper that *He is a Caterpillar, and lives by robbing in the Highway*, Action would lie. Mo. 179. pl. 319.

Words ſpoken of an *Inn-keeper*, viz. *Your Maſter Thomas Clarke did harbour and lodge Cut-purſes and Rogues, and did receive ſtolen Goods, and there are yet ſome in his Houſe*; and declar'd that by reaſon of ſpeaking thoſe Words he loſt his Gueſts. Adjudg'd not actionable; for an Inn-keeper's Houſe being common to all his Gueſts, he may lodge Cut-purſes and receive ſtolen Goods, without knowing them to be ſuch. But Mountague Ch. J. ſaid if the Words had been, *He doth uſe to harbour Cut-purſes*, it would be actionable, becauſe this implies Notice. 2 Roll Rep. 136. Mich. 17 Jac. B. R. Clarke's Caſe.

35. Action for theſe Words, *He was a Bankrupt*; and alleg'd he was a *Shoemaker, and uſed buying and ſelling of Leather*; and it was adjudg'd that the Action did lie, altho' the Plaintiff was not a Merchant, but he got his Living by Buying and Selling. Cro. E. 268. pl. 6. Hill. 34 Eliz. B. R. Stanley v. Osbaſton.

36 *He is broke, and run away*, was adjudg'd actionable, being ſpoken of a *Carpenter*. 3 Mod. 312. cited per Cur. as Mich. 3 Jac.

37. *He is a very Varlet, and a Knave*, being ſpoken of a *Cooper*, adjudg'd actionable; but the Judgment was reverſed for that Reaſon. Cro. J. 204. pl. 8. Hill. 5 Jac. B. R. Coles v. Kettle.

Words ſpoken of a *Diſtiller*, in which the Plaintiff declar'd that the Defendant, diſcourſing with one Iles, ask'd him *Of whom do you buy your Aqua Vitæ*, who *replied Of Mr. Godfrey* (the Plaintiff;) thereupon the Defendant ſaid, *He is a Varlet, he hath ſuppreſs'd his Brother's Will, to cozen and deceive Men of their Legacies; we will make him cry Peccavi on his Knees; he maketh Shew of Religion, but is an Hypocrite.* Adjudged not actionable, becauſe the Words do not relate to his Trade. Palm. 21. Mich. 17 Jac. Godfrey v. Owen.

38. The Plaintiff declar'd that he exerciſed himſelf in Facultate Emendi & Vendendi, and that Defendant ſaid of him, *Thou art a Bankrupt, and I have many Witneſſes for it.* It was moved that he ought to have ſaid he was a Merchant, and that he ought to have averr'd what Goods he had ſold, and that it might be intended that he uſed this Faculty as a Servant. Sed non allocatur; and Judgment for the Plaintiff. 2 Bulſt. 267. Mich. 12 Jac. Nichols v. Catſey.

39. In Diſcourſe with a *Surveyor and Meaſurer of Land*, about meaſuring of Land, one ſays to him, *Thou art a cozening and a ſhifting Knave, and a cheating Knave.* Montague Ch. J. ſaid theſe Words touch'd the Plaintiff in his Way of Living, and ſo the Action lies; but the other Juſtices doubted. But afterwards all the Court agreed, that a Surveyor being an Officer of Skill, and ſuch Officer for the King is mention'd in Statutes by that Name, and the Words take away his Means of gaining his Living, it was adjudg'd for the Plaintiff. Cro. J. 504. Mich. 16 Jac. B. R. Blunden v. Euſtace.

Godb. 278 pl. 371. Anon. ſeems to be S. C. The Plaintiff counted that he was brought up in the Study of the Mathematicks &c. and the Opinion of the Court was that the Words are actionable; and Montague ſaid it was ruled accordingly in 36 Eliz. Rot. 242. between Kirby and Walter; and he ſaid the Words are actionable in regard it is a Faculty to meaſure Land. But Doderidge took a Diverſity between a Meaſurer of Land by the Pole, and one who does it by Geometry or Mathematicks; that in the firſt Caſe it is no Scandal, it not impeaching his Credit; but in Caſe of a Geometrician or Mathematician, it is an Art or Faculty which every one does not attain to.——2 Roll Rep. 72. London v. Eaſtgate, S. C. accordingly, and adjudg'd for the Plaintiff; but the Judges agreed that ſuch Words ſpoke of a Shoemaker, Butcher, or Baker, are not actionable; for the Goodneſs or Deceit of their Ware is ſubject to the View, and may be diſcern'd by the Eye, which in this Caſe can be diſcover'd only by Perſons skill'd in the ſaid Art, and he is a Perſon mention'd in the Statute De Terris menſurandis, and puniſhable by that Statute if he falſifie his Trade.

40. A Trial being appointed at Guildhall between A. and J. a Vintner, and there being Diſcourſe thereof between B. and L. B. ask'd L. Palm. 63. S. C. Mean-

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tague Ch. J. thought the Words actionable; but Haughton e contra; but Haughton said those Words might be so laid in the Declaration as to make them actionable, by averring that in common Understanding they signify a Bankrupt.——2 Roll Rep. 144. S. C. Haughton J. held the Word (broken) of an uncertain Signification, and was applicable to Infirmity of Body as well as of Estate, and therefore to make them actionable an Averment was necessary; but Montague Ch. J. held that the Court ought to take notice what Words are actionable in London; and because they differ'd in Opinion, the Matter was referr'd to the Arbitrement of the Ch. J.

Will you be at the Trial To-morrow between B. and J. To which L. answer'd *J. is broke, and I warrant you he dares not be there.* The Court inclin'd that the Words were actionable; but because the Damages given were great, viz. 200 l. they would advise; and both Parties referr'd themselves to the Ld. Ch. J. who awarded 66 l. 13 s. 4 d. to be paid the Plaintiff, and he to release. Cro. J. 562. pl. 10. Hill. 17 Jac. B. R. Johnson v. Leman.

Palm. 151. S. C. and Judgment affirm'd, because Dyers have a Dependency on Merchants, and use their Credit for Woad, and other Commodities necessary to their Trade.

41. Words of a *Dyer*, who used to get his Living by Buying and Selling, *Thomas Johns of Hertford*, (meaning the Plaintiff) *is a Bankrupt-Knave, and is not worth 3 Half-pence.* After Judgment, Error was assign'd that the Words were spoken adjectively, and that a Dyer is such Trade that for such Words he shall not have an Action; but resolved e contra, and that the Words are actionable, it being alleg'd that he got his Living by Buying and Selling, and the Judgment was affirm'd. Cro. E. 585. pl. 6. Mich. 18 Jac. B. R. Squire v. Johns.

And it was said per Cur. that it had been adjudg'd 14 Eliz. that a *Tanner* shall have an Action for such Words. Ibid.

42. *He is a Bankrupt, and not able to pay his Debts, but will run the Country.* Plaintiff declar'd that he bargain'd and sold, viz. *merchandiz'd for Lead* in the County of Derby, *and thereby acquir'd Money towards his Livelihood.* It was objected that he is intitled *Gentleman*; but the Court held that the Action well lay. Hutt. 46. Mich. 19 Jac. Allen v. Swift.

43. *He is a Bankrupt-Rogue*, being spoken *of a Wool-winder*, is not actionable. Poph. 184. Mich. 2 Car. B. R. Barker v. Ringrose.

44. *Thou art a Rogue, and a beggarly Fellow, and I shall prove thee a Bankrupt before the next Term*; and afterwards the same Day he said to a 3d Person of the Plaintiff, *Trust him not; for he will be thy Undoing.* The Words being spoke of a Merchant, it was held that those spoke at the 2d Time are as well actionable as those spoke at the first Time, and aggravates the first Words; and Judgment for the Plaintiff. Cro. C. 236. pl. 19. Mich. 7 Car. B. R. Jaxon v. Tanner.

Cro. C. 282. pl. 23. S. C. and tho' he declar'd that per Magnum Tempus usus fuit the Trade of buying and selling Cattle, yet that might be diverse Years before; and adjudg'd for the Defendant.

45. *Thou art a Bankrupt*, is actionable, being spoke of a *Drover*; but because he did *not aver that he was a Drover at the Time of speaking* the Words, Judgment was Quod querens nil capiat &c. Jo. 304. pl. 12. Mich. 8 Car. B. R. Collis v. Malins.

In an Action for calling him Bankrupt, the Plaintiff *declar'd that he was, and had been for many Years last past, a Merchant*; but because it did *not appear expressly that he was a Merchant at the Time of speaking the Words*, but only argumentatively, it was adjudg'd against the Plaintiff. Cited by Yelverton J. Yelv. 21. as Trin. 2 Jac. B. R. Grey v. Medcalfe.

S. C. cited per Cur. 12 Mod. 592. Mich. 13 W. 3.

46. *Go not to buy of J. S.* (a Merchant;) *for he will deceive you*, is actionable. Hutt. 125. Pasch. 10 Car. Per Curiam, obiter.

47. *Thou art in a breaking and decay'd Condition, and I will prove it, and if you question me I will prove it to your Disgrace*, being spoke of a *Milliner* in London. It was objected that these are adjective Words, and

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of an uncertain Signification; but Judgment was given for the Plaintiff. Sty. 425. Mich. 1654. Walkenden v. Haycock.

48. *Thou art a broken Fellow, and haſt cheated me of* 200 *l.* was ſpoke of a *Tradeſman*, and it was averr'd that the Words were meant to ſignify that the Plaintiff was a Bankrupt, and a Verdict was found for him. And Roll Ch. J. ſaid that all the Words together, as they are laid, imply that he is broken in his Trade, and that the Word (cheated) inforces this Senſe, and the Averment and Verdict make it more ſtrong; and Judgment for the Plaintiff, Niſi &c. Sty. 429. Hill. 1654. Wiſe v. Jefferies.

49. *Thou art a whore-ſon Bankrupt Rogue*, being ſpoke of a *Farmer*, was adjudg'd actionable. But it was aſſign'd for Error, That it did not appear by the Declaration that the Plaintiff got his Living by Buying and Selling, nor that it was ſpoken with Relation to his Profeſſion. And thereupon the Judgment was revers'd. Sty. 420. Trin. 1654. Phillips v. Phillips. S. C. cited Arg. 3 Mod. 112.

50. *He is a cheating Knave*, being ſpoke of a *Limeburner*, is not actionable, unleſs ſpoke in Reference to his Trade; and being found by the Jury to be ſpoke of him and his Trade, was held by Windham and Twiſden to be actionable; but Hyde Ch. J. and Keeling e contra; and Judgment was ſtaid, the Court being divided. Lev. 115. Mich. 15 Car. 2. B. R. Terry v. Hooper. Raym. 86. S. C. accordingly; but there the Words are, *He is a Runaway, and he is a baſe cheating Rogue, and he ſhall never think to bring W. where he is himſelf; and rather than ſo I will ſpend* 20 *l.* ——Keb. 602. pl. 75. S. C. and the Words according to Raym. and adjornatur.——Ibid. 644. pl. 15. S. C. adjornatur.—— S. C. in a Copy of a MS. Rep. of Lord Ch. J. Keling, ſays, That tho' the Plaintiff counted that he was a Tradeſman, and ſuppoſed the Words ſpoke of him and his Trade, yet that will not make them bear an Action; for the Plaintiff ſhall not by any Flouriſhes or Affirmations of his own make thoſe Words actionable which at firſt ſpeaking were not ſo; ſo that in this Caſe there being no Colloquium of the Plaintiff's Trade at the Time of Speaking, adjudged the Action would not lie, and Judgment was arreſted; but agreed that if the Defendant had ſaid, that *the Plaintiff that Limeburner was a cheating Knave*, this would be actionable; for the Words are of him and his Trade.

61. *Thou art a Rogue, and a baſe Knave, and a cheating Knave, and I will poſt thee for it*, was alleged to be ſpoken of the Plaintiff, *a Clothier, & de Geſto ſuo in exercitio Officii ſui*, Per Cur. is actionable. *And* where the Plaintiff alſo *counted that the ſame Words were ſpoke at another Time the ſame Day*, in Malice to him and his Trade, *ſimiliter injurioſe & falſo, without other Colloquium*, Windham held it ſufficient, and that it muſt be prov'd on the Evidence; and it being mov'd that the laſt Words being *ſimiliter ex ulteriori Invidia towards his Trade*, can relate to nothing elſe; and the Court gave Judgment for the Plaintiff Niſi &c. 2 Keb. 380. pl. 23. and 383. pl. 51. Trin. 20 Car. 2. B. R. Farmer v. Jenkins.

62. *He is a Bungler, and knows not how to make a good Piece of Work*, being ſpoke of a *Watch-maker*, but there was no Colloquium of his Trade. And Judgment was ſtaid. Mod. 19. pl. 50. Mich. 21 Car. 2. B. R. Redman v. Pyne. 2 Keb. 568. pl. 74. S. C. accordingly. ——But it was admitted by Saunders, of Counſel with the Defendant, that if he had ſaid *he could not make a good Watch*, it would have been known what he had meant. Mod. 19. and Keb. 568.

63. A *Shoemaker* brought an Action for ſaying, *He is a Cobler*. And Per Twiſden J. it was held in Glyn's Time that Action lay, tho' a Cobler is a Trade of itſelf. Mod. 19. in pl. 50.

64. Upon Colloquium with a Dyer's Servant of his Maſter and his Trade, the Defendant ſaid, *Where is the Rogue thy Maſter? I will prove him a Rogue.* Theſe Words ſeemed too general to be actionable; but where at another Time, having the ſame Colloquium with the Wife, he ſaid, *Where is that cheating Knave thy Husband? I will prove him a cheating Knave, for he cheated me*, are actionable, Per 3 Juſtices, tho' he did

not ſay in what Particular he had cheated him. Freem. Rep. 276. pl. 307. Hill. 25 Car. 2. Preſton's Caſe.

65. *He is a cheating, cozening Knave, and hath cheated Sir J. F.* (his Maſter) and being ask'd wherein, he anſwered, *In many Things.* The Court inclined that the Words are not actionable, becauſe he does not charge him with cheating in his Employment, neither has he laid any ſpecial Damage. Freem. Rep. 279. pl. 316. Paſch. 1681. Harris v. Tucker.

66. A *Stage-Coachman* declared, that he got his Livelihood by carrying Paſſengers; and *that the Defendant ſpoke ſuch ſcandalous Words of his Wife, which reflected upon him, and render'd him ſo ridiculous, that Nobody would ride in his Coach; and he thereby loſt his Cuſtomers.* The Plaintiff had a Verdict, but Judgment againſt him; and the Court ſaid that the Plaintiff ſhould at leaſt have declar'd what Cuſtomers he had loſt in particular. Vent. 348. Trin. 32 Car. 2. B. R. Anon.

67. The Plaintiff declar'd, that he was a *Renter of Lands &c. and made great Profit by buying and ſelling Wheat, Barley &c.* and that the Defendant ſaid of him, *He hath cheated in Corn*, is not actionable; for Per Cur. the Deſcription is no more than of a common Farmer. But Per Pemberton Ch. J. if no Mention had been made of renting Lands, or if he had *alleged that he was a Badger* &c. the Action perhaps would lie. 2 Jo. 156. Trin. 33 Car. 2. B R. Fox v. Lapthorne.

68. *He owes more Money than he is worth; he is run away and is broke*, being ſpoke of a *Husbandman* or Farmer, was held actionable. 3 Mod. 112. Trin. 2 Jac. 2. B. R. Dobſon v. Thorniſtone.

69. Saying of a Tradeſman, *He is a Cheat*, and ſaying at another Time, with a Colloquium of him and his Trade, *He hath nothing but rotten Goods in his Shop*; the firſt Words are not actionable, but the laſt Words were held clearly actionable. But it was agreed that if the Words had only been, That *he has rotten Goods*, the Action would not lie; for the Slander is in ſaying, that he has *nothing but rotten Goods.* Judgment for the Plaintiff. 12 Mod. 420. Mich. 12 W. 3. Burnet v. Wells.

70. *You are a Raſcal, you are a pitiful ſorry Raſcal, you are next Door to Breaking*, being ſpoke of a *Laceman*, are actionable. Ld. Raym. Rep. 610. Mich. 12 W. 3. Read v. Hudſon.

71. *You are a Soldier, I ſaw you in your red Coat doing your Duty, your Word is not to be taken*, is actionable, being ſpoke of an Upholſterer, it being known to be a common *Practice for Tradeſmen to protect themſelves againſt their Creditors by a counterfeit Liſting*; for a Soldier has the Privilege of not being held to ſpecial Bail. 10 Mod. 111. Mich. 11 Ann. B. R. Arne v. Johnſon.

Barnard. Rep. in B. R. 13. Stanton v. Squibb, S. C. and the whole Court held the Words actionable.

72. *He is a ſorry pitiful Fellow, and a Rogue, and compounded his Debts at 5 s. in the Pound.* Exception was taken that the Words were not actionable, becauſe no Colloquium was laid of his Trade. But per tot. Cur. Such Words ſpoke of a Tradeſman muſt leſſen his Credit much, and be very prejudicial; and therefore actionable. And Judgment for the Plaintiff. 2 Ld Raym. Rep. 1480. Paſch. 13 Geo. Stanton v. Smith.

(X. a) For Words. In what Caſe it lies. [In reſpect of the *Manner of Speaking, and by Way of Report.*] Fol. 64.

1. If a Man ſays, That Pierce ſaid that Lewis did a certain ſcandalous Thing &c. Lewis ſhall have an Action for this againſt him, with an Averment that Pierce never ſaid ſo; for then he himſelf is the Author of the falſe News, and ſhall be charged for it; for this is according to the Law of News. Hill. * 44 [14] Jac. By Rep. between † *Lewis and Walter* adjudged, between Dame ‡ *Morriſon and Cade.* Paſch. 5 Jac. B. R. adjudged. Cro. J. 406. 407. pl. 2. Mich. * 14 Jac. B. R. in the Caſe of Lewis v. Walter, cites Hill. 4 Jac. Moriſon v. Carr,

where the Caſe was, That the Defendant had ſaid that A. had reported that he had the Uſe of her Body, and the Precedent thereof was ſhewn that it was adjudged for the Plaintiff; whereupon the Court was ſatisfied in the principal Caſe, that the Report of the Speech of another, who never us'd ſuch Words, is actionable.——Jenk. 316. pl. 7. S. C.——S. C. cited Roll Rep. 444.——S. C. cited 3 Bulſt. 225. as adjudg'd and affirm'd in Error.

† (Y. a) pl. 35. S. C. not exactly S. P.

‡ See (D. a) pl. 4 S. C.— Infra, pl. 3. S. C.—(Z. a) pl. 7. S. C.

2. If I ſay to J. N. that J. S. ſaid to me, That the ſaid J. N. did ſuch a ſcandalous Matter as Witchery; as the Caſe was, which Matter is ſufficient to maintain an Action, J. N. may have an Action againſt me for the Words aforeſaid, with an Averment that he never ſpoke the Words, nor that J. S. ever ſpoke the Words of him; for this is conformable with the Law for telling of falſe News. Paſch. 15 Jac. B. R. between *Lock and Lock*, adjudg'd, by Admittance; but this Matter was not moved.

3. But if a Man ſays that J. S. ſaid, That J. D. ſaid a certain ſcandalous Thing that will bear an Action of itſelf, tho' this be falſe, yet if J. S. ſaid that J. D. ſaid the Words, no Action lies againſt him; for he has named his Author, ſcilicet, J. S. and therefore he muſt bring his Action againſt J. S. if he will have Remedy. Paſch. * 15 Jac. B. R. in *Dame Morriſon and Cade's Caſe*, per Tanfield. Cro. J. 162. pl. 17. Paſch. * 5 Jac. B. R. S. C. but S. P. does not appear. *J. S. told me that J. N. ſtole a Horſe, but I do not believe him.* This, with an Averment that J. S. did not ſay any ſuch Thing, will bear an Action. Cited Mar. 8. in pl. 18. by Jones J. as a Caſe which he ſaid he remember'd.

4. If a Man ſays, A Woman told me that ſhe heard one ſay, that Meggs his Wife had poiſon'd Griffin her firſt Husband in a Meſs of Milk, Meggs and his Wife may have an Action for this againſt him; for otherwiſe a Man might raiſe a Scandal of his own Head without any Puniſhment. Mich. 37, 38 Eliz. B. R. between *Meggs and Griffin*, adjudg'd. Goldsb. 139. pl. 43. Hill. 43 Eliz. S. C. adjudg'd for the Plaintiff.—— Mo. 408. pl. 552. S. C. The Plaintiff averr'd that the Woman never told the Defendant ſo; but the Court held that neither the Words nor the Averment were ſufficient. But the Reporter ſays Quære.——Cro. E. 400. pl. 7. S. C. The Plaintiff averr'd that no body ſaid ſo. Adjudg'd for the Plaintiff; for it is a great Defamation, and a Cauſe of drawing her Name and Life into Examination.——S. C. cited Arg. Cro. E. 645. in pl. 51. as adjudg'd actionable.

If J. publiſhes that *he heard J. N. ſay that J. G. was a Traytor or Thief*, and an Action is brought againſt J. S. for theſe Words, and the Truth be ſuch, he may juſtify. *But* if J. S. publiſhes *generally, without a certain Author*, that J. G. was a Traytor or Thief, Action lies againſt J. S. becauſe he has not given the Party aggrieved any Cauſe of Action againſt any beſides himſelf who publiſh'd the Words, tho' in Truth he might hear them; or otherwiſe an innocent Perſon might be greatly ſlander'd; for ſhould it be lawful for a Man of Credit to report generally Words ſpoke by one of no Credit, as that he heard ſuch ſcandalous Words, without mentioning his Author, this would give greater Probability of the Truth of the Words, in reſpect of the Credit of the Reporter, than if the Author had been mention'd. 12 Rep. 134. reſolv'd Mich. 10 Jac. in the Star-Chamber, in the Earl of Northampton's Caſe.

5. If

* Jo. 299. pl. 1. Halley v. Stanton, S. C. adjudg'd for the Plaintiff. ——— Cro. C. 268. pl. 2. Halley v. Stanton, S. C. adjudg'd actionable, especially as in this Case it is alleg'd that he falsely

5. If one Man says of another, He was arraign'd at Warwick-Assises for stealing a Dozen of Hogs, and had he not made good Friends it had gone hard with him, an Action lies for these Words, with an Averment that he never stole any Hogs, nor was ever arraign'd for the Stealing of any Hogs; for this is a great Slander, the Arraignment implies an Indictment, and the making of Friends implies that he was greatly suspected at least. Mich. 8 Car. B. R. between * *Hawley and Stanton*, adjudg'd, this Matter being moved in Arrest of Judgment. But in this Case Justice Croke cited a Case to have been adjudg'd, Pasch. 34 Eliz. between † *Bailie and Calenton*, that no Action lies for these Words, Thou was arraign'd for 2 Bullocks, but did not say that he was arraign'd for the Stealing of them; and it was not averr'd that he was not arraign'd, or that he did not steal any Bullocks.

and malitiously spoke these Words, adding (If he had not made good Friends, it would have gone hard with him,) which shews that he conceived he was guilty of such Offence.

† Cro. C. 268. in the Case of Halley v. Stanton, cites S. C. as adjudg'd Pasch. 34 Eliz. C. B. Bayly v. Charrington. ——— Cro E. 279. pl. 6. Bayly v. Churington, S. C. adjudg'd not actionable; and if the Words had been *He was arraign'd for stealing 2 Bullocks*, yet the Words had not been actionable; for one may be arraign'd for Felony, and yet be no Felon.

See (P. a. 3) S. C.

6. If one says of another, He was taken for stealing of 2 Horses, and I have suspected him this 4 Years, no Action lies for these Words, tho' he says that he never was suspected of any Felony; for a true Man may be taken for the stealing of Horses. Pasch. 10 Car. B. R. between *Curson and Wood*, adjudg'd no Action lay after a Verdict for the Plaintiff. But Quære, if he had averr'd that he was never taken for the stealing of Horses.

I heard a Bird sing that you have committed Felony, or I dream'd so. Lev. 277. says such Words have been adjudg'd actionable.

7. Words spoken of a Justice of Peace were, *I heard it spoken that Mr. Read was one that was at Burrel's Robbery, and that 4 of them went to his House the next Morning*; the Plaintiff averr'd that the Defendant never heard any such Words &c. In arguing for the Plaintiff was cited the Case of Beggs v. Griffin; but the Justices doubted thereof, for Words of Slander ought not to be taken by Implication, and will'd the Parties to agree; and the Plaintiff took 15 l. for all. And Judgment was enter'd by Consent. Cro. E. 644. pl. 51. Mich. 40 & 41. Eliz. B. R. Read's Case.

8. The Defendant said, that *as he was carrying one W. to Gaol for Felony, he met one on the Road, who said to him, What? are you carrying W. to Gaol? I shall follow you shortly, and bring with me H. C.* (the Plaintiff) *for stealing a Mare.* All the Court, besides Mallet, held the Words actionable. But 3 Justices held the Declaration ill for want of an Averment, Ubi revera, no one met him on the Road and said so to him; for this had been traversable, and the Defendant might have pleaded to it, that another did say so to him, and so put the Plaintiff to bring his Action against such other; But Twisden held that the Declaration being falso & Malitiose, and so found, is a Proof that none said so to him. But it was ruled, Quod querens nil capiat per Billam. Lev. 82. Mich. 14 Car. 2. B. R. Crawford v. Middleton.

(Y. a) For what Words it lies, in respect of *Uncertainty.*

1. If A. says of B. I have found out B. I have found Records which he hath forg'd, and he shall dearly pay for it; I have catch'd the Forgerer, an Action lies for these Words, tho' it does not appear whether he intends Records of a Copyhold Manor, or what other Record; for it shall be intended to be a true Record of a Court of Record, and if it be a true Record, the Forgery of which is not within the Statute of 5 Eliz. or 1 Hen. 5. yet it is a great Slander. Mich. 13 Car. B. R. between *Garbutt and Bell*, adjudg'd per Cur. this being moved in Arrest of Judgment. *You have made a false Record, and that I will make you answer where you dare not shew your Head, and you have fought my Death.* And. 121. in pl. 168. cites it as adjudg'd for the Plaintiff, Trin. 25 Eliz. Rot. 477. Adams v. Christian.——4 Le. 54. pl. 139. Mich. 27 Eliz. B R. Christian v. Adams, S. C. but there are only the last Words, viz. *He did conspire my Death.* Adjudg'd for the Plaintiff. Fol. 65. See (D. b) pl. 3. S. C.

2. If a Man says, There can be no Writ against me; we have fought for the Writ, but can find none; but if there be any it is forg'd by the Under-Sheriff Mr. Ed. Hole, as he hath forg'd 2 Writs; in this Case Ed. Hole shall have an Action upon the Case for these Words, without an Averment that he was under-Sheriff at the Time, because he is charg'd with the Forgery of a Writ; for tho' the Forgery of a Writ be not within the 5 Eliz. nor 1 Hen. 5. yet this is a great Slander and Defamation. Pasch. 16 Jac. B. R. between *Hole and* adjudg'd, this Matter being moved in Arrest of Judgment. *Thou hast caused the Defendant to be arrested with forged Writs.* It was urged that it might be that the Writs were forged by Strangers, without the Privity of the Plaintiff, and that the Plaintiff, not knowing them to be forg'd, procur'd the Arrest. But the Opinion of the Court was that the Words were actionable; for the Word (caused) extends as well to the Forgery as to the Arrest, and so amounts to the Slander of Forgery. 4 Le. 181. pl. 209. Mich. 26 Eliz. C. B. Hungerford v. Watts

Thou hast used Juggling with me, but thy Juggling shall not serve thy Turn, and hast forg'd a Writ of Quare Impedit. The Court held the first Words not actionable, but that the last are; and Judgment for the Plaintiff. Cro. E. 178. pl. 8. Pasch. 32 Eliz. B. R. Sale v. Marsh.

3. If one Man says to another, Thou hast forg'd an Obligation, and I will prove it, tho' he does not shew between what Persons this was, nor that the Obligation was seal'd and deliver'd, yet an Action lies for these Words; for it cannot be intended but that it was seal'd and deliver'd, for otherwise it could not be an Obligation, but a Writing only. Pasch. 40 Eliz. B. R. between *Wade and Buffard*, adjudged. Cro. E. 627. pl. 7. S. C. adjudg'd accordingly. Thou hast *forg'd a Deed*, was adjudg'd actionable; cited by Twisden J. Sid. 16. in pl 9. as 4 Car. Delahey's Case.——S. P. per Cur. as to forging a Deed or Release &c. but as to forging *a Writing*, it is not actionable. Keb. 2. 3. pl. 60. Pasch. 14 Car. 2. B. R. in Case of Motley v. Slany, where the Words were, *He has forg'd a Bond, and that is not the first by a Hundred*, adjudg'd for the Plaintiff.

It was agreed clearly between Thorn and C. that where an *Obligation is made, and the Obligor and the Obligee conferr'd about it*, and the *Obligor said to the Obligee that he had forg'd it*, this is actionable; for here it refers to a Certainty; but if he had said to the other thus, He was a Forger, and had forg'd false Writings, no Action will lie; for the Words are too general in that Case. Win. 76. Pasch. 22 Jac. C. B. Thorne's Case.

Thou hast made a forg'd Bond, and I will prove it; adjudg'd for the Plaintiff. Cro. E. 554 pl. 8. Pasch. 39 Eliz. B. R. Austie v. Mason.

4. If one says to another, He hath forg'd the Queen's Evidence, and I would not be in his Coat for 1000 l. no Action lies for these Words, for *Thou wert Suitor to a Woman in.*

Southwark, and did ſt cozen her of her Goods, and procur'd certain falſe Witneſſes to be forg'd. for the Generality of them. Mich. 40, 41 Eliz. B. R. between *Wright and Gayner*, Dubitatur.

It was objected, that as to Cozening it had been lately adjudg'd not actionable; and that as to the Witneſſes it appears not what their Teſtimony concerns, nor that the Forgery of it is to any Purpoſe. Judgment was ſtay'd. Cro. E 99. pl. 2. Trin. 30 Eliz. B. R. Enghurſt v. Browne.

3 Bulſt. 157. S. C. adjudg'd accordingly.

5. If A. exhibits an Information in the Exchequer againſt two Men for the cutting of Wood, and after one of the Barons gives to him Licence by Writing to compound with them, whereupon C. ſays of B. The Licences which *1 [A.] had in the Exchequer were counterfeited, and B. did forge them, an Action lies for B. for theſe Words upon ſuch Declaration, tho' he ſpoke of the Licences indefinitely, and tho' no Licence can be given by the 18 Eliz. before the Anſwer of the Defendant, which is not alleg'd; for to ſay that he forg'd ſuch Licences before Anſwer, is a great Slander. Mich. 11 Jac. B. R. between *Gregory and Wilks*, adjudg'd.

* The Original is (I) but it ſeems miſprinted, and that it ſhould be (A)

T. hath forg'd and counterfeited a Certificate to a Commiſſion out of the Exchequer, and hath forg'd and counterfeited B.'s and S's the Commiſſioners, Hands, and had put their Hands to it, by reaſon whereof he got a Verdict in the Exchequer, whereas otherwiſe he muſt needs have had the Foil It was objected, that it was not ſhewn what Commiſſion it was, nor in what Suit, ſo as the Defendant might give Anſwer to it; but Judgment was given for the Plaintiff. Cro. E. 72. pl. 27. Mich. 29 & 30 Eliz. B. R. Topliffe v. Wilſon.

2 Bulſt. 132. S. C. adjudg'd accordingly.

6. In a Suit between A. and B. in Chancery, if A. ſhews a Deed indented, whereby he claims certain Lands, and after B. ſays to A. That Deed is a forg'd Deed, and you made it under a Hedge. A. ſhall have Action for theſe Words, tho' he might make the Indenture, and another write and ſeal it, and ſo forge it; for if he made the Deed that was forg'd, he forg'd it. Mich. 11 Jac. B. R. between *Sir Geo. Reynell and Sackfield*, adjudg'd.

See (S. a) pl. 28. S. C.

7. If one Man ſays of another, Mr. Carr hath put a Preſentment into the Jury's Verdict againſt me of 3 s. 4 d. for ſuing of P. W. [out] of the Court, contrary to a Pain, without the Conſent of the Jury, no Action lies for theſe Words, the ſaid Carr not being any Officer of the Court, tho' this was a Deceit in him ſo to do; for every Deceit will not * maintain an Action. Mich. 4 Jac. B. R. between *Carr and Read*, adjudged.

* Fol. 66.

Roll Rep. 431. pl. 25. S. C. The Court being divided, adjornatur; and the Reporter adds a Nota, that the Court ſeem'd to incline that

8. If one Man ſays to another, Thou haſt made forg'd Writings, and thou ſhouldſt have loſt thy Ears for it, no Action lies for theſe Words, becauſe it is altogether uncertain what Writings he intends by the firſt Words; for perhaps he intends ſome Writings, the Forgery whereof will not deſerve the Loſs of his Ears, and then the laſt Words will not explain his Intention, inaſmuch as it may be that this was but an ill Concluſion upon the Premiſſes. Mich. 14 Jac. B. R. between *Aier and Froſt*.

if the Plaintiff had been an *Attorney*, the Words would be actionable, becauſe they ſhould be taken according to his Profeſſion; but in this Caſe he alleg'd that he was Steward of Courts of divers Lords, which Crooke thought ſufficient to make the Words actionable; but the Reſidue of the Court took no Regard; & adjornatur.——3 Bulſt. 265. Froſt v. Ayer, S. C. The Court divided 2 againſt 2; & adjornatur, and after was ended by Agreement.

Thou haſt forg'd a Writing, not actionable, becauſe the Words are uncertain; per Gawdy, which Wray conceſſit; but if the Declaration had been more certain, as Innuendo *ſuch a Deed*, it had been well enough. 3 Le. 231. pl. 313. Anon.——S. P. by Twiſden J. Sid. 16. in pl. 9.

Popham and Gawdy held that Action lies for ſaying, *Thou art a Forger of Writings*; for the Word ſhall be intended of ſuch Writings whereof Forgery may be. But Fenner e contra; for it may be of a Church-Book &c. and Forgery ſhall not be intended, unleſs preciſely alleg'd; and Clench abſente, adjornatur. Cro. E. 554. Paſch. 39 Eliz. B. R. Goodale v. Caſtle.

Thou

Thou haſt made falſe Writings, thereby to get my Land from me. It was objected that falſe Writings may be Miniments without Seals, for which one is not puniſhable as a Forgerer; and Gawdy and Clench were of that Opinion; but Fenner e contra, becauſe he cannot get Land by them, unleſs they be forged Writings. Et adjornatur. Cro. E. 853. pl. 11. Mich. 43 & 44 Eliz. B. R. Perkinſon v. Bowman.

The making forged Writings is not puniſhable, but the Publication of them; per Haughton J. 3 Bulſt. 266.

9. If a Man ſays to J. S. Thou didſt forge an Acquittance, and I will prove it, an Action lies for theſe Words; for it is not material for what Thing the Acquittance was made; for ſuch Forgery is within the Statute. Mich. 13 Car. B. R. between *Onge and Spark*. Per Curiam adjudged in a Writ of Error, and the firſt Judgment affirmed accordingly. Intratur Trin. 13 Car. Rot. 722. *Thou haſt forg'd falſe Letters, and haſt given me a falſe and forged Acquittance.* The Plaintiff declared that he was a common Carrier. But Judgment was ſtay'd. Sid. 155. pl. 6. Mich. 15 Car. 2. B. R. Monday v. Mills.——*Thou haſt forged an Acquittance.* Twiſden J. held that Action lay, tho' not ſaid whoſe; but this was denied by the other Juſtices, unleſs he had ſaid *an Acquittance of J. N.'s.* Sid. 451. pl. 16. Paſch. 22 Car. 2. B. R. Anon.

You have falſely forged your Father's Hand, and thereby falſely have procured your Father's Tenants to pay their Rents to you [which are] *due to your Siſter.* It was objected that perhaps he counterfeited his Father's Hand to a Letter, which is not puniſhable. And Judgment for the Defendant. Cro E. 166. pl. 1. Hill. 32 Eliz. B. R. Venard v. Wooton ——Yelv. 146. S. C. cited by Crooke J. as adjudged not actionable, becauſe it relates only to a private Matter, and is rather an Aſperſion than a Slander.—— S. C. cited 3 Bulſt. 265. by the Name of Vender's Caſe.

10. If a Man ſays to J. S. Thou haſt cauſed a Deed to be forged, and a dead Man's Hand to be put to it, and cheated and cozened my Husband of his Land, an Action lies for theſe Words, tho' he expreſſes not what Manner of Deed it was, viz. whether it was ſuch a Deed the Forgery whereof is within the Statute of Forgery; for Forgery is an Offence at the Common Law, tho' not within the Statute, for which the Party may be indicted. Mich. 15 Car. B. R. between *Pudſy and Pudſy* and his Wife adjudged, this being moved in Arreſt of Judgment. Intratur Hill. 14 Car. Rot. 902. *Thou haſt forged a Deed to cheat J. S. of his Land.* Adjudg'd actionable. Sid. 16. pl. 9. Mich. 12 Car. 2. B. R. Caſſabilly v. Brit. ——

Adjudg'd that Action lies for the firſt Words, tho' it be not ſpecially alleged what Manner of Deed was forg'd. Ow 47. Trin. 30 Eliz. Moſſe v. Read.——Same Words, with this Addition, viz. *And he gave A. B. 40 s. for ingroſſing of it.* Reſolved the Words are actionable, and ſo a Judgment in C. B. was affirm'd in Error. Raym. 4. Hill. 12 Car. 2. B R. Reynolds v. Burton.

B. ſaid that *A procured the Deed* (a Deed produced at a Trial at the Aſſiſes) *to be forged.* Crooke J. held the Words actionable, becauſe the Statute puniſhes Forgery and the Procurers of it; and the Word (falſely) ſhall be implied. But if it had been ſaid *the Deed given in Evidence was forged*, that was not actionable. Het. 31. Mich. 3 Car. C. B. Andrews v. Bird.

11. If A. ſays, This is B. his Writing, and he hath forged this Warrant, Innuendo &c. B. ſhall not have any Action for theſe Words, becauſe the Word Warrant is of an uncertain Senſe, and the Innuendo ſhall not aid it. Hob. 3. between *Thomas and Axworth.* Hob. 2. pl. 4. Paſch. 12 Jac. C. B. and Hobart ſaid that this was and is his Opinion, but that the Cauſe was not adjudged; but that it was cited by Nichols and Winch J. afterwards, as adjudg'd according to his Opinion, which (he ſays) ſhews their Opinions concurring with his.——Brownl. 4. S. C. but is only an Account of the Words.——S. C. cited Sid. 16. in pl. 9. as not actionable; Per Twiſden J. but he ſaid that to ſay, *Thou haſt forged a Warrant in ſuch a one's Suit*, was adjudg'd actionable 9 Car.——A Sheriff having made a Warrant on a Writ to arreſt another, the Defendant ſaid, *This is a counterfeit Warrant made by Mr. Stone* (a Lawyer of whom they were diſcourſing) is actionable; for the Law takes Notice of this Word Counterfeit. As the Statute of 39 E. 3. 17. if a Soldier counterfeits the Warrant of his Captain, it is Felony. 2 Roll Rep. 266. Mich. 20 Jac. B. R. Stone's Caſe.——Cro. J. 648. pl. 17. S.C the Words (Counterfeit Warrant made by him) are to be intended to be counterfeited by him. Adjudged for the Plaintiff. Stone v. Smalcombe.

12. Where Circumſtances ſhew an apparent Intention of doubtful Words in themſelves, that they are ſlanderous, the Action lies for them. By Reports, 14 Jac. Roote v. Wolyn.

13. If

Roll Rep. 420. pl. 7. S. C. She alleged Loss of Marriage by reason of the Words. And adjudged Per tot. Cur. for the Plaintiff.

13. As if a Man says of a Woman, That she did lie with a Weaver of Colchester in a Ditch, and the Weaver's Breeches were down, and they were at it, an Action lies; for tho' she might lie with him in a Ditch without any Harm, yet the last Words shew that he intended that he had carnal Knowlege of her. By Reports, 14 Jac. *Roote and Molyn.* Adjudged.

S. P. by Crooke J. Roll Rep. 420. in Case of Roote v. Molling.

14. If a Man says of a Woman, That she is a lewd or common Woman of her Body, and has the Pox, an Action lies; for the last Words shew that he intended the French Pox. By Reports, 14 Jac. Per Croke.

Thou art burnt, and hast the Pox. This shall be intended the French Pox, which usually cometh of Burning. Cro. E. 2. pl. 3. Hill. 24 Eliz. B. R. Box's Case.

Thou art a Whore, and a base burnt-Arse Whore, is actionable; and so a Judgment was affirm'd. 2 Sid. 5. Mich. 1675 Commings's Case.——But Glin doubted if the Words, *Thou ark a burnt Whore*, be actionable or not. Ibid.——*Thou art a Whore, and a pocky-ars'd Whore*, actionable; and so a Judgment in C. B. affirm'd. Sid. 50. pl. 14. Mich. 13 Car. 2. B. R. Marshall v. Chickhall.——S. C. cited Cart. 55. as adjudged 12 Car. 2.——Maskalt v. Chirkall, S. C. Keb. 128. pl. 47. Mich. 13 Car. 2. B. R. Judgment in C. B. affirm'd in Error.

Roll Rep. 420. in Case of Roote v. Molling.

15. So if he says, That such a one is eaten out with the Pox, an Action lies. By Reports, 14 Jac. B. Per Dod.

Cro. J. 430. pl. 9 Miller's Case S. C. and all the Court held the Words actionable.—— Roll Rep. 145. Arg. cites 15 Jac. Palmer v. Read S. P. accordingly, and seems to be S. C.——Godb. 340. in pl. 434. Arg. cites it as adjudg'd accordingly 17 Jac. B. R. in the Case of Palmer v. Read.——Palm. 65. Arg. cites S. C. accordingly by the Name of Read v. Palmer, otherwise if he had only, *She had the Pox.*

16. So if one say of another, Mrs. Milner is a Whore, and hath the Pox, and had Holes in her Face that she might turn her Finger in them; J. King (who was a common Surgeon) gave her a Diet-drink; I wish you to take Heed how you drink in a Cup with her. Action lies; for all the Words being joined together, it plainly appears that he intends the Great Pox, inasmuch as he says that she is a Whore, which is the Cause thereof; and says that she had taken a Diet-drink of a Surgeon, which is the Remedy, and that she had Holes in her Face; and advised others not to drink with her, which is the Effect thereof. Trin. 15 Jac. B. R. between *Milner and his Wife v. Reeve* adjudged.

* Fol. 67.

17. If a Man says to another, Thou art a Rogue, and a pocky Rogue, and the Pox haunts thee twice a Year, Action lies; for hereby it is apparent * that he intends the Great Pox, because they use to trouble those that have them twice per Annum, scilicet, in Spring and Autumn. Pasch. 8 Jac. B. *Prekington's* Case. Adjudged.

* S. C. cited by Fenner to have been adjudged actionable; for that it cannot be intended but of the French Pox.

18. So if one Man says to another, Thou wast laid of the Pox, Action upon the Case lies; for this is a proper Phrase for the Curing of the Great Pox. Pasch. 8 Jac. B. *Prekington's* Case, agreed Per Curiam; and there it was said that it had been so adjudged Pasch. 40 Eliz. B. R. between * *Dawes and Taylor* adjudged in Point. 43 Eliz. B. R. † *Backster's* Case adjudged in Point. Hill. 41 Eliz. B. R. agreed in *Davie's* Case.

Cro. E. 214. pl. 7. Hill. 33 Eliz. B. R. in Case of Austin v. White, where the Action was brought for these Words, *Thou was laid of the French Pox.* And adjudged actionable.——S. P. Per Cur. Cro. J. 144. Hill. 4 Jac. B. R. in pl. 3. Arg.

† See (U. a) pl. 15. and the Notes there.

19. If

19. If one says of another, Thou art infected of the Pox, and thy Wife was laid of them, Action upon the Case lies; for it appears that he intends the Great Pox. This was cited by G. Crooke. Pasch. 15 Jac. to have been one *Levet*'s Case. Adjudged. Cro. E. 289. pl. 8. Mich. 34 & 35 Eliz. B. R. S. C. but there

the Words are, *Thy House is infected with the Pox, and this &c.* And adjudged accordingly; and if it were the *Small Pox*, yet they are actionable, they being spoke of an *Inn-keeper*; for Guests would not resort thither.

20. If a Man says to a Woman, Thou art a pocky Whore, and the Pox have eaten the Bottom of thy Belly, that thy Guts are ready to fall out, Action lies; for the following Words shew that he intended the Great Pox. Mich. 7 Jac. B. between *Miles and Bland* adjudged Per Curiam. *Thou art a pocky Knave; get thee home to thy pocky Wife, her Nose is eaten with the Pox.* The Words purport that he hath the French Disease, by saying that his Wife's Nose was eaten with the Pox. And adjudged for the Plaintiff. Cro. E. 878. pl. 7. Pasch. 41 Eliz. B. R. Brooke v. Wise.——S. C. cited 2 Brownl. 276. Mich. 7 Jac. by Doderidge Serjeant, as adjudged accordingly.——S. P. cited accordingly, by Doderidge the King's Serjeant. 2 Brownl. 272. Mich. 7 Jac. C. B

Thou art an arrant Whore, and an old worm-eaten Jade, and one of thy Sides hath been eaten with the Pox. Held actionable. Cro. E. 857. pl. 24. Mich. 43 & 44 Eliz. C. B. Garford v. Clark.

Thou art a pocky Whore, and carriest the Pox along with you. Per Holt Ch. J. to say a Woman is a pocky Whore must be that she is Pocky, quatenus she is a Whore; and the other Words make it stronger. Judgment for the Plaintiff 12 Mod. 633. Hill. 13 W. 3. Clifton v. Wells.——Ld Raym. Rep. 710. S. C. with an Innuendo (the French Pox) And Judgment for the Plaintiff per tot. Cur.

21. But if one says of another, Hang him, hang him, he is full of the Pox; I marvel you will eat or drink with him, no Action lies, because it is uncertain what Pox he intends. Co. 4. 17. * *James and Rutlech.* Trin. 41 Eliz. B. B. *Bonner's* Case adjudged. * 4 Rep. 17. pl. 12. Mich. 41 & 42 Eliz. B. R. S. C. has these further

Words, viz. *I will prove that he is full of the Pox* (innuendo the French Pox.) And the Court held that this Innuendo does not do his proper Office; for it endeavours to extend the general Words (the Pox) to the French Pox, and by imagining an Intent which is not apparent by any precedent Words to which the Innuendo should refer; and the Words themselves should be taken in mitiori sensu.——Mo. 573. pl. 786 S. C. adjudg'd not actionable, because it may be intended the Small Pox; and it is not spoke of a Person certain, with Intent to defame him, but for Advice to his Friend.

22. If one Man says of another, He is rotten with the Pox, an Action upon the Case lies; for this must be intended the Great Pox, because Rottenness comes from them only. Hill. 41 Eliz. B. R. between *Davies and Taylor.* Cro. E. 648. pl. 2. S. C. adjudged actionable Per Fenner J. he only being in Court.——See (U. a) pl. 15. and the Notes there.

23. If a Man says to another, [a Woman] Thou art a pocky Whore, go to John Hawkins the Leech for the Pox, no Action lies for these Words. Mich. 17 Jac. B. R. between *and Farin*, Per Curiam, in Arrest of Judgment, the Postea staid. *Thou art M.'s Hackney, thou art a thieving Whore and a pocky Whore, and I will prove thee a pocky Whore.* Adjudged for the Defendant; for the Words cannot be intended of the French Pox, it not being shewn by any other Circumstances, as to say she was laid of them &c. Cro. J. 514 pl. 26. Mich. 16 Jac. B. R. Califord v. Knight.——Godb. 278. pl. 393. Culliford's Case, S. C. And Judgment was stay'd.

24. If one says to another, Thou art a base Fellow, and hadst the French Pox, no Action lies; for perhaps he had the Pox, but is now cured thereof, and no body will now avoid his Company for that. Pasch. 6 Jac. B. between *Allen and Smith*, adjudg'd. *Away you Pick-pocket, thou art a scurvy pocky Whore.* It was argued that these Words do not shew any Intention that he spake of the French Pox, which ought to appear

by ſome particular Circumſtances from the Words; and ſo held all the Court; and a Judgment given in Briſtol was reverſed Cro. J. 499. pl. 7. Mich. 16 Jac. B. R. Hunt v. Jones.

Thou art a Whore, and haſt had the French Pox. Per Glin, thoſe Words are actionable. 2 Sid 5. Mich. 165- —S. P. without the Word (French) cited per Cur. as actionable; becauſe when (Whore) is accoupled with (Pox) it is apparent that he intended the French Pox. Sid. 50. pl. 14.

Sty. 283. Elliyot v. Blague S. C. adjudg'd accordingly, Niſi.

25. **If one Man ſays to another,** Thou art a Baſtard-getting Rogue, and hadſt a Baſtard at **Oxford,** and a pockey Rogue; and for aught I do know, thou haſt filled my Bed full of the French Pox, and no ſuch pocky Rogue ſhall lie in my Bed, **Action lies; for all being ſaid together, it appears that he intended the French Pox. Trin. 1650. between** *Blage and Elliot,* **adjudged, this being moved in Arreſt of Judgment. Intratur Hill. 1650. Rot. 613.**

Mo. 428. pl. 597. S. C. adjudg'd accordingly.

26. **If a Man ſays,** M. hath ſtolen Sheep, and Reynold Nichols, by Compact and Agreement, hath taken a Meadow to help him to cloak and eſcape from the Felony, **R. Nichols ſhall have Action for theſe Words, tho' he does not ſay that he had Notice of the Felony, for the taking the Meadow to cloak the Felony, implies as much. Hill. 38 Eliz. B. R. between** *Nichols and Badget,* **adjudged.**

Cro. E. 486. pl. 3. Hall v. Hemmerſley S. C. adjudg'd for the Defendant. —— Gouldsb. 119. pl 3. Hall's Caſe S. C. adjudg'd not actionable.——Noy. 57. S. C.

27 **If a Man ſays,** J. S. was robb'd by Perſons unknown, and he hath received again 3 Pieces of his Cloth of the Thief, and beareth with the Thief, and if I receive any Hurt I will charge him with it, **no Action lies for J. S. for theſe Words; for a Man may receive his Goods taken from him by a Thief without being in any Danger, As if a Man makes freſh Purſuit after a Thief; and for ſaying that a Man bears * with a Thief, no Action lies. Mich. 38 & 39 Eliz. between** *Haw and Hemmeſley,* **Trin. 39 Eliz. B. R. adjudged.**

* Fol. 68.

28. **If one Man ſays to another,** J. S. did rob me of a Cloak and a Groat, and J. D. was there preſent, and did carry home my Cloak, and did compound the Robbery, **no Action lies for J. D. for theſe Words, for the Uncertainty. Mich. 41 & 42 Eliz. B. R. between** *Marſh and Dikes,* **dubitatur.**

Cro. E. 888. pl. 1. Dawes v. Bolton S. C. not actionable; for perhaps he

29. **If one ſays to another,** Thou art a Knave, thou haſt received ſtolen Goods, and thou didſt know them to be ſtolen, **no Action lies for theſe Words; for he is not acceſſory by ſuch Receit without an aiding and comforting of the Felon. Trin. 44 Eliz. B. between** *Dawes and Boughton,* **adjudged.**

he received them as Bailiff, or Lord of a Manor, who had Waifs and Felons Goods.———Yelv. 4. Dawſon's Caſe. S. C. but the Words there are, Thou haſt bought &c. And adjudg'd againſt the Plaintiff.

His Boy hath cut my Purſe, and he knowing it hath received it. Adjudg'd actionable. Cro. E. 877. pl. 4. Paſch. 44 Eliz. B. R. Cox v. Humphries.——Cro. E. 889. pl. 4. Trin. 44 Eliz. B. R. this Caſe was moved again, when the Words were alleged to be, viz. *Thy Boy hath cut my Purſe, and thou haſt received it, knowing it, and haſt the Rings and Money that were there in thy Hands, therefore I charge thee with Felony.* Adjudg'd not actionable; for it appears not that the Purſe was cut felonioufly, and then the Receiving of the Boy, and Things which were in the Purſe, is not Felony.———S. C. cited Poph. 210. and ſays that for the Words (Cutting my Purſe) no Action lies; for it is not Felony unleſs taken from the Perſon, and that to receive it is not Felony; but it was reſolved that the laſt Words were actionable.

You have bought a Roan ſtolen Horſe, knowing him to be ſtolen. Adjudg'd actionable. Godb. 157. pl. 212. Mich. 6 Jac. B. R. Brigg's Caſe.

She cauſed L.'s Servant to ſteal and purloin 30 . . . *and received them, and ſold them, which was the Cauſe why his Maſter broke.* Upon a Verdict, Judgment was given in C. B. and affirm'd in Error; becauſe ſhe is charged with procuring Felony and receiving ſtolen Goods. All. 5 Mich. 22 Car. Hinacre v Lemon.

Thou art a Knave, and a ſitting Knave, and haſt received ſtolen Goods. Winnington moved in Arreſt of Judgment, becauſe it is *not averr'd that the Defendant knew them to be ſtolen* Goods, and per Cur. it was ſtay'd. And Twiſden ſaid, albeit they had averr'd he did know them to be ſtolen, the Action would not lie. Adjornatur. 2 Keb. 338. pl. 4. Paſch. 20 Car. 2. B. R. Steventon v. Higgins.

Thou

Thou haſt received ſtolen Goods, and knew they were ſtolen. A. S. ſtole them, and thou waſt Partner with her. Per Cur. the firſt Words are not actionable; for they might admit of a juſtifiable Conſtruction, as if the *Goods were waived* But the laſt were held ſufficient; for *Partner with her*, muſt intend Partner in the Felony. Vent. 18. Paſch. 21 Car. 2. B. R. Anon.

30. If one ſays to another, being a Feme-Covert, Hang thee, Bawd, thou art worſe than a Bawd, and thou keepeſt a Houſe worſe than a Bawdy-Houſe, and keepeſt a Whore in thy Houſe to cut my Throat, Action lies for theſe Words; for it is a great Slander. Mich. 9 Car. B. R. between *Benſon and Goodach*, adjudged, this being moved in Arreſt of Judgment where the Baron and Feme brought the Action, and alleged that the Baron kept an Alehouſe, being thereto legally licenſed by divers Juſtices; but the Court had no Regard thereto, inaſmuch as the Baron and Feme cannot join in an Action for ſuch Loſs, but the Baron only ought to have the Action. Cro. C. 329. pl. 13. Penſon v. Gooday S. C. it was agreed that for ſaying, *She is a Bawd, and keeps a Bawdy-Houſe*, Action lies; but not for calling one Bawd, without ſaying any thing more. And for ſaying, *He keeps a Houſe worſe than a Bawdy-Houſe*, no Action lies; for it is uncertain what is meant thereby. Adjudg'd for the Plaintiff.

31. If one ſays to another Thou art a cozening and Cony-catching Rogue, and haſt cozen'd me of 30 l. no Action lies; for it may be that he juggled with him. Mich. 9 Jac. B. per Curiam. See (U. a) pl. 23. &c.

32. If a Man ſays of J. S. who is a Tradeſman, not having any Diſcourſe of his Trade, Thou art a cheating cozening Knave, and thou haſt cozen'd my Husband of 500 l. no Action lies; for this ſhall not be intended to be ſpoken of him in his Trade. Mich. 11 Car. B. R. between *Needler and Symnel*, adjudg'd in Arreſt of Judgment, after a Verdict for the Plaintiff. See (U. a) pl. 25. S. C. and the Notes there.

33. If a Man ſays to J. S. Thou haſt forged a Privy-Seal and a Commiſſion, and why doſt thou not break up this Commiſſion and ſerve it? (innuendo the Commiſſion of the Plaintiff) An Action lies for theſe Words upon ſuch a Declaration; for it ſhall be intended the Privy-Seal of the King per excellentiam, and not the Fabrick of the Seal only, but alſo the putting thereof to ſome Writing, and alſo a Commiſſion of the King, which was in ſome Matters relating to the Plaintiff, as the Words import in common Diſcourſe. Mich. 9 Car. B. R. between *Ball and Badgarly*, dubitatur, and the Poſtea ſtay'd in Arreſt of Judgment; but after Judgment was given for the Plaintiff per Curiam. Jo. 325. pl. 4. S. C. adjudg'd actionable per tot. Cur. præter Barkley. —— Cro. C. 326. pl. 9. S. C. and Judgment for the Plaintiff, and Berkley agreed with the others.

He hath forged the late Queen's Writ; adjudg'd actionable, and affirm'd in Error. Yelv. 146. Mich. 6 Jac. B. R. Wilſhire's Caſe.

34. If a Man ſays maliciouſly of J. D. He hath pick'd my Pocket of Silver and Gold, Et de ulteriori malitia ſua (as the Declaration was) at another Day ſays of him, I had 100 l. about me, and he pick'd my Pocket of 40 l. and I will indict thee at the Seſſions, and make thee hold up thy Hand at the Bar, and an Action lies for the firſt Words clearly, and alſo for the ſecond Words, they being averr'd to have been ſpoken de ſua ulteriori malitia, and ſo explanatory only of the firſt Words. Mich. 9 Car. B. R. between *Penſon and Goodach*, adjudged per Curiam, this being moved in Arreſt of Judgment, Damages being given intire for all the Words, being ſpoke at ſeveral Days. Cro. C. 327. pl. 11. S. C. adjudg'd actionable without Queſtion; for he directly charges him with a felonious Taking, and the Words have Reference the one to the other.

You and G. (the Plaintiff) *made J. S. drunk, and picked his Pocket*, is actionable. , Keb. 691. pl. 6. Paſch. 16 Car. 2. B. R. Gerrard v. Lyon.

You are a Pick-pocket, you pick'd my Pocket and took away my Money, and I will juſtify it. Not actionable. 2 Lev. 51. Paſch. 24 Car. 2. B. R. Watts v. Rymes. —— Vent 215. S. C. accordingly; for the Words might

might mean only Treſpaſs, and do not neceſſarily imply Felony.——3 Keb. 34. pl. 4. Watts v. Grimes S. C. accordingly.

To ſay a Man is a Pick-pocket, and has pick'd my Pocket, in common Acceptation is actionable. Per Holt Ch. J. 11 Mod 256. Mich. 8 Ann. B. R. in Caſe of Stebbing v. Warner.

Fol. 69. See (C. b.) pl. 2. S. C.— Cro. J. 406. pl. 2. S. C. adjornatur.——Ibid 413. pl. 1. S. C. and all the Juſtices beſides Haughton held clearly that the Action lies; for it being alleged that he ſpoke them on purpoſe to draw his Life in Queſtion, it ſhall be taken in the worſt Senſe, he having pleaded Not guilty, and found Guilty; and if he had other Intention he would have ſhewn it by way of Excuſe; and that not ſhewing when he ſpake them, is not material; for the Plaintiff alleged that he never ſpake them, and that the other never reported them, and ſo cannot ſhew any Time of ſpeaking what never was ſpoke; And adjudg'd for the Plaintiff.—— Roll Rep. 444. pl. 8. S. C. per tot. Cur. the Words are actionable.———3 Bulſt. 225. S. C. adjudg'd for the Plaintiff.

35. If one ſaid to another, 10 Jac. That he ſaid there is no Prince in England, an Action upon the Caſe lies; for the Words have not ſuch an Intendment as if he had ſaid, the Prince is not in England, but that the ſuppoſed Prince which is in England is no Prince. By Reports, 14 Jac. between *Lewes and Walter*, adjudged.

See (C. b) pl. 2. S. C. and S. P.— Roll Rep. 445. pl. 8. S. C. and S. P. per Doderidge, quod fuit conceſſum per Crooke and Mountague.———3 Bulſt. 227. S. C. and S. P. accordingly.——Cro. J. 406. 413. S. C. but S. P. does not appear.

36. So an Action lies in this Caſe, Tho' there are ſeveral Princes in England, as every Earl is a Prince, and ſo is a Duke and Marquis; for when there is a Diſcourſe ſimply, it ſhall be intended the King's eldeſt Son per excellentiam. By Reports, 14 Jac. between *Lewis and Walter*, adjudged.

S. P. exactly held accordingly, Cro. E. 878. pl. 6. Paſch. 44 Eliz. B. R. Fountain v. Rogers.——S. C. cites Roll Rep. 427.——S. C. cited 3 Bulſt. 260.— * Cro. E. 621. pl. 12. Wells v. Hemmerſon S. C. the Words were, *Thou art a Rebel, and no true Subject*. The whole Court held theſe Words not actionable; for he may be ſaid to be a Rebel upon a Proclamation of Rebellion againſt him in an Engliſh Court; and adjudg'd accordingly.——— S. C. cited Sid. 132. pl. 5. in Caſe of Glanvill v. Gully. Paſch. 15 Car. 2. B. R. where the Words were, *Thou art a Rebel againſt the King*, and held that Judgment be arreſted.

† See pl. 38. S. C.

37. If one Man ſays to another, That he is a Rebel, no Action upon the Caſe lies for this; for it might be that a Proclamation of Rebellion was granted againſt him out of the Chancery or Star-Chamber. Mich. 40, 41 Eliz. B. R. * *Emerſon's Caſe*, per Curiam adjudg'd. Mich. 40, 41 Eliz. B. R. † *Redſton's Caſe*, per Curiam.

Cro. E. 638. pl. 38. Redſton v. Eliot S. C. Fenner and Clench held the Words actionable. And tho' it was ſaid to have been adjudg'd 16 Eliz. C. B. in Caſe of Buſtard v. Petts, that for ſaying, *Thou art not the Queen's Friend*, no Action lay; yet they ſaid that being conjoined with the other Words, *All that keep thee Company*, they are thereby aggravated, and ſhew his Intent. But the other Juſtices being abſent, adjornatur.

38. But if one Man ſays to another, Thou art a Rebel, and all that keep thee Company, and thou art not the Queen's Friend, an Action upon the Caſe lies for theſe Words; for he explains his Intention by the laſt Words. Mich. 40 & 41 Eliz. B. R. *Redſton's* Caſe.

See (G. a) pl. 6. S. C. and the Notes there.

39. If T. the Parſon of the Pariſh of D. warns the Pariſhioners to come to Church to give God Thanks for the Deliverance from the Gunpowder Treaſon, and S. ſays to him that he will not come to Church; upon which T. ſays to him, Thou art no true Subject to the King, no Action lies for theſe Words; for the Word (true) is uncertain, inaſmuch as no Man is ſo true as he ought to be. Mich. 5 Jac. B. between *Smith and Turner*, Per Curiam.

* Palm. 410. S. C. and the Plaintiff

40, If one ſays to another, Thou didſt keep Faulkener the Jeſuit in thy Houſe, knowing him to be a Jeſuit, an Action lies for theſe Words

Words, tho' it does not appear whether Faulkner was born within the Dominions of the King, as the Statute 27 Eliz. limits, nor that he received him after the making of the Statute; for they shall be so intended, the Words having a violent Presumption of Slander. Pasch. 1 Car. B. R. between *Sir Simon* * *Clarke and Loggin* adjudged, this being moved in Arrest of Judgment; and Hill. 9 Jac. B. R. Rot. 1439. between † *Flint and Smith* adjudged in Point, where it was said, that he received such a one who was a Seminary Priest, knowing him to be a Seminary Priest. Mich. 16 Jac. B. R. between *Sir John Lenthall and Andrews* adjudged. He did entertain and often harbour in his House one St. John, and others, knowing them to be Romish Priests; and Sir John Lenthal shall be indicted for it. And after the Defendant maliciously procured a Bill of Indictment to be drawn and ingross'd, and to be prefer'd to the Justices of Gaol-Delivery, containing this Matter, and published that he would prefer it to them, tho' it was said in the Declaration that the Plaintiff was Marshal of the Marshalsea of the King's Bench, and thereby might have the Custody of such Priests; yet inasmuch as he said he should be indicted for it, he shewed that he did not intend a lawful Harbouring of them. And Judgment was given for the Plaintiff. Intratur Trin. 16 Car. Rot. 350.

had Judgment. — Jo. 68. pl. 4. S. C. adjudged accordingly. — Lat. 1. S. C. adjudg'd accordingly. — Lat. 83. S. C. says this Case was adjourn'd; but that another Report says it is actionable; for tho' it be not Felony to lodge a Jesuit that is an Alien, as Suarez or Gregory de Valentia, yet it is a Scandal to lodge them.

† Cro. J. 300. pl. 3. Pasch. 10 Jac. B. R. S. C. adjudged actionable. — S. C. cited Jo. 68. in the Case of Clarke v. Loggin; and says, that upon producing the Roll in Court, Judgment in the principal Case was given for the Plaintiff. — Lat. 2. cites S. C. accordingly.

41. If one says to another, Thou art a perjur'd Fellow, for thou wast forsworn before the Lord Bishop of Norwich, no Action lies for these Words, because he does not say this was in the Court of the Bishop, and so uncertain whether it was Perjury, and it shall not be intended to have been in his Court. Mich. 15 Jac. B. R. between *Keble and Page* adjudged, in Arrest of Judgment.

See (F. a) pl. 9. S. P. — Br. Action sur le Case, pl. 104. cites 30 H. 8. contra, That Action upon the Case lies for calling the Plaintiff *false perjured Man.* — Cro. J. 456. pl. 5. Page v Keble, S. C. but there the last Words are, *Forsworn in the Bishop of N.'s Court*; and yet adjudged that the Action did not lie. — But Cro. E. 297. pl. 5. Pasch. 35 Eliz. B. R. Lee v. Secombe, it was held actionable for saying, *He was falsely forsworn in the Court of the Bishop of Exon at Exon*, tho' it was objected that (Court) might mean the Bishop's Yard. It was said that the Court knows that every Bishop has his Consistory Court.

42. If one says to another, Thou wast forsworn in the Court of * Requests, an Action upon the Case lies, between *Brooke and Doughty* cites Hill. 40. 41 Eliz. B. R.

* Fol. 70.

See (F. a) pl. 17. S. C. and the Notes there.

43. If one says of another, Thou art a forsworn Fellow, and I will prove thee one; for thou setteſt thy Hand to a Bond of mine, and swore Nay, no Action lies for the uncertainty. Mich. 15 Jac. B. R. between *Serjeant and Clarke* adjudged.

44. If one says to another, Thou wast forsworn and perjured in 2 or 3 Articles in a Suit between me and thy Daughter in Law, and thou shouldst lose thy Ears for it, and shouldst come from London like a Pollard, an Action upon the Case lies for these Words; for it appears that he intends a Perjury in a Court of Record, for which he ought to lose his Ears. Mich. 15 Jac. B. R. *Goddard and Hampton* adjudged, as to the Words.

Cro E. 374. pl. 25. Hill. 37 Eliz. Brawn v. Michael, S. C. and the Words held not actionable —— Cro. E. 500. pl. 20.

45. If one says to another, That he hath delivered false Evidence and Untruths in his Answer to a Bill of J. S. in the Chancery, no Action lies for the Uncertainty; for many Things in a Bill are not material to the Matter in Variance; and therefore if the Party does not answer truly as to them, he is not punishable for Perjury; and perhaps he intends such Matter. Mich. 38, 39 Eliz. B. R. between *Michel and Brown* adjudged in a Writ of Error, and the Judgment given in Bank to the contrary revers'd accordingly.

Brown v. Michel, S. C. and all the Court (absente Gawdy) agreed the Words not actionable; and revers'd the Judgment —— Noy 36. S. C. and the Words held in B R. not actionable, because he did *not say he delivered Untruths in Matter of Substance*; and so revers'd the Judgment. —— Palm. 65. Mich. 17 Jac. Arg. cites Brown's Case, 38 Eliz. where the Words, *He delivered an Untruth in the Chancery in a material Cause*, were adjudged actionable. —— 2 Roll Rep. 145. Arg. Hill. 17 Jac. cites S. C. that the Words, He deliver'd *Untruths in a material Thing in his Answer in Chancery*, were adjudged actionable.

(F. a) pl. 11. S. C.

46. If one says to another, Thou art a forsworn Man; I will teach thee the Price of an Oath, and will set thee on the Pillory, an Action upon the Case lies for those Words; for this shall be intended such a Forswearing for which he shall stand in the Pillory, and not any voluntary Oath. Hill. 41 Eliz. B. R.

2 Bulst. 81. Lisard v. Stamp, S. C. the Point of the Words was not agreed whether actionable or not; but because the Declaration was uncertain, the Judgment was given against the Plaintiff.

47. If one says to another, Thou hast stolen my Wood, and I will have an Action of Felony against thee, an Action lies. Trin. 11 Jac. B. R. between *Lyford and Stamp*, Per Curiam.

Case &c. for these Words, *You stole my Box-wood, and I will prove it.* Actionable, because they tend to disgrace the Plaintiff by an Imputation of Felony. 2 Salk. 695. pl. 6. Mich. 2 Ann. B. R. Baker v. Pierce. —— 6 Mod. 23. S. C. adjudged per tot. Cur. for the Plaintiff. —— 2 Lord Raym. Rep. 959. S. C. adjudged for the Plaintiff, notwithstanding the Opinion in Cro. J. 166. Low v. Saunders, to the contrary.

Thou stolest my Wood was said by Hutton J. 2 Roll Rep. 381. to have been adjudged by them to be actionable in Coggins's Case; but that the Words, Thou stolest my Wood *out of my Field*, were not actionable; and Winch J. said, that in Coggins's Case, he was of Opinion that the Words were not actionable; but the Court were against him. —— *Thou hast feloniously taken my Wood*, is actionable; for unless it was Wood cut down, he could not have said Feloniously taken. And adjudged for the Plaintiff by Anderson and Beaumont, contradicente Walmsley, and Owen absente. Cro. E. 471. (bis.) pl. 31. Pasch 38 Eliz. B. R. Anon.

48. If one says to another, Thou hast stolen my Wood, an Action upon the Case lies, because it cannot be intended growing, for Arbor dum Crescit &c. By Reports, 11 Jac. *Lyford v. Stamp*, Per Curiam. Trin. 5 Jac. B. R. between * *Litchfield and Saunders.*

Thou hast stolen a Load of Hop-poles, was ruled actionable; for it shall be intended that they were cut down before, otherwise they could not be call'd Hop-poles, or that he could otherwise steal them. Cro. E. 225. pl. 9. Pasch. 33 Eliz. B. R. Guildeslew v. Ward.

* Cro. J. 166. pl. 5. Lo v. Sanders, S. C. adjudged without Argument for the Plaintiff; for it shall be taken in the worst Part. And Wood is to be intended of that which is cut down, according to the ancient Rule of Arbor dum crescit, Lignum dum crescere nescit. —— S. C. cited Cro. J. 674. in pl. 7. by the Name of Child v. Sanders. —— *Thou art a thievish Rogue, and hast stolen my Wood*, Brampston Ch. J. conceived the Words actionable for the Reason above; & adjornatur. Mar. 211. pl. 248. Trin. 18 Car. B. R. Paulin v. Forde. —— Godb. 340. in pl. 434. Arg. cites Hill. 3 Jac. B. R. Roberts v. Hill, where it was adjudged that those Words, *Thou hast stolen my Wood* were not actionable, because it might be Wood standing, and then the cutting and taking it away is not Felony but Trespass. —— S. C. cited 2 Roll Rep. 143.

The Case of Low v. Sanders, Cro. J. 166. was cited by Serjeant Darnell. 2 Ld. Raym. Rep. 960. but Powell J. said the later Books are contrary, and that he would stick to the later Authorities, being grounded on so much Reason. And Gould J. said that Mich. 10 Car. 2. it was adjudged that these Words, Thou hast stole my Wood, were actionable. — So *Thou hast stolen my Timber* is actionable; for it shall not be intended of Trees growing, because they are then Timber-Trees. Noy 114. Short's Case. —— *Thou hast stolen as much Wood and Timber as is worth* 20 s. Verdict found the Words with this Addition, (*off my Landlord's Grounds.*) Adjudged for the Plaintiff, for the additional Words do not qualify the first Words, for Timber implies its being sever'd from the Soil; Per tot. Cur. Yelv. 152. Pasch. 7 Jac. B. R. Higges v. Austen. —— S. C. cited Arg. 2 Bulst. 82.

A.

A. in the Night time did steal my Wood and Oaks, and built his House with them. The Court agreed that this intended Word fell'd, especially the Defendant being found Not guilty as to the Oaks. And Judgment for the Plaintiff, albeit the Word Thief was not in it. 2 Keb. 261. pl. 11. Mich. 19 Car. 2. B. R. Allsop v. Taylor.

49. If one says to another, Thou art a Thief, for thou hast stolen a Load of Turves, an Action lies, for they are not called Turves till they are cut from the Earth, and dried. Mich. 9 Car. B. R. between *Dolman and Young* adjudged, this being moved in Arrest of Judgment.

50. If one says to another, Thou art a Corn-stealer, and hast stolen my Corn off my Land, no Action lies; for it might be that he intended Corn growing. Hill. 5 Ja. B. Per Curiam. *Thou hast stolen as much Corn out of my Fields as is worth 9 or* 10 *s.* It was moved that this might be intended Standing Corn, and then the Taking is not Felony, and so not actionable. The Court doubted, and would advise. Cro. J. 457. pl. 2. Hill. 15 Jac. B. R. Ellis v. Fitch.

51. If one says to another, Thou art a Thief, for thou hast stolen half an Acre of my Corn, no Action lies for these Words; for it may be that he intended Corn growing. Mich. 37, 38 Eliz. B. R. adjudged. Cro. E. 428. pl. 30. Castleman v. Hobbs, S. P. and seems to be S. C. adjudged for the Defendant, for no one will intend it Corn sever'd.—— Mo. 396. pl. 516. S. C. adjudged not actionable.—— Ow. 57. S. C adjudged accordingly.—— S. C. cited by the Name of Hobb's Case, 2 Bulst. 82. Arg.

52. If one says to another, Thou hast * feloniously stolen my Corn, an Action upon the Case lies, tho' he does not say that he stole it out of his Barn. Mich. 8 Jac. B. Per 2 Justices. But saying *he hath stolen my Corn*, being spoken generally, is not actionable; for it might have been growing, and then it had been only a Trespass. Poph. 129. Per Cur. obiter. Mich. 15 Jac.——Lat 176. S. P. accordingly, Per Jones J. Arg. ¶ *Thou hast stolen my Corn, and carried it to Market*, is actionable; for it shall be intended according to the common Sense, viz. Corn in the Barn, not in Sheaves, whereof a Quantity cannot be taken, and carried to Market. Cro. J. 442. pl. 16. Mich. 15 Jac. B R. Turner v. Champion.

* See pl. 48. in the Notes there.

53. If one says of another, He stole Corn from Master Kays, an Action lies for these Words. Mich. 21 Jac. B. R. between *Smith and Ward* adjudged, this being moved in Arrest of Judgment. Cro. J. 673. pl. 7. S. C. but adds the Words, *He is a Thief*; *for he hath stolen &c.* Adjudged for the Plaintiff, and affirm'd in Error.

54. If one says to another, Thou hast stolen my Furse, no Action lies; for it may be well intended that he means Furse growing. Mich. 9 Car. B. R. said to be adjudged in one *Gilbert's Case*, in the Common Pleas. See (R. a) pl. 6. S. C. and the Notes there.

55. If one says of another, He is a Thief, and stole a Pye out of John Barham's House, no Action lies for these Words, because it is uncertain what manner of Pye he intended; for perhaps he intended a Bird so call'd. Mich. 15 Jac. B. R. between *Stabback and Weston*, per Curiam, in Arrest of Judgment, and the Postea stay'd accordingly. Fol. 71.

56. If one says to another, Thou art drunk, and I shall never hold up my Hand at the Bar as thou hast done, no Action lies; for it may be that he held up his Hand for Drink, and not for Felony. Mich. 7 Jac. B. between *Simpson and Warters*, adjudged. 2 Brownl. 272. S. C. agreed that Action lies not. And Foster J. held that if he had said *for Felony*, yet it would not be actionable: for many honest Men are arraign'd.

57. If

57. If one says to another, Thou art a Knave, and didst consent to the taking of a 20 s Piece out of J. S.'s Pocket, no Action lies for these Words, because it does not appear that he intended a felonious Taking thereof. Pasch. 11 Car. B. R. between *Decks and Bagly*, per Curiam, in Arrest of Judgment.

Cro. E. 620. pl. 9. S. C. adjudg'd not actionable, per Popham & Fenner; but Clench e contra, and Gawdy was absent; but Popham and Fenner held that if the Words had been, that *He, scienter & voluntarie, administer'd Physick to J. S. to kill him*, the Words had been actionable, because that touches him in his Profession.

58. If a Man says of a Physician, He hath kill'd J. S. in the Old Jewry with Physick, which Physick was a Pill, and Dr. Atkins and Dr. Paddy found the Vomit in his Mouth, no Action lies for these Words; for if a Physician gives Medicines or Drugs to his Patient, to the Intent to recover him from his Sickness, yet tho' the Patient dies after the taking thereof, the Physician is not punishable, inasmuch as it does not appear that he knew the Medicines to be contrary to the Nature of the Disease, and so he did it not maliciously. Mich. 40, 41 Eliz. B. R. between *Poe and Mumford*, adjudged.

But it had been otherwise if he had said, That he administer'd Medicines that he knew to be contrary to the Disease &c. For an Action lies for these Words. Mich. 40, 41 Eliz. B. R. between *Poe and Mumford*, per Cur.

Saying to a *Surgeon*, who had had one M. under his Cure, and who is since dead, and of whom there was then a Discourse, *Thou didst kill Mr. M. thou didst kill him*, was held actionable by 3 Judges, and that without alleging that he was a Surgeon at the Time the Words were spoken. Het. 69. Mich. 3 Car. C. B. Watson v. Vanderlash.

Cro. E. 889. pl. 3. S. C. and adjudg'd not actionable; and the breaking the House may be a Trespass, and not Felony ——— S. C. cited Comb. 247. Pasch. 6 W. & M. in B. R. Arg. but the Court thought it was a strange Resolution.

59. If one says to another, Thou hast committed Burglary in breaking his House, and stealing his Goods, no Action lies; for it is not known whose House or Goods he intends, there being no Discourse of any. Trin. 44 Eliz. B. R. between *Brown and St. John*, adjudged.

A. hath stolen away such and such *Goods*, (naming them) *and B.* (the Plaintiff) *was privy and consenting thereto*; adjudg'd actionable; for B. is accused of being Accessory. Cro. C. 236. pl. 18. Mich. 7 Car. B. R. Mot v. Butler.

60. *That Thief A. has stolen away my Goods, and deliver'd them to B.* Action lies not for B. For the Words do not charge him as Accessory, it not appearing by what is said that he had any Notice of the Stealing. Dal. 42. pl. 2. 4 Eliz. Anon.

S. C. cited Cro. E. 166. Hill. 32 Eliz. B. R. in pl. 1. and the Court there were of the same Opinion.

61. *He hath counterfeited my Lord of Leicester's Hand to a Letter against the Bishop of London, for which he was committed to the Marshalsea.* 3 Le. 231. in pl. 313. cites it as held not actionable in the Case of Brook v. Doughty.

62. *Thou art a Forger, and art sued in the Star-Chamber for going by one Sedge.* Adjudg'd for the Plaintiff; for Forger is intended of such Thing of which Forgery might be, and to be spoken in the worst Part; and by saying He is sued in the Star-Chamber, this aggravates it that he did such Forgery, for which he is suable there. Cro. E. 296. pl. 1. Pasch. 35 Eliz. B. R. Munday v. Cordal.

63. *There*

63. *There never was a Purſe cut within 2 Miles of Wellingborough, but thou hadſt thy Part in it.* Adjudg'd actionable; for they ſhall be taken to be ſpoken in the worſt Senſe. Cro. E. 342. pl. 11. Mich. 36 & 37 Eliz. B. R. Boll v. Roane. S. C. cited Arg. Bulſt. 147.

64. *He was one of them that broke P.'s Houſe, and did take and carry away Part of the Money that was ſtole*, not actionable; for it may be intended that he broke the Houſe upon juſt Cauſe, and brought the Money to another Place upon juſt Cauſe. Cro. E. 672. pl. 33. Paſch. 41 Eliz. C. B. Anon.

65. *M. was robb'd of* 40 *l. and* 100 *Marks Worth of Plate, and A. and B. had it, and for that they will be hang'd.* The Court at firſt doubted, but afterwards reſolved that Action lies; for taking all the Words together, they ſhall be intended ſpoken in the worſt Senſe, viz. That the Plaintiffs were Actors in the Robbery, and the rather it being ſaid that they will be hang'd for it; and adjudg'd for the Plaintiff. Cro. J. 302. pl. 1. Trin. 10 Jac. B. R. Long v. King. Bulſt. 147. King and Long v. Lorking, S. C. and Judgment for the Plaintiff by four Judges; but Fenner J. ſomewhat doubted.——S. C. cited by Eyre, Comb. 232. but Holt Ch. J. ſaid he thought the Words were actionable.——Cro. J. 331. pl. 12. King v. Bagg, S. C. It was held that the Words of themſelves are not actionable, and that ſaying (they will be hang'd for it) do not inforce the firſt Words, and therefore the Judgment was reverſed in the Exchequer-Chamber.—— Jenk. 339. pl. 92. S. C.—— S. C. cited accordingly Palm. 63.

66. Action on the Caſe was brought for theſe Words, *I have Matter enough againſt thee; for John Halden hath found Forgery againſt thee, and can prove it*; and after Verdict it was reſolved by the Court, that the Words are too general, and will not maintain an Action, no more than if he had ſaid that another had forg'd a Warrant; for it might be a Warrant for a Buck, and this is not a right Affirmative. Hutt. 41. Mich. 18 Jac. Powell v. Ward. Hob. 305. pl. 385. Powell v. Winde, S. C. adjudg'd not actionable, there being no Certainty of what the Forgery was. ——Hob. 327. pl. 398. S. C. accordingly.——S. C. cited Comyns's Rep. 262. Arg. in pl. 144.

67. *He hath got the Pox by a yellow-hair'd Wench in Moorfields, and it will coſt him* 10 *l. if he eſcapes with his Life*; adjudg'd actionable upon the firſt Words, and they rejected the laſt. And Twiſden J. took a Difference between the Words *(got)* and *(caught)* the Pox, and that the firſt means the French Pox. Sid. 324. pl. 3. Paſch. 19 Car. B. R. Lym v. Hockley. Lev. 205. Lerome v. Hockley, S. C. but mentions only the firſt Words; and adjudg'd actionable; and Twiſden and Morton J. held that ſo it would be if the Words had been, That he got it of a *yellow-hair'd Woman.*——2 Keb. 181. pl. 5. Hockley v. Limbe, S. C. adjudg'd for the Plaintiff, Niſi &c.——Ibid. 183. pl. 14. Limbe v. Hockley, S. C. adjudg'd.

68. *She caus'd L.'s Servant to ſteal and purloin* 30 , *and received them and ſold them, which was the Cauſe why his Maſter broke.* Adjudg'd actionable, and affirm'd in Error, becauſe charg'd with procuring Felony, and receiving ſtolen Goods. All. 5. Mich. 22 Car. B. R. Hinacre v. Lemon.

69. *Thou haſt ſtolen as much Lead out of my Maſter's Houſe as is as big as a Houſe.* It was moved in Arreſt &c. that it might be Lead fixed to the Freehold, and be the Covering of the Houſe. But per Cur. if the Words had been, *Stole off the Houſe*, it might be ſo intended; but the Words being *out of the Houſe*, it muſt be intended Lead lying there. Lev. 156. Hill. 16 & 17 Car. 2. B. R. Ering v. Street. So *from my Houſe*, not actionable; Per Dodridge J. Arg. 2 Bulſt. 82.

70. Action for theſe Words, *You are a Forger of Bonds, a Publiſher of Forgery, and ſue upon forged Bonds.* The Jury found the Defendant Not guilty as to the firſt Words. Reſolved that the laſt Words were

not actionable, it not being laid that he knew of the Forgery. Vent. 3. Mich. 20 Car. 2. B. R. Twiſleton v. Hobbs.

See (Y. a) pl. 35. 36. 37. 38. 39. 40.

(Y. a. 2) Words relating to the Government.

I am put out of the Parſonage-houſe by *F.* the Patron, who is *neither the Queen's Friend, nor a true Subject.* Adjudg'd not actionable. Cro. E. 268. pl. 5. Hill. 34 Eliz. B. R. Fowler v. Aſton.

1. *HE is not the Queen's Friend.* Adjudged not actionable. Cro. E. 268. in pl. 5. Arg. cites 16 Eliz. Burſted v. Peck.

Thou art an Enemy to the State. Adjudgad actionable, and affirm'd in Error; for they cannot have any good Conſtruction, but are very ſlanderous Cro. E. 602. Hill. 40 Eliz. C. B. Charter v. Peter.

He is diſaffected to the Government, being ſpoke of a *Juſtice of Peace*, and he thereupon turn'd out of the Commiſſion, was adjudg'd actionable in the Court of Exchequer, and affirm'd in the Exchequer-Chamber; but was afterwards revers'd in the Houſe of Lords. Show. Parl. Caſes 12. Duval v. Price.

See (G. a) pl. 6. —— Le. 335. 336. pl. 469. Trin. 32 Eliz. S. C.

2. *Thou ſerveſt no true Subject*, being ſpoke to a Servant of the Plaintiff, was adjudged actionable, becauſe it was ſhewn that he was a *Juſtice of Peace, and a Deputy-Lieutenant, and near in Service to the Queen.* Cro. J. 202. in pl. 1. cited as the Caſe of Sir W. Walgrave v. Agas.

Wray thought the Words not actionable of themſelves, but that the Quality of the Perſon of whom they were ſpoken may add Weight to them. Gawdy J. held the Words actionable of themſelves; Fenner J. thought them not actionable.— Cro. E. 191. pl. 5. S. C. adjudg'd for the Plaintiff.——Roll Rep. 444. in pl. 8. Arg. cites S. C. as adjudg'd.——Palm. 69. Arg. cites S. C. as adjudg'd.——Cro. J. 202. pl. 1. cites S. C.——S. C. cited by Holt Ch J. in delivering the Opinion of the Court. 7 Mod. 111. Mich. 1 Ann. as adjudged actionable, being ſpoke of one in that high Station; and Holt ſaid that that Caſe has not been queſtioned.

*4 Le. 121. pl. 244. S. C. and the Court were of the ſame Opinion, the Words being too general; for it might be a Stirring up the Tenants of a Manor to Tumult and Sedition, which is not any great Scandal, and the Sedition mentioned in the Statute of 23 Eliz. and thereby made Felony, muſt be Sedition againſt the Queen.

3. *Thou art a mutinous and ſeditious Man, and didſt procure* *[move] *the Queen's Subjects to Sedition*, is not actionable, it not being ſaid he moved them to Sedition *againſt the Queen*; Per Gawdy, and to this the other Juſtices inclined, but it was only upon Motion. Cro. E. 214. pl. 8. Hill. 33 Eliz. B. R. Peake v. Pollard.

To ſay *he is a Traitor* is actionable. Arg. Cro. J. 275. in pl. 5. Paſch. 9 Jac. B. R. and ſo it was held there by all the Court.——*Thou art a traitorly Rogue, and I will prove it*; Per Cur. is actionable, and Judgment for the Plaintiff. 2 Keb. 47. pl. 101. Paſch. 18 Car. 2. B. R. Brunt v. Spencer.

4. *Thou haſt a Traitor to thy Maſter.* Action lies for the Maſter, the Words being ſpoke to his Servant. Cro. E. 906. pl. 15. Mich. 44 & 45 Eliz. B. R. Proctor v. Fitzwilliams.

S. C. cited as adjudg'd accordingly. 2 Brownl. 166.

5. *Thou art an arrant Papiſt; and it were no Matter if ſuch were hang'd; and thou and ſuch as thou would pull the King out of his Seat, if they durſt.* Adjudged not actionable. Godb. 147. pl. 187. Hill. 3 Jac. Kingſton v. Hill.

Godb. 153. pl. 198. Mich. 5 Jac. B. R. S. P. and ſeems to be S. C. and adjudg'd accordingly by the whole Court. ——Cro. J. 276. in pl. 5. cites it by Name of Blandford v. Atwood, and ſays the Precedent of this Caſe was ſhewn.——S. C. cited per Cur. Win. 124.

6. *I will hang him, for he hath ſpoke Words which are High Treaſon*, are actionable; for the firſt Words inforce the Slander. And Fleming Ch. J. thought it might be dangerous to the Plaintiff to have ſet forth the very Words; for Words of Treaſon are Arcana Imperii. Yelv. 107. Mich. 5 Jac. B. R. Blanchflower v. Atwood.

He

He hath ſpoke Treaſon, and that I will prove. It was held at firſt by 2 Juſtices that the Words are actionable, and 2 others held e contra, and that the Words ſhall be taken in mitiori ſenſu, and Fleming Ch. J doubted; but afterwards he, by Aſſent of the Parties, conſented that Judgment be enter'd for the Plaintiff, and that he ſhou'd take one 3d of the Damages given, and releaſe the Reſidue; and ſo it was done. Cro. J. 275. pl. 5. Paſch. 9 Jac. B. R. Berisford v Preſs.——Yelv. 197. S. C. adjudg'd that the Words are actionable.—Hutt. 76. cites 9 Jac. S. P. Pewall v. Vardoſte.——Bulſt. 147. S. C. *You have ſpoken Words, which I think are Treaſon*, and ſays that the Defendant went to a Juſtice of Peace and inform'd, and thereupon the Plaintiff was bound over to the Aſſiſes, and the Defendant bound to proſecute, which he did, and the Plaintiff was acquitted by Verdict, and then brought this Action; and per tot. Cur. Judgment was enter'd for the Plaintiff.——S. C cited Arg. Roll Rep. 427. in pl. 20. adjudg'd actionable.

He is a Rogue, and a Papiſt Dog, and he ſaid he would kill the King, is actionable. Keb. 14. pl. 33. 34. pl. 91. Paſch. 13 Car. 2. B. R. Green v. Green.

Thy Father will be hanged; for he hath ſpoke Treaſon againſt the King and Parliament, is actionable for all the Words except (and Parliament,) and they are void and Surpluſage; and Judgment for the Plaintiff, Niſi. 2 Keb. 478. pl. 11. Paſch. 21 Car. 2. B. R. Hingſtone v. Peek.

7. To ſay *He hath committed Treaſon*, was held per tot. Cur. Cro. J. 275. 276. Paſch. 9 Jac. B. R. in pl. 5. to be actionable; for tho' the Words are general, yet it is an expreſs charging him with Matter of Treaſon.

8. If *Words trench to Diſloyalty*, they ſhall be *taken moſt ſtrong againſt him that ſpeaks them*; Per Mountague Ch. J. Roll Rep. 445. pl. 8. Hill. 14 Jac. in Caſe of Lewes v. Walter.

9. *He put in two Horſes to Colonel W.* (Innuendo Colonel W. who was Governor of B.) *and as ſoon as any Warrants came for preſſing Men for the Service, he acquainted the Cavaliers, ſo that none, that were fit, could be preſs'd; and he holds a conſtant Correſpondency with the Cavaliers.* It was objected that the Words were uncertain throughout; but the Court held them certain enough, being taken all together; for if true, the Plaintiff thereby will be expreſsly made a Delinquent, and his Eſtate be ſequeſtred; and the Plaintiff had his Judgment. Sty. 400. Hill. 1653. B. R. Trevilian v. Welman.

11. *He is a baſe Fellow, and I will queſtion him ere long, for that he would have taken away the King's Life.* The Court conceived the Words actionable. Keb. 112. pl. 13. Mich. 13 Car. 2. B. R. Dolbin v. White.

11. Caſe &c. for theſe Words, ſpoken at an Election for Knights of the Shire, *You and your Crew brought the late King to his Death.* It was moved in Arreſt of Judgment, that the Words are not actionable; for they ought to be taken in Mitiori ſenſu, not that the Plaintiff killed the late King, but that he attended him to his Death. But Per Cur. the Words import Scandal, and in common Acceptation they amount to his having a Hand in the King's Death. Hard. 203. pl. 1. Mich. 13 Car. 2. in the Exchequer, Lewes v. Roberts.

20. *You are a ſcurvy Fellow, I am no Traitor; I have ſeen you in Rebellion.* Adjudged actionable; for by the Oppoſition of the Words they cannot be intended but of a traiterous Rebellion, and the By-ſtanders cannot intend them otherwiſe; and if any Pardon had been after, the Defendant ought to ſhew it in pleading. Lev. 251. Mich. 20 Car. 2. C. B. Dalton v. Sudde. Sid. 381. pl. 13. Dalton v. Sadd, S. C. adjudged for the Plaintiff.——2 Keb. 411. pl. 36. S. C. adjudged for the Plaintiff.

12. *Do not vote for him; for he is a Jacobite, and for bringing the Prince of Wales and Popery to deſtroy our Nation*, being ſpoke of a Juſtice of Peace and Deputy-Lieutenant, who intended to ſtand for Knight of the Shire, is actionable. 2 Salk. 694. pl. 5. Mich. 1 Ann. B. R. How v. Prinn. 7 Mod. 107. S. C. adjudged for the Plaintiff per tot. Cur. and afterwards affirm'd in the Houſe of Lords.——2 Ld. Raym Rep. 812. S. C. adjudg'd; and Error being brought in Parliament, after long Debates at ſeveral Days, Judgment was affirm'd by 48 Lords againſt 34

(Z. a) For Words. In what Caſe it lies. *Where the Words in Mitiori ſenſu are not actionable.*

Cro J. 438. pl. 9. S. C. but not this Rule.—— Cro. E. 672. pl. 33. Paſch. 41 Eliz. C. B. Anon. The ſame Rule laid down by Walmſley; and it ſeems the other Juſtices

1. WHERE the Words are dubious, and may receive a double Interpretation, the one Way that they ſhall be actionable, and the other Way not, they ſhall be taken in Mitiori ſenſu, ſo that they ſhall not be actionable. Mich. 15 Jac. B. R. in *Gardiner and Spurdance's Caſe.*

2. But where the Words are not doubtful, nor in common Acceptance receive a double Conſtruction, there they ſhall be taken according to the common Acceptance; and ſo, if in common Acceptance they ſound in Slander, they ſhall be actionable, and ſhall not be ſtrain'd to any foreign Conſtruction, to make them not actionable. Mich. 15 Jac. B. R. between *Gardiner and Spurdance*, per Curiam.

were of the ſame Opinion. The Caſe was on theſe Words, viz. *He was one of them that broke Mr. P.'s Houſe, and did take and carry away Part of the Money that was ſtolen*, and Walmſley held it not actionable by that Rule; and it may be here intended that he broke the Houſe upon juſt Cauſe, and brought the Money to another Place upon juſt Cauſe; and ſo was the Opinion of the other Juſtices.

Tho' in the old Books the Rule was to take the Words in Mitiori ſenſu, yet Holt Ch. J. ſaid they would give a Favour to Words, and would give a Satisfaction to them who are hurt in their Reputation, and would take Words in a common Senſe, according to the vulgar Intendment of the By-ſtanders; and the *Rule of Mitiori ſenſu is to be underſtood where Words in the natural Import are doubtful, and equally to be underſtood in the one Senſe as well as the other*; per Holt Ch. J. Skin. 364. pl. 8. Mich. 5 W. & M. in B. R. in Caſe of Somers v. Houſe.——S. P. accordingly, 10 Mod. 196. Hill. 12 Ann. B. R. in Caſe of Harriſon v. Thornborough.

Cro. J. 438. pl. 9. S. C. adjudg'd for the Plaintiff, though it was alſo farther objected, that it was *not ſaid when ſhe poiſon'd him, nor that he died of that Poiſon.*

3. As if a Man ſays to a Woman, Thou didſt poiſon thy Husband, and I will juſtify it to thy Face, the ſaid Woman ſhall have an Action upon the Caſe, averring that her Husband was dead before the Words ſpoken, tho' he does not ſay that ſhe poiſon'd him to Death, nor voluntarily; it might be that ſhe poiſon'd him againſt her Will by an ill Herb put into his Pottage, or with a Potion in which Poiſon was mixt, or that ſhe deliver'd to him Poiſon prepar'd by another, when ſhe herſelf knew nothing of it, or that ſhe might poiſon him, and he might recover again, or die after the Year and Day; for theſe are * Foreign Intendments; but the Words in common Acceptance imply that ſhe had poiſon'd him to Death voluntarily and knowingly. Mich. 15 Jac. B. R. between *Gardiner and Spurdance*, per Curiam, adjudg'd. Mich. 37, 38 Eliz. B. R. between † *Meggs and Griffin*, adjudg'd, for ſaying that ſhe had poiſon'd her firſt Huſband in a Meſs of Milk. Trin. 39 Eliz. B. R. between ‡ *Webb and Poore*, adjudg'd. Paſch. 7 Jac. B. *Binford's Caſe*, adjudg'd.

* Fol. 72.

† See (X. a) pl. 4. S. C.

‡ See (P. a) pl. 8. S. C. and (E. b) pl. 7. S. C.

Cro. J. 438. pl. 9 S. C. but S. P. does not appear. ——S. P. Godb. 181. pl. 257. Mich. 9 Jac. C. B. Carle's Caſe.——S. P. cited as adjudg'd not actionable in C. B. becauſe J. S. might come to his Death, and the other peradventure be the Means thereof by Execution, Battail, Phyſick &c. and ſo the Words too general to maintain an Action. Cro. J. 306. pl. 2. Mich. 10 Jac. B. R. in Tooſe's Caſe, which was for theſe Words, viz. *T. kill'd thy Husband* (Innuendo J. D. lately dead;) but adjudged actionable.

4. If one ſays to another, Thou haſt kill'd J. S. an Action lies, tho' it might be taken that he kill'd him as his Executioner by Law; for in common Parlance it is taken for a felonious Killing. Mich. 15 Jac. B. R. in *Gardiner and Spurdance's Caſe*, per Curiam.

Thou haſt killed a Man at M. in Eſſex. All the Court held that the Words being *alleged to be ſpoken maliciouſly*,

maliciously, shall be taken most strongly against him that spoke them; and adjudg'd for the Plaintiff Cro. E. 317. pl. 2. Pasch. 36 Eliz. B. R. Godfrey v. More.

Thou hast kill'd my Wife, tho' there was no Averment that his Wife was dead, nor said that he did it violently, yet it shall be intended, unless the Defendant shews that she is living; and adjudg'd for the Plaintiff. * Cro. E. 823. pl. 24. Pasch. 43 Eliz. B. R. Talbot v. Case.

Thou art a Rogue, and a Rascal, and hast kill'd thy Wife, (Innuendo Elizabetham *super Uxorem* suam) no Action lies for the first Words; and as to the *Super* it shall be intended that she is dead, and shall not have such foreign Construction as that she was divorced; and the Court further held, that the Words shall be intended according to the usual Speaking, that he kill'd her voluntarily; and whatsoever way he kill'd her, the Words are very scandalous; and adjudg'd actionable. Cro. C. 489. pl. 14. Mich. 13 Car. B. R. Wilner v. Hold.

The Words, He hath kill'd a Man, shall be taken in Mitiori sensu; per Scroggs Ch. J. 2 Show. 77. Trin. 31 Car. 2. B. R. in pl. 61.

* S. C. cited Comb. 161. Mich. 1 W. & M. in B. R. and Dolben J. said that of late it hath been ruled contrary to that Case, and that there ought to be an Averment of the Party's being dead.——See (E. b) pl. 3. and the Notes there.

5. If A. was murder'd by B. and after C. says to E. Thou art one of those that did help to murder A. an Action lies for these Words, tho' it might be that he helpt to murder him without his Knowledge; for the Murder implies Malice, and if it was otherwise it ought to be aver'd by the Defendant. Mich. 11 Jac. B. R. between *Foxcraft and Lacy*, adjudged. See (C. b) pl. 5. S. C. and the Notes there. and (H. b) pl. 17. S. C.--Hob. 89 pl. 120. S. C.

adjudg'd for the Plaintiff, and that Judgment affirm'd in Error.—— Jenk. 297. pl. 52. S. C.

6. In an Action upon the Case, if the Plaintiff declares that the Defendant said of the Plaintiff, That Rogue Davies the Apothecary hath poison'd my Uncle, (Innuendo J. S. then dead) I will have him digg'd up again, and hang him; tho' he did not name his uncle, nor might it appear that he intended J. S. yet it appears by the Words themselves after, that he would have him dug up, shews that he was dead, and tho' he does not say that he poison'd him to Death, or voluntarily, yet the Words intend so of themselves, and therefore the Action lies. Hill. 1650. between *Davies and Okeham*. Intratur Mich. 1650. Rot. 557. Sty. 245. S. C. Jerman J. doubted whether the Declaration was good, because it did not allege that the Party died of the Poison; but adjudg'd for the Plaintiff, Nisi &c.

Words spoke of an *Apothecary* were, *It is a World of Blood he has to answer for in this Town thro' his Ignorance; he did kill a Woman and 2 Children also, and he kill'd J. P. at P.* (And in another Place the Defendant said *He was the Death of J. P.) he has kill'd his Patient with Physick*; adjudg'd actionable. 11 Mod. 221. Pasch. 8 Ann. B. R. Tutty v. Alewin.

7. If a Man says of a Woman, That J. S hath had the Use of her Body, by which she loses her Marriage, an Action upon the Case lies; for use of her Body, in common Sense, is unlawfully and dishonestly, and not as a Physician to physick her, as was objected. Pasch. 5 Jac. B. R. between Dame *Morrison and Cade*, adjudged. See (X. a) pl. 1. S. C. —(D. a) pl. 4. S. C. and the Notes there.

8. If a Man says of J. S. As soon as Bushe had kill'd Smith he came to J. S. and told him how he had kill'd Smith, and J. S. gave Bushe Money to shift him away, no Action lies for these Words, with an Averment that Bushe had kill'd Smith, because this Word (kill) is too general; for a Man may kill another lawfully, as upon an Assault to rob him, or as an Officer &c. Pasch. 7 Jac. B. between *Parram and Roe*, adjudg'd.

9. If one says to another, Thou must needs be richer than I; for thou didst coin Thirty new Shillings in a Day; thou art a Coiner of Money, no Action lies for these Words; for perhaps he was a Coiner of Money in the Mint, and earn'd Money thereby. Pasch. 8 Jac. B. between *Ward and Poole*, adjudg'd. Godb. 167. pl. 234. S. C. adjudg'd against the Plaintiff—This Case was denied by the Court. 2 Salk. 679. Trin. 4 Ann. B. R. in pl. 10.

Thou hast coin'd Gold, and art a Coiner of Gold, adjudg'd not actionable; for it may be he had Authority to coin, and the Word shall be taken in Mitiori sensu Godb. 325. pl. 464 Trin. 3 Car. C. B. Mills's

Mills's Caſe. ——S. C. cited Godb. 391. in pl. 477. ——S. C. cited Arg. 2 Ld. Raym. Rep. 1185. But Holt Ch. J. and Powell ſaid that if that Caſe were to be adjudg'd now, they would adjudge it otherwiſe. And Mr. Page mention'd a Caſe in C. B. which Powell agreed, where theſe Words, *You are a Coiner of Money*, were reſolved to be actionable, and the Caſe in Roll's Abridgment denied.

Poph. 150. S. C. *I arreſt you upon Felony*, adjudg'd that the Action lies.——

10. If one Man puts his Hand upon the Shoulder of another, and ſays, Bear Witneſs, my Maſters, I arreſt him of Felony, an Action lies; for this Arreſt is as much as if he had ſaid, I charge him with Felony. Hill. 17 Jac. B. R. between *Searl and Maunder*, adjudg'd per Curiam.

2 Roll Rep. 141. S. C. ſays the Plaintiff alleg'd that the Defendant ſpoke the Words maliciouſly and falſely, and therefore he had Judgment.

The Defendant being in Company with the Plaintiff and a Conſtable, *ſaid to the Conſtable*, viz. *There he is, take him; for I charge him with flat Felony*, without alleging that the Words are ſpoken falſely and maliciouſly. Roll Ch. J. held them actionable, and the Words themſelves appearing ſcandalous, therefore the Plaintiff need not aver they were ſpoken falſely and maliciouſly; and Judgment for the Plaintiff, Niſi. Sty. 59. Mich. 23 Car. B. R. Nevill v. Mott.

2 Roll Rep. 342. Wheeler v. Appleton, S. C. adjudg'd that no Action lies.—— Godb 339. pl. 434. S. C. adjudg'd againſt the Plaintiff.

11. If one ſays of another, He hath ſtole my Piece, (Innuendo quoddam Tormentum &c.) and I charge him with flat Felony, no Action lies for theſe Words; for the firſt Words are meerly uncertain, inaſmuch as it cannot be known what Piece he intended, whether of Wood or &c. and the other Words, * I charge him with Felony, are but an Accuſation of Felony. Trin. 21 Jac. B. R. between *Wheeler and Popleſton*, adjudg'd.

But by Haughton J. if the whole Matter had been ſet forth in the Declaration, as to have ſhewn that the Parties before this Speech had had Diſcourſe of a Gun, then the Action in this Caſe would have been maintainable; but here the Word (Piece) is uncertain, and ſo the Action will not lie. ——S. C. cited Poph. 187. —— All. 7. S. C. cited per Cur. and ſays the Defendant juſtified that the Plaintiff did ſteal his Gun; and tho' the *Juſtification*, which *ſhew'd the Defendant's Meaning to be of a Gun*, was found againſt him, and Piece was a Word of uncertain Signification, which could not be explain'd by the Innuendo, Judgment was given againſt the Plaintiff for the Reaſons aforeſaid.

Fol. 73. Cro. E. 459. (bis) pl. 6.

12. If one ſays of another, He hath ſtolen by the Highway Side, no Action lies, becauſe it may be a Stick, or an Apple from a Tree. Paſch. 38 Eliz. B. R. between *Denyſon and Burke*, adjudg'd.

Paſch. 38 Eliz. S. C. adjudged per tot. Cur. for the Defendant. ——Goldsb. 143. pl. 58. Brough v. Denyſon, S. C. held by Popham and Fenner not actionable.——S. C. cited Arg. Bulſt. 112.

Mo. 407. pl. 547. Brown v. Brinckley, Trin. 37 Eliz. B. R. S. C. ſays the Plaintiff was produced for a Witneſs, and the Defendant ſaid that *He was diſproved before the Juſtices of Aſſiſe by the Oath of Mr. K.* (Innuendo that he was diſproved in his Oath) adjudged not actionable; for the Innuendo cannot ſupply ſuch Intendment. ——Ow. 58. S. C. adjudged not actionable; for the Diſproof might be in a Collateral Matter, or ſome Circumſtance. The Ch. Juſtice and Fenner only were in Court.

13. If one ſays of another, He was produced for a Witneſs at the Aſſiſes, and ſworn, and was reproved in his Oath of J. S. no Action lies for theſe Words; for it might be that he was reproved in his Oath, and yet not be forſworn; for if he was reproved in any Circumſtance of his Oath, yet he is not forſworn, if the very Subſtance for which he was produced be true. Paſch. 38 Eliz. B. R. between *Browne and Brinly*, adjudg'd.

Hutt. 14. Charter v. Hunt, S. C. not actionable.—— Mo. 409. pl.

If one ſays of another, Thou art a prigging pilfering Merchant, and haſt pilfer'd away my Corn and my Goods from my Wife and my Servants, and this I will prove, no Action lies, becauſe (as it ſeems) it does not appear that he intended that he took theſe Goods feloniouſly, and therefore they ſhall be taken in Mitiori ſenſu. Mich. 37,

38

38 Eliz. B. R. adjudg'd, (but there another Reaſon is given) between *Carter and Hunt.* 556. Carter's Caſe, S. C. not actionable, and Judgment given in a baſe Court was reverſed.——Cro. E. 424. pl. 24. S. C. The whole Court held the Words not actionable; for they do not impeach him of Felony, and ſo Judgment was reverſed.——Ow. 56. Anon. S. P and ſeems to be S. C. and Judgment reverſed; but ſays, Sed quære rationem.

15. If one ſays to another, Thou art a filching Fellow, and didſt filch from J. S. 4l. no Action lies; for the Uncertainty of the Words, and of the Senſe of them, and the Words Ex vi termini, is no more than if he had ſaid pilfering or cheating. Mich. 17 Jac. B. between *Bradſhawe and Walker*, per Curiam. Vide the ſame Caſe Hob. Rep. Caſe 323. Hob. 249. pl. 325. S. C. adjudg'd per tot. Cur. not actionable; for the Words are of an uncertain Senſe.——Brownl. 13. S C. adjudg'd accordingly; for it ſhall not be intended that he ſtole the Money.——Palm 29. S. C. but the Words there are, You are a filching Fellow; *for you ſtole from J. S. 4 l.* and held not actionable.——Hutt. 34. S. C. reſolved not actionable; and Judgment accordingly.

16. If a Man ſays to a Miller that keeps a Mill, Thou haſt ſtolen 3 Pecks of Meal, an Action lies; for tho' the Corn was deliver'd to him to grind, yet if he ſteals the Meal this is Felony being taken from the Reſidue. Hill. 8 Car. B. R. between *Langly and Bradſhaw*, adjudg'd in a Writ of Error upon a Judgment in Canterbury Court, and the firſt Judgment affirm'd.

17. If one ſays to another, Thou art a Thief, and didſt break open my Cheſt, and ſteal my Deeds, an Action lies; for this is Felony to break a Cheſt and ſteal Deeds. Trin. 16 Car. B. R. between *Blumly and Roſe*, per Curiam adjudg'd, this being moved in Arreſt of Judgment.

18. If one ſays of another, He did burn my Barn, and none but he, no Action lies; for it ſhall be taken in Mitiori ſenſu, that it was not a Barn with Corn, nor near to any Manſion-houſe. Co. 4. 20. *Barham's* Caſe adjudged. See (I. b) pl. 2. S. C.—— Yelv. 21. Mich. 44 & 45 Eliz. B R. Barham v. Netherſal, S. C. adjudged Quod querens nil capiat &c. by Gawdy and Yelverton only in Court. ——Noy 155. S. C. and adds, viz. *And he doth uſe to ſet Fire of Barns about Michaelmas, when they are full of Corn*; but ſays, that tho' it was objected that it was not ſurmis'd that there were Barns burnt about Michaelmas, nor ſhewn that they were near any Dwelling-houſe, yet adjudged for the Plaintiff. ——S. C. cited Godb. 287. in pl. 413.—— S. C. cited Bulſt. 112.

19. So if one Man ſays of another, He hath burnt my Barn, and if my Lord had done him Juſtice he ſhould have been hanged for it, no Action lies. Trin. 43 Eliz. B. R. between *Levett and Hawthorn*, Per Curiam. See (I. b) pl. 3. S. C.—— Cro. E. 834. pl. 4. Lovet v. Hawthorn, S. C. and 3 Judges held the Words not actionable, but Fenner e contra, becauſe the wilful Burning of any Barn is an odious Act, and a great Slander. Et adjornatur.

20. If one ſays of A. he was a Pickpocket, and had picked my Pocket, and took 12 s. of Money out of my Pocket, no Action lies for theſe Words, becauſe it may be done as a Treſpaſs, or in Jeſt, and not feloniouſly. Mich. 15 Car. B. R. between *Haſel and Auman* adjudged, in Arreſt of Judgment, Per Curiam, Intratur Trin. 15 Car. Godb. 287. in pl. 413. cites Humfries's Caſe, S. P. adjudged not actionable, becauſe he did not ſay he *had ſtolen 12 s.* but that if he had ſaid nothing but *he hath pick'd my Pocket*, the Action would have been maintainable ——Thou haſt pick'd my Pocket, is not actionable, unleſs it be ſaid *Feloniouſly*, or *I will hang thee*, for as Wylde J. ſaid, it is a common Saying, that the Lawyers have pick'd my Pocket. Freem. Rep 277. pl. 310. (bis) Paſch. 1676. Anon ——*D's Wife* (Innuendo the Plaintiff's Wife) *pick'd 5 s. 6 d. out of H's Wife's Pocket, and her Husband* (Innuendo the Plaintiff) *was conſenting to the ſame.* Judgment for the Plaintiff, and held that the Words ſhall be taken in Pe-

iori ſenſu, and are ſlanderous both to the Feme, and alſo to the Baron, in charging him to be conſenting. Yelv. 136. Mich. 6 Jac. B. R. Dromart v. Weſtover.——*Thou art a Pick-pocket Rogue, and haſt pick'd thy Maſter's Pocket and his Money-box; and I will prove it* It was objected that the Words were too general and uncertain. Judgment was arreſted till the Plaintiff ſhould move. Sty. 127. Trin. 24 Car. B. R. Stent's Caſe.

See (G. a) pl 3. S. C. and ſupra, pl. 11. S. C. * Hob. 205. pl. 284 Hill. 17 Jac. Poland v. Maſon, S. C. adjudged not actionable. ——Hob. 226. pl. 297. Fol. 74.

21. If an Infant brings his Action by Guardian, and declares that the Defendant ſaid to him, I charge you with Felony, tho' it may be the Infant was of ſuch an Age that he could not commit Felony, yet becauſe this is collateral, it ſhall not be intended without ſhewing of the other Side. Mich. 5 Jac. B. R. between * *Baſy and Child* adjudged. Hill. 2 Car. between *Wood and Merrick* in B. R. it was adjudged in Arreſt of Judgment, that no Action lies for the ſaid Words, being ſpoke to a Man of full Age, becauſe it is not any Affirmative that he was a Felon; for he might be charged upon a Suſpicion. Hob. Reports, Caſe 381. between † *Pollard and Maſon* accordingly, where the Words were, I charge him with Felony, for taking Money out of the Pocket of J. S.

S. C. adjudged accordingly.——Hutt. 38. Maſon v. Thompſon, S. C. adjudged per Cur. præter Warburton qui hæſitavit.——Brownl. 18. Cowland v. Maſon, S. C. ſays the Court was divided.——2 Ld. Raym Rep. 959 cites S. C. and Holt Ch. J and the Court denied it to be Law; for the taking out of a Man's Pocket muſt be intended a felonious taking.

* Cro. C. 277. pl. 16. S. C. adjudged actionable by 3 J. becauſe the Words (Violently taking from him his Purſe, and threatning to kill him, and that he was in Fear of his Life) is *a Deſcription that he took it feloniouſly*, and by Robbery; but Crooke doubted, becauſe it is not a direct Charge of ſuch taking.

22. If A. ſays of B. He did violently ſet upon me in the King's Highway, and took away my Purſe with 4 s. in it from me, and after he had my Purſe, did threaten to cut me off in the Middle, and I was glad to fly for my Life; tho' he does not ſay that he robb'd him, or that he did this feloniouſly, yet this is tantamount, and in common Underſtanding is but a Deſcription of a Robbery. Mich. 8 Car. B. R. between * *Lawrence and Woodward* adjudged, this being moved in Arreſt of Judgment. But in this Caſe Juſtice Croke cited two Caſes, 10 Car. B. R. between † *Holland and Stoner*, Thou art a lewd Fellow; thou didſt ſet upon me in the Highway, and tookeſt away my Purſe. Adjudged in B. R. that the Action lies for theſe Words; but it was after revers'd upon a Writ of Error in the Exchequer Chamber, becauſe it might be that he took it in Jeſt, or as a Treſpaſſer. But 10 Jac. B. R. between ‡ *Leveſton and Cawdry*, Thou art a lewd Fellow; thou didſt ſet upon me in the Highway, and tookeſt away my Purſe; and if thou wilt go with me before a Juſtice of Peace, I will charge thee with Felony. And adjudged in B. R. that Action lies for theſe Words; and this was affirmed in a Writ of Error, becauſe the laſt Words ſhew his Intention to have been to charge him with Robbery.

——Jo. 302. pl. 8. S. C. ſays it was adjudged per tot. Cur.

† Cro. J. 315. pl. 18. S. C. Mich. 10 Jac. in the Exchequer Chamber, adjudged not actionable; and ſo revers'd a Judgment to the contrary given in B. R.——Bulſt. 112. Stowe v. Holland, S. C. Paſch. 9 Jac. B. R. adjudged actionable.——S. C. cited Cro. C 277.

‡ Cro. J. 312. pl. 13. Lewis v. Cawardly, S. C. adjudged actionable in B. R. and affirmed in the Exchequer Chamber.

He hath beaten me, and taken away my Purſe and 20 s. in Money. The Court (abſente Anderſon) held the Words not actionable; for it may be intended that he took it as a Treſpaſſer; for he charges him not with Felony. Cro. E. 351. pl. 9. Mich. 36 & 37 Eliz. B. R. Lyne v. Backhouſe.

I met A. B. C. and D. upon Whitehill at Cheſham Town's-end, in the Evening, as I (the Defendant) *was going home, and there they bid me deliver my Purſe; and I being afraid, put my Hand into my Pocket, and took out 2 s. 6 d. and gave it over my Shoulder to one of them, I knew not which.* Adjudged by all, præter Yelverton, that Action lies; for every Circumſtance imports Slander, without any ſtrain'd Conſtruction or Implication. Yelv. 145. Mich. 6 Jac. B. R. Gold v. Robins.

He would have robb'd me, and robb'd me of my Dagger, and took it from me, is actionable, Per tot. Cur. and Judgment for the Plaintiff. 2 Bulſt. 227 Paſch. 12 Jac. Gilpin v. Shine

23. *Thou*

23. *Thou waſt the Cauſe that J. S. did hang himſelf and that R. N. did cut his own Throat, and thou beginneſt with no Man but thou undoeſt him,* not actionable; for it might be that they had each done ſome Offence, and that the Plaintiff had got them puniſh'd for it according to Law, and that what they did was for Grief, and ſo not unlawful in the Plaintiff. Dal. 89. pl. 5. 15 Eliz. B. R. Anon. *M. was the Cauſe of the Death of D.'s Child, and I will ſwear it on a Book.* Per Williams J. if the Diſcourſe had been that the Party dead had been poiſon'd, murder'd, or come to ſome other untimely Death by Violence, and then the Defendant had uſed ſuch Words, it had been actionable; but otherwiſe they are too general; and ſo the whole Court agreed clearly that they are not actionable, and gave Judgment againſt the Plaintiff. 2 Bulſt. 10. 11. Mich. 10 Jac. Miller v. Buckden.

So where the Words were, *Thy Husband was the Death of J. P. and had it not been for thee and thy Husband he had been alive until this Day*; Glyn Ch. J. ſaid he might be the *Occaſion and not the Cauſe*, as by ſending J. P. a Journey &c. or by ouſting him of his Eſtate, by which he occaſionally languiſh'd &c. 2 Sid. 71. Paſch. 1650. B. R. Skelton v. Earth.

24. *He is a Maintainer of Thieves.* Godb. 90. in pl. 100. Clench J. cited it as adjudg'd actionable in Ld. Shandois's Caſe. Cro. E. 52. pl. 1. cites S. P. adjudged accordingly, in Caſe of Lea v. Penniſton.——S. C. & S. P. cited accordingly, Roll Rep. 427. in pl. 20.—— S. C. cited by Tanfield Ch. B. as adjudged accordingly, Cro. J. 268. in pl. 30.

25. *He hath aided Pirates contrary to the Laws of the Realm, and againſt a Proclamation in that Behalf.* Clench. J. thought the Words here as forcible as if he had ſaid *Scienter.* Adjornatur, to ſearch for Precedents. Godb. 89. pl. 100. Mich. 28 & 29 Eliz. Anon. Cro. E. 52. pl. 1. Hill. 29 Eliz. B. R. Morgan v. Kiffe, ſeems to be S. C. but there the Words are, *He maintained, victualled, and help'd to let go certain Pirates, contrary to the Laws of the Realm, and the Proclamations made.* Adjudged for the Plaintiff; for it being ſaid he maintained them againſt the Law and Proclamations, it ſhall be intended in the worſt Senſe.——Roll Rep. 427. in pl. 20. S. C. cited as adjudged actionable, for ſaying, Thou art a Maintainer of Pirates. ——S. C. cited accordingly, by the Name of Skite v. Morgan. 3 Bulſt. 260.——S. C. cited Cro. J. 629. in pl. 1.

Thou didſt harbour and maintain Rebels and Traitors. It was objected, that it was not averr'd that the Defendant ſaid that the Plaintiff knew them to be Traitors; but Periam J. took a Difference between the Words (keep) and (maintain,) that (maintain) implies a Thing prohibited, and therefore not ſufferable; and therefore the Action is maintainable. And he, and Windham and Rhodes held the Action well brought. (Anderſon abſente propter Ægritudinem.) Goldsb. 48. pl. 7. Anon.

26. *Thou haſt ſitten upon the Pillory*, but did not ſay in what Manner; not actionable. Cro. E. 62. pl. 3. Mich. 29 & 30 Eliz. B. R. Anon.

27. Words, viz. *Thou haſt procured falſe Witneſſes to ſwear in ſuch an Action*, adjudg'd actionable; for when it is ſaid he procured Witneſſes, it is intended, *in malam partem* that he procured them to ſwear for him which would ſwear falſly. But if the Words had been, *You brought in falſe Witneſſes*, Action would not lie for them. Cro. E. 93. pl. 1. Paſch. 30 Eliz. B. R. Prowſe v. Carew. Le. 101. pl. 131. S. C. the Words were, *Suborn, procure, and bring in falſe Witneſſes in ſuch a Court at Weſtminſter* &c. It was found that he procured and brought in, but was acquitted of the Suborning. No Judgment appears.

28. *Thou haſt ſought the Blood of thy Husband, and waſt his Death; for if thou hadſt been an honeſt Woman he had been alive yet*, and avers in Facto her Husband was killed. It was ruled that the Action lies; for the Words ſhall be taken to be ſpoken in malam partem, and adjudg'd for the Plaintiff. Cro. E. 239. pl. 8. Trin. 33 Eliz. B. R. Gaſtrell v. Townſend.

29. *My Ld. Preſident of the North ſhewed Mr. Stapleton's Hand ſet to a Book, whereby he had conſented to the late Rebels of the North, but by the Means of Mr. Fairfax, my Ld. Preſident was perſwaded, and the Matter ſuppreſſed.* Adjudg'd that the Words are actionable; for it cannot be his Hand unleſs wrote by himſelf, but another may write his Name; and when he ſaid he conſented to the Rebels, and ſhew'd not any certain Perſon, this cannot be otherwiſe intended but that he conſented to all the Rebels in their Rebellion; but if he had ſaid that he *conſented to A.*

and B. which were Rebels, this perhaps may be intended that he conſented to them in ſome other Matter. Cro. E. 251. pl. 17. Mich. 33 & 34 Eliz. C. B. Stapleton v. Frier.

4 Rep. 15. a. b. pl. 4. Stanhope v. Blith, S. C. Paſch. 27 Eliz. B. R. but this Reaſon does not appear there.

25. *Thou getteſt thy Living by ſwearing and forſwearing*; not actionable; for he might have the Fines of ſuch as commit Perjury; cited per Cur. Cro. E. 888. in pl. 1. as Dr. Stanhope's Caſe.

31. *Thou didſt rob Carpenter's Hall, and deceive the Company of* 20 *l.* being ſpoke of one of the Company who had been Maſter of the Company, and as ſuch had the Goods and Money of the Company delivered to him, but it *not* being *affirm'd that he was Maſter at the Time when* he robb'd the Hall, it ſhall be intended that he was not; and therefore the Words do not amount to a Breach of Truſt only, but are actionable. Cro. E. 787. pl. 28. Mich. 42 & 43 Eliz. C. B. Thaxbie v. Smith.

32. *Thou art a Cut-purſe*, is not actionable; Per Cur. Godb. 181. Mich. 9 Jac. C. B. in pl. 257. Obiter.

33. *She hath married the Husband of another Woman.* It was moved in Arreſt of Judgment, that the Plaintiff's *Wife might be dead or beyond Sea for 7 Years*, and then the Caſe is out of the Statute of 1 Jac. cap. 11. and tho' it be *alleged that he had no other Wife*, yet the Words muſt be taken as they were ſpoken before the Auditors. And perhaps the Meaning might be, that the Plaintiff was contracted to, and ſo in Conſcience was the Husband of another Woman. And Judgment was given againſt the Plaintiff. Allen 37. Hill. 23 Car. B. R. Eels v. Smith.

34. *Thou art a cheating Knave, and haſt ſtolen two Bonds from me* (Innuendo two Bonds *for Payment of Money from the Defendant.*) Per Cur. The Words are not actionable. Sid. 35. pl. 3. Paſch. 13 Car. 2. C. B. Lizard v. Clare.

35. *She* (Innuendo the Plaintiff) *had a Child, and either ſhe or ſomebody elſe made it away.* Bridgman Ch. J. held, that (making it away) muſt be underſtood of killing it, and ſo actionable; but the 3 other J. e contra, that it ſhall be taken in Mitiori ſenſu. And thereupon Bridgman conſented that Judgment be arreſted. Cart. 55. Hill. 17 & 18 Car. 2. C. B. Faulkner v. Cowper.

36. *He hath broke* 3 *or* 4 *of his Father's Ribs, of which he ſhortly after died; and I will complain to a Juſtice of Peace of him; he may be hang'd for the Murder, altho' it was done* 20 *Years ſince.* Adjudged for the Plaintiff; for taking all the Words together, they muſt neceſſarily intend a murderous Killing. Vent. 117. Paſch. 23 Car. 2. Phillips v. Kingſton.

37. *He is as very a Rogue as ever went by the Highway; he kill'd a Man on board a Ship, and if he had not bought it off with a Piece of Money he had ſuffered for it.* Scroggs Ch. J. ſaid they could not imagine this any other than an unlawful Killing, when it is ſaid (he would have ſuffered for it.) And per Cur. the Words are actionable, and Judgment for the Plaintiff. 2 Show. 77. pl. 61. Trin. 31 Car. 2. B. R. Bonfield v. Linton.

38. *You are no Harris, and have none of the Blood of the Harris's in you.* Plaintiff alleged that the Words were ſpoke *intentionally to diſinherit him.* Not actionable; for the Words might be meant as to Courage, Humour, or good Nature, and do not of themſelves import him a Baſtard. And Judgment was ſtay'd. 2 Show. 95. pl. 92. Paſch. 32 Car. 2. B. R. Harris v. Roberts.

3 Salk. 326. pl. 6. Anon.

39. *He broke my Houſe like a Thief.* Not actionable. 2 Vent. 172. Paſch. 2 W. & M. in C. B. Anon.

40. *George*

40. *George Button* (the Plaintiff) *is the Man who killed my Husband*, her first Husband being dead. The Court was of Opinion that theſe Words were actionable; for he by whom they were ſpoken, averr'd the Death of her Husband. And as to the Caſes cited to prove theſe Words are not actionable, Diſtinguenda ſunt Tempora; for in thoſe Days People were very litigious, and therefore the Judges diſcouraged Actions for ſlanderous Words; but now too much Liberty is taken to abuſe People with their Tongues; and therefore they ſhould be reſtrained by Juſtice. So that now any Words maliciouſly ſpoken ſhall be taken in malem Partem; for the Uſe of Words is to expreſs the Mind, and ſhould always be intended as they are underſtood by indifferent Perſons. So Judgment was given for the Plaintiff. 8 Mod. 24. Hill. 7 Geo. 1721. Button v. Heyward & Ux'. S. C. & S. P. accordingly; and the Defendant further ſaid, *I can tell you who it was that killed my Husband; it was George Button.* The Court held that the Words here are to be taken in the worſt Senſe, viz. to be a Killing malitioſe & voluntarie, and not by Accident. And there is no Room to ſuppoſe the Party alive after the Verdict The Queſtion is now only, what is underſtood by the Hearers? The Notion of taking Words in Mitiori ſenſu has been exploded many Years; 50 or 60 Years. Ch. J. Holt's Rule was what was underſtood by By-ſtanders; he would ſay that the Caſes were one Way, and another; but wherever Words were ſpoken tending to the Diſparagement of a Perſon, he ſhould be always of an Opinion that the Action would lie. Wherever the Apprehenſion of the Hearers, and the Meaning of the Speaker was ſcandalous, the Words ſhall be taken in the worſt Senſe. If this was intended here of an innocent Killing, the Defendant might have juſtified it in a Plea; and unleſs it doth appear upon Record, that the Perſon was not dead, but alive, the Words are actionable. MS. Rep.

41. In an Action upon the Caſe for ſcandalous Words, the Declaration ſet forth, That in a Diſcourſe between the Plaintiff and the Defendant, the Defendant ſaid to the Plaintiff, *You* (meaning the Plaintiff) *did ſhut up my Siſter* (meaning Anne the late Wife of the Plaintiff, and Siſter of the Defendant, then lately deceaſed) *and murdered her; and I will prove it.* There was Judgment for the Plaintiff below, and upon a Writ of Error it was inſiſted, That the Word (Murder) does not neceſſarily import the taking away another's Life felonioufly, or with a malicious Intent, which is neceſſary, in order to conſtitute an Offence; and therefore (Murdravit) without the Words (Malitia ſua præcogit') will not be ſufficient in an Indictment. But the Court held that the Word (Murder) in its common Signification imports a felonious Killing, unleſs explained by ſomething ſubſequent, which the Party might have taken Advantage of here by a ſpecial Juſtification, or by Evidence, like the Caſe in Cro. C. 510. where the Court ſaid, that to call one a Murderer is actionable, and ſhall not be intended that he was a [Murderer of Hares] unleſs ſuch foreign Intendment be diſcover'd or ſhewn in pleading. And the Judgment was affirmed. Paſch. 13 Geo. 2. B. R. Rivers v. Light.

(A. b) For Words. In what Caſes it lies for the Words for a collateral Reſpect. In what Caſes, where the *Words* are *not underſtood.*

1. **If a Man ſpeaks** ſcandalous Words **of another,** in a Language **that** the Auditors do not underſtand, **no Action lies for them, becauſe they cannot be any Diſcredit to him when they are not underſtood. Trin. 39 Eliz. B. R. between** *Jones and Dawkes* **agreed and adjudged.** Cro. E 496. pl. 16. Jones v. Davers, S. C. adjudged againſt the Plaintiff. —

See Mo 182. pl. 325 Trin. 26 Eliz. Anon. —— (H. b) pl 14. S. C. but S. P. does not appear. —— S. C. cited Cro. E. 865. in pl. 45.

2. As

Cro. E. 496. pl. 16. S. C. adjudged againſt the Plaintiff.—(H. b) pl. 14. S. C. but S. P. does not appear.—S. C. cited Arg. 2 Show. 435. in pl. 399.

2. As if a Man ſpeaks in Latin certain ſcandalous Words of me, in the Preſence of Men that do not underſtand Latin, no Action upon the Caſe lies, becauſe it is no Diſcredit to me. Trin. 39 Eliz. B. R. between *Jones and Davkes* agreed and adjudged, tho' it was averr'd that the Auditors underſtood Linguam Romanam, for this might be Italian, which is now the Roman Language.

Hob. 268. at the End of pl. 353. ſays, That ſlanderous Words in Welſh bear no Action, except you affirm that they were ſpoken in the Hearing of ſuch as underſtood the Welſh Tongue; for the Slander and Damage conſiſt in the Apprehenſion of the Hearers.—Cro. E. 496. pl. 16. Mich. 38 & 39 Eliz. B. R. cites S. P. to have been adjudged accordingly. And of that Opinion was the whole Court.

3. So if one Man in Welſh calls another Thief, in the Preſence of ſuch who do not underſtood what is intended thereby in Scaccario adjudged, cites Trin. 39 Eliz. B. R. Hob. Rep. Caſe 351.

4. Plaintiff declared, that the Defendant ſpake ſuch Words in *Welſh*, and that in *Engliſh* they ſignified, *Thou haſt murdered thy Wife*; but did not aver that the Worps were ſpoken before *Welſhmen*, or ſuch as underſtood the *Welſh* Tongue, but only in Præſentia & Auditu quamplurimorum ſubditorum Dominæ Reginæ. The *Action* was brought in the *County of Monmouth*, which was once Parcel of *Wales*, but is now an *Engliſh County*. All the *Juſtices* and Barons held, that for this *Cauſe* the *Judgment* was *erroneous*; for it ſhall not be intended that any there underſtood the ſaid *Tongue*; and then it was not any Slander. Cro. E. 865. pl. 45. Mich. 43 & 44 Eliz. in the Exchequer, Price v. Jenkins.

(B. b) In what Caſes it lies. Where the *Words* are *repugnant*.

See (H. a) pl. 22. in the Notes there.

1. If a Feme Covert ſays to another, Thou haſt ſtolen my Goods, whereupon he to whom they are ſpoken asks of her what Goods, and the Feme anſwers My Plow-ſhuff, and in the Declaration the Plaintiff avers Innuendo the Plow-ſtuff of the Baron of the Feme, no Action lies; for the Feme Covert cannot have Goods. Paſch. 11 Jac. B. R.

My Turkies are ſtolen, and Charnel hath ſtolen them, ſpoken by the *Wife*; adjudg'd the Words actionable, (tho' the *Wife could have no Turkies*) becauſe ſhe had charg'd him with ſtealing of them. Cro. E. 279. pl. 7. Paſch. 34 Eliz. B. R. Charnel's Caſe.

Words ſpoken by the Defendant's Wife of the Plaintiff's Wife, viz. *Thou art a thieviſh Rogue, and a thieviſh Queen; for thou haſt ſtolen my Faggots*, viz. 5 Faggots of the Defendant's and his Wife. It was ſaid it was impoſſible; for a *Feme Covert* hath not Goods that can be ſtolen. Adjudg'd actionable and ſcandalous, and ſhall be conſtrued according to common Intendments, that ſhe charg'd her with the ſtealing of her Husband's Faggots, which is Felony, and whoſe the Goods were is not material. Cro. J. 600. pl. 24. Mich. 18 Jac. B. R. Stamp v. White.——Palm. 358. Strong v. White, S. C. adjudged for the Plaintiff.

So, Thou art a Thief, *for ſtealing my Corn out of my Barn*, actionable. Sty. 135. Mich. 24 Car. B. R. Gibbs v. Dunn.

F. ſtole my Plate out of my Chamber, being ſpoke by a *Feme Covert*, was held actionable; for in common Speech it is well known that the Wife accounts the Husband's Goods as her Goods. Adjudg'd in B. R. and affirm'd in the Exchequer-Chamber. Cro. C. 52. pl. 10. Mich. 2 Car. C. B. Powell v. Plunkett.

See (P. c) pl 4. where after a Verdict it was intended that they were her Goods dum ſola, and ſtolen then.

2. If

2. If one ſays to another, Thou haſt murder'd J. S. no Action lies, if it be averr'd that J. S. is yet in full Life. H. 11 Jac. B. R. *Pett's Caſe*, adjudg'd. The Plaintiff declar'd that the Defendant had a Wife, who is ſtill living, and that Defendant ſaid of him, *Thou haſt kill'd my Wife*, adjudg'd not actionable; but had ſhe been dead it had been otherwiſe. 4 Rep. 16. a. pl. 9. Hill. 39 Eliz. C. B. Snag v. Gee.——S. C. cited Poph. 187. Arg.—— Litt. Rep. 310 Mich. 5 Car. C. B. the S. P. accordingly per Cur. obiter.——3 Bulſt. 167. S. C. cited by Coke Ch. J.——S. C. cited Arg. Win. 39.——S. C. cited Arg. Mar. 109. in pl. 187.——S. P. per Cur. Jo. 141. at the End of pl. 7.

3. If one Man ſays to another, Thou haſt ſtolen me (Innuendo Defendant) an Hundred of Slate, no Action lies, becauſe the Innuendo has made the Words repugnant; for he could not ſteal the Defendant, as it muſt be taken by the Words. Hill. 13 Jac. B. R. between *White and Brough*, adjudg'd. Roll Rep. 286. pl. 3. S. C. adjornatur; and upon a 2d Motion Doderidge J. ſaid it is uncertain how it ſhall be taken; and therefore, for the Diſavour of ſuch Actions, the Action lies not; and adjudg'd accordingly againſt the Plaintiff.

4. If a Man in an Action upon the Caſe, declares that the Defendant ſaid of him, He is a baſe Gentleman, and had 3 or 4 Children by A. S. his Maid-ſervant, (Innuendo quandam A. D. at the ſpeaking of the Words the Wife of J. D.) and after kill'd them, or cauſed them to be kill'd, ubi revera he never was guilty of any Incontinency with the ſaid A. S. nor any other, nor of any ſuch Felony or Murder. After a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that inaſmuch as he had averr'd that he never was guilty of any Incontinency with A. S. this is all one as if he had averr'd that he never had any Child by A. S. and that if he had ſo averr'd no Action would lie; for then it would appear to the Court that there was no ſuch in Rerum natura, as is ſuppoſed to have been kill'd; As if one Man ſays to another that he kill'd J. S. and avers that there never was any ſuch as J. S. no Action lies. But it was adjudg'd for the Plaintiff, becauſe the Averment is not ſpecial that he had not any Child by A. S. but generally that he was not incontinent with her. Mich. 2 Car. Regis, between *Kemer and Hallet*, adjudg'd, this being moved in Arreſt of Judgment. Fol. 75. Poph. 187. Reynor v. Hallet, S. C. adjudg'd accordingly. —Jo. 141. pl. 7. Keymer v. Hallet, S. C. held accordingly.—— Lat. 159. Keymer v. Clark, or Halley, S. C. but that is only upon the Words, whether actionable or not, and not upon the Pleadings; and agreed by 3 Juſtices that the Words are actionable.——S. C. cited Arg. as to the Words being actionable. Cart. 55 ——S. C. cited Comb. 232. by Eyre J. and ſaid that the Words were held actionable only by reaſon of the Preface (baſe Gentleman.) But Holt Ch. J. ſaid the Words were actionable, and that without ſuch Introduction of calling him baſe Gentleman.

5. *He* (Innuendo the Plaintiff) *and one Allen are perjur'd Knaves.* It was moved that (He) cannot be referr'd to 2 Perſons, neither can (perjur'd Knaves) be referr'd to one Perſon; but the Court held it well enough, tho' it be falſe Engliſh; for the Senſe appears. And adjudg'd for the Plaintiff. Cro. J. 100. pl. 33. Mich. 3 Jac. B. R. Turner v. Darcie.

6. *Thou art a Knave, and haſt forg'd my Husband's Will againſt his Mind.* Win. 39. Arg. cites it as ruled that no Action lies. 10 Jac. Mallard v. Wife. Ibid. 40. Hobart Ch. J. ſaid he agreed this Caſe, becauſe the Words are repugnant and contrary; for if it be forg'd it is not her Husband's Will.

One ſaid of Fenner J. Thou haſt forg'd my Father's Will. Palm. 441. Jones J. cited it, and ſaid the Opinion was that it will ſcarce bear an Action.

7. To ſay of a *Widow* that *her Children* (Innuendo her Children which ſhe had *by her former Husband) are Baſtards* by one F. is actionable, ſhe alleging a Communication and Loſs of Marriage; for tho' in Truth they * See (D. a) pl. 8. S. P.

cannot be * Baſtards in Law, yet in Reputation they may be ſo. Judgment for the Plaintiff. Cro. C. 322. pl. 4. Mich. 9 Car. B. R. Brian v. Cockman.

8. *M. ſtole a Sheep of his*, (Innuendo of the Defendant's) *and that it was not the firſt he ſtole by an Hundred.* It was moved in Arreſt that (his) muſt refer to M. which is Proximum antecedens, and ſo the Words are repugnant; for one cannot ſteal his own Sheep. But the Court held the Words actionable as laid in the Declaration. 8 Mod. 30. Hill. 7 Geo. 1721. Muck's Caſe.

(C. b) In what Caſes it lies. In reſpect of the *Uncertainty* of the Perſon *of whom* they were *ſpoken.*

1. If a Man ſays to the Servant of J. S. I am a true Subject, and thou ſerveſt no true Subject, J. S. may have an Action. between *Sir William Walgrave and Agar*, adjudg'd.

See (Y. a) pl. 36. S. C. and the Note there. —(X. a) pl. 1. S. C. but S. P. does not appear.

2. If one ſays to another, That he ſaid there is no Prince in England, an Action lies, tho' there are ſeveral Princes in England, as Earls, Marqueſſes and Dukes; for when a Diſcourſe is of a Prince ſimply, this intends the King's eldeſt Son. My Reports, 14 Jac. between *Lewes and Walter*, adjudg'd.

See (H. b) pl 2. S. C. * Cro. J. 443. pl. 20. Brown v. Low, S. C. adjudg'd for the Plaintiff; for it ſhall not be intended that he had more Maſters of that Name.

3. If one Man ſays of another, My * [Thy] Maſter, Mr. Browne, hath robb'd me of all my Goods, an Action lies for Browne his Maſter; for his Perſon is apparently deſcrib'd by his Surname, and by the Name of Maſter, which is a Relative. Mich. 15 Jac. B. R. between *Browne and Load*, adjudg'd, this being moved in Arreſt of Judgment.

In Caſe for Words, the Plaintiff alleged *that the Defendant adtunc & ibidem Colloquium habens with a Servant of the Plaintiff, ſaid You are a great Rogue and Raſcal, as great a Rogue as your Maſter &c.* It was held that ſuch Allegation was ſufficient; for the (Adtunc) refers to the whole Clauſe, and imports that he was then Servant when the Diſcourſe was between them; and Judgment for the Plaintiff. Comyns's Rep. 267. pl. 147. Mich. 4 Geo. 1. C. B. Upton v. Pinfold.

R. S. and T. were ſworn in Evidence againſt B. and he ſaid *One of you is perjur'd.*

4. If A. ſays to B. One of us two is perjur'd, and B. ſays to A. It is not I, and A. ſays again I am ſure it is not I, B. ſhall have an Action for theſe Words; for the ſubſequent Words ſhew apparently that he intended him. Dubitatur Paſch. 42 Eliz. B. R. between *Coe and Chambers.*

R. brought an Action for theſe Words, and alleg'd that the Defendant ſpoke thoſe Words, (Innuendo of the Plaintiff.) Cited Cro. E. 497. in pl. 16. per Popham, to be adjudg'd in Sir John Bourn's Caſe.

See (Z. a) pl. 5. S. C. but S. P. does not clearly appear.—— See (H. b)

5. If there be a Bill exhibited in the Exchequer-Chamber againſt 6 [16] for a Conſpiracy, and upon Communication thereof J. S. ſaid, Theſe Defendants are thoſe that help'd to murder W. N. [* meaning one W. N. who was murder'd by one T. O. who was hang'd for it.] Every one of theſe 6 [16] Defendants may have an Action upon

upon the Caſe, as well as if they had been ſpecially named. Hob. pl. 17. S. C. * Hob. 89. pl. 120. S. C. Reports, between *Foxcroft and Lacy*, adjudg'd.

Trin 11 Jac. adjudg'd and affirm'd in Error.——Jenk. 297. pl. 52. S. C. accordingiy.——S. C. cited Godb. 391. in pl. 477. as adjudg'd that the Action would not lie for 2 Reaſons; firſt, becauſe (Theſe) was uncertain in the Perſon. 2dly, it was uncertain in the Thing; for it might be that they had Authority to do it.

A. B. and C. were ſubſcribing Witneſſes to a Will, and they proved the ſame in the Prerogative Court. In Diſcourſe of the ſaid Will the Defendant ſaid, *They* (Innuendo A. the Plaintiff, and B. and C.) *or ſome of them forg'd the Will, and they are perjur'd, and I'le prove them ſo.* Per Cur. The firſt Words are only introductive to the 2d, and the 2d contain a poſitive Charge of Perjury againſt them all; and gave Judgment for the Plaintiff. 2 Barnard. Rep. in B. R. Paſch. 6 Geo. 2. Hughes v. Winter.

6. If one ſays to J. S. *Thy Son hath robb'd me*, and the Son brings an Action, he *muſt aver that J. S. had no more Sons*, or otherwiſe he cannot maintain the Action. *But* if one ſays to a Son, *Thy Father*, or to a Wife, *Thy Husband hath robb'd me*, the Action lies for the Father or Husband without ſuch Averment; for there cannot be more Fathers or Husbands. Cro. J. 444. Mich. 15 Jac. B. R. agreed per Cur. in pl. 21.

So where the Words were, *Thy Son hath murder'd my Child*, and in Action brought by the Son it was held that neither Innuendo the Plaintiff, nor an Averment that the Defendant ſpoke the Words of the Plaintiff, would ſerve; for it is but a general Allegation of Words which import no Slander, without averring that the Plaintiff was the only Son of his Father. But in the Caſes above of Thy Father &c. Thy Husband, or Thy Maſter, it had been good; wherefore, abſente Lea Ch. J. Judgment was given for the Defendant. Cro. J. 635. pl. 1. Paſch. 20 Jac. B. R. Harvy v. Chamberlain.——Palm. 283. S. C. accordingly; but ſays if it had been *Thy Son William*, it had been certain enough.

7. A. and B. diſcourſing of J. Symms and W. Symms, A. ſaid *The Symms's make Half-Crown Pieces, and J. Symms did carry a Cloak-bag full of Clippings.* In an Action for theſe Words it was objected that he did not ſay *Theſe Symms's*, but *The Symms's*; and that a Cloak-bag of Clippings was uncertain; for it might be Clippings of Wool &c. or Clippings of Silver from the Goldſmith's, who in making Plate make Clippings; neither is any certain Time ſhewn when the Words were ſpoke; and therefore adjudg'd that the Action would not lie. Godb. 391. pl. 477. Paſch. 3 Car. B. R. Symms's Caſe.

8. An Action was brought for ſaying, *H. got a Witneſs to forſwear himſelf in ſuch a Cauſe. You or he* (Innuendo the Plaintiff) *hir'd one B. to forſwear himſelf.* It was moved that the Words are not actionable; for tho' the firſt Branch, if alone, is certain enough, yet when he goes on, and ſays, You or the Plaintiff hir'd one B. to forſwear himſelf, it becomes wholly uncertain to whom the Words relate. It was alſo moved that the Action lay not, unleſs B. had actually forſworn himſelf; but Per Cur. the Words You or He &c. do not render the former uncertain; for they relate not to the getting &c. but to New Matter, viz. who paid the Money; beſides, if the Words were A. or D. did &c. either A. or D. might bring an Action, but then there muſt be an Averment that neither of them did it. It is not neceſſary to the maintaining of this Action, that B. did, in Fact, forſwear himſelf, the Innuendoes here are not introductory of new Matters of Fact, but only explanatory of the foregoing Words. Judgment pro quer. 10 Mod. 196. Hill. 12 Ann. B. R. Harriſon v. Thornborough.

(D. a) For

Fol. 76.

(D. b) For what Words it lies, in Reſpect of the *Uncertainty of the Thing.*

1. IF one Man ſays to another, Thou haſt two Wives, and I will hang thee, or do the beſt I can to hang thee, an Action lies for theſe Words, tho' it might be that he had 2 Wives before the Statute which makes this Felony, or otherwiſe it might be that one of might have 2 Wives, and yet it is not Felony within the Statute, as not knowing of the firſt Wife's Life; yet becauſe he ſaid he would hang him for it, and the Words were ſpoken falſely and maliciouſly, it ſhall be interpreted that he intended this to be Felony within the Statute; and the Words altogether import as much, and ſo found in Slander. Mich. 10 Car. B. R. between *Williams and Tedbury* adjudged Per Curiam, after a Verdict for the Plaintiff, becauſe the Words were ſpoken in Anger. Intratur Hill. 9 Car. Rot. 1160.

Jo. 366. pl. 5. Dr Sibthorp's Caſe, S. C. adjudged accordingly. —Cro. C. 417. pl. 6 S. C. adjudged accordingly.

2. In an Action upon the Caſe, if the Plaintiff declares that he was a Doctor of Divinity, and Parſon of B. and there being a Communication of the Plaintiff, the Defendant ſaid theſe Words of the Plaintiff, He is yonder in the Church, and is robbing the Church; & adtunc & ibidem, ſaid of the Plaintiff theſe other Words, Dr. Sibthorpe (Innuendo the Plaintiff) hath robb'd the Church (Innuendo the Church of B. aforeſaid.) After a Verdict for the Plaintiff, upon Not guilty pleaded, the Plaintiff ſhall have Judgment, tho' it was objected that the Word Church had a double Signification, ſcilicet, the Church Material, and the Church Catholick; and it is uſual for Divines to ſay, that Men rob the Church who do not pay their Dues to the Pariſh, or that keep Appropriations in their Hands; and it might be that he intends that he keeps ſome Things, Goods, or Land that appertain to the Church. Yet the Action lies, for the Words cannot bear any ſuch Senſe, inaſmuch as he ſays he is yonder in the Church, by which it appears he intends the Material Church; and the Statute of 23 H. 8. that takes away Clergy from thoſe that rob Churches, has the ſame Words as are here, without any Deſcription what Church he intended. Mich. 11 Car. B. R. between *Dr. Sibthorpe and Robinſon* adjudged Per Curiam, this being moved in Arreſt of Judgment. Intratur Trin. 10 Car. Rot. 1398.

Thou haſt robb'd the Church (Innuendo the Church of A.) *and thou haſt ſtolen the Lead off from the Church* (Innuendo the Church of A. aforeſaid) Fenner and Williams J. thought the Words not actionable; but Popham, Yelverton, and Tanfield e contra; for they are to be taken according to common Parlance, and in the worſt Senſe; and therefore (Robbing the Church) muſt mean in a felonious Manner, and the Innuendo ſhews he meant the Material Church; and the Words (and thou haſt pull'd off the Lead) is a further Addition, and not a ſhewing wherein the Felony he intended, conſiſted; and therefore Tanfield ſaid there was a Difference, where he ſaid (For thou haſt) and (And thou haſt &c.) and adjudged for the Plaintiff. Cro. J. 153. pl. 2. Paſch. 5 Jac. B. R. Benſon v. Morley.

(Y. a) pl. 1. S. C.

3. If A. ſays of B. I have found out B. now; I have found Records which he hath forged, and he ſhall dearly pay for it; I have catched the Forgerer, an Action lies for theſe Words, tho' it does not appear that he intended a Record; but it may be that he intended a Copyhold Record, or other Thing which is not a true Record, but only a Record in Appellation; for it ſhall be intended, according to the Words, a true Record. Mich. 13 Car. B. R. between *Garbut and Bell* adjudged Per Curiam, this being moved in Arreſt of Judgment.

4. If

4. If A. says these Words, That perjured Rogue and Villain Potter, without more Words precedent or subsequent, yet Jo. Potter shall have an Action for these Words, alleging a Communication of him at the speaking of the Words. Hill. 11 Car. B. between *Potter and Loveday* adjudged, this being moved in Arrest. But a Writ of Error was brought. See (K. b) pl. 3. S. C.

5. *Mr. C. came into Cornwall with a blue Coat, but now he hath gotten much Wealth by trading with Pirates, and by cozening by Tale of Pilchards, and by Extortion.* Coke Ch. J. said that the Words (by trading with Pirates) are too general; for an honest Man might trade with a Pirate, not knowing him to be one. Godb 252. pl. 349. Pasch. 12 Jac. B. R. Crook v. Averin. 2 Bulst. 216. S. C. and by Doderidge J. the Words are too general; and the whole Court agreed that they are not actionable. And Judgment against the Plaintiff.

6. *Thou art a sacrilegious Person, and committest Sacrilege every Day.* It was objected that this shall not be intended of robbing Churches, which is Felony, but of detaining Tithes, which by the Civil and Canon Law is Sacrilege; & adjornatur. But afterwards the Court were of Opinion for the Defendant. Sid. 376. pl. 4. Mich. 20 Car. 2. B. R. Gaudy v. Smith. Lev. 250. S. C. adjudged for the Defendant, tho' the Words were laid to be spoke maliciously, and to cause him to be brought in Question for his Life.——2 Keb. 401. pl. 8. S. C. adjornatur. 430. pl. 63. adjudged for the Defendant.——*She was guilty of Sacrilege*, not actionable. Freem. Rep. 67. pl. 80. Mich. 1672. C. B. Lady Stukely's Case.

(E. b) For *what* Words it lies, *without any Averment.*

Fol. 77.

1. IF one Man says to another, Waterman and thou didst kill thy Master's Cook (Innuendo J. S. Servant to J. D.) and thou wast never tried for it, and I will bring thee to Trial for thy Life. An Action lies for these Words, tho' there was not any Discourse before of any Man that was killed, and without alleging that he was his Master, or that he had any Cook that was killed, because it is a great Slander to say that he kill'd his Master's Cook, tho' he was not shewn who was his Master's Cook; for he intends thereby that he had killed a certain Man, and it shall be intended that he had a Master, and that his Master had a Cook, and that he was killed, till it be found or shewn to the contrary by the Defendant, inasmuch as he by the Words has affirm'd it. Pasch. 15 Jac. B. R. between *Cooper and Smith* adjudged. But Houghton was against it, because he thought that the Innuendo had made it ill, because this is Innuendo J. S. the Servant of J. D. where the Words were of a Cook; and he has avert'd him to be his Servant, which is another Person; as if a Man said that he killed J. S. and the Plaintiff in the Action says Innuendo J. N. this destroys the Action. Note, that Cook and Servant may stand Insimul; and so the Court said. Cro. J. 423. pl. 5. S. C. adjudg'd for the Plaintiff. —Bridgm. 60. S. C. adjudg'd for the Plaintiff —Poph. 128. S. C. adjudg'd for the Plaintiff. *Thou art a Murderer; for thou didst kill Mr. S.'s Man.* Adjudg'd in B. R. for the Plaintiff. But because he did not shew that any of S's Servants was slain, nor any Innuendo that any was slain, it was reversed in the Exchequer-Chamber. Cro. J. 331. pl. 19. Mich. 11 Jac. B. R. Barons v. Ball.

An Action was brought for saying, *Thou hast murder'd A. thy late Servant.* Exception was taken that the Plaintiff did not aver that she was dead; but Curia contra; for if she were not dead, or if there were no such, the Scandal is the greater; and Judgment for the Plaintiff Nisi. 3 Keb. 624 Pasch. 28 Car. 2. B. R. Green v. Warner.

Thou haſt kill'd my Brother; per tot. Cur. the Words are not actionable without Averment that he was dead. Mar. 109. pl. 187. Trin. 17 Car. C. B. Anon.

2. If a Man ſays to another, That he has killed the Wife of J. S. or one of the Sons of J. S. or that * he has ſtole his Horſe, an Action lies, without any Averment that J. S. had any Wife or Son, or that he had any Horſe; for this ſhall be intended till the contrary is ſhewn. Paſch. 15 Jac. B. R. in *Cooper and Smith's* Caſe, agreed per Curiam.

* S. P. per Cur. obiter in S. C. Bridgman 60.——Noy. 55. S. P. accordingly per Cur. obiter.——See the Notes on pl. 1.

See (Z. a) pl. 4. and the Notes there. —— This Point does not appear in any of the Books cited above.

3. If one ſays to another, Thou haſt killed a Man, an Action lies, tho' he did not deſign any particular Man; for this is a great Slander. Paſch. 15 Jac. B. R. in *Cooper and Smith's* Caſe, agreed Per Curiam.

——And in ſuch Caſe he *need not averr that a Man is kill'd*; per Twiſden J. Sid. 53. Mich. 13 Car. 2 B. C. in pl. 18.—And ſo if he had ſaid, *Thou haſt kill'd J. N.* for Twiſden ſaid, that tho' it had been controverted heretofore whether the Death of a Man ought to be averr'd, yet it is now ſettled that it need not be averr'd that the Man is dead; for it ſhall be intended, unleſs it appears by the Declaration that he is alive. Sid. 53. ut ſupra.——S. P. by Twiſden, and the Action lies, unleſs it appears upon the Record that the Party is alive; and the Plaintiff had his Judgment notwithſtanding ſuch Exception taken. Vent. 117. Paſch. 23 Car. 2. B. R. Phillips v. Kingſton.

Sty. 66. Roll Ch. J. cited S. P. to have been adjudged actionable. —— Cro. J. 184. pl. 4. Mich. 5 Jac. B. R. Holt v. Aſtgrigg, ſeems to be S. C. and was, *H. ſtruck his Cook on the Head with a Cleaver, and cleav'd his Head, the one Part lay on the one Shoulder, and the other on the other.* Adjudged not actionable, it not being averr'd, unleſs argumentatively, that the Cook was kill'd; Per Cur. Fleming and Williams abſentibus; for Slander ought to be direct, againſt which there may not be any Intendment; but here, notwithſtanding ſuch Wounding, the * Party may be living; and then it is only a Treſpaſs.

4. If a Man ſays of J. S. He hath kill'd his Cook, and the ſaid J. S. or others for him, did give 12 Quarts of Wine to Sheldon's Wife, that ſhe ſhould not certify her Knowledge therein, J. S. ſhall have an Action without Averment that he had any Cook, or that the Cook died, inaſmuch as his Life does not appear within the Record. Paſch. 5 Jac. B. R. between Sir *Thomas Holt and Taylor*, adjudged.

* Quære.

2 Bulſt. 42. Billing v. Knight, S. C. the Words there are, *He came to ſuch an Houſe, where one lay ſick in his Bed, and the Plaintiff got upon the Bed, and with his Knee did break his Blood-bulk, and thereby killed him.* Adjudged for the Plaintiff per tot. Cur.

5. If one ſays to another, Thou didſt kneel upon the Body of J. S. ſo as the Blood guſhed out of divers Parts of his Body, whereby he died, an Action lies, without Averment of the Death of J. S. inaſmuch as the Defendant himſelf has ſaid he is dead. Mich. 10 Jac. B. R. between *Ellis and Knight* adjudged.

See (I. b) pl. 4. S. C. —Hob. 6. pl. 12. S. C. adjudged for the Plaintiff in B. R. but revers'd in the Exchequer-Chamber, becauſe it appeared not by the Words that he poiſon'd him willingly, nor that Smith was dead at the Time of ſpeaking the Words.

6. If one ſays to another, Thou haſt poiſoned Smith; and it ſhall coſt me 100 l. but I will hang thee, no Action lies for theſe Words, without Averment of the Death of Smith. Paſch. 11 Jac. between *Jacob and Miles* adjudged; the ſame Caſe, Hobart's Reports 8. and Caſe 351.

——Cro. J. 343. pl. 9 Paſch. 12 Jac. S. C. adjudg'd in B. R. and that Judgment revers'd.——Roll Rep. 24. pl. 2. S. C. but S. P. does not appear.——Jenk. 293. pl. 40. S. C.——S. C. cited by Hobart Ch. J. Hob. 268.

If one ſays to B. *Thou haſt poiſoned J. S.* it is actionable, tho' J. S. be living; for one may be poiſon'd, and yet not to Death; for it may break out otherwiſe, as in Boils, Vomitings &c. Per Yelverton J. Yelv. 31. Mich. 44 & 45 Eliz. B. R. Arg.

7. If

7. If one says of another, I will call him in Question for poisoning his own Aunt; and I make no Question but to prove he hath poisoned his Aunt, an Action upon the Case lies, without any Averment of the Death of his Aunt at the Time of the speaking of the Words; for it shall be intended that she is dead, till it be shewn to the contrary, inasmuch as her Life does not appear within the Record. Trin. 39 Eliz. B. between *Web and Poor* adjudged. But it is said by Fenner, that the Poisoning without Death gives a Cause of Action. See (P. a) pl. 8. and (Z. a) pl. 3. S. C. —— Cro. E. 569. pl. 3. S. C. says it was objected that the Action lies not because it is

not averr'd that his Aunt was poison'd; for otherwise it was no Offence; Sed non allocatur. —— Noy. 63. S. C. and per tot. Cur. the Action is maintainable without Averment of the Death of his Aunt; because one may be poison'd, and yet not die. So it is not like Snagg's Case; for it is impossible for a Man to be murder'd and he not die —— S. P. by Twisden and Keeling J. Sid. 227. Mich. 16 Car. 2. B. R. in pl. 23.

8. If one says to another, Thou hast committed Burglary, in breaking his House, and stealing his Goods, no Action lies, because it does not appear whose House and Goods he intends. Trin. 44 Eliz. B. R. between *Brown and St. John* adjudged. Fol. 78. See (Y. a) pl. 59. S. C. —— Cro. E.

889 pl. 3 S. C. and tho' it was said (*innuendo the House of one B.*) yet that is not sufficient, and so being uncertain the Action was adjudg'd not maintainable.

9. If a Man says of the Gaoler of a County Prison, He doth let go Prisoners, and is a Partaker with them, and he had never a Sheet on his Bed until he let Prisoners go out of the Gaol to steal them, no Action lies for these Words, without an Averment that he had some Sheets upon his Bed. Mich. 42, 43 Eliz. B. R. *Heath's Case*, adjudged. Cro. E. 783. pl. 20. Heath v. Pole, S. C. and it was also objected that it was not averr'd

that they stole any Sheets for him, wherefore it was adjudg'd for the Defendant. —— S. C. cited Arg. 2 Bulst. 141.

10. If a Man says of J. S. He did murder Hodge Horwood, (quendam Rogerum Horwood innuendo) the Blood was track'd to his Gate, and laid him upon his Henroost, an Action lies for these Words, tho' he names him Hodge Horwood, and tho' no Communication is laid to have been of him, and tho' no Averment is made of the Death of Hodge Horwood, and tho' he says (quendam Rogerum Horwood innuendo) which implies in a manner that he is alive; for the Words strongly imply that he is dead. Pasch. 11 Car. B. R. between *Willet and Sands*, adjudged per Curiam, this being moved in Arrest of Judgment.

11. *He was Confederate with Campian the Jesuit*, not actionable; for it is not said he knew him to be a Jesuit, nor in what manner he was Confederate with him. Cro. E. 251. in pl. 17. cites it as ruled 26 Eliz. Brown v. Lisle. *Thou wast Partaker with the Rebels in the North*, not actionable,

the Words being too general, it not being averr'd that he *knew they were Rebels*. Bulst. 109 cites it as adjudg'd.

12. *Thou art as very a Thief as any is in Warwick-Gaol*, was held clearly to be actionable, with an Averment that such a one was there for Horse-stealing, but without such Averment it would not be good. Cro. E. 214. pl. 9. Hill. 33 Eliz. B. R. Lacy v. Reynolds. S. C. cited by Fenner J. Yelv. 90. —— S. C. cited per Cur. Hutt. 72.

and S. P. adjudg'd there; the Words being *He is as arrant a Thief as any is in England* &c. but did not aver that there was any Thief in England. Potter v. Brown. ——— Win. 70. Hill. 21 Jac. C. B. the S. C. and Hutton, Winch, and Jones held that there needed no such Averment, and took a Difference where the Words relate to a particular Place, and when to an intire Realm, and the same Law when it is tied to one Kind of Felony; for it is very well known that there are Thieves in England, and in every other Realm. But ibid. 89. Trin. 22 Jac. C. B. the Court, viz. Hobart, Hutton, and Winch, arrested

arreſted the Judgment for want of ſuch Averment.——Cro. J. 687. pl. 2. Foſter v. Browning, S. C and held that for want of Averment the Words will not maintain an Action, and Judgment for the Defendant.——S. C. cited by the Name of Walter v. Brown, Cro. C. 40. in pl. 1. ſays that no Judgment was there given for the Plaintiff.

Cro. E. 342. pl. 11. Mich. 36 & 37 Eliz. B. R. the S. C. adjudg'd accordingly; but there inſtead of the Word (Robbery) are the Words (a Purſe cut.)

13. *There was never a Robbery committed within* 40 *Miles of Wellingborough, but thou hadſt thy Part in it*; adjudg'd that no Action will lie, without an Averment that there was a Robbery committed within 40 Miles &c. For otherwiſe it is no Slander. Cro. E. 308. pl. 11. Mich. 35 & 36 Eliz. B. R. Ball v. Roane.

14. *He is a Maintainer of Thieves, and keepeth none but Thieves in his Houſe, and I will prove it.* The Juſtices held the Words were not actionable; for he does not ſay that he knew them to be Thieves whom he maintain'd. Cro. E. 746. pl. 24. Hill. 42 Eliz. B. R. Ball v. Bridges.

Action will lie for ſome Words, without particular Averment of any Damage, as to call a Man Car. B. R. Anon.

15. *Thou art a Thief, and haſt robb'd my Son.* Per Cur. This is good, without any Averment that he hath or had a Son, becauſe the Words (Thou art a Thief) are actionable, by reaſon of the diſcrediting the Party in the Audience of others who know not if he had a Son or not. Noy 55. Ellwin v. Moore.

Thief, Traytor, or the like, theſe are *Malum in ſe*. Agreed. Mar. 2. in pl. 3. Paſch. 15

16. *If ever Man was perjur'd Wittam was*; but becauſe it was not averr'd that any Man was perjur'd, Judgment was ſtay'd by Tanfield, he only being in Court. And he ſaid the Reaſon why, in Theft and Perjury, there muſt be an Averment is, that they are ſuch bad Things in themſelves that they ſhall not be intended without it. Noy 116. Wittam's Caſe.

17. *Thou has hoiſter'd* [houſed] *Thieves, and ſtolen Goods, and the Thieves and Goods were found in your Houſe, and the Thieves were had before ſuch Juſtices, and committed by them to Priſon, and were hang'd, and if the Juſtice had not been your Friend it had been hard with you.* It was objected that becauſe it is not laid that he knew a Felony was done, and that theſe were Felons, and the Goods felonious Goods, the Words were not actionable; for he can be in no Danger by houſing them or their Goods. But per Cur. clearly, the Words taken all together as laid are very ſcandalous, and actionable, and eſpecially the latter Words; and adjudg'd for the Plaintiff. Bulſt. 109. Paſch. 9 Jac. B. R. Tabbe v. Matthew.

Thou haſt ſtolen my Maſter's Tobacco; but becauſe he did not aver

18. *Thy Father is a Thief, and hath ſtolen more Goods than I am worth.* Adjudg'd per tot. Cur. that the Words are actionable, without any Averment of what the Defendant was worth at the Time of ſpeaking the Words. 2 Bulſt. 141. Mich. 11 Jac. Painter v. Warn.

that his Maſter had Tobacco, the Plaintiff could not have Judgment. Cited by Richardſon Ch. J. Litt. Rep. 166. Mich. 4 Car. C. B.

19. Of an Attorney, *He hath forg'd the laſt Will of J. S.* It was moved in Arreſt of Judgment, that it is not alleg'd that the Will is *ſuppoſed to be forg'd*; but per Cur. that is neceſſarily implied; and adjudg'd actionable. Hutt. 29. Hill. 16 Jac. Cardinall's Caſe.

Brownl. 13. S. C. and held the Declaration naught, for want of

20. *He was indicted for Felony at a Seſſions holden at* &c. but did not *aver that he was not indicted*; and for that Reaſon Judgment was ſtay'd. Hob. 219. pl. 290. Paſch. 16 Jac. Bland v. Edmunds.

Averment.——Hutt. 18. Bland's Caſe, S. C. adjudg'd for the Defendant.

21. *As*

21. *As ſure as God governs the World, and King James this Kingdom, ſo ſure hath J. S. committed Treaſon &c.* J. S. may well maintain his Action, without averring that God governs the World, or King James this Kingdom; for they are *Things apparent.* Cited per Twiſden J. Sid. 53. in pl. 18. as adjudg'd in K. James's Time.

22. *My little Boy in my Houſe is A. D.'s Baſtard; I wonder you will keep Company with her.* In Action for theſe Words ſhe alleg'd that ſhe loſt divers good Matches, but did *not aver that there was any Communication of Marriage with her, nor that there was any little Boy there*; and for theſe Defects Judgment was ſtay'd. Litt. Rep. 166. Anne Diſtol's Caſe.

23. *That Whore, that B.'s Wife murder'd my Child, and would have kill'd me, I find it.* Per Cur. the Plaintiff need not ſhew that the Child is dead, and this is ſufficiently affirmative. Litt. Rep. 310. Mich. 5 Car. C. B. Browne's Caſe.

24. *He kept his Wife baſely, and ſtarved her.* Theſe Words of themſelves will bear no Action; but if the Party of whom the Words were ſpoken were in Election to be married to any other, and by ſpeaking of theſe Words is hinder'd, there with ſuch an Averment they will bear an Action. Agreed per Cur. Mar. 2. Paſch. 15 Car. B. R. in pl. 3. Anon. Cro. C. 155. pl. 4 Paſch. 5 Car. B. R. Wicks v. Shepherd, ſeems to be S. C. and the Words are, *He is a ſharking Fellow &c. and us'd himſelf violently to his former Wife, and denied her Neceſſaries &c.* and alleged that ſuch a Woman refus'd to marry him by Reaſon of thoſe Words. And adjudged for the Plaintiff, and that Judgment affirmed in the Exchequer Chamber; but agreed that the Words, without ſuch Circumſtances, will not maintain an Action.——So where the Words were, *You are a Whore, and a perjured Whore*, and lays Loſs of Marriage, ſhe muſt ſet forth particularly with whom ſhe loſt it.——12 Mod. 597. Mich. 13 W. 3. Wetherell v. Clerkſon.——2 Lutw. 1295. S. C. the Words there are, You are a Whore, *and a forſworn Jade.* And Judgment arreſted for the ſame Reaſon.

Words ſpoke of a Suitor to a Woman were, *What do you mean to entertain him; for he was a very harſh Man to his former Wife, and would not allow her Neceſſaries, and is of ſmall Eſtate*; by which the Feme refuſed him Adjudged actionable. Litt Rep. 193. Arg. cites Shepherd's Caſe.

One ſaid of a Maid, *She is a Man, and not a Woman.* She laid ſpecial Damages. Action lies. Cart. 55. Arg. cites Mich 1658. Pye v. Wallis.

She is a burſten bellied Queen, and her Guts hang down to her Garters. Adjudged actionable, a Communication of Marriage being alleged. Litt. Rep. 193. cited by Harvey as a Caſe remembered by him

25. The Count was of a Communication between J. S. and the Defendant of the laſt Will of R. deceaſed, and that Defendant ſaid of the Plaintiff, *He hath forged his Uncle Row's Will.* Exception was taken that it was not averr'd that R. was dead at the time of the Words; Sed non allocatur; It being ſaid that there was a *Diſcourſe of the Will of R. deceaſed*, and there *(deceaſed)* goes to the Deſcription of his Perſon, and expreſſeth that he was then dead. Beſides the Words imply it; for if he were not dead, he could not forge his Will. Vent. 149. Mich. 23 Car. B. R. Dorrel v. Jay.

26. Caſe for ſaying of the Plaintiff to her Mother, *Your Daughter* (innuendo the Plaintiff) *is a brazen-faced Whore, and deſerves to be hanged*, but did not aver that the Mother had not any Daughter beſides herſelf; but the Court held it well enough, the Declaration being that the Defendant habens *Colloquium of the Plaintiff* did ſpeak the Words, which makes it certain enough. And Judgment for the Plaintiff. Sty. 150. Mich. 24 Car. B. R. Ralph v. Davye.

27. *I have an honeſt Man in Langattock, who will prove that Williams* (the Plaintiff) *ſaid he had kill'd a Man in Ireland, and buried him in the Sands*; and the Plaintiff averr'd that he never did ſay ſo. It was moved in Arreſt of Judgment becauſe he did *not aver that he did not kill a Man in Ireland*, nor that there was not a Man in Langattock who could prove that the Plaintiff ſaid ſo; but adjudg'd that if the Words had been laid as ſpoken from the Report of another, then it muſt be averr'd that the other did not ſo report; but here the Defendant undertakes to prove it

himself by a Man he had in Langattock. 3 Lev. 171. Trin. 36 Car. 2. C. B. Williams v. Lewis.

2 Salk. 693. pl. 1. Mich 1 W. & M. in B.R. Taffan v. Rogers, S. P. exactly, and seems to be S.C.

28. Case by a *Butcher*, and declares of a Colloquium of the Plaintiff, and of a Quarter-part of a Cow which he had to sell, and that the Defendant said, that *the Cow of which the Quarter was Part died of Calving*, per quod he lost his Customers; and Judgment for the Plaintiff. It was assign'd for Error that there wanted an *Averment that the Cow was dead.* Per Cur. The *alleging Loss of Customers* is too general; but had it been laid that he exposed a Quarter of a Cow to Sale, and by Reason of those Words *lost the Sale*, it would have been actionable; but as it is now laid, it is not, and therefore Judgment was reversed. Comb. 161. Mich. 1 W. & M. in B. R. Rice v. Pidgeon.

29. *He is a Rogue, and robb'd the Hockley Butcher*; it was objected that it did not appear that there was a Hockley Butcher; to which Holt Ch. J. answer'd that then the Fault is the greater, it is a double Crime; and Judgment for the Plaintiff Nisi. Comb. 247. Pasch. 6 W. & M. in B. R. Smith. v. Williams.

(F. b) For what Words it lies, in Respect of the *Uncertainty of the Thing*, *without* an *Averment*.

Cro J. 331. pl. 11. S. C. *Thou art as bad as thy Wife when she stole my Cushion.* Judgment was revers'd in the Exchequer Chamber, for the same Cause.

1. If a Man says to J. S. Thou usest me now as thy Wife did when she did steal my Cushion, no Action lies for J. S. and his Wife for the Slander to the Wife, without an Averment; for it is not directly said that the Wife had stole his Cushion. Mich. 10 Jac. B. R. between *Ratcliff and Michel* adjudged e contra (scilicet, that the Action lies;) but this was revers'd per Curiam, in a Writ of Error in the Exchequer Chamber, for the same Cause.

Chamber, it not being averr'd that any Felony was committed; and then it is no Slander.—— Godb. 239. pl. 331. Mich. 11 Jac. says that Judgment upon these Words was revers'd in the Exchequer-Chamber, because they were not actionable.——S. C. cited Comyns's Rep. 268. Mich. 4 Geo. 1. C. B. in pl. 147.

Lat. 219. Prior v. Colbold, alias Frier v. Cabold, S. C. Hyde Ch. J. and Jones held the Action lies, but Whitlock J. doubted, because the Words are contradictory. Afterwards it was doubted, because not aver'd that he had justified his Answer after the Words spoke. Judgment for the Plaintiff.

2. If a Man says of J. S. having a Discourse of his Answer in Chancery, If he will justify his Answer in Chancery to be true, I will prove him perjured, an Action lies, without any Averment that he justified his Answer to be true; for this shall be intended, and the Slander is apparent. Mich. 3 Car. B. R. between *Frier and Corbolt* adjudged per Curiam, the which Intratur Hill. 2 Car. Rot. But there the Plaintiff shewed how he justified his Answer, in a second Answer in Chancery; but this was before the speaking of the Words, which was not sufficient, and so taken as no Averment.

See (F. a) pl. 25. S. C. —Cro. C. 321. pl. 3. Sir Richard Snowde's

3. In an Action upon the Case by A. against B. if the Plaintiff declares that one J. S. preferr'd a Bill in Chancery against him, shewing the Effect of the Bill, to which he made a true Answer upon his Oath, according to the Course of the Court, and that after he himself, and one C. discoursed Insimul, and then came into the same Place the said B. and one D. whereupon the Plaintiff said to C. I will

will not talk any more with you now, your 2 Affidavit-men are come; whereupon B. the Defendant said of the Plaintiff, A. need not say so; for he was absolutely forsworn in his Answer to J. Stiles's Bill, Innuendo the said Bill and Answer. Tho' there was not any Discourse of the Plaintiff before, yet the Action lies; for it shall be intended this Bill in Chancery, if it be not shewn of the other Part that there was another Bill in any other Court preferr'd by the said J. S. Mich. 9 Car. B. R. between Sir *Richard Strode and Strode Allen* adjudged, this being moved in Arrest of Judgment. Case, S. C. adjudged accordingly.

4. The Defendant said to J. B. Son of the Plaintiff, in the Presence of divers, *thou* (præfat' J. B. innuendo) *and thy Father* (innuendo the Plaintiff) *were both perjured, and I* (innuendo the Defendant) *will prove you both perjured.* It was moved in Arrest of Judgment, that it was *not averr'd that J. B. was the Son of the Plaintiff.* But it was held well enough, for that it was *alleged that the Words were spoken to J. B. his Son.* And it was adjudged for the Plaintiff. Cro. E. Mich. 36. 37 Eliz. B. R. Brent v. Ingram.

5. *I never came home and pox'd my Wife*; after Verdict Judgment was arrested; for per tot. Cur. the Words are too loose to bear an Action. 8 Mod. 290. Trin. 10 Geo. 1725. C. B. Clarke v. Dier.

(G. b) For what Words it lies, in Respect of the *Uncertainty of the Thing*, *with* an *Averment*.

Fol. 78.

1. IF a Man says to a Feme Covert, Thou bold Collobine, Bastard-bearing Whore, thou didst throw thy Bastard into the Dock at Whitechappel, no Action lies for these Words, with an Averment that before the speaking thereof an Infant was found dead in the Dock of J. S. at Whitechappel; for it does not appear that he intended this Infant. Hill. 10 Car. B. R. between *Collobine and his Wife* Plaintiffs, *v. Vinor*, adjudged, this being moved in Arrest of Judgment. Jo. 356. pl. 6. S. C. adjudged against the Plaintiff. — (D. a) pl. 11. S. C.

2. In an Action upon the Case, if the Plaintiff declares that whereas there was a Discourse of the Plaintiff touching a Suit in Chancery, in which the now Plaintiff was Defendant and J. S. Plaintiff, and that Carlton and Pett were examined in the said Suit, the Defendant said these Words of the Plaintiff, He hath suborned Carlton and Pett to forswear themselves; and I will have them in the Star-Chamber for it, and make them to spend 100 l. yet no Action lies upon this Declaration, because it is not averr'd that Carlton and Pett were examined upon their Oath in the said Cause, nor whether they were examined upon any Matter then in Issue between them. Mich. 11 Car. B. R. between *Bull and Knowles* Per Curiam, in Arrest of Judgment, staid.

3. In an Action upon the Case, if the Plaintiff declares that the Defendant was Plaintiff in an Action brought against S. in the Court of Bathe in the Guild-hall there, and that the Defendant there pleaded to Issue, and it was there tried, and the Plaintiff at the Trial of the said Plea was produced as a Witness on the Part of the said S. and he there, in the said Court, before the Judges and Jurors for the Trial thereof impanelled and sworn in due Form of Law (being examined upon Oath) did depose the Truth, according to his Knowledge of and concerning the said Issue; yet the Defendant (K. b) pl. 2. S. C.

dant having a Communication with A. S. concerning the ſaid Plea and Trial, ſaid theſe Words of the Plaintiff, Your Brother Delamor took a falſe Oath (Innuendo the ſaid Oath) againſt me; I would not have taken ſuch an Oath for all the World. This is not a good Averment to make the Words actionable, becauſe it is not averr'd that the Iſſue was join'd, nor that there was any Trial; but only he ſays that at the Trial he was ſworn &c. which is not ſufficient. Hill. 11 Car. B. R. between *Delamor and Heskins* adjudged for this Cauſe among others, that the Action does not lie. Trin. 11 Car. Rot. 900.

4. *You have done as ill, and worſe, and it will coſt you as much to be quit as it coſt him*, (meaning one R. S. who had been *attainted of Felony.*) Gawdy thought it not actionable, the Words being uncertain; but the other Juſtices doubted, & adjornatur. Cro. E. 31. pl. 6. Trin. 26 Eliz. B. R. Smith's Caſe.

5. *Thou art a pocky Raſcal*, (Innuendo *the French Pox*) and an Averment that in common Intendment the Words are ſo underſtood, held not actionable; otherwiſe if the *Averment* had been *of ſuch Intendment in a particular Place*, as Welch Words, and Healer of Felons in the Weſt Country. Judgment ſtay'd. 2 Show. 285. pl. 280. Paſch. 35 Car. 2. B. R. Jackſon v. Hall.

(H. b) Where the Words are *uncertain of whom* they were ſpoke. *What* ſhall be *a good Averment that they were ſpoke of him.*

Cro. J. 107. pl. 2. Wiſeman v. Wiſeman, S. C. & S. P. by Tanfield;

1. WHERE the Words in themſelves are certain, ſo that it may be intended that the Speaker intended a Perſon certain, there they may be made actionable by an Averment. Mich. 3 Jac. B. R. in *Wiſeman's Caſe*, by Tanfield.

but where the Words import in themſelves apparent Uncertainty, it is otherwiſe.

See (C. b) pl. 3. S. C. and the Note there.

2. If one Man ſays to another, My Maſter Mr. Brown hath robb'd me of all my Goods, Brown may have an Action againſt him, averring that he ſaid the Words of him, without averring that he was his Maſter; for the Averment that he ſaid them of him implies as much, (and peradventure * it ſhall not be intended that there are more Browns.) Mich. 15 Jac. B. R. between *Browne and Lane*, adjudg'd, this being moved in Arreſt of Judgment.

* Fol. 80.

Your Maſter Euſeby (Innuendo the Plaintiff) [and it ſeems it was his Chriſtian Name] *is a Rogue, a Raſcal, and a Forger of Bonds.* But becauſe it did not expreſsly appear that the Perſon to whom the Words were ſpoke was Servant to the Plaintiff at the Time of ſpeaking them, Judgment was ſtay'd by the Court. Brownl. 10. Hill. 12 Jac. Jotham v. Ball.

My Maſter was not content to take my Living from me, but ſent his Man Andrews to kill me. Per tot. Cur. the Declaration is uncertain; for the Words (My Maſter) comprehends a Generality, and doth not refer to any Perſon certain, and therefore it cannot be intended the Defendant meant to tax the Plaintiff more than any other Perſon, and therefore the Count ſhould have ſaid Innuendo the Plaintiff, or averr'd that the Defendant was his Servant at the Time, ſo that it might appear to the Court expreſsly that the Plaintiff was intended; and it may be he had at that Time more Maſters. Mo. 63. pl. 174. Trin. 6 Eliz. Bray v. Andrews. ——— Dal. 66. pl. 29. S. C. in totidem Verbis.

S. C. cited by Doderidge J. 2 Bulſt. 82. as

3. If a Man ſays to J. S. Go tell thy Landlord Hendy he is a Thief, for he ſtole John Dier's Purſe, an Action lies for Hendy againſt him, averring that the Words were ſpoke of him to the ſaid J. S. without

without averring that he is Landlord to J. S. For he is certainly enough deſcrib'd by the Word Landlord, and he avers that they were ſpoken of him. Mich. 10 Car. B. R. between Hendy and adjudged. adjudg'd good.—— S. C. cited by Roll, who ſaid that the Declaration was laid only with an Innuendo of the Plaintiff, then Landlord &c. and adjudg'd good; But that in another Caſe where one ſaid, *Your Landlord (without a Surname) is a Thief*, in ſuch an Innuendo it was, after great Debate, (the Court being at firſt divided in Opinion) adjudg'd naught; but there if the Plaintiff had *averr'd that he*, to whom the Words were ſpoke, *had no other Landlord*, it had been good. Allen 32. Mich. 23 Car. B. R.

4. If a Man ſays to A. Thy Husband and his Maſter have ſtolen my Wood, the Maſter ſhall not have an Action, averring only that he ſaid the Words of him, without an Averment that he was the Maſter of the Husband of A. Trin. 11 Jac. B. R. between *Liford and Stamp*, per Curiam. 2 Bulſt 81. Liſard v. Stamp, S. C. and per tot. Cur. the Declaration is wholly uncertain, and ſo not good; and adjudg'd againſt the Plaintiff.——(Y. a) pl. 47 & 48. S. C. but S. P. does not appear.

5. If a Man ſays, Where is this Baker, he hath perjur'd himſelf &c. J. S. who is a Baker may have an Action againſt him, averring only that he ſaid the Words of him, naming himſelf Baker in the Declaration, tho' he does not allege that there was any Diſcourſe of him before; for his Perſon is ſufficiently deſcribed. Trin. 13 Jac. B. R. *Scory's Caſe*. 3 Bulſt. 72. Baker's Caſe, S. C. adjudg'd per tot. Cur. for the Plaintiff.—— Roll Rep. 227. pl. 34. Scory, alias Scorier, Baker's Caſe, S. C. and Coke Ch. J. and Doderidge held the Declaration good, by alleging the Words ſpoke of the Plaintiff; and Coke held that if a Perſon ſhould ſay of him, *Where is this Chief Juſtice*, or of a Counſellor, *Where is this Counſellor* &c. it would be ſufficient. And Doderidge ſaid that the Words *Your Father-in-Law is perjur'd*, (Innuendo ſuch a one) has been adjudg'd actionable; for the Perſon is deſcrib'd

That murderous Knave Stroughton lay in Wait to murder me. One Tho. Stroughton brought Action thereupon, and ſaid the Words were ſpoke of him. After Verdict it was moved in Arreſt, that the Words were uncertain, and therefore not actionable; but after divers Motions it was adjudg'd for the Plaintiff. Cro J. 108. Hill. 3 Jac. B. R. cited by Tanfield J. as a Caſe wherein himſelf had been of Counſel.

6. If a Man ſays, My Brother is perjur'd, J. S. the Brother of him that ſpoke the Words, ſhall have an Action againſt him, averring that he ſpoke the Words of him being his Natural Brother, without any Averment that he had not more Brothers; for it may be well intended that they were ſpoken of a Perſon certain. Mich. 3 Jac. B. R. between *Wiſeman and Wiſeman*, adjudg'd, this being moved in Arreſt of Judgment. Cro. J. 107. pl. 2. S. C. adjudg'd per tot. Cur. that the Action well lay.

7. If a Man ſays of J. S. He &c. and after J. S. brings an Action for theſe Words, and the Declaration is that the Defendant dixit de querente He &c. this is ſufficient, without alleging that there was any Diſcourſe of him before. Paſch. 11 Jac. B. between *Jacob and Sterling*, per Curiam. Mich. 21 Jac. B. R. between * *Smith and Ward*, adjudg'd; and ſo the ſame Term it was there adjudg'd between *Furnſal and Cotterel*, after Verdict for the Plaintiff. * Cro. J. 673. pl. 7. S. C. The Court at firſt doubted; but upon View of Precedents, and being inform'd it was a common Courſe ſo to declare, when it is alleg'd that he ſaid De præfato the Plaintiff hæc Verba, it is neceſſary to be intended of the ſaid Plaintiff, and the finding his ſpeaking the Words of the Plaintiff helps the Caſe; wherefore it was adjudg'd for the Plaintiff.——Ibid. ſays a Precedent was ſhewn, where the S. P. was adjudg'd accordingly, and affirm'd in Error. Hill. 18 Jac. B. R. Sanders v. Woolrick.

He (Innuendo the Plaintiff) *is not worthy &c.* Exception was taken that the (He) may be ſpoken of any other, and the Innuendo will not help it; but per tot. Cur. Hic & Ille make a Demonſtration what Perſon he intended, and it is alſo alleg'd that he ſpoke de querente thoſe Words; and adjudg'd for the Plaintiff. Cro. E. 861. pl. 34. Mich. 43 & 44 Eliz. C. B. Taylor v. How.——S. P. *He* (Innuendo the Plaintiff) *ſtole a Ring &c.* Win. 102 Mich. 22 Jac. C. B. Crompton v. Philpot.——Raym. 86 Mich. 15 Car. 2 Arg. ſays that in ancient Time it was the conſtant Courſe in Declarations to lay a Colloquium

quium of the Plaintiff, and it was a grand Doubt if it was good without it, until Cro. J. 673. Smith and Ward's Caſe, and there reſolved that (de querente) ſupplies the Colloquium.——Sid. 52. pl. 18. Mich. 13 Car. 2. B. R. Dacy v Clinch, *He* (Innuendo the Plaintiff) *is a Witch &c.* The Court ſaid it was good enough; for the Declaration being (de querente) it ſhall be intended to be ſpoke of the ſame Plaintiff, eſpecially after Verdict, and cited Cro. J. 231. Gyer v. Ormſted; and alſo the Caſe of Smith v. Ward.—— See Beamond v. Hallings.

All. 32 Pierſon v. Dawſon, S. C. It was objected that the Words are not laid to be ſpoke of the Plaintiff, but only in the Innuendo, which cannot ſufficiently aſcertain the Declaration; but adjudg'd for the Plaintiff.—— Sty. 46. S C. adjudg'd for the Plaintiff.

8. In an Action upon the Caſe, if the Plaintiff declares that the Defendant ſaid cuidam Mar' P. matri querentis, Your Son is a Thief, the Plaintiff ſhall have an Action, without [alleging] any Communication of the Plaintiff, * or Averment that he ſaid Mar. P. had not any more Sons; for this is a ſufficient Averment that he was the Son of the ſaid Mar' P. and there ſhall not be intended a Plurality of Sons. Mich. 23 Car. B. R. adjudged, after a Verdict for the Plaintiff. Intratur Trin. 23 Car. Rot. 1052.

There being a Colloquium betwixt the Father of the Plaintiff and the Defendant, he ſaid that *Taylor did ſteal the Mare of J S and thy Son was conſenting to it*, without averring that the Father had no more Sons than the Plaintiff; and therefore adjudg'd per tot. Cur. for the Plaintiff. 3 Bulſt. 249. Mich. 14 Jac. Lewkener v. Godnam

* Original is (one;) but it ſeems it ſhould be (or.)

9. If a Man ſays, The Boxes are Traytors, they have clipp'd Money, and it is no Matter if they be robb'd; for they can get it again with Clipping, and who ſhould do it but Edward Boxe; no Action lies for John Boxe and Edward Boxe for theſe Words, with an Averment that the Words were ſpoke of them; for without a Communication precedent it cannot appear that he intended them; for there may be ſeveral Boxes beſides them, and the laſt Words are only by way of Interrogation. Paſch. 44 Eliz. B. R. adjudged.

In ſome Caſes tho' there be not any Communication of a Man, yet he ſhall have Action, and the *Innuendo ſhall make the Certainty*; As if A. B. and C. are walking along the Street, and J. S. ſays to C. *Yonder goes a Thief*, or *He is a Thief*, pointing to A. an Action lies for

10. If a Man ſays, He that goeth before there is perjur'd, and thereupon J. S. brings an Action upon the Caſe, alleging that there was a Diſcourſe of the Plaintiff between the Defendant and one J. N. and thereupon the Defendant ſaid theſe Words; and does not allege that he ſaid theſe Words of the Plaintiff, nor avers that the Plaintiff was then going before. Mich. 8 Car. B. R. between *Aiſh and Geriſh*, per Curiam, this being moved in Arreſt of * Judgment, and the Poſtea ſtay'd accordingly; and after the ſame Term Judgment was given againſt the Plaintiff.

* Fol. 81.

But in the ſaid Caſe, if the Plaintiff declares Quod Defendens colloquium habens cum J. N. de & concernente querentem adtunc & ibidem præſentem & ante præfatum J. N. ſolum ad tunc euntem, Anglice, Going before the ſaid J. N. [He] then only [going before him] ſaid theſe Words of the Plaintiff, He (Innuendo the Plaintiff) that goeth before thee (prædictum J. N. Innuendo) is perjur'd; the Action lies upon this Declaration, becauſe it is alleg'd that there was a Diſcourſe of the Plaintiff, and that he only was going before J. N. and that the Defendant ſpoke theſe Words of the Plaintiff. Mich. 9 Car. B. R. between *Mercer, alias Aiſh, Plaintiff, and Geriſh, Defendant*, adjudg'd upon Demurrer, they being the ſame Parties between whom the firſt Action was ſtay'd. Intratur Trin. 9 Car. Rot. 523.

A. Per Doderidge and Haughton. 2 Roll Rep. 244. Mich. 20 Jac. B. R. Arg.

Cro. C. 318. pl. 11. S. C. but S P. does not appear.—— Jo. 326. pl. 7. S. C. but

11. If there be a Communication between A. and B. concerning Green the Plaintiff, and thereupon B. ſays to A. Where is that long-lock'd, ſhag-hair'd, murdering Rogue, whereupon C. demands of him whom he intends thereby, and he anſwers Green of Forſer, Innuendo the Plaintiff; this is a good Averment that the Words were ſpoke of the

the Plaintiff, without other Averment that he ſpoke the Words of him, inaſmuch as it is alleg'd there was a Communication of the Plaintiff, and it ſhall not be intended that there were other Greens beſides the Plaintiff. Mich. 9 Car. B. R. between *Green and Lincoln*, adjudg'd, this being moved in Arreſt of Judgment. Intratur Hill. 8 Car. Rot. 1252. S. P. does not appear. —— (I. a) pl. 6. S. C. but S. P. does not appear.

12. Where the Words in themſelves are uncertain, ſo that it cannot be intended that they were ſpoke of any Perſon certain, there they cannot be made actionable by any Averment. Mich. 3 Jac. B. R. by Tanfield, As if a Man ſays one of my Brothers is &c. no Action lies by any Averment. Mich. 3 Jac. B. R. Per Tanfield. Cro. J. 107. pl. 2. S. P. by Tanfield, becauſe in thoſe Words there is an *apparent Uncertainty*; and tho' one of the Brothers would bring an Action, and aver they were ſpoken of him, yet becauſe it appears to the Court that there were divers Brethren, & non conſtat to any of which he ſpoke, no Action lies, tho' he be found guilty by Verdict.

13. In an Action between A. and B. if 3 Men ſeverally before the Juſtices of Aſſize give Evidence to a Jury againſt A. and thereupon A. ſays to them, There is one of you that is perjured in the giving of this Evidence, without naming any of them, no one of them can have an Action with an Averment that the Words were ſpoke of him. between and *Sir J. Borne* adjudged; cites Trin. 39 Eliz. B. R. S. C. cited by Popham as adjudged that the Action did not lie. Cro. E. 497. in pl. 16. *J. C. was one of thoſe that robb'd H. R.* is actionable. Goldsb 85. pl. 7. Paſch. 30 Eliz. Cutts's Caſe.

14. If a Man ſays my Enemy &c. charging him with ſlanderous Matters, which will maintain an Action, yet no Action lies by any with an Averment the Words were ſpoke of him, and by an Innuendo &c. becauſe the Words in themſelves are altogether uncertain. Trin. 39 Eliz. B. R. between *Jones and Dawkes*, adjudged. So in this Caſe the Action does not lie with an Averment alſo, that at the time of the ſpeaking of the Words he himſelf is the Defendant's Enemy, and that then the Defendant had no other Enemy but the Plaintiff, for this is uncertain, and it cannot be known whether he hath another Enemy beſides the Plaintiff. Quære Trin. 39 Eliz. B. R. (A. b) pl. 1. S. C. but S. P. does not appear. —— *My Enemy* (innuendo the Plaintiff) *is an Extortioner*, and divers other ſlanderous Words, which were clearly actionable. It was objected that the Words (My Enemy) cannot be intended of the Plaintiff more than of any other; and the (Innuendo the Plaintiff) is not material; for it did not appear ſo to them that heard it; But if it had been *averr'd that at the ſame time he was the Plaintiff's Enemy, and that the Defendant had not any other Enemy*, there peradventure it would be otherwiſe; and the whole Court were clearly of that Opinion; and gave Judgment againſt the Plaintiff. Cro. E. 496. pl. 16. Mich 38 & 39 Eliz. B. R. Jones v. Davers.

15. In an Action upon the Caſe for Words againſt A. and Eliz. his Wife, if the Plaintiff declares that there was a Diſcourſe between Eliz. B. the Wife of the Plaintiff, and the ſaid Eliz. C. the Wife of the Defendant concerning the Plaintiff, whereupon the ſaid Eliz. C. ſaid eidem Eliz. C. of the Plaintiff, Thy Husband keepeth Keys of Houſes in the Day-time, and ſtealeth Hay out of them in the Night, this is a good Averment * that the Wife of the Defendant ſpoke the ſaid Words of the Plaintiff, tho' it is averr'd that the ſaid Eliz. C. ſpoke the Words eidem Eliz. C. for ſhe could not ſpeak them to her, but eidem ſhall be intended to Eliz. the Wife of the Plaintiff, and it is averr'd alſo that ſhe ſpoke of the Plaintiff, and therefore good. Hill. 9 Car. B. R. between *Nichols and Brampton and Eliz. his Wife*, adjudged in a Writ of Error. Intratur Mich. 7 Car. Rot. 181. * Fol. 82.

16. In an Action upon the Caſe by Ireland againſt B. if the Plaintiff declares that there was a Colloquium between C. and the Defendant, concerning a Robbery of the Defendant, and that the Defendant

dant then said to C. that he was robb'd of 100l. by J. S. who was in Newgate; tho' he confessed that G. Ireland (innuendo the Plaintiff) was Party in the said Felony with him, and then the Defendant said of the Plaintiff to the said C. Where is young Ireland? C. answered, in Gray's-Inn Lane with his Father; to which the Defendant answered, He is as arrant a Rogue as J. S (prædict' J. S. innuendo) and to this Declaration the Defendant justified the speaking of other Words, absque hoc, that he spoke of the Plaintiff the said Words, which is found for the Plaintiff. Upon this Declaration the Plaintiff shall have Judgment, because here was a Discourse of the Plaintiff before; and here constat de persona inasmuch as the Defendant has justified the speaking of other Words, and traversed those, and the Plaintiff has averr'd that he spoke the Words of the Plaintiff; which is also found. Trin. 11 Jac. B. R. between *Ireland and Gardener*, adjudged.

Hob. 89. pl. 120. S.C. adjudg'd and affirm'd in Error; for they held it sufficiently laid to intitle every one of the Defendants to a several Action, as if they had been specially laid.

17. In an Action upon the Case by J. against L. if the Plaintiff declares that he and 20 others were Defendants in a Bill in the Star-Chamber, at the Suit of J. S. which J. S. was after murder'd by J. D. and that after, the Defendant having Discourse of the said Bill and Murder, the Defendant said these Words of the Plaintiff, These are they that did help to murder J. S. and avers that he himself was one of the Defendants to the said Bill; an Action lies upon this Declaration, tho' it does not appear that the Plaintiff and the other were present at the speaking of the Words. Mich. 11 Jac. B. R. between *Foxcroft and Lacy*, adjudged.

——Jenk. 297. pl. 52. S. C. accordingly.

See (S. a) pl. 36. S. C. and the Notes there.

18. If there be a Discourse between B. and C. of M. F. and C. says B. Master Deceiver hath deceived and cozen'd the King, and I have him in Question for it, and doubt not but to prove it against him, M. F. shall have Action for these Words, averring that at the time of the speaking thereof, he was the King's Receiver of his Court of Wards, and that the Defendant said these Words of him. Hill. 17 Jac. B. R. between Sir *Miles Fleetwood* and Auditor *Curle*, adjudged in a Writ of Error upon a Judgment in Bank where it was so adjudged also per Curiam; see the same Case adjudged Trin. 17 Jac. B. and Hobert's Reports, C. 351.

(I. b) For Words. *Innuendo.*

Cro. E. 609. pl. 14. Anon. S. C. adjudged accordingly. *Thou art falsely forsworn in Bell-Court* (Innuendo *a Court Baron held at Bell.*) Per Cur. With this Innuendo the Action lies, otherwise not. Cro. E. 297. pl. 4. Pasch. 35 Eliz. B. R. Green v. Daney.

1. If one Man says of another, He hath forsworn himself (Innuendo before the Justices of Assize &c.) this Innuendo shall not make the Words actionable, because it cannot be collected by the Words that he intended that which by the Innuendo is supposed. Pasch. 40 Eliz. B. R. the last Case adjudged.

In an Action for Words, the Plaintiff declared of a Suit in Colchester Court, and a Trial there before the Bailiff; and that the Plaintiff gave in Evidence his Knowledge, and the Defendant said, *Thou art as much forsworn* (Innuendo in the Evidence given as above) *as God is true.* Adjudged that the Innuendo will not maintain the Action. Brownl. 7. Trin. 12 Jac. Tillet v. Bruen.

He forswore himself at the Bar (Innuendo the Bar *of C. B.* will not maintain an Action. Hutt. 44. Pasch. 19 Jac. said.

2. If

2. If one Man says of another, He did burn my Barn (Innuendo a Barn with Corn) with his own Hands, and none but he; this Innuendo will not make the Words actionable. Co. 4. Barham 20. adjudged. (Z. a) pl. 18. S. C. but S. P. does not appear. —— Yelv. 21.

Mich. 44 & 45 Eliz. B. R. Barham v. Netherfal S. C. and S. P adjudg'd by 2 Judges, they only being in Court. ——Noy. 155. S. C. but S. P. does not appear.

3. So if one Man says of another, He has burnt my Barn (innuendo a Barn with Corn, and adjoining to a dwelling House) and if my Lord had done him Justice he should have been hang'd for it. This Innuendo will not make Words actionable. Trin. 43 Eliz. B. R. between *Levett and Hawthorne*, per Curiam. Fol. 83. (Z. a) pl. 19. S. C. but S. P. does not appear.

——Cro. E. 834. pl. 4. Lovet v. Hawthorn S. C. and S. P. by the other Justices, præter Fenner.

4. In an Action upon the Case, if the Plaintiff declares that the Defendant said to him these Words, Thou hast poison'd Smith (quendam Samuelem Smith innuendo adtunc defunctum) and it shall cost me 100 l. but I will hang thee. This is not a sufficient Averment of the Death of Smith, it being only in the Innuendo, and without this the Action does not lie. Pasch. 11 Jac. B. between *Jacob and Miles*, adjudged, the same Case Hobart's Reports 8. (E. b) pl. 6. S. C. but S. P. dos not appear. —— Cro. J. 343. pl. 9. S. C. and it was

insisted that (**Adtunc*) referr'd to the time of the Declaration, and therefore all the Justices and Barons held that the Action lay not. ——Hob. 6. pl. 12. S. C. in the Exchequer-Chamber held accordingly, that the Action lay not. ——Roll Rep. 24. pl. 2. S. C. but S. P. does not appear.

* So (*modo defunct'* innuendo) extends not to the time of speaking, but of bringing the Action. Cro. J. 215. pl. 12. Mich. 6 Jac. Pritchard v. Hawkins, by all the Judges and Barons in the Exchequer-Chamber, and so reversed a Judgment in B R.——15 Rep. 11. S. C. and Judgment reversed in the Exchequer-Chamber; for instead of (modo defunct') it should have been (tunc defunct')——Jenk. 330. pl. 58. accordingly, and that it should have been (tunc defunct' at the time of the speaking.)

Thou hast kill'd my Brother (innuendo C. fratrem nuper mortuum.) It was objected that it was not said that he was dead at the time. And per tot. Cur. the Words are not actionable without Averment that he was dead, and the Innuendo does not help it. Mar. 109 pl. 187. Trin. 17 Car. C. B. Anon.

So *Thou hast murder'd thy Husband*, innuendo J. S. *jam defunct'*. And because it was not alleged expressly that the Plaintiff's Husband was dead at the time of speaking the Words, it was adjudged against the Plaintiff. Yelv. 22. 21. Mich. 44 & 45 Eliz. B. R. Bolderoe v. Porter.

5. In an Action upon the Case by Doctor Everard, if he declares that he was instituted and inducted into a Benefice call'd Welby in Northamptonshire, and that the Defendant, to the Intent to slander his Title thereto, said these Words, The Parsonage of Welby is none of the Doctor's (Querentem innuendo) this is not a sufficient Averment that the Words were spoke of the Plaintiff, there being no Discourse of him before. Mich. 12 Jac. B. R. between Doctor *Everard and Ball*, adjudged in Arrest of Judgment.

6. In an Action upon the Case for these Words, Thou art a Traitor, and an Arch-traitor, and I will hang thee, or hang for thee; if the Defendant pleads that the Plaintiff said these traiterous Words of the King, viz. the King (regem Jacobum innuendo) is a scurvy King, by Reason of which Words he spoke the Words in the Declaration, this is no good Justification. Pasch. 16 Jac. B. R. between *Whitbrooke and Smith*, adjudged.

7. In an Action upon the Case, if the Plaintiff declares that the Defendant said these Words, Thou art a Thief and stolest a Mare (innuendo the Plaintiff) without an Averment that the Words were spoke eidem Querenti vel de eodem Querente, as the Use is; this is not good, because it does not appear of whom they were spoken, and the Innuendo will not help it. Pasch. 11 Car. B. R. between * *Burgess and Reeves*, adjudg'd in a Writ of Error upon a Judgment in (K b) pl. 7. S. C.

Bank, and this reverſed accordingly. Intratur Hill. 10 Car. Rot. 974. tho' in the Writ it was well, ſcil. dixit eidem querenti. Trin. 1650. between † *Smith and Andrews*, adjudged in a Writ of Error upon a Judgment in Banco. Intratur Trin. 1659. Rot. 1649. and yet there was laid a Communication of the Plaintiff.

† (K. b) pl. 7. S. C.

Bob. 45. pl. 49. S. C. adjudg'd againſt the Plaintiff, for ſince the Words were only (a Writing) which is utterly uncertain, an Innuendo will not change the Matter of the Words; for that is to make the Words otherwiſe than they were by an Innuendo ——Brownl. 9. Harvey v. Bucking S. C and Judgment arreſted.——S. C. cited Arg. 2 Keb. 640. pl. 6. Paſch. 22 Car. 2. B R. in Caſe of Warre v. Ryder, which was for ſaying that, *he forged* the Hand of T. R. to *an Acquittance*, and the *Acquittance being ſhewn*, Judgment was given for the Plaintiff, the Colloquium being now obſolete, and de Querente ſufficient.

8 In an Action upon the Caſe, if the Plaintiff declares that whereas J. S. had made to him a Bill of 40 l. Debt, and had ſealed and deliver'd it, the Defendant ſpoke theſe Words of him, That he had ſhew'd him a Bill of 40 l. (meaning that Bill) releaſed [cancell'd or unſeal'd] and after ſhew'd it him ſeal'd, and that he had forged the ſaid Seal to the Writing; the Action does not lie for this Declaration, for the Innuenno is not a ſufficient Averment that the Words refer to the ſaid Bill of 40 l. without alleging a Diſcourſe thereof before. Hobert's Reports 63. between *Harvey and Duckin*, Paſch. 13 Jac. B. adjudged; for the Words of themſelves are uncertain.

(F.a) pl. 15. S. C but S. P. does not appear. —Cro. E. 609. pl. 13. S. C. adjudg'd accordingly.

9. In an Action upon the Caſe, for ſaying that the Plaintiff was perjured in his Anſwer in the Star-Chamber, innuendo in a certain Bill of Complaint exhibited there by the now Plaintiff againſt the now Defendant, whereas all know that the Plaintiff there is not ſworn to his Bill; yet becauſe the Words of themſelves are actionable, tho' the Innuendo is repugnant thereto, the Action is maintainable. Paſch. 40 Eliz. B. R. between *Corbett and Hill*, adjudged.

Fol. 84. The (Innuendo *the Mare of the Plaintiff*, ſhould have been the Mare *of the Defendant*)

10. [So] In an Action upon the Caſe, for ſaying of the Plaintiffs, You and your Wife are Witches, and have bewitch'd my Mare (innuendo the Mare of the Defendant) [Plaintiff] this is a repugnant and void Innuendo, and the Action lies for the Words without an Innuendo. Mich. 14 Car. B. R. between *Smith and Coker*, adjudged, this being moved in Arreſt of Judgment. Intratur Trin. 14 Car. Rot. 1499.

and as it is ſaid the Mare of the Plaintiff it is repugnant to the preceding Words &c. And Judgment for the Plaintiff. Cro. J. 512. pl. 7. S. C.——Jo. 409. pl. 1. S. C. but S. P. does not appear.

——(H. a) pl. 28. S. C. but S. P. does not appear.

11. *There is a Villain now broken into my Mother's Houſe to rob her, and is in the Houſe* (Innuendo the Plaintiff.) It was doubted among the Juſtices, if the Innuendo can reduce thoſe Words to the Plaintiff to have Action upon them. Mo. 401. pl. 530. Paſch. 37 Eliz. Bale v. Rodes.

Mo. 396. S. P. in pl. 516.——

12. *Innuendo helps nothing, unleſs the Words precedent have a violent Preſumption of the Innuendo.* Cro. E. 428. in pl. 30.

Ow. 57. S. Popham and Gawdy.——*Thou haſt ſtolen half an Acre of my Corn* (Innuendo *Corn ſevered.*) Adjudged not actionable, becauſe the Innuendo is not to the Purpoſe, unleſs the preceding Words had purported a vehement Suſpicion that the Corn was ſever'd. But otherwiſe it would be if he had ſaid, that *Thou haſt ſtolen ſo many Load or Buſhels of Corn*, becauſe there the Innuendo might explain it, with a common Intendment that the ſpeaking was of Corn ſever'd. Mo. 396. pl. 516. Hill. 37 Eliz. Caſtleman v. Hobbs.——Cro. E. 428. pl. 30. S. C. adjudged accordingly.——Ow. 57. S. C. adjudged accordingly.

An Innuendo *in Effect ſtands in the Place of a prædict' but it cannot make a Perſon certain who was uncertain before.* 4 Rep. 17. b pl. 12. Mich. 41 & 42 Eliz. B. R. Per Cur. in Caſe of James v. Rutlech, which ſee at (Y. a) pl. 21. and the Notes there.

The *Nature of an Innuendo is to explain Words doubtful, in ſuch Caſe where there is Matter ſufficient in the Declaration to maintain the Action.* But if the Words before the Innuendo do not ſound in Slander, no Words produced by the Innuendo will make the Action maintainable; for it is not the Nature of an Innuendo to beget an Action, Arg. and agreed by Gawdy and Yelverton J. they only being in Court. Yelv. 21. Mich. 44 & 45 Eliz. B. R. in Caſe of Barham v. Netherſal.——S. P. 10 Mod. 197. 198. Hill. 12 Ann. B. R. in Caſe of Harriſon v. Thornborough

No

No Innuendo will *ſupply Matter which give not Cauſe of Action on the Juſtification*, but the Words ought to contain Scandal in themſelves, without any Supplement. Hutt. 44 Paſch. 19 Jac. ſeems to be ſaid only Arg.——See (Z. a) pl. 13. in the Notes, Brown v. Brinkley.

13. The Plaintiff declar'd, that the Defendant to defame him, being a Merchant, *ſaid de præfato the Plaintiff*, viz. *He* (Innuendo the Plaintiff) *is a Bankrupt*. Reſolved that if (de præfato) had been omitted, the Plaintiff could not have Judgment; for Innuendo makes no Certainty where none was before; but as it is, the Plaintiff had Judgment. 2 Roll Rep. 243. Mich. 20 Jac. B. R. Scutt v. Hawkins.

14. There needs no Innuendo where the *Words* are *ſpoken to the Perſon himſelf*; Per Chamberlaine J. 2 Roll Rep. 243. 244. Mich. 20 Jac. B. R. *But* if one declares barely, that the Defendant ſaid *He* (Innuendo the Plaintiff) *is a Thief*, and ſets forth no Communication, or ſpecial Matter, or the like, the Plaintiff never ſhall have Judgment; Per Doderidge and Haughton. 2 Roll Rep. 244. Arg.

16. In Diſcourſe betwixt the Defendant and J. S. of one S. Godwin, and A. the Plaintiff's Wife, the Defendant ſpake theſe Words of the ſaid S. G. and A. *S. G. hath ſtolen away ſuch Goods, and ſhe* (Innuendo the Plaintiff's Wife) *was privy, and conſenting thereunto*. Reſolved the Words were actionable, reddendo ſingula ſingulis; and (ſhe) cannot be referred to S. G. but to the Plaintiff's Wife. And to ſay one is privy and conſenting to the ſtealing the Goods is actionable; for he accuſeth her to be acceſſary. And Judgment for the Plaintiff. Cro. C. 236. pl. 18. Mich. 7 Car. B. R. Mot and A. his Wife v. Butcher.

17. *Jezebel your Daughter* (Innuendo *Frances* your Daughter) *hath a falſe Key, and hath ſtolen 10s. out of my Box*. The Jury found that the Words were ſpoken of her. Per Vaughan Ch. J. Jezebel is taken proverbially for a Name of Reproach, and ſo he thought a good Action lies; to which the others agreed. Cart. 231. Mich. 23 Car. 2. C. B. Aſhby v. Billingley.

18. Caſe, for that the Defendant went to a Juſtice &c. and ſaid, *I have loſt ſome Sheep, and do ſuſpect quendam J. O.* (Innuendo the Plaintiff;) and thereupon procured the ſaid J. O. to be arreſted &c. It was moved in Arreſt, that the Innuendo was not a ſufficient Averment that the Plaintiff was the Party meant by (quendam J. O.) and *no Colloquium laid* &c. Judgment was ſtaid. 2 Show. 59. pl. 44. Paſch. 31 Car. 2. Osborn v. Key. Vent. 33. Anon. S. C. and Judgment reverſ'd; and per Cur. the Declaration not ſaying, that the Words were ſpoke of the Plaintiff, the Innuendo is not ſufficient; and it is the worſe becauſe (quidam J. O.) imports another Perſon than the Plaintiff.

19 *Thou art a forſworn Man, and didſt take a falſe Oath againſt me before Juſtice Scawen* (Innuendo Scawen a Juſtice of Peace.) Judgment was ſtay'd; for tho' it is actionable to ſay that one is forſworn before a Juſtice of Peace, yet it does not appear here that Scawen was a Juſtice of Peace, otherwiſe than by the Innuendo; and it may be that a Man's Name is Juſtice Scawen. 3 Lev. 166. Mich. 35 Car. 2. C. B. Gurneth v. Derry.

(K. b) Where

(K. b) Where the Words are *uncertain of whom they were ſpoke. What* ſhall be *a good Averment* that they were ſpoke of him.

Cro. C. 420. pl. 10. S. C. the Court was divided; and after, to avoid further Queſtion, it was advis'd, that the Plaintiff ſhould relinquiſh his Action, and amend this Fault in the ſecond; and it was ordered by Conſent.——Jo. 576 pl. 2. Hill. 11 Car. B. R. Anon. S. C and it was inſiſted for the Plaintiff, that it being Dixit de præfato Querente, the Innuendo was ſufficient without Averment, but per Cur. contra.——S. C. cited Comyns's Rep. 268. in pl. 147.——See (H b) pl. 3. and the Notes there.

1. IN an Action upon the Caſe, if the Plaintiff declares that there was a Diſcourſe of the Plaintiff between the Defendant and J. S. and the Defendant ſaid theſe Words of the Plaintiff, Go tell my Landlord (Innuendo the Plaintiff) I ſay he is a Thief, and ſtole two Shutters for a Window; and I will hang him if any Law will do it, and if I cannot do it the Bailiff ſhall do it; this is not a ſufficient Averment that the Words were ſpoke of the Plaintiff, there not being any Averment that he was the Landlord of the Defendant. Mich. 11 Car. between *Spencer and Mudburne*, the Court being divided thereupon in Arreſt of Judgment. But after, Hill. 11 Car. Judgment was given againſt the Plaintiff, quod nil capiat per Billam.

(G. b) pl. 3. S. C.

2. In an Action upon the Caſe, if the Plaintiff, being Delamore, declares that there was a Suit in Bath between the Defendant and one S. and the Defendant pleaded to Iſſue; and at a Trial in Bathe the Plaintiff was ſworn as a Witneſs, and ſhews his Oath; and that afterward the Defendant having a Diſcourſe with the Wife of S. of the ſaid Trial and Oath, ſaid theſe Words of the Plaintiff, Your Brother Delamore (Innuendo the Plaintiff exiſtentem Fratrem of the Wife) took a falſe Oath againſt me in the Hall (Innuendo &c.) I would not take ſuch an Oath for all the World. After Not guilty pleaded, and a Verdict for the Plaintiff, yet the Declaration is not good, becauſe it is not averr'd that the Plaintiff was Brother to the ſaid Wife of S. to whom the Words were ſpoken. Hill. 11 Car. B. R. between *Delamore and Heskins* Per Curiam; and tho' the Judgment given in Bathe was revers'd for Error in the Judgment, yet it was adjudged for the Defendant accordingly. Trin. 11 Car. Rot. 900. for the Court ſaid that the Innuendo is not ſufficient, and without an Averment it is not good, by ſaying that he ſpoke it of the Plaintiff, tho' the Jury has found for him. Quære rationem; for there was another good Cauſe of the Judgment, ſcilicet, inaſmuch as it was not averr'd that the Iſſue was joined in any Trial, but only that at a Trial he ſwore &c.

See (D. b) pl. 4. S. C.

3. If A. having a Diſcourſe of Jo. Potter, ſays theſe Words, That perjured Rogue and Villain Potter, without ſaying any more Words, Jo. Potter ſhall have an Action for thoſe Words, alleging a Diſcourſe of him, and that the Defendant ſaid theſe Words of him without other Averment. Hill. 11 Car. B. adjudged, between *Potter and Loveday*, this being moved in Arreſt. But a Writ of Error was brought.

He did not aver that he was his Son, or that he had but one

4. If Jo. Johnſon junior brings an Action upon the Caſe for theſe Words, averring that the Defendant ſaid theſe Words of him to one John Johnſon ſenior, I will take my Oath that your Son ſtole my Hens. Tho' the Plaintiff be the Son of him to whom the Words were ſpoken,

ſpoken, and the Plaintiff avers that the Defendant ſaid theſe Words of him, yet the Action does not lie, without Averment that he is the Son of the ſaid John Johnſon ſenior, to whom the Words were ſpoken. Mich. 15 Car. B. R. between *Johnſon and Dier*, per Curiam, in Arreſt of Judgment, and this ſtay'd accordingly. Son. Held per tot. Cur. Crooke abſente, that it was not good. Mar. 62. pl. 96.

Mich. 15 Car.—Comyns's Rep. 268. Arg. cites S. C.

5. If Robert Nelſon brings an Action upon the Caſe, and declares that the Defendant having Communication with certain of the King's Liege People of the Plaintiff, ſpoke of the Plaintiff theſe Words, Captain Nelſon (Innuendo the Plaintiff) is a Rogue and a Thief, and hath ſtolen away my Goods, and I will prove him a Thief. This is a good Declaration to maintain an Action, without any Averment that he was a Captain, or known by this Name, inaſmuch as there was Communication of the Plaintiff, and it is averr'd that the Words were ſpoke of the Plaintiff, and there ſhall not be intended Plurality of Nelſons. Trin. 22 Car. B. R. between *Nelſon and Smith* adjudged, this being moved in Arreſt of Judgment. Intratur Paſch. 22 Car. Rot. Fol. 85.

6. And the like Caſe, Mich. 22 Car. B. R. between *Osborn and Brookes*, the Caſe being that the Defendant having Communication with J. S. of the Plaintiff, ſaid of him, Captain Osborn is forſworn, and his Oath is upon Record. Intratur Trin. 22 Car. Rot. 767. Per Curiam, but not adjudged, as I believe. See (F. a) pl. 29 S. C. and the Notes there.

7. In an Action upon the Caſe, if the Plaintiff declares that the Defendant ſpoke certain ſcandalous Words, viz. Thou ſtoleſt my Mare &c. or ſuch like, without an Averment that they were ſpoke eidem Querenti, or de eodem Querente, as the uſe is, becauſe otherwiſe it cannot appear to the Court that they were ſpoke to the Plaintiff, or of him. Paſch. 11 Car. B. R. between * *Burges and Reeves* adjudged in Writ of Error upon a Judgment in Bank, and this reverſ'd accordingly, tho' it was Innuendo the Plaintiff. Intratur Hill. 10 Car. Rot. 674. tho' the Writ was well, ſcilicet, Dicit eidem Querenti. Trin. 1650. between † *Smith and Andrews* adjudged in a Writ of Error upon a Judgment in Bank. Intratur Trin. 1649. And yet there was alleged a Diſcourſe of the Plaintiff, and that the Defendant ſaid the Words He &c. *(I. b.) pl. 7. S. C. †(I. b.) pl. 7. S. C.

8. In an Action upon the Caſe, if the Plaintiff declares that the Defendant habens Colloquium cum querente, the Defendant in Preſence and Hearing of ſeveral other Perſons ſaid theſe Words, Thou (Innuendo the Plaintiff) art a Thief &c. but does not allege that they were ſpoke of or to the Plaintiff, according to the uſual Courſe, yet is this good; for it ſhall be intended they were ſpoke to the Plaintiff, for inaſmuch as the Colloquium was between the Plaintiff and Defendant, it cannot be intended but that the Words were ſpoke to him with whom the Colloquium was, it being alleg'd to be ſpoke upon the Colloquium. Mich. 1651. between *Biſhop and Fitzherbert*, per Curiam. Intratur Trin. 1651. Rot. 1301. Sty. 298. S. C. adjudg'd for the Plaintiff. *I never was a Tray to the State, as you have been.* It was moved that the Words were not ſhewn to be ſpoke of or to the Plaintiff; but it was anſwer'd that the Words being ſpoke upon Conference betwixt the Parties, a ſufficient Averment thereby appears that the Words were ſpoken of the Plaintiff. Judgment for the Plaintiff, Niſi &c. Sty. 435. Hill. 1654. B. R. Lamplugh v. Hewſon.

9. In an Action upon the Caſe for Words, if the Plaintiff declares that the Defendant having a Diſcourſe of the Plaintiff with diverſe Perſons, ſaid theſe Words of the Plaintiff, viz. Your Father (meaning the Plaintiff) hath ſtruck and kill'd Nicholas Ruſſel. After a Ver- S. C. cited Comyns's Rep. 268. in pl. 14. *Thy Father*

(*prædictum querentem*, Innuendo) *is a Thief; for he stole my Sheep.* The Declaration is not good, because it does not shew

dict for the Plaintiff he shall not have Judgment upon this Declaration, because it is not averr'd that he was Father to him to whom the Words were spoken, nor that he had any Son there at the Time of the speaking the Words, so that it is uncertain of whom the Words were spoken, and without such an Affirmative it is not sufficient to say that he spoke them of the Plaintiff. Hill. 1652. between *Burrowes and Usher*, adjudged, contra querentem per Curiam, after a Verdict for the Plaintiff. Intratur Trin. 1652. Rot. 1037.

that the Words were spoke to the Plaintiff's Son; per tot. Cur. præter Gawdy. Goldsb. 187. pl. 131. Hill. 43 Eliz. Badcock's Case.——Cro. E. 416. pl. 11. Mich. 37 & 38 Eliz. B. R. Badcock v. Atkins, S. C. adjudg'd for the Defendant by all except Gawdy; for it cannot be intended to be spoke of the Plaintiff more than of any other Person, unless it had been averr'd that his Son was present. But Gawdy held it should be intended; for otherwise he could not have said (Thy Father.)—— S. C. cited per Cur. Cro. E. 429. in pl. 32. and says that in this Case the Words were spoken in the Presence of divers others ——S. P. adjudg'd accordingly per tot. Cur. and the Innuendo does not help it. Cro. C. 92. pl. 16. Mich. 3 Car. C. B. Phelps v. Lane.——S. P. Cro. C. 177. pl. 25. the Court were divided; Hyde Ch. J. and Jones doubted if the Action was not maintainable, because it was alleg'd that the Defendant spoke of the Plaintiff, and is found guilty; but it was answer'd that so the Words are in every Declaration, and so it was in the Case of Harvey v. Chamberlain, and in that of Bennet v. Codnam; but the Words not being put in certain, nor aided by Averment, the Declaration is not good, nor can be help'd by the Verdict. Et adjornatur. Mich. 5 Car. B. R. Shalmer v. Foster.

I did not know that W. (Innuendo *the Plaintiff*) *was thy Brother; he hath forsworn himself, and I will prove him perjur'd &c.* The Plaintiff declared that he spoke these Words in the Presence of one Lumley. It was objected that it was not averr'd that Lumley was the Plaintiff's Brother; sed non allocatur; for being alleg'd to be spoken in the Presence of one only, it cannot be intended but it was the Plaintiff, if the other Revera be his Brother, and therefore may be help'd by the Innuendo; but otherwise where spoken in the Presence of divers others. Cro. E. 429. pl. 32. Mich. 37 & 38 Eliz. B. R. Woodroff v. Vaughan.——Mo. 365. pl. 498. S. C. but S. P. does not appear.

10. *Mr. Price, you do my Ld. Burleigh Wrong that you do not apprehend Jeremy Johnson* (Innuendo the Plaintiff) *for a Felon, and seise his Goods; for he* (Innuendo the Plaintiff) *hath stolen a Sheep from Wright of Risby*, (Innuendo John Wright.) It was moved in Arrest of Judgment, because the Words are *not alleg'd either in the Writ or Count to be spoke of the Plaintiff, but only in reciting them* he says Innuendo the Plaintiff, which will not maintain the Action; and the Court was of that Opinion, and gave Judgment for the Defendant. Cro. J. 126. pl. 12. Trin. 4 Jac. B. R. Johnson v. Aylmer.

11. *Your Daughters* (Innuendo the Plaintiffs) *are Whores, and play the Whore for their Silk Gowns, and are J. S.'s Whores*; and laid Special Damage. Exception was taken that it was uncertain of whom the Words were spoke, since there might be more Daughters; but per Cur. it could not be better laid, the Innuendo being of the Plaintiffs. Judgment for the Plaintiffs, Nisi. Keb. 525. pl. 15. Trin. 15 Car. 2. B. R. Henacre &c. v. . . . .

(L. b) *How* it shall be *brought for Words not well known* to the Justices, *without an Averment.* And where an Averment shall aid it.

1. IF an Action be brought for Words of Slander, according to the Phrase of the Country where they are spoken, tho' the Court does not know what they signify, yet the Action lies without an Averment of the Signification; for the Judges of themselves ought to take Notice of English Words spoke in any County. Mich. 14 Jac. B. adjudg'd. Hob. Rep. 169. cites 6 Jac. in Banco. An Action lies for these Words, * Thou art a Healer of Felons, without an Averment how the Words are taken, being inform'd that in some Countries they are taken for a Furtherer of Felons. Fol. 86. * S. P. adjudg'd actionable, the Words being spoken in Devonshire, where (Healer) signifies the same as Hider or Concealer. Noy 133. Pridham v. Tucker. ——Yelv. 153. Pasch. 7 Jac. S. C. in B. R. adjudg'd for the Plaintiff, there being these additional Words, viz. *And hast shew'd such Favour to a Horse-stealer in thy Constableship, that thereby both the Horse and Thief were convey'd away, and it lieth in my Power to hang thee* ——S. C. cited Hob. 127. in pl. 157. as adjudg'd, and that without any Averment how the Words were taken, because the Court was inform'd and took Knowledge that in some Countries it was taken for a Smotherer and Coverer of Felons.

2. If B. says of A. a Merchant, (having a Discourse with him concerning several Reckonings and Accounts between them for several Sums of Money, to the said A. by B. then due,) Thou art a base Knave, a cheating Knave, thou hast cozen'd me of 400l. or 500 l. Thou art a beggarly Knave, and I will make thee fly England. Tho' no Action lies for these Words of themselves, yet if there be an Averment that these Words (Thou art a beggarly Knave, and I will make thee fly England,) in London, where these Words were spoken, have the same Sense as if he had call'd him Bankrupt; in this Case if the Defendant demurs upon this Declaration, or if it be found by Verdict, the Action lies for these Words. Trin. 13 Car. B. R. between *Duncan and Knot*, adjudg'd upon a Demurrer; and so in such a Case, in Effect, adjudg'd upon a Verdict the same Term. S. C. cited per Cur. 12 Mod. 592. Mich. 13 W. 3.

3. If a Man says to A. who is a Dyer by his Trade, Thou art not worth a Groat, no Action lies for these Words, tho' it be averr'd that in Exeter, where these Words were spoken, it is Tantamount, as if he had said, Thou art a Bankrupt; for these Words are well known to the Judges, and there needs no Averment, and the Averment will not inforce them contrary to the true Sense of the Words, which is well known to the Judges; and if he is not worth a Groat, yet his Credit may be good, as is the Case of many Tradesmen. Pasch. 15 Car. B. R. between *Moon and Axe*, adjudged per Cur. in a Writ of Error upon a Judgment in Exeter, and the Judgment reversed accordingly. Intratur Mich. 14 Car. Rot. 213. Mar. 15 pl. 37. Pasch. 15 Car. Mead v. Axe, S. C. adjudg'd upon a Writ of Error not actionable; but if he had *laid specially that he was damnified, and had lost his Credit, and that none would trust him*, the Words would be actionable upon this Special Matter. ——S. C. cited by the Name of Moon v. Moxham, as adjudg'd accordingly. Raym. 184. Arg. ——S. C. cited accordingly, 2 Keb. 549. in pl. 25. Arg. ——S. C. cited per Cur. 12 Mod. 592. Mich. 13 W. 3. and says the Averment signifies nothing in the Case; for it does not alter the Nature of the Words; for to say of a Trader in any Place that he is not worth a Groat imports a Scandal, and no body will trust a Man that is thought to be worth nothing.

4. If a Man says of A. to his Master (who is a Shoemaker, and A. his Journeyman, and the Foreman of his Shop, and used to cut Leather to make Shoes, and to sell Goods for his Master,) It is no Matter See (U. a) pl. 8. S. C. and the Notes there

Matter who hath him; for I warrant whoſoever hath him, he will cut him out of Doors; theſe Words, with an Averment that in London (where they were ſpoken) amount to as much as if he had ſaid that he would undoe his Maſter, which ſcandalizes him in his Trade, [are actionable.] There were other Words alſo, ſcilicet, he went to J. S. to receive for me 20 l. and cozen'd me of 20 s. before he came home; but the Court relied not upon theſe, but gave Judgment for the other Words that the Action lies. Paſch. 15 Car. B. R. between *Ellis and Hunt*, adjudged per Curiam, it being moved in Arreſt of Judgment that the Action did not lie. Intratur Hill. 14 Car. Rot. 1218.

Hob. 126. pl. 157. ſeems to be S. C. and was for calling the Plaintiff *Ido-*

* Fol. 87. *nor* in the

5. If a Man brings an Action upon the Caſe againſt another, for ſpeaking of him certain ſcandalous Welch Words, tho' he does not put the Engliſh of them in the Declaration, yet the Declaration is good; for the Court ought to take Information by Welchmen what the Words ſignify. Hob. Rep. 169. an Anonymous Caſe, adjudged, and there cites Trin. 43 Eliz. 3024. between * *William Verch, Howel, and Evan George*, adjudg'd, B. R. and alſo Paſch. 44 Eliz. Rot. 8034. adjudg'd.

Welch Tongue, but did not aver what the Word did import; but averr'd that it was in the Preſence of divers that underſtood the Welch Tongue. The Court took Information from Welchmen what the Word meant in Engliſh, wherein they were ſatisfied it was the ſame as Perjur'd in Engliſh, and gave Judgment for the Plaintiff.

If Words ſpoke in Welch *ſignify that the Plaintiff is perjur'd*, but the Plaintiff turns them into Engliſh Words which do not amount to Perjury, (as that the Plaintiff is forſworn,) an Action lies not for them; per Roll Ch. J. and therefore Judgment was ſtay'd. Sty. 263. Paſch. 1651. Roſſe v. Lawrence.

Palm. 441. cites S. P. as to (Outputter,) and that it ſignifies one that robbs by the Highway.

6. *Thou art a Limer, and an Outputter*, adjudg'd actionable, becauſe in the Country where they were ſpoke, a Limer ſignified a Thief, and an Outputter ſignified a Receiver of Felons. Arg. Dal. 97. in pl. 27. cites 4 H. 8. Bradno v. the Prior of Tinmouth.

S. C. cited Mo. 419. in pl. 574. as Norfolk's Caſe.—— S. P. cited Yelv. 153. as actionable. ——Palm. 64. S. P. cited as actionable.———S. P. cited by Jones J. Mar. 2. in pl. 3

7. *Thou haſt ſtrain'd a Mare*, (Innuendo carnaliter cognovit Equam.) The Jury found the Words, and likewiſe the Meaning to be Carnaliter cognovit; and adjudg'd for the Plaintiff, becauſe the Verdict found preciſely that this was his Meaning, and it is a Phraſe of the Country. Cro. E. 250. pl. 15. Mich. 33 & 34 Eliz. C. B. Coles v. Haviland.

8. Where one call'd an Attorney *Champertor*, it was objected that this was *a Word of Art*, and not to be underſtood by the Vulgar, and ſo no damageable Slander any more than for Words in Latin or Welch, except you ſay that the Hearers underſtood it; but it was reſolved that this being in Engliſh, and *of a certain and ſingle Senſe*, the Court cannot doubt but it was underſtood. Hob. 117. pl. 145. Box v. Barnaby.

* Het. 175. S. C. adjudg'd.—— Hutt. 8. Gibbs v. Davie, S. C. adjudg'd accordingly.—

9. In Action for ſpeaking Welch Words in Preſence of divers underſtanding that Language, Witneſſes were ſworn as to the Signification of the Words; ſome depoſed they ſignified Stealing, which others denied; but all agreed that the proper Signification was Bearing (or * carrying away;) and thereupon Judgment was given againſt the Plaintiff. Hob. 191. pl. 239. Trin. 15 Jac. Gibbs v. Jenkins.

Noy 19. S. C. Judgment was arreſted; for the Words ſhall be taken in Mitiori ſenſu.

10. *L. mark'd and took up the Sheep of B. with a Fleſh-Mark of his own, as his own Sheep*; and averr'd that by marking with a Fleſh-Mark *is underſtood Stealing in the County of Southampton*, and ſo B. Crimen Feloniæ ei impoſuit. Per Cur. with theſe Averments the Words are actionable; and Judgment for the Plaintiff, Niſi. 2 Keb. 289. pl. 66. Mich. 19 Car. 2. B. R. Linter v. Butler.

11. *Two Dyers are gone off*, (Innuendo become Bankrupt) *and for aught I know H. will be ſo too within theſe* 12 *Months*. Per Cur. The Signification of the Words (gone off) are very well known among Merchants, and the Innuendo here is not introductory of new Matter, but explanatory only of the foregoing Words; and Judgment for the Plaintiff. 10 Mod. 196. Hill. 12 Ann. B. R. Harriſon v. Thornborough.

(L. b. 2) Declaration good. In general.

1. ACtion upon the Caſe for calling the Plaintiff *falſe Juſtice of the Peace, vel his Similia*; theſe Words, *his Similia, were* ordered to be *ſtruck out* of the Book [Declaration] per Cur. *for the Uncertainty*. Br. Action ſur le Caſe, pl. 112. cites 4 E. 6. Caſe &c. for theſe Words ſpoken of a Juſtice of Peace, *He makes Uſe of the King's Commiſſion to worry me out of my Eſtate*. And afterwards the Words were laid in Latin (without an Anglice ad tenorem & effectum ſequen'.) It was mov'd, that being laid ad tenorem & effectum ſequen' ſomething may be omitted which may alter the Senſe; and 'tis not an expreſs Allegation that the Defendant did ſpeak thoſe very Words. And for this Reaſon Judgment was ſtaid, tho' the Court held them actionable. 3 Mod. 71. Mich. 1 Jac. 2. B. R. Newton v. Stubbs.——2 Show. 435. pl. 399. S. C. adjudged for the Defendant. But the Reporter makes a Quære if the principal Caſe was not well enough after a Verdict, the (ad effectum) being but Surpluſage; for it is ſaid hæc falſa & ſcandaloſa Verba ad effectum ſequent'. So that it is ſufficiently certain, by ſaying hæc &c. and the other Words, as idle, ought to be rejected; had it been Quædam Verba ad effect. ſequent. it had been undoubtedly ill, but however, after much Debate, Judgment was pro Def. in Michaelmas Term following, it having been after moved.

2. Action for *ſpeaking ſlanderous Words at D. and S.* is not good; for it is not poſſible to ſpeak the ſame Words at divers Places at one and the ſame Time; but if it were at divers Times, he may have ſeveral Actions. Dal. 106. pl. 55. 15 Eliz.

3. In an Action upon the Caſe for Slander, and thereupon Error was brought, becauſe it was *not expreſs'd* in the Declaration, *Quod malitioſe dixit* thoſe Words. And adjudged that that is no Error; for the Words themſelves are malicious and ſlanderous, ſo Judgment affirmed. Noy 35, 36. Mercer v. Sparks. Ow. 51. Trin. 28 Eliz. S. C. adjudged accordingly.—Jenk. 268. pl. 80. S. C. adjudg'd and affirm'd in Error; for ſince the Words are ſcandalous, they are eo ipſo malicious.

In an Action for Words, it is not neceſſary that they be alleged to be ſpoken *falſo & malitioſe*, tho' ſuch Words are neceſſary in Indictments. Sty 392. Per Roll Ch. J. Mich. 1653. Anon.

4. In Action for ſcandalous Words, the Plaintiff declar'd *that the Defendant in præſentia diverſorum malitioſe dixit He hath &c.* It was objected that this may be, and yet no Slander; for it may be in their Preſence, and they not hear it. But this Exception was waiv'd, for it ſhall be intended that they heard it alſo. Noy 57. Trin. 38 Eliz. Hall v. Hemmſly. Cro. E. 486. pl. 3. Hall v. Hennerſley, S. C. held accordingly.

5. In Action for Words, the Declaration was *Quod propalavit quædam ſcandaloſa verba, prout in his Anglicanis verbis ſequen'*. (viz.) *Thou* &c. and it may be the Words were ſpoken in another Language, which they who were preſent underſtood not, and then there is not any Cauſe of

Action, as it hath been adjudged before theſe Times. Sed non allocatur; for it muſt be intended that he ſpake Anglicana Verba, and the Words prout in his Anglicanis Verbis ſequent' *is tantamount as if he had ſaid Hæc Anglicana Verba ſequentia.* Cro. E. 573. pl. 13. Trin. 39 Eliz. C. B. Bate v. Rookwood.

The Words Quorum Tenor &c. is ill, Per tot. Cur. for ſomething might be omitted in the Quorum Tenor &c.

6. Caſe, for that he ſpake of the Plaintiff *quædam ſcandaloſa Verba, quorum Tenor ſequitur in hæc Verba, Thou &c. vel Conſimilia*, held not actionable; and Walmſley ſaid it was by reaſon of the Word (Conſimilia) as it was adjudged in Garter's Caſe. Beſides, the alleging that he ſpake divers Words, quorum Tenor ſequitur is ill; and therefore it was ordered that the Roll be amended. Cro. E. 645. pl. 52. Mich. 40 & 41 Eliz. B. R. Hale v. Cranfield.

which was within the Words which would cauſe the Words not to be actionable; wherefore Judgment was ſtay'd. Cro. E. 857. pl. 24. Mich. 43 & 44 Eliz. C. B. Garford v. Clark.——S. C. cited Hardr. 2.——S. C. cited 2 Show. 436.——So being laid that he *ſpake theſe ſcandalous Words* [*hæc ſcandaloſa Verba*] *ad tenorem & effectum ſequentem*, ſome may be omitted which may alter the Senſe and Meaning of them; and therefore the Judgment was ſtaid, tho' the Court held the Words actionable. 3 Mod. 71. 72. Mich. 1 Jac. 2 B. R. Newton v. Stubbs.— 2 Show. 435. pl. 399. S. C. adjudged accordingly. The Reporter adds a Quære if the principal Caſe was not well after a Verdict, the (ad Effectum) being but Surpluſage; ſo that it is ſufficiently certain, by ſaying (*hæc* &c.) and the other Words, as idle, ought to be rejected. That had it been (*Quædam Verba ad effectum ſequentem*), it had been undoubtedly ill; but ſays that however, after much Debate, it being after mov'd, Judgment was for the Defendant in the Michaelmas Term following.

6. The Plaintiff declar'd, *that the Defendant ſpake theſe Words of him, Thou art &c.* It was objected that the Declaration was ill. Sed non allocatur; for being ſpoken to the Plaintiff they are ſpoken of him, and are all one. Cro. J. 39. pl. 2. Mich. 2 Jac. B. R. Kellan v. Manesby.

Roll Rep. 79. pl. 24. Sell v. Fairee, S. C. & S. P. by Coke, Crooke, & Doderidge.—S. C. & S. P. cited as adjudged Het. 18.

7. In an Action for ſcandalous Words, Plaintiff *declar'd Quod intendebat & conatus fuit to marry ſuch a Woman, and that by Reaſon of ſuch and ſuch Words ſpoke of him ſhe did refuſe him.* It was moved in Arreſt of Judgment, that Intendebat is only to ſhew what his Intention was, and that he ſhould have ſaid Quod Colloquium habitum fuit de Matrimonio. And per Coke Ch. J. what Conatus is, non definitur in Lege. And per tot. Cur. clearly, the Declaration is not good; and adviſed the Plaintiff to begin de novo, and to *lay an expreſs Colloquium of a Marriage, and a Breach*, or falling off, *by Reaſon of thoſe Words.* 2 Bulſt. 276. Mich. 12 Jac. Sell v. Facy.

Roll Rep. 244. pl. 12. Swead v. Badley, S. C. adjudged accordingly; and Coke Ch. J. ſaid that here is Injuria, but not Damnum.——3 Bulſt. 74. Snead v. Badley, S. C. adjudged accordingly.

8. Action for ſlandering his Title, and declar'd *that Lands deſcended to him as Heir* to his Brother, *and he had an Intent to aſſure Part of them upon his Son for his Advancement, and to make Leaſes of the other Part*; and the Defendant, to fruſtrate his Intent, *ſaid*, viz. That *the Plaintiff had no more Right to the Lands than a Stranger*; but becauſe it was *not ſhewed that he was in Communication to make Leaſes, or Aſſurances* to his Son, but only that he had an Intent, which might be ſecret, and not known to any, the Court held it to be ill, and Judgment for the Defendant. Cro. J. 398. pl. 3. Paſch. 14 Jac. B. R. Smead v. Badley.

2 Roll Rep. 373. S. C. ſays, that ſo was the Opinion of Ley Ch. J. but Doderidge ſaid nothing.——Lat. 218. S. C. adjudged for the Plaintiff Niſi &c.

9. Plaintiff declar'd *that A. offered him M. his Daughter in Marriage, and* 300 *l. Portion*; *and that there was a Colloquium at H. between A. and B. and that H. ſaid ſuch ſcandalous Words, whereupon M. refuſed to marry him.* But becauſe *no Place is laid where the Words were ſpoken*, Judgment was arreſted; for tho' the Colloquium was at H. yet the Words might be ſpoke at another Place afterwards, and it is *not ſaid ad tunc & ibidem*, as the common Courſe is. Palm. 385. Mich. 21 Jac. B. R. Taylor v. Tally.

10. *Y. hath forſworn himſelf in a Suit in the Council of the Marches brought by Y.* In Action for theſe Words, Plaintiff ſhews that a Suit was depending there between himſelf and his Wife, and J. S. It was objected that it is not ſhewn that there was a Suit brought by him alone. Sed non allocatur. The Suit is not material, for he is ſcandalized; and the Declaration is well enough, for the firſt Suit is not the Warrant of it, but only the Occaſion of ſpeaking; and in common Intendment it is a Suit by the Baron, if the laſt Suit be grounded on the firſt. 2 Roll Rep. 471. Mich. 22 Jac. B. R. Yates's Caſe.

11. A. ſaid that *B. is a good Attorney, but that he would play on both Sides.* The Words are actionable, but the Court gave no Judgment, becauſe the Plaintiff did * *not declare that the Words were ſpoke of himſelf.* Brownl. 5. Paſch. 13 Car. Brown v. Hook.

* Where the Declaration only *charg'd the Defendant with ſpeaking the Words*, and does *not ſay Dixit de Querente*, it is not good; for in ſuch Caſe they may be ſpoke of any other Body, as well as of the Plaintiff; Per Roll Ch. J. to which Bacon J. agreed, and ſaid, that *the Word (dixit) was not in the Declaration*: and ſo it appears not whether he ſpoke, or writ, or thought the Words. Judgment againſt the Plaintiff Niſi &c. Sty 70. Mich. 23 Car. Anon.

12. The Plaintiff declares, that there was a *Communication of Marriage between the Plaintiff and one M. who was worth* 300 *l. and that ſhe deferr'd Marriage* with him, (as much as to ſay) Veriſimile fuit, that they ſhould be married; and the Defendant, in the hearing of divers Perſons, ſaid *M is Mr. Edwards's Whore* (Innuendo the Plaintiff.) Whereupon M. refuſed to marry the Plaintiff. After a Verdict for the Plaintiff, it was moved, 1ſt. That there was no Agreement of Marriage, nor mutual Love alleged between the Plaintiff and M. 2dly. That the Words were not alleged to be ſpoken of the Plaintiff, but only in the Innuendo; yet upon good Debate Judgment was given for the Plaintiff. All. 6. Mich. 22 Car. B. R. Edwards v. French.

13. *He hath forg'd a Bond &c.* The Plaintiff declar'd that the Defendant *hæc ficta & falſa Verba dixit.* It was objected that it ſhould be *Ficte & falſo dixit.* But per Cur. it is well enough. And Judgment for the Plaintiff. Keb. 273. pl. 60. Paſch. 14 Car. 2. B. R. Motley v. Slaney.

14. In Action for ſcandalous Words, the Plaintiff declar'd that he is a Limeburner, and gets his Living by Buying and Selling, and the Defendant ſaid of him *de Arte ſua He is &c.* After Verdict it was objected, that it is *not* ſaid the Defendant *ſpoke of the Trade* of Limeburning, but de Arte ſua generally, and he may have another Trade. Windham and Twiſden J. held that the Words (de Arte ſua) are applicable to Plaintiff's Profeſſion of a Limeburner; but Hide Ch. J. and Keeling e contra, and the Court being divided no Judgment was given. Raym. 86. Mich. 15 Car. 2. B. R. Terry v. Hooper.

Lev. 115. S. C. the Count was, that the Defendant *habens Colloquium of him & de Arte ſua ſaid He is &c.* Windham and Twiſden held, that the Words being laid to be ſpoke of him * and his Trade, are ſufficient, without any Colloquium either of him or his Trade, the ſame being found to be ſpoken of him and his Trade. But the Court being divided, Judgment was ſtay'd.——Keb. 602. pl. 75. Terry v. Cooper, S. C. adjornatur.——Keb. 644. pl. 15 & 16 Car. 2. B. R. S. C. the Court was divided; & adjornatur.

* It ſeems the Words (and his Trade) ſhould be (and his Art)

The Plaintiff declar'd that the Defendant ſpake of him ſuch and ſuch Words (which were ſcandalous) *Et ex ulteriori malitia de Statu* of the Plaintiff *Colloquium habens*, ſaid ſuch other ſcandalous Words, *Quorum quidem Verborum*, omitting *Prætextu*, or any like Word, *the Plaintiff ſuſtained a ſpecial Damage, ad Damnum &c.* Exception was taken, by reaſon of the Want of Prætextu, or Occaſione; and alſo that the Words are not laid to be ſpoken of his Trade; for the Words *de Statu* will not import that, but that it ought to be *Arte* vel *Miſterio*; but abſente Holt Ch. J. the Court gave Judgment for the Plaintiff, for he declaring that he was a Tradeſman, the Words (de Statu) are equivalent to (Arte ſua) and to be intended of his Trade, and then being ſpoke of him in his Trade, the Words are actionable, tho' the ſpecial Damage had been left out of the Caſe. Ld Raym. Rep. 610. Mich. 12 W. 3 Read v. Hudſon.

15. In

3 Keb. 54 pl. 35. S. C. adjudg'd actionable without a Colloquium; the Words there being That *he is a cheating Knave, and cheats all thoſe that deal with him in Trading.*

15. In Caſe, the Plaintiff declared that he was a Malſter, and the Defendant habens Colloquium of him and of his Trade, ſaid, *Have a Care of him, and do not deal with him; he is a Cheat, and will cheat you; he has cheated all the Farmers at E. and dares not ſhew his Face there, and now he is come to cheat at H.* The *Jury found* all the Words, but that there was *no Colloquium of his Trade.* But per Cur. *The Words themſelves ſupply the Colloquium, they appearing to be ſpoke of his Trade*; and gave Judgment for the Plaintiff. 2 Lev. 62. Trin. 24 Car. 2. B. R. Reeve v. Holgate.

S. C. cited per Cur. 3 Lev. 338. and S. P. adjudg'd there accordingly, and that Cumque etiam were conſtrued for Porro, and that divers Claſſick Authors were cited to that Purpoſe, and of ſuch Opinion were all the Court in this Caſe, and gave Judgment for the Plaintiff. Mich. 4 W. & M. in C. B. Cotterel v. Matthews.

16. Caſe for ſpeaking ſuch Words, *Cumque etiam*, the Defendant *Poſtea ſuch a Day ex ulteriori malitia, ſpoke other Words* (which were actionable.) After a Verdict for the Plaintiff, and entire Damages, it was objected that the laſt Declaration was not affirmative that the Defendant ſpoke the Words, but under a (Cumque etiam) which is always ruled ill in Treſpaſs. Sed non allocatur; for in an Action on the Caſe, as this is, it is good. but not in Treſpaſs. And Judgment for the Plaintiff. 2 Lev. 163. Paſch. 29 Car. 2. B. R. Mors v. Thacker.

In Action for Words *laid two Ways, the laſt Count was Cumque etiam*, which is but Recital; & dubitatur whether good. 2 Mod. 58. Mich. 22 Car. 2. C. B. Eſcourt v. Cole.

S. C. cited Per Cur. 3 Lev. 338. Mich. 4 W. & M. in C. B.

17. Where there were *two Sets of Words, and the firſt are alleged to be ſpoke in Auditu quamplurimorum, but the laſt are not ſo alleged*, yet per Cur. the firſt Auditu quamplurimorum runs thro' the whole. And Judgment for the Plaintiff. 2 Lev. 193. Paſch. 29 Car. 2. B. R. Mors v. Thacker.

(L. b. 3) Declaration. How. As to the Colloquium.

1. THE Plaintiff declared Quod quidam Malefactores ignoti had feloniouſly ſhorn the Sheep of C. and that there being a Communication between the Defendant and another concerning the ſheering of theſe Sheep, the Defendant ſaid, *I do know who did ſheer the Sheep* (innuendo the ſaid J. S.) and thereupon the other ask'd who it was, and the Defendant anſwer'd, that *it was the Plaintiff did ſheer the Sheep* (innuendo *felonice.*) Crooke J. held the Words actionable as laid, they being taken all together. But Doderidge and Haughton contra. For the Colloquium was of the ſheering the Sheep only, and not of the Felony; and it is not laid that he knew who did ſheer them feloniouſly, and ſo it is a Scandal only by Inference, and ſo clearly not actionable. But per Doderidge, if ſhe had ſaid, *I do know who did it*, this would refer directly to the Felony before alleged to be done. It was order'd to ſtay till moved again by the Plaintiff, which he never did, perceiving the better Opinion of the Court againſt him. 3 Bulſt. 83. Mich. 13 Jac. Helly v. Hender.

3. *He*

2. *He hath forged a Bond, and that is not the firſt by an Hundred*; the Plaintiff declared that the Defendant, upon a Colloquium with J. S. ſpake thoſe Words of the Plaintiff, but did *not ſay the Colloquium was of the Plaintiff*; the Court held that the Colloquium is ſufficient. Judgment for the Plaintiff. Keb. 273. pl. 60. Paſch. 14 Car. 2. B. R. Motley v. Slaney.

3. The Plaintiff declared that he was produced as a Witneſs in a Cauſe in C. B. and depoſed nothing but what concern'd the Iſſue, and the Defendant on Diſcourſe of the Plaintiff's Evidence, ſaid, *M. hath forſworn himſelf in every thing he ſwore in the Cauſe.* It was moved that the Plaintiff did *not ſhew the Matter of the Iſſue, nor with whom the Colloquium was*; but per Cur. the Averment is ſufficient; and Judgment for the Plaintiff. 2 Jo. 5. Intratur Trin. 21 Car. 2. C. B. Mayn v. Okey.

4. *He ſtole the Colonels Cup-board Cloth.* Tho' no Colloquium was laid, either of the Colonel or his Cup-board Cloth, yet the Court held the Words actionable; for they charge him with Felony. 3 Mod. 280. Paſch. 2 W. & M. in B. R. Anon.

5. The Plaintiff declared that he is a Trader, and that the Defendant ſaid of him, *You are a Cheat, and have been a Cheat for divers Years.* Holt Ch. J. at firſt held that the Words muſt be underſtood of his way of living, and ſo needed no Colloquium of his Trade. But in another Term Mutata Opinione Judgment was arreſted. 2 Salk. 694. pl. 4. Paſch. 10 W. 3. B. R. Savage v. Robery. 5 Mod. 398. S. C. Judgment was arreſted, becauſe they were Words of Heat, and not actionable, it not being alleged that the Cheat was in any thing relating to his Trade.——See (U. a) pl. 25. 26.

(L. b. 4) Declaration. How. As to the Auditors.

1. IN Action for Words, the Plaintiff counted that Defendant ſpoke them *in præſentia diverſorum*, but did *not ſay in Auditu*, and this was moved to be ill; for if none heard them it is no Slander. Sed non allocatur; for it ſhall be neceſſarily intended that it was in Auditu, when it was in Præſentia &c. Cro. E. 487. pl. 3. Mich. 38 & 39 Eliz. B. R. Hall v. Henneſley. Noy 57. S. C. & S. P. accordingly. ——Goldsb. 119. pl. 3. S. C. but S. P. does not appear

The Plaintiff declar'd that the Defendant *in Præſentia & Auditu quamplurimorum ſubditorum Domini Regis, ſpake theſe Words* of the Plaintiff, *Thou art &c.* It was mov'd in Arreſt &c. that this is not good, for perhaps none of them underſtood the Words, and conſequently it is no Slander. Sed non allocatur; for they are only Words of Form, and it had not been material if they had been left out. Cro. J. 29. pl. 2. Mich. 2 Jac. B. R. Kellan v. Manesby.——It being found by Verdict that the Defendant ſpake the Words, it is not material, tho' he does not ſay in Auditu plurimorum. And Judgment for the Plaintiff. Cro. C. 199. pl. 12. Trin. 6 Car. B. R. Smart v. Eaſdale.——If it be not ſaid that the Words are ſpoken in the Preſence of any Body, they cannot be ſcandalous; Per Bacon J. Sty 70. Mich. 23 Car. B. R.

2. The Declaration was, that the *Defendant Palam & Publice promulgavit de Querente* ſuch and ſuch ſcandalous Words. Exception was taken that he did not ſay that the Defendant ſpoke the Words in Præſentia & Auditu aliorum. But per Cur. the Words (Quod Palam & publice promulgavit) imply that it was in Præſentia & Auditu &c. for otherwiſe it is not Palam. And adjudged for the Plaintiff. Cro. E. 861. pl. 34. Mich. 43 & 44 Eliz. C. B. Taylor v. How.

3. Words ſpoke of a Dyer were, viz. *Thou art not worth a Groat.* The Plaintiff averr'd that theſe Words, among Citizens of E. where the

Words were ſpoke, are underſtood all one as calling him Bankrupt. Error was brought, and aſſign'd that it was ſaid that Defendant ſpoke the Words inter diverſos Ligeos of E. without ſaying Citizens of E. and therefore Judgment was revers'd. But the Court were clear, that the Words of themſelves were not actionable, and that the Averment was idle, becauſe the Words in themſelves imply a plain and intelligent Senſe and Meaning to every Man. Mar. 15. pl. 37. Paſch. 15 Car. Meade v. Axe.

(L. b. 5) Declaration. How. As to ſetting forth his Profeſſion, Office &c.

1. IN Caſe for calling the Plaintiff *Bankrupt* the Plaintiff had a Verdict. It was moved in Arreſt of Judgment, that the Plaintiff had *not declared that he was a Merchant, or of any Myſtery or Trade.* And for that Reaſon the Court held the Declaration inſufficient, and the Judgment was ſtay'd. Goldsb. 84. pl. 5. cites Paſch. 30 Eliz. Anon.

Thou art a beggarly Knave and a Bankrupt, and art not able to ſhew thy Face.

2. *What art thou? a Bankrupt, and waſt a Bankrupt.* After Verdict it was moved, the *Declaration was Quod cum fuit mercator per magnum Tempus*, but *ſaith not he was a Merchant at the Time of the ſpeaking* of the Words. The Court held the Declaration to be good, being alleged he was Mercator per magnum Tempus; but they would adviſe. Cro. E. 273. pl. 1. Paſch. 34 Eliz. B. R. Jordan v. Lyſter.

The Plaintiff declaring that he was a *Merchant* per multos Annos jam retroactos. The Court doubted of the Action, becauſe it is not preciſely alleged he was a Merchant at the Time the Words were ſpoken; and perhaps he uſed the Trade for a Time, and left it off. And would adviſe of it. Cro. E. 794. pl. 39. Mich. 42 & 43 Eliz. in B. R. Dottor v. Ford.

As where the Plaintiff declares, whereas he is a Freeman of Wells, exercens artem five myſterium of a Linnen-Draper

3. *But* it was held per Cur. that where a Man is *ſlander'd in his Profeſſion or Trade*, there *it needs not be ſo preciſely alleged that at the Time of the ſpeaking he was a Lawyer, Phyſician, Merchant, or* Linnen-draper; but it is *ſufficient to ſhew* that *he is of ſuch a Trade, and has exerciſed it for divers Years, without* ſaying (*Ultimo*) or (*Jam*) *elapſos*; for one ſhall not be intended to alter his Trade or Profeſſion, but by Preſumption he continues it during his Life. Yelv. 159. Trin. 7 Jac. in Caſe of Tuthill v. Milton.

within the ſaid City, for the Space of 5 Years paſt, and had great Gains emendo vendendo, and yet the Defendant at B. ſaid, *You are a Bankrupt, and not worth a Groat.* It was argued that this is a good Declaration, tho' not ſaid ultimo or jam elapſ. nor expreſsly laid that the Plaintiff was a Linnen-Draper at the time when the Words were ſpoken; and Judgment affirm'd. Yelv. 158. Trin. 7 Jac. B. R. Tuthill v. Milton.

Plaintiff *declared that he had been an Attorney diverſis Annis jam elapſis*, and that the Defendant maliciouſly ſpoke theſe Words of him, viz. *He is a forging Knave.* Judgment for the Plaintiff in C. B. and Error brought in B R. It was argued that the Word (forging) is adjectively ſpoken, and therefore the Action will not lie, unleſs it appear that he was Attorney at the time of the ſpeaking, which did not appear here; for it was ſaid that he was an Attorney per diverſos Annos elapſos, which might be 30 Years ſince, and is not at the time of the Words ſpoken, and therefore the Words ſhould have been (jam ultimo elapſos.) But where the Words in themſelves import a Scandal in his Profeſſion, as (Ambedexter) it is otherwiſe; for then he takes Notice of his Profeſſion. And the Judgment was reverſed. 2 Roll Rep. 84. Paſch. 17 Jac. B. R. Moor v. Symms.

In an Action for ſcandalous Words ſpoke of a Parſon, who declared that he was inducted into a Parſonage in Ireland, and executed the Office of Paſtor by the Space of 4 Years after. It was moved in Arreſt, That he did *not aver that he was Parſon at the Time of ſpeaking the Words.* But per Cur. it ſhall be intended that he continued Parſon, becauſe he had a Freehold in the Parſonage during his Life; but having

having laid a special Time, during which Time he exercised the Office of a Pastor, the Court doubted if it should be intended he continued so longer than himself had laid it; but inclined for the Plaintiff. All. 63. 64. Pasch. 24 Car. B. R. Dod v. Robinson.

2. In an Action brought by a Counsellor at Law for scandalous Words spoke of him, 'it is not sufficient to *say that he is Homo eruditus in Lege*, but he must say that he is *Homo Conciliarius*; Per Jones J. Poph. 207. Trin. 2 Car. B.R. Cary's Case. A Counsellor is called in pleading *Homo Conciliarius & In Jure peritus*;

Per Coke Ch. J. 2 Bulst. 230. Pasch. 12 Jac. in a Nota.

5. In Action for scandalous Words, the Plaintiff declared that he is *in Medicinis Doctor*; but it was moved in Arrest because he did *not shew that he was licensed by the College &c. or a Graduate in the University*, according to the Statute 14 H. 8. cap. 5. Bankes Ch. J. and Crawley, upon reading the Act agreed it was a general Act, so that it need not be pleaded, wherefore they gave Day to the Defendant to maintain his Plea. Mar. 116. pl. 193. Mich. 17 Car. Dr. Brownlow' Case.

6. In Case, the Plaintiff *declared by the Name of J. E. Merchant; and that by Buying and Selling he got diversa Lucra* &c. and that the Defendant called him a *Bankrupt*. It was moved in Arrest of Judgment that the Declaration was Ill, because it did *not appear that he gained his Living by Buying and Selling as a Merchant*. The Judgment was set aside. Sid. 299. pl. 4. Mich. 18 Car. 2. B. R. Emerson v. Fairfax.

(M. b) For Words. *Justification.* [Or Excuse.]

1. IN an Action upon the Case for Words, it is a good Justification (tho' the Words were false) that he was a Counsellor of Law, retain'd in an Issue between the Plaintiff and J. S. and he said the said Words upon the Evidence for his Client, if they were directly material to the Point in Issue. Mich. 3 Jac. B. R. between *Brooke and Mountague*, per Curiam. See (B. a) pl. 2. S. P. —Cro. J. 90. pl. 18 S. C. adjudg'd for the Defendant; for a Counsellor in Law retain'd hath a Privilege to inforce any thing which is inform'd him by his Client, and to give it in Evidence, it being pertinent to the Matter in Question, and not to examine whether it be true or false; for that is at the Peril of the Informer; and a Counsellor is at his Peril to give in Evidence what his Client informs him of, being pertinent

2. So the said Matter shall be a good Justification, tho' the Words were not precisely pertinent to the Issue, but by a Consequence, and for Mitigation of Damages. Mich. 3 Jac. B. R. between *Brooke and Mountague*, per Curiam.

3. As in false Imprisonment, if the Defendant pleads in Bar that he was Mayor of London, and imprison'd the Plaintiff till he found Sureties for his good Behaviour, being a Man of ill Fame and Behaviour; to which the Plaintiff replied De son tort demesne absque tali causa, and a Counsellor of Law being retain'd for the Defendant upon the Information of his Client, said upon the Evidence that the Plaintiff was of an ill Behaviour, and that he had committed Felony. In an Action upon the Case by the Plaintiff against him for these Words, he may well justify the speaking of them for the Matter aforesaid, (tho' they are false) tho' they tend not precisely in Proof of the Issue; for they tend to clear a Magistrate in the Course of Justice, and are material to mitigate Damages, and were spoke without Malice. Mich. 3 Jac. B. R. between *Brooke and Mountague*, adjudged upon a Demurrer.

nent to the Matter in Queſtion, otherwiſe an Action on the Caſe lies againſt him by his Client, as Popham ſaid.——Cro J. 432. pl. 11. S. C. cited by Haughton as adjudg'd that no Action lay.——S. P. and becauſe it was in his Profeſſion, and pertinent to the Good and Safety of his Client, though not directly to the Iſſue, a Prohibition was granted. Hob. 328. pl. 402. Hughs's Caſe.

If a Counſellor ſpeaks ſcandalous Words againſt one in defending his Client's Cauſe, an Action lies not againſt him for ſo doing; for it is his Duty to ſpeak for his Client, and it ſhall be intended to be ſpoken according to his Client's Inſtructions; per Glyn Ch J. Sty. 462. Mich. 1655. B. R. Wood v. Gunſton.

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

He is a forſworn and perjur'd Man. The Defendant juſtified, for that the *Plaintiff exhibited an Engliſh Bill in the Marches of Wales, on which an Injunction was granted* for Poſſeſſion of Land in Queſtion between them for the ſaid Plaintiff, *and that the ſaid Affidavit was falſe, and the Plaintiff committed Perjury in that.* This was allow'd a good Juſtification. 2 Bulſt. 272. Mich. 1 Jac. C. B. Eſtcourt v. Harrington.

4. In an Action upon the Caſe by A. againſt B. if the Plaintiff declares that he took his Oath in the Court of B. R. againſt B. of certain Matters to have B. bound to his good Behaviour, and thereupon B. then ſaid falſely and maliciouſly, intending to ſcandalize him in the Hearing of the Judges and Officers of the Court, and others there being, There is not a Word true in that Affidavit, and I will prove it by 40 Witneſſes, yet this Action is not maintainable; for the Anſwer that B. made to the ſaid Affidavit was a Juſtification in Law, and ſpoke only in Defence of himſelf, and that in a legal and judicial Way, inaſmuch as he ſays he will prove it by 40 Witneſſes. Paſch. 15 Car. B. R. between *Moulton and Clapham*, per Curiam, adjudged in Arreſt of Judgment, after a Verdict for the Plaintiff. Intratur Hill. 14 Car. Rot. 459.

S. C. cited Cro. J. 91. in pl. 18. and Popham affirm'd it to be good Law, when he delivers Matter after his Occaſion as Matter of Story, and not with an Intent to ſlander any.

5. In Fox's Book of Martyrs there is a Relation of one Greenwood of Suffolk, who is there reported to have perjur'd himſelf before the Biſhop of Norwich, in teſtifying againſt a Martyr in the Time of Queen Mary, and that after he came to his Houſe, and there by the Judgment of God his Bowels rotted out of his Belly, in exemplary Puniſhment of his Perjury; and one Prit being lately made Parſon of the Pariſh where this Greenwood lived, and not well knowing his Pariſhioners, and preaching againſt Perjury cited this Story; and it happen'd that Greenwood was alive, and in the ſaid Church, and after brought Action upon the Caſe againſt the Parſon, and adjudg'd not maintainable by Anderſon at the Aſſiſes, becauſe it was not ſpoke maliciouſly. Vide this cited Mich. 3 Jac. B. R. per Coke.

Thou art a Thief. The Defendant pleaded that there was a Robbery committed, and the *common Fame of the Country* was that he was guilty of it. It ſeems that this is no good Juſtification in Action for Words. D. 236 a. pl. 26. Hill. 7 Eliz. Anon.——S. C. cited Bridgm. 62.——Brownl. 3. S. P. ſaid. ——S. P. per Cur. Hob. 82. at the End of pl. 7.

The Plaintiff brought an Action againſt one for ſaying of him, that *He heard he was hang'd for ſtealing of an Horſe*; and upon the Evidence it appear'd that *the Words were ſpoke in Grief and Sorrow for the News.* Twiſden J. cited it as a Caſe which himſelf heard tried before Hobart, and that Hobart made the Plaintiff be nonſuited, becauſe it was not ſpoke malitioſe; and all the Court now agreed that this is done according to Law. Lev. 82. Mich. 14 Car. 2. B. R.

Hob. 67. pl. 72. S. C. adjudg'd for the Plaintiff, tho' perhaps the Defendant know him not to be within the Pardon.——Mo 863. pl. 1187. S. C. adjudged accordingly.——Mo. 872. pl. 1213. Mich. 14 Jac. C. B. S. C. adjudg'd accordingly. But Nichols J. ſaid if he had *been convicted*, and pardon'd afterwards, it would be otherwiſe.——Ow. 150. S. C. adjudg'd for the Plaintiff. ——Brownl. 10. S. C. and the Court were of Opinion that by the Pardon both the Puniſhment and Fault were

* Fol. 88.

6. In an Action upon the Caſe for calling the Plaintiff Thief, if the Defendant juſtifies it, becauſe the Plaintiff had ſtole a certain Thing, and the Plaintiff replies that after the Felony committed, and before * the ſpeaking of the Words, he was pardon'd by a General Pardon, this ſhall avoid the Juſtification; for by the Pardon the Felony was extinct. Hob. Reports 92. B. Caſe 112. between *Cuddington and Wilkins*, adjudg'd.

were taken away.——S. P. per Cur. obiter Sid. 52. in pl. 16——Hob. 82. pl 107. S. C. adjudg'd for the Plaintiff, and it was held no great Difference, tho' this had been a Special Pardon, and not known to the Defendant; for he muſt take heed at his Peril to do no Man wrong.——But a *Pardon of Perjury* will not reſtore the perjur'd Perſon to his Credit. Sid 52. Mich. 13 Car. 2. B. R. in pl. 16. per Cur.

Thou art a Rebel and a Traytor. The Defendant juſtified that 28 Dec. 1659. the Plaintiff was a Soldier under one Captain C. againſt the King. The Plaintiff demurs, preſuming the General Pardon had reſtor'd him to his good Fame; but adjudg'd for the Defendant, the Plaintiff not ſhewing that he was not one of the Perſons excepted therein. Raym. 23. Mich. 13 Car. 2. B. R. Harris's Caſe.

7. In an Action upon the Caſe for calling the Plaintiff Thief, and that he *ſtole 2 Sheep* of J. S. the *Defendant ſaid that the Plaintiff ſtole the ſame Sheep, by which he call'd him Thief, as well he might*; and good per Cur. Br. Action ſur le Caſe, pl. 3. cites 27 H. 8. 22.

8. Action upon the Caſe for calling the Plaintiff *falſe, perjur'd Man*; and the Defendant juſtified *that ſuch a Day and Year, in the Star-Chamber, the Plaintiff was perjur'd, and pleaded certain in what* &c. by which he call'd him falſe perjur'd Man, ut ſupra, prout ei bene licuit; and a good Plea, per Cur. in C. B. by which the *Plaintiff ſaid that it was of his own Head, abſque hoc that he ſwore Modo & Forma.* Br. Action ſur le Caſe, pl. 104. cites 30 H. 8. S. P. ibid. pl. 3. cites 28 H. 8. Auſten v. Lewis.

9. *Thou art a Traytor*, ſpoken at W. in Suſſex. The Defendant *pleads he ſpoke* theſe Words *at S. in Hampſhire*, viz. *Such Things Traytors do, abſque hoc that he ſpoke the Words at W. in Suſſex.* It was the Opinion of the Court the Juſtification was ill, and the Traverſe upon it; for the Action is general, and the Defendant doth not juſtify the Words in the Declaration, and adjudg'd for the Plaintiff. Cro. E. 133. pl. 34. Mich. 31 & 32 Eliz. B. R. Bellingham v. Mynors.

10. *Thou haſt play'd the Thief with me, and haſt ſtolen my Cloth and half a Yard of Velvet.* The Defendant ſaid the *Plaintiff was his Taylor, and that upon the Day of &c. he deliver'd him a Yard and a half of* Velvet *to make him* Hoſe, *and he made them too ſtreight, ratione cujus he ſpoke theſe Words*, viz. *Thou haſt ſtolen Part of the Velvet which I deliver'd to thee, abſque hoc* that he ſpoke any Word *aliter vel alio Modo.* The Court was of Opinion that the Plea and Traverſe do not confeſs any Word of Slander, and then the *Traverſe* is meerly void; but becauſe the *Defendant* did not anſwer to the Words *(Thou haſt ſtolen my Cloth,)* it was adjudg'd for the Plaintiff. Cro. E. 239. pl. 7. Trin. 33 Eliz. B. R. Johns v. Gittons.

11. *Thou waſt forſworn in ſuch a Leet ſuch a Day.* The Defendant *pleaded that the Plaintiff the ſame Day with others were ſworn before the Steward to preſent &c. and they preſented ſuch a Ditch not ſcour'd ad Nocumentum &c. which was falſe*, and ſo juſtifies; but did not ſay that they knew it to be falſe of their own proper Knowledge, and they might preſent it upon Evidence. Gawdy and Fenner held that it is properly and commonly to be intended that the Preſentment was falſe of their own Knowledge, and ſo Perjury; and if they preſented upon Evidence, the Plaintiff ought to ſhew it in his Replication. But Popham ſaid a Man may *not juſtify by Intendment*, but it ought to be preciſely alleg'd. Cro. E. 492. pl. 9. Mich. 38 & 39 Eliz. B. R. Wyld v. Cookman. Noy 34. S. C. accordingly; and Popham's Reaſon was, becauſe Perjury is an odious thing, and therefore the Juſtification of it ſhall not be taken by Intendment—

Mo. 537. pl. 701. Wild v. Coopman, S. C. and adds theſe further Words, viz. *And didſt procure others to be forſworn*; and adjudg'd for the Plaintiff, becauſe the Words are actionable, and the Juſtification not good either in Matter or Form; as to the Matter, becauſe tho' one preſents a Thing not true in a Leet he is forſworn, becauſe he may do it upon Information, as Jurors in the Seſſions or Aſſiſes; and as to Form, becauſe he does *not anſwer to the Procurement of others to be forſworn*, and ſo *juſtified for Part only*, and the Reſidue remains without Defence.

12. *And* becauſe it was *not alleg'd that the Ditch was within the Leet*, and if not the Preſentment thereof is out of their Charge, and then no Noy 34. S. C. and S. P. ad-

judg'd accordingly, and says the principal Cause not appear.

Perjury, it was agreed per omnes to be an incurable Fault; and adjudg'd for the Plaintiff. Cro. E. 492. pl. 9. Wyld v. Cookman.

of the Judgment was upon this Reason.——Mo. 537. pl. 701. S. C. but S. P. does

13. Plaintiff declar'd that a Commission issued out of the Exchequer to the Plaintiff, and one J. S. directed, by Force whereof they took and return'd the Examinations of several Witnesses; and that thereupon the Defendant said the *Plaintiff had return'd as Depositions the Examination of divers that were never sworn.* The Defendant *pleads in Bar that he did return the Examination of one J. S. who was never sworn.* Upon a Demurrer it was ruled that this was no good Justification or Bar, because it is of one Witness only, whereas the Charge is in the Plural Number. Adjudg'd for the Plaintiff. Cro. E. 623. pl. 17. Mich. 40 & 41 Eliz. B. R. Fysh v. Thoroughgood.

14. In an Action for scandalous Words, the Defendant *justified for other Words which were scandalous likewise*, and actionable, and therefore the Justification adjudg'd naught. Brownl. 5. Mich. 12 Jac. Stober v. Green.

Brownl. 2. S. C. says, if a Felony be committed it is good Cause to arrest one for Felony, but not to speak Words to defame one.

15. *Thou didst steal a Sack.* The Defendant *pleaded that there was a Sack of a Man unknown stolen, and that the common Fame was, that the Plaintiff had stolen it, whereupon the Defendant did inform* Thomas Kemp *a Justice of Peace &c. that he had stolen*, and in complaining and informing the said Justice thereof, he did *there in the Presence of Kemp and of the Plaintiff, say unto the Plaintiff, and of him, Thou didst steal* &c. quæ est eadem &c. whereupon the Plaintiff demurr'd in Law. Hob. 192. pl. 241. Trin. 14 Jac. Rot. 541. 3 Lee 101. Scarlet v. Stiles.

16. The Plaintiff declares that she was in *Communication of Marriage* with one S. and that to defame her the Defendant spoke these Words, *she hath had three Children, and yet was never married*, per quod &c. And the Defendant *pleads that one G. in the Presence of the Defendant and others, did say the same Words, that a Report was spread thereof, and that the Defendant was cited into the Spiritual Court to certify what he could say therein, and thereupon the Defendant did there testify that he did hear the said G. speak* ut supra, *the which is the same Parlance* &c. Adjudg'd an ill Plea; for the Plaintiff has alleged that he spoke these Words &c. and the Defendant says that he heard one G. speak them &c. quæ est eadem &c. which cannot be; for to speak Words, and to say, I heard another speak them, cannot be the same thing. 2 Roll Rep. 284. Hill. 20 Jac. Scarlet v. Jennings.

2 Roll Rep. 414. adjudg'd against the Defendant.

17. *The Plaintiff is a Thief to you, and a Thief to me, and hath stolen 20 l. from me and 40 l. from you*; the *Defendant said the Plaintiff was a Thief, and feloniously stole 2 Hens from her such a Day*, and so justified; it was the Opinion of the Court, it was no Cause of Justification of all the Words; and the last is as scandalous as the first, and therefore the Action maintainable. And Judgment given for the Plaintiff. Cro. J. 676. pl. 12. Mich. 21 Jac. Hilsden v. Mercer.

18. *F. stole Plate out of my Chamber*; the Defendant said she had lost Plate out of his Chamber, and suspecting the Plaintiff to have stoln it, she spake these Words; the Justification is ill; for suspicion is not sufficient. Cro. C. 52. pl. 10. Mich. 2 Car. Powell v. Plunket.

(M. b. 2) Plea in Bar.

1. IF in an Action for theſe Words, *I will abide by it that C. R. was and is a falſe Thief, and was at my Door the Seſſions-Day at Night, between one and two of the Clock after Midnight, and would have robbed me, and did break open my Doors and put me in Jeopardy of my Life*, the Defendant pleads that the Plaintiff non fuit damnificatus in forma qua &c. this is no good Plea, for he acknowledges the ſpeaking of the Words, and what Damage can there be more grievous than ſuch a Report. Adjudg'd per tot. Cur. D. 26. pl. 171. Hill. 28 H. 8. Ruſſel's Caſe.

2. B. brings Action againſt S. for calling him, *Perjured Man*, and S. *juſtifies that he was perjured in ſuch a Court in ſuch a Depoſition, and pleaded it certainly, and found for the Defendant, and Judgment thereupon* accordingly; afterwards *S. again publiſhes the ſame Words of B. who thereupon brings a new Action for the new Publication, and S. pleads the firſt Judgment in Bar*; adjudg'd without Contradiction a good Bar. 2 Brownl. 49. Hill. 8 Jac. C. B. Styles v. Baxſter.

3. Plaintiff declares that whereas ſhe was of a good Fame and honeſt Reputation &c. the Defendant ſaid of her, *She is a common Whore, and I will prove her one* &c. per quod &c. The Defendant *pleads that* at the time when the Words were ſpoken, *the Plaintiff was not of an honeſt Reputation, as in the Declaration is alleged*; adjudg'd for the Plaintiff, Niſi. Sty. 118. Trin. 24 Car. B. R. Strachy's Caſe.

4. Words ſpoken of the Plaintiff, an Alderman of Norwich, and a Juſtice of Peace, viz. *He is a raſcally Alderman, a factious Alderman, a Lampooner*, and *avers that a Lampooner, is there underſtood to be a Libeller*; the Defendant *pleaded in Bar a former Action* brought by the ſame Plaintiff *for the ſame Words, only that in that Action no Interpretation was given of the Word Lampooner*, and that in that Action the Plaintiff was barr'd; upon a Demurrer, it was objected that the Interpretation of the Word, *Lampooner*, in this Action, make it a different Action from the former, and therefore the Bar in that is no Bar in this. But adjudg'd that the Plaintiff having been once barr'd in an Action for the ſame Words, he ſhall not entitle himſelf to a new Action by a new Interpretation of a new Word. 3 Lev. 248. Hill. 1 & 2 Jac. 2. C. B. Gardiner v. Helvis.

(M. b. 3) Replication. Good.

1. IF in an Action for theſe Words, *Thou haſt forged an Obligation, and I will prove it*; the Defendant *juſtifies becauſe the Plaintiff had forged an Obligation in the Name of J. S.* the Plaintiff *replies, De ſon Tort demeſne* &c. It was moved in Arreſt that it was not ſhewn that the Bond was ſeal'd and deliver'd; but per Cur. it is well enough, for it muſt be ſo intended; for otherwiſe it is not a Bond but a Writing only. It was alſo moved that the Iſſue was not good, becauſe a ſpecial Forgery being alleged, it ought to be ſpecially traverſed; but per Cur. it is well enough; but if not, it is aided by the Statute 32 H. 8. And Judgment for the Plaintiff. Cro. E. 607. pl. 7. Paſch. 40 Eliz. B. R. Wade v. Buſſard.

2. One

2. One cannot *rejoin upon Words which are not in the Declaration nor in the Plea*; for if the Declaration and the Plea be naught, the Replication cannot make them good. Per Roll Ch. J. Sty. 70. Mich. 23 Car. Anon.

(M. b. 4) Words. Rules as to Conſtructions of Words.

1. AN Action on the Caſe does *not lie* for Words, *unleſs ſpoke directly, and in the Affirmative*; for ſuch Action does not lie for Words *by Circumſtance tending to any Slander*. Per Meade. Mo. 182. pl. 325. Trin. 26 Eliz.

* And. 269. pl. 277. S. P. and cites S.C. 2. Where one *gains his Living by a lawful Trade* [* *Science or Art*] as a Lawyer, Phyſician &c. and one defames him in exerciſing of that which he profeſſes and exerciſes, Action lies. Per Cur. 2 And. 41. pl. 26. in Caſe of Hele. v. Gyddy.

3 *Sermo relatus ad Perſonam intelligi debet de Conditione Perſonæ.* 4 Rep. 16. a. pl. 6. Mich. 27 & 28 Eliz. in Birchley's Caſe.

4. Where Words are *ambiguous*, ſo as they may be expounded in good or ill Part, no Action lies; for they ſhall be expounded in the beſt Senſe. Cro. E. 672. pl. 33. Paſch. 41 Eliz. C. B. Anon.

5. In every Action for ſlanderous Words 2 Things are requiſite, 1ſt. That the *Perſon ſcandaliz'd* be *certain*. 2dly, That the *Scandal* be *apparent from the Words themſelves*. Reſolv'd 4 Rep. 17. b. Mich. 41 & 42 Eliz. B. R. in Caſe of James v. Rutlidge.

6. Where the Words ſpoken do *tend to the Infamy, Diſcredit, or Diſgrace of the Party*, there they are actionable; Per Williams J. and this Rule was affirm'd by the Court. Bulſt. 40. Trin. 8 Jac. in Caſe of Smale v. Hammon.

7. Defamation which is actionable, muſt be ſuch as *Præbet Occaſionem Ruinæ*, viz. Ruin *to his Profeſſion and Trade* which ſupports him &c. or Ruin *to his Body, or for which ſome corporal Puniſhment ought to be inflicted upon him*; Per Mountague Ch. J. Palm. 21. Mich. 17 Jac. in Caſe of Godfrey v. Owen.

8. In Actions for Words are to be conſidered *the Words themſelves, and the Cauſa dicendi*; for ſometimes in the firſt Caſe they will bear an Action, and yet when the Cauſa dicendi is conſider'd they will not; Per Barkley J. Mar. 20. pl. 45. Paſch. 15 Car.

9. In Actions for Words ſpoke by Way of Hearſay or Report, if the Defendant *names his Author*, he is diſcharg'd, and the Plaintiff put to bring his Action againſt the Author. See Lev. 82. Mich. 14 Car. 2. B. R. Crawford v. Middleton. And ſee (X. a) pl. 3.

10. Action lies for ſpeaking ſcandalous Words of a Limeburner, or *of any Man of any Trade or Profeſſion, be it ever ſo baſe, if* they are *ſpoke with Reference to his Profeſſion*; Per Keeling, Twiſden and Windham. Lev. 115. Mich. 15 Car. 2. B. R. in Caſe of Terry v. Hooper.

11. Bridgman Ch. J. ſaid he was not ſatisfied to go by *Precedents*, becauſe he held that to be ſcandalous now which was not 20 Years ago; That it is *Uſe makes Words have Force*; *and Words that are actionable now, hereafter may not be ſo.* Cart. 55. Hill. 17 & 18 Car. 2. C. B.

12. It

12. If *Part* of the Words *is actionable*, and *Part not*, yet an Action lies for them which are actionable; Per Roll Ch. J. Sty. 113. Trin. 24 Car. in Case of Smith v. Hobson. When any of the Words are actionable, the Plaintiff shall have Judgment; and so it hath been often adjudged; Per tot. Cur. Cro. E. 788. Mich. 42 & 43 Eliz. C. B. in pl. 28.

13. It is a general Rule, that *where one's Life may be brought in Question*, as to call one Thief, the Words are actionable; Per Wild J. 2 Freem. Rep. 14. pl. 14. Mich. 1671. C. B. in Case of King v. Lake.

14. If the Words be such as do *necessarily relate to his Employment*, the Words are actionable, *without any Colloquium*. Freem. Rep. 277. pl. 309. Mich. 1675. B. R. in Case of Bell v. Thatcher.

15. *Words which of themselves are actionable*, without Regard to the Person, or foreign Help, *must either indanger the Party's Life, or subject him to infamous Punishment*; and 'tis not enough that the Party may be fined and imprisoned; for if one be found guilty of any common Trespass he shall not be fined and imprisoned, yet none will say, that to say one has committed a Trespass will bear an Action, or *at least the Thing charged* upon him *must in itself be scandalous*; Per Cur. 6 Mod. 104. Hill. 2 Ann. B. R. in Case of Ogden v. Turner.

16. To bear an Action, Words must have *a certain Signification*, they must so *reflect upon a Person, that if true he might be liable to some legal Punishment, or if* from the Speaking *some particular Damage does accrue, or is likely so to do, and Costs or Damages, or* [*if it be*] *on a Colloquium of his Trade* [the Words may bear an Action.] Rep. of Cases of Pract. in C. B. 160. Mich. 13 Geo. 2. Per Cur. in Case of Palmer v. Edwards.

(M. b. 5) Scandalum Magnatum.

1. *Westm.* 3 E. 1. *cap.* 34. NONE *shall publish or counterfeit any false News, whereby Discord or Slander may grow between the King and his People, or the great Men of this Realm; And he that so doth shall be kept in Prison until he hath brought him forth into the Court which did speak the same.* Of these false News there are 5 Kinds within this Act, 1st. if they are *against the King*, whereby Discord or Scandal may arise between the King and his Commons, signified here by (People.) 2dly, *Against the Commons*, whereby Discord or Scandal may be moved between them and the King. 3dly, *Against the King*, whereby Discord or Scandal may grow between the King and the Peers, or Lords and Nobles of the Realm, signified here by the Great Men of the Realm. 4thly, *Against the Peers*, or Lords and Nobles of the Realm, whereby Discord or Slander may happen between them and the King. Lastly, Whereby Discord or Scandal may arise between the King, his Lords, and Commons. 2 Inst 227.

2. * 2 *R.* 2. *Stat.* 1. *cap.* 5. *of Counterfeiters of false News of Prelates, Dukes, Earls, Barons, and other Nobles, and great Men of the Realm; and also of the Chancellor, Treasurer, Clerk of the Privy Seal, Steward of the King's House,* † *Justices of the one Bench or of the other, and other Great Officers of the Realm, it is defended that none contrive or tell any false Things of Prelates, Lords, and of other aforesaid, whereof Discord or Slander might rise within the Realm; And he that doth the same shall be imprisoned till he have brought him forth that did speak the same.*

3. 12 *R.* 2. *cap.* 11. *When any such mentioned in the Statute Westm.* 1. *cap.* 34. *and* 2 *Rich.* 2. *cap.* 5. *is taken and imprisoned, and cannot bring him forth that did speak the same, he shall be punished by the Advice of the Council.*

It was resolved by all the Justices, That horrible and slanderous Words *spoken of Queen Mary*, were within this Statute, and punishable hereby, and not by the Statutes of 2 R. 2 cap. 5 or 12 R. 2. cap. 11.

11. for the King or Queen is an exempt Perſon, and not included within theſe Words [The great Men or Nobles &c.] 2 Inſt. 228.

But it is to be underſtood, that albeit the Statute of Weſtm. 1. and of 2 R. 2. be general in the Negative, yet do they not extend to all Manner of falſe News, or horrible and falſe Scandals and Lies &c. for they *extend only to extrajudicial Slanders* &c. And therefore if any Man bring an *Appeal of Murder, Robbery, or other Felony againſt any of the Peers* or Nobles of the Realm &c. and charge them with Murder, Robbery, or Felony, albeit the Charge be falſe, yet ſhall they have no Action de Scandalis magnat' neither at the Common Law, nor upon either of theſe Statutes for the bringing of this Action, nor for affirming the ſame to his Council, Attorney, or Curſitor for the framing of his Writ, or for ſpeaking the ſame in Evidence to a Jury, or for uſing of thoſe Words for the neceſſary Commencement or Proſecution of this Action judicially. And ſo it is in an Action of ** *Forger of falſe Deeds*, or any other Action whatſoever; for it is a Maxim in Law, That *a Man ſhall not be puniſhed for ſuing Writs in the Court of the King, be it rightfully or wrongfully.* And the Reaſon thereof is, that Men ſhould not be deterr'd to take their Remedy by due Courſe of Law; and therefore the Statutes never intended to prohibit the ſuing out of the King's Writs, and the proceeding thereupon. And ſo it is, if in the Star-Chamber a Peer of the Realm be charged with Forgery, Perjury, or the like; but if in the Bill the Plaintiff charge him with Felony, or any other *Offence not examinable in that Court*, that Slander is within theſe Statutes, for that the Plaintiff purſueth not his Charge in any judicial Courſe, ſeeing the Court hath no Juriſdiction of the ſame. And ſo hath it been adjudged. 2 Inſt. 228.

** See pl. 2.

It appears that not only the Tellers and Reporters of ſuch falſe News, but the Deviſors and Inventors thereof are prohibited, but *no Puniſhment is inflicted by the Statute of Weſtm. 1. upon the Deviſer or Inventor, for he is left to the Common Law to be puniſhed by Fine and Impriſonment*, according to the Quality and Quantity of the Offence, which is aggravated, in reſpect that it is prohibited by this Act of Parliament. 2 Inſt. 228.

* It was reſolved that this Statute is a general Law. 2 Mod. 99. Trin. 28 Car. C. B. in Caſe of the Earl of Shaftsbury v. Ld Digby.

† How far it extends to the Judges of both Benches, See Vaugh. 139. in Buſhell's Caſe.

This Caſe is reported at large, Kelw. 26 to 30.——S. C. cited Palm. 189.—S. P. cited Hob. 266. in pl. 352. but cites it as 11 Eliz. which ſeems to be a Miſtake as to the Reign and Year, by reaſon of the Caſe in Dyer, being taken in among the Caſes reported in Trin. 11 Eliz. tho' D. cites it as Mich. 13 H. 7.

2. C. brought a Writ of *Forger of falſe Deeds againſt Ld. B.* and pending the Writ Ld. B. for ſlandering him of Forgery by the ſaid Suit, brought an Action de Scandalis Magnatum. The Defendant juſtified by his having the ſaid Writ before, and concluded that it is the ſame Slander &c. Upon Demurrer the beſt Opinion was that the Juſtification was good, and out of the Intendment of the Law, and Statutes of Slander &c. For no Puniſhment was ever appointed for Suit in Law, tho' it be falſe, and for Vexation; and in this Caſe, the Suit not being determin'd, it cannot be ſaid whether it be true or falſe. D. 285. a. pl. 37. reports it as Mich. 13 H. 7. C. B. Lord Beauchamp v. Sir Richard Croft.

I underſtand my Ld. Aburgany is of late grown into a paſſing Rage, threatning to make my Guts to fly about my Heels, and kill me he will, tho' he ſhould be hang'd within one Hour after the Fact done. A ſtrange Kind of dealing in a Nobleman, and ſuch it is that upon my Complaint unto the Lords of the Council, it hath pleaſed them to take Order for my Safety as the Law doth require.

3. *I have heard that your Lordſhip hath ſought, by uncharitable Means, to bereave me of my Life, Lands, and Liberty*, is actionable, the Words being in a Letter directed to the Lord himſelf. Mo. 142. Arg. cites Trin. 10 Eliz. Lumley (Lord) v. Fox.

The Plaintiff alleg'd that the Defendant ſpoke the ſaid Words, viz. Dixit & contrafecit. The Caſe was that the Defendant never ſpoke thoſe Words, but wrote them in a Letter to B. verbatim, and the Letter was ſhewn to the Jury, but no Proof was offer'd that he ſpoke the ſaid Words; but ſeveral Witneſſes were produced to prove that he ſpoke the ſaid Words to the Privy Council; but there was no direct Proof, but Preſumptions only. The Court ſeem'd that this was within the Compaſs, and a Counterfeiting and Publiſhing; and whether a Man be the firſt Deviſer or not, is not material; for if he be the firſt Reporter afterwards, he is in Danger of the Statute by publiſhing it; and here, tho' he ſays (*I underſtand,*) yet becauſe he *does not vouch his Author*, it ſhall be underſtood that he is the Underſtander and Deviſer. Dal. So. pl. 19. Anno 14 Eliz. Ld. Aburgany v. Cartwright.

S. C. cited by Popham and Clench. Poph. 69.

4. *It is no Marvel that you like not of me; you like of thoſe that maintain Sedition againſt the Queen's Proceedings.* The Defendant *juſtified*, for that the Defendant was Vicar of N. which was a Benefice with Cure, and that the Plaintiff procured J. S. and J. D. to preach in his Church, who inveigh'd

inveigh'd in their Sermons againſt the Book of Common Prayer, and becauſe the Defendant would have hinder'd their Preaching as not licenced, the *Plaintiff ſaid to the Defendant, Thou art a falſe Varlet, I like not of thee*; to whom the Defendant *replied, 'Tis no Marvel, tho' you like not of me; for you like of thoſe* (meaning the ſaid J. T. and J. G.) *that maintain Sedition* (meaning Seditioſam illam Doctrinam) *againſt the Queen's Proceedings.* Reſolved a good Juſtification; for the Senſe of the Words muſt be collected from the Cauſe and Occaſion of ſpeaking them; ſo that in this Caſe, by the Word (Sedition) the Defendant did intend the ſeditious Diſcourſe and Doctrine againſt the Queen's Proceedings upon the Act 1 Eliz. by which the Common Prayer Book is eſtabliſh'd, and not any ſuch publick and violent Sedition as was deſcrib'd, and as Ex vi Termini the Word imports. 4 Rep. 12. b. pl. 1. Trin. 20 Eliz. B. R. Ld. Cromwell v. Denny.

5. *You* (prædict. Epiſc. Innuendo) *have writ a Letter to me, which I have to ſhew, which is againſt the Word of God, againſt the Queen's Authority, and to the Maintenance of Superſtition, and that I will ſtand to prove againſt you.* 500 Marks Damages were given, and the Court, upon good Deliberation, awarded that the Biſhop recover the 500 Marks Damages, and 8 l. Coſts. Cro. E. 1. pl. 2. Hill. 24 Eliz. B. R. Biſhop of Norwich v. Prickett.

6. *My Lord Mordaunt did know that P. robb'd S. and bid me compound with S. for the ſame, and ſaid he would ſee me ſatisfied for the ſame tho' it coſt him* 100*l. which I did for him, being my Maſter, otherwiſe the Evidence which I could have given would have hang'd P.* It was adjudg'd that the Words were actionable, and ſhall be taken in the worſt Senſe, and to the Diſgrace of the Plaintiff. Error was brought in the Exchequer-Chamber, and Error aſſign'd in the Point adjudg'd. Quære. Cro. E. 67. pl. 17. Mich. 29 & 30 Eliz. B. R. Lord Mordaunt v. Bridges. Cro. E. 294. pl. 10. Scroggs v. Ld. Mordaunt, S. C. in Error by the Plaintiff, as Adminiſtrator of Bridges; but nothing ſaid as to the Point adjudg'd, but whether an Adminiſtrator might maintain a Writ of Error.——Mo. 686. pl. 949 S. C. adjudg'd in B. R. and Error brought in the Exchequer-Chamber; and the Point of the Error was argued for the Plaintiff in Error; but nothing more ſaid about it.

7. Words ſpoken in open Seſſions, viz. *You have perverted Juſtice, and to your Shame and Diſhonour I will prove it*, adjudg'd actionable; whereupon the Defendant juſtified, and afterwards the Parties agreed. Mo. 409. pl. 554. Trin. 37 Eliz. Lord Delawarr v. Pawlet.

8. Words were, viz. *The Earl of Lincoln's Men, by his Commandment, did take the Goods of one Hoskins by a forg'd Warrant* &c. It was moved in Arreſt of Judgment that the Words were not ſufficient to maintain the Action, becauſe it was *not averr'd that the Earl knew the Warrant to be forg'd*; and of the ſame Mind was the Court at this Time. Golds. 115. pl. 10. Mich. 39 & 40 Eliz. Lincoln (Earl) v. Michelborn.

9. *My Lord is a baſe Earl and a paultry Lord, and keepeth none but Rogues and Raſcals like himſelf.* The Court divided, whether actionable or not; and afterwards the Defendant died, whereupon the Bill abated. Cro. J. 196. pl. 22. Mich. 5 Jac. B. R. Lincoln (Earl) v. Roughton.

10. The Defendant diſcourſing with T. S. the Servant of the Lord Say, ſaid *Thy Lord is a Traytor, and I will prove it.* Upon Not Guilty pleaded the Lord Say had a Verdict, and 2000 l. Damages. It was moved in Arreſt of Judgment that the Statute was miſrecited; for the Word * *(Lies)* was mention'd inſtead of *(Slander.)* Sed per Curiam, This is a Miſrecital in a *Word not material*, and not in any Subſtance of the Statute, and therefore well enough. 2dly, 'Tis not averr'd that the Plaintiff was a Peer when the Words were ſpoken. Sed per Curiam, 'Tis that the Defendant † *dixit de eodem Vicecomite*, which *is a ſufficient Averment.* Jo. 194. pl. 5. Mich. 4 Car. B. R. Lord Say v. Stephens. Cro. C. 135. pl. 10. S. C. adjudg'd for the Plaintiff.——Ibid. 142. pl. 19. S. C. The Queſtion there was whether a *Writ of Error* in this Caſe might be brought in the Exchequer-Chamber.——Ley's Rep. 82. S. C. and reſolved that Miſrecital of any Part of the Statute

Statute which does not make the Offence, or provide Puniſhment, does not vitiate the Count; and that the Words (Thy Lord) is ſufficient Averment of his being Sheriff [Viſcount] at the Time. And that afterwards it was reſolved that ‡ Error does not lie in the Exchequer Chamber, upon the Statute of 27 Eliz. —— Palm 565. S. C. adjudged accordingly for the Plaintiff.

* Vide pl. 14 in the Notes.

† See pl. 22.

‡ Sid. 143. pl. 20. Paſch. 15 Car. 2. B. R. Earl of Stamford v. Nedham, S. P. adjudged that it does not lie; and ſaid it had been ſo adjudged in Lord Say's Caſe, and alſo in the Caſe of Nevill v. South. ——S. P. cited as adjudged in Lord Say's Caſe. Sid. 240. Arg. in pl. 13.——5 Mod. 230. Arg. cites S. P. held accordingly.

11. The Defendant being a Parſon, ſpoke ſcandalous Words of the Lord Leiceſter in the Pulpit. It was moved in Arreſt of Judgment that this Action being brought on the Statute, it ſhould have concluded *contra formam Statuti*, which not being done, it ſhall be intended an Action at Common Law; and if ſo, then at Common Law theſe Words are not actionable; but adjudg'd for the Plaintiff by 2 Juſtices againſt one. 2 Sid. 21. 30. Mich. 1657. B. R. Ld. Leiceſter v. Mandy.

12 The Defendant being a Parſon ſaid in his Pulpit, *The Lord of Leiceſter is a wicked and cruel Man, and an Enemy to the Reformation*, adjudg'd for the Plaintiff. 2 Sid. 21. 30. Mich. 1657. B. R. Leiceſter (Ld.) v. Mandy.

S. C. cited per Cur. Vent. 60.

13. *My Lord Abergavenny ſent for us, and put ſome of us into the Coal-Houſe, and ſome into the Stocks, and me into his Houſe call'd Little Eaſe*, adjudg'd actionable. Le. 336. pl. 466. cites Lord Abergavenny's Caſe.

Lev. 148. S. C. and the Court ſeem'd to think the Miſericordia ſufficient; but as to

14. Words were, *My Lord is no more to be valued than the Dog that lies there.* After Judgment for the Plaintiff in C. B. it was aſſign'd for Error that there was not any Averment that a Dog did lie there; beſides the Judgment was Quod ſit in Miſericordia, when it ſhould be Quod Capiatur, being founded on a Statute. Sed adjornatur. Sid. 233. pl. 35. Mich. 16 Car. 2. B. R. Probee v. Ld. Dorcheſter.

the other Error, and like to another, which was that the Declaration ſaid *Hæc falſa & opprobrioſa Verba of him, and did not ſay* * *Mendacia, or falſa Nova*, but to theſe the Court ſaid nothing, but adjornatur to be further argued. But in the mean time Proby was kill'd, and his Executors paid the Money, as the Marquis told the Reporter. * See pl. 10.

As where the Defendant ſaid to J. S. a Servant of the Ld. P. viz. *I met J. D. whom I do not know, but my Lord ſent after me to take my Purſe*,

15. There is a Difference between an Action on the Statute De Scandalis Magnatum, and a common Action of Slander; per Cur. And the Ch. J. ſaid *that Words ſpoken* of a common Perſon ſhall be taken in Mitiori ſenſu; but in the Caſe *of a Nobleman* they *ſhall be taken in the worſt Senſe* againſt him who ſpoke them, that the Honour of ſuch great Perſons may be preſerved. Vent. 60. Hill. 21 & 22 Car. 2. B. R. in Caſe of Lord Peterborough v. Mordaunt.

an Action of Scandalum Magnatum lies, tho' not poſitively ſaid My Lord B. ſent after him, or that it was to take the Purſe feloniouſly; which laſt, tho' in Caſe there of an Action by a common Perſon it might be a good Exception, yet otherwiſe it is in the Caſe of a Peer; and Judgment for the Plaintiff. Lev. 277. Mich. 21 Car. C. B. Lord Peterborough v. Mordant.——Vent. 59. S. C. adjudg'd for the Plaintiff.

16. The Foreman of a Grand Jury in Cheſhire ſaid of the Plaintiff, *He is a tedious Man, and a Promoter of Sedition and tedious Addreſſes*; and upon a Motion for *Special Bail* it was denied, and ſo it was to the Duke of Norfolk, unleſs Oath made of the Words ſpoken. 3 Mod. 21. Paſch. 36 Car. 2. B. R. Earl of Macclesfield's Caſe.

2 Jo. 49. S. C. adjudg'd for the Plaintiff, and the rather be-

17. *You are not for the King, but for Sedition and a Commonwealth, and by G-d we will have your Head the next Seſſions of Parliament.* It was moved in Arreſt of Judgment that the Statute was miſrecited, the Words whereof are, That *none ſhall ſpeak any ſcandalous Words of Dukes, Earls* &c.

&c. *the Juſtices of either Bench, nor of any other great Officer* &c. but thoſe Words (nor of) were omitted in the Declaration, which runs thus, *None ſhall ſpeak any ſcandalous Words of any Duke, Earl, &c. Juſtices of either Benches, great Officers of the Kingdom*, ſo that it muſt be conſtrued thus, viz. None ſhall ſpeak any ſcandalous Words of Dukes, Earls, being great Officers &c. and ſo the Plaintiff muſt not only be an Earl, but a great Officer, which is not averr'd. Sed per Curiam, this is a general Law, and need not be recited; it is true, if the Plaintiff will recite a Statute, and miſtakes it in a material Part, it is incurable; but if he recites truly ſo much as will maintain his Action, tho' he miſtakes the reſt, it will not make his Declaration ill; and here the Plaintiff recites, that none ſhall ſpeak any ſcandalous Words of an Earl, which is enough (he being an Earl) to entitle him to an Action, and his Concluſion is, Prout per eundum Actum plenius liquet. 2 Mod. 98. Trin. 28 Car. 2. B. R. Ld. Shaftsbury v. Ld. Digby.

cauſe it was after a Verdict. Freem. Rep. 425. pl. 572. adjornatur.

19. Words were, viz. *My Lord Townſend is an unworthy Perſon, and does things againſt Law and Reaſon*; upon not guilty pleaded, the Plaintiff had a Verdict, and 4000 l. Damages; and upon a Motion for a new Trial, becauſe of the exceſſive Damages, it was denied by 3 Judges againſt Atkins J. becauſe the Jury are the ſole Judges of the Damages. And Atkins J. held that an Action would not lie for theſe Words; but the other 3 held e contra, and ſo the Plaintiff had Judgment. Mod. 232. pl. 22. Hill. 28 & 29 Car. 2. C. B. Lord Townſend v. Hughes.

2 Mod. 150. S. C. with the Arguments of that Counſel, and Judges Seriatim from pag. 149. to 167. adjudg'd for the Plaintiff.

20. The Defendant ſaid of the Plaintiff, *The Earl of Pembroke is of ſo little Eſteem in the Country, that no Man of Reputation hath any Eſteem for him, he is a pitiful Fellow, and no Man will take his Word for two Pence; and no Man of Reputation values him more than I value the Dirt under my Feet.* Reſolved per Cur. that the Words are actionable upon the Statute, though in the Caſe of a common Perſon they are not actionable. And it was ſaid per Twiſden, that if Words be ſpoke of a Peer of the Realm that are actionable in Caſe of a common Perſon, the *Peer hath* his *Election to ſue upon the Statute or otherwiſe.* Freem. Rep. 49. pl. 58. Mich. 1672. C. B. Earl of Pembroke v. Staniel.

Sir Francis North cited the Marquis of Dorcheſter's Caſe, where theſe Words were reſolv'd to be actionable upon the Statute, viz. *He is no more to be valued than that Dog that lies there.* Ibid.

21. It was moved for Leave to *charge* M. being *Priſoner in Newgate, with a Scandalum Magnatum, and ac etiam Billæ of* 100 *l. in Order to hold him to ſpecial Bail* for ſaying the *D. of S. was a Cheat, and had cheated the King and the Army.* Per Holt, this being a poor Man, to charge him thus will be a perpetual Impriſonment to him, and ſpecial Bail has been often demanded in theſe Actions, yet it has been frequently denied; but he was order'd to find 2 that would ſwear themſelves worth 25 l. each, and himſelf be bound in 100 l. 12 Mod. 420. Mich. 12 W. 3. 1700. Duke Schomberg v. Murrey.

22. *Go fetch your Lord out, G——d d——n him, I will kill him; he is a Villain, and a villainous Rogue.* And the Defendant ſpoke other Words, viz. *He is a Scrub and Scoundrel.* It was inſiſted, 1ſt. That the Plaintiff ought to prove himſelf a Peer. Sed non allocatur; for *in his Declaration he * names himſelf Lord Viſcount Falkland one of the Peers of Great Britain*; and if he was not ſo, *the Defendant ſhould have pleaded the Miſnoſmer*; but by pleading in Bar he admits the Plaintiff to be what he ſtiles himſelf. 2dly, That the Plaintiff being a *Peer of Scotland*, was not *intitled to an Action of Scandalum Magnatum* on the Statute 2 R. 2. 5. unleſs he had been a Peer of Parliament; for the Precedents of Actions of this Nature are Vocem & Locum in Parliamento haben' &c. Sed non allocatur; for by the *Statute of Union* 5 Ann. 8. Art. 23. all Peers of Scotland, after the Union, ſhall be Peers of Great Britain, and have Rank and Precedency

* See pl. 10.

&c. be tried &c. and enjoy all Privileges as Peers as fully as the Peers of England now do or hereafter may enjoy, except of ſitting in the Houſe of Lords, and the Privileges depending thereon, and particularly the Right of ſitting on the Trial of Peers. Now the Statute 2 R. 2. 5. extends to other Nobles and great Men of the Realm, as well as to Peers of Parliament, ſo that when the Peers of Scotland are by Act of Parliament made Peers of England or Great Britain, they are Nobles of the Realm; and John Beaumont, who was created Viſcount 18 H. 6. when created noble, tho' by a new Title, was intitled to his Action on this Statute; and tho' ſome Precedents have Vocem & Locum in Parliamento haben', it is not neceſſary. Comyns Rep. 439. Mich. 7 Geo. 2. in the Exchequer, Ld. Faukland v. Phipps.

(M. b. 6) For Slander of Title.

1. A *Remainder-Man in Tail*, brought Action on the Caſe againſt B. for ſlandering his Title, in *affirming that* Tenant in Tail *had Iſſue one D. who is alive.* Adjudg'd that the Action lay. Ow. 37. Mich. 15 Eliz. Bliſs v. Stafford.

S. P. Jenk. 247. in pl. 37. for *immiſcet ſe Rei alienæ ad ſe nihil pertinenti.*

2. *If a Stranger ſays that J. S. has a better Title to the Lands than the Tenant in Poſſeſſion*, and makes no Pretence of Title to himſelf, an Action lies. Mo. 188. in pl. 334. Arg. cites it as adjudg'd in 20 Eliz. Wildgooſe's Caſe.

S. C. cited Arg. Cro. E. 197. in pl. 14. ſays nothing of Attorney and Client, but that for ſuch Words ſpoke by a Stranger, Action lies.——S. C. cited Arg. 2 Le. 112. in pl. 147.

3. *Attorney* tells his Client in private, being about to purchaſe of J. S. that *he had heard* that the Father of the Vendor had *granted a Rent Charge* out of the Land in Fee. Adjudg'd Quod quer' nil capiat. Mo. 187. pl. 334. Hill. 26 Eliz. Johnſon v. Smith.

1 Rep. 177. a. b. Mildmay v. Standiſh S. C. cited and S. P. adjudg'd and affirm'd in Error.——Cro. E. 34. pl. 1. Mich 26 & 27 Eliz. B. R. the S. C. adjudg'd and affirm'd in Error.——Mo. 144 pl. 287. S. C. adjudg'd.——S. C. cited Cro. E 197. in pl. 14.——Mo. 188. in pl. 334. Arg. S. P. cited as adjudg'd in 20 Eliz. Wildgooſe's Caſe.——S. P. agreed by all the Juſtices. Mo. 410. pl. 558. Trin. 37 Eliz. in Caſe of Pennyman v. Rawbanks.——Cro. E. 427. pl. 28; S. C. and S. P. agreed therein.——2 Roll Rep. 409. pl. 49. Trin. 14 Jac. B. R. Lovet v. Weller S. P. where the Plaintiff loſt the ſelling his Land by Reaſon of the Words, and Judgment was ſtay'd.

4. If one *claims a Title to himſelf of the Land of another*, *as* if B. publiſhes that he has a Leaſe of Bl. Acre for 1000 Years, he is not ſubject to an Action of Slander, tho' he has not ſuch Leaſe; for this is *his own Title.* Jenk. 247. in pl. 36.

3 Le. 177. pl. 229. S. C. in totidem Verbis.

5. There is no Difference whether the Words ſlandering a Title be *ſpoke to the Party or to a Stranger*; for in both Caſes the Party is ſlander'd ſo as he cannot make Sale or Exchange of his Lands, which he was in Treaty to do. Per Wray J. And Judgment accordingly for the Plaintiff. 2 Le. 112. pl. 147. Trin. 30 Eliz. B. R. Williams v. Linford.

There ought to be particular Damage ſet forth; and the ſaying that they were ſpoken falſo & malitioſe is not ſufficient, but a Communication of ſelling &c. ſhould appear;

6. In all Caſes when one intitles a Stranger, it is not actionable unleſs it be *ſhewn that ſome Damage comes to the Proprietor by it*, viz. that he cannot let or ſell it &c. Per Wray Ch. J. Cro. E. 197. Mich. 32 & 33 Eliz. B. R. in pl. 14.

year; for there muſt be both Damnum & Injuria. Sty. 169. 1 Mich. 1649. B. R. Cane v. Golding. —And in ſetting forth a Communication of Sale, it ſhould be particularly expreſſed to whom the Sale was to be made. Palm. 529. Paſch. 4 Car. B. R. Harwood v. Lowe.

7. Action upon the Caſe, the Plaintiff declared that he was in *Communication to demiſe* the Manor and Caſtle of &c. at ſo much Rent to R. E. and that the Defendant præmiſſorum non ignara, ſaid, *I have a Leaſe of the ſaid Caſtle and Manor of H. for 99 Years*, and *publiſh'd a Demiſe to be made by one ſeiſed of the ſame before the Plaintiff's Purchaſe thereof, to E. D. her Husband, and offer'd to ſell it, ubi revera*; the *Defendant knew it to be forged*, by Reaſon whereof the ſaid R. E. did not proceed to accept of the ſaid Leaſe. Reſolv'd that Action lies, becauſe the Count alleges that the Defendant knew of the Communication of making a Leaſe to R. E. and alſo that the Leaſe was forg'd, and yet againſt her own Knowledge had affirm'd that it was a good and true Leaſe, whereby the Plaintiff was defeated of his Bargain. 4 Rep. 18. a. b. pl. 14. Mich. 32 & 33 Eliz. Gerard v. Dickenſon. Cro. E. 196. pl. 14. S. C. adjudg'd for the Plaintiff. — S. C. cited Het. 161. 162.

8. If *J. S. hath Land by Deſcent*, and *ſells it to J. D.* and *he offers to ſell it to B.* and *one ſaith to C. in common Diſcourſe, that J. S. is a Baſtard*, and *this cometh to the Ears of B.* yet J. D. ſhall have no Action; for it was *not ſpoken directly to ſlander the Title of J. D.* but oblique this is no Slander; *but* if he had ſaid to B. *Take heed How you buy the Land, for J. S. was a Baſtard*, Action lieth; for it was directly ſpoken to that Purpoſe to ſlander the Title. Cro. E. 346. per Popham Ch. J. Mich. 36 & 37 Eliz. B. R. in pl. 17.

9. Plaintiff declared that W. B. Brother of the Defendant, had married one J. who died, and after the Plaintiff married her, and whereas the *Plaintiff and the* ſaid J. (innuendo *his Wife*) *as in her Right, were ſeiſed of certain Lands*, as well Freehold as Copyhold, and of the Freehold had *levied a Fine to the Plaintiff and his Heirs, who offered to ſell the Lands, for the Payment of his Debts*, to J. S. The Defendant ſaid, *She* (innuendo the Wife of the Plaintiff) *was never lawful Wife of my Brother W. B. for ſhe was married before to one N. K. who is yet alive, which Marriage is fully to be, and hath already been as fully, proved as any other Marriage can be proved*; and by Reaſon of theſe Words none would buy the Lands. Gawdy and Clench conceived that the Action lies; for it is brought for ſlandering his Title, and not his Perſon, and the Law intends it was a good Marriage with K. and that no Divorce was except the contrary be ſhewed. But Fenner e contra, and that the Action lies not by the Prejudice of the Sale. Popham ſaid that all the Words might be true, and yet ſhe might be the lawful Wife of the Plaintiff; for it may be ſhe was pre-contracted to the Plaintiff, and afterwards married K. and then to W. B. and then divorced from K. and married to the Plaintiff. Adjornatur. Cro. E. 346. pl. 17. Mich. 36 & 37 Eliz. B. R. Bold v. Bacon.

10. In Caſe for Slander of Title, the Plaintiff need not *ſhew what Eſtate* he had therein; for his Seiſin of any Eſtate is ſufficient; Per tot. Cur. Cro. E. 419. pl. 14. Mich. 37 & 38 Eliz. B. R. Marvin v. Maynard.

11. Action for ſlandering his Title, for that he ſaid to J. S. who was *in Speech to buy* the Plaintiff's Land, *I know one who hath two Leaſes of his Land, who will not part with them at any reaſonable Rate*, ubi revera there was no ſuch Leaſe. The Defendant *juſtified by two ſeveral Parol Leaſes made to himſelf*. It was the Opinion of the Juſtices, that the Words, as they are ſpoken, ſhall not be intendable of himſelf, but of ſome other Perſon, and imports a Slander; and the *Juſtification after ſhall not take away the Action* which was *given before*. And adjudged for the Plaintiff, but Mo. 410. pl. 558. S. C. Popham ask'd whether one that had ſpoken Words, purporting that a third

but

Perſon had Title, he could afterwards ſave himſelf by applying it to himſelf for his Juſtification; and he held that he could not; but Gawdy and Fenner held that he might; to which Popham replied, that then no Man could ever have an Action for ſlandering his Title.

but Fenner e contra. Cro. E. 427. pl. 28. Mich. 37 & 38 Eliz. B. R. Penniman v. Rabanks.

12. A. has no Title to *Upton*, *Innuendo Upton-Grey*. Held that the Innuendo ſufficiently ſerves to ſhew his Intent, what he meant in naming Upton; for it is uſually *known without the Addition*, and might be call'd ſo; wherefore the Innuendo ſtands well with his ſpeaking; but if without the Innuendo it could not by any Intendment be taken ſo, it might have been otherwiſe. And in Action on the Caſe for thoſe Words Judgment pro Quer. Cro. E. 419. Mich. 37 & 38 Eliz. B. R. Marvin v. Maynard.

13. *He had rather buy the Title of B.* (who was the Plaintiff's younger Brother) *than the Title of the Plaintiff*; and further ſays, *he had ſeen an Indenture to lead the Uſe of a Fine, whereby appeared that the Plaintiff had no Authority to ſell the Land.* Not actionable. Yelv. 80. Mich. 3 Jac. B. R. Cruſh v. Cruſh.

14. *Thy Brother was a Fool, and was never born to do himſelf any Good, for that he could not hold his Hand from ratifying his Father's Will; notwithſtanding I have that to ſhew in my Houſe, that if his Heir El. G. do not any ſuch Act as her Father has done, it ſhall bring her to inherit Titſley.* The Plaintiff alleged that he had an Intention to make a Jointure to his Wife &c. But adjudged the Words would not bear Action, the Plaintiff not having laid that he was about to ſell it, or had enter'd into Bond to make a Jointure, and by Reaſon of thoſe Words it would not be accepted. Yelv. 88. Paſch. 4 Jac. B. R. Sir Tho. Gretham v. Grinſley.

15. The Earl of A. gave a Manor to the Plaintiff in Tail. The Defendant was a Copyhold Tenant of an Houſe, and Lands held of the ſaid Manor for Life; and the Plaintiff being in Treaty to make a Leaſe to P. for 500 l. to commence after the Defendant's Death, the Defendant ſaid *the late Earl of A. made a Leaſe of my Tenement to one S. for 60 Years, to begin after my cuſtomary Eſtate ended, and the ſame is a good Leaſe*; by Reaſon whereof P. nor any other would not give him 10 l. to make a Leaſe. The Defendant juſtified, that the Earl of A. before the Gift made ſuch a Leaſe to S. for 60 Years, and that S. conveyed it to him. Reſolved by the Court the Words ſhall be taken in the worſt Senſe, according to his Intent, which he ſpake when he affirm'd it to be a good Leaſe. And the Words themſelves imply that he ſpake them to countenance the Title of a Stranger, which is not lawful; and * now he cannot excuſe himſelf, when at the firſt the Words did not import ſo much, and he cometh too late now to juſtify. It was adjudged for the Plaintiff. Cro. J. 163. pl. 18. Paſch. 5 Jac. B. R. Earl of Northumberland v. Birt.

* S. P. Per 3 Juſtices. Palm. 531. Paſch. 4 Car. B. R.

16. In an Action on the Caſe for calling the Plaintiff Baſtard, the Plaintiff ſet forth that his Grandfather was Tenant in Tail of Lands, with divers Remainders over; that his Father was the Iſſue in Tail, and that he was his youngeſt Son; and that W. R. was about purchaſing the Land, and offered him a Sum of Money for his Title, and to join in the Conveyance; but afterwards, by Reaſon of ſpeaking thoſe Words, he refuſed to give him any Thing. After Judgment for the Plaintiff, Error was aſſigned, that the Plaintiff hath *not aſſigned any ſpecial Loſs*, for upon his own ſhewing he had no preſent Title. But adjudged, that tho' he had not a preſent Title, yet is appears that by Poſſibility he might inherit the Eſtate Tail; and being offered Money for that Poſſibility to join in the Conveyance, he had a *preſent Loſs and Damage* by ſpeaking thoſe

thoſe Words, and in futuro he might receive Prejudice thereby, in Caſe he was to claim any Land by Deſcent. So the Judgment was affirm'd. Cro. J. 213. pl. 6. Mich. 6 Jac. B. R. Vaughan v. Ellis.

16. The Plaintiff had Lands *by Deſcent*, Part whereof he *intended* to ſettle on his Son, and to make a Leaſe of other Part; and to fruſtrate his Intent, the Defendant ſaid *that he* (the Plaintiff) *had no more Right to the Land than a Stranger*. Not actionable, becauſe he had an Intent to ſettle the Land, which might be ſecret, he ſhould have ſhewn that he was in Communication to ſettle it, or make Leaſes; ſo that there is no ſufficient Cauſe of Loſs. And adjudged for the Defendant, notwithſtanding the Precedents in the new Book of Entries, fol. 55. Cro. J. 397. pl. 3. Paſch. 14 Jac. B. R. Smead v. Badley. Roll Rep. 244. pl. 12. Swead v. Badley, S. C. adjudged againſt the Plaintiff. — 3 Bulſt. 74. S. C. adjudged accordingly.

18. E. the Plaintiff had Lands by Deſcent, and the Defendant ſpeaking of his Wife ſaid, *Shall Elborough's Wife ſit above my Wife? He is but a Baſtard.* All the Court, præter Doderidge, held that theſe Words in themſelves are ſcandalous, and dangerous to cauſe his Inheritance to be queſtioned; and ſo the Plaintiff had laid it in his Declaration, that he was put to great Charges to defend it. But Doderidge ſtrongly e contra, that neither the Words themſelves, nor the Manner of ſpeaking them, do import any Slander, but obliquely; and the Allegation of the Plaintiff ſhall not help them. But by the other 3 the Plaintiff had Judgment. Cro. J. 642. pl. 2. Mich. 20 Jac. B. R. Elborow v. Allen. 2 Roll Rep. 248. S. C. adjudged, abſente Doderidge. — Palm. 299. S. C. adjudged by 3 Juſtices for the Plaintiff.

19. If I have *Colour of Title* to Land, and I ſay to another, I have better Title to the Land than you, yet an Action will not lie againſt me, tho' my Title be not ſo good as the Title of the other is; Per Roll Ch. J. Nota. Sty 414. Hill. 1654. Anon.

20. In Caſe for Scandal of Title, it was agreed that the *Defendant claim'd Title*, yet if it be *found by Verdict to be done Malitioſe*, the Action lies; but if upon the Evidence *any probable Cauſe of Claim* appeared, it ought not to be found Malitioſe. 3 Keb. 141. pl. 11. Paſch. 25 Car. 2. B. R. Goulding v. Herring.

21. *M. hath mortgaged all his Lands for* 100 *l. and has no Power to ſell or let the ſame.* And becauſe no ſpecial Damage, nor particular Colloquium was laid of a Treaty to ſell them to any Perſon certain, but only in general, that he *intended to ſell it to any that would buy*, which is too general, the Judgment was ſtay'd. 3 Keb. 153. pl. 27. Paſch. 25 Car. 2. C. B. Manning and Avery. Freem. Rep. 274. pl. 301. S. C. and it being urg'd that the laſt Words were actionable, it was anſwered, that theſe ſhall have Relation to the firſt. And Judgment for the Defendant, Niſi.

22. *I have a Surrender of the Lands of B. and intend to ſue for the ſame, and the Plaintiff has no Title.* Adjudged for the Defendant Niſi &c. becauſe the Defendant claims Title himſelf, and ſo the Plaintiff hath none. 3 Keb. 744. pl. 10. Paſch. 29 Car. 2. B. Cock v. Heathcock.

Fol. 88.

(N. b) Nuſance. [In what Caſes Action ſur le Caſe will lie for a Nuſance, and againſt whom.]

Cro. E. 664. pl. 14. S. C. and Popham, Gawdy, and Fenner held, that without a ſpecial Grief ſhewn by the Plaintiff the Action lies not; but Clench e contra, for the ſtopping it is a ſpecial Prejudice to the Plaintiff, that he cannot go that Way, and ſo reaſonable that he ſhould maintain the Action. Sed adjornatur.—— Mo 180. pl. 321. Paſch. 26 Eliz. S. P. accordingly ——Br. Action ſur le Caſe, pl. 6. cites 27 H. 8. 26. 27. S. P. by Baldwin Ch. J accordingly; but by Fitzherbert J. where one has greater Damage than another, as in the Caſe put by Baldwin of Stopping a Highway, ſo that I cannot go from my Houſe to my Cloſe, I ſhall have an Action.——Br. Nuſance, pl. 1. cites S. C.——S. C. cited by Mountague Ch. J. 2 Roll Rep. 4. And that for a common Nuſance none ſhall have a particular Action, cites 33 H 6. 26.—S. P. 9 Rep. 113. a. accordingly per Cur. Arg.

1 Salk. 16. pl. 7. Trin. 11 W. 3. B. R. in the Caſe of Iveſon v. Moore, ſays all the Court agreed, That where an Action ariſes from a publick Nuſance, there muſt be a ſpecial Damage, becauſe he that did the Nuſance is puniſhable at the Suit of the Publick; and to allow all private Perſons their Actions, without ſpecial Damage, would create an endleſs Multiplicity of Suits.

1. If a Man be diſturb'd from going in a common Highway, or if a Ditch be made acroſs the Way, ſo that he cannot paſs, yet he ſhall not have an Action upon the Caſe for this for the Multiplicity of Suits; for if he may, every Man may, have ſuch Action; and the Law has provided another proper Remedy for this common Nuſance, viz. a Preſentment in the Leet or Turn. Co. Lit. 56. where is cited Trin. 41 Eliz. B. R. between *Fineux and Hovenden* reſolved.

Cro. J. 446. pl. 25. Mich. 15 Jac. B. R. Fowler v. Sanders, S. P. adjudg'd, and ſeems to be S. C.—— 2 Roll Rep. 49. cites Fuller v. Sanders, S. C. adjudg'd ——S. C. cited Cro. J. 491. —— See Tit. Nuſance (B) pl. 1. S. C.

2. If a Man puts Logs of Wood ſparſim in a Highway, and ſuffers them them to continue there for two Months, or other ſuch long Time, tho' a Man may with great Care, and in the Day, paſs ſafely, yet if I ride in the Way, not perceiving the Logs, and my Horſe ſtumbles upon the Logs, whereby he falls and throws me, by which means I receive any Damage, (ſcilicet, ſeveral Wounds, as the Caſe was) I may have an Action upon the Caſe againſt him for this Special Damage received, tho' this laying of Logs in the Way be a common Nuſance. Hill. 15 Jac. B. R. adjudg'd between .....

If a Man lays *Logs of Timber in the Highway adjoining to his Houſe*, by which the Cart of one was overthrown, this is not Nuſance; but the Plaintiff ſhall recover in Action on the Caſe. 2 Roll Rep. 49. cites it ſo reſolved in the Caſe of Fuller v. Sanders, in B. R. about 14 Jac.

For *General* Nuſance every particular Man ſhall not have *Action*, unleſs he has *Special Prejudice*; but every Man may *abate it*.

But for *Particular* Nuſance a Man may have his Action, and by this means abate the Nuſance, and recover Damages, or may abate it. Jo. 222 per 3 Juſtices, Paſch. 6 Car. B. R. in Caſe of James v. Hayward.

Cro. E. 664. pl. 14. S. C. & S. P. admitted per Cur.—— Mo. 180. pl. 321. Paſch. 26 Eliz. S. P. admitted per Cur. ——Br. Action ſur le Caſe, pl. 6. cites 26 H. 8. 26. 27. S. P. accordingly.——Br. Nuſance, pl. 1. cites S. C.——Vaugh. 341. S. P. by Vaughan Ch. J. accordingly, Arg. and S. C. cited in Marg.

3. So if a Man makes a Ditch overthwart a common Highway, whereby my Horſe falls into the Ditch, or if I have any other particular or ſpecial Damage, I may have an Action upon the Caſe for it. Co. Litt. 56. where is cited Trin. 41 Eliz. B. R. between *Fineux and Hovenden*, reſolved.

Where the Party griev'd has received ſome *Special Damage* by it, *or can have no other Remedy*, an Action lies. Admitted. Carth. 193. Trin. 3 W. & M. B. R. in Caſe of Pain v. Partrich.

Cro. J. 158. pl. 11. S. C. adjudg'd

4. If A. ſeiſed of a Waſte adjacent to a Highway, digs a Pit in the Waſte within 36 Foot of the ſaid Way, and the Mare of B. eſcapes into the

the ſaid Waſte, and falls into the ſaid Pit, and there dies, yet B. ſhall not have any Action againſt A. becauſe the making of the Pit in the Waſte, and not in the Highway, was not any Wrong to B. but it was the Default of B. himſelf that his Mare eſcaped into the Waſte. Paſch. 5 Jac. B. R. between *Blithe and Topham*, adjudg'd. upon the Declaration, and not upon the Verdict, that the Bill ſhould abate; for when the Mare was ſtraying, and he ſhews not any Right why his Mare ſhould be in the ſaid Common, it was no Wrong to him, and tho' his Mare fell in he has no Remedy, and ſo it is Damnum abſque Injuria.—— S. P. Arg. Vent. 295.

5. If a Man digs a Ditch in the Highway, into which my Servant falls, and breaks his Thigh, by which I loſe his Service for a long Time, I ſhall have an Action upon the Caſe againſt him for this Loſs of Service. Hill. 12 Jac. B. R. in *Everard and Hopkin's Caſe*, per Curiam. 2 Bulſt. 334. S. P. by Croke, and agreed per tot. Cur. in the S. C. obiter.——

S. P. agreed by Coke, Crooke, and Doderidge. Roll Rep. 124. pl. 6. in S. C.——(B. c) pl. 5. S. C. but not S. P.

In Caſe for digging a Pit in the Highway, *per quod J. S. for whoſe Life the Plaintiff had a Leaſe, fell therein and was drown'd*, it was doubtful if this Action lies. Cited by Windham J. Keb. 847. Hill. 16 & 17 Car. 2. B. R. in pl. 44.

6. If A. be Owner of an Inn in D. and B. has a Houſe next adjoining thereto, and B. in a Room in his Houſe next to the Inn erects a Furnace, in which he melts ſtinking Tallow and ſtinking Greaves, by reaſon of the ill Smell whereof the Gueſts of the Inn forbear to come thither, to the Damage of the Inn-keeper, A. the Inn-keeper ſhall have an Action upon the Caſe againſt B. for this Nuſance. Mich. 14 Car. B. R. between *Morly*, Inn-keeper of the George in Baſingſtoke, *and Pragnel*, adjudg'd per Cur. this being moved in Arreſt of Judgment; and in Truth, upon the Evidence, it appear'd that the Defendant was a Chandler, and he melted it for the uſe of his Trade. But there it was proved that his Tallow and Greaves was not like the Tallow and Greaves of other Chandlers; for this is a Nuſance to the whole Town, and ſo preſented at the Leet; and the Reaſon of the Nuſance was, becauſe he kept the Greaves ſo long before he melted it, that it ſtunk, and had ſuch an ill Smell. But this Queſtion whether it lay againſt a Chandler * came not in Queſtion in the King's Bench, becauſe it did not appear in the Declaration that he was a Chandler. Intratur 14 Car. Rot. 549. Trin. 8 Hen. 4. Rot. 57. Willielmus Wilburn recuperet per Juratam per Villam ſuam in qua queritur verſus Johannem Cutting, Cook, de eo quod ipſe Johannes apud Weſtmonaſterium † vendebat dicto Wilhelmo unum caponem piſtum corruptibilem & recalefactum, qui capo aſſatus per 4 Dies in Hoſpitio Domini Regis, & iterum calefactus, & piſtus extitit, de quo poſtquam edit, vomitum horribilem fecit, ita quod infirmabatur per 2 ſeptimanas, recuperat inquam 20 s. pro damnis. (And I have been inform'd that it appears upon the Record at large, that the Juſtices increaſed the Damages. Cro. C. 510. pl. 3. S. C. adjudg'd for the Plaintiff. —See Tit. Nuſance (G) pl. 18. and the Notes there. † See (P. b) pl. 2. S. P. An Action lies againſt a *Glover*, becauſe he *with a Lime-pit ſo corrupted the Water, that the Tenants departed.* Arg. Hutt. 136. cites 13 H. 7. 26.

* Fol. 89.

7. In an Action upon the Caſe, if the Plaintiff declares that whereas he was poſſeſs'd of a Cloſe call'd D. and the Defendant poſſeſs'd of another Cloſe call'd S. next adjoining to the Plaintiff's Cloſe, the Defendant maliciouſly intending to deprive the Plaintiff of the Profit of his Cloſe, maintain'd a Houſe for ſeveral Years before erected upon his Cloſe; and for one Year before the Action brought uſed this Houſe for a Smelting-Houſe for Lead, and the Chimney of the ſaid Houſe ſo exaltavit, and for the ſaid Year ſo continuavit, that by the Exaltation and Continuation thereof the Smoke aſcended out of the ſaid Chimney per vim ventorum upon the Cloſe of the Defendant aſſiatur & diſſipatur ſo that by ſuch uſe of See Tit. Nuſance (G) per totum. *Caſe*, for that he was poſſeſs'd of a Houſe and Garden for 20 Years, and the *Defendant being a Butcher* had a Slaugh-

See Hetley's Case next following, that the Defendant exalted his Yard, and made a Ditch, whereby he conveyed the Filth and Offal into the Plaintiff's Garden. Upon Not Guilty pleaded, it was found for the Plaintiff; but Judgment was arreſted for a Variance between the Writ and the Declaration Cro. E. 829. Paſch. 43 Eliz. C. B. Norton v. Palmer.

of the ſaid Smelting-Houſe and Chimney, and Continuation thereof, all the Graſs and Wood of the Plaintiff in his ſaid Cloſe growing and being, ſo ſuffocata, corrupta, & putrida fuerunt, with the Fume (ſcilicet Smoke) of the ſaid Chimney, out of the ſaid Chimney coming, that by reaſon thereof the Plaintiff had loſt all the Graſs and Wood of his ſaid Cloſe there growing, and alſo had loſt 2 Horſes and 1 Cow, that were depaſturing in the ſaid Cloſe; tho' this is a lawful Trade, and for the Benefit of the Commonwealth, and neceſſary, yet the Action lies; for he ought to uſe it in waſte Places and great Commons, remote from Incloſures, ſo that no Loſs or Damage might ariſe thereby to the Proprietors of Lands adjoining thereto; tho' I objected that in ſuch waſte Places other Men have Common for Cattle, that may be prejudiced thereby alſo. Mich. 15 Car. B. R. between *Poynton and Gill*, adjudg'd per Jones & Barkly, no other of the Judges being preſent, this Matter being moved in Arreſt of Judgment, after a Verdict for the Plaintiff. Intratur Hill. 14 Car. Rot. 648.

An Action on the Caſe for *erecting a Tanfat*, with Averment of corrupting the Air and Water, to the Annoyance of the Plaintiff; and after Verdict adjudg'd for the Plaintiff. Hutt. 136. Arg. cites 5 Jac. Smith v. Mopham.

See Tit. Commoner (A) &c. So in Caſe for a Stranger's *digging Clay* in the Land where the Plaintiff had Common, and carrying away the ſame over the Common, per quod he could not uſe it in tam amplo modo &c. adjudg'd for the Plaintiff in C. B. and affirm'd in B. R. by 3 Juſtices; but Haughton e contra.

8. If a Copyholder by the Cuſtom of a Manor has uſed to have Common for all his Cattle, levant and couchant upon his cuſtomary Tenement in a certain Place Parcel of the Manor, and a Stranger digs Turfs there, and carries them away, per quod his Common is impair'd, an Action upon the Caſe lies, declaring that the Defendant dug ſo many Turfs there, and them with his Horſes and Carts herbam tunc & ibidem creſcentem pedibus ambulando & conculcando from the Place aforeſaid minus rite ceperit & abcarriavit per quod querens Communiam ſuam prædictam pro averiis ſuis &c. in tam amplo & beneficiali modo, prout preantea habuit &c. habere non potuit; this is a good Declaration, tho' the Commoner cannot have any Damage for the taking and carrying away of the Turf, yet the coming upon the Land with his Horſes and Carts to carry them, is a Prejudice to the Common, and there per quod his Common is impair'd, is the Cauſe of the Action, and the carrying and taking them is a Means of the impairing thereof. Mich. 9 Car. B. R. between *Terry and Goodier*, adjudg'd, this being moved in Arreſt of Judgment upon ſuch a Declaration, the Damages being intire. Intratur Trin. 9 Car. Rot. 49.

Godb. 343. pl. 437. Trin. 21 Jac. B. R. Bullen v. Sheen.——2 Roll Rep. 308. Shean v. Bullen, S. C. adjornatur.——Ibid. 344. adjudg'd in B. R. by 3 Juſtices; and ſays that Ley Ch. J. and Doderidge took a *Difference between Treſpaſs and Treſpaſs on the Caſe*; and the Reporter ſays, Nota the Reaſon of the Judgment was upon the Concluſion of the Plea, viz. Per quod non potuit &c.——Palm. 366. S. C. adjudg'd, and affirm'd accordingly.

In Caſe the Plaintiff counted that he was ſeiſed of the Manor of C. and preſcrib'd for Common for 400 Sheep in L. as pertaining to his Manor, and the Defendants with their Sheep eat the Graſs there growing, per quod he could not enjoy his Common there in tam amplo modo &c. and upon Not Guilty the Plaintiff had Verdict, Judgment, and Execution. 9 Rep. 113. a. Coke Ch. J. cites Trin. 41 Eliz. Holland v. Lovel.——2 Brownl. 148. S. C. cited per eundem, and ſays that inaſmuch as the Plaintiff may take them Damage feaſant, it proves that he has Wrong, and therefore may diſtrain Damage feaſant; and for the ſame Reaſon, if the Beaſts are gone before, he may have Caſe; for otherwiſe one that has many Beaſts may deſtroy all the Common in a Night, and not be puniſh'd, and ſo differs from a Nuſance which is publick, and may be puniſh'd in a Leet.——Jenk. 144. pl. 96. at the End, S. P.

So Caſe lies for a Copyholder, having Right of Common, againſt a Stranger for putting Beaſts into the Common, and depaſturing there, per quod in tam amplo modo &c. 9 Rep. 111. b. Trin. 10 Jac. Mary's Caſe, alias, Crogate v. Marys.——2 Brownl. 55. S. C. and by 3 Juſtices the Action lies; but Foſter e contra, becauſe then every Commoner might have Action, and ſo would be infinite.

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The Lord may have Action for any Treſpaſs done on the Common, more or leſs, as being immediate to him; but the Commoner ſhall have it only where it is ſuch, per quod proficuum Communie ſine &c. amiſit; or that he cannot have his Common in tam amplo modo, as before. 9 Rep. 113. a. Reſolv'd in Mary's Caſe, alias, Crogate v Murys.

9. If J. S. hath Lands adjoining to the Lands of J. D. in which ſeveral Tenants hath Common of Paſture, and J. S. ſtores his Lands with Coneys, without any lawful Grant or Preſcription, whereby the Coneys go into the Lands of J. D. and eat the Graſs there, whereby the Commoners cannot have ſufficient Common for their Cattle, yet a Commoner cannot have an Action upon the Caſe againſt J. S. for this Matter, becauſe * when the Coneys go out of his Lands he is not the Owner of them, but the poſſeſſory Property of them is in J. D. who is the Owner of the Soil where the Commoner hath Right of Common, and where the Coneys are, and the Commoners may † kill them. Mich. 10 Car. B. R. between *Hunſley and Wilkinſon*, adjudg'd per Curiam, contra Barkly, in a Writ of Error upon a Judgment in Banco, and the Judgment reverſed accordingly. Intratur Hill. 8 Car. Rot. 302. But after this was adjourn'd to Paſch. 11 Car. Fol. 90.

See Tit. Commoner (A) pl. 4. Everſley v. Wilkinſon, S. C. contra.——Cro. C. 387. pl. 20. S. C. and ruled by all the Juſtices in B. R. præter Barkley, who doubted thereof, that the Judgment in C. B. be reverſed; and Crooke J. ſaid he had conferr'd with 3 Judges of C. B that they did not remember ſuch Caſe there, but that it paſs'd ſub ſilentio——Jo. 356. pl. 5. S. C. and Judgment in C. B. reverſed.

So where they come into the Lands of a Neighbour he may kill them; but Action on the Caſe does not lie. 5 Rep. 104 b. Mich. 39 & 40 Eliz. C. B. Boulſton's Caſe.——Mo. 420. pl. 580 Anon. but ſeems to be S. C. held not actionable; for when they are out of the Conigree they are not His Conies. ——Ibid 453. pl. 621. Boulſton v. Hardy, S. C. held by all the Juſtices not to be actionable.——Cro. E. 547. pl. 21. S. C. adjudg'd accordingly.——S. C. cited 2 Bulſt. 116. Arg.

* Mo. 421. pl. 580. Mich. 37 & 38 Eliz. Anon. S. P.

† See Tit. Commoner (A)

10. The Declaration in Action for ſtopping a Way was, That he *hath a Way, and the Defendant obſtructed it ſo that the Plaintiff cannot have it*; and therefore *repugnant* (habet & habere non poteſt) by ſeveral, and ill. Quære. Br. Action ſur le Caſe, pl. 12. cites 33 H. 6. 26.

11. A Man who *has a particular Hurt or Damage* in any Caſe, ſhall have *Action upon the Caſe againſt* him who does a common Nuſance; as *by ſtopping the King's Highway*, and the like, *as if he cannot go to his Houſe*, or *to his Paſture, by reaſon thereof, or that he and his Horſe in the Night fell into the Ditch*, and ſuch like; per Fitzherbert clearly. 27 H. 8. 26. b. 27. Br. Nuſance, pl. 1. cites 26 H. 8. 2. 28. but the Year is miſtaken, and likewiſe the Print in the Beginning of the pl.——Mo. 180 pl. 321. S. P. Paſch. 26 Eliz. Anon——S. P. per Fitzherbert J. But per Baldwin Ch. J. contra, that the ſtopping the King's Highway ſhall be puniſh'd by the Leet, and every Man grieved ſhall not have an Action of it. And there Fitzherbert ſaid, That *where one Man has more Damage than another*, he ſhall have Action on the Caſe. Br. Action ſur le Caſe, pl. 6. cites 27 H. 8. 26. 27.

But where a *common Way is not repair'd, ſo that I mire my Horſe*, I ſhall not have Action againſt him who ought to repair it; for that is the People, and ſhall be reform'd by Preſentment. Quod nota per Heydon. Br. Action ſur le Caſe, pl. 93. cites 5 E. 4. 3.——S. C. cited Mo. 180. pl. 321. Anon.

12. Caſe, for *ſtopping Water inceſſanter decurrent' by his Land, by which his Land was drown'd, and his Graſs rotted.* Exception was taken, becauſe it is *not alleg'd that the Water had ſo run Time out of Mind.* But per Gawdy J. If the Water had run there but for one Year, yet if Defendant diverts it ſo as it drowns the Plaintiff's Land, the Action will lie well enough. 4 Le. 193. pl. 305. Paſch. 30 Eliz. C. B. Smith v. Babb.

13. The Inhabitants of Southwark had by Cuſtom a *common Watering-Place* for their Cattle, and the Defendant ſtopp'd it up. Adjudg'd that any Inhabitant of S. might have an Action; for otherwiſe they would be without Remedy, ſuch a Nuſance not being prefentable Cro. E. 664 pl. 14. in Caſe of Fitzeuſ v. Haverden, cites

S. C. as adjudg'd, and for the ſame Reaſon.——Infra (O. c) pl. 3. S. C. but ſeems miſplaced there, as not anſwering the Head.

ſentable in the Leet or Tourn. Co. Litt. 56. a. cites Weſtbury v. Powell.

Keb. 847. pl. 44. Hill. 16 & 17 Car. 2. B. R. the S. C. and Hyde and Windham ſaid the Court will not, after a Verdict, intend any other Way, and that this is ſufficient Special Damage; and Judgment was affirm'd.

14 Plaintiff declar'd *that there was a Highway leading from A. to B. and that he had a Cloſe in A. ſow'd* with Corn, viz. &c. and ſhews what &c. *and that he lived in B. and that this Way was the moſt convenient*, & maxime propinqua via *for carrying his Corn from his Cloſe to A. to his Houſe in B.* and that he had ſo many Load of Corn ready to be carried &c. *and the Defendant ſtopt the Way, ſo that he could not carry his Corn* &c. *and in the mean time Rain fell and ſpoil'd his Corn.* After Verdict for the Plaintiff Judgment was given for him in C. B. ſub ſilentio; and upon Error brought in B. R. Error was aſſign'd that the Action would not lie; but adjudg'd that it would. Cited by Holt Ch. J. Arg. Ld. Raym. Rep. 494. as enter'd Mich. 14 or Hill. 14 & 15 Car. 2. B. R. Rot. 271. Maynell v. Saltmarſh.

2 Keb. 575. pl. 93. S. C. & S. P. agreed accordingly, per Cur.—Vent. 48. S. C. is of a Way to his Meſſuage thro' another's Freehold, and the Way is ſtopt, and then the Houſe is alien'd, the Alience can bring no Action for this Nuſance before Requeſt.

15. In a Special Action on the Caſe for *keeping a Paſſage ſtopt up, ſo that the Plaintiff could not come and cleanſe his Gutter* &c. It was moved in Arreſt of Judgment, that there ought to have been a Requeſt to open it. Per Cur. It is aided by the Verdict; but by Twiſden J. the *Defendant might have demurr'd.* Judgment for the Plaintiff. 1 Mod. 27. pl. 71. Mich. 21 Car. 2. B. R. Tomlin v. Fuller.

16. Caſe &c. for a Nuſance in *building a Smith's Forge near the Plaintiff's Houſe* in S. *and for making ſuch a Noiſe with Hammers that the Plaintiff could not ſleep, by which he was annoy'd, and loſt the Benefit and Eaſement of his Houſe.* The Defendant *pleaded* in Bar, *that he had uſed the Trade of a Blackſmith 20 Years and upwards in S.* and that he was Apprentice to that Trade, *that the Plaintiff adviſed him to dwell in the Houſe, and follow his Trade there*, and accordingly he did dwell there, and ſet up a Forge in an old Room, and work'd there with his Servants at ſeaſonable Times; *and traverſed that he newly built a Smith's Forge, aliter than as aforeſaid.* And upon Demurrer to this Plea, the Opinion of the Court was that the Action lies; and they held that the Plea did not anſwer the Declaration, and that the Traverſe was idle. But by Conſent he had Licence to amend his Plea. 1 Lutw. 69. Hill. 3 & 4 Jac. 2. Bradley v. Gill.

Show. 243. Mich. 2 W. & M. S. C. adjornatur. ——Ibid. 255. Paſch. 3 W. & M. S. C. accordingly. And Judgment for the Defendant.——1 Salk. 12. pl. 1. S. C. and S. P. accordingly.——Comb. 180. S. C. and S. P. held accordingly. And Judgment for the Defendant.——Carth. 191. S. C. & S. P. and Judgment accordingly.——S. C. cited by Holt Ch. J. as adjudged accordingly. Ld Raym. Rep. 493. 494.

17. Action on the Caſe will not lie for diſturbing or *hindering a Paſſage over a common Ferry* (which is a common Highway) unleſs he alleges ſome particular Damage done to himſelf; but it muſt be by Preſentment in the Leet, or Indictment. 3 Mod. 289. Trin. 2 W. & M. in B. R. Pain v. Patrick.

18. If a *Highway* is *ſo ſtopt*, that a Man *is delayed in his Journey* a little While, and by Reaſon thereof he is damnified, or *ſome important Affair neglected*; this is *not ſuch a ſpecial Damage* as Action on the Caſe lies for, *but* a particular Damage to maintain this Action *ought to be di-*

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rect, and not conſequential, as the *Loſs of his Horſe, or ſome corporal Hurt* in falling into a Trench in the Highway. Reſolved Trin. 3 W. & M. in B. R. Carth. 194. in Caſe of Pain v. Partridge.

19. Caſe &c. for *ſtopping up a Highway leading to the Plaintiff's Colliery*, with Intent to deprive him of the Profit thereof, *per quod* he loſt the Profit &c. and that *his Coals were ſpoiled for Want of Buyers*. The Plaintiff had a Verdict, but on a Motion in Arreſt of Judgment, Turton and Gould held that the Action did lie, but Rookby and Holt held that it did not lie, it being for a *publick Nuſance*; That no Man can have an Action without a particular Injury done, or a particular Right claimed. Now in this Caſe the Plaintiff had no particular Right to the Highway, for that was common to all People, nor a particular Injury done to him, becauſe ſtopping a Highway is a publick Injury; but if he had ſuch an Injury by any *ſpecial Damage*, it is not ſufficiently *ſet forth in his Declaration*, by alleging in general that his Coals were ſpoiled for Want of Buyers; for he ought to ſhew *ſpecially, that* * *Cuſtomers were coming to buy them*, and were hinder'd. 1 Salk. 15. pl. 7. Trin. 11 W. 3. B. R. Iveſon v. Moor.

* S. P. *And who they were by Name.* But if it had been laid, that the Coals which the Plaintiff had ready for Sale, *were ſpoiled, or loſt or damnified, becauſe he could not carry them off*, in ſuch Caſe Holt Ch. J. who was againſt the Action, admitted, that the Action had been maintainable. Carth. 453. S C. but Court divided, and the Caſe adjourned before all the Judges.——Comb. 480. S. C. adjornatur.——12 Mod. 262. Hill. 11 W. 3. S. C. the Court divided. But at the End of the Caſe, the Reporter ſays, that in the Caſe of Philips v. Ryand, Paſch. 11 Geo 1. the Ch. J. ſaid it was revers'd by the Opinion of all the Judges in the Exchequer Chamber.——Ld Raym. Rep. 486. S. C with the Pleadings, and the Court was divided. But the Reporter ſays, that afterwards, by Conſent of Holt, this Caſe was argued before all the Juſtices of C. B. and Barons of the Exchequer, at Serjeant's-Inn; and they all were of Opinion for the Plaintiff, that the Action well lay.

(N. b. 2) Actions for Nuſances. Againſt whom, Leſſor, Leſſee, Feoffee &c. At what Time.

1. IT is not any Offence for a Feoffee &c. to keep up a Nuſance erected before his Time; as where the Action on the Caſe was laid for *keeping and maintaining a Bank on the Brook*, by Reaſon whereof the Brook ſurrounded his Land. But the Plaintiff is to have his Remedy to abate it by a Quod permittat, and not bring his Action ſur Caſe, as here; and therefore this differs from 4 Aſſ. pl. 3. and Judgment for Defendant. Cro. E. 520. pl. 46. Mich. 38 & 39 Eliz. C. B. Beſwick v. Cumden.

A *Diverſity* was remembred, *when the Continuance ceaſes a new Nuſance*, as in Caſe of a *Pent-houſe*, where every new Dropping of the Rain is a new Nuſance, *and where* the Nuſance *at firſt Daſh has done all the Miſchief* it can; in the firſt Caſe Action will lie againſt the Aſſignee, but not in the other. Arg. 12 Mod. 636. in Caſe of Roſwell v. Prior.

2. If I have a *Way over B.'s Land*, and B. ſtops it, and after leaſes it for Years, it ſeems that Action on the Caſe lies againſt Leſſee; Per Haughton, quod fuit conceſſum per Coke and Doderidge. Roll Rep. 222. Trin. 13 Jac. B. R. in pl. 27.

Action lies *againſt Leſſee for the continuing* a Nuſance erected by the Leſſor, by which the Land of the Plaintiff was overflowed. Cro. J. 555. Mich. 17 Jac. B. R. Brent v. Haddon.

3. If a Man *abates the Nuſance*, he cannot bring an Action afterwards for the Nuſance; but it is a good Plea that the Plaintiff himſelf, either before the Writ purchaſed, or pending the Writ abated the Nuſance. 9 Rep. 55. a. Mich. 8 Jac. C. B. in Batten's Caſe.

4. After

Ld Raym. Rep. 370. S. C. adjudged accordingly.

4. After a *Recovery*, a Man can never have a new Action for the *Erection* of the same Nusance, but for the *Continuance* he may. 1 Salk. 10. pl. 3. Mich. 10 W. 3. B. R. Johnson v. Long.

2 Salk. 460. pl. 6. S. C. accordingly; for per Cur. in this

5. An Action lies *against* the *Lessor* for a *Nusance continued by his Lessee*, it being erected by him. 12 Mod. 636. in Case of Rosewell v. Prior, cites 2 Cro. 373. in Point.

Case the Lessor transferr'd the Thing, with the original Wrong, and his Demise affirms the Continuance of it. Besides, he has Rent as a Consideration for the Continuance; and therefore ought to answer the Damage it occasions ——In the Case of Rippon v. Bowles, Cro. J. 373. Trin. 13 Jac. B. R. it was insisted that if the Plaintiff had any Remedy, it should be by Quod permittat against the Tenant of the Freehold; and to that Opinion Coke Ch. J. inclined, tho' the other Justices doubted.

For more of Nusance, See Tit. Chimin, Common, Nusance, Stopping Lights.

(O. b) [Case.] Against whom it lies. [*A third Person.*]

* This should be (*to my Use*) according to Year-book, and should be

1. IF I deliver Goods to A. who delivers them to B. to keep to the * Use of A. and B. wasts them, I may have an Action upon the Case against B. tho' I did not deliver them to him. † 14 Ed. 4. 13.

12 E. 4. 13. a. pl. 9. and Brook Action sur le Case, pl. 96. cites S. C. and is accordingly.

S. P. by all the Justices, except Brian, 12 E. 4. 13. a. pl. 9.

2. If I deliver my Horse to a Smith to shoe, and he delivers him to another Smith, who pricks him, I may have Action upon the Case against him, tho' I did not deliver the Horse to him. Contra 12 Ed. 4. 13. Per Brian.

Fitzh. Action sur le Case, pl. 19. cites S. C. accordingly by all the Justices, but Brian econtra.

(P. b) Disceit in Nature of Case. In what Cases it lies upon a Warranty in Law. [*And Pleadings.*]

S. C. cited 2 Roll Rep. 5. Arg.—— S. P. And it is no *Plea*, *that at the Time of the Sale the Wine was sufficient and able*, but *shall say further, and Not corrupted*; Per Cur. Br. Action sur le Case, pl. 8. cites S. C.——Trespass upon the Case, inasmuch as the Defendant *sold to the Plaintiff a Tun of Wine, knowing it to be corrupted*; the *Defendant said that the Plaintiff had tasted it, and accepted it, and the other said that he did not accept but upon Condition that it should be good* when it was carried to his House. The *Defendant said that the Plaintiff accepted it for good, and travers'd the Condition*; and the other e contra. Br. Action sur le Case, pl. 35. cites 7 H. 4. 15.——And *so quære* if Sale of a Thing corrupted is not material, where it is not warranted, and where the Buyer tastes it. Ibid.

1. IF a Vintner sells Wine (knowing it to be corrupt) to another, as sound, good, and not corrupt, without any express Warranty, yet an Action of Disceit lies against him; for this was a Warranty in Law. 9 Hen. 6. 53. b.

F. N. B.

F. N. B. (c) says, but note, It behoves that he warrants it to be good, for if he sells it without Warranty, it is at the Buyer's Peril; and his Taste ought to be his Judge in such Case. ——S. C. cited Arg. Cro. J 470.——Bridgm. 127. Arg. cites F. N. B. 94 (c) as above; and also cites 7 H. 4. 14. that the Defendant there pleaded he gave the Plaintiff a Taste of the Wine, and that he *agreed it was good Wine*; and adjudged that the Action would not lie.——[But the Year-Book 14. b. 15. pl. 19. is according to Brook, and not reported to be adjudged.]

2. So if I come to a Tavern to eat, and the Taverner gives and sells me Meat and Drink corrupted, whereby I am made very sick, Action lies against him without any express Warranty; for there is a Warranty in Law. 9 Hen. 6. 53.

Br. Action sur le Case, pl. 8. cites S. C. —— Cro. J. 197. pl. 23. cites

S. C. and 7 H. 4. 15. and 11 E. 4. 6. because it is against the Commonwealth. ——S. C. cited 2 Roll Rep. 5. 6. Arg. and agreed, because none shall sell any corrupt Victuals.——S. P. by Frowike; for no Man can justify the selling corrupt Victuals Keilw. 91. a. pl. 16. Hill. 22 H. 7. Anon.——F. N. B. 94. (c) in the new Notes there (c) says, Note a *Diversity* between *selling corrupt Wines to Merchandize*; for there an Action on the Case lies not without Warranty. Otherwise if it be *to a Tavern or Victualler, if it prejudices any*; and cites 19 H. 6. 19. 49. accordingly.——D. 75. a. Marg. pl. 23. cites it as Popham's Opinion, Trin. 3 Jac. that if I sell corrupt Victuals for good, knowing them to be corrupt, and affirm them to be so, Case will lie for the Deceit; but tho' they are corrupt, and I do not know it, tho' I affirm them to be good, yet no Action lies, unless I warrant them to be good.

3. If a Man (it seems it is intended of a Merchant) sells a Piece of woollen Cloth, knowing it to be not well fulled, an Action of Disceit lies for this, because it is a Warranty in Law. 9 Hen. 6. 53.

S. P. Br. Action sur le Case, pl. 8. cites S. C. —— If he

sells Stuff which he knows to be false and corrupt, Action lies without any Warranty. Br. Garranty, pl. 93. cites S. C.—— S. P by Frowike, Keilw. 91. a. pl. 16. Hill. 22 H. 7. Anon. but if he does not know it, Action lies not.

4. If a Man sells a Horse to me without Warranting of him to be sound, if he be distemper'd in his Body, yet no Action lies against him. Contra 20 Hen. 6. 35.

Contra Per Paston. Br. Disceit, pl. 2. cites S. C.——

F. N. B. 94. (C) that no Action lies.——Bridgm. 127. Arg. cites S. C.

5. If a Man takes Goods wrongfully from J. S. and sells them to me for Money, as his own Goods, and after J. S. [* the Owner] takes them from me, I shall have an Action upon the Case against my Vendor. 42 Assisarum 8. adjudged.

* Br. Action sur le Case, pl. 85. cites S. C. —— S. C. cited 4 Rep. 18. b

Per Cur in pl. 14. that the Defendant offered them to Sale to the Plaintiff, and Action lies ——S. C. cited Cro. J 197. in pl. 23 and Tanfield Ch. B. answered that the said Book is not adjudged, but the Party admits it, and takes Issue; yet if it were allowed to be Law, it is because he had there Possession by Tort, and so had Colour in Shew to be Owner, and he was deceived by buying of him, who had only a tortious Possession; and tho' he had not any Right, yet *every one took Notice of him as Owner*, and he himself knew that he was not right Owner, which is the Reason that the Action is maintainable.

6. If there be a Communication between A. and B. for the buying of certain Sheep, and thereupon B. the Vendor, says they are his own Sheep, where in Truth they are the Sheep of another, but thereupon A. buys them of B. tho' B. made not any express Warranty of the Sheep, yet an Action upon the Case in Nature of Disceit lies against B. Pasch. 16 Jac. B. R. between *Lyster and Furnace*, adjudged.

Cro. J. 474. pl. 6. Furnis v. Leicester S. C. adjudg'd for the Plaintiff. —See (D. c) pl. 1. —— See (P. b. 2) pl. 9.

7. So if the Vendor affirms that the Goods are the Goods of a Stranger his Friend, and that he had an Authority from him to sell them to him, and thereupon B. buys them, where in Truth they are the Goods of another, yet if he sold them fraudulently and falsely upon this Pretence of Authority, tho' he did not warrant them, and tho' it

Fol. 91. S. P. and being found at the Trial

in which it was neceſſary that the Fraud be given in Evidence, it was adjudg'd

is not averr'd that he ſold them, knowing them to be the Goods of a Stranger, yet B. ſhall have an Action upon the Caſe for this Diſceit. Mich. 1650. adjudged between *Warner and Tallard*. Intratur Trin. 1650. Rot. 1338. this Matter being moved in Arreſt of Judgment.

actionable; cited by Twiſden J. Keb. 523. in pl. 9.

Sty. 310. S. C. the Declaration was that Defendant falſo & fraudulenter affirm'd the Horſe to be his own; but the Court ſtay'd the Judgment, for they ſaid here is no direct Affirmation, but only an Intendment that Scienter fecit, yet afterwards Judgment was given for the Plaintiff. — S. C. cited by Twiſden J. as adjudg'd for the Plaintiff. Keb. 523. in pl. 9

8. In an Action upon the Caſe by A. againſt B. if the Plaintiff declares, that whereas the Defendant craftily and ſubtilly intending to deceive and cozen the Plaintiff, offering to ſell one Gelding to the Plaintiff, affirm'd to the Plaintiff, that he had brought up that Gelding of a Colt, and that the ſaid Gelding was then his own, upon which Affirmation of the ſaid Defendant, the Plaintiff being ſeduced, and giving Credit thereunto, afterwards, that is to ſay, upon the ſame Day and Year, and at the Place aforeſaid, did buy the ſaid Gelding for 5 Hogſhead of Cyder to the value of 25 l. where indeed the Defendant did not breed up the ſaid Gelding of a Colt, neither was the ſaid Gelding the Gelding of the Defendant, but was the Gelding of J. S. who afterwards did take away the ſaid Gelding from him, whereby the Defendant did cheat and cozen him of his 5 Hogsheads of Cyder; the Action lies upon this Declaration, tho' there was not any Warranty upon the Sale; for this was an apparent Deceit, contrary to his own Knowledge; and tho' it is not averr'd that he ſold him * at the ſame Time when he affirm'd he bred him up of a Colt, but that he afterwards, the ſame Day and Place, bought him, giving Credit thereunto; this ſhall be intended immediately after the ſpeaking of the Words, for all the Words could not be ſpoke together. Paſch. 1652. between *Harding and Freeman*, adjudged after a Verdict for the Plaintiff.

* See (Y. b)

(Z. b) pl. 7. S. C. — S. P. but *contra if he promiſes to purchaſe it*, by the beſt Opinion. Br. Action ſur le Caſe, pl. 108. cites S. C.

9. If I retain a Man of the Law to be of my Counſel to buy me ſuch a Manor, if he does his Endeavour, tho' he procures it not, yet no Action lies againſt him. 11 Hen. 6. 18.

10. [But] If he becomes of Counſel of my Adverſary after in this Matter againſt me, an Action upon the Caſe lies againſt him. 11 Hen. 6. 18.

— F. N. B. 94. (D) in the new Notes there (b) S. P. cites 11 H. 6. 24. 55. that tho' he warrants his Client that he ſhall have the Manor, but fails therein, yet if he does his Endeavour Caſe does not lie; for perhaps he could not have the Manor, viz. it was impoſſible — S. P. Br. Action ſur le Caſe, pl. 108. cites S. C.

(P) pl. 6. S. C.

11. [So] If I retain him to be of my Counſel at Guildhall in London at a certain Day, if he does not come at the Day, by which my Cauſe miſcarries, an Action of Diſceit lies againſt him. 20 Hen. 6. 34.

Br. Action ſur le Caſe, pl. 108. pl. S. C. and S. P. accordingly. But contra if he be retain'd to ſee the Evidences, and after he diſcovers it to the other Party.

12. [But] If a Man ſhews his Evidence to a Man of the Law, tho' he after becomes of Counſel to another, and diſcovers the Counſel of the ſaid Evidences, yet no Action lies againſt him, becauſe he was not retain'd with him. 11 Hen. 6. 18.

(Z. b) pl. 6. S. C. but not S. P. exactly. — In Treſpaſs on the Caſe for that the Defendant aſſumed to cure his Horſe, but did tam negligenter & improvide &c. quod Equus

13. If a common Marſhal [Farrier] kills my Horſe with bad Medicines, an Action upon the Caſe lies againſt him, without any expreſs Aſſumpſit to cure him, 19 Hen. 6. 49. But otherwiſe it is of one that is not a common Farrier. 19 Hen. 6. 49.

Equus interiit. It was held firſt, if one who is not a common Farrier kills a Horſe by Medicines, Caſe will not lie without doubt, without a ſpecial Promiſe. And 2dly. Newton and Aſcough held that tho' he was a common Farrier, yet there being no ſuch ſpecial Promiſe, Caſe will not lie, and ſo the Aſſumpſit is traverſable. F. N. B (D) in the new Notes there (b) cites S. C. and 17 E. 4. 4. but ſays, ſee contra 48 E. 3. 6. 17 E. 4. 4. and ſee 11 R. 2. Action ſur le Caſe 37. 39. 21 H. 6. 55.

14. If a Man applies Medicines to my Hand, and through his Negligence my Hand is mayhem'd, yet Action upon the Caſe does not lie, without an Aſſumpſit to cure it. 19 H. 6. 49. It ſeems to be intended of one that was not a common Surgeon. Treſpaſs' upon the Caſe againſt him who *took upon him to cure the Plaintiff of a Wound, and did not do it*, but by his Negligence impair'd the Plaintiff, and becauſe he *did not allege in his Writ at what Place the Aſſumpſit was*, therefore the Writ was abated notwithſtanding he alleged it in his Count. Br. Action ſur le Caſe, pl. 24. cites 48 E. 3. 6.

15. If a * Smith pricks my Horſe, an Action upon the Caſe lies againſt him. 46 Edw. 3. 19. adjudged. (Z. b) pl. 4. S. C.—— The Count in this Caſe was, that the Defendant *fix'd a Nail in the Foot of his Horſe, in a certain Place, by which he loſt the Profit of his Horſe aforeſaid, for a long Time*, and it was *not Vi & Armis nor Injuſte*, and yet the Writ awarded good. Br. Action ſur le Caſe, pl. 22. cites S. C.——— * S. P. Br. Action ſur le Caſe, pl. 24. (bis) per Ham.——F. N. B. 94. (D) S. P. for it is the Duty of every Artificer to exerciſe his Art rightly and truly as he ought. ———2 Bulſt. 333. Arg. cites S. C.———At Common Law before the Statute of 5 Eliz. any Man might uſe what Trade he pleaſed, without having been bred up to it; but if he did any thing amiſs in ſuch Trade, the Party grieved might have Action againſt him; as in the Caſe here of a Smith's cloying a Horſe in the ſhooing him &c. Arg. And the Court ſeems to have been of the ſame Opinion. Saund. 312. Trin. 21 Car. 2. ——— S. P. by Hobart Ch. J. Hob. 211. Paſch. 14 Jac. in pl. 268.

16. If a Farrier takes upon him to cure my Horſe, being gravell'd in the Feet, and after tam negligenter & improvide takes Care of the Horſe, that he * dies, an Action lies againſt him upon this Negligence and Damage. Trin. 36 Eliz. B. R. between *Fowtuary and Walton* See (P) pl. 5. S. C. —— * Fol. 92. S. P. Br. Action ſur le Caſe, pl. 23 (bis). *But if he does all that he can, and did not warrant him*, and the Horſe is impair'd, Action upon the Caſe does not lie, note the Diverſity. Per Cand.———2 Bulſt. 333. Arg. cites S. C.—— So tho' he be not a common Farrier. See (Z. b) pl. 6.

17. Action upon the Caſe, inaſmuch as the *Defendant bargain'd and ſold ſuch Land to the Plaintiff, and after he enfeoff'd W. N.* to which the *Defendant ſaid, Ne enfeoffa pas W. N.* And a good Plea per Townſend and Brian. Br. Action ſur le Caſe, pl. 87. cites 2 H. 7. 12. & 13.

18. Caſe lies for *falſely affirming to a Purchaſer of Houſes that the Rent is more than they were actually let for*; and after 2 Motions, the Plaintiff had Judgment. Lev. 102. Paſch. 15 Car. 2. B. R. Ekins v. Treſham. Sid. 146. pl. 3. Leakins v. Cliffel S. C. and tho' the Declaration did not ſay Fraudulenter, yet it ſhould be intended after Verdict, and ſhould be aided by ſaying Sciens; and Judgment for the Plaintiff.——There was no Averment of Defendant's knowing that the Rent was leſs. Keb. 510. pl. 80. Leakins v. Clizard S. C. adjornatur.——Keb. 518. pl. 106. S. C. and per Cur. it cannot be ſaid fraudulent, unleſs it were Sciens &c. & adjornatur.——Ibid. 522. pl. 9. Trin. 15 Car. 2. B. R. the S. C. adjudg'd for the Plaintiff.——S. P. adjudg'd, after long Conſideration of the Record of Eakins v. Treſham, for the Plaintiff; tho' it ſeems that the Defendant had only the Equity of Redemption of the Houſes. 2 Ld. Raym. Rep. 1118. Hill. 3 Ann. Lyſney v. Selby.

19. *But* Action will not lie for *falſely and fraudulently affirming that a thing is of greater Value than it really is*; for Value conſiſts in Judgment. Per Cur. Lev. 102. Paſch. 15 Car. 2. B. R. in Caſe of Ekins v. Treſham. Same Diverſity taken Sid. 146. per Cur. —— S. P. But if the Defendant had warranted the thing to be of ſuch Value to be ſold, and thereupon the Plaintiff had given and diſburſed his Money, it would have been otherwiſe; for the Warranty by the Defendant is Matter to induce Confidence and Truſt in the Plaintiff; But upon a naked Aſſertion to give Credit was the Plaintiff's Folly. Yelv. 20. Mich. 44 & 45 Eliz. B. R. Harvey v. Young.

(P. b. 2) Diſceit in Nature of Caſe. Warranty in Law. Pleadings.

1. J. S. *Executor de ſon Tort, ſold a Term in Reverſion to A. and then took out Adminiſtration and ſold it to B.* and ſo the firſt Sale void, becauſe being a Term in Reverſion, no Entry could be made. Per Cur. A. may have Caſe in Nature of Diſceit againſt J. S. alleging he knew he had no Right, yet aſſerting that he was lawfully poſſeſſed &c. ſold it for ſo much to him &c. But Tho. Gawdy ſaid, the *Plaintiff muſt allege that Defendant Sciens* &c. ut ſupra, tamen *obtulit vendere* &c. *aſſerens* &c. for that without ſuch Offer there is not any Diſceit; becauſe if the Plaintiff made the firſt Motion to buy, and thereupon the Defendant agreed to ſell, there Caveat Emptor, unleſs there be ſpecial Parlance between them of making Aſſumpſit. Mo. 126. pl. 273. Paſch. 25 Eliz. B. R. Kendrick v. Burges.

Mo 467. pl. 666. Anon. but S. C. accordingly. And adjudged for the Plaintiff. ——Cro J. 196. pl. 23. Roſwell v. Vaughan, in Caſe in Nature of Diſceit. Adjudged for the Defendant, Mich 5 Jac. in the Exchequer.

2. In Diſceit the Plaintiff declares, That the *Defendant ſciens that he had no Right to the Advowſon of D. took upon himſelf to be Owner thereof, and ſold the Profits thereof to the Plaintiff pro quadam Pecuniæ ſumma.* It was moved in Arreſt, that the Plaintiff did *not aver ubi revera the Defendant had no Title.* Sed non allocatur. Goldsb. 123. pl. 8. Hill. 43 Eliz. Ruſwell v. Vaughan.

3. The Defendant *ſold* the Plaintiff *two Oxen, and warranted them to be ſound abſque infirmitate*, whereas they were not ſo, and was *found Not guilty as to one, and Guilty as to the other.* It was mov'd in Stay of Judgment, that the Warrant was joint, and now being found Guilty as to one only, it is not the ſame Warranty. But the Court held it well enough, for the Action is not founded upon the Contract but upon the Diſceit. And Judgment for the Plaintiff. Cro. E. 884. pl. 22. Paſch. 44 Eliz. C. B. Gravenor v. Mete.

* This Word (&) ſeems to be put in by Miſtake of the Printer, otherwiſe there could be no Reaſon for the laſt Objection, which is for the Want thereof in the Declaration.

4. Action upon the Caſe, for that the Defendant *bargained to ſell the Plaintiff a Mare, the Defendant adtunc & ibidem knowing the Mare to be lame with Spavins, Splints* &c. *Equam prædictam ſanam & abſque aliqua infirmitate warrantizavit*, * & eandem Equam præd' 31 Maii 19 Jac. pro 20 l. apud L. &c. eidem the Plaintiff, *falſo & fraudulenter adtunc & ibidem vendidit*; and ſo falſely deceived the Plaintiff therein. It was the Opinion of the Juſtices that the Declaration was not good, becauſe he doth *not ſay Warrantizando vendidit*; for if the Warranty was not at the Time of the Sale, the Action is not maintainable. It was alſo objected that the Declaration *wanted the Word* (&) after (Warrantizavit) and ſo was uncertain and inſenſible. And two Judges being of that Opinion, and the Ch. J. ſaying nothing, the Plaintiff declar'd de Novo. Cro. J. 630. pl. 3. Hill. 16 Jac. B. R. Pope v. Lewyns.

5. In an Action upon the Caſe for falſely and fraudulently *ſelling an Horſe to the Plaintiff, as the proper Horſe of the Defendant, ubi revera it was the Horſe of Sir J. L.* becauſe the Plaintiff could not prove that the Defendant knew it not to be his own Horſe (for the *Declaration muſt be that he did it fraudulently, or knowing it to be not his own Horſe*) for the Defendant bought the Horſe in Smithfield, but not legally tolled, the Plaintiff was Nonſuit. All. 91. Mich. 24 Car. B. R. Sprigwell v. Allen.

6. In

6. In Caſe for *ſelling and warranting a Horſe* &c. *which was none of his*, it hath been commonly ruled good to ſay that Knowing the Horſe &c. to be another's, or Quod fraudulenter vendidit. Arg. And the Court agreed both Ways ſufficient, and that the * *Fraudulenter ſupplied the Scienter*; but the *beſt Way is* to ſay, that *knowing it was none of his*. Keb. 309. Trin. 14 Car. 2. B. R. in pl. 24. In Caſe in Nature of Diſceit for affirming the Rent of Houſes ſold to be more than it was, the Declaration did not ſay *Fraudulenter*, yet it ſhall be intended after a Verdict for the Plaintiff, and ſhall be *aided by the Scienter*. Sid. 146. pl. 3. Trin. 15 Car. 2. B. R. Leakens v. Cliffell.

7. Caſe &c for that the Plaintiff *retained the Defendant, a Taylor, to make him a Coat well and artificially*; but he maliciouſly intending to damnify the Plaintiff, *made it tam inepte, negligenter, & inartificialiter*; *that it was of no Value* or Uſe to him, ad damnum 20l. The Defendant demurr'd, becauſe he did *not allege that he delivered him any Materials for Spoiling whereof Action might lie*; ſo that there does not appear to be any Damage. Nor does he ſhew how, or in what Manner he ſpoiled the Coat, or what Defect there was in it, which ought to be ſet forth certainly. And adjudged againſt the Plaintiff. Vent. 268. Paſch. 27 Car. 2. B. R. Beſt v. Yates.

8. Caſe for *ſelling Goods of one S.* to the Plaintiff *with Warranty*. It was moved in Arreſt, that there was no Scienter; and that this Action being only on the Deceit there muſt be a Scienter; but where there is a Warranty the Evidence would be of Compoſition for the Goods, or taking them away. Sed non allocatur; for this Action *lies* on the Warranty, *without Scienter*, he *averring that the Goods were another's*. It was mov'd alſo, that it is *not aver'd that the Defendant was ever poſſeſs'd*, but that he ſold the Goods which were S.'s. But Per Cur. the *Falſo & Deceptive vendidit* is ſufficient, unleſs the contrary appears. And Judgment for the Plaintiff. 3 Keb. 807. pl. 18. Mich. 29 Car. 2. B. R. Northcote v. Maynard.

9. Caſe &c. for that there was a *Diſcourſe* between him and the Defendant *concerning the Sale of two Oxen, then in the Defendant's Poſſeſſion*; and that the *Defendant adtunc & ibidem did falſely affirm them to be his own*; *and that the Plaintiff ratione inde did buy them at ſo much*, when in Truth they were the Oxen of another Man. After a Verdict for the Plaintiff, it was moved that it is not alleged that he affirmed them to be his own, ſciens they were the Oxen of another, or that he ſold them Fraudulenter & Deceptive, or that there was any Warranty. Sed per Curiam, it might have been good [ill] upon a Demurrer, but after Verdict it is well enough. 3 Mod. 261. Mich. 1 W. & M. in B. R. Croſſe v. Garnett. Show. 68. S. C. adjudged for the Plaintiff. —Comb. 142. S. C. adjudged accordingly.—Carth. 90. S. C. And the Court were clear of Opinion (upon Conſideration of this Declaration) that the Action would lie upon a bare Affirmation ut ſupra; and that this Caſe differ'd from the Books cited, becauſe here the Plaintiff had no Means to know to whom the Property of theſe Oxen did belong, but only by the Poſſeſſion. And Judgment for the Plaintiff.

See Return (N)

(Q. b) Case in Nature of Disceit against [*Judges and Sheriffs, and other*] Officers [*&c.*]

Br. Judges, pl. 2. cites S. C.——

1. A MAN shall not have an Action upon the Case against a Judge of Record, for giving a false Judgment. 9 H. 6. 60. b.

S. P. Br. Action sur le Case, pl. 9. cites 6 H. 6. 60. but it should be 9 H. 6. 60.

If Sheriff quash an Essoign in his County where it lies well, *Bill lies against him* for so doing

2. As it does not lie against a Sheriff for quashing an Essoign in his Court with the Consent of the Suitors, tho' it was erroneously done, for the Party might have false Judgment for it. 26 Ass. 45. * But if the Sheriff quash the Essoign erroneously, without the Assent of the Suitors, an Action lies against him for this, because no false Judgment lies for it. 26 Ass. 45. adjudged.

; for the Suitors are the Judges, and not the Sheriff. Quod nota per Judicium, that the Bill lies. Br. Bill, pl. 43. cites S. C.——If he quashes it without Assent of the Suitors a Bill lies against him in the Exchequer. Br. False Judgment, pl. 18. cites S. C.

* S. P. Br. Action sur le Case, pl. 79. cites S. C.

If a *Replevin* be *removed out of the Liberty by Pone into* C. B. and *afterwards* (*pending the Plea there*) *the Bailiff of the Liberty awards a Return in the Liberty to the Defendant, by which he taketh the Cattle, and impounds* them

3. If the Bailiffs in Ancient Demesne hold Plea after the Record is removed in Bank, by which the Tenant loses his Land there by Recovery, he may have an Action upon the Case against them. 14 Ed. 3. Action upon the Case 39. Adjudged.

; whereupon *some of them die for Want of Food*, the Party grieved shall have an Action upon the Case against the Bailiff of the Liberty, who awarded that Return to hold Plea after the Matter removed into C. B. F. N. B. 93. (E)

A *Plaint affirm'd in an Inferior Court was remov'd by Corpus cum Causa delivered to the Under-Steward, who notwithstanding gave Judgment, and awarded Execution*; for which an Action was brought against him, and the Party recover'd. 3 Le. 99. pl. 143. Mich. 26 Eliz. C. B. Iplet v. Williams.

S. P. For he and the Sheriff are Officers of Record, but not Justices of Record.

4. If an Escheator returns a false Office, contrary to that which was found by the Jury, in Prejudice of the Party, an Action upon the Case lies against him, for he is not a Judge, but an Officer in this. 9 Hen. 6. 60. Adjudged.

Br. Action sur le Case, pl 9. cites 6 H. 6. 60. but it should be 9 H. 6. 60.—— Br. Judges, pl. 2. cites 9 H. 6. 60. S. C.——S. C. cited Palm. 143. Arg.——2 Vent. 26. S. C. cited by Wylde J.——4 Inst. 226. S. P.

5. If a Sheriff returns upon an Exigent 3 or 4 Exactus's, and that there were not more Counties, where in Truth there was a 5th County, the Plaintiff shall have an Action upon the Case against him. 9 Hen. 6. 60. b.

S.C. cited by Powell J. 2 Lutw. 1561. in the Appendix.

6. If a Sheriff hath a Court by Prescription, and hath used to execute Process himself, no Action lies against him, because he does it as Judge. Mich. 8 Jac. B. Per Curiam.

An Action was brought in an Inferior Court where the *Sheriff was Judge*, and the Plaintiff recover'd, and the Sheriff *took insufficient Bail of the Defendant*, yet no Action lies against the Sheriff, because the taking the Bail was done as Judge, and not as Sheriff. Judgment against the Plaintiff. Hutt. 120. Pasch. 8 Car. Metcalf v. Hodgson.——S. C. cited by Powell J. 2 Lutw. 1561.

S. P. Br. Action sur le Case, pl.

7. If a Sheriff upon a Venire facias returns 12 Jurors, where one hath nothing whereupon Issues may be levied, the Successor Sheriff, when

when a Diſtringas iſſues to him, is bound by this Return, ſo that he cannot return a Nihil; and therefore he may have a Writ of Diſceit againſt the Predeceſſor Sheriff, and ſhall recover Damages, having Regard to what he loſes by the Return of Iſſues that cannot be levied. 19 Hen. 6. 38. b.

53. cites 16 H. 6. 38. but it ſhould be 19 H. 6. 38. ——Br. Retorne de Brief, pl. 49. cites S. C.

8. If the Sheriff returns the Tenant ſummon'd in a Real Action, where he was not, by which he loſes by Default, an Action lies againſt him for this. 26 Aſſ. 48.

S. P. Br. Action ſur le Caſe, pl. 51. cites 8 H. 6. 1. It appearing upon Examination of the Summoner Veiors and Pernors.——The Court adjudg'd according to the Return, and put the Party to his Remedy againſt the Sheriff. Mo. 349. pl. 467. Trin. 35 Eliz. Corbet v. Marſh. —— It ſeems admitted by all the Juſtices, that if the Tenant was not ſummon'd a Writ of Deceit lies againſt the Sheriff. Cro E. 398. pl. 2. Trin. 37 Eliz. B. R. Collet v. Marſh, S. C.—— Goldsb. 129. pl. 22. S. C. adjudg'd that if the Return be falſe, Caſe lies againſt the Sheriff.

9. So it lies againſt the Sheriff, tho' the Summoners and Veyors are dead &c.* For he is in this Action to recover all in Damages, and not the Land. 1 Hen. 6. 1. b. But Quære.

S. P. becauſe he cannot have Writ of Deceit; per June Ch. Baron, before all the Juſtices of England in the Exchequer-Chamber. Br. Action ſur le Caſe, pl. 73. cites S. C.——(M. c) pl. 11. S. C.

* S. P. Br. Action ſur le Caſe, pl. 51. cites 8 H. 6. 1.

10. If a Sumner of the Eccleſiaſtical Court, upon a Præmonition directed to him by the Eccleſiaſtical Court, to warn J. S. to pay certain Coſts awarded againſt him by the Court, returns to the Court that he hath warn'd the ſaid J. S. whereby the ſaid J. S. is excommunicated, where in Truth he never warn'd him, J. S. may have an Action upon the Caſe againſt him for this falſe Return, tho' he be an Eccleſiaſtical Officer; for the Excommunication is a great Damage to him as well Temporal as Spiritual. Mich. 12 Jac. B. R. between *Powle and Godfrey*, adjudg'd; for during this he cannot have any Action, and is liable to an Excommunicato Capiendo.

Mo. 835. pl. 1126. Pole v. Godfrey, S. C adjudg'd.—— Roll Rep. 63. pl. 9. S. C. held that the Action well lies.——2 Bulſt. 264. S. C. adjudg'd for the Plaintiff.—— 12 Rep. 127. Anon. but ſeems to be S. C. & S. P. reſolved accordingly. ——Cro. J. 351. pl. 4. S. C. adjudg'd for the Plaintiff.

On a Fi. Fa. to the *Sheriffs* of L. they *return'd Nulla Pena, but that Clericus eſt beneficiatus in Ely*, whereupon *Writ iſſues to the Biſhop of E. and he returns* Quod *nulla habet bona Eccleſiaſtica*; an Action upon the Caſe lies againſt the Biſhop for this falſe Return, if the Party has in Truth a Spiritual Living there. Sid. 276. pl. 3. Hill. 17 & 18 Car. 2. Pickard v. Payton.——Keb. 947. pl. 10 S. C. ſays the Reaſon of the Biſhop's making ſuch Return was, becauſe in Truth the Defendant had leaſed his Parſonage, and that if the Leaſing had been after the firſt Fi. Fa. and before the Biſhop's Return, an Action on the Caſe would have lain againſt the Biſhop for his falſe Return; but as this Caſe is, the Action does not lie.

11. If the Sheriff takes an Obligation according to the Statute of 23 H. 6. for Appearance, and the Party does not appear, yet no Action upon the Caſe lies againſt the Sheriff; for he let him to Bail by the Command of the Statute. Trin. 13 Jac. B. Carter, per Curiam.

Caſe &c. in Nature of a Deceit for *taking falſe and inſufficient Bail, with an Intention to defraud the Plaintiff of his juſt Debt.* The Defendant *pleaded that he had taken ſufficient Sureties of honeſt Men within his Bailiwick.* The Plaintiff demurr'd, becauſe the Defendant did *not ſet forth the Place where he took the Bail*, and for that he *did not make* any *Anſwer to the Deceit alleg'd*; but adjudg'd that the Place where is not iſſuable, and the Intention to deceive the Plaintiff is not traverſable. Sid. 96. pl. 24. Mich. 14 Car. 2. B. R. Bentley v. Hoare.—— Lev. 86. S. C. accordingly per Cur.

12. If an Attorney, by Deceit between him and the Sheriff, puts a Writ of Seiſin upon the File of the Sheriff's Writs, whereby I am ouſted of the Poſſeſſion of my Land, ſuppoſing a Judgment againſt me

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was *enter'd* against a Plaintiff, and his *Attorney, knowing it, cauſed Judgment to be enter'd* againſt the then Defendant, now Plaintiff, by reaſon whereof he *was impriſon'd*, tho' afterwards the Judgment was evacuated; for which he now brought an Action againſt the Attorney, and adjudg'd well brought. Hutt. 125. Mich. 10 Car. Knight v. Copping.

me where there was not any, a Writ of Deceit lies againſt the Attorney. 17 Ed. 3. 51. b.

But where, after a Verdict againſt the Plaintiff, the Defendant's Attorney *enter'd Judgment before the Rules were out*, ſo that the *Plaintiff was prevented moving in Arreſt*, and thereupon the ſaid Plaintiff now brought an Action againſt the Attorney, [after the Judgment, as it ſeems, was ſet aſide.] But Twiſden J. thinking it hard to ſue the Attorney after the Judgment ſet aſide, and conſequently the *Plaintiff not damnified*, reſpited the giving Judgment for a while. Raym. 194 Mich. 22 Car. 2 B. R. Goodyear v. Barks.——2 Keb. 688. pl. 15. and 716. pl. 104. S. C. Exception was taken to the Declaration, becauſe it only ſaid Contra Officii ſui debitum, and did not aver that any Rule was given, or that by the Courſe of the Court it ought to be, nor for what Time the Rule was, that the Time may appear to be out; and the Court agreed that all theſe ought to be expreſs'd; ſed adjornatur.

S. P. Notwithſtanding that the *Defendant pleaded it was done by the Advice of the Plaintiff's Friends in his Behalf.*

13. If a Venire Facias comes to the Sheriff in a Quare Impedit, and the Sheriff ſends to the Bailiff of the City of C. to return the Pannel, who does it accordingly, whereas he had no Warrant to do it, not being Bailiff of the Franchiſe, for which the Pannel is quaſh'd, the Plaintiff for this Default in the Sheriff, and for his Damages, ſhall have an Action upon the Caſe againſt the Sheriff. 38 Aſſ. 13. Adjudg'd.

——Br. Action ſur le Caſe, pl. 20. cites S. C.——Br Bille, pl. 21. cites S. C. And tho' the Sheriff pleaded that it was ſent to his Under-ſheriff in his Abſence, and that the Return was made in Favour of the Plaintiff by Aſſent and Advice of the Plaintiff's Servants, and that the Plaintiff did not challenge the Pannel; that Defendant for this Return had been amerced, and that if the Plaintiff had recover'd he had not recover'd more than 40 s yet Damages were tax'd to 20 Marks, and the Sheriff in Miſericordia; but if the Plaintiff had quaſh'd the Pannel, the Sheriff had been excuſed; but now it appears the Plaintiff was damaged.——Br. Retorn de Briefs, pl. 77. cites S. C.

In *Aſſiſe* the *Sheriff return'd the Pannel*, and *A. Bailiff of Fee*, came *and ſhew'd Indenture, by which he had return'd certain Names to the Sheriff, and* the *Sheriff had return'd other Names in Blemiſhment of his Bailiwick*, and pray'd that the Inqueſt be not taken; & non allocatur; and the ſame if Bailiff of Franchiſe was in ſuch Caſe; but he ſhall have Action againſt the Sheriff. Br. Retorn de Briefs, pl. 73. cites 30 Aſſ. 5.

Caſe lies againſt the Sheriff for making a Return of a Baily, who was not Baily at the Time of the Return, or who had not executed the Writ. Agreed per Cur. Mo. 432. Hill. 38 Eliz. in pl. 606.——See (R. b) pl. 2.

Bill of Deceit againſt the Sheriff, for *embezzling of an Exigent*, upon ill Plea pleaded by the Sheriff, it was awarded that the Sheriff ſhall recover 10 *l. for Damages*, tax'd by the Court. Nota. Br. Damages, pl. 113. cites 41 Aſſ. 12.

14. If the Sheriff imbezzles an Exigent deliver'd to him at my Suit, an Action upon the Caſe lies Tam pro me Quam pro Domino Rege. 41 Aſſ. 12. adjudg'd.

Br. Action ſur le Caſe, pl. 121. S. C. and ſaid that he ſent the Writ by A. B. his Servant, who was robb'd of the Writ by the Way by one of thoſe named in the Exigent, and held no Plea.——S P. becauſe the Sheriff ought to have kept it in his own Cuſtody; and the Plaintiff recover'd 10 l. Damages, and Defendant was awarded to Priſon to make Fine to the King, and agree with the Party. Br. Bille, pl. 22. cites S. C.——Br. Barre, pl. 67. (68) cites S. C.

15. So it lies againſt him, tho' the Sheriff deliver'd the Writ to one of his Coroners, and he was robb'd by another of the Perſons who was named in the Exigent, if he was before in the Cuſtody of the Sheriff, and he [the Sheriff] ſuffers him to go at large; for this was his own Default. 41 Aſſ. 12. adjudg'd.

Cro. E. 175. pl. 1. S. C. adjudg'd for the Plaintiff. ——Le. 146. pl. 203. S. C. adjudg'd accordingly.——(R. b) pl. 4 S. C.

16. In a Real Action, if the Demandant delivers a Writ of Summons to the Sheriff, and the Sheriff ſummons the Tenant accordingly, and after does not return the Writ, an Action upon the Caſe lies againſt him. Hill. 32 Eliz. B. R. between *Marſh and Aſtry*, admitted.

If

If the *Sheriff upon Writ of Second Deliverance makes Deliverance to the Plaintiff of the Distress, and will not return the Writ, so that the Defendant may compel the Plaintiff to come and count, in order that he may avow*, the Defendant shall have Remedy against the Sheriff, and this it seems by Action upon the Case. Br. Action sur le Case, pl. 48. cites 21 E. 3. 43.

If the *Sheriff arrests a Man* by Capias, *and does not return the Writ*, the Plaintiff shall have Remedy against the Sheriff. Quære if by Action upon the Case. Br. Action sur le Case, pl. 54 cites 21 H. 6. 5 ——But it seems by Trespass Vi & Armis. Ibid. cites P. 21 H. 7. 22, 23.

17. If a Capias be directed to the Sheriff, who takes the Party, and takes a Bond of him for his Appearance according to the Statute of 23 H. 6. and at the Day of the Return of the Writ returns Cepi Corpus, but the Defendant does not appear at the Day, yet no Action upon the Case lies against the Sheriff, because there is not any Falsity in the Sheriff; for he bail'd him by the Command of the Statute, and he is to be amerced by the Court if the Defendant does not appear. Mich. 43, 44 Eliz. B. R. between *Bowles and Lassels*, adjudg'd. Cro. E. 852. pl. 8. S. C. The Sheriff return'd Languidus in Prisona, but held not material; and adjudg'd as here, and for the same adjudg'd accordingly, and that the Return was good, though no such Return was ever seen before, and though he might have return'd that he let him at large upon Bail ——S. C. cited Arg. Mod. 244. and ibid. 245. allow'd by the Court, præter Scroggs, who deliver'd no Opinion.

Reason, for the Defendant.——Noy 39. Bolls v. Lassels, S. C. according to Cro. E.

18. If a Sumner of the Ecclesiastical Court falsely and maliciously colore Officii sui of a Sumner, to the Intent to defame J. S. with the Fame of Incontinency with A. and to put him to Expence in the Ecclesiastical Court, cites J. S. to appear there for Incontinency with A. upon which J. S. appears, and is there charg'd by the Judge with it, and upon his Answer discharg'd, by which he is put to Expence, J. S. may have an Action upon the Case against the Sumner, upon such a Declaration, tho' he be an Officer of the Ecclesiastical Court, for inasmuch as it is alleg'd that he cited him falsely and maliciously, colore Officii, it shall be intended that he did it without Process. Hill. 8 Car. B. R. between *Carlian and Mill*, this being moved in Arrest of Judgment. Intratur Hill. 7. ..... Rot. 1147. See (P. c) pl. 9.—— Cro. C. 291. pl. 1. S. C. adjudg'd per tot. Cur. for the Plaintiff; but no mention is there of its being intended without Process. —— Jo. 312. pl. 1. S. C. adjudg'd accordingly.——S. C. cited by Holt Ch. J. Pasch. 10 W. 3. 5 Mod. 409. in delivering the Resolution of the Court.

19. Hill. 17 Edw. 3. B. R. Rot. 69. Action brought by John Bokeland, Knight of the County of Wilts, against the Sheriff of the same County, for not levying 10 l. 4 s. for his Expences in attending in Parliament &c. Simile ibidem Rot. 138.

20. If a Distringas issues to the Sheriff to distrain the Defendant in an Action by all his Lands and Chattels &c. and the Sheriff returns too small Issues, tho' an Averment lies by the Statute of Westm. 2. cap. 43. yet the Plaintiff may well have an Action upon the Case against the Sheriff, because it appears by the Words of the Statute, that this is a false Return, and the Words are Quod distringeret by all his Lands and Chattels, ita quod de exitibus eorum &c. so that if he does not return all the Issues he does not do as he is commanded; also if this Action does not lie, the Plaintiff had not any Remedy at the Common Law, which was greatly mischievous; and the Statute ordains that the King shall have the Issues, but * does not restrain the Plaintiff from any Remedy that he had at the Common Law. * 8 H. 6. 12. b. Vide 10 Hen. 7. 11. b. Quære. Nota that Trin. 3 Car. Mistress *Dorothy Bennet* of London, Widow, upon good Advice, brought such an Action *against the Sheriffs of London*, scilicet, for returning too small Issues against the Mayor and Commonalty of London. * Br. Averment, pl. 12. cites S. C. per June.—Br. Damages, pl. 69. cites S. C. by June, and that he shall recover his Damages ~ * Fol. 94. against him, quod nullus negavit.—See Tit. Return P. pag. 206, 207, 208.

Cro. C. 286. pl. 34 S. C. but S. P. does not appear. —Jo. 307. pl. 20. S. C. but S. P. does not appear. —See Tit. Return (O) pl. 47. —

21. If the Sheriff takes an Inquiſition upon an Elegit, and upon Requeſt refuſes to deliver Poſſeſſion to the Plaintiff, and yet after at the Day of the Return of the Writ, returns that he deliver'd Poſſeſſion to the Plaintiff at the Day of the Inquiſition taken, an Action upon the Caſe lies againſt him for this falſe Return, though the Plaintiff might enter after the Inquiſition, without any Delivery; for peradventure the Poſſeſſion is kept by a ſtrong Hand, ſo that he cannot enter without the Aid of the Sheriff. Hill. 8 Car. B. R. between *Liſter and Bromley*, adjudg'd, this being moved in Arreſt of Judgment. Intratur Mich. 8 Rot. 68.

In Caſe the Plaintiff declared that he recover'd in Debt againſt A. and deliver'd a *Cap. Utlag. to the* Defendant, being *Sheriff* &c. *who*, as the Plaintiff alleg'd, *was often in Company of the ſaid A.* within his Baily wick afterwards, and yet return'd Non eſt inventus. Judgment was given for the Plaintiff. Noy 22. Parkinſon v. Powell.

Caſe againſt a Sheriff to whom a Fi. Fa. iſſued, for that he falſo & malitioſe return'd Quod *Fieri fecit ad* 40 *l. and that he had no more, ubi revera he had to the Value of the Debt.* Verdict and Judgment for the Plaintiff. 2 Show. 314. pl. 327. Mich. 35 Car. 2. B. R. Atkins v. Tankard.

Goods taken on a Fi. Fa. were *appraiſed at* 26 *l. and* afterwards *ſold for* 10 *l.* and the *Sheriff return'd Fieri feci* 10 l. Per Holt Ch. J. an Action on the Caſe lies againſt him. Comb. 255. Paſch. 6 W. & M. in B. R. Taylor v. Batten.

* Br. Record, pl. 5. cites S. C.

22. Where a Man brought Action upon the Caſe *againſt the Clerk of the Juries*, becauſe he brought Præcipe quod reddat againſt R. C. and rehearſed the Proceſs and the Plea, and the Iſſue till Octavis Hillar. quo die Defend' pro tali ſumma &c. *aſſumpſit ſuper ſe to inroll the Jury*, * [*and the Niſi Prius*] *and did not*, by which the Jury paſs'd for him, and by this means his Judgment was loſt. Br. Action ſur le Caſe, pl. 13. cites 34 H. 6. 4.

Br. Retorn de Briefs, pl. 56. cites S. C.

23. If a Sheriff returns a Man *ſummon'd or attach'd*, and no Time is expreſs'd, and yet it ought to be by 2 Months in Præmunire, and by 15 Days in another Caſe; but if it be *not ſerved* by ſuch Time *according to the Law, by which the Party is damnified*, he ſhall have Diſceit againſt the Sheriff for the falſe Return, which is by Action upon the Caſe, as it ſeems, viz. Diſceit upon the Caſe. Br. Action ſur le Caſe, pl. 67. cites 39 E. 3. 7.

24. In Scire facias upon a Recovery by Default in Writ of Inquiry of Waſte, if the Defendant was *not ſummon'd, attach'd, nor diſtrain'd*, in the firſt Action he may have Diſceit againſt the Sheriff &c. Br. Scire facias, pl. 49. cites 48 E. 3. 18.

25. *Debt upon a Leaſe for Years, rendring Rent payable annually at D.* the *Defendant ſaid that he has been always ready to pay*, and yet is, *and tender'd the Money to the Court*; the *Plaintiff pleaded Eſtoppel that the Sheriff return'd the Defendant ſummon'd, and after return'd him attach'd, and after return'd Diſtring. Nihil*, by which *Capias iſſued till the Pluries, when he came in Ward of the Sheriff, and Day given over; at which Day he made Default, and Diſtreſs iſſued, and return'd that he had nothing, and Capias iſſued again returnable* &c. *at which Day he came and pleaded*; Judgment *if againſt this Record* he ſhall ſays Tout temps priſt. And per Hill and Hank clearly he ſhall not be eſtopp'd; for *it may be that he was never ſummon'd, attach'd, or diſtrain'd, notwithſtanding the Return.* But Thirn contra; and that if it be ſo, the Defendant ſhall have Action of Diſceit againſt the Sheriff. Br. Tout temps priſt, pl. 12. cites 11 H. 4. 61.

26. Where the Citizens of N. have Charter *that they ſhall not be impanelled in any Jury extra Civitatem ſuam*, and one of them is impanelled, if he *ſhewed his Charter to the Sheriff* before &c. *and notwithſtanding he returns him*, there he may have *Action upon the Caſe* againſt the Sheriff. Br. Exemption, pl. 1. cites 18 H. 8. 5.

22 Caſe

27. Caſe &c. againſt the Sheriff for *returning a Cepi Corpus upon a Latitat, & habeo Corpus paratum, when in Truth he had not the Party, whereby the Plaintiff had loſt his Suit.* Upon a Demurrer the Plaintiff had Judgment, becauſe by this *Demurrer* the Sheriff *confeſs'd the falſe Return, and the Plaintiff's Loſs*; but if he *pleaded the Statute* 23 *H.* 6. *and ſet forth the Bail-bond*, it ſeemed to Popham that had been a good Bar to this Action. Mo. 428. pl. 596. Hill. 38 Eliz. Laughton v. Gardiner. Cro. E. 400. (bis) pl. 8. Langton v. Gardiner, S. C. the Plaintiff demurr'd, and the Defendant ſhew'd to the Court that he had taken Bond of the Party to appear; and by the 23 H 6. was compellable to bail him, and ſo ought not to be charged. But per Cur. it not being pleaded, the Court cannot intend it, nor take Conuſance of it. And therefore adjudged for the Plaintiff.——S. C. cited, and S. P. reſolved accordingly, and the Statute of H. 6. is out of the Caſe; for it being a private Statute, the Court can take no Notice of it by Suggeſtion, without pleading. But if the Defendant had pleaded it ſpecially, or had pleaded Not guilty, he might have taken Advantage of the Statute, and ouſted the Plaintiff of his Action. And Judgment for the Plaintiff Cauſa qua ſupra. Sid. 439. pl. 6. Hill. 21 & 22 Car. 2. B. R. Parker v. Welby.——Vent. 85. S. C. Per Cur. accordingly; for as it is it ſhall be intended that the Plaintiff let him go without Bail; and upon pleading Not guilty he might have given the Statute in Evidence —— Mod. 57. pl. 1. S. C. Trin. 22 Car. 2. B R. And Keeling ſaid that they have relied here upon the falſe Return, and the general Demurrer he took to be well enough; and Moreton and Rainsford accorded, and therefore Judgment was given againſt the Plaintiff.—— 2 Saund. 154. 155 Trin. 22 Car. 2. B. R. Benſon v. Welby, the Court ſeemed of divers Opinions as to the Declaration, viz. ſome that it was for the falſe Return only, and that the precedent Matter was only Inducement; others thought the Declaration was for the Eſcape only, and ſo the other Matter but only Surpluſage. A third Opinion was, that the Action was brought for the Eſcape, and for the falſe Return likewiſe; but the Court agreed not in this Matter. But the whole Court reſolved that Judgment be given for the Plaintiff, becauſe the Statute is a private Statute, and ought to be pleaded. And the Reporter ſays, that in the Caſe of Parker v. Welby, the ſame Judgment was given in the ſame Term.——See 2 Keb. 591. 626. 630. 632. 657. 670. And adjudged for the Plaintiff. Both the Caſes are exactly the ſame.

28. If upon a *Mandamus* to *a* Mayor &c. *to reſtore a Perſon diſfranchis'd* to his Place, or to ſignify Cauſe &c. the Mayor &c. *returns a good Cauſe* &c. *but the Matter is falſe*, an Action lies upon the ſpecial Matter againſt the Certifiers. 11 Rep. 99. a. b. Trin. 13 Jac. B. R. Reſolved in Bagg's Caſe.

29. C. ſued K. in the Stannary Court, and the Defendant pleaded to the Juriſdiction. And by Jones J. abſentibus aliis, if the *Judge refuſes a Plea which by the Law he ought to accept*, an Action on the Caſe lies againſt him. 2 Roll Rep. 498. Hill. 22 Jac. B. R. Curriton v. Killigrew.

30. An *Officer pro hac Vice only, diſtrained the Cattle of B. by Virtue of a Diſtringas out of an Inferior Court, and* he, *without taking ſufficient Sureties for Appearance at the next Court, delivered back the Cattle.* B. did not appear. Adjudged that this was ſuch a Diſceit for which an Action on the Caſe lies, tho' he was not a known Officer there, but only pro hac Vice for this Purpoſe. Lat. 159. Trin. 2 Car. Wilde v. Dowſe.

31. Caſe *againſt the Cuſtos Brevium & Cuſtos Rotulorum of B. R. for that the Plaintiff had obtained Judgment againſt J. S. which by Negligence was razed, and (Capiatur) made (Miſericordia.)* It was prov'd at the Trial, that all the Attornies of the Court have Liberty without Controul to ſee the Records, and that frequently there are ſeveral of them together there, ſo that it is almoſt impoſſible to obſerve them all; and therefore the Defendant not anſwerable. But Mallet and Windham held, that tho' no Neglect appears in the Defendant, yet having taken upon him to keep the Records, he is to anſwer for all Miſuſages; and therefore chargeable in this Action. But Twiſden contra, becauſe he cannot by any Induſtry prevent it. But by Reaſon of a Variance in the Declaration the Plaintiff was nonſuited. Lev. 64. Paſch. 14 Car. 2. B. R. Herbert v. Paget. Sid. 77. pl. 12. S. C. but no Opinion of the Court appears, [tho' Nelſ. Abr. 51. pl. 25. cites it as adjudg'd there, that the Maſter of the Office ſhall not anſwerable.] ——Raym. 55. S. C. that upon Evidence of Abundance of Perſons there ſpecified, having Liberty to go into the Office and view the Records, the Jury found for the Defendant.—— Keb. 288. pl. 100. S. C. adjornatur ——Keb 346. pl. 27. S. C. and there being ſuch an uncontroulable Liberty of coming into the Office, there muſt ſome ſpecial Negligence appear. And thereupon the Plaintiff was nonſuited

32. If

32. If a *Juſtice of Peace refuſes to take the Oath of the Party reb'd*, he may have an Action on the Caſe againſt him; for he cannot indict him, and this is his only Remedy. Sid. 209. Trin. 16 Car. 2. B. R. in pl. 3. Per Twiſden J.

33. Where an Officer *does any Thing againſt the Duty of his Place* and Office, *and a Damage thereby accrues to the Party*, an Action lies; Per Wylde J. 2 Vent. 26. Mich. 23 Car. 2. C. B. in Caſe of Turner v. Sterling.

34. If the Sheriff upon a Writ *de Coronatore eligendo will not return him as a Coroner who was choſen by the major Part*, an Action on the Caſe lies; Per Archer J. who mentions it as a Caſe put at the Bar; and ſays he agrees to it, tho' he knows no Authority for it in Point. 2 Vent. 26. Mich. 23 Car. 2. B. R.

2 Lev. 50. Starling v. Turner, S. C. accordingly in B. R. the Mayor had failed to do his Duty, and the Plaintiff alleged that thereby he loſt the Office, which after Verdict is ſufficient.

35. Caſe &c. againſt the Lord Mayor of London, for refuſing a Poll to the Plaintiff, who was Competitor for the Office of Bridge-maſter, and who then inſiſted that he had the Majority, which the other denying, the Plaintiff deſired a Poll &c. The Plaintiff had a Verdict and Judgment in C. B. And in Error it was inſiſted that it was uncertain whether the Plaintiff would have been elected; and that he cannot bring an Action for a Poſſibility of Damages; and that this was no more, it not being decided who had the moſt Votes. But Judgment was affirm'd, becauſe the Defendant had deprived him of the Means by which it might appear whether he had the moſt Votes, or not. Vent. 206. Paſch. 24 Car. 2. B. R. Sir Sam. Sterling v. Turner.

And the Reporter adds a Nota, That in neither of the Courts was any Queſtion made whether ſuch Action would lie ſimply for denying the Poll and returning another; but this ſeemed to be admitted by both Courts.——Freem. Rep. 17. pl. 15. Turner v. Sterling, S. C. in C. B. and ſays Judgment was affirm'd in B. R.——2 Vent. 25. S. C. in C. B. adjudged for the Plaintiff by 3 J. contra Vaughan, with the Reaſons.

The Plaintiff was a *Serjeant at Law, and Recorder of Colcheſter*, and the Defendants reſolving to turn him out, procured *Articles of Miſdemeanor* to be *drawn againſt him*, and then all who had Liberty to vote proceeded to vote for and againſt him, and a *Poll was granted* to decide the Controverſy, it not appearing upon the View who had the Majority of Votes; but before the Plaintiff had taken all the Names, and *whilſt he was taking of the Poll, the Defendants took away the Paper, and would not ſuffer him to proceed.* The Jury gave him 300 l. Damages, on a Trial at Bar. 2 Mod. 228. Paſch. 29 Car. 2. C. B. Shaw v. Colcheſter Burgeſſes.

36. Action will not lie for the Plaintiff in an Outlawry againſt the Sheriffs *for neglecting to ſeize the Goods of the Outlaw upon a Capias Utlagatum*; for that is the King's Loſs. And tho' it was pretended that Seizing might have inforced the Defendant to appear to the Plaintiff's Action, the Court thought it ſo remote as not to be conſidered as a Ground to ſupport an Action. 2 Vent. 90. Mich. 1 W. & M. in C. B. Dawſon v. London Sheriffs.

If a Bailiff of a Franchiſe has a Warrant on a Fieri facias delivered to him, and neglects to execute it, ſo as the Party is prejudiced by it, and he brings an Action againſt the Bailiff, and concludes to his Negligence in not executing the Writ, the Action will be maintainable. Mo. 431. pl. 606. Hill. 38 Eliz. Palmer v. Porter.——If a Miniſter of Juſtice has a Warrant to attach the Goods of another, if he can do it, and does not do it, Caſe lies againſt him; Per Coke Ch. J. 3 Bulſt. 212. Trin. 14 Jac.——So if one ſues a Writ, and ſhews the Sheriff the Party to be arreſted, and delivers him the Writ, requiring him to make the Arreſt, Caſe lies againſt him for not doing it. Cro. E. 873. Hill. 44 Eliz. C. B. by Walmſley J. Arg. in pl. 10.

37. *But* if it had been ſhewn, that they had neglected *to take his Body when they might have taken it*, there might have been more Reaſon to ſupport this Action. 2 Vent. 90. Mich. 1 W. & M. in C. B. Dawſon v. Sheriffs of London.

(R. b) Againſt whom it lies. [*Principal or Under Officer.*] See Tit. Eſcape.

1. IF the Deputy of the Sheriff ſubſtracts a Writ which is to be returned, a Writ of Diſceit lies for this againſt the Sheriff himſelf, and not againſt the Deputy. 19 H. 6. 71. b. (It ſeems that this is not Law, becauſe the Deputy may be puniſh'd for Matter of Falſity. Br. Bille, pl. 9. cites 19 H. 6. 29. & 50. & 72. where it was inſiſted that the Suit ought to be againſt the Sheriff himſelf (whereas the Suit was by Bill of Diſceit againſt the Sheriff's Deputy and an Attorney;) but non allocatur; for the Defendants did the Diſceit, and not the Sheriff. ——S. P. admitted Arg. and takes a Difference between a Falſity or Deceit and a Non-feaſance, that in the firſt Caſe it lies againſt the Under-Sheriff, tho' not in the laſt. Le. 146. in pl. 203.——S. C. cited Arg. Cro. E. 175. in pl. 1.——S. C. cited by Coke Ch. J. Roll Rep. 78. in pl. 20.

2. If the Under-Sheriff, when a Venire Facias comes to the Sheriff in the Abſence of the Sheriff, ſends to the Bailiff of C. to return the Pannel, whereas there is * not any ſuch Bailiff of C. that hath any Warrant to return it, and yet he returns the Pannel, for which Cauſe it is quaſh'd, the Plaintiff ſhall have an Action upon the Caſe for this Default againſt the Sheriff himſelf. 38 Aſſ. 13. adjudged. See (Q. b) pl. 13. S. C. and the Notes there. —* See (F. c) pl. 2.

3. If a Bailiff Errant, or Special, arreſts a Man upon a Capias ad Satisfaciendum, and after the Priſoner reſcues himſelf, he at whoſe Suit he was arreſted cannot have an Action upon the Caſe upon the Eſcape againſt the Bailiff, but muſt have it againſt the Sheriff; for the Baily is but a Servant to the Sheriff. Mich. 37 Eliz. B. R. between *Atterton and Harward*, agreed. See (B. c) pl. 1. 3. S. C. (C. c) pl. 1. S. C. —— Cro. E. 349. pl. 26. S. C. but S. P. does not appear.——A Servant or Deputy quatenus ſuch cannot be charged for *Neglect*, but the Principal only ſhall be charged for it; but for a *Miſ-feaſance* an Action will lie againſt a Servant or Deputy, but not quatenus a Servant, but a Wrongdoer; as if a Bailiff, who has a Warrant from the Sheriff to execute a Writ, ſuffers his Priſoner to eſcape, the Sheriff ſhall be charged for it, and not the Bailiff; but if the Bailiff *turns the Priſoner looſe*, the Action may be brought againſt the Bailiff himſelf; for then he is a Kind of a Wrongdoer or Reſcuer, and it will lie againſt any other that will reſcue in like Manner; Per Holt Ch. J. Paſch. 13 W. 3. in his Argument in the Caſe of Lane v. Cotton.

4. If the Demandant, in a Writ of Entry ſur Diſſeiſin, delivers a Writ of Summons to the Under-Sheriff of the County, and after he ſummons the Tenant upon the Land accordingly, and notwithſtanding does not return the Writ, an Action upon the Caſe may be brought againſt the Under-Sheriff, if the Plaintiff pleaſes; for peradventure the Sheriff had no Notice thereof, and it may be that the Under-Sheriff took the Fees for executing the Writ. Hill. 32 Eliz. B. R. between *Marſh and Aſtrey*, adjudg'd. See (Q. b) pl. 16. S. C. —Cro. E. 175. pl. 1. S.C. adjudg'd for the Plaintiff; for this is for a Tort done by the Under-Sheriff himſelf, and therefore may pe puniſh'd; and it is alleged that he falſo & malitioſe intending to delay the Plaintiff of the Execution of his Writ did not return it, ſo that it is an Embezling of the Writ for which he is puniſhable; and it was charged in this Action that he had taken the Fees to return it.—— Le. 146. pl. 203. S. C. adjudg'd for the Plaintiff.

5. If a Warrant upon a Fieri Fac' to levy a Debt at the Suit of J. S. be directed to an Under-Bailiff of a Liberty, and he by Force thereof levies the Debt, and after conceals the Writ, and makes not any Certificate thereof, an Action upon the Caſe lies againſt the Under-Bailiff, becauſe he has done a perſonal Tort. Mich. 12 Jac. B. R. between *Bell and Catesby*, adjudged. Roll Rep. 78. pl. 20. S. C. adjudg'd for the Plaintiff. But Coke Ch. J. agreed that the Under-Sheriff ſhall not be charged for not returning a Writ, where there is no perſonal Tort ſuppoſed in him.

6. It is good Action upon the Caſe by Bill *againſt the Deputy of a Sheriff for imbezzling of a Writ of Habeas Corpora*, and that it lies *as well againſt him who excites the other to do it as againſt the Doer*; for in Treſpaſs there is no Acceſſory, and the Matter ſhall be given in Evidence. Br. Diſceit, pl. 52. cites 19 H. 6. 29.

7. If a *Clerk in an Office miſenters* any thing, he himſelf ſhall be puniſh'd, and not the Maſter of the Office; becauſe he takes a Fee for it. Arg. Le. 146. in pl. 203.

8. Caſe againſt a Gaoler, for that a *Plaint being before the Bailiffs of B. they directed a Warrant to the Under-Bailiff to take the Party, Ita quod habeant corpus ejus coram Ballivis ad proximam Curiam ibid. tenend. and they arreſted and committed him to Priſon ſub Cuſtodia of the Defendant.* It was moved in Arreſt of Judgment that this Action did not lie, for the Priſoner was not committed to him by any lawful Authority; for the Under-Bailiffs had Authority to take him, Ita quod &c. but not to commit him to any other, and whoſoever they commit him to are but as their Servants, and the Houſe in which, is as their Houſe, and Action lies againſt them if they have him not at the Day, and againſt no body elſe. Cro. E. 743. pl. 20. Hill. 42 Eliz. C. B. Baldry and Johnſon.

9. If a *Certificate* made *of a Cuſtom in London is falſe*, the *Party ſhall have Action* on the Caſe, not againſt the Recorder, but *againſt the Mayor and Aldermen*; for it is their Certificate by their Recorder. Per Hobart Ch. J. Hob 87. pl. 114. Trin. 12 Jac. in Caſe of Day v. Savage.

10. Caſe for *Refuſal of ſufficient Bail* lies againſt the Sheriff, but not againſt the Officer. Per North Ch. J. But it was ſaid Arg. that for not carrying the Party before the Sheriff to put in Bail, Caſe lies againſt the Bailiff. 2. Mod. 32. Paſch. 27 Car. 2. C. B. Smith v. Hall.

Fol. 95.

See Tit. Maſter and Servant (B).

(S. b) [Diſceit.] Againſt whom it lies upon a *Warranty in Law.* Againſt the *Maſter.*

So if my Servant ſells *falſe Stuffs.* Br. Action ſur le Caſe, pl. 8. cites S. C. —— S. C. Arg. Poph. 143. ——2 Roll Rep. 6. Arg. cites S. C. as ſo held by Rolfe and Martin. —— S. C. cited by Mountague Ch. J. Bridgm. 128.

1. If a Servant that is my Merchant [Agent] ſells a falſe [an unſound] Horſe or other Merchandize in a Fair, to a Man, no Action lies againſt the Maſter for the Diſceit; for he did not command his Servant to ſell to any Man particularly. 9 Hen. 6. 53. b.

S. P. Br. Action ſur le Caſe, pl. 8. cites 9 H. 6. 53. and mentions as to ſelling in general, without expreſſing any Command or Covin to ſell it to any particular Perſon.

2. But if the Servant by Command and Covin of the Maſter, ſells it to any particular Perſon, if it be unſound [or corrupt] an Action lies againſt the Maſter, for this is his Sale. * 8 Hen. 6. 53. b.

* This ſhould be 9 H. 6. 53. b.

Br. Action ſur le Caſe, pl. 8. cites S. C. but S. P as to the Servant's ſelling the Wine does not appear.

3. If the Servant of a Taverner ſells Wine to another, which is corrupted, an Action upon the Caſe lies againſt the Maſter, tho' he did not command the Servant to ſell it to this particular Perſon. 9 H. 6. 53. b.

4. Caſe

4. Caſe for that the Defendant *having counterfeit Jewels, and knowing them to be ſo, ſent his Servant* J. S. *with them to Barbary, to make Sale* of the Jewels, *where he applied to the Plaintiff to ſell them for him, which he did to the King of Barbary for* 800*l. and deliver'd the Money to J. S. who brought it over and deliver'd it to the Defendant.* The Jewels afterwards *being diſcover'd to be counterfeit, and not worth more than* 100*l. the Plaintiff was impriſon'd till he repaid the King the* 800*l.* It was argued after Verdict, that the Deceit done to the Plaintiff is found to be done by the Servant, and the Jury found that the Maſter did not command the Servant to conceal their being counterfeit, and then by his general Power to ſell the Maſter ſhall not be charged if the Servant exceeds his Power; and for that and other Reaſons there aſſign'd, he conceived the Action not maintainable; and to that Opinion the Court inclined, and principally for the Reaſon abovemention'd. Cro. J. 468. 470. pl. 14. Hill. 15 Jac. B. R. Southern v. How.

Popham 143. S. C. and Mountague Ch. J. ſaid that the Plaintiff is no Party who ſhall have the Action, but the King of Barbary.—— Bridgm. 125. S. C. that Trin. 16 Jac. after Argument, Mountague, Doderidge and Haughton, abſente Crooke, agreed that the Action would not lie, and that Mich. 16 Jac. Judgment was given by all the Court, Quod Querens nil capiat per Billam.——2 Roll Rep. 5. S. C. adjornatur.——Ibid. 26. S. C. adjornatur, but that Mich. following Judgment was given for the Defendant.——Nelſ. Abr. 38. pl. 16. cites Paſch. 143. as adjudg'd that the Action lay againſt the Maſter, and ſo at pag. 1166. pl. 2. cites 2 Cro. 468. as adjudg'd that it lies. But ſee ſupra and the Reports themſelves.

5. *But* if a *Goldſmith makes Plate wherein he mingles Droſs* ſo as it is not according to the Standard, and *ſends his Servant to a Fair to ſell it, who ſells it for good* Plate, according to the Standard, an Action on the Caſe lies againſt the Maſter; Per Doderidge J. to which Mountague Ch. agreed, becauſe it fails in the Price in Silver. And ſo made a Difference between the ſelling of Plate and the ſelling of Jewels (as in the principal Caſe) which are ſold by their Valuation and fail in their Value. Cro. J. 471. Hill. 15 Jac. B. R. in pl. 14.

(T. b) [Diſceit.] [*Upon Warranty in Law.*] Againſt the *Servant.*

1. If the Servant of a Taverner ſells Wine that is corrupted, knowing it to be ſo, Action of Diſceit does not lie againſt the Servant; for he did it but as a Servant. Contra 9 Hen. 6. 53. b.

(U. b) Diſceit. Againſt whom it lies upon an *Expreſs Warranty.* [*Servant.*]

1. If my Servant leaſes my Lands to another for Years, reſerving a Rent to me, and to perſuade the Leſſee to accept thereof he promiſes that he ſhall enjoy the Land during the Term without Incumbrances, if the Land be incumber'd &c. the Leſſee may have an Action upon the Caſe againſt my Servant, becauſe he made an expreſs Warranty. Trin. 15 Jac. B. R. between *Broking and Came*, per Curiam. Cro. J. 425. pl. 10. S. C. but S. P. does not appear.

2. Diſceit

If a Servant ſells Oaks, or an Apprentice ſells Wares of the Maſter, with Warranty, the Warranty is void; for it is the Sale of the Maſter, and the Warranty of the Servant, and ſo not good. 2 Roll Rep. Per Doderidge & Haughton, cites 11 E. 4.

2. Diſceit upon a *Warranty of Cloths* upon a Sale of them, *to be of the Length of* 30 *Yards*, where they were only 22 Yards. The *Defendant ſaid that the Property was in J. N.* and he as his Servant, and by his Command, ſold them; abſque hoc that he ſold Modo & Forma. And per Littleton, Tho' it was the Sale of the Maſter, by which the Maſter may have Action of Debt, yet it is the Warranty of the Servant who is Defendant, and Action lies againſt him; for it may be that the Plaintiff would not have bought them, but by truſting to the Warranty of the Defendant. But by Choke and Bryan, Diſceit lies not where it is the Sale of one by the Warranty of another: But Brooke ſays Quære; for he ſays it ſeems that Action on the Caſe ſur Aſſumpſit, pro tali ſumma, will lie. Fairfax agreed that if they fail'd of the Length, Diſceit lies; for this does *not appear by the View*, but by meaſuring. Br. Diſceit, pl. 29. cites 11 E. 4. 6.

(X. b) [Diſceit.] In what Caſe it lies upon a Warranty in Law. *Againſt an Attorney.*

* It ſeems that this ſhould be (3;) and ſee 21 E. 3. 45. b. pl. 63. & 61. pl. 8.

1. IF my Attorney in a Plea of Land makes Default, by which I loſe the Land, I ſhall have a Writ of Diſceit againſt him, and ſhall recover all in Damages. 21 Edw. * 4. 45. b. 61. but Quære if he did not loſe it by Colluſion.

Br. Error, pl. 64. cites S. C.—— Br. Attorney, pl. 35. cites S. C. & S. P.—— See Tit. Attorney, (L) pl. 1. S. C.

2. [But] If the Tenant makes an Attorney in Bank, and after Conuſance of this Plea is demanded by a Franchiſe, and granted, he remains Attorney for him in the Franchiſe, yet if he makes Default there by which the Land is loſt, no Writ of Diſceit lies againſt him, becauſe he is not bound to go there. 21 Ed. 3. 46.

Br. Attorney, pl. 35. cites S. C.

3. So an Attorney in a Plea is not bound to go to the Niſi Prius, and therefore if he makes Default at the Niſi Prius, no Writ of Diſceit lies againſt him. 21 Ed. 3. 46.

A Client gives his Attorney a *Warrant to plead the General Iſſue*, and he *ſuffers Judgment by Nihil dicit*.

4. If an *Attorney pleads falſely or faintly*, Action of Diſceit lies; but the Party by this cannot remove him; per Aſhton, which was clearly denied. Br. Diſceit, pl. 41. cites 8 H. 6. 8.

It was ſaid that this was not any Cauſe of Action, unleſs it was by Covin, and muſt be alleg'd in the Declaration, or otherwiſe he cannot recover. It was afterwards agreed that the Covin was not traverſable by Plea, but only in Evidence at the Bar. Win. 90. Trin. 22 Jac. C. B. Adams v. Ward.

5. An Attorney who is inform'd to plead Matter, which he cannot plead by Conſcience, may plead Quod *non eſt Veraciter informatus* &c. and in Writ of Diſceit this ſuffices againſt his Client. Br. Attorney, pl. 76. cites 20 E. 4. 9.

6. Diſceit, for that the *Plaintiff being ſued by A. on a Bond*, the *Defendant without Warrant appear'd as Attorney, and pleaded Non ſum informatus*. The Defendant *pleaded that A. ſued the Plaintiff and J. S. joint Obligors, and that J. S. retain'd him for them both, & pro defectu Informationis he pleaded*

pleaded as above. Upon Demurrer the Court were of Opinion that the Fraud and Covin are traverſable. D 361. b. pl. 13. Hill. 20 Eliz. Manſer v. Franklin.

7. An *Infant being ſued on a Bond enter'd into by him and another, the Plaintiff in the Suit procur'd an Attorney, without any Warrant from the Infant to appear for him, who pleaded Non ſum informatus*, and the *Infant was taken in Execution.* It was ſaid by the Court, that his Remedy was by Writ of Diſceit againſt the Attorney, and not by Audita Querela. Cro. J 694. pl. 7. Mich. 22 Jac. C. B. Allely v. Colley.

8. If a Man be retain'd as an *Attorney to ſue for a Debt which he knows to be releaſed, and was himſelf a Witneſs* to the Releaſe, yet an Action will not lie againſt him, becauſe what he does is only as Servant to another, and in the way of his Calling and Profeſſion; per tot. Cur. Mod. 209. Hill. 27 & 28 Car. 2. C. B. in pl. 41.

(Y. b) [Diſceit.] In what Caſe it lies *upon* an *Expreſs Warranty.* In reſpect of the Warranty, and the Time of the making.

Fol. 96.

1. IF a Man, knowing his Horſe to be lame and founder'd, offers him to me to buy, and warrants him to be ſound &c. and I truſting thereto buy him, by which I am deceived, tho' here the Warranty was before the Sale, yet inaſmuch as this was the Cauſe of the Buying, an Action upon the Caſe lies thereupon. Paſch. 3 Jac. B. R. between *Goldſmith and Preſton*, admitted. (Z) pl. 1. S. C. but not S. P. — See (Z. b) pl. 3. S. C.

2. If one ſells a Horſe to another, and *after at another Day warrants him to be good and ſound*, it is a void Warranty; for it ought to be at the Time of the Selling. Godb. 31. in pl. 40. Per Windham, cites 5 H. 7.

3. If A. *ſells Cloths to B. and warrants them of ſuch a Length*, and they are not, *the Warranty ought to be in Writing, if made at another Time after the Bargain*; for to have an Action of Diſceit the Warranty muſt be made upon, and at the Time of, the Bargain. F. N. B. 98. (K) Br. Garranty, pl. 57. S. P. cites 5 H. 7. 18. and Ibid. pl. 58. S. P. cites 5 H. 7. 43. [All the Editions of Brooke are printed 5 H. 7. 43. but there are not ſo many Pages in that Year; but it ſhould be (41) and is at 41. b. pl. 7.]

4. Q. Eliz. was ſeiſed in Fee of the Vicarage of S. whereto the Tithes in S. did belong, whereof the Defendant upon the 9 June *did affirm himſelf to be lawful Incumbent, and had Right to the Tithes from the Death of T. V. the Incumbent.* And after upon 16 June the Plaintiff treating with the Defendant about his buying the ſaid Tithes till Mich. following, the Defendant adtunc *knowing that he had not Right thereto, he not having been inſtituted* &c. yet falſo & deceptive ſold them to the Plaintiff for 30 l. and alleges in Facto, that E. T. was alſo preſented &c. and took the Tithes &c. The *Action does not lie for ſelling a Thing in which he has no Property, unleſs he makes a Warranty at the ſame Time that the Plaintiff ſhould enjoy them*, whereas this Affirmation of his being Vicar, and having a Right to ſell, was 7 Days before the Sale. Adjudg'd for the Defendant. Cro. J. 196. pl. 23. Mich. 5 Jac. B. R. Roſwell v. Vaughan.

2 Show. 284. pl. 279. Mew v. Ruſſell, S. C. Saunders Ch. J. ſaid the Adtunc proves it to be all at the ſame Time, and would be well enough if the (in Conſideratione inde) had been out. And upon moving it at the next Term, all the Court thought it well enough. And Judgment for the Plaintiff.

4. Caſe, for that the Plaintiff *had bargain'd and bought of the Defendant* 16 Hogſheads of Wine &c. The Defendant *in Conſideratione inde adtunc & ibidem, warranted the Wine to be good* and merchandizable. It was objected that this Warranty was after the Contract, and ſo not good; and cited the Caſe of Pope v. Lewins. But the Court ſeemed to think it too nice, and adtunc & ibidem ſhall be intended all at an Inſtant, and that it would be well enough if (in Conſideratione inde) had been out. Afterwards the Plaintiff had his Judgment, by the Opinion of Raymond and Withins, Jones hæſitante. Skin. 104. pl. 2. Paſch. 35 Car. 2. B. R. Moor v. Ruſſell.

5. Plaintiff declar'd that Defendant on ſuch a Day and Place ſold him a Horſe, and then and there warranted him to be ſound &c. Whereupon he paid him ſo much, and averr'd that the Horſe was not ſound. It was mov'd that this Warranty, as ſet forth, might be after the Sale, whereas it ought to be Part of the Contract, and therefore it ſhould be Warrantizando vendidit. Sed non allocatur; for the Payment was afterwards, and by that the Bargain was completed which till then was imperfect. 1 Salk. 211. pl. 4. Trin. 5 Ann. B. R. Butterfield v. Burroughs.

(Z. b) In what Caſe it lies, upon an expreſs Warranty.

S. P. Br. Action ſur le Caſe, pl. 8. cites 9 H. 6. 53. by Babb. and Marten.——F. N. B. 94. (C) S. P. and S. C. cited in Marg.

1. IF a Man ſells a Tun of Wine, and warrants it to be ſound, and not corrupted, if it be corrupted, an Action upon the Caſe lies. 11 Hen. 6. 18.

F. N. B. 94. (C) S. P. and S. C. cited in Marg.

2. So if a Man ſells a Horſe, and warrants him to be clear [ſound] of his Limbs, if he be not, an Action upon the Caſe lies. 11 Hen. 6. 18.

(Z) pl. 1. S. C. but not S. P. —— (Y. b) pl. 1. S. C. & S. P. accordingly.

3. [So] if a Man ſells a Horſe, and warrants him to be ſound &c. whereas he knows him to be lame and foundered, an Action upon the Caſe lies. Paſch. 3 Jac. B. R. between *Goldſmith and Preſton* admitted.

See (P. b) pl. 15. —— Action lies againſt him without any Warranty; for it is the Duty of every Artificer to exerciſe his Art rightly and truly as he ought. F. N. B. 94. (D) Marg. cites 24 H. 6. 10. and 46 E. 3. 19.—— Poph. 143. Arg. cites F. N. 94. (C)

4. If a Smith promiſes to ſhoe my Horſe well and commodiouſly, if he pricks him, an Action upon the Caſe lies. 14 Hen. 6. 18. b. it ſeems it lies without this Warranty.

Action lies againſt him for denying to ſhoe him. Agreed per tot Cur. Kelw. 50. a. pl. 4 Paſch. 18 H. 7.——S. C. cited by Holt Ch. J. 12 Mod. 484. as actionable, becauſe he has made Profeſſion of a Trade which is for the Publick Good, and has thereby ex-

5. So if he does not ſhoe him, by which I travel without, and my Horſe is damnified for Want of Shoes, an Action upon the Caſe lies againſt him. 14 Hen. 6. 18. b.

poſed

posed and vested an Interest of himself in all the King's Subjects that will employ him in the Way of his Trade.

6. If a Farrier, tho' he be not a common Farrier, assumes to cure my Horse of a Malady, if he kills the Horse through negligent Administration of his Medicines, an Action upon the Case lies against him. 19 Hen. 6. 49. See (P. b) pl. 13. and the Notes there.

7. If one retains a Man of the Law to be of his Counsel to get a certain Manor, and the Counsellor warrants him to gain the Manor, yet no Action lies against the Counsellor, if he does not obtain it; for this rests meerly in Covenant, and therefore the Warranty ought to have been by Deed. 11 Hen. 6. 18. (It seems this is intended without Consideration.) *Contra if he promises to purchase it*; by the best Opinion. Br. Action sur le Case, pl. 108. cites S. C.——F. N. B. 94. (D) in the new Notes there (b) S P. and if he does his Endeavour Case does not lie; for perhaps it was impossible to get it; cites 11 H. 6. 24 55.——(P. b) pl. 9. S. C.

8. So if a Man warrants to purchase a Manor, and does not, no Action lies without a Deed, because it sounds in Covenant. 11 Hen. 16. 18. b. (It seems it is intended without Consideration.)

9. If a Man sells certain Packs of Wool, with Warranty that they are good and merchantable, if they are full of Moths, an Action upon the Case lies. 19 Hen. 6. 49. b.

10. So if a Man sells certain Bales of Green, and warrants them to be merchantable, whereas he knows them to be * damaged, an Action upon the Case lies against him. 20 Hen. 6. 35. adjudged. Orig. is (Eveigne oue Zabul.)

11. If a Man undertakes to carry my Pack-horse over Humber, in a Vessel safe and sound, if he surcharges his Boat with other Horses, by which surcharging my Horse is lost, an Action upon the Case lies against him. 22 Ass. 41. adjudged. (It seems that it is intended that he was a common Carrier of such Things over the River. See (P. b) pl. 18. S. C. —S. P. And the Ferry Wages is certain. Br. Action sur le Case, pl. 78. cites S. C.

12. If a Man carries a Bale of Woad to a Carrier, and warrants it to him to be only of the Weight of 800 l. and prays him to carry it to such a Place, and that he should have 2 s. for the Carriage of every Hundred Weight, whereas it was in Truth of the Weight of 2000 l. but the Carrier giving * Credit to the Promise aforesaid, carries it to the Place appointed; but by the said Deceit in the Weight his Waggon in which he carried it was so overloaded, that by their excessive Labour he loses 3 of his Horses that drawed the Waggon, an Action upon the Case lies against him upon this Warranty, tho' he might have weigh'd it presently upon the Receipt; for he might take it upon the other's Promise, without weighing of it. Mich. 13 Jac. B. R. between *Bayly and Merril*, for the Weight is not discernible by the View. Roll Rep. 275. pl. 50. S. C. but does not mention the warranting, but only the affirming it * Fol. 97. to be 800 l. Weight, and without saying that it was no more.

13. But the Action does not lie in this Case, if he had only affirm'd to the Carrier that it was but 800 Weight; for this is not any Warranty. Dubitatur Mich. 13 Jac. B. R. between *Bayly and Merril*. The Court was divided 2 against 2 whether the Action lay or not. Et adjornatur ——Cro. J. 386. pl. 18. S. C. stated according to Roll Rep. and as to what was urg'd of the Plaintiff's Negligence in not weighing it, viz. that perhaps the Plaintiff was a Stranger there where he undertook the Carriage, and had no Weights to weigh it. It was answer'd that it was gross Negligence to undertake a Weight so far exceeding the Affirmation without weighing; wherefore Judgment was stay'd——3 Bulst. 94. S. C. says the whole Court (absente Coke Ch. J.) held the Action lay not, because the Default was in the Plaintiff himself by not weighing it; but being order'd to stay till moved again, and the Plaintiff perceiving the Opinion of the Court to be against him, never moved the Court again, and so no Judgment was pronounced either way; neither does this Report take any Notice of any Warranty.

A Goldsmith *had a Stone, which he affirmed to be a Bezoar-Stone, and sold it to the Plaintiff for* 100 whereas it was not a Bezoar-Stone. Adjudged that the bare Affirmation, without warranting it to be so, would not maintain an Action; Per all the Justices and Barons in the Exchequer Chamber, præter Anderson. Cro. J. 4. pl. 3. Patch. 1 Jac. Chandler v. Lopus.

In Case for *selling* the Plaintiff *false Bills of publick Faith, knowing them to be false*, and yet *affirming them to be true*, with an Intent to deceive, Judgment was given for the Plaintiff Sty 348. Mich. 1652. B. R. Fowke v. Boyle.

2 Roll Rep. 188. S. C. adjudg'd for the Plaintiff; but says that no Reason was given, only that Mountague Ch. J. said here was an apparent Fraud; for the Plaintiff would have rid the Horse, and the Defendant said, I will warrant him to be sound.

14. If A. sells a Horse to B. and warrants him to be found of Wind and Limb, and clean of his Legs, whereas he well knows that he is Shoulder-pitch'd, and has Splints upon his Legs, an Action lies against him upon this Warranty; for these Imperfections are not subject to the View without some Skill. Trin. 18 Jac. B. R. between *Dorrington and Edwards*, adjudg'd, this being moved in Arrest of Judgment.

Case &c. for that the Defendant, *on such a Day and Place, sold him an Horse, and then and there warranted him to be sound Wind and Limb*, whereupon he paid so much Money; and *averr'd the Horse had but one Eye*. Upon Non Warrantizavit pleaded the Plaintiff had a Verdict; and it was objected in Arrest of Judgment, first, that a Warranty extends only to secret Infirmities, but the Want of an Eye was apparent; but resolved that *this must be intended secret, since the Jury found that the Defendant did warrant.* 1 Salk. 211. pl. 4. Trin. 5 Ann. B. R. Butterfield v. Burroughs.

If a Man sells a Horse with one Eye, and warrants that he hath 2 Eyes, it is a void Warranty, because it is apparent to the Vendee. Br. Disceit, pl. 29. cites 11 E. 4 6.

15. If one sells a *Horse that is blind*, and warrants him to be sound, no Action lies, because I may see whether he be blind or not; but otherwise where he *has a Disease in his Eye which I cannot discern.* Bridgm. 128. cites 13 H. 4. 1.

(A. c) What shall be a *good* Warranty.

Ow. 60. S. C. accordingly by Clench and Fenner.

1. If a Man sells certain Sheep to another, and warrants that they are sound at the Time of the Sale, and that they shall continue sound by the Space of one Year after, this is a good Warranty, upon which an Action upon the Case lies, tho' it be the Act of God if they continue sound; for this is not impossible. Trin. 39 Eliz. B. R. between *King and Brayne*, per 2 Justices.

S. P. by Clench and Fenner, obiter. Ow. 60. in the Case above.

2. So if a Man warrants such a Ship to return safe from such a Place; for it is usual between Merchants to insure them in such manner. Trin. 39 Eliz. B. R.

3. So if one warrants that such a Man will live a Year; for this is the common usage of the Insurers among Merchants and others. Trin. 39 Eliz. B. R.

4. If A. promises B. for a Sum of Money for the Pasture of certain Sheep in certain Lands for a certain Time, to preserve the Sheep in the said Land for the Time aforesaid, sound and free from Rot; in this Case, if the Sheep were at the Time of the Promise altogether unsound, infirm, rotten, and corrupted, tho' they die after of this Rottenness within the Time aforesaid, yet this is not any Breach of the Promise if he keeps them during the said Time; for the Effect of the Promise is only to keep them in the said Lands, and that the Land should

should not infect them with the Rot; for if they were before the Promise utterly rotten, it was not possible for him to restore them to their Soundness, nor did he promise to do; but only upon a Presumption, that if they were sound then, they should not be infected with the Rot during the Time that they should depasture with him. Trin. 1651. *Matrevers and Aland*, adjudg'd upon a Demurrer. Intratur Pasch. 1651. Rot. 57.

5. If a Man *sells Seeds* to me, *and warrants* to me that they are good, where they are not, or *that they are Seeds of such a Country* which is false, Disceit lies; for I can't know them but by him. *But* if he warrants *that the Seeds shall grow*, it is a false Warranty; for it is as it pleases God. Br. Disceit, pl. 29. cites 11 E. 4. 6.

6. *So* Warranty *that a Horse shall carry a Man* 30 *Leagues a Day*, it is void; for he *cannot warrant a Thing to come*. Ibid.

7. *And* per Fairfax, if a Man *sells Cloths* of a *Murrey Colour, and warrants that they are blue*, it is a void Warranty; for it is apparent by the View. But per Brian, if the *Vendee be blind*, in such Case Disceit lies. Ibid.

(B. c) *Disceit*, in Nature of an Action upon the Case, *who may have it.* The *Master*.

1. If a Bailiff Errant takes J. S. in Execution upon a Cap. ad Satisfaciend' at the Suit of J. D. and after J. S. escapes by a Rescue of himself, the Sheriff may have an Action upon the Case against him for this Escape; for he is thereby chargeable over for this to J. D. and this Escape made to his Bailiff * was an Escape to himself. Mich. 37 Eliz. B. R. between *Atterton and Harward*, adjudg'd. Cro. E. 349. pl. 26. S. C. & S P. admitted, Arg. * Fol. 98. and said to have been adjudg'd in the Case of Hill v. Holt.

2. But if such a Prisoner, taken by a Bailiff of a Franchise, escapes from the Bailiff, the Sheriff shall not have an Action upon the Case against him, because he is not chargeable over, but the Bailiff only is chargeable. S. P. per Cur. Cro E 26. Pasch. 26 Eliz. C. B. in pl. 8.— See (F. c) pl. 3. S. P.

3. If a Bailiff Errant takes J. S. in Execution at the Suit of J. D. and after he escapes by a Rescue of himself, the Sheriff, if he will, may have an Action upon the Case against the Bailiff for his Escape, because when he takes upon him to be his Bailiff, it is an Assumpsit in Law to keep the Prisoners safely, and not to suffer them to escape. Dubitatur Mich. 37 Eliz. B. R. between *Atterton and Harward*. (R. b) pl. 3. S. C. but not S. P.— (G c) pl. 12. S. C. but not exactly S P

4. If my Servant be cozen'd of my Money, I may have an Action upon the Case for this Deceit against the Cozoner. Pasch. 8 Jac. in the Exchequer-Chamber, *Paul Tracey's Case*, per Curiam. Cro. J. 223. pl. 3. Tracy v. Veal, S. C. in 7 Jac. B. R. and it was for getting the Master's Money from his Servant by a counterfeit Letter, as from the Master to his Servant to pay it; and adjudg'd the Action lay for the Master; for the Abuse and Loss was only to him; and the Judgment affirm'd in Error. —See Noy 105 Pasch. 7 Jac. Hawley v. Richmond

(N. b pl. 5 S. C. but S. P. does not appear. —Roll Rep. 124. pl. 6. S. C. but upon Exceptions taken to the Pleadings, adjornatur ——3 Bulst. 332. S. C. says the whole Court inclin'd of Opinion for the Plaintiff, that the Action was well brought; but the Pleading not being good, no Judgment was given, but was adjorn'd, and not moved again, but ended by Agreement as was thought.——Jenk. 315. pl. 1. Tracy's Case, S. C. but states it that C. the Servant brought an Action upon this Matter, and that it was adjudg'd for him, and affirm'd in Error, altho' in the Name of the Servant.

5. If a Surgeon, in Consideration of a Sum of Money, promises to cure my Servant of a Hurt which he has in his Leg, and after applies unwholsome Medicines thereto, of Purpose to make the Wound worse, by which I lose the Service of my Servant for a long Time, the Master may well have an Action upon the Case against the Surgeon for the Loss of the Service of his Servant. Hill. 12 Jac. B. R. between *Everard and Hopkins*, per Curiam.

(C. c) [*In what Cases an Action upon the Case lies for or against*] the Servant.

See (R. b) pl. 3. (B. c) pl. 2. & infra pl. 2. S. C. but not exactly S. P.—— Cro. E. 349. pl. 26. S. C. says the Sheriff directed his Warrant to the Plaintiff, as his Bailiff to serve it, and that the Plaintiff assumed to save him harmless against all Escapes; and it was moved in Arrest, that tho' the Sheriff may have Action against the Prisoner who escapes, yet the Bailiff shall not, and that of that Opinion was the Court, for the Bailiff [who it seems was Special] was not chargeable to the Sheriff by Law but by his Assumpsit, and this being his voluntary Act, shall be no Cause to charge the Defendant who escaped, but shall only make himself chargeable; but they agreed that if the Baily had been chargeable by Law without such Promise, an Action would lie against the Defendant, who caused him to be charged.

1. If a Bailiff itinerant, or special, arrests J. S. upon a Cap. ad Satisfaciend. at the Suit of J. D. and J. S. escapes by the Rescue of himself, and after J. D. recovers in an Action upon the Case for the Escape against the Sheriff, who after in such Action recovers against the Bailiff, upon an Assumpsit to save him harmless from Escapes, the Bailiff may after have an Action upon the Case against J. S. that escaped, because he is chargeable over. Dubitatur Mich. 37 Eliz. B. R. between *Atterton and Harwood*.

2. So in the Case above, if the Sheriff recovers against the Bailiff in an Action upon the Case for the Escape, (as he may as it seems upon an Assumpsit in Law) the Bailiff may well after have an Action upon the Case against J. S. who escaped, because he is charg'd over for it. Dubitatur Mich. 37 Eliz. B. R. between *Atterton and Harwood*.

(F. c) pl. 1. S. P. and seems to intend S. C.— Mo. 431. pl. 606. Palmer v. Porter, seems to be S. P. does not appear.

3. If the Bailiff of a Franchise makes a false Return to the Sheriff, and the Sheriff returns it to the Court accordingly, an Action upon the Case lies against the Bailiff, and not against the Sheriff; for no Default is in him. Trin. 39 Eliz. B. R. between *Palmer and Marsh*, per Curiam.

S. C. and S. P. held accordingly.——Cro. E. 512. pl. 37. Palmer v. Potter & al' S. C. but

(D. c) At

(D. c) At what Time it lies.

A Sells Sheep to B. as his own Goods, ſaying that they are his own Goods, whereas they belong to D. B. may have an Action againſt him for this Diſceit before D. hath ſeiſed the Sheep or interrupted him, becauſe they are things tranſitory, and therefore the Action lies before Interruption; for if he ſhould ſtay till D. interrupted him, he may be dead before, or other Diſadvantage may happen. Paſch. 16 Jac. B. R. between *Lifter and Furnace*, adjudged. (P. b) pl. 6. S. C. but S. P. does not appear. —Cro. J. 474. pl. 6. Furnis v. Leiceſter S. C. adjudg'd (abſente Mountague) for the Plaintiff.

2. If a Man *ſells* a Thing *with Warranty*, and the Buyer is therein deceived, he may have Writ of Diſceit, tho' he *has not yet paid for the Thing*. Per Huſſey and tot. Cur. Br. Diſceit, pl. 24. cites 9 H. 7. 21. After the Delivery of the thing ſold, and before he has paid for it, becauſe the Seller may have Action of Debt for the Money when he will. Br. Garrantes, pl. 59. cites S. C.

3. On a Ca. Sa. directed to the Plaintiffs, *Sheriffs* of Norwich, they *made a Warrant to 3 Serjeants to take B. in Execution*, which *they did, and let him eſcape*, for which an Action upon the *Caſe was brought by them againſt the Serjeants*. It was moved in Arreſt of Judgment that they only ſay they are chargeable, but not charged or damnified, and *perhaps no Suit may ever be brought againſt them*. But adjudg'd for the Plaintiff; for *if they ſtay till they are ſued, the Party that eſcaped may die or fly the Country in the mean Time*. Cro. Eliz. 53. pl. 3. Hill. 29 Eliz. B. R. Sheriffs of Norwich v. Bradſhaw. Godb. 125. pl. 145. Yarram v. Bradſhaw S. C. adjudg'd for the Plaintiff.

(E. c) Action upon the Caſe in Nature of Diſceit againſt Officers. In what Caſe it lies. Upon an Eſcape.

Fol. 99.

1. IF a Man be arreſted upon mean Proceſs at the Suit of J. S. and he eſcapes, J. S. ſhall have a Special Action upon the Caſe againſt the Sheriff for this Eſcape. By Reports, 14 Jac. * *May againſt Proby and Lumly*, † adjudged per Admittance, 16 Edw. 4. 3. by all the Juſtices. * Mo. 852. pl. 1162. May v. the Sheriffs of London S.C. held per tot. Cur Reſcous is no Plea, but it will excuſe the Contempt to the King.——Roll Rep. 388. pl. 9. May v Probie S. C. adjornatur.——Ibid. 440. pl. 5 S. C. the Court inclined for the moſt Part, that the Action would lie, but after upon Deliberation, it was adjudg'd that it would not; becauſe the Sheriff is not bound to take the Poſſe Comitatus to ſerve every meſne Proceſs, nor is it convenient ſo to do, but he may if he will; beſides the Party may have Action againſt the Reſcuers; But upon Writs of Execution a Return of Reſcous is no Excuſe; nor where the Party taken on meſne Proceſs has been once in Priſon —— 3 Bulſt. 198. S. C. adjudg'd that the Action did not lie.—— Cro. J. 419. pl. 10. S. C. adjudg'd for the Defendant; and as to the Caſe of Waldoe v. Lambert adjudg'd to the contrary, the Court upon View of the Precedent, conceiv'd that the Plea was ill by Reaſon of the Traverſe of the Place, and ſo it might be adjudg'd for the Plaintiff for that Point.——Reſolved the Plea is good tho' he did not plead that he return'd the Reſcous. 3 Lev. 46. Trin. 33 Car. 2. C. B. Ld Gorges v. Gore.

† Br. Escape, pl. 37. cites 16 E. 4. 2. 3. that it was said by all the Justices, that if a Sheriff serves a Capias and another rescues him, and the Sheriff returns the Rescue, the Sheriff is hereby discharged; and Catesby agreed it, when it is on mesne Process, because the Plaintiff may proceed by Alias & Pluries, and so to Exigent; but e contra after Condemnation.

Case for that he *affirm'd a Plaint of Debt in the Court of B. against J. S.* and thereupon *caused J. S. to be arrested*, and the *Defendant conspiring to delay the Plaintiff* in his said Suit, and in Peril of his said Debt, *had let J. S. go at large, without taking Bail.* Per 3 Justices, contra Periam, this Action lies; for the not taking of Bail is not the Cause of the Action, but the Conspiracy. Le. 189. pl. 269. Mich. 31 & 32 Eliz. C. B. Cockshall v. the Mayor &c. of Bolton.

2. If a Man brings an Action against J. S. before the Mayor, Bailiffs, and Steward of a Town, where the Bailiffs are the Jaylors of the Town, and J. S. is committed to the Bailiffs upon the mean Process for Want of Bail, and they suffer him to go at large before Judgment and Execution, and after the Plaintiff recovers against him, the Plaintiff may have a Special Action upon the Case against the Bailiffs for the Escape; for by this he is deprived of the speedy Means to have him in Execution after Judgment, the which he might have had if he had not been suffer'd to go at large. Hill. 4 Jac. B. R. the Bailiffs of Newcastle, per Curiam.

(F. c) Against whom it lies. Against Officers. Where against the Master.

See (C. c.) pl. 3. S. P. and seems to be S. C.

1. If the Sheriff returns mandavi Ballivo libertatis &c. qui mihi responsum dedit &c. if the Matter of the Return be false no Action lies against the Sheriff, but only against the Bailiff; for the Sheriff ought to accept of the Return of the Bailiff, if it be sufficient in Law, and not examine the Truth of it. Trin. 30 Eliz. B. R. per Curiam.

Mo. 431. pl. 606. Palmer v. Porter S. C adjudg'd against the Plaintiff; but the Court held that if the Plaintiff had brought Action against the old Bailiff, and *concluded to his Negligence*

2. If upon a Fieri Facias against an Administrator, the Sheriff makes a Warrant to the Bailiff of a Franchise to execute it, and after the Bailiff is removed and another Bailiff elected, and after the old Bailiff returns in his own Name to the Sheriff, that the Administrator has not any Goods præterquam &c. the which is false, and after the Sheriff makes a Return accordingly to the Court, yet no Action upon the Case lies; for this false Return lies against the old Bailiff, for the Return ought to have been in the Name of the new Bailiff, and to the Sheriff has accepted of a Return as of a * meer Stranger which is void, and he ought to take Conusance of the right Ministers of the Law, and therefore the old Bailiff is not punishable for his false Return, but the Sheriff. Trin. 39 Eliz. B. R. between *Palmer and Marsh*, adjudged that it does not lie against the Bailiff.

in not executing the Writ, the Action should be maintainable. ——Cro. E. 512. pl. 37. Palmer. v. Potter S. C. adjudg'd for the Defendant.

* See (R. b.) pl. 2.

See (B. c) pl. 2. S. P.— Cro. E. 26. pl. 8. Pasch. 26 Eliz. C. B. in the Mayor and Burgesses of Windsor's Case S. P. per Cur.

3. If a Writ of Execution comes to the Sheriff, and he makes his Mandate to the Bailiff of a Franchise, who takes him, and after suffers him to escape, an Action lies against the Bailiff of the Franchise, and not against the Sheriff. 5 Edw. 4. 1. b. 2. Brook Escape 40.

4. Note,

4. Note, that if *Execution* be *directed to a Sheriff to arreſt* any Man, *or to make Execution within a Liberty, and* the Sheriff *directs his Warrant to a Bailiff of the Liberty* to make Execution of the Proceſs, *who makes it, and after is a Fugitive*, and not able to anſwer for it, the *Lord of the Franchiſe ſhall anſwer* for it, and ſhall be liable to anſwer for his Bailiff; by all the Juſtices. 2 Brownl. 50. Hill. 8 Jac. Anon.

5. Tho' by Agreement between a Bailiff of a Franchiſe and his Deputy the *Deputy is reſtrain'd to ſerve Proceſs beyond ſuch a Sum*, yet if *he ſerves Proceſs of a greater Sum without other Warrant*, and after levies the Money, the Bailiff ſhall be chargeable. Litt. 33. Paſch. 2 Car. C. B. Anon. See Tit. Under-Sheriff (A) pl. 6.

(G. c) In what Caſes it lies.

Fol. 100.

1. IF a Man acknowledges a Fine in my Name, or confeſſes a Judgment in an Action in my Name of my Land, this ſhall bind me perpetually; and in ſuch Caſe I may have a Writ of Diſceit againſt him who acknowledges it. 19 Hen. 6. 44. So if a Man acknowledges a Recognizance, Statute Merchant, or Staple. 19 Hen. 6. 44. Br. Eſtoppel, pl. 182. cites S. C. as to both Points: —Br. Fines levies &c. pl. 54. cites S. C. as to both Points.—S. P. and ſo if he vouches and confeſſes any other Matter of Record, I have no Remedy but by Action of Diſceit. Br. Diſceit, pl. 17. cites 9 H. 6. 44.

If a *Statute be acknowledged in my Name* by a Stranger, I ſhall have an Action of Diſceit againſt him, but I ſhall *not avoid the Statute*, or Recognizance; but if it be acknowledged by one of the *ſame Name*, I ſhall avoid it by Plea. Cary's Rep. 50. cites 23 June 1602. 44 Eliz.

Action on the Caſe will lie againſt one for *procuring one to confeſs a Judgment* by Fraud *to deprive the Plaintiff of his Execution* obtain'd on a prior Judgment, whereas nothing was due to him to whom the Judgment was confeſſed, and yet he took out Execution, and ſeiſed all the Goods. Adjudg'd and affirm'd in Parliament. Carth. 3. Trin. 3 Jac. 2. B. R. Smith. v. Tonſtall.——Comb. 51. S. C. but S. P. does not appear.

2. [But] If a Man makes an Obligation in my Name, he [I] ſhall not have a Writ of Diſceit againſt him, becauſe I may avoid the Deed by the Plea of Non eſt Factum. 19 Hen. 6. 44. Br. Diſceit, pl. 17. cites S. C.—— Br. Fines levies &c. pl. 54. cites S. C.

3. If a Man razes the Name of the Obligor out of an Obligation, and inſtead thereof puts in the Name of J. S. and after ſues him upon this Obligation, J. S. may have an Action againſt him for this. Trin. 43 Eliz. B. R. per Gawdy.

4. If A. be excommunicated, and the Letters of Excommunication are brought to the Parſon of the Pariſh to be read and publiſhed in the Church againſt A. and the Parſon having Malice to B. puts out the Name of A. and puts in the Name of B. and then pronounces B. excommunicated, B. may have an Action upon the Caſe againſt the Parſon; for this is not only an injurious Vexation, but alſo ſcandalous to B. Trin. 43 Eliz. B. R. *Harris's* Caſe adjudged, Per Curiam. (D. a) pl. 15. to the like Purpoſe. —— Cro. E. 838. pl. 13. Kenton v. Wallinger, S. C. adjudged for the Plaintiff.——S. P. Arg. Skin. 124. in pl. 2.

5. If a Man calls a Protection for himſelf Quia moratur' by which the Parol is put without Day, whereas he was all the Time within the Realm about his own Buſineſs, and not at the Place, a Writ of * Br. Diſceit, pl. 1. cites S. C.—Calling a

Protection without Cauſe is actionable; Per Fenner and Clinch J. only in Court. Arg. Cro. E 629. Mich. 40 & 41 Eliz. B. R. in pl. 22 ——S. P Per Cur. Cro. E. 794 Mich. 42 & 43 Eliz. C. B. in pl. 38.——F N. B. 97. (B) S P ——S. P. and ſame Book cited by Doderidge J. Palm. 185. Mich. 18 Jac.

Diſceit lies againſt him. * 20 Hen. 6. 10. 33 Edw. 1. Liber Parliamentorum 103. b.

S. C. cited Arg Cro E. 714 in pl. 37.

9. So if a Man calls a Protection Quia Profecturus, and never goes, an Action lies. 20 Hen. 6. 10. 18 Edw. 3. 12. b. Trin. 7 Hen. 5. B. R. Rot. 70. adjudged.

7. But if, in going towards the Parts beyond Sea, he is ſeiſed with a Malady, ſo that he cannot go nor ride, and before this the Protection is allowed, no Action lies againſt him. 18 Edw. 3. 13.

Br. Diſceit, pl. 1. cites 20 H. 6. 10. where S. P. is admitted. ——Br. 17. b.

8. [But] if a Man calls a Protection Quia Moratur' in York, if he abides in York a Week in every Month, and for the reſt of the Time abides in another Place in the ſame County about his own Buſineſs, it ſeems that Diſceit lies againſt him. Quære 29 Edw. 3.

Decies tantum, pl. 2. cites S. C. & S. P. admitted.

Cro. E. 90. pl. 15. Hill. 30 Eliz. B. R. like Point adjudged for the Plaintiff. —F. N. B. 95. (D) S. P. And tho' the Defendant does not intice the Plaintiff to play, yet if the Defendant plays with falſe Dice &c. by which he gets the Plaintiff's Money, it ſeems the Action is maintainable, becauſe the Inticement is not the Cauſe of the Action, but the Calling of the falſe Dice, by which he gains the Money &c.——So in Caſe for cheating at Cards the Plaintiff had Judgment. Mo. 776. pl. 1075. Mich. 3 Jac. Baxter v. Woodward.

9. If A. entices B. to play with him at Dice, at a Play called Paſſage, whereupon B. plays with him; and when it comes to the Turn of B. to play, A. delivers in true Dice with which he ſhould play; and when it comes to the Turn of A. himſelf to play, he puts in and plays with falſe Dice, ſcilicet, ſuch Dice as he knows will run 5 or 6 upon every Die, whereby B. loſes 10 l. an Action upon the Caſe lies for this Diſceit by B. againſt A. Hill. 8 Car. B. R. between *Nortwell and Oake* adjudged, tho' it was moved in Arreſt that the Declaration was repugnant, becauſe it was laid that he play'd with falſe Dice, ſcilicet, that he Quaſdam aleas falſas & falſo titulatas quas numeros de ſer & quinq; ſuper quamlibet aleam quolibet jactu attingere ſcivilſet falſo & fraudulenter projecit & luſus fuit. Yet the Court gave Judgment for the Plaintiff, I being of Counſel for the Plaintiff. Mich. 8 Car. Rot.

Cro. C. 325. pl. 7. S. C. adjudged for the Plaintiff. ——S. P. by Fol. 101. Baron Altham. Arg. Lane 67. Trin. 7 Jac.

10. If a Man takes my Cattle with Force and Arms, and chaſes them into the Cloſe and Emblements of J. S. per quod I am ſubject to the Action of J. S. I may have an Action upon the Caſe for this againſt him, and ſuch * a Declaration is good in an Action upon the Caſe, for the Per quod is the Ground of the Action. Mich. 9 Car. B. R. between *Tiffin and Winkefield* adjudged, this being moved in Arreſt of Judgment. Intratur Trin. 9 Car. Rot. 451.

And ſo it is if a Man takes my Goods, and lays them upon the Land of A. either Treſpaſs or Caſe lies againſt the Taker; Per Tanfield Ch. B. Ibid. 68.

All. 3. Mich. 22 Car. B. R. Newman v. Zachary, S.C. accordingly.

11. If I deliver my Sheep to J. S. who is a common Shepherd for the Inhabitants of a Village, and afterwards they ſtray and return again, and then I ſell them, and after J. S. maliciouſly intending not only to deceive me of the ſaid Sheep falſely and fraudulently, but alſo to induce a Scandal upon me as to the ſaid Sheep, and to damnify me, affirms that theſe Sheep are not my Sheep, but Strays, and procures the Bailiff of the Manor to ſeiſe and carry away the ſaid Sheep as Strays, (they not being proclaimed and marked as Strays, according to Law)

Law) per quod I am not only falsely and fraudulently deceived and defrauded of the said Sheep, and the Profit that might have been taken thereby, but I am also brought into great Infamy and Trouble, I may have an Action upon the Case against J. S. upon this Matter; for he did it contrary to the Trust reposed in him, and this puts me to Trouble and Expence, and was done by him falsely and maliciously. Mich. 22 Car. B. R. between *Newbon and Newbon* adjudged, it being moved in Arrest of Judgment that the Action does not lie. Intratur Trin. 22 Car. Rot. 207.

12. If a Man recovers against my Tenant in a Præcipe in Capite, to the Intent to oust me of my Court and Seigniory, a Writ of Disceit lies against him. 17 Edw. 3. 31. b. 36. b. Præcipe *quod reddat* at Common Law *of Land* which is *Ancient Demesne of the King*, and the *Tenant* suffers it to be recovered, and *will not plead Ancient Demesne*, the King shall have Action of Disceit. Br. Disceit, pl. 37. cites 11 H. 4. 86.

13. And in this Writ I shall recover according to my Damage, scilicet, for the Disceit, because this is a Prejudice to me, for now he holds by Estoppel of the King, and I shall not have the Ward of his Heir against the King, unless by Petition; but I shall not recover Damages to the Value of the Seigniory, because this is not lost, tho' there be a Tenure by Estoppel of the King. 17 Edw. 3. 31. b. 37.

14. If my Feoffee, upon Condition to re-infeoff me, acknowleges a Statute, and after re-infeoffs me, and after the Conusee sues Execution against me, I may have a Writ of Disceit against the Feoffee, for he [J] infeoffed him to be re-infeoffed discharged. 28 Edw. 3. 91. See (P) pl. 13.

15. If it be agreed between you and me, that you shall make an Estate to me in certain Lands, if you make a Feoffment thereof to another, I shall have an Action upon the Case for the Disceit. 3 H. 7. 14. So if the Defendant *undertakes for 10 l. to labour J. S. to make a Lease for certain Years to the Plaintiff*, and the Defendant *labour'd J. S. to make a Lease to himself in Disceit of the Plaintiff*, the Action well lies by the Opinion of the Court; and the same Law in other Cases upon an Assumpsit and Non-feasance. Br. Action sur le Case, pl. 88. cites S. C.

16. If a Man having a Term for Years, offers to sell it to another, and says that a Stranger would give him 20 l. for this Term, by the Means of which Speech the other buys it, where in Truth he was never offered 20 l. for the Term, tho' he be deceived in the Value, yet no Action upon the Case lies. Mich. 40 & 41 Eliz. B. R. adjudged. S. P. exactly per Cur. Sid. 146. pl. 3. Trin 15 Car. 2. B. R.

17. Disceit, for *selling to the Plaintiff certain Goods as his Goods*, whereas in Truth they were the Goods of a Stranger. But because it was *not alleged that the Defendant sciens them to be the Goods of a Stranger*, sold them, Periam and Windham held, that the Action did not lie, but Anderson e contra. And afterwards adjudged against the Plaintiff. Cro. E. 44. pl. 5. Mich. 27 & 28 Eliz. C. B. Dale's Case.

18. Libel &c. for Tithes. The *Defendant suggested a Custom, that the Parson should have for his Tithes the tenth Land sowed with any Manner of Grain, to be reckoned at the first Land next the Church* &c. The *Parson shew'd, that the Defendant by Fraud sowed every tenth Land very ill, and did not dung and manure it as he did the other 9 Parts, which usually yielded 8 Cocks each, but the 10th yielded only 3.* Wray held this Custom against common Reason, and therefore void; but if it were good, the Parson might have an Action on the Case for the Fraud. Le. 99. pl. 127. Pasch. 30 Eliz. B. R. Stebbs v. Goodluck. Mo. 913. pl. 1290. S. C. and S. P. Per Cur. accordingly.

19. Case,

19. Caſe, for that he *had* 100 *l. deliver'd to him to pay J. S.* and that the *Defendant falſo & fraudulenter affirm'd to him, that he was J. S. and thereupon he deliver'd the* 100 *l. to him*, when in Truth he was not the ſaid J. S. Adjudged that the Action would lie upon this Deceit. Mo. 538. pl. 705. Paſch. 39 Eliz. B. R. Thompſon v. Gardner.

20. *Fraud without Damage*, or *Damage without Fraud*, gives no Cauſe of Action; but where theſe 2 do concur and *meet together*, an Action lies. Per Croke J. 3 Bulſt. 95. Mich. 13 Jac. in Caſe of Baily v. Merrill.

Lev. 102. Ekins v. Trecham, S. C.

21. A. ſold Houſes to B. and *affirm'd the Annual Rent to be* 20 *l. where it was but* 14 *l.* Action lies for B. for this Diſceit; but otherwiſe if he had affirm'd *that they were worth* 20 *l. a Year.* Sid. 146. pl. 3. Trin. 15 Car. 2. B. R. Leakins v. Cliffell.

2 Lev. 196. Virtue v. Bird, S. C. The Plaintiff gave Notice of the Day he would carry in the Timber, and then deſir'd the Defendant to appoint a Place where he ſhould lay it. Judgment was ſtay'd becauſe the Action lay not; for he might have taken his Horſes out and walk'd them about, or put them into a Stable; and ſince on his coming there the Defendant appointed no Place, he might have unloaded the Timber in any convenient Place, and gone home, and ſo the Injury received was by his own Fault.——3 Keb. 766. pl. 2. S. C. and Judgment ſtay'd.

22. Caſe &c. for that the Defendant had *agreed with the Plaintiff to carry the Defendant's Timber from* &c. *to the Defendant's Houſe, and there deliver it at ſuch a Place as the Defendant ſhould appoint*; and that ſuch a Day &c. he did carry it &c. and was ready to deliver it, but the *Defendant delay'd to appoint a Place for the Space of ſix Hours, ſo that his Horſes being hot &c. and ſtanding in the open Air, died ſoon after.* It was moved in Arreſt of Judgment, that it was his Folly to let his Horſes ſtand there, and the Action not maintainable; and per tot. Cur. Judgment was ſtay'd. Vent. 310. Paſch. 29 Car. 2. B. R. Vertue v. Bird.

23. Action ſur le *Caſe* was brought, wherein the Plaintiff *declared* that whereas *ſhe was a Virgin* of good Name and Fame, and fought to for Marriage by J. S. that the *Defendant, pretending himſelf to be a ſingle Perſon*, made Love to her, and *married her*, when in Truth he was *married to another Woman* &c. whereby ſhe became of leſs Credit, and loſt &c. After a Verdict for the Plaintiff it was moved that an Action did not lie in this Caſe; but the Court was of a contrary Opinion, wherefore Judgment, Niſi. Skin. 119. pl. 14. Trin. 35 Car. 2. B. R. Anon.

24. Action lies *againſt one poſſeſs'd of Goods ſelling them as his own*, tho' they were not, and that without any expreſs Warranty. Show. 68. Mich. 1 W. & M. Croſs v. Gardiner.

25. A. *ſells Goods* to B. to which he has no Title, if A. *knows he has no good Title* to them, Action lies againſt him for the Deceit, if the *Owner recovers them* againſt B. but ſecus if A. does not know but his Title to them is good. 12 Mod. 245. Mich. 10 W. 3. Turner v. Brent.

(H. c) Where it lies upon legal Proceeding in Courts. [*Vexation.*]

1. IF a Man sues an Action of Debt against me in the Name of J. S. without the Will of J. S. I shall have a good Action upon the Case against him for this Vexation. 7 H. 6. 43. Admitted by Issue, and so it is held Fitzherbert Action sur le Case 3. Br. Disceit, pl. 15. cites S. C.—— Br. Action sur le Case, pl. 49 cites S. C.——Case &c. for suing the Plaintiff *in the Name of H. without his Privity, and* thereupon *imprisoned him, by reason whereof all his Creditors came upon him, so that he lost his Credit.* After Verdict for the Plaintiff it was insisted that the Action did not lie, because in Truth there was a just Debt owing to H. But adjudg'd that if H. himself had commenced the Action, tho' it had brought all the Creditors upon him, and he thereby had been undone, yet because it was a lawful Act no Action would lie; but where one sues in another's Name, and without his Privity, that is Maintenance, which is a tortious Act, and therefore an Action will lie. March 47. pl. 76. Trin. 15 Car. Thurston v. Ummons.

2. If A. sued B. for Tithes in the Ecclesiastical Court, where B. pleaded Payment, and had two Witnesses to prove it, and therefore A. discontinued his Suit, and after one of the Witnesses died, whereupon A. knowing * this, and that one Witness would not serve in the Ecclesiastical Court, commences again his Suit against B. there for the same Tithes, supposing that B. cannot prove Payment there, yet no Action lies by B. against A. for this Vexation; for then every Man that brings two Actions for the same Thing should be punish'd for the Vexation. Trin. 43 Eliz. B. R. between *Bray and Partrige*, adjudg'd. Cro. E. 836. pl. 8. S. C. and the whole Court held that the Action did not lie; and they all agreed against the Plaintiff; but adjornatur.——Noy 23. S. C. but S. P. does not appear.——Noy 37. S. C. & S. P. and per Cur. the Action does not lie. * Fol. 102.

3. If B. comes to answer a Writ which R. hath depending against him in Bank, and A. causes him to be arrested in London, and he sues a Corpus cum Causa, by which he was removed and discharged, and the Day after he goes into London for his Evidences, and A. knowing the said Writ to be depending against him at the Suit of R. arrests him de novo, he may have an Action upon the Case against him for this Vexation. 7 Hen. 6. 45. admitted. Br. Action sur le Case, pl. 50. cites S. C.—— Fitz. Action sur le Case, pl. 4. cites S. C.—— S. C. cited Arg. Show. 254.——If a Clerk informs the Justices that Action is pending here against J. S. who is arrested in London, and the Justices credit it, and grant Writ of Privilege, Action upon the Case does not lie, tho' it was a *false Information*; for the *Justices may know* it *by the Record*, and so the Default in the Justices; contra here of the Servant; per Fairfax. Br. Action sur le Case, pl. 100. cites 21 E. 4. 22.——*And after* the *Defendant said that it does not appear in the Bill that the Defendant was Officer of the Bank at the Time of the Writ obtain'd.* And it was held that the *Defendant shall not allege Discontinuance of the Plaint in London before the Supersedeas comes*; for he is a Stranger to the Record. Ibid.

4. If A. recovers Debt or Damages against B. and after B. pays the Sum recover'd to A. before any Execution sued out, and thereupon A. releases to B. all Actions, Executions &c. and after within the Year sues out a Capias against B. and takes him in Execution, B. shall not have any Action upon the Case against A. for this Vexation in suing out of Execution after a Release; but he is put to his Audita Querela, which is the Remedy which the Law has provided for it. Mich. 16 Jac. B. R. between *Bemish and Gilderfly*, adjudg'd per Curiam. Cro. J. 505. pl. 17. Bennus v. Guildley, S. C. & S. P. adjudg'd accordingly.

5. So in this Case, if after the said Release, and after the Year, he sues Execution by a Capias, and takes him in Execution, which is Cro. J. 505. pl. 17. Bennus v. Guild-

 erroneous,

ley, S. C. but S. P does not appear.

erroneous, being after the Year, yet no Action upon the Case lies for this Vexation; but he is put to his Writ of Error to help himself. Mich. 16 Jac. B. R. between *Bemishe and Hilderfly*, adjudg'd.

Cro. E. 628. pl. 22. S. C. adjudg'd for the Plaintiff by 2 Judges, (absentibus aliis.)

6. If A. sues an Action against B. in which J. S. and J. D. are Mainpernors for B. and after A. recovers against B. and sues a Cap. ad Satisfaciendum against him, which was return'd Nihil; and after A. knowing that W. was not a Mainpernor for the said B. but that J. S. and J. D. were Mainpernors, he in Deceit of the Court procured two Scire Facias's to be awarded against W. as Mainpernor of B. whereupon 2 Nihils are return'd, and thereupon a Cap. ad Satisfaciend', by which the said W. is taken in Execution, he shall have an Action upon the Case against A. tho' it was the Act of the Court to grant such judicial Process; for they were procured in Disceit of the Court, and to the Damage of the Party, and so the Action lies for the tortious Vexation. Mich. 40 & 41 Eliz. B. R. between *Baron and Sleigh.*

Cro E. 714. pl. 37. Skelhorn v. Harfon, S. C. but the Jury found the Defendant Not Guilty as the Procurement of the Habeas Corpus, and therefore this Point was not adjudg'd.

7. If A. brings an Action against B. in London, where C. and D. become Mainpernors for B. and after C. in the Name of B. false & deceptive procures an Habeas Corpus out of the Exchequer to remove the Suit thither, and after hires E. and F. whom he knew to be insufficient to become Mainpernors for the said B. and then a Procedendo is granted, and after A. recovers there against B. and B. goes beyond Sea, so that he cannot have Execution against him, and by reason of the said Fraud of C. the first Mainpernors are discharged, so that A. cannot have Execution against them; A. may have an Action upon the Case against C. for this Disceit. Hill. 41 Eliz. B. R. between *Skalehorne and Harrison.*

Cro. E. 714. pl. 37. Skelhorn v. Harrison, S. C. and Gawdy and Popham held that the Action well lay for this Falsity; and afterwards it was adjudg'd for the Plaintiff.———Cro. J. 602. Mich. 18 Jac. B. R. in pl. 26. S. C. cited by Doderidge J. and he said he knew it, and that the better Opinion was that it was not maintainable, but that by this means the Action was compounded, and no Judgment given.—Palm. 143. Doderidge J. said he was of Counsel with the Defendant in that Case, and that the Opinion of the Court was once with him; but afterwards Fenner and others doubted.—Palm. 276. S. C. cited, and that it was affirm'd by Counsel at the Bar, that the Opinion was that the Action lay; but Doderidge J. said he argued the Case, and that it was not adjudg'd, but the Plaintiff had good Composition.———2 Roll Rep. 195. Doderidge J. cites Shalrowe's Case, S. C. and says that upon the Removal of the Cause, one who was offer'd to be Bail took his Oath that he was rated at so much, and so being accepted as Bail, the Party brought Action against him, and resolved that it would not lie.—Ibid. 197. 198 Doderidge J. cites Skalron and Harrison's Case, that the Information of the Sufficiency of the Bail being by the Attorney the Action was brought against him; that the Court at first were of Opinion for the Defendant, and after differ'd; and because Doderidge thought his Client ought to pay the Money upon the Principal Action, he persuaded him to compound, which he did, so that the Case never received a full Resolution.

8. So in the said Case, tho' C. did not procure the Habeas Corpus but another, but C. false & deceptive inform'd the Clerks of the Court in the Exchequer that the second Bail was sufficient, where it was not, and so the first Bail was discharged, and the Plaintiff defrauded of his Debt, an Action upon the Case lies. Pasch. 41 Eliz. B. R. between *Harrison and Scallerd*, adjudg'd.

Fol. 103. Hob. 205. pl. 259. S. C. adjornatur.—Hob. 266. pl. 352. S. C. adjudg'd for the Plaintiff.

9. If A. hath a Judgment and Execution by Fieri facias for a Debt against * B. and the Sheriff upon the said Writ of Fieri facias returns to the Court, that he had taken Goods to the Value, but that they remained in his Hands for Default of Buyers, whereupon he feigns all this, fraudulently and to the Intent to charge B. again, sues out another Fieri facias to the same Sheriff; whereupon the Sheriff takes other Goods of B. and therewith satisfies A. his Debt, B. may have an Action upon the Case, because this is a Vexation and Damage done by

by Deceit against his own Knowledge, on Purpose to vex B. tho' he executes his Malice in an illegal Proceeding. Trin. 17 Jac. B. between *Watever and Freeman* adjudged Per Curiam. Hobart's Reports 278. the same Case.

But Hobart Ch. J. in delivering the Opinion of the Court held, That

if the Defendant had not known of the Cattle first taken, he had not been liable nor subject to this Action. —— Noy 23. S. C. but no Judgment.

10. Action upon the Case was brought *against S. Officer of B. R. that where the Plaintiff affirm'd a Plaint of Debt against B. in London, the said S. purchased Surpersedeas of Privilege for B. supposing that he was his Servant in the said Court, where he was not* his Servant, *by which the Plaint was discontinued, to the Damage* &c. and the Defendant pleaded to Issue &c. and so it was *admitted clearly that the Action well lies.* Br. Action sur le Case, pl. 100. cites 21 E. 4. 22.

It was alleged in Arrest of Judgment, that the Action does not lie, for the *Supersedeas was the King's Writ.* Et non allocatur; for it was *granted by false Information of the Party*; and the Justices cannot know the Servants of the Officers but by Information. Ibid.

11. Because the Defendant *procured J. S. to bring Formedon against the Plaintiff by Collusion*, by which he was travell'd by the Suit, and in bringing a Writ of Warranty of Charters in Defence of it, *to the Damage of* 40 *l.* and because the Defendant could not deny the Collusion, the Plaintiff *recovered* 20 *l. Damages*; *quod nota, for Vexation and Collusion only.* Br. Action sur le Case, pl. 17. cites 43 E. 3. 20.

Br. Deceit, pl. 9. cites S. C. —— S.C. cited by Hobart Ch. J. Hob 267. in pl. 352.

12. In Ashse, if a *Stranger of his own Head puts in Pledges*, Per Cockin he shall be punished for the Deceit. Br. Pledges, pl. 23. cites 8 H. 4. 7.

13. In *Trespass* they were *at Issue*, and when the *Inquest* was *ready to pass, the Defendant cast Supersedeas of the Chancery, because he was Servant of J. S. one of the Clerks* of the Chancery. And it was allow'd, notwithstanding it was when the Inquest was to be taken, and after Plea pleaded. And it was said, that *if he be not Servant, the Party may have thereof Action upon the Deceit*, which is Action upon the Case, as it seems. Br. Privilege, pl. 54. cites 11 H. 6. 8.

14. Debt *against two as Executors*, where the *one is not Executor, nor ever administred* &c. and *he after confessed* &c. and the *other made Default*, the *Plaintiff recover'd*, the other has no Remedy but Action of Deceit, and this it seems upon the Case, for he shall not have Trespass, for he *is Party to the Judgment*; Per Littleton. Quod non negatur. Br. Action sur le Case, pl. 66 cites 9 E. 4. 13.

The Executor shall have Deceit. Br. Executors, pl. 9. cites S. C. and F. N. B 98.

—— Br. Executors, pl. 89. cites S. C. and the same Reason why he cannot have Trespass. —— He shall recover as much in Damages. F. N. B. 98. (H) and in the new Notes there (d) cites S. C. and 21 E. 4. 24. 48 E. 3. 25. 11 H. 4. 84. 20 E. 4. 9. 51.

15. An *Attorney appeared* for a Man *without Authority, and he imparls where the Defendant is misnamed, by which he loses the Advantage of this Plea*, or other Advantage, the Party has no Remedy but Action upon the Case against the Attorney, notwithstanding that no Warrant of Attorney be entred; for they will compel him to shew forth Warrant; Quod nota. Br. Action sur le Case, pl. 65. cites 15 H. 7. 14.

16. 8 *Eliz.* 3. *cap.* 2. *S.* 4. *If any Man shall maliciously (for Vexation and Trouble) cause or procure any Person to be arrested or attached, to answer in the Courts of &c. or in any of the said Courts, at the Suit of any Person, whereas there is none such, or without the Consent or Agreement of the Party at whose Suit such Arrest or Attachment is procured, the Party so causing or procuring the same, and thereof convict by Indictment, Presentment, the Testi-*

In Action on this Statute the Plaintiff declared that the Defendant caused

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him to be arreſted at the Suit of A. B. C. and D. where B. C and D. never conſented to it; and that this was for Vexation, none of them having Cauſe of Action. Wray and Gawdy held this out of the Statute, but the other Juſtices e contra; for one of the Parties has Colour, and may give ſufficient Authority to arreſt him; and it cannot be ſaid to be malicioufly done. Bnt the Statute being miſrecited, it was for that Cauſe principally adjudg'd, quod Querens nil capiat &c. Cro. E. 236. pl. 1. Trin. 33 Eliz. B. R. Vander Plunken v. Griffith.

money of two or more Witneſſes, or other due Proof, ſhall ſuffer ſix Months Imprisonment without Bail, and ſhall not be enlarged until he hath ſatisfied the Party grieved his treble Damages; and beſides, ſhall forfeit unto the Party in whoſe Name the Action is brought (if he be known) 10 l. to be recovered, as alſo the ſaid treble Damages, by Action of Debt, Bill, or Plaint in any Court againſt the Party ſo offending, his Executors or Adminiſtrators, in which no Eſſoign &c. ſhall be allowed.

In Debt upon this Statute the *Proof ſhall be in the ſame Action*, and not in any other Court. Cro. J. 188. pl. 11. Mich. 5 Jac B. R. Aldred v. Matthew.

An Action on this Statute was brought in C. B. but this was held per tot. Cur. not to be within the Statute; and therefore Judgment was given for the Defendant. Lutw. 166. 169 Paſch. 3 Jac. 2. Read v. Jones.

Caſe *on the Statute 8 Eliz. cap. 2 for proſecuting a Suit againſt the new Plaintiff in the Name of the Defendant and J. S. without the Knowlege of J. S. and in which the new Defendant was nonſuited.* The Jury found the Proſecution malicious. It was argued whether the Action lay, but adjornatur. 2 Sid. 162. Hill 1659 B. R. Chamberlain v. Preſcot ——— S. C. cited Raym. 135. by Twiſden J. [who was Counſel for the Plaintiff in the ſaid Cauſe] as reſolved that the Action lies for ſuch Indictment; but that the Judgment was afterwards revers'd in the Exchequer Chamber, but ſaid it ſeemed a hard Caſe if the Action ſhould not lie —— S C. cited by Holt Ch. J. in delivering the Opinion of the Court, Paſch. 10 W. 3 5 Mod. 409. And ſays it is true that the Judgment was revers'd, but that it was not becauſe the Action would not lie, but becauſe he was not indicted of any Offence within the Statute, as appeared upon the Fact, as ſet forth in the Indictment. So that if he had been convicted he could have incurr'd no Damage; for the Court would have arreſted Judgment —— S. C. cited by Holt Ch. J. as from a MS. Report of Bridgman Ch. J. which ſays the Reaſon of the Reverſal was becauſe the Indictment was for no Offence at all; for, in Fact, Preſcott arreſted Chamberlaine in his own Name and the Name of J. S. for a Debt due to them jointly, which was lawful without the Conſent of J. S. and if J. S did not appear, if it were in a perſonal Action, he might be nonſuit, or if in a real Action he might be ſummon'd and ſever'd; and therefore it was held to be no Offence. Ld Raym. Rep. 380. Mich. 10 W. 3. ——— S. C. cited thus, viz. A. was indebted to B. and C. and B. without the Knowledge of C. takes out Proceſs *in both their Names* againſt A. who afterwards proſecuted B. upon the Statute for ſo doing, but B. was acquitted; and then he brought an Action on the Caſe againſt B. for this malicious Proſecution. But adjudged that it would not lie, becauſe he might have demurr'd to the Action on the Statute; for the Caſe was not within the Statute, and ſo it *was his own Fault* that he was put to Charges by the Trial. Carth. 417 in Caſe of Savil v. Roberts. ——— S. C. cited by Parker Ch. J. in delivering the Opinion of the Court. 10 Mod. 217. Hill. 12 Ann takes Notice that the Ld Ch. J. Holt, in his excellent Argument upon the Caſe of Savil v. Roberts, where he gives the Reſolution of the Court, ſeems unwilling to deny this Caſe to be Law, tho' he might.

S.P. by Noy. Arg. Godb. 406. in pl. 486.

17. If *A. is indicted of Felony*, and *J. S. gives Evidence againſt him*, whereas A. did *no Felony*, nor *was* any Felony *committed*, Action on the Caſe will lie againſt J. S. 2 Roll Rep. 199. cited by Noy as adjudged 30 & 31 Eliz. B. R. German v. Maſon.

2 And. 47. pl. 34. S. C. adjudg'd accordingly.

19. Caſe, for that the Defendant being *produced a Witneſs* on the Part of J. D. *ſwore falſely that the* Thing in Diſpute [* *a Jewel*] *was not worth above 180 l. whereas* in Truth *it was worth 500 l.* by Reaſon whereof the

* Ow. 158. S. C. adjudg'd accordingly. —— Cro. J. 601. pl. 26. S. C. cited, and agreed to by Mountague Ch. J. Doderidge and Chamberlaine. —— S. C. cited by Mountague Ch. J. 2 Roll Rep. 198. and Ibid. Arg. 195. ——— S. C. cited Palm. 144. Arg. But Noy ſaid that the Reaſon of that Judgment was, becauſe a Jewel is of no certain Value, but only as Perſons

Jury gave but 200 l. Damages, and found againſt the Defendant. It was moved in Arreſt of Judgment, that the Action did not lie; for the Law intends the Oath of every Man to be true, and there was not any Puniſhment for any falſe Oath of any Witneſs by the Common Law; and if this Action ſhould be allowed, he might be puniſhed twice, viz. by the Statute, and by Action, and no Precedent to be found for it; and therefore not maintainable. And 3 Juſtices were of the ſame Opinion, and that if this might be ſuffered every Witneſs might be drawn in Queſtion. Wherefore Judgment was given for the Defendant, againſt the Opinion of Anderſon. Cro. E. 520. pl. 48. Mich. 38 & 39 Eliz. C. B. Damport v. Symſon.

Perſons eſteem it; ſo that it was not a falſe Oath when he valued it at 180 l. that being according to his Eſtimation. Mountague Ch. J accorded to this Reaſon.

19 Caſe, for that B. brought *Debt upon a Bill of* 40 *l. It appeared to the Court that all was ſatisfied but* 28 *s. and thereupon ordered, that if the Plaintiff would not accept of the* 28 *s. with Damages*, then *the now Plaintiff ſhould imparl till Oct. Mich.* and the *Defendant knowing this, procured a Nil dicit to be enter'd.* The Defendant *demurr'd, for that he did not ſhew a Tender of the* 28 *s.* without which he was not to have the Benefit of the Order; *beſides*, that this Action lies not in reſpect of the Matter, *the entring the Nil dicit being the Act of the Court.* But all the Court held e contra. But the not alleging any Tender is ill; for without that there is no Breach of the Order in the now Defendant, and then his procuring the Nihil dicit was lawful. Cro. E. 793. pl. 38. Mich. 42 & 43 Eliz. C. B. Perren v. Budd.

20. Upon a Jury return'd, a *Stranger*, who was not one of the Jury, *caus'd himſelf to be ſworn in the Name of one who was of the Jury.* All the Court agreed that he might be indicted for that Miſdemeanor. And by Reeve and Foſter Juſtices, the Parties may have an Action upon the Caſe againſt him. Mar. 81. pl. 132. Paſch. Term. 16 Car. Anon.

21. Caſe for *making a falſe Affidavit in Chancery*, by Reaſon whereof he was damnified to ſuch a Sum. It was moved in Arreſt of Judgment, that the Action would not lie, but that the Plaintiff ought to take his Remedy by Indictment; for where a Man is compelled to give Evidence, if it is falſe he ſhall not be puniſhed by an Action on the Caſe. But Judgment for the Plaintiff niſi Cauſa, Per 3 J. but Haughton e contra. 2 Roll Rep. 195. Mich. 18 Jac. B. R. Ayre v. Sedgwick. S. C. mov'd again, and debated by the Court, but not reſolved. —— 2 Cro. J. 601. pl. 26. Eyres v. Sedgewick, S. C. adjudged for the Defendant by 3 Juſtices, but Haughton e contra. ——— Palm. 122. S. C. and there Haughton held that the Action does not lie. And Judgment was given by all the four Juſtices againſt the Plaintiff.

If one make a *falſe Affidavit, by which the Party is arreſted by Proceſs of Contempt*, he may have an Action on the Caſe, and recover Damages. 12 Rep. 128. ſays it was agreed. ——— 3 Mod. 108. Paſch. 2 Jac. 2 B. R. Dawling v. Venman, Caſe was brought for making a ſcandalous Affidavit in Chancery, viz. *Mr. D is a Rogue and a Knave, and I will make it out before my Lord Chancellor; and I will have him in the Fellery.* It was moved in Arreſt, that the Truth of an Oath ſhall not be liable to a Trial in an Action on the Caſe, becauſe the Law intends every Oath to be true; and that before the 3 & 11 H. 7. no Puniſhment was at Common Law for a falſe Oath made by any Witneſs; and therefore no Action will lie for a ſcandalous Affidavit. Adjornatur. ——— Adjudg'd that no Action will lie. 2 Show. 446. pl. 409. Dawling v. Wenman, S. C.

Caſe &c. for that he being an Officer in the Cuſtoms, *made a falſe Affidavit* of him *in Chancery, concerning ſome Malverſation in his Office, and* afterwards *petitioned the Commiſſioners* of the Cuſtoms againſt him; and *thereupon cauſed him to be turned out.* It was moved in Arreſt of Judgment, that an Action would not lie for making a falſe Oath, nor for the Petition, becauſe it was done in a Courſe of Juſtice. But per Curiam, the Action is not founded on the Oath, nor on the Petition, which are only Inducements to prove the malicious procuring him to be turned out. And the Jury have found that it was falſely and maliciouſly done Judgment for the Plaintiff. 1 Lev. 119. Mich. 15 Car. 2. Cox v. Smith.

22. Caſe &c. for that the Defendant *having no Cauſe of Action for more than* 40 *l. did falſely and maliciouſly bring an Action, and cauſed the Sheriff to arreſt the Plaintiff for* 500 *l. and to hold him to ſuch Bail as he could not find, and ſo laid in Priſon ſuch a Time.* The Defendant *pleaded that he had Cauſe of Action to the Value of* 200 *l.* and *travers'd that he informed the Sheriff that he had Cauſe of Action for* 500 *l.* After Verdict it was mov'd, that it appears by the Pleadings on both Sides, that the Defendant had a good Cauſe of Action, and that it is not a Crime to inlarge the Sum, becauſe he *might not know certainly what is due.* But per Cur. the Plaintiff having declared that it was done falſely and maliciouſly, and it being ſo *found by the Jury*, and *that he was thereby forced to lie in Priſon*, it was adjudged Sid. 424. pl. 4. Daw v. Swaine, S. C. adjudged for the Plaintiff, becauſe he had ſpecial Damages by ſuch falſe Parlance. —— Mod. 4. pl. 15. S. C. and the Judge-

ſeem'd to hold it actionable; judged for the Plaintiff. Lev. 275. Mich. 21 Car. 2. B. R. Dowſe v. Swaine.

but no Judgment is mentioned. ——S. C. cited by Holt Ch. J. in delivering the Opinion of the Court, Paſch 10 W. 3. 5 Mod. 459. ——So in Caſe for falſely procuring him to be arreſted for 500 l. and impriſoned for ſuch a Time, ubi revera the then Plaintiff had *not any Cauſe of Action vel ſaltem non tantam Cauſam* Actionis, it was moved in Arreſt that it was not poſitively ſaid that he had No Cauſe, but that he had No Cauſe, or at leaſt not ſo much; and that it was not ſo much if it wanted 1 s. But it being found to be maliciouſly done, Judgment was ruled for the Plaintiff. Lev. 275. Mich. 21 Car. 2. B. R. Stribler v. Johns and Waters.——2 Keb. 547. pl. 19. Stribling v. Anthony and Strange, S. C. adjornatur. ——Ibid. 557. pl. 49. S. C. but ſtates it for *ſuing out a Latitat without Date, returnable ſuch a Return Quinden' Martini, not ſaying what Year*, and that Poſtea ſuperſedeas the Defendant was arreſted 20 Oct. and forced to ſpecial Bail, where the Plaintiff had none, or very ſmall Cauſe of Action. It was moved in Arreſt of Judgment, that this Arreſt was void, and cannot be intended on the firſt Writ; but it being after Verdict, Judgment was given for the Plaintiff. And by Twiſden and Morton, on *Action of a great Sum averr'd ea Intentione that the Defendant ſhould not find Bail, is not ſufficient* Cauſe of Action, *unleſs* the Defendant be *averr'd to be arreſted, and put to Charge* by Virtue thereof.

* Ibid. Rainsford ſaid that the Words (without Cauſe) ſhall be underſtood without any Libel, or legal Proceedings againſt him.

† Sid. 463. pl. 7. S. C. ſtates it to be alleged ſine aliqua Cauſa, and alſo that it was done without giving the Plaintiff any Notice: Adjudged for the Plaintiff.——Lev. 292. Hoskins v. Matthews, S C. it was moved in Arreſt of Judgment, becauſe it does not appear for what Cauſe the Suit was; but it is ſaid, and found to be falſely & ſine aliqua Cauſa, and the Action lies, and Judgment for the Plaintiff.——2 Keb. 636. pl. 59. S. C. adjornatur.——Ibid. 663. pl. 22. S. C. and the Court held that Caſe lies on a falſe Proſecution ex Officio clearly, as on Adultery, and ſuch Cauſes, which are proſecuted by Promoters; and the Defendant ſhould have pleaded that there was a juſt Cauſe, or that the Suit was inter Partes, and not ex Officio. And Judgment for the Plaintiff.

23. Caſe &c. for maliciouſly *impleading* * [*ſine aliqua Cauſa*] and *cauſing him to be excommunicated in the Spiritual Court*, and that he was *taken upon Excom. cap. and impriſoned until he was abſolved.* It was mov'd in Arreſt of Judgment, that this Action would not lie for ſuing in a Spiritual Court, tho' without Cauſe; but adjudged that it would, for tho' in Action between Party and Party there, in which Defendant ſhall have his Coſts, no Action will lie if the Court has Juriſdiction, yet where there is a *Citation ex Officio*, and it is proſecuted maliciouſly † without Cauſe, the Party ſhall have his Action, becauſe, if acquitted in ſuch Suit, he can have no Coſts. Vent. 86. Trin. 22 Car. 2. B. R. Hocking v. Matthews.

25. Caſe will lie for a *malicious Arreſt where there is no probable Cauſe of Action*; per Pemberton Serj. Arg. but that the principal Caſe was much ſtronger, which was an Action on the Caſe, for cauſing him to be indicted falſo & malitioſe for taking away 100 Bricks, and ſo put to great Charges, and that the Jury acquitted him, and ſaid that this was in Nature of a Conſpiracy; and the Court agreed that the Action would lie after an Acquittal upon a greater or leſſer Treſpaſs. 2 Mod. 51. Trin. 27 Car. 2. C. B. Norris v. Palmer.

26. Caſe, for that the *Defendant ex malitia ſua &c. ſine aliqua rationabili cauſa, procured him to be arreſted, and impriſon'd until he gave a Warrant of Attorney to confeſs a Judgment for 20 l.* Upon a Demurrer it was objected that an Action would not lie againſt the Defendant for proſecuting the King's Writ in a proper Court, becauſe it would deter the Subjects from ſuch Proſecutions, and a Man may be miſtaken in his Action; and it is *not ſaid that he, ſciens that he had no Cauſe of Action, ſued.* Charleton held ſtrongly that the Action did not lie, becauſe the Law had provided another Remedy, viz. Coſts. Jones Ch. J. and Street held that the Action lies, for the cauſeleſs and malicious Vexation premeditated and confeſs'd by the Demurrer. Levins doubted, becauſe it was not expreſsly laid ſciens, that he had no Cauſe of Action; but inclin'd that the Action lies, becauſe the Defendant compell'd the Plaintiff to give him Judgment for 20 l. whereby he is deprived of Coſts. Sed adjornatur. 3 Lev. 210. Hill. 36 & 37 Car. 2. C. B. Webſter v. Haigh.

27. Caſe,

28. Case, for *prosecuting him in the Sheriff's Court of London for Rent of Land in the Country*, when he had *no Cause of Action arising within the Jurisdiction*. It was moved in Arrest of Judgment that tho' the Sheriff's Court had not an original Jurisdiction in this Case, yet when the Plaintiff was in the City that Court had a Jurisdiction over his Person, besides he might have pleaded to the Jurisdiction, or set forth in his Declaration that he was held to unreasonable Bail, and that might have been some Colour for an Action. The Judgment was stay'd. 4 Mod. 13. Hill. 2 W. & M. Baugh v. Killingworth.

28. If A. sues an Action against B. for mere Vexation, B. in some Cases, upon *particular Damage*, may have an Action; but it is not enough to say that A. sued him falso & malitiose, but *must shew the Matter of the Grievance specially, so that it may appear to the Court to be manifestly vexatious*; per Holt Ch. J. in delivering the Opinion of the Court. Ld. Raym. Rep. 380. Mich. 10 W. 3. in Case of Savil v. Roberts.

29. Case, for *arresting without Cause* of Action, will not lie, unless he he be held to *excessive Bail*. 12 Mod. 257. Mich. 10 W. 3. Neal v. Spencer.

(I. c) In what Cases it lies.

1. If A. is commorant in Middlesex, and B. knowing thereof, falso & malitiose lays an Action against him in London, and to the Intent that his Goods should be forfeited, makes a Suggestion that A. is commorant in London, and so prosecutes the Suit till A. is outlaw'd, A. may have an Action upon the Case against B. for this Vexation. Hill. 7 Jac. in Scaccario, between *Shosby*, Plaintiff, *and Walker and Bromlye*, Defendants, adjudg'd. Quod vide Coke's Book of Entries, Action sur le Case, 42. Lane 49. Shoftbey v. Waller and Bromley, S. C. adjudg'd for the Plaintiff.—Noy 25. 24. cites S. P. as adjudg'd in Sharplee's Case, and seems to intend S. C.——S. P. and seems to be intended the S. C. cited Mod 4. in pl. 15. by Morton J. by the Name of Foxley's Case.

2. Hill. 13 Edw. 3. B. R. 101. Thomas Ufflete, Receptor Denariorum Regis pro Vadiis solvendis soldiariis in exercitu Regis in Scotia &c. implacitat plurimos pro captione sive redemptione equi per ipsum capti pro servitio regis ad portandum 400 l. usque Scotiam, apud F. ad damnum 1000 l. Defendant pleads Not guilty, ideo venit Jurata.

3. Pasch. 1 Edw. 3. B. R. Rot. 59. Oto de Grandisono custos insularum de Gernere & Jerefy, & aliarum insularum adjacentium, recover'd per Juratam 1000 l. against Johannem de Vivers, because he with 200 others imprison'd him for 11 Days, quo minus Officium suum exercere non potuit.

4. If Tenant by Stat. Merchant cuts down Timber Trees, it seems that the Value of them may be recoup'd in a Scire Facias ad Computandum; but he in the Reversion may have an Action upon the Case against him for the Damage, over and above the Value. 21 Edw. 3. 26. B.

(I. c. 2) Where

(I. c. 2) Where it lies. Upon legal Proceedings in Courts. Pleadings.

1. DIſceit on the Caſe becauſe the *Defendant forged a Releaſe, by which the Plaintiff loſt a Ward in Writ of Ward brought by him againſt B.* and becauſe he *did not ſhew that Judgment was given againſt him* in the Writ of Ward, *nor what Delay he ſuffer'd* by the Releaſe, therefore the Writ was abated; quod nota. Br. Action ſur le Caſe, pl. 68. cites 39 E. 3. 13.

Br. Action ſur le Caſe, pl. 49. cites S. C.

2. Diſceit was brought againſt R. P. becauſe he *ſued Writ of Debt againſt the Plaintiff in the Name of M. and* 3 *Capias's and Exigent without the Aſſent of M.* and he did not know of it, by which he (the Plaintiff) was vexed to the Coſts and Damages &c. And the *Defendant ſaid*, as to the Original, *that the ſaid M. retain'd him at K. to be of his Counſel to ſue the Writ*, by which he ſued it by the Aſſent of the ſaid M. Priſt, Judgment Si Actio; Mecheley ſaid, You ought to have *traverſed Abſque hoc that you ſued without his Aſſent*; But Hals J. ſaid No; for the Iſſue is perfectly tender'd, becauſe the *Declaration is upon a Negative* that he ſued the other not unknown to viz. * without the Conſent of the ſaid M. which is a mere Negative, and when a Negative is alleged, it ſuffices for the other to anſwer accordingly by an Affirmation, which makes a perfect Iſſue; for *a Negative of the one Part or the other ought to be in every Iſſue*, otherwiſe it is not a good Iſſue, *unleſs in a ſpecial Caſe*, and as *to the* 3 *Capias's and Exigent, he pleaded Arbitrement* at another Place, which the Plaintiff challenged; for he is not grieved by the Original, but by the Capias's and Exigent, therefore the laſt Plea is ſufficient for all. Hals ſaid No; you have alleged the Whole, therefore he ought to anſwer to all. By which the *Plaintiff replied*, as to the Arbitrement, *No ſuch Submiſſion, and* as *to the firſt Matter that he ſued the Original, as the Plaintiff has ſuppoſed without the Aſſent and Will of M.* Priſt, and the other ut ſupra, e contra. But by the Book of Entries, he who pleaded the Affirmation to the Negative ſhall put himſelf upon the Country; for this is an Iſſue immediately. Br. Diſceit, pl. 15. cites 7 H. 6. 43.

* Nient Sache.

3. In Treſpaſs upon the Caſe againſt one who was *Attorney* for the Plaintiff, and had *falſely acknowledged in Court that the Plaintiff was ſatisfied of a Debt*, by which the Plaintiff excluſus ſuit of this Debt &c. It was held that he *ought to ſuppoſe by* the Writ, by *expreſs Words, that he was not ſatisfied of the Debt*; for it ſhall not be intended by the Words (excluſus ſuit) that he was not ſatisfied. But Chaunt' for the Defendant paſſed over degree. Thel. Dig. 99. Lib. 10. cap. 9. S. 17. cites Mich. 11 H. 6. 2.

4. Bill *of Diſceit by L. againſt P. and W. Attorney*, for that *P. was deputed by the Sheriff of D. to ſend Writs ſerved by the Sheriff to C. B. and there came to the ſaid P. a Writ of Habeas Corpora in placito terræ between L. and D. ſerved, to ſend in* 15 *Paſch. and the Defendants imbezill'd it at D. in the County of Middleſex ad damnum* &c. And it was pleaded to the Bill, becauſe *all the Record had not been alleged certain.* Per Porter, *Nul tiel Record* is no Plea in this Action, but he ſhall anſwer to the Tort by which the Defendant was compell'd to anſwer. Br. Bille, pl. 9. cites 19 H. 6. 29, & 50. & 72.

5. *And* after he *pleaded* to the Abatement thereof, *that P. was deputed, and W. the Attorney had nothing to do, and therefore he ought to have ſeveral Bills*, et non allocatur. Br. Bille, pl. 9. cites 19 H. 6. 29. & 50. & 72.

6. *By*

6. *By which* he *ſaid that the Bill was in Retardationem Recuperationis*, where it *ſhould be* in Retardat' *Sectæ ſuæ*, & non allocatur; for *Bill has no Form, therefore, if it has Subſtance it is ſufficient.* Br. Bille, pl. 9. cites 19 H. 6. 29 & 50 & 72.

7. *And* after he *ſaid that this Suit ought to be againſt the Sheriff himſelf*, & non allocatur; for the Defendants made the Diſceit, and not the Sheriff, and there it is agreed, that if *one makes the Diſceit or Treſpaſs by Excitation of the other*, yet the Suit lies againſt both, quod nota, and ſhall give the Matter in Evidence, as it ſeems; for there is no Acceſſary in Treſpaſs. Br. Bille, pl. 9. cites 19 H. 6. 29. & 50 & 72.

8. *By which* he *ſaid, that after the Delivery of the Writ to him, and before the Subſtraction, the Sheriff by N. his Under-Sheriff, commanded him to retain the Writ*, viz. at D. in the County of D. *by which he did it, which is the ſame Subſtraction* &c. *where the Action was brought in Middleſex, and the Tort ſuppoſed there*, and therefore no Plea *without traverſing the Tort in Middleſex*, by the beſt Opinion. Br. Bille, pl. 9. cites 19 H. 6. 29 & 50. & 72.

9. Diſceit was brought, becauſe *in Præcipe quod reddat* brought by the Plaintiff againſt the *Defendant* in Bank at Weſtminſter in the County of Middleſex, he *caſt Protection quia Moratur'* &c. *where he was attending at his own Buſineſs in the County of York.* Judgment was demanded of Writ, becauſe it was *de Placito de uno Meſuagio, and* 40 *Acres of Land*, and *did not ſhew by what Action*; and yet well, becauſe the *Certainty of the Land appear'd.* Br. Diſceit, pl. 1. cites 20 H. 6. 10. Br. Decies tantum, pl. 2. cites S. C.

10. In Writ upon the Caſe, that the *Defendant manucepit curare equum querentis de infirmitate*, and the Defendant ita negligenter curam ſuam fecit quod equus interiit &c. no *contra Pacem* ſhall be in ſuch Writ, and if there be it ſhall abate. Thel. Dig. 114. lib. 10. cap. 24. S. 11. cites 43 E. 3. 33. Trin. 17 E. 4. 2.

10. Caſe &c. *for proſecuting a Plaint in London, when the Cauſe of Action did ariſe out of the Juriſdiction.* It was moved in Arreſt of Judgment, that the Plaintiff ought to have pleaded it to the Juriſdiction, and if the Plea had been refuſed, then a Prohibition would have been granted. The Court inclined to that Opinion, and Judgment was ſtay'd till the Plaintiff ſhould move it again. And afterwards the Plaintiff moved for Judgment, and the Caſes in the * Margin were cited to maintain the Action; but the Court was not ſatisfied with the Action. Carth. 189. Temple v. Killingworth. Show. 254. S. C. Holt Ch. J. ſaid the Point was fit to be conſider'd by all the Judges.—2 Mod 4. S. C. Holt Ch. J. ſaid that of late it is held, that Caſe will not lie for Proſecution in an inferior Court, where the Court has not Juriſdiction; that the firſt Caſe in Point was at Huntingdon Aſſiſes, and referr'd to C. B. and there adjudg'd that for ſuing one without any Cauſe of Action at all, no Action lies, unleſs it appears to be with a malitious and vexatious Deſign.

* Hob. 205. Cro J. 607. Cro. E. 628. 836.——Stat. 5 E. 1. cap. 38. Regiſter 98. F. N. B. 45. (F) 1 Saund. 221. Sid. 463. 4 Rep. 14. b. Kelw. 106. a. 10 Rep. Caſe of the Marſhalſea. Fitz. a. Eſtoppel 18. 7 H. 6. 45. Vent. 369. Hudſon v. Cook, Trin. 27 Car. 2. Smith v. Fuller.

See (M. c)

(K. c) The Gift of the Action.

* The Original is misprinted (He.)

1. IF a Man finds my Goods, and does not deliver them upon Demand, an Action upon the Case lies for the Non-delivery of them upon Demand, per quod * I lose so much of the Profit of the Goods, tho' this is only a Non-feasance. Pasch. 15 Jac. B. R. *Mould and Pynn*, adjudg'd in a Writ of Error.

See (N. c) pl. 2 — See Tit Toll (I) pl. 3. in the Notes there.

2. An Action upon the Case lies for Toll, shewing that such a Body Politick of a Vill has used, Time whereof Memory &c. to repair certain Walls, Gates, and Bridges within the Vill, and in Consideration thereof have had Time out of Mind &c. de quolibet summagio bracii, scilicet, of every Horse-load of Malt imported into the said Vill to be sold one Half-penny, and that the Defendant such a Day did import so many Horse-loads of Malt to be sold in the Vill, per quod he ought to have paid so much for Toll, the which he refused to pay, licet requisitus &c. Tho' an Action of Debt lies, yet this Action lies also, it being grounded upon a Deceit. Mich. 11 Car. B. R. between *Sprosly and Evans*, per Curiam, ruled in a Writ of Error * as to this Point, upon a Judgment given in the Town of Ludlow, though reversed for another Matter.

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3. In an Action upon the Case, if the Plaintiff declares that the Defendant pull'd down and prostrated one Wall, which divided the House of the Plaintiff and Defendant, and also pull'd off the Tiles from the House of the Plaintiff, per quod the Water came into the Plaintiff's House, and rotted the Timber, therefore the Action lies; for tho' he might have an Action of Trespass for pulling off the Tiles, yet this Action lies also, inasmuch as it is alleg'd that by reason thereof the Timber of the House is rotten. Mich. 10 Car. B. R. between *Booth and Oliver*, adjudg'd, this being moved in Arrest of Judgment after a Verdict for the Plaintiff.

See Nusance (H)

(L. c) Case, not Assise.

Br. Action sur le Case, pl. 44. cites S. C.——Br. Nusance, pl. 31. cites S. C. per Thirne & Hanke.

1. FOR Negligence in Non-feasance an Action upon the Case lies, and not an Assise. 11 Hen. 4. 83.

Br. Action sur le Case, pl. 44. cites S. C. and S. P.

2. As if he, who ought to repair a Bridge, does not repair it, per quod it falls, an Action upon the Case lies for this. 11 H. 4. 83.

Br. Action sur le Case, pl. 44. cites S. C.— Br. Nusance, pl. 31. cites S. C. per Thirne and Hanke.

3. So if he, who ought to scour a Ditch, does not scour it, per quod my Land is surrounded, an Action upon the Case lies. 11 Hen. 4. 83.

4. But

4. But for the Miſ-feaſance of a Thing, no Action upon the Caſe lies, but an Aſſiſe. 11 H. 4. 83. Br. Action ſur le Caſe, pl. 44. cites S. C.

S. C.——Br Nuſance, pl. 31. cites S. C.

5. As for the making an Hedge croſs the Way, no Action upon the Caſe lies. 11 Hen. 4. 83. D. 8 El. 250. 88. Contra Paſch. 15 Jac. B. R. adjudged. D. 256. b. pl. 88. Paſch. 8 Eliz. Yevance v. Holcombe.

6. If a Man ſtops my Way totally, tho' an Aſſiſe lies for it, yet I may have an Action upon the Caſe at my Election, as in *Slade's* Caſe, that Debt, or an Action upon the Caſe lies upon a Contract. Paſch. 15 Jac. B. R. adjudged, this Matter being moved in Arreſt of Judgment. Paſch. 42 Eliz. B. R. between * *Church and Cyntel* adjudged, Trin. 11 Jac. B. R. between † *Collycote and Tucker* adjudged, Mich. 3 Jac. B. ‡ *Gainsford's* Caſe, Per Curiam. * Noy 37. Cautwell v. Church, S. C. in a Writ of Error, and affirm'd the Judgment, for that the Action

on the Caſe was well brought; and perhaps a Stranger did it, and not the Tertenant; or he that did it may be dead, and ſo no Aſſiſe.

† See (N. c) pl. 38 S. C. and the Note there.

‡ Noy 112. Gainsford v. Nightingale, S. C. adjudg'd the Action well brought.

7. If a Man ſtops my Water-courſe, per quod my Land of which I am ſeiſed in Fee is ſurrounded, tho' I may have an Aſſiſe, yet I may have an Action upon the Caſe at my Election. Mich. 32. & 33 Eliz. B. R. between *Drye and Mordant* adjudged. Le. 247. pl. 333. Sly v. Mordant, S. C. adjudg'd accordingly.—

S. C. cited Arg. 3 Mod. 50.

8. If I have Common in Black-acre, as appendant to certain Lands whereof I am ſeiſed in Fee, and the Tenant of Black-acre plows the Land, I may have an Action upon the Caſe againſt him for the Diſturbance of my Common, tho' I am ſeiſed in Fee of the Land to which the Common is appendant. Mich. 32. 33 Eliz. B. R. between *Loveret and Townſend* adjudged. Cro. E. 198. pl. 19. S. C. held that he might have either Caſe or Aſſiſe.—2 Le. 184. pl. 229.

S. C. held accordingly.——3 Le. 263. pl. 354. S. C. in totidem Verbis.

9. If a Man diverts totum Curſum Aquæ from my Water-courſe to my Mill, tho' I may have an Aſſiſe for this, yet an Action upon the Caſe lies at my Election. Mich. 10 Jac. B. R. *Kirby's* Caſe, Per Curiam. See 4 Rep. 86. Paſch. 43 Eliz. Lutterell's Caſe, where Action on

the Caſe was brought for breaking a Bank, and diverting the Water from his Corn-Mills erected in the Place of ancient Fulling-Mills, and Judgment for the Plaintiff, and affirm'd in Error.

10. If the *Lord approves* where I have Common, and *ſtops my Way appendant to it*, I ſhall have Aſſiſe of *Common*; and if my Way appendant is ſtopp'd, I ſhall have Aſſiſe of Nuſance, but not where a *Way in Groſs* is ſtopp'd; for Action upon the Caſe lies there, and not Aſſiſe; Per Scotte and Hanke. Br. Aſſiſe, pl. 55. cites 11 H. 4. 25,

11. In Scire facias it was ſaid, that if a *Man has an Office*, and another diſturbs him, ſo that he *cannot have Poſſeſſion to have Aſſiſe*, there the Party ſhall have an Action upon the Caſe. Br. Action ſur le Caſe, pl. 94. cites 6 E. 4. 9. In the Caſe of a *private Office*, as in that of Clerk of the Butcher's

Company in London, if it be a Freehold, either Caſe or Aſſiſe lies; Per Holt Ch J. 6 Mod. 18. Mich. 2 Ann. B. R. Anon.

12. Upon

12. Upon a *Contract* Debt only lies, and not Action on the Case, because Defendant may wage his Law. Mo. 433. pl. 596. Hill. 38 Eliz. B. R. Slade v. Morly.

Cro. J. 257. pl. 15. S. C. says, that if the Lord cuts down all the Thorns, the Commoner may have Assise.——F. N. B. 58. (I) 59. S. P. that B. shall have Assise.——9 Rep. 112. b. it was held per Cur. that if B. has Common of Estovers in Fee or for Life, and all the Wood is cut down, B. shall have Assise, because it is a Disseisin of his Common; but if he has only a *Term* in them, he shall have Action on the Case; and cited S. P. adjudg'd Hill. 5 Jac. C. B. Buttolph v. Kipping.——S. P. as to the Fee or Freehold, Hob. 48. by Hobart Ch. J. and says that the Inheritance of the Common of Estovers remains, notwithstanding there are no Estovers, or else he could not have an Assise wherein he must declare of his Inheritance or Freehold, at least by Grant or by Prescription; and he shall recover a Seisin of those Estovers which are not in Being, whereof he is supposed to be disseised, and also Damages, not according to what it now yields, but according to the Value it yielded Communibus Annis, tho' it was uncertain.

13. If *B. claims reasonable Estovers in the Soil of A. and A. cuts down all the Wood*, B. shall have Action of the Case, and not Assise; for when all is destroy'd he cannot be put in Seisin. Yelv. 188. Mich. 8 Jac. B. R. Per Cur. in Case of Dewclass v. Kendall.